

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY,

FLORIDA
CALVERT VICTOR, individually
and on behalf of all other persons
similarly situated,

Plaintiff,

vs.

CASE NO. 07-019486-05

WASHINGTON INTERNATIONAL
INSURANCE COMPANY,

Supplemental Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION
FOR AWARD OF ATTORNEY'S FEES AND COSTS**

THIS CAUSE, having come before the Court on January 28th, 2009 to be heard upon Plaintiff CALVERT VICTOR's Motion for Award of Attorney's Fees and Costs, it is hereby

ORDERED AND ADJUDGED that, based upon the following findings, said Motion hereby is Granted.

I. Procedural History

This case first began as an action by Plaintiff CALVERT VICTOR against the Defendant LOW PRICE AUTO SALES, INC., a motor vehicle dealer, for causes of action arising out of the sale of a used car. The Court entered a Partial Final Judgment in favor of Plaintiff VICTOR and against LOW PRICE, finding that it had not only failed to honor the used car warranty which was part of its sales contract for such used car, but that it had also committed Theft of said car by supposedly accepting the used car from Plaintiff pursuant to said warranty but keeping it and never returning it to Plaintiff. Defendant LOW PRICE did not satisfy the Judgment.

Supplemental Defendant WASHINGTON INTERNATIONAL INSURANCE COMPANY

had issued a Motor Vehicle Dealer Surety Bond to LOW PRICE, which was in full force and effect at the time of its transactions with Plaintiff VICTOR. The Surety Bond, pursuant to Fla. Stat. Sec. 320.(27)10., is in favor of any person who suffers any loss as a result of a motor vehicle dealer violating either the conditions of a written contract involving the sale of a motor vehicle or violating any of the provisions of Florida Statutes Chapters 319 or 320. Plaintiff brought these Supplemental Proceedings against WASHINGTON INTERNATIONAL, seeking satisfaction of his Judgment against LOW PRICE from the Surety Bond. After granting Plaintiff's Motion for Judgment on the Pleadings, a Final Supplemental Judgment was entered in his favor and against WASHINGTON INTERNATIONAL, reserving jurisdiction for the Court to award attorney's fees and costs. Plaintiff VICTOR now comes before the Court seeking an award of attorney's fees and costs pursuant to Fla. Stat. Sec. 627.428.

II. Entitlement to Attorney's Fees

Florida Statute Section 627.428(1) provides that upon the rendition of a judgment against an insurer and in favor of any named or omnibus insured under a policy or contract executed by the insurer, the trial court shall enter an award against the insurer and in favor of the insured for a reasonable sum as fees or compensation for the insured's attorney prosecuting the suit in which the recovery is had.

In its opposition to Plaintiff's Motion for Award of Attorney's Fees, Supplemental Defendant WASHINGTON INTERNATIONAL argues that Fla. Stat. Sec. 627.428(1) does not apply to the present case because Plaintiff VICTOR is not in privity of contract with WASHINGTON INTERNATIONAL, nor is he an omnibus insured, and he is merely a third-party claimant rather than a contracting party or an insured under an insurance policy, relying upon Hubbel v. Aetna, 758 So.2d 94 (Fla. 2000) and distinguishing Nichols v. Preferred National Insurance Company, 704

So.2d 1371 (Fla. 1997). Supplemental Defendant WASHINGTON INTERNATIONAL further argues that attorney's fees are not awardable to a prevailing plaintiff in a suit to recover monies under a Motor Vehicle Dealer Bond in order to satisfy a judgment entered against its principal (the motor vehicle dealer) for violations of The Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ch. 501. In support of such argument, WASHINGTON INTERNATIONAL relies upon Hubbel, supra, and the language of the bond itself as required by Fla. Stat. Sec. 320.27(10).

In support of his Motion for Award of Attorney's Fees, Plaintiff VICTOR argues that he is an omnibus insured, entitled to an award of attorney's fees like any other plaintiff prevailing in a suit against its own insurance company. Plaintiff VICTOR further argues that Hubbel specifically stated that it was only considering an award of fees pursuant to Florida Statutes Chapters 320 and 501, and expressly excluded any consideration of fees awardable under Fla. Stat. Sec. 627.428. In support of his position, Plaintiff VICTOR relies upon Boland v. Trans Coastal Roofing Company, 851 So.2d 724 (Fla. 2003).

The Court hereby finds and determines that this case is governed by Boland, and the Court gives Hubbel a narrow reading, ruling that it did not consider an award of attorney's fees under Fla. Stat. Sec. 627.428 but rather applied only Fla. Stat. Sec. 320.27(10). A fair reading of the Boland case is that it encompasses Motor Vehicle Dealer Surety Bonds and entitles a plaintiff prevailing in a suit against a surety to recover under the bond to be awarded attorney's fees under Fla. Stat. Sec. 627.428, regardless of the underlying cause(s) of action against the bond principal/dealer.

Therefore, Plaintiff VICTOR is entitled to an award of attorney's fees against Supplemental Defendant WASHINGTON INTERNATIONAL, pursuant to Fla. Stat. Sec. 627.428(1), for prevailing in the prosecution of this action.

III. Amount of Attorney's Fees

Plaintiff VICTOR argues that he is entitled to an award of attorney's fees in an amount above and beyond the face amount of the surety bond. Supplemental Defendant WASHINGTON INTERNATIONAL argues that the total amount of all monies, including damages and attorney's fees, cannot exceed the face amount of the bond. Pursuant to Boland, supra, the Court finds that Plaintiff VICTOR is entitled to an award of attorney's fees in an amount above and beyond the face amount of the surety bond, and without having to prove any independent misconduct by the surety.

To establish the amount of reasonable attorney's fees to which he is entitled, Plaintiff VICTOR called two witnesses: Plaintiff's Attorney, Jerard C. Heller; and an expert witness, Attorney Robert W. Murphy. Supplemental Defendant WASHINGTON INTERNATIONAL did not call any witnesses, and did not offer any other evidence.

Attorney Heller testified that he has been practicing Consumer Protection Law in Broward County since 1981, that he entered into a written contingency fee contract with Plaintiff VICTOR to represent him in this action, that his regular rate during the period of such representation was \$350.00 per hour, that he had incurred 84.1 hours in the prosecution of this action, and that it is very difficult for consumers to obtain representation in matters such as this because of the scarcity of Consumer Protection Attorneys in Broward County, as well as the difficulty of litigating against motor vehicle dealers and their insurers and sureties.

Attorney Murphy testified that he has practiced law in Florida since 1987, that he does only Consumer Protection Law, and that he is familiar with this action and with Attorney Heller's file on the case. He testified that in reviewing the case file, he considered the factors enumerated in Florida Patient's Compensation Fund v. Rowe, the Standard Guarantee v. Quanstrom case, and in

Rule 4.15 of The Rules of The Florida Bar. Attorney Murphy further testified that a reasonable amount of time for the prosecution of the case would be 64.5 hours; that a reasonable hourly rate for an attorney with the experience of Attorney Heller would actually be more than the \$350.00 per hour which he had claimed; and that in so concluding he was applying as a factor the fact that acceptance of this case precludes other employment by Attorney Heller in that he is a member of the National Association of Consumer Advocates, which requires members to forego employment by car dealers and other clients with interests adverse to consumers. Attorney Murphy further testified that under the Quanstrom case, this would be a Category Two case involving contract and tort matters; that absence of a contingent fee multiplier would diminish the ability of consumers who are unable to pay hourly attorney's fees to obtain counsel; that there was a substantial risk of Attorney Heller not being paid at all when he agreed to represent the Plaintiff on a contingent fee basis, and that there was no way to mitigate such risk. Attorney Murphy also testified that the chances of Plaintiff prevailing in this case at the time that Attorney Heller entered into the contingent fee contract were even, based upon the "clear and convincing" standard of proof in proving Theft and the possibility of the dealer arguing "non-payment" as a defense.

Based upon the testimony of Attorney Heller, the testimony of Attorney Murphy, and WASHINGTON INTERNATIONAL having failed to call any witnesses or introduce any other evidence to refute any of the testimony of the two aforementioned attorneys, the Court hereby finds that \$350.00 is a reasonable hourly rate for the legal services performed herein by Plaintiff's Attorney Jerard C. Heller; that 64.5 is a reasonable number of hours for Attorney Heller to have expended in the prosecution of this action; and that a contingent fee multiplier of 2.0 should be applied thereto. Therefore, the Court hereby awards the sum of \$42,500.00 to Plaintiff's Attorney Jerard C. Heller as reasonable attorney's fees for the successful prosecution of this action, for which

sum the Court shall enter judgment in favor of Attorney Heller and against Supplemental Defendant WASHINGTON INTERNATIONAL INSURANCE COMPANY.

IV. Costs

Plaintiff's Attorney testified that he had incurred costs of \$256.00 for the filing fee in this action and \$70.00 for service of process. Plaintiff's expert witness, Attorney Robert W. Murphy, testified that he had expended 5.5 hours preparing for and attending the hearing on this matter, and that his rate is \$400.00 per hour. No contrary testimony or other evidence was offered by WASHINGTON INTERNATIONAL. The Court hereby finds all of the above cited costs to have been necessarily incurred by Plaintiff and reasonable in their amount. Accordingly, the Court hereby awards \$326.00 to Plaintiff for filing fees and process server fees, plus \$2,200.00 for expert witness attorney's fees, for which sums the Judgment shall also be entered.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida this ____ day of _____, 2009.

CIRCUIT COURT JUDGE

copies furnished:
Jerard Heller, Esq.
Melissa Munroe, Esq.