**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC06-283**

**THIRD DISTRICT CASE NO. 3D05-951**

**BRASS & SINGER, D.C., P.A.,**
**A/A/O MILDRED SOLAGES,**

**Petitioner,**

**vs.**

**UNITED AUTOMOBILE INSURANCE COMPANY,**
**A Florida corporation,**

**Respondent.**

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# BRIEF OF RESPONDENT ON THE MERITS

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**MICHAEL J. NEIMAND, ESQUIRE**
**The Office of the General Counsel**
**United Automobile Insurance Company**
**Trial Division**
**One Columbus Center**
**1 Alhambra Plaza, Suite 1200**
**Coral Gables, Florida 33134**
**Phone: (305) 774-6160**
**Fla. Bar No. 239437**

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## INTRODUCTION

The Petitioner, Brass & Singer, D.C., P.A., was the Plaintiff in the trial court, the Petitioner before the District Court and will be referred to as the Assignee. The Respondent, United Automobile Insurance Company, was the Defendant below, the Respondent before the District Court and will be referred to as the Insurer. Mildred Solages was the Insured and will be referred to as such. The symbol "R." will designate the record on appeal and the symbol "A." will designate the appendix to this brief.

## STATEMENT OF THE CASE AND FACTS

This case originated as a county court lawsuit over personal injury protection (PIP) benefits. The insured, Mildred Solages, assigned her benefits to the Petitioner physicians, Brass & Singer, P.A. The county court denied a motion by the Respondent insurer, United Automobile Insurance Company for a continuance. The doctors prevailed at trial and the Insurer appealed. (A. 2)

A three-judge panel of the circuit court reversed and remanded for a new trial. The appellate division concluded that under the circumstances presented, it had been an abuse of discretion to deny the Insurer's motion for continuance. (A. 2)

The Assignee had filed a motion for appellate attorney's fees under section 627.428, Florida Statutes (2004). The Assignee's had lost the appeal, but contended,

however, that they should be conditionally granted appellate attorney's fees, to be paid to them if they recovered judgment against the insurer at the conclusion of the case. The appellate division denied the doctors' motion for attorney's fees on authority of *Nationwide Mut. Ins. Co. v. Nu-Best Diagnostic Labs, Inc.*, 810 So.2d 514 (Fla. 5th DCA 2002). (A. 2).

The Assignee then petitioned the Third District for a writ of certiorari. The petition was accepted since there is a conflict between the Fourth and Fifth Districts on how to interpret section 627.428, Florida Statutes, in the present circumstances. The Fourth District has taken the position that where an insured loses an appeal but the matter is remanded for a new trial, the correct procedure is for the appellate court to conditionally grant appellate attorney's fees and remand for a determination of the amount, contingent on the insured recovering judgment against the insurer at the conclusion of the case. *See Gedeon v. State Farm Mut. Auto. Ins. Co.*, 805 So.2d 119 (Fla. 4th DCA 2002); *Aksomitas v. Maharaj*, 771 So.2d 541, 543-45 (Fla. 4th DCA 2000)(en banc). The Fifth District has taken the position that where, as here, the insured loses the appeal but there will be a new trial, the insured is not entitled to any appellate attorney's fees for the appeal which the insured has lost. *See Nu-Best*, 810 So.2d at 515. (A. 2-3).

The Third District agreed with the Fifth District and denied the petition. The Third District recognized the conflict and certified it to this Court. (A. 3).

## SUMMARY OF THE ARGUMENT

The Third District agreed and endorsed the Fifth District's opinion in *Nu-Best*, holding that by the plain words of the statute that the insured is entitled to appellate attorney's fees only "in the event of an appeal in which the insured or beneficiary prevails...." The Third District's interpretation is in accord with the construction provided fee statutes as well as the general rules of statutory construction

Statutes providing for awards of attorney's fees are to be strictly construed. The basis for this rule is that an award of fees to an insured is in the nature of a penalty against an insurer. Under the plain wording of the statute, the Assignee is not entitled to a conditional award of fees because the instant case was not an appeal in which the insured or beneficiary prevailed.

Under general rules of statutory construction, the result is the same as when the fee statute is strictly construed. The statute is not ambiguous and therefore this court does not need to resort to the rules of statutory construction. It is not ambiguous since the term "an" is used in the clause "in the event of an appeal in which the insured or beneficiary prevails...." This means that each appeal is a

separate unit and must be won by the insured in order to be entitled to fees. The term "any" is not used which does not make the statute all-inclusive. If it was all-inclusive, than any appeal, regardless of the outcome, is subject to fees.

## ARGUMENT

### THE THIRD DISTRICT'S DECISION IN THIS CASE WHICH CONFLICTS WITH GEDEON V. STATE FARM MUTUAL AUTOMOBILE INS,. CO., 805 SO.2D 119 (FLA. 4TH DCA 2002) SHOULD BE APPROVED SINCE IT CORRECTLY INTERPRETS FLA. STAT. § 627.428

The Third District agreed and endorsed the Fifth District's opinion in *Nu-Best*, holding that by the plain words of the statute that the insured is entitled to appellate attorney's fees only "in the event of an appeal in which the insured or beneficiary prevails...." The Third District's interpretation is in accord with the construction provided fee statutes as well as the general rules of statutory construction

Statutes providing for awards of attorney's fees are to be strictly construed. *Dade County v. Pena*, 664 So.2d 959 (Fla. 1995). The basis for this rule is that an award of fees to an insured is in the nature of a penalty against an insurer. *Travelers Indemnity Co. v. Chisholm*, 384 So.2d 1360 (Fla. 2d DCA 1980); *Salter v. National Indemnity Co.*, 160 So.2d 147 (Fla. 1st DCA 1964).

Section 627.428(1), Florida Statutes, provides:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed bu the insurer, the trial court *or, in the event of an appeal in which the insured or beneficiary prevails,* the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had.

(Emphasis added). Under the plain wording of the statute, the Assignee is not entitled to a conditional award of fees because the instant case was not an appeal in which the insured or beneficiary prevailed.

Under general rules of statutory construction, the result is the same as when the fee statute is strictly construed. Legislative intent is the polestar that guides a court's statutory construction analysis. *State v. J.M.*, 824 So.2d 105 (Fla. 2004). When a statute is clear, a court may not look behind the statute's plain language or resort to rules of statutory construction to determine legislative intent. *Overstreet v. State*, 629 So.2d 125 (Fla. 1993). This is so because the Legislature is assumed to know the meaning of the words used in the statute and to have expressed its intent through words. *State v. Burris*, 875 So.2d 408 (Fla. 2004). It is only when a statute

is ambiguous that a court may resort to the rules of statutory construction. *BellSouth Telecomms., Inc. v Meeks,* 863 So.2d 287 (Fla. 2003). A statute is ambiguous when the statute suggests that reasonable persons can find different meaning in the same language. *State v. Huggins,* 802 So.2d 276 (Fla. 2001). Administrative construction of a statute, the legislative history of the statute's enactment, and other extraneous matters are properly considered only when the construction of a statue results in a doubtful meaning. *Donato v. Am. Te. & Tel. Co.,* 776 So.2d 1146 (Fla. 2000).

This statute uses the term "an"and not "any" in the clause "in the event of an appeal in which the insured or beneficiary prevails." The term "any" when used in a statute is all-inclusive and unambiguous and requires no statutory interpretation. *Clark v. State,* 790 So.2d 1030 (Fla. 2001). Thus, had the statute provided fees in the event of "any" appeal, then and insured or beneficiary who losses an appeal would be entitled to conditional fees. However, the statute used the term "an" which deals with a single appeal and not all appeals. *Grappin v. State,* 450 So.2d 480 (Fla. 1984)(The use of the article "a" in reference to a firearm in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution). Since the term "an" is used the insured or beneficiary must prevail in the appeal in which fees are sought in order to entitled to such fees.

Since the terms "an" and "any" are unambiguous the statute does not require any statutory interpretation to determine its meaning. Thus, the Third District's opinion that attorney's fees are not authorized when an insured losses an appeal is correct since it merely applies the plain words of the statute.

The Fourth District's decisions in *Aksomitas v. Maharaj*, 771 So.2d 541 (Fla. 4th DCA 2000) and *Gedeon v. State Farm Mutual Automobile Insurance Company*, 805 So.2d 514 (Fla. 4th DCA 2002) are not in accord with the plain and unambiguous language of the statute. *Aksomitas* was a contract case where attorney's fees were based on contract and thus controlled by the prevailing party standard. The Court found that since under the prevailing party standard, the prevailing party was entitled to fees even if he did not prevail on all issues, then it would only be logical if he would be granted conditional fees based on losing the appeal since he might ultimately prevail on the merits of the case. Although the court did address section 627.428(1), Florida Statutes, it incorrectly considered it a prevailing party statute instead of a fee shifting statute. *Holiday v. Nationwide Mutual Fire Insurance*, 864 So.2d 1215 (Fla. 5th DCA 2004)(Section 627.428(1), Florida Statutes is a fee shifting statute). Thus its reasoning is irrelevant to the issue herein.

In *Gedeon* the Court, without analyzing section 627.428(1), Florida Statutes, as a fee shifting statute, applied *Aksomitas* to a PIP case. The Fourth District holding

is erroneous since its underpinning is based on prevailing party law. Thus, the Fourth District's decisions which fail to strictly construe the instant fee shifting statute that requires, in plain and unambiguous language, the insured must prevail in the appeal in order to obtain fees, should be quashed.

The Insurer acknowledges that the purpose of the instant statute is to make the insured whole by placing the insured in the same position he would have been if the insurer had paid the claim without litigation. However, the fact that the insured will not receive fees when he loses an appeal will not violate the purpose of the statute since in most PIP appeals the attorney agrees to represent the insured upon the understanding that, if successful, the attorney would be entitled to a fee which would be set by the court pursuant to section 627.428(1), Florida Statutes. Implicit in this type of arrangement is the understanding that no fee would be paid if the attorney did not prevail. *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990). Since the insured does not suffer any losses if the attorney does not prevail on an appeal, any fee awarded to the attorney for losing said appeal would be a windfall to the attorney. This clearly is not what is envisioned by the statute. Thus the public policy argument also defeats the logic of the Fourth District's decisions.

## CONCLUSION

Based upon the foregoing points and authorities, Appellant respectfully prays that this Court approve the Third Districts decision.

Respectfully submitted,

The Office of the General Counsel
United Automobile Insurance Company
Trial Division
One Columbus Center
1 Alhambra Plaza, Suite 1200
Coral Gables, Florida 33134
Phone: (305) 774-6160
Fax: (305) 774 -6220
Fla. Bar No. 239437

_____
MICHAEL J. NEIMAND

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail, on this ___ day of March 2006 to: Marlene Reiss, Esq., 9130 South Dadeland Boulevard, Penthouse II, Miami, Florida 33156.

_____
MICHAEL J. NEIMAND

## CERTIFICATE OF COMPLIANCE WITH FLORIDA RULE OF APPELLATE PROCEDURE 9.210

I HEREBY CERTIFY that this brief complies the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
MICHAEL J. NEIMAND