

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

**MAURICIO CHIROPRACTIC WEST,
as assignee of Alesha Kirkland,**

Appellant,

v.

CASE NO.: 2010-CV-15-A
Lower Court Case No.: 2008-CC-19076-O

MGA INSURANCE COMPANY, INC.,

Appellee.

Appeal from the County Court,
for Orange County,
John E. Jordan, Judge.

Kevin B. Weiss, Esquire,
for Appellant.

Scott W. Dutton, Esquire,
for Appellee.

Before O’KANE, KOMANSKI, and MCDONALD, J.J.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING TRIAL COURT

Appellant Mauricio Chiropractic West, as assignee of Alesha Kirkland, (“Mauricio Chiropractic”) timely appeals the trial court’s “Final Judgment Awarding Attorney’s Fees and Costs Against Gainsco Insurance Companies,” entered on March 5, 2010, in which the trial court awarded attorney’s fees and costs in favor of Mauricio Chiropractic and against the Appellee, MGA Insurance Company, Inc. (“MGA”), for expenses incurred before MGA’s confession of judgment, but in which it also refused to award attorney’s fees and costs to Mauricio

Chiropractic for the time that its counsel spent litigating issues related to attorney's fees and costs after MGA's confession of judgment, including, specifically, its failure to file a written motion to tax attorney's fees and costs with the court. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). Pursuant to Florida Rules of Appellate Procedure 9.040(d), 9.400(b), and 9.410 and sections 59.46, 627.428(1), and 627.736(8), Florida Statutes, Mauricio Chiropractic requests an award of appellate attorney's fees and costs.

Facts and Procedural History

Mauricio Chiropractic sued MGA for the payment of PIP benefits under an insurance policy issued to Alesha Kirkland. Mauricio Chiropractic alleged that MGA failed to pay covered medical expenses resulting from a covered motor vehicle accident.

Less than one month after the complaint was filed and litigation had commenced, MGA sent a letter to Mauricio Chiropractic's counsel, in which it agreed to pay the claim and conceded Mauricio Chiropractic's entitlement to an award of attorney's fees and costs. However, MGA requested Mauricio Chiropractic's counsel's time sheets associated with this case because it viewed his claimed hours and requested fees to be excessive.

What ensued thereafter was 13 months of litigation focused solely on determining the amount of attorney's fees and costs to which Mauricio Chiropractic was entitled. This 13-month period culminated at a hearing on attorney's fees and costs in January of 2010. During this hearing, for the first time, MGA asserted that, though Mauricio Chiropractic had served MGA with its Motion for Attorney's Fees and Costs, it had failed to file the motion with the court. Therefore, MGA argued, Mauricio Chiropractic should be procedurally barred from receiving an award of attorney's fees and costs. MGA's counsel was careful to maintain that MGA was not challenging Mauricio Chiropractic's entitlement to fees, but rather, it was merely stating that

Mauricio Chiropractic was procedurally barred.

The trial judge ordered the parties to file memoranda with the court in support of their respective positions regarding whether Mauricio Chiropractic may recover attorney's fees and costs despite failing to file a written motion for more than 13 months after MGA had confessed judgment. In Mauricio Chiropractic's memorandum of law, in addition to asserting that it was still entitled to recover attorney's fees and costs, it argued that, pursuant to section 627.428, Florida Statutes, it was further entitled to an award of attorney's fees and costs associated with litigating the issue of its failure to file a written motion because that issue is an entitlement issue.

In the final judgment, the trial judge found that a written motion requesting an award of attorney's fees and costs was not required in light of MGA's confession that Mauricio Chiropractic was entitled to such an award. Therefore, the trial judge ruled in favor of Mauricio Chiropractic on that issue and awarded attorney's fees and costs that it incurred prior to MGA's confession of judgment. However, the trial judge found that Mauricio Chiropractic was not entitled to an award of attorney's fees and costs associate with litigating the issue of its failure to file a written motion. This appeal followed.

Discussion of Law

On appeal, Mauricio Chiropractic asserts that it is entitled to an award of attorney's fees and costs associated with litigating the issue of its failure to file a written motion for attorney's fees and costs. It argues that, although MGA initially conceded its entitlement to attorney's fees and costs, MGA changed its position at the fee hearing by claiming that Mauricio Chiropractic should be procedurally barred from recovering fees and costs. On the contrary, MGA argues that it was not challenging Mauricio Chiropractic's entitlement to attorney's fees and costs, but rather, it was merely raising a procedural problem.

The trial court did not clearly state its reason for denying Mauricio Chiropractic's request for an award of attorney's fees and costs associated with litigating the issue of its failure to file a written motion. In the final judgment, the trial court merely stated that Mauricio Chiropractic was not entitled to such an award based on the theory that MGA disputed its entitlement to attorney's fees and costs, and the trial court stated that MGA's focus was on whether Mauricio Chiropractic had to first file a written motion.

However, implicit in the trial court's final judgment is the purely legal conclusion that MGA's procedural challenge did not amount to a dispute regarding Mauricio Chiropractic's entitlement to an award of attorney's fees and costs. Furthermore, apparently based on this legal conclusion, the trial court refused to award attorney's fees and costs to Mauricio Chiropractic for litigating the issue of its failure to file a written motion.

"[T]he standard of review for a pure question of law is de novo." Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000) (citing Askew v. Firestone, 421 So. 2d 151, 154 (Fla. 1982)). Additionally, the interpretation of a statute presents a purely legal matter. Ellis v. Hunter, 3 So. 3d 373, 378 (Fla. 5th DCA 2009) (citing Kephart v. Hadi, 932 So. 2d 1086, 1089 (Fla. 2006)). Therefore, a trial court's interpretation of a statute is subject to de novo review. Joseph L. Riley Anesthesia Assocs. v. Stein, 27 So. 3d 140, 142-43 (Fla. 5th DCA 2010) (citing Health Options, Inc. v. Palmetto Pathology Servs., P.A., 983 So. 2d 608 (Fla. 3d DCA), review denied, 994 So. 2d 1104 (Fla. 2008)).

Section 627.428, Florida Statutes, "clearly provides that attorney's fees *shall* be decreed against the insurer when judgment is rendered in favor of the insured or when the insured prevails on appeal." State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993) (emphasis added). "[I]f the dispute is within the scope of section 627.428 and the insurer loses,

the insurer is *always obligated* for attorney's fees." Id. (quoting Ins. Co. of N. Am. v. Lexow, 602 So. 2d 528, 531 (Fla. 1992)) (emphasis added).

Attorney's fees may be properly awarded under section 627.428 for litigating the issue of *entitlement* to attorney's fees. Id. at 833. "When an insured is compelled to sue to enforce an insurance contract because the insurance company has contested a valid claim, the relief sought is both the policy proceeds *and* attorney's fees pursuant to section 627.428." Id. at 832. "Because [an attorney's services in litigating the insured's entitlement to an award of attorney's fees] are rendered in procuring full payment of the judgment, the insured [has] an interest in the fee recovered." Id. at 833. However, attorney's fees may not be awarded for litigating the *amount* of attorney's fees because "such work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment." Id.

Despite MGA's rhetoric in which, on the one hand, it claims that it is not disputing Mauricio Chiropractic's entitlement to attorney's fees and costs, and on the other hand, it asserts that Mauricio Chiropractic should be procedurally barred from recovering attorney's fees and costs, there is no question that MGA sought to prevent Mauricio Chiropractic from receiving any award of attorney's fees and costs. Whether MGA based its argument on procedure or substantive law or statute or rule of court, it was seeking to avoid paying Mauricio Chiropractic's attorney's fees and costs to which Mauricio Chiropractic would have otherwise been entitled under section 627.428. MGA was not challenging the amount of attorney's fees to be awarded based upon Mauricio Chiropractic's failure to file a written motion. Rather, MGA was seeking a complete bar on recovery.

If MGA had prevailed in the matter, Mauricio Chiropractic would have been barred from recovering its attorney's fees and costs incurred prior to MGA's confession of judgment, and

therefore it would have been denied full payment of the judgment, as defined in Palma. See 629 So. 2d at 832-33. Mauricio Chiropractic's interest in the outcome of this matter, and its counsel's work in the matter, fit the description of litigating the issue of entitlement to fees and costs described in Palma. See Id. However MGA may wish to phrase it, in essence, it was challenging Mauricio Chiropractic's then-present entitlement to recovery of attorney's fees and costs. Therefore, we find that the issue of Mauricio Chiropractic's failure to file a written motion for attorney's fees and costs was an entitlement issue, as defined in Palma and for which attorney's fees are properly awarded pursuant to section 627.428.

Awards of attorney's fees to a prevailing insured pursuant to section 627.428 are mandatory. See § 627.428(1), (3), Florida Statutes (2011); Palma, 629 So. 2d at 832. When a prevailing insured is compelled to litigate its entitlement to attorney's fees, it is entitled to an award of attorney's fees incurred in doing so pursuant to section 627.428. Palma, 629 So. 2d at 833. Thus, Mauricio Chiropractic is entitled to an award of attorney's fees that it incurred for litigating the issue of its failure to file a written motion for attorney's fees and costs. Therefore, we find that, in addition to the attorney's fees and costs that Mauricio Chiropractic has already been awarded for those incurred in this case prior to MGA's confession of judgment, it is entitled to an award of attorney's fees and costs associated with litigating its entitlement to attorney's fees and costs despite its failure to file a written motion, incurred at the fee hearing on January 27, 2010, and thereafter, until the trial court rendered its final judgment on March 5, 2010.

Appellate Attorney's Fees and Costs

Mauricio Chiropractic filed a motion to tax appellate attorney's fees and costs pursuant to Florida Rules of Appellate Procedure 9.040(d), 9.400(b), and 9.410 and sections 59.46, 627.428(1), and 627.736(8), Florida Statutes. Because Mauricio Chiropractic is the prevailing

party at trial and on appeal, as assignee of an insured, in an action pursuant to section 627.736, it is entitled to an award of appellate attorney's fees under rule 9.400, pursuant to sections 627.736(8), 627.428(1), and 59.46. However, Mauricio Chiropractic is not entitled to an award of attorney's fees as a sanction against MGA, under rule 9.410, because it has failed to satisfy the requirements of rule 9.410.

Finally, Florida Rule of Appellate Procedure 9.400(a) provides, in material part: "Costs shall be taxed *by the lower tribunal* on motion served within 30 days *after issuance of the mandate.*" (Emphasis added). Therefore, we deny Mauricio Chiropractic's motion to tax appellate costs because it is not appropriate to file it with this Court or at this time.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Final Judgment Awarding Attorney's Fees and Costs Against Gainsco Insurance Companies," entered on March 5, 2010, is **REVERSED** as to its refusal to grant attorney's fees and costs to Mauricio Chiropractic associated with litigating its entitlement to such an award, including fees and costs associated with litigating the issue of its failure to file a written motion with the court; the "Appellant's Motion to Tax Appellate Attorney's Fees and Costs" is **GRANTED IN PART**, as to its entitlement to appellate attorney's fees pursuant to Florida Rule of Appellate Procedure 9.400(b) and sections 59.46, 627.428(1), and 627.736(8), Florida Statutes, and **DENIED IN PART**, as to its request for attorney's fees as a sanction pursuant to Florida Rule of Appellate Procedure 9.410; and this case is **REMANDED** to the trial court for the assessment of appellate attorney's fees and for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the
____ 2nd _____ day of _____ August _____, 2012.

_____/S/_____
JULIE H. O'KANE
Circuit Judge

_____/S/_____
WALTER KOMANSKI
Circuit Judge

_____/S/_____
ROGER J. MCDONALD
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: **Kevin B. Weiss, Esq., Weiss Legal Group, P.A.**, 698 North Maitland Avenue, Maitland, Florida 32751 and **Scott W. Dutton, Esq., Dutton Law Group**, Post Office Box 260697, Tampa, Florida 33685-0697 on the _____ 2nd _____ day of _____ August _____, 2012.

_____/S/_____
Judicial Assistant