SUPREME COURT OF FLORIDA

CASE NO.: SC14-282

KELLY PATON

Petitioner, Lower Tribunal No: 4D13-2166

vs.

GEICO GENERAL INSURANCE CO.

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Throughout this brief the Petitioner will be referred to as "Paton." The Respondent will be referred to as either "Respondent" or "GEICO."

All emphasis unless otherwise indicated will be supplied by the writer.

STATEMENT OF THE CASE AND FACTS

The Respondent in the instant matter, GEICO General Insurance Company (hereinafter "GEICO"), was the Defendant in first party bad faith action, where the Petitioner Kelly Paton (hereinafter "Paton") was the Plaintiff. After prevailing in a personal injury action, Paton sued her UM insurance carrier for bad faith and obtained a favorable verdict. Thereafter Paton filed a Motion for Fees and Costs pursuant to sections 627.428 and 624.155, Florida Statutes. To that end, Paton engaged in attorney's fee discovery -- propounding an Attorney's Fees Request to Produce as well as Lodestar/Multiplier Fee Determination Interrogatories. The Request to Produce sought the following:

1. Any and all time keeping slips and records regarding time spent defending GEICO in the bad faith action in *Paton v. GEICO General*, Case No.: 09-013697 (12).

2. Any and all bills, invoices, and/or other correspondence for payment of attorney's fees for defending GEICO in the bad faith action in *Paton v. GEICO General*, Case No.: 09-013697 (12).

3. Any and all retainer agreements between you and/or your respective law firm for defending GEICO in the bad faith action in *Paton v. GEICO General*, Case No.: 09-013697 (12).

Plaintiff also propounded Lodestar/Multiplier Fee Determination Interrogatories on GEICO. Of relevance to this Petition, Interrogatory number 8 asked the following:

> 8. Did you or your attorneys spend any attorney's time in prosecuting or defending this lawsuit? If so, list a description of each such item of attorney's fees, the date incurred, hourly rate and the hours incurred on each such date. (Note: you may answer this question by stapling your time records to the answers to interrogatories as long as those records are legible and complete or indicating that you are relying on attached time records for your answer).

GEICO objected to providing the information sought by Paton, and argued that such information was both privileged and irrelevant, as the information was sought solely for the purpose of supporting her claim for attorney's fees. After a hearing on the matter where Paton declined to make any showing as to the relevancy of the material requested or the necessity for its production, the court nonetheless overruled GEICO's objections and ordered it to produce the information sought.

GEICO then petitioned the Fourth District for certiorari review. The district court granted GEICO's petition and quashed the subject orders. In so doing the Court found that the case was controlled by *Estilien v. Dyda*, 93 So.3d 1186 (Fla. 4th DCA 2012). Construing *Dyda*, the District Court found that Paton failed to meet her burden of showing that the requested material was

actually relevant, that the records sought were needed to prepare for the attorney's fee hearing, and that substantially equivalent material could not be obtained from another source. Paton then petitioned to this Court asking it to exercise its discretionary jurisdiction as, she argued, the district court's decision was in conflict with this Court's decision in *State Farm Fire & Casualty Co. v. Palma*, 555 So.2d 836 (Fla. 1990).

Ultimately this Court accepted jurisdiction, hence this Answer Brief on the Merits.

POINTS ON APPEAL

POINT I

THE DISTRICT COURT'S DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

POINT II

THE DISTRICT COURT'S DECISION REQUIRING SOME SHOWING OF RELEVANCY BEFORE ORDERING THE PRODUCTION OPPOSING COUNSEL'S BILLING RECORDS, SOUGHT SOLELY FOR THE PURPOSES OF SUPPORTING A CLAIM FOR ATTORNEY'S FEES, SHOULD BE AFFIRMED.

SUMMARY OF ARGUMENT

POINT I

This Court has accepted jurisdiction to hear this matter on the basis of an alleged conflict between the lower court's decision and this court's decision in *State Farm Fire and Casualty Company v. Palma*, 555 So.2d 836 (Fla. 1990). That decision involve the propriety of the application of a contingency fee multiplier to be applied to an attorney's fee awarded. In discussing that issue, this Court noted in passing that the insurance company's counsel expended more hours on the case than the attorney representing the insured, and that the insurance company had decided to "go to the mat" in defending that case because of the precedent it would create. Such an observation is not a holding on a question of law and did not involve substantially similarly controlling facts as did the instant action. As such, this Court should not exercise its discretionary review of this case in that the instant case does not "expressly and directly" conflict with a decision of this Court on the same question of law.

POINT II

In the instant action, the District Court did not say that the billing records of an opposing counsel can never be subject to discovery. It simply ruled that,

in this instance, Paton failed to make any showing that her opponent's billing records were relevant.

The District Court bottomed its decision on the earlier case of *Estilien v. Dyda*, 93 So.3d 1186 (Fla. 4th DCA 2012). That case took the view that records of one's opponent are, at best, only marginally relevant to the general issue of determining the appropriate amount of attorney's fees to be awarded.

In general terms, the fees of a prevailing party cannot be predicated upon the fees of one's opponent. *See, HCA Health Services of Florida, Inc. v. Hillman*, 870 So.2d 104 (Fla. 2d DCA 2003); and *Johnson v. University College of University of Alabama*, 706 F. 2d 1205, 1208 (11th Cir. 1983). While Florida has not adopted a "hard and fast" rule regarding discovery of opposing counsel's fees, such discovery has been recognized to be justified in some cases, but not others. The District Court's decision in this case acknowledges this concept and does not set forth a "hard and fast" rule regarding the production of these matters.

Recognizing this concept the District Court decided here that Paton must make some showing that the information requested is relevant to a disputed issue. Here, no such showing was made or even attempted. As such, the District Court quashed the order under review. It did not foreclose Paton to

revisit the issue at the trial court level to make such a showing and perhaps obtain the documents requested.

Finally, Paton argues that the District Court erred in requiring a Paton to make such a showing without also requiring GEICO to file a privilege log. However, that argument fails to appreciate the long-standing principle that the necessity of a privilege log does not apply where the assertion of a privilege is not document – specific, but in fact directed to a category of documents.

As such, this Court should decline to exercise its discretion to review this matter as there is no conflict with the *Palma* decision. Additionally, should the court decide to exercise its discretion and determine this matter on its merits, the decision of the Fourth District should be affirmed.

ARGUMENT, POINT ONE ON APPEAL

Paton seeks review of the District Court's decision in *GEICO Gen. Ins. Co., v. Paton*, 133 So.3d 1071 (Fla. 4th DCA 2014), claiming that decision expressly and directly conflicts with this Court's decision in *State Farm Fire & Casualty Co. v. Palma*, *supra*. For the reasons set forth below, Paton is incorrect and this Court should re-visit it grant of jurisdiction in this case and should deny the Petition on that basis.

Paton's request falls short of the Constitutional requirements for discretionary review. Article V, section 3(b)(3) limits the Court's use of this discretionary review to cases where the decision in question "***expressly and directly conflicts*** with a decision of another district court of appeal or of the supreme court ***on the same question of law***." Art. V, § 3(b)(3), Fla. Const.

This Court has further identified two "principle circumstances that support [its] jurisdiction to review district court decisions based upon alleged express and direct conflict." *Wallace v. Dean*, 3 So.3d 1035, 1039 (Fla. 2009). They are:

> [First,] the announcement of a rule of law that conflicts with a rule previously announced by this Court or another District Court; or [second,] the application of a rule of law to produce a different result in a case **that involves substantially similar controlling facts as a prior case disposed of by this Court** or another district court.

Id., at 1039 n.4 (citing to *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960)). This case involves neither of the circumstances outlined in *Wallace* or *Nielson*. Paton's request should fail as she is unable to point to any announced rule of law which conflicts with any previous pronouncements by this Court. Additionally, her claim should fail as the decision under review did not yield a conflicting result in a situation involving substantially the same facts as those involved in any of this Court's prior decisions.

The District Court's holding below does not announce a rule that conflicts with a rule previously announced by this Court. Rather, the Fourth District's decision adheres to, and is in harmony with, previous decisions from this Court and other District Courts. *See Estilien v. Dyda*, 93 So.3d 1186 (Fla. 4th DCA 2012); and, *HCA Health Services of Florida v. Hillman*, 870 So.2d 104 (Fla. 2d DCA 2003).

The decision below simply recognized that Paton's discovery request "failed to make the showing required to obtain her opponent's attorney's fee records." *Paton, supra*. Echoing the holdings in *Estilien* and *Hillman*, the District Court here noted that:

> Where the billing records of opposing counsel are sought solely for the purposes of supporting a claim for attorney's fees, the party seeking production must establish that the requested material is actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source.

Paton, at 1071.

From this language, it is clear that the District Court's decision was based upon its finding that the Paton had not met her burden of making some showing that the requested material was actually relevant to an issue in controversy regarding attorney's fees.

Nothing in the District Court's decision here conflicts with this Court's opinion in *State Farm Fire and Casualty Company v. Palma*, 555 So.2d 836 (Fla. 1990). There, in approving a lower court's decision allowing for a contingency fee multiplier to be applied to the attorney's fee award, this Court noted in passing that that the insurance company's counsel expended more hours on the case than the attorney representing the insured. Such an observation is not a holding on a question of law. Paton cannot posit a good faith argument to the effect that this Court's observation as to the number of hours expended by State Farm's counsel in *Palma* amounts to a holding on a question of law. Said another way, there can be no reasonable reading of this Court's decision in *Palma* which leads to the conclusion that in an attorney's fee dispute, the billing records of opposing counsel are relevant as a matter of law. Moreover, there is no mention in the *Palma* decision that State Farm was compelled to produce those records or that there was a showing there that the records were necessary to evidence the amount of the fees requested. Accordingly, based upon the language of the two opinions, there is no conflict between the lower court's decision and this Court's opinion in *Palma*.

Petitioner's claim likewise fails in that she is unable to show that the decision sought to be reviewed will produce a different result in a case that

involves substantially similar controlling facts as a prior case disposed of by this Court or another district court. There is nothing in the *Palma* decision which indicates that the Court was swayed or ultimately relied upon the number of hours expended by State Farm's counsel. In sum, the decision sought to be reviewed is supported by case law from several District Courts, and certainly does not directly or expressly conflict with any holding from this Court. Petitioner's claim should be denied.

ARGUMENT, POINT TWO ON APPEAL

a.

It is important to consider what the district court here did not decide in its decision in this matter. It did not say that billing records of an opposing counsel can never be subject to discovery. In its decision below it merely found that, in this instance, Paton failed to make any showing that her opponent's billing records were relevant. Indeed, in quashing the discovery orders under review, the District Court did not foreclose Paton from attempting to make the required showing on remand to the trial court.

In its decision below District Court below indicated that the case was controlled by its decision in the earlier case of *Estilien v. Dyda*, 93 So.3d 1186 (Fla. 4th DCA 2012). The *Estilien* case took the view that "the records of one's

opponent are, at best, only marginally relevant to the general issue of determining of an appropriate amount of attorney's fees to be awarded in a given case." *Id.* at 1188 (*citing HCA Health Services of Florida Inc. v. Hillman*, 870 So.2d 104 (Fla. 2d DCA 2003).

In *Estilien*, the 4th District held that:

> Where the billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees the parties seeking production must establish that the requested material is actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source.

93 So.3d at 1188-89.

In *Estilien* the court recognized that certiorari review was appropriate where a discovery order "compels production of protected and private information of the attorney and client without a showing of relevancy," as such disclosure may cause irreparable harm to the party forced to disclose it. *Id*. at 1187.

There, after obtaining a favorable verdict in an automobile accident case, the Respondent/Plaintiff sought attorney's fees pursuant to section 768.79(b), Fla. Stat. (2012). To that end, the Respondent sought the production of any and all billing records related to the opposing attorney's defense of the case.

Petitioner Estilien objected, arguing that such information was irrelevant and would require disclosure of privileged information. The trial court overruled Estilien's objection and ordered that the billing records be produced, albeit with privileged information redacted. Estilien filed a petition for certiorari which the district court granted. In so doing, the court reaffirmed the notion that "discovery of billing records of the opposing party's attorney are not discoverable if such records contain privileged material or are otherwise irrelevant." *Id.* at 1188 (citing *Heinrich Gordon Batchelder Hargrove Weihe & Gent v. Kapner*, 605 So.2d 1319, 1319 (Fla. 4th DCA 1992)) (emphasis supplied).

To be sure, Paton's request for GEICO's billing information was meant only to bolster her claim for fees and for a multiplier. As stated in the *Estilien* decision, such use is not allowed. In *HCA Health Services of Florida, Inc. v. Hillman*, 870 So.2d 104 (Fla. 2d DCA 2003), relied upon in the *Estilien* opinion, the court disapproved use of opposing counsel billing records for this purpose. The *Hillman* court expressed its rationale as follows:

> The fees of a prevailing party cannot be predicated upon the fees of one's opponent. *See Stowe v. Walker Builders Supply, Inc.*, 431 So.2d 180 (Fla. 2d DCA 1983). There are many reasons for this rule. For example, two competent attorneys handling opposite sides of a case will often, if not usually, spend substantially different amounts of time on the

> case. A deposition that may take one attorney a few minutes to prepare for and attend may require hours of work on the part of the other lawyer. A production of documents by one side may require little time by that party's attorney because the work was performed by the client's staff. As such, the same production may require days for the other attorney to review and analyze. Different clients have difference reporting requirements and sometimes different expectations as to the time the attorney will spend on their case. Without belaboring the point, ***it should be self evident that the records of one's opponents are, at best, only marginally relevant to the general issue of determining appropriate amount of attorney's fees to be awarded in a given case.***

Hillman, 870 So. 2d at 106 (emphasis supplied).

In addition to the examples cited in *Hillman*, many times an attorney's time is spent on pursuing potential avenues of a defense or prosecution of a claim, researching possible legal issues to be raised, or engaging in discussions and conferences debating the wisdom of raising those potential issues. Such matters considered and discarded would penalize the client of a creative attorney if that time was cited as justification of an opponent's request for attorney's fees.

The *Hillman* court also bottomed its decision on the applicable Florida Bar Rule. Rule 4-1.5(b) of the Rules regulating the Florida Bar sets forth the several relevant factors to be considered in determining a reasonable fee. None

of those factors, however, implicate or are predicated upon the time records of the opposition.

Ultimately, *Estilien* and *Hillman* hold that "where the billing records of opposing counsel sought solely for the purpose of supporting a claim for attorney's fees, the party seeking production must establish that the requested material is actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source." *Estilien* at page 1188-1189. Paton did not even attempt to make such a showing. And while the trial court possess the discretion to decide such matters, its discretion is restricted. *See Hillman*, at 107 ("while the trial court has discretion to permit this discovery, this discretion is quite restricted due to the nature of the material sought. In this case the trial court abused its discretion because it required no special showing before ordering the production").

b.

Paton cites as authority for her position that the District Court is in error here two Federal trial court decisions from other jurisdictions regarding the discovery of opposing counsel's billing records. Yet she ignores the 11th Circuit Court's determination that,

> This Court has questioned the relevance of the number of hours spent by defense counsel to a determination of the reasonable fee for plaintiffs' attorneys. *Harkless v. Sweeny Independent School District, 608 F.2d at 598*. The amount of hours that is needed by one side to prepare adequately may differ substantially from that for opposing counsel, since the nature of the work may vary dramatically. The case may have far greater precedential value to one side than the other. *Mirabal v. General Motors Acceptance Corp., 576 F.2d 729, 731* (7th Cir.), *cert. denied, 439 U.S. 1039, 99 S. Ct. 642, 58 L. Ed. 2d 699 (1978)*.

Johnson v. University College of University of Alabama, 706 F.2d 1205, 1208 (11th Cir. 1983).

Paton also cites the case of *Mangel v. Bob Dance Dodge, Inc.*, 739 So.2d 720 (Fla. 5th DCA 1999), as supporting authority for her argument. The District Court's decision here, however is not inconsistent or in conflict with *Mangel.* It merely expounds on the principles set out by the *Mangel* court that Florida has not adopted a "hard and fast" rule regarding discovery of opposing counsel's fees and that such discovery may be justified in some cases but not in others. Here the district court acknowledged that there are some occasions where such discovery may be appropriate.

Courts have long required the testimony of attorney's fee experts in hearings to assess fees to a prevailing party. *Crittenden Orange Blossom Fruit v. Stone*, 514 So.2d 351, 352-53 (Fla. 1987) ("It is well settled that the testimony of an expert witness concerning a reasonable attorney's fee is

necessary to support the establishment of the fee."). It should be through this avenue that fees are justified, not merely on the basis of an opponent's time records. For, as the 11th Circuit has noted,

> Plaintiffs had many avenues to obtain evidence to support their fee petition. Plaintiffs submitted numerous affidavits from other local attorneys concerning their customary fee for litigation-related work. Other affidavits from attorneys discussed the reasonableness of the fee request. In addition, the court allowed plaintiffs to submit much information concerning defense fees. The court advised plaintiffs at the hearing that they could inquire about defense counsel's customary fee, just not their fee in this particular case, and plaintiffs were able to question one defense attorney about the hourly rate he charged in this case.
>
> *Johnson, supra,* at page 1208-09.

Certainly, Paton is free to depose GEICO's fee expert or engage in other avenues of discovery which might yield relevant information while not requiring GEICO to turn over privileged or irrelevant material; she has not, however, endeavored to do so.

c.

As seen above a decision allowing a review of an opponent's billing records may be justified in certain situations, as recognized by the *Hillman* court. Also, Respondent would posit that such discovery may be appropriate where the opposing counsel takes the view that that the totality of the hours

sought to be compensated for were "grossly excessive" or "exorbitant." In such a case a comparison of each side's records may aid a court in divining a reasonable fee. *See e. g. Serricchio v. Wachovia Sec., LLC,* 258 F.R.D. 43, 46 (D. Conn. 2009). Here, though, as seen above, there was no such defense raised to Paton's claim of fees. Paton merely alleged she was entitled to the information and wanted it produced without any showing as to it relevance.

d.

Finally, Paton argues that the court below erred in its requirement of compelling a showing before production of the matters requested without requiring a privilege log. This argument, however, fails to appreciate the long-standing principle that the necessity of a privilege log should not apply where the assertion of privilege is not document-specific, but category-specific and the category itself is protected. *See Matlack v. Day*, 907 So.2d 577 (Fla. 5th DCA 2005) (Griffin, J., specially concurring).

Here, as the objection raised was not document specific but addressed to the entire category of items requested the requirement of a privilege log would not be necessary.

CONCLUSION

This court should decline to exercise its discretion to review this matter as there is no conflict with this court's *Palma* decision. Should that discretion be applied to this matter, based upon the aforegoing, the decision of the Fourth District should be affirmed.

CERTIFICATE OF TYPEFACE COMPLIANCE

The typeface font used in the body of this document is New Times Roman 14 which complies with the Rules of this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on January 5, 2015.

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