IN THE SUPREME COURT OF FLORIDA

GARY MOORE,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

CASE NO. : 75,366
DCA-1 NO.: 89-918

RESPONDENT'S BRIEF ON THE MERITS

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OTHER AUTHORITIES:

STATEMENT OF THE FACTS AND CASE

Respondent adopts the petitioner's statement of the facts and case with the following additions. During the eighteen month period between the time Respondent acknowledged the full extent of the coverage and the time that the case was settled, the depositions and discovery taken in the case were directed toward the issues of liability and damages, rather than toward the issue of coverage, which had already been admitted (R. 4, along with numerous notices of deposition contained throughout the record on appeal).

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

The purpose of uninsured motorist coverage is to put an insured in the same position as if the tortfeasor had been insured. Pena v. Allstate Insurance Company, 463 So.2d 1256 (Fla. 3d DCA 1985). While the award of attorney's fees in the prosecution of an action against one's own insurance company is generally governed by Florida Statutes, §627.428(8)(1), attorney's fees in uninsured motorists cases are governed in particular by Florida Statutes, S627.727(8), which was added in 1983.

While the 1983 amendment, which limits attorney's fees to cases of coverage disputes, cannot be applied retroactively, the Second District Court of Appeal has impliedly held that §627.727(8) would limit attorney's fees to coverage issues subsequent to 1983. Cooper v. Aetna Casualty & Surety Company, 485 So.2d 1367 (Fla. 2d DCA 1986). Similarly, the Fourth District Court of Appeal has held that §627.727(8) limits attorney's fees to those actions where the insurance company denies coverage. LaChance v. Sagumeri, 14 F.L.W. 215, 4th District, January 18, 1989.

To allow the Petitioner in this case to recover attorney's fees on issues other than the coverage issue would be to place the Petitioner herein in a better position than he would have been in had the tortfeasor been fully insured up to $200,000.00. This is not the purpose of the uninsured motorist statute and the Trial Court's decision limiting attorney's fees to the coverage issue should be affirmed.

Finally, while Petitioner has argued that an admission in an answer to a complaint is not dispositive of "discreet pieces of litigation" because a party can seek to amend an answer during the course of litigation, that did not occur herein and, after the answer of Allstate was filed, there was never any contention by Allstate that there was no coverage up to $200,000.00.

ARGUMENT

THE DECISION OF THE TRIAL COURT AND THE FIRST DISTRICT COURT OF APPEAL LIMITING ATTORNEY'S FEES TO THE WORK PERFORMED ON THE COVERAGE ISSUE ONLY SHOULD BE AFFIRMED.

The purpose of uninsured and underinsured motorist coverage is to place an insured motorist in the same position with regard to liability insurance when he is injured by an uninsured motorist as he would have been in if the uninsured motorist had bad liability insurance coverage. Pena v. Allstate Insurance Company, 463 So.2d 1256 (Fla. 3d DCA 1985). The general provision regarding attorney's fees awardable to an insured who sues his own insurance company is found in Florida Statutes, §627.428, but the specific provision governing suits in uninsured motorist insurance situations is Florida Statutes, §627.727(8), which was passed in 1983. That section provides that S627.428 does not apply unless there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident.

In order to fully understand the rationale for attorney's fees in uninsured motorist cases, it is important to look at pre-1983 decisions as well as post-1983 decisions. In the case of United Services Automobile Association v. Kiibler, 364 So.2d 57 (Fla. 3d DCA 1978), USAA specifically denied coverage, but the Trial Court granted motions for summary judgment on the issues of coverage against USAA. After USAA appealed, the Appellate Court affirmed the orders granting the summary judgments on coverage. Thereafter, the insureds moved the Trial Court to award reasonable attorney's fees pursuant to

Florida Statutes, 5627.428, for the trial work which resulted from USAA's denial of coverage. The Trial Court held evidentiary hearings and awarded attorney's fees to McCray in the amount of $100,000.00 and to Kiibler in the amount of $45,000.00. The Third District Court of Appeal stated:

> We have carefully reviewed the record in regard to Kiibler's award of attorney's fees and have concluded that the trial court abused its discretion in making the award because it failed to differentiate, in considering the evidence, between the attorney's time spent in working on the liability and coverage issues.
>
> It is well settled in this State that a successful tort claimant is not entitled to attorney's fees for litigating the tortfeasor's liability. The claimant is only entitled, pursuant to Section 627.428, to a reasonable fee for litigating the issue of insurance coverage. See, e.g., Wilder. v. Wright, 278 So.2d 1 (Fla. 1973); Central National Insurance Co. v. Gonzalez, 295 So.2d 694 (Fla. 3d DCA 1974); and Cincinnati Insurance Co. v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974).

One of the cases cited by the Kiibler court was Central National Insurance Co. v. Gonzalez. In that case, the Trial Court had entered summary final judgment in which he awarded $40,000.00 to the plaintiffs on the issue of damages and a total of $8,500.00 in attorney's fees. Of the $8,500.00, $5,500.00 represented the work performed in the action to determine coverage and the remaining $3,000.00 represented the services performed in the suit against the tortfeasor. The appellate court held:

> It is established now that a successful tort claimant is not entitled to attorney's fees under Fla. Stat. 5627.428, F.S.A. in a direct action on the issue of negligence

> against the tortfeasor and his (her) insurance carrier where the question of insurance liability coverage is not an issue. Wilder v. Wright,-Fla. 1973, 278 So.2d 1. Accordingly, we reversed that portion of the amended final summary judgment awarding plaintiff $3,000.00 in attorney's fees for their lawsuit against Azpericueta.

Thus, it was clear prior to the 1983 amendment to the uninsured motorist statute that attorney's fees were not awardable for work done in proving liability or damages, but only for work done by the plaintiff's attorney in proving coverage. After the 1983 amendment to the uninsured motorist statute, the Second District Court of Appeal held that the amendment to the statute could not be applied retroactively because the Supreme Court had held that the right to attorney's fees is a substantive right. Cooper v. Aetna Casualty & Surety Company, 45 So.2d 1367 (Fla. 2d DCA 1986). In that case, the Trial Court had awarded attorney's fees in the amount of $40,000.00 reflecting the fees relating to the coverage dispute and had said that the sum of $120,000.00 represented the total amount of fees involved in the action. Because the appellate court said that the amendment to §627.727(8) could not apply retroactively, it held that the trial court erred in limiting the attorney's fees to $40,000.00. Impliedly, this is a holding that the statute would have required the trial court to limit the attorney's fees to $40,000.00 if the cause of action had arisen after the effective date of the statute. The statute was amended in 1983 and the cause of action in the case herein arose in 1986. Therefore, the Trial Court below was correct in limiting the attorney's fees to the time spent on the issue of coverage.

In the case of LaChance v. Sagumeri, 14 F.L.W. 215, 4th DCA, January 18, 1989, the Appellate Court held that an attorney's fee award under §627.428(1) was prohibited by §627.727(8). The plaintiff in that case had sued State Farm for uninsured motorist benefits and State Farm did not contest coverage in the case. While the Appellate Court recognized that §627.428(1) entitled an insured to an award of attorney's fees against her own insurer when suit is brought on the insurance policy and the insured prevails, it noted that §627.727(8) specifically provided that 5627.428 did not apply to any action brought pursuant to the uninsured motorist statute unless there is a dispute over whether the policy provides coverage. State Farm argued that it was the intent of the legislature in enacting subsection 8 that an insured should have the right to recover attorney's fees from the insurance company in an uninsured motorist suit only where the isurance company has denied coverage. State Farm reasoned that "to hold otherwise would lead to the anomalous result of an injured insured being in a better position if the tortfeasor did not carry insurance than he would be in if the tortfeasor did carry insurance. In the former situation, he would recover his attorney's fees as well as his damages, while in the latter, he would be limited to his damages without attorney's fees." Id. at page 216.

The Appellate Court in the LaChance decision adopted the rationale of State Farm and held that attorney's fees are recoverable only where there is a denial of coverage in an uninsured motorist situation. The same rationale would extend to

the situation presented herein, that is, the attorney's fees that are awarded should be only for the labors of the attorney in establishing coverage, as opposed to labors of the attorney in establishing liability and damages. To allow an insured's attorney to recover adequate fees for the time spent by the attorney in establishing coverage does not place the insured in a better position than he would have been in had there been liability coverage for the tortfeasor because he would not have had to sue the liability insurance company to establish that coverage. However, awarding attorney's fees to the insured for the insured's attorney's time spent in establishing liability and damages would place the insured in a better position than he would have been in had the tortfeasor had liability insurance coverage, because he would not have been able to obtain attorney's fees from the liability insurance carrier for having to prove liability and damages.

The Petitioner's reliance on the case of Florida Rock and Tank Lines, Inc. v. Continental Insurance Co. is totally misplaced herein. That case was not an uninsured motorist case and that case predated the amendment to the uninsured motorist statute which limited recovery of attorney's fees under **5627.428.** Likewise, the Whitfield case relied upon by the Petitioner was decided in **1973,** well before the amendment to the uninsured motorist statute. Further, the Whitfield case did not involve a plaintiff attempting to prove liability and damages and did not involve a plaintiff bringing a lawsuit pursuant to the uninsured motorist statute to collect damages from the uninsured motorist

carrier. Rather, it involved a suit concerning *a* declaration of rights and appointment of an impartial third arbitrator.

Finally, the Leaf v. State Farm Mutual Automobile Insurance Company case relied upon by the Petitioner distinguishes itself from our case in the following language:

> We disaqree with State Farm's contention that §627.727(8) qoverns in the instant case. In our view, that statutory section specifically deals with disputes involving whether the uninsured motorist coverage insurer is liable for insurance benefits given the facts of a particular claim. The pleadings filed in the instant case clearly show that Leaf's action against State Farm did not constitute a request for payment of uninsured motorist coveraqe benefits but rather a demand that the determination of the amount of such benefits be arbitrated rather than litigated. We perceive this to be a case falling within the parameters of chapter 682, the Arbitration Code, of the Florida Statutes, and not the uninsured motorist coverage provision of chapter 627. Leaf's pleadings and oral argument established that while chapter 682 provided the remedy, Section 627.428 justified the attorney's fee. We agree. [Emphasis added.1

In other words, the Fourth District Court of Appeal in the Leaf case specifically recognized that attorney's fees are not recoverable under §627.727(8) except in coverage disputes, but that that section did not apply to the lawsuit filed by Kathleen Leaf because she did not file a suit requesting "payment of uninsured motorist coverage benefits," but rather she filed a suit demanding "that the determination of the amount of such benefits be arbitrated rather than litigated." The Fourth District Court of Appeal recognized that the Arbitration Code and 5627.428 would govern the issue of whether or not a fee should be

awarded in that case and that the uninsured motorist statute and specifically §627.727(8) would not govern since the plaintiff in that case was not seeking monetary damages from the uninsured motorist carrier. Exactly the opposite was true in the case below as shown in the complaint (R. 1) and §627.727(8) would control. In other words, the Fourth District Court of Appeal in the Leaf case specifically recognized the distinction that we have previously made in this brief regarding the Whitfield case, that is, that the Whitfield case concerned the issue of arbitration and was not a suit for monetary damages from the uninsured motorist carrier. While the language from the Leaf and the Whitfield cases concerning the "reasonably necessary to pursue the insurance claim" standard is viable language in regard to cases under the Arbitration Code, those cases do not in any way consider §627.727(8) when arbitration is not an issue.

Likewise, Petitioner's reliance on the Drake and Wilson cases, which hold that a court must adjudicate the entire controversy once a proper case for declaratory relief has been instituted, is inappropriate. The Trial Court herein did adjudicate the entire controversy by awarding fees to the Petitioner for the efforts of the attorney in establishing coverage. The Trial Court did not fail or refuse to rule on part of the controversy, rather, Petitioner simply does not like to ruling of the Trial Court. Respondent has no dispute with the cases which hold that the Trial Court is empowered to resolve all the rights of the parties once a lawsuit has been properly filed, but simply saying that the Trial court is empowered to resolve

all those rights does not mean that the Trial Court has to award fees to the prevailing party on all issues adjudicated by it.

Petitioner has argued that the award of attorney's fees is designed to penalize an insurance company for wrongfully causing its insured to resort to litigation. What Petitioner chooses to ignore in his brief is that the Trial Court has done just that by awarding fees to the Petitioner's attorney commensurate with the work that was necessitated by the carrier's causing its insured to resort to litigation. Petitioner's argument that the Petitioner should be made "better off" *so* that the carrier will be penalized for initially denying coverage defies logic. The carrier has been penalized by both the Trial Court and the First District Court of Appeal herein and to adopt Petitioner's position on this issue would not only penalize the carrier but also make the Petitioner better off than an injured party suing a tortfeasor. It would also make the Petitioner herein better off than an insured who simply seeks to file a court action against his own insurance company, rather than proceeding to arbitration, even when there is not a denial of coverage. In such a case, if the carrier agrees to waive arbitration and to allow the court to consider all of the other issues involved, the insured is not entitled to attorney's fees in the court action because Florida Statute §627.7278(8) simply does not allow for such fees by its clear and unambiguous language. If the Petitioner could point to clear language in Florida Statute §627.727(8) (1985) which would allow an insured to file suit against his own insurance company even when there

has not been a denial of coverage and then recover fees in that action, then Petitioner's argument would merit consideration. However, the clear language of the statute does not allow for fees in such a case and the Petitioner herein should not be placed in a better position than other insureds where the insurance company has not denied coverage just to further penalize the carrier for denying coverage.

Finally, Petitioner argues that the First District Court of Appeal erred in following the decision in State Farm Automobile Insurance Company v. Stack because that case involved a partial summary judgment establishing coverage and the case herein had an admission of coverage in the answer filed by Allstate. Such a distinction between this case and the Stack case is a distinction without real difference. The First District Court of Appeal recognized that Stack was not directly on point, but found that the holding in Stack was sufficiently analogous to our factual situation *so* as to be controlling. The First District Court of Appeal specifically found that "the issue of coverage was not in dispute after Allstate's answer.'' (A-5) A review of the entire record would reveal that that finding by the First District Court of Appeal is accurate. Allstate never again disputed the coverage issue in this litigation and did not seek to amend its answer at any time prior to the Trial Court's awarding of attorney's fees. If Petitioner had been concerned about the finality of the admission by Allstate, the Petitioner could have done just what the insured did in the Stack case, i.e., move for partial summary judgment on the coverage issue.

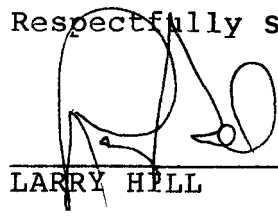
The Trial Court could have then entered partial summary judgment based upon the admission in Allstate's answer. To accept Petitioner's argument on this issue would allow an insured to control whether or not he is entitled to fees beyond the admission of coverage in the answer filed by the insurance company by simply not moving for summary judgment. This certainly cannot be the public policy of the state of Florida.

The purpose of the uninsured motorist statute, as described in the Pena case previously discussed, has been met by the Trial Court and the First District Court of Appeal in their decisions to limit attorney's fees to the coverage issue and would be abrogated by a reversal of those decisions by this Court. Therefore, it is respectfully urged that this Court should affirm the decision of the First District Court of Appeal.

CONCLUSION

Respondent respectfully requests that this Court affirm the decision of the First District Court of Appeal and the Final Judgment of the Trial Court on attorney's fees pursuant to the clear legislative intent regarding the purpose of the uninsured motorist statute.

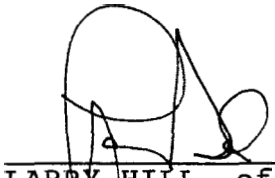
Respectfully submitted,



LARRY HILL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Respondent's Brief on the Merits to the Honorable Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, by First Class U. S. Mail; and a copy to Norton Bond, Esquire, 300 East Government Street, Pensacola, Florida 32501, by hand delivery on this the 13th day of March, 1990.



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