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MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

AMY MILLING,)
)
Appellant,)
)
v.)
)
THE TRAVELERS HOME AND)
MARINE INSURANCE)
COMPANY,)
)
Appellee.)
_____)

Case No. 2D18-4724

Opinion filed November 13, 2020.

Appeal from the Circuit Court for
Hillsborough County; E. Lamar Battles,
Judge.

Brent Steinberg and Stephanie M. Miles
of Swope, Rodante P.A., Tampa, for
Appellant.

Anthony J. Russo, Matthew J. Lavisky,
and Mihaela Cabulea of Butler
Weihmuller Katz Craig LLP, Tampa, for
Appellee.

ATKINSON, Judge.

Amy Milling appeals the order denying her motion for summary judgment and granting the cross-motion for summary judgment filed by The Travelers Home and Marine Insurance Company (Travelers) on the issue of her entitlement to attorney's fees and costs in the lawsuit she filed against Traveler's for denial of her claim for uninsured motorist benefits (the UM Suit). We reverse in part because the trial court erred by granting Travelers' cross-motion for summary judgment based upon an erroneous interpretation of section 627.727(8), Florida Statutes (2016), and a mischaracterization of Milling's attorney's fees as "fees-for-fees" rather than as prevailing party fees under section 624.155(4), Florida Statutes (2016). However, we affirm the trial court's denial of Milling's motion for summary judgment because she failed to meet her burden of proof.

This court has jurisdiction. See Fla. R. App. P. 9.110(a), (k); Fabing v. Eaton, 941 So. 2d 415, 417 (Fla. 2d DCA 2006) ("Generally, an order denying a motion for attorney's fees is a final, appealable order when that order ends the judicial labor as to that portion of the case."); Yampol v. Turnberry Isle S. Condo. Ass'n, 250 So. 3d 835, 837 (Fla. 3d DCA 2018) ("A post-judgment order denying a party's claim for entitlement to attorney's fees . . . is an appealable final order." (citing BDO Seidman, LLP v. British Car Auctions, Inc., 789 So. 2d 1019, 1020 (Fla. 4th DCA 2001))).

Background

Milling brought suit against Travelers in November of 2012 after it denied her claim for uninsured motorist (UM) benefits. Travelers litigated the issue of who was at fault for the automobile accident; it did not contest coverage. In January of 2013, Milling filed and served a Civil Remedy Notice on Travelers which alleged that Travelers had failed to settle her claim in good faith. Ultimately, she obtained a jury verdict in

excess of the \$100,000 UM policy limits. The attorneys who represented Milling in the underlying UM Suit (UM Attorneys) received \$125,000 in fees based upon her offer of judgment.

The parties agreed to the entry of a stipulated partial judgment resolving Milling's claim that Travelers failed to settle the UM claim in good faith under section 624.155, Florida Statutes (2016) (the Bad Faith Suit). The partial judgment was in the amount of the excess verdict and provided for a reservation of jurisdiction to consider motions for attorney's fees and costs "as pled in paragraphs 18 through 20 of Count II of the Amended Complaint." Those paragraphs provide in pertinent part the following:

18. As a result of Travelers["] . . . failure to act in good faith and statutory violations alleged above, [Milling] is entitled to recover the total amount of her damages pursuant to section 627.727(10), Florida Statutes, including all damages suffered as a result of the crash and all damages caused by Travelers["] . . . failure to act in good faith and statutory violations alleged above.

19. Travelers["] . . . violation of section 624.155, Florida Statutes has caused damages to [Milling] of interest on unpaid benefits, pre-judgment interest accrued since the date of Travelers["] . . . violation, attorney's fees incurred by [Milling] in the prosecution of this claim for uninsured motorist benefits and pre-judgment interest thereon, costs incurred in the prosecution of [Milling's] claim for uninsured motorist benefits, including expert [w]itness fees, costs incurred in the prosecution of [Milling's] claim for violation of section 624.155, Florida Statutes, post-judgment interest.

20. As a further direct and proximate result of Travelers["] . . . failure to act in good faith and statutory violations alleged above, [Milling] had to retain the services of the undersigned attorneys and contracted [w]ith them for the payment of their attorney's fees to bring this action and recover the excess damages owed by [] Travelers. . . . By operation of law, including section 627.428, Florida

Statutes, Travelers . . . [w]ill be obligated to pay those fees upon the successful conclusion of [Milling's] claim.

Milling filed a "Motion for Summary Judgment for Entitlement to Attorney's Fees as part of Plaintiff's Total Bad Faith Damages" in which she sought an award of attorney's fees. In the motion, Milling argued her entitlement pursuant to sections 624.155(8) and 627.727(10) to all fees incurred in the underlying UM Suit as damages in the first-party, bad-faith action against Travelers. She also claimed entitlement as the prevailing party in the bad-faith action to the fees paid to Swope, Rodante P.A. in order to establish her entitlement to those damages.

Travelers filed a response in opposition to summary judgment and a cross-motion for summary judgment. Travelers argued that attorney's fees incurred in furtherance of a UM action are not recoverable in a bad-faith suit. It also argued that Milling failed to "put forth undisputed evidence that Travelers acted in bad faith, that [Milling] incurred damages, or that the damages were caused by any alleged bad faith." And Travelers argued that Milling failed to prove her entitlement to the UM Attorney's Fees because they were not recoverable under her fee agreement. It further argued that Milling "could not recover attorney's fees for establishing the amount of attorney's fees to be awarded" because case law precluded the award of "fees-for-fees."

The court denied Milling's motion for summary judgment in part and granted Travelers' cross-motion in part. The court permitted Milling to recover fees for the time spent prosecuting the Bad Faith Suit and obtaining the excess verdict judgment, "including filing the Civil Remedy Notice and negotiating with defense counsel on the terms of the Partial Final Judgment and the June 22, 2018 Stipulation and

Acknowledgment." However, it denied her request for fees spent in furtherance of the underlying UM Suit, with the exception of the "time spent directly in furtherance of" the Bad Faith Suit. The court also denied her request for the time spent "establishing the amount of attorney's fees to be awarded for the work of [her UM Attorneys] in the underlying action for UM benefits."

Milling claims entitlement as bad-faith damages to all of the attorney's fees that she incurred from the time she filed the civil remedy notice until she filed the \$75,000 proposal for settlement (the UM Attorney's Fees) as well as all of the attorney's fees incurred by Swope, Rodante P.A. in establishing her entitlement to those damages (the Swope Rodante Fees). She contends that "the plain language of sections 624.155(4), 624.155(8) and 627.727(10) collectively require a UM insurer who commits bad faith to pay the insured's attorneys' fees and any other reasonably foreseeable damages incurred by the insured as a result of the insurer's bad faith violation."

I.

Section 624.155(1)(b)1 provides a civil remedy when an insurer does "not attempt[] in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." Section 624.155(4) provides for prevailing party fees that a plaintiff incurs prosecuting the bad faith action: "Upon adverse adjudication at trial or upon appeal, the authorized insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff." The statute also provides for fees as a form of damages. See § 624.155(8) ("The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of

a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits."); McLeod v. Cont'l Ins. Co., 591 So. 2d 621, 622–23 (Fla. 1992) (holding that a plaintiff may recover any reasonably foreseeable damages resulting from an insurer's bad faith violation in the subsequent bad faith case, including "any fees incurred in the original underlying action as a result of the insurer's bad faith action"); see also § 627.727(10) ("The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state.").

In McLeod, the supreme court held "that the damages recoverable in a first-party action under section 624.155, Florida Statutes (1989), for bad faith failure to settle an uninsured motorist claim are those damages which are the natural, proximate, probable, or direct consequence of the insurer's bad faith actions." McLeod, 591 So. 2d at 622–23. The legislature subsequently enacted section 627.727(10), which provides that

The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor.

§ 627.727(10), Fla. Stat. (1992) (emphasis added). However, it merely "overturned the holding of McLeod by authorizing the recovery of the 'excess judgment' in first-party bad

faith actions against uninsured motorist insurance carriers." Time Ins. Co. v. Burger, 712 So. 2d 389, 392 (Fla. 1998).

In denying Milling's request for fees spent in furtherance of the underlying UM Suit, the court erroneously concluded that Milling's position would render section 627.727(8) meaningless. Section 627.727(8) precludes an award of prevailing party attorney's fees in favor of an insured in a UM action unless UM coverage was disputed: "The provisions of s. 627.428 do not apply to any action brought pursuant to this section against the uninsured motorist insurer unless there is a dispute over whether the policy provides coverage for an uninsured motorist proven to be liable for the accident." § 627.727(8); see also § 627.428 (providing for an award of attorney fees to an insured that prevails against an insurer in a suit brought under a policy issued by the insurer).

Contrary to the trial court's conclusion, section 627.727(8) does not preclude Milling from recovering attorney's fees as damages. Because UM coverage was not contested, the trial court was correct insofar as Milling is not entitled to recover prevailing party attorney's fees incurred in the underlying UM case that would otherwise be available under section 627.428. However, the attorney's fees were not sought as prevailing party fees under section 627.727(8). Milling sought the fees as damages under section 624.155(8), which permits recovery for reasonably foreseeable damages resulting from the insurer's bad-faith conduct. These damages may include "reasonable attorney's fees" incurred in the underlying action. § 627.727(10) (including "reasonable attorney's fees and costs" as "damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155"). Milling sought the attorney's fees as compensatory damages resulting from Travelers' bad faith failure to settle pursuant to

section 624.155. The court erred by granting Traveler's motion for summary judgment by concluding that section 627.727(8) precludes, categorically, the recovery of the UM Attorney's Fees.

II.

Milling claims that the trial court incorrectly precluded an award of the attorney's fees incurred by Swope, Rodante P.A. on the basis that they constituted attorney's fees spent establishing the amount of attorney's fees to be awarded for the underlying UM case. That firm formally appeared in the proceedings after the jury verdict, but before Milling filed the Bad Faith Suit.

Section 624.155(4) requires that the trial court award a plaintiff reasonable attorney's fees for successfully prosecuting a bad faith action: "Upon adverse adjudication at trial or upon appeal, the authorized insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff." (Emphasis added). Litigation of the existence and amount of Milling's damages—including whether and how much of the fees incurred litigating the UM action were the natural, proximate, probable, or direct consequence of the insurer's bad faith actions—was a part of the prosecution of the Bad Faith Suit. As such, attorney's fees incurred for such litigation should be awardable as prevailing-party fees in the bad faith case. Consequently, the trial court erroneously granted Travelers' cross-motion for summary judgment as to the Swope Rodante Fees.

III.

On appeal, Travelers contends that reversal of the denial of Milling's motion for summary judgment would be improper because Milling failed to prove that

she actually suffered damages in the form of the attorney's fees. Milling is only entitled to recover as compensatory damages those attorney's fees that would make her whole. See Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 958 (Fla. 2d DCA 2004) ("[T]he primary basis for an award of damages is *compensation*." (quoting Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965))). In other words, unless she was obligated to pay her UM Attorneys for their legal services, she wasn't damaged at all, and any fees for such services are therefore not awardable as damages even if she was the prevailing party in the bad faith action. Therefore, whether she is entitled to recover those fees as bad-faith damages depends on whether she is actually liable for the UM Attorney's Fees that she claims are the consequence of Travelers' failure to settle her claim in good faith.

Milling's fee agreement with her UM Attorneys provides in relevant part the following:

Client hereby expressly agrees that the attorney is entitled to receive the following from any recovery which Client may receive in settlement, compromise, judgment, arbitration, mediation or trial of this cause: . . .

I understand that if a recovery is made for me I shall be obligated to pay my attorneys a fee computed on the total amount paid to me by all defendants for whatever reason. . . . 40% of any recovery if that defendant denies liability and either files an answer or demand appointment of arbitrators.

1. I agree that if my attorney obtains a court awarded fee that is higher than the fee calculated above, then my attorney is entitled to such higher reasonable attorney's fee.

2. If all defendants are required by a statute or rule to pay attorney's fees or if all defendants offer in settlement negotiations to pay attorney's fees, any such amounts shall be considered as part of the total recovery by me and used in the computations of attorney's fees set forth above.

Under this agreement Milling is responsible for payment to her UM Attorneys of forty percent of the recovery. If her UM Attorneys obtained a court-awarded fee that was higher than forty percent of the recovery, then Milling agreed to pay them the higher amount. While Milling is entitled to compensatory damages, under the agreement she is not liable to her UM Attorneys for an hourly rate beyond the forty percent.

As to her motion for summary judgment, Milling bore the burden of proof on these issues. See Fla. R. Civ. P. 1.510(c); cf. Glass v. Camara, 369 So. 2d 625, 627–28 (Fla. 1st DCA 1979) ("A record that is silent on a determinative issue of fact forecloses summary judgment, for the movant's burden is to show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (citation omitted)). Milling failed to establish the absence of material issue of fact regarding her liability for the UM Attorney's Fees. Accordingly, the trial court properly denied her motion for summary judgment.

Conclusion

The trial court erred in granting Travelers' cross motion for summary judgment but properly denied Milling's motion for summary judgment. We therefore reverse as to the former but affirm as to the latter.

Affirmed in part, reversed in part, and remanded.

CASANUEVA J., Concurs.
KELLY, J., Concurs in result only.