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MAR 12 1998

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

**SCOTTSDALE INSURANCE
COMPANY, a foreign
insurance corporation,**

Petitioner,

v.

**JOHN DESALVO, as Personal
Representative of the
Estate of H. P. DEMERY,
Deceased, d/b/a PORT CITY
TRADING,**

Respondent.

92, 467

PETITIONER'S JURISDICTIONAL BRIEF

**On Review from the District Court
of Appeal, First District
State of Florida**



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EXPRESSLY AND DIRECTLY CONFLICTS WITH THE
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SERVICES V. FP, INC., 659 SO. 2ND 1120 (FLA. 3D
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Mendez v. Bankers Insurance Company, 8, 9
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515 So.2d 248 (Fla. 3d DCA 1987), *review denied*

CONSTITUTIONAL PROVISIONS AND STATUTES:

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PRELIMINARY STATEMENT

In this Jurisdictional Brief, the Petitioner/Defendant, SCOTTSDALE INSURANCE COMPANY, will be referred to as "SCOTTSDALE."

The Respondent/Plaintiff, JOHN DESALVO, will be referred to as "DESALVO".

STATEMENT OF THE CASE AND FACTS

DESALVO's commercial building, located at 27 West Monroe Street, Jacksonville, Florida, was damaged by fire on or about January 13, 1995. DESALVO made an insurance claim against SCOTTSDALE for loss of the building, and SCOTTSDALE accepted coverage.

DESALVO claim \$677,200.00 in damages. That amount was in excess of the \$563,000.00 limit of insurance for the building. Consequently, DESALVO made an insurance claim against SCOTTSDALE for its policy limits of \$563,000.00.

Based on a repair estimate in the amount of \$405,402.08, SCOTTSDALE paid to DESALVO \$404,402.08 (an amount which reflects the \$1,000.00 deductible). DESALVO filed suit against SCOTTSDALE on March 3, 1995, seeking payment of the remaining policy limit. SCOTTSDALE served a Motion to Dismiss or Abate the Action, based upon SCOTTSDALE's demand for appraisal of the amount of the loss.

DESALVO took the incorrect position that the appraisal provision in the insurance policy was void for lack of mutuality. After SCOTTSDALE's Motion to Dismiss or Abate based on the demand for appraisal was denied at the trial court level, that decision was appealed to the First District Court of Appeal.

While the appeal was pending, SCOTTSDALE served a Motion to Stay Proceedings in the trial court. That Motion was denied, and the parties proceeded with discovery and mediation. The matter was

set for trial, with the understanding that it would be continued if the appeal was not resolved.

On December 28, 1995, the First District Court of Appeal ruled that the appraisal provision was valid and enforceable. See DeSalvo v. Scottsdale Insurance Co., 666 So.2d 944 (Fla. 1st DCA 1995). The appellate court directed the trial court to compel appraisal and stay the action.

On January 13, 1996, SCOTTSDALE served an Offer of Judgment in the amount of \$100,000.00. On January 29, 1996, the trial court entered an Amended Order granting SCOTTSDALE's Motion to Dismiss or Abate, and referring this matter to appraisal.

The appraisal was completed, and the net amount of the appraisal award was \$84,133.92. That appraisal award, which was less than SCOTTSDALE's previous Offer of Settlement, was filed and entered by the trial court on August 6, 1996.

DESALVO served a motion for attorney's fees pursuant to Florida Statute 627.428. SCOTTSDALE argued that attorney's fees would be inappropriate because DESALVO lost the lawsuit, lost the appeal, lost the appraisal, and ultimately recovered an amount less than SCOTTSDALE'S Offer of Judgment. The trial court, relying on Baker Protective Services v. FP, Inc., 659 So.2d 1120 (Fla. 3d DCA 1995), held that DESALVO was not a prevailing party under Florida Statute 627.428 because the insured's recovery (\$84,133.96) was less than SCOTTSDALE's previous Offer of Judgment (\$100,000.00).

DESALVO appealed the trial court's decision, and on January 30, 1998, the district court reversed the order of the trial court.

The district court held that an insured can be the prevailing party under Florida Statute 627.428, and thus become entitled to attorney's fees, even though the insured's recovery is less than the highest valid offer of settlement made by the insurer. SCOTTSDALE's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on February 26, 1998.

SUMMARY OF THE ARGUMENT

In this case, the district court of appeal held an insured can be the prevailing party under Florida Statute 627.428, and thus become entitled to attorney's fees, even though the insured's recovery is less than the highest valid Offer of Settlement made by the insurer. The decision of the First District cannot be reconciled with the Third District's Baker Protective Services v. FP, Inc., 659 So.2d 1211 (Fla. 3d DCA 1997). Thus, SCOTTSDALE contends that the decision of the First District expressly and directly conflicts with decisions of the Third and Fourth District Courts of Appeal.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. Art. V, §3 (b) (3) Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURIS-
DICTION OVER THIS CASE AS THE FIRST DISTRICT'S
JANUARY 30, 1998 ORDER EXPRESSLY AND DIRECTLY
CONFLICTS WITH THE THIRD DISTRICT'S BAKER DECISION
AND THE FOURTH DISTRICT'S MENDEZ DECISION.

On January 30, 1998, the First District Court of Appeal reversed the trial court's order denying DESALVO's motion for attorney's fees. In reversing the trial court's order, the First District "expressly" held that an insured can be the prevailing party under Florida Statute 627.428, and thus be entitled to attorney's fees, even though the insured's recovery is less than a previous offer of settlement made by the insurer.

The trial court based its decision to deny DESALVO's entitlement to attorney's fees on the holding of Baker Protective Services vs. FP, Inc., 659 So.2d 1120 (Fla. 3d DCA 1995). In Baker, the Third District held that in order to be the prevailing party under Florida Statute 627.428, and thus become entitled to recover attorney's fees, an insured's recovery must be greater than the highest valid offer of settlement made by the insurer. Baker at 1123. The Baker court, relying on Westinghouse Elec. Corp. v. Shafer Miller, Inc., 515 So.2d 248 (Fla. 3d DCA 1987), review denied, 525 So.2d 881 (Fla. 1988); and Danis Indus. Corp. v. Ground Improvements Techniques, Inc., 629 So.2d 988 (Fla. 5th DCA 1993), aff'd 645 So.2d 420 (1994), held that the plaintiff was not the prevailing party under Florida Statute 627.428 because its recovery

(\$97,431.00) was less than the highest valid offer (\$125,000.00) of judgment made by Defendant.

The Third District's Baker decision is factually identical to the Fourth District's interpretation of Florida Statute 627.482 in Mendez v. Bankers Insurance Company, 696 So.2d 1210 (Fla. 4th DCA 1997). In Mendez, the court affirmed the trial court's ruling that the plaintiffs were not the prevailing party under Florida Statute 627.428 because their recovery was less than the insurer's offer of judgment. The case at hand is factually indistinguishable from Baker or Mendez.

Here, the First District reversed the trial court, and held that an interpretation of Florida Statute 627.428: "to mean that an insured who did not receive a recovery which exceeds the highest offer of settlement was not a prevailing party, and thus, that party was not entitled to recover any attorney's fees incurred during any portion of the proceedings, notwithstanding how many offers of settlement had been filed or how late in the process the highest offer of settlement had been filed" is contrary to the clear intent of Florida Statute 627.428, which is to encourage early and fair settlements by an insurance company of valid claims. The First District also held that the Baker court's interpretation of Florida Statute 627.428 is contrary to the expressed language of Danis Indus. Corp. v. General Improvement Techniques, 645 So.2d 420 (Fla. 1994).

For the above-mentioned reasons, the First District's DeSalvo decision expressly and directly conflicts with the Third District's

Baker, and the Fourth District's Mendez decisions. Jurisdiction of the Supreme Court should be granted under Fl.R.App.P. 9.030(a)(2)(A)(iv). SCOTTSDALE respectfully submits that this Court should grant discretionary review and resolve the conflict by quashing the decision of the First District Court.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and this Court should exercise that jurisdiction to consider the merits of the Petitioner's argument. The First District's opinion in this case expressly and directly conflicts with decisions of the Third and Fourth District, and the Supreme Court's guidance is necessary to resolve this conflict.

RESPECTFULLY SUBMITTED this 9th day of March, 1998.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery to J. CLARK HAMILTON, ESQUIRE, 4741 Atlantic Blvd., Suite D, Jacksonville, Florida 32207, this 9th day of March, 1998.



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