IN THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA
CASE NO.: 5D15-131

MID-CONTINENT CASUALTY COMPANY,

L.T. CASE NO.: CA06-0815

Appellant,

vs.

JAMES T. TREACE and ANGELINE G. TREACE,
Appellees,

and

HARBOUR ISLAND JOINT VENTURE III, JC DESIGN MANAGEMENT CO., HUNTINGTON BUILDERS, INC., DOESN'T MEAN ANYTHING, INC., STEPHENSON DESIGN AND DEVELOPMENT, RYSKCON CONSTRUCTION INC., RAKE BROTHERS ENTERPRISES, INC., BARRY K. CHERRY, and ARCHITECURAL WINDOWS & CABINETS

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND RULES

STATEMENT OF THE CASE AND FACTS

I. Overview

This is an appeal of a final order and judgment on attorneys' fees and costs from a garnishment action by the Appellees, James T. Treace and Angeline G. Treace (the Treaces), against Appellant, Mid-Continent Casualty Company (MCC). The garnishment action is based on judgments entered against MCC's insured in the underlying construction-defect action. MCC raises two issues on appeal: (i) whether the Treaces, as assignees of MCC's insurance policies, are entitled to attorneys' fees incurred in prosecuting the garnishment action; and (ii) whether the trial court abused its discretion by awarding the Treaces arbitration and certain expert-witness costs.

II. The Underlying Action

MCC's insured, Stevenson Design & Development of Jacksonville, Inc. (Stevenson Design), constructed the Treaces' home in 2002. (R. Vol. VII, p. 1015). In 2006, the Treaces filed suit against Stevenson Design and others alleging construction defects and resultant water intrusion damage. (R. Vol. III, p. 365). Over five years into the underlying action, MCC filed a motion to intervene to submit special interrogatories to the jury, but the court denied the motion because MCC had waited until "the eve of trial." (R. Vol. VII, p. 1016, Vol. VII, p. 1139). A jury returned a verdict in favor of the Treaces and awarded them $810,280 in damages.

(R. Vol. V, p. 670). On June 27, 2012, the court entered a final judgment against Stevenson Design and in favor of the Treaces in the amount of $1,016,187.00.[1] (R. Vol. VIII, p. 1301-02). Later, the court entered a separate final judgment against Stevenson Design and in favor of the Treaces for their attorney's fees and costs incurred in the underlying action; $316,528 of this judgment was for fees.[2] (R. Vol. IX, p. 1382).

III. The Assignment

Stevenson Design was out of business and unable to pay the amounts awarded to the Treaces in the underlying action. (R. Vol. XXXII, p. 5196). On December 13, 2013, during the pendency of the garnishment action against MCC, Stevenson Design negotiated an assignment to the Treaces recognizing its outstanding indebtedness to them in the amount of $1,183,262.64 as a result of the final judgments entered in the underlying action.[3] (R. Vol. XIII, p. 2066-68). To account for the outstanding indebtedness, it assigned to the Treaces all of its rights and

[1] The difference in the amounts between the final judgment and the verdict was due to the amount of pre-judgment interest. (R. Vol. XXXII, p. 5195).

[2] Stevenson Design appealed this fee judgment, and this Court affirmed. *Stevenson Design and Dev. v. Treace*, Case No. 5D13-2062, 147 So. 3d 1015 (Fla. 5th DCA 2014) (table).

[3] The outstanding indebtedness amount includes the final judgment of $1,016,187, plus the fee and cost judgment of $379,076, less a credit for two partial payments in the amount of $265,027.54. (R. Vol. XIII, p. 2066).

benefits under its insurance policies with MCC. (R. Vol. XIII, p. 2066-67). The parties negotiated an effective date of June 27, 2012, for the assignment based on the date the trial court entered final judgment against Stevenson Design in the underlying action. (R. Vol. X, p. 1658; Vol. XIII, p. 2066).

Stevenson Design had been administratively dissolved on September 23, 2011. (R. Vol. II, p. 107). Although it was administratively dissolved at the time of the assignment, its corporate status was reinstated on February 13, 2014. (R. Vol. XXXI, p. 5154). Under section 607.1422, Florida Statutes, the reinstatement "relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." § 607.1422, Fla. Stat. (2012).[4]

IV. The Garnishment Action

The Treaces commenced the garnishment action in July 2012 by way of a motion, in which it sought to implead MCC and garnish the proceeds of MCC's policies insuring Stevenson Design. (R. Vol. I, p. 53-59). The trial court ordered non-binding arbitration, and the arbitrator awarded $600,000 to the Treaces plus

[4] The 2012 versions of the statutes cited herein likely apply since the garnishment action was filed that year. Even if the Court applies different versions, there have been no material amendments to section 607.1422 since 2003, to section 607.1405 since 1993, to sections 607.1406 or 606.1421 since 2009, to section 627.428 since 1982, or to section 44.103 since 2007; therefore, the Court's decision will be the same whether it applies the 2012 versions or other recent versions.

interest and costs. (R. Vol. XXXV, p. 5767-82). The arbitrator determined the assignment from Stevenson Design to the Treaces was valid and for sufficient consideration. (R. Vol. XXXV, p. 5778). Based on the valid assignment, the arbitrator concluded the Treaces could recover from MCC, under section 627.428, Florida Statutes, all of their attorneys' fees incurred in pursuing the garnishment action. (R. Vol. XXXV, p. 5780-81). The arbitrator recommended rejecting MCC's argument that the Treaces were limited to collecting attorneys' fees incurred after the signatory date of the assignment. (R. Vol. XXXV, p. 5781 n. 3). MCC rejected the arbitrator's award and requested a trial. (R. Vol. XV, p. 2350-52).

During the course of discovery, the Treaces disclosed three expert witnesses to be called at trial: Brian Wingate, Brett Newkirk, and Ricardo Morales. (R. Vol. IX, p. 1485-87). MCC requested an opportunity to depose all three experts, and the Treaces complied with that request. (R. Vol. X, p. 1629). Although the experts were entitled to a reasonable witness fee for their services under Florida Rule of Civil Procedure 1.390, MCC would not agree to a reasonable fee for the experts, and the Treaces had to resort to filing a motion to compel payment of reasonable fees for the depositions taken by MCC. (R. Vol. X, p. 1628-44). The trial court did not rule on the motion to compel prior to trial. (R. Vol. XXXII, p. 5202).

A week prior to trial, the parties filed two stipulations and a joint pretrial statement. In the first stipulation, the parties agreed that, to the extent the court found

the assignment enforceable, the Treaces would have all rights and claims Stevenson Design would have to pursue attorneys' fees against MCC. (R. Vol. XIV, p. 2190-91). In the second stipulation, the Treaces waived their right to a jury trial based on MCC's representation that only certain factual issues were to be raised. (R. Vol. XIV, p. 2202). The pretrial statement contained a statement of admitted facts, including that Stevenson Design and the Treaces executed an assignment of insurance rights and benefits. (R. Vol. XIV, p. 2314).

The garnishment trial was a one-day bench trial in February 2014. (R. Vol. XXXII, p. 5227-28). Mssrs. Wingate and Newkirk testified at trial. (R. Vol. LI, p. 7995). The Treaces did not call Mr. Morales to testify at trial because, based on the course of discovery and MCC's case, his expert testimony was unnecessary for trial purposes. (R. Vol. LI, p. 7995; Vol. LII, p. 8094). The trial court awarded the Treaces $660,280 as "the amount of the jury's verdict for covered damages." (R. Vol. XXXII, p. 5249.) The court later added this amount to the pre-judgment interest and the amount of costs from the underlying trial to which the Treaces were entitled. The resulting final garnishment judgment in favor of the Treaces was $906,648. (R. Vol. XXXV p. 5764-65).

Following the bench trial, the Treaces filed a motion for an award of fees, costs, and prejudgment interest. (R. Vol. XXXII, p. 5274-78). The trial court initially denied the motion. (R. Vol. XXXV, p. 5789-95). Upon the Treaces' motion for

rehearing, the trial court heard argument on issues related to their recovery of attorneys' fees and costs. (R. Vol. XXXV, p. 5804-09; Vol. LII, p. 8085-97). At that hearing, MCC's counsel agreed with the trial court that "the Treaces would be entitled to their fees in this garnishment action if there's a valid assignment." (R. Vol. LII, p.8086). Thereafter, the trial court entered a final judgment of awardable costs in favor of the Treaces and an order granting their motion for an award of fees, costs, and prejudgment interest. (R. Vol XXXVI, p. 5906-18).

MCC appealed the final judgment awarding costs and the order granting attorneys' fees. (R. Vol XXXVI, p. 5920). This Court ordered MCC to show cause why the order granting the motion for attorneys' fees should proceed on appeal. (Case No.5D15-0131, Order to Show Cause, dated 01/15/2015). MCC then filed an unopposed motion for entry of final judgment in the trial court preserving its right to challenge the Treaces' entitlement to attorneys' fees but stipulating to $300,000 as a reasonable amount of fees. (R. Vol. XXXVI, p. 5946-49). Thereafter, the trial court entered final judgment in favor of the Treaces in the amount of $300,000 for their attorneys' fees incurred in the garnishment action, and this Court directed the parties to proceed on appeal. (R. Vol. XXVI, p. 5953-55, 5977).

SUMMARY OF ARGUMENT

The Treaces, as assignees of Stevenson Design's insurance policies, are entitled to recover attorneys' fees against MCC under section 627.428, Florida

Statutes. Florida law permits Stevenson Design, as the insured, to freely assign its rights to an insurance policy even in the presence of an anti-assignment clause if the assignment occurs after the loss. MCC's arguments regarding the validity of the assignment must be rejected. First, Stevenson Design's retroactive reinstatement as a corporation renders the purpose of the assignment irrelevant. Second, regardless of the reinstatement, Stevenson Design assigned the policies for the purpose of discharging its outstanding indebtedness to the Treaces. Third, to the extent MCC may raise on appeal any argument regarding retroactivity, awarding the Treaces all of their attorneys' fees for prosecuting the garnishment action comports with section 627.428's purpose of discouraging litigation on valid claims. Finally, to the extent MCC is permitted to raise the defense of lack of consideration, Stevenson Design received valuable consideration for the assignment: decreased liability exposure for the outstanding merits judgment and the Treaces' pursuit of its insurance claims with MCC on its behalf. This Court should affirm the trial court's conclusion that the Treaces are entitled to attorneys' fees under section 627.428, Florida Statutes.

The trial court acted within its broad discretion in awarding arbitration costs and expert witness costs related to Mr. Morales. Allocating the costs of arbitration to MCC, rather than the Treaces, is sensible and fair because MCC is responsible for the trial on the merits and the attendant accumulation of avoidable costs, and section 44.103, Florida Statutes, does not prohibit the exercise of such discretion under the

Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. In addition, the trial court appropriately awarded costs related to Mr. Morales because he was disclosed as an expert witness and testified via deposition at MCC's request. This Court should affirm the trial court's costs judgment.

ARGUMENT ON APPEAL

I. THE TREACES ARE VALID ASSIGNEES OF MCC'S POLICIES AND ENTITLED TO RECOVER ATTORNEYS' FEES UNDER SECTION 627.428, FLORIDA STATUTES.

***Standard of Review*.** This Court reviews *de novo* a trial court's ruling on a party's entitlement to attorney's fees under section 627.428, Florida Statutes. *Do v. GEICO Gen. Ins. Co.*, 137 So. 2d 1039, 1043 (Fla. 3rd DCA 2014); *see also Saltzman v. Hadlock*, 112 So. 3d 772, 774 (Fla. 5th DCA 2013) (reviewing *de novo* an order on attorneys' fees based on interpretation of statute). Likewise, the validity of an assignment is a legal issue subject to *de novo* review. *See e.g., Free v. Free*, 936 So. 2d 699, 702 (Fla. 5th DCA 2006) (applying *de novo* review to validity-of-contract issue). To the extent the trial court's conclusion regarding the validity of the assignment is based on findings of fact, this Court reviews those findings only to assure they are supported by competent and substantial evidence. *See Jarrard v. Jarrard*, 157 So. 3d 332, 337-38 (Fla. 5th DCA 2015) (explaining mixed standard of review).

Merits. An assignee of an insurance policy is entitled to an award of attorneys' fees from the insurer under section 627.428, Florida Statutes.[5] *Indiana Lumbermens Mut. Ins Co. v. Pennsylvania Lumbermens Mut. Ins. Co.*, 125 So. 3d 263, 266 (Fla. 4th DCA 2013). An insured may assign a post-loss claim even if the policy prohibits assignments. *Accident Cleaners, Inc. v. Universal Ins. Co.*, 40 Fla. L. Weekly D862 (Fla. 5th DCA April 10, 2015); *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 769 (Fla. 4th DCA 2015); *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 195 (Fla. 5th DCA 2012). An insured's broad ability to assign its policies and the assignee's attendant ability to recover attorneys' fees is consistent with section 627.428's purpose of discouraging litigation and encouraging prompt resolution of valid claims. *See Jerkins v. USF & G Specialty Ins. Co.*, 982 So. 2d 15, 17 (Fla. 5th DCA 2008) (describing purposes of section 627.428, Florida Statutes).

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[5] Section 627.428(1), Florida Statutes provides:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

§ 627.428, Fla. Stat. (2012).

The trial court concluded the Treaces were valid assignees of Stevenson Design's policies with MCC and thus entitled to recover attorneys' fees under section 627.428, Florida Statutes. (R. Vol. XXXVI, p. 5913-17). In reaching its conclusion, the trial court rejected MCC's arguments that the assignment was invalid due to Stevenson Design's status as an administratively dissolved corporation or for lack of consideration, and, based on the purpose of the attorneys' fees statute, rejected MCC's argument that Stevenson Design could not retroactively assign its rights. (*Id*.) The trial court's decision should be affirmed for the reasons discussed below.

A. Stevenson Design was reinstated prior to trial, with the reinstatement relating back as though Stevenson Design had never been dissolved.

An administratively dissolved corporation may apply for reinstatement at any time. § 607.1422, Fla. Stat. (2012). The reinstatement "relates back to and takes effect as of the effective date of the administrative dissolution," *id.*, and the corporation is treated "as though it had never been dissolved," *Allied Roofing Indus., Inc. v. Venegas*, 862 So. 2d 6, 8 (Fla. 3rd DCA 2003). The sanction accompanying administrative dissolution—the inability to carry on regular business—is "intended to benefit the State, not third parties outside the corporation/State relationship." *Allied Roofing*, 862 So. 2d at 9; *see also LeLac Prop. Owners' Assoc., Inc. v. Routh*, 493 So. 2d 1131, 1133 (Fla. 4th DCA 1986) (finding no reason to construe the

corporate-reinstatement provision "so narrowly as to provide a windfall to the parties who may create a cause of action during the grace period by allowing them to escape their obligations to the reinstated corporation"). Because corporations are reinstated retroactively, a reinstated corporation may, for example, pursue a lawsuit filed during a period of administrative dissolution even if the cause of action arose during the period of dissolution. *See, e.g.*, *Allied Roofing*, 862 So. 2d at 8 (reinstated corporation entitled to maintain suit filed while administratively dissolved); *Levine v. Levine*, 734 So. 2d 1191, 1197 (Fla. 2d DCA 1999) (reinstated corporation may sue on causes of action existing at time of dissolution)

MCC ignores the impact of Stevenson Design's reinstatement on the validity of the assignment and instead relies on an argument that the assignment did not discharge corporate liabilities. (MCC Initial Br., p. 5-8). The corporate reinstatement, however, renders the purpose of the assignment irrelevant because upon reinstatement, Stevenson Design is treated as if the administrative dissolution had never occurred. § 607.1422, Fla. Stat. (2012). In other words, the assignment is now viewed retroactively through the lens of a reinstated corporation. *See, e.g.*, *Allied Roofing*, 862 So. 2d at 8 (reinstated corporation entitled to maintain suit filed while administratively dissolved). Thus, although Stevenson Design assigned the policies to the Treaces during a period of administrative dissolution, its subsequent

reinstatement renders that fact irrelevant: It is "as if the administrative dissolution had never occurred." *See* § 607.1422, Fla. Stat. (2012) (quoted).

Moreover, it is improper for MCC to rely on Stevenson Design's administrative-dissolution sanction to avoid its obligation to pay attorneys' fees to the Treaces under section 627.428, Florida Statutes. The purpose of the attorneys' fees statute is "to discourage litigation and encourage prompt disposition of valid insurance claims without litigation." *Jerkins*, 982 So. 2d at 17. The Treaces spent years litigating issues regarding the construction defects and related property damage to their home, and they negotiated an assignment from Stevenson Design to pursue a valid claim for insurance coverage under MCC's policies. MCC could have avoided further litigation by indemnifying Stevenson Design, but it did not. Florida's administrative-dissolution sanctions are not intended to benefit third parties outside the corporation/State relationship, much less an insurer attempting to avoid its statutory obligation to pay attorneys' fees incurred by assignees in prosecuting a valid claim for insurance coverage.

Finally, even if Stevenson Design had not been reinstated, MCC's argument that its administrative dissolution invalidates the assignment is without merit. In *National Judgment Recovery Agency, Inc. v. Harris*, the assignee of an administratively dissolved corporation initiated garnishment proceedings against an individual alleged to be indebted to the assignor. 826 So. 2d 1034 (Fla. 4th DCA

2002). The trial court granted the garnishee's motion to dissolve the writ because the assignor had been administratively dissolved eight years prior to the assignment and had not been reinstated. *Id.* at 1035. The Fourth District Court of Appeal reversed the trial court's dissolution of the writ. *Id.* Even the dissenting opinion noted that the assignor's administrative dissolution at the time of the assignment "would not seem to have any effect on the validity of the transfer." *Id.* at 1036 n.2 (Farmer, J., dissenting). Thus, although Stevenson Design's reinstatement negates the need for the Court to consider MCC's argument, the assignment would be valid even if Stevenson Design had not been reinstated.

In sum, because Stevenson Design was retroactively reinstated, its status as an administratively dissolved corporation at the time of the assignment is irrelevant to the validity of the assignment. Thus, the Court need not consider MCC's argument that the assignment was invalid because it was unrelated to the winding up or liquidation of Stevenson Design's affairs. Regardless, as discussed below, MCC's administrative-dissolution argument fails for the additional reason that Stevenson Design entered the assignment for the purpose of discharging its liability to them on the outstanding merits judgment.

B. Stevenson Design assigned the policies to the Treaces for the purpose of discharging its liability to them on the outstanding merits judgment.

An administratively dissolved corporation continues its corporate existence and is permitted to engage in specified activities, including "[d]ischarging or making provision for discharging its liabilities," and "[d]oing every other act necessary to wind up and liquidate its business and affairs." §§ 607.1421(3); 607.1405(1)(c),(e), Fla. Stat. (2012); *see also* § 607.1406, Fla. Stat. (2012) (requiring dissolved corporation to "make reasonable provision to pay all known claims and obligations"). Its activities may include "bringing or defending legal proceedings associated with winding up or liquidation." *Selepro, Inc. v. Church*, 17 So. 3d 1267, 1269 (Fla. 4th DCA 2009) (quoting *Allied Roofing*, 862 So. 2d at 8); *see also Cygnet Homes, Inc. v. Kaleny Ltd. Of Fla., Inc.*, 681 So. 2d 826, 826 (Fla. 5th DCA 1996) (permitting administratively dissolved corporation to pursue claim to collect assets). Significantly, as discussed above, an administratively dissolved corporation may validly assign its rights to an uncollected judgment such that the assignee may pursue recovery of that judgment in garnishment proceedings. *See Nat'l Judgment Recovery Agency*, 826 So. 2d at 1034 (holding trial court erred by dissolving writ of garnishment on basis that corporation had been administratively dissolved at time of assignment).

The Treaces obtained a final judgment against Stevenson Design in the amount of $1,016,187 for damages related to construction defects and property damage to their home, and a subsequent attorneys' fees and cost judgment for $379,076. (R. Vol. XIII, p. 2066). Stevenson Design, even during a period of administrative dissolution, could have initiated proceedings against MCC to discharge its liability to the Treaces through a claim for insurance coverage. *See, e.g.*, *Cygnet Homes*, 681 So. 2d at 826 (permitting suit to collect assets). Instead, it assigned its right to do so to the Treaces. The assignment explicitly recognizes Stevenson Design's outstanding indebtedness to the Treaces for the judgments and assigned to them all of its "rights, benefits and choses in action available under all insurance policies provided to [it] by MCC." (R. Vol. XIII, p. 2066). In addition, the assignment contained a warranty from the Treaces to protect against another person or entity seeking to recover against Stevenson Design for the outstanding judgments rendered in the trial. (R. Vol. XIII, p. 2067). Under section 607.1405, Florida Statutes, the assignment is a permissible provision for the discharge of corporate liability on outstanding judgments.

MCC's focus on the assignment's "no release" and "waiver" provisions is misplaced. The "no release" provision acknowledges that the Treaces are not releasing Stevenson Design from liability "in connection with the [j]udgments." (R. Vol. XIII, p. 2067). The "waiver" provision waives any claims by the Treaces against

individuals Jeffrey and Jane Chefan as "further consideration" for the assignment. (R. Vol. XIII, p. 2067). Neither of these provisions changes the fact that Stevenson Design entered the assignment to discharge its "outstanding indebtedness" to the Treaces. (R. Vol. XIII, p. 2066). As contemplated by the assignment, the Treaces have pursued Stevenson Design's rights as the insured and obtained a significant judgment against MCC in the garnishment action, thereby discharging a significant portion of Stevenson Design's outstanding indebtedness that the Treaces are able to collect from MCC. That two individuals also received a benefit as "further consideration" for the assignment, or that Stevenson Design may still be liable for some portion of the outstanding indebtedness, does not change the nature of the assignment as a provision by a corporation to discharge an outstanding debt. As stated by the trial court in rejecting MCC's argument to the contrary, "If there's a judgment against Stevenson [Design], and the Treaces get an appreciably-sized judgment against [MCC], Stevenson [Design] would be entitled to a setoff on that, even if there wasn't a full release." (R. Vol. LII, p. 8086).

Moreover, the cases cited by MCC offer no support for its argument that the purpose of the assignment is invalid. (*See* MCC Initial Brief, p. 6-7). The *111 Properties* case recites the basic proposition that a corporation is a legal entity separate and distinct from its shareholders. *See 111 Properties, Inc. v. Lassiter*, 605 So. 2d 123, 126 (Fla. 4th DCA 1992) (declining to pierce corporate veil and impose

personal liability). The *Miner* case concludes that a shareholder-director does not have an interest in the property of a dissolved corporation for purposes of an avoidance action in bankruptcy. *In re Miner*, 185 B.R. 104, 106 (N.D. Fla. 1994). Rather than supporting MCC's argument, these cases bolster the Treaces' argument that the waiver of liability on behalf of the Chefans as individuals is irrelevant to Stevenson Design's discharge of its corporate liabilities because those individuals would not be personally liable for its outstanding indebtedness under the general law of corporations.

Stevenson Design did not engage in an impermissible corporate activity during its period of administrative dissolution. Rather, as permitted under section 607.1405(1)(c), Florida Statutes, it entered the assignment as a provision to discharge its liability to the Treaces. For the reasons discussed above, this Court should affirm the trial court's conclusion that Stevenson Design's status as an administratively dissolved corporation does not affect the validity of the assignment.

C. The assignment is enforceable as of June 27, 2012.

MCC conceded at the hearing before the trial court that the issue regarding the date of the assignment concerns only the amount of fees rather than entitlement to fees. (R. Vol. LII, p. 8086). MCC subsequently "waive[d] any challenge to [the trial court's determination] that $300,000 is a reasonable amount for [the Treaces'] attorneys' fees." (R. Vol. XXXVI, p. 5954). Thus, MCC is precluded from arguing

on appeal that the assignment is invalid to the extent it retroactively assigned rights to the Treaces. Regardless, as discussed below, MCC's argument fails because, under section 627.428, Florida Statutes, MCC is liable for all attorneys' fees incurred by the Treaces in litigating the valid claims for insurance coverage.

As discussed previously, the purpose of section 627.428, Florida Statutes, is to discourage litigation and encourage insurers to pay valid claims without delay. *Jerkins*, 982 So. 2d at 17. Courts interpret the statute broadly, and an assignee "stands to all intents and purposes in the shoes of the insured and logically should be entitled to an attorney's fee when he sues and recovers on the claim." *Indiana Lumbermens Mut. Ins. Co.*, 125 So. 3d at 266 (internal quotation marks omitted). In applying section 627.428 to an assignee's claim for attorneys' fees, the Eleventh Circuit Court of Appeals has rejected an insurer's argument that an assignment executed a day prior to trial precluded the recovery of any attorneys' fees incurred prior to the assignment. *Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1288 (11th Cir. 1983). Specifically, the court found "no reason or support for attaching significance to the date of the assignment which would, in this case, limit the fee award to only three days of work, thus eliminating from consideration the extensive preparation for trial that is documented in the record." *Id.* at 1289.

The Eleventh Circuit's reasoning is persuasive here. Precluding recovery of fees incurred prior to the assignment would thwart the purposes of the statute

because it would permit MCC to avoid the bulk of attorneys' fees despite forcing valid insurance claims through significant litigation. MCC could have avoided the litigation entirely by prompt disposition of the valid claims for coverage. Alternatively, MCC could have significantly reduced the litigation and attendant fees by accepting the arbitrator's award of $600,000 to the Treaces and avoiding trial. MCC did neither and the Treaces, as assignees, are entitled to recover their attorneys' fees under section 627.428, Florida Statutes, for their efforts in prosecuting the garnishment action.

Significantly, MCC's brief lacks any legal authority for its argument that retroactive assignments are unenforceable.[6] (MCC Initial Br. at 9-10). Nor does MCC's argument on appeal address why section 627.428, Florida Statutes, would preclude recovery of the Treaces' attorneys' fees incurred throughout the garnishment action. (*Id.*). Instead, MCC cites a federal patent case holding that, because the plaintiff did not have legal title to the patent at the time of the suit, it lacked standing to bring patent and trademark claims. *See Gaia Tech., Inc. v.*

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[6] In fact, this was a question the trial court asked MCC:

> THE COURT: Are there any cases that say it doesn't allow for a retroactive assignment?
>
> MR. CATIZONE: I couldn't find a case either way.

(R. Vol. LII, p. 8087).

Reconversion Tech., Inc., 93 F.3d 774, 779-80 (Fed. Cir. 1996). In that context, the court determined an assignment was insufficient to confer retroactive standing on the plaintiff to bring the lawsuit. *Id.* Here, however, neither standing at the inception of a lawsuit nor patents are at issue. As MCC conceded at the hearing before the trial court, the issue regarding the date of the assignment concerns only the amount of fees rather than entitlement. (R. Vol. LII, p. 8086).

In sum, MCC has waived any argument regarding the amount of fees. Regardless, for the reasons stated above, under section 627.428, Florida Statutes, MCC is liable for all attorneys' fees incurred by the Treaces in litigating the valid claims for insurance coverage. This Court should affirm the trial court's conclusion that the assignment is valid and enforceable as of June 27, 2012, the retroactive date of the assignment.

D. Valid consideration supports the assignment.

As a preliminary matter, lack of consideration for an assignment is an affirmative defense that may be raised only by the assignor. *See McCampbell v. Aloma Nat'l Bank of Winter Park*, 185 So. 2d 756, 758 (Fla. 1st DCA 1966) (stating that only original parties to assignment could raise defense of lack of consideration). Because MCC is not the assignor, it cannot raise this defense. Even if MCC could raise a consideration defense, any such defense would fail for the following reasons.

A fundamental principle of contract law is that a court will not inquire as to the adequacy of consideration. *AC Assoc. v. First Nat'l Bank of Fla.*, 453 So. 2d 1121, 1129-30 (Fla. 2d DCA 1984); *Parker v. Purvis*, 282 So. 2d 12, 13 (Fla. 2d DCA 1973). Thus, "anything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the thing promised." *Parker*, 282 So. 2d at 13. Either a benefit to the promisor or a detriment to the promisee may constitute consideration. *Real Estate World Comm., Inc. v. Piemat, Inc.*, 920 So. 2d 704, 706 (Fla. 4th DCA 2006). It is not, however, necessary that the benefit flow directly to the promisor; it may instead flow to a third party. *Id.*; *Equilease Corp. v. Williams Steel Indus., Inc.*, 452 So. 2d 40, 41-42 (Fla. 5th DCA 1984).

Stevenson Design received consideration for the assignment: decreased liability exposure for its outstanding indebtedness to the Treaces. In addition, Stevenson Design received the benefit of the Treaces' efforts to pursue its insurance claims with MCC, rather than Stevenson Design itself having to prosecute those claims. Both the trial court and the arbitrator rejected MCC's lack-of-consideration argument, with the trial court observing that the consideration would be "you're no longer going after Stevenson [Design] on the judgment; you're going after the insurance company." (R. Vol. LII, p. 8086). Because Stevenson Design received

benefits in exchange for the assignment, the Court need not and should not inquire as to the comparative value of those benefits.

Moreover, that the Chefans also received a benefit as "further consideration" for the assignment undermines, rather than bolsters, MCC's lack-of-consideration argument. Florida law explicitly permits consideration in the form of a benefit to a third party. Thus, even if the Court were to accept MCC's argument that Stevenson Design did not receive anything of value in exchange for the assignment to the Treaces, MCC concedes the Chefans received a benefit, and a third-party benefit constitutes valid consideration. For those reasons, this Court should affirm the trial court's ultimate conclusion that the assignment from Stevenson Design to the Treaces is valid.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING THE TREACES ARBITRATION AND EXPERT-WITNESS COSTS.

Standard of Review. This Court reviews an award of costs for abuse of discretion. *Nilo v. Fugate*, 30 So. 3d 623, 624 (Fla. 1st DCA 2010).

Merits. The trial court, applying its broad discretion under the State Uniform Guidelines for Taxation of Costs in Civil Actions, awarded the Treaces $7,324.84 in arbitration costs and $9,049 in expert witness costs. (R. Vol. XXXVI, p. 5906-07; Vol. LII, p. 8096). MCC challenges the award of arbitration costs and the portion of expert witness costs attributable to the deposition of Ricardo Morales ($1,237.50).

(MCC Initial Br., p. 11-13; R. Vol. X, p. 1634; Vol. LII, p. 8093). MCC's arguments for reversal must be rejected because the trial court acted within its broad discretion in allocating the arbitration costs to MCC, and Mr. Morales was a testifying, rather than consulting, expert.

A. The trial court did not abuse its discretion by awarding arbitration costs.

The Florida Supreme Court has adopted the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions (the Guidelines). *In re Amendments to Unif. Guidelines for Taxation of Costs*, 915 So. 2d 612, 616 (Fla. 2005). The Guidelines "are advisory only" and "[t]he taxation of costs in any particular proceeding is within the broad discretion of the trial court." *Id.* The Guidelines are intended to "decreas[e] the overall cost of litigation." *Id.* at 614.

Section 44.103, Florida Statutes, permits a court to order nonbinding arbitration and assess costs against the defendant if, having filed for a trial de novo, it has a judgment entered against it that is at least 25 percent more than the arbitration award. § 44.103, Fla. Stat. (2012). Like the Guidelines, an assessment of costs under section 44.103, Florida Statutes, is within the trial court's discretion. *Saltzman v. Hadlock*, 112 So. 3d 772, 775 (Fla. 5th DCA 2013).

The trial court relied on its broad discretion under the Guidelines, rather than its discretion under section 44.103, to award the Treaces arbitration costs and fees. (R. Vol. LII, p. 8096; Vol. XXXVI, p. 5907). Although MCC contends such an

allocation is contrary to section 44.103, it has not pointed to any authority prohibiting a court from awarding arbitration fees and costs under the Guidelines if the judgment does not meet the 25 percent threshold. Rather, both the Guidelines and the statute governing non-binding arbitration fees are discretionary. Moreover, the trial court's decision to award arbitration fees and costs to the Treaces ultimately furthers the Guidelines' goal of decreasing the overall costs of litigation: because MCC refused to accept the arbitration award of $600,000 and forced a trial on the merits, substantial court and party resources were devoted to a trial that resulted in virtually the same outcome as the arbitration —a judgment of $660,280 in favor of the Treaces. Compelling MCC, rather than the Treaces, to bear the costs of arbitration is sensible and fair where MCC is responsible for the trial on the merits and the attendant accumulation of avoidable costs. The trial court did not abuse its broad discretion under the Guidelines by awarding the Treaces $7,324.84 in arbitration fees and costs.

B. The trial court did not abuse its discretion by awarding expert fees related to Mr. Morales.

The Guidelines provide that "a reasonable fee for deposition and/or trial testimony" of expert witnesses should be taxed. *In re Amendments to Unif. Guidelines for Taxation of Costs,* 915 So. 2d at 616. Florida Rule of Civil Procedure 1.390 also recognizes that expert witness "whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine." Fla. R. Civ. P.

1.390. Significantly, "[t]his rule imposes no requirement that the expert must actually testify at trial or that the deposition must actually be used at trial, only that the witness be deposed." *See Winter Park Imports, Inc. v. JM Family Enter., Inc.*, 77 So. 3d 227, 231 (Fla. 5th DCA 2011) (concluding court may consider time expert spent to prepare for deposition in assessing costs).

In contrast to the expenses for expert witnesses that are subject to a deposition, "expenses relating to consulting but non-testifying experts" should not be taxed. *In re Amendments to Unif. Guidelines for Taxation of Costs*, 915 So. 2d at 617. A consulting expert is one that "has been hired to conduct an investigation in anticipation of litigation;" the findings of a consulting expert generally are protected from discovery by the work-product privilege. *See Wackenhut Corp. v. Crant-Heisz Enter., Inc.*, 451 So.2d 900, 902 (Fla. 2d DCA 1984) (quoted); *State v. Ross*, 792 So. 2d 699, 702 (Fla. 5th DCA 2001) (identity of consulting expert generally protected by work-product privilege).

MCC narrowly focuses on the fact that Mr. Morales did not testify at trial. Consistent with the Guidelines' stated objective to decrease litigation costs, the Treaces' counsel decided not to call Mr. Morales at trial based on the course of discovery and the case presented by MCC. (R. Vol. LII, p. 8094). Mr. Morales's failure to testify at trial, however, does not place him in the "consulting but non-testifying experts" category. He was disclosed on the Treaces' expert witness list as

an expert expected to testify at trial, and MCC deposed him prior to trial at a cost of $1,237.50. (R. Vol. IX, p. 1487, 1491 Vol. X 1628, 1634 Vol. XII 1855 Vol. XIV 2331). Clearly, Mr. Morales was not a consulting expert whose findings were protected by the work-product privilege. Rather, he testified via deposition, and both the Guidelines and Rule 1.390 provide that a fee for his deposition testimony should be awarded. The trial court did not abuse its broad discretion under the Guidelines in awarding the Treaces expert witness costs for Mr. Morales. This Court should affirm the trial court's costs judgment.

CONCLUSION

For the reasons stated in Arguments I and II above, this Court should affirm the trial court's final order and judgment in the garnishment action insofar as they require MCC to pay the Treaces all of their attorneys' fees incurred in prosecuting the garnishment action and $27,517.72 in costs.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished to the following counsel of record by e-mail on the 18th day of August, 2015:

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