O.A.G. Corp. v. Britamco Underwriters, Inc.
Fla.App. 3 Dist.,1998.

District Court of Appeal of Florida,Third District.
O.A.G. CORPORATION d/b/a La Casa Criolla and Georgina Messir, Appellants,
v.
BRITAMCO UNDERWRITERS, INC., Appellee.
No. 97-1208.

Jan. 14, 1998.
Rehearing Denied March 25, 1998.

Liability insurer sought declaratory judgment of no coverage after it voluntarily dismissed tort claims against insureds. The Circuit Court, Dade County, Gisela Cardonne, J., granted costs, but denied insureds' request for attorney fees. Their appeal was treated as petition for certiorari. The District Court of Appeal, Gersten, J., held that voluntary dismissal of suit without prejudice before bringing action for declaratory judgment did not entitle insureds to attorney fees or costs.

Certiorari denied.

Schwartz, C.J., dissented and filed opinion.
West Headnotes
[1] Certiorari 73 17

73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 k. Particular Proceedings in Civil Actions. Most Cited Cases
Proper method to obtain review of orders awarding or denying costs and fees after voluntary dismissal is by petition of certiorari.

[2] Costs 102 194.48

102 Costs
102VIII Attorney Fees
102k194.48 k. On Dismissal, Nonsuit, Default, or Settlement. Most Cited Cases
Rule providing for assessment of “costs” in action that has been voluntarily dismissed does not contemplate assessment of attorney fees. West's F.S.A. RCP Rule 1.420(d).

[3] Costs 102 194.16

102 Costs
102VIII Attorney Fees
102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases
“Costs” is not generally understood to include attorney fees absent express contractual provision or statute.

[4] Insurance 217 3585

217 Insurance
217XXXI Civil Practice and Procedure
217k3584 Costs and Attorney Fees
217k3585 k. In General. Most Cited Cases
(Formerly 217k675)
Insurer's voluntary dismissal of suit without prejudice before bringing action for declaratory judgment did not entitle insureds to attorney fees or costs under statute entitling insured to fees upon rendition of judgment or decree against insurer; voluntary dismissal without prejudice was not functional equivalent of judgment in favor of insureds, and they were not “prevailing parties.” West's F.S.A. § 627.428(1).

***785** Manuel Vega, Jr., Coral Gables; Lauri Waldman Ross, Miami, for appellants.
***786** Fertig and Gramling, and Raissa I. Rouse, Fort Lauderdale, for appellee.

Before SCHWARTZ, C.J., and GERSTEN and SHEVIN, JJ.
GERSTEN, Judge.
Appellants, O.A.G. Corporation d/b/a La Casa Criolla and Georgina Messir (hereafter collectively referred to as “insureds”), appeal an order entered after a voluntary dismissal by appellee, Britamco Underwriters, Inc. (“Britamco”), which granted costs but denied attorney's fees. We treat this appeal as a petition for certiorari and deny.

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Britamco is a liability insurance carrier which provided insurance to the insureds. Britamco filed a complaint against the insureds in March of 1995 seeking a determination of no coverage in a personal injury action. The complaint was later amended to add tort claims against the insureds for fraud and rescission.

Thereafter, Britamco took a voluntary dismissal without prejudice. Three days after the dismissal, Britamco refiled its action as a simple declaratory judgment action, withdrawing the prior tort claims.

The insureds responded by serving motions for attorney's fees and costs, citing Section 627.428, Florida Statutes (1997), and Florida Rule of Civil Procedure 1.420(d). Britamco did not dispute the insureds' entitlement to costs, but claimed the insureds were not prevailing parties and thus not entitled to attorney's fees. The trial court agreed, and granted the insureds costs but denied their request for attorney's fees. The insureds then filed this appeal.

[1] First, as a procedural matter, an order denying attorney's fees is non-final and thus not reviewable on direct appeal. *See* *Sholkoff v. Boca Raton Community Hosp. Inc.*, 693 So.2d 1114 (Fla. 4th DCA 1997). The proper method to obtain review of orders awarding or denying costs and fees after a voluntary dismissal is by petition of certiorari. *See* *Chatlos v. City of Hallandale*, 220 So.2d 353 (Fla.1968). We therefore treat this appeal as a petition for certiorari.

[2][3] Turning our attention to the merits, Rule 1.420(d) provides for the assessment of "costs" in an action that has been voluntarily dismissed. However, Rule 1.420(d) does not contemplate the assessment of attorney's fees, and the term "costs" is not generally understood to include attorney's fees absent an express contractual provision or statute. *See* *Wilson v. Rose Printing Co., Inc.*, 624 So.2d 257 (Fla.1993); *Puig v. Pasteur Health Plan, Inc.*, 640 So.2d 101 (Fla. 3d DCA 1994).

[4] Because here there is no agreement providing for attorney's fees, the insureds argue such fees are awardable under Section 627.428. Section 627.428 provides for an award of attorney's fees to an insured or beneficiary who prevails and states specifically that:

(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.

§ 627.428(1), Florida Statutes (1995)(emphasis added).

The purpose of the statute is "to discourage insurers from contesting valid claims and to reimburse successful policy holders forced to sue to enforce their policies." *Danis Indus. Corp v. Ground Improvement Techniques, Inc.*, 645 So.2d 420, 421 (Fla.1994). An insurer's good faith in bringing suit is irrelevant. The insurer must pay attorney's fees if the controversy is within the scope of Section 627.428 and the insurer loses. *See* *Ins. Co. of North America v. Lexow*, 602 So.2d 528 (Fla.1992).

The question here is whether an insured is entitled to prevailing party attorney fees under Section § 627.428, where the insurer voluntarily dismisses its coverage action without prejudice and thereafter refiles a simplified complaint for declaratory judgment. In other***787** words, does Britamco's voluntary dismissal without prejudice constitute the functional equivalent of a judgment in favor of the insureds?

The insurer's dismissal was without prejudice and thus did not constitute an adjudication on the merits.FN1 Fla.R.Civ.P. 1.420(a)(1). There is therefore no prevailing party for purposes of an award of attorney's fees under Section 627.428. *See* *Puig v. Pasteur Health Plan, Inc.*, 640 So.2d at 101.

FN1. Such a dismissal is not the functional equivalent of a confession of judgment or verdict because the plaintiff retains the right to refile the complaint. *See* Fla.R.Civ.P.

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> 1.420(a); *Wollard v. Lloyd's and Companies of Lloyd's,* 439 So.2d 217 (Fla.1983). Only a second dismissal based on or including the same claim will operate as an adjudication on the merits. Fla.R.Civ.P. 1.420(a)(1).

We are not persuaded by the insureds' argument that the case of *Wollard v. Lloyd's and Companies of Lloyd's,* 439 So.2d 217 (Fla.1983), compels a different result. In *Wollard,* the Supreme Court of Florida interpreted Section 627.428 as allowing attorney's fees where an insurer ultimately makes payment on an insurance claim. The court stated "the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the Insured." *See* *Wollard v. Lloyd's and Companies of Lloyd's,* 439 So.2d at 218.

Wollard stands for the proposition that once an insurer agrees to settle a disputed case, the settlement furnishes the basis for an award of attorney's fees to the insured. As previously stated by this Court:

The issue of awarding attorney's fees under section 627.428, Florida Statutes, has been litigated and is now well settled in the State of Florida. Where an insurer has agreed to settle a disputed case, it has, in effect declined to defend its position in the pending suit. The insurer's payment of the claim has been deemed the functional equivalent of a confession of judgment or a verdict in favor of the insured. Such settlement furnishes the basis for an award of attorney's fees to the insured. *Wollard v. Lloyd's and Companies of Lloyd's,* 439 So.2d 217 (Fla.1983); *Fortune Insurance Company v. Brito,* 522 So.2d 1028 (Fla. 3d DCA 1988).

Avila v. Latin American Prop. & Cas. Ins. Co., 548 So.2d 894, 894-95 (Fla. 3d DCA 1989). *See* *U.S. Fidelity & Guaranty Co. v. Rosado,* 606 So.2d 628 (Fla. 3d DCA 1992); *Losicco v. Aetna Cas. and Sur. Co.,* 588 So.2d 681 (Fla. 3d DCA 1991); *Hopkins v. The Vizcayans,* 582 So.2d 689 (Fla. 3d DCA), *review denied,* 592 So.2d 683 (Fla.1991). The *Wollard* doctrine does not apply because Britamco did not decline to defend its position regarding coverage-it has not offered to settle or pay the claim.

Under Section 627.428, an insured must obtain some form of recovery due to the voluntary dismissal to be considered a prevailing party for attorney's fees. *See* *Danis Industries Corp. v. Ground Improvement Techniques, Inc.,* 645 So.2d at 420; *Baker Protective Services v. FP Inc.,* 659 So.2d 1120 (Fla. 3d DCA 1995), *review denied,* 669 So.2d 250 (Fla.1996); *Fortune Ins. Co. v. Cardoso,* 592 So.2d 1245 (Fla. 3d DCA 1992). In this case, the insureds recovered nothing from Britamco's voluntary dismissal.FN2

> FN2. Even if we follow the dissent's reasoning and maintain that the insureds somehow prevailed by the voluntary dismissal, they are still not entitled to fees. Section 627.428(1) requires the insureds to obtain a judgment greater than any offer of settlement previously tendered by the insurer in order to be a prevailing party. *See* *Baker Protective Services v. FP Inc.,* 659 So.2d at 1120. "Absent that, the insured or beneficiary is entitled to no fee award." *Danis Industries Corp. v. Ground Improvement Techniques, Inc.,* 645 So.2d at 421. Here, Britamco offered nothing, and the insureds recovered nothing. Thus, the insureds cannot be entitled to fees.

Simply, the insureds are prematurely seeking attorney's fees prior to a determination regarding coverage in their favor and/or payment of the claim. The litigation has neither concluded nor has Britamco conceded on the merits. Should the insureds eventually prevail in court, or should Britamco at a later date decide to settle the case, then the insureds will be entitled to recover reasonable attorney's fees. *See* *FIGA v. R.V.M.P. Corp.,* 681 F.Supp. 806 (S.D.Fla.1988).

However, we hold that an insurer's voluntary dismissal without prejudice does not ***788** entitle the insured to attorney's fees, as well as costs, pursuant to Section 627.428 and Rule 1.420(d). Because we find the insureds cannot be considered as prevailing parties under these circumstances, the trial court did not depart from the essential requirements of the law in denying attorney's fees. *See* *Danis Industries Corp. v. Ground Improvement Techniques, Inc.,* 645 So.2d at 420; *Baker Protective Services v. FP Inc.,* 659 So.2d at 1120; *Fortune Ins. Co. v. Cardoso,* 592

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So.2d 1245. Accordingly, certiorari is denied.

Certiorari denied.

SHEVIN, J., concurs.
SCHWARTZ, C.J., dissents.
SCHWARTZ, Chief Judge (dissenting).
On the authority of what I believe to be the closely analogous and conceptually indistinguishable case of *Wollard v. Lloyd's and Companies of Lloyd's,* 439 So.2d 217 (Fla.1983), I would grant certiorari. In my view, the majority is simply wrong in concluding that the voluntary dismissal effected by the insurance company does not constitute a "judgment" in favor of the defendant insured. While it is true that the adjudication is without prejudice to the filing of another action-which in fact need never be filed-this is irrelevant to the ultimate conclusion that the voluntary dismissal of the plaintiff's case unquestionably means that the defendant has "won" that piece of litigation. See *Gries Inv. Co. v. Chelton,* 388 So.2d 1281 (Fla. 3d DCA 1980)(judgment is "final" even if without prejudice to another action); *Capital Bank v. Knuck,* 537 So.2d 697 (Fla. 3d DCA 1989)(same); *Derma Lift Salon, Inc. v. Swanko,* 419 So.2d 1180 (Fla. 3d DCA 1982)(same); *Orange Motors of Coral Gables, Inc. v. Rueben H. Donnelley Corp.,* 415 So.2d 892 (Fla. 3d DCA 1982)(same). In my opinion, when the plaintiff in this scenario is an insurance company seeking a determination of no coverage and the thus successful defendant is a putative insured, section 627.428, Florida Statutes (1997), mandates the assessment of attorneys fees.

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