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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BREVARD ORTHOPAEDIC, SPINE & PAIN CLINICS, INC. AND RICHARD HYNES M.D.,

Petitioners,

v. Case No. 5D13-1165

HEALTH FIRST MEDICAL MANAGEMENT, INC.,

Respondent.

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Opinion filed January 17, 2014

Petition for Certiorari Review of Order from the Circuit Court for Brevard County, Charles M. Holcomb, Judge.

Allan P. Whitehead and Erika McBryde, of Frese, Hansen, Anderson, Anderson, Heuston & Whitehead, P.A., Melbourne, for Petitioners.

David C. Borucke, of Holland and Knight, Tallahassee, and Clifton A. McClelland, Jr., of McClelland Jones, L.L.C., of Melbourne, for Respondent.

PER CURIAM.

Petitioners seek certiorari review of two orders rendered by the trial court in an ongoing lawsuit between the parties regarding two billing services agreements. One order under review denies Petitioners' motion to disqualify the law firm representing Respondent in the underlying action, and the other order regards a discovery matter of

alleged privileged materials. We deny the Petition for Writ of Certiorari without further discussion.

The billing services agreements contain identical prevailing party attorneys' fee provisions, which state, "If legal action is commenced by any party to enforce or defend its rights under this Agreement, the prevailing party in such action shall be entitled to recover its costs and reasonable attorney fees in addition to any other relief granted." Therefore, each party has filed motions for appellate attorneys' fees. Because Respondent is the prevailing party in the proceedings in this court, we grant Respondent's motion for fees provided Respondent is found by the trial court to be the prevailing party under the pertinent provision of the agreements at the conclusion of the underlying lawsuit. If so, the trial court will determine the reasonable amount of the fees. The question arises whether we should also grant Petitioners' motion contingent upon the trial court ruling that Petitioners are the ultimate prevailing parties under the agreements. We believe that we should not and therefore deny the motion for fees to Petitioners. See E. Coast Metal Decks, Inc. v. Boran Craig Barber Engel Constr. Co., Inc., 114 So. 3d 311, 314 (Fla. 2d DCA 2013) ("[W]e continue to adhere to the traditional approach of conditionally awarding prevailing party appellate attorneys' fees only to the party who prevails on appeal.").

PETITION DENIED.

SAWAYA and LAWSON, JJ., concur.
GRIFFIN, J., dissents, with opinion.

I respectfully dissent for four reasons. First, in my view, the analysis of this issue, set forth thirteen years ago in *Aksomitas v. Maharaj*, 771 So. 2d 541 (Fla. 4th DCA 2000), is the correct approach; and, as far as I am aware, until now, we have generally applied *Aksomitas* in this Court to provisionally authorize fees for an appeal to the ultimately prevailing party, even though they may not have prevailed in the appeal itself.

Second, in deciding *Brass & Singer v. United Automobile Insurance Co.*, 944 So. 2d 252 (Fla. 2006), which recognized that insureds can only recover fees for an appeal if they prevail on appeal, the Florida Supreme Court expressly relied on the language of section 627.428, Florida Statutes. If *all* litigants who do not prevail on appeal are not entitled to recover any appellate fees, even if they ultimately prevail on the merits of the case, the statutory distinction would have been irrelevant. The Florida Supreme Court did not question the basic premise of *Aksomitas*.

Third, I am not persuaded by the case of *East Coast Metal Decks, Inc. v. Boran Craig Barber Engel Construction Co.,* 114 So. 3d 311 (Fla. 2d DCA 2013), on which the majority relies. The case offers no analysis or rationale, nor does it identify any flaw in the Fourth District Court of Appeal's reasoning in *Aksomitas*. Even Judge Altenbernd, in his concurring opinion, acknowledges that the *Aksomitas* decision is logical. He merely suggests that there may be a policy reason to deny these fees in order to discourage interlocutory appeals because they can be disruptive to the litigation. This does not make a lot of sense to me. Interlocutory appeals are expressly authorized by detailed and well thought out rules designed to allow immediate review of those few issues that

arise in litigation where delay in resolving them, one way or the other, can lead to waste, unreasonable delay and undue expense to the parties. The venue issue in *East Coast Metal Decks* is a perfect example. Immunity from suit and entitlement to arbitration are others. I cannot see that denying fees to a successfully prevailing litigant for an unsuccessful interlocutory appeal is an appropriate policy to discourage the use of the interlocutory appeal rule. I suspect that in the old days, fees were denied for an unsuccessful appeal simply because no one had thought about the ultimately prevailing party issue addressed in *Aksomitas*.

Finally, I prefer the flexibility of *Aksomitas*. According to *East Coast Metal Decks*, fees are never awardable in any measure to the non-prevailing party on appeal. Under *Aksomitas*, they are, but are always subject to the appellate court's determination whether fees for the appeal or events within it are properly allowed.