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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1257

TRAVELERS COMMERCIAL
INSURANCE COMPANY,

Petitioner,

L.T. Case No.: 1D11-0015

vs.

CRYSTAL MARIE HARRINGTON,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF
THE FIRST DISTRICT COURT OF APPEAL
CERTIFYING QUESTIONS OF GREAT PUBLIC IMPORTANCE

**SUPPLEMENTAL INITIAL BRIEF OF PETITIONER
TRAVELERS COMMERCIAL INSURANCE COMPANY**

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STATEMENT OF THE CASE AND FACTS

After Petitioner Travelers Commercial Insurance Company filed its initial brief, this Court ordered Travelers “to serve a supplemental initial brief addressing whether an award of appellate attorney’s fees is final because a motion for review of that award was not timely filed, or whether the award must be quashed if the appeal on the merits is successful because the award is a derivative claim” (S.A. 1).¹ The question stems from the First District Court of Appeal’s order granting Respondent Crystal Marie Harrington’s motion for appellate attorneys’ fees and the trial court’s subsequent appellate-fees judgment. Travelers did not seek review of that judgment because it had invoked this Court’s discretionary review and, if this Court answers either certified question “no,” Harrington’s prevailing-party status will be affected. If so, the trial court may vacate the appellate-fees judgment under Florida Rule of Civil Procedure 1.540(b)(5) without the need for a separate appeal, as we explain below.

Proceedings Relevant to the Supplemental Initial Brief

When the First DCA affirmed in part and reversed in part the summary judgment in Harrington’s favor, it also granted Harrington’s motion for appellate attorneys’ fees. *Travelers Commercial Ins. Co. v. Harrington*, 86 So. 3d 1274 (Fla. 1st DCA 2012); (S.A. 2). The First DCA remanded the case for the trial court

¹ A supplemental appendix is attached to this brief.

to determine the amount (S.A. 2). In the meantime, Travelers invoked this Court's discretionary jurisdiction (S.A. 3-4).

On remand, the trial court entered a final judgment awarding Harrington \$144,305 in appellate attorneys' fees under section 627.428, Florida Statutes, which entitles a prevailing insured to reasonable attorneys' fees (S.A. 5-11). Travelers did not seek review of that judgment. It did, however, file a motion to stay its enforcement (S.A. 12-13). Travelers also posted a supersedeas bond, the trial court's prerequisite for a stay of execution (S.A. 14). The trial court envisioned that the supersedeas bond would trigger the automatic-stay provision in Florida Rule of Appellate Procedure 9.310(b) (S.A. 16).

Harrington nevertheless moved for release of the funds securing the appellate-fees judgment (S.A. 17-20). Harrington argued that the trial court lacked jurisdiction to stay execution because Travelers never sought review of the judgment (S.A. 18-20). The trial court granted Harrington's motion, authorizing immediate execution of the bond (S.A. 21-24). Travelers then asked this Court, which had accepted jurisdiction (S.A. 25), to stay the proceedings below, including execution of the appellate-fees judgment (S.A. 27-42). The Court granted the motion, with one Justice dissenting in part: "Would deny the motion to stay as to execution of the appellate attorney fees judgments" (S.A. 43).

After Travelers filed its initial brief, the Court requested a supplemental brief addressing whether the appellate-fees judgment is final because Travelers did not move for review of it or whether it would be quashed if Travelers prevails before this Court (S.A. 1).

SUMMARY OF THE ARGUMENT

Because Harrington’s entitlement to appellate attorneys’ fees stems from her status as the prevailing party in the First DCA, her continued entitlement to those fees depends on this Court’s answers to the First DCA’s certified questions. If this Court answers the first certified question “no,” Harrington will no longer be the prevailing party. If it answers the first question “yes” but the second question “no,” the extent to which Harrington prevailed would change. Should either occur, Travelers may move to vacate the appellate-fees judgment under Florida Rule of Civil Procedure 1.540(b)(5), which provides for relief from a final judgment when the judgment on which it is based has been reversed or vacated. Because the appellate-fees judgment derives solely from Harrington’s prevailing-party status before the First DCA, if Travelers prevails here to any degree, that judgment should be vacated under rule 1.540(b)(5).

ARGUMENT**THE APPELLATE-FEES JUDGMENT DERIVES FROM THE ORDER ON APPEAL AND SHOULD BE VACATED IF TRAVELERS PREVAILS BEFORE THIS COURT**

Florida Rule of Civil Procedure 1.540(b)(5) allows a court to relieve a party from a judgment when the judgment on which it is based is reversed or vacated:

(b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: . . . (5) that the judgment or decree has been satisfied, released, or discharged, or *a prior judgment or decree upon which it is based has been reversed or otherwise vacated*, or it is no longer equitable that the judgment or decree should have prospective application.

Fla. R. Civ. P. 1.540(b)(5) (emphasis added).

Florida courts have recognized that, when a merits judgment is reversed or vacated, a judgment for attorneys' fees flowing from that judgment should be reversed, too, and that rule 1.540(b)(5) is the mechanism for doing so. In *Viets v. American Recruiters Enterprises, Inc.*, 922 So. 2d 1090 (Fla. 4th DCA 2006), for example, the Fourth DCA voided a default and default judgment on due-process grounds. *Id.* at 1096. Having done so, it reviewed an order denying a motion to vacate the prevailing party's fee award under rule 1.540(b)(5). *Id.* at 1095-96. The Fourth DCA described vacatur of the fees judgment as mandatory:

Where a court awards prevailing party attorney's fees and the underlying judgment is vacated, the attorney's fee judgment *must* also be vacated. Once the trial court vacated the dismissal of plaintiff's complaint, it was no longer possible to identify the prevailing party. Thus, vacating the attorney's fee award was *mandatory*. Similarly, our reversal of the default final judgment on defendant's counterclaim *requires* setting aside the attorney's fee award.

Id. at 1096 (emphasis added). In that case, the defaulting party had not appealed the underlying judgment, but the Fourth DCA rejected the argument that the judgments resulted from a mistake of law and could be addressed only on appeal rather than through a motion to vacate. *Id.* at 1097.

Other DCAs have held similarly. In *Marty v. Bainter*, 727 So. 2d 1124 (Fla. 1st DCA 1999), the First DCA found vacatur equally mandatory, although it did not address which procedural mechanism was proper. *See id.* at 1125. There, a trial court entered a fees-and costs-judgment pending appeal. *Id.* The award was predicated on a money judgment that the First DCA later reversed. *Id.* Like the Fourth DCA, the First DCA recognized that the fees judgment *must* fall with the money judgment:

Once a final judgment is reversed and remanded by an appellate court, there can be no prevailing party for purposes of an award of prevailing party attorney's fees. Consequently, an award of attorney's fees and costs predicated on a reversed or vacated judgment also *must* be reversed.

Id. (emphasis added).

And in *River Bridge Corp. v. American Somax Ventures*, 76 So. 3d 986 (Fla. 4th DCA 2011), an award of attorneys' fees was based on a final judgment that the appellate court substantially reversed. *Id.* at 989. After that reversal, the party taxed with payment of the fees filed a motion for relief from the attorneys' fees judgment under rule 1.540(b)(5). *Id.* at 988. The Fourth DCA, which was resolving an appeal from the fees judgment, relinquished jurisdiction to allow the trial court to address the motion. *Id.* The trial court denied the motion, and the movant appealed. *Id.*

Before addressing the fees-judgment appeal, the Fourth DCA addressed the appeal from the order denying the motion to vacate. *Id.* at 989. The court reversed because the trial court failed to conduct an evidentiary hearing to determine which party ultimately prevailed following appeal. *Id.* at 989. The court noted that, “[w]here a judgment on which attorney’s fees are predicated is reversed, the attorney’s fees judgment should generally be reversed for further proceedings also.” *Id.* at 989 (citations omitted). Notably, the Fourth DCA addressed the appeal from the denial of the motion to vacate independently of the appeal from the fees judgment, implicitly recognizing that rule 1.540 is a proper procedural mechanism for vacating the fees judgment. *See id.* at 988-89.

Here, Travelers did not seek review of the appellate-fees judgment. But, like the successful appellants in *Viets* and *River Bridge*, if this Court answers either

certified question “no” and therefore alters Harrington’s prevailing-party status, Travelers also will have the opportunity to move to vacate the appellate-fees judgment. It is the shift in prevailing-party status, not the existence of a separate appeal, that governs.

Federal appellate courts faced with this same question have concluded that a party need not appeal a fees judgment to preserve the right to move for vacatur under the corresponding federal rule.² In *California Medical Association v. Shalala*, 207 F.3d 575, 576 (9th Cir. 2000), for example, Medicare providers sued for reimbursements. The district court found in their favor and awarded attorneys’ fees pursuant to the statute on which they sued. *Id.* The defendant appealed the underlying judgment, did not appeal the fees order, and paid the fees award. *Id.* When the Court of Appeals reversed, the defendant moved under Federal Rule of Civil Procedure 60(b)(5) for relief from the fees order and for restitution of the fees. *Id.* The district court denied the motion. *Id.* The Ninth Circuit reversed. The court explained that parties have three options for obtaining relief from a fees order: they may appeal the order as any other final judgment and petition for consolidation; they may move under Federal Rule of Civil Procedure 58 “to enlarge the time to appeal the underlying judgment until the fee judgment is

² The comment to Florida Rule of Civil Procedure 1.540 notes that the Florida rule is “substantially the same as Federal Rule 60.” Fla. R. Civ. P. 1.540, Authors’ Comment.

rendered”; or they may move for relief under rule 60(b)(5) after a merits judgment is reversed. *See id.* at 576-77. Because the sole basis for challenging the fees order was potential reversal of the underlying judgment, the defendant was not required to appeal the fees order. *See id.* at 578. (“A separate appeal of the fee award would have been a meaningless formality, as [Defendant] had no quarrel with the award beyond her contention that she should have prevailed on the merits [T]his is precisely the scenario under which a Rule 60(b)(5) motion rather than a separate appeal of the fee award is appropriate.”).

At least two other federal appellate courts have agreed. *See Flowers v. S. Reg’l Physician Servs., Inc.*, 286 F.3d 798, 801 (5th Cir. 2002) (holding that, where the appellate court had reduced the underlying damages to a nominal award, a motion under rule 60(b)(5), rather than a distinct appeal, was the proper vehicle for seeking review of a fees order); *Mother Goose Nursery Schs., Inc. v. Sendak*, 770 F.2d 668, 676 (7th Cir. 1985) (explaining that the losing party is not “forced into the ludicrous position of appealing fee awards they might otherwise choose not to challenge in order not to be faced with a fee award against it if the underlying action is reversed” and finding that rule 60(b)(5) provides an appropriate remedy where the party’s “only reason for challenging the award is to preserve his rights in case th[e] court reverses” the underlying judgment).

This Court should adopt the same approach. It should conclude that a separate appeal is not required to preserve the right to seek vacatur of a fees judgment predicated solely on an underlying judgment that may be reversed. As these courts have noted, a second appeal would be a meaningless formality. Where the fees judgment derives from the challenged underlying judgment, rule 1.540(b)(5) provides a mechanism for vacating the attorneys' fees judgment.

CONCLUSION

For these reasons, the Court should conclude that the appellate-fees judgment is not final and that it may be vacated if Travelers prevails—even in part—before this Court.

Respectfully submitted,

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I certify that, on April 22, 2013, a copy of this brief was served by e-mail only upon the following:

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CERTIFICATE OF COMPLIANCE

I certify that, this brief is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.100(1).

/s/ Raoul G. Cantero

Raoul G. Cantero

**SUPPLEMENTAL
APPENDIX**

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TAB 1

Supreme Court of Florida

MONDAY, APRIL 1, 2013

CASE NO.: SC12-1257

Lower Tribunal No(s):

1D11-15;10-219-CA

TRAVELERS COMMERCIAL
INSURANCE
COMPANY, ETC.

vs. CRYSTAL MARIE
HARRINGTON

Petitioner(s)

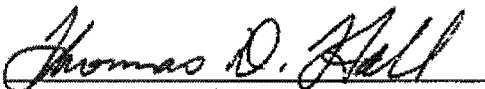
Respondent(s)

After issuing an opinion on the merits, the district court granted Respondent's motion for appellate attorney's fees and remanded to the trial court to set the amount. The trial court then issued an order granting Respondent appellate attorney's fees, and Petitioner did not file a motion for review of that order pursuant to Florida Rule of Appellate Procedure 9.400(c). The enforcement of the order has been stayed.

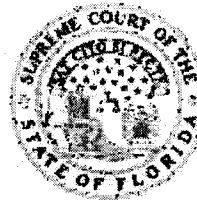
Petitioner is hereby directed to serve a supplemental initial brief addressing whether an award of appellate attorney's fees is final because a motion for review of that award order was not timely filed, or whether the award must be quashed if the appeal on the merits is successful because the award is a derivative claim. Petitioner's supplemental initial brief is to be served on or before April 22, 2013; respondent's supplemental answer brief shall be served fifteen days after service of petitioner's supplemental initial brief; and petitioner's supplemental reply brief shall be served five days after service of respondent's supplemental answer brief.

A True Copy

Test:



Thomas D. Hall
Clerk, Supreme Court



th
Served:

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TAB 2

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

May 10, 2012

CASE NO.: 1D11-0015
L.T. No.: 10-218-CA

Travelers Commercial Insurance Company, etc. v. Crystal Marie Harrington, Individually

Appellant / Petitioner(s),

Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellee's motion filed October 17, 2011, for attorney's fees is granted. The cause is remanded to the trial court to assess the amount.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Stephen C. Bullock
Samuel A. Maroon

James P. Waczewski
Hon. P. Dewitt Cason, Clerk

Matthew C. Mitchell

cc


JOB S. WHEELER, CLERK



TAB 3

IN THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

TRAVELERS COMMERCIAL
INSURANCE COMPANY, AN
AFFILIATE OF TRAVELERS
INSURANCE CO.,

Defendant/Petitioner,

CASE NO. 1D11-15
CASE NO.: 10-219-CA

vs.

CRYSTAL MARIE HARRINGTON,

Plaintiff/Respondent.

**NOTICE TO INVOKE
DISCRETIONARY JURISDICTION OF SUPREME COURT**

NOTICE IS GIVEN that TRAVELERS COMMERCIAL INSURANCE COMPANY, an affiliate of TRAVELERS INSURANCE COMPANY, Defendant/Petitioner, invokes the discretionary jurisdiction of the Florida Supreme Court to review the order of this court rendered on May 10, 2012 (hereinafter, the "Opinion"). The Opinion passes on two questions certified to be of great public importance. Art. V, §(3)(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v). Furthermore, the Opinion also expressly and directly conflicts with other decisions of other district courts of appeal and of the Florida Supreme Court on the same questions of law. Fla. R. App. P. 9.030(a)(2)(A)(iv).

Dated this 5th day of June, 2012.

Respectfully submitted,

LUKS, SANTANIELLO,
PETRILLO & JONES

By: 

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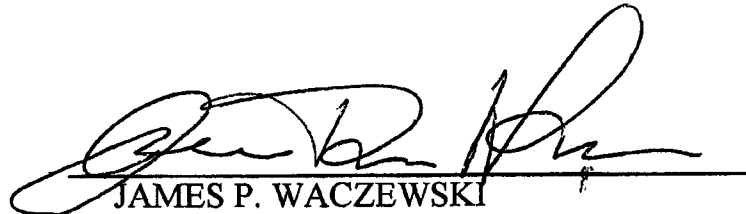
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Fax: (850) 727-0233

Attorneys for Defendant/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished via U.S. Mail to Stephen C. Bullock, Esq., Brannon Brown Haley & Bullock, Post Office Box #1029, Lake City, Florida 32056-1029, this 5th day of June, 2012.


JAMES P. WACZEWSKI

TAB 4

**IN THE CIRCUIT COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA
CASE NO. 10-219-CA**

CRYSTAL MARIE HARRINGTON, individually,

Plaintiff,

v.

**TRAVELERS COMMERCIAL INSURANCE
COMPANY**, an affiliate of Travelers Insurance Cos.,

Defendant.

**FINAL JUDGMENT
FOR
REASONABLE APPELLATE ATTORNEYS' FEES**

THIS CAUSE came on to be heard July 19, 2012 on Plaintiff, **CRYSTAL HARRINGTON's** ("Harrington") Amended Motion for Reasonable Appellate Attorneys' Fees ("Motion") against Defendant, Travelers Commercial Insurance Company ("Travelers") pursuant to the Florida First District Court of Appeal ("DCA") Order dated May 10, 2012, and following the MANDATE issued May 29, 2012; and pursuant to Florida Statutes §627.428. The Court having reviewed the Plaintiff's attorneys' time records and fee agreement, the Appellate record, the DCA Order dated May 10, 2012, having heard testimony from Harrington's appellate attorneys and expert witness, and the Court having made the following findings of fact and conclusions of law, it is

ORDERED and ADJUDGED

1. On December 23, 2010, Defendant Travelers filed a Notice of Appeal with the First District Court of Appeal (the "DCA"), appealing the Final Judgment herein. The case was assigned Case No. 1D11-15. Stephen C. Bullock, Esquire and Christopher M. Costello, Esquire are the two primary appellate attorneys who worked on the appeal. On October 17, 2011, Plaintiff filed her Motion for Attorneys' Fees on Appeal.
2. On May 10, 2012, in a separate Order, the DCA granted Plaintiff's Motion for (appellate) Attorneys' Fees and remanded the case to this Court to assess the amount of reasonable appellate attorney's fees¹.
3. The DCA issued the MANDATE on May 29, 2012.
4. Here, Plaintiff is the prevailing party in the appeal and the prevailing party under *Fla. Stat.* §627.428. Florida Statute §627.428 provides that, when an insured brings a civil action against an insurer for coverage and upon the rendition of a judgment or decree in favor of the insured, the Court shall adjudge or decree an insured a reasonable attorneys fees to the attorneys prosecuting the suit. See also §627.727(8). Applied to the facts of this case, this Court granted summary final judgment against Defendant, Travelers Commercial Insurance Company, on behalf of its insured, adjudicating a finding of coverage against Travelers on the under insured motorist benefits for the sum of \$300,000.00 which was affirmed in part on appeal by the DCA. Under this section, an insured which successfully maintains a declaratory judgment action against the insurer for declaration of liability of the insured on an automobile liability policy was

¹ Plaintiff was previously successful in obtaining a Final Judgment for Attorneys' Fees in the sum of \$109,072.50 which was reversed only because the Final Summary Judgment awarding \$300,000.00 was reversed for the purpose of the Trial Court resolving any issues of fact regarding the amount of Harrington's damages.

entitled to reasonable sum as compensation for its attorneys who prosecuted the action. *Continental Casualty Company v. Giller Concrete*, 116 F.2d 431 (5th Cir. 1940) See also: *Johnson v. Atlantic National Company*, 163 So.2d 340 (Fla. 3d 1964) and *Florida Farm Bureau v. Quinones*, 409 So.2d 97 (Fla. 3d DCA 1982). Consequently, the Plaintiff is entitled to reasonable appellate attorneys' fees and taxable costs.

5. Attorneys' fees incurred by a party may be awarded against the opposing party only when authorized by statute or contract. *American and Foreign Insurance Co. v. Avis Rent-A-Car System, Inc.*, 401 So. 2d 855 (Fla. 1st DCA 1981). Here, *Fla. Stat.* §627.428 mandates that reasonable attorneys' fees "shall" be awarded to an insured who prevails. Further, the award of attorneys' fees is committed to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of clear abuse of discretion. *Distefaro Construction, Inc. v. Fidelity and Deposit Co. of Maryland*, 597 So. 2d 248 (Fla. 1st DCA 1992). Further, the DCA ordered that reasonable appellate attorneys' fees should be awarded.

6. Travelers elected to pursue litigation rather than resolve the insurance coverage claim dispute and refused to pay the legal and proper claim for underinsured motorist coverage and now Travelers must pay the cost much like the result reached in the *State Farm Fire and Casualty Co. v Palma*, 555 So.2d 836 (Fla. 1990) case where the Florida Supreme Court stated:

It appears that State Farm decided to "go the mat" over the bill for thermographic studies because, apparently, it is a diagnostic tool which is becoming more widely used contrary to State Farm's view of what is "necessary medical treatment" as provided in the statute. Having chosen to stand and fight over this charge, State Farm, of course, made a business judgment for which it should have known a day of reckoning would come should it lose in the end. The court described a similar situation in *McGowan v King, Inc.*, 661 F.2d 48, 51 (5th Cir.1981), in reversing what it termed a "stingy" allowance of attorney's fees:

The borrower's counsel did not inflate this small case into a larger one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost.

7. Since Plaintiff has been successful on appeal and the DCA entered an Order granting Plaintiff's Motion for Reasonable Appellate Attorneys' Fees, this Court finds that she should be awarded reasonable appellate attorneys' fees and costs. Reasonable attorneys' fees incurred by a party may be awarded against the opposing party only when authorized by statute or contract. *American and Foreign Insurance Co. vs. Avis Rent-A-Car System, Inc.*, 401 So.2d 855 (Fla. 1st DCA 1981). Here, *Fla. Stat.* §627.428 allows for the recovery of reasonable attorney's fees to a party who prevails against an insurance company that refuses to provide coverage. Further, the amount of the award of attorneys' fees is committed to the sound discretion of the Trial Judge and will not be disturbed on appeal absent a showing of *clear abuse* of discretion. *Distefano Construction, Inc., vs. Fidelity and Deposit Co. of Maryland*, 597 So.2d 248 (Fla. 1st DCA 1992). In *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828, 834-35 (Fla. 1990), the court considered awards of attorney's fees and reaffirmed the principles set out in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985). *Florida Patient's Compensation Fund v. Rowe*, in turn, relied upon Rule 4-1.5, Rules Regulating The Florida Bar, as to the factors this Court should and has considered in determining reasonable appellate attorneys' fees:

- i. Time, skill, complexity and difficulty: Applied here, Harrington's attorneys spent considerable time defeating the dilatory tactics raised by Travelers in their constant attempts to deny insurance benefits due to Harrington under the insurance policy.
- ii. Likelihood that acceptance of the employment would preclude other employment: Applied here, Harrington's attorneys were precluded from devoting their time and efforts to other clients due to the constant issues raised by Travelers;

- iii. The rate of fee customarily charged in the local area: Applied here, the hourly rates charged by Harrington's attorneys are more than reasonable and previously Ordered and found to be reasonable by this Court;
- iv. The significance and amount involved in the subject matter and results obtained. Applied here, Harrington's attorneys have been successful in prevailing in the various motions asserted and appeal filed;
- v. The time limitations imposed by the client and additional/special time required: Applied here, Harrington's attorneys were required to spend enormous amounts of time responding to issues denying coverage raised by Travelers;
- vi. The nature and length of the professional relationship with the client: Applied here, the nature and length of the professional relationship with the client has been limited primarily to this litigation;
- vii. The experience, reputation, diligence and ability of the lawyer performing the skill and service: Applied here, the lawyers hired by Harrington all have excellent reputations; and
- viii. Whether or not the fee is fixed or contingent upon ability of client to pay, rested on outcome of the representation: Applied here the fees charged by Harrington's lawyers are contingent and this Court has considered that a multiplier should be awarded and that 2.5 multiplier should be awarded to enhance the appellate attorneys' fees as further explained below.

8. Under *Florida Patient's Compensation Fund v Rowe*, 472 So.2d 1145 (Fla. 1985), the Court can apply an adjustment to the fee because of the contingency nature of the case by an enhanced multiplier of 1.5 to 2.5, depending on the facts. As stated in *Bell, supra*, the Court can apply a 1 to 1.5 multiplier if success was more likely than not at the outset of the case; 1.5 to 2.0 multiplier if the likelihood of success was approximately even at the outset of the case; and 2.0 to 2.5 multiplier if success was unlikely at the outset of the case. From the record and testimony from Plaintiff's counsel Defendant, Travelers, has repeatedly referred to this case as clearly defensible and that the Plaintiff was owed nothing in Uninsured Motorist (U-M) benefits. After repeated requests for over two (2) years, Travelers has refused to pay U-M benefits even after this Court granted the summary judgment finding coverage for the U-M benefits. Further,

applied here, Plaintiff, Crystal Marie Harrington, employed the same attorneys from the beginning of her litigation against Travelers through the appeal. This Court has previously found and continues to find that the probability of success was low which is further bolstered by the conduct of Travelers in refusing to pay the U-M benefits to Harrington. This Court finds that there has been no change in representation and that the trial and appellate work are governed by the same contingency fee arrangement and, therefore, under the rationale in *Stack v Lewis*, 641 So.2d 969 (Fla. 1st DCA 1994), a risk multiplier of 2.5 is appropriate. Assuming a contingency fee of 40%, a multiplier of 2.5 should be appropriate under the facts and circumstances of this case.

9. The Court applies the mathematical calculation for Harrington's counsels' demand for reasonable legal fees for the appeal computed as follows:

Attorneys' Fees Incurred in the Appellate Court

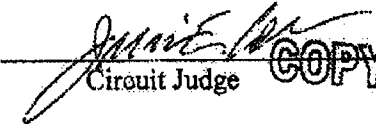
<u>Firm</u>	<u>Date(s)</u>	<u>Fees</u>
A. Brannon Brown Haley & Bullock P.A.	2010-2012	\$57,722.00
<ul style="list-style-type: none"> • Stephen C. Bullock (Partner at \$450.00/hour – total hours 72.6) • Christopher M. Costello (Associate at \$300/hour – total hours 23.7) • Matthew C. Mitchell (Associate at \$300/hour – total hours 47.0) • Paralegal at \$85.00/hour – total hours 45.2) • The total hours of 188.5 for appellate attorneys and paralegal assistance is reasonable. 		
B. The Court does consider a 2.5 multiplier, to be applicable, resulting in total reasonable appellate attorneys' fee (\$57,722.00 x 2.5) of		<u>\$144,305.00</u>

10. In conclusion, Harrington is awarded and judgment is entered for reasonable appellate attorneys' fees permitted under the DCA Order in the sum of \$144,305.00 against Travelers

Commercial Insurance Company, plus reasonable taxable cost for the expert witness in the sum of \$3,500.00 . It is, therefore,

ORDERED and **ADJUDGED**, Plaintiff, Crystal Marie Harrington, shall recover from Defendant, Travelers Commercial Insurance Company, the sum of \$144,305.00 as reasonable appellate attorneys' fees, plus taxable costs for the expert witness in the sum of \$3,500.00 for the total sum of \$147,805.00 **FOR WHICH LET EXECUTION ISSUE.**

DONE and **ORDERED** in Chambers the 24th day of August, 2012.


Circuit Judge **COPY**

Copies to:

James P. Waczewski, Esq.
Samuel A. Maroon, Esq.
Stephen C. Bullock, Esq

TAB 5

IN THE CIRCUIT COURT,
THIRD JUDICIAL CIRCUIT,
COLUMBIA COUNTY, FLORIDA

CRYSTAL MARIE HARRINGTON,
INDIVIDUALLY,

CASE NO.: 10-219-CA

Plaintiff(s),

v.

TRAVELERS COMMERCIAL
INSURANCE COMPANY, AN
AFFILIATE OF TRAVELERS INSURANCE
CO.,

Defendant(s).

DEFENDANT'S MOTION TO STAY ENFORCEMENT OF JUDGMENT

Defendant, TRAVELERS COMMERCIAL INSURANCE COMPANY ("Travelers"), by and through its undersigned counsel, hereby files its Motion to Stay Enforcement of Judgment for Appellate Attorneys' Fees, as set forth below.

1. Pursuant to the an Order from the First District Court of Appeal dated May 10, 2012, Plaintiff's Motion for (appellate) Attorneys' Fees was granted and remanded to this Court to assess the amount reasonable appellate attorneys' fees.
2. On July 19, 2012, this Honorable Court heard argument from both parties concerning the calculation of the amount of reasonable appellate attorneys' fees to be awarded to Plaintiff.
3. In Supreme Court Case No. SC12-1257, Defendant is seeking review of the First DCA's May 10, 2012 decision on the basis of the certified questions and upon conflict jurisdiction.


4. Accordingly, to the extent that this Court enters a judgment in favor of Plaintiff for appellate attorneys' fees and/or costs, defendant requests that the judgment be stayed pending resolution of the appeal.

WHEREFORE, for the foregoing reasons, Defendant respectfully requests this Court grant this motion, and award any further relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail, to all counsel of record on the attached Service List, this 23 day of July, 2012.

LUKS, SANTANIELLO,
PETRILLO & JONES
Attorneys for Defendant
301 W. Bay Street
Suite 1050
Jacksonville, FL 32202
Telephone: (904) 791-9191
Facsimile: (904) 791-9196

BY: 

PAUL S. JONES
Florida Bar No.: 149550
SAMUEL A. MAROON
Florida Bar No.: 0174270

SERVICE LIST

Stephen C. Bullock
Brannon Brown Haley & Bullock
PO Box 1029
Lake City FL 32056-1029

TAB 6



January 17, 2011

TRAVELERS GRP-CLAIM L&P (0PG025)
PO BOX 26385
RICHMOND, VA 23260-6385

Mayra Mercado
485 Lexington Ave
NEW YORK, NY 10017

Phone: (917) 778-6023
Fax: 917 778-7016
Email: MMERCAD2@travelers.com

This is an Agency Billed Policy.

This is the New Business for: TRAVELERS COMMERCIAL INSURANCE COMPANY (DAL5986)
C/O OF TRAVELERS CLAIM GROUP - FL
7840 WOODLAND CORPORATE CENTER BLVD.
TAMPA, FL 33614

Bond Number: 105552966
Type of Bond: SUPERSEDEAS BOND
Obligee Name: FLORIDA COLUMBIA COUNTY CLERK OF COURT
Obligee Address: P.O. BOX 2069
Obligee City, State & Zip: LAKE CITY, FL 32856 USA
Transaction Effective Date: January 17, 2011
Premium Effective Date: January 17, 2011
Premium Expiry Date: January 17, 2012
Bond Limit: \$458,161.20
Bond Premium: \$1,145.00
Commission - Percentage: 0%
Special Commission: \$0.00
Countersignature Branch:
Countersignature Commission: \$0.00
State Tax: \$0.00
State Surcharge: \$14.88
TOTAL PREMIUM: \$1,159.88

Comments:

ATTY: JAMES WACZEWSKI, ESQ. @ LUKS, SANTANIELLO, PETRILLO & JONES, 2022-2 RAYMOND DIEHL
ROAD, SUITE K, TALLAHASSEE, FL. 32308 (850) 385-9901 - CASE: Crystal Marie Harrington v. Travelers Commercial
Insurance Company

Thank you for placing your business with us.

Producer Name: In-House Account

8-4123 (9/96) Premium Evidence

TAB 7

IN THE CIRCUIT COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA
CASE NO. 10-219-CA

CRYSTAL MARIE HARRINGTON,
individually,

Plaintiff,

v.

TRAVELERS COMMERCIAL INSURANCE
COMPANY, an affiliate of Travelers Insurance
Cos.,

Defendant.

ORDER GRANTING MOTION TO STAY

THIS CAUSE came on to be heard September 19, 2012, on Defendant, TRAVELERS COMMERCIAL INSURANCE COMPANY's, Motion to Stay Enforcement of Judgment dated August 4, 2012 ("Motion") and the Court having heard argument of counsel, reviewed the Motion and Rule 9.310(b) of the *Florida Rules of Appellate Procedure*; it is

It is, therefore

ORDERED and ADJUDGED:

1. The Final Judgment dated August 24, 2012 in the amount of \$147,805.00 constitutes a money judgment described in Rule 9.310(b) of the *Florida Rules of Appellate Procedure* for which a Stay of Execution is ENTERED automatically only upon Defendant's filing of a Supersedeas Bond;
2. Since the entry of the Final Judgment on August 24, 2012 in the amount of \$147,805.00 Defendant, Travelers Commercial Insurance Company has not filed a

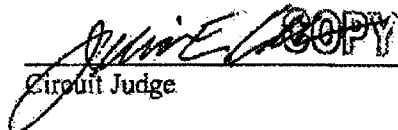
Supersedeas Bond. The Court, however, GRANTS this Temporary Stay From Execution of the Final Judgment dated August 24, 2012 in the amount of \$147,805.00 to and including 5:00 p.m. EST, Wednesday, September 26, 2012 in which Defendant, Travelers Commercial Insurance Company can file and post with the Clerk of this Court, its Supersedeas Bond in the amount of the Final Judgment dated August 24, 2012 in the amount of \$147,805.00 plus two years' statutory interest in accordance with Rule 9.310(b) of the *Florida Rules of Appellate Procedure*.

3. In the event the Defendant, Travelers Commercial Insurance Company does not file and post a Supersedeas Bond by 5:00 p.m. EST on Wednesday, September 26, 2012, then this Temporary Stay Order shall be lifted and vacated.

4. Further in the event Defendant Travelers does file and post a Supersedeas Bond with the Clerk of Court, then this Order GRANTING Temporary Stay shall also be lifted and vacated and the automatic stay provisions of Rule 9.310(b) of the *Florida Rules of Appellate Procedure* shall govern.

DONE and ORDERED in Chambers at Lake City, Columbia County, Florida this

5th day of ~~September~~ ^{Oct.}, 2012.

 COPY

Circuit Judge

Copies to:

Samuel A. Maroon, Esquire
Stephen C. Bullock, Esquire

TAB 8

**IN THE CIRCUIT COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA
CASE NO. 10-219-CA**

CRYSTAL MARIE HARRINGTON, individually,

Plaintiff,

v.

**TRAVELERS COMMERCIAL INSURANCE
COMPANY**, an affiliate of Travelers Insurance Cos.,

Defendant.

**PLAINTIFF'S EMERGENCY MOTION
FOR ORDER RELEASING MONIES DEPOSITED INTO THE
REGISTRY OF THE COURT TO APPLY FOR SATISFACTION OF
FINAL JUDGMENT FOR REASONABLE APPELLATE ATTORNEYS' FEES**

Plaintiff, **CRYSTAL MARIE HARRINGTON** ("Harrington") by and through her undersigned attorneys, pursuant to Fla.R.Civ.P. 1.600 and Fla.R.App.P. 9.310(d) and moves the Court to Order payment of funds on deposit in the Registry of the Court in the form of an Appeal Bond ("Bond No. 105841080") in the amount of \$161,846.47 and states:

1. On August 24, 2012, the Court rendered a Final Judgment for Appellate Attorneys' Fees and Costs (the "Judgment") awarding Harrington the sum of \$147,805.00, together with interest on the unpaid balance at the statutory rate until paid in full, "all for which, let execution issue".
2. The Judgment was recorded August 29, 2012 in Columbia County Official Records Book 1240 at page 2057

COPY

3. Defendant, Travelers Commercial Insurance Company ("Defendant") has never filed with the First District Court of Appeal for a Motion for Review of the Final Judgment under Appellate Rule 9.400(c), nor has Defendant filed a Notice of Appeal of the Final Judgment under Appellate Rule 9.110 and, otherwise, the Final Judgment therefore is not under pending review with any tribunal in this State.

4. On September 26, 2012, Defendant filed a Supersedeas Bond with this Court and deposited the Appeal Bond No. 105841080 in the sum of \$161,846.47 into the Registry of the Court. The *condition* language in the Appeal bond states:

"The condition of the above obligation is such that whereas Crystal Marie Harrington has in the Circuit Court, third Judicial Circuit, in and for Columbia County, Florida, in the above entitled cause therein pending recovered a judgment against Defendant, Travelers Commercial Insurance Company, and whereas the above named appellant(s) has, according to law, taken appeal from the said judgment."

Applied here, Travelers never became an "appellant" from the said Final Judgment because Travelers never filed a Motion for Review under Appellate Rule 9.400(c) nor a Notice of Appeal under Appellate Rule 9.110 and, therefore, did not "take an appeal from the said Judgment".

5. This Court entered an Order GRANTING a temporary *Stay* on October 5, 2012, indicating that in the event Defendant, Travelers, did not file and post a Supersedeas Bond by 5:00 p.m. EST on Wednesday, September 26, 2012, then this Court's Temporary Stay Order shall be lifted and vacated¹. Further, in the event Defendant, Travelers, does file and post a Supersedeas Bond with the Clerk of Court, then this Court's Order GRANTING temporary

¹ This Court was without jurisdiction to enter the Temporary Stay Order. *See, Aetna Insurance Company v Buchanan*, 372 So2d 172 (Fla 2d DCA 1979) holding in part that a trial judge is without authorization under Fla.R.App. 9.310 to issue a *Stay* Order following a MANDATE from the Appellate Court since the Appellate Court becomes the "lower tribunal"; *See, also, Citibank National Bank v Plapinger*, 469 So2d 144 (Fla 3d DCA 1985).

Stay shall also be lifted and vacated and the automatic Stay provision of Rule 9.310(b) of the Florida Rules of Appellate Procedure shall govern.

6. First and foremost, the provisions of Fla.R.App.P. 9.310(b): "Money Judgments, provides that if the Order is a judgment solely for the payment of money, a party may obtain an automatic Stay of execution "pending review", without the necessity of a Motion or Order, by posting a good and sufficient bond ...". (Emphasis supplied). Applied here, the Defendant, Travelers, never sought "review" of the Final Judgment either by way of "Motion for Review with the Appellate Court" [which is the only proper procedure under Appellate Rule 9.400(c)] nor sought review by an inappropriate "Notice of Appeal".

7. The time for filing either a Motion for Review or Notice of appeal for review have long expired (i.e., thirty days from the date of the Final Judgment [September 24, 2012]) and since there is – "no pending review" for this Court's Final Judgment filed before any tribunal in the State of Florida, then the Automatic *Stay* provision under Appellate Rule 9.310(b)(1) is not applicable and this Court should immediately and without delay enter an Order requiring the release and payment of the Supersedeas Bond to satisfy the Final Judgment.

8. On May 29, 2012, the First District Court of Appeal issued a MANDATE in Case No. 1D11-15 and no Motion to Stay the MANDATE was filed within fifteen (15) days. See, Fla.R.App.P. 9.340.

9. Defendant failed to timely file with the First DCA in Case No. 1D11-15 a Motion for Review pursuant to Fla.R.App.P. 9.400(c) to review the Final Judgment entered on August 24, 2012. See, *Pellar v Granger Asphalt Paving, Inc.*, 687 So2d 282, 284 (Fla 1st DCA 1997) holding that the correct method of seeking review of an Order on Appellate costs or attorneys' fees is to file a motion for review in the Appellate Court in the proceeding that

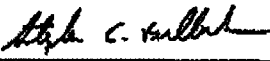
was the subject of the award, within 30 days of rendition of the Order in the Lower Tribunal. *See, also, Browning v New Hope South, Inc.*, 785 So2d 732 (Fla 1st DCA 2001) dismissing an appeal to review an appellate fee award for failing to follow the Appellate Rules.

10. Harrington seeks to have the Court Order payment of \$147,805.00 plus statutory interest at the rate of 4.75% per year from August 24, 2012 until the present.

WHEREFORE, Harrington respectfully moves for an Order directing the Clerk of Court to immediately and forthwith release the Supersedeas Bond to Harrington and to Order the payment of \$147,805.00 from funds deposited into the Registry of this Court by Defendant.

I **HEREBY CERTIFY** that on this 16h day of January, 2013, a copy of the foregoing has been furnished by electronic mail to Paul S. Jones, Esquire and Samuel A. Maroon, Esquire, luks-pleadings@ls-law.com, Luks, Santaniello, Petrillo & Jones, Attorneys for Defendant, Travelers Commercial Insurance Company.

**BRANNON BROWN HALEY & BULLOCK,
P.A.**

By: 

Stephen C. Bullock
FBN 347264
sch@bbattorneys.com
Telephone: (386) 752-3213
Facsimile: (386) 755-4524
Counsel for Plaintiff

TAB 9

**IN THE CIRCUIT COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA**

CASE NO. 10-219-CA

CRYSTAL MARIE HARRINGTON, individually,

Plaintiff,

v.

**TRAVELERS COMMERCIAL INSURANCE
COMPANY, an affiliate of Travelers Insurance Cos.,**

Defendant.

ORDER

**GRANTING PLAINTIFF'S EMERGENCY MOTION FOR ORDER RELEASING
MONIES DEPOSITED INTO THE REGISTRY OF THE COURT TO APPLY FOR
SATISFACTION OF FINAL JUDGMENT FOR REASONABLE APPELLATE
ATTORNEYS' FEES**

THIS CAUSE came on to be heard January 17, 2013, on *Plaintiff's Emergency Motion for Order Releasing Monies Deposited into the Registry of the Court to Apply for Satisfaction of Final Judgment for Reasonable Appellate Attorneys' Fees* ("Motion") and the Court having heard argument of counsel, reviewed Fla.R.Civ.P. 1.600; the Motion; and Fla.R.App.P. 9.310(d); as well as Appellate Rules 9.400(c) and 9.130(b)(1); and various Court pleadings and Orders, the Court finds:

1. On August 24, 2012, this Court rendered its Final Judgment for Appellate Attorneys' Fees and Costs (the "Judgment") awarding Harrington the sum of \$147,805.00, together with

interest on the unpaid balance at the statutory rate until paid in full, "all for which, let execution issue".

2. The Judgment was recorded August 29, 2012 in Columbia County Official Records Book 1240 at page 2057.

3. Defendant, Travelers Commercial Insurance Company ("Defendant") never filed with the First District Court of Appeal a Motion for Review of the Final Judgment under Appellate Rule 9.400(c), nor a Notice of Appeal of the Final Judgment under Appellate Rule 9.110 and, otherwise, the Final Judgment therefore is not under pending review with any tribunal in this State.

4. On September 26, 2012, Defendant filed a Supersedeas Bond with this Court and deposited the Appeal Bond No. 105841080 in the sum of \$161,846.47 into the Registry of the Court. The *condition* language in the Appeal bond states:

"The condition of the above obligation is such that whereas Crystal Marie Harrington has in the Circuit Court, third Judicial Circuit, in and for Columbia County, Florida, in the above entitled cause therein pending recovered a judgment against Defendant, Travelers Commercial Insurance Company, and whereas the above named appellant(s) has, according to law, taken appeal from the said judgment."

That applied here, Travelers never became an "appellant" from the said Final Judgment because Travelers never filed a Motion for Review under Appellate Rule 9.400(c) nor a Notice of Appeal under Appellate Rule 9.110 and, therefore, did not "take an appeal from the said Judgment".

5. This Court entered an Order GRANTING a temporary *Stay* on October 5, 2012, indicating that in the event Defendant, Travelers, did not file and post a Supersedeas Bond by 5:00 p.m. EST on Wednesday, September 26, 2012, then this Court's Temporary Stay Order was to be lifted and vacated. Further, that in the event Defendant, Travelers, did file and post a

Supersedeas Bond with the Clerk of Court, then this Court's Order granting temporary Stay was also to be lifted and vacated and the automatic Stay provision of Rule 9.310(b) of the Florida Rules of Appellate Procedure would govern.

6. The provisions of Fla.R.App.P. 9.310(b): "Money Judgments, provides that if the Order is a judgment solely for the payment of money, a party may obtain an automatic Stay of execution "pending review", without the necessity of a Motion or Order, by posting a good and sufficient bond ...". (Emphasis supplied). That applied here, the Defendant, Travelers, never sought "review" of the Final Judgment either by way of "Motion for Review with the Appellate Court" nor by "Notice of Appeal".

7. The time for filing either a Motion for Review or Notice of Appeal for review has long expired (i.e., thirty days from the date of the Final Judgment [September 24, 2012]) and since there is -- "no pending review" of this Court's Final Judgment filed before any tribunal in the State of Florida, then the Automatic *Stay* provision under Appellate Rule 9.310(b)(1) is not applicable and, therefore, this Court concludes it should immediately and without delay enter an Order requiring the release and payment of the Supersedeas Bond to satisfy the Final Judgment.

8. On May 29, 2012, the First District Court of Appeal issued a MANDATE in Case No. 1D11-15 and no Motion to Stay the MANDATE was filed within fifteen (15) days. See, Fla.R.App.P. 9.340.

9. Defendant failed to timely file with the First DCA in Case No. 1D11-15 a Motion for Review pursuant to Fla.R.App.P. 9.400(c) to review the Final Judgment entered on August 24, 2012. See, *Pellar v Granger Asphalt Paving, Inc.*, 687 So2d 282, 284 (Fla 1st DCA 1997) holding that the correct method of seeking review of an Order on Appellate costs or attorneys' fees is to file a motion for review in the Appellate Court in the proceeding that was the subject of

the award, within 30 days of rendition of the Order in the Lower Tribunal. *See, also, Browning v New Hope South, Inc.*, 785 So2d 732 (Fla 1st DCA 2001) dismissing an appeal to review an appellate fee award for failing to follow the Appellate Rules.


10. That Harrington seeks to have the Court Order payment of \$147,805.00 plus statutory interest at the rate of 4.75% per year from August 24, 2012 until the present.

It is, therefore

ORDERED and ADJUDGED:

That Plaintiff's *Emergency Motion for Order Releasing Monies Deposited into the Registry of the Court to Apply for Satisfaction of Final Judgment for Reasonable Appellate Attorneys' Fees* is hereby **GRANTED** and the Clerk of this Court is herewith directed to immediately deliver the original Supersedeas Bond #105841080 in the amount of \$147,805.00 to counsel for the Plaintiff, Stephen C. Bullock, and the Surety, Travelers Casualty & Surety Co. of America is Ordered forthwith to pay the sum of \$147,805.00 plus 4.75% statutory interest (\$2,808.30) commencing August 24, 2012, to and including the date of this Order for the total sum of \$150,613.30, FOR WHICH LET EXECUTION ISSUE.

DONE AND ORDERED in Chambers at Lake City, Columbia County, Florida, this 22nd day of January, 2013.

 **COPY**

Julian Edward Collins, Circuit Judge

Copies to:

~~Samuel A. Murray Esquire~~
Counsel for Defendant

Stephen C. Bullock
Counsel for Plaintiff

TAB 10

Supreme Court of Florida

MONDAY, JANUARY 28, 2013

CASE NO.: SC12-1257
Lower Tribunal No(s): 1D11-15,
10-219-CA

TRAVELERS COMMERCIAL
INSURANCE COMPANY, ETC.

vs. CRYSTAL MARIE
HARRINGTON

Petitioner(s)

Respondent(s)

The Court accepts jurisdiction of this case. Oral argument will be set by separate order. Counsel for the parties will be notified of the oral argument date approximately sixty days prior to oral argument.

Petitioner's initial brief on the merits shall be served on or before February 22, 2013; respondent's answer brief on the merits shall be served twenty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits shall be served twenty days after service of respondent's answer brief on the merits. Please file an original and seven copies of all briefs.

Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

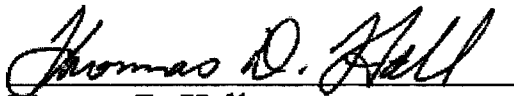
The Clerk of the First District Court of Appeal shall file the original record which shall be properly indexed and paginated on or before March 29, 2013. The record shall include the briefs filed in the district court separately indexed.

SC12-1257

Page 2

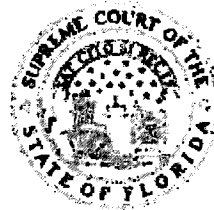
A True Copy

Test:



Thomas D. Hall

Clerk, Supreme Court



aa

Served:

CYNTHIA SKELTON TUNNICLIFF
HON. JON S. WHEELER, CLERK
JAMES P. WACZEWSKI
HENRY GEROME GYDEN
JACK WILLIAM SHAW, JR.
DOROTHY VENABLE DIFIORE

TAB 11

IN THE SUPREME COURT OF FLORIDA

TRAVELERS COMMERCIAL
INSURANCE COMPANY, AN
AFFILIATE OF TRAVELERS
INSURANCE CO.,

Petitioner,

CASE NO.: SC12-1257
DCA CASE NO. 1D11-15
L.T. CASE NO.: 10-219-CA

vs.

CRYSTAL MARIE HARRINGTON,

Respondent.

**PETITIONER'S EMERGENCY MOTION FOR STAY OF UNDERLYING
PROCEEDINGS; INCLUDING STAY OF EXECUTION OF UNDERLYING
APPELLATE FEES JUDGMENTS; AND/OR FOR AN ORDER STAYING
THE FIRST DISTRICT COURT OF APPEAL'S MANDATE.**

COMES NOW the Petitioner, Travelers Commercial Insurance Company (hereinafter "Travelers"), through undersigned counsel, and moves, pursuant to authority cited below, on an emergency basis, for a stay of the underlying proceedings, including a stay of the execution of the underlying judgment awarding Respondent, Crystal Marie Harrington, appellate attorneys' fees, and/or moves for an order staying the First District Court of Appeal's mandate, for the grounds stated below.

Introduction, Facts, and Procedural History

This matter involves Ms. Crystal Marie Harrington's (hereinafter "Plaintiff") claims for UM benefits related to a single-car accident that occurred on October 24, 2009. Plaintiff's mother had purchased insurance coverage through Travelers for three family vehicles, purchasing \$100,000 in liability coverage, and \$100,000 in non-stacked UM coverage. The above accident, which resulted from the negligent operation of a family vehicle by a non-family-member, occurred while this policy was in effect. After collecting \$100,000 from Travelers under the liability portion of the policy, Plaintiff also demanded UM benefits, but Travelers denied the claim, taking the position that the policy did not provide for UM coverage under the circumstances. Plaintiff then sued for UM benefits, and both parties sought a determination, from the Trial Court, of whether there was UM coverage for Plaintiff's claim, and if so, whether such coverage should be stacked or non-stacked. The parties filed opposing summary judgment motions, and, following a hearing, the Trial Court entered an order granting summary final judgment in favor of Plaintiff on both coverage issues, and also including language entering judgment for the Plaintiff in the full amount of the stacked UM coverage that the Trial Court found to apply to Plaintiff's claim -- \$300,000.00. Subsequently, the Trial Court entered a judgment awarding Plaintiff trial-court-level attorneys' fees. On appeal from these judgments, the First District Court of

Appeal affirmed the summary judgment as to the UM coverage and stacking issues, but certified both issues as being of great public importance. (**Appendix, Item I, First DCA opinion**). The First District also reversed both the judgment for \$300,000 in uninsured motorist benefits and the judgment for trial-level attorneys' fees. (Id.). Finally, the First District granted Plaintiff's Motion for Appellate Attorneys' Fees, ordering the Trial Court to assess those fees. (**Appendix, Item II, Order Awarding Appellate Fees**). The First District issued its Mandate on May 29, 2012 (**Appendix, Item III, First District's Mandate**), and the term during which that Mandate was issued expired just over one month later, in the month of July, 2012. Travelers timely filed its notice to invoke the discretionary jurisdiction of this Court on or about June 5, 2012. (**Appendix, Item IV, First District's Docket**). Travelers did not file a motion to stay, or to recall the mandate, before the expiration of the First District's term a few weeks later. (Id.).

On remand, on the appellate fees issue, the Trial Court held a hearing on July 19, 2012 to hear evidence in order to assess appellate fees. In early August, before a judgment assessing appellate fees was entered, Travelers filed a motion with the Trial Court asking the Trial Court to stay enforcement of the soon-to-be-entered judgment for appellate fees pending the Florida Supreme Court's

consideration of its notice to invoke this Court's discretionary jurisdiction. **(Appendix, Item V, Defendant's Motion to Stay Enforcement of Judgment).**

On August 24, 2012, the Trial Court assessed the appellate attorneys' fees due to Plaintiff pursuant to the First District's order on fees, entering a judgment in her favor for \$147,805.00 in appellate fees and costs. **(Appendix, Item VI, August 2012 Judgment on Appellate Fees).** The Trial Court then held a hearing on Travelers' Motion to Stay. At the hearing, the Court announced that it would require Travelers to post a separate supersedeas bond to stay the execution of the appellate fees judgment. Travelers timely posted the required bond. **(Appendix, Item VII, Supersedeas Bond).**

A formal "Order Granting Motion to Stay" was entered on or about October 5, 2012. **(Appendix, Item VIII, Order Granting Motion to Stay)**. The Order provided that the Trial Court granted a temporary stay that would be lifted once the supersedeas bond was posted, after which the appellate fees judgment would be automatically stayed pursuant to Rule 9.310(b). (Id.). At no time before Travelers posted bond pursuant to the Trial Court's order did Plaintiff's counsel argue that the Trial Court did not have jurisdiction to consider the motion for stay, or that Rule 9.310(b) did not apply to stay an ancillary judgment while a petition for review is pending before this Court. Plaintiff did not seek review of that order with the First District Court of Appeal.

As noted above, the First District had also remanded for further proceedings, since it reversed the judgment awarding Plaintiff \$300,000 in UM benefits. On remand, the parties proceeded to conduct discovery in preparation for Trial, which is currently scheduled for February of 2013. On October 31, 2012, Travelers filed a motion asking the Trial Court to also stay all trial proceedings while the related proceedings before this Court remain pending. (**Appendix, Item IX, Motion for Stay of Proceedings Pending Florida Supreme Court Review**). A hearing was held on the motion on January 15, 2013. At that hearing, for the first time, Plaintiff's counsel argued that the Trial Court did not have jurisdiction to stay the proceedings. The Trial Court has not yet ruled on the motion for stay of the proceedings.

However, on the next day, January 16, 2013, Plaintiff also filed her "Plaintiff's Emergency Motion for Order Releasing Monies Deposited into the Registry of the Court to Apply for Satisfaction of Final Judgment for Reasonable Appellate Attorneys' Fees," (hereinafter "Plaintiff's Emergency Motion") arguing that the Trial Court has no jurisdiction to enter a stay of execution of that judgment, and that Rule 9.310(b) does not apply because Travelers did not seek review of the appellate fees judgment with the First District.¹ (**Appendix, Item X,**

¹ Even though Travelers found the amount awarded to Plaintiff for appellate attorneys fees excessive, and also disagreed with the application by the Trial Court of a 2.5 multiplier – Travelers voluntarily elected not to seek further review of the

Plaintiff's Emergency Motion, without exhibits). The Trial Court held an immediate hearing on the motion, and, on January 22, 2013, signed an order granting Plaintiff's emergency motion and entering a new judgment in favor of Plaintiff, for Appellate Attorneys' Fees and Costs, in the amount of \$150,613.30. **(Appendix, Item XI, "Order Granting Plaintiff's [sic] Emergency Motion for Order Releasing Monies Deposited Into the Registry of the Court to Apply for Satisfaction of Final Judgment for Reasonable Appellate Attorneys' Fees").**

Thus, as the case presently stands, the matter is proceeding to trial, and, while a supersedeas bond had been filed by Travelers per the Trial Court's prior order to avoid execution of the appellate fees judgment, and to protect Plaintiff's award in the event Plaintiff prevails in the proceedings before this Court – the Trial Court has now entered another judgment against Travelers permitting Plaintiff to execute her judgment on appellate fees. Plaintiff, through counsel, acted swiftly upon receipt of this new judgment, writing to Travelers demanding immediate payment under the bond, and threatening to go forward with all collections efforts. **(Appendix, Item XII, January 25, 2013 letter from attorney Stephen C. Bullock).**

order before the First District Court of Appeal. However, as noted above, Travelers had sought a stay of that judgment, and, pursuant to the Trial Court's ruling, filed a supersedeas bond, with the intention to guarantee the payment of the judgment of appellate fees depending on the outcome of the proceedings before this Court.

For the reasons above, therefore, Travelers has filed this motion seeking, *on an emergency basis*, a stay of the proceedings below, and an immediate stay of the execution of the judgments on appellate fees, pending this Court's consideration of Travelers' notice to invoke the discretionary jurisdiction of this Court.

Travelers notes that it has attempted to resolve this issue amicably with Plaintiff, in order to avoid having to file a motion before this Court, to no avail. This motion is being filed on an emergency basis because the trial below is fast approaching (it is scheduled for February), and more importantly, because the Trial Court has ordered immediate execution of its appellate fee judgments in favor of Plaintiff and against Travelers, and Plaintiff has threatened to take immediate action against Travelers.

Argument/Discussion

The undersigned has not found any Florida authority discussing the proper procedure to obtain a stay under the posture herein.

Florida Rules of Appellate Procedure, Rule 9.400, regards appellate fees and allows the District Court of Appeal, when finding that a party is entitled to such fees, to remand the assessment of fees. See Fla.R.App.P., Rule 9.400(b). The rule also specifically provides that if "attorneys' fees are assessed by the court, the lower tribunal may enforce the judgment." See Fla.R.App.P., Rule 9.400(c).

Rule 9.310 regards stay pending review. Under subsection (a), a stay of a mandate may be sought from the “lower tribunal” (here, presumably, the First District), which shall have continuing jurisdiction . . . — even though it has been held that such jurisdiction ends when the term during which the mandate was issued ends. See State Farm Mut. Auto. Ins. Co. v. Judges of the Dist. Ct. of App., Fifth Dist., 405 So. 2d 980, 982-983 (Fla. 1981). Furthermore, under subsection (b)(1), Rule 9.310 provides for an automatic stay of execution of money judgments pending review “by posting good and sufficient bond” Review of orders entered under this rule is made by the Court where the appeal is pending. See Rule 9.310(f).

Florida Rules of Civil Procedure, Rule 1.550(b), also allows for a stay to be entered, providing “The Court before which an execution or other process based on a final judgment is returnable may stay such execution or other process and suspend proceedings thereon for good cause on motion and notice to all adverse parties.” Rule 1.550(b) has been described as a vehicle for protecting a judgment debtor “briefly while he perfects his appeal and obtains supersedeas.” See Campbell v. Jones, 648 So. 2d 208 (Fla. 3d DCA 1994); Barnett v. Barnett Bank of Jacksonville, N.A., 338 So. 2d 888, 889 (Fla. 1st DCA 1976).

There is support for the proposition that a trial court may enter a stay of an ancillary judgment on fees and costs under Rule 9.310, even where the judgment

sought to be stayed was not appealed, pending resolution of the appeal on the principal judgment – circumstances that are analogous to those in the present case. See Platt v. Russek, 921 So. 2d 5, at 7-9 (Fla. 2d DCA 2004) (Holding that the trial court could, under Rule 9.310, stay an ancillary judgment for fees and costs that was not appealed, pending review of the primary judgment by the appellate court).

There is also support for the proposition that this Court has jurisdiction to order a stay of an appellate court’s mandate during the “pendency of a petition for review in this Court” See State v. Roberts, 661 So. 2d 821, 821-822 (Fla. 1995)(“[A] motion for stay and to recall a mandate may be filed in this Court Because there is a reasonable possibility that this Court will accept jurisdiction in this case and perhaps obviate the necessity for a new trial, we hereby grant the State’s motion and direct the district court of appeal to withdraw its mandate pending consideration of the notice to invoke this Court’s discretionary jurisdiction.”).

Plaintiff has argued, below, that the Trial Court cannot order a stay of either the trial proceedings or of the appellate fee judgment, and, with respect to the latter, that the automatic stay under Rule 9.310 is not appropriate, here, because Travelers did not appeal the appellate fees judgment.² It is Travelers positions that

² Plaintiff relied upon Aetna Ins. Co. v. Buchanan, 372 So. 2d 172 (Fla. 2d DCA 1979)(holding that the Trial Court could not stay proceedings where the appellate court reversed a summary judgment and remanded for further proceedings, even

the cases relied upon by Plaintiff are distinguishable and, therefore, inapposite, or have no application to the issue before this Court. See fn. 2, supra.

The purpose of a stay is merely to preserve the status quo. See 1 Fla. Jur. Actions §48 (1999). A stay is a proper vehicle to avoid the waste of judicial resources. See Rosen v. Zoberg, 680 So. 2d 1050, 1052 (Fla. 3d DCA 1996). This Court can order a stay, particularly when doing so will obviate the need for a trial that, as this Court noted in Roberts, may not be needed at all depending on the Court's ultimate ruling, and particularly when there is a "reasonable possibility" that this Court will accept review. See State v. Roberts, 661 So. 2d 821, 821-822 (Fla. 1995). Here, this Court should order a stay of the underlying proceedings, and a stay of the execution of the appellate fees judgment, for various reasons.

First, there is a reasonable possibility that this Court will accept jurisdiction in this case. The First District Court of Appeal certified two questions as questions of great public importance. Furthermore, as argued in the Petitioner's jurisdictional brief, the First District's opinion is in conflict with various opinions of this Court and of other District Courts of Appeal on both of the coverage issues

though the losing party sought review with the Florida Supreme Court – and that the Appellate Court, not the Trial Court, had continuing and original jurisdiction to stay the trial proceedings); and Robbins v. The Honorable Fredric Pfeiffer, 407 So. 2d 1016 (Fla. 5th DCA 1981)(holding that Trial Court did not have jurisdiction to stay a money judgment affirmed by the appellate court, even though the judgment debtor has sought discretionary review by the Florida Supreme Court, where both the district court, and the Florida Supreme Court, had already denied the judgment debtor's motion to stay execution of the same judgment).

before this Court. The issues presented in this case are, indeed, very important, and the First District's opinion has created significant uncertainty in the processing of UM and UIM claims due to its holdings on the two coverage issues presented. For example, under the First District's opinion, a mother who purchased non-stacked UM coverage and signed a form rejecting stacked coverage will only be entitled to non-stacked coverage; but her daughter, who did not participate in the purchase of the policy and thus did not sign the rejection form required to purchase non-stacked coverage, will be entitled, under the same policy, for stacked UM coverage, irrespective of the fact that no premium was paid for such additional coverage. Two entities have already filed notices with this Court that they intend to file Amicus briefs for this Court's consideration (PERSONAL INSURANCE FEDERATION OF FLORIDA and GEICO INSURANCE COMPANY).

Second, if this Court accepts jurisdiction, and reverses on the coverage issues presented, there will not be a need for a trial at all, as Travelers is the only defendant. Thus, holding a trial would seem to be a significant waste of judicial resources. See State v. Roberts, 661 So. 2d 821, 821-822 (Fla. 1995).

Third, whether this Court will directly reverse the First District's order granting appellate fees to Respondent, or whether the First District will set the order aside on remand, or even whether the judgments on appellate fees will be set aside under Florida Rules of Civil Procedure Rule 1.540, there can be no doubt that

the judgment for appellate fees will be set aside if Travelers prevails on the coverage issues raised in this appeal. See Key v. Angrand, 638 So. 2d 628 (Fla. 3d DCA 1994). That is, if Travelers is successful in obtaining a reversal of the First District's decision – if this Court rules in its favor on the coverage issues presented – Travelers would be entitled, at a minimum, to relief from the Final Judgment for Reasonable Appellate Attorneys' Fees and Costs under Rule 1.540. See Mulato v. Mulato, 734 So. 2d 477, 478 (Fla. 4th DCA 1999)(“where the judgment on which a cost judgment is predicated is reversed, the original cost judgment also cannot stand;” trial court should have granted party prevailing on appeal relief from the cost judgment); Austin v. B.J. Apparel Corp., 523 So. 2d 675, 677 (Fla. 3d DCA 1988)(granting relief from judgments that were founded upon subsequently reversed bankruptcy order); Thornburg v. Pursell, 476 So. 2d 323, 324 (Fla. 2d DCA 1985)(“the trial court therefore erred in affirming the costs judgment entered in favor of the defendants in the first trial because the judgment upon which it was predicated was reversed on appeal.”). Considering that Travelers is willing and able to guarantee payment of the appellate fees judgments if it loses this appeal, and it has already done so by filing its supersedeas bond, it would seem prudent to stay execution of the appellate fees judgments until this Court resolves this appeal, rather than allowing execution proceedings to go forward.

Although the language in the bond filed by Travelers may be confusing because it does not directly mention the notice to invoke pending before this Court, and since Travelers did not appeal the judgment for appellate fees and costs, Plaintiff is well aware that the supersedeas bond was posted as a result of the Trial Court's order on its motion to stay the execution of the appellate fees judgment while this Court considered its notice to invoke this Court's discretionary jurisdiction. Travelers has posted a bond to protect Plaintiff's award of appellate attorneys' fees, and it remains willing and able to post a corrected bond, conditioning payment on it losing this appeal in full or in part, if this Court so requires. Plaintiff has been, and will continue to be, thus protected – if this Court declines to accept jurisdiction, or if Plaintiff prevails in this appeal, she will be able to collect the appellate fees judgment with interest.

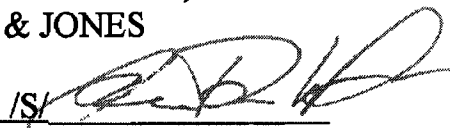
It is Travelers' position that it, under Platt, had correctly obtained a stay of the ancillary judgment for appellate fees by posting a bond – but this has now been apparently negated by the Trial Court entry of a new judgment on January 22, 2013, in favor of Plaintiff. Travelers thus seeks, on an emergency basis, a stay of all proceedings below, including stay of the execution of the appellate fees judgments. Travelers is uncertain whether this simply requires an order from this Court giving effect to such a stay, or an order directed to the First District directing it to recall its mandate and issue the stay. See State v. Roberts, supra.

Nonetheless, given the Plaintiff's threat of immediate execution against Travelers, Travelers respectfully requests that this Court enter an immediate temporary order granting such a stay, pending this Court's consideration of Plaintiff's response to this motion, if any, and this Court's final decision on this motion on whether a stay is warranted while this Court considers Travelers' notice to invoke the discretionary jurisdiction of this Court.

Conclusion

In light of all of the above, Travelers respectfully requests that this Court enter an order granting this emergency motion and issuing a stay of all proceedings below, including an immediate temporary stay of the execution of the appellate fees judgments at issue, and/or enter any other order this Court deems just and proper under the circumstances presented herein.

LUKS, SANTANIELLO,
PETRILLO & JONES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail, to all counsel of record on the attached Service List, this 28th day of January, 2013.


/s/ _____
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TAB 12

Supreme Court of Florida

FRIDAY, FEBRUARY 8, 2013

CASE NO.: SC12-1257

Lower Tribunal No(s): 1D11-15, 10-219-
CA

TRAVELERS COMMERCIAL
INSURANCE
COMPANY, ETC.

vs. CRYSTAL MARIE
HARRINGTON

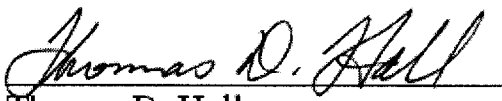
Petitioner(s)

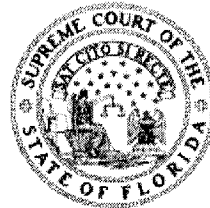
Respondent(s)

Petitioner's Emergency Motion to Stay Further Proceedings, to Stay Enforcement of Appellate Fees Order, and to Recall Mandate filed in the above cause is granted and proceedings in the First District Court of Appeal and in the Circuit Court of the Third Judicial Circuit in and for Columbia County, Florida, are hereby stayed pending disposition of the petition for review filed herein.

POLSTON, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY, J., concurs in part and dissents in part. Would deny the motion to stay as to execution of the appellate attorney fees judgments.

A True Copy
Test:


Thomas D. Hall
Clerk, Supreme Court



th
Served:

HON. JON S. WHEELER, CLERK
CYNTHIA SKELTON TUNNICLIFF
JAMES P. WACZEWSKI
DOROTHY VENABLE DIFIIORE
HENRY GEROME GYDEN
STEPHEN CHARLES BULLOCK
HON. P. DEWITT CASON, CLERK