SUPREME COURT OF FLORIDA

JACQUES LUGASSY and DEBRA LUGASSY,	**	
Petitioners,	**	CASE NO. 80,823
vs.	**	DISTRICT COURT OF APPEAL THIRD DISTRICT - NO. 90-1626 90-2861 91-783
INDEPENDENT FIRE INSURANCE COMPANY,	**	
Respondent.	**	

BRIEF ON THE MERITS BY AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE POSITION OF PETITIONERS

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STATEMENT OF THE CASE AND OF THE FACTS

The Academy of Florida Trial Lawyers adopts the Statement of the Case and of the Facts of the petitioners.

SUMMARY OF THE ARGUMENT

The District Court of Appeals erred in failing to give effect to petitioners' agreement with their attorneys by affirming the trial court's award of a reasonable attorney's fee. The Lugassys' original contract with their attorneys provided for the recovery of a court-awarded fee; both the original Complaint and the first Amended Complaint expressly sought recovery of reasonable attorney's fees; and the parties subsequently confirmed that their agreement provided for such a recovery. Independent lacks standing to undercut the Lugassys' freedom of contract by disputing the terms of the Lugassys' fee contract or questioning the sufficiency of consideration for the parties' clarification of their contract.

The insured's right to recover a reasonable fee under Section 627.428 is part of the insured's claim against his insurer and a reasonable statutory fee should be awarded to a prevailing insured, irrespective of the provisions of the fee agreement which determine the insured's obligation to his attorney. There is no inequity or hardship presented by the prospect of an award of a reasonable fee to a prevailing insured. The fee contract should be irrelevant to the Court's determination of the extent of the reasonable fee; a reasonable fee is a reasonable fee, and presents no danger of excessiveness by definition. Even if this Court ignores the Lugassys' clarification of the original intent underlying their fee

agreement with their counsel, Section 627.428 calls for the award of a reasonable fee to the Lugassys in this case.

ARGUMENT

I. THE LUGASSYS WERE FREE TO ENTER INTO A FEE CONTRACT WITH THEIR ATTORNEYS PROVIDING FOR THE PAYMENT OF A REASONABLE FEE AS AWARDED BY THE COURT AND INDEPENDENT HAS NO STANDING TO DISPUTE THE TERMS OF THE FEE CONTRACT.

The District Court misconstrued and misapplied the holding of the Supreme Court in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) and its progeny to reach a result wholly unintended by this Court and inconsistent with the legislative policy which underlies the court-awarded attorney's fees provisions of Section 627.428, Florida Statutes. Recent decisions of this Court make it clear that parties may freely contract to pay a fee based solely upon an award of reasonable attorney's fees without any consideration of a percentage of the recovery or to pay a fee which will be the greater of that awarded by the court or a contingent percentage of the verdict.[1]

> To allow a plaintiff to contract with his lawyer to pay a fee larger than the fee provided in their contingent fee contract when the trial court finds it to be a reasonable fee does no violence to the statement in Rowe to the effect that private agreements between

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[1] See Florida Patient's Compensation Fund v. Moxley, 557 So. 2d 863 (Fla. 1990); Kaufman v. MacDonald, 557 So. 2d 572 (Fla. 1990); State Farm Fire & Casualty Co. v. Palma, 555 So. 2d 836 (Fla. 1990); Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); See also Tallahassee Memorial Regional Medical Center, Inc. v. Poole, 547 So. 2d 1258 (Fla. 1st DCA 1989); Inacio v. State Farm Fire & Casualty Co., 550 So. 2d 92 (Fla. 1st DCA 1989).

> plaintiff and counsel cannot be allowed to control the award of attorney's fees.

Florida Patient's Compensation Fund v. Moxley, 545 So. 2d 922, 923 (Fla. 4th DCA 1989).

The Lugassys and their attorneys were entitled to enter into a fee contract of their choosing, so long as it did not violate public policy. Clearly, this contract did not. Indeed, there are good public policy reasons, in this type of case, to allow petitioners' attorneys to seek a greater fee than the contingent percentage of the judgment, since relatively modest recoveries are often sought in cases arising out of disputed insurance coverage. In analogous circumstances in a medical malpractice case, the First District has expressly recognized the propriety of counsel receiving a reasonable fee for their services under circumstances in which the amount in controversy is relatively small, compared to the value of the legal services necessary to secure the claimant's entitlement to it:

> [W]e are unable to accept [defendants'] arguments that the dollar amount of recovery controls the award of attorney's fees in every type of case, nor that an award is per se "unreasonable" merely because the fee exceeds the recovery...
>
> Implicit in [defendants'] argument on this point is the notion that [claimants'] attorneys should be required, in effect, to subsidize [claimants'] litigation, except in cases likely to produce a relatively high monetary award, a proposition that we are unable to accept.

Baker v. Varela, 416 So. 2d 1190, 1192-1193 (Fla. 1st DCA 1982).

Respondent Independent had no standing or right to attempt to "rewrite" or "reform" the Lugassys' contract with their attorneys

so as to reduce the amount of a reasonable fee awarded against it. It is fundamentally accepted that competent parties have the utmost liberty of contracting and agreements voluntarily entered into will be enforced by the courts except where illegal, against public policy, or in contravention of statute. Foster v. Jones, 349 So. 2d 795 (Fla. 2d DCA 1977). Ultimately, the written clarification of the original intent of the Lugassys and their attorneys which was executed after trial was superfluous; regardless of the requirement under the rules regulating The Florida Bar that contingency fee agreements be reduced to writing, the fact that the Lugassys' agreement with their attorneys was at least in part oral cannot be used by Independent in order to wriggle off the hook for the statutorily mandated fee. See Harvard Farms, Inc. v. National Casualty Company, 18 Fla. L. Weekly D1039 (Fla. 3d DCA April 20, 1993).

Similarly, Independent lacks standing to challenge the adequacy of consideration underlying a contract to which it is not a party.

> The Court will not ordinarily inquire into the adequacy of the consideration. And the Court will not interfere with the facility of contracting and the free exercise of the will and judgment of the parties by not allowing them to be sole judges of the benefits to be derived from their bargains, provided there is no incompetency to contract, and the agreement violates no rule of law... A contract may be supported by any detriment or inconvenience, however small, sustained by one party, if it is by the express or implied consent of the other party.

Bayshore Royal Co. v. Doran Jason Company of Tampa, Inc., 480 So. 2d 651, 656 (Fla. 2d DCA 1985).

It is the duty of the Court to determine the intention of the parties from the language used, the apparent objects to be accomplished, and the surrounding circumstances at the time the agreement was entered into. J & S Coin Operated Machines, Inc. v. Gottlieb, 362 So. 2d 38 (Fla. 3d DCA 1978). The courts have no discretion to decline to enforce provisions in contracts for awards of attorney's fees, any more than any other valid contractual provision. Sybert v. Combs, 555 So. 2d 1313 (Fla. 5th DCA 1990). Even if, arguendo, there is some ambiguity in the terms of the fee agreement, the Court should arrive at an interpretation consistent with reason, probability, and the practical aspects of the transaction. Hessen v. Kaplan, 564 So. 2d 184 (Fla. 3d DCA 1990).

> The Court is not at liberty to rewrite the contract of the parties. Where they have in clear language contracted for certain obligation (or lack thereof) based upon stated eventualities, the parties are entitled to have their contract enforced as written in the absence of matters affecting public policy.

Sapienza v. Bass, 144 So. 2d 520 (Fla. 3d DCA 1962).[2]

Contracts are to be construed as having been made in contemplation of the applicable law, and such law is implicitly incorporated in the contract terms. Under the circumstances of this case, as testified to by the Lugassys' counsel, entitlement to a court-awarded fee was implicit in the original fee agreement (Tr. 1474-75, 1625-27, 1673-74); indeed, this agreement was consistent

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[2] See Prudential Insurance Company of America v. Wynn, 398 So. 2d 502 (Fla. 3d DCA 1981), holding that even a beneficiary under a contract may not rewrite the contract between the parties to achieve a result unintended by the parties; see also Muravchick v. United Bonding Insurance Co., 242 So. 2d 179 (Fla. 3d DCA 1970).

with generally accepted customary practice acknowledged in similar cases:

> The law also permitted these parties to agree that plaintiff's attorneys would be paid a reasonable fee consisting either of [a percentage] of the plaintiff's recovery, or a reasonable fee to be set by the court and paid by the defendant, whichever may be **greater.** The law and customary practice at the time this agreement was made generally contemplated that plaintiff's attorney would receive the reasonable fee awarded by the court if that amount should be the greater of the two amounts. State Farm Fire & Casualty Co. v. Johnson, 547 So. 2d 940, 942 (Fla. 1st DCA 1988) (Zehmer, J., specially concurring and dissenting).[3]

A party's freedom to contract with his attorney includes the freedom to take into account the possibility of a court-awarded fee where statutory authority for such an award exists. Brown v. General Motors Corp., Chevrolet Division, 722 F.2d 1009 (2d Cir.1983). It is clear that the Lugassys and their attorney were entitled to enter into a clarifying addendum to their agreement explicitly acknowledging the prospect of recovering a court-awarded fee in excess of the percentage of the fee identified in the original contract. See Inacio v. State Farm Fire & Casualty Co., 550 So. 2d 92 (Fla. 1st DCA 1989) and Pendley v. Shands Teaching Hospital and Clinics, Inc., 577 So. 2d 642 (Fla. 1st DCA 1991), rev. den., 589 So. 2d 292 (Fla. 1991).

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[3] The Fourth District incorporated this portion of Judge Zehmer's decision into Florida Patient's Compensation Fund v. Moxley, 545 So. 2d 922, 923 (Fla. 4th DCA 1989) and relevant portions of that opinion were subsequently approved by this Court in Florida Patient's Compensation Fund v. Moxley, 557 So. 2d 863 (Fla. 1990).

II. A REASONABLE FEE IS, BY DEFINITION, NOT EXCESSIVE; REGARDLESS OF THE PREVAILING PARTY'S FEE CONTRACT, A REASONABLE FEE SHOULD BE AWARDED TO THE PREVAILING INSURED, AS PROVIDED BY SECTION 627.428.

Section 627.428(1), Florida Statutes, provides:

> Upon the rendition of the judgment or decree by any of the courts of this state against an insurer and in favor of any named... insured... the trial court... shall adjudge... against the insurer and in favor of the insured... a reasonable sum as fees or compensation for the insured's... attorney prosecuting the suit in which the recovery is had.

The statute goes on to provide that, when awarded, attorney's fees "shall be included in the judgment or decree rendered in the case." Section 627.428(3). Section 627.428 is intended to discourage insurance companies from contesting valid claims by providing a means by which insureds may secure counsel to assert their right to coverage without depleting their recovery. Insurance Company of North America v. Lexow, 602 So. 2d 528 (Fla. 1992).

> If the dispute is within the scope of Section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees.

602 So.2d at 531.

By providing for the award of reasonable fees, the insured may gain access to counsel notwithstanding the fact that the amount in controversy may be relatively modest. This statute was obviously intended to level a playing field which, because of the insurer's typically vast resources, was tilted in favor of the insurer who could easily afford to retain counsel to defend its denial of coverage over an extended period of time, as here. As held in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1149 (Fla. 1985):

> We reject the Fund's contention that requiring an unsuccessful litigant to pay the prevailing party's attorney fees constitutes a 'penalty' offensive to our system of justice. The assessment of attorney's fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed.... It can be argued that, rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they are not economically feasible under the contingent fee system.

472 So. 2d at 1149.

Both in the original Complaint and in the Amended Complaint, the Lugassys gave Independent notice of their claim for attorney's fees as provided by Section 627.428; the relief which the Lugassys sought in the suit was both the policy proceeds and attorney's fees (R. 1-30, 69-77). Because Section 627.428 "is a part of every insurance policy", the Lugassys' claim for attorneys' fees was a claim under the policy. State Farm Fire & Casualty Company v. Palma, 585 So. 2d 329, 332 (Fla. 4th DCA 1991).

> The one entitled to an award of attorney's fees under the statute is the **insured** not the insured's attorney. The amount of reasonable attorney's fees and costs, like the amount of damages for injuries, is within the power of the insured to negotiate and settle.

Fortune Insurance Company v. Gollie, 576 So. 2d 796, 797 (Fla. 5th DCA 1991), rev. den., 589 So. 2d 290 (Fla. 1991).[4]

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[4] The Gollie court was construing a prevailing insured's right to attorney's fees under Section 627.428, Florida Statutes. But see Brown v. Vermont Mutual Insurance Company, 614 So. 2d 574 (Fla. 1st DCA 1993). Countless other courts, most frequently in civil rights cases, have interpreted analogous statutes with similar "prevailing party" language in determining that it is the party rather than the lawyer who is entitled to attorney's fees. y See Evans v. Jeff D., 475 U.S. 717, n.19, 106 S.Ct. 1531, n.19 (1986); Benitez v. Collazo, 888 F.2d 930, 933 (1st Cir.1989); Brown v. General Motors Corp., 722 F.2d 1009, 1011 (2d Cir.1983).

Since it is the Lugassys themselves who are entitled to recover attorney's fees under Section 627.428, the provisions of the Lugassys' contract with their attorneys are ultimately irrelevant to a determination of the amount of a reasonable fee which "shall" be awarded "in favor of the insured" pursuant to the legislature's clear intent. To the extent Rowe or its progeny, including Lane v. Head, 566 So. 2d 508 (Fla. 1990) and Miami Childrens Hospital v. Tamayo, 529 So. 2d 667 (Fla. 1988), suggest otherwise, they should be receded from; a reasonable fee is a reasonable fee and, where the prevailing party is limited to a reasonable fee, there is no danger of the courts becoming the "instruments of enforcement, as against third parties, of excessive fee contracts" as prohibited in Rowe, 472 So.2d at 1151.

> [Defendant] cautions us that refusing to limit the recovery to the amount of the contingent agreement will result in a "windfall" to attorneys who accept [statutory] actions. Yet the very nature of recovery under [the statute] is designed to prevent any such "windfall." Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered...

Inacio v. State Farm Fire & Casualty Co., 550 So. 2d 92 at 95, n.4 (Fla. 1st DCA 1989), citing Blanchard v. Bergeron, 489 U.S. 87, at 96, 109 S.Ct 939, at 944-46 (1989).

The trial court's determination that a reasonable attorney's fee in this action is $315,879.80 is, in itself, the most eloquent rebuttal to Independent's anticipated arguments that such a fee award would be improper, excessive, or would constitute a windfall which would unjustly enrich the Lugassys. Indeed, by being relieved of its statutory liability for the manifestly reasonable

fee calculated by the trial court, it is Independent that receives a windfall.

The Third District has mischaracterized Pendley v. Shands Teaching Hospital and Clinics, Inc., 577 So. 2d 642 (Fla. 1st DCA 1991), rev. den., 589 So. 2d 292 (Fla. 1991). Pendley did not involve a post-trial modification of a fee contract to provide for the award of a "greater" fee than was provided by the original agreement; as is abundantly clear from the First District's opinion, the original fee agreement in Pendley clearly contemplated the recovery of a reasonable attorney's fee award by the trial court. 577 So. 2d at 643. After the trial court in Pendley expressed concern about the propriety of the original fee agreement, which provided for the aggregation of the fee award with the damage verdict, the fee agreement was modified to provide that Mr. Pendley would owe his lawyers the reasonable fee awarded by the Court or a fee in the amount of 40 percent of the verdict, whichever was greater. Like Inacio, supra, Pendley supports the Lugassys' right to clarify their fee agreement to reflect changed circumstances and to have their clarified agreement enforced.

CONCLUSION

Having been placed on notice of the Lugassys' claim for attorney's fees at the outset of the litigation, and the trial court having found that $315,879.80 constituted a reasonable fee reflecting the services performed by the Lugassys' attorneys, what is the evil which the Third District seeks to protect Independent from? This Court's comment in Rowe that "in no case should the court-awarded fee exceed the agreement reached by the attorney and his client," 472 So. 2d at 1151, has been blindly extended by the

District Court of Appeal in a manner which, under the circumstances of this case, will only serve to undermine the clear policy of Section 627.428 and abrogate, without any justification, the plaintiffs' freedom to contract with their attorneys as they see fit. To the extent that Rowe and its progeny, including Lane v. Head, 566 So. 2d 508 (Fla. 1990) and Miami Childrens Hospital v. Tamayo, 529 So. 2d 667 (Fla. 1988), suggest that a reasonable fee may not be awarded under Section 627.428 under the circumstances of this case, they should be receded from. The reasonable fee determined by the trial court should be awarded to the Lugassys.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of foregoing was furnished to Milton Ferrell, Esquire, 201 South Biscayne Boulevard, Suite 1920, Miami Center, Miami, FL 33131-2305; Richard A. Friend, Esquire, 5975 Sunset Drive, Suite 106, South Miami, FL 33143; Evan J. Langbein, Esquire, 1125 Alfred I. duPont Building, 169 East Flagler Street, Miami, FL 33131-1294; Alvin W. Weinstein, Esquire, 920 Biscayne Building, 19 West Flagler Street, Miami, FL 33130; and Arthur J. Morburger, Esquire, Penthouse I, 155 South Miami Avenue, Miami, FL 33130, by mail, this 17th day of May, 1993.

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