

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

JUAN ESPAILLAT,

Appellant,

v.

CASE NO.: CVA1 08-38

Lower Court Case No.: 2007-SC-9229

PERMANENT GENERAL ASSURANCE CORPORATION,

Appellee.

Appeal from the County Court,
for Orange County,
Nancy Clark, Judge.

Justin H. Presser, Esquire,
for Appellant.

Kari Metzger, Esquire,
for Appellee.

Before STRICKLAND, SHEA, WATTLES, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Juan Espailat (Espailat) timely appeals the trial court's order denying plaintiff's motion to enforce settlement, entered on May 28, 2008. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Espailat filed suit against Appellee Permanent General Assurance Corporation (PGAC) seeking a declaration as to whether PGAC should extend personal injury protection (PIP) coverage to Espailat for injuries and losses resulting from a motor vehicle accident on August 9,

2005. At the time of Espaillat's accident, he was insured under an insurance contract issued by PGAC which provided for PIP benefits and other coverage. Upon seeking PIP benefits for necessary medical, rehabilitative, nursing and remedial care, PGAC terminated Espaillat's coverage for PIP benefits asserting that Espaillat failed to attend two compulsory medical examinations. Following PGAC's denial of coverage, Espaillat filed a complaint for declaratory judgment on July 26, 2007.

On September 18, 2007, PGAC filed a motion to dismiss stating that Espaillat failed to provide PGAC with a written notice of intent to initiate litigation as required by section 627.736(11)(a), Florida Statutes. It appears that PGAC's motion to dismiss was abandoned because Espaillat filed a notice of settlement on February 29, 2008, stating that the matter had been resolved and he would be filing a dismissal upon completion of settlement paperwork. Approximately one month later, Espaillat filed a motion to enforce the settlement stating that settlement funds and attorney's fees and costs were to be tendered to Espaillat on or before March 19, 2008, but Espaillat had not received any funds as of March 24, 2008. Espaillat sought an additional 12% interest on the settlement proceeds pursuant to section 627.4265, Florida Statutes, along with reasonable attorney's fees for the preparation and filing of the motion to enforce settlement.

In response to Espaillat's motion to enforce, PGAC filed a motion to strike stating that at no time after the settlement was reached on February 28, 2008, did PGAC contest the settlement or intimate to Espaillat that it did not agree that a settlement had been reached. PGAC admitted that the settlement check was not forwarded to Espaillat within twenty days due to inadvertence; however, checks for additional interest were automatically issued pursuant to section 627.4265, Florida Statutes. PGAC argued that section 627.4265, Florida Statutes, does not provide for

payment of additional attorney's fees if the settlement check is not received by the twentieth day. PGAC further argued that Espaillat failed to provide a factual or legal basis for the motion to enforce.

On May 28, 2008, the trial court entered an order denying Espaillat's motion to enforce finding that PGAC did not contest the terms of the underlying settlement and PGAC properly included an additional amount in excess of the statutory interest amount for the late payment. The trial court held that Espaillat was not entitled to any additional attorney's fees. This appeal followed.

When an appeal involves a purely legal matter the standard of review is de novo. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000). When an appeal calls for judicial interpretation of a statute, then the appeal is a purely legal matter. Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 377 (Fla. 5th DCA 1998). The instant appeal invokes judicial interpretation of section 627.4265, Florida Statutes. Therefore, the standard of review is de novo.

It is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1980); Wright v. Wright, 431 So. 2d 177, 178 (Fla. 5th DCA 1983).

This appeal involves a declaratory judgment action under chapter 86, Florida Statutes, and the application of attorney's fees under section 627.428, Florida Statutes, to section 627.4265, Florida Statutes. Section 627.428(1), Florida Statutes, provides that:

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 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.

Also at issue in this appeal is section 627.4265, Florida Statutes, which states:

In any case in which a person and an insurer have agreed in writing to the settlement of a claim, the insurer shall tender payment according to the terms of the agreement no later than 20 days after such settlement is reached. The tender of payment may be conditioned upon execution by such person of a release mutually agreeable to the insurer and the claimant, but if the payment is not tendered within 20 days, or such other date as the agreement may provide, it shall bear interest at a rate of 12 percent per year from the date of the agreement; however, if the tender of payment is conditioned upon the execution of a release, the interest shall not begin to accrue until the executed release is tendered to the insurer.

Under Florida law, each party generally bears its own attorney's fees unless a contract or statute provides otherwise. Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1148 (Fla. 1985). One such statute that mandates an award of attorney's fees when an insured prevails against an insurer is section 627.428, Florida Statutes. Espailat asserts that he is entitled to additional attorney's fees under section 627.428, Florida Statutes, because he had to file a motion to enforce settlement when PGAC did not tender the settlement proceeds within 20 days as contemplated by the settlement agreement and section 627.4265, Florida Statutes. Espailat is correct in his assertion that a statutory obligation for attorney's fees cannot be avoided simply by tendering payment before judgment is entered; however, the Court finds that he has failed to prove reversible error by the trial court.

Espailat asserts that PGAC's change in position in tendering settlement proceeds and additional interest to him was a direct result of his motion to enforce which was the equivalent of a confession of judgment for which additional attorney's fees and costs are now due. However,

there is no showing that PGAC's payment of the settlement proceeds was a direct result of Espailat's motion. The Court finds that the agreement to settle the claim, not the delayed payment of the settlement proceeds, was the change in position that triggered entitlement to attorney's fees and costs under section 627.428, Florida Statutes. It is undisputed that attorney's fees and costs were included in the settlement agreement and the payment of additional interest under section 627.4265, Florida Statutes, due to PGAC's untimely tender of the settlement proceeds was uncontested. Moreover, we find that the cases cited by Espailat are distinguishable from the instant case in that in those cases, either attorney's fees were not included in the settlement amount or the settlement agreement was later contested by one of the parties. Wollard v. Lloyd's & Companies of Lloyd's, 439 So. 2d 217 (Fla. 1983)(insured entitled to attorney's fees pursuant to Florida Statute 627.428 where parties agreed to settle claim but stipulated that the matter of any award of attorney's fees would be submitted to trial court); United Auto. Ins. Co. v. Zulma, 661 So. 2d 947 (Fla. 4th DCA 1995)(insurer's settlement and payment of claim is functional equivalent of a confession of judgment and insured is entitled to attorney's fees); Losicco v. Aetna Cas. & Sur. Co., 588 So. 2d 681 (Fla. 3d DCA 1991)(trial court has no discretion to deny attorney's fees to insured where insurer first disputes claim and then settles case after lawsuit is filed); Amador v. Latin Am. Prop. & Cas. Ins. Co., 552 So. 2d 1132 (Fla. 3d DCA 1989)(insured entitled to attorney's fees where insurer first disputed claim and then settled case after lawsuit was filed); Friedman v. Allstate Indem. Co., 11 Fla. L. Weekly Supp. 651b (Fla. 9th Cir. Ct. May 14, 2004)(insured entitled to attorney's fees and interest where insurer did not timely tender settlement proceeds and has not stipulated to attorney's fees and entitlement to interest under Florida Statute 627.4265); Rehab Right, Inc. v. U.S. Sec. Ins. Co., 11 Fla. L. Weekly Supp. 342b (Fla. 9th Cir. Ct. Jan. 29, 2004)(plaintiff entitled to attorney's fees

and costs incurred to enforce settlement agreement; however, the opinion does not state whether attorney's fees and costs were included in settlement agreement or whether defendant contested settlement agreement or payment of interest for untimely payment of settlement proceeds); Raymond D. Clites, D.C., P.A. v. United Services Auto. Ass's, 8 Fla. L. Weekly Supp. 391a (Fla. 13th Cir. Ct. April 5, 2001)(plaintiff entitled to attorney's fees where parties executed settlement agreement and parties later disputed whether settlement agreement encompassed the execution of a release).

The Court further notes that the record reflects that Espaillat was put on notice that counsel for PGAC was moving offices and the payment of the settlement proceeds could be delayed. The record also reflects that Espaillat did not attempt to communicate with PGAC's counsel regarding the status of the proceeds prior to serving the motion to enforce settlement on the 21st day following the settlement agreement.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Order Denying Plaintiff's Motion to Enforce Settlement," entered on May 28, 2008, is **AFFIRMED** and "Appellant's Amended Motion to Tax Attorney Fees and Costs" is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 8 day of October , 2009.

_____/s/_____
TIM SHEA
Circuit Judge

_____/s/_____
STAN STRICKLAND
Circuit Judge

_____/s/_____
BOB WATTLES
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Justin H. Presser, Esquire**, Weiss Legal Group, P.A., 698 North Maitland Avenue, Maitland, Florida 32751 and **Kari A. Metzger, Esquire**, Metzger Law Group, P.A., 4100 W. Kennedy Blvd., Suite 213, Tampa, Florida 33602 on the ____8____ day of _____ October _____, 2009.

_____/s/_____
Judicial Assistant