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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

CASE NO. 78,376

vs.

INSURANCE COMPANY OF NORTH AMERICA,

~~Appellee.~~ appellant

______________________________/

APPELLANT'S REPLY BRIEF

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

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INA'S SUBROGATION RIGHTS AROSE, INTER ALIA, BY VIRTUE OF ITS INSURANCE CONTRACT WITH LEXOW AND INA'S SUIT CONTESTED ITS OBLIGATION TO INDEMNIFY LEXOW, THEREBY MAKING THEIR LITIGATION SUBJECT TO §627.428 (1), FLA. STAT. (1987)

INA characterizes the litigation between INA and LEXOW as a dispute over INA's subrogation rights arising by operation of law and entitlement to proceeds outside its insurance contract. INA argues it paid LEXOW, has not breached any policy obligation due LEXOW, and having discharged its policy obligation, the judgment in favor of LEXOW did not arise "under a policy or contract". INA misconstrues LEXOW's argument and misreads §627.428(1).

The statutory phrase "under a policy or contract", as used in §627.428(1), refers to the immediately preceding noun "beneficiary" in defining the class of individuals entitled to attorney's fees. LEXOW cited Industrial Fire and Casualty Insurance Co. v. Prygrocki, 422 So.2d 314 (Fla. 1982) to illustrate this interpretation of the statute. However, case law cited by both LEXOW and INA interprets the purpose of §627.428 as protecting an insured from incurring attorney's fees in disputes affecting an insured's policy rights.

INA requests this Court to "strictly construe" §627.428. Strict construction of a statute, however, does not equate to a narrow, literal, or nonsensical interpretation. Johnson v. Presbyterian Homes of Synod Fla., Inc., 239 So.2d 256 (Fla. 1970). As discussed in LEXOW's Initial Brief, §627.428(1) has been construed as applying to factual circumstances which at

first blush appear to be outside its scope. The most recent example is this Court's adoption of the Second District Court of Appeal's en banc opinion in Fewox v. McMerit Construction Co., 556 So.2d 419 (Fla. 2d DCA 1989). Insurance Company of North America v. Acousti Engineering Company of Florida, 579 So.2d 77 (Fla. 1991). Notwithstanding no rendition of a judgment occurred, the Second District in Fewox held that the voluntary payment of an arbitration award constituted the functional equivalent of the rendition of a judgment for the purpose of meeting the statutory requirement. Fewox at 424.

INA argues semantics, not substance. INA smartly answers LEXOW with the rhetorical question: "What policy obligation?" INA completely discounts the parties' extant relationship as arising by reason of LEXOW purchasing a contract of insurance for indemnification against the very loss suffered. INA discusses conventional (contractual) subrogation and legal (equitable) subrogation, implying these two types of subrogation are mutually exclusive. This is one fallacy in INA's argument. The same facts which give rise to subrogation by operation of law may also entitle a person to claim the benefit of a contract (convention) for subrogation, and the distinction between the two types of subrogation often lacks any real significance. Rhodes, 16 Couch on Insurance 2d (Rev. ed.), §61.2 (1983).

In discussing the nature of an insurer's right of subrogation and the enforcement of such right, this Court in Atlantic Coast Line Railroad Co., v. Campbell, 104 Fla. 274, 139 So. 886 (1932) recognized conventional and legal (equitable)

subrogation are not mutually exclusive, but co-exist.

> In cases like this, the liabilty of the [tortfeasor] is in legal effect, first and principal, and that of the insurer secondary; not in the order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases, to the [tortfeasor] by his right at law, or to the insurance company, because of his insurance contract. If he obtains payment of his damages from the [tortfeasor], he thereby diminishes his loss, and his claim against the insurance company for indemnity is for the balance only of the loss, if any. And so it is that, if he applies first to the insurer and receives his whole loss from the insurer, he thereafter holds his claim against the [tortfeasor] in trust for the insurer who indemnified him. Such being the equitable situation that exists, the party holding the legal right against the tort-feasor is deemed to have made an equitable assignment of his right to recover the tort, which the insurer is entitled enforce by an action brought in the name of the injured party for his own use and benefit against the tort-feasor, after the insurer has already indemnified the injured party in first instance by paying the loss he has sustained through the injury tortiously inflicted. (Citations omitted).
>
> Since the insurer's right of recovery rests upon the very nature of the contract of insurance as a contract of indemnity, and his title arises out of the insurance contract, and is derived from the assured alone, and can only be enforced in the right of the latter-and, in a court of common law, can only be asserted in the assured's name-and because it rests upon the equitable doctrine of subrogation by operation of law, whether any special agreement to assign the cause of action was made by the injured party with the assured or not, the fact that a common law cause action in tort is not assignable becomes immaterial to plaintiff's right to recover, since the suit is maintainable under the doctrine of subrogation by operation of law, without any express assignment to that effect being necessary. *Id*. at 888,889. (Emphasis added).

Further, INA overlooks a well-settled principle of subrogation, a volunteer cannot obtain subrogation. *DeCespedes v. Prudence Mutual Casualty Co.*, 193 So.2d 224 (Fla. 3d DCA

1966). Without being under the legal obligation to indemnify LEXOW pursuant to its contract of insurance, INA had no reason to make payment to LEXOW and would not have been entitled to subrogation. In other words, even assuming INA's right to subrogation arose only by operation of law by reason of making payment to LEXOW, such right originated out of the underlying relationship between LEXOW and INA, as insured and insurer, under a contract of insurance. As stated in Rhodes, 16 Couch on Insurance 2d (Rev. ed.) §61.18 (1983):

> Subrogation has also been explained in terms of a salvage operation by the insurer, the theory being that from the very nature of the contract of insurance as a contract of indemnity, the insurer, when [it] has paid to the insured the amount of the indemnity agreed upon between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the same loss.

LEXOW purchased the right to have INA pay up to policy limits for a fire loss to assure restitution. LEXOW sustained a fire loss and sought recourse first against INA, then the tortfeasors because LEXOW had not been fully reimbursed by INA for the total loss suffered. If INA were to obtain the tortfeasor's recovery before LEXOW received full resitution, INA effectively reduces the amount it paid, and was obligated to pay, LEXOW. INA must account for any subrogation recovery (salvage) as an offset to losses paid. Fla. Admin. Code Rule 4 - 42.002.

Moreover, under equitable subrogation principles an insurer may only recover the excess which an insured obtains from a tortfeasor, exclusive of costs and expenses in obtaining the

recovery. Central National Insurance Group v. Hotte, 312 So.2d 235, 237 (Fla. 1st DCA 1975).

INA tries to distinguish the PIP cases cited by LEXOW and contends not only are these cases inapplicable, but that the First District Court of Appeal incorrectly relied upon a PIP case in deciding Lititz Mutual Insurance Co. v. Bowdoin, 365 So.2d 173 (Fla. 1st DCA 1978). PIP cases involve the application of principles of equitable distribution, which have been held applicable to subrogation cases. Central National Insurance Group v. Hotte, 312 So.2d 235, 237 (Fla. 1st DCA 1975). The First District correctly applied its reasoning in Catches v. Government Employees Insurance Co., 318 So.2d 552 (Fla. 1st DCA 1975), which is a PIP case, to Bowdoin, a non-PIP case, in finding that the insured was entitled to attorney's fees under §627.428 because litigation over an insurer's demand for reimbursement contests the insurer's contractual indemnity obligation. INA ignores the court's remark in Government Employees Insurance Co. v. Graff, 327 So.2d 88, 92 (Fla. 1st DCA 1976) that Graff differed from those cases where the insurer made an unfounded reimbursement demand, thereby denying a material obligation of payment. Not only did the insurer in Graff win its reimbursement demand, but the nature of the initial dispute concerned payment to the insured's attorney for procuring the insurer's undisputed subrogation recovery.

Travelers Indemnity Company v. Rosedale Passenger Lines, Inc., 55 F.R.D. 494 (D.Md. 1972) should not be distinguished on the basis that the case involved third party insurance as INA

asserts. INA admits Rosedale was correctly decided and had the case arisen in Florida §627.428 would have applied. INA says attorney's fees were awarded in Rosedale because the insured "had to protect his policy right to have the insurer pay the liability claim." (INA's Answer Brief at 27). LEXOW concurs. Therefore, if INA must indemnify LEXOW and INA's reimbursement demand asserted in the district court litigation, as a request for subrogation, contested INA's obligation to bear the ultimate loss incurred by LEXOW, the rationale of Rosedale applies here.

§627.428 protects an insured from litigious insurers using the state and federal courts of Florida as an arena "to go to the mat" with their insureds. Feller v. Equitable Life Assurance Society of the United States, 57 So.2d 581 (Fla. 1952). INA challenged LEXOW after the state trial court ruled for LEXOW, seeking to minimize the loss it suffered by payment to LEXOW and acting in derogation of LEXOW's right to restitution not only from INA, but also the tortfeasors. INA lost and must pay LEXOW's attorney's fees.

INA'S ARGUMENT ON ADDITIONAL MATTERS NOT CERTIFIED BY THE ELEVENTH CIRCUIT COURT OF APPEALS LACKS MERIT AND IS FACTUALLY DISTINGUISHABLE FROM THE CITED CASES

INA argues that even if this Court answers the certified question in the affirmative, attorney's fees should be denied LEXOW for the alternative reason stated by the district court, namely: INA's dispute with LEXOW was of a type INA could readonably expect to be resolved by a court. INA's alternative argument was fully briefed by the parties to the Eleventh Circuit

Court of Appeals, which did not request this Court to address the arguments and/or issues presented by the parties on this point. LEXOW surmises that the Eleventh Circuit Court of Appeals believes INA's alternative argument lacks merit for the reasons discussed below and the dispositive issue for this appeal is as stated in the certified question. LEXOW respectfully submits that this Court should decline INA's invitation to resolve this appeal on an issue not certified to this Court. However, LEXOW shall reply so the Court has the benefit of LEXOW's rebuttal, if the Court elects to address INA's alternative argument.

INA contends it required a judicial determination in federal court as to the effect of its "subrogation receipt" and the "factual issue" of LEXOW's total damages; therefore, INA is exempt from paying LEXOW's attorney's fees.

First, a coverage dispute, which consists of an insurer's contest with its insured as to the application or interpretation of certain policy language is not the type of dispute outside the ambit of §627.428. INA's dispute with LEXOW over the effect of the language employed by INA in the "subrogation receipt" should not receive any different treatment than a coverage dispute.

At the time INA instituted suit in the district court no contrary Florida authority existed, and still does not exist, permitting an insurer to exercise its subrogation rights under facts similar to the instant case. The district court followed settled Florida law that an insurer cannot pursue subrogation against the tortfeasor(s) unless its insured has been fully compensated. Florida Farm Bureau Insurance Company v. Martin,

377 So.2d 827 (Fla. 1st DCA 1979); DeCespedes v. Prudence Mutual Casualty Co., 193 So.2d 224, 227 (Fla. 3d DCA 1966); Rubio v. Rubio, 452 So.2d 130 (Fla. 2d DCA 1984); Southeastern Fidelity Insurance Co. v. Earnest, 395 So.2d 230 (Fla. 3d DCA 1981). The district court lacked the power to adopt a different rule and was obligated to follow Florida law. Salve Regina College v. Russell, ____ U.S. ____, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). Furthermore, even if the district court had the authority to modify Florida law, the rationale for the rule is sound as discussed by the district court. (R2-64-7). Prohibiting an insurer from exercising its subrogation rights until its insured has been fully compensated by the tortfeasor(s) gives effect to the purpose for casualty insurance. The insurer was paid to bear its insured's loss and must bear that part of its insured's loss not paid by the tortfeasor(s). Central National Insurance Group v. Hotte, supra.

Secondly, INA is under a duty to have evaluated and/or known the extent of LEXOW's fire loss. INA's normal, daily business operation includes adjusting insurance claims, i.e., establishing a good faith value for a particular loss. §626.9541 (1)(i)(3), Fla. Stat. (1989), mandates that insurance companies adopt and implement standards for investigating losses. Whatever procedure and standards INA used in deciding LEXOW was entitled to the initial amount of $418,585.26, increased to $430,571.26, apply with equal force to evaluating the full amount of LEXOW's loss. Also, INA participated for four years with LEXOW in joint litigation against the two tortfeasors responsible for the fire

loss. Obviously, one of the issues in that litigation was the amount of LEXOW's loss.

Insurers regularly litigate the amount of an insured's loss, but this type of "factual issue" comes within the type of dispute governed by §627.428. INA would have this Court adopt an argument for allowing an insurer to have a court value a loss whenever an insurer disagrees with its insured over the amount of such loss, yet avoid the reach of §627.428.

INA bolsters its argument with a statement that the district court noted Florida law has been somewhat murky with respect to the award of lost future profits as damages. Whether Florida law was murky or not, the district court did not decide the issue. (R2 - 64 - 9). The district court specifically found that under any theory of damages, LEXOW's loss exceeded the amounts received from INA plus the $99,000.00 previously recovered; therefore, LEXOW was entitled to the $100,000.00. (R2 - 64 - 9).

INA's unwillingness to interpret its own document consistent with established Florida law and to accept LEXOW's damage calculation(s) resulted in INA bringing suit to effectively contest, retroactively, its obligation to indemnify LEXOW.

INA relies upon Government Employees Insurance Co. v. Battaglia, 503 So.2d 358 (Fla. 5th DCA 1987); Crotts v. Bankers and Shippers Insurance Company of New York, 476 So.2d 1357 (Fla. 2d DCA 1985); Manufacturer's Life Insurance Company v. Cave, 295 So.2d 103 (Fla. 1974); and New York Life Insurance Company v.

Schuster, 373 So.2d 916 (Fla. 1979). None of the cases cited by INA involve a dispute over the amount of the insured's loss or an insurer's demand to a tort recovery obtained jointly with its insured. The cited cases exempt insurers from paying an insured's attorney's fees, but this exemption should remain confined to the facts of the cited cases.

Battaglia involved a question of the existence of uninsured motorist coverage. Battaglia is distinguishable on its facts. The insurer was not liable for attorney's fees because the trial court stayed arbitration and erroneously failed to previously grant the insurer's motion for summary judgment denying coverage. Battaglia at 361. In Battaglia, the insurer won the coverage issue, hence no basis to award attorney's fees.

Cave and Schuster involved insurers interpleading life insurance benefits. Crotts concerned conflicting claims to no-fault disability benefits, based upon a disputed assignment, by the insured and a hospital. Cave and Schuster are distinguishable on their facts, as discussed infra. In Crotts, as in Cave and Schuster, the dispute was between competing claimants, creating legitimate indecision over whom to pay and entitling the insurer under the facts to have a court decide which claimant should be paid the policy benefits.

Justice Ervin's cogent dissent in Cave deserves consideration here. Permitting insurers to resort to the courts promotes laxness and unbusinesslike conduct, penalizing an insured for the insurance company's timidity in failing to uphold its policy obligations; and, it is a rare instance when the

interests of the insurer should override an insured's entitlement to attorney's fees when forced into litigation. Cave at 108.

In Cave, the decedent changed the beneficiary on his life insurance from his widow to one Mrs. Cave. The decedent's widow, through her lawyer, advised the insurer on September 30, 1971, that the beneficiary designation form naming Mrs. Cave was a forgery. By letter dated October 7, 1971, the insurer requested the widow to provide documentation of her claim, and on October 26, 1971, Mrs. Cave filed a lawsuit claiming the benefits of the policy before the insurer could complete its investigation. The insurer cross-claimed for interpleader. According to Judge Walden, it appeared that the insurer reasonably began an investigation and before the investigation could be completed, Mrs. Cave filed suit.

Likewise, Shuster also involved conflicting demands from purported beneficiaries and a contention that the signature on the change of beneficiary form was a forgery. Again, the insurer filed a counter-claim for interpleader, wherein it alleged that it was ready, willing and able to pay the proceeds, but because of the forgery allegations was uncertain who was entitled to the proceeds. The insurers in Cave and Shuster had no interest in the proceeds once they paid the life insurance benefits into the registry of the court nor further policy obligations. Compare, however, Hernandez v. Travelers Insurance Co., 356 So.2d 1342 (Fla. 3d DCA 1978), where the court denied the insurer's request for interpleader because the insurer could not avoid its

obligation to defend its insured from multiple claims arising out of an automobile accident "by depositing a sum of money and saying to the courts, 'divide it up'". Id. at 1344.

In a footnote, the Cave Court explained that it declined to follow Kurz v. New York Life Insurance Co., 168 So.2d 564 (Fla. 1st DCA 1964), but did not overrule Kurz. Cave at 106, fn. 1. In Kurz, the insurer steadfastly maintained that the change of beneficiary on a life insurance policy was effective, but refused to make payment to the beneficiary (the new wife) unless the decedent's ex-wife released her conflicting claim. The ex-wife sued, and the insurer filed a counter-claim and cross-claim for interpleader, alleging that it was in doubt as to which of the claimants was entitled to the proceeds and simultaneously paying the monies into the registry of the court. The ex-wife denied the insurer's allegation that it was in doubt regarding which claimant was entitled to the proceeds because the insurer at all times maintained that the new wife was entitled to the proceeds.[1] The trial court awarded the new wife the proceeds; but denied her request for attorney's fees. Under these facts, the Kurz court concluded that the case presented a matter of interpretation of the insurance policy that the insurer should have resolved to avoid embroiling its insured in litigation and awarded the new wife her attorney's fees.

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1. A party's specious statement that it cannot determine the entitlement to a sum of money cannot support an action for interpleader. Miller v. Kokanour, 155 Fla. 543, 20 So.2d 797 (1945).

INA's conduct here in refusing to interpret its own document is more analogous to the insurer's conduct in Kurz than to the insurers' conduct in Cave and Shuster. INA also cannot rely upon the interpleader cases becauses of its interest in the outcome of its litgation with LEXOW, Ellison v. Riddle, 166 So.2d 840 (Fla. 2d DCA 1964), and its obligation and duty to determine the amount of LEXOW's loss.

CONCLUSION

INA's subrogation right depends upon, and arose from, the underlying contractual relationship with LEXOW. Contrary to INA's assertion, INA could, and should, have determined LEXOW's entitlement to the settlement proceeds. Instead INA filed its declaratory relief action in federal court after initially losing the very issue in the state court. This case presents nothing more than a "garden variety" effort by INA to litigate, albeit indirectly, its policy obligation to indemnify LEXOW. LEXOW prevailed, obtained a judgment, and is therefore entitled attorney's fees under §627.428.

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I HEREBY CERTIFY that a copy of the foregoing Appellants' Reply Brief has been furnished by U.S. Mail to: CHARLES M. JOHNSTON, ESQ., of Taylor, Day & Rio, Ten South Newnan Street, Jacksonville, Florida 32202, this 14th day of November, 1991.

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