IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MICHAEL ROHRBACHER,

Petitioner,

CASE NO. SC16-2232
L.T. CASE NO. 5D16-393

v.

GARRISON PROPERTY AND
CASUALTY INSURANCE COMPANY,

Respondent.
_____/

PETITIONER'S MOTION FOR AWARD OF APPELLATE ATTORNEY'S FEES

COMES NOW Respondent, MICHAEL ROHRBACHER, 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 attorney's fees and costs in this matter, stating as follows:

1. Rohrbacher requests this Court revisit its 4-3 decision in *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993) prohibiting attorney's fees for litigating the amount of attorneys fees that a prevailing party is entitled to under section 627.728, Fla. Stat.

2. As Justice Kogan observed in his dissent in *Palma* (which dissent was joined by Justices Barkett and Shaw), there is no functional difference between a allowing awarding attorney's fees for litigating the issue of entitlement to attorney's

fees, and litigating the amount of fees. Throughout the years, other courts have expressed disagreement with *Palma*, and Florida district courts have moved away from it when they could. Rohrbacher's counsel respectfully submits that it is time to revisit this distinction and set forth specific parameters for when attorney's fees should be awarded for litigating the amount of attorney's fees.

3. One does not have to look very hard to see that the majority of appeals regarding attorney's fees are filed by insurance companies. They file appeals regarding hourly rates. They file appeals regarding the number of hours expended in a case. They file appeals regarding expert fees. And they file appeals, like in this case, essentially inviting the Fifth District to err in its favor. Knowing that it will not be responsible for an award of any additional fees if it loses the appeal is incentive enough for insurance companies to routinely launch appeals regarding attorney's fees for no other reason than to dilute the value of the fees award by a lower court. This is not an equal playing field and equity suggests that its time to revisit *Palma*.

4. The *Palma* majority decision has been criticized by other courts, such as the Supreme Court of Kansas, in *Moore v. St. Paul Fire Mercury Ins. Co*., 3 P.3d 81, 86; 269 Kan. 272 (2000) (holding that "the fact that the award of such fee ultimately results in the insured's attorney being paid to litigate the fee is collateral and incidental to the primary purpose of indemnifying an insured for the cost of counsel in an action against the insurer."). Florida courts have avoided *Palma* when

possible. *See Citbank Federal Savings Bank v. Sandel*, 766 So. 2d 302, 304 (Fla. 4th DCA 2000) (Justice Farmer concurring, "the premises on which the *Palma* exclusion is based are, to me, all but indefensible"); *Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386 (Fla. 4th DCA 2012) (construing a contractual provision that provided for reasonable attorney's fees and court costs at all trial and appellate levels as broad enough to encompass fees incurred in litigating the amount of fees); *Schneider v. Schneider*, 32 So. 3d 151 (Fla. 4th DCA 2010) (holding that a final award of fees to a spouse under Chapter 61 can include the time spent litigating the amount of the fee); *Bennett v. Berges*, 50 So. 3d 1154, 1161 (Fla. 4th DCA 2010) (affirming the award of "fees on fees" in an adversarial probate proceeding because the fees were being imposed as a "sanction")

5. "The award of fees under section 627.428 acts 'as a penalty to discourage wrongful refusals to pay benefits.'" *Florida Ins. Guar. Ass'n. v. Petty*, 44 So. 3d 1191, 1193 (Fla. 2d DCA 2010). It is in essence a sanction against an insurer. *See, e.g., Aetna Cas. & Sur. Co. v. Langel*, 587 So. 2d 1370, 1373 (Fla. 4thDCA 1991) (describing attorney's fees as a sanction for delayed payment pursuant to §627.428). So to should an award of attorney's fees be available as a sanction when insurers like Garrison litigate erroneous points of law and in essence invite appellate error in it favor.

6. Based on the forgoing, Rohrbacher requests this Court to recede from the limitation in *Palma* and hold that under the plain language of §627.428(1), counsel is entitled to an award of fees for litigating the amount of fees - when such litigation is required. In this case, Rohrbacher has no control over whether the Fifth District follows the precedent of this Court. But for Garrison's appeal and argument regarding application of the federal presumption against contingency risk multipliers, Rohrbacher would not have had to incur the legal fees of two additional appeals. By encouraging, and in essence bating the Fifth District to not follow the law, as set forth by this Court, with respect to contingency risk multipliers, Garrison should be held responsible for the fees incurred by Rohrbacher for this appeal.

WHEREFORE Petitioner, MICHAEL ROHRBACHER, respectfully requests that this Court grant its Motion to Tax Appellate Attorney's Fees, 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 Courts using the Florida Courts E-Filing Portal and that a copy hereof has been furnished to the following recipients via electronic mail: Mr. Douglas Stein, Esquire, Association Law Group, PL, 1200 Brickell Avenue, PH 2000, Miami, FL 33131, at Doug@algpl.com on this 8th day of December, 2017.

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