IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR MARTIN COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 18-AP-1
Lower Tribunal No. 17-SC-936

ZERO 6 INCORPORATED,

Appellant,

v.

SAFECO INSURANCE COMPANY
OF ILLNOIS,

Appellee.
_____/

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

Decision filed January 31, 2019.

Appeal from the County Court for Martin County; Curtis Disque, Judge.

Chris Kasper, Ovadia Law Group, P.A., for appellant.

No appearance for appellee.

PER CURIAM.

On appeal, the Appellant argues that the trial court erred when it sua sponte raised the issue of the Appellant's standing when neither party admitted the assignment of benefits into evidence. It also motions this court for its appellate attorney's fees. As explained below, we affirm the trial court and deny the Appellant's motion.

Ian Cummings' ("Cummings") Mercedes sedan was damaged in an auto accident, and he took it to the Appellant's auto repair shop to be repaired. His car was insured by the Appellee ("Safeco"), and he assigned his benefits to the Appellant. The Appellant wrote up an estimate, indicating that it would cost $4,890.98 to perform the necessary repairs. However, Safeco's adjuster estimated that the repairs would cost $4,178.86. Each side agreed that there was a $500.00 deductible in the insurance policy, which dropped the estimates to $4,390.98 for the Appellant's repairs and $3,678.86 for the Safeco's adjuster's estimate. The Appellant insisted that it must

obtain a headlamp from an authorized Mercedes dealer, as well as command its usual labor rates to perform the repairs. Safeco was only willing to reimburse the Appellant at a reduced labor rate and use an "Opt OEM"[1] headlight, which resulted in the discrepancy in the estimates. The Appellant had already began its work on the vehicle before Safeco did its estimate; however, Safeco did issue the Appellant two separate checks, which it cashed. The record does not indicate the amounts of these checks.

The Appellant filed a complaint for breach of contract, seeking $4,390.98, plus attorney's fees. The trial court conducted a non-jury trial on December 12, 2017. The Appellant admitted its estimate and receipts for parts into evidence; however, it did not admit the assignment of benefits signed by Cummings, or the amount of the payments it received. Safeco admitted its estimate into evidence, but it did not admit the insurance policy or the checks that it paid to the Appellant, despite having pre-marked them for identification. At the end of trial, the trial court brought these issues to the attention of both sides and allowed them the opportunity to discuss the case outside of its presence and attempt to settle it; however, the parties could not come to an agreement. Therefore, the trial court rendered a final judgment in favor of Safeco the next day. It found that the Appellant had standing to bring the lawsuit, but it did not enter the assignment into evidence or have its representative testify about its contents. Therefore, the trial court found that it "has no knowledge of its content or what limits might have been imposed...".

"When a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence.... However, where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is de novo." *Jasser v. Saadeh*, 91 So. 3d 883, 884 (Fla. 4th DCA 2012) (quoting *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008)).

The Appellant relies heavily on *Lawson v. Frank*, in which a circuit court sua sponte dismissed a pro se litigant's amended complaint on the basis that the litigant did not have standing. 197 So. 3d 1269 (Fla. 2d DCA 2016). In that case, the record indicated that there was not a motion or objection raised as to the pro se litigant's standing; therefore, the circuit court deprived the litigant of due process when his claims was dismissed without notice and opportunity to be heard.

[1] "Opt OEM" stands for optional original equipment manufacturer. The estimate further describes it by stating "parts that are OEM parts that may be provided by or through alternate sources other than the OEM vehicle dealerships.

Id. at 1271. *See also Liton Lighting v. Platinum Television Group, Inc.*, 2 So. 3d 366, 367 (Fla. 4th DCA 2008) (a trial court cannot sua sponte dismiss a claim based on an affirmative defense not properly pled in the pleadings because it deprives the parties of due process). The Appellant misses two huge distinctions between the instant case and *Lawson.* First, that the trial court in the instant case granted the parties their due process during the entire proceedings and nonjury trial, instead of sua sponte dismissing the case during the pleadings stage. Further, this trial court's order expressly resolved any standing issue in Appellant's favor.

The order also expressly found that neither the assignment of benefits nor the insurance policy was entered into evidence, so that "without this evidence, this Court will not guess as to its contents, limitations, if any, or the contents of the policy…". Stated another way, the Appellant's cause of action was for breach of contract, which it did not prove; additionally, it did not prove damages. Therefore, the trial court properly rendered a final judgment in favor of Safeco.

In the last sentence of the initial brief, the Appellant requests that this court award it its appellate attorney's fees pursuant to §627.428, Fla. Stat. (2017). However, a motion for appellate attorney's fees must be made in a separate motion and cannot be a request made in the body of a brief. *McCreary v. Florida Residential Property and Casualty Joint Underwriting Ass'n*, 758 So. 2d 692, 696 (Fla. 4th DCA 1999). Further, the Appellant is not the prevailing party in this action. Therefore, the request for appellate attorney's fees is denied.

Affirmed.

SWEET, SCHWAB, JJ., and ALONZO, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.