IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. SC02-152

KEVIN M. STEELE,

Appellant,

-vs-

SUSAN B. KINSEY and UNITED AUTOMOBILE INSURANCE COMPANY,

Appellee.

AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF THE APPELLANT

CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
Attorneys for Amicus Curiae Academy
of Florida Trial Lawyers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

STATEMENT OF INTEREST OF AMICUS

The Academy of Florida Trial Lawyers is a large voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. The members of the AFTL are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The AFTL has been involved as amicus curiae in hundreds of cases in the Florida appellate courts and this Court. The lawyer members of the AFTL care deeply about the integrity of the legal system and, towards this end, have established an amicus committee for the purpose of considering requests by trial lawyers for amicus assistance. While not every request for amicus assistance is granted by the AFTL, the committee considered the issues presented in the case sub judice to be of importance and voted to seek leave of this Court to appear as amicus.

SUMMARY OF ARGUMENT

This Court should disapprove the decision of the Second District and remand for the trial court to apply the rationale of the Fourth District decision in JOHNSON. The Second District construed the supplementary payments provision in isolation, and did not consider the insurance policy as a whole, especially the nature of the risks which the insurance company agreed to assume. The very purpose of obtaining a liability policy is to protect the insured against exposure for certain claims made by third parties, and the expenses of litigation necessarily related thereto. To allow an insurer to avoid its responsibility for those expenses when they were incurred solely as the result of the insurer's control of the litigation is contrary to the very purpose of the parties' contract. Clearly, where the insurer made the choice not to settle within policy limits, and the result is a sanction of attorney's fees under §768.79, Fla. Stat., that constitutes an expense that has been incurred at the request of the insurer. To hold otherwise defeats the purpose of the contract and should not be upheld, especially since it is not compelled by the language of the supplementary payments provision.

ARGUMENT

THE SECOND DISTRICT ERRED IN CONSTRUING THE SUPPLEMENTARY PAYMENTS PROVISION IN ISOLATION AND NOT IN THE CONTEXT OF THE INSURANCE POLICY AS A WHOLE.

The Second District's decision holds that an insurer is not responsible under a Supplementary Payments Provision for attorney's fees under §768.79, Fla. Stat., even though the rejected settlement offer was within the policy limits, and the decision was made solely by the liability insurer. It is respectfully submitted that the Second District erred by focusing narrowly on the word "request" in the relevant policy provision, and construing it in isolation without consideration of the contract as a whole, as required by Florida law, see AUTO OWNERS INS. CO. v. ANDERSON, 756 So.2d 29 (Fla. 2000); THE PRAETORIANS v. FISHER, 89 So.2d 329 (Fla. 1956). A consideration of the purpose of the parties in entering into the liability insurance policy, as well as the obvious equities of the situation, compel the conclusion that the Second District's decision should be disapproved, and the rationale of FLORIDA INS. GUARANTY ASSOC., INC. v. JOHNSON, 654 So.2d 239 (Fla. 4th DCA 1995), should be applied here.

The insured in the case sub judice is in the (relatively) enviable position of being protected against the award of attorney's fees assessed against her under §768.79, Fla. Stat., pursuant to the Cunningham agreement reached by the parties. However, this is not the normal situation, and if the Second District's decision is upheld, there will be many cases in which the insured will be held individually liable for fees and costs assessed under §768.79, Fla. Stat., with no means of recourse. As the Second District noted, this is clearly in equitable and bad policy, since the insured has no control over the conditions which led to the award of fees since the insurer is contractually entitle to control settlement negotiations. Morever, this situation causes §768.79, Fla. Stat. to become an instrument of oppression rather than the implementation of sound public policy. The Academy believes that a broader analysis of the provisions of the insurance contract, consistent with established Florida law, can avoid this nonsensical result.

This Court has held on numerous occasions that, like any other contract, an insurance policy is to be construed as a whole, and a particular provision is not to be interpreted in isolation, AUTO OWNERS v. ANDERSON, supra; THE PRAETORIANS v. FISHER, supra. This principle of contract interpretation is designed to arrive at a reasonable construction of the agreement in order to accomplish the intent and purposes of the parties, see JAMES v. GULF LIFE INS. CO., 66 So.2d

62 (Fla. 1953). More specifically, Florida courts have stated that in construing an insurance policy, the court "needs to view the contract provisions in light of the character of the risks assumed by the insurer," SOUTH CAROLINA INS. CO. v. HEUER, 402 So.2d 480, 481 (Fla. 4th DCA 1981); see also, O'CONNER v. SAFECO INS. CO. OF NORTH AMERICA, 352 So.2d 1244 (Fla. 1st DCA 1977). In both of those cases, that rule has been relied upon to limit an insurer's exposure under a policy; respectfully, the time has come for that principle to be applied on behalf of an insured.

Considerations of the risks assumed by the insurer in this case compels the conclusion that the exposure to an award of fees under §768.79, Fla. Stat., is precisely the type of risk that the insured contracted to avoid. Therefore, where such fees are awarded against an insured based solely on the settlement decision of the insurer, the overriding purpose of the policy should inform the construction of the policy's terms. Here, the Supplementary Payments Provisions can be reasonably construed to implement the overall intentions of the contracting parties, rather than defeat them.

In a related context, many jurisdictions have held that under virtually identical policy provisions, an insurer is liable for fees incurred by an insured in defending a declaratory judgment action challenging coverage, ELLIOTT v. DONAHUE, 485 N.W.2d 403 (Wis. 1992); CITIZENS INS. CO. OF AMERICA v. CHARITY, 871

F.Supp. 1401 (D.Kan. 1994); ALLSTATE INS. CO. v. ROBINS, 597 P.2d 1052 (Col. Ct. App. 1979); OCCIDENTAL FIRE & CAS. CO. v. COOK, 435 P.2d 364 (1967); UPLAND MUTUAL INS., INC. v. NOEL, 519 P.2d 737 (1974); STATE FARM FIRE & CASUALTY CO. v. SIGMAN, 508 N.W.2d 323 (N.D. 1993); SECURITY MUTUAL CAS. CO. v. LUTHI, 226 N.W.2d 878 (Minn. 1975); STANDARD ACCIDENT INS. CO. v. HULL, 91 F.Supp. 65 (D.C.Cal. 1950). Those courts had no difficulty construing the insurer's action of filing a declaratory judgment action as constituting a "request" under the contractual language thereby rendering the insurer responsible for the insured's expenses, including attorneys fees in defending the action, see UPLAND MUTUAL v. NOEL, supra; ALLSTATE v. ROBINS, supra; CITIZENS INS. v. CHARITY, supra. Certainly, that conclusion, in itself, contradicts the Second District's position that the only reasonable construction of the term "request" in the Supplementary Payments Provision is "the act of asking, or expressing a desire, for something; solicitation or petition" (quoting from Webster's New World College Dictionary p.1218 (4th Ed. 2001)). The term "request" in a legal context is obviously much broader, and even in common understanding, indicates that something is incurred as a result of a party's choice.

More importantly, the rationale for the courts' decisions in the above cases is that to hold otherwise would defeat the underlying purpose of the insurance contract,

which was to limit the exposure of the insured to liability for particular claims and related litigation expenses. One court noted that to accept the insurer's position (7 AJ. APPLEMAN INS. LAW AND PRACTICE §4691 (1962)), quoted in ALLSTATE v. ROBINS, supra, 597 P.2d at 1053:

> [W]ould actually amount to permitting the insurer to do by indirection that which it could not do directly. That is, the insured has a contract right to have actions against him defended by the insurer, at its expense. If the insurer can force him into a declaratory judgment proceeding and, even though it loses in such action, compel him to bear the expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above.

In UPLAND MUTUAL v. NOEL, 519 P.2d at 740, the trial court ruled that the insurer was responsible for the insured's attorneys fees because its interpretation of the policy provision was an extension of [the] contractual guarantee that the policy holder will be protected from all expenses and attorney's fees even if a false, fraudulent or groundless action is filed against him). The Supreme Court of Kansas upheld that ruling, relying inter alia on APPLEMAN, quoted supra. Similarly in SECURITY MUTUAL v. LUTHI, supra, the Supreme Court of Minnesota held that unless the insurer was required to pay the fees incurred as a result of the Declaratory Judgment action, the insured would be compelled to bear litigation costs even though he or she contracted to avoid just such expenses.

The provision in the case sub judice should be construed under the same reasoning. The purpose of an insured obtaining a liability insurance policy is to protect themselves against exposure for particular claims and litigation expenses related thereto. In order to achieve that result, the insured contracts with an insurance company, which has usually marketed its product as providing security and protection from such exposure. While, the insurer has a contractual right to control the investigation, litigation, and negotiation of a claim, it should be contractually obligated to protect the insured from the litigation expenses resulting from its decision. Fees awarded under §768.79, Fla. Stat., can often equal or even exceed the amount in controversy, e.g. FLORIDA PATIENT'S COMPENSATION FUND v. MOXLEY, 557 So.2d 863 (Fla. 1990) (attorney's fee award of $150,000 assessed pursuant to §768.79 is upheld in a case in which the underlying judgment was $155,674); JONES v. MINNESOTA MUTUAL LIFE INS. CO., 759 So.2d 723 (Fla. 4th DCA 2000) (award of attorney's fees of $76,843.50 awarded pursuant to §768.79 upheld in case in which client's award was $75,000). It would completely defeat the purpose of the contract if the insured could be exposed to such attorney's fee awards that result

solely from the insurer's handling of the litigation, when the insured has no control over it and specifically contracted to avoid that exposure.[1]

Therefore, for the reasons stated above, the decision of the Second District should be disapproved, as it construed the contractual provision in isolation, and not in consideration of the policy as a whole. The rationale of the Fourth District in JOHNSON should be applied here in order to effectuate the purposes of the contract at issue, consistent with settled principles of contract interpretation adopted by this Court.

CONCLUSION

[1]/A different situation might ensue if the offer of judgment exceeded the policy limits, at which point the insured would presumably be informed by the insurer, and would have the option to contribute to the settlement. Under those circumstances, a rejection of the offer would not be solely at the insurer's request.

The district court decision should be quashed and this court should hold that United Auto's supplementary payments provision covers attorney's fees and costs assessed against the defendant-insured pursuant to section 768.79, Florida Statutes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to LOUIS K. ROSENBLOUM, P.A., 4300 Bayou Boulevard, Ste. 36, Pensacola, Florida 32503; DALE SWOPE, ESQ., 1234 East 5th St., Tampa, Florida 33605; MICHAEL W. LEHRER, ESQ., and JACK POWELL, ESQ., 501 E. Kennedy Blvd., Ste. 1275, Tampa, FL 33802; HINDA KLEIN, ESQ., 3440 Hollywood Blvd., 2nd FL, Hollywood, FL 33021; SHARON STEDMAN, ESQ., 1516 E. Hillcrest St., Ste. 108, Orlando, FL 32803; KAREN BARNETT, ESQ., 201 E. Kennedy Blvd., Ste. 1518, Tampa, FL 33602, by mail, on April 22, 2002.

CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Amicus Curiae, AFTL

By:_____
PHILIP M. BURLINGTON
Florida Bar No. 285862

T:\BRIEFS\Briefs - pdf'd\02-152_acAFTL.wpd\GG

CERTIFICATE OF TYPE SIZE & STYLE

Appellants hereby certify that the type size and style of the Brief of Amicus Curiae of the Academy of Florida Trial Lawyers on behalf of the Appellant is Times New Roman 14pt.

_____

PHILIP M. BURLINGTON
Florida Bar No. 285862