IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D10-2180

STATE FARM FLORIDA INSURANCE COMPANY,

Appellant,

vs.

STEVEN AND RAGNHILD ULRICH

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This Answer Brief is filed on behalf of Appellees, Steven and Ragnhild Ulrich ("the Ulriches"), in response to State Farm Florida Insurance Company's ("State Farm") appeal from the trial court's order awarding the Ulriches attorneys' fees, costs and prejudgment interest in an action arising out of an unpaid claim for hurricane damage to the Ulriches' dwelling. As will be demonstrated below, the trial court did not err in granting the Ulriches' motion for attorneys' fees and costs because the lawsuit was filed for the legitimate purpose of compelling State Farm to admit coverage and act on the Ulriches' claim and because State Farm's payments on the Ulriches' claim after the Ulriches' filed suit acted as a confession of judgment. The trial court did not abuse its discretion by granting attorneys' fees in this case and this Court should affirm the award on appeal.

STATEMENT OF THE CASE AND FACTS

On October 24, 2005, the Ulriches' dwelling sustained damage due to Hurricane Wilma. (R. 5). The damage included damage to the exterior of the dwelling, the interior ceilings, walls and floors, screen enclosure, and the roof of the dwelling. (R. 5). The Ulriches made a claim under their homeowner's insurance policy with State Farm. State Farm, however, denied coverage for much

of the Ulriches' claim. (R. 18; App. "A" p. 1).[1] State Farm further determined that the remaining, covered losses fell within the Ulriches' deductible and denied payment for their damages. (R. 18). State Farm's initial assessment of the damage to the Ulriches' dwelling, and its resulting denial of payment for the damage, was done without any inspection of the Ulriches' property.

In addition to its denial of coverage for much of the claim, State Farm initially took the position that it was not required to pay the expense necessary to bring the Ulriches' roof into compliance with the applicable building codes pursuant to the Building Ordinance or Law provision of the policy. On February 20, 2008, State Farm notified the Ulriches by letter of its position that damage to the Ulriches' home was not, for the most part, attributable to wind, and therefore not covered under the policy. Accordingly, State Farm denied these portions of the claim. (App. "A" p. 1; R. 18; 55-56; 58; 269). State Farm did not respond to the Ulriches' objection to this assessment.

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[1] Given the admission that it denied coverage of the Ulriches' claim in its Motion to Compel Appraisal, Abate Action and Stay Discovery, (R. 18), there can be no dispute that State Farm denied, at least in part, coverage for the Ulriches' claim. Although not entered into the record, State Farm's letter of February 20, 2008 confirms this fact and substantiates representations made by counsel throughout this litigation and at the hearing. (R. 18; 55-56; 58; 269). On February 23, 2011, the Ulriches moved to supplement the record with this letter and have included same as Appendix entry "A" to this Brief.

On March 15, 2008, the Ulriches filed a Civil Remedy Notice of Insurer Violation against State Farm for its failure to tender the full value of the insured losses suffered. (R. 298). Again, as grounds giving rise to the violation, the Ulriches asserted State Farm's failure to properly pay for the losses, its improper denial of coverage, and its failure to make the needed repairs in compliance with the Florida Building Code. (R. 299). On June 19, 2008, State Farm invoked the appraisal clause of the Ulriches' insurance policy in order to determine the amount of loss. (R. 71-73).

In response, the Ulriches sent correspondence to State Farm objecting to the appraisal and requesting an itemization as to what damage State Farm wanted appraised. (R. 269). In relevant part, the Ulriches' explained their objection to the appraisal and their position as follows:

> . . . To date, State Farm has not provided us any indication of what items it wishes to appraise. *There is no disagreement as to valuation of items on this loss. Both State Farm and the Hurricane Law Group use Xactimate to determine loss value and we are both in agreement on valuation issues* (we agree upon replacement values and repair values). *However, we disagree on coverage issues and matters of law. . . .*
>
> State Farm has previously denied coverage of this claim for coverage reasons. We believe that these denials are incorrect. As we agreed today, coverage issues are not ripe for appraisal and neither are matters of law. It appears that coverage issues and legal matters are the

> only outstanding issues on this claim (as previously provided to State Farm, we believe that State Farm has breached the contract, acted in bad faith, failed to follow the Florida Building Code, etc.). Thus, appraisal is not appropriate in this matter.

(R. 269) (emphasis added). State Farm did not respond to this correspondence.

On October 10, 2008—three years after the damage occurred without compensation from State Farm, and four months after having objected to appraisal and hearing no response from State Farm—the Ulriches filed a two-count complaint for declaratory relief and breach of contract. (R. 1-6).

Only after this Complaint was filed did State Farm conduct its first inspection of the property and provide the Ulriches with a "revised estimate of damages" (which included items previously determined not to be covered), along with a check for payment to the Ulriches in the amount of $2,520.97 for their loss. (App. "A"; R. 59-62; (R. 136; 139). This estimate included a line-by-line summary of State Farm's estimate of the costs to fix the damages. (R. 62). However, similar to its first estimate, State Farm did not admit coverage for the replacement cost of the entire roof. (R. 62-67).

This correspondence requested the Ulriches to identify their appraiser, and noted "I recognize that you and/or your clients do not wish to submit voluntarily to appraisal, as evidence by the filing of your Complaint. However, should your

position change, let me know as we can stipulate to the entry of an order abating action, *rather than waiting until next year to have the dispute about appraisal heard."* (R. 59-61) (emphasis added). This was the first time that State Farm acknowledged the Ulriches' objection to the appraisal process due to the coverage dispute and questions of law that would likely need to be litigated and preempt any appraisal.

Shortly thereafter, State Farm filed its "Motion to Compel Appraisal, Abate Action and Stay Discovery." (R. 17-21). The Ulriches filed a response objecting to the appraisal and abatement of the action, and a hearing was held on this motion. As grounds for its Motion, State Farm argued that the disagreement was over the value of the additional claimed losses, the necessity of additional repairs and the costs of those repairs, as well as the amount of internal damage to the residence that was caused by a covered loss. (R. 18, ¶ 2). At the hearing, State Farm cast the issue as one of valuation of damages, rather than coverage. However, State Farm's valuation for the repair of the roof and screen enclosure still did not include the costs of replacing the entire roof nor bringing the repairs to code. (R. 420).[2]

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[2] In its Initial Brief, State Farm admits that this dispute included questions of coverage and was not, as portrayed at the hearing, merely a dispute as to valuation of the loss, stating "After review, it became apparent that the parties were not able to agree on *whether all of the additional claimed losses were related to Hurricane Wilma* or on the extent and cost of such repairs as might be required." (IB 2). It has been the Ulriches' position since the inception of the claim that the entire roof

Counsel for the Ulriches argued that the dispute was not related to the amount of loss appropriate for the appraisal process, but rather an issue of coverage under the law and to determine "whether the Florida Building Code and the Broward County ordinances require that [the Ulriches] get a new roof." (R. 428). The Ulriches argued that whether coverage should extend to the replacement of the entire roof due to code requirements is a question of law, which cannot properly be resolved through appraisal. (R. 428-430). Counsel for the Ulriches also made the trial court aware of State Farm's reversal as to its position on coverage for damages to the interior of the Ulriches home and its delayed partial-payment for damages (not made until after the filing of the Complaint), and argued that this payment acted as a confession of judgment. (R. 431).[3]

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needed to be replaced, regardless of the portion that was damaged, due to the requirements of the Florida Building Code and the Broward County ordinances. (R. 3 & 5). Indeed, throughout this action, the Ulriches have maintained that the central issue involves a question of law regarding whether, *inter alia*, coverage should extend to pay the costs associated with the replacement of the entire roof to bring it up to code, or whether State Farm is only obligated to provide coverage for the replacement costs of the damaged portions of the roof, which would allow the roof to remain in noncompliance with the applicable building codes. Because this issue was resolved through appraisal, this legal issue was ultimately not addressed by the trial court.

[3] State Farm contends that the Ulriches' counsel conceded that the filing of this suit was premature in light of State Farm's request for appraisal. State Farm selectively quotes from the transcript of the January 29, 2009 hearing, arguing that Ulriches' counsel stated that he "doesn't disagree" with this proposition. (IB 4). However, State Farm ignores the fact that Ulriches' counsel was merely acknowledging that the appraisal could properly compensate the Ulriches for

Ultimately, the trial court granted State Farm's Motion, abated the action, and allowed the dispute to proceed through appraisal. (R. 437). The appraisal process went forward, and on September 14, 2009, a line-item appraisal award was filed with the trial court. (R. 126-129). The line-item appraisal award included $69,536.97 to "remove, repair, and replace damaged portions of the House/Roof" under the Building Replacement Cost Coverage, and $44,180.00 under the Law & Ordinance coverage, for a total of $113,716.97. (R. 127-129). The appraisal award further indicated that it "reflects the agreed damages and costs associated with all damages claimed for Building, Contents, and Loss of Use. The amount above is subject to deduction for previous payments and deductibles that are not applied to this award." (R. 129). On September 23, 2009, State Farm issued the Ulriches a check in the amount of $89,146.00 for payment of the loss, which took into account payment of the appraisal award, less the deductible and prior payment. (R. 147-148).

After appraisal, the Ulriches filed a "Motion to Confirm Appraisal Award and for the Award of Prejudgment Interest, Costs and Attorneys' Fees." (R. 130-

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replacing their roof and bringing the repairs into compliance with the building codes, and that State Farm could then either drop its contention that it was not responsible for payment of this expense or continue to dispute this coverage issue. As Ulriches' counsel pointed out, however, State Farm was even at that point disputing whether the policy required that the repairs be made to code, and that this dispute is one of law not properly subject to appraisal. (R. 433-34; 436-37).

143). The Ulriches explained in their Motion that under the Florida Statutes and controlling case law, an insured is entitled to attorneys' fees when the actions of the insureds' attorneys served a legitimate purpose of resolving a legitimate dispute. (R. 132, ¶¶ 14-16). This is so even in cases where the dispute is resolved through appraisal. (R. 132, ¶¶ 14-16).

State Farm opposed this Motion, arguing that the Ulriches were not entitled to pre-judgment interest due to what it argued was timely payment of the claim under the terms of the policy. (R. 212-215). State Farm's main argument, however, was that the Ulriches were not entitled to attorneys' fees premised upon State Farm's contention that it was not necessary for the Ulriches to file the lawsuit. (R. 212-219). The trial court disagreed, making the factual determination that the filing of the Ulriches' suit served a legitimate purpose and that the award of attorney's fees was therefore justified. The trial court's Order read, in pertinent part:

> 1. Plaintiff's Motion to Confirm Appraisal Award is DENIED.
> 2. Plaintiff's Motion for Entitlement to Attorneys' Fees and Costs is GRANTED pursuant to Florida Statute § 627.428. The court finds that the filing of the lawsuit served a legitimate purpose pursuant to Citizens Property Insurance Corporation v. Cuban-Hebrew Congregation of Miami, Inc., 5 So. 3d 7[0]9 (Fla. 3d DCA 2009).
> 3. The court defers on the issue of prejudgment interest.

(R. 270). On April 8, 2010, the trial court awarded fees to the Ulriches' counsel totaling $14,750.00; costs in the amount of $3,897.25; an expert witness fee of $2,500.00; and prejudgment interest to accrue on the award of attorneys' fees and costs at the statutory rate from December 18, 2009, which was the date that the Court granted the Ulriches' entitlement to these fees and costs. (R. 354-55). Final Judgment was entered on April 26, 2010. This appeal followed. (R. 364-366).

SUMMARY OF THE ARGUMENT

Prior to the Ulriches filing suit in this case, State Farm indisputably refused payment for much of the Ulriches' claim, taking the position that the damages claimed were not covered. Moreover, State Farm consistently maintained that it had no contractual obligation to bring the Ulriches' home into compliance with the applicable building codes. Moreover, prior to the Ulriches filing suit, State Farm ignored the letter sent by Paul Berger, the Ulriches' attorney, inquiring as to the issues for which State Farm sought appraisal. Because State Farm was unwilling to acknowledge its obligations to the Ulriches for a period of years, and because even after the Ulriches obtained counsel to protect their interests State Farm refused to acknowledge the Ulriches' attempts to settle their dispute, it became necessary for the Ulriches to file suit against State Farm.

It was not until after the lawsuit was filed (over three years after the loss), that State Farm visited the Ulrich's property to inspect the damage or made any payment to the Ulriches for the loss (a payment that included claimed damage originally denied by State Farm). The lengthy delay of State Farm's investigation into and payment on the claim, along with the large discrepancy between State Farm's estimates and the appraisal award, are indicative of the legitimate purpose of the lawsuit.

The trial court properly recognized, based upon the facts of this case, that the filing of the Ulriches' suit served a legitimate purpose in facilitating an end to the dispute. As the facts of this case demonstrate, the trial court did not abuse its discretion by reaching this conclusion.

STANDARD OF REVIEW

State Farm incorrectly contends that the standard of review is *de novo*, arguing that statutory interpretation is a question of law. (IB 11). However, State Farm's appeal challenges only the trial court's *factual determination* that filing suit in this case served a legitimate purpose. Therefore, the correct standard of review as to the trial court's findings is whether those findings are supported by competent substantial evidence. *See Acoustic Innovations, Inc. v. Schafer,* 976 So.2d 1139, 1143 (Fla. 4th DCA 2008)("When a decision in a non-jury trial is based on

findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence. *See In re Estate of Sterile,* 902 So.2d 915, 922 (Fla. 2d DCA 2005). This is because "the trial judge is in the best position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses.'")(quoting *Shaw v. Shaw,* 334 So.2d 13, 16 (Fla.1976)).

Further, the trial court's decision awarding attorneys' fees is reviewed on the abuse of discretion standard. *See Bateman v. Serv. Ins. Co*. 836 So. 2d 1109 (Fla. 3d DCA 2003) (noting that the standard of review for an award of attorneys' fees is abuse of discretion); *Citizens Prop. Ins. Corp. v. Cuban-Hebrew Congregation of Miami, Inc.*, 5 So. 3d 709 (Fla. 3d DCA 2009) (applying an abuse of discretion standard to a case involving an award of attorneys' fees under section 627.428, Florida Statutes).

In support of its position, State Farm cites *Spano v. Bruce*, ___ So. 3d ___, 2010 WL 3154873 (Fla. 3d DCA 2010), and *BellSouth Telecommunications, Inc. v. Meeks*, 863 So. 2d 287 (Fla. 2003). In both of these cases, the facts revolved around questions of law involving the court's interpretation of statutory provisions, not a trial court's factual findings.

For example, in *Spano*, a question of law existed as to whether a child support case could be considered a Title IV-D case when the Department of Revenue is not present as a party; and if so, whether this precluded an award of attorneys' fees under Section 61.16, Florida Statutes. *Spano*, 2010 WL 3154873 at *2. In *Spano*, it was necessary for the court to interpret the statutory language to determine whether a specific set of circumstances applied.

Similarly, in *Bellsouth*, the Florida Supreme Court was presented with the following issue:

> ARE THE DAMAGES RECOVERABLE BY A MINOR CHILD PURSUANT TO SECTION 768.21(3), FLORIDA STATUTES, LIMITED TO THE PERIOD OF MINORITY?

BellSouth, 863 So. 2d at 288 (Fla. 2003). The Supreme Court explained the proper interpretation of the statute at issue, stating, "the damages recoverable by a minor child under section 768.21(3), Florida Statutes (2002), should be calculated based on the joint life expectancies of the minor child and the deceased parent." *Id*. at 288. As evident from the above passages, the Supreme Court in *BellSouth* reviewed de novo a question of *law; i.e.,* how a statutory provision should be interpreted so as to calculate damages.

Unlike *BellSouth* and *Spano*, the issue here is clearly the propriety of the trial court's factual determination that the facts of the instant case justify an award of attorney's fees—in other words, was the trial court justified in reaching the

factual conclusion that the filing of the Ulriches' lawsuit served a "legitimate purpose" so as to allow for an award of attorney's fees under Section 627.428, Florida Statutes. Unlike the *BellSouth* and *Spano*, this question is not a matter of statutory interpretation, but rather a question of whether the trial court's view of the facts of the case is proper. Thus, the challenge brought by Appellants here is of the trial court's factual finding, universally understood to be reviewed on the abuse of discretion standard.

Here, as it did at the trial level, State Farm argues that there was no legitimate purpose served by bringing the lawsuit, and therefore, attorneys' fees under the statute were inappropriate. Through its argument in the Initial Brief, State Farm concedes that this is an issue of fact: "The material facts here show that this was *not* a case in which the insureds' lawsuit was a 'necessary catalyst' to getting the hurricane loss amount determined and paid." (IB at 15) (underlined emphasis added). There is no question of law present here and it was not necessary for the trial court to conduct any analysis into the interpretation or meaning of section 627.428, Florida Statutes. Instead, the issue is whether the trial court was correct in its finding of fact that the lawsuit served a legitimate purpose. The court's order, therefore, is reviewed under an abuse of discretion standard, with the court's findings of fact accorded the presumption of correctness. *See*

Black v. Bedford At Lake Catherine Homeowners Ass'n, Inc., 801 So. 2d 252, 253 (Fla. 4th DCA 2001)("The standard of review for an award of attorney's fees is abuse of discretion."); *Alternative Dev., Inc. v. St. Lucie Club & Apartment Homes Condo. Ass'n, Inc.*, 608 So. 2d 822, 828 (Fla. 4th DCA 1992)("Finally, we affirm the trial court's attorney's fee award to the Associations. The trial court's findings of fact in this regard, which are set forth in great detail in the final judgment, are presumed correct. *See Maass v. Christensen*, 447 So.2d 1044 (Fla. 4th DCA 1984). The record contains competent, substantial evidence in support thereof."); *Maass v. Christensen,* 447 So.2d 1044, 1044 (Fla. 4th DCA 1984).

ISSUES PRESENTED

Pursuant to Section 627.428(1), Florida Statutes, and the controlling case law, an award of attorneys' fees is appropriate where the trial court makes the factual determination that the filing of suit against an insurer served "a legitimate purpose" in protecting the insured's rights and resolving the dispute. In the present case, the trial court made the factual determination that the filing of suit against State Farm served such a "legitimate purpose." Did the trial court abuse its discretion in awarding attorneys' fees?

Under Florida law, if an insurer makes payment on its insured's claim after suit is filed, such payment acts as a confession of judgment, entitling the insured to

attorneys' fees on his claim. In the present case, State Farm made not one, but two payments on the Ulriches' claim after the Ulriches filed suit. Did the trial court abuse its discretion in awarding attorneys' fees?

ARGUMENT

The trial court did not abuse its discretion by entering a judgment for attorneys' fees and costs in favor of the Ulriches in this case. Instead, the trial court properly considered the evidence presented and found that the lawsuit served a legitimate purpose. In accord with this determination, the trial court correctly concluded that an award of fees under the statute was appropriate.

I. WHETHER COVERAGE EXISTED UNDER THE INSURANCE POLICY AND WHETHER STATE FARM WAS REQUIRED TO PAY FOR REPLACEMENT OF THE INSUREDS' ENTIRE ROOF DUE TO CODE REQUIREMENTS WERE PROPERLY QUESTIONS OF LAW FOR THE COURT; NOT QUESTIONS OF VALUATION FOR THE APPRAISAL PANEL.

State Farm argues in the Initial Brief that once State Farm invoked the appraisal process, compliance with the process became mandatory. (IB 15). Because the Ulriches filed suit after the appraisal process had been invoked, State Farm claims that the Ulriches' themselves breached their insurance policy. (IB 15). However, the plain terms of the operative contract state that appraisal is only available where the issue involved the amount of loss, rather than coverage of a given claim:

> If you and we fail to agree on the amount of loss, either one can demand that the amount of loss be set by appraisal….

(R. 89).

As the above quoted passage makes clear, the appraisal clause of the Ulriches' insurance policy states that either party may invoke the appraisal process in cases where one of the parties fails to agree on the *amount* of loss, not whether coverage exists for a given claim. (R. 89). Here, the dispute was not over the amount of loss, but instead over whether specific items of damage were actually covered under the terms of the insurance policy. (App. "A"; R. 18; 55-56; 58; 269).

Further, the law is clear that questions involving coverage are properly reserved for the court and are not ripe for appraisal. *See Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002). As the *Nationwide* Court explained:

> Very simply, the *Licea* court was saying that when the insurer admits that there *is* a covered loss, but there is a disagreement on the *amount* of loss, it is for the appraisers to arrive at the amount to be paid. In that circumstance, the appraisers are to inspect the property and sort out how much is to be paid on account of a covered peril. In doing so, they are to exclude payment for "a cause not covered such as normal wear and tear, dry rot, or various other designated, excluded causes."
> Thus, in the *Licea* situation, if the homeowner's insurance policy provides coverage for windstorm damage to the roof, but does not provide coverage for dry rot, the appraisers are to inspect the roof and arrive at a fair value for the windstorm damage, while excluding payment for the repairs required by preexisting dry rot.
> In the present case (unlike *Licea*) State Farm says that there is no coverage for the claim whatsoever, while the homeowners say that the

> claim falls within an applicable coverage. Whether the claim is covered by the policy is a judicial question, not a question for the appraisers.

Johnson v. Nationwide Mut. Ins. Co., 828 So. 2d 1021, 1025 (Fla. 2002), quoting *Gonzalez v. State Farm Fire & Casualty Co.*, 805 So. 2d 814, 816-817 (Fla. 3d DCA 2000)(emphasis in original).

In the present case, the facts make clear that no appraisal was warranted (or even possible) given the fact that *State Farm had denied coverage of the Ulriches' claim*. (App. "A"; R. 18; 55-56; 58; 269). Contrary to State Farm's characterization at the hearing on State Farm's motion to compel appraisal, the issue before the trial court was not solely a matter of valuation; State Farm had denied coverage for the Ulriches' claim. It was not until after the suit was filed that State Farm dropped its denial of coverage defense and made a (partial) payment on the Ulriches' claim. (R. 59-61). Thus, as stated by the Florida Supreme Court in *Nationwide*, this issue was "a judicial question, not a question for the appraisers." *Nationwide*, 828 So. 2d at 1025. *See also Midwest Mut. Ins. Co. v. Santiesteban*, 287 So. 2d 665, 667 (Fla. 1973)("A challenge of Coverage is exclusively a Judicial question and may not be decided by arbitration.");

Throughout this action, there has never been a dispute as to the valuation of the loss. Indeed, as noted in the Ulriches' correspondence to State Farm and

during the trial proceedings, both State Farm and the Ulriches' estimates used Xatimate to value the damages, and the costs of materials, labor and the various repairs were never at issue. Nor was the extent of the damages at issue. Instead, the primary dispute centered around State Farm's denial of coverage under the policy.[4] State Farm's position, until the rendition of the appraisal award, was that the only coverage provided by the policy was for the replacement of a *portion* of the roof. This is evident from the content of the two estimates presented to the Ulriches' prior to the filing of the Complaint. On the other hand, it was the Ulriches' position that coverage should extend to the replacement of the *entire* roof, regardless of the amount of damage done to the roof, due to the requirements of the Florida Building Codes and Broward County ordinances.

Furthermore, as evidence that this issue is a question of coverage, the Ulriches' insurance policy states as follows:

OPTIONAL POLICY PROVISIONS

> Each Optional Policy Provision applies only as shown in the Declarations and is subject to all the terms, provisions, exclusions and conditions of this policy.

*** * ***

[4] Other issues included State Farm's legal obligation to make repairs in compliance with applicable building codes. While it is true that State Farm ultimately did not dispute coverage for the full scope of loss after the appraisal award was issued, it is equally true that it was only after suit was filed that State Farm dropped its position that there was no coverage for the damage to the Ulriches' home.

Option OL – Building Ordinance or Law.

1. *Coverage Provided*.

   The total limit of insurance provided by this Building Ordinance or Law provision will not exceed an amount equal to the Option OL percentage shown in the Declarations at the time of the loss, as adjusted by the inflation coverage provisions of the policy. This is an additional amount of insurance and applies only to the dwelling.

2. Damaged Portions of Dwelling.

   When the dwelling covered under COVERAGE A-DWELLING is damages by a Loss Insured we will pay for the increased cost to repair or rebuild the physically damaged portion of the dwelling caused by the enforcement of a building, zoning or land use ordinance or law if the enforcement is directly caused by the same Loss Insured and the requirement is in effect at the time the Loss Insured occurs.

3. Undamaged Portions of Damaged Dwelling.

   When the dwelling covered under COVERAGE A – DWELLING is damaged by a Loss Insured we will also pay for:

a. the cost to demolish and clear the site of the undamaged portions of the dwelling caused by the enforcement of a building, zoning or land use ordinance or law if the enforcement is directly caused by the same Loss Insured and the requirement is in effect at the time the Loss Insured occurs; and

b. loss to the undamaged portion of the dwelling caused by enforcement of any ordinance or law if:

(1) the enforcement is directly caused by the same Loss Insured;
(2) the enforcement requires the demolition of portions of the same dwelling not damaged by the same Loss Insured;
(3) the ordinance or law regulates the construction or repair of the dwelling, or establishes zoning or land use requirements at the described premises; and
(4) the ordinance or law is in force at the time of the occurrence of the same Loss Insured; or

a. the legally required changes to the undamaged portion of the dwelling caused by the enforcement of a building, zoning or land use ordinance or the enforcement is directly caused by the Loss Insured and the requirement is in effect at the time the Loss Insured occurs.

1. Building Ordinance or Law Coverage Limitations.

a. We will not pay for any increased cost of construction under this coverage:

(1) until the dwelling is actually repaired or replaced at the same or another premises in the same general vicinity; and
(2) unless the repairs or replacement are made as soon as reasonably possible after the loss occurs not to exceed two years.

b. We will not pay more for loss to the undamaged portion of the dwelling caused by the enforcement of any ordinance or law than:

(1) the depreciated value of the undamaged portion of the dwelling, if the dwelling is not repaired or replaced;

(2) the amount you actually spend to replace undamaged portion of the dwelling if the dwelling is repaired or replaced.

c. We will not pay more under this coverage than the amount you actually spend:

(1) for the increased cost to repair or rebuild dwelling at the same or another premises in same general vicinity if relocation is required by ordinance or law; and
(2) to demolish and clear the site of undamaged portions of the dwelling caused by enforcement of building, zoning or land use ordinances or land.

We will never pay for more than a dwelling of the same height, floor area and style on the same or similar premises as the dwelling subject to the limits provided in paragraph 1. Coverage Provided of this option.

(R. 179-183). At the time the instant suit was filed, State Farm was maintaining the position that there was no coverage for the interior of the home or for significant portions of the roof, which State Farm argued were not damaged as a result of a wind event. (App. "A"). Indeed, even after the Ulriches provided State Farm with their position pertaining to coverage for the replacement of the entire roof, State Farm continued to provide estimates premised on coverage for only a portion of the roof. (R. 18; 55-56; 58; 269).

Moreover, after receiving State Farm's request for appraisal, the Ulriches objected and specifically requested an itemization of what State Farm intended to be appraised. (R. 269). This request went unanswered by State Farm, and the

Ulriches filed suit accordingly. Thus, because of State Farm's denial of coverage for repair of anything more than a portion of their roof, the Ulriches had a valid question of law under the policy which would have been properly addressed by the court.

Moreover the dispute as to whether the insurance policy covered the replacement of the entire roof versus the replacement of a portion of the roof when there has been damage was not an issue of valuation, but was plainly a question pertaining to coverage under the insurance policy. The valid question of law relating to coverage for the Ulriches' claim was never determined by the court. Instead, the appraisal panel awarded the Ulriches the replacement value of the roof, pursuant to the Law and Ordinance requirements of the insurance policy. (R. 142).

State Farm, not wanting to enter into further litigation concerning whether full replacement of the roof should be covered, paid the award in its entirety.

II. THE FILING OF SUIT AGAINST STATE FARM SERVED A LEGITIMATE PURPOSE AND THE TRIAL COURT DID NOT ERR IN GRANTING THE AWARD OF ATTORNEYS' FEES PURSUANT TO SECTION 627.428, FLORIDA STATUTES.

Section 627.428(1), Florida Statutes, provides that attorneys' fees may be awarded under the following circumstances:

> 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.

Sect. 627.428(1), Fla. Stat. As explained by this Court in *Travelers Indem. Ins. Co. of Illinois v. Meadows MRI, LLP*, 900 So. 2d 676, 679 (Fla. 4th DCA 2005), "The purpose behind section 627.428 is plainly to place the insured or beneficiary in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees."

Despite all of its protestations, State Farm is unable to escape the dispositive timeline in this case which, consistent with *Meadows*, lends ample support for the trial court's factual determination that filing this lawsuit served a legitimate purpose:

First, *State Farm initially denied coverage* for the majority of the damage to the Ulriches' roof and for the interior damage to the home. Further, State Farm took the position that it was not required to pay for the repairs necessary to bring the Ulriches' roof into compliance with the applicable building codes pursuant to the Building Ordinance or Law provision of the policy.

After repeated attempts to obtain proper coverage for their claim, on October 10, 2008, the Ulriches ultimately filed suit against State Farm.[5] With the complaint in this action filed, State Farm inspected the Ulriches' property for the first time and reassessed the covered damages to include damages to the interior of the home. On November 17, 2008, State Farm issued a check in the amount of $2,520.97 (such payment acting as a confession of judgment). However, State Farm remained firm in its position that it was not obligated to pay for bringing the repairs to the home into compliance with the building codes.

On January 26, 2009, State Farm filed its motion to abate the Ulriches' suit and to compel appraisal. At the hearing on this motion, the trial court made clear that, should State Farm maintain its position that it has no obligation bring the roof into compliance with the current building codes, then the Ulriches' lawsuit would continue. (R. 433). The court instructed that the appraisal award include a line item assessment of the damages, so that the Ulriches would be able to determine whether all damages claimed were included. (R. 437). Ultimately, the appraisal

[5] In its Initial Brief, State Farm argues that the fact that it invoked the appraisal process prior to the Ulriches filing suit demonstrates that attorneys' fees are not appropriate here. As will be discussed in greater detail *infra*, however, this fact is irrelevant to the question of entitlement to attorneys' fees. *See Lewis v. Universal Prop. and Cas. Ins. Co.*, 13 So. 3d 1079, 1082 ("[W]hether suit is filed before or after the invocation of the appraisal process is not determinative of the insured's right to fees; rather, the right to fees turns upon whether the filing of the suit served a legitimate purpose.").

award was returned awarding the Ulriches $113,716.97, including a "Law and Ordinance" award necessary to bring the repairs within the code requirements (a *de facto* ruling that State Farm's position that it was not required to pay for these repairs was incorrect).

Thus, faced with the knowledge that the Ulriches would continue in their suit against State Farm if the entire appraisal award was not paid, State Farm dropped its coverage defenses and reversed its position that it was not required to bring the roof within code requirements and paid the Ulriches the entire award.

Thus, the timeline demonstrates the following facts: 1) State Farm initially denied coverage for the Ulriches' claim; 2) it was not until suit was filed that State Farm ever sent an adjuster to the home to assess damage; 3) it was only after suit was filed that State Farm ever acknowledged that interior damage to the home *was* covered under the claim; 4) State Farm paid the Ulriches in compensation for damages that *it did not acknowledge* before filing of the suit; and 5) State Farm's decision to change its position and agree to pay for the costs of bringing the roof to code came with the knowledge that the Ulriches' suit would continue if it did not do so.

As explained by this Court in *Meadows,* 900 So. 2d at 679 (Fla. 4th DCA 2005):

> [I]t is entirely possible that [the insurer's] conduct and participation in the appraisal was affected by [the insured's] representation of counsel and the threat of what ultimately became a pending lawsuit. *See Ajmechet v. United Auto. Ins. Co.*, 790 So.2d 575, 575 (Fla. 3d DCA 2001) (holding because payment of appraisal award was obviously effected by law suit, insured was entitled to fees under section 627.428(1)).
>
> The trial court's award of attorney's fees was consistent with this court's stated purpose for section 627.428(1).
>
> The purpose behind section 627.428 is plainly to place the insured or beneficiary in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees.

Similarly, in the present case there is no doubt that the Ulriches lawsuit affected State Farm's conduct and participation in the appraisal, where State Farm clearly changed its position as to whether portions of the Ulriches' claim were covered *after* commencement of suit, and ultimately paid monies in fulfillment of policy provisions that it had previously denied were applicable.

Because of State Farm's initial denial of coverage for the Ulriches' claim, its failure to acknowledge the applicability of governing building codes and State Farm's repeatedly ignoring the Ulriches' attempts to resolve the matter, the Ulriches were compelled to file suit against State Farm.

Because, as noted by *Meadows*, "The purpose behind section 627.428 is plainly to place the insured or beneficiary in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees" the trial court's order

awarding attorney's fees is appropriate because the Ulriches incurred these attorney's fees as a direct result of State Farms' failure to properly address the Ulriches' claim.

Given these facts, and based upon competent substantial evidence presented to it, the trial court made the factual determination that the filing of the suit served a legitimate purpose, and justified an award of attorney's fees. (R. 18; 55-56; 58; 269). Under the facts of this case, the trial court cannot be said to have abused its discretion in reaching this conclusion. *See Acoustic Innovations, Inc. v. Schafer,* 976 So.2d 1139, 1143 (Fla. 4th DCA 2008)("When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence."); *Bateman v. Serv. Ins. Co*. 836 So. 2d 1109 (Fla. 3d DCA 2003) (noting that the standard of review for an award of attorneys' fees is abuse of discretion).

A. State Farm's Payment on the Ulriches' Claim After the Filing of Suit Justifies the Trial Court's Award of Attorney's Fees.

In the Initial Brief, State Farm focuses the first section of its argument on the meaning of and purpose behind section 627.428, and the statute's reference to an award of fees "upon the rendition of a judgment." (IB 11-14). Presumably, this is an attempt to convince this Court that this is a novel issue of law requiring interpretation of the statute by the Court.

However, as State Farm itself points out in the Initial Brief, the Florida Supreme Court has developed the Confession of Judgment Doctrine, wherein the payment of policy benefits by an insurer after a suit has been filed is deemed to be the functional equivalent of a judgment, entitling the opposing party to attorney's fees. *See Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217 (Fla. 1983); (IB 12-13).

Under this doctrine, attorneys' fees are to be awarded where there has been no actual judgment (due to appraisal, etc.), but where "the filing of suit acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." *Lewis v. Universal Prop. and Cas. Ins. Co.*, 13 So. 3d 1079, 1082 (Fla. 4th DCA 2009) (citing *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 398-99 (Fla. 5th DCA 2007)).

To determine whether a suit was necessary, the Florida Courts have looked at the totality of the circumstances underlying the facts of the case; where the insurer was not complying with the terms of the insurance policy, or was delaying payment for coverage under the policy, the courts have freely awarded attorneys' fees. *See, e.g. Lewis*, 13 So. 3d 1079 (Fla. 4th DCA 2009); *Meadows, supra; Citizens Prop. Ins. Corp. v. Cuban-Hebrew Congregation of Miami, Inc.*, 5 So. 3d 709 (Fla. 3d DCA 2009).

As the facts of this case demonstrate, the Ulriches' suit "acted as a necessary catalyst" in resolving their dispute with State Farm who, prior to the filing of the Complaint, had refused to acknowledge coverage for interior damage to the home, denied that it was responsible for putting the home in compliance with applicable building codes, had failed to send an adjuster to the home to do a proper inspection, and had utterly refused to discuss its coverage position with the Ulriches. Thus, an award of attorneys' fees was appropriate.

Moreover, this Court has explained that the doctrine applies in cases where the filing of the suit served a "legitimate purpose" regardless of whether the suit was filed before or after the appraisal process is invoked. *See Lewis,* 13 So. 3d at 1082 (Fla. 4th DCA 2009) (citing a number of cases discussing this issue and noting that "The decisions in these cases plainly indicate that whether suit is filed before or after the invocation of the appraisal process is not determinative of the insured's right to fees; rather, the right to fees turns upon whether the filing of the suit served a legitimate purpose.").

In the present case, in direct response to the Ulriches filing suit, State Farm for the first time acknowledged coverage for damage to interior portions of the Ulriches' home and issued a check for damages in excess of the deductible under the policy. (R. 61). Further, after the appraisal award was issued, State Farm paid

the entire appraisal award. (R. 142). Both of these payments were made after the Ulriches filed their lawsuit, and both represent payment pursuant to policy provisions which State Farm initially maintained were not applicable to the Ulriches' claim. Thus, the confession of judgment doctrine justifies the trial court's ruling that awarding attorney's fees despite the fact that State Farm (inappropriately) demanded an appraisal prior to the Ulriches filing suit.

B. There is no requirement that the trial court confirm the appraisal award in order to grant an award of attorneys' fees under section 627.428, Florida Statutes.

In the Initial Brief, State Farm relies heavily on the argument that attorneys' fees were inappropriate because the appraisal award was never confirmed, citing to *Federated Nat'n Ins. Co. v. Esposito*, 937 So. 2d 199 (Fla. 4th DCA 2006). (IB 19).

We address *Esposito* and why it is inapplicable to this case in detail below; however it must be noted at the outset that State Farm's assertion that an award must be confirmed in order to justify an award of attorneys' fees under the Confession of Judgment Doctrine is completely incorrect. In fact, subsequent to *Esposito*, this Court's decision in *Lewis* explained that the "whole thrust" of the Confession of Judgment Doctrine is to allow for attorneys' fees in cases where

awards were paid after the suit was filed, regardless of whether there was a judgment entered or an order confirming appraisal:

> And, while it is true that the trial court never entered a judgment or an order confirming the appraisal award, it is undisputed that the insurer paid the claim. Florida law squarely holds that "payment after suit was filed operates as a confession of judgment . . . entitling [the insured] to attorney's fees."

Lewis, 13 So. 3d at 1083 (citations omitted).

The law is clear that even where there is no judgment or confirmation of the appraisal award, attorneys' fees may still be appropriate under section 627.428, Florida Statutes. Thus, the confession of judgment doctrine fully supports the trial court's award of attorney's fees, which was premised upon the court's finding that the suit served a legitimate purpose, and the trial court did not abuse its discretion in making that factual determination.

C. The court must consider the totality of the facts and circumstances when determining whether an award of attorneys' fees under section 627.428, Florida Statutes, is appropriate, and the facts in *Esposito* are not relevant to this case.

As noted above, State Farm relies heavily on *Esposito* to support its argument that the award of attorney's fees was improper. *Esposito*, however is readily distinguishable.

Esposito involves a claim for hurricane damage wherein *the insured* invoked the appraisal process. *Esposito,* 937 So. 2d at 200. The insurer immediately appointed its appraiser and complied with the appraisal process. *Id.* Notwithstanding the insurer's compliance, the insured wrote the insurer's attorney and advised that it had twenty days to appoint an appraiser (which it had already done), and warned of an impending civil remedy. *Id.* Thereafter, the insured filed a petition to compel appraisal. *Id.* The insurer did not object to the appraisal process and an *agreed* order was entered by the court. *Id*. The appraisal went forward. After the award was issued and paid, the insured filed a motion to confirm appraisal and sought attorneys' fees under section 627.428, Florida Statutes. *Id.* The trial court confirmed the appraisal award and granted attorneys' fees, and the insurer appealed. *Id.*

On appeal, this Court explained that "the precise issue" was the confirmation of the appraisal award after it had already been paid; and that the "underlying driving question" of the case was whether attorneys' fees were appropriate when "the insured initiates litigation even though the insurer complies with the terms of the alternate dispute resolution provided for in the insurance contract." *Esposito,* 937 So. 2d at 201.

Discussing these issues, this Court analyzed two cases involving a similar issue, but coming to differing conclusions due to the nature of the facts. *Id.* at 201 (discussing *Bobinski* and *Meadows MRI*). This Court found that the facts of *Esposito* were more akin *Bobinski*, where attorneys' fees were inappropriate, and denied fees. *Id.* at 201. In so holding, this Court found noted that in *Esposito*, (and unlike this case) there was no coverage dispute, and no need to file a suit for declaratory relief due to coverage issues or to litigate the appraisal process. *Id.* at 201.

State Farm contends in the Initial Brief that the "whole thrust of *Esposito* is that timely payment of an appraisal award from an appraisal that began before the insured initiated litigation is *not* akin to a 'confession of judgment', as other courts have also held." (IB 19). State Farm focuses its entire argument on the position that because State Farm eventually initiated and participated in the appraisal process and paid the appraisal award, even though this was done three years after the loss and over the insureds' objections, an award of attorneys' fees was inappropriate.

State Farm misses the point: in *Esposito*, the attorneys' fee issue was *not* resolved solely on whether the insurance carrier participated in the appraisal

process. Instead, the Court looked at the totality of the circumstances surrounding the need for the litigation and whether filing suit served a legitimate purpose.

Specifically, this Court found that fees were inappropriate because, unlike here, the filing of suit did nothing to influence the insurer's behavior and, unlike here, no coverage or other legal issues were involved in the dispute. *Esposito*, 937 So. 2d at 201-202.

The facts of this case much are closely analogous to those addressed by this Court in *Lewis v. Universal Prop. and Cas. Ins. Co.*, 13 So. 3d 1079 (Fla. 4th DCA 2009), and this Court's analysis there is much more appropriate to the present case.

In *Lewis*, the insureds suffered damages to their roof due to Hurricane Wilma. *Lewis*, 13 So. 3d at 1080. As in this case, the insureds sought replacement of the entire roof, but the insurer asserted that it would only pay for the replacement of a portion of the roof. *Id.* Later, the insureds sent a letter to the insurer with a draft complaint for breach of contract. *Id.* As in this case, the insurer invoked its right to appraisal prior to the insureds filing their complaint. *Id.* Thereafter, the insureds filed its Complaint for breach of contract, and sought declaratory relief as to coverage for its roof. *Id*. Just as occurred in this case, the court stayed the litigation and permitted the appraisal to go forward. *Id.* Finally,

as in this case, the insurer paid the appraisal award, and the insured sought attorneys' fees under section 627.428, Florida Statutes. *Id.*

The insurer objected to the award of attorneys' fees on the grounds that "it had never denied coverage; rather, there was merely a dispute as to the amount of the loss, and it had invoked the policy's appraisal process prior to the insureds' filing suit.[6] It also asserted that fees were not appropriate as the appraisal award was never confirmed by a court and there had never been any judicial relief in favor of the insureds." *Id.* at 1081. The trial court denied fees and the insureds appealed. *Id.*

On appeal, this Court reversed the trial court's denial of attorney's fees, stating:

> In short, the insureds contend that they were entitled to a fee award under the statute even though they filed their civil complaint after the insurer invoked its right to an appraisal and that the absence of a court order or judgment is not fatal to their claim. Under the facts of this case, we agree and reverse the order appealed

Lewis, 13 So. 3d at 1080.

In reversing the trial court's order, this Court looked at the totality of the circumstances and whether the lawsuit served a legitimate purpose. *Lewis*, 13 So. 3d at 1082 (noting that "The decisions in these cases plainly indicate that whether

[6] Of course, in this case there is no dispute that State Farm actually *did* deny coverage. (App. "A"; R. 18; 56-59)

suit is filed before or after the invocation of the appraisal process is not determinative of the insured's right to fees; rather, the right to fees turns upon whether the filing of the suit served a legitimate purpose.").

Specifically, this Court compared the facts there presented to those in *Travelers Indem. Ins. Co. of Illinois v. Meadows MRI, LLP,* 900 So.2d 676, 679 (Fla. 4th DCA 2005) and *Esposito,* and found that the facts more closely resembled those in *Meadows*. *Id.* Explaining its position, the *Lewis* court opined:

> We believe that the instant case is more akin to *Meadows* and that the insureds were entitled to fees. Here, more than a year after the loss, the insurer was taking the position that the bulk of the damage to the roof was not covered and indicating to the insured that it intended to take no further action and was "closing [its] file." The insureds thus invoked their right to mediation under the insurance contract. When this failed to resolve the dispute, the insureds hired counsel and threatened suit, sending the insurer a draft complaint, stating a claim for breach of contract. Only after the insureds' counsel sent the letter and draft complaint did the insurer invoke its right to an appraisal and, even in invoking such right, the insured asserted it was retaining the right to deny the claim. The insureds then filed suit, stating a claim for breach of contract and seeking declaratory judgment regarding coverage. These circumstances are not indicative of an insured who "raced to the courthouse" or who filed suit simply for the purpose of securing a fee award. And, while it is true that the trial court never entered a judgment or an order confirming the appraisal award, it is undisputed that the insurer paid the claim. Florida law squarely holds that "payment after suit was

> filed operates as a confession of judgment . . . entitling [the insured] to attorney's fees."

Id. at 1082-83 (citations omitted) (emphasis added).

Here, and analogous to the facts in *Lewis*, State Farm initially denied coverage for the Ulriches' claim. As in *Lewis*, after three years of dispute State Farm was holding to the position that the bulk of the damage to the Ulriches' roof was not covered. It was only after suit was filed that State Farm ever inspected the property and acknowledged that interior damage to the home *was* covered under the claim. However, State Farm refused to acknowledge that it was required to pay for the repairs necessary to bring the home to code as required under the policy, and invoked the appraisal process. Finally, the Ulriches filed a Complaint for declaratory relief. State Farm then filed a motion abate the suit and compel appraisal (which was again objected to by the Ulriches), and the trial court ultimately allowed appraisal to go forward. This appraisal award compensated the Ulriches for the entire scope of their damage—including replacement of the entire roof, and State Farm reversed its position and paid the entire award.

After examining these facts, the trial court ruled that filing the suit served a legitimate purpose, and awarded attorneys' fees. As in *Lewis*, this is not a situation in which the insured raced to the courthouse simply for the purpose of obtaining

attorneys' fees. The involvement of counsel—as determined by the trial court—played a legitimate role in bringing about payment of the Ulriches' claim.

As in *Lewis*, the analysis of the facts here under the totality of the circumstances support the conclusion that the lawsuit against State Farm served a legitimate purpose. The trial court did not abuse its discretion when it granted the Ulriches' motion for attorneys' fees and costs and this Court should affirm the Order on appeal.

CONCLUSION

WHEREFORE, based upon the above facts and authorities, Appellees, Steven and Ragnhild Ulrich, respectfully request that this Court affirm the trial court's grant of attorneys' fees and costs to the Appellees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via overnight delivery this **23rd** day of **February, 2011**, to: Elizabeth K. Russo, Esq., Russo Appellate Firm, P.A. 6101 S.W. 76th St., Miami, FL. 33143, and Taylor, Day & Currie, 50 N. Laura St. Suite 3500, Jacksonville, FL. 32202.

BY: _____
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CERTIFICATE OF COMPLIANCE

This brief complies with font requirements; it is typed in Times New Roman 14 point font, and is proportionately spaced type.

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