

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED  
IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION**

**CONTINENTAL CASUALTY COMPANY,  
Appellant,**

**Case No. 15-000070AP-88A  
UCN: 522015AP000070XXXXCV**

**v.**

**JASON WEBSTER,  
Appellee.**

Opinion Filed \_\_\_\_\_/

Appeal from Final Judgment  
Pinellas County Court  
Judge Myra Scott McNary

Stephen J. Poljak, Esq.  
Michael A. Packer, Esq.  
Devon A. Woolard, Esq.  
Attorneys for Appellant

Kim E. Wells, Esq.  
Attorney for Appellee

**PER CURIAM.**

Appellant, Continental Casualty Company, appeals the "Order Entering Confessed Judgment in Favor of Plaintiff; Denying Defendant's Motion for Summary Judgment; Granting Plaintiff's Motion for Entitlement to Award of Attorney's Fees" entered on October 16, 2015, in favor of Appellee, Jason Webster. We affirm.

**Statement of Case**

The parties filed cross-motions for summary judgment and both assert there are no genuine issues of material fact in dispute.

**Timeline:**

10/31/2013	Effective date of Yacht Policy between Continental Casualty Company and Jason Webster issued through the BoatUS Marine Insurance Program
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<b>2014</b>	
03/02/2014	Boat damaged
03/19/2014	Damage determined to be cosmetic by Continental and the repair facility and \$3,992.22 paid for repairs
07/14/2014	Webster retained counsel
12/03/2014	Joint inspection by Webster and Continental determined that damage to boat should be characterized as a complete loss for the Hull Policy limits of \$78,500.00
<b>2015</b>	
01/05/2015	Final Report of Joint Survey declares boat substantially structurally damaged and a constructive total loss
02/05/2015	Correspondence from Continental to confirm settlement of Webster's claim for \$74,507.78: the agreed Hull Value less \$3,992.22 previously paid for repairs
02/10/2015	Correspondence from counsel for Webster notifying Continental that Webster disputes the payment amount of \$74,507.78 as he is entitled to the full Hull Policy limits of \$78,500.00, as the monies spent on the failed repairs were "wasted"
02/24/2015	Second correspondence from Continental confirming settlement of the claim in the amount of \$74,507.78. "This amount reflects the Agreed Hull Value less prior payment of \$3,992.22 issued on March 19, 2015."
03/16/2015	Webster filed a "Civil Remedy Notice of Insurer Violations" (CRN) with the Florida Department of Financial Services and with Continental pursuant to section 624.155, Florida Statutes (2015)
03/17/2015	Correspondence from Continental acknowledging telephone conference with counsel for Webster and supplying revised Sworn Proof with addendum recognizing the disputed amount of \$3,992.22
03/19/2015	Correspondence from Continental enclosing checks totaling \$74,507.78 for the undisputed portion of the claim and stating in part: "We are reviewing the demand in the Civil Remedy Notice as it related to the prior settlement payment in the amount of \$3,992.22 and will respond accordingly."
03/25/2015	Webster filed Complaint for Declaratory Relief requesting a "declaration as to the rights, obligations and duties of the insurer and the boat owner, if any, under the policy for the claims made by Plaintiff [Webster]" and stating "that the object of this proceeding is the construction of the rights, status and relationship of the parties herein concerning the subject policy between Plaintiff and CONTINENTAL" (R 13-14)
04/22/2015	Correspondence from Continental in response to the CRN with a check for \$4,210.95 (representing \$3,992.22 plus interest). Continental denied "wrongdoing" and "in an effort to continue its good faith dealings" remitted the payment. Continental stated in part that the check was made "purely to cure the alleged violations asserted in



	the CRN and are in no way related to the pending lawsuit filed in the County Court of Pinellas County, Florida."
05/04/2015	Continental filed Answer and Affirmative Defenses to Complaint for Declaratory Relief
05/15/2015	Correspondence from counsel for Continental in response to CRN and demanding that CRN be withdrawn as payment had been made
06/24/2015	Continental filed "Motion for Final Summary Judgment"
07/23/2015	Webster filed "Motion for Summary Judgment and Motion for Entitlement to Award of Attorney's Fees Pursuant to § 627.428, Florida Statutes"
10/16/2015	"Order Entering Confessed Judgment in Favor of Plaintiff; Denying Defendant's Motion for Summary Judgment; Granting Plaintiff's Motion for Entitlement to Award of Attorney's Fees" rendered
11/13/2015	Notice of Appeal filed

### **Continental's Motion for Summary Judgment**

In the motion, Continental argues that it is entitled to judgment as a matter of law on Webster's declaratory relief action because it paid the "agreed value" of the boat hull as defined by the policy. Allegedly, the Complaint for Declaratory Relief is moot because no controversy exists between the parties due to the fact that the policy limits have been paid. Continental points to the fact that it paid the amount in dispute plus interest within the sixty-day cure period provided by section 624.155(3)(a), Florida Statutes (2015), in response to Webster's "Civil Remedy Notice of Insurer Violations" (CRN).

### **Webster's Motion for Summary Judgment and Attorney's Fees**

In the motion, Webster sets out a statement of facts and documents that he repeatedly requested that Continental pay the disputed amount prior to filing the Complaint for Declaratory Relief. Webster notes that after filing the CRN and commencing suit, Continental paid the disputed amount of the claim; therefore, he is the prevailing party in this action. It is asserted that Continental's payment of the disputed amount constitutes a confession of judgment and Webster is entitled to summary judgment. Webster cites to Wollard v. Lloyd's & Companies of Lloyd's, 439 So. 2d 217, 218-19 (Fla. 1983); and Sanchez v. American Ambassador Casualty Co., 559 So. 2d 344, 347 (Fla. 2d DCA 1990), to support his argument that there has been a confession of judgment by Continental. Further, Webster cites to Travelers Indemnity Insurance

Company of Illinois v. Meadows, MRI, LLP, 900 So 2d 676 (Fla. 4th DCA 2005), to support his request for attorney's fees under section 627.428, Florida Statutes (2015).

### **Trial Court Judgment and Order on Entitlement to Attorney's Fees**

Section 624.155 requires the insured to file a CRN with the Florida Department of Financial Services and with the insurance company as a condition precedent to filing an action against an insurance company for bad faith failure to settle a disputed claim. A sixty-day cure period is provided for the insurance company to determine if in good faith the disputed amount should be paid. If the dispute is cured within the sixty-day period, the insured is precluded from bringing an action for bad faith failure to settle.

In addressing Continental's motion for summary judgment, the trial court acknowledged that Continental paid the amount of the claim in dispute within the sixty-day cure period provided by section 624.155(3)(a). However, it was noted that a bad-faith action is a separate and distinct cause of action from the claim in Webster's Complaint for Declaratory Relief. The trial court found that payment of the disputed sum may preclude a future bad faith action against Continental; but was not determinative of Webster's Complaint for Declaratory Relief concerning the duties of the parties under the policy.

The trial court held: "Where a party makes a post-suit payment of additional insurance proceeds, such payment operates as a confession of judgment against it and a verdict in favor of the insured, making summary judgment in the insurer's favor improper." Continental's motion for summary judgment was denied.

In addressing Webster's motion, the trial court found that by paying the disputed amount, Continental effectively agreed to the relief sought by Webster in his Complaint and rendered the controversy moot. The trial court did not enter summary judgment for Webster, but noted that while technically no judgment would be entered for Webster, his motion for entitlement to attorney's fees under section 627.428 must be granted based on the confession of judgment.

The trial court concluded:

It is undisputed that, subsequent to Webster filing the instant lawsuit and the CRN, Continental paid the additional disputed benefits there were the subject of this action. Thus, Webster's lawsuit prompted Continental to pay the disputed benefits that it had previously determined Webster was not entitled to. Under



Florida law, Continental's subsequent payment of the disputed amount operated as a confession of judgment which entitles Webster to the recovery of attorney's fees. See § 627.428(1), Fla. Stat.; Wollard, 439 So. 2d at 218.

The trial court ordered that a "confessed judgment" was entered and granted Webster's motion for entitlement to attorney's fees.

### **Arguments on Appeal**

I. "The County Court committed reversible error when it held Continental had confessed judgment because the filing of the Plaintiff's lawsuit was not a necessary catalyst to resolve the dispute."

II. "Since it is clear Continental did not confess judgment, the County Court erred in denying its Motion for Summary Judgment since all available policy limits had been paid to the Plaintiff."

Continental argues that the trial court misinterpreted the confession of judgment doctrine when it concluded that the payment of the disputed amount to cure the CRN was a confession of judgment. Quoting Contreras v. 21st Century Insurance Co., 53 So. 3d 1194, 1198 (Fla. 5th DCA 2011), Continental argues that under Florida law, the confession of judgment doctrine applies when an insured has been denied benefits to which he is entitled and is forced to file a lawsuit that results in the insurance company's change of heart and payment before a judgment is entered. It is asserted: "For the confession of judgment doctrine to apply, the insurance company must have unreasonably withheld payment under the policy or engaged in some other wrongful behavior that forced the insured to sue." (emphasis in Initial Brief, p. 16). In support of this statement, Continental cites to Tampa Chiropractic Center, Inc. v. State Farm Mutual Automobile Insurance Co., 141 So. 3d 1256, 1258-59 (Fla. 5th DCA 2014); State Farm Florida Insurance Co. v. Lime Bay Condominium, Inc., 187 So. 2d 932 (Fla. 4th DCA March 23, 2016); and Jenkins v. USF&G Specialty Insurance Co., 982 So. 2d 15, 17 (Fla. 5th DCA 2008). Allegedly, no evidence was presented to establish that Webster was forced to file suit to receive benefits; but in fact, Continental notes that it "promptly" paid any remaining policy benefits within the sixty-day CRN statutory cure period.

Further, Continental quotes First Floridian Auto and Home Insurance Co. v. Myrick, 969 So. 2d 1121, 1124 (Fla. 2d DCA 2007), and argues that the confession of

judgment doctrine is not absolute, but rather "the filing of the suit [must have] acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligation under the insurance contract." It is asserted that the doctrine is intended to penalize insurance companies for "wrongfully" causing an insured to resort to litigation. See State Farm Florida Insurance Co. v. Colella, 95 So. 3d 891, 896 (Fla. 2d DCA 2012).

Continental argues that Webster "elected" to file a CRN specifying that Continental was to cure the alleged violations by tendering the disputed funds. Thereafter, notwithstanding the sixty-day cure period under section 624.155(3)(c),(d), Webster filed the declaratory relief action. In Continental's view, because Webster first "elected" to avail himself of the remedies afforded under the Civil Remedy statute, his declaratory relief action was entirely unnecessary until the expiration of the cure period.

Continental asserts that the trial court's ruling in the present case thwarts the intent of section 624.155 and encourages a race to the courthouse after the filing of a CRN to begin unnecessary litigation with the hope of recovering attorney's fees. Further, it is alleged, the trial court's ruling directly contradicts the purpose behind the confession of judgment doctrine, which is to penalize insurance companies who force an insured to resort to litigation.

### **Analysis**

There are two statutes at issue in this appeal.

#### **Section 624.155, Florida Statutes, Civil Remedies Statute**

Webster filed a CRN with the Florida Department of Financial Services and with Continental pursuant to section 624.155, as a condition precedent to bringing an action against Continental for bad faith failure to promptly settle.

Prior to 1982, the only recognized cause of action for bad faith failure to settle claims was the common law third-party bad faith action. See Fridman v. Safeco Ins. Co. of Illinois, 185 So. 3d 1214, 1220 (Fla. 2016). In 1982, the Florida Legislature enacted the Civil Remedies Statute, section 624.155 and created a statutory first-party bad faith cause of action. This statute extended the duty of an insurance company to act in good faith in handling claims brought by its own insured. As noted above, the statute requires notice to the insurance company through the CRN and provides for a sixty-day cure period. See § 624.155(3)(d); Fridman, 185 So. 3d at 1220 (holding sixty-



day cure period provides insurance companies with final opportunity "to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.") If the dispute is not resolved during the cure period, the claimant is authorized to proceed with a civil action for statutory bad faith failure to settle, if appropriate. Macola v. Gov't Employees Ins. Co., 953 So. 2d 451, 456 (Fla. 2006).

#### Election of Remedies Argument

When a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. Macola, 953 So. 2d at 457. Section 624.155(8) specifically states in part: "The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state."

Section 624.155(8) is clear and unambiguous. In the October 16, 2015, judgment the trial court properly concluded: "While the fact that Continental availed itself of the sixty-day cure period provided by section 624.155(3)(a), Florida Statutes, may preclude a future bad faith action, it is not determinative in the instant case [in which Webster seeks declaratory relief.]" The cause of action for declaratory judgment regarding the policy is a separate and distinct cause of action from an action for bad faith failure to settle. In fact, in Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d 1289, 1291 (Fla. 1991), the Supreme Court held that a bad faith action cannot accrue until the underlying lawsuit seeking insurance benefits is resolved in the insured's favor. See Hunt v. State Farm Fla. Ins. Co., 112 So. 3d 547, 549 (Fla. 2d DCA 2013).

There was no requirement that there be an election of remedies as asserted by Continental because after filing the CRN, Webster was not precluded from bringing a separate and distinct cause of action against Continental during the sixty-day cure period for declaratory relief concerning the contractual/policy dispute.

Continental's reliance on the holding by the Fifth District Court of Appeal in Lime Bay, 187 So. 3d 932, is misplaced as it is factually distinguishable from the present case.

Section 627.428, Florida Statutes Entitlement to Attorney's Fees and the Confession of Judgment Doctrine

In the Complaint for Declaratory Relief, Webster seeks to have the Court make a declaration as to the rights, obligations, and duties of Continental and Webster under the insurance policy. Webster claims he is entitled to an additional \$3,992.22 under the policy, prejudgment interest, attorney's fees pursuant to section 627.428, Florida Statutes (2015),<sup>1</sup> court costs, and any other benefit available under the insurance policy.

In 1983, the Florida Supreme Court in Wollard discussed insured's right to the award of attorney's fees under section 627.428. In upholding the trial court's award, the court stated: "When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured." 439 So. 2d at 218.

As noted above, Continental argues that the confession of judgment doctrine applies only when an insurance company has "unreasonably withheld payment under the policy or engaged in some other wrongful behavior that forced the insured to sue." Allegedly, the confession of judgment doctrine operates only to penalize an insurance company for wrongfully causing its insured to resort to litigation to resolve a conflict with the insurance company: "the filing of the suit [must have] acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract."

At the time Continental filed its Initial Brief and Reply Brief, it did not have the benefit of the Florida Supreme Court's recent opinion in Johnson v. Omega Insurance Co., Case No. SC14-2124, 41 Fla. L. Weekly S415a (Fla. Sept. 29, 2016)(mandate issued Oct. 20, 2016), that rejected these arguments.

In Johnson, the Supreme Court reiterated the well-established law that the

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<sup>1</sup> Section 627.428(1) states:

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 . . . 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.



insurance company's payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment. Id. at \*7; see, e.g., Pepper's Steel & Alloys, Inc. v. U.S., 850 So. 2d 462, 465 (Fla. 2003) ("[Section 627.428] clearly provides that attorneys' fees shall be awarded against the insurer when judgment is rendered in favor of an insured. In Florida, the payment of a settlement claim is the functional equivalent of a confession of judgment or a verdict in favor of the insured."); Ivey v. Allstate Ins. Co., 774 So. 2d 679, 684-85 (Fla. 2000) ("[W]here an insurer pays policy proceeds after suit has been filed but before judgment has been rendered, the payment of the claim constitutes the functional equivalent of a confession of judgment or verdict in favor of the insured, thereby entitling the insured to attorney's fees."); Wollard, 439 So. 2d at 218 (Fla. 1983) ("When the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured."); Goff v. State Farm Fla. Ins. Co., 999 So. 2d 684, 688 (Fla. 2d DCA 2008); Barreto v. United Servs. Auto. Ass'n, 82 So. 3d 159, 162 (Fla. 4th DCA 2012); De Leon v. Great Am. Assur. Co., 78 So. 3d 585, 591-92 (Fla. 3d DCA 2011).

The Supreme Court reiterated that it has held on numerous occasions "that the bad faith or degree of 'wrongfulness' of the insurance company is not relevant to a recovery of attorney's fees under section 627.428." Johnson, at \*8 (citing Ivey, 774 So. 2d at 684; Ins. Co. of N. Am. v. Lexow, 602 So. 2d 528, 531 (Fla. 1992)). "As we said in Ivey, '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.'" Johnson, at \*9 (emphasis in original). The Supreme Court continued:

Once an insurer has incorrectly denied benefits and the policyholder files an action in dispute of that denial, the insurer cannot then abandon its position without repercussion. To allow the insurer to backtrack after the legal action has been filed without consequence would "essentially eliminate the insurer's burden of investigating a claim." Ivey, 774 So. 2d at 684. We therefore disagree with the hypothetical reasoning in Clifton v. United Casualty Insurance Co. of America, 31 So. 3d 826 (Fla. 2d DCA 2010), and disapprove of the suggestion that section 627.428 requires a finding of bad faith on the part of the insurance company.



In sum, the law is clear. Section 627.428 provides that an incorrect denial of benefits, followed by a judgment or its equivalent of payment in favor of the insured, is sufficient for an insured to recover attorney's fees. Extensive case law further provides that an insurer's concession that the insured was entitled to benefits after a legal action has been initiated is the functional equivalent of a confession of judgment. Here, it is undisputed that Omega did not admit its error in denying benefits until after Johnson filed the action. Thus, there is no question that Johnson is entitled to attorney's fees in this situation.

Thus, consistent with our decision in Ivey, we hold that a recovery for attorney's fees under section 627.428 requires an incorrect denial of benefits by the insurance company, not a bad faith denial.

Johnson, at \*11.

Continental has relied on Tampa Chiropractic Center, 141 So. 3d at 1258-59; Lime Bay, 187 So. 2d 932; and Jenkins, 982 So. 2d at 17 (Fla. 5th DCA 2008), to support its argument that an insured must be "forced" to litigate in order to get the insurance company to pay the claim. However, in Johnson the Supreme Court expressly rejected such an argument and stated that the purpose of the confession of judgment doctrine and section 627.428 is deeply rooted in public policy to "level the playing field." The court stated:

Most assuredly, the average policyholder has neither the finances nor the expertise to single-handedly take on an insurance carrier. Without the funds necessary to compete with an insurance carrier, often a concerned policyholder's only means to take protective action is to hire that expertise in the form of legal counsel. Counsel then have the ability and knowledge to hire an independent engineer or other expert to prepare a report that either confirms or denies the policyholder's view of the cause of damages. For this reason, the Legislature recognized that an insured is not made whole when an insurer simply grants the previously denied benefits without fees. See [Ivey], 774 So. 2d at 684]. The reality is that once the benefits have been denied and the plaintiff retains counsel to dispute that denial, additional costs that require relief have been incurred. Section 627.428 takes these additional costs into consideration and levels the scales of justice for policyholders by providing that the insurer pay the attorney's fees resulting from incorrectly denied benefits. Without this approach, we would leave the insured to foot the bill not only for attorney's fees, but also for experts to overcome the denial, which would render insurance payments insufficient to cover the loss.

Johnson, at \*8 (Fla. 2016).



### **Conclusion**

The trial court properly found that Continental's payment of the disputed funds after Webster had filed the declaratory relief action amounted to a confession of judgment that entitled Webster to attorney's fees under the statute.

Due to the fact that there was a confession of judgment by Continental, the trial court correctly denied Continental's motion for summary judgment.

The "Order Entering Confessed Judgment in Favor of Plaintiff; Denying Defendant's Motion for Summary Judgment; Granting Plaintiff's Motion for Entitlement to Award of Attorney's Fees" was properly entered by the trial court.

Affirmed.

**DONE AND ORDERED** in Chambers in Clearwater, Pinellas County, Florida, this 28<sup>th</sup> day of October, 2016

Original Order entered on October 28, 2016, by Circuit Judges Linda R. Allan, Keith Meyer, and Patricia Muscarella.

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