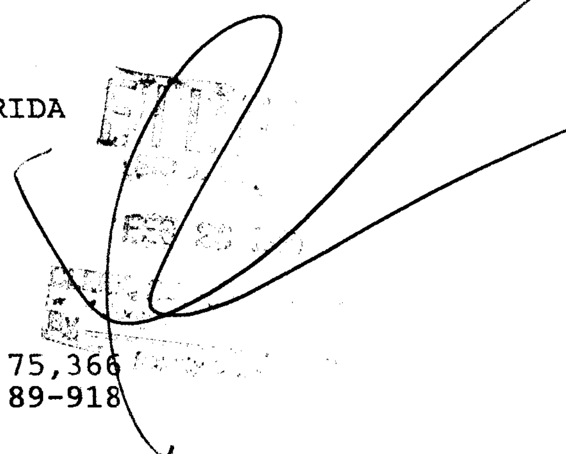
IN THE SUPREME COURT OF FLORIDA



GARY MOORE,

Petitioner,

vs. Case No: 75,366
DCA-1 No: 89-918

ALLSTATE INSURANCE COMPANY

Respondent.

INITIAL BRIEF ON THE MERITS OF PETITIONER GARY MOORE

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STATEMENT OF THE FACTS AND CASE

The accident giving rise to this lawsuit occurred January 6, 1986 when plaintiff, a pedestrian, was struck by an uninsured motor vehicle. (R. 1,88). Prior to this suit being filed, defendant Allstate Insurance Company contended that the uninsured motorist coverage available to plaintiff, its insured, was only $50,000.00. (R. 9, 14). Plaintiff contended that the uninsured motorist coverage available under the policies issued by defendant amounted to $200,000.00. (R. 1, 9, 14). Plaintiff thereafter filed suit in Escambia County Circuit Court against his own insurance Company, Allstate, to collect the full amount of uninsured motorist insurance benefits he contended was available to him. (R. 1).

After this suit was filed and served on Allstate, the defendant, on April 18, 1986, admitted in its answer that the uninsured motorist coverage available to plaintiff was indeed $200,000.00 rather than $50,000.00. (R. 4). Although Allstate admitted by answer in April 1986 that the uninsured coverage was $200,000.00, Allstate never offered to pay any of that coverage to plaintiff until November 1987 when Allstate paid the full $200,000.00 to plaintiff as damages for his injuries. (R. 89). During the eighteen month period between the time Allstate admitted in its answer the full extent of the coverage and finally paid that coverage to plaintiff, at least seven depositions had been taken and extensive other litigation had occurred. In fact, this case had been scheduled fox trial before

defendant paid the insurance coverage available to plaintiff. (R. 50). At anytime prior to paying those proceeds to plaintiff, defendant could have simply amended its answer and contested the amount of coverage.

After defendant paid to plaintiff the entire uninsured motorist coverage provided under defendant's policies, plaintiff sought attorney's fees and costs for the prosecution of this action in the lower court. (R. 53, 56). The parties stipulated that defendant would pay the costs sought by plaintiff and that plaintiff was entitled to an award of attorney's fees. (R. 59). The parties further stipulated to the amount of attorney's fees to be awarded if the fees were limited to litigation of the coverage issue alone and the amount of the fees to be awarded if plaintiff was entitled to fees for the prosecution of the entire action. (R. 59).

The only issue left for determination by the lower court, therefore, was whether plaintiff was entitled to an award of attorney's fees for the prosecution of the entire action or whether the attorney's fees should be limited to only the work done by plaintiff's counsel before the amount of coverage was admitted by defendant in its answer. The lower court sided with the defendant and held that plaintiff was entitled to attorney's fees only for the work performed prior to the admission of the amount of coverage by defendant. (R. 96). The First District Court of Appeal agreed with the trial court. (App. 1). Thereafter, plaintiff invoked the discretionary jurisdiction of

this Court, when the First District certified the question as being of great public importance.

CERTIFIED QUESTION

WHEN AN INSURANCE COMPANY DENIES COVERAGE AND LIABILITY UNDER THE UNINSURED MOTORIST PROVISION OF ITS POLICY, SO THAT ITS INSURED IS FORCED TO FILE SUIT AGAINST IT, BUT THEREAFTER CONCEDES COVERAGE SO THAT ONLY LIABILITY AND DAMAGES REMAIN AT ISSUE, DOES SECTION 627.727 (8), FLORIDA STATUTES (1985) LIMIT THE FEE AWARDABLE UNDER SECTION 627.428(1), FLORIDA STATUTES (1985) TO ONLY THAT PERIOD DURING WHICH COVERAGE WAS AT ISSUE, ALTHOUGH LIABILITY AND DAMAGES CONTINUE TO BE LITIGATED AFTER THE ELIMINATION OF THE COVERAGE ISSUE?

SUMMARY OF ARGUMENT

Pursuant to Section 627.428(1), Florida Statutes, plaintiff is entitled to an award of attorney's fees for all the work performed in the prosecution of this action to collect uninsured motorist insurance proceeds. Nothing in Section 627.428(1) limits plaintiff's attorney fee award to only those efforts expended through the time defendant admitted coverage in its answer.

Once a proper case for declaratory relief has been instituted, the Court, and the parties, can and should adjudicate and litigate the entire controversy involved in an uninsured motorist claim. None of the rights of the parties, including attorney fees, should be determined on a piecemeal basis.

Section 627.428 is intended to penalize insurers that cause their insured to resort to litigation in order to resolve disputes that reasonably could have been resolved without litigation. After having to sue one's own insurance company, therefore, an injured policy holder should be in a better position than an injured person who sues a tortfeasor with whom the injured person has no contractual relationship.

Finally, admissions in answers do not dispose of "discreet pieces of litigation", and cannot be equated with the entry of summary judgment against a party.

ARGUMENT

PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES FOR ALL WORK PERFORMED IN THE PROSECUTION OF THIS UNINSURED MOTORIST ACTION.

Plaintiff's entitlement to an award of attorney's fees in this cause, of course, is found in Section 627.428(1) Florida Statutes (1985):

> Upon the rendition of a judgment or a decree by any of the courts of this state against an insurer and in favor of any named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of any 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. (Emphasis added)

Defendant contends that the award of attorney's fees under Section 627.428(1) must be limited to work performed by the plaintiff's attorney prior to defendant's admission in its answer of the amount of coverage. Plaintiff, on the other hand, contends that he should be awarded attorney's fees under Section 627.428 for his entire efforts, including litigating coverage, up through the time the defendant finally agreed to pay to plaintiff the entire uninsured motorist coverage available to plaintiff.

Obviously, there is no language whatsoever in Section 627.428 that limits plaintiff's award of attorney's fees to the

coverage issue alone. Section 627.428(1) states plainly that a plaintiff is entitled to:

> "A reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."

The First District Court of Appeal has squarely held that Section 627.428 applies across the board and is not limited only to coverage disputes. In Florida Rock and Tank Lines, Inc. v. Continental Insurance co., 399 so. 2d 122, 123, (Fla. 1st DGA 1981), the First District held:

> Further, the fact that Continental had defended the claims and had not denied coverage does not preclude application of the statute [Section 627.4281. James Furniture Manufacturing Co., Inc. v. Maryland Casualty Company, 114 So. 2d 722 (Fla. 3d DCA 1959), disapproved on other grounds, Roberts v. Carter, 350 So. 2d 78, 79 n.6 (Fla. 1977). Finally, the finding that no "coverage question" was presented is not determinative of the issue of attorney's fees. The purpose of the statute is to discourage the "contesting" of insurance policies and to reimburse successful insureds reasonably for their outlays for attorney's fees, when they are compelled to defend or sue to enforce their contracts. Wilder v. Wright, 269 So. 2d 434, 436 (Fla. 2d DCA 1972), quoted with approval on affirmance, 278 So. 2d 1, 3 (Fla. 1973). Here, a bona fide controversy existed as to the rights and obligations of the parties under the contract of insurance. The statute does not require that the contested issue be that of coverage. Gulf Life Insurance Co. v. Urquiaga, 251 So. 2d 904 (Fla. 2d DCA 1971). See also, Travelers Insurance Company v. Horton, 366 So. 2d 1204 (Fla. 3d DCA 1979).

In other words, an award of attorney's fees to plaintiff is appropriate and is required by Section 627.428 in his claim

against his uninsured motorist carrier, if the action was reasonably necessary to pursue the claim under this insurance policy. Whitfield v. Century Insurance Company of New York, **281 So.** 2d **569** (3rd DCA **1973).** Or stated another way, attorney's fees for plaintiff are appropriate under **627.428,** whenever a company's insured must resort to litigation to resolve a conflict when it was reasonably within the insurance company's power to resolve that conflict. Leaf v. State Farm Mutual Automobile Insurance Company, **544** So. 2d **1049** (4th DCA **1989).**

Limiting an insured to an award of fees against the insurer for only that portion of his or her attorney's time expended in litigating the coverage issue violates the long recognized Florida rule that once a proper case for declaratory relief has been instituted, a court must adjudicate the entire controversy involved in an uninsured motorist claim. Kenilworth Insurance Co., v. Drake, 396 So. 2d **836** (Fla. 2d DCA **1981);** Travelers Insurance Co. v. Wilson, **371** So. **2d 145** (Fla. 3rd **DCA 1979),** cert denied **385** So. 2d **762** (Fla. **1980).**

Because the instant case was clearly a proper one for declaratory relief, the court was clearly empowered to resolve all rights of the parties relating to coverage, liability, and damages. **See** Green v. United States Fidelity & Guaranty Co., **181** So. 2d **198** (Fla. 2rd DCA **1965).** Just as it would be improper to adjudicate the rights of the parties in a piecemeal fashion, there can be no rational basis for carving up attorney fees and allowing them for only a small piece of the entire litigation.

The focal point of defendant's position on this issue is Section 627.727(8) (1985):

> 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.

Under the above-quoted statute, the defendant contends that in uninsured motorist litigation, the only time attorney's fees are authorized under Section 627.428 is when coverage is the issue being litigated. Defendant contends, therefore, that once it conceded the coverage issue in its answer in this case, plaintiff's entitlement to attorney's fees magically died at that point, and that plaintiff was not entitled to attorney's fees for the enormous effort over eighteen months required of plaintiff's counsel to force Allstate to pay the coverage it admitted that it had. In other words, Allstate contends that pursuant to Section 627.727(8) the one and only time an insured is entitled to an award of attorney's fees in an uninsured motorist action is when coverage is the issue being litigated.

This identical argument was made by another insurance company and rejected by the Fourth District Court of Appeal in the very recent case of Leaf v. State Farm Mutual Automobile Insurance Company, 544 So. 2d 1049 (4th DCA 1989), where the plaintiff had prevailed in a suit to compel arbitration of an uninsured motorist claim against State Farm. In that case the insurance company just like the defendant in this case contended that plaintiff was not entitled to an award of attorney's fees

because Section 627.727(8) supposedly only allows attorney's fees in an uninsured motorist action unless coverage is in dispute. The Fourth District dismissed that argument out of hand and held that attorney's fees under 627.428(1) should be awarded to plaintiff for prevailing in any action "reasonably necessary to pursue the insurance claim." Id. at 1277-1278 (citation omitted).

Just as in Leaf v. State Farm, the insurance company in the instant case cannot force an insured to resort to litigation and then somehow extinguish plaintiff's claim for attorney's fees by running in and conceding the extent of coverage in its answer. Plaintiff would respectfully suggest, therefore, that "coverage" is not the only issue which gives rise to attorney's fees when an insured prevails against his own insurance company, after being forced into litigation by that insurance company,

The contentions of Allstate on this issue are also defective based upon the clear wording of the statute upon which it relies. Subsection 8 of Section 627.727 simply authorizes attorney's fees in an uninsured motorist case in the event there is a dispute over coverage. Such a dispute clearly existed in this case and the defendant has stipulated that plaintiff is entitled to an award of attorney's fees. When there is a coverage dispute and a proper case for declaratory judgment thereon has been filed, there is nothing in Section 627.727(8) or Section 627.428 which limits attorney's fees only to the coverage issue.

Moreover, Allstate's reading of the statute does not comport with the plain language of Section 627.727(8) which triggers the applicability of Section 627.428 if there is a coverage dispute. Once Section 627.428 applies, there is no statutory or case law to support the proposition that no fees are awardable for the enormous effort over eighteen months required to force Allstate to pay to plaintiff the coverage that it ultimately admitted it had to pay.

In April of 1986 after being sued, Allstate admitted in its answer that the coverage under this policies for the protection of its insured was indeed $200,000.00 rather than $50,000.00. Thereafter, Allstate never offered to pay one dime of that coverage to plaintiff, its insured, until November 1987, when Allstate finally voluntarily paid the full $200,000.00 to plaintiff for his injuries without trial. Allstate now takes the position that plaintiff is not entitled to attorney's fees for all of this extensive litigation over an eighteen month period and that the fees awarded herein should be limited solely to the issue of coverage. Plaintiff respectfully submits that to limit the attorney's fees in this case solely to the effort expended on the issue of coverage would violate the very purpose of Section 627.428 which is: "to penalize a carrier for wrongfully causing its insured to resort to litigation to resolve a conflict when it was reasonably within the carrier's power to do so." Leaf v. State Farm, supra at 1278; Crotts v. Bankers &

Shippers Insurance Co. of New York, 476 So. 2d 1357 (Fla. 2d DCA 1985), review denied, 486 So. 2d 595 (Fla. 1986).

Notwithstanding the penal nature of Section 627.428, the trial court and the majority below obviously got confused by Allstate's argument that to grant attorney's fees on anything other than "coverage" would make the insured who has to sue his own uninsured motorist carrier "better off" than he would be if he were simply suing a third party tortfeasor who was insured. This result, of course, is precisely what Section 627.428 sets out to do. If the uninsured motorist carrier does what it is contractually obligated to do and does not force its insured to resort to litigation to enforce the insurance contract, the uninsured motorist carrier does not have to pay its insureds attorney's fee. If the insurance company does not live up to its contractual obligations and thereby forces its insured to sue the insurance company, then that company, pursuant to Section 627.428 must pay the insured's attorney.

In other words, Section 627.428 is expressly designed to penalize an insurance company that wrongfully causes its insured to resort to litigation against it and to make an insured "better off" when forced to sue his own company than the insured would be if he were suing a third party who had no contractual obligation to the insured.

In short, the "better off" argument militates strongly in favor of awarding fees for all the effort expended in this litigation and not limiting the fee just to that portion of the

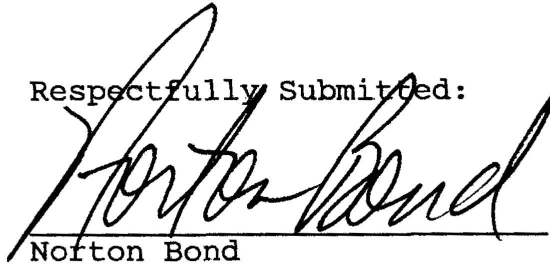
litigation and not limiting the fee just to that portion of the litigation concerning coverage.

Finally, plaintiff respectfully suggests that by relying on State Farm Mutual Automobile Insurance Co. v. Stack, **543** So. 2d 782 (Fla. 3rd DCA 1989) and equating an admission in an answer with the entry of summary judgment the majority below apparently ignores what actually goes on in trial courts in Florida. The entry of summary judgment on the issue of coverage does indeed "finally dispose of a discreet piece of litigation which is concerned with that issue." On the contrary, an admission of coverage in an answer in no way finally disposes of a discreet piece of litigation which is concerned with that issue. Pursuant to Rule 1.190, Florida Rules of Civil Procedure, defendant Allstate Insurance Company had the absolute right to at any time amend its answer and assert any coverage defenses it may wish to assert. Indeed, such amendments could have even conceivably been made after the entry of judgment below. To say that the mere admission of coverage in an answer forever eliminates that issue from litigation is simply incorrect and totally contrary to Rule 1.190, FRCP. To say that an insurance company can deny coverage and force its insured to sue that insurance company and then come in and make an unsworn admission of coverage in its answer and forever cutoff attorney's fees for the prosecution of plaintiff's case is simply wrong and ignores the letter and spirit of Section 627.428.

CONCLUSION

Plaintiff respectfully requests that this Court answer the certified question in the negative, reverse the decision of the First District Court of Appeal in this cause and direct the lower court to award attorney's fees to plaintiff for his attoney's entire efforts expended in the prosecution of this action up to the time defendant finally paid the uninsured motorist coverage to plaintiff.

Respectfully Submitted:



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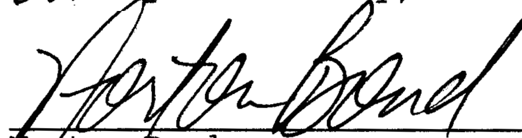
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief on the Merits of Petitioner Gary Moore has been furnished to Larry Hill, Esquire, 9th Floor, Sun Bank Tower, Pensacola, Florida, by hand delivery, on this 22 day of February, 1990.



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