IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner

Vs. CASE NO. 78,766

MARGARITA J. PALMA,

Respondent

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Counterplaintiff in an action arising from medical expenses in an automobile accident and the Appellant in the District Court of Appeal. Respondent was the Plaintiff, Counterdefendant and Appellee respectively. The parties will be referred to as they appear before this Court.

The symbol "A" followed by a number will refer to the Appendix to this Brief.

STATEMENT OF THE CASE AND FACTS

This is the third time this case comes before this Court.

In Palma v. State Farm Fire & Casualty Co., 489 So.2d 147 (Fla. 4DCA), rev. denied, 496 So.2d 143 (Fla. 1986), the Fourth District sent the case back to the trial Court for entry of a judgment in favor of Palma and to determine and award costs and attorneys' fees.

Next, in State Farm Fire & Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4DCA 1988), the fourth District affirmed an award of attorneys' fees for Palma, entered an order granting Palma's motion for attorneys' fees for the appeal, and remanded to the trial Court to determine the amount.

In State Farm Fire & Casualty Co. v. Palma, 555 So.2d 836 (Fla. 1990), this Court approved the attorneys' fees award for the prior appeal. By separate order this Court remanded Palma's motion for attorneys' fees to the trial Court for determination of entitlement and amount (A14).

On remand, the trial Court awarded attorneys' fees for services rendered in the Fourth District and for services in this Court, finding that they were proper under Section 627.428, Florida Statutes (1983). The Court applied a multiplier of 2.6, finding that this was the law of the case.

At the hearing to assess attorneys' fees, both of Respondent's attorneys testified as to their agreement with her. Each was to receive no fee unless he prevailed and each agreed to accept whatever the Court awarded if he prevailed (A15-16).

Petitioner noted that it had challenged only the amount of attorneys' fees, not Respondent's entitlement, on the attorneys' fee appeal. Respondent's attorney agreed with this assessment (A17-18).

On the latest appeal, Petitioner challenged Respondent's entitlement to attorneys' fees for the attorneys' fee appellate review under Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4DCA 1974), because no portion of the attorney's fees awarded for that appeal and that discretionary review were to be paid over to Respondent (A2, 5). Petitioner also challenged what appeared to be mandatory use of a multiplier because the trial Judge thought he was bound by the law of the case (A8-9), and the use of a multiplier which exceeds the range approved by this Court (A9).

The District Court noted the conflicting decisions as to entitlement to attorneys' fees for litigating attorneys' fees (A7-8). It declared this case distinguishable from Cincinnati, because Petitioner allegedly never voluntarily paid or offered to pay attorney's fees (A5-6). It declared attorney's fees recoverable under Section 627.428 Fla.Stat. even where only attorney's fees are still at issue (A6).

The District Court also rejected the argument that the trial Judge thought the multiplier mandatory (A9), but reversed the award with directions to reduce the multiplier (A9-10).

By separate order, the District Court granted Respondent's motion for attorney's fees for the instant appeal (A19).

Petitioner timely sought rehearing, rehearing en banc or certification of conflict (A11-12). The motion was denied September 10, 1991 (A13).

By notice filed October 9, 1991, Petitioner seeks discretionary review in this Court.

SUMMARY OF ARGUMENT

The Second District holds that the prevailing party may not be awarded attorney's fees for litigating over attorney's fees where no portion of the fees go to the client. The Fourth District initially held to the same rule, but chose this case to join the other District Courts and allow such awards. There is thus a hopeless deadlock and conflict of decisions on the issue which requires resolution by this Court.

POINT INVOLVED

WHETHER THE DECISION OF THE FOURTH DISTRICT HEREIN THAT ATTORNEY'S FEES MAY BE AWARDED TO THE PREVAILING PARTY FOR LITIGATING ATTORNEY'S FEES IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT IN U.S. SECURITY INSURANCE COMPANY V. COLE, 579 SO.2D 153 (FLA. 2DCA 1991), B&L MOTORS V. BIGNOTTI, 427 SO.2D 1070 (FLA. 2DCA 1983) AND SERVICE INSURANCE COMPANY V. GULF STEEL CORPORATION, 412 SO.2D 967 (FLA. 2DCA 1982) AND THE DECISION OF THIS COURT IN THORNBER V. CITY OF FORT WALTON BEACH, 568 SO.2D 914 (FLA. 1990)?

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT HEREIN THAT ATTORNEY'S FEES MAY BE AWARDED TO THE PREVAILING PARTY FOR LITIGATING ATTORNEY'S FEES IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT IN U.S. SECURITY INSURANCE COMPANY V. COLE, 579 SO.2D 153 (FLA. 2DCA 1991), B&L MOTORS V. BIGNOTTI, 427 SO.2D 1070 (FLA. 2DCA 1983) AND SERVICE INSURANCE COMPANY V. GULF STEEL CORPORATION, 412 SO.2D 967 (FLA. 2DCA 1982) AND THE DECISION OF THIS COURT IN THORNBER V. CITY OF FORT WALTON BEACH, 568 SO.2D (FLA. 1990).

The issue is whether attorney's fees may be awarded to the prevailing party for the time spent litigating over attorney's fees. There is a hopeless conflict of decisions on the issue.

The Fourth District recognized the conflict. It acknowledged decisions such as U.S. Security Insurance Company v. Cole, supra and B&L Motors v. Bignotti, supra, which reversed such awards. It noted conflicting decisions from other Districts, such as

> Ganson v. State, Dept. of Admin., 554 So.2d 522, 525 (Fla. 1DCA 1989)("it also appears to be well settled that attorney fees may also be recoverable for the time spent litigating entitlement to attorney fees"), rev'd on other grounds, 566 So.2d 791 (Fla. 1990); Tiedeman v. City of Miami, 529 So.2d 1266, 1267 (Fla. 3DCA 1988)("attorneys' fees were properly awardable under the above statute for, among other things, litigating the amount of fee to be awarded"); Earnest v. Southeastern Fidelity Ins. Co., 407 So.2d 995 (Fla. 3DCA 1982)(an insurance case in which such fees were awarded without explanation, in accordance with the earlier Gibson decision); Gibson. (A8)

The Fourth District aligned itself with the First, Third and Fifth in this case, just as it did in Pirretti v. Dean Witter Reynolds, Inc., 578 So.2d 474 (Fla. 4DCA 1991).

In doing so, the Fourth District purported to distinguish its own Cincinnati Insurance Company v. Palmer, supra. It suggested that the insurance carrier voluntarily paid Palmer's claim and offered to pay attorney's fees, while Petitioner "went to the mat". Petitioner does not agree that this is a correct statement factually. Petitioner "went to the mat" over the thermography bill, which increased the hours for which Respondent's attorney had to be compensated. However, Petitioner never questioned the right of Respondent's attorney to be compensated for those hours. Petitioner was perfectly willing to pay attorney's fees - it just objected to the amount.

Cincinnati was decided on the nature of Palmer's contract with his attorney, not the fact that the payment was voluntary, and in that regard this case is indistinguishable from Cincinnati. However, whether the Fourth District can distinguish Cincinnati or not really does not matter, because the conflict of decisions exists regardless. In B&L Motors v. Bignotti, supra, the loser fought the case through appeal without incurring attorney's fees for litigating attorney's fees.

The District Court also ruled that it had already decided entitlement to attorney's fees when it granted Respondent's motion for attorney's fees (A2). Petitioner did not agree that the Fourth District could not follow its own prior contrary ruling in Cincinnati. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965) would certainly authorize it to do so. However, the point to note in this jurisdictional brief is that the alternate ground for affirmance cited by the Fourth District cannot dissipate the conflict of decisions here. The alternate basis applies only to the attorney's fees for work done in the Fourth District. It cannot apply to the fees awarded for discretionary review in this Court because this Court

remanded for determination of entitlement and amount (A14).

In U.S. Security Insurance Company v. Cole, supra, the Second District acknowledged the conflicting decisions. However, it does not seem that Cole's attorney sought review in this Court. The Fourth District issued a plea for guidance in Pirretti v. Dean Witter Reynolds, Inc., supra, but Perretti did not follow through on it either.

The result is that the conflict of decisions on this issue remains unresolved. The only pronouncement this Court has made on the subject was to approve denial of an award of attorney's fees for litigating attorney's fees under Section 111.07 Fla.Stat. (indemnification of municipal officials) and 57.105 Fla. Stat. (frivolous actions). This Court simply announced that attorney's fees could not be awarded for litigating attorney's fees. The decision does not seem to depend on the nature of Thornber's contract with her lawyer. It does not seem to depend on whether anything was paid voluntarily. Thornber v. City of Fort Walton Beach, supra, 568 So.2d at 919-920.

Because Thornber is an indemnity action, it does not really resolve the conflict. However, it is difficult to see why a prevailing party under an insurance policy, like Respondent, should recover for litigating over attorney's fees, while a prevailing party in an attempted recall should not. Respondent was not obligated to pay her attorneys anything for litigating their own attorney's fees if the Court made no award, while Thornber may well have owed her attorneys for their time from her own pocket.

To the extent that the recovery of attorney's fees for litigating attorney's fees is a legal issue, the ruling of the Fourth District here is in conflict with Thornber, supra. Even if Thornber is distinguishable, there is a hopeless deadlock between the Second District and its sister Courts which only this Court can resolve. It has jurisdiction and should accept this case to resolve this issue once and for all.

CONCLUSION

This Court can and should accept jurisdiction in this case to resolve the conflict of decisions as to recovery of attorney's fees for litigating attorney's fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to RONALD V. ALVAREZ, ESQUIRE, 1801 Australian Avenue, South, Suite 101, West Palm Beach, Florida, 33409 and LARRY KLEIN, ESQUIRE, Klein & Walsh, P.A., Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida, 33401, this 21st day of October, 1991.

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