IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO.:

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

vs.

ALYSIA M. MACEDO AND ZACKERY R. LOMBARDO,

Respondents.

FIRST DISTRICT COURT OF APPEAL CASE NO.: 1D15-2896

FIRST JUDICIAL CIRCUIT CASE NO.: 2013-CA-003359

GOVERNMENT EMPLOYEES INSURANCE COMPANY'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Government Employees Insurance Company ("GEICO"), seeks this Court's discretionary review of the First DCA's decision in Government Employees Ins. Co. v. Macedo, 2016 WL 2610605, *1 (Fla. 1st DCA May 6, 2016), pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), 9.030(a)(2)(A)(vi), and Article V, § 3(b)(3), Florida Constitution. This appeal arises out of a post-judgment ruling that the insurance policy ("Policy"), which covered the underlying claim against GEICO's insured, Zackery R. Lombardo ("Lombardo"), also provided coverage for attorneys' fees assessed against Lombardo pursuant to the Plaintiff, Alysia M. Macedo's ("Macedo"), Proposal for Settlement ("PFS").

During the underlying personal injury litigation between Macedo and Lombardo, Macedo served Lombardo with a PFS for $50,000.00, which was not accepted. GEICO was not a party to the action nor the PFS and was not served with the PFS. Following a jury trial, the trial court entered judgment in favor of Macedo for $172,965.91. Thereafter, Macedo moved for attorneys' fees pursuant to the PFS and the court entered an attorney fee judgment against Lombardo for $140,583.50. Macedo then moved to add GEICO to the fee judgment. On May 19, 2015, the trial court found the fee judgment taxable against GEICO pursuant to the "Additional Payments" provision of the Policy, which provides payment for "All

reasonable costs incurred by an insured at our request." On May 6, 2016, the First DCA affirmed the trial court's decision. [See App. 1].

SUMMARY OF THE ARGUMENT

The decision reached by the First DCA in the present matter is erroneous because it directly conflicts[1] with long-standing Florida precedent that attorneys' fees are not subsumed within the meaning of "costs". The First DCA's contravention of the American Rule regarding attorneys' fees is antithetical to Florida jurisprudence and should be reversed. Furthermore, the First DCA erred when it declared the term "costs" to be ambiguous and ignored well-established principles of insurance policy construction that prohibit a court from rewriting a policy to add meaning or to reach results contrary to the intentions of the parties.[2] Moreover, the First DCA inappropriately invoked principles of equity in their holding and certified conflict with Steele v. Kinsey, 801 So.2d 297 (Fla. 2d DCA

[1] Identification by the lower court of a direct conflict with another Florida appellate decision is not necessary to create an "express" conflict. Discussion by the lower court of the legal principles upon which it bases its opinion supplies a sufficient basis for a petition for conflict review. Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). "Direct" means that the conflict must appear in the majority decision. Reaves. V. State, 485 So.2d 829, 830 (Fla. 1986).

[2] See Dorsey v. Reider, 139 So. 3d 860, 863 (Fla. 2014), reh'g denied (May 22, 2014) (identifying misapplication of decisions as a basis for express and direct conflict jurisdiction under Art. V, §3(b)(3), Florida Const.).

2001). Therefore, this Court has jurisdiction to review the present matter pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv) and 9.030(a)(2)(A)(vi).

ARGUMENT AND CITATIONS OF AUTHORITY

I. The First DCA's Ruling in the Present Matter is Erroneous and Conflicts with Long-Standing Jurisprudence that Attorneys' Fees are Not Costs

The First DCA's determination that the term "costs" encompasses attorneys' fees ignores the American Rule for the recovery of attorneys' fees, which provides that the same are only recoverable pursuant to a statute or contractual provision providing for their recovery. Air Turbine Technology, Inc. v. Quarles & Brady, LLC, 165 So.3d 816, 821 (Fla 4th DCA 2015). The decision of the First DCA in the present matter contravenes the American Rule and is antithetical to over ninety years of Florida precedent establishing that the term "costs" does not include attorneys' fees.[3]

[3] It is well-established that the term "costs" does not include attorney's fees. See Wiggins v. Wiggins, 446 So. 2d 1078 (Fla. 1984)("the term 'costs' is not generally understood as including attorney's fees."); State ex. rel. Royal Ins. Co. v. Barrs, 99 So. 668 (Fla. 1924)(citing the long-standing principle that there is no controlling provision of law which provides that attorneys' fees should be regarded as costs in a case); see also, First Protective Ins. Co. v. Featherston, 978 So. 2d 881 (Fla. 2d DCA 2008)(noting the "material difference between attorney's fees and costs"); Suwanee Cnty. v. Garrison, 417 So. 2d 1070 (Fla. 1st DCA 1982)(holding that statute which provided for the award of costs could not be expanded to include attorneys' fees); Harris v. Richard N. Groves Realty, Inc., 315 So. 2d 528 (Fla. 4th DCA 1975)(same).

The principle that attorney's fees are not subsumed within the term "costs" was firmly reestablished by this Court in Price v. Tyler, 890 So.2d 246 (Fla. 2004). In Price, this Court rejected an argument that attorney's fees should be awarded as compensatory damages or costs incurred in a quiet title action. Id. at 253. This Court ruled that because Florida Statute, §57.041 (which governs the recovery of costs by the prevailing party in a legal action), does not include attorneys' fees in the definition of litigation costs and since the term "costs" does not generally include attorney's fees, it was error for the trial court to award attorney's fees as "costs" Id. at 253.

As was cogently explained by the Third DCA in Attorney's Title Ins. Fund, Inc. v. Landa-Posada, 984 So.2d 641, 643 (Fla 3d DCA 2008):

> Three well-established rules of law compel our decision. Attorney's fees may only be awarded pursuant to statute or contract. Costs recovered by a litigant do not include attorney's fees. Attorney's fees cannot be awarded as a matter of equity.

Thus, it is quite clear that "Under the great weight of Florida law, a contract that provides for recovery of only legal 'costs' and 'expenses' does not allow for recovery of attorney's fees." Air Turbine Technology, Inc. v. Quarles & Brady, LLC, 165 So.3d 816 (Fla 4th DCA 2015). In Air Turbine, the Fourth DCA affirmed a summary judgment that was entered in favor of a lawyer, Horn, in a legal malpractice action. Id. at 824. The crux of the issue on appeal was whether Horn committed legal malpractice by advising his client that the term "legal costs

and expenses" in a contract did not include attorney's fees and did not give the opposing party the right to recover such fees in the event of litigation. Id. at 819. The opposing party won the case and subsequently moved to recover over 4.7 million dollars in attorney's fees. Id. at 819. The attorney fee award was initially denied by the federal district judge but was reversed by the Eleventh Circuit Court of Appeals. Id. at 820. On remand, the federal district judge entered judgment for attorney's fees in an amount slightly over one million dollars. Id. Instead of appealing the award, Air Turbine opted to pursue a legal malpractice claim against Horn. Id. In rejecting the legal malpractice claim, the Fourth DCA ruled that not only had Horn not committed legal malpractice but that "Horn's advice to Air Turbine was dead-on under Florida law." Id. at 821. By following, as required, the American Rule regarding the recovery of attorney's fees, the Fourth DCA stated that attorney's fees may only be awarded pursuant to statute or contract and statutes and contractual provisions awarding attorney's fees must be strictly construed. Id.

That principle has been consistently applied by this Court. The Florida Rules of Civil Procedure specifically recognize costs and attorneys' fees as being separate and distinct items. For example, Rule 1.525 states, in part, that a "party seeking a judgment taxing costs, attorneys' fees, or both. . ." needs to serve such a motion within thirty days after the judgment has been filed. (Emphasis added).

Additionally, Rule 1.442 specifically identifies costs and fees as separate and distinct items as well. "[i]f a party is entitled to costs and fees pursuant to applicable Florida law. . ." Fla.R.Civ.P. 1.442. (Emphasis added). Clearly, this Court would not have felt the need to refer separately to attorneys' fees in the aforementioned rules if the term was superfluous and subsumed in the meaning of costs. As aforementioned, §57.041 has been interpreted in a fashion such that the term "costs" does not include attorney's fees and a party who prevails in a legal action may not recover attorney's fees in the guise of "costs" under §57.041. Price v. Tyler, 890 So.2d 246 (Fla. 2004). It is axiomatic that the term "costs" in an insurance policy should receive no different treatment.

Therefore, it is clear that the First DCA's ruling in the present matter conflicts with the American Rule regarding the recovery of attorneys' fees and the over ninety years of precedent since State ex. rel. Royal Ins. Co. v. Barrs, 99 So. 668 (Fla. 1924), establishing that attorneys' fees are not subsumed within the meaning of "costs". Thus, this Court should accept jurisdiction in the present matter to correct the decision of the First DCA and reaffirm the paramount and fundamental importance of stare decisis.

II. The First DCA's Erroneous Conclusion that the Term "Costs" is Ambiguous Misapplied Well-Established Principles of Insurance Policy Construction.

The First DCA's erroneous and expansive interpretation of the unambiguous term "costs" to include attorneys' also violates well-established principles of policy construction, which prohibit a court from rewriting a policy to add meaning that is not present or to reach results contrary to the intentions of the parties. See Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938 (Fla. 1979)(rule that ambiguities in a contract are to be construed in favor of insured applies only when there is a genuine ambiguity and does not permit courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties).

It is well settled law in Florida that, "[w]hen interpreting an insurance policy, courts are bound by the plain meaning of the policy's text." State Farm Mut. Auto Ins. Co. v. Menendez, 70 So. 3d 566 (Fla. 2011); see also, Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29, 33-34 (Fla. 2000)(if a policy provision is "clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision."); V & M Erectors, Inc. v. Middlesex Corp., 867 So. 2d 1252, 1253 (Fla. 4th DCA 2004)("[W]here the contract [language] is clear and unambiguous there is no reason to go further."); Gen. Sec. Ins. Co. v. Barrentine, 829 So. 2d 980, 982 (Fla. 1st DCA 2002)("If the language of an insurance policy is clear, it must be construed to mean what it says

and nothing more. Courts have no power to create insurance coverage, if it does not otherwise exist by the terms of the policy.").

However, in direct disregard of the duty to construe the policy as plainly written, The First DCA in the present action employed a verboten standard of policy construction to create coverage for Macedo's counsel's attorneys' fees. In reaching the conclusion that GEICO was liable for attorneys' fees under the policy issued to Lombardo, the First DCA held that GEICO's "policy didn't provide a definition of legal or other costs, nor exclude, for example, costs and fees awarded to a plaintiff driver pursuant to the offer of judgment statute." [App. 1 at 3]. The First DCA's opinion has therefore placed the completely impractical, if not unattainable, task on an insurer to explicitly define every conceivable meaning of a term, regardless of its plain meaning or common sense interpretation, or risk being subject to unprecedented judicial expansion of the term.

It is patently obvious that not every word or phrase in an insurance policy requires definition and the mere failure to provide a definition does not, in and of itself, render a word or phrase ambiguous. See State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072 (Fla. 1998)("The lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts."); Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161 (Fla. 2003). To the contrary, ambiguity in an insurance policy arises

only where more than one reasonable interpretation may fairly be given to a particular policy provision. See, CTC Dev. Corp., 720 So. 2d at 1076; State Farm Fire & Cas. Co. v. Metro. Dade Cnty., 639 So. 2d 63 (Fla. 3d DCA 1994).

The fact that the Policy does not define the term "costs" in no way renders the term ambiguous. The hypothetical premise that other policies may be structured in a way so as to expressly exclude this term does not justify receding from over ninety years of precedent. It is clear that the First DCA's decision in the present matter not only goes against the principle that everyday words be given their everyday meaning but also conflicts with well-established Florida precedent, and thus should be reversed by this Court.

III. The First DCA Committed Further Error by Holding GEICO Liable for Payment of Attorneys' Fees Assessed Pursuant to a Proposal for Settlement.

In holding GECIO liable for the payment of attorneys' fees assessed against an insured defendant pursuant to a PFS, the First DCA committed multiple errors. As a threshold matter, pursuant to Florida Rule of Civil Procedure, 1.442, a PFS is served by one party to another party. They are not permitted to be served upon non-parties nor can non-parties be held liable for payment of attorneys' fees pursuant to a PFS. Sparks v. Barnes, 755 So. 2d 718 (Fla. 2d DCA 1999).

In Sparks, the Second DCA addressed this issue in a factual context quite akin to the case at bar. Id. In holding that the plaintiff could not collect his

attorneys' fees directly from the insurer, the court found that the plaintiff did not serve the insurer with his PFS and since the insurer was not a party to the litigation, it could not be held directly liable for payment of the plaintiff's fees. Id. at 719. The court noted, as did this Court in Spiegel v. Williams, 545 So. 2d 1360 (Fla. 1989), that in order to obtain attorneys' fees directly from an insurer, a claimant could file a bad faith claim seeking such fees as damages. Under similar circumstances in Meyer v. Alexandre, 772 So. 2d 627 (Fla. 4th DCA 2000), the Fourth DCA concluded that the plaintiff could not recover attorneys' fees against a liability insurer, which was not a party, under §768.79. More recently, in GEICO Gen. Ins. Co. v. Williams, 111 So. 3d 240 (Fla. 4th DCA 2013), the Fourth DCA again acknowledged that it is reversible error to tax attorneys' fees against an insurer when such fees are entered against the insured pursuant to a PFS. Id. at 248. ("Another ground for reversal, also waived, is that at the time the [PFS] was made, appellant was not a 'party' under [§768.79]."). Likewise, in Feltzin v. Bernard, 719 So. 2d 315 (Fla. 3d DCA 1998), the Third DCA reversed an order assessing PFS fees against the insurer, as the PFS was not made against the insurer nor was the insurer a party to the motion for fees against Feltzin. Id. at 316. Analogously, the PFS in this case was never served on GEICO, nor could it have been since GEICO was never a party in the underlying litigation.

The whole purpose of the First DCA's ruling appears to be a misguided attempt to bring this claim within the scope of the insurance policy, rather than to simply read the policy as it is clearly written. The First DCA's decision in the present matter is in certified conflict with Steele v. Kinsey, 801 So.2d 297 (Fla. 2d DCA 2001), where the Second DCA found the language "expenses incurred at our request," in a supplementary payments provision, to be unambiguous and held that the attorney fees and costs under the offer of judgment statute were not incurred at the "insurer's request" as required for payment under supplementary payments provision in the policy and, thus, were not covered under the terms of the policy. The Steele court concluded that the policy language was clear on its face and should be applied according to its generally understood meaning. Id. at 299.

Courts review policy provisions in light of the character of the risks assumed by an insurer. See S. Carolina Ins. Co. v. Heuer, 402 So. 2d 480 (Fla. 4th DCA 1981); O'Conner v. Safeco Ins. Co., 352 So. 2d 1244 (Fla. 1st DCA 1977). When viewed in this light, the First DCA's view of "costs" is clearly unreasonably expansive because it essentially results in providing unlimited coverage to the insured. While insurers assume the risk of having to defend the insured and contract to pay all expenses associated with that defense, there is nothing in the contract, or within the realm of common sense, that indicates an insurer also assumes the risk of paying for the prosecution of a claim against the insured. Such

an analysis would result in an absurd result, contrary to principles of policy construction. See Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135 (Fla. 1998)(insurance policies will not be construed so as to reach an absurd result).

The First DCA further erred by attempting to invoke equity to impose attorneys' fees on GEICO pursuant to a PFS , in contravention of the clear dictates of the American Rule. As aforementioned, GEICO was not a party to the action nor the PFS and was not served with the PFS. The First DCA's creative attempt to invoke equity is quite simply not permitted under Florida law. Steele v. Kinsey, 801 So.2d 297 (Fla. 2d DCA 2001). Moreover, the entire premise that all cases go into litigation solely because of the conduct of the insurer is spurious. While it is true that some cases reach litigation because of a disagreement regarding the value of a claim, it is not the insurance company who files the lawsuit, it is the claimant. The First DCA appears to ignore the very real possibility that the insurance company may have taken a very fair and reasonable approach to the value of negotiations and that some claimants simply choose to demand more than the claim is worth. This should not be equated to the insurance company having willfully subjected the insured to litigation costs and expenses. What's more, there are many examples of cases in which the insurance company has offered the full amount available under the policy but the claimant simply will not accept those

limits and will not settle. The decision to pursue a lawsuit in such circumstances is clearly not the insurers. Surely, a rule such as that devised by the First DCA should not be invoked to impose attorneys' fees on an insurance company when litigation was forced on them.

The foregoing should make it abundantly clear that the First DCA has inappropriately employed principles of equity in an effort to shift the responsibility for the payment of the attorneys' fees and costs. In short, what the First DCA thinks is "fair" or "just" is irrelevant, as the American Rule does not permit the use of equity in such a fashion. This Court should therefore accept jurisdiction and reverse the unprecedented decision of the First DCA.

CONCLUSION

The issues ruled upon in this matter are of wide-ranging importance and continue to be the subject of litigation throughout the state. Accepting jurisdiction of this case would not only allow the decision below to be corrected, but would assist the bar and litigants alike in clarifying the interrelationship between similar additional payments clauses and §768.79. Accordingly, it is respectfully requested that this Court take jurisdiction of this case and quash the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of GOVERNMENT EMPLOYEES INSURANCE COMPANY's Brief on Jurisdiction has been furnished to the following in the manner specified this 31st day of May, 2016:

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Undersigned counsel hereby certifies that GOVERNMENT EMPLOYEES INSURANCE COPMANY'S Brief on Jurisdiction has been completed in the font style of Times New Roman 14pt and complies with the font requirements of Fla.R.App.P. 9.210.

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