IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA
CIVIL DIVISION

CAMELOT GARDENS CONDOMINIUM HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

vs. **CASE NO: 562006CA001676 AXXXXHC**

STATE FARM FLORIDA INSURANCE COMPANY,

Defendant.
_____/

PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT AND TO DETERMINE ENTITLEMENT TO ATTORNEY'S FEES AND COSTS

COMES NOW the Plaintiff, CAMELOT GARDENS CONDOMINIUM HOMEOWNERS ASSOCIATION, INC. ("Plaintiff"), by and through its undersigned attorneys, and files this Motion for Entry of Final Judgment and to Determine Entitlement to Attorney's Fees and Costs and states the following grounds:

INTRODUCTION

This case arises from Hurricane Frances and Jeanne losses sustained by the Plaintiff in 2004. Defendant, STATE FARM FLORIDA INSURANCE COMPANY ("State Farm"), was Plaintiff's property insurer. Below is a history of the claim and the events leading up to Plaintiff having to file the instant suit against State Farm in August of 2006 due to the carrier's failure to fully pay the claims and denial of coverage for portions of the claims. There is also a background history of how the litigation and

appraisal proceeded and the necessity for Plaintiff being represented by legal counsel throughout. Accordingly, the facts of this case reveal that it was necessary for Plaintiff to file suit against Defendant, and that by paying the appraisal award in full and giving up on its coverage defenses, State Farm confessed judgment. Thus, Plaintiff is entitled to a final judgment and an award of attorney's fees and costs pursuant to Florida Statute Section 627.428.

BACKGROUND

Plaintiff is a condominium association whose property is comprised of 33 multi-tenant dwellings and a pool house which were insured with Defendant, STATE FARM FLORIDA INSURANCE COMPANY ("State Farm"). This action arises from Defendant's failure to pay the full amount of insurance benefits owed to Plaintiff as a result of windstorm losses from Hurricane Frances on September 4, 2004, and Hurricane Jeanne on September 25, 2004.

State Farm initially sent a Claim Representative, Jim Ryan, to inspect the property and prepare a scope and estimate of the damages. No engineer was sent to make a causation analysis until months later. Mr. Ryan determined that the total damages from Frances were $716,478.03, resulting in a net claim payment to Plaintiff of $495,085.60, after a deduction for $137,920.43 in depreciation and application of the deductible. See November 16, 2004, letter from Felipe Farias of State Farm to Plaintiff and Statement of Loss (Composite Exhibit "1"). State Farm tendered a total of $1,680.00 for the Jeanne damages. See November 16, 2004, letter from Felipe Farias of State Farm to Plaintiff and Statement of Loss (Composite Exhibit "2").

While other portions of the buildings were damaged, the crux of the dispute between the parties since September of 2004 has been the concrete tile roofs. A roofer advised Plaintiff that all of the roofs required replacement. State Farm failed to have an engineer evaluate the roof damages until over five months after the storms, after the company had already made its claims decisions. State Farm eventually hired Haag Engineering ("Haag"), which acknowledged in a March 25, 2005, report (Exhibit "3") that nearly 50 percent of tiles on typical roofs at the subject property were not bonded to the mortar. Haag speculated that much of the damage was "unrelated to storms," and that many of the tiles "likely" were broken during material handling and by foot traffic on the roof. Haag went on to suggest that the roofs could be repaired using harvested tiles from an existing roof and glued back on with foam adhesive.

Plaintiff disputed Haag's assessment and was ultimately forced to retain a public adjuster, Barry Goodman of Adjusters International, in order to obtain proper indemnification under the policy. Plaintiff provided Defendant with a June 2, 2005, engineering report (Exhibit "4") from CeBB, Corp. ("CeBB"), opining that both of the hurricanes had a tremendous impact on the roofs, and that all of the roof coverings should immediately be replaced. CeBB, however, acknowledged that, "The probability of acquiring the same profile, shape, size and color of the roofing concrete tiles would be difficult, and anything similar would have an impact in the aesthetics of the repaired roofs."

On September 12, 2005, State Farm reminded Plaintiff that "any code upgrade requirements for roof repairs are excluded from coverage." See September 12, 2005, letter from David Peters of State Farm to Barry Goodman (Exhibit "5"). Plaintiff's

public adjuster, Barry Goodman, pointed out that Florida law requires insurance companies to match the roofs, and asked to meet with State Farm "as soon as possible to walk through the actual scope to resolve this claim." See September 27, 2005, letter from Barry Goodman to David Peters of State Farm (Exhibit "6"). State Farm failed to take Mr. Goodman up on this offer.

Six months after the Haag report, and over a year after the storms, Defendant ultimately denied Plaintiff's request to replace the entirety of the roofs. See September 30, 2005, letter from David Peters of State Farm to Barry Goodman (Exhibit "7"). Instead, the carrier only paid to replace roofs on 9 of the 33 buildings. In response, Plaintiff's public adjuster explained that if the insurer was unwilling to meet further at the property and discuss a fair resolution of the claim, then Plaintiff would have no option but to demand appraisal. See October 4, 2005, letter from Barry Goodman to David Peters of State Farm (Exhibit "8"). In a letter dated October 27, 2005, from Chris Rasmussen to Barry Goodman (Exhibit "9"), State Farm reiterated its refusal to pay for the roofs and denied the insured's request to have a new, less outcome oriented engineer inspect the roofs and determine the storm related damages.

On November 1, 2005, Plaintiff officially demanded appraisal. See November 1, 2005, letter from Barry Goodman to Chris Rasmussen (Exhibit "10"). The policy's appraisal provision states:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. Each party will notify the other of the selected appraiser's identity within 20 days after receipt of the written demand for appraisal.

As of November 22, 2005, over 20 days after the appraisal demand, State Farm had still failed to identify its appraiser. See November 22, 2005, letter from Barry Goodman to Randy Welsh of the Department of Financial Services ("DFS") (Exhibit "11"). Finally, after involving the DFS, Plaintiff heard back from Defendant on November 24, 2005, regarding appraisal. However, State Farm failed to name its appraiser and instead demanded that Plaintiff, "Please advise, specifically, what you wish to appraise. As you know coverage issues are not subject to appraisal." See November 24, 2005, letter from Carolyn Martin of State Farm to Barry Goodman (Exhibit "12"). On November 30, 2005, Mr. Goodman responded and explained that Plaintiff was not seeking to appraise coverage issues, but rather the claim for the differences in the roof payments. Mr. Goodman further explained that since State Farm had failed to name an appraiser the company had breached the insurance contract. See November 30, 2005, letter from Barry Goodman to Carolyn Martin of State Farm (Exhibit "13"). A week later, having still heard nothing from State Farm, Mr. Goodman again requested that the company name its appraiser. See December 5, 2005, letter from Barry Goodman to Carolyn Martin of State Farm (Exhibit "14"). On December 13, 2005, Mr. Goodman again sent State Farm the CeBB report, his letter explaining the differences, and some letters from unit owners supporting that the roofs were in good working order before the storms. Mr. Goodman further volunteered that maintenance men and Mike Skard with Premium Paint and Pressure Cleaning, Inc., who had been cleaning the roof gutters for the last five years, could attest that prior to the storms the roofs were in good condition. See December 13, 2005, letter from Barry Goodman to Bob Daube of State Farm (Exhibit "15").

Finally, on December 27, 2005, adjuster Bob Daube acknowledged that the roofs involved a difference of scope "regarding the damage caused by Hurricane Wilma." Mr. Daube acknowledged that these items would be subject to appraisal. See December 27, 2005, letter from Robert Daube of State Farm to Barry Goodman (Exhibit "16"). Mr. Daube's letter was perplexing to the insured because he referenced the wrong storm (while Plaintiff did have a minor Hurricane Wilma loss, the dispute was over the roofs damaged in Hurricanes Frances and Jeanne over a year before) and still failed to identify State Farm's appraiser.

On January 18, 2006, having still no cooperation from State Farm in proceeding to appraisal, Mr. Goodman provided the company with a line-by-line recapitulation of the differences between the parties' positions and informed the carrier the insured was seeking mediation through the DFS program. See January 18, 2006, letter from Barry Goodman to Erin Power of State Farm (Exhibit "17"). This was because 79 days had passed, and State Farm had been completely unresponsive and breached the policy appraisal provision by failing to name an appraiser within 20 days. Rather than filing suit for breach of the policy and to compel appraisal at that point, the insured sought a DFS mediation in the hopes of expediting the tender of insurance benefits from State Farm.

On March 3 and 4, 2006, State Farm sent another engineer, John Carroll of 21st Century Engineering to inspect and reevaluate the windstorm damages.

On March 7, 2006, the parties participated in the DFS mediation, but the matter reached an impasse.

On March 8, 2006, a year and a half after the storms, after making partial payments on the claims thereby waiving its right to a proof of loss, after allegedly

agreeing to go to appraisal, after an impasse at a DFS mediation, State Farm requested, for the first time, that the insured submit a Sworn Statement in Proof of Loss for the Frances claim. See March 8, 2006, letter from Erin Power of State Farm to Barry Goodman (Exhibit "18"). On March 17, 2006, State Farm requested for the first time that the insured submit a Proof of Loss for the Jeanne claim. See March 17, 2006, letter from Erin Power of State Farm to Barry Goodman (Exhibit "19"). At this point, the insured had already provided State Farm with an engineering report, a detailed repair estimate from Rolyn Construction, a line-by-line recapitulation of the differences between State Farm's estimate and the insured's, invoices for temporary repairs, debris removal and other work already performed, such as replacement of fencing, and an estimate for replacement of some of the roofs from a roofing company.

State Farm's request for a Proof of Loss at this late stage of the claim is a common delay tactic used by the company. State Farm frequently makes its insureds jump through hoops—even when it has complete damages information in its possession. The company's hope is that the insured will fail to comply with a policy term and give the insurer additional excuses for failing to properly pay a claim. Even if the insured complies, State Farm benefits from the delay by holding on to its money longer and by wearing some insureds down. In this case, the "hoop jumping" is evident.

Nevertheless, the insured timely provided the carrier with a Proof of Loss for Frances and Jeanne totaling $4,354,619.60. See April 21, 2006, letter from Barry Goodman to Erin Power of State Farm and the insured's Sworn Statement in Proof of Loss (Exhibit "20"). On May 11, 2006, State Farm refused to accept the Proof of Loss because it combined both the Frances and Jeanne losses and stated that the actual cash

value and replacement cost of the 33 building complex at the time of the loss was undetermined. See May 11, 2006, letter from Erin Power of State Farm to Barry Goodman (Exhibit "21"). This was the first time State Farm made an issue of apportioning the damages between the storms—over a year and seven months after the losses.

In the meantime, on April 20, 2006, Mr. Carroll provided his report and estimate to State Farm. State Farm acknowledged that the company was prepared to make a supplemental payment but failed to promptly do so because it insisted on the insured apportioning the damages between the storms. See June 6, 2006, letter from Erin Power of State Farm to Barry Goodman (Exhibit "22").

On June 22, 2006, State Farm denied coverage for the repair costs to the septic system which were caused by storm debris, contending they were not covered under the policy. See June 22, 2006, letter from Erin Power of State Farm to Barry Goodman (Exhibit "23").

On July 6, 2006, Plaintiff submitted two Proofs of Loss—one for Frances in the amount of $2,660,593.38, and one for Jeanne in the amount of $1,726,169.34. Plaintiff explained the process it used to allocate the damages and provided a worksheet giving a break down of same. See July 6, 2006, letter from Barry Goodman to Erin Power of State Farm and Proofs of Loss for Frances and Jeanne (Composite Exhibit "24").

On July 28, 2006, State Farm again rejected Plaintiff's Proofs of Loss and refused to tender any additional payment for either storm. See July 28, 2006, letter from Lisa Hume of State Farm to Plaintiff (Exhibit "25").

On August 8, 2006, however, State Farm apparently reevaluated its position based on the estimates it had obtained from John Carroll nearly 4 months earlier totaling $1,411,189.85, and issued a supplemental claim payment. State Farm advised, "We have completed our evaluation of the claim and paid damages we believe are covered under the policy." See August 8, 2006, letter from Erin Power to Barry Goodman and enclosed Commercial Statement of Loss – Multiple Lines (Composite Exhibit "26").

Thus, State Farm made it clear this was a final payment. No attempt was made by the company to invoke appraisal. Plaintiff's prior attempts to put the matter into appraisal were to no avail. The company initially contended there were coverage issues not subject to appraisal, and then acknowledged appraisal would be appropriate for the Wilma loss, which was not even what Plaintiff had demanded appraisal on. State Farm had denied coverage for the septic system repair costs. At no time did State Farm ever name its appraiser. Indeed, two and a half months after the appraisal demand, State Farm had still not named an appraiser, and the insured resorted to a DFS mediation in the hopes of speeding up the process as it was well into 2006 at that point. After impassing at mediation, what followed was eight months of hoop jumping, a flat out refusal to make any further payments, then a supplemental final payment based on a report the company had in its possession for months. It took State Farm nearly two years after the losses to determine what it believed was owed—$1,411,189.85—and pay the undisputed amounts. This was still far below what the appraisal panel ultimately determined the damages to be—$2,148,929.42. Furthermore, the record reflects a constant effort by the Plaintiff to comply with State Farm's ever changing demands. It further reflects that, while Plaintiff

sought to meet with State Farm at the site to negotiate the scope of the claim, the insurance company refused.

At the time this suit was filed, State Farm had breached the insurance policy in a number of ways, including but not limited to: failing to promptly and fully pay all amounts owed under the policy for the loss; failing to adjust the loss with the insured; failing to promptly retain the appropriate experts; ultimately retaining outcome oriented experts; wrongfully rejecting Plaintiff's proof of loss; delaying the investigation; frequently changing adjusters (there were at least 11 different adjusters on this claim!) causing further delay; failing to name an appraiser within the time period specified by the policy; denying coverage for the septic system repairs; needlessly forcing the insured to jump through hoops by filing proofs of loss when the carrier had already waived that requirement by making payment[1]; and needlessly forcing the insured to apportion damages between the storms. Thus, this lawsuit was not filed for the "improper purpose of obtaining attorney's fees," but rather to force State Farm to meet its obligations under the policy. State Farm had two years to get this claim right and detailed information regarding what Plaintiff was seeking before suit was filed. Further, the company had been given the opportunity to resolve the dispute in appraisal and mediation and failed to do so.

Thus, on or about August 31, 2006, Plaintiff filed the instant lawsuit alleging the following counts: Count I – Compel Appraisal; Count II – Selection of Umpire; Count III – Breach of Contract for Failure to Pay the Full Insurance Benefits Owed; Count IV –

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[1]See Bear v. New Jersey Ins. Co., 138 Fla. 298, 189 So. 252 (1939); English & Am. Ins. Co. v. Swain Groves, Inc., 218 So. 2d 453 (Fla. 4th DCA 1969); Llerena v. Lumbermens Mut. Cas. Co., 379 So. 2d 166 (Fla. 3d DCA 1980); see also Fla. Gaming Corp. v. Affiliated FM Ins. Co., 502 F. Supp. 2d 1257 (S.D. Fla. 2007).

Breach of Contract for Failure to Participate in Appraisal; and Count V – Declaratory Judgment. It took attorney involvement for State Farm to finally name its appraiser. The company then moved to dismiss counts III, IV and V of the Complaint. However, the Court refused and entered an Order staying those counts until resolution of the appraisal process.

But the need for Court involvement did not stop there. State Farm next filed a Motion to Determine Scope of Appraisal in which the insurer emphasized that, **"If we submit to an appraisal, we will still retain our right to deny the claim."** State Farm argued that since it might still deny the claim, the appraisal panel must delineate the award in great detail—to the extent that the panel would have to agree upon a line-by-line estimate which must be attached to the award. Plaintiff refused to delineate the award to that extent, but did agree to break down the award by building. See December 11, 2006, letter from Plaintiff's counsel Kristin Demers-Crowell, Esq., to State Farm's counsel Bonnie Sack, Esq. (Exhibit "27"). On December 20, 2006, the Court heard argument on the motion and refused to hamstring the appraisal panel by forcing them to agree to a line-by-line estimate. The Court granted the motion in part and denied it in part, and merely required a break down by building with the roof damages parsed out. The Court ordered the parties to negotiate and try to agree on any other potential line items that should be parsed out. Hard fought negotiations ensued, with many letters exchanged between the attorneys. See February 1, 6, 7, March 7, 22, and April 25 letters from Demers-Crowell to Sack (Composite Exhibit "28"). In the midst of the negotiations, State Farm reset its Motion to Delineate for hearing on April 26, 2007. Ultimately, on

the day of the hearing an Appraisal Award form was agreed upon in accordance with the Court's instructions.

However, attorney involvement continued to be necessary. State Farm continued to assert it had a right to deny coverage for the claim. Furthermore, State Farm derailed the neutral umpire selection of the appraisers. State Farm's own appraiser, John Carroll, suggested Andrew Fuxa as an umpire candidate, and Plaintiff's appraiser, Joseph Dubreuil, agreed. Some time later State Farm objected, demanded that Plaintiff select someone else from State Farm's list, and threatened if Plaintiff was refusing to attempt to agree to a neutral umpire, State Farm would set the matter for hearing and have the Court appoint someone. See March 30 and April 16, 2007, letters from Sack to Demers-Crowell (Composite Exhibit "29"); see also April 24, 2007, letter from Demers-Crowell to Sack (Exhibit "30"). State Farm ultimately agreed to a neutral umpire from Plaintiff's list of candidates.

On February 8, 2008, an Appraisal Award was entered determining the damages to be $2,148,929.42. Thus, State Farm lowballed the damages to the tune of $737,739.57. State Farm confessed judgment and ultimately paid the full amount of the award, giving up on the coverage defenses it previously reserved the right to assert—**including the septic system damages for which State Farm had previously denied coverage.** See June 22, 2006, letter from Erin Power of State Farm to Barry Goodman (Exhibit "23"). Accordingly, Plaintiff is entitled to entry of final judgment in its favor and an award of attorney's fees and costs.

The facts of this case beg the questions:

If State Farm truly wanted to get this matter resolved amicably, why did it refuse the public adjuster's offers to meet, walk the site, and try to resolve the scope issues?

If State Farm was so agreeable to going to appraisal, upon receipt of the demand why did it contend there were coverage issues inappropriate for appraisal? Why did the company fail to name an appraiser for over two and a half months after the demand? Why didn't State Farm demand appraisal after it finally completed its tender of the undisputed payments in August of 2006?

State Farm contends this Court's involvement was unnecessary, yet the insurer wrongfully attempted to impose an onerous requirement that the appraisal award be formatted as a line-by-line estimate. State Farm contended this was necessary so it could cherry pick what portions of the award it would and would not pay since it had the right to deny coverage for the claim even after the appraisal award was issued. The Court refused to require such a line item break down of the award.

State Farm's contention that Court involvement was not necessary poses a stark contrast to the correspondence in this case wherein the carrier frequently threatened to have the Court decide matters.

State Farm erroneously contends Plaintiff repeatedly requested that various code upgrades and law and ordinance issues be part of the appraisal, and Plaintiff refused to remove these items, despite that no law and ordinance coverage was available under the policy. This is not accurate. Indeed, it was Plaintiff's counsel that drafted the proposed appraisal award, including text specifically stating, **"None of the following damages result from operation of ordinance or law or code upgrades."**

Thus, the record reflects that State Farm was in breach of the policy, and Plaintiff had every right to file the instant lawsuit. By paying the appraisal award, State Farm confessed judgment, and Plaintiff is entitled to a final judgment and award of attorney's fees and costs pursuant to Florida Statute Section 627.428.

MEMORANDUM OF LAW

1. Florida Statute Section 627.428

Under Florida law an insured may obtain an award of attorney's fees against an insurance company pursuant to Florida Statute Section 627.428, which states:

> 627.428 Attorney's fee –
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> (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.

§ 627.428(1), Fla. Stat.

This statute was enacted to discourage insurers from contesting valid claims, and to level the playing field so that insureds are not overwhelmed by the disparate economic power of the insurance companies. Ivey v. Allstate Ins. Co., 774 So. 2d 679 (Fla. 2000). "The purpose of section 627.428 is to penalize an insurance company for wrongfully causing its insured to resort to litigation in order to resolve a conflict with its insurer when it was within the company's power to resolve it." Bassette v. Standard Fire Ins. Co., 803 So. 2d 744 (Fla. 2d DCA 2001).

According to Section 627.428, in order to recover attorney's fees the insured must obtain a judgment in its favor. However, payment of an appraisal determination can

constitute a confession of judgment. Travelers Indem. Ins. Co. of Ill. v. Meadows MRI, LLP, 900 So. 2d 676, 679 (Fla. 4th DCA 2005); Jerkins v. USF&G Specialty Ins. Co., 982 So. 2d 15 (Fla. 5th DCA 2008); First Floridian Auto & Home Ins. Co. v. Myrick, 969 So. 2d 1121 (Fla. 2d DCA 2007); Ajmechet v. United Auto. Ins. Co., 790 So. 2d 575 (Fla. 3d DCA 2001); see also Scottsdale Ins. Co. v. DeSalvo, 748 So. 2d 941 (Fla. 1999); Preferred Nat'l Ins. Co. v. Miami Springs Golf Villas, Inc., 789 So. 2d 1156 (Fla. 3d DCA 2001); Sierra v. Allstate Ins. Co., 725 So. 2d 403 (Fla. 3d DCA 1999).

2. Fourth District Court of Appeals Decisions

Meadows is a Fourth District Court of Appeals decision and is therefore controlling authority. There, the Fourth District awarded prevailing party attorney's fees to the insured **even where the carrier had demanded appraisal prior to suit being filed.** Both parties had selected their appraisers, and the appraisal process had already begun when the insured filed a lawsuit alleging breach of contract and a declaratory judgment count to request that the appraisal be governed by the Florida Arbitration Code, and to ensure that the policyholder would be entitled to attorney's fees upon prevailing in the appraisal. Meadows, 900 So. 2d at 677. The appraisal resulted in the insurer owing the insured a significant balance, **which was seasonably paid once determined**. Id. However, when all was said and done, the appraisal process had lasted one year and one day. Id. The insured filed a Motion to Confirm Appraisal Award and Entry of Judgment Thereon before the claim had been paid. However, by the time the trial court heard argument on the motion, the carrier had paid the claim. Id. The carrier contested confirmation of the appraisal award and strenuously argued that the insured should not be deemed the prevailing party in anticipation of a motion for attorney's fees. Id. The trial

court declined to address whether Meadows was the prevailing party and entered its Judgment Confirming the Appraisal Award. Id.

The insured then filed a Motion for Entitlement to Attorney's Fees and Costs pursuant to Florida Statute Section 627.428(1). The insurer contested the motion and argument that the lawsuit was initiated as a way to seek attorney's fees, rather than for any "valid purpose", citing to Nationwide Property & Casualty Insurance v. Bobinski, 776 So. 2d 1047 (Fla. 5th DCA 2001). Id. at 678. Nevertheless, the trial court awarded attorney's fees to the policyholder, and the insurer appealed. Id.

The carrier in Meadows relied heavily on Nationwide Prop. & Cas. Ins. v. Bobinski, 776 So. 2d 1047 (Fla. 5th DCA 2001), in contesting the insured's attorney fee entitlement. In Bobinski, the Fifth District addressed a situation where the insurer and insured participated in two property insurance appraisals. The insurer paid both appraisal awards ***before*** any lawsuit was initiated or needed. Bobinski, 776 So. 2d at 1048. After the insurer paid the second appraisal, the insured filed suit to confirm the appraisal awards and sought entitlement to attorney's fees. Id. In analyzing this question, the Bobinski court noted:

> Attorney's fees have been awarded when suit was filed prior to payment of the appraisal or arbitration award or to compel an insurer to participate in an appraisal. See State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832-33 (Fla. 1993). Attorney's fees may also be awarded for litigating entitlement to attorney's fees. See id. However, the instant appeal has none of the elements of those cases.

Id. at 1048-49.

Ultimately, the Bobinski court declined to award attorney's fees, as the particular facts at hand did not fit any of the scenarios it cited, nor did the case fall within the "confession of judgment" exception of Wollard v. Lloyd's & Cos. of Lloyds, 439 So. 2d

217 (Fla. 1983), and its progeny. See Id. at 1049. The Fifth District's analysis noted its decision was consistent with the policy to: "...encourage insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention." Id.

In Meadows, the Fourth District discounted the insurer's reliance on Bobinski, and affirmed the judgment in favor of the insured. Id. The Meadows court found it important that the lawsuit was filed prior to the completion of the appraisal, and that a judgment confirming the appraisal was obtained, whereas in Bobinski, suit was filed after the appraisal was completed, and the appraisal award was not confirmed. Id.

Moreover, the Meadows court specifically noted that counsel was necessary to protect the insured's rights throughout the appraisal process. Id. at 678-79. Thus, it was entirely possible that the insurer's conduct and participation in the appraisal was affected by the hiring of an attorney, and by the threat of what ultimately became a lawsuit. Id. at 679. Significantly, the Meadows court stated:

> Given that the goal of §627.428(1) is to place Meadows in the place it would have been if Travelers had seasonably paid the claim without causing Meadows to retain counsel and incur obligations for attorney's fees, taken in conjunction with the rule of law that Meadows could have recovered any attorney's fees incurred in reaching a settlement of its lawsuit, had a settlement been reached, we see no rationale for not extending §627.428(1) to cover an award of attorney's fees associated with an expensive and drawn out appraisal due to Travelers' disputed value estimation. See Fewox v. McMerit Constr. Co., 556 So. 2d 419, 423-24 (Fla. 2d DCA 1989).

Id. The Meadows court concluded that the only way the policyholder could have been made whole was to allow for entitlement to attorney's fees in cases such as the one at hand, where an appraisal occurred. Id.

The instant is case is analogous to Meadows, and indeed, presents even more compelling facts for granting an award of attorney's fees to Plaintiff under Section

627.428. In Meadows, the insurance company had demanded appraisal prior to the insured filing suit, yet attorney's fees were nonetheless awarded. Here, Plaintiff demanded appraisal, and State Farm NEVER named its appraiser until after this lawsuit was filed. Two-and-a-half months after the initial appraisal demand, Plaintiff finally gave up and sought a DFS mediation in the hopes of expediting a resolution—to no avail. Once finally under way, the appraisal process lasted well over a year—again similar to the Meadows facts, but worse. Plaintiff's attorney was forced to grapple with State Farm's attorney in order to protect Plaintiff's rights throughout the course of the appraisal process. There were disputes over the delineation of the appraisal award, the scope of the appraisal, and the selection of the umpire. As in Meadows, Plaintiff in the instant case filed a Motion to Confirm the Appraisal Award prior to State Farm tendering payment; however, by the time the motion was heard State Farm had tendered payment within the time frame set forth in the policy. However, similar to Meadows, this court found that timely payment of the appraisal award did not alone preclude confirmation of the award. Another important similarity to Meadows is in that case, the court noted the insured had to retain counsel to get the insurer to accept coverage. Here, while State Farm had admitted coverage on portions of the loss, State Farm had denied coverage for the septic system and repeatedly asserted its right to deny coverage for anything set forth in the appraisal award. State Farm confessed judgment on all of these arguments when it paid the award.

Plaintiff anticipates State Farm will cite another Fourth District decision, Federated National Insurance Company v. Esposito, 937 So. 2d 199 (Fla. 4th DCA 2006), in opposing Plaintiff's entitlement to attorney's fees. However, the facts of the instant

case are closer to Meadows—even more extreme—and are readily distinguished from those of Esposito. Esposito did not involve an attorney fee entitlement motion but, rather, an insured's motion to confirm the appraisal award and enter a judgment against the insurance company. Esposito, 937 So. 2d at 200.

In Esposito, at the time the insured filed suit, the insurance company had named an appraiser, and there had been talks between the appraisers regarding umpire selection, as well as a meeting set. Id. All of this was documented in letters prior to suit. Id. Despite that the appraisal was already underway and moving forward, the insured filed a petition to compel appraisal. Id. In response, the carrier did not contest coverage and did not move to delineate the award, but rather, the parties agreed to an order appointing a neutral umpire. Id. The appraisal award was entered only two months after suit was filed because the process was already partially completed. None of these facts exist in the instant case.

The Fourth District ultimately reversed the trial court's order confirming the appraisal award in Esposito. In doing so, the court distinguished Meadows as follows, and the same distinguishing factors exist in the instant case: (1) coverage disputes were involved at some point; and (2) the insured was required to seek declaratory relief and litigate the appraisal process. Id. at 201. The record here reveals that State Farm denied coverage for the septic system and maintained its right to deny coverage for any portion of the appraisal award throughout the entire process up until it paid the award. After years of waiting for proper indemnification and jumping through State Farm's hoops, Plaintiff was forced to file a breach of contract suit, petition to compel appraisal, and sought declaratory relief. Plaintiff was forced by State Farm to litigate delineation of the

award, and deal with disputes over the selection of the neutral umpire. Based on this record, the Fourth District would likely find that this case is more like Meadows and unlike Esposito, and will confirm an award of attorney's fees if an appeal were to ensue.

3. Other Florida Attorney Fee Cases Arising from Appraisal

Another recent 627.428 case where the court awarded attorney's fees to an insured after an appraisal under a property insurance policy is Jerkins v. USF&G Specialty Insurance Company, 982 So. 2d 15 (Fla. 5th DCA 2008). In Jerkins, USF&G initially made no payment for a Hurricane Charley loss and found that the damages only amounted to $715.60 and did not exceed the deductible. Jerkins, 982 So. 2d at 16. Six months later, the insureds filed suit for breach of contract. Id. USF&G filed a motion to dismiss or abate the suit in favor of appraisal. Id. Thereafter, the parties participated in an appraisal of the damages which resulted in an award of $9,084.29, **which the insurance company paid, minus the deductible.** Id. **Following payment,** the insureds moved for an award of attorney's fees and costs contending that the carrier's payment constituted a confession of judgment entitling them to attorney's fees under Section 627.428. Id. The insurer contested the motion on the grounds that the matter was resolved through appraisal, not litigation. Id.

Unfortunately, the Jerkins court was not privy to the litany of delay tactics that State Farm used in the instant case prior to suit being filed. Nevertheless, the Fifth District explained its decision to award attorney's fees to the insured as follows:

> On this record, it is unclear what occurred between USF&G's initial estimate of damages and when the Jerkinses filed suit six months later. What is clear is that there was a substantial discrepancy between USF&G's initial estimate of the damages to the Jerkinses' property ($715.60) and the final appraisal value ($9,084.29). It appears that there was a bona fide dispute between the parties as to the amount of property

> damage and that the Jerkinses complied with the policy prior to filing their lawsuit. Further, the Jerkinses did not "race to the courthouse" to file a complaint against USF&G, as they waited nearly six months after USF&G's initial assessment to file their complaint. USF&G's payment acted as a confession of judgment, such that the Jerkinses were entitled to attorney's fees under section 627.428, Florida Statutes.
>
> If the USF&G insurance policy contained a mandatory arbitration or appraisal provision, the Jerkinses would not be entitled to attorney's fees under section 627.428. But the USF&G appraisal clause was permissive, not mandatory, providing that either party **may** demand an appraisal. The Jerkinses were not required to request an appraisal prior to filing their lawsuit.

Id. at 18 (citation omitted).

Similarly, as the background of the instant claim reveals, there was a substantial discrepancy between State Farm's assessment of the damages and the final appraisal value. Plaintiff complied with the policy conditions prior to filing suit. Thus, there was a bona fide dispute between the parties as to the amount of the property damage. This was not a "race to the courthouse" as Plaintiff had waited nearly two years for State Farm to properly pay the subject claims. Furthermore, like the Jerkins policy, the appraisal provision here is also permissive and not mandatory. Accordingly, State Farm's payment—and decision to abandon its coverage defenses—acts as a confession of judgment under Section 627.428.

Yet another appellate decision resulting in a favorable attorney fee ruling for an insured after a property insurance appraisal is First Floridian Auto & Home Insurance Company v. Myrick, 969 So. 2d 1121 (Fla. 2d DCA 2007). There the insurance company also argued an attorney fee award to an insured was improper because the claim was resolved through the appraisal process. Myrick, 969 So. 2d at 1122-23. The case involved a sinkhole claim which was confirmed by the insurer's experts; thus, First

Floridian accepted coverage. Id. at 1123. The insured disputed the carrier's scope of repairs and filed a proof of loss for the policy limit of $104,000.00 through her public adjuster. Id. The insurer disagreed, tendered a check for $49,706.00, and cited the "Mediation or Appraisal" provision of its policy—which also involved a permissive appraisal process. Id. First Floridian did not request additional information from the insured and did not invoke the appraisal process. Id. The public adjuster followed up and asked why his questions and concerns regarding the scope and efficacy of the carrier's proposed repair process had been ignored. This letter too was ignored. About two months after receiving the insurer's unilateral payment and decision on the claim, the insured filed suit for breach of contract. Id. First Floridian initially answered the complaint and contended the claim was not covered. After four months of litigation, the insurer invoked appraisal and the insured agreed to go to appraisal in order to expedite the process so long as the court retained jurisdiction to deal with coverage disputes and attorney fee entitlement. Id. About a year after suit was filed, the parties completed the appraisal process resulting in an award of $102,500, minus a $500 deductible. Id. **The insurance company timely paid the appraisal award.** Id. Thereafter, the insured moved to confirm the appraisal award and to determine entitlement to attorney's fees and costs. Id. Over First Floridian's objection, the trial court confirmed the award and later entered its final judgment awarding attorney's fees and costs to the insured. Id.

On appeal, the insurer argued that the lawsuit was unnecessary; that the insured could have made further inquiry, provided additional information for First Floridian's consideration, or initiated the appraisal process. Id. at 1124. The carrier contended the

insured filed a lawsuit primarily to obtain attorney's fees. Id. However, the Second District disagreed and affirmed the award of attorney's fees reasoning:

> The prospect of an attorney's fee award under section 627.428 should prompt insurers to process and pay claims timely. We recognize also that the appraisal process provides a mechanism to resolve claims promptly and discourages insureds from racing to the courthouse to file needless lawsuits. Nonetheless, given First Floridian's handling of Ms. Myrick's claim, we can find no error in the trial court's final judgment.

Id. at 1125.

Likewise, in the instant case, State Farm did not request additional information from Plaintiff, and did not invoke the appraisal process. State Farm had entirely denied coverage for the septic system and reserved its rights to deny coverage as to other damages as well. Plaintiff did not file suit until nearly two years after the losses occurred. These similar facts should result in a similar ruling that the insurance company is responsible for paying the insured's attorney's fees.

4. Additional Confession of Judgment Case

Another important case regarding confession of judgment requiring an insurer to pay 627.428 attorney's fees—though it does not involve appraisal—is Stewart v. Midland Life Insurance Company, 899 So. 2d 331 (Fla. 2d DCA 2005). There, the insured filed a proof of loss, and the insurer did not pay as requested. Stewart, 899 So. 2d at 332. The insurer made no additional requests for information either. Id. Accordingly, the insured filed a lawsuit eighty-six days after the proof of loss was received by the carrier. Id. Before being served with the lawsuit, the carrier paid the outstanding sum of money under the insurance policy. Id. The Stewart court found that payment of the benefits operated as a confession of judgment since suit was filed prior to payment. Id. at 333.

The fact that the insurance company was unaware of the lawsuit at the time of payment did not defeat the carrier's obligation to pay attorney's fees. Id.

Similar to State Farm in the instant case, the insurer in Stewart argued it was not necessary for the insured to file a complaint to enforce her rights under the policy since the company never denied the insurance claim. Id. The Second District disagreed, querying, "How long was [the insured's] counsel to wait without payment before suit was filed?" Id.

5. State Farm's Case Law Distinguished

Plaintiff anticipates that State Farm will rely on the cases it previously cited in opposition to confirmation of the appraisal award: Federated National Insurance Company v. Esposito, 937 So. 2d 199 (Fla. 4th DCA 2006); State Farm Florida Insurance Company v. Lorenzo, 969 So. 2d 393 (Fla. 5th DCA 2007); and Tristar Lodging, Inc. v. Arch Specialty Insurance Company, 434 F. Supp. 2d 1286 (M.D. Fla. 2006), affirmed, 215 Fed. Appx. 879 (11th Cir. 2007). Esposito is distinguished above and the other decisions are equally inapposite.

For example, in Tristar the trial court found there was, "no showing that the insurer failed to timely pay claims properly made and substantiated, sufficient to warrant the suit." Tristar Lodging, Inc. v. Arch Specialty Ins. Co., 215 Fed. Appx. 879, 880 (11th Cir. 2007). In contrast, here Plaintiff provided State Farm with an engineering report, a detailed repair estimate from Rolyn Construction, a line-by-line recapitulation of the differences between State Farm's estimate and the insured's, invoices for temporary repairs, debris removal and other work already performed, such as replacement of fencing, and an estimate for replacement of some of the roofs from a roofing company.