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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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

ARGUMENT

A.

Conflict Jurisdiction

United Auto argues initially that the decision below does not conflict for jurisdictional purposes with Florida Ins. Guar. Ass'n v. Johnson, 654 So. 2d 239 (Fla. 4th DCA 1995), because Johnson applied the supplementary payments provision to costs while the decision below dealt with attorney's fees. United Auto fails to identify, however, any distinction between costs and attorney's fees that affects conflict jurisdiction. United Auto's jurisdictional argument also ignores the fact that Johnson and the decision below construed identical policy language but reached different results. Thus, the court should accept jurisdiction despite the insignificant factual distinction between the conflict cases. See Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 939 (Fla. 1979) (accepting conflict jurisdiction where "the district courts of appeal construed identical language in separate insurance contracts but reached contrary conclusions as to its legal effect.").

United Auto also contends that conflict between Johnson and the decision below does not exist because the Johnson court did not find an ambiguity in the supplementary payments provision common to both cases. Steele disagrees. Although the Johnson court did not expressly decide that issue, it determined 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 (emphasis supplied). Insurance policies are not construed liberally in favor of the insured or strictly against the insurer unless the operative policy language is inconsistent, uncertain or ambiguous. See Excelsior Insurance, 369 So. 2d at 942. Thus, by giving the policy a liberal construction favoring the insured, the Johnson court necessarily found the identical supplementary payments provision ambiguous in direct conflict with the decision below.

B.

Ambiguous Policy Language

Steele's interpretation of the disputed policy language is grounded on the principle of construction which holds that if policy language is susceptible to more than one reasonable interpretation, the policy is ambiguous and must be construed in favor of the insured. See State Farm Fire & Cas. Co. v. CTC Development Corp., 720 So. 2d 1072, 1076 (Fla. 1998)**. In response, United Auto contends that its supplementary payments provision which covers "[o]ther reasonable expenses incurred at our request" is not ambiguous requiring a construction favoring the insured because Steele's contention that the clause covers court-awarded attorney's fees assessed against the insured is not reasonable. To support its position that Steele's interpretation is unreasonable, United Auto argues that**

"there is nothing in the contract or within the realm of common sense that indicates that a carrier 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." Answer Brief at 13 (emphasis in the original). In response, United Auto's argument is somewhat perplexing in light of the insurer's concession in its brief that "UNITED AUTO has never disputed its liability for taxable costs under the Supplementary Payments provision, in light of the Johnson decision." Answer Brief at 15 n.2. The court costs incurred by the plaintiff and taxed against the defendant-insured are as much a part of the expense of "prosecution of a claim" as the plaintiff's attorney's fees similarly taxed against the defendant-insured. To provide coverage for one and not the other under the identical policy provision is completely illogical.

In any event, Steele submits that it is entirely reasonable for the insurer to cover plaintiff's attorney's fees assessed against the defendant-insured as "reasonable expenses incurred at [the insurer's] request" when, as here, the insurer decides to litigate rather than settle. First, the term "expenses" selected by the insurer surely is broad enough to encompass attorney's fees when defined in the litigation context. Second, when the insurer rejects an offer of judgment and thereby exposes the insurer to prevailing party attorney's fees and court costs, that decision is, in effect, a request

by the insurer for the insured to incur these litigation expenses. Thus, under the policy language in question, the insurer's payment of plaintiff's attorney's fees and costs assessed against the defendant-insured pursuant to the offer of judgment statute is an entirely reasonable and expected consequence of claims litigation. This was precisely the rationale followed by the court in Johnson when it held that plaintiff's costs assessed against the defendant-insured were covered by the defendant-insured's policy under a supplementary payments provision with language identical to the supplementary payments provision in the present case. See Johnson, 654 So. 2d at 240 ("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.").

C.

Medical Malpractice Cases

As Steele indicted in his initial brief, United Auto's reliance on the medical malpractice cases decided by this court is misplaced because the insurance policies construed in those cases contained different policy language. In particular, in the lead case, Spiegel v. Williams, 545 So. 2d 1360, 1361 (Fla. 1989), the policy's supplementary payments provision covered "all costs of defending a suit . . . ." Consistent with the settled proposition that attorney's fees

are not considered "costs" unless specifically authorized by statute, this court ruled that the quoted policy language did not cover court-awarded attorney's fees. The term "expenses" employed by United Auto's policy in the instant case connotes broader coverage than "costs."

D.

Sparks v. Barnes

United Auto's concession that Sparks v. Barnes, 755 So. 2d 718 (Fla. 2d DCA 1999), "is somewhat distinguishable from this case," is a dramatic understatement. Answer Brief at 18. The plaintiff in Sparks sought court-awarded attorney's fees directly from the insured's non-party liability insurance carrier. In the present case, Steele has not attempted to recover court-awarded attorney's fees directly from United Auto. The issue in this case, which was not decided by Sparks, is whether court-awarded attorney's fees assessed directly against the defendant-insured are covered by her liability policy.

In its discussion of Sparks, United Auto further argues that the fact that the insurance policy gives the insurer complete control over the litigation cannot make the carrier responsible for court-awarded attorney's fees without legislative intervention. See Answer Brief at 19-20. In response, Steele agrees that attorney's fees under section 768.79, Florida Statutes, cannot be assessed directly against a non-party insurer merely because the policy gives the insurer complete control over settlement and defense of claims. But, as mentioned previously, Steele is not asserting an

attorney's fee claim directly against the insurer. Moreover, the supplementary payments provision under scrutiny in the instant case is broad enough to require the insurance company to cover attorney's fees assessed against the insured after the insurer unilaterally decides to litigate rather than settle, thereby exposing the insured to liability for plaintiff's litigation expenses.

E.

Decisions From Other Jurisdictions

In response to the decisions from other jurisdictions cited by Steele and The Academy of Florida Trial Lawyers, United Auto correctly notes that those cases involve first-party actions initiated by the insurer directly against its insured in states which apparently have no statutory basis for assessing attorney's fees in favor of the prevailing insured under those circumstances. Although the decisions are distinguishable on that basis, their analysis is useful because the courts in those cases recognize that the term "request" used in identical or similar supplementary payments provisions is broad enough to cover attorney's fees incurred by the insured through litigation. See, e.g., Upland Mut. Ins., Inc. v. Noel, 214 Kan. 145, 519 P.2d 737, 742-43 (1974).

F.

Legislative Intent and Public Policy

The public policy arguments advanced by United Auto and the Florida Defense Lawyers Association (FDLA) are based on the faulty premise that Steele seeks to impose per se responsibility on liability insurers for attorney's fees and costs assessed against the insured under the offer of judgment statute. This is not Steele's position. He simply contends that United Auto is liable for such attorney's fees and costs in this instant case under the ambiguous supplementary payments provision found in its policy which requires the insurer to cover "[o]ther reasonable expenses incurred at our request." And, although not required by it, Steele's interpretation of the policy is consistent with the legislative intent of the offer of judgment statute to promote settlement of claims and thereby conserve judicial resources and reduce litigation expenses.

Steele does not contend that the insurer would be liable for attorney's fees and costs assessed against the insured under the offer of judgment statute if the policy clearly and unambiguously did not provide such coverage. For example, the insurer would not be liable for attorney's fees and costs assessed against the insured under the offer of judgment statute if the policy covered: "[o]ther reasonable expenses incurred at our request but not including attorney's fees and costs incurred by the injured party and assessed by the court against the insured." As a further example, the insurer could provide coverage for prevailing party attorney's fees and costs but

restrict such coverage to the policy limits. As presently worded, however, the policy language is sufficiently ambiguous to cover attorney's fees and costs irrespective of policy limits.

Both United Auto and FDLA suggest a bad faith action against the insurer as the insured's remedy to recover attorney's fees and costs assessed in plaintiff's favor under the offer of judgment statute. Steele suggests, however, that an insured should not be forced into years of expensive and unpredictable litigation to satisfy a judgment for attorney's fees and costs when the policy covers damages for bodily injury and "[o]ther reasonable expenses incurred at our request."

FDLA offers several examples of circumstances in which an insurer could be responsible for attorney's fees and costs assessed against the insured under Steele's interpretation of the policy even though the insurer acts in good faith. See Brief of Amicus Curiae FDLA at 3-4. Before responding, Steele reemphasizes that his position in this case is based on policy language, not the insurer's good or bad faith in defending the claim against the insured.

As its first example, FDLA argues that insurers should not be liable for attorney's fees and costs if "[t]he insured requested the carrier to reject the settlement proposal." Brief of Amicus Curiae FDLA at 3. In response, the insured's position is irrelevant since the insurer has the right under the policy in question to control all

settlement decisions.

[1] FDLA next argues that insurers should not be responsible for attorney's fees and costs if the insured misrepresents the facts of the case. This is not a legitimate concern, however, because the insured's misrepresentation of a material fact involving the claim could vitiate coverage entirely. Next, FDLA contends an insurer should not be liable for attorney's fees and costs when it rejects a proposal for settlement on the information then available. In response, the insurer, not the insured, has the duty under the policy to investigate all the facts necessary to make an informed decision. But again, the policy language under scrutiny in this case covers prevailing party attorney's fees and costs even when the insurer acts in good faith. Finally, FDLA expresses concern that insurers could be liable for attorney's fees and costs in cases where the plaintiff withholds material information that would have affected the insurer's decision to accept or reject a settlement proposal. In response, if the plaintiff withholds material information relevant to the claim, the court has the authority, as acknowledged by FDLA, to deny the request for attorney's fees and costs and could, in its discretion, dismiss the case altogether.

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[1] The United Auto policy provides: "We will settle or defend, as we consider appropriate, any claim or suit asking for these damages." (R-II 306) (emphasis supplied).

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; David B. Pakula, David B. Pakula, P.A., 5100 N. Federal Hwy., Suite 202, Fort Lauderdale, Florida 33308; and Philip M. Burlington, Esquire, Suite 3A/Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401 by U.S. Mail on this 10th day of June, 2002.

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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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