

IN THE SUPREME COURT OF FLORIDA

Case No.: SC07-2095
Lower Tribunal No: 5D06-3875

AmerUs Life Insurance Co.
Plaintiff/Petitioner,
vs.

Michael H. Lait and Michael H. Lait, P.A.,
Defendants/Respondents.

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

Table of Contents2

Table of Citations.....3

Format of References4

Statement of the Case and of the Facts 5

Summary of Argument..... 7

Argument..... 8

 I. Standard of Review8

 II. Rule 1.525 did not apply because entitlement for costs and fees had
 already been established.....8

 III. Lait waived his right to object to the award of costs and attorney’s fees..12

Conclusion 14

Certificate of Service15

Certificate of Compliance15

Appendix.....16

TABLE OF CITATIONS

AmerUs Life Ins. Co. v. Lait, 967 So.2d 340 (Fla. 5th DCA 2007).....9

Association of School Consultants, Inc. v. Spillis Candela & Partners, Inc.,
639 So.2d 991 (Fla. 3rd DCA 1994).....8

Barco v. School Board of Pinellas County, 975 So.2d 116 (Fla. 2008).....8,9

Braxton v. Morris, 914 So.2d 8 (Fla. 1st DCA 2005).....9

Chamizo v. Forman, 933 So.2d 1240 (Fla. 3rd DCA 2006).....9,11

Gulf Shores, L.L.C. v. Riverwood Community Development District, 927 So.2d 246
(Fla. 2nd DCA 2006).....9

Hart v. City of Groveland, 919 So.2d 665 (Fla. 5th DCA 2006).....9

Ingalglio v. Ennis, 443 So.2d 459 (Fla. 4th DCA 2004).....13

Iteka Intern v. Hinson, 671 So.2d 204 (Fla. 4th DCA 1996).....13

Joanides v. Jubis, 886 So.2d 10070 (Fla. 4th DCA 2004).....13

Lyn v. Lyn, 884 So.2d 181 (Fla. 2nd DCA 2004).....9

Mook v. Mook, 873 So.2d 363 (Fla. 2nd DCA 2004).....9

Norris v. Treadwell, 9078 So.2d 1217 (Fla. 1st DCA 2005).....8,9

Parrot Cove Marina, LLC v. Duncan Seawall Dock & Boatlift, Inc., ---So.2d---, 2008
WL 441948 (Fla. 2nd DCA 2008).....9

Reid v. Saia Motor Freight Line, Inc., No. 01-28040 CA 06 (Fla. 11th Circ. Ct.
2003).....10

Roque v. Paskow, 812 So. 2d 500 (Fla. 4th DCA 2002).....8

Saia Motor Freight Line, Inc. v. Reid, 930 So.2d 835 (Fla. 1991).....8, 10,11

Seijo v. Futura Realty, Inc., 269 So.2d 738 (Fla. 2nd DCA 1972).....13

Shipley v. Bellair Group, Inc., 759 S o.2d 28 (Fla. 2nd DCA 2000).....8-9

Stockman v. Downs, 573 So.2d 835 (Fla. 1991).....8

REFERENCES

Appellant, AmerUs Life Insurance Co., shall be referred to as “AmerUs.”

Appellees, Michael H. Lait and Michael H. Lait, P.A. shall be referred to as “Lait.”

References to the record on appeal shall be in the format (R. #). References to the Appendix shall be in the format (A. #).

STATEMENT OF THE FACTS AND CASE

AmerUs is an insurance company. Lait and AmerUs entered into an agreement for Lait to act as an insurance agent for AmerUs. Lait was prepaid commissions under the agreement. Certain policies sold by Lait were cancelled or otherwise terminated for unpaid premiums, and Lait was charged by AmerUs for reimbursement of the prepaid commissions on those policies, pursuant to the terms of the agreement. Lait refused payment to AmerUs. AmerUs filed a four-count Complaint for the amounts alleged due from Lait. Lait filed an answer with affirmative defenses, and a counterclaim which was later withdrawn. Following a non-jury trial, the trial court rendered final judgment in favor of AmerUs and against Lait in the amount of \$125,867.57. (R.1). The judgment included the recitation that Lait was “liable to AmerUs for prejudgment interest, court costs and attorney’s fees, which are reserved at this time.” (R.1).

Approximately eight months later, AmerUs filed a Motion to Amend Final Judgment Pursuant to Reservation of Jurisdiction (R. 2-3), along with an Affidavit as to costs and interest (R. 4-8) and an affidavit in support of attorney’s fees (R. 9-10). An Amended Final Judgment was entered shortly thereafter (R. 11-12), which included an award of costs, interest, and attorney’s fees in the amount of \$4,672.50 in accordance with the affidavits. A Second Amended Final Judgment was entered less than a month after that, correcting a scrivener’s error in the Amended Final Judgment (R. 13-14). Shortly thereafter, a hearing took place on Plaintiff’s Motion to amend the

judgment to correct another scrivener's error. At that hearing, Lait moved to vacate the judgments based on AmerUs's failure to comply with the time requirements of Rule 1.525 of the Florida Rules of Civil Procedure. The court granted Lait's motion, finding that the motion filed by AmerUs was untimely. (R. 15-16).

AmerUs timely filed an appeal with the Fifth District Court of Appeals, who affirmed the order vacating the amended and second amended final judgments. The Fifth District Court of Appeals certified their decision as being in conflict with the decision of the Third District Court of Appeal in Chamizo v. Forman, 933 So.2d 1240 (Fla. 3rd DCA 2006). AmerUs timely filed the Appellant/Petitioner's Notice to Invoke Discretionary Jurisdiction with the Supreme Court of Florida, and jurisdiction was accepted.

SUMMARY OF ARGUMENT

The Fifth District incorrectly relied on the Saia case when affirming the decision of the trial court. The facts in the Saia case are distinguishable from the case at hand. The trial court in Saia reserved jurisdiction in the final judgment to consider attorney fees and costs, but did not actually make a finding of entitlement. The facts in this case are more analogous to the Chamizo case in which the trial court made a determination in the final judgment that the prevailing party was entitled to an award of attorney's fees and costs. The Third District in Chamizo held that the timeliness of the motion for fees was a non-issue as fees and costs had already been awarded by the final judgment and the reservation of jurisdiction was solely for the purpose of determining an amount.

The purpose of Rule 1.525 is to eliminate uncertainty as to the timeliness of a motion and the obligations of a party to avoid prejudice or unfair surprise. The granting of entitlement in a final judgment eliminates these concerns and puts the other parties on notice that there will be an award of fees.

Furthermore, Lait waived its right to object to the award of attorney's fees and costs since it was not done in a timely manner. Lait did not move to vacate the judgment until 10 months after the entry of the award of costs and fees, and the *ore tenus* motion made by Lait resulted in a denial of due process to AmerUs.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on application of law is de novo See, Roque v. Paskow, 812 So. 2d 500 (Fla. 4th DCA 2002). The standard of review for a trial court's denial of attorney's fees is "abuse of discretion." See, Association of School Consultants, Inc. v. Spillis Candela & Partners, Inc., 639 So.2d 991 (Fla. 3rd DCA 1994).

II. RULE 1.525 DID NOT APPLY BECAUSE ENTITLEMENT FOR COSTS AND FEES HAD ALREADY BEEN ESTABLISHED.

Florida Rule of Civil Procedure 1.525 establishes a bright-line time requirement for motions for costs and attorney fees. Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598 (Fla. 2006).¹ Prior to the enactment of Rule 1.525 there was a "reasonable time" standard established by case law. Stockman v. Downs, 573 So.2d 835 (Fla. 1991). See also Barco v. School Board of Pinellas County, --- So.2d ---, 2008 WL 321469 (Fla.), 33 Fla. L. Weekly S87; Norris v. Treadwell, 907 So. 2d 1217 (Fla. 1st DCA 2005). There was a great deal of uncertainty in determining the timeliness of a motion and the obligations of a party under this prior standard. Norris at 1218, citing to Shipley v. Bellair Group, Inc., 759 So. 2d

¹ Florida Rule of Civil Procedure 1.525 provides: "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."

28 (Fla. 2nd DCA 2000).² The purpose of the rule was to resolve the uncertainty surrounding the timing of post-trial motions and to prevent prejudice or unfair surprise. Saia at 600, 601. See also Norris at 1218; Barco at 7.

Since its enactment, the courts have taken a strict view of the Rule. See Hart v. City of Groveland, 919 So. 2d 665 (Fla. 5th DCA 2006); Braxton v. Morris, 914 So.2d 8 (Fla. 1st DCA 2005); Lyn v. Lyn, 884 so.2d 181 (Fla. 2nd DCA 2004). Case law is clear that merely reserving jurisdiction to award fees is not sufficient to override the 30-day requirement of the Rule. See Hart at 668; Mook v. Mook, 873 So.2d 363 (Fla. 2nd DCA 2004). There has been, however, a split between the districts as to whether an award of fees and costs with a reservation as to the amount requires the filing of a motion within the 30-day time period. See Parrot Cove Marina, LLC v. Duncan Seawall Dock & Boatlift, Inc., ---So.2d---, 2008 WL 441948 (Fla. 2nd DCA 2008); Gulf Shores, L.L.C. v. Riverwood Community Development District, 927 So.2d 246 (Fla. 2nd DCA 2006) (disallowing an award of fees outside the 30-day period even when there has been an award of entitlement); Chamizo v. Forman, 933 So.2d 1240 (Fla. 3rd DCA 2006) (holding that an entitlement to costs and fees removes a case from the requirements of Rule 1.525).

In the instant case, the Fifth District relied on the Saia decision. AmerUs

² The court in Shipley lamented on the inconsistencies in the decisions regarding the reasonable time standard and suggested the enactment of a rule of procedure concerning a time frame in which to move for an award of costs and fees. See

Life Ins. Co. v. Lait, 967 So.2d 340 (Fla. 5th DCA 2007)(A.1). In Saia, the trial court entered a judgment reserving jurisdiction “to award the Plaintiff costs and to consider Plaintiff’s claim for attorneys’ fees upon a determination of entitlement thereto.” Id. At 598 (quoting Reid v. Saia Motor Fright Line, Inc., No. 01-28040 CA 06 at 1-2 (Fla. 11th Cir. Ct. order filed Jan. 3, 2003)). The motion to tax costs was filed more than thirty days after the entry of the judgment. The Third District affirmed the award of costs. The Florida Supreme Court quashed the decision, holding that Rule 1.525 applied even though the final judgment reserved jurisdiction to award attorney fees and costs. Id. at 600.

In the instant case, the Fifth District’s reliance on the Saia case was misplaced. In Saia, the court had not yet determined an entitlement to costs or fees. In the instant case, the trial court made a finding in the final judgment that Lait was “liable to AmerUs Life for prejudgment interest, court costs and attorney’s fees, which are reserved at this time.” (R.1). The reservation was solely to determine the amount of attorneys fees and not the issue of entitlement.

In its ruling, the Fifth District noted that a contradictory conclusion was reached on this issue in the case of Chamizo. In Chamizo a summary judgment was entered in favor of the defendant, and an order was entered awarding him attorney fees and costs as the prevailing party with the amount to be determined at another hearing. The motion for attorney fees was filed by the defendant outside of the 30-

day time period allowed under Rule 1.525. In ruling that the defendant was not deprived of an entitlement to fees and costs the Third District stated: “We find no merit to Chamizo’s claim that the motion for fees was untimely. The final judgment in this case had specifically awarded fees and costs to Forman. The court reserved its jurisdiction solely to allow it to determine the amount of said fees and costs. Given the fact that fees and costs had already been awarded by the final judgment and affirmed by this court, the timeliness of Forman’s motion is a non-issue.” Chamizo at 1241. The court further clarified that a reservation of jurisdiction to determine fees and costs does not extend the 30-day filing requirement of Rule 1.525 where an award has yet to be determined. Id. at 1241.

From a plain reading of Rule 1.525 it is clear that the rule was enacted for parties seeking a **judgment** taxing costs and attorneys’ fees. In the instant case, a judgment was already entered that included the taxation of costs and fees. Justice Pariente, in her dissenting opinion in Saia, stated: “I do not quarrel with the purpose of adopting rule 1.525: to remove the uncertainty created by the ‘reasonable time’ standard, which was previously used to determine the timeliness of a motion seeking attorneys’ fees and costs; to put parties on notice; and to prescribe a time certain for filing motions for attorneys’ fees and costs.” Saia at 603. In the same opinion Justice Pariente also noted: “In this case, neither party was surprised and neither party was prejudiced by the filing of the motion for attorneys’ fees and costs beyond the time period set forth in Florida Rule of Civil

Procedure 1.525.” As in Saia, the defendant in the instant case was put on notice through the final judgment that the plaintiff was entitled to an award of costs and attorneys’ fees. It was only the amounts that had not yet been determined. By virtue of the inclusion of attorneys’ fees and costs in the judgment, there was no surprise or prejudice to the defendant on this issue.

III. LAIT WAIVED THEIR RIGHT TO OBJECT TO THE AWARD OF COSTS AND ATTORNEY’S FEES.

The original final judgment, which included the award to AmerUs of interest, court costs and attorney’s fees, was entered on December 15, 2005 (R.1). It was not until October 6, 2006—almost **10 months** after the award of costs and fees and almost 2 months after the entry of the Amended Final Judgment, which included a specific award of costs, interest, and attorney’s fees—that Lait made an *ore tenus* motion to vacate the judgments entered. Lait failed to request a new trial or a rehearing within the time prescribed by Florida Rule of Civil Procedure 1.530(b)³, nor was a Notice of Appeal filed within the 30 day time period prescribed Fla. R. App. P. 9.110(b).⁴ By failing to timely move to strike the award

³ Rule 1.530(b) provides in part: “A motion for new trial or for rehearing shall be served not later than 10 days after the return of the verdict in a jury action or the date of filing of the judgment in a non-jury action.”

⁴ Rule 9.110(b) provides: “Jurisdiction of the court under this rule shall be invoked by filing 2 copies of a notice, accompanied by filing fee prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.”

of costs and attorney's fees, Lait waived the right to object. See Seijo v. Futura Realty, Inc., 269 So.2d 738 (Fla. 2nd DCA 1972).

Additionally, the trial court erred in considering Lait's *ore tenus* motion which was not noticed for hearing. The purpose of the October 6, 2006 hearing was to correct a scrivener's error in the Second Amended Final Judgment. Lait raised the untimeliness of the Motion for Attorneys Fees for the first time at that hearing. Fla. R. Civ. P. 1.090(d) provides: "A copy of any written motion which may not be heard ex parte and a copy of the notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing." The failure of Lait to properly notice AmerUs of its motion was a denial of due process. Ingalglio v. Ennis, 443 So.2d 459 (Fla. 4th DCA 1984). See also Joanides v. Jubis, 886 so.2d 1070 (Fla. 4th DCA 2004); Iteka Intern v. Hinson, 671 So.2d 204(Fla. 4th DCA 1996).

CONCLUSION

For the reasons expressed herein, the order entered by the 5th District vacating the amended and second amended final judgments should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that on _____ a true and correct copy of this brief was furnished by mail to: Michael H. Lait, P.A. and Michael H. Lait, 6083 Strada Isle Way, Orlando, FL 32835.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is submitted in Times New Roman 14 point in compliance with Rule 9.210(a)(2) Fla. R. App.P

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APPENDIX TO PETITIONER'S INITIAL BRIEF

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INDEX

1. Conformed copy of AmerUs Life Insurance co., v. Michael H. Lait and Michael H. Lait, P.A., 967 So.2d 340 (Fla. 5th DCA 2007).....