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IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

EEZZZZ-ON TRAILERS, INC.,

Petitioner,

v.

BANKERS INSURANCE COMPANY,

Respondent.

CASE NO. 82,029

RESPONDENT'S ANSWER BRIEF ON MERITS

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[1] Table of Authorities prepared by Lexis.

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

The Respondent, Bankers Insurance Company[2], respectfully restates the Statement of the Case and Facts to include matters omitted or in need of clarification as follows:

Factually and procedurally, this case is not complicated. Bankers Insurance Company initiated the present action by the filing of a two-count Complaint for declaratory relief. (R. 1-7)[3] Count I sought a declaration from the court that the liability policy provided by Bankers to EEZZZZ-ON provided no coverage for an incident involving the use of one of EEZZZZ-ON's trailers and the death of Gerald D. Smith, Jr. (R. 1-4, 8-58)

Count II of the Complaint sought rescission of the liability policy issued by Bankers to EEZZZZ-ON on the basis of Fla. Stat. § 627.409. Bankers alleged that there were material misrepresentations of fact in the application for such coverage and that it would not have issued the policy had it known of the undisclosed risks. (R. 4-7, 64-70(a))

EEZZZZ-ON answered the Complaint admitting jurisdiction, the existence of the policy and venue. (R. 72-73) EEZZZZ-ON denied the material allegations of the Complaint and raised as affirmative defenses an estoppel based upon the conduct of Bankers' insurance

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[2] For ease of reference herein, the Respondent, Bankers Insurance Company, will be referred to as Bankers or as Plaintiff. The Petitioner, EEZZZZ-ON Trailers, Inc., will be referred to by name or as Defendant. All other persons will be referred to by name.

[3] All references to the Record on Appeal will be referred to as (R) followed by the appropriate citation to the page number of the Record on Appeal.

agent and an estoppel based upon Bankers' failure to provide completed operations coverage as requested on the application. (R. 74-75) EEZZZZ-ON also filed a counterclaim against Bankers requesting the court to find coverage under the policy, and in addition, in Paragraph 16, requested attorney's fees pursuant to Fla. Stat. § 627.428. (R. 75-77)

Bankers filed an amended two-count Complaint again requesting a declaration of the party's rights under the contract as written and rescission. (R. 105-175) EEZZZZ-0N again admitted the court's jurisdiction and venue, generally denied the remaining allegations and raised a variety of affirmative defenses including estoppel. (R. 181-184) EEZZZZ-ON also filed essentially the same counterclaim and demand for attorney's fees pursuant to Fla. Stat. § 627.428. (R. 184-186) In its answer to the counterclaim, Bankers was without knowledge and, therefore, denied the allegations concerning EEZZZZ-ON's responsibility for the payment of fees to its attorney. (R. 198-199)

Bankers filed an amended motion for partial summary judgment in which it requested the court to determine that the policy, as issued, provided no coverage for the injuries claimed in the Smith case arising out of the ownership, maintenance, use or entrustment to others of EEZZZZ-ON's trailer. (R. 194-196) By order of July 22, 1991, the trial court denied the summary judgment motion. (R. 262) On August 2, 1991, Bankers voluntarily dismissed the action as to all defendants. (R. 263)

Approximately five weeks later, EEZZZZ-ON filed its motion for summary judgment on its counterclaim. (R. 264-265) The trial court granted a partial summary judgment with respect to Count II finding that since Bankers had earlier taken a voluntary dismissal of its cause of action under that count, the latter voluntary dismissal acted as an adjudication of the merits on that action. (R. 266)

Bankers filed a motion to dismiss the pending counterclaim in which it stated that the policy proceeds had been exhausted by the payment of the policy limits to the estate of Gerald D. Smith. As such, there remained no justiciable issue, and the counterclaim had been rendered moot. (R. 273-274)

On February 25, 1992, the court entered an order on Bankers' motion to dismiss, EEZZZZ-ON's motion for summary judgment and a motion for sanctions by EEZZZZ-ON. (R. 286-288) In its order, the court stated that Bankers had conceded its obligation under Fla. Stat. § 627.428 to pay EEZZZZ-ON's attorney a reasonable fee. (R. 287) It should be noted that the court had previously granted EEZZZZ-ON Trailer's motion for protective order canceling the hearing to determine the fee, which had been scheduled by Bankers so that the amount of its obligation could be determined. (R. 278-279, 282-284)

Thereafter, the court conducted a hearing on the attorney's fee issue. There is no transcript from that hearing in the record. However, the court's order states that Bankers paid its policy limits and filed a voluntary dismissal of the action.

(R. 408-409) The court found that Bankers' conduct was the functional equivalent of a confession of judgment which thereby entitled EEZZZZ-ON to an attorney's fee. (R. 409) The order also states that the contract between EEZZZZ-ON and its attorney was contingent upon success and that under no condition, was EEZZZZ-ON or its principals, Mr. or Mrs. Studer, to be responsible for an attorney's fee. (R. 409) The order also indicates that EEZZZZ-ON's attorney, Mr. Routh, sought approximately $88,000.00 in attorney's fees associated with defending the case, arguing the counterclaim and litigating the amount of his attorney's fee. (R. 409-410) After considering the evidence, the court found that rather than the $175.00 an hour fee requested by Mr. Routh, $150.00 an hour was reasonable. (R. 413-414) The court also rejected Mr. Routh's contention that he was entitled to a 2.5 multiplier, and instead, utilized him a 2.0 multiplier. (R. 414) The court denied fees for litigating the moot counterclaim and for litigating the amount of the fee. (R. 414) A timely appeal followed.

STATEMENT OF ISSUE ON APPEAL

The Respondent, Bankers, respectfully restates the issue on appeal as follows:

> WHETHER THE SECOND DISTRICT CORRECTLY CONCLUDED THAT EEZZZZ-ON'S ATTORNEY WAS NOT ENTITLED TO A FEE FOR LITIGATING THE ISSUE OF THE AMOUNT OF HIS ATTORNEY'S FEES WHERE EEZZZZ-ON HAD NO INTEREST IN THE FEE SOUGHT BY ITS ATTORNEY.

SUMMARY OF THE ARGUMENT

This case is not complicated. It involves the construction of Fla. Stat. § 627.428(1). The purpose of the statute is two-fold. It is intended to discourage the contesting of valid claims of insureds against their insurers and to reimburse successful insureds reasonably for their outlays for attorney's fees when they are compelled to defend or to sue to enforce the contract. Wilder v. Wright, 278 So.2d 1, 3 (Fla. 1973). In interpreting the statute, this court has stated the fundamental rule in Florida has always been that an award of attorney's fees is in derogation of the common law, and those statutes which allow for an award of such fees must be strictly construed. Roberts v. Carter, 350 So.2d 78 (Fla. 1977).

The Second District has interpreted the statute so as to not to require an insurer to pay fees to an attorney hired on a purely contingency-fee basis where the insured has retained no interest in the fee award. That interpretation fairly recognizes both purposes of the statute. The insurer is penalized because it must pay the fee that was necessarily created by its wrongful conduct in denial of the claim. The insured's attorney is compensated for the amount of time in which he or she represented the interests of his client in establishing the coverage. Thereafter, in a purely contingency-fee case, the attorney is no longer representing the interests of the client, but is only representing his or her own interests. Since there is no need to

reimburse the insured for work done for the attorney's sole interest, the insurer ought not have to pay that amount.

The Third District has announced the exact opposite rule in Sonara v. Star Cas. Ins. Co., 603 So.2d 661 (Fla. 3d DCA 1992). There, the court stated that it was irrelevant whether the insured retained a technical interest in the fee or whether the fee was to be given solely to the attorney. Under either scenario, the insurer was required to pay for the fees expended in litigating the amount of the fee to which the insured's attorney would be entitled. The justification for this rule, according to the Third District, is that in the absence of allowing such an award, the insured cannot retain an attorney. However, the risk of non-payment is a factor already considered in the fee award to the insured's attorney. As noted by this court in Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828, 834 (Fla. 1990), in tort and contract cases, a multiplier is a useful tool which can assist the trial court in determining a reasonable fee in that category of cases when a risk of non-payment is established. Since there clearly is no legislative expression contained within Fla. Stat. § 627.428(1) that an insurer should be penalized in excess of that amount necessary to render the insured whole, the strained interpretation of that statute by the Third District should be rejected.

Finally, EEZZZZ-0N argued that the Third District's rule should be adopted to prevent insurers from unreasonably declining to pay reasonable demands for attorney's fees by their insured's

attorneys. Even recognizing that there are occasions in which some insurers may be unreasonable, insurance companies have no corner on the market when it comes to being unreasonable. Lawyers, especially when talking about their fees, have been known to be equally unreasonable. The facts of this case suggest such a scenario. The rule advocated by EEZZZZ-ON rewards an attorney for his or her unreasonableness. There is no incentive to make a reasonable offer because the more unreasonable the attorney is, the greater the fee that he or she will generate.

This court need not adopt the strained interpretation of the statute to solve this dilemma. Offers and demands for judgment authorized under Fla. Stat. § 768.79 are available and have been available to both insureds and insurers alike. Rather than torture the clear language of the statute in an effort to additionally penalize the insurer, an attorney who believes that an insurance carrier is unreasonably denying a reasonable fee request should simply file a demand for judgment, and should he succeed in accordance with the statute, be rewarded with the additional fees. There simply is no basis for the creation of a blanket rule that the insured's attorney should be entitled to fees for litigating the amount of the fee to which he is solely interested. This court should approve the decision of the Second District and in doing so, announce a rule which discourages rather than encourages additional litigation.

ARGUMENT

I.

THE SECOND DISTRICT CORRECTLY CONCLUDED THAT EEZZZZ-ON'S ATTORNEY WAS NOT ENTITLED TO A FEE FOR LITIGATING THE ISSUE OF THE AMOUNT OF HIS ATTORNEY'S FEES WHERE EEZZZZ-ON HAD NO INTEREST IN THE FEE SOUGHT BY ITS ATTORNEY.

This case is not complicated. The pertinent facts are not disputed. The case simply involves the construction of Fla. Stat. § 627.428(1) and whether Bankers is required to pay EEZZZZ-ON's attorney's fees for litigating the issue of the amount of fees that its attorney was to be awarded pursuant to the statute. Here, the trial court correctly determined that since EEZZZZ-ON retained no interest in the attorney fee award, as the contingency contract contemplated that the attorney's sole compensation would be statutory fees, Bankers was not required to pay EEZZZZ-ON's attorney for litigating the amount of the fee to which he was entitled. The Second District correctly affirmed that decision. This court should approve the decision of the Second District and the reasoning which led to its conclusion.

Florida courts have consistently interpreted Fla. Stat. § 627.428(1) and its purpose. That purpose is two-fold. The statute is intended to discourage the contesting of valid claims of insureds against insurance companies and to reimburse successful insureds reasonably for their outlays for attorney's fees when they are compelled to defend or to sue to enforce their contracts. Wilder v. Wright, 278 So.2d 1, 3 (Fla. 1973). See also, Insurance Company of North America v. Lexow, 602 So.2d 528, 531 (Fla. 1992);

Florida Rock & Tank Lines, Inc. v. Continental Ins. Co., 399 So.2d 122, 124 (Fla. 1st DCA 1981). This court has also stated that the fundamental rule in Florida has always been that an award of attorney's fees is in derogation of the common law and those statutes which allow for an award of such fees must be strictly construed. Roberts v. Carter, 350 So.2d 78 (Fla. 1977). See also, Lumbermens Mut. Ins. Co. v. American Arbitration Assn., 398 So.2d 469, 471 (Fla. 4th DCA 1981); Sheridan v. Greenberg, 391 So.2d 234, 236 (Fla. 3d DCA 1980). The person entitled to an award under the statute is the insured and not the attorney. Fortune Ins. Co. v. Gollie, 576 So.2d 796, 797 (Fla. 5th DCA 1991).

Interpreting the two-fold purpose of the statute, the Second District in the present case stated:

> This court in State Farm Mutual Automobile Insurance Company v. Moore, 597 So.2d 805, 807 (Fla. 2d DCA 1992) held:
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> "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. U.S. Security Insurance Company v. Cole, 579 So.2d 153 (Fla. 2d DCA 1991)." 619 So.2d 470.

The basis for the rule announced by the Second District is well reasoned and long entrenched in Florida law. As noted by the Second District in B & L Motors, Inc. v. Bignotti, 427 So.2d 1070, 1073 (Fla. 2d DCA 1983), disapp'd. on other grounds, Travieso v. Travieso, 474 So.2d 1184 (Fla. 1985), case law construing various attorney's fee statutes had held that fees for an attorney's work to recover fees are not recoverable when the client was not obligated to the attorney for that work. The court

explained that the rationale for the rule was that statutorily-authorized attorney's fees are for the benefit of the prevailing party. As such, an attorney may not recover such fees for work done for the attorney's sole benefit.

As part of the basis for the rule which is applied in the Second District, the judges of that court have relied upon the Fourth District's decision in Cincinnati Ins. Co. v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974). There, the named insured under a fire policy brought suit against the insurer seeking recovery in favor of a mortgagee. After the suit was commenced, the insurer paid the face amount of the policy to the mortgagee which rendered moot all issues in the suit other than the question of attorney's fees. Cincinnati first argued that the statute should be strictly construed, and since there was no rendition of a judgment or decree in favor of the insured, there was no basis for the imposition of any fee. The Fourth District rejected that argument and determined that the terms of the statute were a part of every insurance policy issued in Florida. The court also stated that the relief sought was not only the policy proceeds, but likewise, attorney's fees. The failure of the insurer to voluntarily pay any part of the relief sought would be interpreted as its continued contesting of benefits under the policy.

Having determined that the insurance carrier would be responsible for payment of a fee, the Fourth District next turned to whether the amount which was awarded was proper. The court explained that the insured's attorney had a contract with his

client for a $500.00 retainer plus any additional fee as the court might award, no portion of which was to be returned to the client. According to the insured's attorney, he expended 234 hours of professional time prosecuting the case. However, only 30 hours had been expended up until the time that the insurance carrier voluntarily paid the policy proceeds. The remainder of that time was expended in attempting to collect the attorney's fees. About the time that the insurer paid the policy proceeds, it offered $500.00 to the insured to reimburse him for his outlay of attorney's fees. The insured's attorney refused such an offer and instead, demanded a fee ten times that amount. The court noted that it was clear from the time the insurer paid the policy proceeds, all subsequent efforts on behalf of the insured's attorney were solely for his own benefit and not that of the client.

Reversing the attorney's fee award, the Fourth District explained that the insured was entitled to an award of attorney's fees for the use and benefit of his attorney in an amount based upon quantum meruit for services rendered to the insured. Since the insured's contract with the attorney did not allow the insured to recover any part of his attorney's fee out of any sum awarded for that purpose (the entire award going to the attorney), the service which the attorney rendered to the insured was determined to effectively terminate when the insurance company voluntarily paid its policy proceeds. From that point on, the court reasoned that the insured's attorney was rendering service only for his own

benefit. The court explained that such a result might not have been mandated under a different contractual arrangement between the insured and his counsel. The court concluded that the fee awarded to the attorney was not based solely upon the portion which was rendered prior to the time that the insurer paid the policy proceeds, and as such, it should be reversed.

Since the Second District's adoption of the Palmer reasoning in Bignotti, it has consistently and uniformly applied the rule that where the insured retains no interest in the attorney's fee, the attorney is not entitled to a fee for the amount of time expended in litigating the amount of such fee. See, U.S. Security Ins. Co. v. Cole, 579 So.2d 153 (Fla. 2d DCA 1991); State Farm Mut. Auto. Ins. Co. v. Moore, 597 So.2d 805 (Fla. 2d DCA 1992). The Second District is not alone in this approach. For instance, in Inacio v. State Farm Fire & Cas. Co., 550 So.2d 92 (Fla. 1st DCA 1989), Inacio sued State Farm for uninsured motorists benefits under his policy. The matter eventually settled before trial leaving the only issue for the court to be a determination of the amount of attorney's fees under Fla. Stat. §§ 624.155(3) and 627.428. The trial court had denied the attorney representing the insured an award of fees for hours spent in pursuit of the claim for attorney's fees after settlement. Unlike the contract between EEZZZZ-0N and its attorneys, Inacio retained an interest in the fee. The contract stated the contingency percentage was due and payable to the attorney upon receipt of the settlement recovery regardless of the outcome of Inacio's claim for statutory

attorney's fees against State Farm. Under the fee agreement, any statutory fee later recovered would be returned to Inacio in application against any amount previously paid. The First District concluded that the trial court had misapplied the rule as stated in B & L Motors, Inc. v. Bignotti because Inacio had retained an interest in the fee.

The rule relied upon by the Second District makes a great deal of sense and should be easy to apply. In the vast majority of situations where an insured retains an interest in the fee award, the insured is paying the attorney an hourly rate for his or her representation. Once an insurer has agreed to settle the claim, the corresponding obligation to pay the statutory attorney's fee arises. Under that scenario, the amount of the fee can easily be determined by merely forwarding a copy of the fee agreement and the bills incurred on behalf of the insured to the insurance carrier. If the insurance carrier refuses to pay the fee as being unreasonable, the insured continues to maintain an interest in the fee award because the insured is incurring ongoing expenses and the services which are being rendered are being performed on his behalf. In such a situation, the role of the attorney is still one of an advocate of the client's interests, as opposed to an advocate for his or her own interest. Equally as important, both underlying purposes of the statute are satisfied. First, the insurer is penalized for its wrongful declination of coverage. Second, the insured is reimbursed for reasonable outlays for attorney's fees which he or she had been compelled to pay because of the insurer's

conduct. Finally, the rule realistically recognizes that an insured who has a contingency fee agreement with his attorney has no real interest in the case after the coverage issue has been resolved in his favor. From the insured's viewpoint, the problem which necessitated legal representation is resolved. Work done thereafter is of no benefit to him as opposed to his attorney.

EEZZZZ-ON argues that this court should reject the Second District's view. It suggests this court should adopt the viewpoint of several other district courts of appeal which have held that an insured's attorney is entitled to an award of attorney's fees for the time spent litigating the amount of fees to be paid to that attorney under a contingency fee contract where only the attorney receives the award. Not surprisingly, EEZZZZ-ON refers to no language in the statute which mandates this result. Instead, EEZZZZ-ON emphasizes the penalty nature of the statute as the basis for its argument that Bankers should be required to pay EEZZZZ-ON's attorney's fees for the hours associated with litigating the amount of his fee. Although EEZZZZ-ON has not cited to the court any cases which specifically reached that conclusion, it appears that the Third District Court of Appeal shares its view.

In Sonara v. Star Cas. Ins. Co., 603 So.2d 661 (Fla. 3d DCA 1992), the insured was injured in an automobile accident and made a claim for PIP benefits from his insurer, Star Casualty. The insurer initially declined the claim, and the plaintiff filed suit to collect the PIP benefits as well as attorney's fees. Thereafter, the insurer changed its position and agreed to pay the

plaintiff's PIP claim and a reasonable attorney's fee. The insurer did not agree to the amount of attorney's fees claimed by the plaintiff's attorney. Thereafter, the insured's attorney continued to press his fee claim and prepared a case on that issue for trial. The trial court conducted an evidentiary hearing on the plaintiff's attorney's fee claim and awarded a fee which utilized the lodestar approach. The trial court refused, however, to award any fees expended by the attorney subsequent to the time that the insurance company paid the benefits and agreed that it owed a reasonable fee.

On appeal, the Third District reversed the attorney's fee judgment and remanded the case to the trial court with directions to recalculate the attorney's fee by including the reasonable hours of attorney time spent in prosecuting the attorney's fee claim. Citing to the Fourth District's decision in Cincinnati Ins. Co. v. Palmer, 297 So.2d 96, 99 (Fla. 4th DCA 1974), the Third District stated that Fla. Stat. § 627.428(1) provided that a successful insured was entitled to an award of reasonable attorney's fees against the insurer for prosecuting the suit in the which the recovery was had. The court further elaborated that upon the filing of such a suit, the relief sought was both the policy proceeds and attorney's fees. According to the Third District, so long as the insurer failed to voluntarily pay any part of the relief sought, it continued to contest the policy even though the claim at that point in time was limited to the recovery of attorney's fees. The court stated that it followed that when the insurer pays the insurance benefits sought after suit has been

filed, but declines to pay the claim for fees, the insurer is still contesting the insured's claim under his insurance contract, and the insured would be entitled to a fee award for prosecuting the entire claim to its successful conclusion.

The Third District stated that the purpose of a fee award under Fla. Stat. § 627.428(1) was to discourage the contesting of insurance policies and to reimburse successful insureds reasonably for their outlays for attorney's fees when they were compelled to defend or sued to defend their contracts. Further, the public policy expressed in the statute would be defeated if the insurer was able to contest the insured's claim for attorney's fees and yet avoid any liability for the attorney's fees in prosecution of that claim.

In rejecting the rules elaborated by the First and Second Districts, the Third District held that insurers should be required to pay for the fees regardless of whether the insured had an interest in the fees when the award was made. The court explained that if the insured had a technical interest in the award upon collection, it would be turned over to the attorney. It made no difference if, in lieu of that procedure, the insured had relinquished any interest in the fee to his or her attorney prior to the collection of the fee as a means of retaining the attorney. According to the Third District, under either scenario, the insured had a substantial interest in the attorney's fee as it was used as the basis for retention of the attorney, and in either event, the attorney received the award. The Third District concluded that the

insurer must pay the claim and that even utilizing the type of rule employed by the First or Second Districts, the plaintiff obviously retained an interest in the fee as clearly he would have been unable to retain an attorney without it. See also, U.S. Fidelity & Guaranty Co. v. Rosado, 606 So.2d 628 (Fla. 3d DCA 1992).

The Fifth District has likewise allowed an attorney to recover fees from an insurer for the time spent in litigating the amount of the fee in Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980). In Gibson, the insured made a claim under a group policy issued by Lloyd's for theft of a trailer insured under the policy. The policy contained a provision that such a loss was not payable until 60 days after the verified proof of loss was submitted to the underwriters. Prior to the expiration of that 60-day period, the insured filed suit alleging the loss and demanding the full policy limits plus interest, costs and attorney's fees. Within that 60-day period, the agent for the underwriters mailed to the insured a check for the policy limits which the insured and his attorney refused to accept claiming that interest and attorney's fees were still due. Thereafter, the parties agreed that the check could be negotiated without prejudice to the insured's claim for interest and attorney's fees. At no time did the insurer concede its liability for or offer to pay either the interest or the attorney's fees. In that posture, the case proceeded to a jury trial. At the conclusion of the evidence, the trial court directed a verdict on the issue of liability and then proceeded to hear testimony concerning interest and attorney's fees. As to the matter of

attorney's fees, the trial court concluded that the insured was entitled to recover such fees for services rendered by his attorney up until the time that the insurance proceeds were received, but not beyond then. On appeal, Gibson contended that he was entitled to recover a reasonable fee up to and including the trial and not solely from the date that the payment was received. The insurer evidently did not argue that Gibson's attorney was not entitled to any fee, but objected and argued that he was not entitled to a fee after the date the insured received the payment.

The Fifth District stated that it must determine at what point in the proceedings the obligation for attorney's fees terminated. That court concluded that in the case before it, the insured was entitled to recover attorney's fees through the final judgment. As the Third District did in Sonara, the Fifth District relied upon Cincinnati Ins. Co. v. Palmer, 297 So.2d 96 (Fla. 4th DCA 1974) as authority for its position. After concluding that the statutory provision became a part of every insurance policy, the court distinguished Palmer on the basis that the insurer there not only tendered the policy proceeds, but the full amount of the attorney's fees which had been paid to the insured's attorney and for which he was obligated. The court stated that the insurer before it had denied not only an obligation for attorney's fees, but interest as well and, therefore, it had resisted other obligations under its policy. As such, it determined that the insured's attorney was entitled to a fee from the time of the prosecution of the suit through final judgment.

Both the First and Fourth District Courts of Appeal have construed other attorney's fee statutes to allow an attorney recovery of fees for the time expended in establishing the amount of the fee owed under a statutory provision. See, Ganson v. State Dept. of Administration, 554 So.2d 522 (Fla. 1st DCA 1989); Pirretti v. Dean Witter Rentals, Inc., 578 So.2d 474 (Fla. 4th DCA 1991) (wherein the Fourth District certified this issue to this court). See also, State Farm Fire & Cas. Co. v. Palma, 585 So.2d 329 (Fla. 4th DCA 1991) (holding insured's attorney entitled to fee for time establishing fee and apparently holding that Fla. Stat. § 627.428 awards trial and appellate attorney's fees regardless of whether such an award would be unjust).

The Fifth District's decision in Gibson is clearly distinguishable from the present case. Bankers had settled the third-party liability claim against its insured at the time it had filed its voluntary dismissal. It paid its full policy limits in settlement of that claim. Also, unlike the insurer in Gibson, Bankers conceded, rather than contested, the fact that it was obligated to pay a reasonable fee. As such, Gibson would simply not appear to apply to this case.

With respect to the rule announced by the Third District in Sonara, it is respectfully submitted that the Third District's analysis is flawed in at least two respects. In order to reach its holding in Sonara, the Third District created a legal fiction upon which it based its determination that the insurer should be obligated to pay attorney's fees for the time required to prove the

amount of the fee. That fiction is that in a true contingency contract, the insured retains an interest in the fee to be awarded to his attorney. With a pure contingency contract, however, just as it was in this case, the insured is not obligated to pay the attorney anything unless the case is favorably resolved in the insured's favor. Once the issue is determined in favor of the insured, the right to a statutory attorney's fee has been established. With a contingency fee, that award goes directly to the attorney. To suggest that the insured retains an interest in a fee award that he or she will never see simply ignores the true nature of the contingency contract.

The second basis for allowing such an award, according to the Third District, was that the statutory fee claim was used as the basis for retaining the attorney in the first instance. According to the Third District, in the absence of this fee award, the insured would have been unable to retain an attorney. However, that factor is one that is already considered by the trial court when determining the amount of the fee and to what extent a lodestar multiplier should be applied. In Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828, 834 (Fla. 1990), this court explained that in tort and contract cases, a multiplier was a useful tool which could assist the trial court in determining a reasonable fee in that category of cases when a risk of non-payment was established. It certainly is not equitable for the attorney to receive a fee which represents a reasonable hourly rate, multiplied by some number greater than 1.0 in recognition of his risk of non-

payment and then justify the imposition of additional fees against the insurer because of the same risk of non-payment. The Third District would have been on safer ground had it strictly construed the statute, as it is required to do, rather than to add penalty provisions which do not appear within the terms of the statute itself.

This court should likewise reject the position adopted by the Third District because it emphasizes only one of the purposes of Fla. Stat. § 627.428(1) to the exclusion of the other. Under the rule announced by the Third District in Sonara, the penalty aspect of the statute is emphasized, whereas the intent simply to reimburse the successful insured for his or her outlay of attorney's fees is ignored. Admittedly, an insurer who wrongfully declines coverage ought to be responsible to make its insured whole when the insured has prevailed in the insurance coverage claim. In a purely contingency fee case, however, the insured has made no outlay, and when the lodestar multiplier is applied, the attorney is already compensated for the risk of non-payment. At that point in time, there is no need to additionally penalize the insurer who has declined the coverage in the first instance. Likewise, such a result cannot be justified under the traditional notion of damages (i.e., making the person whole) because he has incurred no real expense or outlay.

Finally, EEZZZZ-ON argues that Fla. Stat. § 627.428 is a penalty statute and as such, the statute should be interpreted broadly to require the insurance carrier to pay for the hours

expended in litigating the amount of a fee. According to EEZZZZ-ON, the reasoning of the Second District is flawed heavily in favor of an insurance carrier. It further contends that in the Second District, and after an insured has prevailed, a carrier can feel free to, in bad faith, decline to pay a reasonable fee to the insured's counsel without any fear of additional fees for the litigation of the entitlement. EEZZZZ-ON then maintains that a situation develops where an insurance carrier announces to the insured's attorney that he or she should take a fee as the insurer offers, or otherwise, the insurance carrier will keep the insured in court for the next year litigating the entitlement to a fee expending a great deal of time for which the insured's attorney will not be compensated.

Predictably, EEZZZZ-ON has cited to no portion of this record which can remotely support this assertion. In fact, the record in this case demonstrates the contrary to be true. Here, as stated in the final judgment of attorney's fees and costs, EEZZZZ-ON's attorney sought approximately $88,000.00 in fees. (R. 409-410) That amount reflected time spent litigating a counterclaim for declaratory relief after the issues involved had become moot by virtue of Bankers' payment of its policy limits to the third-party claimant. It likewise included approximately a week's time litigating the fee issue. (R. 410) After applying a multiplier, the trial court entered judgment for a little more than half of that demand. (R. 414) Under the circumstances, it is impossible for the undersigned to understand how Bankers' refusal to pay that

demand would be unreasonable. Just as important, it demonstrates that insurers do not enjoy a monopoly concerning unreasonableness. Insured's attorneys are equally capable of being unreasonable. A blanket rule requiring the insurance carrier to pay for the time spent litigating the fee under a contingency contract will do nothing but provide a financial incentive for attorneys to be even more unreasonable.

Certainly, there may be instances in which an insurance carrier wrongfully refuses to pay a reasonable fee to the insured's attorney. Those limited circumstances do not justify an interpretation of Fla. Stat. § 627.428(1) which would require an insurer to pay unreasonable fees under the threat that it will be required to pay even more fees if it rejects the unreasonable request. Such an interpretation, as appears to have been adopted by the Third District in Sonara, creates a problem of at least equal size in the process. Once there is a determination that the insured is entitled to coverage, under the Sonara rule, there is absolutely no incentive for the insured's attorney to provide the insurance carrier with a reasonable request for fees. If the insurer does not give in to the unreasonable demand, the insured's attorney is free to litigate the issue, as much or as little as he or she pleases. The only restriction on the amount of the fee that the insurance carrier would ultimately have to pay under that situation is the amount of money that sits in its bank account. It is difficult to understand what possible justification there could be for that result when the intent of the statute is to make the

insured whole for the wrongful denial of coverage. While EEZZZZ-ON would argue that the penalty aspect of the statute would justify this result, there is no language in the statute which remotely suggests that it should provide a windfall to insured's attorneys.

There does exist a practical solution to this dilemma which places the burden of unreasonableness squarely on the responsible party while at the same time avoids a strained interpretation of the statute. In Timmons v. Combs, 608 So.2d 1 (Fla. 1992), this court adopted the procedural section of Fla. Stat. § 768.79 as the rule of the court which effectively replaced Fla.R.Civ.P. 1.442. Florida Statutes § 768.79 allows a plaintiff to serve a demand for judgment. If the demand is not accepted and a judgment is returned in an amount 25% or greater than the demand, the party is entitled to recover his or her attorney's fees generated subsequent to the date of the demand. Florida Statutes § 768.79(2) directs that such an offer shall be construed as including all damages which may be awarded in a final judgment. As applied to a scenario similar to the facts of this case, once Bankers filed its notice of voluntary dismissal, and after an attempt to voluntarily reach an agreement on the fee, EEZZZZ-ON's attorney could have served a demand for judgment in the amount of the fee that he reasonably believed he was entitled to for the defense of the coverage action brought by Bankers. Bankers then would have had the appropriate time period to either accept the demand or reject it. EEZZZZ-ON's counsel then could have litigated the issue, and if it were determined that he was entitled to an

amount 25% or more greater than the demand, he would then be entitled to his attorney's fees from the date of the demand.

Alternatively, an insurer, faced with the prospect of an insured's attorney making an unreasonable demand, may protect itself from the cost of the unnecessary litigation associated with litigating the amount of the fee by serving an offer of judgment in an amount it believes is reasonable. If the amount received by the insured's attorney is at least 25% less than the offer, then the attorney who generated that needless litigation will have the insurer's fees deducted from the fees awarded to him by the court.

Use of the offer of judgment and demand for judgment rule not only appears to be a pragmatic approach, but a fair one. The insured's counsel is protected from unreasonable insurers who force the insured's attorney into additional needless litigation simply to be paid the obligation that the insurance carrier might otherwise owe. Conversely, it protects the insurer from the unreasonable lawyer who may believe that upon rendition of the judgment against the insurer for coverage, he now has effectively created a blank check payable to himself in an amount he deems reasonable.

This court should approve the decision of the Second District below and interpret Fla. Stat. § 627.428(1) as not requiring an insurance carrier to pay for the insured's fees generated in litigating the amount of the statutory fee to which the insured may be entitled where that insured has retained no interest in the fee. The interpretation of the statute by the

Second District recognizes the two-fold purpose of the statute which is not only to discourage the wrongful declination of covered claims, but to make the insured whole for the outlay of fees necessitated by the insurer's conduct. The rule relied upon by the Second District, unlike the rule announced by the Third District in Sonara, does not create a penalty based on legal fiction that ignores the reality of contingency fee contracts. There certainly are procedural means available by which an insured and an insurer can protect themselves from the unreasonable positions of the other. The statute need not be judicially re-written and should be interpreted in the fair manner which the Second District has utilized.

CONCLUSION

It is respectfully submitted that the Second District's interpretation of Fla. Stat. § 627.428(1) is both a logical and sensible interpretation. The interpretation in the present case recognizes both purposes of the statute, both to penalize the insurer for its wrongful conduct and to make the insured whole for the outlay of attorney's fees he or she has been required to expend to enforce the contract. The rule advocated by EEZZZZ-ON ignores the second purpose of the rule and solely emphasizes the penalty aspect to discourage unreasonableness by insurers. However, adopting such a rule will encourage unreasonableness by insured's attorneys. This court ought not to fix one problem and thereby create a problem of equal proportion in the process. The offer and demand for judgment rules can adequately protect the parties from these problems without requiring a strained interpretation of the statute. This court should approve the decision of the Second District below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by U. S. Mail to **George A. Routh, Esquire,** 1446 Court Street, Clearwater, Florida 34616, on November 24, 1993.

George A. Vaka, Esquire