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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC14-282

Lower Case No. 4D13-2166

KELLY PATON,

Petitioner,

-vs-

GEICO GENERAL
INSURANCE CO.

Respondent.
_____/

BRIEF OF PETITIONER ON JURISDICTION

On review from the Fourth District Court of Appeal of the State of Florida

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PREFACE

This is Petitioner's request for discretionary review of a decision of the Fourth District Court of Appeal dated January 8, 2014, granting Respondent's Petition for Writ of Certiorari.

Petitioner will be referred to as "Petitioner" or "Plaintiff." Respondent will be referred to as "Respondent" or "Defendant."

STATEMENT OF THE CASE AND FACTS[1]

This Petition arises out of an insurance dispute. Plaintiff prevailed in the trial court and, pursuant to section 627.428, Florida Statutes, was entitled to an attorneys fee, including a multiplier. Plaintiff requested production of defense counsel's time and billing records to, in part, "support the award of a multiplier." The trial court compelled the production and GEICO filed a Petition for Writ of Certiorari.

The Fourth District quashed the order compelling production, even after recognizing that the discovery was sought for an award of a multiplier. Citing Estilien v. Dyda, 93 So.2d 1186 (Fla. 4th DCA 2012); HCA Health Srvcs. of Fla., Inc. v. Hillman, 870 So.2d 104 (Fla. 2d DCA 2003), it held that discovery of opposing counsel's time records was not relevant, and that Plaintiff had failed to prove that the substantial equivalent information was not available elsewhere.

The court below granted the writ, and quashed the discovery order.

[1] Because the opinion is only one page long, citations to the opinion would all be the same and are, therefore, unnecessary. All citations to the opinion have been omitted.

SUMMARY OF ARGUMENT

The decision below conflicts with this Court's decision in State Farm Fire & Cas. Co. v. Palma, 555 So. 2d 836, 837 (Fla. 1990) in which this Court held that the trial court awarded fee, and the multiplier, awarded to plaintiff was reasonable, in part by comparing the hours expended by plaintiff to the hours expended by defendant. The court below, by contrast, held that the time records of opposing counsel are not relevant to the question of a reasonable fee due to Plaintiff.

The decision of the Fourth District in this case follows a line of cases from the Fourth District and Second District which prohibit such discovery unless the party seeking to compel the time records can show that the records are relevant. See HCA Health Services of Florida, Inc. v. Hillman, 870 So.2d 104, 107 (Fla. 2d DCA 2003) and Estilien v. Dyda, 93 So.3d 1186 (Fla. 4th DCA 2012). These decisions hold that the time spent by opposing counsel is only marginally relevant, and must be proven to be relevant in every case by some special circumstances, such to settle a dispute over a particular billing event, not to decide whether the amount of time spent as a whole was reasonable.

The district courts' limitation of discovery is contrary to Palma because the court limited discovery to exclude relevant information. Because the central question at issue in an attorneys' fees claim is whether the time spent and work performed by counsel is reasonable, the time spent and work performed by

opposing counsel will always be relevant.

ARGUMENT

THE FOURTH DISTRICT'S DECISION THAT OPPOSING COUNSEL'S TIME AND BILLING RECORDS ARE NOT RELEVANT TO THE ISSUE OF A FEE MULTIPLIER EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN STATE FARM FIRE & CAS. CO. V. PALMA, 555 SO.2D 836 (FLA. 1990), WHICH UTILIZED OPPOSING COUNSEL'S TIME RECORDS AS ONE FACTOR JUSTIFYING A FEE MULTIPLIER.

The Florida Constitution gives this Court discretionary subject-matter jurisdiction over any decision of a district court that expressly and directly conflicts with a decision of the Court, or of another district court, on the same question of law. See Art. V, §3(b)(3), Fla. Const. The Court has discretionary conflict jurisdiction over a decision of a district court that misapplies this Court's decisions. See Wallace v. Dean, 3 So.3d 1035, 1040 (Fla. 2009).

The Decision Below

The decision below, Geico Gen. Ins. Co. v. Paton, 39 Fla. L. Weekly D132 (Fla. 4th DCA 2014), arises out of an insurance dispute. As a result of the lawsuit, Paton was entitled to payment of his attorneys' fees. As part of the preparation for the motion for fees, Plaintiff requested defense counsel's billing records.

The Fourth District held that opposing counsel's billing records were not discoverable, applying the "controlling precedent" of Estilien v. Dyda, 93 So.3d 1186, 1188-89 (Fla. 4th DCA 2012) (quoting HCA Health Srvcs. of Fla., Inc. v. Hillman, 870 So.2d 104, 107 (Fla. 2d DCA 2003)):

> [W]here the billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees, '[t]he 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.'

The court held that Plaintiff had not made the required showing, and quashed the discovery order.

The Conflict Cases and Analysis

In State Farm Fire & Cas. Co. v. Palma, 555 So.2d 836, 837 (Fla. 1990), this Court held that the court awarded fees to the plaintiff was reasonable based, in part, on evidence of the amount of time spent by opposing counsel. The work performed by defendant, along with other evidence, indicated that defendant had decided to "go to the mat" on the issue, which made it reasonable for plaintiff's counsel to spend hundreds of hours litigating a claim that had a very small monetary value. This Court wrote:

In computing this fee, the trial court found that 650 was a reasonable

> amount of hours and that a reasonable hourly rate was $150. Further, the trial court applied a multiplier of 2.6. We note that State Farm's counsel expended 731 hours on this case. On appeal, the district court affirmed and found the fee to be reasonable in light of the extraordinary circumstances presented, stating:
>
> > It appears that State Farm decided to "go to 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 specifically utilized the information requested (opposing counsel's time records) to prove the need for a fee multiplier. The request in the court below was also for use in determining a multiplier, a fact which the Fourth District recognized. However, despite recognizing that the information was sought to prove the right to a multiplier, the Fourth District quashed the discovery order because the information was not relevant. That decision contradicted the holding in Palma.

The decision in Palma did not set forth any new or unique need for additional relevance, nor did it impose an additional burden of having to show that the substantial equivalent being otherwise unavailable. This Court's decision is clear that the amount of time and the work performed by opposing counsel is relevant to the question of whether the work performed by Plaintiff's counsel is

relevant.

Despite the holding in Palma, the Second District held that opposing counsel's time records are not discoverable. See HCA Health Services of Florida, Inc. v. Hillman, 870 So.2d 104, 107 (Fla. 2d DCA 2003). That decision was followed by the Fourth District in Estilien v. Dyda, 93 So.3d 1186 (Fla. 4th DCA 2012). In Hillman, the court held that the only issues which are relevant to calculation of fees due are listed in Rule 4-1.5(b) of the Rules Regulating The Florida Bar sets forth the relevant factors to be considered in determining a reasonable fee, and the amount of time spent by opposing counsel is not listed among the factors. It therefore concluded the information was not relevant.

By relying on this reasoning, the Fourth District misapplied or ignored the decision in Palma. The court below also misapplied this Court's decisions recognizing that relevant evidence is evidence "tending to prove or disprove a material fact." § 90.401, Fla. Stat.; Ramirez v. State, 810 So.2d 836 (Fla. 2001) (reiterating the statutory definition).

The district court's additional requirement that the "substantial equivalent" not be available elsewhere imposes a burden applicable to work product privileged materials, but the opinion does not reflect that any privileged information was requested, nor does the court state that a work product privilege was asserted. The only objection to the production was that it was irrelevant, and the imposition of an

additional "substantial equivalence" burden is contrary to the definition of relevance. Moreover, because only Defendant and defense counsel know what work was performed, and how many hours billed, for litigating the case, they are the only source of the information, so it is difficult to interpret the court's imposition of a burden to prove the information is not available elsewhere.

In short, the decision below misapplies the law of relevance, and conflicts with this Court's decision in Palma.

CONCLUSION

This Court should grant discretionary review to resolve the conflict created by the Fourth District's decision in this case.

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 March 10, 2014.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Jurisdiction is Times New Roman 14pt.

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