DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BAIN COMPLETE WELLNESS, LLC, as assignee of KERRI McDOUGALD,

Appellant,

v.

GARRISON PROPERTY & CASUALTY INSURANCE COMPANY, a foreign corporation,

Appellee.

No. 2D21-259

December 14, 2022

Appeal from the County Court for Hillsborough County; Joelle Ann Ober, Judge.

Xavier J. Jackman of Westchase Legal Center, Tampa, for Appellant.

Rebecca Delaney, Stephen B. Farkas, and Scott W. Dutton of Dutton Law Group, PA, Tampa, for Appellee.

ATKINSON, Judge.

Bain Complete Wellness, LLC (Bain), appeals the final judgment for attorney's fees in favor of Garrison Property & Casualty Insurance Company (Garrison). In the judgment, the trial court awarded Garrison attorney's fees as sanctions pursuant to section 57.105(1), Florida

Statutes (2018), and costs pursuant to section 57.041(1) and Florida Rule of Civil Procedure 1.420(d). The trial court ordered Bain's trial counsel, Xavier J. Jackman, to pay the entire award. Because Bain does not challenge the portion of the final judgment awarding court reporter costs pursuant to rule 1.420(d), we affirm that portion of the trial court's judgment. However, we reverse the portion of the judgment in which the trial court imposed sanctions against Mr. Jackman because the trial court erred by concluding that Mr. Jackman knew or should have known that the demand letter was statutorily deficient. We also reverse the portion of the judgment awarding expert witness costs because Garrison's motions for costs were untimely.

Background

In 2015, Kerri McDougald (the insured) was injured in a car accident and received medical care from Bain. The insured had an automobile insurance policy with USAA; however, Garrison was the insurance company that reimbursed claims under her policy. The insured assigned her claim for Personal Injury Protection (PIP) benefits under her insurance policy to Bain. Bain submitted bills for medical services related to the accident to Garrison. Garrison did not pay all of Bain's claims, advising Bain in multiple explanations of reimbursement that the insured's PIP benefits had been exhausted.

On May 6, 2016, Mr. Jackman sent a presuit demand letter on behalf of Bain to USAA—not to Garrison—indicating that the amount of PIP and Medical Payment Coverage (MPC) medical benefits owed by the insurance company was $36,215.09. Mr. Jackman attached a billing ledger indicating total charges on the insured's account of $36,582.91, insurance payments in the amount of $367.82, total adjustments of $71,123.55, and a current account balance of $29,091.54. On June 27,

2016, Garrison responded to the demand letter, informing Bain that the presuit demand was addressed to the wrong insurance company (USAA) and again advising Bain that the insured's PIP benefits of $10,000 had been exhausted.

On August 30, 2016, Bain filed a lawsuit against Garrison as the insured's assignee, alleging that Garrison had breached the insurance contract by failing to pay overdue claims for PIP benefits and interest in an amount less than $99. On December 1, 2016, Garrison filed a motion for summary judgment in which it argued that Bain's demand letter failed to "state with specificity . . . each exact amount . . . claimed to be due," as required by section 627.736(10)(b)3, Florida Statutes (2016), because the amount requested was greater than the maximum amount of PIP benefits provided under the policy. Garrison also argued that the amount requested to satisfy Bain's claim was ambiguous because the amount requested in the demand letter and the attached billing ledger were inconsistent.

On March 14, 2017, Garrison sent a safe harbor letter to Bain and Mr. Jackman, requesting that Bain dismiss its lawsuit or Garrison would file a motion for sanctions pursuant to section 57.105(1). *See* § 57.105(4) ("A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged . . . claim . . . is not withdrawn or appropriately corrected."). In the safe harbor letter and attached motion for sanctions, Garrison asserted that Bain's demand letter was addressed to the wrong insurer (USAA) and requested an amount greater than the maximum PIP benefits available under the insured's policy. This, the motion argued, established that Bain and Mr. Jackman knew or should have known that Bain's lawsuit

was not supported by material facts necessary to establish Bain's claim because the presuit demand letter was statutorily deficient and, therefore, a condition precedent to bringing suit had not been met. Bain did not dismiss its lawsuit within twenty-one days of receiving the safe harbor letter. On April 11, 2017, Garrison filed its motion for sanctions.

Bain requested a continuance at the hearing on Garrison's motion for summary judgment on June 21, 2018. When the trial court denied Bain's request, Mr. Jackman made an ore tenus notice of voluntary dismissal. On September 20, 2018, the trial court entered a written order in which it found that Bain's notice of voluntary dismissal was effective pursuant to rule 1.420(a)(1)(A), on the date that the ore tenus motion was made, where it was made before the hearing on the motion for summary judgment. In the order, the trial court found that Garrison was entitled to an award of sanctions pursuant to section 57.105(1) because Bain's "counsel knew or should have known that the pre-suit demand letter . . . did not comply with the statutory requirements" since Bain demanded an amount greater than the maximum PIP benefits provided in the insured's policy, attached a billing ledger that was inconsistent with the aggregate amount demanded, and was addressed to the wrong insurer. The trial court also noted that the demand letter was misleading because the amount requested to satisfy Bain's claim—$36,215.09—exceeded the amount in controversy in Bain's complaint—$99. The trial court specifically found that Mr. Jackman knew or should have known that Bain's claim would not be supported by the application of then-existing law to the material facts. *See* § 57.105(1)(b).

Immediately after the trial court entered its order granting entitlement to sanctions, Garrison filed a motion to tax fees and costs. *See* Fla. R. Civ. P. 1.525. In the motion, Garrison sought an award of

costs based on rule 1.420(d) and sections 768.79 and 57.041, Florida Statutes (2018). In the motion, Garrison reiterated its request for an award of attorney's fees as sanctions pursuant to section 57.105. Garrison also requested an award of attorney's fees pursuant to section 768.79. *See* § 768.79 (providing that a trial court may award attorney's fees and costs to a party who has made an offer of judgment under certain circumstances). On October 7, 2019, the trial court entered an order granting Garrison's motion. In its order, the trial court reiterated that it found Garrison was entitled to an award of attorney's fees as sanctions and also found that Garrison was entitled to an award of court reporter costs pursuant to rule 1.420(d). The trial court's order did not specifically address Garrison's requests for costs pursuant to section 57.041 or for costs and attorney's fees pursuant to section 768.79. The trial court ordered the parties to mediate as to the amount of reasonable attorney's fees.

The parties were unable to agree, and the trial court held a hearing on the reasonable amount of attorney's fees and costs. Before the hearing, on June 29, 2020, Garrison filed a motion for entitlement to expert witness costs pursuant to section 57.041. Bain opposed Garrison's request for expert witness costs, arguing that the request was untimely pursuant to Florida Rule of Civil Procedure 1.525.

After the hearing, the trial court entered its final judgment for attorney's fees and costs. In the judgment, the trial court awarded Garrison $17,438 in attorney's fees, $3,602.50 in costs for Garrison's expert witness fees pursuant to section 57.041, and $262.50 in court reporter costs pursuant to rule 1.420(d), plus interest. The trial court explained that Garrison had requested costs pursuant to section 57.041 in its initial motion for costs, which the trial court had granted;

therefore, Garrison's motion for entitlement to expert witness costs was a necessary supplemental motion for costs in light of the parties' failure to reach an agreement as to the reasonable amount of attorney's fees in court-ordered mediation. The trial court ordered Mr. Jackman to pay the entire sanction award. *See* § 57.105(3)(c).

Attorney's Fees

"A lower court's decision to impose sanctions is reviewed under an abuse of discretion standard." *Deutsche Bank Nat'l Tr. Co. v. Bennett*, 291 So. 3d 605, 606 (Fla. 2d DCA 2020) (quoting *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 573 (Fla. 2005)). "However, to the extent a trial court's order on fees is based on an issue of law, this court applies de novo review." *Rivera Chiropractic, Inc. v. Rosello*, 336 So. 3d 409, 413 (Fla. 2d DCA 2022) (quoting *Lago v. Kame By Design, LLC*, 120 So. 3d 73, 74 (Fla. 4th DCA 2013)).

In relevant part, section 57.105(1) provides

> Upon . . . motion of any party, the court shall award a reasonable attorney's fee . . . on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> . . . .
>
> (b) Would not be supported by the application of then-existing law to those material facts.

In its motion for sanctions, Garrison argued that Mr. Jackman knew or should have known that Bain's lawsuit was not supported by the application of the then-existing law to the material facts because the presuit demand letter did not strictly comply with the statutory requirement to "state with specificity . . . the exact amounts . . . claimed

to be due." *See* § 627.736(10)(b)3. Garrison argued that the presuit demand letter was statutorily deficient in two respects—identifying the incorrect insurer and demanding an amount in excess of the policy limit such that Garrison was unable to determine the exact amount it would be required to pay to avoid litigation.

In its order granting Garrison's motion for sanctions, the trial court found that Garrison was entitled to an award of sanctions because Mr. Jackman knew or should have known that the demand letter did not strictly comply with the statutory requirements and, therefore, knew or should have known that Bain's lawsuit for PIP benefits would not be supported by the application of the then-existing law to the material facts. The trial court found that the demand letter was deficient because the amount demanded exceeded the maximum PIP benefits allowed under the insured's policy, the billing ledger attached to the demand letter conflicted with the amount demanded in the letter, and the amount demanded in the demand letter was different from the jurisdictional amount pled in Bain's complaint.

The PIP statute, section 627.736, requires insurance companies to provide certain "[r]equired benefits" in automobile insurance policies, including medical benefits. § 627.736(1)(a) ("Required benefits.—An insurance policy complying with the security requirements of s. 627.733 must provide personal injury protection to the named insured . . . to a limit of $10,000 in medical and disability benefits . . . resulting from bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle . . . ."). In relevant part, section 627.736(10) provides

> (a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. . . .

> (b) *The notice must* state that it is a "demand letter under s. 627.736" and *state with specificity*:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and *an itemized statement specifying each exact amount*, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. . . .

§ 627.736(10)(a)–(b) (emphasis added).

The PIP statute provides that the presuit demand letter must "state with specificity . . . *an itemized statement specifying each exact amount*, the date of treatment, service, or accommodation, and the *type of benefit claimed to be due*." § 627.736(10)(b)3 (emphasis added). On appeal, Garrison argues that the demand letter must specify the exact amount claimed to be due under the insurance policy. Contrary to this characterization of the statutory language, the phrase "claimed to be due" does not modify the phrase "each exact amount," but rather the phrase it immediately follows—"type of benefit." A fair reading of the statutory language in context indicates that the itemized statement included with the demand letter must include three pieces of information: (1) "each exact amount"; (2) "the date of treatment, service, or accommodation"; and (3) "the type of benefit claimed to be due." § 627.736(10)(b)3. Thus, the specificity requirement in the statute does not pertain to an aggregated dollar amount demanded by the insured;

rather, it pertains to "each exact amount" for each instance in which "treatment, services, accommodations, or supplies" were "rendered" by "any medical provider . . . to an insured." *See id.* The phrase "type of benefit claimed to be due" pertains merely to the category of benefit that corresponds to the "exact amount" paid on the "date of treatment, service, or accommodation," *id.*—e.g., medical benefits, disability benefits, or death benefits required by the PIP statute, *see* § 627.736(1)(a)–(c).

Nowhere in the statute is there a requirement for a precise, aggregated amount in a demand letter. *See* § 627.736(10)(b). Thus, Bain's demand letter was not statutorily deficient for demanding an aggregate amount greater than the maximum PIP benefits payable under the policy or by demanding an aggregate amount that was inconsistent with the aggregate amount identified in the billing ledger attached to the demand letter. While the lack of a provision requiring the insured or assignee to specify the aggregate amount due may seem a curious omission in a subsection entitled "Demand Letter" with the express purpose of putting a defendant on "notice," *see* § 627.736(10)(a), (b), our role is to apply the text as written, according its words their ordinary meaning in context. *See Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022) ("In interpreting a statute, our task is to give effect to the words that the legislature has employed in the statutory text" and "what they convey, in their context, is what the text means." (quoting *Ham v. Portfolio Recovery Assocs.*, 308 So. 3d 942, 946 (Fla. 2020))); *CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs of Gendron*, 198 So. 3d 3, 9 (Fla. 2d DCA 2015) ("[I]t is this court's role to apply the law as written . . . .").

Bain complied with the statute by including an itemized statement specifying each amount to which Bain believed it was entitled based on its belief that the insured may be entitled to both PIP coverage and MPC. The amount specified in the demand letter and the attached billing ledger may well have been completely unfounded, but it put Garrison on notice of the amounts Bain was seeking. Section 627.736(10)(b)3 does not require that the demand letter only include amounts that are justifiable under the policy or applicable law; only that the insured or assignee "state with specificity . . . each exact amount" in its itemized statement along with other information as required by section 627.736(10)(b).

Further, the fact that Bain filed its lawsuit for less than the amount requested in the demand letter does not retroactively render Bain's demand letter statutorily deficient. The statute only requires the insured or assignee to specify "each exact amount," *see* § 627.736(10)(b)3; it does not require the insured or assignee to demand only that amount that it will—after a period of time during which additional evidence might be obtained or litigation strategy might be rethought—later seek in a lawsuit if the insurance company does not pay the claim as demanded in the letter. Nothing in section 627.736 indicates that a disparity (no matter how drastic) between the sum of the amounts listed in an itemized statement and the amount ultimately sought in the complaint—or between that sum and the policy limits—would render a demand letter statutorily deficient such that it fails as a condition precedent. In its motion and on appeal, Garrison urges that allowing such a purported deficiency defeats the purpose of the statutory presuit demand letter. Be that as it may, entitlement to attorney's fees pursuant to section 57.105(1) cannot be based on the alleged failure of a presuit requirement

that the legislature did not include in the language of the governing statute.

The record also does not support Garrison's argument that Bain's demand letter failed to strictly comply with the requirements of section 627.736 because Bain addressed the demand letter to the wrong insurer, USAA, instead of Garrison. The insured was insured through USAA. Although Garrison held the insured's policy and paid claims due under the policy, all of Garrison's communications to Bain were made on USAA letterhead. Garrison also admitted that the USAA contact person to whom Bain addressed the demand letter was "the current PIP contact for" Garrison. The demand letter specified the name of the insured; the claim number; and an itemized statement specifying each exact amount, date of treatment, and type of benefit claimed to be due. *See* § 627.736(10)(b)1–3. It was not misleading for Bain to address its demand to USAA; USAA was the insured's "insurer," and Bain provided it with written notice. *See* § 627.736(10)(a) (requiring "written notice of an intent to initiate litigation [to] be provided to *the insurer*" (emphasis added)). Therefore, the fact that Bain addressed the demand letter to USAA does not mean that Bain's demand letter was statutorily deficient.

Garrison relies on *Rivera v. State Farm Mutual Automobile Insurance Co.*, 317 So. 3d 197 (Fla. 3d DCA 2021), to support its argument that Bain's demand letter failed to strictly comply with the statutory requirements of section 627.736(10)(b). Insofar as is necessary to resolve this case, we agree with the Third District's general holding in *Rivera* "that in order for an insured's pre-suit demand letter to comply with section 627.736(10), it must provide the exact information listed in the statute." *Rivera*, 317 So. 3d at 207. However, to the extent that the *Rivera* opinion could be read to include among such "information listed

in the statute," *id.*, the aggregate dollar amount demanded, a demand for an amount only within the policy limits, or that the amount demanded be equal to the amount sought in a later lawsuit, we disagree that such information is required by section 627.736(10)(b), the text of which does not support such requirements. Importantly, in *Rivera* the appellate court did not conclude that any demand for an amount in excess of the policy limits in the insurance contract renders the demand letter statutorily deficient for lack of specificity regarding the amount. *See generally Rivera*, 317 So. 3d at 198–207. Further, in *Rivera* it was clear that the insured's demand letter failed to strictly comply with the requirements of section 627.736(10)(b)3 by failing to include the name of the medical provider, the exact amounts the insured was seeking for each trip to the medical provider, and the dates of the relevant services. *See id.* at 205–06 (concluding Rivera's demand "letter failed to include an itemized statement specifying the exact amount of requested reimbursement for *each* trip, the dates of treatment, service or accommodation as required by the statute, whether he was seeking reimbursement for twelve or sixteen trips, and the demand letter did not state with specificity the amount due and owed or the addresses to which Rivera allegedly traveled for *each* trip to incur his mileage costs" (emphasis added)). Here, Garrison has not alleged such insufficiencies, focusing instead on infirmities related to the aggregated amount sought by Bain in the demand letter.

If at some point during legal proceedings, an insurance company establishes and the trial court finds that the plaintiff, its attorney, or both knew or should have known that the amount claimed to be due in its demand letter "[w]as not supported by the material facts necessary to establish the [plaintiff's] claim," *see* § 57.105(1)(a), this could very well

form a basis for a motion for sanctions. However, even if the plaintiff and its attorney knew or should have known that the amount claimed in the demand letter far exceeded the amount provided in the insurance policy, this does not retroactively render the plaintiff's demand letter itself statutorily deficient. And that is what the trial court *found*—that the claim was not supported by the application of the then-existing law to the material facts because the demand letter was *statutorily* deficient, not that the amount requested could not be supported under the terms of the insurance policy. *See* § 57.105(1) (providing entitlement to attorney's fees when "the court *finds* that the losing party or the losing party's attorney knew or should have known" the claim was "not supported by the material facts necessary to establish" it or "would not be supported by the application of then-existing law to those material facts" (emphasis added)).

A presuit demand letter is not rendered *nunc pro tunc* statutorily deficient if the amount demanded is later found to be unsupported by the material facts; rather section 627.736(10) requires only that the claimant state the exact amounts to which the claimant believes he or she is entitled. The trial court did not find that the claim lacked *factual support* because the amount demanded exceeded the $10,000 policy limit; instead, it found that Bain's claim lacked legal support because a statutory condition precedent had not been met. *See* § 627.736(10)(a) (establishing the demand letter as a "condition precedent to filing any action for benefits under this section" satisfied by "written notice of an intent to initiate litigation" that contains enumerated information). In other words, the trial court did not find that Bain knew or should have known that its claim was factually unsupported because the amount demanded in its presuit letter could never be justified under the terms of

the insurance policy that capped PIP benefits at $10,000; rather, the trial court credited Garrison's argument that Bain had sent a "statutorily deficient pre-suit demand letter," concluding that Bain's "counsel knew or should have known that the pre-suit demand letter . . . did not comply with the statutory requirements, and as such, [Bain] had not complied with a condition precedent to the filing of th[e] action." Because the demand letter was not insufficient under the statute, Garrison could not establish entitlement to fees as a sanction on that basis, and the trial court's order was erroneous.

Costs

The trial court awarded Garrison a total of $3,765.00 in costs. Of this total amount, $262.50 were court reporter costs awarded pursuant to rule 1.420(d) ("Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs."). Bain does not challenge this award on appeal. Therefore, to the extent that Bain could have argued that the trial court erred by awarding court reporter costs, Bain abandoned these arguments on appeal. *See Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy.").

However, Bain challenges the imposition of the remaining $3,602.50 for expert witness fees. "An appellate court reviews whether a trial court's award of costs is excessive for an abuse of discretion; however, whether a cost requested may be awarded, at all, is a question of law to be reviewed de novo." *Sherman v. Sherman*, 279 So. 3d 188,

190 (Fla. 4th DCA 2019) (quoting *City of Boca Raton v. Basso*, 242 So. 3d 1141, 1144 (Fla. 4th DCA 2018)).

Bain first argues that the trial court erred by imposing costs as a sanction pursuant to section 57.105(1), relying on this court's decision in *In re Estate of Assimakopoulos*, 228 So. 3d 709, 713 (Fla. 2d DCA 2017), in which this court held that "an award of sanctions under section 57.105(1) may not include costs." However, unlike the trial court in *In re Estate of Assimakopoulos*, which awarded costs as a sanction pursuant to section 57.105(1), the trial court in this case awarded costs pursuant to section 57.041, which provides in relevant part that "[t]he party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment." *See In re Estate of Assimakopoulos*, 228 So. 3d at 714 (distinguishing *Wells v. Halmac Dev., Inc.*, 184 So. 3d 620, 622 (Fla. 3d DCA 2016), and *Indem. Ins. Co. of N. Am. v. Chambers*, 732 So. 2d 1141, 1142 (Fla. 4th DCA 1999), because "the part[ies] recovering the fees and costs w[ere] also the prevailing part[ies] . . . and so would have been entitled to an award of costs under section 57.041(1)"). Therefore, *In re Estate of Assimakopoulos* does not require reversal of the expert witness costs award in this case.

Second, Bain argues that the trial court erred by awarding the expert witness costs because Garrison's motion for entitlement to expert witness costs was untimely. *See* Fla. R. Civ. P. 1.525 ("Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal, which judgment or notice concludes the action as to that party."). Both of Garrison's motions for costs—the initial motion seeking an award of costs based on several grounds, including section 57.041, filed on

September 20, 2018, and the supplemental motion for entitlement to expert witness costs filed on June 29, 2020—were filed more than thirty days after June 21, 2018, the date on which Bain made its ore tenus notice of voluntary dismissal. Therefore, we reverse the award of expert witness costs.

Conclusion

We affirm the portions of the trial court's final judgment awarding Garrison $262.50 in court reporter costs pursuant to rule 1.420(d). However, we reverse the portion of the judgment awarding Garrison attorney's fees as sanctions pursuant to section 57.105(1)(b) and expert witness costs.

Affirmed in part, reversed in part, and remanded.

SILBERMAN and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.