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Insurance -- Personal injury protection -- Attorney's fees -- Medical providers were not prevailing parties entitled to attorney's fees award pursuant to section 627.428 when they obtained judgments no better than amounts offered by insurer in response to presuit demand letters -- Neither failure to comply with proposal for settlement statute and rule 1.442 nor failure to provide explanation of benefits invalidates settlement offers -- Attorney's fees award is vacated

UNITED AUTOMOBILE INS. CO. Appellant, v. A REHAB ASSOC. OF SOUTH FLORIDA CORP. A/A/O FRITZNEL LECONTE, Appellee, and UNITED AUTOMOBILE INS. CO., Appellant, v. MED PLUS CENTERS, INC., A/A/O FRITZNEL LECONTE, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case Nos. 12-413 AP, 13-148 AP, 12-381 AP, 13-147 AP. L.T. Case No. 07-01814 SP 24. January 9, 2015. On Appeal from the County Court for Miami-Dade County, Judge Rodolfo Ruiz. Counsel: Michael J. Neimand, Miami Gardens, for Appellant. Joel S. Perwin, Joel S. Perwin, P.A., Miami; and Scott J. Jontiff and Jeannie M. Jontiff, Jontiff & Jontiff, Miami, for Appellee.

(Before HIRSCH, VERDE, and DE LA O, JJ.)

OPINION

(DE LA O, Judge.) United Automobile Insurance Company ("United") appeals two final judgments for attorney's fees entered in favor of two medical providers pursuant to section 627.428, Florida Statutes. Presented with an appeal involving attorney's fees arising from a PIP benefits lawsuit, we are reminded of the immortal lines from Simon and Garfunkel's "Sounds of Silence" -- *Hello darkness, my old friend, I've come to talk with you again.*

BACKGROUND

Fritznel Leconte ("Leconte") was allegedly injured in an automobile accident on July 22, 2006, while insured by a PIP insurance policy issued by United. Leconte received treatment from A Rehab Associates of South Florida Corp. ("A Rehab") and Med Plus Centers, Inc. ("Med Plus") (collectively, the "Providers"). Leconte assigned his PIP claims against United to the Providers. The cases were tried separately, but were consolidated for appellate review.

The specific facts of each case are different in detail, but identical in concept. In response to a presuit statutory Demand Letter, United made a determination in each case that it was only liable for pre-IME treatments. As a result, United offered A Rehab $595.20[1] and Med Plus $1,324.80.[2] After lengthy litigation, two juries returned verdicts in favor of A Rehab for $595.20 and Med Plus for $1,324.80, respectively.[3]

Despite securing judgments no better than United offered presuit, the Providers filed motions for attorney's fees as "prevailing parties" pursuant to Florida Statutes sections 627.428 and 627.736. We address whether an insured is a "prevailing insured" pursuant to section 627.428 when it obtains a judgment no better than the amount offered by the insurer presuit.

DISCUSSION

The American Rule provides that each party shall bear its own attorney's fees unless an award of fees is "authorized by statute or by agreement of the parties." *Florida Patient's Comp. Fund v. Rowe,* 472 So. 2d 1145, 1148 (Fla. 1985).[4] The Providers agree that the *sole* basis for their claims to attorney's fees is Florida Statutes section 627.428 (as authorized by section 627.436(8)). *See* Appellee's Answer Brief at 16. Section 627.48 provides in relevant part:

> (1) 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.

In *Danis Industries Corp. v. Ground Improvement Techniques, Inc.,* 645 So. 2d 420 (Fla. 1994), the Florida Supreme Court was asked to decide whether the "prevailing party" test it enunciated in *Moritz v. Hoyt Enterprises,* 604 So. 2d 807 (Fla. 1992),[5] applied to awards of attorney's fees pursuant to section 627.428. *Danis,* at 421. Because section 627.428 does not refer to a "prevailing party" (but rather to a "prevailing insured or beneficiary"), and because it authorizes attorney's fees only in favor of the insured, the Court concluded that the *Moritz* prevailing party test was inapplicable. Instead, the Court held that under section 627.428 "a 'prevailing insured or beneficiary' is one who has obtained a judgment greater than any offer of settlement previously tendered by the insurer." *Danis,* at 421. "Absent that," the Court concluded, "the insured or beneficiary is entitled to no fee award." *Id.* In short, *Danis* recognized that an insured can prevail at trial but not be a "prevailing insured or beneficiary" for purposes of an attorney's fees award under section 627.428.

The Court explained that to cut off an insured's statutory right to fees under section 627.428, the insurer must offer the insured *all* amounts to which the insured is entitled *at the time of the offer.*

> We emphasize, however, that any offer of settlement shall be construed to include all damages, attorney fees, taxable costs, and prejudgment interest which would be included in a final judgment if the final judgment was entered on the date of the offer of settlement. We make this point so that it is plain that the insurer or surety relieves itself from further exposure to the insured or beneficiary's attorney fees at the point in time that the insurer or surety offers in settlement the full amount which the insured or beneficiary would be entitled to recover from the insurer or surety at the time the offer is made. By our construction, an insurer or surety cannot avoid attorney fees by making a belated offer of its insurance coverage or any amount which would be less than the insured or beneficiary could recover in a final judgment as of the date of the offer. On the other hand, an insured or beneficiary cannot continue to incur attorney fees and costs or accrue interest and have those awarded against the insurer or surety after the insurer or surety has offered the full amount for which it has liability on the date it offers to make the payment.

Danis, at 421-22 (Fla. 1994). The latter scenario is precisely the situation here. United made presuit settlement offers which included all sums it owed to each Provider if judgment had been entered on the date of the settlement offer. The Providers rejected these offers, litigated the cases extensively, but did no better at trial. *Danis* compel us to reverse the trial court's decision awarding the Providers attorney's fees in this case.[6]

The Providers raise two central arguments to avoid application of *Danis:* (1) United's settlement offer did not

comply with the requirements for Proposal for Settlement under section 768.79 and Florida Rule of Civil Procedure 1.442; and (2) United's settlement offer did not comply with section 627.736(4) of the PIP statute. Neither argument has merit.

The Requirements for Proposals for Settlement are

Inapplicable to Qualifying Settlement Offers under Danis

The Providers primarily argue that United's presuit settlement offer did not comply with the Proposal for Settlement statute (section 768.79) nor Florida Rule of Civil Procedure 1.442. The Providers are correct, but it is of no moment. There is a *fundamental* difference between a Proposal for Settlement and a settlement offer. The former is a statutory creature which allows *any* party (including an insurer) to recover fees from its opponent if certain conditions are met -- even where no right to recover fees is otherwise provided by law or agreement. In the context of a lawsuit over PIP benefits, a Proposal for Settlement can create a statutory right to attorney's fees in favor of an insurer where none exists otherwise because section 627.428 is a "one-way street" allowing awards of attorney's fees only in favor of insureds.

By contrast, settlement offers are governed by common law principles of contract. If accepted, the parties are bound. More importantly, even if unwisely rejected, a settlement offer never subjects an insured to having to pay an insurer's attorney's fees. A rejected settlement offer merely sets a marker by which a trial court can measure whether the insured prevailed and, therefore, whether the insured is entitled to recover attorney's fees against the insurer. The Florida Supreme Court recognized this obvious distinction in *State Farm Mutual Auto. Insurance Co. v. Nichols,* 932 So. 2d 1067 (Fla. 2006) [31 Fla. L. Weekly S358a].

> The question here is whether the insurer, having made an offer that eliminates the insured's entitlement to further attorney's fees under section 627.428, can recover its *own* fees if it meets the conditions of the offer of judgment statute. Neither *Danis* nor *DeSalvo* resolved that question.

Id. at 1074.

The Providers' effort to impose the requirements of the Proposal for Settlement statute and Rule on all settlement offers is without basis in law.[7] If the Provider's interpretation were correct, *no* presuit settlement offer would ever be "valid" under Florida law because, as the Providers correctly note, Proposals for Settlement cannot be served until 90 days after litigation was commenced. Yet, in *Danis* the Florida Supreme Court expressly addressed the effect of an insurer's presuit settlement offer and its impact on an award of attorney's fees to an insured. The Proposal for Settlement statute and Rule played no role *Danis,* and they play no role in the instant case.

Our interpretation is strengthened by the fact it is faithful to the very purpose of the PIP statute: prompt resolution of claims. *"Danis* recognized [ ] that the 'one-way street' under section 627.428 cannot be used as a detour around settlement negotiations." *State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So. 2d 1067, 1074 (Fla. 2006) [31 Fla. L. Weekly S358a]. To adopt the Providers' arguments would allow (or more accurately, encourage) insureds to litigate over portions of claims that the insurer has already offered to pay, knowing they have nothing to lose because the insurer has to pay the attorney's fees even if they are generated litigating over claims upon which the insured will not prevail. Worse still, the Providers' position invalidates *all* presuit settlement offers by extending the scope of Rule 1.442 to all settlement offers, rather than to only Proposals for Settlements. To what end? Such a result is inefficient and runs counter to the PIP statutes' goal of reducing

litigation and encouraging expeditious payment of legitimate claims.[8] *See United Auto. Ins. Co. v. Rodriguez,* 808 So. 2d 82, 86 (Fla. 2001) [26 Fla. L. Weekly S747a] ("The provisions [of section 627.736] were intended to promote the prompt resolution of PIP claims by imposing several reasonable penalties on insurers who pay late."); *Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 683-84 (Fla. 2000) [25 Fla. L. Weekly S1103a] ("Without a doubt, the purpose of the no-fault statutory scheme is to provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption. To this end, section 627.736(4)(b), Florida Statutes (1995), clearly provides that PIP insurance benefits 'shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.").

There is no rational universe where a party that litigates for years over disputed and undisputed claims is considered to have prevailed when it wins the undisputed claims and loses the disputed claims. The Florida Supreme Court operates in the rational universe and has emphatically held that insureds who reject settlement offers that would make them whole[9] cannot seek attorney's fees under section 627.428.

> Unless and until the insurer offers to pay the insured's damages plus attorney's fees, costs, and interest, the "one-way street" under section 627.428 entitles the insured to attorney's fees. But once such an offer is made and rejected, the "one-way street" ends. The insured, having turned down the full amount she is owed, cannot claim the protection of section 627.428.

Nichols, 932 So. 2d at 1074.

The PIP statute worked exactly as intended here. United timely offered to pay the full benefits to which the Providers were entitled. The Providers turned the offer down and chose to litigate. They did not prevail in the litigation. Therefore, pursuant to the American Rule, they are responsible for their own attorney's fees.

Section 627.736(4) Does Not Invalidate United's Settlement Offer

The Providers also argue that United's settlement offers were invalid because they did not comply with section 627.736(4)(b), which provides in relevant part:

> (b) Personal injury protection insurance benefits paid pursuant to this section are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. However:
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> * * *
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> 2. If an insurer pays only a portion of a claim or rejects a claim, the insurer shall provide at the time of the partial payment or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay and any information that the insurer desires the claimant to consider related to the medical necessity of the denied treatment or to explain the reasonableness of the reduced charge if this does not limit the introduction of evidence at trial. The insurer must also include the name and address of the person to whom the claimant should respond and a claim number to be referenced in future correspondence.

The Providers again graft portions of a statute to other areas where they do not belong. The purpose of section 627.736(4) is to define the time period by when an insurer must pay a claim or it becomes overdue.[10] This section does not set the criteria for when an insured prevails, nor does it authorize a cause of action. *See United*

Auto. Ins. Co. v. A 1st Choice Healthcare Sys., 21 So. 3d 124, 129 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2268a] ("There is nothing in the text of section 627.736(4)(b) from which one can deduce that the legislature intended an insured have a private right of action against an insurer for failure to provide an EOB."). It is telling that the Providers assert that United's purported[11] failure to comply with section 627.736(4) renders its settlement offer invalid without citing any case or statutory provision supporting this assertion. Telling, but not surprising, because section 627.736(4) has no relevance to the issues before us, and will not justify an award of attorney's fees to insureds that did not prevail at trial.

CONCLUSION

The trial court erred in granting the Providers' motion for attorney's fees. Therefore, its decision is REVERSED, the award of attorney's fees is VACATED, and the matter is remanded for proceedings consistent with this opinion.[12] (HIRSCH, J. and VERDE, J. concur.)

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[1]A Rehab's presuit Demand Letter sought $2,418.00. United offered payment of $595.20 for pre-IME treatments, interest, postage, and penalty.

[2]Med Plus's presuit Demand Letter sought $6,602.00. United offered payment of $1,324.80 for pre-IME treatments, interest, postage, and penalty.

[3]The Providers correctly concede that the Providers were not entitled to any award of attorney's fees at the time United made the settlement offers because litigation had not commenced. Section 627.428 grants an insured the right to recover attorney's fees only where the insured obtains a judgment or decree against the insurer.

[4]United's claim that statutes awarding attorney's fees are in derogation of the common law and must be strictly construed (appellant's Initial Brief at 9) is rejected by *Rowe.* "At the outset, we note that some of the decisions of this Court contain the historically incorrect statement that attorney fee statutes are 'in derogation of the common law.' " *Rowe,* at 1147 n.3.

[5]The test provides that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees. . . . [T]he fairest test to determine who is the prevailing party is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." *Moritz v. Hoyt Enterprises, Inc.,* 604 So. 2d 807, 810 (Fla. 1992).

[6]The trial court correctly rejected United's alternate argument that the motion for attorney's fees should be denied based on its mid-litigation Offer of Judgment pursuant to section 768.79. United abandoned this alternate theory on appeal when it did not challenge the trial court's ruling in this respect.

[7]The Providers do raise significant policy arguments which might militate in favor of promulgating some standards for presuit settlement offers, similar to the rules for Proposals for Settlement. *See* Appellee's Answer Brief at 25-26. Our role, however, is to apply the law as enacted by the Legislature and interpreted by higher courts, not to speculate about what the law should be. *Danis* spells out the precise requirements for a settlement offer to extinguish an insured's right to an attorney's fees award under section 627.428. United's presuit settlement offer met those requirements.

[8]For example, assume an insured files a claim for $9,000.00 in PIP benefits, but the insurer believes it is only obligated to pay $100 in benefits. *Danis* provides that if the insurer offers $100 in benefits, plus interest and penalties, before litigation is initiated, the insurer has no liability for the insured's attorney's fees if the insured recovers $100 or less in benefits. If the insured recovers $101 or more, the insurer is liable for all of the insured's attorney's fees.

If the Providers are correct, on the other hand, the insurer will be liable for all attorney's fees at the end of the litigation even if the insured recovers only the $100 the insurer offered day one. To avoid this result, the insurer must either: (1) pay the full $9,000, plus interest and penalties, even if it has a strong argument that it owes only $100; or (2) serve a Proposal for Settlement 90 days after the litigation commences for $100 (or for $125 if it wants to shift attorney's fees), plus all attorney's fees incurred by the insured to date (which can easily exceed the insured's $9,000 claim), plus interest and penalties. The Providers' interpretation of Florida law gives the insurer no avenue for resolving the claim efficiently and encourages the insurer to delay offering the $100 until 90 days after litigation commences. A statutory interpretation which results in generating unnecessary litigation should be viewed with healthy skepticism. *See Brown v. Saint City Church of God of Apostolic Faith, Inc.*, 717 So. 2d 557, 560 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1667b] (it is a "fundamental tenet of statutory construction [ ] that we not give a literal interpretation to the language of a statute when to do so would lead to an unreasonable or ridiculous conclusion").

[9]"Whole" being defined as receiving the benefits to which the insured *is* due, not what the insured *claims* to be due.

[10]Overdue payments "bear simple interest at a rate of ten percent per year; and [ ] whenever an insured files an action for payment of PIP benefits and prevails, the insured is entitled to attorneys' fees." *United Auto. Ins. Co. v. Rodriguez,* 808 So. 2d 82, 86 (Fla. 2001) [26 Fla. L. Weekly S747a].

[11]We recognize that United does not concede it failed to comply with section 627.736(4). *See* Appellants' Consolidated Reply Brief at 6-7. The trial court did not rely on the alleged violation of section 627.736(4)(b) for its ruling and, therefore, made no factual findings in this regard. Therefore, we do not address the validity of the Providers' claim, only the legal import of the purported failure on United's presuit settlement offer. Because we hold that even if United failed to comply with this section it would not render its presuit settlement offer invalid, we do not remand to the trial court for further findings.

[12]United's request that we order the Providers to show cause why we should not sanction them pursuant to Florida Rule of Appellate Procedure 9.410(a) is respectfully denied.

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