DA 12-7-92

IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner

Vs. CASE NO. 78,766

MARGARITA J. PALMA,

Respondent

PETITIONER'S REPLY BRIEF

CHARLES W. MUSGROVE, ESQUIRE
2328 South Congress Avenue
Congress Park - Suite 1D
West Palm Beach, Florida 33406
407/968-8799
Florida Bar No. 095137

STEPHEN C. McALILEY, ESQUIRE
319 Clematis Street
West Palm Beach, Florida 33401
407/659-3700
Florida Bar No. 051769

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STATEMENT OF THE CASE AND FACTS

Petitioner adheres to its statement of the facts.

To the extent that Respondent adds to Petitioner's version, she is reciting ancient history, not pertinent to the instant appeal.

It is not significant that Petitioner did not seek review of the Fourth District's separate order awarding attorney's fees in its last visit to this Court. That separate order did not meet the requirements for review in this Court.

The significance of this Court's order on attorney's fees from the last appearance in this Court is that it left open the question of Respondent's entitlement to attorney's fees. Now is the opportunity for this Court to review the answer given by the trial Judge and approved by the Fourth District.

POINTS INVOLVED

I. WHETHER ATTORNEY'S FEES MAY BE AWARDED TO THE INSURED'S ATTORNEYS FOR THEIR EFFORTS TO PRESERVE THEIR OWN PRIOR ATTORNEY'S FEES, PARTICULARLY WHERE NO PORTION OF THOSE FEES INURE TO THE BENEFIT OF THE INSURED?

II. WHETHER THE USE OF A MULTIPLIER ON THE ATTORNEY'S FEES AWARDED TO RESPONDENT'S ATTORNEYS SHOULD HAVE BEEN REVERSED BECAUSE THE TRIAL JUDGE THOUGHT THE MULTIPLIER WAS THE LAW OF THE CASE?

ARGUMENT

I. ATTORNEY'S FEES MAY NOT BE AWARDED TO THE INSURED'S ATTORNEYS FOR THEIR EFFORTS TO PRESERVE THEIR OWN PRIOR ATTORNEY'S FEES, PARTICULARLY WHERE NO PORTION OF THOSE FEES INURE TO THE BENEFIT OF THE INSURED

Respondent argues that her attorneys could not have agreed to take this case if they knew they would be dragged through the Courts for years, for hundreds of hours of noncompensable time, without attorney's fees.

Respondent exaggerates. Her attorney was paid, and paid very well (R22) right after the District Court ruled initially in 1988 (524 So.2d 1035). Petitioner was unable to renew its supersedeas, and the attorney collected over $250,000.00 at once (R24). Thus, counsel has not been without attorney's fees for years. Moreover, the amount collected is such that counsel might well take the case even if he might spend some [1] noncompensable time thereafter.

The argument that denying attorney's fees to Respondent's attorneys will encourage insurance companies to "go to the mat" over attorney's fees to discourage claims by insureds is untenable. Even if Petitioner does not have to pay Respondent's lawyers, it still has to pay its own. It has no motive to engage in frivolous litigation over attorney's fees.

On the other hand, assuring attorneys that they will be compensated for all the hours they spend litigating over attorney's fees for their own account may well encourage them to "go to the mat" over their fees. Cincinnati Insurance Company v. Palmer, 297 So.2d 96 at 99 (Fla. 4DCA 1974) is an example. There 200 of the 230 total

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Mr. Alvarez spent 153.85 hours on the appeal (R82). He was awarded $253,500.00 for his 650 hours on the original case. (524 So.2d 1036-1037) If that fee is spread over all 803.85 hours, he still has an hourly rate of $315.36.

hours were spent trying to collect a fee. Until the Fourth District reversed, counsel had succeeded in making the insurer bear this expense, plus its own fees.

In the case at bar, it would be inappropriate to accuse either side of litigating in bad faith. Petitioner had ample reason to question the value of the $600.00 thermographic examination. Its value has been questioned in other venues as well. See e.g. the cases collected in Sabatier v. State Farm Mutual Automobile Company, 592 A.2d 1098 at 1106 (Md.App. 1991).

On the next appeal, Petitioner's challenge to the multiplier was well-founded. Not only was there a recent United States Supreme Court ruling on the subject (R111), but this Court was prepared to modify Rowe, and did so in Quanstrom.

To the extent that Section 627.428 Fla.Stat. has the purpose of discouraging the contesting of valid claims, Wilder v. Wright, 278 So.2d 1 at 3 (Fla. 1973), it does not require the insurance company to roll over and play dead on fairly debatable claims or else be assessed for attorney's fees on litigation over attorney's fees.

Another purpose of Section 627.428 Fla.Stat. is to reimburse successful insureds when they are compelled to defend or sue to enforce their insurance contracts Wilder v. Wright, supra. That purpose ended when the insurance claim was resolved. There was certainly nothing to reimburse Respondent for in this case.

Respondent's reliance on Federal civil rights cases is misplaced. As stated in Jonas v. Stack, 758 F.2d 567 at 569 (11th Cir. 1985):

> "The Act's primary function is to shift the costs of civil rights litigation from civil rights victims to civil rights violations, Dowdell v. City of Apopka, 698 F.2d 1181 at 1189 (11th Cir. 1983). Its legislative history articulates two justifications for the cost-shifting mechanism. First, the mechanism affords civil rights victims effective access to the courts by making it financially feasible for them to challenge civil rights violations. Second, it provides an in-

> centive for both citizens and members of the bar to act as 'private attorneys general' to ensure effective enforcement of the civil rights laws. Id. (citing H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1 (1976) and S. Rep. No. 1011, 94th Cong. 2d Sess. 1, 3 reprinted in 1976 U.S. Code Cong. and Ad. News 5908, 5910)."

Respondent is not a civil rights victim and Petitioner is not a civil rights violator. The purposes which underlie the civil rights Act have no relevance here.

Obviously the federal interpretation of a federal statute is not binding on this Court in its interpretation of a Florida statute. Any persuasive quality that Respondent would attribute to the civil rights rulings is dubious. As this Court recognized in Standard Guaranty Insurance Company v. Quanstrom, supra, 555 So.2d at 832, the Supreme Court of the United States has distinguished public enforcement cases from personal injury cases with regard to the setting of attorney's fees.

Rather than following such doubtful precedents, this Court should follow its own decisions, which are far more relevant and persuasive than civil rights cases. The statutory purpose for awarding attorney's fees ceases when the statutory dispute is over. This Court should simply construe such statutes strictly and not allow attorney's fees, especially where, as here, Petitioner never challenged its obligation to pay attorney's fees, only the amount, and the fees awarded were entirely for the benefit of the attorneys.

Sonara v. Star Casualty Insurance Company, 17 FLW D1897 (Fla. 3DCA August 11, 1992) simply reaffirms the position of the Third District on this issue. What should be of importance for this Court is that the Third District once again certifies the question of attorney's fees for litigating over attorney's fees. This is the time for this Court to answer.

Respondent proves herself a poor prognosticator when she speculates that Petitioner will undoubtedly appeal again if this Court awards her attorney's fees. Like the courts of this state, Petitioner is waiting for this Court to answer whether such awards are authorized in this type of case. Though Petitioner will be unhappy if this Court makes it pay Respondent's attorneys as well as its own, it will have its answer, and will have no reason to institute further appeals.

Respondent also claims the law of the case requires approval of her attorney's fees even if this Court rules that no such fee should have been awarded. She relies on the fact that no review of the separate District Court Order granting attorney's fees for the appeal was sought by Petitioner when this Court reviewed the decision on appeal. She cites Tillman v. Smith, 560 So.2d 344 (Fla. 5DCA 1990), which holds that unappealed points become the law of the case. Respondent is mistaken both legally and factually.

Factually, the cases are distinguishable because they rely on the right of appeal to provide a clear opportunity to appeal. No case involved discretionary review.

Review of the decision of the District Court of Appeal does not automatically trigger jurisdiction in this Court to review separate orders. This Court's jurisdiction is limited to review of decisions which expressly conflict with orders of other appellate Courts. Article V, Section 3(b)(3), Florida Constitution. Unfortunately for Petitioner, there was nothing expressly stated in the separate order

which could have constituted conflict of decisions. Thus, Petitioner had no clear means to obtain review of that order until now.

Legally, Respondent is mistaken because the rule stated by the Fifth District in Tillman v. Smith, supra, is contrary to this Court's U.S. Concrete Pipe Company v. Bould, 437 So.2d 1061 at 1063 (Fla. 1983):

> "Furthermore, the respondent claims that U.S. Concrete is bound by the doctrine of law of the case by failing to challenge the trial court's instruction in the previous appeal.
>
> This last point raised by respondent has no merit. The doctrine of law of the case is limited to rulings on questions of law actually presented and considered on a former appeal."

The law of the case doctrine is no impediment to reversal of the attorney's fees erroneously awarded to Respondent here.

ARGUMENT

II. THE USE OF A MULTIPLIER ON THE ATTORNEY'S FEES AWARDED TO RESPONDENT'S ATTORNEYS SHOULD HAVE BEEN REVERSED BECAUSE THE TRIAL JUDGE THOUGHT THE MULTIPLIER WAS THE LAW OF THE CASE

Respondent says this point is moot because the multiplier was reversed. She also says no abuse of discretion has been shown here. Both claims are wrong.

The point is not moot, because the reversal was only as to the 2.6 numerical multiplier. The trial Judge was not directed to reconsider whether any multiplier at all was appropriate.

The issue here is not whether the Judge could have applied a multiplier and not abused his discretion. The issue is whether he knew he had discretion in view of his ruling that the multiplier was the law of the case. The District Court should have ordered him to reconsider and clarify his ruling, and did not do so.

CONCLUSION

Petitioner respectfully submits that this Court should decide this issue now, and should hold that attorney's fees may not be awarded for litigating over the amount of attorney's fees, at least where no part of the award goes to the client. It should quash the decision of the District Court herein for that reason and also because it did not require the trial Judge to clarify his understanding of his discretion as to the multiplier.

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 5th day of October, 1992.

Charles W. Musgrove

CHARLES W. MUSGROVE, ESQUIRE
2328 South Congress Avenue - Suite 1D
West Palm Beach, Florida 33406
407/968-8799
Florida Bar No. 095137