047

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 78,766

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

vs.

MARGARITA J. PALMA,

Respondent.

On Discretionary Review from the District Court of Appeal, Fourth District of Florida

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

The parties will be referred to as insurer and insured or by their proper names. The following symbol will be used:

(R) - Record on Appeal.

STATEMENT OF THE CASE AND FACTS

We cannot agree with State Farm's statement of the facts because it is incomplete. In State Farm Fire & Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988), approved, 555 So.2d 836 (Fla. 1990), the Fourth District summarized this first party insurance benefit litigation on pages 1036 and 1037 as follows:

> It appears that State Farm decided to "go to the mat" over the bill for thermographic studies because, apparently, it is a diagnostic tool which is becoming more widely used contrary to State Farm's view of what is "necessary medical treatment" as provided in the statute. Having chosen to stand and fight over this charge, State Farm, of course, made a business judgment for which it should have known a day of reckoning would come should it lose in the end. ...
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> * * *
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> The trial of the case took six days during which eleven medical doctors and a chiropractic physician testified to all aspects of the medical procedure and study known as thermography. The trial judge entered a twenty-eight-page final judgment, in which he found that a thermographic examination was not a necessary medical service within the meaning of section 627.733, Florida Statutes (1983), and, thus, he entered judgment for State Farm. After this court reversed that decision, holding the trial court judge's interpretation of the statute was too restrictive, the matter was remanded for a determination of costs and attorney's fees for Palma's counsel. ...

* * *

> We are fully cognizant of the great disparity between the monetary sum recovered in the case and the amount of the attorney's fee. However, the parties elected to go toe-to-toe over the issue and they brought to bear all of their skill and resources to try to win the day as evidenced by the number of medical experts and the time of trial (which, had it been a jury trial, would doubtless have been much longer). Furthermore, the real issue was not an incidental medical bill. This record is clear that State Farm hoped to prove a point in this case regarding bills for this medical procedure that would avail it in other cases nationally. So, the stakes were high and the issue became complex, justifying the legal effort.

At the time the Fourth District rendered the above opinion, affirming the first attorney's fee award, it awarded insured's counsel attorney's fees for services rendered on that appeal, remanding for the trial court to determine the amount. State Farm then sought and obtained review of the above opinion in this court. This court reviewed the Fourth District's decision on the merits and affirmed with opinion. State Farm Fire & Casualty Co. v. Palma, 555 So.2d 836 (Fla. 1990).

It is significant that when State Farm obtained review in this court on the merits, it did not seek review in this court of the Fourth District's order awarding attorney's fees for services rendered on that appeal. It is also significant that when this court affirmed, in its opinion reported at 555 So.2d 836, it

authorized attorney's fees for counsel for the insured, remanding to the trial court to decide entitlement and amount.

The trial court then set the amount of appellate attorney's fees for services rendered in the Fourth District and in this court. State Farm appealed that order to the Fourth District, arguing that attorney's fees should not be awarded for services rendered in litigating attorney's fees.

The Fourth District affirmed in State Farm v. Palma, 585 So.2d 329 (Fla. 4th DCA 1991), juris. accepted, ___ So.2d ___ (Fla. July 21, 1992), partially under the law of the case doctrine, as well as holding that attorney's fees should be awarded for litigating attorney's fees under Section 627.428, Florida Statutes (1983). This court granted review.

ISSUES

ISSUE I

WHETHER ATTORNEY'S FEES AWARDED THE INSURED PURSUANT TO SECTION 627.428, FLORIDA STATUTES, SHOULD INCLUDE ATTORNEY'S FEES FOR DEFENDING APPEALS OF ORDERS AWARDING ATTORNEY'S FEES?

ISSUE II

DID THE TRIAL COURT ERR IN APPLYING A CONTINGENCY RISK MULTIPLIER WHEN IT DETERMINED THE AMOUNT OF ATTORNEY'S FEES?

SUMMARY OF ARGUMENT

As the Fourth District recognized in State Farm and Casualty Company v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988), approved, 555 So.2d 836 (Fla. 1990), State Farm elected to "go to the mat" over the first party claim brought against it by its own insured. Since the rendition of that opinion by the Fourth District in 1988, State Farm has also "gone to the mat" on attorney's fees. State Farm has taken two separate appeals to the Fourth District, solely on attorney's fees. This is the second time State Farm has been before this court in this case, solely on attorney's fees. If counsel for the insured cannot recover attorney's fees from State Farm for these four appeals, it will substantially diminish the attorney's fees originally awarded to the insured for services rendered in regard to the merits of this claim. This result would frustrate the intent of the legislature in enacting Section 627.428, Florida Statutes, by encouraging insurers such as State Farm to "go to the mat" over attorney's fees in order to discourage claims by insureds.

In the event this court determines that attorney's fees should not be recoverable for litigating prevailing party attorney's fees, that law should not be applied in this case. The entitlement to prevailing party attorney's fees, for litigating attorney's fees, has already been established as the law of the case in this litigation.

State Farm also argues that this court should review the trial court's award of a multiplier. The amount of the fee awarded by the trial court should not be disturbed on appeal absent a clear abuse of discretion. State Farm has demonstrated no abuse of discretion here.

ARGUMENT

ISSUE I

WHETHER ATTORNEY'S FEES AWARDED THE INSURED PURSUANT TO SECTION 627.428, FLORIDA STATUTES, SHOULD INCLUDE ATTORNEY'S FEES FOR DEFENDING APPEALS OF ORDERS AWARDING ATTORNEY'S FEES?

1. Courts should not be precluded from awarding attorney's fees for litigation involving attorney's fees recoverable under this statute.

This was a suit over a $600 bill for a medical procedure, a thermogram, in which State Farm elected to "go to the mat" in order to establish national precedent and save itself hundreds of thousands of dollars. Because of the amount involved, insured's trial counsel could not have undertaken the case but for the statute which provided for attorney's fees. Had he known that State Farm would drag him through the courts for years on his attorney's fees, without having to pay attorney's fees, it would have put the case in an entirely different light. If the insured's counsel has to spend hundreds of hours (as here) of non-compensable time litigating his attorney's fees, the effect is that the attorney will be compensated for only a small percentage of the

time spent litigating the merits of the claim, instead of 100%, as intended by the statute.

This is precisely why federal courts have held that the time spent collecting attorney's fees in civil rights cases, in which the successful plaintiff is entitled to fees, is compensable. The federal law in this area has been summarized in Johnson v. State of Miss., 606 F.2d 635 (5th Cir. 1979), wherein the court stated on pages 637-638:

> * * *
>
> Four of our sister circuits have held that the time expended by an attorney litigating the fee claim is justifiably includable in the court's fee award. In Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978), the court affirmed a fees award over defendants' objections that fees may not be recovered for time spent establishing and negotiating the fee claim. To deny compensation, the court reasoned, would dilute the fee award and thus be inconsistent with the Fees Act's purpose. 587 F.2d at 77.
>
> In Prandi v. National Tea Co., 585 F.2d 47 (3d Cir. 1978), the court reversed part of a district court's order for failure to include in its fee award time spent appealing a fee award and preparing the fee petition. The court observed that statutory fee authorizations are designed to encourage representation of particular types of clients and noted that, to the contrary, (i)f an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. 585 F.2d at 53.
>
> The Sixth Circuit agreed that the district court abused its discretion in refusing fees for time spent pursuing recovery of attorney's fees in Weisenberger v. Huecker, 593 F.2d 49, 53-54 (6th Cir. 1979), petition for cert.

> filed, ____ U.S. ____, 100 S.Ct. 170, 62 L.Ed.2d 30 (1979). That court also noted the frustration of the Act's intent which such exclusions would accomplish. 593 F.2d at 54.
>
> Finally, in Gagne v. Maher, 594 F.2d 336, 344 (2d Cir. 1979), petition for cert. filed, ___ U.S. ___, 100 S.Ct. 44, 62 L.Ed.2d 30 (1979), the court found the district court had erred in excluding from consideration time spent establishing the fees claim. The court found further support for its decision in the fact that the Senate Report for amendment of s 1988 had cited with approval a district court decision, Stanford Daily v. Zurcher, 64 F.R.D. 680, 683-684 (N.D.Cal. 1974), Aff'd, 550 F.2d 464 (9th Cir. 1977), Rev'd on other grounds, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978), which held that denying fees for time spent obtaining fees would " 'dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees.' " 594 F.2d at 344. See S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5, 6, Reprinted in (1976) U.S. Code Cong. & Admin. News, pp. 5908, 5913.
>
> Two more circuits, the District of Columbia and Seventh Circuits, have, without elaboration, ordered that a fee award include an amount for time spent on the fee claim. Moten v. Bricklayers, Masons & Plasterers International Union, 177 U.S.App.D.C. 77, 93, 543 F.2d 224, 240 (D.C. Cir. 1976); Hairston v. R & R Apartments, 510 F.2d 1090, 1093 (7th Cir. 1975).
>
> * * *

The Eleventh Circuit has also held that attorney's fees should be awarded for time spent pursuing prevailing party attorney's fees in civil rights cases. Jonas v. Stack, 758 F.2d 567 (11th Cir. 1985).

State Farm recognizes that this court has not addressed this issue of whether attorney's fees are recoverable for litigating attorney's fees awarded under Section 627.428(1), Florida Statutes (1983). State Farm argues that this court should follow its prior opinions in which it denied attorney's fees incurred in collecting attorney's fees under different facts and different law. Those three cases are In re Estate of Platt, 586 So.2d 328 (Fla. 1991), Thornber v. City of Ft. Walton Beach, 568 So.2d 914 (Fla. 1990), and Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351 (Fla. 1987). The claims for attorney's fees in those cases were so different from the claim in the present case as to make those cases of little persuasive value.

In Platt, supra, the main issue was the method of computation of attorney's fees and personal representative fees in estates. Fees awarded to lawyers and personal representatives in estates are not prevailing party attorney's fees. They are not awarded under a statute passed by the legislature which is intended to discourage certain conduct, such as the unreasonable refusal of an insurer to pay a claim to its own insured. The attorney's fees and personal representative fees in estates are borne by beneficiaries or creditors who have little or no control over work performed by the personal representative or counsel. Thus, this court's statement on page 336 of Platt, supra, that the hours expended by counsel in collecting his fee were not compensable, should not control the outcome in this case.

This court gave no explanation for its statement in Platt that time spent in collecting fees is not compensable, other than to cite Crittenden Orange Blossom Fruit v. Stone, supra. Crittenden is a worker's compensation case in which this court noted that the worker's compensation law at that time placed "primary responsibility for the claimant's attorney's fees on the claimant", but that the claimant should not have to absorb the cost of paying his attorney because the claim was denied in bad faith. This court then stated:

> Our holding does not extend, however, to cover the time spent by the attorney in establishing the amount of the fee such as that involved in the third hearing in this case. Id., at 353.

A significant distinction between the present case and Platt and Crittenden, supra, is that in Platt and Crittenden, counsel was seeking compensation for the time spent in proving up attorney's fees in the trial court. In contrast, in the present case, State Farm is contesting paying attorney's fees for appeals, in which State Farm was the appellant, appealing orders awarding attorney's fees. Normally, proving up attorney's fees in the trial court is a very minor aspect of litigation and only takes a small proportion of the time spent by counsel on the entire case. In the present case the hours spent on all of State Farm's appeals of orders awarding fees may well exceed the time expended establishing the claim in the trial court.

The only other opinion of this court relied on by State Farm is Thornber, supra, in which city council members, who had to expend fees defending themselves, were seeking reimbursement from the city under a statute which allowed reimbursement to council members in actions brought against council members by third parties. This court stated on pages 919 and 920:

> Even though the council members are entitled to reimbursement for attorney's fees incurred in the recall election and in the federal civil rights action, they are not entitled to attorney's fees in their efforts to collect those fees. They claim such a right under section 57.105. The purpose of this statute is to discourage baseless claims, stonewall defenses, and sham appeals in civil litigation by placing a price tag through attorney's fee awards on losing parties who engage in these activities. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982). While the statute serves a salutary purpose, it may not be extended to every case and every unsuccessful litigant. City of Deerfield Beach v. Oliver-Hoffman Corp., 396 So.2d 1187 (Fla. 4th DCA), review denied, 407 So.2d 1104 (Fla. 1981). The city's defense of the council members' claim did not completely lack a justiciable issue of either law or fact so as to allow them to recover fees against the city under section 57.105.

The obvious distinction between Thornber and the present case is that in Thornber the city was reimbursing its council members for attorney's fees which they incurred in suits brought against them. They were not prevailing party attorney's fees provided by statute, nor were the fees being paid by the party that caused the litigation. In addition, the attorney's fees were being paid out of public funds.

Thus, it is clear that none of this court's prior opinions, denying attorney's fees for litigating attorney's fees, involved a statute such as 627.428(1), Florida Statutes (1983), which provided:

> 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 for which the recovery is had.

This statute singles out a particular class, insureds or beneficiaries of insurance policies, and provides that where the insured or beneficiary prevails, the courts must award attorney's fees. In Government Employees Ins. Co. v. Battaglia, 503 So.2d 358 (Fla. 5th DCA 1987), the court stated on page 360:

> The purpose of section 627.428 is to penalize a carrier for wrongfully causing its insured to resort to litigation to resolve a conflict when it was reasonably within the carrier's power to do so.

The Third District recently summarized existing law and cogently explained why the insurer should be responsible for paying attorney's fees in similar circumstances, in Sonara v. Star Casualty Insurance Company, 17 FLW D1897, D1898 (Fla. 3d DCA August 11, 1992), wherein the court stated:

> ...the purpose of such an award under Section 627.428(10), is "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 defend their contracts." Florida Rock & Tank Lines, Inc. v. Continental Ins. Co., 399 So.2d 122, 124 (Fla. 1st DCA 1981). This public policy would clearly be defeated if the insurer is able, as urged, to contest the insured's claim for attorney's fees under the insurance contract and yet avoid any liability for attorney's fees is prosecuting that claim.
>
> Moreover, we think the insurer should be required to pay for such fees regardless of whether the insured has a technical interest in such fees when the award is made, which fees upon collection would be turned over to the insured's attorney - or whether, in lieu of this procedure, the insured has relinquished any interest in the fees to his/her attorney prior to the collection of same as a means of retaining the attorney to prosecute the suit under a contingency contract. Under either contractual arrangement, (1) the insured clearly has a substantial interest in his/her attorney's fee claim as this claim is used as a basis for retaining the attorney in the first instance, and (2) the attorney, in any event, ultimately receives the award. This being so, we reject the rule of the First and Second Districts that absolves the insurer of any liability to pay these fees where it is shown that the insured has turned over his interest in the fees to his/her attorney by the time the award is made as a means of initially retaining the attorney. [Cit.om.]

If statutes such as Section 627.428 are to be given the effect intended by the legislature, courts should not be stripped of their authority to award attorney's fees, for litigating attorney's fees. Each case should be decided on its particular facts and the legal basis on which the prevailing party is entitled to attorney's fees. In a case relied on by State Farm, Cincinnati Ins. Co. v. Palmer,

297 So.2d 96 (Fla. 4th DCA 1974), the insured brought suit on a fire insurance policy, and three months after suit was filed the insurer voluntarily paid the insured the full amount in dispute plus $500 in attorney's fees. At that time insured's counsel had spent 30 hours litigating. Insured's counsel then expended another 200 hours litigating his attorney's fees, and the Fourth District held that since the insurer had voluntarily paid the claim early in the litigation, the fee awarded for 230 hours work, 200 of which occurred after payment of the claim, was excessive and had to be reduced.

In contrast, in the present case, State Farm has never voluntarily paid one cent until it ran out of appeals or stays. Both the Fourth District and this court have recognized that State Farm elected to "go to the mat" on the merits of the claim. State Farm likewise elected to "go to the mat" over attorney's fees. If this court awards attorney's fees for services rendered in the case now before it, State Farm will probably appeal that order setting such fees, once it is entered by the trial court.

There should be no hard and fast rule either requiring or prohibiting the award of attorney's fees for litigating attorney's fees, recoverable by statute or contract. An award of attorney's fees for litigating the issue of attorney's fees should be discretionary, depending on the legal basis for the attorney's fee award (statute, contract, etc.), who is paying (insurer,

government, individual), the facts and issues of the case, whether the case is being over-litigated, and by whom. This court's statement in its prior opinion in State Farm Fire & Casualty Co. v. Palma, 555 So.2d 836 (Fla. 1990), in answer to State Farm's contention that the small amount of the claim did not justify the large attorney's fees, is also appropriate to the issue presented here:

> * * *
>
> ...the amount involved is not a significant factor in this cause due to the extraordinary circumstances. This is an illustration of the need for flexibility to allow for this type of unique and rare case, especially where the prevailing party has not been the primary cause of the extensive litigation. Id., at 838.

When, as the result of the litigiousness of the party who is liable for payment of an attorney fee award, the attorney's fees aspect of a lawsuit becomes the tail that wags the dog, courts should be given the discretion to award fees. If there ever existed a case in which attorney's fees should be awarded for litigating attorney's fees, it is respectfully submitted that this is the case.

2. The entitlement to attorney's fees in this case has already been established as the law of the case.

The attorney's fees at issue herein were awarded for services rendered in prior appeals. The first award was made pursuant to an order awarding fees by the Fourth District Court of Appeal, when

that court issued the opinion in State Farm Fire & Casualty Co. v. Palma, 524 So.2d 1035 (Fla. 4th DCA 1988). State Farm sought and obtained review of that opinion in this court. The result was this court's opinion in State Farm Fire & Casualty Co. v. Palma, 555 So.2d 836 (Fla. 1990). In that proceeding, State Farm did not challenge or seek review of the order of the Fourth District which awarded attorney's fees for services rendered on the appeal. Thus, State Farm had the opportunity to raise the issue of whether attorney's fees could be awarded for litigating attorney's fees, the last time it was before this court, and did not do so. This court then granted the insured's motion for attorney's fees and remanded for the trial court to determine entitlement and amounts.

State Farm's liability for attorney's fees, for litigating attorney's fees, has already thus been established. It is the law of the case. The Fourth District recognized this in its most recent opinion:

> * * *
>
> ...insofar as the award pertains to attorney's fees for services rendered in this court upon the prior appeal, the issue of entitlement is no longer open to question but constitutes the law of the case. This is true because in the earlier appeal we granted the motion for attorneys' fees, leaving open only the amount to be determined by the trial court. The issue of fees for services in the supreme court is not disposed of so readily because the supreme court's order remanded to determine both entitlement and amount. 585 So.2d at 330-331.

It is respectfully submitted that the Fourth District should have concluded that the law of the case governed all subsequent attorneys' fees awards in this case.

In Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965), this court stated on page 2:

> Early in the jurisprudence of this state it was established that all points of law adjudicated upon a former writ of error or appeal became "the law of the case" and that such points were "no longer open for discussion or consideration" in subsequent proceedings in the case. ...

In Tillman v. Smith, 560 So.2d 344 (Fla. 5th DCA 1990), a second appeal involving statutory attorney's fees, as is the present case, the appellant was attempting to challenge the formula used to calculate the fee, which had been determined by the trial court before the first appeal. In holding that the formula could not now be challenged, the Fifth District stated on page 560:

> The "law of the case" doctrine that unappealed points become the law of the case is described in Marine Midland Bank Central v. Cote, 384 So.2d 658 (Fla. 5th DCA 1980):
>
> > The parties have the right to appeal any matter by which they may be aggrieved and their failure to do so acts as an acceptance of the propriety of the matter. If no appeal is taken on one point but the case is appealed on another point, then the first point becomes "law of the case" and upon a reversal that law of the case remains correct and cannot be revisited.
>
> Id. at 659 (emphasis added). Since neither party appealed the manner in which fees were

> calculated in the hearing leading to the decision in Tillman, the formula became the law of the case and should have been used by the trial court to award attorneys fees on the earlier remand by this court. (Emphasis in original)

Since State Farm did not seek review in this court of attorney's fees awarded by the Fourth District in Palma, 524 So.2d 1035, the award of attorney's fees for litigating attorney's fees became the law of the case at that point in time, and should govern all future proceedings.

ISSUE II

DID THE TRIAL COURT ERR IN USING A MULTIPLIER IN DETERMINING THE AMOUNT OF ATTORNEY'S FEES?

This argument is moot. State Farm argues on page 14 of its brief that "the application of the multiplier should have been reversed with directions to reconsider in light of the change made by Quanstrom". This is precisely what the Fourth District did. The Fourth District reversed the trial court as to the amount of the multiplier and remanded for further proceedings. Moreover, the Fourth District concluded that the record did not establish that the trial court had concluded that the use of the multiplier was mandatory, as State Farm suggests. 585 So.2d at 333, 334.

The application of a multiplier is discretionary and will not be disturbed on appeal except where there is a clear abuse of

discretion. DiStefano Const., Inc. v. Fidelity and Deposit Co. of Maryland, 597 So.2d 248 (Fla. 1992). No abuse has been demonstrated here.

CONCLUSION

The opinion of the Fourth District should be affirmed because the entitlement to attorney's fees for litigating attorney's fees has already become established as the law of this case. The award of attorney's fees should also be affirmed because if they are not allowed, the intent of the legislature in enacting Section 627.428 will be frustrated. If this court determines that the award of attorney's fees for litigating attorney's fees under this statute is not mandatory, it should hold that they are discretionary, so that attorney's fees can be awarded in cases such as this one, in which the insurer "goes to the mat" over attorney's fees as well as the merits of the claim for benefits.

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By: 
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 9th day of September, 1992, to:

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