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IN THE SUPREME COURT OF FLORIDA

CLAUSSON P. LEXOW and UNITED STORAGE SYSTEMS, INC., d/b/a THE EXTRA CLOSET OF OCALA, LTD.,

~~Appellants,~~ appellees

vs,

INSURANCE COMPANY OF NORTH AMERICA,

~~Appellee.~~ appellant

/

CASE NO. 78,376

APPELLEE'S ANSWER BRIEF

CERTIFIED QUESTION
ELEVENTH CIRCUIT
COURT OF APPEALS
CASE NO. 90-3331

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INTRODUCTORY STATEMENT

Appellee, Insurance Company of North America, shall be referred to in this brief as "INA." Appellants, Clausson P. Lexow and United Storage Systems, Inc., d/b/a The Extra Closet of Ocala, Ltd., shall be collectively referred to as "Lexow." The United States District Court for the Middle District of Florida, Case No. 88-67-Civ-OC-12, The Honorable William Terrell Hodges, Judge, shall be referred to as "District Court."

References to the District Court record shall be to the docket sheet and shall refer to the volume, court paper number, and page. References to the opinion of the United States Court of Appeals, Eleventh Circuit, certifying the question before this Court shall be to the page number of that opinion.

STATEMENT OF THE CASE

INA accepts the statement of the case submitted by Lexow in his initial brief herein, except that INA disagrees with Lexow's characterization of the contents of its memorandum in opposition to Lexow's motion for attorney's fees filed in the district court (R2-70-1 through 7) and respectfully suggests that the document speaks for itself.

STATEMENT OF THE FACTS

INA agrees with the first paragraph of the statement of the facts set forth in Lexow's initial brief herein. Lexow disagrees

with the remaining portion of the statement of the facts and therefore, submits its own statement as follows. [1]

In the subrogation action, a settlement was reached with the insurer for the second tortfeasor in the amount of $100,000.00. (R2-37-1 through 2) Once that settlement was reached, INA and Lexow could not agree on who was entitled to the $100,000.00 in settlement proceeds. (R2-64-3) On February 23, 1988, Lexow's attorney forwarded the $100,000.00 settlement proceeds to the attorney for INA for deposit in an interest bearing account pending determination of entitlement to the settlement proceeds. (R2-83-4) Entitlement to the settlement fund was never pled as an issue in the state trial court. (R1-12-22, 23; R1-18-4) It was first raised before the state trial court by Lexow's attorney at a "pre-trial conference" attended only by Lexow's attorney. (R1-12-26) Since

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[1] Lexow's statement of the "facts" in part is based upon correspondence and orders entered by the state court which were not in evidence before the district court. These documents, from the state court subrogation action against the tortfeasors responsible for Lexow's fire loss, were attached as exhibits in support of Lexow's motion to dismiss, or in the alternative, motion to abate (R1-12; R1-13) and in support of Lexow's motion for summary judgment (R2-31) in the district court. The district court ruled that the state court orders, and thus the "facts" derived from those orders, had no collateral estoppel or res judicata effect on the matters pending before the district court because the state trial judge was reversed on appeal and there was no evidence submitted to the district court which would tend to establish the "facts" argued by Lexow, as extrapolated from those documents. (R2-44) Accordingly, INA submits that any "facts" extrapolated from those documents are not properly before this Court. Because Lexow has extrapolated certain facts from those documents, however, INA has been required to do the same here, in an effort to present its version of what occurred in the state court, in order to demonstrate that, contrary to the inference raised by Lexow in his statement of the facts, INA did not improperly avoid the state court's ruling by dismissing the state court action in an effort to re-litigate the issue.

the case had settled prior to the pre-trial conference and INA had agreed to dismiss the case pursuant to that settlement, the other parties assumed there would be no trial and no pre-trial. (R1-12-26) A trial date was nevertheless set by the judge. (R1-12-23, 26) Realizing that the issue had never been pled, Lexow's counsel contacted INA's counsel and said that Lexow would file a motion for resolution of the entitlement issue and that the motion would be set for hearing after the trial. (R1-12-23, 25) Nevertheless, Lexow's attorney attended trial before the state judge, and, without any other parties present, the state trial judge ruled that Lexow should get the settlement fund. (R1-12-17 through 21) INA appealed the court's order, and the state appellate court reversed finding that the trial court had no jurisdiction to decide the entitlement issue. CIGNA v. United Storage Systems, Inc., 537 So.2d 129 (Fla. 5th DCA 1988). In light of what occurred in the state court action, it was reasonable for INA to believe that the entitlement issue could be more properly litigated in a forum removed from the local jurisdiction. Thus, INA filed its declaratory judgment action in federal court and litigated for the first time the factual and legal issues pertaining to entitlement to the fund. (R1-1)

In the declaratory judgment action, the district court had to determine the effect of the subrogation receipt given to INA by Lexow and the amount of Lexow's total loss, which embraced the subsidiary question as to whether the claimed business losses and lost future profits could be proven to the degree required by

Florida law. (R2-64-3, 4) On these issues, the district court has noted that Florida law was murky with respect to proof of Lexow's claim for lost future profits. (R2-64-8) In regard to the issue concerning the effect of the subrogation receipts, the district court noted that while a case did exist on the issue, Florida Farm Bureau Insurance Co. v. Martin, 377 So.2d 827 (Fla. 1st DCA 1979), the interpretation of this case was subject to a dispute which the court had to resolve involving the fact that in the Martin case, there was no separate subrogation receipt or agreement as there was in the case before the district court, therefore requiring the district court to determine whether or not Martin should be applied to the case. (R2-64-4 through 6) The district court resolved these issues in favor of Lexow and therefore ruled that Lexow was entitled to the $100,000.00 settlement fund. (R2-64-9)

Post-trial, Lexow requested an award of attorney's fees (R2-66) pursuant to §627.428(1), Florida Statutes (1987), which reads in pertinent part:

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

INA filed its opposition to Lexow's motion for attorney's fees, arguing that attorney's fees were not authorized under §627.428(1). (R2-70)

The district court denied Lexow's motion for attorney's fees finding that the dispute between the parties was not one under a policy or contract of insurance, as required by §627.428, and alternatively finding that an award of attorney's fees would not be appropriate even if §627.428(1) applied, because INA's dispute with Lexow was over a type of claim which could reasonably be expected to be resolved by a court, rather than by the insurer itself. (R2-90-1 through 7)

INA specifically disagrees with the statement made by Lexow in his statement of the facts at page 8 of his initial brief that "The Eleventh Circuit indicated in its opinion that a literal reading of §627.428(1) appeared to entitle Lexow to an award of appellate attorney's fees, but the case law from the First District Court of Appeal and the Second District Court of Appeal was conflicting without such conflict having been resolved by this Court." Rather, the Eleventh Circuit in its opinion merely stated as follows:

> Provided that these requisite conditions are met, we note that the literal language of the statute appears to direct an appellate court to award attorney's fees to a successful insured.

(Opinion of the Eleventh Circuit at page 4574) (emphasis supplied) By this statement, the Eleventh Circuit was not implying that a literal reading of the statute entitled Lexow to an award of appellate attorney's fees in this case. Rather, the court was stating that to the extent that the statutory conditions are met, a successful insured would be entitled to attorney's fees. This reference was not specifically directed to Lexow under the facts of this case, but was intended to mean that any successful insured

would be entitled to attorney's fees, provided that the conditions of the attorney's fee statute were met. The Eleventh Circuit certified its question to this Court, because it found a conflict in the decisions of the First and Second District Courts of Appeal in regard to whether the dispute between Lexow and INA was "under a policy or contract" of insurance, as that phrase is used in §627.428(1), Florida Statutes. (Opinion of the Eleventh Circuit at page 4575).

SUMMARY OF ARGUMENT

Florida Statutes §627.428 is in derogation of the "American rule" that attorney's fees are generally not recoverable and, hence, must be strictly construed. This statute consistently has been interpreted by this Court as authorizing the recovery of attorney's fees only when the insured prevails in a dispute involving the rights and obligations of the parties under a policy or contract of insurance. The district court correctly followed the clear language of the statute and the weight of Florida authority in denying Lexow's motion for attorney's fees because the dispute between INA and Lexow as to entitlement to the fund recovered from the third party tortfeasor was not a dispute under the insurance policy issued by INA to Lexow and did not involve INA's policy obligations to Lexow. Indeed, at the time of the dispute over entitlement to the subrogated fund, INA had already paid its full policy limits to Lexow and INA's obligations to Lexow under the insurance policy had therefore come to an end. The

dispute between INA and Lexow arose from the subrogation action against the tortfeasor.

INA's subrogation rights against the tortfeasor arose from the common law of subrogation, and were not created by the insurance policy or any contract between INA and Lexow. Contrary to Lexow's central argument, INA did not have a policy obligation to indemnify Lexow and bear the loss until Lexow had been made whole, and Lexow has not pointed to any policy language that would make this so. The only obligation INA had was to pay for those losses that were covered by the policy, up to the amount of policy limits, and this obligation was met by INA in this case. In making his central argument, Lexow is confusing insurance policy obligations with a principle of common law subrogation that precludes the subrogor's recovery from the wrongdoer, until the subrogee has been made whole. This principle of common law subrogation was interpreted and applied by the district court in the declaratory judgment action in this case and resulted in the award of the subrogated fund to Lexow. Hence, the award to Lexow of the subrogated fund was not as the result of any breach of a policy obligation that INA had to Lexow, but rather was based upon application of common law principles of subrogation. As such, the district court correctly held that Lexow was not entitled to attorney's fees under §627.428 because the dispute between the parties had not involved their respective rights under the policy or contract of insurance. INA bore the burden of paying full policy limits and its seeking of reimbursement from the tortfeasor pursuant to its subrogation

rights did not affect or reduce the insurance payment made to Lexow or involve INA's policy obligations to Lexow.

Contrary to Lexow's argument, only one appellate case involving subrogated insurers can be said to support an award of attorney's fees to Lexow, and that case clearly did not analyze the provisions of Florida Statutes §627.428 requiring that the dispute be under a policy or contract of insurance. The cases involving subrogated insurers relied upon by INA do not support an award of attorney's fees to Lexow in this case, and as found by the district court, are the better reasoned cases on this issue. Lexow mistakenly relies upon cases involving the Florida PIP statute in support of his argument that he is entitled to attorney's fees in this case. However, the PIP cases are not relevant to this dispute because the PIP statute authorized reimbursement from the insured of PIP benefits previously paid by the insurer and the PIP statute specifically made Florida Statute §627.428 applicable to the PIP dispute. There is no similar Florida Statute making §627.428 applicable to disputes over subrogated funds such as that involved here.

Alternatively, the district court correctly held under Florida law that even if it had construed this action as one under an insurance contract or policy, an award of attorney's fees would not be appropriate because INA did not wrongfully withhold the settlement fund obtained from the tortfeasor. Under Florida law, an insurance company does not wrongfully withhold benefits, for purposes of an award of attorney's fees, if the dispute is over a

type of claim which reasonably could be expected to be resolved by a court rather than by the insurance company itself. The district court correctly found that INA reasonably filed the declaratory judgment action to resolve the underlying questions as to the amount of Lexow's loss and the legal effect of the subrogation receipt. As noted by the district court, Florida law had been murky with respect to Lexow's claim for lost future profits. Moreover, as held by the district court, the subrogation issue was not so clear that INA acted wrongfully in litigating it. The Florida case which existed on the issue was distinguishable on its facts and, therefore, its application to the dispute between INA and Lexow was not clear.

ARGUMENT

Lexow is not entitled to attorney's fees because the dispute between INA and Lexow as to entitlement to the third party tortfeasor's payment was not "under a policy or contract" of insurance, as that phrase is used in Florida Statutes §627.428(1).

The Eleventh Circuit Court of Appeals has asked this Court to determine whether the dispute between INA and Lexow as to entitlement to the third party tortfeasor's payment was a dispute "under a policy or contract" of insurance, as that phrase is used in Florida Statutes §627.428(1). Since this Court is being asked to construe a Florida Statute, the rules of statutory construction are important, particularly those pertaining to the construction of statutes providing for attorney's fees. As noted by the Eleventh Circuit Court of Appeals, the fundamental rule in Florida is that an award of attorney's fees is in derogation of the "American Rule" that attorney's fees are generally not recoverable and, hence, statutes allowing for the award of such fees should be strictly construed. Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985); Sunbeam Enters., Inc. v. Upthegrove, 316 So.2d 34 (Fla. 1975); Roberts v. Carter, 350 So.2d 78 (Fla. 1977).

The Florida courts have consistently applied this rule of strict construction to Florida Statute §627.428. Lumberman's Mutual Insurance Co. v. American Arbitration Assoc., 398 So.2d 469 (Fla. 5th DCA 1981); Travelers Indemnity Co. v. Chisholm, 384 So.2d 1360 (Fla. 2d DCA 1980); Sheridan v. Greenberg, 391 So.2d 234 (Fla. 3rd DCA 1980); Travelers Indemnity Co. of American v. Morris, 390

So.2d 464 (Fla. 3rd DCA 1980); Argonaut Insurance Co. v. Maryland Casualty Co., 372 So.2d 960 (Fla. 3rd DCA 1979); Hartford Accident and Indemnity Co. v. Smith, 366 So.2d 456 (Fla. 4th DCA 1978); American Home Assurance Co. v. Keller Industries, Inc., 347 So.2d 767 (Fla. 3rd DCA 1977); Time Insurance Co. v. Arnold, 319 So.2d 638 (Fla. 1st DCA 1975); American Bankers Insurance Co. of Florida v. Benson, 254 So.2d 851 (Fla. 3rd DCA 1971); American National Insurance Co. v. de Cardenas, 181 So.2d 359 (Fla. 3rd DCA 1966).

Not all disputes between an insured and insurer are subject to the provisions of §627.428. Construing the statute pursuant to its clear and unambiguous provisions, unless a judgment is rendered in favor of an insured under a policy or contract of insurance, §627.428 is inapplicable. This has been acknowledged by this Court in The Equitable Life Assurance Society of the United States v. Nichols, 84 So.2d 500 (Fla. 1956), wherein this Court stated that the predecessor to this statute consistently has been interpreted by this Court as authorizing the recovery of attorney's fees from the insurer only when the insurer has wrongfully withheld payment of the proceeds of the policy. Likewise, in Wilder v. Wright, 278 So.2d 1 (Fla. 1973), this Court quoted the appellate court with approval stating:

> 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 attorney's fees when they are compelled to defend or to sue to enforce their contracts ...

Id. at page 3. To the same effect is Feller v. Equitable Life Insurance Society of the United States, 57 So.2d 581 (Fla. 1952),

wherein this Court stated that the predecessor to §627.428 had as its purpose the reimbursement of insureds when they are compelled to sue to enforce their insurance contracts. This has been recognized by Florida's district courts of appeal, which have consistently held that the purpose of the attorney's fee statute is to reimburse the insured's attorney's fees incurred in disputes involving the rights and obligations of the parties under a contract of insurance. Florida Rock and Tank Lines, Inc. v. Continental Insurance Co., 399 So.2d 122 (Fla. 1st DCA 1981); Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989).

This Court's decision in Industrial Fire and Casualty Insurance Co. v. Prygrocki, 422 So.2d 314 (Fla. 1982), is not to the contrary. Lexow argues that this Court intended that decision to hold that §627.428 is applicable in all cases where an insured receives a judgment against his insurer, regardless of whether or not the underlying suit was under the contract of insurance between the parties. However, Industrial Fire and Casualty Insurance Co. v. Prygrocki did not construe the provisions of §627.428 which require that the dispute be one under a policy or contract of insurance. Instead, Prygrocki dealt solely with the issue of the class of persons whom §627.428 is intended to benefit. The only issue resolved by Prygrocki was whether a pedestrian, who was not the named or contracting insured or part of the insured's household, but who was an "insured" under the provisions of the personal injury protection coverage of an automobile policy, could claim attorney's fees under §627.428. This case did not deal with

whether the dispute had to involve the contract of insurance for purposes of application of the statute. This latter issue, which is the issue before this Court, was the issue addressed by this Court in Wilder v. Wright, supra; Equitable Life Assurance Society of the United States v. Nichols, supra; and Feller v. Equitable Life Assurance Society of the United States, supra. Accordingly, this Court's decision in Prygrocki is not relevant to the issue to be decided in this case, and for this reason, Lexow's argument that Prygrocki stands for the proposition that the statutory phrase "under a policy or contract" does not modify, or refer to, the word "judgment" as used in the statute, is without merit.

The district court specifically found that Lexow did not prevail in the declaratory judgment action under a policy or contract of insurance and, therefore, correctly denied Lexow's claim for attorney's fees. (R2-90-3) The purpose of the declaratory judgment action was to resolve the dispute between INA and Lexow as to which party was entitled to the fund which had been recovered by INA and Lexow from the third party tortfeasor who caused the fire loss for which INA paid its policy limits. This dispute was not one involving the insurance policy issued by INA to Lexow and did not involve INA's policy obligations to Lexow. Rather, the dispute arose from the subrogation action against the tortfeasor.

The crux of Lexow's argument on this appeal is that INA's claim to the tortfeasor's payment obtained in the subrogation action contested INA's policy obligation to indemnify Lexow and

bear the loss until Lexow had been made whole. This argument, however, is without merit. The short answer to Lexow's argument is "What policy obligation?" Contrary to Lexow's argument, the only obligation INA had was to pay for those losses that were covered by the policy, up to the amount of policy limits. DeCespedes v. Prudence Mutual Casualty Co., 193 So.2d 224, 226 (Fla. 3rd DCA 1967). There is no dispute on this appeal that INA paid its full policy limits to Lexow after the fire, without the need for litigation in regard to that payment. Had INA contested its policy obligations to Lexow to pay policy limits for the fire loss, Lexow would have been entitled to attorney's fees under §627.428 in regard to that dispute. Lexow recognizes this at page 24 of his initial brief before this Court. However, there was no dispute in regard to INA's payment to Lexow of policy limits and once INA paid its policy limits to Lexow, its obligations to Lexow under the insurance policy were at an end. See, Hoffman v. White, 277 So.2d 290 (Fla. 4th DCA 1973) (payment in good faith in accordance with the provisions of the insurance policy discharges the insurer from further liability under the policy unless the insurer is on notice of an objection to the payment by the insured or policy beneficiary).

An insurer has no obligation under a first party insurance policy, such as the fire insurance policy pursuant to which INA paid Lexow, to proceed against the tortfeasor who caused the loss for purposes of obtaining for the insured proceeds over and above the policy limits which were paid to the insured. Holyoke Mutual

Insurance Co. v. Concrete Equipment, Inc., 394 So.2d 193 (Fla. 3rd DCA 1981). The insurer does have a right of subrogation against the tortfeasor which it may exercise, in its discretion, for purposes of its own benefit. Holyoke Mutual Insurance Co. v. Concrete Equipment Co., Inc.. However, no fiduciary duty arises under the policy as between insurer and insured to see to it that the insured is made whole where the relationship was pursuant to a first party contract of insurance. See, Kujawa v. Manhattan National Life Insurance Co., 541 So.2d 1168 (Fla. 1989); Baxter v. Royal Indemnity Co., 317 So.2d 725 (Fla. 1975). Accordingly, once insurance policy benefits have been paid, if the insurer decides to proceed against the tortfeasor pursuant to its subrogation rights, and a recovery is had against the tortfeasor, any contest between the insurer and the insured as to which party is entitled to the fund of money recovered from the tortfeasor is not one which arises under the policy because it involves no duties or obligations to the insured under the policy and no fiduciary obligation by the insurer to the insured exists. It is a dispute that is outside of the insurance contract and, hence, §627.428 has no application.

Because Lexow recognizes that §627.428 is only applicable to disputes between an insured and insurer involving the insurance contract between them, Lexow has advanced the argument that the parties' contest over the subrogated fund somehow is a breach of INA's policy obligation to Lexow. Lexow has not, however, pointed to any policy language which makes this so. Indeed, the policy of insurance issued by INA to Lexow is not a part of the record on

this appeal and this is because it has never been disputed by the parties that full policy limits were paid by INA to Lexow at the outset, following the fire loss. The issues involved in the declaratory judgment action before the district court and on this appeal have never related to INA's obligations under the insurance policy it issued to Lexow, but rather, have involved the respective rights of the parties as a result of the subrogation action which they prosecuted against the tortfeasor.

In this regard, it is important to examine the nature of the subrogation action which underlies the parties' dispute. As indicated in the statement of facts, at the time that INA paid its full policy limits to Lexow, Lexow executed a subrogation receipt. In its memorandum opinion on the question of whether INA or Lexow was entitled to the subrogated fund, the district court held that the subrogation receipt was neither a separate contract nor part of the insurance policy, but rather, was merely an acknowledgment of INA's common law right of subrogation against the tortfeasor who was responsible for the fire. (R2-64-6; R2-90-1,3) This Court has held that the doctrine of subrogation is based upon the principles of natural justice and was created to afford relief where one is required to pay a legal obligation which ought to have been met, either wholly or partially, by another. Trueman Fertilizer Co. v. Allison, 81 So.2d 734 (Fla. 1955). The doctrine is based on the policy that the tortfeasor should not be unjustly enriched merely because the loss which he has caused has been paid by insurance and that the tortfeasor should be ultimately liable to the one paying

the loss. West American Insurance Co. v. Yellow Cab Co. of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986).

There are two types of subrogation. Conventional subrogation, which depends upon a contract between the parties providing for rights of subrogation, and equitable subrogation, which arises by operation of law and is an equitable action implied in law in favor of one whose money is used to discharge the obligation of another. Phoenix Insurance Co. v. Florida Farm Bureau Mutual Insurance Co., 558 So.2d 1048 (Fla. 2d DCA 1990); Jones v. Williams Steel Industries, Inc., 460 So.2d 1004 (Fla. 5th DCA 1984).

As held by the district court, INA's subrogation rights in this case were not found within the policy of insurance nor were they created by contract between Lexow and INA, rather, they arose by operation of law upon INA's payment to Lexow of its policy limits. As such, the dispute between Lexow and INA was not a dispute which involved INA's insurance policy obligations to Lexow, which at that point had already been met, but was a dispute involving subrogation rights which arose by virtue of Florida's common law of subrogation. In arguing that INA had a policy obligation not to seek reimbursement from the tortfeasor until Lexow was made whole, Lexow is confusing policy obligations with legal principles of subrogation. INA acknowledges that the district court ruled that INA was not entitled to the subrogated fund because Lexow had not recovered all of his damages resulting from the fire. However, this ruling was based upon the district court's interpretation of the common law of subrogation and not

upon any finding that the insurance policy obligated INA to refrain from seeking reimbursement from the tortfeasor until Lexow was made whole. (R2-64)

The rule that consistently has been followed in Florida, with one exception, is that disputes such as that between INA and Lexow over entitlement to the subrogated fund are not disputes that arise under the insurance policy, but rather, are in the nature of an action in rem against the fund of money recovered from the tortfeasor. Therefore, the dispute is not subject to the provisions of §627.428 because the dispute is not one that is pursuant to a policy or contract of insurance. Forsyth v. Southern Bell Telephone & Telegraph Co., 162 So.2d 916 (Fla. 1st DCA 1964); Government Employees Insurance Co. v. Graff, 327 So.2d 88 (Fla. 1st DCA 1976); Lititz Mutual Insurance Co. v. Bowdoin, 365 So.2d 173 (Fla. 1st DCA 1978).

In Forsyth v. Southern Bell Telephone & Telegraph Co., Columbia Casualty paid its insured, Forsyth, for property damage done to the insured's motorcycle as a result of a motor vehicle accident. The insured then instituted litigation against the alleged tortfeasor and recovered damages, which included the property damage done to the motorcycle. Columbia Casualty then sought to exercise its subrogation rights against the fund recovered from the tortfeasor, but refused to allow a deduction from the fund for the insured's attorney's fee for recovering the fund from the tortfeasor. A declaratory judgment action was therefore filed to resolve the dispute as to entitlement to the

fund. On appeal, the appellate court affirmed the trial court's award of a reasonable fee for recovering the fund, but denied an award of attorney's fees for services rendered in the declaratory judgment action to resolve the entitlement dispute. In interpreting §627.0127, Florida Statutes, the predecessor to §627.428, the court stated that the declaratory judgment action was not a suit under the insurance policy as required by the statute:

> This petition does not constitute a suit against Columbia Casualty under the insurance policy issued by it for which an attorney's fee would be allowable under F.S. §627.0127, F.S.A. The suit is in the nature of an action in rem against the fund of money received by Forsyth's attorney in settlement of the [suit against the tortfeasor].

Id. at 921-922.

Similarly, in Government Employees Insurance Co. v. Graff, 327 So.2d 88 (Fla. 1st DCA 1976), GEICO paid its insured $10,000.00 for personal injuries sustained in an accident with an uninsured vehicle. Subsequently, the insured recovered $25,000.00 in an action against the alleged tortfeasor. When the parties could not agree on the division of the money recovered from the tortfeasor, GEICO filed an action in state court. The court concluded that GEICO was entitled to a portion of the settlement fund, but deducted from the sum the amount of a reasonable fee for the services of the insured's lawyer in collecting the money from the tortfeasor. [2] The court declined, however, to assess against GEICO

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[2] It must be kept clear that, in the present case, Lexow and INA each paid its respective attorneys fees and costs in the subrogation action against the tortfeasors and neither party has ever contended that it was not appropriate for each party to bear

an additional fee for the services of the insured's lawyer in the action for a judicial determination of entitlement to the settlement fund because the lawsuit was not "'under a policy or contract of insurance' within the meaning and application of §627.428 ..." since, as the court stated, GEICO "long ago paid the benefits due under the policy." Id. at 92. Contrary to Lexow's argument regarding this case in his brief, the insured had prevailed on the merits of the case because GEICO did not receive 100% of the insurance benefits as it had claimed, but rather had its claim reduced by the insured's attorney's fees in recovering the fund. Hence, the court's decision not to apply §627.428 did not turn on the fact that the insured did not prevail, but rather, turned on the fact that the dispute was not under a contract or policy of insurance.

Molyette v. Society National Life Insurance Co., 452 So.2d 1114 (Fla. 2d DCA 1984), is the only Florida case which conflicts with the weight of Florida authority on this issue. In footnote 2 of the order denying attorney's fees in this case, the District Judge points out that the appellate court in Molyette merely applied the statute and awarded fees without addressing the important portion of §627.428 which requires that, for the statute to be applicable, a judgment against an insurer and in favor of an insured must occur "under a policy or contract" of insurance. In

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its own fees and costs in that action. The attorney's fees sought here by Lexow are for the declaratory judgment action brought subsequent to the recovery from the tortfeasors wherein the parties disputed entitlement to that recovery.

its decision, the Molyette court merely holds that the statute is applicable, without setting forth any analysis of the statute and without discussing whether the dispute in that case was one under a policy or contract of insurance. The Molyette court may have overlooked this requirement of the statute in reaching its decision and if so, its decision is in conflict with the better reasoned Florida cases followed by the district court in this case. Alternatively, INA notes that in Molyette, the insurance policy contained a subrogation clause. It may be that the Second District Court of Appeal believed that because the insurance policy itself contained a subrogation clause, the subrogation dispute was one under the policy of insurance thereby making §627.428 applicable. [3] If so, Molyette is distinguishable on this basis from the facts of the case before this Court. In any event, either because it is distinguishable on its facts, or because it is erroneously decided in that no consideration was given to whether the dispute in the

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[3] Because the right of subrogation is recognized at common law, to the extent that a subrogation clause in an insurance policy merely acknowledges that common law right, a dispute between an insured and insurer regarding the insurer's subrogation rights would not necessarily fall within the provisions of Florida Statutes §627.428 because such a dispute would not involve the insurer's obligations under the insurance policy, but rather would only involve the parties' respective rights under the common law doctrine of subrogation. To the extent that a subrogation clause within an insurance policy expands the common law right of subrogation and gives the insurer greater rights than that available to it under the common law, §627.428 more properly would be applicable to a dispute between the insured and insurer under such a clause because in such a case, the insurance policy itself would have created the respective rights of the parties in regard to subrogation and therefore, their dispute would be based on obligations created by the insurance policy.

case arose under a policy of insurance, Molyette should not be followed by this Court.

Lexow attempts to characterize the parties' dispute over entitlement to the subrogation fund as a dispute under the policy of insurance issued by INA, by arguing that INA was in essence attempting to receive reimbursement of the insurance benefits it had paid to Lexow and that this constituted INA's attempt at a partial rescission of performance of its policy obligations to Lexow. Lexow mistakenly relies on a number of cases decided under Florida's personal injury protection (PIP) statute, §627.736 (1991), Florida Statutes, for this argument. Florida's PIP statute formerly contained a provision permitting equitable distribution between the insured and the insurer of PIP benefits paid by the insurer. This provision of the former PIP statute was contained at §627.736(3), Florida Statutes (1975), and was repealed in 1976. While in effect, the statute as to equitable distribution permitted the insurer to claim reimbursement from its insured of PIP benefits paid to the insured, to the extent that those benefits were subsequently recovered from the tortfeasor, with equitable apportionment of reasonable attorney's fees and other reasonable expenses incurred in effecting the recovery. The PIP statute at §627.736(8) (1975) also provided that with respect to any dispute between the insured and the insurer in regard to the payment of PIP benefits and/or with regard to the equitable apportionment thereof, the provisions of §627.428 would apply and therefore, the prevailing insured would be entitled to his attorney's fees as a

result of any such dispute. See generally in regard to equitable distribution Uniguard Insurance Co. v. Davis, 299 So.2d 667 (Fla. 1st DCA 1974); overruled in part by Williams v. Gateway Insurance Co., 331 So.2d 301 (Fla. 1976).

Lexow cites to a number of cases involving petitions for equitable distribution under the former PIP statute for the proposition that attorney's fees under §627.428 are recoverable in all disputes between an insured and his insurer involving entitlement to a subrogated fund. See Catches v. Government Employees Insurance Co., 318 So.2d 552 (Fla. 1st DCA 1975); Reliance Insurance Companies v. Kilby, 336 So.2d 629 (Fla. 1st DCA 1976); Rodriguez v. Travelers Insurance Co., 367 So.2d 687 (Fla. 3rd DCA 1979); and Travelers Insurance Co. v. Rodriguez, 387 So.2d 341 (Fla. 1980). However, these cases are only applicable to PIP disputes, and are not applicable to the present dispute.

Initially, it should be noted that the former PIP statute specifically gave the insurer the right to seek reimbursement of PIP policy benefits previously paid from the insured, to the extent that those benefits had been recovered by the insured from the third party tortfeasor. Because reimbursement from the insured of benefits already paid was in question, the cited cases involving the doctrine of equitable distribution commented that a material obligation of coverage to its insured would be denied by the insurer to the extent that it wrongfully claimed reimbursement of policy benefits already paid. Such is not the case here. INA's claim of entitlement to the subrogated fund recovered from the

tortfeasor was not a claim for reimbursement of policy benefits it had already paid to Lexow. The funds recovered from the third party tortfeasor were independent of and were in excess of the policy benefits that had been paid to Lexow. Whether or not INA was entitled to recover those separate and excess funds in no way affected the fact that Lexow had already recovered his full policy benefits from INA and INA's recovery of the separate fund from the tortfeasor did not affect Lexow's ability to retain the insurance funds previously provided to him by INA. Had INA prevailed on the entitlement claim and received the subrogated fund, this would not have diminished Lexow's prior recovery of insurance benefits from INA.

More importantly, the PIP statute specifically made §627.428 applicable to the reimbursement dispute. There is no statutory provision making §627.428 applicable to the dispute between INA and Lexow in this case. Accordingly, the PIP cases have no application to the question presently before this Court.

Lexow also argues that the First District Court of Appeal's decision in Lititz Mutual Insurance Co. v. Bowdoin, 365 So.2d 173 (Fla. 1st DCA 1978), supports his position on this appeal. Analysis of the Lititz decision, however, demonstrates that it supports INA's position that §627.428 is not applicable to this case. In Lititz, the First District Court of Appeal stated:

> While it is generally true that an insured is not entitled to attorney's fees when the suit does not arise out of the insurance contract, (Forsyth v. Southern Bell Telephone & Telegraph Co., supra, and Government Employees Insurance Co. v. Graff, 327 So.2d 88 (Fla. 1st DCA 1976)) the opposite is

> true where there is evidence that the insurer refused to negotiate in good faith. (Catches v. Government Employees Insurance Co., 318 So.2d 552 (Fla. 1st DCA 1975))

Id. at page 176.

The Lititz court recognized and affirmed its prior decisions in Forsyth and Graff which had held that disputes between insurers and insureds over entitlement to a separate subrogation fund do not arise out of the insurance contract and therefore, §627.428 is not applicable. The Lititz court did not apply that rule in the case before it, however, because it found that there was evidence that the insurer had refused to negotiate in good faith with the insured in regard to the entitlement issue and therefore held that under its prior decision in Catches v. Government Employees Insurance Co., 318 So.2d 552 (Fla. 1st DCA 1975), attorney's fees should be awarded as the result of the insurer's bad faith. INA submits that the First District Court of Appeal's reliance on Catches was misplaced. Catches was a PIP case and therefore differed from the facts of Lititz, which was not a PIP case, in that, as noted by this Court in Travelers Insurance Co. v. Rodriguez, 387 So.2d 341 (Fla. 1980), the Florida PIP statute expressly makes §627.428 applicable to PIP cases. Moreover, this Court in Rodriguez disagreed with Catches, to the extent that it employed a "bad faith" test, holding that by virtue of the statutory language in the PIP statute, §627.428 was applicable to all PIP cases regardless of the insurer's good or bad faith. Consequently, it appears that the court in Lititz erred in making a "bad faith" exception to the general rule of Forsyth v. Southern Bell and

Government Employees Insurance Co. v. Graff, cases which were more closely on point on the facts with Lititz than the Catches case.

Whether or not the Lititz "bad faith" exception to the general rule that an insured is not entitled to attorney's fees when the suit does not arise out of the insurance contract is or is not good law, in the instant case there is absolutely no evidence of bad faith on the part of INA. As found by the district court in the order denying Lexow an award of attorney's fees:

> Plaintiff reasonably filed this declaratory action to resolve the question as to the amount of Lexow's loss and the legal effect of the subrogation receipt. Moreover, the court does not consider the subrogation issue so clear that plaintiff acted wrongfully in litigating it. See Lititz Mutual Insurance Co. v. Bowdoin, 365 So.2d 173 (Fla. 1st DCA 1979). Consequently, the court finds that defendants are not entitled to an award of attorney's fees under §627.428.

(R2-90-5)

Lexow argues at page 15 of his initial brief herein that the fact that INA paid Lexow and initially discharged its performance under the policy, a fact material in the district court's decision to deny Lexow attorney's fees, has been "rejected as an unsound basis for denying attorney's fees to an insured forced to litigate a reimbursement demand by its insurer." Lexow cites to Florida Rock and Tank Lines, Inc. v. Continental Insurance Co., 399 So.2d 122 (Fla. 1st DCA 1981); Travelers Indemnity Co. v. Rosedale Passenger Lines, Inc., 55 FRD 494 (D.Md. 1972); and Catches v. Government Employees Insurance Co., supra for this argument. The inapplicability of the Catches decision to this case has been discussed above by INA. Likewise, Florida Rock and Tank Lines v.

Continental Insurance Co. and Travelers Indemnity Co. v. Rosedale Passenger Lines are not applicable to the facts of this case. In Rosedale Passenger Lines, a decision based upon Maryland law, the insurer paid a liability claim made against its insured to a third party. Thereafter, the insurer sought reimbursement of that payment from the insured, arguing that the insured had breached its insurance policy obligations and therefore, the insurer should not have been required to pay the liability claim on behalf of the insured. The insured prevailed in that action and was awarded attorney's fees. The rationale for the award of attorney's fees in the Rosedale Passenger Lines case was that the court had found that the insurer was obligated to pay the liability claim under the insurance policy to the third party. Accordingly, attorney's fees were awarded to the insured because he had to protect his policy right to have the insurer pay the liability claim. Obviously, the dispute between the insurer and the insured in that case pertained to the insurer's obligations to make payment under the insurance policy and had this case arisen in Florida, §627.428 would have applied. In the present case, INA's obligations under the insurance policy issued to Lexow were not disputed.

Likewise, the dispute between the insured and the insurer in the Florida Rock and Tank Lines, Inc. case, supra, also directly involved the insurer's obligations under the insurance policy. In this case, the insurer defended and settled certain claims against its insured and subsequently, sought reimbursement of the defense costs and settlement payment from the insured, arguing that the

insurance policy and/or an endorsement that was a part of the policy required that reimbursement be made. The insured denied that this was the effect of the policy and prevailed against the insurer and was awarded attorney's fees under §627.428. Clearly, in this case, the dispute between the insurer and the insured pertained to the insurer's obligations under the insurance policy to defend the insured and settle the claims against the insured. The First District Court of Appeal in this case specifically stated that the purpose of §627.428 was 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. The court noted that a bona fide controversy existed as to the rights and obligations of the parties under the contract of insurance and hence, the attorney's fee statute applied. Again, the dispute between the parties in the present case did not pertain to INA's policy obligations.

Lexow's reliance on Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980) and Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1974), is also misplaced in that neither of these cases are relevant to the case before this Court. In Gibson, the insurer denied that it was liable for policy benefits to the insured and litigated the issue. However, just prior to entry of judgment against the insurer, it tendered payment of policy benefits to the insured. The court held that the insurer could not avoid application of the attorney's fee statute by tendering

payment just prior to judgment, because by litigating the insured's claim under his policy, it had required the insured to incur attorney's fees. Obviously, this is not the case before this Court wherein INA paid full policy benefits to Lexow, without the need for litigation. Clearly, the dispute between Lexow and INA before this Court is not about whether INA should have paid policy limits to Lexow and this has never been a dispute between the parties. Rather, the dispute between INA and Lexow concerns entitlement to a separate sum of money recovered by INA and Lexow from the third party tortfeasor.

Campbell v. Government Employees Insurance Co. was a third party bad faith claim filed by the insured against his insurer, after the insured suffered judgment against him in excess of his policy limits. The insured sued the insurer arguing that because of the insurer's bad faith failure to settle the liability claim against the insured within policy limits, the insured had been subjected to an excess judgment. The dispute between the insurer and the insured pertained to whether or not the insurer had properly performed its policy obligations to the insured and hence, the dispute directly pertained to the policy of insurance and attorney's fees were awardable. In the case before this Court, the dispute between the parties has nothing to do with INA's performance of its policy obligations to Lexow. As argued above, INA met its policy obligations when its paid full policy limits to Lexow. INA had no policy obligation to pursue the third party tortfeasor in this case for the benefit of Lexow nor did it have a

policy obligation to refrain from pursuing the tortfeasor, merely because Lexow claimed that the insurance policy benefits paid by INA had not made him whole. INA's rights and obligations in regard to pursuit of the tortfeasor arose from the common law doctrine of subrogation, a doctrine which arises from operation of law so that the tortfeasor who actually caused the loss is not unjustly enriched merely because of the presence of insurance for payment of the loss. Because INA's subrogation claim did not arise from the policy of insurance, §627.428 has no application to this dispute.

Lexow's argument that fees should be recoverable by him because no Florida statute expressly prohibits an insured from recovering attorney's fees under the facts of Lexow's case is without merit. As argued above, the award of attorney's fees is in derogation of the common law and therefore, statutory or contractual authority for the award is needed, and such authority will be strictly construed. By virtue of the very language of §627.428 the legislature has specifically limited the cases in which attorney's fees are recoverable to those in which a judgment is rendered in favor of an insured and against an insurer in a dispute under a policy or contract of insurance. Instead of a broad, sweeping intent, as argued by Lexow, the limiting language used by the legislature is consistent with the public policy consideration of providing for the recovery of attorney's fees only when the insurer disputes its obligations under an insurance contract, but allows insurers to litigate other kinds of disputes--outside of the obligations of the insurance policy--in the same

manner and under the same conditions as any other corporation or individual, without the imposition of fees to the prevailing party. Since the dispute between Lexow and INA did not arise under a policy or contract of insurance and, therefore, the judgment rendered in favor of Lexow was not one meeting the statutory requirement, it can be said that the legislature has specifically precluded an award of attorney's fees under the facts of Lexow's case.

Alternatively, even if this Court should find that the dispute between INA and Lexow was one under the policy of insurance issued by INA to Lexow, §627.428 should not be applied to this case because the subrogated fund was not wrongfully withheld by INA. As noted in the statement of facts, when the tortfeasor paid its policy limits pursuant to the subrogation action prosecuted by INA and Lexow to INA, INA placed the fund in an interest bearing account and sought a declaratory decree as to how the fund should be distributed. As noted by the district court, an insurance company does not wrongfully withhold benefits for purposes of application of §627.428 where the dispute is over a type of claim which reasonably could be expected to be resolved by a court. Government Employees Insurance Co. v. Battaglia, 503 So.2d 358 (Fla. 5th DCA 1987); Crotts v. Bankers and Shippers Insurance Co. of New York, 476 So.2d 1357, 1358 (Fla. 2d DCA 1985). To the same effect are the cases of Manufacturers Life Insurance Co. v. Cave, 295 So.2d 103 (Fla. 1974) and New York Life Insurance Co. v. Shuster, 373 So.2d 916 (Fla. 1979). In these cases the insured

filed interpleader actions when it was faced with conflicting claims to insurance proceeds. The courts held that the insurer did not act wrongfully in withholding payment of benefits and litigating the issue because factual and legal issues were involved which the company could not reasonably be expected to resolve on its own. See Lumbermans Mutual Insurance Co. v. American Arbitration Assoc., 398 So.2d 469, 471 (Fla. 5th DCA 1981) (where the court expressly stated that §627.428 must be strictly construed and authorizes recovery only when insurance proceeds are wrongfully withheld under the policy).

The district court correctly held that INA reasonably filed this declaratory judgment action to resolve the factual issue of the amount of Lexow's loss and the legal effect of the subrogation receipt. The district court noted, in its opinion on the factual issue, that Florida law had been somewhat murky with respect to proof of Lexow's claim for lost future profits which was the crux of the issue in regard to the amount of Lexow's loss and whether or not he had already been made whole by the insurance payments which he had received from INA, and by the additional $99,900.00 which Lexow recovered from the receivership of the insolvent insurer of one of the tortfeasors. (R2-64-3) On the legal issue, the court held that it did not consider the subrogation issue so clear that INA acted wrongfully in litigating it. (R2-90-5) As noted by the district court in its opinion (R2-64-4 through 6), while a case existed on the issue, Florida Farm Bureau Insurance Co. v. Martin, 377 So.2d 827 (Fla. 1st DCA 1979), the interpretation of this case

was subject to a dispute - a dispute which the court had to resolve. In Martin, there was no separate subrogation receipt as there was in the instant case. Rather, the insurance company proceeded upon a subrogation provision in the insurance policy itself. Relying primarily upon Garrity v. Rural Mutual Insurance Co., 77 Wis.2d 537 (1977), the court in Martin held that the insured was entitled to be made whole before the subrogated insurer could recover or participate in any portion of a recovery from a tortfeasor. In Garrity, unlike the Martin case, a separate subrogation receipt was involved. In citing to Garrity, the Florida court in Martin stated that it expressed no opinion as to whether the execution of the separate subrogation receipt modified the common law doctrine of subrogation. Accordingly, this question, which was the main legal issue to be decided in the declaratory judgment action, was left in doubt by the Martin court and the district court had to make a decision as to whether Martin should be applied to this case or not. Therefore, neither the factual issue nor the legal issue presented to the district court in the declaratory judgment action were such that INA should have been expected to resolve them on its own without the assistance of the court and as such, §627.428 should not be applied to this case.

CONCLUSION

Based upon the foregoing, the question certified by the Eleventh Circuit Court of Appeals must be answered in the negative, because the dispute between INA and Lexow as to entitlement to the subrogated fund did not arise "under a policy or contract" of insurance executed by INA, as required for application of Florida Statute §627.428(1). Alternatively, §627.428 should not be applied in this case, because INA did not wrongfully withhold policy benefits, since the parties' dispute was the type reasonably expected to be resolved by a court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellee's Answer Brief has been furnished by U.S. Mail to ROBERT PAUL KEELEY, ESQUIRE, Ellis, Spencer, Butler and Kisslan, Attorneys for Appellants, Hollywood Federal Building, 1909 Tyler Street, P.O. Box 6, Hollywood, Florida 33022, this 21st day of October, 1991.

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