

IN THE SUPREME COURT OF FLORIDA

FILED  
APR 3 1990  
SUPREME COURT  
*ph*

GARY MOORE,  
Petitioner,

vs.

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

ALLSTATE INSURANCE COMPANY  
Respondent.

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REPLY BRIEF ON THE MERITS OF  
PETITIONER GARY MOORE

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ARGUMENT

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

Allstate Insurance Company relies solely on the contention that Section 627.727(8) provides that Section 627.428 does "not apply to any action brought pursuant to the uninsured motorist statute unless there is a dispute over whether the policy provides coverage." On the other hand, Allstate freely admits, as it must, that the instant case clearly involved a dispute over whether the Allstate policy provided uninsured motorist coverage to plaintiff. Allstate freely admits, therefore, and so stipulated in the lower court, that Section 627.428 applies to this action and that plaintiff was entitled to an award of attorney's fees in this cause.

Allstate, however, has never come to grips with the fact that attorney's fees are paid under Section 627.428 and not under Section 627.727(8). Try as it might, Allstate cannot explain how Section 627.727(8) in some way limits fees to be awarded under Section 627.428.

Perhaps the most constructive way to construe this statute is to paraphrase Section 627.727(8) so that it states a positive rather than a negative:

"The provisions Section 627.428 do...apply to any action brought pursuant to this section against the uninsured motorist insurer [where] there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident." (Emphasis added)

Section 627.727(8) clearly provides that the provisions of Section 627.428 apply to the instant case. One of the provisions of Section 627.428(1) which clearly applies to this case is:

"...the...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 or beneficiary's attorney prosecuting the suit in which the recovery is had." (Emphasis added)

Again, at the expense of being redundant, nothing in Section 627.428 in any way limits attorney's fees to the coverage issue only.

This is the very reason why Florida Rock and Tank Lines, Inc. v. Continental Insurance Co., 399 So. 2d 122 (Fla.1st DCA 1981), and the cases cited therein are important in this appeal. Florida Rock and Tank Lines and the cases cited in that decision stand for the proposition that Section 627.428 is not limited to awarding attorneys' fees for the litigation of coverage only. Indeed, as this Court stated in Wilder v. Wright, 278 So. 2d 1 (Fla. 1973):

"The purpose of the statute is to discourage contesting of valid claims of insureds against insurance companies...and to reimburse successful insureds reasonably for their outlays for attorneys' fees when they are compelled to defend or to sue to enforce their contracts..."

In this action, Allstate is attempting to convince this Court to engraft upon the final sentence of 627.428(1) language such as "except in uninsured motorist cases where attorneys\* fees

would be awarded on the coverage issue only." In passing Section 627.727(8) the Florida legislature made no effort whatsoever to change one single word of the language in Section 627.428. In passing Section 627.727(8) the legislature could have changed the wording of Section 627.428 to conform to the position now taken by Allstate in this appeal. This Court, however, cannot make such changes. This Court cannot add to the language of Section 627.428 to limit its application. This Court has repeatedly refused to serve simply as an arm of the Florida legislature and must continue to refuse. As written Section 627.428(1) provides "compensation for the insureds or beneficiary's attorney prosecuting the suit in which the recovery is **had.**" (Emphasis added). Section 627.428 does not apply to the coverage issue alone.

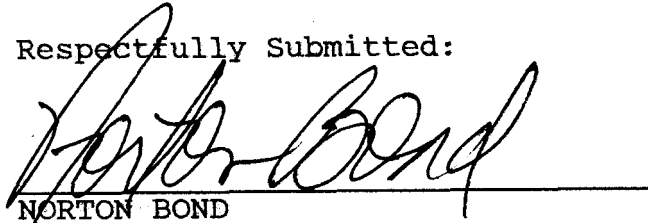
When one considers the history of Section 627.727(8) and its predecessor, Section 627.727(6)(1983), it becomes clear that Section 627.727(8) was enacted for the sole purpose of confronting the situation faced by the Fourth District in LaChance v. Sagumeri, 537 So. 2d 665 (Fla. 4th DCA 1989) and not for the purpose of limiting Section 627.428 only to coverage issues. LaChance clearly holds that Section 627.428 applies to an uninsured motorist action where there is a dispute over whether the policy provides coverage for an insured motorist proven to be liable for the accident. Section 627.727(8) does not and cannot limit Section 627.428 to attorneys' fees solely on the issue of coverage.

Finally, the situation and decision in LaChance v. Sagumeri also remove all the substance from the "better off" argument made by Allstate in this action, Allstate continually contends that allowing fees in this uninsured motorist case would make the plaintiff "better off" than he would be if the tort feasor had been fully insured, This argument might make sense if fees could be recovered simply by suing one's uninsured motorist carrier. LaChance in Section **627.727(8)** obviously does not allow the insured in **this** instance to be better off. However, when the insurance company "'contests" a valid claim of an insured and the insured is "compelled to defend or to sue to enforce their contract'", the insured is indeed, from an attorney's fee standpoint, better off than one who is simply suing a third party tort feasor. That is the precise reason Section **627.428** was enacted. When an insurance company has a valid contractual obligation to an insured and it refuses to fulfill that obligation, that insurance company must pay that insured's attorney's fees for prosecuting the suit in which the recovery is had.

CONCLUSION

Again, 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 trial court to award attorneys' fees to plaintiff for his attorney's entire efforts expended in the prosecution of this suit.

Respectfully Submitted:

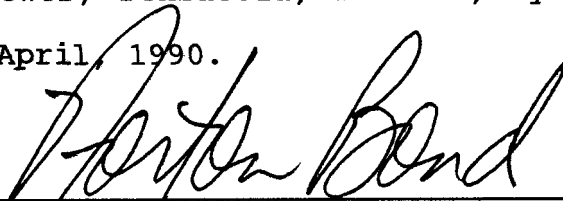
A handwritten signature in black ink, appearing to read "Norton Bond", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished to Larry Hill, Esquire, 9th Floor, Sun Bank Tower, Pensacola, Florida, by hand delivery, on this 2<sup>d</sup> day of April, 1990.



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