Section 627.428 Attorneys' Fees and the Confession of Judgment Doctrine: What's a Court to Consider After a Post-Suit Payment?

By Anthony J. Russo and Ezequiel Lugo

The Florida Supreme Court recently issued an opinion addressing the requirement of showing an insurer has "wrongfully" denied a claim before an insured is entitled to attorneys' fees. That decision, *Johnson v. Omega Insurance Co.*, is the focus of the following article. The authors explain that, among other things, *Johnson* reaffirmed earlier precedent that "wrongfully" does not mean acting in bad faith or with ill intent, but describes a situation where the insurer has failed to comply with a statutory or contractual obligation in processing the claim.

Most first-party insurance lawsuits are accompanied by a claim for attorneys' fees based on section 627.428, Florida Statutes. The operative language of this statute has been part of Florida law for over a century, and the cases interpreting that language are legion. On September 29, 2016, the Florida Supreme Court issued its decision in *Johnson v. Omega Insurance Co.*,[1] which addressed the following issue: "Whether an insured's recovery of attorneys' fees under section 627.428, Florida Statutes, requires that there be bad faith on the part of an insurance company in the denial of a valid claim, or simply an incorrect denial of benefits."

In *Johnson*, an insurer appealed an award of attorneys' fees after initially denying a claim for sinkhole damage in reliance on an engineering report. The Fifth District Court of Appeal reversed the award of fees, reasoning that the insurer's actions did not constitute a "wrongful or unreasonable denial of benefits that forces the insured to file suit."[2] The plaintiff sought review on the basis of express and direct conflict with *Ivey v. Allstate Insurance Co.*[3] The supreme court essentially stated it had settled this issue sixteen years ago in *Ivey* when it held that "the bad faith or degree of 'wrongfulness' of the insurance company is not relevant to a recovery of attorneys' fees under section 627.428."

This article aims to explain the historical context of the "wrongfulness" doctrine, which has a substantial presence in Florida jurisprudence, and considers how it might be reconciled with the holdings of *Ivey* and *Johnson*.

The Legislature enacted section 627.428 in 1959,[4] but the substance of this statute has existed in Florida since at least 1893.[5] The current version of the statute reads:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.[6]

The Florida Supreme Court recognizes a two-fold legislative purpose

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of section 627.428: "to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to [litigate] to enforce their policies."[7] The statute is both a penalty on insurers and a source of compensation to the policyholders.[8] Because section 627.428, like its predecessors, imposes a penalty,[9] the statute "must be strictly construed in favor of the one against whom the penalty is imposed and is never [to be] extended by construction."[10] Moreover, strict construction is the rule because the statute authorizes an award of attorneys' fees in derogation of common law, i.e., the "American Rule."[11]

So, attorneys' fees are awarded where the insurer's behavior has forced the policyholder to sue, and the policyholder has obtained a judgment,[12] or when the insurer has sued the policyholder, and the policyholder prevailed.[13] But when the insurer has not forced the policyholder to litigate, an abundance of case law supports withholding attorneys' fees, even where the policyholder has obtained a judgment against the insurer.[14] Over 75 years ago, the Florida Supreme Court ruled "the liability imposed by [the predecessor of section 627.428(1)] is in effect an incident of the insurer's *wrongful* refusal to pay, not a mere procedural incident to the entry of judgment."[15] As the court explained, "the insurance company should not be required to pay fees for complainant's attorneys in cases where there was no delinquency or *wrongful refusal to pay* on the part of the insurance company."[16] In other words, "if there is no wrongful refusal to pay [benefits], then there is no statutory liability to pay" attorneys' fees.[17]

The Florida Supreme Court similarly interpreted a later version of section 627.428 "as authorizing the recovery of attorney's fees from the insurer only when the insurer has *wrongfully* withheld payment of the proceeds of the policy."[18] Every Florida district court of appeal has likewise held that a policyholder is entitled to attorneys' fees under section 627.428 only where the insurer has *wrongfully* forced the policyholder to litigate.[19]

"Wrongful" is not applied in the sense as "with malice." As the Florida Supreme Court explained in *Ivey*, "[i]t is the *incorrect* denial of benefits, *not* the presence of some sinister concept of 'wrongfulness,' that generates the basic entitlement to the fees if such denial is incorrect."[20] It is used in the sense of a failure to abide some contractual or statutory duty to adjust or pay a claim, creating a bona fide dispute that forces the policyholder to file suit. Even an innocent error by the insurer, if it creates a bona fide dispute, and forces the policyholder to seek relief from the courts, provides a basis for a fee award.[21] A multitude of cases hold that section 627.428 fees may be awarded even though the insurer contested its duty to pay in good faith and on reasonable grounds.[22]

A "confession of judgment" is a stand-in for a "judgment or decree."

The plain language of section 627.428 requires the "rendition of a judgment or decree" against an insurer as a prerequisite for an award of statutory attorneys' fees. Since 1983, and the *Wollard v. Lloyd's & Cos. of Lloyd's*[23] case, courts have deemed an insurer's post-suit payment of a claim to be "the functional equivalent of a confession of judgment or a verdict in favor of the insured."[24]

The post-suit payment, in essence, satisfies the statutory prerequisite of a "judgment or decree" against the insurer. An award of fees based on a confession of judgment is still an award of fees based on section 627.428. And the principles applied to a case where a judgment is rendered against the insurer are also applied where the court dispenses with the requirement of a judgment. Specifically, the element of "wrongfulness" — or, in the parlance of *Johnson*, "an incorrect denial"[25] — is still applied by the courts when determining entitlement to fees under section 627.428 in the confession of judgment context.

Wollard established that an insurer "unreasonably withhold[ing] payment under the policy" is both a "threshold issue" and "a condition precedent to the award of attorney's fees."[26] This means that a post-suit payment, by itself, is insufficient to trigger entitlement to attorneys' fees under section 627.428.[27] In several cases, section 627.428 has been triggered in confession-of-judgment cases because the insurer has forced its policyholder to litigate.[28]

Public policy favors "settlement of disputes without litigation where possible."[29] The Florida Supreme Court invoked this public policy when it applied the confession-of-judgment doctrine in *Wollard*.[30] *Wollard* states that section 627.428 was meant "'to discourage litigation and encourage prompt disposition of valid insurance claims without litigation.' "[31] The court then held that a confession of judgment would trigger section 627.428(1) because requiring a policyholder to continue to litigate a case after a confession of judgment [in order to obtain a rendered judgment] would "discourage[ ] any attempt at settlement."[32]

Since the imposition of fees is always a penalty, the trial court historically considered whether the insurer had acted wrongfully before awarding section 627.428 fees. Again, this is not "wrongful" in the sense of malicious intent, but rather specific types of incorrect action. A great number of confession-of-judgment cases where courts have held that an insurer has acted "wrongfully," entitling the policyholder to section 627.428 fees, fall into one of three categories of error:

- the insurer has failed to make a payment as required by statute;[33]
- the insurer has failed to make a payment as required by the policy;[34] or
- the claims adjusting process has broken down because the insurer is no longer working to resolve the claim within the terms of the policy.[35]

These three categories describe, for the most part, some kind of "incorrect" action. As

Johnson holds (or reaffirms), a recovery of attorneys' fees under section 627.428 requires an incorrect denial of benefits by an insurance company, not a bad faith denial.

The required error can be shown where the insurer fails to make payment as required by statute. For example, in the *Midland Life* case,[36] a life insurer failed to pay proceeds until after the beneficiary had filed suit. Even though the insurer was unaware of the lawsuit when it paid the claim, the court awarded section 627.428 fees because suit was "appropriately" filed after the 60-day period to pay, provided by section 627.428(2), had expired.

An "incorrect" action can also be shown where the insurer fails to make a payment as required by the policy. In the *Barreau*[37] case, an auto insurer delayed paying a property damage claim for over six months, prompting the policyholder to sue. The insurer's delay was based on a suspicion that the accident might have been staged. Ultimately the insurer paid the claim before any judgment was entered. At the fee hearing, it was revealed the insurer's suspicion was based on nothing more than intuition; the court held the insurer's "belated recognition of coverage does not effectuate repair of the vehicle and is little solace to the policy holder who is without transportation."[38] The insurer's belated payment was deemed a confession of judgment upon which fees could appropriately be awarded.

In another such case, the property insurer in *Cincinnati Insurance Co. v. Palmer* acknowledged coverage for a fire loss, but resisted payment to a guarantor of a loan made by the property mortgagee.[39] The guarantor sued, and the insurer ultimately recognized the right of the guarantor to receive payment. The insurer then paid the proceeds — a confession of judgment — and the guarantor sought a section 627.428 fee award. The appellate court held the insurer's good-faith challenge to the policyholder's right to receive payment, and the lack of an actual judgment, were not bars to an award of section 627.428 fees.[40]

In *De Leon v. Great American Assurance Co.*,[41] the insurer delayed or denied payment for a theft loss because the policyholder had refused to answer irrelevant personal questions at an examination under oath. The policyholder sued, and the insurer prevailed in the trial court by arguing that "De Leon's refusal to complete the examination and provide the requested documents prevented [the insurer] from exercising its contractual right to fully investigate his claim."

The appellate court disagreed, finding the insurer's lawyer had used the policy provision requiring an examination under oath "as a license to make unwarranted and intrusive inquiries into the personal life of an insured who had the temerity to make a claim against it." Reversing, the appellate court rejected the insurer's argument about the course of the adjustment process. The appellate court explained its reasoning as follows:

> This is completely wrong; because [the policyholder] "refused" to respond to wholly impertinent and improper questions which had nothing to do with the merits of the claim. And we think he was right to do so. To hold in these circumstances, as did the trial court, that it was not necessary to file the action and thus that section 627.428 is inapplicable, is to turn reality upon its head. [42]

The insurer's actions in the adjustment of DeLeon's claim were not precisely "incorrect," but they were "wrongful," and forced the need for judicial intervention to secure payment of the claim.

Johnson focuses on the "policyholder's misleading conduct"

Johnson distinguishes several cases where the policyholder's "misleading conduct" was relevant to the claim for attorneys' fees. The distinguished cases are consistent with other Florida precedent holding that a policyholder is *not* entitled to section 627.428 attorneys' fees where:

- the policyholder has filed an unnecessary lawsuit after the insurer paid or agreed to pay benefits under the policy;[43] or
- the policyholder has filed suit after withholding information from the insurer important to the adjustment of claim.[44]

No "wrongful" or "incorrect denial" results when the policyholder files an unnecessary lawsuit after the insurer has paid or agreed to pay benefits. In the *Federated National Insurance Co. v. Esposito*[45] case, the insurer invoked the appraisal process when the parties failed to reach agreement on the value of a property loss. Despite the apparent progress of the appraisal process, the policyholder filed a lawsuit, and then sought an award of attorneys' fees after the insurer paid the appraisal award. The appellate court found no right to fees, despite the insurer's payment of policy proceeds after suit had been filed:

> We cannot fault the insurer for complying with the terms of its insurance contract by participating in the appraisal process and paying in a timely manner. To do so would dissuade insurers from complying with the terms of their own agreements. In this case, the insured filed the petition before the appraisal award was issued, but not prior to the time the carrier had already appointed its own appraiser and participated in the appraisal process. The insurer did not contest coverage, but rather participated in the contractual appraisal process because it could not reach an agreement with the insured over the disputed amount of the insured's claim. To

> rule otherwise would encourage an insured to run to the courthouse rather than to participate in the alternative dispute resolution outlined by the agreement between the parties. This is contrary to the intent and purpose behind the appraisal process.[46]

A similar case is *Florida Life Insurance Co. v. Fickes*,[47] where the insurer paid the claim before the policyholder filed suit. The appellate court "found no cases in Florida which have sustained the award of an attorney's fee under section 627.428 (or its precursors), where no lawsuit by the beneficiary or insured was filed before payment of the proceeds." Plainly the policyholder's suit was not necessary to resolve the insurance claim.[48]

Courts have also denied an award of fees where the policyholder filed suit after withholding important information from the insurer. In *State Farm Florida Insurance Co. v. Lorenzo,*[49] the insurer paid the actual cash value of the property loss, holding back the depreciation until the damaged property was replaced. The policyholder concealed the fact that the damaged property had been replaced, and then sued the insurer. Upon learning the property was repaired, the insurer paid the balance of what it owed, and that payment was made after the suit was filed. The policyholder moved for fees, asserting that the insurer's payment after suit was filed was a confession of judgment. The appellate court disagreed, explaining:

> The confession of judgment doctrine turns on the policy underlying section 627.428: discouraging insurers from contesting valid claims and reimbursing insureds for attorney's fees when they must sue to receive the benefits owed to them. This doctrine applies where the insurer has denied benefits the insured was entitled to, forcing the insured to file suit, resulting in the insurer's change of heart and payment before judgment. However, courts generally do not apply the doctrine where the insureds were not forced to sue to receive benefits; applying the doctrine would encourage unnecessary litigation by rewarding a race to the courthouse for attorney's fees even where the insurer was complying with its obligations under the policy.[50]

The appellate court found that the order awarding fees was a miscarriage of justice because the policyholders brought "a premature suit against [the insurer], which was complying with its policy obligations, confounding the role of the attorney's fee in facilitating the economical, efficient, and expeditious administration of justice."[51]

In *Johnson*, the Florida Supreme Court reaffirmed the holding of *Ivey* that an insurer's denial of a claim, based on a good faith, albeit mistaken, belief that it has no statutory or contractual obligation to pay, is no defense to section 627.428 fee liability.

Johnson calls into question whether the policyholder must put an insurer on notice of a dispute.

The policyholder, as the party seeking fees, has the burden to show that he or she was forced to file a lawsuit to resolve *a bona fide* dispute with his or her insurer.[52] A bona fide dispute is more than "the mere possibility of a dispute" and is a crucial condition precedent to finding wrongfulness.[53] This means that the court must determine from objective evidence whether it was reasonably necessary for the policyholder to file a lawsuit.[54] Case law has suggested that a policyholder could probably not show a need to sue the insurer to obtain policy benefits if the policyholder failed to put the insurer on notice of a dispute.[55] However, the court in *Johnson* disapproved a suggestion by the Second District Court of Appeal that, without notice of a dispute to the insurer, a policyholder would be hard-pressed to show a need to file suit.[56]

Still, there is no strict liability for attorneys' fees in Florida law historically, and *Johnson* did not create a new strict liability standard. After *Johnson*, the insurance company may defend against a fee claim with evidence of misleading conduct, manipulation, or "foul play" on the part of the policyholder.[57] What is unclear is whether the insurer may still defend with evidence showing, that when the suit was filed, it was complying with its contractual and statutory obligations, and that the adjustment of the claim was proceeding under the terms of the policy or applicable statute without need for judicial intervention. Under previous case law, after the insurer presented such evidence, the court would then determine whether it was necessary for the policyholder to file a lawsuit.[58] There is no right to a jury trial on attorney fee awards.[59]

With scores of cases from over 100 years on this subject, one can find a handful of opinions that seem to conclude that, if the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always liable for attorney's fees.[60] Often these cases contain a conclusory ruling with a dearth of facts needed to provide context; or they fail to address conflicting case law; or they show one of the parties has failed to raise all the appropriate arguments.[61] These cases are outliers that are outweighed by the long line of cases applying the "wrongfulness" requirement, or in *Johnson's* parlance, an "incorrect" decision.

In *Johnson*, the Florida Supreme Court was critical of the Fifth District's opinion, noting it relied on several cases "to support its assertion that the 'wrongful' denial of a claim required by section 627.428 must be accompanied by the insurer's bad faith; yet a review of the facts of these cases also indicates that it was the policyholder's

misleading conduct — not the insurer's — that was relevant to an award of attorneys' fees."[62] The court also distinguished *State Farm Florida Insurance Co. v. Colella*,[63] on which the Fifth District had relied, pointing out that the policyholder in that case had engaged in manipulation and "foul play," which, it said, was "simply not present" in *Johnson*.[64]

Conclusion

The plain language of section 627.428 requires entry of a "judgment or decree" in favor of the policyholder before an award of fees may be made. Because the statute imposes a penalty, and because it departs from the common law, it is applied narrowly. The great bulk of a century of jurisprudence requires a showing that the insurer has acted wrongfully before this fee penalty is applied. "Wrongfulness" is not applied in the sense of requiring a showing the insurer acted with some sinister intent, but rather describes a situation where the insurer has decided incorrectly, and failed to abide some contractual or statutory obligation to adjust or pay the claim.

The *Johnson* decision has reaffirmed this precedent. While the terminology — substituting "incorrect" for "wrongful" — may be confusing, the overall result is consistent with existing case law. For fee liability to attach, the insurer's actions, under *Johnson*, need only be "incorrect," a term that should mean breaching a contractual or statutory obligation to pay benefits, or being responsible for a breakdown in the adjustment process. The insurer has no "good faith" defense to a claim for attorneys' fees, but this has been the law for decades; *Johnson* announces no new rule in that regard. *Johnson* did approve, or at least it did not criticize, those cases finding relevant the actions of the policyholder that may have been improper, misleading, or in bad faith. These are all potential evidentiary issues to be sorted out in the trial courts.

[1] *Johnson v. Omega Ins. Co.*, No. SC14-2124, — So. 3d —, 2016 WL 5477795 (Fla. Sept. 29, 2016). This article draws from portions of a brief drafted by the authors on behalf of the defendant in *Johnson*.

[2] *Omega Ins. Co. v. Johnson*, 39 Fla. L. Weekly D1911, 2014 WL 4375189, *4 (Fla. 5th DCA Sept. 5, 2014), *reversed*, *Johnson v. Omega Ins. Co.*, No. SC14-2124, — So. 3d —, 2016 WL 5477795 (Fla. Sept. 29, 2016).

[3] 774 So. 2d 679 (Fla. 2000).

[4] Ch. 59-205, § 477, Laws of Fla; § 627.0127, Fla. Stat. (1961).

[5] *See Tillis v. Liverpool & London & Globe Ins. Co.*, 35 So. 171, 174 (Fla. 1903) (quoting Ch. 4173, § 1, Laws of Fla. (1893)).

[6] § 627.428(1), Fla. Stat. (2016).

[7] *Danis Indus. Corp. v. Ground Improvement Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994).

[8] *E.g.*, *Time Ins. Co. v. Arnold*, 319 So. 2d 638, 640 (Fla. 1st DCA 1975) (holding that section 627.428 "is in the nature of a penalty"); *Liberty Nat'l Life Ins. Co. v. Bailey ex rel. Bailey*, 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006) ("[W]e recognize that section 627.428 is a penalty in derogation of the common law."); *Mercury Ins. Co. of Fla. v. Anatkov*, 929 So. 2d 624,627 (Fla. 3d DCA 2006) (holding that section 627.428 was intended to penalize insurers); *Leaf v. State Farm Mut. Auto. Ins. Co.*, 544 So. 2d 1049, 1050 (Fla. 4th DCA 1989) (same); *Gov't Emps. Ins. Co. v. Battaglia*, 503 So. 2d 358, 360 (Fla. 5th DCA 1987) (same).

[9] *Pendas v. Eq. Life Assur. Soc.*, 176 So. 104, 111 (Fla. 1937) (quoting *U.S. Fire Ins. Co. v. Dickerson*, 90 So. 613, 616 (Fla. 1921)). *Pendas* further stated that the liability imposed by the statute is "an incident of the insurer's wrongful refusal to pay, not a mere procedural incident to the entry of judgment." *Id.* at 112 (quoting *Orlando Candy Co. v. N.H. Fire Ins. Co. of Manchester*, 51 F.2d 392, 393 (S.D. Fla. 1931)).

[10] *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 223 (Fla. 2003); *Nationwide Mut. Ins. Co. v. Nu-Best Diagnostic Labs, Inc.*, 810 So. 2d 514, 516 (Fla. 5th DCA 2002).

[11] *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006); *Pepper's Steel & Alloys, Inc. v. U.S.*, 850 So. 2d 462, 465 (Fla. 2003).

[12] *E.g.*, *Pawtucket Mut. Ins. Co. v. Manganelli*, 3 So. 3d 421, 422-23 (Fla. 4th DCA 2009) (insurer insisted arbitration take place in New Hampshire); *Stonewall Ins. Co. v. W.W. Gay Mech. Contractor, Inc.*, 351 So. 2d 403, 403-04 (Fla. 1st DCA 1977) (insurer refused to indemnify policyholder in underlying case); *Williams v. Peninsular Life Ins. Co.*, 306 So. 2d 144, 146-47 (Fla. 1st DCA 1975) (insurer refused to pay life insurance benefits to beneficiary's children despite beneficiary's assignment to his children).

[13] *E.g.*, *Old Republic Ins. Co. v. Monsees*, 188 So. 2d 893, 894-95 (Fla. 4th DCA 1966) (policyholder obtained dismissal of insurer's case); *James Furniture Mfg. Co. v. Md. Cas. Co.*, 114 So. 2d 722, 723 (Fla. 3d DCA 1959) (trial court ruled that insurer was obligated to pay judgment against policyholder in underlying negligence case).

[14] *E.g.*, *Battaglia*, 503 So. 2d at 360 (reversing award of attorneys' fees where insurer filed suit at time when there was no coverage); *Crotts v. Bankers & Shippers Ins. Co. of N.Y.*, 476 So. 2d 1357, 1358 (Fla. 2d DCA 1985) (affirming denial of attorneys' fees where insurer tendered remaining insurance benefits payable to policyholder and hospital before policyholder sued); *Waters v. State Farm Mut. Auto. Ins. Co.*, 393 So. 2d 1203, 1204 (Fla. 2d DCA 1981) (reversing fee award where insurer offered all insurance benefits due but the policyholder rejected the payment and sued instead), *quashed on other grounds by* 408 So. 2d 1044 (Fla. 1982) (mem.).

[15] *Pendas*, 176 So. at 112.

[16] *Id.* (emphasis supplied).

[17] *Id.*

[18] *Equitable Life Assur. Soc'y of U.S. v. Nichols*, 84 So. 2d 500, 502 (Fla. 1956) (emphasis supplied). The supreme court has since held that this interpretation in *Nichols* applies to section 627.428. *Mfs. Life Ins. Co. v. Cave*, 295 So. 2d 103, 106 (Fla. 1974).

[19] *E.g.*, *Great Sw. Fire Ins. Co. v. DeWitt*, 458 So. 2d 398, 400 (Fla. 1st DCA 1984) ("Section 627.428 is in the nature of a penalty against an insurer who *wrongfully* refuses to pay a legitimate claim . . . ."); *Beverly v. State Farm Fla. Ins. Co.*, 50 So. 3d 628, 633 (Fla. 2d DCA 2010) (holding that a policyholder is entitled to section 627.428 attorneys' fees where the insurer *wrongfully* caused the policyholder to resort to litigation); *Vivas v. State Farm Fla. Ins. Co.*, 138 So. 3d 479, 479 (Fla. 3d DCA 2014) (mem.) ("Because we agree with the trial court that the insurer did not *wrongfully* cause the insureds to resort to litigation, we affirm the trial court's denial of attorney's fees and costs."); *Logue v. Clarendon Nat'l Ins. Co.*, 777 So. 2d 1122, 1124 (Fla. 4th DCA 2001) ("[A]n insurer is liable for attorney's fees only when it has *wrongfully* withheld the proceeds of the policy."); *Ray v. Travelers Ins. Co.*, 477 So. 2d 634, 636 (Fla. 5th DCA 1985) ("[Section 627.428], and its predecessors, has consistently been interpreted to authorize recovery of attorney's fees from an insurer only when the insurer has *wrongfully* withheld payment of the proceeds of the policy.") (emphasis supplied).

[20] 774 So. 2d at 684.

[21] *See Johnson*, 2016 WL 5477795, at *7 ("we make abundantly clear today that in the context of section 627.428, a denial of benefits simply means an incorrect denial").

[22] *See, e.g.*, *N.Y. Life Ins. Co. v. Lecks*, 165 So. 50, 55 (Fla. 1935).

[23] 439 So. 2d 217 (Fla. 1983).

[24] *Id.* at 218-19.

[25] 2016 WL 5477795, at *11.

[26] 439 So. 2d at 219 n.2.

[27] *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826, 829 (Fla. 2d DCA 2010); *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 397-98 (Fla. 5th DCA 2007); *Tristar Lodging, Inc. v. Arch Specialty Ins. Co.*, 434 F. Supp. 2d 1286, 1298 (M.D. Fla. 2006), *aff'd*, 215 F. App'x 879 (11th Cir. 2007).

[28] *Clifton*, 31 So. 3d at 829; *Tristar Lodging, Inc.*, 434 F. Supp. 2d at 1295.

[29] *Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Group*, 64 So. 3d 1187, 1192 (Fla. 2011).

[30] *Wollard*, 439 So. 2d at 218.

[31] *Id.* (quoting *Gibson v. Walker*, 380 So. 2d 531, 533 (Fla. 5th DCA 1980)).

[32] *Id.*

[33] **"Statutory failure to pay" cases:** *See*

Ivey, 774 So. 2d at 684 ("That is, *under PIP law, the focus is outcome-oriented*. If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees. It is the incorrect denial of benefits, not the presence of some sinister concept of "wrongfulness," that generates the basic entitlement to the fees if such denial is incorrect) (emphasis supplied); *Tampa Chiropractic Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 141 So. 3d 1256, 1259 (Fla. 5th DCA 2014) (finding beneficiary was forced to sue where insurer refused to pay PIP benefits until beneficiary complied with request for documents outside the scope of section 627.736(6)(b)); *Stewart v. Midland Life Ins. Co.*, 899 So. 2d 331, 333 (Fla. 2d DCA 2005) (finding that "it was appropriate to file suit and seek attorney's fees after the applicable sixty-day period [from section 627.428(2)] had passed" without payment of life insurance benefits); *Superior Ins. Co. v. Libert*, 776 So. 2d 360, 364 (Fla. 5th DCA 2001) (affirming fee award where insurer did not pay insurance benefits within 30 days as required by PIP statute); *Gov't Emps. Ins. Co. v. Gonzalez*, 512 So. 2d 269, 271 (Fla. 3d DCA 1987) (holding that insurer wrongfully withheld PIP benefits that were not paid within the 30-day period provided by the PIP statutes).

[34] **"Contractual failure to pay" cases:** *See Barreau v. Peachtree Cas. Ins. Co.*, 79 So. 3d 843, 844-45 (Fla. 5th DCA 2012) (finding policyholder was forced to sue where insurer delayed payment under the terms of the policy for nine months based on unfounded suspicions of a staged accident); *Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 98 (Fla. 4th DCA 1974) (holding policyholder was entitled to fees where insurer did not pay after admitting liability for the loss); *Kurz v. N.Y. Life Ins. Co.*, 168 So. 2d 564, 568 (Fla. 1st DCA 1964) (reversing denial of attorneys' fees where insurer wrongfully delayed payment to rightful beneficiary under life insurance policy); *Salter v. Nat'l Indem. Co.*, 160 So. 2d 147,150 (Fla. 1st DCA 1964) (finding insurer wrongfully withheld payment it paid policyholder 19 months after proof of loss and policy required payment within 30 days).

[35] **"Adjustment breakdown" cases:** *See Barreto v. United Servs. Auto. Ass'n*, 82 So. 3d 159, 162 (Fla. 4th DCA 2012) (reversing order denying attorneys' fees where insurer had abated pre-suit appraisal process); *De Leon v. Great Am. Assur. Co.*, 78 So. 3d 585, 591 (Fla. 3d DCA 2011) (reversing order denying attorneys' fees where policyholder sued insurer after insurer insisted that policyholder respond to impertinent and improper questions during examination under oath); *First Floridian Auto & Home Ins. Co. v. Myrick*, 969 So. 2d 1121, 1124 (Fla. 2d DCA 2007) (affirming fee award where policyholder objected to insurer's proposed subsurface remediation plan but insurer did not respond, request additional information, or seek appraisal); *Leaf*, 544 So. 2d at 1050-51 (reversing order striking claim for attorneys' fees where insurer had ignored policyholder's letter stating her selection of an arbitrator).

[36] 899 So. 2d 331 (Fla. 2d DCA 2005).

[37] 79 So. 3d 843, 844.

[38] *Id* at 845.

[39] 297 So. 2d 96, 98.

[40] *Id.* at 98.

[41] 78 So. 3d 585, 586.

[42] *Id.* at 591.

[43] **Unnecessary suit cases:** *See Federated Nat'l Ins. Co. v. Esposito*, 937 So. 2d 199, 201-02 (Fla. 4th DCA 2006) (insurer timely paid appraisal award before policyholder sued); *Nationwide Prop. & Cas. Ins. v. Bobinski*, 776 So. 2d 1047, 1048 (Fla. 5th DCA 2001) (same); *Basik Exports & Imports, Inc. v. Preferred Nat'l Ins. Co.*, 911 So. 2d 291, 294 (Fla. 4th DCA 2005) (Insurer's settlement of third-party claim brought against policyholder did not constitute a "confession of judgment," and thus the policyholder was not entitled to award of attorney fees; *Fla. Life Ins. Co. v. Fickes*, 613 So. 2d 501, 502-03 (Fla. 5th DCA 1993) (insurer paid all amounts due before policyholder sued); *Obando v. Fortune Ins. Co.*, 563 So. 2d 116, 117 (Fla. 3d DCA 1990) (insurer had paid all medical bills within 30 days before the policyholder sued); *Morris v. Conn. Gen. Life Ins. Co.*, 346 So. 2d 589, 590-91 (Fla. 3d DCA 1977) (insurer had agreed to pay policy proceeds upon execution of release before policyholder filed suit).

[44] **Policyholder withholding important information cases:** *See Travelers of Fla. v. Stormont*, 43 So. 3d 941, 945 (Fla. 3d DCA 2010) (policyholder did not alert insurer of dispute regarding appraiser's competency or demand that insurer replace appraiser); *Lorenzo*, 969 So. 2d at 398-399 (policyholder concealed a repair contract that would have triggered payment under policy); *Bailey*, 944 So. 2d at 1029 (policyholder did not contact insurer to explain that claim form contained an error); *Arnold*, 319 So. 2d at 640 (policyholder responded to insurer's questions about doctor's entry by stating that "I would send you a corrected copy, but do not feel inclined to investigate your case for you").

[45] 937 So. 2d 199, 201–02.

[46] *Id.*

[47] 613 So. 2d 501, 503.

[48] *Id.*

[49] 969 So. 2d at 398.

[50] *Id.* (internal citations omitted).

[51] *Id.*

[52] *Lorenzo*, 969 So. 2d at 398; *Beverly*, 50 So. 3d at 633.

[53] *Lorenzo*, 969 So. 2d at 398 (quoting *Tristar Lodging*, 434 F. Supp. 2d at 1297-98).

[54] *Stormont*, 43 So. 3d at 944-45.

[55] *Clifton,* 31 So. 3d at 831 ("if an insurer is not on notice that the claim or payment is disputed, the insured generally will be unable to show that he or she was "forced" to file suit, and a subsequent post-suit payment by the insurer may not constitute a confession of judgment.") This fact was critical in *Johnson*, but is not apparent from the opinion. The policyholder obtained a report showing the existence of a sinkhole on the property after the insurer had received a report showing no sinkhole, and had denied the claim. The policy holder sued the insurer, and only in the discovery process revealed the contrary report. The insurer then invoked the neutral evaluation process, and paid the claim in accordance with the neutral evaluator's findings.

[56] 2016 WL 5477795, at *11.

[57] *Id.* at **9-11.

[58] *Stormont*, 43 So. 3d at 944-45.

[59] *Mid-Contintent Cas. Co. v. Giuliano*, 166 So. 2d 443, 444 (Fla. 1964); *see also Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 979 (Fla. 1987).

[60] *See, e.g.*, *Do v. GEICO Gen. Ins. Co.*, 137 So. 3d 1039 (Fla. 3d DCA 2014); *Magnetic Imaging Systems, I, Ltd. v. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987 (Fla. 3d DCA 2003) (PIP case); *United Auto. Ins. Co. v. Zulma*, 661 So. 2d 947 (Fla. 4th DCA 1995) (PIP case); *Losicco v. Aetna Cas. & Surety Co.*, 588 So. 2d 681 (Fla. 3d DCA 1991).

[61] *See, e.g.*, *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528 (Fla. 1992), where the court wrote: "[i]f the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees." *Id.* Superficially, this states what appears to be a strict liability standard. However, the facts and the context reveal *Lexow* is consistent with all of the other "wrongfulness" cases. In *Lexow* the insurer filed a declaratory judgment action that forced the policyholder to defend its rights under the insurance policy, and the policyholder prevailed. This is the context for the statement that the policyholder is "always" entitled to fees if the insurer has forced the policyholder to litigate to enforce the policy.

[62] 2016 WL 5477795, at *11 (citing *Lorenzo*, *Bailey*, and *Battaglia*). Interestingly, the Fifth District's opinion does not contain the words "bad faith."

[63] 95 So. 3d 891 (Fla. 2d DCA 2012).

[64] 2016 WL 5477795, at **9-11.