

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

SHAZAM AUTO GLASS, LLC, a/a/o KAYLA ELLIS, CINDY
ANDREW, and DEMITRIS WEAVER,

Petitioner,

v.

GEICO GENERAL INSURANCE COMPANY,

Respondent.

No. 2D21-383

April 13, 2022

Petition for Writ of Certiorari to the Circuit Court for Hillsborough
County; sitting in its appellate capacity.

David M. Caldevilla of de la Parte & Gilbert, P.A., Tampa, for
Petitioner.

John P. Marino and Lindsey R. Trowell, of Smith, Gambrell &
Russell, LLP, Jacksonville, for Respondent.

STARGEL, Judge.

This proceeding arises from a consolidated certiorari
proceeding in the circuit court appellate division involving five

county court actions brought by Shazam Auto Glass, LLC, against GEICO General Insurance Company. Shazam seeks a writ of certiorari quashing the denial of its requests for appellate attorney's fees pursuant to section 627.428(1), Florida Statutes (2020), in three of the five underlying actions. As explained below, we treat the petition as a direct appeal from the denial of Shazam's fee motions and reverse.¹

Shazam, as assignee of GEICO's insureds, sued GEICO based on unpaid claims for windshield replacement services. GEICO moved to stay each of the underlying cases pending the outcome of a federal lawsuit which GEICO asserted involved overlapping issues. In each case, the county court denied a stay, and GEICO sought certiorari review in the circuit court. The circuit court ultimately rendered a consolidated order denying GEICO's petitions in three of the cases and granting its petitions in the other two.²

¹ See Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.").

² In case number 2D21-382, GEICO filed a second-tier certiorari petition seeking relief on the merits as to the three petitions that the circuit court denied. That petition has been

The circuit court also denied Shazam's motions for appellate attorney's fees in all five cases without explanation. In the instant petition, Shazam challenges the denial of its fee motions in the three cases in which the circuit court denied GEICO's petitions.³

While decisions of a circuit court in its appellate capacity are normally reviewed under this court's second-tier certiorari jurisdiction, motions for attorney's fees "made in and originally decided by the circuit court" must be reviewed "by means other than second-tier certiorari." *Certified Windshield, LLC v. GEICO Gen. Ins. Co.*, 264 So. 3d 217, 217-18 (Fla. 2d DCA 2018). In *Certified Windshield*, this court observed that "[t]he authorities addressing whether this kind of fee order should be reviewed by way of first-tier certiorari or, alternatively, under our appellate jurisdiction as a direct appeal . . . are conflicting." *Id.* at 218; *Mejia v. United Auto. Ins. Co.*, 83 So. 3d 897, 897 (Fla. 3d DCA 2012) (addressing the issue via first-tier certiorari); *Ramirez v. United*

denied. *GEICO Gen. Ins. Co. v. Shazam Auto Glass, LLC*, No. 2D21-382 (Fla. 2d DCA April 13, 2022).

³ Shazam does not challenge the circuit court's denial of fees in the two cases in which GEICO's petitions were granted.

Auto. Ins. Co., 67 So. 3d 1174, 1175-76 (Fla. 3d DCA 2011)

("Because the order denying appellate fees was the first ruling on the question, we do not think that, properly viewed, this proceeding is the second, but rather the first tier of [certiorari] review."); see also *Hallandale Chiropractic Ctr. v. United Auto. Ins. Co.*, 79 So. 3d 868, 868 (Fla. 4th DCA 2012) (citing *Ramirez* in generic opinion quashing circuit court's denial of appellate fees motion). But see *Massagee v. MGA Ins. Co.*, 128 So. 3d 871, 871-72 (Fla. 5th DCA 2013) (addressing the issue by way of direct appeal). Since the facts in *Certified Windshield* reflected that the petitioner was not entitled to relief under any standard, we disposed of the petition in that case without deciding the jurisdictional issue. 264 So. 3d at 218.

After careful consideration, we now conclude that the denial of a request for appellate attorney's fees in the circuit court is properly reviewable by direct appeal rather than certiorari. See *Massagee*, 128 So. 3d at 871-72 (holding that circuit court's denial of appellate attorney's fees was reviewable by direct appeal because "the circuit court's order denying . . . appellate attorney's fees constituted an 'original decision' which had 'never before [been] subjected to

judicial review' " (alteration in original) (quoting *Highwoods DLF EOLA, LLC v. Condo Dev., LLC*, 51 So. 3d 570, 573 n.1 (Fla. 5th DCA 2010)). This approach better aligns with Florida Rule of Appellate Procedure 9.030(b)(1)(A), which vests this court with appellate jurisdiction over "final orders of trial courts" which are "not directly reviewable by the supreme court or a circuit court." See also *Fabing v. Eaton*, 941 So. 2d 415, 417 (Fla. 2d DCA 2006) (noting that orders denying motions for attorney's fees are final and appealable unless it is clear that the court did not intend to end judicial labor as to that issue).⁴

Because we treat this proceeding as a direct appeal from this portion of the circuit court's order, our standard of review is abuse of discretion. See *D'Alusio v. Gould & Lamb, LLC*, 36 So. 3d 842, 846 (Fla. 2d DCA 2010).

Section 627.428(1) provides for an award of attorney's fees in favor of an insured or beneficiary "in the event of an appeal in

⁴ By contrast, this court's certiorari jurisdiction under rule 9.030(b)(2) is limited to (A) "nonfinal orders of lower tribunals other than as prescribed by rule 9.130" and (B) "final orders of circuit courts acting in their review capacity," which, as recognized in *Certified Windshield*, does not include attorney's fees motions filed in and originally decided by the circuit court. 264 So. 3d at 217.

which the insured or beneficiary prevails" against an insurer. Courts have recognized that under this provision, "an insured's assignee is entitled to appellate attorney's fees to the extent that it has prevailed on appeal." *Comprehensive Health Ctr., LLC v. United Auto. Ins. Co.*, 99 So. 3d 525, 526 (Fla. 3d DCA 2011); *see also Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377 (Fla. 2008) (reaffirming that "third parties who claim policy coverage through an assignment are entitled to an award of fees under section 627.428"). This right applies equally with respect to attorney's fees incurred in the appellate court in certiorari proceedings. *Allen v. State Farm Fla. Ins. Co.*, 209 So. 3d 11, 13 (Fla. 2d DCA 2016) (citing *Home Ins. Co. v. Drescher*, 220 So. 2d 902, 903 (Fla. 1969)).

In its response, GEICO attempts to frame the outcome of the consolidated proceedings as a loss for Shazam because the circuit court granted GEICO's petitions in two of the five cases. We note, however, that the consolidated proceedings involved five separately filed lawsuits, each of which was assigned to a different judge in the county court. After GEICO filed its certiorari petition in each case, the cases were consolidated by the circuit court in the interest of judicial economy. This did not strip the underlying lawsuits of their

individual character. Had the circuit court chosen to rule on the petitions in each case separately, there would be no question that Shazam prevailed as to the petitions in the cases at issue here.⁵

Shazam clearly prevailed in the circuit court in the three cases in which GEICO's certiorari petitions were denied. The circuit court abused its discretion by denying Shazam's requests for appellate attorney's fees in those cases. We reverse that portion of the circuit court's consolidated order and remand with instructions for the circuit court to grant Shazam's requests for appellate attorney's fees, contingent upon Shazam ultimately prevailing in those actions.

Affirmed in part; reversed in part, and remanded.

⁵ Even assuming Shazam only scored a "partial" victory in the consolidated proceedings, that would still not affect its entitlement to attorney's fees under section 627.428(1). See *Danis Indus. Corp. v. Ground Improvement Techs., Inc.*, 645 So. 2d 420, 421 (Fla. 1994) (holding that an insured who prevails is entitled to fees even if the insurer "prevails on some but not all of the issues"); *Hallandale Chiropractic Ctr.*, 79 So. 3d 868 (awarding fees under section 627.428(1) where "Hallandale prevailed in part on appeal"); *Great Sw. Fire Ins. Co. v. DeWitt*, 458 So. 2d 398, 400 (Fla. 1st DCA 1984) ("[A]ppellees seek attorney fees for this appeal pursuant to [section] 627.428. Inasmuch as both parties have obtained some relief in this court, we find that appellees are entitled to a portion of their appellate fees").

VILLANTI and KHOUZAM, JJ., Concur.

Opinion subject to revision prior to official publication.