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 REPLY BRIEF
On Appeal from the Third District Court of Appeal

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Case Law

REPLY

While Fla.Stats. ç627.428 may be in the Anature of a penalty@ imposed upon insurance companies that wrongfully refuse to pay policy benefits, (Respondent=s Brief at 5), the more important issue is the *purpose* of the statute, which is wholly ignored by Respondent United Auto and the Third and Fifth Districts= decisions in *Brass & Singer (a/o/a Mildred Solages) v. United Automobile Insurance Company*, 919 So.2d 473 (Fla. 3d DCA 2005) and *Nationwide Mutual Insurance Company v. Nu-Best Diagnostic Labs, Inc.*, 810 So.2d 514 (Fla. 5th DCA 2002).

This Court has recognized that the primary purpose of fee statutes like ç627.428 Ais to encourage individual citizens to bring civil actions that enforce statutory policy,@ *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828, 833 (Fla. 1990). Section 627.428 is intended to Aenable aggrieved persons to obtain counsel to represent them in enforcing certain legal rights in court by assuring reasonable compensation to the attorney should the plaintiff prevail ... .@ *Inacio v. State Farm Fire & Cas. Co.*, 550 So.2d 92, 97 n.4 (Fla. 1st DCA 1989). Claims brought pursuant to Fla.Stats. ç627.736 are public policy enforcement cases. *See Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d

828 (Fla. 1990). Thus, the legislative intent behind the statute is particularly important in construing ç627.428.

A strict construction of ç627.428, which leads to an unreasonable result that is contrary to legislative intent, has no basis in the law.

Legislative Intent Must Guide the Court=s Construction of ç627.428

Respondent United Auto argues that the language of ç627.428 is Aunambiguous,@ and thus does not require statutory interpretation at all. (Respondent=s Brief at 7). The Petitioner disagrees that the phrase Aan appeal@ is unambiguous - - as the Legislature may well have contemplated only a single appeal which renders the insured either the winning or losing party.

The cases on which Respondent relies to argue the lack of any ambiguity in the use of the article Aan@ are not particularly instructive. There is a significant difference between prosecution for the theft of multiple firearms, *see Grappin v. State*, 450 So.2d 480 (Fla. 1984), and the potential number of appeals in a PIP case. Similarly uninstructive is United=s reliance on the cases that construe Aany@ to be all-inclusive. *See Clark v. State*, 790 So.2d 1030 (Fla. 2001). The Legislature=s use of the article Aan@ does not conclusively demonstrate that it contemplated multiple appeals in a PIP suit, for which the

insured may or may not be compensated. Rather, when viewed as a whole, the statute clearly demonstrates legislative intent to compensate the insured for *all* litigation upon prevailing. Meticulous parsing of grammatical structure should not yield an absurd result. *See State v. Hopkins*, 520 So.2d 301, 303 (Fla. 3d DCA 1988).

However, even assuming *arguendo* that the phrase Aan appeal@ *is* unambiguous, the statute=s plain and ordinary meaning controls *only* if it does not lead to an unreasonable result or a result that is clearly contrary to legislative intent. *See Holly v. Auld*, 450 So.2d 217-219 (Fla. 1984).

The Court need not literally interpret the language of a statute when to do so would lead to an unreasonable or ridiculous conclusion. *Holly, supra, citing Johnson v. Presbyterian Homes of Synod of Florida, Inc.*, 239 So.2d 256 (Fla. 1970). A departure from the letter of the statute is permitted when there are cogent reasons - - as there are here - - for believing that the letter of the law does not accurately disclose the legislative intent. *Holly, supra, citing State ex rel. Hanbury v. Tunnicliffe*, 124 So.2d 279, 281 (Fla. 1929).

Unlike the Fourth District in *Gedeon v. State Farm Mutual Automobile Insurance Company*, 805 So.2d 119 (Fla. 4th DCA 2002), the Respondent and

the Third and Fifth Districts= decisions have ignored those cogent reasons: (1) a strict construction of ç627.428 directly contravenes the legislature=s intent to make the insured Awhole@ upon prevailing in an action against an insurer; (2) denying appellate attorneys fees for a lost appeal does not encourage insureds to sue their insurers in order to enforce their contractual and statutory rights; (3) rather than enabling aggrieved insureds to obtain counsel to represent them in enforcing the statutory and contractual rights, a strict construction of the statute will preclude aggrieved insureds from obtaining competent appellate counsel; and, (4) a strict construction of the statute creates a false distinction between trial counsel and appellate counsel that has no basis in the law.

The Third and Fifth Districts= Decisions Contravene Legislative Intent

The Fourth District in *Gedeon, supra*, has recognized the legislative intent behind ç627.428.

In contrast, the Respondent and the Third and Fifth Districts= decisions have wholly failed to address the purpose of the statute, which is to encourage and enable insureds to sue their insurers for contractual benefits, where the financial disparity would otherwise preclude an insured=s ability to enforce his or her contractual rights. Further, the statute is intended to place insureds in

the position in which they would otherwise be had they not been forced to litigate. Respondent United Auto has wholly failed to address these issues, arguing instead that a strict construction of the statute is required because the statute=s language is Aplain and unambiguous.@ (Respondent=s Brief at 8).

The Third and Fifth Districts= Decisions Create a False Distinction Between Trial and Appellate Counsel

In addition, neither the Respondent nor the Third or Fifth Districts have addressed the resulting false distinction that a strict construction creates between trial counsel and appellate counsel. As Petitioner=s Brief discusses, trial counsel is compensated for the *entire* litigation, even though the insured may have lost in the first Around,@ while ultimately prevailing on remand. There is no basis in law or fact for creating such a distinction between trial and appellate counsel. Undisputedly, the statute makes no distinction between *any* loss by the insured at the trial court level as long as the insured ultimately obtains a judgment. Thus, the final judgment is all that matters to enable the insured to recover *all* fees at the trial court level. The same must hold true for the appellate court level.

Section 627.428 is a Prevailing Party Statute, Albeit One Way

Finally, United=s distinction between Aprevailing party@ fee statutes and

Afee shifting@ statutes is one without a difference. There can be no argument that an insured must ultimately Aprevail@ before recovering attorney=s fees from an insurer. Indeed, other than simply pointing out that the fees at issue in *Aksomitas v. Maharaj*, 771 So.2d 541 (Fla. 4th DCA 2000), involved a contractual prevailing party provision and the fact that ç627.428 is a fee-shifting statute, United makes no effort to explain why this distinction matters. (Respondent=s Brief at 7-8). In fact, it does not - - precisely for the reason that an insured *must* prevail in order to recover fees. In that sense, ç627.428 is a Aprevailing party@ statute, albeit a Aone-way street.@ *See Pepper=s Steel & Alloys, Inc. v. U.S.*, 850 So.2d 462 (Fla. 2003), quoting *Danis Indus. Corp. v. Ground Improvement*, 645 So.2d 420 (Fla. 1994).

Finally, the Respondent concedes that the purpose of the statute is to make the insured Awhole,@ by placing the insured in the same position that he or she would have been in had the insured not been forced to sue for benefits. (Respondent=s Brief at 8-9). Its subsequent argument, however, based on a false factual predicate, contradicts that concession, i.e., denying appellate attorney=s fees for a lost appeal will not contravene the purpose of the statute, because most PIP appeals are taken on a contingent basis in any event. AImplicit in this type of arrangement is the understanding that no fee would be

paid if the *attorney* did not prevail.@ (Respondent=s Brief at 9)(emphasis added). For two reasons, United=s argument makes no sense.

First, and most obvious, is the fact that PIP cases - - not just PIP appeals as United suggests - - are virtually always taken on a contingent fee basis. Trial attorneys, as well as appellate attorneys, recognize the risk of nonpayment *if the insured does not prevail*. Thus, the whole point of the statute, which is to encourage attorneys to represent insureds who are forced to sue their insurers, applies equally to trial counsel and appellate counsel. United=s argument that appellate counsel somehow stand on unequal footing with trial counsel contradicts the very legislative intent which it concedes, i.e., to make the insured Awhole@ upon prevailing(Respondent=s Brief at 8-9). .

Second, the point is not whether the *attorney* prevails. Rather, the statute provides for the recovery of attorney fees if the *insured* ultimately prevails. Where the *insured* prevails, the *insured* must be compensated for his or her attorney=s fees. Often, the decision to accept or reject an insured=s appeal is based on appellate counsel=s weighing the risk of the insured ultimately prevailing beyond a losing appeal.

This case is a perfect example of such a risk analysis. The insured prevailed at trial. United Auto won its appeal - - which the insured was forced

to defend - - on the basis that the trial court should have continued the trial, in order to give United an opportunity to depose the medical providers, allegedly in an attempt to prove fraud (which had not been pled). On remand, United never bothered to depose the doctors and the plaintiff/provider ultimately obtained a summary judgment. Although the case should never have been remanded in the first place, counsel=s risk analysis included the likelihood that the insured would prevail on remand and appellate attorney=s fees would be recovered for the appeal.

The Third and Fifth Districts= decisions contravene legislative intent by *not* compensating the insured for a lost appeal, notwithstanding that the insured ultimately prevails. Moreover, the false distinction created by a strict construction of the statute has no basis in law or fact.

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. NEIMAND, ESQ., *Counsel for Respondent United Auto*, United Automobile Insurance Company, 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 12th day of April, 2006.

CERTIFICATE OF COMPLIANCE

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

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