First District Court of Appeal
State of Florida

No. 1D21-275

Allstate Fire and Casualty Insurance Company,

Appellant,

v.

Lymaris Jeanette Colomba Castro,

Appellee.

On appeal from the Circuit Court for Duval County.
Gary L. Wilkinson, Judge.

November 9, 2022

Bilbrey, J.

Allstate Fire and Casualty Insurance Company appeals the trial court's final judgment for Lymaris Jeanette Colomba Castro in the amount of $25,000. Allstate also challenges the order granting Castro's motion for entry of confessed judgment and denying Allstate's motion to dismiss. We find no error in the trial court's judgment and order, and therefore affirm.

Background

In December 2017, the vehicle Castro was driving was rear-ended by an uninsured or underinsured motorist. Castro was injured in the crash and underwent treatment for her injuries.

Castro notified her insurer, Allstate, of her losses, including losses covered by the Uninsured Motorist (UM) portion of her policy. Castro's UM policy covered up to $25,000 in benefits.

In April 2019, Castro, through counsel, demanded the $25,000 in UM benefits. Allstate did not respond, so suit was brought in May 2019 seeking damages under Castro's UM policy. In her single-count complaint, Castro sought judgment against Allstate for "uninsured motorist benefits, interest, costs, and such further relief as the Court deems just and proper." Castro alleged that despite its contractual obligation to pay her benefits under her UM policy, Allstate "has not paid" any UM benefits. In the complaint, Castro did not allege any bad faith or wrongdoing during Allstate's claims-adjusting process.

In its answer to the complaint, Allstate admitted Castro's UM coverage. But Allstate asserted affirmative defenses to reduce the amount of Castro's recovery, such as payments received under other insurance coverage including PIP and from collateral sources. Allstate's affirmative defenses also included comparative negligence.

After four months of discovery and trial preparation by both parties, in September 2019 Castro served Allstate with a demand for judgment under section 768.79, Florida Statutes, and rule 1.442, Florida Rules of Civil Procedure. Castro proposed to settle her case for $18,500. Allstate did not respond within thirty days. The proposal was thus considered rejected. *See* Fla. R. Civ. P. 1.442(f). The court then set the case for trial to begin in July 2020.

In January 2020, Castro filed a notice under section 624.155, Florida Statutes (2019). That statute provides a civil cause of action when the insurer fails to attempt "in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." § 624.155(1)(b)1., Fla. Stat. Castro began the condition precedent to this statutory "bad-faith" action by notifying the Florida Department of Financial Services. *See* § 624.155(3), Fla. Stat. The Department accepted Castro's notification and forwarded the Civil Remedy Notice (CRN) to Allstate, giving Allstate sixty days to pay "the damages," correct the "circumstances giving rise to the violation," or face the prospect

of a bad faith suit. § 624.155(3)(c), Fla. Stat. Allstate's deadline to cure the CRN was in March 2020.

A few days before the statutory deadline for Allstate to respond to the CRN, Allstate issued a check for Castro's UM policy limits of $25,000. The cover letter accompanying the check asserted Allstate's good-faith handling of Castro's UM claim. Allstate denied "all allegations" of the CRN. Allstate stated that its payment of the policy limits cured any violation of section 624.155(1)(b)1. and declared "the matter is now resolved." No conditions of acceptance were imposed by Allstate, and Castro accepted the payment without objection. Both Allstate's check and cover letter in response to Castro's CRN referenced the date of Castro's crash and the Allstate UM claim number.

Castro then moved for entry of a confessed judgment and for attorney's fees under the demand for judgment statute, section 768.79. Castro did not allege bad faith or any other ground under section 624.155, the CRN, or Allstate's response to the CRN. Rather, she alleged that after Allstate had rejected her earlier settlement proposal for $18,500, Allstate confessed judgment by its voluntary, unconditional payment of her $25,000 policy limits before final judgment could be entered by the court. She requested that the court enter a confessed judgment in her favor and award her attorney's fees under section 768.79.[1] Finally, Castro sought an award of her court costs as the prevailing party, under section 57.041, Florida Statutes.

Given the payment from Allstate, Castro's lawsuit did not proceed to trial as scheduled in July 2020. The next action in the court file is Allstate's motion to enforce settlement and to dismiss with prejudice, filed in October 2020. Allstate asserted that Castro's acceptance of Allstate's payment of her UM policy limits constituted a "settlement and/or accord and satisfaction" rendering the lawsuit moot and requiring dismissal of the case.

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[1] Castro sought an award of attorney's fees under section 768.79(1) because Allstate's payment of $25,000, and the court's confessed judgment entered afterward, exceeded Castro's offer to settle for $18,500 by more than 25 percent.

The trial court heard both motions in November 2020. No evidence was presented — the court's ruling was based on the arguments of counsel and filings in the record. The court denied Allstate's motion to dismiss, finding that Castro's acceptance of Allstate's payment of the UM policy limits did not constitute a settlement of the case, render the case moot, or bar her action under the defense of accord and satisfaction. The court granted Castro's motion for entry of confessed judgment, based in part on the Florida Supreme Court's holdings in *Wollard v. Lloyd's and Cos. of Lloyd's*, 439 So. 2d 217 (Fla. 1983), and *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000).

Upon its finding that Allstate had confessed judgment in the UM policy lawsuit by paying the policy limits after the lawsuit was filed, the trial court entered final judgment for Castro in the amount of $25,000. The court did not allow execution on the judgment. The court reserved jurisdiction to determine Castro's entitlement to, and amount of, her attorney's fees under section 768.79.[2] This appeal follows.

Analysis

Questions of law and the application of legal principles to settled facts are "subject to de novo review." *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1213 (Fla. 2016).

"At common law a judgment by confession was one entered for the plaintiff in a case where the defendant, instead of entering a plea, confessed the action, or at any time before trial confessed the action and withdrew his plea and other allegations." *Information Buying Co. v. Miller*, 173 Ga. 786, 161 S.E. 617, 619 (1931) (citations omitted). The Georgia Supreme Court continued:

> The confession of judgment was well known at the common law, which recognized two kinds of judgments by

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[2] The trial court ultimately found that Castro was entitled to attorney's fees under the demand for judgment and awarded fees to Castro. Allstate has appealed the final judgment for attorney's fees and costs in our case number 1D21-2145. Contemporaneous with this opinion, we affirm that award without further comment.

> confession, the one a judgment by cognovit actionem, and the other by confession relicta verificatione. In the former the defendant after service, instead of entering a plea acknowledged or confessed that the plaintiff's cause of action was just and rightful. In the latter, after pleading and before trial, the defendant abandoned his plea or other allegations; whereupon judgment was entered against him without proceeding to trial.

Id.; see also 49 C.J.S. Judgments § 179.

Confession of judgment by cognovit evolved into a debt-collection method to avoid the need for judicial action and a court order.[3] Such judgments based on presuit agreements are barred by Florida statute. § 55.05, Fla. Stat.; *see also Trauger v. A.J. Spagnol Lumber Co., Inc.*, 442 So. 2d 182 (Fla. 1983). This case does not concern a confession of judgment by presuit cognovit.

The type of confession of judgment at issue in this case is the second type mentioned in *Information Buying* — a confession *relicta verificatione*, meaning "his pleading being abandoned." Black's Law Dictionary (11th ed. 2019). "The practice of confessing judgment by a defendant after an action is brought was established by immemorial usage. . . ." *Information Buying*, 161 S.E. at 618 (citations omitted). Although not called a confession *relicta verificatione* in any reported Florida case, confession of judgment following the abandonment of a defendant's pleadings has been applied under Florida law as discussed below.

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[3] A debtor could agree by "cognovit" at the time of entering into a debt to allow entry of judgment upon failure to repay the debt without requiring the creditor to resort to further legal process to enforce the debt. *See D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 176 (1972). This agreement was a "confession of judgment" and the judgment entered on it was a "confessed judgment." *See Confession of Judgment* Black's Law Dictionary (11th ed. 2019); *Trauger v. A.J. Spagnol Lumber Co., Inc.*, 442 So. 2d 182 (Fla. 1983).

"[A] confession of judgment is substantially an acknowledgment that the debt is justly due." *Bank of Chatham v. Arendall*, 178 Va. 183, 191, 16 S.E.2d 352, 355 (1941) (citing *Kinyon v. Fowler*, 10 Mich. 16, 17 (1862)). "A confession of judgment is the substitute for verdict." *Whitley v. S. Wholesale Corp.*, 164 S.E. 903, 903 (Ga. Ct. App. 1932) (citations omitted). "A judgment must be regularly entered upon a confession of judgment. The confession itself is not the judgment of the court." *Id.* (citations omitted).

Florida has used the confession of judgment doctrine in disputes involving insurance policies. "Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured." *Wollard*, 439 So. 2d at 218. "Moreover, Allstate's payment [of the amount in dispute] after suit was filed operates as a confession of judgment. . . ." *Ivey*, 774 So. 2d at 684 (citations omitted).

In most insurance cases, one consequence following a confession of judgment by an insurer after pleading is to enable an insured to recover statutory attorney's fees when forced to file suit to collect valid insurance policy benefits. Section 627.428(1), Florida Statutes, entitles an insured to attorney's fees, "[u]pon the rendition of a judgment or decree by any of the courts of this state against an insured."[4] The effect of a confession of judgment in the context of section 627.428 was discussed by *Wollard* cited by the trial court.[5] 439 So. 2d at 218. In *Wollard*, the Florida Supreme Court held that confession of judgment occurs when insurer denies a policy claim by insured, forcing insured to file suit, and the insurer then pays policy benefits before final judgment. *Id.*

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[4] An exception for UM claims will be discussed below.

[5] The Florida Supreme Court has acknowledged the existence of a confession of judgment after pleading in a case involving matters other than an insurance dispute. *See St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 245 (Fla. 1983) (suit over a contract for the sale of timber).

The *Wollard* holding was reiterated in *Johnson*, where the Court said, "it is well settled that the 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." 200 So. 3d at 1215–16. After determining that a confession of judgment had occurred, the Court found the law "clear" that "[s]ection 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." *Johnson*, 200 So. 3d at 1219.

"'By using the legal fiction of a 'confession of judgment,' our supreme court extended [section 627.428's] application' to cases in which the insurer settles or pays a disputed claim before rendition of judgment." *Tampa Chiropractic Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 141 So. 3d 1256, 1258 (Fla. 5th DCA 2014) (quoting *Basik Exports & Imports, Inc. v. Preferred Nat'l Ins. Co.,* 911 So. 2d 291, 293 (Fla. 4th DCA 2005) (citing *Wollard*)). Without this, an insurer could avoid liability for statutory attorney's fees by paying the benefits sought in the insured's lawsuit before entry of a final judgment, thus avoiding the "rendition of a final judgment or decree" required for the insured to recover statutory attorney's fees under section 627.428(1), Florida Statutes. The Supreme Court in *Wollard* addressed this in stating that it is not "reasonable nor just that an insurer can avoid liability for statutory attorney's fees by the simple expedient of paying the insurance proceeds to the insured or beneficiary at some point after suit is filed but before final judgment is entered, thereby making unnecessary the entry of final judgment. . . ." *Id.* at 218 (quoting *Cincinnati Ins. Co. v. Palmer*, 297 So. 2d 96, 99 (Fla. 4th DCA 1974)). Potentially, if the payment of a debt after suit was justly filed was allowed to occur without consequences, the payment by an insurer could happen even after a jury had rendered a verdict for the insured but before the trial court reduced the verdict to judgment.

The confession of judgment doctrine "applies where the insurer has denied benefits the insured was entitled to, forcing the insured to file suit, resulting in the insurer's change of heart and payment before judgment." *Echo v. MGA Ins. Co., Inc.,* 157 So. 3d 507, 512 (Fla. 1st DCA 2015) (quoting *State Farm Fla. Ins. Co. v.*

Lorenzo, 969 So. 2d 393, 397 (Fla. 5th DCA 2007)); *see also Bryant v. GeoVera Specialty Ins. Co.*, 271 So. 3d 1013, 1019 (Fla. 4th DCA 2019).[6] As *Echo* and *Lorenzo* show, the confession of judgment doctrine provides an important protection for an insurer or other defendant. When an insured never gives the insurer a chance to "incorrectly deny the benefits before filing a lawsuit," the confession of judgment doctrine does not apply. *See Goldman v. United Servs. Auto. Ass'n*, 244 So. 3d 310, 312 (Fla. 4th DCA 2018).

In *Goldman*, the court held that confession of judgment as discussed in *Johnson* was inapplicable when an insured did not give the insurer any notice that the insured disagreed with the payment under the policy before suing. *Goldman*, 244 So. 3d at 311–12. Here, however, Castro made demand on Allstate for the benefits before suit and filed suit only after, as Castro's attorney stated without contradiction, the demand "was not reciprocated or responded to." Castro therefore satisfies the "incorrect denial of benefits/refusal to pay a debt" prerequisite to entry of a confessed judgment.

Allstate acknowledges the validity of the above Florida cases but argues that an exception to the fee provision in section 627.428(1) for UM claims precludes the application of the common law confession of judgment doctrine. Section 627.727(8), Florida Statutes, states, "The provisions of s. 627.428 do not apply to any action brought pursuant to this section against the uninsured motorist insurer unless there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident." Allstate argues that because Castro has brought a UM claim, and there is no coverage dispute, then the trial court's finding that Allstate's payment was a confession of judgment and

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[6] Sometimes it is an insurer that seeks to enforce a confessed judgment rather than an insured. *See Alliance Spine & Joint, III, LLC v. GEICO Gen. Ins. Co.*, 321 So. 3d 242 (Fla. 4th DCA 2021) (affirming confessed judgment sought by insurer where the complaint sought $100 in damages and insurer filed a confession agreeing to those damages plus interest); *see also Garrido v. SafePoint Ins. Co.*, 47 Fla. L. Weekly D173, 2022 WL 107606 (Fla. 3d DCA Jan. 12, 2022).

allowing Castro to pursue fees under the demand for judgment statute was legally erroneous.

We disagree with Allstate's contention that the UM fee exception in section 627.428(1) alters the confession of judgment doctrine. "Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." *Wyche v. State*, 232 So. 3d 1117, 1119 (Fla. 1st DCA 2017) (quoting *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990)). Nothing in section 627.428(1) or anywhere in the insurance code prevents the entry of a confessed judgment. *Cf.* § 55.05, Fla. Stat. (precluding the entry of a confession of judgment based on presuit agreement). We see no reason why the confession of judgment doctrine should not apply in an UM case after an insured was forced to sue to recover the amount due, and the insurer then pays the policy limits, thereby abandoning any pleadings or defenses.

Most Florida cases applying confession of judgment concern a claim for attorney's fee under section 627.428. We have stated:

> The law in Florida is well settled that, after an insured has filed suit to recover under an insurance policy, the insurer's settlement and payment to the insured ordinarily does not relieve the insurer of the obligation to pay an attorney's fee pursuant to section 627.428. This rule is based on the principle that the payment of the claim is the functional equivalent of a confession of judgment, thus obligating the insurer to also pay the attorney's fees.

Brown v. Vermont Mut. Ins. Co., 614 So. 2d 574, 579 (Fla. 1st DCA 1993) (citations omitted). As shown by *Brown*, whether a post suit payment of claim is a confession of judgment is the issue to be addressed first. Here, *Wollard*, *Ivey, Johnson*, and other cases above compel us to answer "yes" to that question.

If a confession of judgment has occurred, only then is the second issue the consequences of the confessed judgment. Allstate correctly states that section 627.428 does not allow an award of

attorney's fees in Castro's UM suit under section 627.727(8). But Castro has a separate statutory basis for fees under section 768.79. A confessed judgment from an insurer or other debtor by abandoning its defenses and paying the policy limits can be a "judgment obtained" under section 768.79, allowing for the award of fees if the other requirements of that statute are met, just as it is a "judgment" under section 627.428.[7] Otherwise, the same absurd results that the Court in *Wollard* cautioned about could occur. *Id.* at 218–19.

Finally, Allstate argues that the payment of policy limits was only made in response to Castro's CRN. Allstate contends that it only made the payment to avoid the possible bad faith exposure including possible attorney's fees. *See* § 624.155(4). But the motivation of an insurer in making the payment on the claim is immaterial in assessing whether a confession of judgment has occurred. *Do v. GEICO Gen. Ins. Co.*, 137 So. 3d 1039, 1043–44 (Fla. 3d DCA 2014). In *Do*, the court said, "there is no requirement that an insurer must intend to confess judgment in order for it to occur—the sole fact that the claim was paid, without more, constitutes a settlement or judgment within the meaning of section 627.428." *Id.* (citing *Avila v. Latin Am. Prop. & Cas. Ins. Co.*, 548 So. 2d 894, 895 (Fla. 3rd DCA 1989)).

For the above reasons, we affirm the order of the trial court which found that Allstate confessed judgment and then entered a judgment based on the confession. Since it was appropriate for the trial court to enter a confessed judgment, it was correct to deny Allstate's motion to dismiss. Although Allstate's payment of the policy limits eliminated any further dispute over the UM policy, Castro's claim for attorney's fees meant that the case was not moot. *See Soud v. Kendale, Inc.*, 788 So. 2d 1051, 1053 (Fla. 1st DCA

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[7] Following the confession of judgment, but before the trial court found entitlement to fees, Allstate raised the reasonableness of the demand for judgment. See § 768.79(7)(b). Allstate also questioned whether the demand was ambiguous. The trial court found the demand was reasonable and unambiguous. In case number 1D21-2145, we affirm that finding without further comment.

2001) (citing *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992)) (allowing a case to proceed where a claim for attorney's fees remained and holding "an otherwise moot case will not be dismissed if there are collateral legal consequences affecting the rights of the parties").

AFFIRMED.

LEWIS and MAKAR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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