IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2279

RUTH W. HAYNES, by and through NANCY BUSH,
Personal Representative, HOME AWAY FROM HOME
OF HOLLY HILL, INC., LYNN COSTNER,
RONNY COSTNER and PAULA BAILIE,

Petitioners,

v.

SCOTTSDALE INSURANCE COMPANY,

Respondent.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL
IN THE STATE OF FLORIDA

LOWER TRIBUNAL NO.: 5D00-111

REPLY BRIEF

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ARGUMENT

I.

THE TRIAL COURT PROPERLY DECLARED THAT THE POLICY INCLUDED COVERAGE FOR AN AWARD OF ATTORNEY FEES

A. §400.429 Does Not Govern Interpretation of the Contract

Scottsdale begins by relying on language from section 400.429, Florida Statutes, even though that language was *not* incorporated into its Policy. As recognized by the Fifth District in its decision below, the insurer's liability turns on the language of its contract. *Scottsdale Ins. Co. v. Haynes*, 793 So.2d 1006, 1008 (Fla. 5th DCA 2001). Moreover, this Court has made it clear that an insurance company cannot deny coverage based on statutory language that was *not* used in its policy. *Green v. Life & Health of America*, 704 So.2d 1386 (Fla. 1998). Finally, by citing to this statutory language, Scottsdale is reneging on its promise that only language in the Policy would govern: "The limit of the company's liability against such Coverage shall be *as stated herein, subject to all the terms of this policy having reference thereto*." (R. 141). For the foregoing reasons, Scottsdale's attempt to deny coverage to its insured based on statutory language that it did not incorporate into this Policy must be rejected.

Alternatively, even if the language of section 400.429 had been incorporated into the Policy, it would expand – not restrict – coverage, as Scottsdale suggests. *See*

Amicus Brief of The Academy of Florida Trial Lawyers; *see also Haynes* at 1009 (commenting that if the language of section 400.429 had been incorporated it might "expand" the coverage).

B. Lack of a Definition of "Damages"

Scottsdale acknowledges that if an ambiguity exists, it should be construed against the insurer.[1] Scottsdale attempts to counter the assertion that its Policy is ambiguous because of the lack of a definition of the word "damages" by citing to *State Farm Fire & Cas. Co. v. CTC Development Corp.*, 720 So.2d 1072 (Fla. 1998), in which this Court stated: "the lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts." However, Scottsdale failed to cite the remainder of that passage, which is determinative of this case. Specifically, immediately after commenting that the lack of a definition does not *necessarily* render a term ambiguous, this Court went on to explain:

> However, where policy language is *subject to differing interpretations*, the term should be construed liberally in favor of the insured and strictly against the insurer. (citations omitted). In addition, "when an insurer fails to define a term in a policy, ... the insurer *cannot take the position that there should be a 'narrow, restrictive*

[1]Answer Brief at 11.

> *interpretation* of the coverage provided.' (citations omitted) (Emphasis added).

Based on the foregoing, Home Away acknowledges that the lack of a definition does not always render a term ambiguous. However, when, as in this case, a definition is lacking *and* the language is subject to differing interpretations, it should be construed liberally in favor of the insured, and the insurer cannot take the position that there should be a "narrow, restrictive interpretation of the coverage provided." *Id*. When those two principles are applied in this case, it is clear that the Policy provides coverage.

First, Home Away has shown by numerous examples that "damages," as used in this Policy, is most definitely subject to differing interpretations. The trial judge commented on the record that his interpretation of "damages" would include attorneys' fees. (TR. 40). Additionally, even the Fifth District Court acknowledged in its opinion that attorneys' fees are a *type* of "damages," although indirect as opposed to direct damages. *Haynes, supra.* Further, when faced with the exact same policy provision and issue presented in this case, the Third District Court concluded that the word "damages" in this context includes attorney fees awarded to the prevailing party.[2] *Scottsdale Ins. Co. v. Pinecrest Ltd. Partnership*, 739 So.2d 733

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[2]The Fourth District's opinion in *Scottsdale, supra*, also is instructive because it construed essentially the same policy language at issue here. Although Scottsdale was not

(Fla. 3d DCA 1999). Finally, other courts across the country have concluded that the word "damages" in a policy like this includes coverage for attorneys' fees awarded to an opposing party. *See, e.g., City of Ypsilanti v. Appalachian Ins. Co.*, 547 F.Supp. 823 (E.D. Mich. 1982), *aff'd,* 725 F.2d 582 (6th Cir. 1983); *Hyatt Corp. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 393 (Mo.App. 1990); *Barton Protective Services, Inc. v. Coverx Corp.*, 615 So.2d 438 (4th Cir. 1993); *Kelloch v. S & H Subwater Salvage, Inc.,* 397 F.Supp. 742 (E.D. La. 1973). Given these examples, it simply cannot be denied that the word "damages" in the context of this provision has been given a different interpretation than the one suggested by Scottsdale.

Secondly, because Scottsdale failed to define "damages," it cannot take the position that there should be a "narrow, restrictive interpretation of the coverage provided." *CTC* at 1076. However, that is precisely what Scottsdale has done. Scottsdale asserts that in the absence of a definition, "damages" should be narrowly

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liable for the payment of fees in that case, the Fourth District did ***not*** reach that conclusion, as Scottsdale has suggested, on the grounds that the policy unambiguously excludes coverage for fees. Instead, the denial of coverage appears to have been based on the fact that the event giving rise to an award of fees in that case was an *injunction*, which was not a covered event under the policy. *Property damage,* on the other hand, was a covered event. *Id*. Thus, although the Fourth District was not required to address whether a fee award would be covered if it arose from a covered event, the *Deer Run* court left open the possibility of such a recovery when, as in this case, the fees are assessed as a result of a covered event.

interpreted so that it is limited to actual, compensatory, or direct damages. In the absence of a definition (which would have been simple to include), Scottsdale does not have the luxury of narrowly defining this term in that manner after-the-fact.

In short, a review of this Policy, and the cases decided in the context of *this* provision, reveals that: (1) this Policy unambiguously provides coverage; or, at the very least, (2) differing interpretations of the Policy exist. In either event the insured prevails because even Scottsdale admits that if the Policy is ambiguous it should be construed against the insurer.[3]

C. Florida Decisional Law

Scottsdale asserts: "Florida decisional law is clear that attorney's fees in this context are not 'damages.'"[4] That is not so. Scottsdale has not cited any other case in which a court has held that attorneys' fees *in this context* are not "damages." The cases Scottsdale relies upon are taken out of context because none of them involved analysis of whether "damages" within a liability policy covers an award of attorneys' fees assessed against an insured. Only Home Away has cited cases *in this context* and those courts have concluded that attorneys' fees assessed against an insured constitute "damages" covered by a liability policy.

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[3]Answer Brief at 11.

[4]Answer Brief at 11.

Next, Scottsdale cites to Florida case law regarding recovery of attorneys' fees and recites the well-known proposition that absent a specific contractual or statutory provision, attorneys' fees are not recoverable. [5] Home Away does not dispute that. However, the so-called American Rule, to which Scottsdale refers, only applies when a prevailing litigant seeks to recover its own attorneys' fees. *See, e.g., Ypsilanti, supra*. Home Away was not a prevailing litigant and does not seek to recover fees for itself. On the contrary, it seeks coverage for attorneys' fees assessed against it. Therefore, cases in which prevailing parties have attempted to recover fees for themselves do not apply. *See, e.g., Ypsilanti, supra* (explaining that the American Rule does not apply when an insured seeks coverage for fees assessed against it). The issue in this case is different because it raises the question of whether attorneys' fees assessed against an insured are covered under a broad definition of the word "damages" in an insurance policy.

Finally, Scottsdale cites to cases in which it has been held that an award of statutory attorneys' fees is not considered a "cost" of defending the suit.[6] That is not the issue in this case. Home Away has never contended that attorneys' fees are a type of "cost." Rather, Home Away contends that attorneys' fees it is legally obligated to

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[5]Answer Brief at 14-17.

[6]Answer Brief at 17-19.

pay arising out of an incident for which it has coverage is a type of "damages" covered by its Policy.

D. Doctrine of Reasonable Expectations

In *Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998), this Court explained that: "[t]here is no need for [the doctrine of reasonable expectations] if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer." As explained above, the Policy at issue either unambiguously provides coverage, or is ambiguous because differing interpretations exist. Therefore, Home Away does not need to rely on this doctrine to prevail.

The out-of-state cases were cited by Home Away simply to demonstrate that differing interpretations of the word "damages" exist. The fact that those courts may apply the doctrine of reasonable expectations to resolve the coverage issue *after* determining that the policy is ambiguous in no way detracts from the point for which Home Away has cited those cases – to demonstrate that this Policy is ambiguous because different interpretations of the word "damages" exist. Once an ambiguity is shown, a Florida court, unlike courts in some other jurisdictions, will construe coverage in favor of the insured, and will not need to resort to the doctrine of reasonable expectations. *Deni, supra*. Therefore, contrary to Scottsdale's assertion,

the fact that the doctrine of reasonable expectations may be accepted in other jurisdictions in no way diminishes the impact of those cases.

E. Public Policy Argument

In making its public policy argument, Scottsdale argues that requiring insurers to provide coverage for attorney fee awards will reduce the general aggregate limit of coverage available under the policy to satisfy claims of other residents. [7] In essence, Scottsdale implies that if required to provide coverage to its insureds, other persons may be precluded from a recovery. That is not so. If other residents make claims that entitle them to a recovery, and coverage has been exhausted, the living facility will be required to satisfy that judgment from its own funds. Either way, the resident will recover. However, until coverage has been exhausted, the insured should *not* have to satisfy a judgment from its own funds – that is the very reason coverage was purchased. Scottsdale's purported "public policy" argument is nothing more than an effort to benefit itself, twice: first, through premiums, and second, by narrowly construing its policies to force its insureds to pay the bulk of the judgments assessed against them.

Additionally, if the 2001 version of section 400.429 has significantly limited a prevailing party's right to recover attorneys' fees, that undercuts rather than enhances

[7] Answer Brief at 42.

Scottsdale's argument. Specifically, it means that in the future attorneys' fee awards will be reduced and, as a result, the aggregate coverage will *not* be substantially affected by coverage for such awards.

Finally, *Hubbell v. Aetna Casualty & Surety Co.*, 758 So.2d 94 (Fla. 2000), is distinguishable. That case involved a "modest" fund intended to compensate consumers when car dealers go out of business and default on their obligations. After that fund is depleted, the consumers have no other recourse for recovery. In this, and other similar cases, if policy limits are exhausted, residents have recourse against the funds of the facility. However, when a facility like Home Away acts responsibly by purchasing insurance to cover residents' claims, and to protect its own funds, it is unfair for it to have to pay damages that were not clearly and unequivocally excluded from coverage under the Policy.

II.

THE JUDGMENT ENTERED IN FAVOR OF HOME AWAY MUST BE AFFIRMED BECAUSE THE TRIAL COURT REACHED THE RIGHT RESULT

Scottsdale concedes that "a discussion regarding the precedential value of the Pinecrest decision is no longer really an issue of advocacy on the part of Scottsdale."[8] Nevertheless, this argument is briefly addressed below.

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[8]Answer Brief at 45.

Scottsdale contends that the trial court erred in finding that the decision in *Pinecrest, supra*, had precedential value. However, Scottsdale was a party to the *Pinecrest* case and conceded in open court that the identical policy language and attorneys' fee issue in this case also was presented in *Pinecrest*. The *Pinecrest* court concluded that the policy provided coverage for attorney fee awards assessed against the insured and cited legal authority supporting its decision. When faced with a written appellate court decision that Scottsdale conceded was directly on point, the trial court was bound to follow it pursuant to *Pardo v. State of Florida*, 596 So.2d 665 (Fla. 1992). In this case, unlike *Department of Legal Affairs v. District Court of Appeal Fifth District*, 434 So.2d 310 (Fla. 1983), the attorneys as well as the court understood the precedential value of the *Pinecrest* decision. The trial court properly fulfilled its role in the hierarchy by relying upon an appellate decision that, although not lengthy, was supported by legal authority and was directly on point.

CONCLUSION

Based on the reasons and authorities set forth above, Home Away respectfully requests this Court to reverse the judgment of the Fifth District Court, affirm the judgment entered by the trial court, and remand this case for a determination as to the amount of attorneys' fees to be awarded the insured for defending the appellate

proceedings.[9]

Respectfully submitted,

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[9]A separate motion for attorneys' fees was filed with the Initial Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail this _____ day of January, 2002 to: **KENNETH M. RUBIN, ESQUIRE**, Wiederhold, Moses, Bulfin & Rubin, P.A., Northbridge Centre - Suite 800, 515 North Flagler Drive, P.O. Box 3918, West Palm Beach, Florida 33402, Attorneys for Respondent, Scottsdale Insurance Company, **KENNETH L. CONNOR, ESQUIRE**, Wilkes & McHugh, P.A., P.O. Box 11187, Tallahassee, Florida 32302, Counsel for Ruth W. Haynes, by and through Nancy Bush, Personal Representative, and to: **JEFF TOMBERG, J.D., P.A.,** 626 S.E. 4th Street, P.O. Drawer EE, Boynton Beach, Florida 33425, Counsel for Academy of Trial Lawyers.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I have used font Times New Roman, 14 point.

____

__ Laura P. Denault, Attorney