[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11644
Non-Argument Calendar

D.C. Docket No. 2:15-cv-14005-KAM

DEIRDRE LEVESQUE,

Plaintiff - Appellant,

TIMOTHY LEVESQUE,

Plaintiff - Appellant,

versus

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 28, 2020)

Before WILSON, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

On August 2, 2011, Deirdre Levesque walked into the parking lot in front of her place of employment to assist a client. Tragically, Levesque was severely injured when a vehicle backed up without realizing that she was there, pinning her against a car door. At the time of the accident, Levesque and her spouse Timothy possessed non-stacking uninsured motorist coverage from GEICO for $100,000 per person and $300,000 per occurrence. GEICO initially did not pay the Levesques under the policy. The Levesques responded by filing a lawsuit in state court.

GEICO confessed judgment in the initial suit. This appeal addresses the Levesques' follow-on bad faith lawsuit against GEICO after judgment was entered against GEICO in the initial suit. The jury found in this case that GEICO acted in bad faith and awarded $317,200 in damages to the Levesques. But the district court entered judgment in favor of GEICO after finding that various set offs of benefits already received reduced the damages amount to $0. In response, the Levesques filed a motion to alter the judgment arguing two points. First, the couple asserted that under a pretrial stipulation, the district court was required to calculate the amount of attorneys' fees that the Levesques paid in their initial suit as a component of damages in this second suit. The Levesques also argued the

district court erred in setting off the payments received by other insurance companies and workers' compensation against the damages award. The district court denied the motion, and the Levesques now appeal. We affirm the district court's set off of the workers' compensation package against the Levesques' economic damages and the other insurance amounts against their non-economic damages. But we reverse the district court's conclusion that it should not determine the appropriate amount of attorneys' fees from the initial suit. We remand for further proceedings.

I.

Deirdre Levesque was grievously injured during her accident in the parking lot; her injuries included a fractured clavicle, a fractured scapula, a fractured and rotated sternum, a punctured lung, and fractured ribs. She contacted GEICO following the accident and indicated that she would likely make a claim on her uninsured motorist policy. But GEICO delayed its full investigation into the exact scope of Levesque's medical injuries. Instead, it spent the next several months primarily focused on Levesque's ability to recover from other sources. For example, Progressive Insurance Co., the at-fault liability carrier, paid Levesque its $100,000 policy limits within days of her accident. And because Levesque was on the job at the time of the accident, she received medical and wage benefits from her employer's insurance carrier. Finally, GMAC Insurance Co., another

insurance carrier, potentially owed Levesque money due to its coverage on one of the cars involved in the accident. GEICO and GMAC went back and forth for several months over whether GMAC was going to pay $100,000 under its policy (due to GMAC's internal deliberations about whether or not the terms of its policy extended to the accident in question). When GMAC finally did pay, GEICO immediately wrote to Levesque stating that "it appears that you have been fairly compensated" and asking Levesque to "advise if you are seeking uninsured motorist coverage from GEICO." The Levesques' reaction was to hire counsel.

At this point, it's worth setting out some principles of Florida law. In general, a plaintiff who prevails against an insurer in a lawsuit for uninsured motorist benefits is prohibited from recovering an award of attorneys' fees. *See* Fla. Stat. § 627.248 (generally providing for recovery of attorneys' fees); Fla. Stat. § 627.727(8) (generally limiting the award of fees pursuant to § 627.248 in cases for uninsured motorist benefits). But if the plaintiff believes that the insurance company acted in bad faith, she may file a separate lawsuit. *See* Fla. Stat. § 624.155. In that second suit, the available damages include attorneys' fees incurred during the first lawsuit. *See* Fla. Stat. § 627.727(10) (the "damages recoverable from an uninsured motorist carrier in a bad faith action include the total amount of the claimant's damages, including . . . reasonable attorney's fees and costs"). And a successful plaintiff in the second, bad faith lawsuit may be

entitled to attorneys' fees incurred during that second suit; under Florida Statutes § 627.248, those attorneys' fees are awarded by the court, rather than considered as a component of damages.

With that background, the parties' dispute in this case comes into sharper focus. The Levesques began by filing a lawsuit seeking to require GEICO to tender its policy. GEICO eventually offered to tender the policy if Levesque released any bad faith claim; Levesque refused.

GEICO decided to "confess judgment" for its $100,000 policy limits, which under applicable precedent at the time had the effect of mooting the initial case. *See Safeco Ins. Co. of Illinois v. Fridman*, 117 So. 3d 16 (Fla. 5th DCA 2013) ("*Fridman I*"), *quashed*, 185 So. 3d 1214 (Fla. 2016) ("*Fridman II*"). The court therefore entered judgment in favor of the Levesques for the $100,000 policy limit.

The Levesques proceeded to file their claim alleging that GEICO had acted in bad faith. As mentioned, the first case was mooted out under a Florida precedent—one that was in effect only briefly until it was quashed by the Florida Supreme Court three years later—holding that a claim for uninsured motorist benefits was mooted by the insurance company's offer of the policy limits. *See Fridman I*, 117 So. 3d at 19. Mooting the Levesque's initial case meant that the amount of the Levesques' damages was never determined by the jury, as it would have been if the case had been allowed to go forward after GEICO paid on the

policy. As a result, the subsequent bad faith suit required trying the amount of damages stemming from the accident, rather than merely taking the number that had been determined in the initial suit (as would occur under current law). *See Fridman II*, 185 So. 3d at 1222–27 (holding that the plaintiff "is entitled to a jury determination of the amount of damages in the UM action" that is then binding in the bad faith case, so long as sufficient appellate process was afforded).

As the bad faith suit progressed, the parties entered into a pretrial stipulation. As relevant here, that stipulation listed the "total amount of damages sustained by Deirdre Levesque and Timothy Levesque as a direct and proximate result of the collision" as a fact to be proven at trial. In contrast, it marked as an issue of law for decision by the court the "amount of any attorney's fees and costs reasonably incurred by the Levesques" (as well as any "post trial set offs that may apply to any judgment obtained by the Levesques").

At trial, the jury found that GEICO had acted with bad faith. The jury awarded damages to Ms. Levesque arising from the accident, including $50,000 for past pain and suffering, $200,000 for future pain and suffering, $10,000 for future medical expenses, and $50,000 in past lost earnings—totaling $60,000 in economic damages and $250,000 in non-economic damages. The jury also awarded her husband $7,200 for loss of consortium. The total amount of damages awarded by the jury was therefore $317,200.

GEICO filed a Motion to Determine Set Off Against Jury Verdict pursuant to Florida Statutes §§ 627.727(1) and 768.76(1). In particular, GEICO requested that the verdict be offset by $100,000 in bodily injury benefits from Progressive, $100,000 in uninsured motorist benefits from GMAC, $10,000 in personal injury protection benefits from GEICO, and $183,000 in workers' compensation benefits received via settlement. GEICO indicated that the workers' compensation and personal injury protection amounts should offset the $60,000 the jury had awarded for economic damages, while the other amounts should apply against the $257,200 remaining.

The district court, using a different calculation than the one suggested by GEICO, concluded that those set offs reduced the verdict to $0, and thus entered judgment in favor of GEICO. The Levesques filed a motion to alter or amend the judgment, arguing that the district court still needed to determine the amount of attorneys' fees they were entitled to from the previous lawsuit. That decision, the Levesques said, had been reserved to the court under the parties' pretrial stipulation. GEICO responded that because attorneys' fees in the underlying suit counted as damages, they needed to have been submitted to the jury—and that the Levesques' failure to put evidence before the jury on that point did not give the district court the authority to determine them now on its own. The district court again agreed with GEICO and denied the motion. The Levesques now appeal,

arguing (1) that the district court abused its discretion by ruling that the pretrial stipulation did not provide for the court to determine damages from the previous suit and (2) that the court erred in applying the workers' compensation set offs against economic damages.

II.

We review the district court's interpretation of a pretrial order for an abuse of discretion. *Pulliam v. Tallapoosa Cty. Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999). As part of that review, we afford "great deference to the trial judge's interpretation and enforcement of pretrial stipulations." *W. Peninsular Title Co. v. Palm Beach Cty.*, 41 F.3d 1490, 1493 (11th Cir. 1995). The district court's ruling that a party is entitled to a set off on damages due to state law is reviewed de novo. *See McMahan v. Toto*, 311 F.3d 1077, 1081 (11th Cir. 2002); *see also Adams v. Toyota Motor Corp.*, 867 F.3d 903, 921 (8th Cir. 2017).

III.

While we are mindful of the deference that we owe to the district court's interpretation of pretrial stipulations, we first reverse the district court's conclusion that the underlying damages from the Levesques' prior suit against GEICO were an issue of fact left to the jury. The district court stated in its order denying post-judgment relief that the "reference in the Pretrial Stipulation to 'the amount of any attorney's fees and costs reasonably incurred by the Levesques' as the last item

listed for the Court's resolution is reasonably read to apply only to those attorney's fees and costs incurred in this action if available." We do not see it that way. To begin, the phrase "attorney's fees and costs" is at least ambiguous as to whether it broadly refers to the attorneys' fees at issue from both lawsuits or more narrowly as to only the fees at issue in the current suit. Still, were that the only language before us, we likely would not reverse, in large part due to the deference we afford the district court in interpreting pretrial stipulations.

We reverse, however, because the broader reading is the only way to provide reasonable effect to the portion of the parties' pretrial stipulation that left for factual resolution the "total amount of damages sustained by Deirdre Levesque and Timothy Levesque as a direct and proximate result of the collision." In concluding otherwise, the district court zeroed in on the phrase "total amount of damages"—but those words are modified by the phrase "as a direct and proximate result of the collision." Under the stipulation's plain language, then, those damages awardable under the statute that were not proximately and directly caused by the collision were not included as an issue of fact to be resolved by the jury. As the Levesques note, any attorneys' fees incurred while bringing the initial suit were proximately caused not by the collision, but by GEICO's decision not to immediately pay the Levesques under the terms of the policy. *Cf. U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1329 (11th Cir. 2018) (citation

omitted) (the directness requirement for proximate cause at common law "usually does not exist 'beyond the first step' in a causal chain"); *Ruiz v. Tenet Hialeah Healthsystem, Inc.*, 260 So. 3d 977, 982 (Fla. 2018) (citation omitted) (proximate cause is only found where "the alleged tortfeasor 'substantially caused the specific injury that actually occurred'"). Because the attorneys' fees in the initial suit could not reasonably be interpreted as resulting proximately and directly from the collision, and the stipulation explicitly stated that the court would decide reasonable attorneys' fees as a matter of law, we conclude that the district court abused its discretion by failing to interpret the stipulation to include the determination by the court of reasonable attorneys' fees from the initial action.[1]

On the other hand, we affirm the district court's treatment of the set offs applicable to the damages verdict. Under Florida law, GEICO was entitled to a credit against the Levesques' damages to the extent the jury's award duplicated the benefits available to the Levesques from workers' compensation or personal injury protection. *State Farm Mut. Auto. Ins. Co. v. Siergiej*, 116 So. 3d 523, 528 (Fla.

[1] GEICO suggests that this result is inappropriate because it means that the district court will evaluate attorneys' fees from a suit that did not occur before it. Many of the same reasons for having courts determine attorneys' fees still apply, however. For example, judges "are better equipped than juries to make computations based on details about billing practices, including rates and hours charged on a particular case"—whether or not the fees stemmed from the trial the jury was witnessing. *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1316 (2d Cir. 1993). We therefore find no inherent absurdity in the parties deciding to have the court determine those fees as a matter of law. Nor, as GEICO would have it, is there a Seventh Amendment issue; parties may always stipulate to have damages determined by the court.

Dist. Ct. App. 2013) (discussing Fla. Stat. § 627.727(1)). The Levesques now argue that GEICO should not have received credit in this case because it did not prove that the $10,000 in personal injury protection benefits and $183,000 workers' compensation settlement were actually duplicative of the jury's award of $10,000 for future medical expenses and $50,000 in past lost earnings. In particular, the Levesques claim that because the $183,000 workers' compensation settlement was "undifferentiated" among claims for "medical benefits," "monetary compensation benefits and impairment benefits, including penalties and interest," and attorneys' fees and costs, it cannot be applied against the economic losses at issue.

The district court was correct that under Florida law the workers' compensation and personal injury protection amounts are fairly set off against the economic damages at issue. As GEICO points out, evidence before the court included checks issued to Deirdre Levesque stating that they were issued for Temporary Total Disability, recoverable as a component of workers' compensation as per Florida Statutes § 440.15(2). That evidence sufficed for the district court to apply the set off. *Cf. Primo v. State Farm Mut. Auto. Ins. Co.*, No. 3:13-CV-64-J-32MCR, 2014 WL 6769344, at *2 (M.D. Fla. Dec. 1, 2014) (finding that the workers' compensation benefits paid were "plainly" covered by jury award for past medical expenses even when the exact bills at issue were not specified). But even

assuming arguendo that there is any doubt on that point, the Levesques failed to make this precise argument before the district court when arguing against the set offs. We therefore follow our ordinary practice of declining to consider an issue raised for the first time on appeal. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

Finally, the Levesques argue that the district court erred in explaining that the entire jury verdict could be set off even without considering GEICO's payment of $100,000 in the initial suit. Assuming that the $183,000 workers' compensation settlement may only be set off against the $60,000 in economic damages, then the Levesques' math is correct: the $257,200 in non-economic damages are only reduced to $57,200 after setting off the $100,000 in bodily injury benefits from Progressive and $100,000 in uninsured motorist benefits from GMAC. But GEICO's initial tender *is* appropriately set off against the non-economic damages—reducing the damages available to $0. Additionally, it appears that the district court included its comment merely for emphasis, not as its substantive ruling. In either case, we may affirm "on any ground that finds support in the record." *Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008). We affirm the district court on this point and conclude that, on the basis of the damages before the court at that time, the set offs appropriately reduced the amount awardable to the Levesques to $0. As previously mentioned,

however, we now reverse the district court's ruling on the pretrial stipulation and hold that the district court must determine the amount of any reasonable attorneys' fees the Levesques incurred in their initial suit. We therefore vacate the district court's entry of judgment in favor of GEICO (and the subsequent cost judgment) and remand for further proceedings consistent with this opinion.