

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

APPELLATE DIVISION (CIVIL): "AY"
Case No.: 502009AP000067XXXXMB
(Consolidated w/ 2009AP000072)
L.T. No.: 502007SC007082XXXXMB

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Appellant,

v.

BENJAMIN MARK MORROW,

Appellee.

Opinion filed: January 11, 2011

✓Appeal from the County Court in and for Palm Beach County,
Judge Nancy Perez.

- ✓For Appellant/Petitioner: Kenneth P. Hazouri, de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, 332 North Magnolia Avenue, Orlando, FL 32801.
- ✓For Appellee/Respondent: Julie H. Littky-Rubin, Lytal, Reiter, Clark, Fountain & Williams, LLP, P.O. Box 4056, West Palm Beach, FL 33402.

PERCURIAM.

REVERSED.

The Appellant, State Farm Mutual Automobile Insurance Company ("State Farm"), seeks review of the trial court's Final Judgment entered in favor of the Appellee, Benjamin Mark Morrow ("Morrow"), holding that State Farm confessed judgment by producing the insurance policy to Morrow and based upon that confession of judgment, Morrow was entitled to fees as well as the trial court's Order and Final Judgment Awarding Fees and Costs in favor of Morrow in the amount of \$23,800.00 as attorney's fees, pre-judgment interest of \$5.51 per day together

with the sum of \$397.00 for costs bearing interest at the legal rate and \$2,400.00 for expert witness fees. We find that, though there was a technical confession of judgment, Morrow was not entitled to attorney's fees under section 627.428 of the Florida Statutes and reverse.

In this case, Morrow suffered injuries when he was involved in a car accident while driving his work vehicle. Pursuant to section 627.4137 of the Florida Statutes, Morrow requested the insurance policy information of his fiancée from her insurance provider, State Farm. State Farm did not provide the requested information within the thirty day time frame proscribed by section 627.4137 and consequently, Morrow filed suit in a one count complaint for breach of contract on May 25, 2007. Morrow's complaint alleged that he was traveling as a passenger in a vehicle owned by his fiancée. State Farm subsequently supplied the requested insurance policy information to Morrow on July 23, 2007 at which point Morrow filed a Motion for Attorney Fees and Costs/Confession of Judgment.

On October 1, 2008, after a litany of motions and oral arguments, the trial court granted Morrow's Motion for Attorney Fees and Costs/Confession of Judgment. State Farm then filed an Emergency Motion for Reconsideration on November 2, 2009. In it, State Farm revealed that a companion circuit court case existed in which Morrow filed a lawsuit against State Farm for Uninsured Motorist benefits under McCullough's policy (the "UM Case"). It argued that the fee award in the instant case was based upon a faulty declarations sheet from the UM case stating Morrow was a named insured under the policy.¹ State Farm argued that because Morrow was not entitled to benefits in the UM case, he was not entitled to fees in the instant case. State Farm

¹ As a part of the UM case, an affidavit of an underwriting supervisor was filed to correct the faulty declarations sheet stating that Morrow was an additional driver under the policy and entitled to liability coverage under the policy while driving a covered vehicle, but not otherwise an insured. Summary Judgment was entered in favor of State Farm in the UM case on September 2, 2008.

further argued that the proper procedure called for Morrow to file the suit for a copy of policy information with the suit for benefits to avoid inconsistent rulings.

On November 3, 2009, the trial court issued an Omnibus Order denying State Farm's Emergency Motion for Reconsideration. In the Order, the court held that because State Farm produced the policy information and because this production amounted to a confession of judgment, Morrow was entitled to attorney's fees. On November 4, 2009, Final Judgment was entered in favor of Morrow stating that based on the confession of judgment, Morrow was entitled to attorney's fees. State Farm timely appealed this Order ("Merits Appeal"). On December 9, 2009, after conducting a hearing, the trial court issued an Order and Final Judgment Awarding Attorney's Fees and Costs. State Farm timely appealed this order ("Fee Appeal"). The appeals were consolidated by motion on January 29, 2010.

The confession of judgment doctrine is a legal fiction used to create a judgment where none was rendered. *Basik Exports & Imports, Inc. v. Preferred Nat. Ins. Co.*, 911 So. 2d 291, 293 (Fla. 4th DCA 2005). Though no benefits are directly at issue such that the traditional confession of judgment jurisprudence applies, the logic surrounding the doctrine of confession of judgment is still persuasive. A functional equivalent of a confession of judgment occurs when a request is made (whether for insurance benefits, a contract, etc.) and that request is denied resulting in the filing of a lawsuit which in turn causes the opposing party to yield to the request. Such is the case in the instant appeal. Morrow requested policy information and State Farm did not provide it within the thirty day period section 627.4137 requires. Morrow filed suit² and State Farm subsequently provided the information rather than litigate his entitlement to that

² Though Morrow's Complaint is for breach of contract for damages, State Farm acknowledged repeatedly that the purpose of the Complaint was to obtain the insurance policy information. Furthermore, it is well-settled that "[o]rdinarily, it is the facts alleged, the issues, and the proof, not the form of the prayer for relief, which determine the nature of the relief to be granted." *Raskin v. Raskin*, 625 So. 2d 1314, 1315 (Fla. 4th DCA 1993).

information. This amounts to a confession of judgment or verdict in favor of Morrow.

In its Final Judgment in Favor of the Plaintiff, the trial court held that based upon State Farm's confession of judgment, Morrow was entitled to fees under section 627.428. State Farm argues that the trial court erred in its determination that a fee award was appropriate because Morrow is not one of the enumerated parties entitled to recover fees and costs under section 627.428. Morrow in turn argues that he is an omnibus insured because he was entitled to claim first-party PIP benefits under the policy.

In Florida, attorney's fees are generally not awarded unless provided by contract or statute. *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993). Any statute awarding attorney's fees will be strictly construed. *Consolidated Ins. Services v. Freeman*, 848 So. 2d 444, 447 (Fla. 4th DCA 2003). The pertinent statute in the instant case is section 627.428(1) of the Florida Statutes. The statute states in relevant part:

Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428(1), Fla. Stat. (2009).

Both a named insured and a named beneficiary are specifically designated as the insured or beneficiary under the policy. *Continental Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, 374 (Fla. 2008). An omnibus insured is "one who is covered by a provision in the policy but not specifically named or designated." *Id.* The rights of an omnibus insured "flow directly from his or her status under a clause of the insurance policy without regard to the issue of liability." *Id.*

The Florida Supreme Court in *Industrial Fire & Cas. Ins. Co. v. Prygrocki*, 422 So. 2d 314 (Fla. 1982), utilized the term “omnibus insured” to extend the attorney’s fee provision of section 627.428(1) to a pedestrian who was not a named or contracted insured. In *Prygrocki*, a pedestrian was struck by a vehicle insured by the petitioner. *Id.* at 315. The policy contained a clause that extended payments for medical expenses to pedestrians struck by the insured vehicle. *Id.* The respondent made a claim under the policy and the petitioner denied coverage. *Id.* Respondent filed suit at which point the petitioner agreed to pay the proceeds but refused to pay attorney’s fees. *Id.* The trial court ruled in favor of the petitioner on the issue of fees. *Id.*

The district court reversed and held that the respondent was an “omnibus insured” under the personal injury protection coverage. *Id.* Based upon this status, the respondent was entitled to statutory fees. *Id.* The Supreme Court of Florida granted petition to review and affirmed. *Id.* at 316. Reasoning that precluding omnibus insureds from recovering attorney’s fees “erroneously interpret[ed] the statute”, the Court stated that though third-party claimants were not within the class of insureds that could recover, because the respondent was insured under the personal injury protection coverage of the policy, he was entitled to recover fees under the statute. *Id.* at 315. The Florida Legislature amended section 627.428, adding the phrase “omnibus insured” to those entitled to recover under the statute. *Id.* at 315 n.1. It did not define what constituted an omnibus insured.

The Fourth District Court of Appeal, in *State Farm & Cas. Co. v. Kambara*, 667 So. 2d 831 (Fla. 4th DCA 1996), attempted to define omnibus insured. In *Kambara*, the appellee was a resident of a building insured by a premises liability policy issued by the appellant. *Id.* at 832. The appellee was injured on the premises and sought reimbursement of medical expenses from the appellant. *Id.* The parties stipulated that the appellee was entitled to benefits but not

attorney's fees under section 627.428(1) of the Florida Statutes. *Id.* The court reasoned that because the appellee's rights to collect first-party benefits from the policy flowed from his status without regard to liability, he was an omnibus insured for the purposes of section 627.428. *Id.* at 833-34. Therefore, it would frustrate the intent of the legislature if the appellee was precluded from recovering attorney's fees. *Id.* at 834. The court also recognized that permissive users in automobile liability insurance and personal-injury protection contracts could qualify as an omnibus insured under the statute. *Id.* at 833.

It is well-settled that the purpose behind section 627.428 is to discourage insurers from contesting valid claims by reimbursing an insured for attorney's fees when the insured must sue to collect "benefits owed to them." *Pepper's Steel & Alloys, Inc. v. United States*, 850 So. 2d 462, 465 (Fla. 2003). In order for a court to award fees to the prevailing party, a bona fide dispute over claimed benefits must exist instead of a "mere possibility of a dispute." *State Farm Florida Ins. Co. v. Lorenzo*, 969 So. 2d 393, 398 (Fla. 5th DCA 2007). The purpose of the statute is to discourage litigation and encourage prompt payment of legitimate claims. *Goff v. State Farm Florida Ins. Co.*, 99 So. 2d 684, 688 (Fla. 2d DCA 2008).

Further demarcating the boundaries of proper section 627.428 fee awards, the Fifth District Court of Appeal addressed the issue of whether section 627.428 applied to suits not involving insurance proceeds. *Progressive American Ins. Co. v. Rural/Metro Corp. of Florida*, 994 So. 2d 1202 (Fla. 5th DCA 2008). In *Progressive*, an insured was injured in an accident and Rural Metro ("RMA") accepted an assignment from the insured for the personal injury protection benefits under the Progressive contract. *Id.* RMA sought certain insurance policy information, including a copy of the policy under section 627.4137 of the Florida Statutes. *Id.*

Progressive brought a declaratory judgment action to determine whether it had a legal obligation to provide the requested information. *Id.* at 1205. The trial court dismissed the suit. *Id.*

The district court held that Progressive was entitled to judgment as a matter of law and reversed the lower court. *Id.* On appeal, both parties sought attorney's fees under various sections of the Florida Statutes, including section 627.438(1). *Id.* at 1208-09. The district court stated that RMA was not entitled to attorney's fees because it would not recover insurance proceeds under the current suit. *Id.* at 1209. The court reasoned that the statute was consistently interpreted to "authorize recovery of attorney's fees from an insurer only when the insurer has wrongfully withheld payment of the proceeds of the policy." *Id.*; *Government Employees Ins. Co. v. Gonzales*, 512 So. 2d 269, 270 (Fla. 3d DCA 1987); *Logue v. Clarendon Nat. Ins. Co.*, 777 So. 2d 1122, 1124 (Fla. 4th DCA 2001). The district court held that "because insurance proceeds were not at issue and because RMA was not entitled to recover any wrongfully withheld payment, section 627.428 [did] not apply." *Progressive*, 994 So. 2d at 1209. The Florida Supreme Court has made it clear that the word "wrongfully" does not imply something sinister, but merely means an "incorrect denial of benefits." *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000).³

Morrow concedes he must be an omnibus insured in order to be entitled to attorney's fees. It is clear that Morrow is not the named insured or a beneficiary. Morrow is an additional driver covered under the liability provision of the contract. This provision only applies if he was in an accident in a covered vehicle and sued. That, however, was not the case here. Morrow was not forced to sue to collect benefits owed to him under a policy of insurance, nor was he sued

³ The Court in *Ivey* stated in dicta that "any dispute" that led to a judgment against an insurer prompts a fee award. *Ivey*, 774 So. 2d at 684. This statement was used to refute the contention that bad faith or a level of "wrongfulness" had to be shown. The Court clarified that it was the dispute and later payment that triggered a fee award rather than any notion of wrongdoing. *Id.* Therefore, it is the withholding of benefits that triggers fee awards rather than *any* dispute.

based upon his liability for an accident triggering the right to a defense under the liability coverage of the policy.

No case that Morrow cites in support of an award involves facts such as these. *Wollard*, *Prygrocki*, *Basik*, and *Kambara* all concerned first-party insureds or third-party claimants whose benefits were derived from the circumstances under which the claim arose. If attorney's fees are awarded in this case it will encourage litigants to file separate lawsuits when a policy is not delivered to a potential omnibus insured. This does not enforce the intent behind section 627.428 to reduce litigation, and in fact has the opposite effect.

Furthermore, this was not a bona fide dispute over benefits as contemplated by *Lorenzo*. Indeed, Morrow had to fabricate facts in the complaint in order to assert coverage under McCullough's policy. Morrow states that the trial court determined that he fell within the class of those who have a right to a copy of insurance policy information. Morrow also states he had a right to PIP benefits.⁴ Both of these are not true. PIP benefits are not liability benefits. See *Progressive*, 994 So. 2d at 1207. Morrow would be an omnibus insured under the policy only if he were driving a covered vehicle with permission of the insured and was subsequently liable for damages.⁵ He was not and therefore he cannot recover fees. Finally, because this lawsuit was over production of policy information rather than wrongfully withheld benefits, as in *Progressive*, a fee award under section 627.428 is not appropriate.

Accordingly, the final judgment and fee award are hereby REVERSED. Morrow's Motion to Tax Appellate Attorneys' Fees and Court Costs is DENIED.

FINE, SASSER, BARKDULL, JJ., concur.

⁴ In the UM case, it was decided that Morrow was not entitled to coverage. It is clear that, under the facts stemming from his accident, Morrow was not entitled to collect first party benefits under an omnibus clause and therefore, is not an omnibus insured entitled to an award of attorney's fees.

⁵ Morrow's entitlement to benefits would not flow without regard to liability as stated in *Kambara*.