SUPREME COURT OF FLORIDA

CASE NO.: SC02-152

KEVIN M. STEELE,

Petitioner,

vs.

SUSAN B. KINSEY and UNITED AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NOS. 2D00-4295, 2D00-4384 and 2D01-533

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 1

Preliminary Statement 1

Course of Proceedings in the Trial Court 2

District Court Decision 7

ISSUE PRESENTED FOR REVIEW 10

WHETHER THE SUPPLEMENTARY PAYMENTS PROVISION OF AN AUTOMOBILE LIABILITY INSURANCE POLICY WHICH PROVIDES COVERAGE IN ADDITION TO THE BODILY INJURY LIABILITY AND PROPERTY DAMAGE LIMITS FOR "OTHER REASONABLE EXPENSES INCURRED AT OUR REQUEST" COVERS ATTORNEY'S FEES AND COSTS ASSESSED AGAINST THE INSURED PURSUANT TO THE OFFER OF JUDGMENT STATUTE, SECTION 768.79, FLORIDA STATUTES, WHEN THE INSURER, WHICH CONTROLS SETTLEMENT AND DEFENSE OF CLAIMS, DECIDES TO LITIGATE RATHER THAN ACCEPT CLAIMANT'S DEMAND FOR JUDGMENT

SUMMARY OF ARGUMENT 11

ARGUMENT 14

A. Standard of Review 14

B. Ambiguous Policy Language 14

C. Florida Ins. Guar. Ass'n, Inc. v. Johnson 19

D. Medical Malpractice Cases 21

E. Sparks v. Barnes 24

F. Decisions From Other Jurisdictions 26

G. Legislative Intent and Public Policy 28

CONCLUSION 33

CERTIFICATE OF SERVICE 34

CERTIFICATE OF TYPE SIZE AND STYLE 35

TABLE OF AUTHORITIES

CASES

Allstate Ins. Co. v. Robins,
42 Colo. App. 539 P.2d 1052 (Col. Ct. App. 1979) 28

Auto-Owners Ins. Co. v. Anderson,
756 So. 2d 29 (Fla. 2000) 15

Citizens Ins. Co. of America v. Charity,
871 F. Supp. 1401 (D. Kan. 1994) 28

Coleman v. Florida Ins. Guar. Ass'n, Inc.,
517 So. 2d 686 (Fla. 1988) 14

Cunningham v. Standard Guar. Ins. Co.,
630 So. 2d 179 (Fla. 1994) 3, 32

Elliot v. Donahue,
169 Wis. 2d 310, 485 N.W.2d 403 (1992) 27, 28

Feltzin v. Bernard,
719 So. 2d 315 (Fla. 3d DCA 1998) 25

Florida Ins. Guar. Ass'n v. Johnson,
654 So. 2d 239 (Fla. 4th DCA 1995) . . . . . *passim*

Florida Patient's Comp. Fund v. Moxley,
545 So. 2d 922 (Fla. 4th DCA 1989) 24

Florida Patient's Comp. Fund v. Moxley,
557 So. 2d 863 (Fla. 1990) 21, 24

Florida Rock & Tank Lines, Inc. v. Continental Ins. Co.,
399 So. 2d 122 (Fla. 1st DCA 1981) 26

Home Ins. Co. v. Sentry Ins. Co.,
461 So. 2d 1038 (Fla. 4th DCA 1985),
receded from on other grounds,

Hartford Acc. & Indem. Co. v. U.S.C.P. Co.,
515 So. 2d 998 (Fla. 4th DCA 1987) 25

Mathews v. Ranger Ins. Co.,
281 So. 2d 345 (Fla. 1973) 16

McMullen Oil Co. v. ISS Int'l Serv. Sys., Inc.,
698 So. 2d 372 (Fla. 2d DCA 1997) 29

Meyer v. Alexandre,
772 So. 2d 627 (Fla. 4th DCA 2000) 25

National Healthcorp Ltd. P'ship v. Close,
787 So. 2d 22 (Fla. 2d DCA),
rev. denied, 799 So. 2d 216 (Fla. 2001) 29

Occidental Fire & Cas. Co. v. Cook,
92 Idaho 7, 435 P.2d 364 (1967) 28

Pacific Employers Ins. Co. v. Alex Hofrichter, P.A.,
670 So. 2d 1023 (Fla. 3d DCA 1996) 14

Pirelli Armstrong Tire Corp. v. Jensen,
752 So. 2d 1275 (Fla. 2d DCA 2000)
rev. dismissed, 777 So. 2d 973 (Fla. 2001) 29

Rodriguez v. American Ambassador Casualty Co.,
4 F. Supp. 2d 1153 (M.D. Fla. 1998),
aff'd, 170 F.3d 188 (11th Cir. 1999) 30

Scottsdale Ins. Co. v. Deer Run Property Owner's Ass'n, Inc.,
642 So. 2d 786 (Fla. 4th DCA 1994) 31

Scottsdale Ins. Co. v. Haynes,
793 So. 2d 1006 (Fla. 5th DCA 2001) 31

Smith v. Sitomer,
550 So. 2d 461 (Fla. 1989) 21, 23, 24

Sparks v. Barnes,
755 So. 2d 718 (Fla. 2d DCA 1999) . . . . . ii, 24, 25

Spiegel v. Williams,
545 So. 2d 1360 (Fla. 1989) 21, 22, 23, 24

State Comprehensive Health Ass'n v. Carmichael,
706 So. 2d 319 (Fla. 4th DCA 1997) 17

State Farm Fire & Cas. Co. v. CTC Development Corp.,
720 So. 2d 1072 (Fla. 1998) 15, 17

State Farm Fire & Cas. Co. v. Sigman,
508 N.W.2d 323 (N.D. 1993) 28

Steele v. Kinsey,
801 So. 2d 297 (Fla. 2d DCA 2001) . . . . . *passim*

Upland Mut. Ins., Inc. v. Noel,
214 Kan. 145, 519 P.2d 737 (1974) 28

Vest v. Travelers Ins. Co.,
753 So. 2d 1270 (Fla. 2000) 30

Wiggins v. Wiggins,
446 So. 2d 1078 (Fla. 1984) 22

STATUTES

Section 627.428, Florida Statutes (2000) 26

Section 627.4136, Florida Statutes (1997) 25

Section 768.56, Florida Statutes 21

Section 768.79, Florida Statutes . . . . . *passim*

Section 768.79, Florida Statutes (1995) 2, 7, 14

Section 768.79, Florida Statutes (1997) 25

Section 768.79(1), Florida Statutes (1995) 4

OTHER AUTHORITIES

7C J. Appleman, Insurance Law & Practice
§ 4691 at 282 (Berdal ed. 1979) 27

8A J. Appleman, Insurance Law & Practice
§ 4894.65 (1981) 23

STATEMENT OF THE CASE AND FACTS

Preliminary Statement

Petitioner Kevin M. Steele seeks review of the decision below from the District Court of Appeal, Second District, reported as Steele v. Kinsey, 801 So. 2d 297 (Fla. 2d DCA 2001) (Tab 1), in which the court affirmed a declaratory judgment holding that an automobile liability insurance policy issued by respondent United Automobile Insurance Company (United Auto) to Susan B. Kinsey does not provide coverage for attorney's fees and costs assessed against Kinsey pursuant to the offer of judgment statute, section 768.79, Florida Statutes.

In this brief, the record on appeal will be cited by designation "R" followed by the volume and page number assigned by the clerk of the circuit court. The following documents are appended to the brief:

Steele v. Kinsey, 801 So. 2d 297 (Fla. 2d DCA 2001)	Tab 1
Joint Stipulation and Agreement and Joint Motion for Stay (R1 146-52)	Tab 2
Order Denying Plaintiff's Motion to Determine Coverage (R2 354-57)	Tab 3
Final Declaratory Judgment Determining Insurance Coverage (R2 363)	Tab 4

Amended Final Declaratory Judgment Tab 5
Determining Insurance Coverage (R3 466-68)

Course of Proceedings in the Trial Court

On November 28, 1995, Steele filed an action for damages in Hillsborough County against Kinsey resulting from bodily injuries he sustained during a motor vehicle accident caused by Kinsey's negligence. (R1 1-4).

[1] Kinsey was insured for the accident by a standard automobile liability insurance policy issued by United Auto with bodily injury liability limits of $10,000 per person and $20,000 per accident. (R2 302).

On March 15, 1996, after United Auto assumed Kinsey's defense, Steele served a demand for judgment pursuant to section 768.79, Florida Statutes (1995), offering to settle his claim against Kinsey for $10,000 plus taxable costs. (R1 8, 184). Kinsey did not accept Steele's settlement offer.

Subsequently, Steele, Kinsey, and United Auto executed and filed with the trial court a Joint Stipulation and Agreement and Joint Motion for Stay which particularized the terms of a settlement agreement. (R1 146-52; Tab 2).

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[1] Steele also named his uninsured motorist carrier, Regal Insurance Company, as a party to the suit and later joined Margherita Yedwab and Margarita C. Harris, an owner and driver allegedly responsible for a subsequent accident and injuries which possibly overlapped Steele's injuries from the first accident. (R1 90-93). By stipulation, Yedwab, Harris and Regal Insurance Company were dismissed from the action. (R1 108-09, 110-11).

According to the stipulation, Steele's suit against Kinsey would be stayed while Kinsey promptly filed an action against United Auto for bad faith failure to settle Steele's claim for damages within United Auto's $10,000 policy limits following the procedure approved by Cunningham v. Standard Guar. Ins. Co., 630 So. 2d 179 (Fla. 1994), in which this court held that the trial court had jurisdiction to determine by stipulation the insurer's liability for bad faith before adjudication of the underlying tort action. (R1 147 at ¶¶ 1-2). The parties further stipulated to submit two additional issues to the trial court: (1) whether Steele was entitled to have attorney's fees and costs assessed against Kinsey based on Steele's unaccepted demand for judgment filed pursuant to section 768.79, Florida Statutes; and, if so, (2) whether United Auto's automobile liability insurance policy issued to Kinsey provided coverage for such attorney's fees and costs. (R1 148 at ¶ 4). To implement the stipulation regarding attorney's fees and costs, United Auto expressly submitted itself to the jurisdiction of the court, and the parties stipulated that the trial court would assume a judgment for plaintiff's damages of $125,000 for purposes of assessing attorney's fees and costs under section 768.79. (R1 148 at ¶ 4). By order dated August 6, 2000, the trial court approved the stipulation by staying the

underlying action and reserving jurisdiction to consider Steele's entitlement to attorney's fees and costs pursuant to section 768.79, Florida Statutes. (R1 153).

As contemplated by the settlement agreement, Steele subsequently filed a Motion to Determine Entitlement to Attorneys' Fees and Expenses Pursuant to Florida Statute 768.79 based on his unaccepted demand for judgment for $10,000 and the stipulated judgment amount of $125,000.[2] (R1 182-93). Three specific issues were raised by Steele's motion: (1) the amount of Steele's attorney's fees and costs; (2) whether Steele's offer of judgment was made in good faith; and (3) whether United Auto's policy insuring Kinsey covered Steele's attorney's fees and costs to be assessed against United Auto's insured under section 768.79, Florida Statutes. (R3 414). Before the hearing on the motion began, the parties stipulated to the amount of Steele's attorney's fees and costs and deferred consideration of whether Steele's offer of judgment was made in good faith, leaving only the insurance coverage issue for the trial court's resolution. (R3 414-15).

In support of his motion, Steele introduced in evidence a copy of United Auto's insurance policy issued to Kinsey which provides bodily injury liability coverage with limits of $10,000 per person and $20,000 per accident and property damage liability

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[2] Under section 768.79, Florida Statutes, plaintiff is entitled to attorney's fees and costs if the amount of the judgment exceeds the offer by at least twenty-five percent, assuming the offer is made in good faith. See § 768.79(1), Fla. Stat. (1995).

with limits of $10,000 per accident. (R2 302). The policy's insuring agreement quoted below gives the insurer exclusive control over settlement and defense of claims based on the following language:

> We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim asking for these damages. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

(R2 306) (bold type in original).

In addition to the bodily injury liability and property damage limits, United Auto's policy includes a typical supplementary payments provision which provides as follows:

> In addition to our limit of liability, we will pay on behalf of a **covered person**:
>
> 1. Up to $250 for the cost of bail bonds required because of an accident, including related traffic law violations resulting in bodily injury or property damage covered under this policy.
>
> 2. Premiums on appeal bonds and bonds to release attachments in any suit we defend.
>
> 3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of a judgment which does not exceed our limit of liability for this coverage.
>
> 4. Up to $50 a day for loss of earnings, but not other

> income because of attendance at hearings or trials at our request.
>
> 5. Other reasonable expenses incurred at our request.

(R2 306) (bold type in original; underlining supplied). The outcome of the insurance coverage dispute in this case depends on whether the attorney's fees and costs assessed against the insured pursuant to section 768.79, Florida Statutes, are considered "[o]ther reasonable expenses incurred at our request." Although the policy defines several terms (R2 306), it notably does not define the term "expenses" or the phrase "incurred at our request." (R2 306, 313-14).

After considering the argument and authorities submitted by counsel, the trial court ruled in United Auto's favor by order dated August 25, 2000 (R2 354-57; Tab 2), and entered a Final Declaratory Judgment Determining Insurance Coverage on September 26, 2000, which holds as follows: "The court finds, declares and decrees that the automobile liability insurance policy issued by United Automobile Insurance Company to defendant Susan B. Kinsey does not provide coverage for plaintiff Kevin M. Steele's attorney's fees and costs to be awarded in this action pursuant to his demand for judgment." (R2 363; Tab 3).

[3]

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[3] On September 25, 2000, Steele filed a notice of appeal directed to the trial court's order dated August 25, 2000. (R2 358-62; Case No. 2D00-4295). Steele later filed a second notice of appeal on September 29, 2000, directed to the Final Declaratory

The District Court's Decision

In the district court below, the sole issue on appeal was whether the language in United Auto's supplementary payments provision, "[o]ther reasonable expenses incurred at our request," provides coverage for attorney's fees and costs assessed against United Auto's insured, Kinsey, pursuant to section 768.79, Florida Statutes (1995). Steele, 801 So. 2d at 298. Relying on Florida Ins. Guar. Ass'n v. Johnson, 654 So. 2d 239 (Fla. 4th DCA 1995), Steele argued in support of reversal that because the insurer controlled the defense and elected to continue litigation rather than accept Steele's demand for judgment, the subsequent attorney's fees and costs assessed against the insured pursuant to section 768.79, Florida Statutes, were covered under

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Judgment Determining Insurance Coverage. (R2 364-65; Case No. 2D00-4384). While the appeals were pending, United Auto filed a motion to vacate the final declaratory judgment entered on September 26, 2000, on two grounds: (1) the trial court lacked jurisdiction to enter the final declaratory judgment on September 26, 2000, because Steele had filed a notice of appeal on September 25, 2000, and (2) the trial court lacked jurisdiction to enter judgment against United Auto because United Auto had not been served with process or otherwise made a party to the action. (R3 367-403). After conducting a hearing on United Auto's motion to vacate, the trial court determined that Steele's first notice of appeal had divested the trial court of jurisdiction to enter the original declaratory judgment and that United Auto had voluntarily submitted itself to the court's jurisdiction for a final determination of the insurance coverage issue. Based on those rulings, the trial court entered an Amended Final Declaratory Judgment Determining Insurance Coverage reaffirming its previous holding that United Auto's policy does not provide coverage for attorney's fees and costs based on Steele's demand for judgment. (R3 466-68; Tab 4). Steele filed a third notice of appeal directed to the amended declaratory judgment (R3 469-72; Case No. 2D01-533) and all three appeals were consolidated by district court order dated March 20, 2001.

the supplementary payments provision as "expenses incurred at our request." Steele, 801 So. 2d at 299. Steele also argued that the disputed policy language contained in the supplementary payments provision is ambiguous requiring a liberal construction favoring the insured. Steele, 801 So. 2d at 299.

Rejecting Steele's arguments, the district court affirmed the trial court's ruling and held that United Auto's supplementary payments provision does not provide coverage for attorney's fees and costs assessed against the insured under the offer of judgment statute. Certifying conflict with the fourth district's Johnson decision, the district court found that the language "expenses incurred at our request" within the context of Kinsey's policy is unambiguous and limits the insurer's obligation to "expenses that it had authorized and over which it had control, such as the selection of a service or product of known value and cost." Steele, 801 So. 2d at 299. In the district court's view, attorney's fees and costs incurred by the opposing party and taxed against the insured are not included in that definition.

The district court acknowledged that "[i]t may be preferable, as a matter of public policy, for the entity that has the sole right to settle or litigate a damages claim to be ultimately responsible for paying the resulting extra expenses . . . when the litigation concludes favorably to the other side," but felt constrained by the written

contract to reach a contrary result. Steele, 801 So. 2d at 300. The district court further noted that, although its opinion might produce unjust results since the losing insured rather than insurer which controlled the litigation would be liable for attorney's fees and costs, "any remedy for that injustice is within the sphere of the legislature, not the courts." Steele, 801 So. 2d at 300.

ISSUE PRESENTED FOR REVIEW

WHETHER THE SUPPLEMENTARY PAYMENTS PROVISION OF AN AUTOMOBILE LIABILITY INSURANCE POLICY WHICH PROVIDES COVERAGE IN ADDITION TO THE BODILY INJURY LIABILITY AND PROPERTY DAMAGE LIMITS FOR "OTHER REASONABLE EXPENSES INCURRED AT OUR REQUEST" COVERS ATTORNEY'S FEES AND COSTS ASSESSED AGAINST THE INSURED PURSUANT TO THE OFFER OF JUDGMENT STATUTE, SECTION 768.79, FLORIDA STATUTES, WHEN THE INSURER, WHICH CONTROLS SETTLEMENT AND DEFENSE OF CLAIMS, DECIDES TO LITIGATE RATHER THAN ACCEPT CLAIMANT'S DEMAND FOR JUDGMENT

SUMMARY OF ARGUMENT

For several reasons, the district court erred by holding that attorney's fees and costs assessed against the defendant-insured under the offer of judgment statute, section 768.79, Florida Statutes, are not covered under an automobile liability insurance policy which provides coverage over and above the bodily injury liability and property damage limits for "[o]ther reasonable expenses incurred at our request." First, the district court incorrectly reasoned that the policy language in question is clear and unambiguous. The critical phrase "[o]ther reasonable expenses incurred at our request" is not defined by the policy and, when read with the policy provision giving the insurer exclusive control over the defense and settlement of claims, is susceptible to more than one reasonable interpretation. In particular, the disputed policy language could be interpreted narrowly, as the district court held, to cover only specific requests made by the insurer for the insured to incur expenses for a "service or product of a known value and cost." Steele, 801 So. 2d at 299. On the other hand, the supplementary payments provision is susceptible to an equally reasonable interpretation advanced by the Johnson court which would provide coverage for expenses requested by implication based on the insurer's decision to continue litigation rather than settle. When, as here, the policy is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the

policy is ambiguous and must be construed in favor of the insured.

Second, this court should approve and apply the rationale from the fourth district's decision in Florida Ins. Guar. Ass'n, Inc. v. Johnson, 654 So. 2d 239 (Fla. 4th DCA 1995), which held that costs taxed against the insured in excess of his policy's bodily injury liability limit were covered under a supplementary payments provision with language identical to the policy language contested at bar. The Johnson court recognized that because a liability insurance policy gives the insurer exclusive control over the defense and settlement of claims, the policy should cover the insured's costs (and presumably attorney's fees) assessed against the insured as a result of the insurer's unilateral decision to litigate rather than settle. In the instant case, because United Auto rejected Steele's demand for judgment for policy limits of $10,000 and elected to litigate the claim, the policy's supplementary payments provision should be interpreted, as in Johnson, to require the insurer to cover the attorney's fees and costs assessed against the insured under section 768.79, Florida Statutes, as a direct result of that decision. In other words, by unilaterally deciding to litigate, the insurer effectively requested its insured to incur expenses in the form of prevailing party attorney's fees and taxable costs, and those expenses should be covered under the supplementary payments provision which obligates the insurer to pay "[o]ther reasonable expenses incurred at our

request."

Third, a determination that United Auto's supplementary payments provision covers attorney's fees and costs assessed against its insured under section 768.79, Florida Statutes, will be consistent with the legislature's intent in enacting that statute to conserve judicial resources and reduce legal expenses by encouraging early settlement of litigation.

ARGUMENT

A.

Standard of Review

This issue before the court involves the construction of an automobile liability insurance policy based on undisputed facts which raises a pure question of law subject to de novo review. See Coleman v. Florida Ins. Guar. Ass'n, Inc., 517 So. 2d 686, 690 (Fla. 1988).

B.

Ambiguous Policy Language

The supplementary payments provision typically found in liability insurance policies provides coverage for incidental litigation expenses over and above the stated limits of liability for bodily injury and property damage. The supplementary payments provision applies irrespective of whether the policy provides coverage for a particular loss. See Pacific Employers Ins. Co. v. Alex Hofrichter, P.A., 670 So. 2d 1023, 1025 (Fla. 3d DCA 1996).

As pertinent to the instant case, United Auto's supplementary payments provision covers "[o]ther reasonable expenses incurred at our request." (R2 306). The pivotal issue before this court is whether attorney's fees and costs assessed against the insured under the offer of judgment statute, section

768.79, Florida Statutes (1995), are "[o]ther reasonable expenses incurred at our request" which United Auto would be required to pay in addition to its bodily injury liability limit. Although it defines several other terms, United Auto's policy does not define the word "expenses" and, as noted by the trial judge, that term "has no common definition in the legal profession." (R3 441). The policy likewise does not define or explain the meaning of the dispositive phrase "incurred at our request."

"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." State Farm Fire & Cas. Co. v. CTC Development Corp., 720 So. 2d 1072, 1076 (Fla. 1998). However, when the undefined term "is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous." Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000). In this case, as explained hereafter, United Auto's failure to define the operative terms "expenses" and "incurred at our request" creates a policy ambiguity which must be resolved in favor of coverage under the basic tenet of construction which holds that ambiguities are construed liberally in favor of the insured and strictly against the insurer. See CTC Development, 720 So. 2d at 1076.

Disagreeing with Steele's position and the fourth district's decision in Johnson,

the district court below found that the disputed policy provision was not ambiguous and "that the language 'expenses incurred at our request' is clear on its face and should be applied according to its generally understood meaning." Steele, 801 So. 2d at 299. Applying dictionary definitions, the district court explained:

> The common meaning of "request" is "the act of asking, or expressing a desire, for something; solicitation or petition." Webster's New World College Dictionary 1218 (4th ed. 2001). The legal meaning of the word is "[a]n asking or petition. The expression of a desire to some person for something to be granted or done, particularly for the payment of a debt or performance of a contract." Black's Law Dictionary 1172 (5th ed. 1979). Both of these commonly understood definitions reinforce the clear use of the term within the context of the policy—that the insurer intended to pay for expenses that it had authorized and over which it had control, such as the selection of a service or product of known value and cost.

Steele, 801 So. 2d at 299.

With the utmost respect, the district court's dictionary-based analysis is too restrictive and overlooks basic principles of insurance policy construction. First, the district court's interpretation of the supplementary payments provision overlooks the settled principle "that a single insurance policy provision should not be considered in isolation, but should be construed with other policy provisions against the background of the case." Mathews v. Ranger Ins. Co., 281 So. 2d 345, 348 (Fla. 1973). **The disputed language from the supplementary payments provision must be construed with the policy provision which gives the insurer**

the exclusive right to control the insured's defense and make all settlement decisions. When those two provisions are construed together "against the background of the case," which includes the claimant's demand for judgment and the insurer's rejection thereof, it is reasonable and logical to interpret the language "[o]ther reasonable expenses incurred at our request" to provide coverage for prevailing party attorney's fees and costs assessed against the insured.

Next, under the district court's interpretation of the supplementary payments provision, the insurer's liability would be limited to "expenses that it had authorized and over which it had control, such as the selection of a service or product of known value and cost." Steele, 801 So. 2d at 299. This narrow construction should be rejected, however, because "'when an insurer fails to define a term in a policy, . . . the insurer cannot take the position that there should be a "narrow, restrictive interpretation of the coverage provided."'" CTC Development, 720 So. 2d at 1076 (quoting State Comprehensive Health Ass'n v. Carmichael, 706 So. 2d 319, 320 (Fla. 4th DCA 1997)**). Thus, construing United Auto's supplementary payments provision strictly against the insurer, the language "[o]ther reasonable expenses incurred at our request," should be interpreted broadly to cover attorney's fees and costs assessed against the insured pursuant to section 768**.79,

Florida Statutes.

The interpretation of the disputed policy language suggested by the Johnson court offers a more reasonable construction consistent with all policy provisions. Under that interpretation, as explained in the next subsection of this brief, when the insurer unilaterally elects to litigate rather than settle, the insurer effectively requests the insured to incur additional litigation expenses, including prevailing party attorney's fees and costs assessed against the insured. See Florida Ins. Guar. Ass'n, Inc. v. Johnson, 654 So. 2d 239, 240 (Fla. 4th DCA 1995).

In any event, a construction of the policy providing coverage for attorney's fees and costs assessed against the insured at the insurer's implied request is not inconsistent with the district court's narrow construction of the supplementary payments provision limiting coverage to "expenses that it had authorized and over which it had control, such as the selection of a service or product of known value and cost." Steele, 801 So. 2d at 299. When the insurer in this case, with exclusive control over the insured's defense and all settlement decisions, elected to litigate rather than accept Steele's settlement offer, it effectively "authorized" the insured to incur expenses in the form of the opposing party's attorney's fees and costs that might be assessed pursuant to section 768.79, Florida Statutes. Attorney's fees and costs incurred in litigation are "services and products of known value and cost" to any

insurance company experienced in defending claims. Thus, at least by implication, the insurer's rejection of Steele's demand for judgment satisfied the district court's definition of the disputed policy language.

C.

Florida Ins. Guar. Ass'n, Inc. v. Johnson

Steele argued below that United Auto's policy provided coverage for attorney's fees and costs based on Florida Ins. Guar. Ass'n, Inc. v. Johnson, 654 So. 2d 239 (Fla. 4th DCA 1995). In that case, the insured was covered by an automobile liability insurance policy which included a supplementary payments provision which, like the case at bar, provided coverage in addition to the bodily injury liability limit for "[o]ther reasonable expenses incurred at our request." Johnson, 654 So. 2d at 240 (emphasis the court's). A suit against the insured resulted in a judgment for policy limits of $10,000 plus $3,062.11 in taxable costs. The Florida Insurance Guaranty Association (FIGA), as successor to defendant's insolvent insurer, First Miami Insurance Company, argued it was not liable for the costs taxed against the insured based on policy language capping the insurer's liability at the $10,000 bodily injury liability limit. In response, the claimant argued that because the insurer decided to litigate rather than settle, the resulting costs taxed against the insured were covered under the supplementary payments provision previously quoted as reasonable expenses

necessarily incurred at the insurer's request. In this respect, the claimant contended:

> At bar, Johnson asserts that the "request" referred to took the form of First Miami's election to litigate the matter. Johnson contends that, having thus chosen to litigate, the taxable costs entered against the insured were, therefore, expenses covered under the terms of the policy. The award of taxable costs in this case are reasonable expenses incurred by the plaintiff, and charged to the defendant, as a result of the litigation of the action.

Johnson, 654 So. 2d at 240 (emphasis the court's).

In affirming the judgment against FIGA for costs awarded in excess of policy limits, the fourth district agreed with the claimant's contention and reasoned:

> In the instant case, First Miami made the decision to defend this action. Since First Miami had sole discretion regarding the decision to defend the lawsuit, it is obvious that the expenses incurred by the plaintiff in litigating the action were as a result of the insurance company's choice not to settle the action. Thus, those expenses were incurred at the insurer's request.

Johnson, 654 So. 2d at 240.

Applying Johnson to the present case, United Auto decided to litigate rather than accept Steele's demand for judgment for policy limits of $10,000, thereby exposing its insured to substantial court-awarded attorney's fees and costs under the offer of judgment statute. Since the policy gives United Auto exclusive control over the defense and sole discretion concerning settlement of claims, the expenses chargeable to the insured from United Auto's decision to litigate rather than settle,

including attorney's fees and costs under section 768.79, Florida Statutes, should be considered "[o]ther reasonable expenses incurred at [the insurer's] request" which are covered by the supplementary payments provision.

In the Johnson case, FIGA also argued that the disputed language in the supplementary payment provision was unambiguous, while the claimant urged the opposite conclusion. Although the opinion does not expressly resolve that issue, by implication the fourth district found the policy language ambiguous, concluding that "the 'Supplementary Payments' provisions obviously have the intent of extending coverage and, therefore, must be construed liberally in favor of the insured." Johnson, 654 So. 2d at 240.

D.

Medical Malpractice Cases

Although not cited by the district court, the trial court relied on a series of medical malpractice cases decided by this court which determined that prevailing party attorney's fees assessed against health care providers under former section 768.56, Florida Statutes**, were not covered under the health care providers' liability insurance policies. See Spiegel v. Williams, 545 So. 2d 1360 (Fla. 1989); Smith v. Sitomer, 550 So. 2d 461 (Fla. 1989); and Florida Patient's Comp. Fund v. Moxley, 557 So. 2d 863 (Fla. 1990). In Spiegel**, this court decided whether attorney's fees

assessed against the health care provider in a medical malpractice case were covered under a policy provision which required the insurer to "pay all costs of defending a suit . . . ." Spiegel, 545 So. 2d at 1361 (emphasis supplied). Following the settled proposition that attorney's fees recoverable by statute are not considered "costs" unless the statute specifically authorizes their recovery, this court ruled that the quoted policy language did not cover court-awarded attorney's fees.

Distinguishing this decision, Spiegel is based solely on the court's interpretation of the term "costs," a term with a definite and commonly accepted meaning under Florida law that does not include attorney's fees. See Wiggins v. Wiggins, 446 So. 2d 1078, 1079 (Fla. 1984). **The Spiegel decision did not address the broader term "expenses" employed by the policy in the instant case, which, as noted by the trial judge below, "has no common definition in the legal profession." (R3 441).**[4] Surely the undefined term "expenses" is broad enough to encompass attorney's fees as well as other litigation expenditures.

In dicta, the Spiegel court noted that "[w]hile a policy could no doubt be written

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[4] According to the dissenting opinion, the policy in Spiegel included a supplementary payments provision that required the insurer to "pay all reasonable costs you incur at our request while helping us investigate or defend a claim or suit against you." Spiegel, 545 So. 2d at 1362 (Erlich, C.J., dissenting). The majority opinion, however, does not mention this provision and, in any event, it employed the term "costs," not "expenses."

specifically to cover court-awarded attorneys' fees, liability insurers are normally only responsible for the payment of the plaintiff's attorneys' fees where bad faith is involved or the insured prevails in a direct action against the company." Spiegel, 545 So. 2d at 1361 (citing 8A J. Appleman, Insurance Law & Practice § 4894.65 (1981)**. This dicta recognizes that, absent bad faith or fraud, the question of insurance coverage for court-awarded attorney's fees assessed against the insured depends entirely on policy language.**

In Smith, a similar issue arose under the following policy language:

> "The Staff Fund will pay, in addition to the applicable limits of liability: (a) all expenses incurred by the Staff Fund, all costs taxed against the Member in any suit defended by the Staff fund and all interest on the entire amount of any judgment...."

Smith, 550 So. 2d at 462. Relying on Spiegel, this court held that court-awarded attorney's fees assessed against the health care provider were not covered as taxable costs under policy language requiring the insurer to pay "all costs taxed against the Member in any suit defended by the Staff fund . . . ." Smith, 550 So. 2d at 462. In so holding, the court limited its decision to the term "costs" and did not address the policy language more analogous to the instant case requiring the insurer to pay "all expenses incurred by the Staff fund . . . ." Smith, 550 So. 2d at 462. Even had the court considered that language, there is a decided difference between the policy

provision in Smith ("all expenses incurred by the Staff Fund") and the policy provision at bar ("other reasonable expenses incurred at our request"). In Smith, the policy obligated the insurer to pay only those expenses actually incurred by the insurer, while in the instant case the insurer agreed to pay expenses incurred by the insured at the insurer's request.

Finally, in Moxley, this court answered a certified question by holding that a claimant in a medical malpractice case can recover prevailing party attorney's fees above the percentage amount specified by the attorney's contingency fee contract when the contract contains language providing that the attorney will receive a percentage of the recovery or the court-awarded fee, whichever is greater. Although not part of the certified question, the Moxley court reaffirmed its rulings in Spiegel and Smith and determined that the health care provider's policy did not cover court-awarded fees. Neither this court's opinion nor the district court opinion [5] sets forth the operative policy language.

E.

Sparks v. Barnes

Also to be distinguished is a line of cases led by Sparks v. Barnes, 755 So. 2d 718 (Fla. 2d DCA 1999), holding that attorney's fees and costs cannot be assessed

[5] Florida Patient's Comp. Fund v. Moxley, 545 So. 2d 922 (Fla. 4th DCA 1989).

directly against a liability insurance carrier under section 768.79, Florida

Statutes, when the insurer is not a party to the action. In Sparks, the court affirmed the trial court's ruling in a personal injury case which denied plaintiff's motion filed pursuant to section 627.4136, Florida Statutes (1997), to join the defendant's liability insurance carrier in her judgment for attorney's fees awarded under section 768.79, Florida Statutes (1997). Notably, the insurer had not been a party to the action against the defendant-insured and therefore had not been served with the offer of judgment which ultimately triggered the fee award. Pursuant to section 627.4136, the plaintiff cannot join the defendant's liability insurer until after verdict or settlement. See Home Ins. Co. v. Sentry Ins. Co., 461 So. 2d 1038 (Fla. 4th DCA 1985), receded from on other grounds, Hartford Acc. & Indem. Co. v. U.S.C.P. Co., 515 So. 2d 998 (Fla. 4th DCA 1987).

Rejecting plaintiff's contention that sections 627.4136 and 768.79 operated jointly to allow recovery of attorney's fees directly against the insurer, the second district noted that "a fee award is never justified absent a legal basis, contractual or statutory, to support it." Sparks, 755 So. 2d at 719. Finding no such basis in either statute for assessing fees against a non-party insurer, the court affirmed without addressing the insurance contract. A similar result was reached in Feltzin v. Bernard, 719 So. 2d 315 (Fla. 3d DCA 1998), and Meyer v. Alexandre, 772 So. 2d 627 (Fla. 4th DCA 2000).

Unlike the plaintiffs in the above-cited cases, Steele is not attempting to assess attorney's fees and costs directly against the insurer. The issue in the present case is not whether attorney's fees and costs can be assessed directly against United Auto,

but whether the attorney's fees and costs assessed against its insured, Kinsey, are covered by her policy. Further distinguishing these cases, the insurance company at bar voluntarily submitted itself to the jurisdiction of the court before verdict or settlement notwithstanding the non-joinder statute. (R1 148 at ¶ 4).

F.

Decisions From Other Jurisdictions

Steele has not located any decisions from other jurisdictions addressing the precise question raised by this appeal. However, based on policy language identical or similar to the disputed policy language at bar, courts from several states have determined that an insurer must pay attorney's fees incurred by its insured while defending a declaratory judgment coverage action brought by the insurer.

[6] Professor Appleman explains:

> Where an insurer failed to defend until after an adverse decision in a declaratory judgment action instituted by it, such insurer was held not liable to pay attorneys' fees and expenses incurred by the insured in the declaratory judgment action, in the absence of fraud, bad faith, or stubborn litigiousness on the part of the insurer. Some courts have qualified this rule on the assumption that the expenses were incurred at "the request of the insurer" and therefore came within the policy provision for

[6] Under Florida law, the insurer would be obligated by statute to pay the insured's attorney's fees under the same circumstances. See § 627.428, Fla. Stat. (2000); Florida Rock & Tank Lines, Inc. v. Continental Ins. Co., 399 So. 2d 122 (Fla. 1st DCA 1981).

> reimbursement of the insured for reasonable expenses, or on the theory that since suit was brought by a third party, the insurer owes a duty to defend.

7C J. Appleman, Insurance Law & Practice § 4691 at 282 (Berdal ed. 1979) **(emphasis supplied). Although obviously the issue addressed by Professor Appleman is not the same as the issue presently before the court, the rationale of the cases supporting the emphasized text, particularly its treatment of the language "expenses incurred at our request," is quite instructive.**

For example, based on policy language identical to the policy at bar, the court in Elliot v. Donahue, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), held that the insurer was obligated to pay attorney's fees incurred by the insured in litigating the issue of insurance coverage against the insurer. The court explained:

> **The "Additional Payments" section of the insurance policy issued by Heritage states "we will pay, in addition to our limit of liability ... [a]ny other reasonable expenses incurred at our request" (emphasis in original). Courts in several other jurisdictions have held that attorney fees are recoverable by the insured in defending against an insurer's declaratory judgment action where the insurance policy provides reimbursement for all reasonable expenses incurred at the request of the insurance company. . . . We agree with this line of reasoning. Initiating an action which imposes an obligation on the part of the insured to successfully defend coverage is the equivalent of requesting the insured to incur reasonable expenses. Therefore, the**

> **attorney fees incurred by Donahue in successfully defending coverage under the policy represents expenses incurred at Heritage's request.**

Elliot, 484 N.W.2d at 407 (citations omitted). Although the insurer in the present case did not sue its insured as in Elliot, it certainly compelled the insured to litigate and become exposed to court-awarded fees by rejecting a demand for judgment for policy limits. Thus, because United Auto controlled the defense and held exclusive authority to accept or reject Steele's demand for judgment, the insured in this case is no less vulnerable than the insured in Elliot. See also Citizens Ins. Co. of America v. Charity, 871 F. Supp. 1401 (D. Kan. 1994); **Allstate Ins. Co. v. Robins, 42 Colo. App. 539, 597 P.2d 1052 (Col. Ct. App. 1979); Occidental Fire & Cas. Co. v. Cook, 92 Idaho 7, 435 P.2d 364 (1967); Upland Mut. Ins., Inc. v. Noel, 214 Kan. 145, 519 P.2d 737 (1974); State Farm Fire & Cas. Co. v. Sigman, 508 N.W.2d 323 (N.D. 1993).**

G.

Legislative Intent and Public Policy

The result reached by the district court and urged by the insurance carrier below is contrary to legislative intent. Section 768.79, Florida Statutes, was enacted to reduce judicial resources and litigation expenses by encouraging early settlement of civil cases. See National Healthcorp Ltd. P'ship v. Close, 787 So. 2d 22, 26 (Fla. 2d DCA), rev. denied, 799 So. 2d 216 (Fla. 2001); McMullen Oil Co. v. ISS Int'l Serv. Sys.,

Inc., 698 So. 2d 372, 374 (Fla. 2d DCA 1997); Pirelli Armstrong Tire Corp. v. Jensen, 752 So. 2d 1275, 1278 (Fla. 2d DCA 2000) (Casanueva, J., concurring in part and dissenting in part), rev. dismissed, 777 So. 2d 973 (Fla. 2001). The statute, however, does not operate as the legislature intended when the real party in interest bears no responsibility for attorney's fees and costs. In this case, the plaintiff submitted a demand for judgment to settle his claim for policy limits during the early stages of the litigation before the parties incurred substantial attorney's fees and costs. (R1 8, 184). The insurer, however, unilaterally rejected the offer and forced the insured to litigate with resulting liability for court-awarded fees and costs. Nonetheless, the district court's decision below, absent bad faith or fraud, permits the insurer to escape responsibility for attorney's fees and costs assessed against the insured even though such fees and costs were incurred at the insurer's direction. If this ruling stands, insurers will have less incentive to settle, knowing that the insured, not the insurer, must bear ultimate financial responsibility for any attorney's fees and costs resulting from that decision.

The insurer presumably will argue that an insured saddled with a personal judgment for attorney's fees and costs resulting from the insurer's unilateral decision to litigate rather than settle can bring a common law or statutory bad faith action

against the insurer to recover the damages. This suggestion, however, does not offer the insured an effective alternative. First, if the attorney's fees and costs assessed against the insured under the offer of judgment statute are not covered by the policy, as the district court held, the insurer may escape bad faith liability based on the principle that an action for bad faith cannot be maintained unless the policy covers the loss suffered by the insured. See Rodriguez v. American Ambassador Casualty Co., 4 F. Supp. 2d 1153 (M.D. Fla. 1998), aff'd, 170 F.3d 188 (11th Cir. 1999) (table).

Second, there obviously is no guarantee that the insured will prevail in the subsequent bad faith action. As this court has noted, an "insurer has a right to deny claims that it in good faith believes are not owed on a policy." Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000). For example, assume a $100,000 bodily injury liability limit with a supplementary payment provision covering "other reasonable expenses incurred at our request" and a demand for judgment by plaintiff for $25,000. In good faith, the insurance carrier declines to accept the demand for judgment and the jury returns a verdict for $50,000, well within the policy limits. Pursuant to the unaccepted demand for judgment, the trial court awards $35,000 in attorney's fees against the insured-defendant. Under the district court's interpretation of the policy, the insurer

would be obligated to pay $50,000 under the bodily injury liability coverage[7] but nothing towards the $35,000 attorney's fee judgment which becomes the insured's individual responsibility. Because the insurer ostensibly exercised good faith in rejecting the settlement offer under these hypothetical facts, the insured has no recourse even though the total award (damages and attorney's fees) is less than the bodily injury liability limit.

The district court below acknowledged that "[i]t may be preferable, as a matter of public policy, for the entity that has the sole right to settle or litigate a damages claim to be ultimately responsible for paying the resulting extra expenses, such as the taxable costs in Johnson and the section 789.79 fees here, when the litigation concludes favorably to the other side." Steele, 801 So. 2d at 300. The court, however, refused to "enforce such a public policy in the face of a written contract with such a clearly contradictory meaning." Steele, 801 So. 2d at 300. For reasons previously expressed in this brief, the insurance contract is ambiguous and therefore should not serve as an impediment to this court implementing the strong public policy favoring the insured in this case.

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[7] A standard insuring agreement requiring the insurer to pay all sums which the insured becomes legally obligated to pay as "damages" does not cover prevailing party attorney's fees and costs assessed against the insured. See Scottsdale Ins. Co. v. Haynes, 793 So. 2d 1006 (Fla. 5th DCA 2001) (question certified); Scottsdale Ins. Co. v. Deer Run Property Owner's Ass'n, Inc., 642 So. 2d 786 (Fla. 4th DCA 1994).

The court below further observed:

> Although Ms. Kinsey, by virtue of the Cunningham stipulation into which she entered, is insulated from personal liability for Mr. Steele's fees and costs no matter the further outcome of these proceedings,[8] we note that not all personal injury defendants may be so fortunate. The result reached in Johnson finding coverage despite clear and unambiguous language to the contrary, may well be an appropriate public policy result. One can well envision a scenario where, under section 768.79, an insurer may reject in good faith an offer of judgment, and the jury verdict so exceeds the offer that the resulting final judgment, combining the jury verdict and the section 789.79 fees and costs, is in excess of the insured's policy's limits. In such a case the losing insured defendant, and not the insurer who controlled the case, will be liable for the excess. Although it seems unjust that an insured should be required to bear the brunt of satisfying an excess adverse judgment that resulted, at least in part, from the insurance company's total control of the litigation, any remedy for that injustice is within the sphere of the legislature, not the courts.

Steele, 801 So. 2d at 300 (footnote added). Steele certainly concurs with the district court's assessment that a legislative solution would level the playing field between insurers and insureds, particularly if insurers rewrite their policies to clearly and unambiguously exclude prevailing party attorney's fees from coverage. But based on the policy language in this case, the desired result can be achieved without legislative

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[8] Under the terms of the "Cunningham" agreement, Steele has agreed to accept policy limits and release Kinsey if the bad faith action is decided in United Auto's favor. (R1 149, ¶ 5). If Kinsey prevails in the bad faith action, United Auto will pay the excess judgment and any attorney's fees and costs assessed against her which are not covered by the policy. (R1 149, ¶ 6).

intervention by applying settled maxims of insurance policy construction favoring the insured.

CONCLUSION

The district court decision should be quashed. Johnson should be approved, 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.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Michael W. Lehrer, Esquire, and Jack Powell, Esquire, 501 East Kennedy Boulevard, Suite 1275, Tampa, Florida 33802; Hinda Klein, Esquire, 3440 Hollywood Boulevard, 2nd Floor, Hollywood, Florida 33021; Sharon Stedman, Esquire, 1516 East Hillcrest Street, Suite 108, Orlando, Florida 32803; Karen Barnett, Esquire, 201 East Kennedy Boulevard, Suite 1518, Tampa, Florida 33602 and to Philip M. Burlington, Esquire, Suite 3A/Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401 by U.S. Mail on this 26th day of March, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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