NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SECURITY NATIONAL INSURANCE CO.,

Appellant,

v.

MARIA GONZALEZ, JUAN GONZALEZ, ALMA REYES, and HERMELO REYES,

Appellees.

ALMA REYES and HERMELO REYES,

Appellants,

v.

MARIA GONZALEZ and JUAN GONZALEZ,

Appellees.

Case Nos. 2D18-3427
2D19-2050

CONSOLIDATED

Opinion filed March 26, 2021.

Appeal from the Circuit Court for Hillsborough County; Martha J. Cook, Judge.

Chris W. Altenbernd and Ezequiel Lugo of Banker Lopez Gassler, P.A., Tampa, for Security National Insurance Company.

David M. Caldevilla of de la Parte & Gilbert, P.A., Tampa; and Michael A. Roe of Austin Roe & Basquill, P.A., Tampa, for Maria Gonzalez and Juan Gonzalez.

David C. Borucke of Cole, Scott & Kissane, P.A., Tampa, for Hermelo Reyes and Alma Reyes.[1]

SMITH, Judge.

In this consolidated appeal involving a claim for bodily injury brought by Juan and Maria Gonzalez, husband and wife, arising out of an automobile accident, Security National Insurance Company, which insured the other vehicle driven by Alma Reyes and owned by her father Hermelo Reyes, appeals the amended final judgment. Security National challenges the trial court's order determining that Security National was jointly liable with Hermelo Reyes when Security National provided only property damage coverage. Hermelo Reyes also appeals the amended final judgment on the grounds the trial court erred in determining that the Gonzalezes were entitled to attorneys' fees and costs pursuant to an offer of judgment and proposal for settlement where Reyes' performance was financially impossible. Because we find merit in Security National's argument, we reverse and remand. We affirm without comment all other issues raised in this consolidated appeal.

I.

The origins of this case involve an automobile accident that occurred in May 2012. Reyes' minor daughter was driving a vehicle owned by him and collided with the Gonzalezes' vehicle. Maria Gonzalez was injured in the accident. At the time of the accident, the Reyeses had automobile insurance coverage with Security National that

[1]Alma Reyes was included in the Notice of Appeal but was not included in the initial or reply briefs.

insured four vehicles. The Declarations page of the policy issued by Security National provided only for property damage up to $10,000 for each of the Gonzalezes' vehicles; no bodily injury coverage or additional supplemental policy was listed on the Declarations page. Consistent with the absence of bodily injury coverage on the Declarations page, the Reyeses had rejected bodily injury coverage—the Gonzalezes do not argue otherwise.

The relevant liability coverage terms of the policy provided in pertinent part:

> **PART A – LIABILITY COVERAGE**
>
> If you pay us the premium when due for this coverage, we will pay damages for bodily injury and property damage for which an insured person becomes legally responsible because of an accident. Damages include prejudgment interest awarded against an insured person.
>
> We will settle or defend, at our expense and as we consider appropriate, any claim or suit asking for these damages . . . . Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment, settlement or judgment.
>
> We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.
>
> **SUPPLEMENTARY PAYMENTS**
>
> In addition to our limit of liability, we will pay on behalf of an insured person:
>
> 1. Up to $250 for the cost of bail bonds required because of an accident, including related traffic law violations. The accident must result in bodily injury or property damage covered under this policy.
>
> 2. Premiums on appeal bonds and bonds to release attachments in any suit we defend.

> 3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends after we have paid, offer to pay, or deposited into court, that portion of the judgment that does not exceed the limit of our liability for this coverage.
>
> 4. Up to $200 a day for loss of earnings, but not other earnings, because of attendance at hearings or trials at our request.
>
> 5. Other reasonable expenses at our request.

The Gonzalezes commenced this action in July 2012, by the filing of a three-count complaint against the Reyeses for damages arising from the accident, including damages for bodily injury, property, and loss of consortium. On September 26, 2012, Security National wrote the Reyeses informing them that their policy did not provide coverage for the Gonzalezes' bodily injury and loss of consortium claims for the reason that the Reyeses "did not elect bodily injury or uninsured motorist coverage."[2] In that same correspondence to the Reyeses, Security National claimed its reservation of rights to disclaim coverage; citing the policy language, Security National advised the Reyeses they had no duty to defend claims not covered by the policy and that, based upon their rejection of bodily injury coverage, the Reyeses would become legally responsible for those damages.

On February 26, 2013, Security National wrote the Reyeses regarding the status of the lawsuit and advised them that "a[t] the present time a courtesy defense is being provided to you as to Count I and Count II of the Complaint," which were related to the bodily injury and loss of consortium claims, respectively. Security National also

[2]Security National previously advised the Reyeses prior to the lawsuit that its initial investigation suggested that the amount of the Gonzalezes' damages would exceed the Reyeses' policy limits.

advised the Reyeses of their right to retain separate counsel at their own expense for any amounts not covered under the policy. Lastly, Security National advised the Reyeses of its recommendation to settle the property damage demand made by the Gonzalezes and that such settlement would "likely not extinguish the lawsuit" as to the remaining bodily injury counts.

Security National thereafter resolved the Gonzalezes' property damage claim in May 2015, resulting in the dismissal and release of the property damage claims against the Reyeses in count III of the complaint. For reasons unclear from the record, after the dismissal of the covered property damage claims, Security National continued its "courtesy defense" of the Reyeses as to the bodily injury and loss of consortium counts. The Gonzalezes served separate proposals for settlement on Alma and Hermelo Reyes, both of which were deemed rejected due to the lack of an acceptance within the statutory timeframe under section 768.79, Florida Statutes (2018). In June 2016, the case went to trial, and the jury returned a verdict in favor of the Gonzalezes for $762,805.63, which the trial court later reduced to $679,526.03 in the final judgment.[3] The Gonzalezes timely filed a motion to tax costs and attorneys' fees pursuant to section 768.79, based upon the Reyeses' failure to accept the proposals for settlement.[4] The trial court reserved jurisdiction in the final judgment to determine entitlement and amount with regard to the attorneys' fees and costs while the Reyeses

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[3]The final judgment amount was reduced to offset prior personal injury protection, workers compensation, and health insurance payments to the Gonzalezes.

[4]Maria Gonzalez subsequently filed an amended motion to tax costs and attorneys' fees, clarifying that she alone sought to collect attorneys' fees and costs from Hermelo Reyes only.

appealed the final judgment to this court. This court affirmed the jury's verdict and final judgment.

Following this court's affirmance of the final judgment, the Gonzalezes filed a motion with the trial court to join Security National as a party defendant, which was denied without prejudice by the trial court in July 2018, pursuant to section 627.4136(4), Florida Statutes (2018). In the meantime, the trial court determined the Gonzalezes were entitled to attorneys' fees and costs, and the parties continued to litigate the issue of amount. A final judgment awarding the Gonzalezes their trial and appellate attorneys' fees and costs and reserving jurisdiction to determine the joinder of Security National to the final judgment was entered on September 25, 2018.[5] The following day, the Gonzalezes filed a supplemental motion to join Security National as a party defendant to the final judgment arguing estoppel and alleging Security National failed to comply with the requirements of section 627.4136(4), Florida's nonjoinder of insurers statute, by either denying coverage to the Reyeses or defending them under a reservation of rights as proscribed by section 627.426(2). On April 23, 2019, the trial court granted the supplemental motion but cited to Government Employees Insurance Co. v. Macedo, 228 So. 3d 1111, 1113 (Fla. 2017), and New Hampshire Indemnity Co. v. Gray, 177 So. 3d 56 (Fla. 1st DCA 2015) for support for its decision. The trial court amended the October 30, 2018, corrected final judgment and entered an amended final judgment against the Reyeses and Security National, "jointly and severally." This appeal followed.

[5]A Corrected Final Judgment Awarding Fees and Costs was entered on October 30, 2018, to correct a scrivener's error.

II.

Security National contends that it was improperly joined as a party defendant to the amended final judgment and challenges the trial court's interpretation and application of the nonjoinder statute, section 627.4136, and interpretation of the policy language. We review de novo. See Gov't Employees Ins. Co. v. Macedo, 228 So. 3d 1111, 1113 (Fla. 2017) (holding that the interpretation of an insurance policy contract is subject to de novo review, as is the interpretation of statutes).

We begin our analysis with section 627.4136, which permits the joinder of a liability insurer to a lawsuit filed against its insured for the purpose of enforcing a settlement or collecting damages. See Hazen v. Allstate Ins. Co., 952 So. 2d 531, 536-37 (Fla. 2d DCA 2007). The nonjoinder statute was enacted "to ensure that the availability of insurance has no influence on the jury's determination of . . . damages." Geico Gen. Ins. Co. v. Lepine, 173 So. 3d 1142, 1144 (Fla. 2d DCA 2015) (quoting Gen. Star Indem. Co. v. Boran Craig Barber Engel Constr. Co., 895 So. 2d 1136, 1138 (Fla. 2d DCA 2005)). Consistent with its purpose, section 627.4136(1) provides:

> It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy ***for a cause of action which is covered by such policy.***

Hazen, 952 So. 2d at 534 (emphasis added).

Security National argues the nonjoinder statute has no application here based upon the plain language of section 627.4136(1) because the only cause of action covered by the policy was the property damage claim—and that claim was dismissed

well before the case went to trial. Indeed, the only claims that were tried to jury verdict were the Gonzalezes' claims for bodily injury and loss of consortium. Conceding the policy provided only property damage coverage, the Gonzalezes instead rely on the language in Part A – Liability Coverage which provides for "Supplementary Payments," arguing that this language provides coverage for attorneys' fees and costs arising from the litigation.

The relevant portion of the Supplementary Payments provision 5 reads:

> **SUPPLEMENTARY PAYMENTS**
>
> In addition to our limit of liability, we will pay on behalf of an insured person:
> . . . .
>
> 5. Other reasonable expenses incurred at our request.

The Gonzalezes argue that similar "supplementary" and "additional" payments provisions have been construed by the Florida Supreme Court and our sister courts to encompass claims for attorneys' fees and costs pursuant to an offer of judgment. They rely on Macedo and Gray, as did the trial court in its order granting joinder. In Macedo, the supreme court held that attorneys' fees and costs awarded to an injured plaintiff under an offer of judgment were "reasonable costs incurred by an insured" at the insurer's request and were therefore covered under the "additional payments" provision of the defendant's liability insurance policy. Id. at 1114. The supreme court agreed with the First District's conclusion that

> GEICO's policy with Mr. Lombardo gave it the sole right to litigate and settle claims, and contractually obligated it to pay for "all investigative and legal costs incurred by us" and "all reasonable costs incurred by an insured at our request." [citing Gov't Employees Ins. Co. v. Macedo, 190 So. 3d 1155 (Fla. 1st DCA 2016)] (quoting the Additional Payments

> section of the policy). The First District reasoned that "[a]ny such expression, or request [to litigate rather than settle], necessarily encompasses incurring litigation costs, which may mean not only the insurer's litigation costs, but also those incurred by the opposing party should that party prevail." [Macedo, 190 So. 3d at 1157.]

Macedo, 228 So. 3d at 1113.

However, the Gonzalezes overlook a critical distinction—unlike the policy here, the insurance policy in Macedo "provided bodily injury liability coverage for up to $100,000 per person and $300,000 per incident." Macedo, 228 So. 3d at 1112. There was no coverage dispute in that case, nor was there an issue of coverage in Gray, another case on which the Gonzalezes rely. See Gray, 177 So. 3d 56. In Gray, an injured motorist obtained a final judgment for damages sustained in a car accident and a subsequent order granting his motion for attorneys' fees and costs in the amount of $127,000. Id. at 58. The injured party, the appellee on appeal, then moved to join the at-fault motorist's liability insurer, New Hampshire, in the final judgment, which had provided a defense to its insured throughout the case. Id. New Hampshire argued that there was no coverage for payment of attorneys' fees and costs under the "supplementary payments" provision of the policy. Id. at 60-61. The First District recognized a conflicting interpretation of a similar "supplementary payments" provision by this court but ultimately agreed with the rationale expressed by the Fourth District in Florida Insurance Guaranty Assoc. v. Johnson, 654 So. 2d 239 (Fla. 4th DCA 1995). The Johnson court recognized that the language in the policy was commonly seen in similar "supplementary payments" policy provisions and held that where the policy allowed the insurer to maintain the sole right to decide whether to litigate or settle the claim at issue, the resulting litigation expenses were "at the insurer's request." Id. at 61.

As in Macedo and Gray, there was no dispute that the Johnson policy covered bodily injury and thus no issue regarding the insurer's contractual duty to defend those claims. Johnson, 654 So. 2d at 240.

"The role of precedent in insurance policy interpretation cases depends largely on whether the underlying facts and the policies at issue in the two decisions are similar." U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 882 (Fla. 2007). "[This] doctrine of precedent is basic to our system of justice." Id. (citing Perez v. State, 620 So. 2d 1256, 1259 (Fla. 1993) (Overton, J., concurring)). Moreover, courts cannot create coverage where it does not exist by the terms of the insurance policy. See Telemundo Television Studios, LLC v. Aequicap Ins. Co., 38 So. 3d 807, 809 (Fla. 3d DCA 2010). Here, the Gonzalezes urge us to apply precedent in a matter that, while legally similar, is factually distinguishable. But in this case Security National represented at all times to the Reyeses that the policy did not provide coverage for the Gonzalezes' claims other than for property damage. Throughout the pendency of this action, Security National advised the Reyeses and the Gonzalezes, through their counsel, that the policy did not provide coverage for bodily injury as the Reyeses' policy contained a "Florida Bodily Injury Rejection Form."[6] Thus, there was never a dispute regarding whether the policy afforded coverage for Maria Gonzalez's bodily injuries, and so Macedo, Gray, and Johnson do not constitute precedent because they are materially distinguishable. Therefore, the trial court's reliance on Macedo and Gray was error.

The Gonzalezes alternatively request that we affirm under a tipsy

[6]Security National's correspondence, dated September 26, 2012, to the Reyeses attached the rejection form and advised them of the personal risks associated with uncovered bodily injury claims.

coachman analysis applying principles of equitable estoppel, arguing that coverage was created by Security National's continued "courtesy defense" of the Reyeses after the only covered claim was dismissed. See, e.g., Fla. Mun. Ins. Tr. v. Vill. of Golf, 850 So. 2d 544, 548 (Fla. 4th DCA 2003) (concluding insurer that negligently investigated claim, which ultimately prevented its insured from being able to prove causation of damages, could be estopped from denying coverage). But see Solar Time Ltd. v. XL Specialty Ins. Co., 142 Fed. App'x. 430, 434 (11th Cir. 2005) (declining to find coverage by estoppel where insurer initially provided defense to its insured but later denied coverage because insurer had advised insured at all times it was defending under a reservation of rights and insured was not prejudiced). Even though Security National at all times advised the Reyeses it was continuing to defend them in the action, even after the property damage covered claim was dismissed, under a "courtesy defense"—for which it had no duty—the Gonzalezes argue this was not sufficient. And as a result, they contend Security National failed to strictly adhere to the requirements of section 627.426(2), which governs the administration of insurance claims:

> (2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:
>
> (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by United States postal proof of mailing, registered or certified mail, or other mailing using the Intelligent Mail barcode or other similar tracking method used or approved by the United States Postal Service sent to the last known address of the insured or by hand delivery; and
>
> (b) Within 60 days of compliance with paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30

days before trial, the insurer:

> 1. Gives written notice to the named insured by United States postal proof of mailing, registered or certified mail, or other mailing using the Intelligent Mail barcode or other similar tracking method used or approved by the United States Postal Service of its refusal to defend the insured;
>
> 2. Obtains from the insured a nonwaiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or
>
> 3. Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.

The Gonzalezes' main point of contention appears to be that Security National neglected, in its communications with the Reyeses, to invoke the magic words "reservation of rights" as stated in section 627.426(2). First and foremost, the Gonzalezes' reliance on section 627.426(2) is misplaced. From the beginning, Security National asserted that the policy did not provide coverage for the Gonzalezes' bodily injury claim. From our review of the record, Security National was not required to comply with section 627.426(2) because it was not asserting a "coverage defense" under the statute. Security National always unequivocally maintained that the policy did not provide coverage and that it was providing a courtesy defense.

Additionally, even if Security National had not clearly and unequivocally informed all parties that the policy did not provide coverage for the Gonzalezes' bodily injury claim, it would not change the outcome here. The Florida Supreme Court has expressly denounced the theory that the failure of an insurer to comply with the technical requirements of section 627.426(2) provides coverage by estoppel for a loss

or claim excluded from the policy issued to its insured. See AIU Ins. Co. v. Block Marina Inv., Inc., 544 So. 2d 998, 999 (Fla. 1989). As the supreme court noted, "while the doctrine of estoppel may be used to prevent a forfeiture of insurance coverage, the doctrine may not be used to create or extend coverage." Id. at 1000 (citing Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla.1987)); see also Pioneer Life Ins. Co. v. Heidenfeldt, 773 So. 2d 75, 77 (Fla. 2d DCA 2000); Danny's Backhoe Serv. LLC v. Auto-Owners Ins. Co., 116 So. 3d 508, 511 (Fla. 1st DCA 2013). In fact,

> construing the term "coverage defense" to include a disclaimer of liability based on an express coverage exclusion has the effect of rewriting an insurance policy when section 627.426(2) is not complied with, thus placing upon the insurer a financial burden which it specifically declined to accept. Such a construction presents grave constitutional questions, the impairment of contracts and the taking of property without due process of law. Therefore, we hold that the term "coverage defense," as used in section 627.426(2), means a defense to coverage that otherwise exists.

AIU, 544 So. 2d at 1000 (footnote omitted).

The record indicates that the trial court inquired of Security National's counsel as to why it continued to provide a "courtesy defense" to the Reyeses even after it had settled the only covered claim, but Security National could not explain in the proceedings below. However, we see no reason why this would bear on the ultimate outcome here given the holding presented in AIU and its progeny and where all parties agree there was no coverage for the bodily injury claims. Therefore, the fact Security National maintained at all times that the policy did not provide coverage of anything other than the Gonzalezes' property damage claim but continued to provide its "courtesy defense" did not invent coverage for the bodily injury and loss of consortium

damages, even under an estoppel theory, where coverage did not otherwise exist. Id.

III.

Because the Reyeses rejected bodily injury coverage under their policy and such coverage was never in dispute, Security National was improperly joined as a party defendant to the final judgment under the nonjoinder statute. Macedo and Gray, upon which the trial court relied, have no application here. We also refuse to invoke the doctrine of equitable estoppel to create coverage when all parties understood there was no coverage for the bodily injury claims despite Security National's "courtesy defense" of those claims. Accordingly, we reverse the amended final judgment and remand with instructions for the trial court to enter a second amended final judgment solely against Hermelo Reyes. All other issues on appeal are affirmed without comment.

Reversed and remanded.

CASANUEVA and ATKINSON, JJ., Concur.