DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

SYNERGY CONTRACTING GROUP, INC.,
a/a/o ANNE DORRELL,

Appellant,

v.

FEDNAT INSURANCE COMPANY,
f/k/a FEDERATED NATIONAL INSURANCE COMPANY,

Appellee.

FEDNAT INSURANCE COMPANY,
f/k/a FEDERATED NATIONAL INSURANCE COMPANY,

Appellant,

v.

SYNERGY CONTRACTING GROUP, INC.,
a/a/o ANNE DORRELL,

Appellee.

Nos. 2D21-144, 2D21-147
CONSOLIDATED

December 10, 2021

Appeals from the County Court for Pinellas County; Edwin Jagger, Judge.

Andrew Graf of Battisti Felce, Celebration, for Synergy Contracting Group, Inc.

Kenneth A. Hall and David T. Burr of Galloway, Johnson, Tompkins, Burr & Smith, PLC, Tampa, for Fednat Insurance Company.

LUCAS, Judge.

This is an insurance appraisal dispute over attorneys' fees. In case number 2D21-144, Fednat Insurance Company (Fednat) persuaded the county court that once it had paid an appraisal award to the assignee of its insured, Synergy Contracting Group, Inc. (Synergy), there was no further breach of contract claim to be litigated and, thus, Fednat was entitled to a judgment in its favor. The county court agreed, and Synergy now appeals that judgment. In the companion case number 2D21-147, Fednat appeals the denial of its motion for attorneys' fees and costs pursuant to a proposal for settlement. For purposes of this opinion, we have consolidated the cases. Because the judgment should not have been entered in Fednat's favor under the facts presented below, we reverse the county court's judgment in case number 2D21-144. Our disposition in that appeal renders the appeal in 2D21-147 moot, and we dismiss that case accordingly.

I.

On September 7, 2017, Anne Dorrell's house suffered damages as a result of "sudden and accidental water loss." She hired Synergy to perform restorative repair work and, pursuant to an assignment of benefits provision in Synergy's contract, assigned her rights in her Fednat insurance policy to Synergy. A dispute arose between Fednat and Synergy as to the amount of compensable repairs. Unable to reach a resolution of their dispute, Synergy brought a breach of contract lawsuit against Fednat in the Pinellas County Court.

Fednat filed an answer generally denying it owed any further benefits and asserted as affirmative defenses that Synergy's recovery should be limited to the terms and conditions of the policy and that Synergy had overcharged for the repair work it actually performed. Separately, Fednat filed a motion to compel an appraisal process under the policy to determine the amount of covered damage the property had sustained.[1] The litigation was

[1] The appraisal provision in this policy is fairly standard, and it reads, in pertinent part, as follows:

stayed, the parties proceeded to appraisal, and at the end of the process, the appraisers determined that Synergy was entitled to an additional $3,795.62. Fednat tendered payment of the award to Synergy on May 31, 2019.

Following its payment of the award, Fednat maintained that, because it had fully compensated Synergy under the policy, the lawsuit should be dismissed with prejudice. The county court did not agree with Fednat's position. On June 19, 2019, Fednat served a proposal for settlement in the amount of $100 on Synergy, but Synergy did not accept Fednat's proposal.

Fednat then filed a motion for partial summary judgment in which it essentially requested a declaration from the court that it had fully paid the appraisal award. Insofar as Synergy had no

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> If you and we fail to agree on the amount of the loss, either may:
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> . . . .
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> b. Demand an appraisal of the loss. . . . The appraisers will separately set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of the loss. If they fail to agree, they will submit their difference to the umpire. A decision agreed to by any two will set the amount of the loss.

dispute with that discrete, decretal finding, Synergy agreed to the entry of a partial summary judgment order, which read:

> **ORDERED AND ADJUDGED** that:
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> 1. Defendant's Motion is GRANTED insofar as the Court finds that Defendant paid the appraisal award in full and within the time limit required by the policy.
>
> 2. Plaintiff is entitled to no further benefits under the policy.
>
> 3. The Court makes no determination as to breach of contract at this time.
>
> 4. The Court reserves jurisdiction on the parties' entitlement to attorney fees and costs and the amount to be awarded, if any.

A few months later, Fednat sought to take that partial summary judgment a step farther. On January 28, 2020, it filed a motion for entry of final summary judgment in which it argued that a final judgment—in its favor—was an administrative, ministerial matter necessary to close out the case. Moreover, Fednat pointed out, any award of fees and costs (which was all that really remained in dispute) was ancillary to the breach of contract action, which, according to Fednat, was now moot. Synergy countered that it was improper to enter a judgment in Fednat's favor because Fednat had essentially confessed judgment by paying the appraisal award to

Synergy. Furthermore, as Synergy pointed out, Florida law deems the statutory provision of attorney's fees a part of the insurance contract itself. Thus, Synergy's claim remained viable despite Fednat's postlawsuit payment of the appraisal award.

We surmise the county court may have tried to split the difference, though it appears to have agreed more with Fednat's position. On May 14, 2020, the court entered a final judgment for Fednat. The final judgment stated that Fednat had paid the appraisal award within the policy's time limit, that Synergy was entitled to no further benefits, and that the court would reserve jurisdiction to determine entitlement to attorneys' fees and costs. With this judgment in hand, Fednat then sought to enforce its rejected proposal for settlement. Here, however, the county court balked at Fednat's argument. The court denied the motion in an order, which stated that "[o]n the facts of this case, the Court does not find that Defendant was the prevailing party."

Both parties now appeal; we address their arguments in tandem.

II.

Because the underlying facts and sequence of events are, in the essentials, undisputed, we are left with a question of law—was Fednat entitled to a judgment in its favor after it paid the postlawsuit appraisal award? This is an issue we review de novo. *See Macola v. Gov't Emps. Ins. Co.*, 953 So. 2d 451, 454 (Fla. 2006); *Bedwell v. Bedwell*, 320 So. 3d 896, 897 (Fla. 2d DCA 2021). It is a question that, under the facts presented thus far, should have been answered in the negative. We explain why below.

III.

Judgments are entered in civil lawsuits to decree the rights and obligations of the litigants and indicate an end of litigation in the trial court. In an ordinary breach of contract complaint, the trial court would enter a judgment in favor of either a plaintiff or defendant by referencing the verdict or court adjudication of the underlying claim and defenses. Here, however, the complaint asserted a breach of an insurance policy contract. Thus, the ordinary elements of a breach of contract claim—a contract, a

breach, and causation of damages[2]—and the process for adjudicating attorney's fees arise in a somewhat unique context.

In a case that is virtually indistinguishable from the case at bar, a federal district court provided a thorough and considered examination of this gloss in the law. In *Astorquiza v. Covington Specialty Insurance Co.*, 8:19-CV-226-T-60CPT, 2020 WL 6321868, at *1 (M.D. Fla. Oct. 28, 2020), a commercial property was damaged by Hurricane Irma. When their insurer failed to pay the owners' claimed damages, the insureds filed a lawsuit for declaratory judgment and breach of contract. *Id.* The insurer denied liability, asserted several affirmative defenses, and invoked the policy's appraisal process. *Id.* The subsequent appraisal determined that the property had sustained $39,951.67 of covered damages above the policy's deductible, and the insurer tendered that amount to the insureds. *Id.* The insurer then sought summary judgment,

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[2] *See DNA Sports Performance Lab, Inc. v. Club Atlantis Condo. Ass'n*, 219 So. 3d 107, 109 (Fla. 3d DCA 2017). If a breach is material, then the nonbreaching party is excused from further performance (whereas if a breach is immaterial, the nonbreaching party may still have to render performance). *See generally* 23 Williston on Contracts § 63:3 (4th ed.).

advancing the same arguments Fednat advances here. *Id.* at *3.

Rejecting those arguments, the *Astorquiza* court explained:

> While attorney's fees are generally deemed ancillary to the underlying substantive claim, *see Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977 (Fla. 1987), it is questionable whether this concept applies to claims for fees under § 627.428, at least in the situation presented here. The Florida Supreme Court has held that § 627.428 is incorporated into every insurance contract and in that regard also noted that the fee statute provides that the fee award "shall be included in the judgment or decree rendered in the case." *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla 1993). Accordingly, the Florida Supreme Court held, when an insured is forced to sue to enforce the insurance contract because the insurer has contested a valid claim, "the relief sought is both the policy proceeds *and* attorney's fees pursuant to section 627.428." *Id.* . . . .
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> Even if the attorney's fees claim could be considered ancillary to the contract claim, it does not follow that summary judgment for Defendant would be appropriate here. A number of cases, including *Hill* [*v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 960 (Fla. 2d DCA 2010)], which is cited by Defendant, reverse summary judgments in favor of insurers in similar circumstances. *See, e.g.*, *Hill*, 35 So. 3d at 960-61 (reversing summary judgment and remanding for a determination whether the plaintiff may be entitled to fees); *Beverly v. State Farm Fla. Ins. Co.*, 50 So. 3d 628 (Fla. 2d DCA 2010) (reversing summary judgment for insurer who invoked appraisal process and paid appraisal award after the insured filed suit); *Clifton v. United Cas. Ins. Co. of Am.*, 31 So. 3d 826 (Fla. 2d DCA 2010) (reversing summary judgment for insurer because issues of fact remained as to whether the insurer forced the insured to file suit); *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008)

> (reversing summary judgment for insurer where insurer's post-suit payment entitled plaintiff insureds to attorney's fees)[.]
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> . . . .
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> A summary judgment for Defendant here would additionally be inconsistent with the concept underlying the confession of judgment rule—that the insurer by payment of the claim has effectively abandoned the defense of the insured's lawsuit and conceded that its prior withholding of payment had been incorrect. *See Amador v. Latin Am. Prop. & Cas. Ins. Co.*, 552 So. 2d 1132, 1133 (Fla. 3d DCA 1989) (" 'When the insurance company has agreed to settle a disputed . . . case, it has, in effect, declined to defend its position in the pending suit.' ") (quoting *Wollard v. Lloyd's & Companies of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983)).

2020 WL 6321868, at *3-4.

We agree with the federal court's assessment of Florida law on this point. We would only add a couple of further points that were developed in the case at bar. First, we would point out that Fednat's theory that the payment of a postlawsuit appraisal award renders an insured's breach of contract claim moot is fatally inconsistent with the judgment that was entered in this case. For if Fednat were correct, if this case did indeed become moot upon its payment of the appraisal award, then the proper disposition of the case would have been a dismissal, not a judgment in Fednat's favor.

See Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992) ("A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist. A moot case generally will be dismissed." (citation omitted)); *Breslof v. Pines of Delray N. Ass'n*, 583 So. 2d 810, 811 (Fla. 4th DCA 1991) (questioning whether judgment should have been entered in a moot case because "dismissal [was] the appropriate disposition"); *see also Waters v. Dep't of Corr.*, 306 So. 3d 1264, 1266 (Fla. 1st DCA 2020) ("Because the issues Appellant requested the trial court determine ceased to exist at the time his petition was filed, the trial court properly dismissed Appellant's petition for writ of mandamus as moot."), *reh'g denied* (Dec. 7, 2020).

But as the authorities discussed in *Astorquiza* show, the case was not mooted simply because Fednat tendered the appraisal award in the midst of litigation. And this leads to our second observation about Fednat's arguments in these appeals. Fednat's claims turn upon a rather novel view of the law. According to Fednat, so long as an insurer pays an appraisal award pursuant to a policy provision, even if the payment is occasioned after the filing

of a breach of contract lawsuit, the insurer has fully complied with the policy and cannot be held liable for its prior denial of the claim.

That, however, is not the law. To the contrary, an insurer is ordinarily deemed to have breached the contract of its policy when it wrongly denies a claim. *See Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215 (Fla. 2016); *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684-85 (Fla. 2000); *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983); *Luciano v. United Prop. & Cas. Ins. Co.*, 156 So. 3d 1108, 1110 (Fla. 4th DCA 2015). In this case, the appraisal process confirmed that Fednat had wrongly denied paying Synergy $3,795.62 of benefits under this policy. Quantifying that amount served to expedite resolution of the substantive litigation in the county court; it did not wipe away Fednat's prior denial like a tabula rasa.

Fednat may yet have a defense to liability for Synergy's fees.[3] But under these facts, a judgment in its favor is not one of them.

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[3] For example, the parties have discussed, albeit indirectly, the "race to the courthouse defense" wherein an insured files a breach of contract lawsuit before the insurer has an opportunity to adjust the claim. *See Lewis v. Universal Prop. & Cas. Ins. Co.*, 13 So. 3d 1079, 1081 (Fla. 4th DCA 2009) ("Florida's cases have uniformly held that a section 627.428 attorney's fee award may be appropriate

We, therefore, reverse the final judgment and remand this case for further proceedings consistent with this opinion. Because the underlying judgment has been reversed, we need not address the court's order denying Fednat's attorney's fees based upon that judgment.

Reversed and remanded.

ATKINSON and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.

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where, following some dispute as to the amount owed by the insurer, the insured files suit and, *thereafter,* the insurer invokes its right to an appraisal and, as a consequence of the appraisal, the insured recovers substantial additional sums. Underlying these decisions is the notion that the insureds were entitled to fees as the insureds 'did not race to the courthouse,' the suit was not filed simply for the purpose of the attorney's fee award, but rather to resolve a legitimate dispute, and the filing of the suit acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." (citations omitted)); *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 398 (Fla. 5th DCA 2007) ("[C]ourts generally do not apply [the confession of judgment] doctrine where the insureds were not forced to sue to receive benefits; applying the doctrine would encourage unnecessary litigation by rewarding a race to the courthouse for attorney's fees even where the insurer was complying with its obligations under the policy."). Our holding today is limited to the impropriety of entering a final judgment in Fednat's favor on the facts of this case. We leave it to the county court on remand to address any fee and cost entitlement issues either party may bring before it.