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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.,
et al.

Petitioner,

vs.

BANKERS INSURANCE COMPANY,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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CASE AUTHORITIES CITED

Florida Statutes

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ISSUE AND FACTS

The Petitioner and Respondent are in accord as to the issue before the court. The facts set forth in Respondent's Brief although factual, are not dispositive of the issue.

ARGUMENT

The suggestion of Respondent that offer and demand for judgment under 768.79 Fla.Stat., (1993) is the better solution of the issue before the court begs the question and destroys the theory and concept of 627.428 Fla.Stat., (1993). Such position by the Court would also impact upon 627.6698, Fla.Stat. (1993), a similar statute authorizing attorney's fees upon the rendition of a judgment against the insurer and in favor of the insured under a group policy. If the insured obtains judgment against its carrier, then under 627.428 Fla.Stat. (1993) such carrier is required to pay the insured counsel fees. To utilize the offer and demand or judgment provisions under 768.79 Fla.Stat. (1993) places an undue burden on counsel for the insured to obtain a judgment at least twenty-five percent (25%) greater than such offer or demand, otherwise the insured would be required to pay the carriers counsel fees and cost from the date of such offer or demand. This in effect destroys the intent of the Statute which is to cause the carrier to negotiate and pay claims promptly.

The insured should never be put in the position of exposure to

pay substantial attorney's fees and cost to its insurance carrier because its said carrier and counsel cannot agree on a reasonable fee.

It is foreseeable that an insured could be successful in defending an action by its insurance carrier, and subsequently be required to pay substantial counsel fees and cost to its said carrier because of a dispute over fees to which it, the insured, had no control.

Adequate protection for the carrier is found in numerous cases dealing with assessment of attorney's fees. In Florida Patients Compensation Fund vs. Rowe, 472 So 2nd 1145 (Fla. 1985) and Standard Guarantee Insurance Co. vs. Quanstrom, 555 So 2nd 828 (Fla. 1990) standards are set for the trial court to follow in evaluating the right to, as well as the amount of a fee award. Most recently in Estate of Platt, 586 So 2nd 328 (Fla. 1991), this Court at page 334 defined reasonable rate as:

> "A reasonable hourly rate takes into account the rate charged in the community of lawyers of comparable skill, experience and reputation for similar services." (Emphasis in original)

The Court went on to define "reasonable":

> "That means a reasonable fee for the public as well as the lawyer.." (Emphasis supplied) ..." `Reasonable' also means that the fee should be considered with other fees set in similar cases. Similar facts require the application of similar factors." (Platt at p.336)

Therefore, under the existing case law, and in any fee hearing to determine entitlement to fee, the trial court is free to assess the situation to determine if the demands of the lawyer for fee was "reasonable" and what is a "reasonable" rate to be assessed, and the "reasonable" hours expended. In short the trial court can determine if the insurance carrier or the attorney acted unreasonable in the fee demand or negotiations therefore resulting in litigation of entitlement to fee. Further, can it be said to be a fair situation wherein a carrier declines to pay <u>any</u> fee subsequent to successful litigation for the insured, and causes litigation to entitlement and counsel for the insured prevails, but is declined a fee for litigating his right to such entitlement.

The First, Third, Fourth and Fifth Florida District Courts of Appeal have exhaustively examined the issue and each concluded that counsel for the insured is entitled to a fee for litigating the issue of entitlement. Although they may vary in reasoning as to why counsel should be entitled to a fee for litigating entitlement, each reached the same result. Perhaps the better reasoned opinion is found in <u>Gibson v. Walker</u>, 380 So2d 531 (Fla. 5th DCA, 1980) wherein the Court quoted and adopted the opinion of the trial court:

> "...Appellee contends and we think correctly so, that upon suit being filed the relief sought was both the policy proceeds and attorney's fees, and so long as the insurer fail to voluntarily pay any part of the relief sought it continued to contest the policy... and thus even though the claim at that point is limited to the recovery of attorney's fees, it is none the less a claim under the policy..."

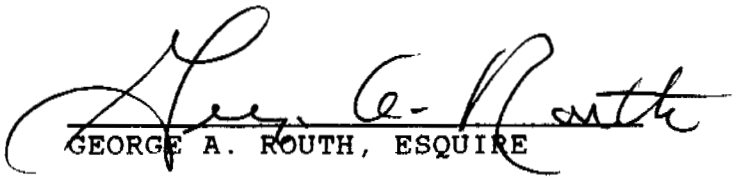
The Appellate Court then stated:

"We adopt the view of Cincinnati, that the Statute Section 627.428, Fla.Stat. (1977), becomes a part of every insurance policy of which the insurer is bound to take notice as it does in any other provision of the policy."

CONCLUSION

As suggested herein, the better reasoned position of the court would be to adopt the view of the Florida Fifth District Court of Appeal. Section 627.428 Fla.Stat. (1993) is written into each contract of insurance in this State and so long as there is litigation under the contract, the statute applies. This is inclusive of litigation of entitlement to attorney's fees.

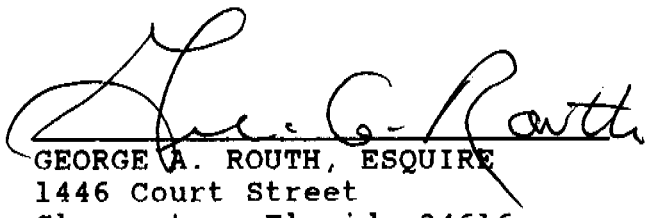
Respectively submitted,



GEORGE A. ROUTH, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to Steven A. Strickland, Esquire, 605 South Boulevard, Tampa, Florida 33606 and George A. Vaka, Esquire, Post Office Box 1438, Tampa, Florida 33601 this 9th day of December, 1993.



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