

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D2024-0307
LT CASE NO. 2015-003378-SP-21

VELO CHIRO FIZIK, INC., a/a/o
ALFONSO QUIROGA,

Appellant,

vs.

ALLSTATE FIRE AND CASUALTY
COMPANY,

Appellee.

_____ /

**APPELLANT'S MOTION FOR AWARD OF
APPELLATE ATTORNEY'S FEES**

COMES NOW, Appellant, by and through its undersigned counsel, pursuant to section 627.428, Florida Statutes, and Florida Rule of Appellate Procedure 9.400, and moves for entry of an order taxing appellate attorneys' fees in this matter, stating as follows:

1. Section 627.428, Florida Statutes, provides 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.

2. This suit was filed by Appellant alleging Appellee wrongfully breached the underlying insurance contract through its unlawful failure to fully pay Appellant's charges.
3. This is the second time this case has been before this Court. In the first case, this Court reversed the trial court's summary final judgment concluding that Allstate had filed no summary judgment demonstrating that it properly reimbursed all of Appellant's charges.
4. Based on Appellant prevailing in the first appeal, this Court granted Appellant's motion for appellate attorney's fees conditioned on Appellant ultimately prevailing before the trial court.
5. On remand, the trial court has again entered final summary judgment for Allstate.
6. Appellant has appealed from the trial court's summary final judgment.

7. Just as in the first appeal, the award of appellate attorney's fees to an insured is mandatory in any dispute arising out of a dispute regarding insurance coverage which proceeds to judgment against the carrier. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000); *Progressive Express Ins. Co. v. Physician's Injury Care Ctr., Inc.*, 906 So. 2d 1125, 1127 (Fla. 5th DCA 2005) ("section 627.428(1) specifically provides for an award of appellate attorney's fees upon rendition of a judgment or decree in actions in which the insured prevails").

8. Although section 627.428 was recently repealed by Chapter 2023-15, §11, Laws of Florida, that repeal does not retroactively apply to this case. Under Section 29 of that session law, "This act shall not be construed to impair any right under an insurance contract in effect on or before the effective date of this act. To the extent that this act affects a right under an insurance contract, this act applies to an insurance contract issued or renewed after the effective date of this act." Under Section 30 of that session law, "Except as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." The effective date of the act was March 24, 2023, when the

Governor signed and approved it. *See*, CS/CS/HB 837: Civil Remedies, Bill History (www.flsenate.gov/Session/Bill/2023/837).

9. Despite the recent “tort reform” legislation, every potentially relevant event pertaining to the underlying lawsuit and this appeal (i.e., the date that the insurance policy was issued, the date of loss, the date the breach of contract claim accrued) took place before the effective date of HB 837. Accordingly, the new legislation does not retroactively impair the entitlement to an award of appellate attorney’s fees, in an amount to be determined by the trial court pursuant to Rule 9.400 and section 627.428, Fla. Stat. (2021).

10. “[R]etroactive abolition of substantive vested rights is prohibited by constitutional due process considerations.” *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d, 494, 503 (Fla. 1999).

11. Aside from the prospective effect described in the session law itself, controlling case law holds that a vested statutory right to recover attorneys’ fees cannot be retroactively impaired by an amendment to the statute. *See, e.g., Menendez v. Progressive*

Express Insurance Company, Inc., 35 So. 3d 873, 877-880 (Fla. 2010) (amendment to PIP statute which, among other things, allowed an insurer to avoid an award of attorney fees, could not be retroactively applied); *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 947-948 (Fla. 2011) (amendment adding “safe harbor” provision to Section 57.105 to avoid an award of attorneys’ fees could not be applied retroactively). *See also*, *Metro. Dade Cnty. v. Jones Boatyard, Inc.*, 611 So. 2d 512, 513-514 (Fla. 1993) (statute providing for award of attorney fees in favor of party which recovers judgment more favorable than its offer of judgment does not apply when underlying cause of action accrued prior to statute's effective date); *L. Ross, Inc. v. R.W. Roberts Constr. Co.*, 481 So. 2d 484 (Fla.1986) (statute creating right to attorney's fees could not be applied retroactively); *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla.1961) (only statutes that do not create new or take away vested rights are exempt from the general rule against retrospective application); *Poole v. Tallahassee Memorial Hospital*, 520 So. 2d 627 (Fla. 1st DCA 1988) (repeal of attorney fee statute applied prospectively, and appellant was entitled to award of attorneys’ fees as

prevailing party because her claim was filed before effective date of the repealer clause); *Tison v. Clairmont Condo. F Ass'n, Inc.*, 288 So. 3d 699, 702 (Fla. 4th DCA 2019) (“substantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues”); *Godbey v. Walsh*, 530 So. 2d 343, 343–344 (Fla. 1st DCA 1988) (prevailing party’s right to attorney fees vests when the cause of action accrues). *See, also, Baptist College of Florida Inc. v. Church Mut. Ins. Co.*, 2023 WL 4358785, *3 (N.D. Fla. June 23, 2023) (the December 16, 2022 amendment to Section 627.428 did not apply retroactively to Plaintiff’s insurance policy executed on October 15, 2017, and would not be permitted to apply retroactively even if the Legislature had intended so).

12. Notably, the Sixth District has ruled on the applicability of section 627.428, Fla. Stat. (2021) and entered an unpublished order provisionally awarding attorney’s fees where the cause of action accrued prior to the effective date of the repeal of Section 627.428. *See, SFR Servs., LLC v. Tower Hill Prime Ins. Co.*, No. 6D23-0118, Order (Fla. 6th DCA June 22, 2023) (citing *Couch v. Drew*, 554 So. 2d 1185, 1187 (Fla. 1st DCA 1990) and *Poole v.*

Tallahassee Mem'l Hosp., 520 So. 2d 627 (Fla. 1st DCA 1988)).

13. “Section 627.428 is a substantive statute that prescribes an insured’s right to prevailing party attorney’s fees against an insurer,” and therefore any alteration to the statute may not be applied retroactively to an insurance policy incepted before the statute’s alteration. *Garrido v. SafePoint Ins. Co.*, 347 So. 3d 108, 112 (Fla. 3d DCA 2022). *See also, Menendez*, 35 So. 3d at 877, n. 4 (“Retroactivity will also be rejected where a statute impairs the obligation of contracts in violation of article I, section 10, of the Florida Constitution.”).
14. Moreover, section 627.428, Fla. Stat. (2021) was in effect when the insurance policy was issued and is deemed to be incorporated into and a part of the insurance policy. *Grant v. State Farm Fire & Cas. Co.*, 638 So. 2d 936, 938 (Fla. 1994) (“where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become a part of the contract”).
15. The “terms of section 627.428 are an implicit part of every

insurance policy issued in Florida” and when a party must 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.” *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993). As such, a prevailing insured is entitled to an award of attorneys’ fees under the insurance policy itself because Section 627.428 is incorporated into the insurance policy. *Palma*, at 832-833.

16. “[I]t is generally accepted that the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract.” *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996). *See also, Heritage Prop. & Cas. Ins. Co. v. Condo. Ass’n of Gateway House Apts. Inc.*, 344 So. 3d 52, 55 (Fla. 3d DCA 2021).

17. In the absence of clear legislative intent to the contrary, a law is presumed to operate prospectively.” *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass’n One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008). Thus, before a new statute can be retroactively applied, a court “must ascertain whether the Legislature intended for the statute to apply retroactively.” *Menendez*, 35 So.

3d at 877.

18. The “inclusion of an effective date for an amendment is...evidence rebutting intent for retroactive application of a law.” *Florida Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.*, 67 So. 3d 187, 196 (Fla. 2011).

19. In this case, HB 837 includes an effective date without stating or even implying any intention to apply the new statutes retroactively. Accordingly, retroactive application is impermissible. *Old Port Cove Holdings*, 986 So. 2d at 1284.

20. In addition, even if the Legislature expresses an intention to retroactively apply a statutory change, the intended retroactive application is not allowed if it impacts a substantive right. *Menendez*, 35 So. 3d at 878-880. In analyzing whether a statutory change can be applied retroactively in an action involving the breach of an insurance policy, Florida courts look to the date the insurance policy was issued, not the date the lawsuit was filed. This is because “the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract.” *Id.* at 877 (quoting *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108

(Fla. 1996)).

21. At the time the subject insurance policy was issued, section 627.428, Fla. Stat. (2021) was the controlling statute for the substantive issue of attorney's fees as they relate to claims for benefits under the insurance policy. Therefore, the subsequent repeal of section 627.428, Fla. Stat. (2021) cannot be applied retroactively to this case.

22. As used in section 627.428(1), Fla. Stat. (2021), the word "shall" is mandatory and leaves this Court without discretion. *Fidelity and Deposit Co. of Maryland v. USAFORM Hail Pool, Inc.*, 465 F.Supp. 478 (M.D. Fla. 1979) (Section 627.428 "mandates the inclusion in the judgment of a reasonable sum as compensation for the claimants' attorneys' fees"). *See also, State v. Harper*, 792 So. 2d 1243, 1245 (Fla. 2d DCA 2001)(statute's use of the mandatory "shall" instead of the permissive "may" signifies required action); *Stanford v. State*, 706 So. 2d 900, 902 (Fla. 1st DCA 1998) (normal meaning of the word "shall" is mandatory); *Fla. Tallow Corp. v. Bryan*, 237 So. 2d 308, 309 (Fla. 4th DCA 1970) ("The word 'shall' when used in a statute or ordinance has, according to its normal usage, a mandatory

connotation”).

23. Because the section 627.428, Fla. Stat. (2021) was the controlling statute for attorney’s fees at the time the insured customer’s insurance policy was issued, it governs the right to appellate attorney’s fees here. *See also, Water Damage Express, LLC v. First Protective Ins. Co.*, 336 So. 3d 310 (Fla. 4th DCA 2022) (section 627.428, Fla. Stat. (2018) governed insured’s award to attorney’s fees instead of section 627.7152(10), Fla. Stat. the statute in effect when insured filed suit). *See also, SFR Servs., LLC v. Tower Hill Prime Ins. Co.*, No. 6D23-0118, Order (Fla. 6th DCA June 22, 2023) (attached as Exhibit C); *Geico Gen. Ins. Co. v. Shazam Auto Glass, LLC, a.a.o. Francisco Fernandez Hernandez*, Fla. 2d DCA Case No. 2D22-3961, Order dated December 6, 2023; *Geico Gen. Ins. Co. v. Shazam Auto Glass, LLC, a.a.o. Carmelo Hernandez*, Fla. 2d DCA Case No. 2D22-3958, Order dated December 6, 2023; *Geico Gen. Ins. Co. v. Shazam Auto Glass, LLC*, Fla. 2d DCA Case No. 2D22-2948.

24. Accordingly, in the event this Court reverses the trial court’s final summary judgment via this appeal, this Court must enter an order establishing Appellant’s entitlement to appellate

attorney's fees conditioned upon Appellant prevailing at the trial court level and remand the cause to the trial court.

WHEREFORE Appellant respectfully requests that this Court grant its Motion to Tax Appellate Attorneys' Fees and Costs and grant any other such relief as this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was filed with the Clerk of the Court using the e-filing portal and that a copy hereof has been furnished to Daniel E. Nordby, Esquire and Garrett A. Tozier at dnordby@shutts.com and gtozier@shutts.com on this 1st day of November 2024.

s/Chad A. Barr

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