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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1257

TRAVELERS COMMERCIAL INSURANCE COMPANY,

Petitioner,

vs.

CRYSTAL MARIE HARRINGTON,

Respondent.
_____/

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

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

SUPPLEMENTAL REPLY BRIEF OF PETITIONER TRAVELERS COMMERCIAL INSURANCE COMPANY

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INTRODUCTION

Harrington devotes much of her supplemental brief to arguing that this Court should lift the stay it entered on February 8, 2013 (br. at 2, 11-12, 14-18). She also spends much time reminding the Court that Travelers did not seek review or a stay of the appellate-fees judgment, which is undisputed (br. at 6-11, 14, 16). But neither of these arguments answers this Court's question: "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). In its supplemental initial brief, Travelers explained why that judgment is not final and may be vacated under Florida Rule of Civil Procedure 1.540(b)(5). Harrington's supplemental answer brief does not rebut this conclusion.

SUMMARY OF THE ARGUMENT

On the rare occasions when Harrington responds to this Court's question, it fails to distinguish the appellate-fees judgment here from the fee judgments vacated under rule 1.540(b)(5) when a merits judgment was reversed or vacated, other than to say those judgments were for fees awarded by the trial court. But the trial court awarded the amount of appellate fees here and entered the appellate-fees judgment. Thus, the trial court may vacate its appellate-fees judgment under rule

1.540(b)(5), as Travelers explained in its initial supplemental brief and confirms below.

ARGUMENT

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

In response to Travelers' supplemental brief, Harrington cites cases for various unremarkable propositions not debated here. *See American Cas. Co. of Reading, Pa. v. Pan Am. Bank of Miami*, 156 So. 2d 27, 28-29 (Fla. 2d DCA 1963) (a surety is liable when an appeal is not perfected or is dismissed); *Computer Task Group, Inc. v. Palm Beach Cnty.*, 809 So. 2d 10, 11 (Fla. 4th DCA 2002) (motions for appellate attorneys' fees are directed to appellate courts); *Pellar v. Granger Asphalt Paving, Inc.*, 687 So. 2d 282, 284 (Fla. 1st DCA 1997) (Florida Rule of Appellate Procedure 9.400(c) is the procedure for reviewing an order determining appellate fees and costs); *Browning v. New Hope S.*, 785 So. 2d 732, 733 (Fla. 1st DCA 2001) (same); *Blackhawk Heating & Plumbing Co. v. Date Lease Fin. Corp.*, 328 So. 2d 825, 827 (Fla. 1975) (trial courts must follow appellate-court mandates and may not alter or evade them); *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993) (section 627.428, Florida Statutes, entitles a prevailing

insured to attorneys' fees)[1]; *State Farm Mut. Auto. Ins. Co. v. Judges of Dist. Court of Appeal, Fifth Dist.*, 405 So. 2d 980, 982 (Fla. 1981) (the need for finality in litigation). None addresses the issue on which this Court requested supplemental briefing: "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).

On that point, Harrington describes Travelers' reliance on Florida Rule of Civil Procedure 1.540(b)(5) and the cases applying that rule as an "end-run" (br. at 13). Far from it. In fact, rule 1.540(b)(5) is the recognized procedure for vacating a fees judgment when the underlying merits judgment is vacated. *See River Bridge Corp. v. Am. Somax Ventures,* 76 So. 3d 986, 988-89 (Fla. 4th DCA 2011); *Viets v. Am. Recruiters Enters., Inc.*, 922 So. 2d 1090, 1096 (Fla. 4th DCA 2006).

Harrington next argues that the cases Travelers cites do not apply because they do not address *appellate* attorneys' fees (br. at 13-14). And she seeks to limit the availability of rule 1.540(b)(5) relief to "trial court awarded fees" (br. at 14). But rule 1.540 does not impose the limitation Harrington seeks to read into it. Rule 1.540(b)(5) allows a court to relieve a party from "a final judgment," without limitation, when the judgment on which it is based is reversed or vacated. Fla. R.

[1] Travelers will address Harrington's additional request for fees incurred for supplemental briefing in its opposition to that motion.

Civ. P. 1.540(b)(5). By its plain terms, the rule applies to *any* final judgment, regardless of whether it is a fees judgment or whether fees were awarded for trial- or appellate-court work. Moreover, even though the appellate court granted the motion for appellate attorneys' fees (S.A. 2), the trial court awarded the fee amount and the resulting appellate-fees judgment is a final judgment of the trial court (S.A. 5-11), like the trial-fees judgment before it. Thus, it falls within rule 1.540(b)(5) and is subject to vacatur if the underlying judgment is vacated.

Harrington then cites a case – allegedly from this Court – as resolving the question:

> Travelers, for the first time, acts as if its plan all along was to rely upon Fla. R. Civ. P. 1.540 as a means to seek further review of the Final Judgment Awarding Reasonable Appellate Attorneys' Fees. However, in response, this Court has stated: The Florida Supreme Court has said that Rule 1.540 was not intended to serve as a substitute for the new trial mechanism prescribed by Rule 1.530 nor as a substitute for appellate review of judicial error. *Sacco v Slavin*, 64[1] So. 2d 955 (Fla. 3d DCA 1994).

(br. at 15). But *Sacco* does no such thing. First, *Sacco* is not a case from this Court, but from the Third DCA. Second, *Sacco* does not address whether rule 1.540 is a means—or not, as Harrington claims—to address a derivative appellate-fees judgment. Instead, it deals with a merits judgment. *Sacco*, 641 So. 2d at 956. Third, the *Sacco* motion was made under rule 1.540(b)(1), which allows relief from judgment for mistake, inadvertence, surprise or excusable neglect, *not* rule 1.540(b)(5), which will apply if the underlying judgment here is vacated. *See id.*

Fourth, Travelers does not "seek further review" of the appellate-fees judgment, as Harrington claims (br. at 15). Travelers' view is that, if Harrington loses on the merits, the appellate-fees judgment must fall. Thus, the court's statement that rule 1.540 is not a substitute for "appellate review of judicial error" does not apply. *See id.* at 957. In sum, *Sacco* does not address, much less answer, the question posed here.

Harrington's other response is to require Travelers to pay the appellate-fees judgment now and seek disgorgement if it ultimately prevails (br. at 11-12, 15-17). Harrington argues that, because the defendant in *California Medical Association v. Shalala*, 207 F.3d 575, 576 (9th Cir. 2000), did so and Travelers relies on *Shalala*, it must follow the procedure followed by the defendant there (*id.*). But Harrington ignores the Ninth Circuit's holding, which lists three options for parties in Travelers' situation: 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 rendered"; or they may move for relief under rule 60(b)(5) after a merits judgment is reversed. *See id.* at 576-77. Payment and a later request for disgorgement was not one of the options. Moreover, the Ninth Circuit added that a separate appeal would be a "meaningless formality." *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."). Again, this Court should adopt the reasoning of the Ninth Circuit and its fellow federal appellate courts. *See Flowers v. S. Reg'l Physician Servs., Inc.*, 286 F.3d 798, 801 (5th Cir. 2002); *Mother Goose Nursery Schs., Inc. v. Sendak*, 770 F.2d 668, 676 (7th Cir. 1985).

Harrington's last argument is that the Court should treat appellate fees like appellate costs and find that the award "may not be conditioned upon the ultimate outcome of the case" (br. at 17). The very cases Harrington cites defeat her argument. For example, in *Computer Task Group*, the Fourth DCA notes that "[t]he appellate rules treat appellate attorney's fees separately from the issue of appellate costs." 809 So. 2d at 11. And rejecting the argument that prevailing-party status for a cost award must await the conclusion of the case, the First DCA noted that a different construction of prevailing party applies to costs: "The prevailing party under [rule 9.400(a)] is 'the party who prevailed in the appellate proceeding that was the subject of the motion to tax costs, and not necessarily the party who ultimately prevail[s] after the completion of all the litigation.'" *Centennial Mortg., Inc. v. SG/SC, Ltd.*, 864 So. 2d 1258, 1260-61 (Fla. 1st DCA 2004). Here, however, section 627.428, Florida Statutes, determines who is the prevailing party, and that determination must await the ultimate outcome of the

case. Notably, to support its construction, the Fourth DCA looked to the corresponding federal rule of appellate procedure. *Centennial Mortg.*, 864 So. 2d at 1261, as Travelers suggests that the Court do here to conclude that rule 1.540(b)(5) will be available to vacate the appellate-fees judgment if Travelers ultimately prevails.

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

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