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FILED
SID J. WHITE
AUG 4 1993
CLERK, SUPREME COURT
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IN THE SUPREME COURT, STATE OF FLORIDA
TALLAHASSEE, FLORIDA
PETITION NUMBER 82,029
APPEAL NUMBER: 2nd DCA 92-03806
L.T. CASE NO. 90-2800CA

IN RE:

EEZZZZ-ON TRAILERS, INC.,

Petitioner,

vs.

BANKERS INSURANCE COMPANY,

Respondent.
_____/

RESPONDENT'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, EEZZZZ-ON TRAILERS, INC., was the Defendant in the trial court and the appellant before the Second District Court of Appeal. Petitioner will be referred to as "EEZZZZ-ON" or "Petitioner".

Respondent, BANKERS INSURANCE COMPANY, was the plaintiff in the trial court and the appellee before the Second District Court of Appeal. Respondent will be referred to as "BANKERS".

STATEMENT OF THE CASE AND FACTS

On June 14, 1990, BANKERS filed a two count declaratory action against Petitioner, EEZZZZ-ON TRAILERS, INC. (R.1-70); Count I of BANKERS' complaint requested the trial court to declare that the policy of liability insurance issued to EEZZZZ-ON did not provide liability coverage for a motor vehicle accident involving a trailer manufactured by EEZZZZ-ON due to applicable policy exclusions; Count II of BANKERS' complaint requested the trial court to declare that there were material misrepresentations in the application of insurance made by EEZZZZ-ON and therefore the policy of insurance was void and there was no duty on the part of BANKERS to either defend nor indemnify EEZZZZ-ON as a result of the subject motor vehicle accident (R.1-70).

In response to BANKERS' declaratory action, EEZZZZ-ON retained the services of George Routh, Esquire, who filed an answer, affirmative defenses, as well as a counterclaim on behalf of EEZZZZ-ON (R.72-83). The asserted counterclaim was for declaratory judgment requesting the trial court to determine that the subject policy of insurance issued to EEZZZZ-ON was in fact valid and imposed a duty upon BANKERS to defend as well as indemnify; in essence, the asserted counterclaim was the mirror image of BANKERS' two count declaratory action (R.72-83).

BANKERS filed an amended complaint on February 25, 1991 (R.105-175) which simply added additional party defendants to the declaratory action. EEZZZZ-ON filed an answer, affirmative defenses and counterclaim for declaratory relief which was identical to that which was previously filed (R.181-193). Following discovery and an unsuccessful motion for summary judgment filed before the trial court by BANKERS, BANKERS agreed that the subject liability policy was in effect, settled all pending controversies and on August 8, 1991 filed a voluntary dismissal (R.263) extinguishing all issues except for reasonable fees to be awarded to EEZZZZ-ON's counsel, Mr. Routh. BANKERS never disputed Mr. Routh's entitlement to a reasonable attorney's fee.

Although BANKERS admitted to coverage, settled all pending controversies, and voluntarily dismissed their two count declaratory action thus making EEZZZZ-ON's counterclaim moot, Mr. Routh continued to "actively defend the action as well as pursue its counterclaim against BANKERS" (as demonstrated by the record following the voluntary dismissal and as stated in his initial brief to the Second District Court of Appeal, Appellant's Initial Brief page 2). For instance, on September 10, 1991, Mr. Routh filed a motion for summary judgment on behalf of EEZZZZ-ON (R.264-265), moved to set EEZZZZ-ON's counterclaim for trial (R.275), and again on February 5, 1992, filed a motion for summary judgment on the counterclaim asserted by EEZZZZ-ON (R.278-279).

In order to finally resolve all pending issues, the trial court on February 25, 1992, entered an order finding EEZZZZ-ON's counterclaim for declaratory relief and subsequent motion for summary judgment to be moot, disposed of all pending motions, and retained jurisdiction to determine a reasonable attorney's fee in favor of EEZZZZ-ON's counsel, Mr. Routh (R.286-288). At this stage of the proceedings, (as demonstrated by EEZZZZ-ON's initial brief to the Second District Court of Appeal, page 3), Mr. Routh had expended 16.8 hours litigating and pursuing the counterclaim after BANKERS accepted coverage and filed a voluntary dismissal making all matters moot.

On June 9, 1992, the trial court awarded EEZZZZ-ON's counsel, Mr. Routh, $44,810.00 in attorney's fees representing 136 hours at $150.00 per hour times a multiplier of 2 plus $4,010.00 in interest; this number represented Mr. Routh's reasonable attorney's fee up to the point of BANKERS' acceptance of coverage and filing of a voluntary dismissal of its two count declaratory action. The trial court denied Mr. Routh an attorney's fee for litigating and pursuing EEZZZZ-ON's counterclaim following BANKERS voluntary dismissal (R.408-414). Following the final judgment for attorney's fees, EEZZZZ-ON's counsel, Mr. Routh, filed a motion for rehearing (R.415-416), a motion for relief from judgment (R.417-418), a motion for summary judgment as to EEZZZZ-ON's counterclaim

(R.419), and a motion for judgment on the pleadings (R.420), all which were denied by the trial court on September 28, 1992 (R.421). It is from this final order that EEZZZZ-ON filed a notice of appeal.

On appeal, EEZZZZ-ON's counsel, Mr. Routh, presented this issue to the Second District:

> The trial court erred in denying appellant's, EEZZZZ-ON, and its attorney, Routh, a reasonable fee for litigating the issue of entitlement to fee under the contract of insurance between BANKERS and EEZZZZ-ON (EEZZZZ-ON's initial brief submitted to the Second District Court of Appeal, page 7).

On June 9, 1993, the Second District Court of Appeal filed its per curium opinion affirming the order of the trial court and citing as authority, U.S. Security Insurance Company v. Cole, 579 So.2d 153 (Fla. 2d DCA 1991), rev. den. 591 So.2d 631 (Fla. 1991).

The record is devoid of any evidence demonstrating that BANKERS disputed EEZZZZ-ON's entitlement to a reasonable attorney's fee award following BANKERS' acceptance of coverage and filing of a voluntary dismissal of its declaratory action. However, BANKERS was left with no option but to dispute the amount of the reasonable attorney's fee to be awarded to EEZZZZ-ON's counsel, Mr. Routh, due to the fact that Mr. Routh consistently requested an attorney's fee for litigating the coverage issue beyond the filing of the voluntary dismissal; essentially, Mr. Routh continually requested a reasonable attorney's fee for litigating a moot issue and in the absence of an actual controversey.

SUMMARY OF ARGUMENT

Article V, Section 3(b)(3) of the Florida Constitution, as well as Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., provides that a decision must expressly and directly conflict with the decision of another District Court of Appeal before discretionary jurisdiction of the Supreme Court may be sought and invoked. Although the Second District Court of Appeal in State Farm Mutual Automobile Insurance

Company v. Moore, 597 So.2d 805 (Fla. 2d DCA 1992) and U.S. Security Insurance Company v. Cole, 579 So.2d 153 (Fla. 2d DCA 1991), held that an attorney cannot be awarded fees for time spent litigating the issue of attorney's fees where the client, as prevailing party, has no interest in the fee recovered, a blind application of that rule is not at issue in the matter presently before this court. Here, the issue is not entitlement to a reasonable attorney's fee, but entitlement to a reasonable attorney's fee for continuing to litigate a moot issue that served no other purpose other than to increase the attorney's fees which were to be awarded.

The crucial factual distinctions between the decision of the Second District Court of Appeal below and the decisions of the other districts include:

> 1. BANKERS never disputed EEZZZZ-ON's counsel's entitlement to an award of attorney's fees following the acceptance of coverage and filing of the voluntary dismissal;
>
> 2. EEZZZZ-ON's counsel, Mr. Routh, continued to litigate in the absence of an actual controversy merely to increase his attorney's fee award and in no way benefitted his client, EEZZZZ-ON.

Based upon the foregoing factual distinctions, EEZZZZ-ON has failed to demonstrate an express and direct conflict which is a prerequisite to this court's discretionary jurisdiction and therefore BANKERS respectfully requests this court to deny discretionary review.

ARGUMENT

Petitioner, EEZZZZ-ON, fails to assert any facts or record evidence in its jurisdictional brief to this court which would demonstrate an express and direct conflict with other districts and therefore has failed to meet the prerequisites of invoking this court's discretionary jurisdiction as set forth in FLA. CONST., Art. V, Section 3(b)(3) and Rule 9.030(a)(2)(A)(iv), Fla. R. App. P.

Further, as demonstrated by the facts presented by Respondent, BANKERS, this case is not one which would merit the invocation of this court's discretionary jurisdiction. In Golden Loaf Bakery, Inc., v. Charles W. Rex Construction Company, 334 So.2d 585 (Fla. 1976), this court held:

> This Court's conflict jurisdiction was created in 1957, at the same time the legislature established the District Courts of Appeal. The obvious and limited purpose of that form of appellate review was to allow us to clarify the law when it becomes necessary under the new court structure created by the Constitution. Where our views on a matter of law are not absolutely necessary, we should not express them. Moreover, the constitutional role of our District Courts as courts of last resort is unnecessarily diminished to the extent we use this discretionary jurisdictional tool to express ourselves in situations which do not require our clarification.

Incorporating the same rationale, this court in Johns v. Wainwright, 253 So.2d 873 (Fla. 1971), held:

> District courts of Appeal were not intended to be intermediate courts. It was the intention of the framers of the constitutional amendment which created the DCA that the decision of these courts would, in most cases, be final and absolute.

In order to promote the rationale cited above, it is clear that this court's discretionary jurisdiction is invoked sparingly and only if there is an express and direct conflict of decisions between the districts. In the matter presently before this court, no such conflict exists. Although in State Farm Mutual Automobile Insurance Company v. Moore, 597 So.2d 805 (Fla. 2d DCA 1992), and U.S. Security Insurance Company v. Cole, 579 So.2d 153 (Fla. 2d DCA 1991), the Second District Court of Appeal disallowed an award of attorney's fees for time spent by the prevailing attorney in litigating issues of attorney's fees where the prevailing client has no interest in the fee recovered, that is not the true issue in this case.

The issue is not whether EEZZZZ-ON's counsel, Mr. Routh, is entitled to an award of reasonable attorney's fees, but whether he is entitled to a reasonable attorney's fee for continuing to litigate a moot issue and continuing to litigate in the absence of an actual controversy. In seeking discretionary review, EEZZZZ-ON cites conflict with Sonara v. Star Casualty Ins., Co., 603 So.2d 661 (Fla. 3rd DCA 1992); State Farm Fire and Casualty Co. v. Palma, 585 So.2d 329 (Fla. 4th DCA 1991); Ganson v. State, Department of Administration, 554 So.2d 522 (Fla. 1st DCA 1989); rev'd on other grounds, 566 So.2d 791 (Fla. 1990); Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980). The crucial distinctions between the matter presently before this court and those cases cited immediately above include:

> 1. Entitlement to reasonable attorney's fees was never disputed by BANKERS following their concession that there was coverage and the filing of the voluntary dismissal of their declaratory action; and
>
> 2. EEZZZZ-ON's counsel, Mr. Routh, continued to actively defend and pursue their counterclaim following BANKERS concession and voluntary dismissal thus litigating a moot issue merely in an attempt to increase his own award for attorney's fees and which had no benefit which would accrue to this client, EEZZZZ-ON.

To demonstrate a further lack of express and direct conflict, BANKERS would assert that this case is more factually aligned with Cincinnati Insurance Company v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974). In Cincinnati, the insured brought suit against his insurer seeking recovery under a fire insurance policy. Before trial, the insurer voluntarily paid the policy and offered the insured the $500 he had previously paid his attorney as a retainer. Counsel for the insured refused this offer and instead demanded $5,000. The matter went to trial on the issue of the insured's attorney's fees and the court entered judgment for the insured in the sum of $7,125.00 for attorney's fees for the prosecution of the action.

On appeal, the Fourth District initially determined that the insured was entitled to an award of attorney's fees pursuant to Florida Statutes §627.428 but held that the amount of attorney's fees awarded was improper based upon the following facts:

> The contract between the insured and his counsel provided for a $500 retainer fee plus such additional fee as the court might award, no portion of which would be returned to the client. Counsel spent 230 hours in the prosecution of the case, but only 30 hours had been expended up to the time that appellant voluntarily paid the policy proceeds and offered to reimburse the insured for his outlay of $500 attorney's fees.

Based upon these facts, the court in Cincinnati held:

> Since appellee's (insureds) contract with his attorney did not allow appellee to recover any part of his attorney's fees out of any sum awarded for that purpose, (i.e. the entire award was to go to the attorney) the service which the attorney rendered to appellee effectively terminated when the insurance company voluntarily paid the insurance proceeds to the SBA. From that point on, appellee's attorney was rendering service only for his own benefit. This might not have been so under a different contractual arrangement between appellee and his counsel. It is clear from the record that the amount which the court awarded as an attorney's fee was based upon the entire professional services of appellee's attorney and not merely that portion which was rendered prior to the time that appellant paid the policy proceeds. Cincinnati, 297 So.2d at 99.

The testimony of Mrs. Studer, a principal of EEZZZZ-ON, as reflected in the trial court's final judgment of attorney's fees and costs (R.409), demonstrates that the contract of representation entered between EEZZZZ-ON and their counsel, Mr. Routh, was purely contingent upon success and EEZZZZ-ON was not to be responsible for attorney's fees under any circumstances and clearly had no interest in the continued litigation following BANKERS' concession of coverage and voluntary dismissal. Therefore, like in Cincinnati, Mr. Routh's services for which he was retained terminated when BANKERS paid the insurance proceeds and filed a voluntary dismissal.

Based upon the foregoing, it is clear that EEZZZZ-ON's counsel, Mr. Routh, continued to litigate following BANKERS' voluntary dismissal simply in an attempt to increase the attorney's fees award and to promote his own financial interests. BANKERS never disputed EEZZZZ-ON's entitlement to a reasonable attorney's fee; however, BANKERS was left with no option but to dispute the amount of the reasonable fee due to the fact that EEZZZZ-ON's counsel consistently requested fees for litigating a moot issue and in the absence of an actual controversy. As a result, this case does not present an express and direct conflict which is a prerequisite to this court's discretionary jurisdiction.

CONCLUSION

The case presently before this court fails to present a express and direct conflict which is a prerequisite to this court's discretionary review as set forth in FLA. CONST., Art. V, Section 3(b)(3) as well as Rule 9.030(a)(2)(A)(IV), Florida Rules of Appellate Procedure, and respondent, BANKERS, respectfully requests this court to deny discretionary review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail on August 2, 1993 to **George Routh, Esquire, 1446 Court Street, Clearwater, Florida 34616.**

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