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In the District Court of Appeal of the State of Florida
Third District

Case No. 3D24-0916

T.C. No. 22-13358-CA-01

T & G Locksmith Corp., et al.,

Appellants,

v.

Granada Insurance Company, et al.,

Appellees.

Appellants' Initial Brief

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Statement of the Case and Facts

The insurance company filed a complaint for declaratory relief, listing T & G Locksmith Corp. and Gabriel Garcia (the "insureds") as defendants. (*See generally* R. 15-86.) The complaint sought a "declaration that the Subject Policy does not obligate it to defend and/or indemnify defendants T & G Locksmith and Mr. Garcia with respect to" the accident that was at issue in other, pending litigation. (R. 16.) The insurance company alleged, "Because Granada believes that there is no coverage under the Subject Policy for claims arising out of the Subject Accident, a conflict of interest and controversy exist between the insured and Granada." (R. 19.)

The insureds moved to dismiss the complaint. (R. 160-166.) Therein, the insureds argued:

- The insurance company failed to identify or raise an ambiguity regarding the policy or a need for judicial interpretation of the policy;
- The policy is clear in that it does not cover any vehicles and "there is no dispute that there is no coverage for the subject loss"; and

- The insureds did not make a claim with the insurance company and "in fact has conceded that there was no coverage for the subject loss."

(R. 161. *See also* R. 162-166.)

In 2022, the insureds also admitted that the insurance company had no obligation under the policy to pay for any damages or claims as a result of the accident. (R. 316.) (The insureds' counsel had reached out to the insurance company's counsel nearly immediately to alert the insurance company that there was no dispute as to the absence of coverage for the accident. (*See* R. 700.))

Instead of accepting the repeated concession that there was no coverage under the policy, the insurance company responded to the motion to dismiss. (R. 172-211.) The insurance company posited that it would have agreed to not list the insureds as defendants, provided that the insureds executed an affidavit. (R. 174.) The correspondence attaching the affidavits advises that the execution thereof is "not mandatory per Florida law. . . ." (R. 201-202.) Moreover, the correspondence states that it is the plaintiff in the underlying case, and not the insurance company, who would likely demand execution

of the affidavits. (R. 201-202.) The correspondence then requires the insureds to execute an attached form. (R. 203.)

The correspondence also provides that the insurance company would seek attorneys' fees:

> Similarly, if it is determined that there is no duty to defend under the Subject Policy, Granada reserves its right to be reimbursed for any defense costs, including attorney's fees and costs, it may incur.

(R. 204.)

The insureds replied. (R. 212-219.) The insureds reiterated, "The subject policy is crystal clear that it does not cover any vehicles and there is not dispute that there is no coverage for the subject loss; and the Defendants have never sought any coverage for the loss at any time from the Plaintiff." (R. 215.)

The motion to dismiss was denied. (R. 220-221.) But the motion was also granted. (R. 222-228.) The insurance company moved for summary judgment. (*See generally* R. 229-323.) The motion for summary judgment referenced the admissions in which the insureds again stated that there could be no basis for dispute because they could not claim coverage. (*See generally* R. 229-323.) But the trial court advised that it had inadvertently executed the insurance

company's proposed order on the prior motion to dismiss. (R. 324-325.) The trial court then explained:

> 4. However, the Court thoroughly reviewed the Complaint, the Motion to Dismiss, reviewed and conducted its own research regarding the Declaration Action claim.
>
> 5. Based on the Court's review, the Court intended to only enter the Order Granting the Motion to Dismiss.

(R. 324.) The trial court dismissed the complaint without prejudice. (R. 325.) In stating that it intended to enter the order granting the motion to dismiss, the trial court reasoned that there was "no ambiguity" to resolve. (*See* R. 225.) The trial court explained that the insurance company did "not identify any provision of the insurance contract that is in doubt and in need of construction." (*See* R. 225.) (Internal quotations omitted.)

The insureds moved for their attorneys' fees and costs. (R. 326-329.) The insurance company moved for rehearing of the final judgment. (R. 330-344.) The motion for rehearing argued that "Granada has provided defense counsel to T & G Locksmith and Mr. Garcia to defend against Ms. Macias" claims. Granada contends that it is not obligated to pay for the defense or to indemnify T & G

Locksmith and Mr. Garcia. Without a declaration from [the trial] Court as to its duties and obligations under the Subject Policy, Granada, will be forced to continue to pay for legal fees to defend the case." (R. 335.)

The insurance company responded to the motion for fees and costs, arguing that the motion was premature because the motion for rehearing remained pending. (R. 345-382.) The insureds responded to the motion for rehearing. (*See generally* R. 383-389.)

The trial court granted in part and denied in part the motion for rehearing. (R. 390-391.) The trial court vacated the order, but granted the motion to dismiss and allowed the insurance company to file an amended complaint for declaratory relief. (R. 390-391.)

On September 28, 2023, the insurance company amended its complaint. (*See generally* R. 392-508.) The amended complaint again references the correspondence sent to the insureds, requiring them to execute forms in order to not be named as defendants. (R. 394.) The insurance company alleged that it maintained that it had no duty to defend or indemnify the insureds and that there was no coverage available relating to the incident. (R. 397.) The insurance company then posits:

> While Granada maintains that there is no duty to defend and/or indemnify Defendants T & G Locksmith and Mr. Garcia, they have taken a contrary position by not returning the estoppel letters.

(R. 398.)

The insurance company did not wait for the amended complaint to be tested, and instead voluntarily dismissed the complaint against the insureds, with prejudice, fewer than 20 days later, on October 16, 2023. (R. 509-510.) The dismissal was purportedly based on "representations made in open court" that the insureds conceded that the policy "provides no coverage" for the incident. (R. 509.) Notably, that issue had been conceded since the inception of the case. (*See* R. 161.) In fact, the insurance company had never pointed to any evidence that could demonstrate that the insureds had ever taken a contrary position or had sought coverage for the incident. (*See* R. 161; R. 162-166.)

The insureds moved for their attorneys' fees and costs, again, now that the voluntary dismissal had been noticed. (R. 511-516.) The insureds relied on *O'Malley v. Nationwide Mut. Fire. Ins. Co.*, 890 So. 2d 1163 (Fla. 4th DCA 2004), as well as section 627.428, Florida

Statutes in support of its position that they prevailed in the dispute. (R. 514-515.)

The insurance company, which moved for rehearing only to dismiss its claim premised on concessions made in responding to the initial request for admissions and in the initial motion to dismiss, responded to the motion for fees and costs. (R. 517-526.) The insurance company argued that section 627.428 dd not apply because the trial court had not entered a judgment regarding the amended complaint, given that only the insureds were dismissed. (R. 522-523.) The insurance company argued that it did not confess judgment. (R. 523-525.) And the insurance company argued that the insureds "could have approached Granada and agreed to sign a joint stipulation. . . ." (R. 525.)

The insurance company then amended its response to the insureds' motion for fees and costs following the voluntary dismissal of the complaint in the case where the complaint had been previously dismissed by the trial court. (R. 527-563.) The insurance company raised the same arguments as those in the initial response. (*See* R. 532-536.)

The insurance company thereafter noticed the voluntary dismissal of other defendants. (R. 564-565.)

The insureds replied to the response to the renewed motion for fees and costs. (R. 569-580.) The insureds argued that the voluntary dismissal of the insureds that resolved all issues against the insureds was the functional equivalent of a judgment. (R. 571-578.) The insureds argued that the insurance company conferred an unsolicited benefit on them, constituting the functional equivalent of a confession of judgment or verdict for the insureds. (R. 578-579.)

Without leave of court, the insurance company filed a sur-reply. (*See generally* R. 581-699.) Counsel for insureds then provided an affidavit in support of the motion for attorneys' fees, explaining that counsel nearly immediately reached out to the insurance company's counsel to attempt to resolve the case as there was "no dispute that the clear and unambiguous language of the policy excludes coverage for the aforementioned accident." (R. 700.)

The trial court entered its order denying the insureds' renewed motion for attorneys' fees and costs. (R. 715-723.) The trial court found that the insureds were properly added as parties to the amended complaint for declaratory relief. (R. 720.) The trial court

found that the insurance company provided no benefit or recovery to the insureds. (R. 720-721.) The trial court found that the voluntary dismissal was not functionally a confession of judgment. (R. 721.) And the trial court found that the insureds were not per se prevailing parties. (R. 721.) Further, the trial court reasoned that *O'Malley v. Nationwide Mut. Fire. Ins. Co.*, 890 So. 2d 1163 (Fla. 4th DCA 2004), relied on by the insureds, is distinguishable because the insurance company did not resolve the underlying claim with the insureds. (R. 721-722.)

Summary of the Argument

The insureds are entitled to their attorneys' fees and costs. The action for declaratory relief never should have been filed against them. The trial court reasoned that there was no basis for dispute as to the insurance contract at issue and no ambiguity for the trial court to resolve. The insureds have never argued nor have they ever sought coverage for the incident or attempted to procure coverage from the insured.

The declaratory action was not properly filed against the insureds. While litigating the declaratory action, the insurance company provided the benefit of a defense to the insureds. The

insurance company conceded that it provided this benefit in its own motion for summary judgment. The insurance company then dismissed the declaratory action against the insureds, after having already had the matter involuntarily dismissed and thereafter being allowed to attempt to amend the complaint. Per se or otherwise, the insureds were prevailing parties. The order on appeal should be reversed. On remand, the trial court should be instructed to enter an order granting the insureds' entitlement to attorneys' fees and costs.

Standard of Review

This Court reviews the issue of entitlement to attorneys' fees and costs de novo. *State Farm Mut. Auto. Ins. Co. v. Best Med. Treatments*, 354 So. 3d 612, 613-14 (Fla. 3d DCA 2023).

Argument

I. The trial court committed reversible error in denying the insureds' motion for attorneys' fees and costs.

A. The trial court committed reversible error in finding that the complaint was properly filed against the insureds.

Section 86.021, Florida Statutes provides:

> Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article,

> memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

A complaint "seeking declaratory relief must allege facts showing a bona fide adverse interest between the parties concerning a power, privilege, immunity or right of the plaintiff; the plaintiff's doubt about the existence or non-existence of his rights or privileges; that he is entitled to have the doubt removed." *Floyd v. Guardian Life Ins. Co.*, 415 So. 2d 103, 104 (Fla. 3d DCA 1982).

A plaintiff seeking declaratory relief must show that:

> there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is

> some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

Santa Rosa Cty. v. Admin. Comm'N, Div. of Admin. Health, 661 So. 2d 1190, 1192-93 (Fla. 1995) (quoting *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991). *See also Crawley-Kitzman v. Hernandez*, 324 So. 3d 968, 974-75 (Fla. 3d DCA 2021); *Golf Club v. City of Plantation*, 717 So. 2d 166, 171 (Fla. 4th DCA 1998).

Specifically within the context of disputes over coverage in an insurance policy, the dispute must be "bona fide" in order to constitute a proper subject for declaratory relief. *Tavares v. Allstate Ins. Co.*, 342 So. 2d 551, 553 (Fla. 3d DCA 1977). *See also O'Donnell v. Colonial Penn Ins. Co.*, 509 So. 2d 371, 371-72 (Fla. 3d DCA 1987).

Moreover, "purely factual disputes are not the proper subject of an action for declaratory judgment." *Perez v. State Auto. Ins. Asso.*, 270 So. 3d 377, 378 (Fla. 3d DCA 1972).

The question is not whether a party welcomes an action for declaratory relief, but rather whether the trial court actually has jurisdiction to enter such relief based upon the limitations of judicial power. *State Dep't of Envtl. Prot. v. Garcia*, 99 So. 3d 539, 545 (Fla. 3d DCA 2011).

Here, the trial court reasoned that the complaint was properly filed because Ms. Macias' demand with respect to the policy "created an actual and present controversy." (R. 720.) But there was no bona fide adverse interest, and nor could the insurance company reasonably have had any doubt as to its rights. *See Floyd*, 415 So. 2d at 104; *Tavares*, 342 So. 2d at 553; *O'Donnell*, 509 So. 2d at 371-72. There was no actual need for a declaration, either. *See Santa Rosa Cty.*, 661 So. 2d at 1192-93. The insureds had always conceded that there was no obligation under the policy; they did so because there was no reasonable basis for dispute. (*See* R. 575-577,) Moreover, the insureds interests would not only be required to be adverse to the insurance companies but would also have to be "antagonistic." *Santa*

Rosa Cty., 661 So. 2d at 1192-93. The insureds made no claim, did not state that they would make a claim, and in fact took no action at all with regard to the subject policy arising out of the subject incident. Quite simply, there was a fundamental lack of antagonism. And the trial court had already recognized that there was no basis for the claim against the insureds. (R. 225.)

And nor does the fact that the insurance company unilaterally attempted to create jurisdiction for the trial court by demanding that the insureds fill out a form within less than four days, to accomplish the insurance company's goal. The Declaratory Judgment Act places firm limits upon judicial power. There was no justiciable controversy before the insurance company sent the form because the insureds had taken no action with respect to the insurance policy to create a bona fide need for a declaration. And there was no justiciable controversy after the insureds continued to take no action, following the insurance company's correspondence.

The trial court additionally found that the insureds did not admit that the policy's exclusion G was applicable prior to the filing of the case. (R. 720.) But, again, the insureds admission prior of the filing of the complaint would not have changed the limits of power

placed upon the trial court. Either there was a bona fide, actual need or there was not. And here, there was not. The trial court cites section 86.091, Florida Statutes and *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5 (Fla. 2004). Section 86.091 merely concerns who may be made a party to a case where a court has jurisdiction. In *Higgins*, the Court held that an insurance company could seek determination of a fact upon which the insurer's obligations under an insurance policy depend. *Id.* at 12. *See also id.* at 15. The opinion is unremarkable and does not alter the requirements of the statutory scheme. *See Citizens Prop. Ins. Corp. v. Samperdo*, 275 So. 3d 744, 745 (Fla. 3d DCA 2019).

Finally, the order on appeal is in error because there was no "present" need for the trial court to issue a declaration. *Santa Rosa Cty.*, 661 So. 2d at 1192-93. *See also Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1286 (Fla. 3d DCA 2020). In the amended complaint, the insurance company alleges that the insureds "have never agreed to endorse a judicially enforceable written instrument . . . in which they agree with Granada's coverage position and agree to be bound by the result of Granada's Declaratory Judgment action." But that does not mean that the insureds had done the opposite:

presently claiming that they disagree with the coverage position taken by the insurance company.

The order on appeal should be reversed. On remand, the trial court should be instructed to enter an order granting the insureds' entitlement to attorneys' fees and costs.

B. The trial court committed reversible error in finding that the insurance company provided no benefit or recovery to the insureds.

The trial court found that the insurance company provided no benefit or recovery to the insureds. (R. 720-721.) However, such is not the case. The insurance company had provided a defense to the insureds in the underlying case through the dismissal of the insureds from the declaratory action. (*See* R. 578.) In *Coppola v. Federated Nat'l Ins. Co.*, 939 So. 2d 1171, 1174 (Fla. 4th DCA 2006), the court reasoned that, when the insurance company "voluntarily dismissed the declaratory action, the insured" received "the benefit of representation in the underlying tort suit." *See also Attain Specialty Ins. Co. v. Henry's Carpet & Interiors*, 564 F. Supp. 3d 1265, 1270 (S.D. Fla. 2021); *Kinsale Ins. Co. v. Best Wellness USA, LLC*, (S.D. Fla. Aug. 15, 2022).

The order on appeal, however, reasons that the provision of a defense under a reservation of rights has the same legal effect as a refusal to provide a defense, citing *Nationwide Mut. Fire Ins. Co. v. Beville*, 825 So. 2d 999, 10003 (Fla. 4th DCA 2004). The *Coppola* opinion appears to find the same court holding differently after the issuance of the *Beville* opinion. Regardless, the *Beville* opinion does not state that the provision of a defense under a reservation of rights is not a benefit, but rather that a unilateral defense under such a reservation is similar to a refusal to provide a defense to the extent that "the carrier has violated its duties under the policy to defend and indemnify its insured within specified limits." *Beville*, 825 So. 2d at 1003.

Here, the insurance company provided a defense in the underlying tort case through the dismissal of the declaratory action, even though such a defense was not within the specified limits, as conceded by all parties.

The order on appeal should be reversed. On remand, the trial court should be instructed to enter an order granting the insureds' entitlement to attorneys' fees and costs.

C. The trial court committed reversible error in finding that the voluntary dismissal was not functionally a confession of judgment.

The trial court found that the voluntary dismissal was not functionally a confession of judgment. (R. 721.) In *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218-19 (Fla. 1983), the Court reasoned that an insurance company's declining to defend its position in a pending suit is "the functional equivalent of a confession of judgment or a verdict in favor of the insured." The doctrine applies not only where the insurance company unreasonably withholds payment, but also where the insurance company engages in any "wrongful behavior" that caused the suit. *See Explorer Ins. Co. v. Cajusma*, 178 So. 3d 923, 926 (Fla. 5th DCA 2015). (Internal quotations omitted.)

This doctrine applies not only where an insured is forced to sue, but also where an insured is forced to defend: "Section 627.428 was intended 'to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts." *Do v. GEICO Gen. Ins. Co.*, 137 So. 3d 1039, 1042-43 (Fla. 3d DCA 2014). (Internal quotations omitted.)

Here, the insureds were compelled to defend against the action for declaratory relief regarding their insurance contract by stating that there could be no basis for such relief as outlined in argument (I)(A). The insureds were successful. The suit was voluntarily dismissed against them, after being involuntarily dismissed against them, and before they were required to file a responsive pleading. The insureds were entitled to their attorneys' fees and costs.

The trial court reasoned that there was no "incorrect denial of benefits." (R. 721.) But there is no requirement for an incorrect denial of benefits before the doctrine applies. *See Wollard*, 439 So. 2d at *passim*; *Explorer Ins. Co.*, 178 So. 3d at 926; *Do*, 137 So. 3d at 1042-43.

The trial court also reasoned that the insurance company did not provide a benefit or recovery to the insured. (R. 721.) The insureds incorporate argument (I)(B) in response.

Finally, the trial court cites *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215 (Fla. 2016) for the proposition that the insurance company's conduct during claims handling is immaterial to a section 627.428(1) analysis. (R. 721.) That much is true, but only because, "If the dispute is within the scope of section 627.428 and the insurer

loses, the insurer is always obligated to for attorney's fees." *See id.* (Internal quotations omitted.)

The order on appeal should be reversed. On remand, the trial court should be instructed to enter an order granting the insureds' entitlement to attorneys' fees and costs.

D. The trial court committed reversible error in finding that the insureds were not per se prevailing parties.

Whether "a withdrawal or abandonment of a lawsuit constitutes a bona fide termination in favor of a person against whom the suit was brought, depends on the total circumstances surrounding the withdrawal or abandonment." *Valdes v. GAB Robins N. Am., Inc.*, 924 So. 2d 862, 866 (Fla. 3d DCA 2006) (quoting *Doss v. Bank of Am., N.A.*, 857 So. 2d 991, 994-95 (Fla. 5th DCA 2003)). *See also Cohen v. Corwin*, 980 So. 2d 1153, 1156 (Fla. 4th DCA 2008) (holding, "[s]ometimes a voluntary dismissal is reflective of the merits, such as where the allegations in the underlying complaint are demonstrated to be false and there is evidence the" current defendant "knew they were false").

In *Thornber v. City of Fort Walton Bch*, 568 So. 2d 914, 919 (Fla. 1990) the Florida Supreme Court reasoned, "[i]n general, when a

plaintiff voluntarily dismisses an action, the defendant is the prevailing party.” *See also Yampol v. Schindler Elevator Corp.*, 186 So. 3d 616, 616-17 (Fla. 3d DCA 2016) (quoting *Thornber*, 568 So. 2d at 919 for same); *Bahrakis v. Zimmerman*, 2020 U.S. Dist. LEXIS 146814, * 4 (M.D. Fla. Aug. 14, 2020) (reasoning that a defendant is the prevailing party following a voluntary dismissal and collecting cases).

In *Ajax Paving Indus. v. Hardaway Co.*, 824 So. 2d 1026, 1029 (Fla. 2d DCA 2002), the court explained:

> Generally, when a plaintiff voluntarily dismisses an action, the defendant is deemed the prevailing party for purposes of attorney's fees . . . . This is true despite the fact the case has not been resolved on the merits . . . . Thus, prevailing party attorney's fees will be awarded upon the voluntary dismissal of an action so long as there is either a contractual or statutory basis for doing so and the request for fees has been properly pleaded . . . . When a case has been voluntarily dismissed before the defendant has filed a responsive pleading, a request for fees is deemed properly pleaded if it was either asserted in a motion to dismiss or in a separate motion filed within thirty days of the dismissal of the action.

Here, the insurance company voluntarily dismissed the action before the insureds had been required to file an answer. The insureds are thus deemed the prevailing party for purposes of attorneys fees.

The trial court cites *O.A.G. Corp. v. Britamco Underwriters*, 707 So. 2d 785 (Fla. 3d DCA 1998) The timeline in *O.A.G. Corp. v. Britamco Underwriters, Inc.*, 707 So. 2d 785 (Fla. 3d DCA 1998) was as follows:

> (1) The insurer filed a complaint against the insureds;
>
> (2) The insurer took a voluntary dismissal without prejudice; and
>
> (3) "Three days after the dismissal, [the insurer] refiled its action[.]"

O.A.G. Corp., 707 So. 2d at 786.

The optics and substance of *O.A.G.* are far different from what occurred in the instant dispute. In *O.A.G.*, there was an active fight in a separately refiled case over coverage. Therefore, there could be no victor until the fight is done. *O.A.G. Corp.*, 707 So. 2d at 787 ("Should the insureds eventually prevail in court, or should [the carrier] at a later date decide to settle the case, then the insureds will

be entitled to recover reasonable attorney's fees"). Additionally, that opinion and others like it apply only where the cause of action is dismissed "without prejudice to refile its lawsuit." *See Houston Specialty Ins. Co. v. Jensen's Liquor Store, Inc.*, 2016 U.S. Dist. LEXIS 136494, at * 9-10 (M.D. Fla. Jan. 25, 2016). (Internal quotations omitted.) As the Fourth District explained in *Coppola v. Federated Nat'l Ins. Co.*, 939 So. 2d 1171, 1173 (Fla. 4th DCA 2006):

> We have also considered *O.A.G. Corp. v. Britamco Underwriters, Inc.*, 707 So. 2d 785 (Fla. 3d DCA 1998) . . . but deem it distinguishable, in that it involved a voluntary dismissal of a declaratory action, followed by the insurer immediately filing a second declaratory lawsuit which was still pending; the court did not deny fees to the insured, but found that the insured had prematurely sought the fees.

But here, the insurance company did not dismiss the suit intending to refile and, in fact, did not refile the suit against the insureds. Put simply, when the insurance company "voluntarily dismissed the declaratory action, the insured" had already "received the benefit of representation in the underlying tort suit." *See id.* at 1174.

The order on appeal should be reversed. On remand, the trial court should be instructed to enter an order granting the insureds' entitlement to attorneys' fees and costs.

E. The trial court committed reversible error in its treatment of *O'Malley v. Nationwide Mut. Fire Ins. Co.*, 890 So. 2d 1163 (Fla. 4th DCA 2004).

In *O'Malley v. Nationwide Mut. Fire. Ins. Co.*, 890 So. 2d 1163, 1163-64 (Fla. 4th DCA 2004), the court was presented with a single issue:

> The issue presented by this appeal is whether appellant insured was entitled to attorney's fees under section 627.428, Florida Statutes (2001), after the insurer voluntarily dismissed its declaratory judgment action seeking a determination as to whether there was a duty to defend or coverage. We conclude that she was.

The trial court in that case denied a motion for attorneys' fees, not because of any resolution in the underlying tort action, but because it had found that the insured had not prevailed in the declaratory judgment action. *Id.* at 1164. The trial court had reasoned that the insured did not prevail because the insurance company "paid no money to the claimant." *Id.* The district court reversed, reasoning:

> The trial court's denial of fees in the present case, grounded on the fact that the tort claimant was paid no money, does not take into account the benefit received by the insured. If Nationwide had obtained a judgment in the declaratory action, the insured would have been responsible for furnishing her own defense and resolving the tort claim. As it turned out, however, Nationwide furnished the insured a defense and settled the claim. Nationwide, in that action, provided the insured precisely what Nationwide was contending the insured was not entitled to in the declaratory action. When Nationwide dismissed the declaratory action, it was thus the functional equivalent of a confession of judgment or a verdict in favor of the insured in the declaratory action.

Id. (Internal quotations omitted.) *See also Explorer Ins. Co. v. Cajusma*, 178 So. 3d 923, 926-27 (Fla. 5th DCA 2015); *Coppola*, 939 So. 2d at 1174.

The benefits in *O'Malley* were two-fold: the insurance company furnished a defense "and" settled the tort claim. The settlement was not a necessary precondition for the first benefit to occur. *See State Farm Mut. Auto. Ins. Co. v. Coker*, 505 Fed.Appx. 824, 827 (11th Cir. 2013) (reasoning that fees would be appropriate if the insurance company had either provided "a defense to ***or*** payment of the claim

against her in the state court suit”). (Emphasis supplied.) *But see id.* at 827 & n. 1.

In fact, and of course, the furnishing of a defense precedes the settlement of the claim on the basis of that defense. If there was a settlement of the underlying tort action, even if the insureds had been required to contribute their own money to the settlement, the *O’Malley* analysis still would have resulted in an award of attorney’s fees to the insureds. *See W&J Grp. Enters. v. Houston Specialty Ins. Co.*, 684 Fed.Appx. 867, 870 (11th Cir. 2017).

Here, the trial court found that the insureds’ position differed from that in *O’Malley* because the insurance company did not resolve the underlying action with the tort plaintiff. But the insurance company had provided a defense through the dismissal of the declaratory action. The defense was unsolicited by the insureds. The defense necessarily occurred before any settlement could potentially be reached on the basis of that defense. The defense is, itself, an unsolicited benefit to the insureds.

The order on appeal should be reversed. On remand, the trial court should be instructed to enter an order granting the insureds’ entitlement to attorneys’ fees and costs.

II. The trial court committed reversible error in denying the insureds' motion for costs.

Even if the order on appeal had appropriately denied the motion for attorneys' fees, there was nevertheless no basis to deny the motion for costs. Pursuant to Florida Rule of Civil Procedure 1.525, the notice of voluntary dismissal concluding the action as to the insureds triggered their entitlement to costs. Pursuant to Florida Rule of Civil Procedure 1.420(d), "Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs." *See also Aguilo v. Am. Sales & Mgmt. Org. LLC*, 300 So. 3d 730, 732 (Fla. 3d DCA 2020). The action was dismissed against the insureds pursuant to Florida Rule of Civil Procedure 1.420. (R. 509.) The insureds are entitled to costs.

Conclusion

The order on appeal should be reversed. On remand, the trial court should be instructed to enter an order granting the insureds' entitlement to attorneys' fees and costs.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was furnished this 22nd day of August, 2024 via the Florida E-Filing Portal to: Ricardo M. Corona, ricky@coronapa.com, and John B. Atkinson, jatkinson@atkattorneys.com.

Certificate of Compliance

I hereby certify that the undersigned has complied with the formatting requirements of Florida Rule of Appellate Procedure 9.045. This brief was prepared using Bookman Old Style 14-point font and contains 5,360 words.

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