IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-283
3d DCA CASE NO. 3D05-951

BRASS & SINGER, P.A.,
(a/o/a Mildred Solages)

Petitioner,

vs.

UNITED AUTOMOBILE INSURANCE COMPANY,

Respondent.
_____/

PETITIONER=S INITIAL BRIEF ON THE MERITS
On Appeal from the Third District Court of Appeal

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INTRODUCTION

This case is before the Court on express and direct conflict certified by the Third District Court of Appeal in *Brass & Singer (a/o/a Mildred Solages) v. United Automobile Insurance Company*, 919 So.2d 473 (Fla. 3d DCA 2005). (A -1). The Third District has certified conflict with the Fourth District Court of Appeal in *Gedeon v. State Farm Mutual Automobile Insurance Company*, 805 So.2d 119 (Fla. 4th DCA 2002). (A-2). The issue is whether an insured, in a claim for benefits under a personal injury protection (PIP) policy, is entitled to recover appellate attorney=s fees for a lost appeal, prior to ultimately prevailing. Florida Statute '627.428 provides for attorney=s fees when an insured prevails in an action against an insurer.

JURISDICTION

Pursuant to the February 17, 2006, Order, the Court has postponed its decision on jurisdiction and ordered the parties to submit briefs on the merits. *See Gedeon v. State Farm Mutual Automobile Insurance Company*, 805 So.2d 119 (Fla. 4th DCA 2002).

STATEMENT OF THE CASE AND FACTS

This case originated in the County Court in Miami-Dade County. The Petitioner is a health care provider, which sued United Auto for PIP benefits, as a valid assignee of United=s insured, Mildred Solages. The case proceeded to a jury verdict in favor of the health care provider, which United appealed.

On appeal, the Circuit Court reversed the jury=s verdict and granted a new trial on the basis that United should have been granted a last-minute continuance where the Provider had recently been charged with improper patient solicitation.[1] United contended that it was entitled to depose the treating physicians to determine whether there had been any improper conduct on the part of the physicians. The Circuit Appellate Court reversed and remanded for a new trial, denying the Provider=s request for a conditional award of appellate attorney=s fees, should it ultimately prevail on the merits.

[1] Prior to the circuit appellate court=s decision on rehearing, the Provider supplemented its Motion for Rehearing with the State Attorney=s dismissal of all charges against the Provider. Nonetheless, the circuit appellate court denied the Provider=s Motion for Rehearing.

On remand, United never deposed the physicians and, ultimately, the Provider prevailed by obtaining a summary judgment.

The Provider sought certiorari review of that portion of the Circuit Court=s decision denying conditional appellate fees if the Provider ultimately prevailed - - which they did.

On second-tier review, the Third District aligned itself with the Fifth District in *Nationwide Mutual Insurance Company v. Nu-Best Diagnostic Labs, Inc.*, 810 So.2d 514 (Fla. 5th DCA 2002), concluding that A[b]y the plain words of the statute, the insured is entitled to appellate attorney=s fees only >in the event of an appeal in which the insured or beneficiary prevails... .=@ *Brass & Singer, supra* at 475, quoting Fla.Stats. '627.428.

The Third District certified conflict with *Gedeon v. State Farm Mutual Automobile Insurance Company*, 805 So.2d 119 (Fla. 4th DCA 2002), in which the Fourth District awarded attorney=s fees to PIP plaintiff for an appeal which was lost prior to the plaintiff ultimately prevailing on remand.

SUMMARY OF THE ARGUMENT

The Third District=s decision strictly construes Fla.Stats. '627.428 in a manner that is contrary to legislative intent, which conflicts with the Fourth District Court of Appeal in *Gedeon v. State Farm Mutual Automobile Ins. Co.*, 805 So.2d 119 (Fla. 4th DCA 2002).

In *Gedeon*, the Fourth District awarded attorney=s fees to an insurer for a lost appeal, construing '627.428 in a manner consistent with the public policy underlying the statute and the legislative intent to make insureds whole when they are forced to file suit against an insurer.

This Court has consistently recognized that the public policy underlying ç627.428 is to discourage insurers from contesting valid claims and to reimburse successful insureds who are forced to sue to enforce their policies. Particularly, the purpose of '627.428 is to make the insured whole, i.e., in the same position the insured would have been had the insurer timely paid the claim.

By denying attorney=s fees for a lost appeal on the way to becoming a prevailing insured, the Third District=s decision does *not* make the insured whole at the conclusion of the litigation. Section 627.428 is reasonably susceptible to two meanings: (1) that the insured may not recover attorney=s

fees for *any* lost appeal; or, (2) that the legislature never contemplated multiple appeals and intended that the insured recover fees for prevailing in Aan@ appeal. Fla.Stats. '627.428.

Where a statute is susceptible of two meanings, the court should favor the construction that gives effect to the purpose of the statute - - not the construction that defeats the purpose.

Finally, the Third District=s decision results in inconsistent treatment of insureds who are forced to initiate or defend an appeal, which is lost, on the way to becoming the prevailing party. An insured who has the opportunity to correct an erroneous circuit court appellate decision is compensated for *all* of his or her attorney=s fees once the circuit court appellate decision is reversed and the insured ultimately prevails. On the other hand, an erroneous circuit court appellate opinion which does *not* confer certiorari jurisdiction on the district court of appeal results in a gap in the recovery of appellate attorney=s fees. The insured is forced to live with an erroneous circuit appellate decision, even though he or she has ultimately prevailed.

The Petitioner respectfully requests that the Court reverse the Third District=s decision and approve the Fourth District=s decision in *Gedeon v. State Farm Mutual Automobile Ins. Co.*, 805 So.2d 119 (Fla. 4th DCA 2002).

ARGUMENT

The Third District in this case, and the Fifth District in *Nationwide Mutual Ins. Co. v. Nu-Best Diagnostic Labs, Inc.*, 810 So.2d 514 (Fla. 5th DCA 2002),

(A-3), have interpreted Fla.Stats. '627.428 in a manner which is contrary to legislative intent and defeats the purpose of the statute.

The Legislature Intended to Make Prevailing Insureds Whole

Florida Statute '627.428 provides, in pertinent part:

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

Fla.Stats. ç627.428(emphasis added).

Although the Third District purports to have strictly construed the Aplain words@ of the statute, it has in fact interpreted language, which is susceptible of two meanings, in a manner that is contrary to legislative intent. The Third District has interpreted Aan appeal@ to mean *any* appeal. AAn appeal,@ also can reasonably be interpreted to mean an appeal at the conclusion of the case. The former interpretation defeats the purpose of '627.428, while the latter is consistent with public policy and legislative intent.

The Fourth District Has Interpreted '627.428 Consistent With the Public Policy Considerations Underlying the Statute

In *Aksomitas v. Maharaj*, 771 So.2d 541 (Fla. 4th DCA 2000), (A-4), the case on which the Fourth District relies in *Gedeon v. State Farm Mutual Automobile Ins. Co.*, 805 So.2d 119 (Fla. 4th DCA 2002), the court recognized the public policy considerations underlying statutes which provide for prevailing party attorney=s fees, in particular Fla.Stats. '627.428.

In *Aksomitas, supra,* an *en banc* panel examined the Fourth District=s earlier rulings, which were consistent with Fla.R.App.P. 9.400,[2] and receded from its prior position of denying appellate attorney=s fees to unsuccessful

[2] *See General Accident Insurance Co. v. Packal*, 512 So.2d 344 (Fla. 4th DCA 1987); *Cline v. Gouge*, 537 So.2d 625 (Fla. 4th DCA 1988).

parties on appeal in Aprevailing party@ cases. In short, the court held that a party who is unsuccessful on appeal, but who ultimately prevails in litigation, is entitled to an award of conditional appellate attorney=s fees.

In receding from its earlier position, the Fourth District recognized the public policy behind statutes which provide for prevailing party attorney=s fees. In particular, the court examined Fla.Stats. ç627.428 - - the statute at issue in this case - - and stated:

> For example, *section 627.428*, Florida Statutes, provides that an insured who prevails in litigation against an insurer is entitled to recover attorney=s fees from the insurer. *The purpose of the statute is to make the insured whole, i.e., in the same position the insured would had [sic] been if the insurer had paid the claim without litigation*. *Clay v. Prudential Ins. Co. Am.*, 617 So.2d 433 (Fla. 4th DCA 1993), citing *Insurance Co. of N. Am. v. Lexow*, 602 So.2d 528 (Fla. 1992)(purpose of section 627.428 is to Areimburse successful insureds insureds for their attorney=s fees.@) Under *Packal*, however, if the insured loses an appeal during the litigation, but ultimately recovers under the policy, the insured cannot recover fees for services rendered on the appeal. The policy behind the statute, which is to make the insured whole, is thus frustrated. *Packal* is also inconsistent with the intent of the parties in the present case, who agreed that the prevailing party in litigation should be reimbursed for fees.

Aksomitas, 771 So.2d at 544(emphasis added).

Thereafter, in *Gedeon v. State Farm Mutual Automobile Insurance Co.*, 805 So.2d 119 (Fla. 4th DCA 2002), a case in which an insured sued her insurer for PIP benefits - - facts identical to this case - - the court granted certiorari and remanded to the circuit court, sitting in its appellate capacity, for the circuit court to consider *Aksomitas* and to award appellate attorney=s fees contingent on the petitioner ultimately prevailing in the trial court.

The Fourth District=s decisions are consistent with the policy consideration underlying Fla.Stats. '627.428.

The Third District=s Decision is Contrary to Legislative Intent

Contrary to the public policy considerations that underlie the Fourth District=s decisions in *Aksomitas, supra,* and *Gedeon, supra*, the Third District, aligning itself with the Fifth District in *Nationwide Mutual Insurance Company v. Nu-Best Diagnostic Labs, Inc.*, 810 So.2d 514 (Fla. 5th DCA 2002), has taken a strict construction approach, which is contrary to legislative intent.

In *Nationwide*, *supra*, on a strict construction analysis, the Fifth District Court of Appeal held that the insured, who was not successful on an appeal was *not* entitled to a provisional grant of appellate attorney=s fees. The court determined that the provider, which was unsuccessful on appeal, was not entitled to a conditional award of fees because the appeal was not one Ain

which the insured or beneficiary prevail[ed].@ 810 So.2d at 516.

In this case, the Third District has endorsed the Fifth District=s decision in *Nationwide*, and concluded:

> By the plain words of the statute, the insured is entitled to appellate attorney=s fees only Ain the event of an appeal in which the insured or beneficiary prevails... .@ '627.428(1) Fla.Stat. The doctors did not prevail in their appeal. It follows that the doctors= request for appellate attorney=s fees was correctly denied.

Brass & Singer, 919 So.2d at 474.

Legislative Intent is the Polestar of Statutory Construction

The Third District=s decision should be reversed, because its construction of Fla.Stats. '627.428 disregards legislative intent.

Legislative intent is the polestar that guides a court=s statutory construction analysis. *See Reynolds v. State*, 842 So.2d 46, 49 (Fla. 2002); *State v. J.M.*, 824 So.2d 105, 109 (Fla. 2002). To this end, a statute should be construed and applied to give effect to the legislative intent, regardless of whether such construction varies from the statute=s literal meaning. *See Deason v. Florida Department of Corrections*, 705 So.2d 1374, 1375 (Fla. 1998); *see also Department of Environmental Protection v. Millender*, 666

So.2d 882, 885-886 (Fla. 1996)(quoting *Plante v. Smathers*, 372 So.2d 933, 936 (Fla. 1979) AIntent is traditionally discerned from historical precedent, from the present facts, from common sense, and from an examination of the purpose the provision was intended to accomplish and the evils sought to be prevented.@)

This Court has consistently recognized that the public policy underlying c627.428 is to discourage insurers from contesting valid claims and to reimburse successful insureds who are forced to sue to enforce their policies. *See Peppers Steel and Alloys, Inc. v. U.S.*, 850 So.2d 462 (Fla. 2003); *Bell v. U.S.B. Acquisition Co., Inc.,* 734 So.2d 403, 412 n.10 (Fla. 1999); *Danis Indus. Corp. v. Ground Improvement*, 645 So.2d 420 (Fla. 1994); *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830, 833 (Fla. 1993); *Insurance Company of North America v. Lexow*, 602 So.2d 528 (Fla. 1992); *see also Aksomitas, supra* at 544; *Clay v. Prudential Insurance Company of America*, 617 So.2d 433 (Fla. 4th DCA 1993).

In particular, as the Fourth District recognized in *Aksomitas, supra*, A[t]he purpose of ['627.428] is to make the insured whole, i.e., in the same position the insured would had [sic] been if the insurer had paid the claim without

litigation.@ *Aksomitas*, 771 So.2d at 544. *See also Clay v. Prudential Co. v. America*, 617 So.2d 433 (Fla. 4th DCA 1993)(AThe purpose behind section 62.7428 is plainly to place the insured or beneficiary in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to engage counsel and incur obligation for attorney=s fees.@); *Travelers Indem. Ins. Co. of Illinois v. Meadows MRI, LLP*, 900 So.2d 676 (Fla. 4th DCA 2005)(the goal of section 627.428 is to place the insured in the place it would have been had the insurer seasonably paid the claim without causing the insured to retain counsel and incur obligations for attorney=s fees).

Rules of construction also require that courts look for a reason to uphold the acts of the legislature and adopt a reasonable view that will do so. *See Department of Legal Affairs v. Rogers*, 329 So.2d 257, 263 (Fla. 1976). Thus, if a statute is fairly susceptible of two constructions, one of which will give effect to it, and the other which will defeat it, the former construction is preferred. *Id.*

Here, the language at issue - - A*in the event of an appeal in which the insured or beneficiary prevails*@ - - is fairly susceptible of two meanings. The

Legislature may have meant *any* appeal in which the insured prevails, thereby precluding recovery for a lost appeal. More reasonably, however, the Legislature could have meant a final plenary appeal in which the insured prevails, not contemplating interlocutory appeals on the way to ultimately becoming the prevailing party. (AAn appeal@ certainly seems to indicate that the Legislature contemplated only one appeal, i.e., a final appeal at the end of the case, without giving thought to interlocutory appeals). The former construction, adopted by the Third District, deprives the insured of appellate fees for a lost appeal on the way to prevailing defeats the purpose of '627.428, i.e., to make the insured whole. The latter promotes the Legislature=s intent and the public policy underlying the statute.

Finally, this Court has recognized that certain statutory attorney=s fee provisions are enacted to encourage the public enforcement of legislative acts through private lawsuits. *See Bell v. USB Acquisition Co., Inc.*, 734 So.2d 403, 411 (Fla. 1999); *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828, 833 (Fla. 1990). Section 627.428 is such a statute. *Quanstrom, supra*. A primary purpose behind such fee authorizations is to encourage attorneys to represent clients who otherwise would not be able to pursue their legal rights. *See State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830, 833 (Fla.

1993).

The Third District=s decision will surely discourage appellate attorney=s from representing PIP claimants if faced with the possibility of not recovering fees even though the claimant has ultimately prevailed and his or her trial attorney is fully compensated from the beginning of the litigation. This scenario clearly contravenes the legislative intent to make the insured Awhole@ at the conclusion of the litigation and places appellate counsel on unequal footing with trial counsel.

An award of conditional appellate fees for a lost appeal is even more compelling where the insured has not initiated the lost appeal - - as was the case here - - but, rather, has been forced to defend a judgment on appeal, on the way to ultimately prevailing. But for the legal error of the circuit court on review, the insured would have recovered *all* of his or her attorney=s fees. Since circuit court appellate decisions do not always confer certiorari jurisdiction in the district court of appeal, the insured is left with no further opportunity for review and must live with a lost appeal - - for which the insured may not recover attorney=s fees under the Third District=s decision - - even though the insured ultimately prevails on remand. In this regard, an insured who does not have the opportunity to correct an erroneous circuit court

appellate decision is treated differently than an insured who prevails in a second-tier appeal to the district court and who ultimately recovers *all* appellate attorney=s fees - - even those for the lost appeal. The inconsistent results are manifestly unjust.

In light of the clear intent of the statute and the pertinent rules of statutory construction, the Third District=s decision should be reversed and *Gedeon v. State Farm Mutual Automobile Insurance Co.*, 805 So.2d 119 (Fla. 4th DCA 2002) should be approved.

CONCLUSION

The Petitioner respectfully requests that the Court reverse the Third District=s decision in this matter and approve the Fourth District=s decision in *Gedeon v. State Farm Mutual Automobile Ins. Co.*, 805 So.2d 119 (Fla. 4th DCA 2002) as consistent with the legislative intent to make an insured whole as the prevailing party in a lawsuit against an insurer.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail to: MICHAEL A. NEWMONT, ESQ., *Counsel for Respondent United Auto*, Office of the General Counsel, United Automobile Insurance Company, Trial Division, One Columbus Center, 1 Alhambra Plaza, Suite 1200, Coral Gables,

Florida 33134; and KENNETH J. DORCHAK, ESQ., *Trial Counsel for Petitioner*, 11900 Biscayne Boulevard, Suite 310, North Miami, Florida 33181, this day of March, 2006.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief has been computer generated in Time New Roman 14-point font, in compliance with Fla.R.App.P. 9.210(a).

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