

>> ALL RISE.
HEAR YE, HEAR YE, SUPREME COURT
OF FLORIDA IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR.
YOU SHALL BE HEARD.
GOD SAVE THESE GREAT UNITED
STATES, THE GREAT STATE OF
FLORIDA AND THIS HONORABLE
COURT.
>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING, EVERYONE.
WELCOME TO THE FLORIDA SUPREME
COURT.
THE FIRST CASE ON THE DOCKET IS
JOHNSON VERSUS OMEGA INSURANCE
COMPANY.
WHENEVER YOU'RE READY.
>> THANK YOU, YOUR HONOR.
MAY IT PLEASE THE COURT, CHIEF
JUSTICE LABARGA, MEMBERS OF THE
COURT, THIS IS A CASE ABOUT A
BREACH OF CONTRACT, AN INSURANCE
CONTRACT ISSUED BY OMEGA
INSURANCE COMPANY TO KATHY
JOHNSON.
SHE HAD STRUCTURAL DAMAGE TO HER
HOME.
SHE REPORTED TO HER INSURANCE
COMPANY THAT SHE HAD DAMAGE DUE
TO SINKHOLE ACTIVITY.
THEY HIRED AN ENGINEER AND
DENIED THE CLAIM BASED ON HIS
REPORT.
SHE FILED SUIT.
CLAIMANT HAD AN ENGINEER.
THERE WAS DAMAGE TO SINKHOLE
ACTIVITY.
ULTIMATELY OMEGA INSURANCE
COMPANY ITSELF AGREES THAT
DAMAGE WAS DUE TO SINKHOLE,
ADMITTING THAT THEY HAD DENIED
THE CLAIM AND THERE WAS COVERAGE
UNDER THE POLICY.
>> LET ME ASK YOU THIS.
JOHNSON SKIPPED THE PROCESS AND
FILED SUIT.
IS THAT WHAT HAPPENED?

>> NO.

THE PROCESS WAS COMPLETE.
THERE WAS A COMPLETE DENIAL OF
COVERAGE.

THERE WAS NO FURTHER PROCESS
UNDER ANY STATUTE OR POLICY OR
ANYTHING AT THE POINT IN TIME
THE COVERAGE WAS COMPLETELY
DENIED.

>> BUT IS THERE ANY REQUIREMENT
THAT SHE COMPLY WITH ALL THOSE
THINGS THE STATUTE SUGGESTS,
MORE OR LESS, BEFORE SHE CAN
FILE SUIT?

>> WELL, IF WE'RE TALKING ABOUT
THE NEUTRAL EVALUATION STATUTE,
IT'S CLEARLY AN OPTIONAL
PROCEDURE AND THE STATUTE ITSELF
SAYS THE CLAIMANT RETAINS ACCESS
TO COURT.

CLAIMANT HAD EVERY RIGHT ONCE
THERE WAS A DENIAL OF HER
INSURANCE CLAIM TO FILE A
LAWSUIT TO CONTEST THAT DENIAL.
AND THERE IS NO PROVISION IN
THIS POLICY, THERE'S NO
PROVISION IN ANY STATUTE THAT
REQUIRED HER TO DO ANY OF THESE
OPTIONS THAT OMEGA SAYS WERE
AVAILABLE TO HER AT THAT POINT.

>> I THOUGHT UNDER THE STATUTE
ONCE THE INSURANCE COMPANY HAD
THE PROFESSIONAL EVALUATION AND
DOESN'T THE STATUTE SAY THAT
EVALUATION IS PRESUMED CORRECT?
AND SO AT THAT POINT, IF THAT
EVALUATION WAS PRESUMED CORRECT,
SHOULDN'T THE HOMEOWNER AT THAT
POINT BEEN REQUIRED -- I MEAN,
THE HOMEOWNER HAD AN ALTERNATIVE
FROM THAT POINT AND THAT WAS TO
GO TO THE NEUTRAL EVALUATOR,
CORRECT?

>> WELL, SURE.

THAT WAS AN ALTERNATIVE.
BUT THAT'S NOT AN EXCLUSIVE
REMEDY.

IN FACT, OMEGA COULD HAVE GONE
TO NEUTRAL EVALUATION AT THAT
POINT IN TIME.

>> WELL, THEY DID AFTER THE SUIT WAS FILED.

>> THEY EVENTUALLY DID AFTER SUIT WAS FILED, YES. BUT THE HOMEOWNER IS NOT REQUIRED TO DO SO. WHAT DOES THE PRESUMPTION REALLY MEAN?

>> IF THEY PRESUME CORRECT, WHY THEN SHOULD THE INSURANCE COMPANY BE LIABLE UNDER THESE CIRCUMSTANCES WHEN THEY HAD A REPORT THAT WAS PRESUMED CORRECT AND NOTHING ELSE WAS DONE?

>> YEAH. PRESUMED CORRECT FOR WHAT PURPOSE?

THIS COURT SAID THIS PRESUMPTION IS THERE TO SHIELD THEM FROM SOMEONE LATER CLAIMING BAD FAITH IN THE WAY IN WHICH THEY HANDLED THE CLAIM AND SO THE COURT WENT THROUGH THE HISTORY OF THAT IN THE WUERFFEL OPINION THAT THIS WAS ABOUT PUTTING SOME PROTECTION FROM THE INSURER IN THE BAD FAITH LAWSUIT THAT WOULD FOLLOW.

IN OTHER WORDS, THE STATUTE ITSELF TALKS ABOUT STANDARDS FOR INVESTIGATION.

IT'S A TORT STANDARD OF CARE THAT HAS NOTHING TO DO WITH THE UNDERLYING CONTRACT DISPUTE. THIS IS A COVERAGE THAT WAS SOLD BY THE INSURANCE COMPANY TO KATHY JOHNSON.

THEY DIDN'T PROVIDE IT WHEN IT WAS TIME TO PROVIDE IT.

THAT'S A BREACH OF CONTRACT UNDER ANY SCENARIO.

AND THIS PRESUMPTION WAS NEVER INTENDED TO VITIATE THE INSURANCE COMPANY'S OBLIGATIONS UNDER THE CONTRACT.

ALL THE STATUTE WAS INTENDED TO DO -- AND THE COURT DESCRIBES THIS -- WAS TO SAY WE WANT SOME MINIMUM THINGS THE INSURANCE COMPANY HAS TO DO BEFORE THEY

CAN DENY AN INSURANCE CLAIM AND THAT IS FOR THE PROTECTION OF THE PUBLIC, NOT FOR THE PROTECTION OF THE INSURANCE COMPANY.

>> THERE'S ANOTHER STATUTORY PROVISION I'D LIKE TO ASK YOU ABOUT IN THE ALTERNATIVE PROCEDURES FOR RESOLUTION OF DISPUTES HERE.

IN 627.707415B.

YOU PROBABLY KNOW WHAT THAT IS. INSURER IS NOT LIABLE FOR ATTORNEY'S FEES UNDER 4A OR OTHER PROVISIONS IN THE INSURANCE CODE UNLESS THE POLICYHOLDER OBTAINS A JUDGMENT THAT IS MORE FAVORABLE THAN THE RECOMMENDATION OF THE NEUTRAL EVALUATOR.

HOW DOES THAT PROVISION OF THE STATUTE FIGURE INTO THE DISPUTE HERE?

>> I THINK THAT HAS A COUPLE OF DIFFERENT THINGS.

THEY TALK ABOUT WHETHER THE INSURANCE COMPANY HAS MADE AN OFFER TO PAY.

THERE ARE CERTAIN PROVISIONS FOR FEES THERE.

THEN THERE'S THE NEUTRAL EVALUATOR MAKES A DETERMINATION AND IF THE INSURED REJECTS THAT, FORCES EVERYONE TO FURTHER LITIGATION AND THEN DOESN'T BEAT THAT, I THINK WHAT THEY'RE SAYING UNDER THAT SCENARIO IS THERE'S NO FEES.

BUT NONE OF THAT REALLY HAS ANY APPLICABILITY HERE.

>> THIS HAS NOTHING TO DO WITH WHEN YOU'RE ABLE TO GET -- WHERE YOU HAVE FILED A SUIT PRIOR TO WHATEVER HAS HAPPENED UNDER THE NEUTRAL EVALUATOR HAPPENING.

>> CORRECT.

AND IN FACT THEY LATER AMENDED THE STATUTE TO SAY UNDER CERTAIN CIRCUMSTANCES YOU WON'T BE ABLE TO CONFESS JUDGMENT, FOR

INSTANCE, IF THE INSURANCE COMPANY AGREES TO FOLLOW THAT AND YOU DON'T BEAT IT. THEIR ACTIONS WON'T BE A CONFESSION OF JUDGMENT. SO THEY LATER AMENDED THE STATUTE, CONTEMPLATING THAT THERE WERE CIRCUMSTANCES IN WHICH YOU WOULD HAVE A CONFESSED JUDGMENT AFTER AN INSURANCE COMPANY HAD DENIED COVERAGE, HAD GONE THROUGH SOME PROCESS.

>> WELL, IT MIGHT HAVE CONTEMPLATED THAT OR TO CLARIFY WHAT THIS SAYS.

>> NEUTRAL EVALUATION CAN LITERALLY BE REQUESTED BY EITHER PARTY AT ANY TIME. WE COULD HAVE SEVEN YEARS OF LITIGATION. IN FACT, WE COULD BE ON THE CUSP OF ARGUMENT BEFORE THIS COURT AND IF SOMEONE REQUESTS IT, THE LITIGATION GETS STAYED AND NEUTRAL EVALUATION PROCESS. SO TO INTERPRET THE STATUTE THE WAY THEY DO, THEY COULD FORCE YOU TO YEARS OF LITIGATION AND EXPENSE, DENYING, STANDING ON THEIR ERRONEOUS DENIAL, GO TO NEUTRAL EVALUATION IN THE MIDDLE OF LITIGATION AND THEN WE SAY TO AGREE, CAN'T CONFESS A JUDGMENT AGAINST US. AND THE PROBLEM HERE IS THIS NEUTRAL EVALUATION STATUTE HAS ABSOLUTELY NOTHING TO DO WITH THE CONTRACTUAL RIGHTS OF THE PARTIES. THEY DENIED COVERAGE. THERE WAS A BREACH OF THE CONTRACT. IT'S AN ALTERNATIVE PROCESS. IT'S OPTIONAL. MANDATORY IF SOMEBODY REQUESTS IT, BUT OPTIONAL, ELECTIVE, AND THE PARTIES RETAIN ACCESS TO COURTS. THAT'S WHAT THE STATUTE PROVIDES.

AND SO HERE KATHY JOHNSON DID ABSOLUTELY NOTHING WRONG. SHE HAD EVERY RIGHT ONCE THE INSURANCE COMPANY SAID WE'VE CONDUCTED OUR COMPLETE INVESTIGATION AND WE DENY YOUR CLAIM, SHE HAD EVERY RIGHT TO FILE A LAWSUIT AT THAT POINT IN TIME, EVERY RIGHT TO GARNER WHATEVER EXPERT SHE NEEDED TO PRESENT.

THAT IS THE EXACT SAME FACTS OF THE WUERFFEL CASE.

THEY HIRED THE STATUTORY ENGINEER, WHICH THE INSURANCE COMPANY HIRES.

THEY DENIED COVERAGE.

HE FILED SUIT.

IT WASN'T UNTIL TRIAL THE PLAINTIFF FIRST PRESENTED HIS EXPERTS.

AND THIS COURT SAID HE WAS ENTITLED TO A TRIAL TO PROVE THAT THEIR ACTIONS IN DENYING COVERAGE BASED ON THAT REPORT WAS A BREACH OF THE CONTRACT. THAT'S WHAT THIS COURT HELD IN THAT CASE.

AND SO THE PRESUMPTION THEY'RE TRYING TO APPLY IT TO INSULATE THEM FROM THEIR CONTRACT OBLIGATION.

AND THAT'S NOT WHAT IT WAS FOR. THIS COURT MADE IT CLEAR WHAT IT WAS FOR, THAT IT WAS TO INSULATE THEM, WHERE SOMEONE SAYS, OKAY, WE KNOW YOU BREACHED THE CONTRACT, BUT NOW WE WANT TO SUE YOU AND SAY YOU DID IT IN BAD FAITH.

>> SO THE NEUTRAL EVALUATION UNDER YOUR ARGUMENT HERE REALLY HAS NOTHING TO DO WITH THE FACT THAT SHE FILED A CLAIM, THE PROFESSIONAL EVALUATION WAS DONE, THEY DENIED THE CLAIM AND THEN THAT'S WHEN HER RIGHT TO SUE, YOU KNOW, WAS PERFECTED AND THAT UNDER THE STATUTE OR IS IT UNDER THE POLICY SHE'S ENTITLED

TO FEES AND COSTS?

>> WELL, CERTAINLY UNDER THE STATUTE SHE HAD THE RIGHT TO SUE.

HAD THIS NOT BEEN A CONFESSED JUDGMENT, WE WOULD HAVE HAD A JURY TRIAL IN WHICH OMEGA HAS REQUESTS FOR ADMISSIONS AND ANSWERS IN THEIR ANSWERS THAT THEY DENIED COVERAGE UNDER THEIR CONTRACT AND NOW ADMIT IT EXISTS.

>> OBVIOUSLY, YOU'RE ONLY ENTITLED TO REASONABLE FEES, SO YOUR SCENARIO ABOUT THEY COULD HAVE DONE THIS NEUTRAL EVALUATION RIGHT UP UNTIL TRIAL, HERE YOUR FEES, IF THE COURT WERE TO AGREE WITH YOU, ARE PRETTY LIMITED, ARE THEY NOT? WHAT ARE YOU ENTITLED TO FEES FOR?

>> RIGHT.

AND I THINK IN WOLLARD AND PALMER THEY TALK ABOUT SOME OF THESE ARGUMENTS INSURANCE COMPANIES ARE MAKING GO TO THE REASONABLENESS OF THE AMOUNT OF FEES.

IN THIS CASE, THOUGH, THEY STIPULATED TO REASONABLENESS. AND SO THEY'VE WAIVED ANY ISSUES TO ARGUE ABOUT REASONABLENESS OF FEES.

>> BUT THE POINT OF THE POLICY HERE IS THAT WE DON'T WANT -- I THINK ON ONE HAND YOU DON'T WANT ATTORNEYS TO JUST JUMP IN AND FILE SUIT SO THEY CAN HAVE A GOTCHA SITUATION WITH THE INSURANCE COMPANY.

>> SURE.

>> AND THAT IS A VALUE THAT WE WANT TO PROTECT.

BUT SOMETIMES THAT'S PROTECTED THROUGH EITHER AN OFFER OF JUDGMENT OR WHAT THE AMOUNT OF REASONABLE FEES ARE.

NOW, THE OTHER QUESTION I HAVE IS THE CONFLICT WITH WUERFFEL,

WHICH IS THE BASIS IN WHICH WE TOOK THIS CASE.

HOW WOULD YOU ARTICULATE WHAT THE CONFLICT WITH THAT CASE IS? I KNOW THAT I AGREED THAT THERE WAS CONFLICT, BUT I'M NOT SURE. I'D LIKE YOU TO REARGUE THAT ISSUE.

>> SURE.

AND THIS COURT IN THAT CASE MADE VERY, VERY CLEAR, IT SAYS SPECIFICALLY 627.7073 HAS NO APPLICATION IN THE LITIGATION CONTEXT.

IN FACT, IT DOESN'T APPLY TO THE PARTIES' FIRST-PARTY COVERAGE DISPUTE AT ALL.

IT DOESN'T HAVE ANY APPLICATION TO BREACH OF CONTRACT.

AND HERE WE HAVE THE FIFTH DISTRICT COURT OF APPEAL SAYING THERE'S NO WAY KATHY JOHNSON COULD EVER PREVAIL IN A BREACH OF CONTRACT LAWSUIT WHERE THEY DENIED COVERAGE, TWO ENGINEERS HAVE SAID THEY WERE WRONG AND THEY NOW ADMIT THEY WERE WRONG, YET THERE'S NO WAY SHE COULD PREVAIL IN THAT BREACH OF CONTRACT LITIGATION BECAUSE OF THIS PRESUMPTION.

THAT'S ESSENTIALLY WHAT THE FIFTH DISTRICT'S OPINION HAS DONE.

AND IF WE'RE NOT SUPPOSED TO BE APPLYING IT IN THE LITIGATION CONTEXT, AS THIS COURT HAS TAUGHT, WHY DID IT EVEN COME UP IN THIS CASE AT THE TRIAL LEVEL?

>> LET ME ASK YOU ABOUT THE TIME FRAME HERE.

THE NEUTRAL EVALUATION WAS DONE IN MARCH OF 2011?

>> I THINK IT WAS A LITTLE BIT LATER.

THE REPORT CAME OUT IN OCTOBER.

>> WELL, I GUESS MY QUESTION HERE IS WAS THE NEUTRAL EVALUATION, WHICH SAID THIS WAS SINKHOLE DAMAGE, DONE BEFORE THE

LAWSUIT WAS FILED?

>> NO, IT WAS NOT.

>> BECAUSE I THOUGHT THE LAWSUIT WAS FILED AFTER THE REPORT.

NO?

>> THE LAWSUIT WAS FILED IN MAY. IN JUNE OMEGA REQUESTED NEUTRAL EVALUATION.

THE CLAIMANT READILY AGREED.

THE LAWSUIT WAS STAYED BY STIPULATION AT THAT POINT IN TIME, AND THE NEUTRAL EVALUATION PROCESS PROCEEDED.

THE NEUTRAL EVALUATOR ISSUES HIS REPORT IN OCTOBER.

OMEGA DOES EVENTUALLY ACCEPT THE RECOMMENDATIONS, BUT THEN FILES AN ANSWER AND 11 AFFIRMATIVE DEFENSES.

>> I GUESS THAT GOES BACK TO JUSTICE PARIENTE'S QUESTION. DON'T WE HAVE PRETTY LIMITED FEES HERE IF THE FACT THE NEUTRAL EVALUATION WAS DONE VERY SHORTLY AFTER THE LAWSUIT WAS FILED?

>> WELL, THERE'S \$15,000 IN COSTS THE INSURED HAD TO INCUR JUST TO CONTEST THE REPORT AND GET HER FOOT IN THE COURTHOUSE DOOR.

AND SO THAT'S ONE OF THE ISSUES HERE.

>> DID SHE HAVE HER OWN EVALUATION DONE?

>> SHE DID AND THAT WAS ADVANCED BY HER ATTORNEY TO THE TUNE OF \$15,000.

OTHERWISE PEOPLE LIKE KATHY JOHNSON, IF THEY DIDN'T HAVE ACCESS TO A LAWYER, THEY'RE NOT GOING TO HAVE A LAWYER LIKE MR. BARFIELD, WHO ADVANCED THE MONEY TO HIRE AN ENGINEER, TO TAKE ON THE BURDEN OF CHALLENGING A DENIAL LIKE THIS. AND IF WE SAY THAT FEES ARE NOT GOING TO BE AVAILABLE ONCE THEY HIRE AN ENGINEER SOLELY IN THEIR CONTROL WHO SAYS THERE'S NO

SINKHOLE, THEY'RE GOING TO BE LEAVING INSURED WITHOUT THE MEANS AND WITHOUT THE ABILITY TO GET THE COVERAGE THAT THEY CONTRACTED FOR.

HERE THERE'S NO DISPUTE. THE COVERAGE WAS THERE ALL ALONG.

AND SO HERE THERE WAS -- SUBSTANTIAL COSTS HAD TO BE ADVANCED BY A LAWYER THAT WAS KNOWLEDGEABLE IN THE WAYS IN WHICH TO ATTACK A DENIAL AND TO ATTACK AN ENGINEERING REPORT THAT DIDN'T ANALYZE THE PARTICLE SIZE OF THE SOILS, WHICH WAS SIGNIFICANT, MISSED DATA THAT WAS THERE, CONDITIONS AT THE SITE.

AND SO ALL OF THAT IS WHAT A LAWYER HAS TO DO WHEN A CLIENT'S INSURANCE CLAIM IS DENIED.

THIS IS NOT A SITUATION WHERE THEY WERE IN THE ADJUSTMENT PROCESS AND SOMEONE HAS RACED TO THE COURTHOUSE TO TRY TO TRUMP UP FEES.

>> IF SHE HAD REQUESTED A NEUTRAL REPORT, DOES THE STATUTE REQUIRE THE CARRIER TO PAY FOR IT OR DOES THE INSURED PAY FOR THAT?

>> THE INSURANCE WOULD PAY FOR THAT.

>> WHY NOT WAIT FOR THAT TO GET THE EXPERTS NEEDED TO CONFRONT THE INITIAL REPORT?

>> THERE'S NO INDICATION THE NEUTRAL EVALUATOR IS GOING TO GO TO THE SITE AND START BORING INTO THE GROUND.

THERE WERE TWO ADDITIONAL BORINGS DONE BY HER ENGINEERING THAT FOUND SIGNIFICANT SINKHOLE ACTIVITY AT THE PROPERTY.

SO WE COULD CONCLUDE EITHER THEIR ENGINEER DIDN'T DRILL WHERE THE SINKHOLES WERE LIKELY TO BE OR WAS UNLUCKY, WHATEVER THE CASE MAY BE.

BUT KATHY JOHNSON SENDS AN ENGINEER OUT THERE WHO DRILLS TWO MORE BORINGS AND IT'S OBVIOUS.

>> HOW DOES THAT WORK, THE NEUTRAL EVALUATION?

THE PROCESS IN SELECTING THAT PERSON, HOW DOES THAT WORK?

>> THE STATE APPOINTS THEM AND TYPICALLY THEY'RE REVIEWING THE REPORTS OF THE EXPERTS.

SO TO ANSWER YOUR QUESTION, HAD KATHY JOHNSON JUST SAID GIVE ME A NEUTRAL EVALUATION, THEY'D HAVE GONE THERE AND THE INSURANCE COMPANY WOULD HAVE TOUTED THEIR REPORT, EVERYONE WOULD HAVE TAKEN THE GUIDED TOUR AND SHE WOULD NOT HAVE GOTTEN \$325,000 IN INSURANCE BENEFITS.

>> SO THE NEUTRAL EVALUATOR DOESN'T GO TO THE SITE AND REASSESS OR WHATEVER?

THEY JUST LOOK AT REPORTS?

>> THIS NEUTRAL EVALUATOR DID GO TO THE HOUSE AND HE LOOKED AT THE CRACKING AND THE DAMAGE ON THE HOUSE.

HE DID NOT DO ANY BORINGS OR TEST PITS OR ANY OF THE SCIENTIFIC ANALYSES THAT THE INSURED'S EXPERT DID THAT PUT THEM IN A POSITION TO CONTEST THE DENIAL.

>> IF THE INSURANCE COMPANY DENIES COVERAGE, AN INSURER NEEDS THE PROTECTION OF AN ATTORNEY AND EXPERTISE TO KNOW HOW TO FIGHT THIS DENIAL OF COVERAGE, WHICH IS WHY 627.428 EXISTS.

YOU'RE IN YOUR REBUTTAL, BUT AS I'M HEARING THIS -- AND I HAVE TO SAY, I WAS CONCERNED ABOUT THIS RUSH TO THE COURTHOUSE, BUT I THINK YOU'VE ARTICULATED VERY WELL HOW THIS WOULD BE SUCH AN UNEVEN PLAYING FIELD WITHOUT AN ATTORNEY BEING INVOLVED.

>> AND THAT IS THE SLIPPERY

SLOPE OF OMEGA'S ARGUMENT HERE,
IS THAT YOU WOULD NOT BE IN A
POSITION TO TAKE ON THAT
PRESUMPTIVELY CORRECT REPORT,
WHICH THEY WOULD WAIVE THIS
PRESUMPTION EVERYWHERE YOU WENT,
WITHOUT BEING ABLE TO SAY I HAD
A CONTRACT, THEY AGREED TO
PROVIDE ME BENEFITS, THEY DIDN'T
PROVIDE THEM AND I HAVE EVERY
RIGHT TO GO INTO A COURT.
IF THIS WERE ANY OTHER INSURANCE
POLICY NOT IN A SINKHOLE
CONTEXT, THERE WOULD BE NO
QUESTION THIS WOULD BE A
CONFESSED JUDGMENT IN FAVOR OF
THE INSURED.

YET THEY WANT THIS TO CHANGE
SOLELY BECAUSE OF THIS
PRESUMPTION WHICH THIS COURT
SAID HAD NO APPLICATION.

>> LET ME TAKE ABOUT 30 MORE
SECONDS OF YOUR REBUTTAL.

IN OTHER INDUSTRIES, OTHER AREAS
OF THE LAW, WE SEE EXPERTS AND
WE KIND OF SEE THE SAME NAMES.
IN THE AREA OF SINKHOLE DAMAGE,S
ARE THERE A HANDFUL OF PEOPLE OR
COMPANIES WHO ARE EXPERTS AT
THIS WHO ARE CONSTANTLY CALLED
UPON BY EITHER THE CARRIERS OR
THE INSURED TO DEAL WITH THIS,
OR THERE'S A LOT OF PEOPLE, YOU
DON'T SEE THE SAME FOLKS OVER
AND OVER AGAIN?

>> YOU SEE -- THERE ARE FOLKS
THAT CERTAIN INSURANCE COMPANIES
USE WITH A GREAT FREQUENCY.
THE 1099s TO SOME OF THESE
ENGINEERS ARE STAGGERING.

FRANKLY, THE INSURED HAS TO BE
ABLE TO FIND EXPERTS TO TAKE ON
AN INSURANCE COMPANY.
THEY EITHER DON'T WORK FOR THE
INSURANCE COMPANY OR AT LEAST
HONEST ENOUGH TO CALL IT AS THEY
SEE IT.

BUT, YOU KNOW, THIS WAS AN
ERRONEOUS DENIAL.
AND WHERE SHOULD THE RISK OF

THAT FALL?

ON MY CLIENT OR ON THE COMPANY WHO HAD IT IN THEIR CONTROL TO HIRE THE PERSON?

>> HAD YOUR CLIENT NOT FILED THE LAWSUIT, WOULD THEY BE ENTITLED TO RECOVER THE MONIES FOR EXPERT, YOUR CLIENT?

>> NO.

THEY WOULDN'T EVEN HAVE GOTTEN THEIR \$15,000 BACK.

THEIR LAWYER WOULDN'T HAVE GOTTEN A PENNY.

AND FRANKLY, IN THE NEXT CASE WHERE THIS OCCURS, THAT INSURED'S NOT GETTING A LAWYER. AND THAT'S THE REAL PROBLEM.

>> AND WITHOUT THE LAWYER'S INVOLVEMENT, THE EVALUATOR ONLY HAD ONE REPORT TO EVALUATE.

>> CORRECT.

AND WOULD HAVE BEEN TOLD HOW CORRECT IT WAS BY THE INSURANCE COMPANY.

AND SO I THINK THAT'S THE PROBLEM WITH THE ARGUMENT HERE. I'D ASK THE COURT TO REVERSE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL.

AGAIN, KATHY JOHNSON WAS EVEN DENIED INTEREST ON THE MONEY THAT WAS DENIED TO HER FOR OVER 27 MONTHS BY THE FIFTH DISTRICT'S OPINION AND I DON'T KNOW HOW YOU CAN SQUARE THAT. THANK YOU.

>> AND I'LL GIVE YOU A COUPLE MINUTES FOR REBUTTAL.

>> THANK YOU VERY MUCH.

>> MAY IT PLEASE THE COURT, GOOD MORNING.

ANTHONY RUSSO FOR OMEGA.

>> WOULD YOU SPEAK INTO THE MICROPHONE, PLEASE?

>> ANTHONY RUSSO FOR OMEGA. JUSTICE PARIENTE, LET ME ADDRESS THE CONFLICT QUESTION THAT YOU RAISED FIRST.

THE FIFTH DISTRICT APPLIED A VANISHING PRETRIAL PRESUMPTION

NOT TO PROVE THE EXISTENCE OF THE SINKHOLE, BUT TO DETERMINE WHETHER OMEGA HAD PROPERLY EXECUTED ITS STATUTORY DUTY TO INVESTIGATE AND DETERMINE WHETHER OR NOT THIS WAS A SINKHOLE.

>> YOU AGREE THAT IN ANY OTHER CONTEXT OTHER THAN SINKHOLE, THAT ONCE THERE IS A DENIAL OF COVERAGE, THE INSURED WOULD HAVE EVERY RIGHT TO FILE SUIT AND TO SEEK TO CONVINCING THE INSURANCE COMPANY THAT THE DENIAL WAS IMPROPER.

>> THOSE ARE TWO THINGS AND ABSOLUTELY SHE HAD A RIGHT TO FILE SUIT.

THERE WAS NOTHING IN THE CONTRACT OR STATUTE THAT I'M AWARE OF THAT BARS HER FROM FILING SUIT.

>> BUT DIDN'T -- SO GOING BACK TO THIS CONFLICT ISSUE, --

>> YES.

>> THE IDEA THAT THE PRESUMPTION, WHICH IS MR. WEBER SAYS IS TO PROTECT THEM FROM BAD FAITH.

WE'RE NOT --

>> JUDGE, YOU --

>> LET ME FINISH.

IT'S TO PROTECT THEM FROM BAD FAITH.

THEY FIND AN EVALUATION AND AN EXPERT MAYBE PAID BY--

EXTENSIVELY BY THE INSURANCE COMPANY AND THEN IF THEY DENY COVERAGE, THEY'RE NOT GOING TO BE IN BAD FAITH.

BUT WHAT WE SAID IN WUERFFEL IS IT DOES NOT APPLY IN THE LITIGATION CONTEXT.

>> CORRECT.

>> HOW DOES IT AFFECT FEES IF SHE HAD A RIGHT TO FILE SUIT?

>> THE VANISHING PRESUMPTION APPLIES TO THE INITIAL CLAIM PROCESS AND INVESTIGATION THAT INSURANCE COMPANIES ARE REQUIRED

TO FOLLOW IN ACCEPTING OR
DENYING CLAIMS.
THAT'S WHERE THE PRESUMPTION
WAS.

THIS VANISHING PRESUMPTION WAS
APPLIED BY THE FIFTH DISTRICT AT
SLIP OPINION.

PAGE 9 OF THEIR DECISION THEY
SAID, THIS PRESUMPTION IS NOT AN
EVIDENTIARY PRESUMPTION.

IT DOESN'T GO TO PROVE THE FACT
OF A SINKHOLE.

IT IS BUT A PRETRIAL VANISHING
PRESUMPTION REQUIRING THE
PRODUCTION OF SOME
COUNTERVAILING EVIDENCE.

REMEMBER, THIS WAS A FEE
PROCEEDING WHERE THEY WERE
LOOKING FOR FEES.

>> HOW DO YOU GET TO THE POINT
THAT THEY DIDN'T HAVE A RIGHT TO
FILE THE SUIT WHEN THEY DID?

>> THEY DID HAVE A RIGHT TO FILE
SUIT.

THE QUESTION IS WERE THEY FORCED
TO FILE SUIT.

BECAUSE, REMEMBER, UNDER WOLLARD
A BONA FIDE DISPUTE AND WRONGFUL
ACTION BY THE INSURANCE COMPANY
IS REQUIRED TO JUSTIFY THE
APPLICATION OF THE CONFESSION OF
JUDGMENT.

>> EXCUSE ME.

I'M NOT SO SURE THAT YOU'RE
USING WRONGFUL IN THE SAME
CONTEXT.

ARE YOU SUGGESTING THAT THE WORD
"WRONGFUL" IN CONNECTION WITH
627.428 REQUIRES SOME
MALICIOUSNESS, SOME INTENTIONAL
BAD DEALINGS ON THE PART OF AN
INSURANCE COMPANY?

>> ABSOLUTELY NOT, YOUR HONOR.
IT DOES NOT.

>> OKAY.

IT DOES NOT.

>> WRONGFULNESS --

>> YOU AGREE IT DOES NOT.

>> THAT'S CORRECT.

>> OKAY.

IT'S WRONG -- IN THE VERNACULAR,
AN INCORRECT DENIAL OF COVERAGE.

>> NO.

IT'S MORE THAN THAT, YOUR HONOR.
WRONGFUL IN THE BODY OF CASE LAW
THAT'S DEVELOPED THROUGH THE
DISTRICT COURTS OF APPEAL AND
THIS COURT REQUIRES SOME BREACH
OF A STATUTORY DUTY OR SOME
FAULT THAT RESULTS IN THE --

>> IT'S AN INCORRECT DENIAL OF
COVERAGE.

>> IT'S MORE THAN THAT, YOUR
HONOR.

>> TELL ME A CASE THAT SAYS THAT
YOU HAVE TO HAVE MORE THAN A
DENIAL OF COVERAGE, JUST A
DENIAL OF COVERAGE, FOR 627.428
TO APPLY.

>> THERE'S A NUMBER OF CASES.
WOLLARD REQUIRES WRONGFUL
CONDUCT.

I'LL CITE TO THREE CASES --

>> MAKE SURE.

I WANT TO GET YOU ON THE RECORD
HERE.

YOU'RE SAYING THAT AN INCORRECT
DENIAL OF COVERAGE ALONE IS NOT
ENOUGH FOR ATTORNEY'S FEES UNDER
627.428.

>> YES, SIR.

>> AS AN OFFICER OF THIS COURT
THAT'S WHAT YOU'RE MAKING THE
REPRESENTATION.

>> AND I'LL MAKE THAT ON THE
BASIS OF --

>> IS THAT YOUR REPRESENTATION?

>> YES, BASED ON THREE CASES
CITED, ARNOLD, BAILEY AND
LORENZO.

IN EACH OF THOSE CASES INSURANCE
COMPANY DENIED COVERAGE, A
POLICYHOLDER SUED.

THE INSURANCE COMPANY PAID MONEY
AND THE POLICYHOLDER MOVED FOR A
CONFESSION OF JUDGMENT.

IN EACH OF THOSE THREE CASES THE
MOTION WAS DENIED.

AND THE SPECIAL FACTORS THAT
WERE PRESENT IN THOSE CASES WERE

THE INSURANCE COMPANY, SOME INFORMATION HAD BEEN WITHHELD FROM THEM, SOME INFORMATION WAS INCORRECTLY GIVEN TO THEM, THEY WERE NOT -- AND THEY WERE FOUND NOT RESPONSIBLE FOR FEES. THIS CASE FALLS INTO THAT CATEGORY.

AND WHEN I SAID, YOUR HONOR --
>> WHAT DID THE INSURED DO HERE TO MISLEAD THE INSURANCE COMPANY?

>> I DIDN'T --

>> WELL, YOU GAVE US EXAMPLES OF AN INSURANCE COMPANY BEING MISLED, NOT GIVING INFORMATION. SO WHAT DID THE INSURED DO WRONG HERE?

>> WHAT THE INSURED DID NOT DO WAS PERFECT A CLAIM FOR FEES BECAUSE THERE WAS NO CONTACT, NO EVIDENCE THAT SHE PRESENTED AT AN EVIDENTIARY HEARING IN THE TRIAL COURT THAT SHE HAD PUT THE INSURANCE COMPANY ON NOTICE THAT THE CLAIM WAS DISPUTED.

AND WHEN WE GO BACK TO CASES LIKE CLIFTON --

>> AND THE CLAIM IS NOT SUFFICIENT TO SAY I HAVE SINKHOLE DAMAGE TO MY PROPERTY. I'M NOT AN EXPERT.

I'M A SIMPLE FLORIDA CITIZEN AND MY SUBMITTING A CLAIM MY HOUSE HAS FALLEN INTO A HOLE, THIS IS A SINKHOLE CLAIM, THAT'S NOT SUFFICIENT TO PUT THEM ON NOTICE?

>> THAT PUTS THEM ON NOTICE TO GO INVESTIGATE AND GET THE STATUTORY REPORT, WHICH THEY DID AND WHICH IS PRESUMED CORRECT PURSUANT TO THIS COURT'S DECISION IN WUERFFEL.

AND THE PRESUMPTION WAS APPLIED TO SHOW MY CLIENT'S EXECUTION OF ITS STATUTORY DUTY TO GO OUT, DO THE INVESTIGATION AND PROVIDE THE REPORT.

BUT NOTHING CAME BACK.

AND FROM THE TIME THAT WE
PRESENTED THE DENIAL TO THE TIME
THEY FILED SUIT, THERE WAS
SILENCE.

THERE WAS NO DISPUTE.

AND CASES LIKE CLIFTON SAY --

>> DID YOU AGREE EARLIER THAT
THIS PRESUMPTION IS APPLICABLE
ONLY IN THE CONTEXT OF BAD
FAITH?

>> I THINK THAT'S INCORRECT.
I BELIEVE THAT WHAT MY OPPONENT
SAID, THAT IT'S RESTRICTED TO
BAD FAITH, IS INCORRECT, BECAUSE
THAT'S NOT WHAT THE WUERFFEL
CASE SAID.

IT APPLIES TO THE INITIAL CLAIM
PROCESS AND INVESTIGATION.

IT DOESN'T MENTION 624.115.

>> WHAT DO YOU SUGGEST A
HOMEOWNER SHOULD DO FROM THERE?
ONCE THE INSURER HAS THIS CLAIM,
HAS THIS REPORT THAT SAYS, NO,
THIS DAMAGE IS NOT FROM SINKHOLE
ACTIVITY, WHAT DO YOU DO FROM
THERE?

AND DO YOU DENY THE CLAIM BASED
ON THAT REPORT?

WHAT IS THE HOMEOWNER SUPPOSED
TO DO?

>> THE JUDGE WROTE THREE
DIFFERENT OPTIONS IN THE OPINION
THAT'S BEFORE THE COURT TODAY,
SLIP OPINION, PAGE 10.

HE SAID AFTER JOHNSON RECEIVED
THE REPORT THAT SHE HAD
COMMISSIONED, RATHER THAN
PRESENT HER COUNTERVAILING
EVIDENCE TO OMEGA TO REBUT THE
PRESUMPTION OR AT LEAST NOTIFY
OMEGA THAT SHE DISAGREED WITH
OMEGA'S REPORT, IN AN ATTEMPT TO
FURTHER DISCUSS THE CLAIM, SHE
KEPT IT TO HERSELF.

>> YOU GOT A HOMEOWNER WHO
DOESN'T HAVE AN ATTORNEY, RIGHT?
YOU'VE GOT THE INSURANCE COMPANY
THAT IS THE EXPERT IN NOT ONLY
EVERY KIND OF COVERAGE THAT THEY
WRITE, INCLUDING THE SINKHOLE

DAMAGE, WHO HAS ASSUMINGLY,
ACCORDING TO YOUR OPPOSING
COUNSEL,S HAS A STAPLE OF
EXPERTS THAT ARE THERE TO -- IF,
YOU KNOW -- AGAIN, I ALWAYS
THOUGHT SINKHOLE WAS AN EASY
THING TO FIGURE OUT, BUT
APPARENTLY IT'S NOT.

SO THEY HAVE AN EXPERT THAT SAYS
IT'S NOT FROM SINKHOLE DAMAGE.
NOW WHAT YOU'RE SAYING IS THE
HOMEOWNER ON HER OWN SHOULD
FIGURE THIS OUT, SHOULD HIRE AN
EXPERT, SHOULD TALK TO HER
FRIENDS, SHOULD GO TO LEGAL ZOOM
AND FIGURE THIS OUT.

BUT IF SHE -- AND TALK IT OUT
WITH THE INSURANCE COMPANY.

HOW -- THAT'S NOT THE WAY --
THAT'S WHY 627.428 EXISTS.

>> I UNDERSTAND.

>> TO LEVEL THE PLAYING FIELD.

>> YES.

SHE DID HAVE AN ATTORNEY.
BUT CASES LIKE WHAT THE JUDGE
SAID IN THE JOHNSON CASE --

>> BUT SHE HAS TO PAY THE
ATTORNEY OUT OF HER OWN POCKET?

>> WELL, LET ME EXPLAIN.

JOHNSON, THE CLIFTON CASE, THE
CALELA CASE, EACH OF THOSE TALK
ABOUT INSURANCE -- IF THE
POLICYHOLDER PICKS UP THE PHONE
AND SAYS I DISAGREE, WOULD YOU
PLEASE CHECK AGAIN, THAT'S
ENOUGH TO PERFECT THE CLAIM FOR
FEES BECAUSE DOWN THE LINE --
BECAUSE AT THAT POINT THE
INSURANCE COMPANY IS GOING TO DO
ONE OF TWO THINGS.

THEY'RE GOING TO SAY FORGET IT

--

>> SHE DOESN'T NEED AN EXPERT TO
COUNTER THE EXPERT?

>> SHE DOESN'T NEED AN EXPERT TO
COUNTER THE PRESUMPTION.

>> IF SHE DIDN'T NEED THE EXPERT
THEN, WHEN SHE FILED THE CLAIM
ORIGINALLY THE INSURANCE COMPANY
WOULD HAVE PAID WITHOUT GETTING

AN EXPERT.

>> THE ASSUMPTION WASN'T APPLIED TO PROVE THE TRUTH OF WHETHER THERE WAS A SINKHOLE OR NOT. HER BURDEN WAS NOT TO PROVE THAT THERE WAS A SINKHOLE.

HER BURDEN WAS TO SHOW THERE WAS A DISPUTE THAT CAUSED HER TO FILE THE SUIT.

SHE DIDN'T HAVE TO PROVE SINKHOLE.

SHE DIDN'T NEED THE SECOND REPORT.

>> I'M CONFUSED ABOUT THE DYNAMIC HERE.

IT SEEMS LIKE YOUR POSITION YOU'RE ARTICULATING HERE IS HIGHLY FORMALISTIC.

IF THE HOMEOWNER SAYS I DISPUTE THAT, WE'RE TO BELIEVE THIS WOULD PROCEED DIFFERENTLY THAN IT DID, THAT THE INSURER BASED ON THAT WOULD HAVE CONDUCTED ITSELF IN A DIFFERENT MANNER AND SAID, OH, WELL, WE MUST BE WRONG.

>> I UNDERSTAND.

>> SO THAT CONFUSES ME BECAUSE THE POINT IS HERE SHE'S NOT -- SHE CAN SAY THAT, BUT WITHOUT AN EXPERT TO CHALLENGE WHAT THIS OTHER EXPERT HAS SAID -- AND REALISTICALLY THE ONLY WAY THAT SOME HOMEOWNERS CAN DO THAT IS BY GOING DOWN THE LEGAL ROUTE. HOW CAN THE HOMEOWNER HAVE ANY REAL PROSPECT OF EFFECTING THIS OUTCOME?

>> JUSTICE CANADY, THE PROCEEDING WASN'T -- SHE DIDN'T NEED TO PROVE THERE WAS A SINKHOLE.

SHE NEEDS TO PROVE THAT THERE WAS A DISPUTE TO PERFECT HER RIGHT TO FEES.

THIS IS ABOUT FEES.

NOW, IF SHE HAD CALLED THEM AND SAID I DISAGREE AND THEN THE INSURANCE COMPANY SAID, FORGET IT, WE'RE NOT DOING ANYTHING, OR

PERHAPS THE INSURANCE COMPANY WOULD HAVE COME OUT AND FIXED HER HOME AND THERE WOULD HAVE BEEN NO LAWSUIT.

>> BUT THIS REQUIRES A WILLING SUSPENSION OF DISBELIEF TO SAY THAT BECAUSE A HOMEOWNER CALLS UP AND SAYS, WELL, I DISAGREE, THAT THE INSURER IS GOING TO-- AND, AGAIN, I'M NOT SAYING THERE'S BAD FAITH ON THE PART OF THE INSURER, BUT THEY'VE GOT THEIR PROCEDURES AND THEY'VE GOT THEIR EXPERT AND THE FACT -- WITHOUT SOME ABILITY TO COUNTER THAT MEANINGFULLY, THE IDEA THAT THIS IS GOING TO GO ANY DIFFERENTLY IS JUST -- SEEMS TO ME TO BE FANCIFUL.

>> I'M NOT SAYING BE FANCIFUL OR SUSPEND YOUR DISBELIEF.

I'M SAYING THEY NEED TO PERFECT A RIGHT TO FEES.

THEY NEED TO SHOW A DISPUTE. SHE CAN DO THAT WITH A PHONE CALL.

CLIFTON OR THIS CASE, HOW TO PUSH THAT BACK.

THEY DON'T HAVE TO DISPROVE THERE WAS A STATUTORY REPORT.

>> LET ME MOVE YOU TOWARD THE STATUTORY PROVISION THAT JUSTICE CANADY ASKED EARLIER ABOUT, WHICH IS THE ATTORNEY'S FEES UNDER THE NEUTRAL EVALUATOR. HOW DOES THAT PLAY IN THIS CIRCUMSTANCE?

>> WELL, IT DOESN'T APPLY BECAUSE THAT 15B SECTION IS TRIGGERED WHEN THE INSURANCE COMPANY SAYS WE'D LIKE TO GO TO NEUTRAL EVALUATION.

THE NEUTRAL EVALUATOR MAKES A REPORT AND THE POLICYHOLDER REJECTS IT, TAKES THEIR OPTION TO GO TO TRIAL AND THEN DOES NOT -- DOES OR DOES NOT WIN A GREATER REWARD THROUGH THE LITIGATION PROCEEDINGS THAN THEY WOULD HAVE TAKEN THROUGH NEUTRAL

EVALUATION.

>> YOU AGREE WITH OPPOSING
COUNSEL, HAS NO APPLICATION?

>> I BELIEVE IT DOES NOT APPLY
HERE, YOUR HONOR.

>> DOES NOT APPLY.

>> CORRECT.

CORRECT.

WE'RE NOT SAYING THAT --
REMEMBER, THERE WAS NOT AN
EVIDENTIARY PRESUMPTION ATTACHED
TO THIS STATUTORY REPORT.

IT WASN'T USED TO PROVE --

>> THAT'S OKAY.

>> I'M SORRY.

IT WAS NOT USED TO PROVE THE
TRUTH.

IT WAS NOT USED TO PROVE THE
TRUTH OF WHETHER THERE WAS
COVERAGE, WHETHER THERE WAS A
SINKHOLE.

IT WAS USED TO SHOW THAT THE
INSURANCE COMPANY, MY CLIENT,
HAD EXECUTED ITS STATUTORY
OBLIGATIONS.

THAT WAS IT.

BUT SHE NEEDED --

>> I STILL HAVE TO GET BACK TO
THIS WHOLE NOTION THAT A
HOMEOWNER HAS MADE A CLAIM TO
THE INSURANCE COMPANY CLAIMING
THAT THERE WAS SINKHOLE DAMAGE
AND THERE IS NOT ENOUGH TO PUT
THE MATTER IN DISPUTE.

>> NOT EVERY CLAIM IS A
BONA FIDE DISPUTE, YOUR HONOR.
AND NOT EVERY DENIAL -- EVERY
DENIAL MAY PRESENT THE
POSSIBILITY OF A DISPUTE, BUT IT
IS NOT A BONA FIDE DISPUTE, AND
THAT DISTINCTION IS RECOGNIZED
IN THE LAW.

THAT'S WHAT THEY DID NOT PROVE.
THAT WAS THE PROBLEM AT THE
EVIDENTIARY HEARING.

>> WELL, AT THE FILING OF THE
LAWSUIT CERTAINLY SEEMS TO SAY
THERE'S A DISPUTE HERE.

>> YES.

AND AT THAT POINT WE KNOW

THERE'S A DISPUTE.
BY THE WAY, WITHIN 20 DAYS OR SO
OF THE SUIT BEING FILED, THERE
WAS A STIPULATION -- WE USED
NEUTRAL EVALUATION, WHICH
OPERATES AS A STAY OF THE
PROCEEDINGS.
THEN THE FOLLOWING NOVEMBER, IT
WAS JUNE TO NOVEMBER THAT THE
NEUTRAL EVALUATION PROCESS
PLAYED OUT.
THE NEUTRAL EVALUATOR GAVE HIS
REPORT BUT THEN ANOTHER --
>> WHEN WAS -- WHEN DID THE
INSURANCE COMPANY FILE AN ANSWER
WITH ALL THESE OTHER --
>> RIGHT.
>> -- DEFENSES?
>> SO AFTER NEUTRAL EVALUATOR
COMES OUT, MY CLIENT ACCEPTS THE
REPORT AND SAYS WE WILL PROCEED,
THAT THE STAY IS LIFTED.
SO NOW THIS COMPLAINT IS OUT
THERE THAT SAYS GIVE US THE
POLICY PROCEEDS, ET CETERA.
AN ANSWER HAS TO BE FILED.
IN THE ANSWER WE DID ADMIT
SINKHOLE CAUSED YOUR LOSS AND
WE'RE WAITING FOR A CONTRACT, A
SIGNED CONTRACT FROM THE
POLICYHOLDER, TO HAVE THEIR HOME
SUBSURFACE FIXED.
THAT TOOK A FEW MONTHS.
>> BUT WHAT ELSE -- WHAT WERE
THE AFFIRMATIVE DEFENSES?
SO YOU ADMITTED IN THE ANSWER
THAT THERE WAS COVERAGE?
>> YES.
>> SO THE ISSUE OF THAT GOES TO
-- DOESN'T IT GO TO WHAT
REASONABLE FEES ARE?
BECAUSE FROM THE MOMENT, I'M
ASSUMING, THAT THE LAWSUIT WAS
FILED, THE INSURANCE COMPANY HAD
AN ATTORNEY THAT IT PAYS.
>> THE INSURANCE COMPANY?
>> YES.
>> I'M NOT AWARE OF --
>> YOU DON'T THINK -- YOU'RE NOT
PAID BY THE INSURANCE COMPANY?

>> I AM, YES.

>> BUT THE ATTORNEY THAT WAS REPRESENTING OMEGA GETS PAID BY THE INSURANCE COMPANY.

NOW, THE WAY 627.428 WORKS IS WHEN THE INSURANCE COMPANY DENIES COVERAGE AND THEN THEY FINALLY ADMIT THERE IS COVERAGE OR THERE'S A JUDGMENT IN THE INSURED'S FAVOR, THE INSURED IS ALLOWED TO GET HER ATTORNEY'S FEES.

THAT'S THE LEGISLATIVE DICTATION, NOT THIS COURT'S, CORRECT?

>> WELL, ON TOP OF 627.428 THIS COURT HAS APPLIED DECADES OF LAW THAT SAYS THERE HAS TO BE A WRONGFUL REFUSAL OF THE INSURANCE COMPANY THAT FORCES THE POLICYHOLDER TO FILE SUIT TO OBTAIN THEIR POLICY BENEFITS.

>> COULD YOU READ 428, WHAT IT SAYS?

BECAUSE I'M SORT OF WITH WHAT JUSTICE LEWIS SAID.

IT'S FEES FOR -- DOES IT SAY WHEN THERE'S A, QUOTE, WRONGFUL DENIAL OF COVERAGE?

WHAT DOES IT SAY?

>> THAT HAS BEEN READ INTO THE STATUTE FOR 80 YEARS, YOUR HONOR.

>> DO I UNDERSTAND YOUR POSITION CORRECTLY THAT IN THIS CASE IT WOULD HAVE BEEN A WRONGFUL DENIAL IF THE HOMEOWNER HAD CALLED UP AFTER THE FIRST REPORT CAME OUT AND SAID, OH, NO, I THINK THIS IS A SINKHOLE.

>> NO.

WHAT THAT ACTION WOULD HAVE DONE, JUSTICE CANADY, WOULD HAVE BEEN TO SET UP -- WOULD HAVE BEEN TO PERFECT THE RIGHTS TO FEES THAT THEY'RE CLAIMING NOW.

BECAUSE THEY WOULD HAVE BEEN ABLE TO SHOW A BONA FIDE --

>> THE WRONGFUL DENIAL WAS IN THE CONTEXT OF WHETHER FEES

COULD BE OBTAINED OR NOT.
>> THERE WAS NO WRONGFUL DENIAL
BECAUSE WE FOLLOWED -- WE
FOLLOWED THE STATUTORY
PROCEDURES FOR INVESTIGATION AND
ACCEPTING OR DENYING THE CLAIM.

SO --

>> BUT I THOUGHT -- OKAY.

>> SEE, THERE'S TWO THINGS GOING
ON, AND THAT'S WHY THAT
DISCONNECT --

>> I THOUGHT THEY WERE
INTERRELATED, THOUGH.

>> THEY ARE.

WHEN WE PROVIDED THE REPORT, IT
WAS PRESUMED TO BE CORRECT, WITH
THE VANISHING PRESUMPTION THAT
THIS COURT ESTABLISHED OR
DISCUSSED IN WUERFFEL.

AT THAT POINT MY CLIENT HAS
EXECUTED ITS STATUTORY DUTIES.
THERE IS NO DISPUTE ABOUT THAT
REPORT UNTIL WE GET THE LAWSUIT.
WHETHER THERE IS A WRONGFUL
DENIAL DEPENDS ON WHETHER THE
INSURANCE COMPANY HAS FORCED THE
POLICYHOLDER TO RESORT TO
LITIGATION TO OBTAIN HER POLICY
BENEFITS.

AND IN CASES LIKE CLIFTON,
CALELA AND WHAT THE JUDGE SAID
IN THIS OPINION SAYS THAT IF
THERE'S NO COMMUNICATION, THEY
CANNOT PROVE THERE'S A BONA FIDE
DISPUTE.

THAT WRONGFUL CONDITION IS A
CONDITION PRECEDENT UNDER THE
CONFESSION OF JUDGMENT DOCTRINE.

>> LET ME ASK YOU SO I'M CLEAR
WHAT YOU'RE SAYING.

IF I'M A HOMEOWNER AND I'M
CLAIMING A SINKHOLE CAUSED
DAMAGE AND THE REPORT COMES IN,
IS PRESUMED TO BE CORRECT, FROM
THE INSURANCE COMPANY'S EXPERT.

>> YES.

>> ALL I HAVE TO DO IS CALL OUT
THE CARRIER AND SAY I DISAGREE
WITH THAT REPORT AND THAT RIGHT
THERE ESTABLISHES THE WRONGFUL

OR UNREASONABLE DENIAL OF BENEFITS THAT WOULD ENTITLE ME LATER ON TO ATTORNEY'S FEES, JUST A PHONE CALL SAYING I DISAGREE WITH THE REPORT THAT'S PRESUMED TO BE CORRECT.

>> JUSTICE LABARGA, THAT WOULD ESTABLISH A BONA FIDE DISPUTE AND THEN IT'S HOW DOES THE INSURANCE COMPANY RESPOND. DO THEY COME OUT AND SAY, OKAY, WE MADE A MISTAKE, WE'LL FIX YOUR HOUSE OR DO THEY COME OUT AND SAY WE'RE STANDING ON OUR DENIAL.

EITHER WAY YOU HAVE PERFECTED YOUR RIGHT TO CLAIM ATTORNEY'S FEES.

>> SUBSEQUENTLY IT DOES HAVE TO BE DETERMINED THAT THEY OWED COVERAGE.

>> YES.

RIGHT.

>> SO THAT IS --

>> YES.

>> SO HAS TO BE DETERMINED ULTIMATELY IN ORDER TO REALLY DETERMINE THAT THERE'S THE FEES. BUT THE PREDICATE FOR HAVING THE FEES IS CREATING THIS DISPUTE.

>> YES.

>> OKAY.

I UNDERSTAND YOUR ARGUMENT.

>> OKAY.

THANK YOU.

>> NOW, IT JUST SEEMS UNREASONABLE TO ME TO BELIEVE THAT ANYTHING WOULD HAVE CHANGED IF THE HOMEOWNER HAD CALLED AND SAID, I DISAGREE WITH THIS REPORT AND NOTHING MORE AND THEN WE GET INTO THIS NEW PHASE. THAT JUST -- IT DEFIES LOGIC TO ME.

>> IF NOTHING HAD HAPPENED, AS YOU SUSPECT NOTHING WOULD HAVE HAPPENED, THEN THEY WOULD HAVE GOT THEIR EXPERT, THEY WOULD HAVE GONE TO TRIAL, THEY WOULD HAVE WON AND THEY WOULD HAVE

PERFECTED THEIR RIGHT TO
ATTORNEY FEES.

>> THANK YOU FOR YOUR ARGUMENT.
COUNSEL, I'LL GIVE YOU TWO
MINUTES.

>> NO FLORIDA COURT HAS SAID
THAT A COMPLETE DENIAL OF
COVERAGE AFTER THE INSURANCE
COMPANY HAS CONDUCTED A FULL
INVESTIGATION UNIMPEDED BY ANY
ACT OF THE INSURED IS
INSUFFICIENT TO TRIGGER THE
RIGHT TO FILE A LAWSUIT AND THE
RIGHT TO GET FEES UNDER 627.428.

>> I SEE THAT SOME OF THE
APPELLATE COURTS HAVE USED THIS
LANGUAGE OF WRONGFULLY DENYING
COVERAGE, WHICH I DON'T KNOW IF
THEY ADDED SOMETHING.
HAS OUR COURT ACTUALLY USED THAT
LANGUAGE?

>> THIS COURT USED THAT LANGUAGE
IN THE EQUITABLE ASSURANCE
COMPANY VERSUS NICKELS, WHERE
THE LIFE INSURER SAYS WE AGREE
THE PERSON'S DEAD AND THE
COVERAGE IS PAYABLE, BUT THE
FORMER WIFE AND THE NEW
BENEFICIARY WERE SQUABBLING OVER
A CHANGE IN BENEFICIARY, SO THEY
HELD THE MONEY UNTIL THE TWO
COMBATANTS DECIDED AS BETWEEN
THEM WHO WAS ENTITLED AND THE
COURT SAID, WELL, THEY DIDN'T DO
ANYTHING WRONGFUL THERE IN
WITHHOLDING THE MONEY PENDING
THAT.

THAT'S NOT A DENIAL OF COVERAGE
CASE.

SIMILAR, THE CASES THEY'RE ALL
POINTING TO IN THEIR BRIEFS ARE
SITUATIONS IN WHICH THE INSURED
WAS GIVEN BUM INFORMATION OR WAS
IN THE PROCESS OF ACTUALLY
ADJUSTING THE CLAIM AND HAD NOT
DENIED IT WHEN THE INSURED FILED
SUIT.

THAT'S WHERE THIS WRONGFUL
NOTION ARISES OUT OF THOSE
CASES.

AND THEY TALK ABOUT CALELA, BUT THE SECOND DISTRICT HAS SPECIFICALLY HELD IN REGARD TO INSURANCE CONTRACTS, A SPECIFIC REFUSAL TO PAY A CLAIM IS THE BREACH WHICH TRIGGERS THE CAUSE OF ACTION.

VALID DISPUTE ABOUT THE EXISTENCE OF COVERED LOSS AROSE UNDER THE POLICY AT THE TIME CITIZENS DENIED COVERAGE. SECOND DISTRICT WENT ON, SAID CITIZENS HAS FAILED TO POINT TO LEGAL AUTHORITY OR PORTION OF THE POLICY REQUIRING THEM TO HAVE GIVEN CITIZENS A CONTRARY REPORT PRIOR TO FILING SUIT. IN FACT, THE DIAZ, MUNOZ CASES HAVE ALL REJECTED THIS ARGUMENT BEING MADE.

A BONA FIDE DISPUTE AROSE. SHE MADE A CLAIM FOR BENEFITS FOR SINKHOLE COVERAGE.

THEY DENIED IT.

AND AT THAT POINT IN TIME THERE WAS NOTHING MORE.

AND ONE LAST POINT.

THIS COURT IN WUERFFEL REJECTED UNIVERSAL'S ARGUMENT THAT THE POLICIES BEHIND 7073 WERE TO LIMIT THE INSURED'S ACCESS TO FEES OR TO COURT.

THEY SPECIFICALLY SAID NEITHER OF THESE WERE ADVANCED OR INCLUDED IN THE SINKHOLE STATUTES.

AND SO THIS COURT HAS ALREADY INTERPRETED 7073 NOT TO HAVE ANY EFFECT ON THAT FIRST-PARTY DISPUTE.

THANK YOU VERY MUCH.

>> THANK YOU FOR YOUR ARGUMENTS.