SUMMARY
December 1, 2022

**2022COA138**

**Nos. 21CA1916 & 22CA0285, *Del Valle v. California Casualty Indemnity Exchange* — Insurance — Automobile Insurance Policies — Medical Payments Coverage — Workers' Compensation Exclusions**

In this automobile policy coverage dispute, the plaintiff contends the district court erred by ruling that his claim for medical payments coverage is barred under an exclusion in his automobile insurance policy.

A division of the court of appeals concludes that a workers' compensation exclusion in an automobile policy is valid and enforceable and does not violate public policy. The division also rejects the insurer's cross-appeal challenging the order denying its request for attorney fees.

COLORADO COURT OF APPEALS **2022COA138**

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Court of Appeals Nos. 21CA1916 & 22CA0285
El Paso County District Court No. 21CV30875
Honorable Gregory R. Werner, Judge

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Daniel Del Valle,

Plaintiff-Appellant and Cross-Appellee,

v.

California Casualty Indemnity Exchange,

Defendant-Appellee and Cross-Appellant.

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JUDGMENT AND ORDER AFFIRMED

Division C
Opinion by JUDGE DUNN
Kuhn and Casebolt*, JJ., concur

Announced December 1, 2022

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Bradford Pelton, P.C., Alex D. Kerr, Colorado Springs, Colorado, for Plaintiff-Appellant and Cross-Appellee

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 In this automobile policy coverage dispute, plaintiff, Daniel Del Valle, appeals the district court's order dismissing his complaint for failure to state a claim against defendant, California Casualty Indemnity Exchange (California Casualty). He specifically contends the court erred by ruling that his claim for medical payments coverage is barred under an exclusion in his automobile insurance policy with California Casualty. Because we agree with the district court that the policy exclusion is valid and enforceable, we affirm the order dismissing Del Valle's complaint.

¶ 2 We also reject California Casualty's cross-appeal challenging the order denying its request for attorney fees.

## I. Background

¶ 3 According to Del Valle's complaint, he was injured in a car accident while acting in the course and scope of his employment. As a result, Del Valle filed a workers' compensation claim and received workers' compensation medical benefits. Del Valle and his employer later settled the workers' compensation claim.[1]

[1] The terms of Del Valle's workers' compensation settlement are not reflected in the record.

¶ 4 At the time of the accident, Del Valle also had a personal automobile insurance policy with California Casualty. That policy includes medical payments coverage for "reasonable expenses incurred for necessary medical" services for bodily injuries "caused by an accident." But that coverage is subject to nine exclusions, one of which states as follows:

> We do not provide [m]edical [p]ayments [c]overage for any "insured" for "bodily injury":
>
> . . . .
>
> 4. Occurring during the course of employment if workers' compensation benefits are required or available for the "bodily injury."

¶ 5 After Del Valle settled his workers' compensation claim, he continued to receive medical treatment. He then filed a claim for medical payments benefits under his California Casualty policy to cover the additional medical expenses. Based on the workers' compensation exclusion, California Casualty denied the claim.

¶ 6 Unable to resolve the coverage dispute, Del Valle filed this action asserting claims for (1) breach of insurance contract; (2) common law bad faith breach of insurance contract; (3) statutory bad faith; and (4) declaratory relief. As to the last

claim, Del Valle asked the court to declare the workers' compensation exclusion invalid because, among other reasons, it violates public policy.

¶ 7 California Casualty moved to dismiss the complaint for failure to state a claim under C.R.C.P. 12(b)(5), arguing the workers' compensation exclusion is valid and enforceable. The district court agreed, concluding that the exclusion is valid and that Del Valle wasn't entitled to medical payments benefits under his automobile insurance policy.

¶ 8 California Casualty then moved for attorney fees and costs, arguing that (1) because it prevailed on its motion to dismiss, it was entitled to fees and costs under sections 13-16-113 and 13-17-201, C.R.S. 2022; and (2) because Del Valle's statutory claim was frivolous, it was entitled to fees and costs under section 10-3-1116(5), C.R.S. 2022. The district court denied the motion.

¶ 9 Del Valle now challenges the court's order dismissing his complaint, while California Casualty says the district court should have granted its request for attorney fees. We are persuaded by neither challenge.

## II. Insurance Policy Exclusions and Public Policy

¶ 10 Del Valle doesn't dispute that the workers' compensation exclusion is plain and unambiguous. Instead, he contends that the exclusion violates public policy "because it conditions and limits statutorily mandated coverage" and is therefore unenforceable. We disagree.

¶ 11 An insurance policy provision may be void and unenforceable if it violates public policy by attempting to "dilute, condition, or limit statutorily mandated coverage." *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1045 (Colo. 2011) (citation omitted); *see also Pacheco v. Shelter Mut. Ins. Co.*, 583 F.3d 735, 740 (10th Cir. 2009) (concluding that an insurance policy provision was void as against public policy where it "attempt[ed] to limit or condition" Colorado's statutorily mandated coverage).

¶ 12 Whether an insurance policy provision violates public policy is a legal question that we review de novo. *See Bailey*, 255 P.3d at 1045. And "[w]e determine whether a public-policy violation exists based on the particular facts of the case before us." *Id.* Statutory interpretation is also a question of law that we review de novo. *Ford Motor Co. v. Walker*, 2022 CO 32, ¶ 17. In construing a statute, we

seek to ascertain and give effect to legislative intent. *Id.* at ¶ 18. To do that, we start with the statute's language. If the language is clear, we apply the words as written and go no further. *Id.* at ¶ 19.

¶ 13 Del Valle presents several variations on his argument that the workers' compensation exclusion is void. But they are all premised on his contention that medical payments coverage is "mandatory" under section 10-4-635, C.R.S. 2022 (the MedPay statute), and that the workers' compensation exclusion is "an attempt to limit and condition" that statutorily required coverage in violation of public policy.

¶ 14 Del Valle's fundamental premise, however, isn't correct. True, under the MedPay statute, an automobile liability insurer must offer medical payments coverage of at least $5,000 to cover medical expenses for bodily injuries arising from the ownership or use of a motor vehicle. § 10-4-635(1)(a); *see Budnella v. USAA Gen. Indem. Co.*, Civ. A. No 20-cv-00944-KMT, 2021 WL 288763, at *4 (D. Colo. Jan. 27, 2021); *see also* § 10-4-635(1)(c) (noting that "if" the insurer "fails to offer" medical payments coverage, the policy is presumed to include such coverage). But an insured is not required to purchase such coverage. Indeed, "[a] policy may be issued without medical

payments coverage" if the insured "rejects medical payments coverage in writing or in the same medium in which the application for the policy was taken." § 10-4-635(1)(b). Thus, the plain language of the MedPay statute makes medical payments coverage optional — not mandatory. *See All. Mut. Cas. Co. v. Duerson*, 184 Colo. 117, 123, 518 P.2d 1177, 1180 (1974) (explaining that a similar provision requiring insurers to offer uninsured motorist coverage but allowing the insured to reject such coverage "mandates only that insurance companies make available uninsured motorist coverage in an amount as prescribed" by the statute and that "the coverage is not mandatory and may be rejected"); *see also* 8 John W. Grund, J. Kent Miller & David S. Werber, *Colorado Practice Series: Personal Injury Practice – Torts and Insurance* § 50:6, Westlaw (3d ed. database updated Dec. 2021) (identifying medical payments coverage as optional).

¶ 15 Because medical payments coverage is optional at the insured's discretion, the workers' compensation exclusion in Del Valle's policy doesn't attempt to "dilute, condition, or limit statutorily mandated coverage." *Bailey*, 255 P.3d at 1045 (citation omitted).

¶ 16 To the extent Del Valle contends that because he elected medical payments coverage, the workers' compensation exclusion violated public policy, we are aware of no authority — and Del Valle points us to none — supporting his contention. If Del Valle is correct that an insured's election transforms optional coverage into statutorily mandated coverage, no policy exclusion would ever be valid and enforceable. But "[i]n the absence of statutory inhibition, an insurer may impose any terms and conditions [in an insurance agreement] consistent with public policy which it may see fit." *Chacon v. Am. Fam. Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990).

¶ 17 And to the extent Del Valle claims that the exclusion generally conflicts with the MedPay statute, nothing in that statute prohibits limitations on medical payments coverage, particularly where — as here — an insured is covered under a workers' compensation policy. § 10-4-635; *see also Budnella*, 2021 WL 288763, at *8; *Bailey*, 255 P.3d at 1048 (finding insurance exclusion didn't violate public policy, in part, due to the absence of any statutory mandate suggesting otherwise). Had the legislature "intended to limit" or prohibit exclusions for medical payments coverage, it "would have said so." *Sooper Credit Union v. Sholar Grp. Architects, P.C.*, 113

P.3d 768, 772 (Colo. 2005). Because it didn't, we may not read such a limitation into the MedPay statute. *See id.*; *see also Budnella*, 2021 WL 288763, at *8.

¶ 18 Turning from a statutory argument to a policy one, Del Valle again suggests that because he elected medical payments coverage, the workers' compensation exclusion is void because it narrows coverage that he purchased. But that's the very point of a coverage exclusion. *See Dupre v. Allstate Ins. Co.*, 62 P.3d 1024, 1029 (Colo. App. 2002) ("An exclusion is '[a]n insurance policy provision that excepts certain events or conditions from coverage.'" (quoting Black's Law Dictionary 585-86 (7th ed. 1999))). And "a policy term is not void as against public policy simply because it narrows the circumstances under which coverage applies." *Farmers Ins. Exch. v. Chacon*, 939 P.2d 517, 520 (Colo. App. 1997). Because Del Valle doesn't contend the workers' compensation exclusion is ambiguous or unclear, it must be enforced as written. *See Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 803 (Colo. 2007) (explaining that clear and specific policy exclusions are enforceable).

¶ 19 Our conclusion that the workers' compensation exclusion is valid and enforceable is far from novel. Indeed, it's consistent with

decisions of other courts finding no public policy basis to invalidate similar exclusions. *See Budnella*, 2021 WL 288763, at *8 (concluding that the MedPay statute "does not prohibit clearly worded coverage exclusions within the context of [m]edical [p]ayments insurance coverage" and that the exclusion did not violate public policy); *see also Starrett v. Okla. Farmers Union Mut. Ins. Co.*, 849 P.2d 397, 400 n.1 (Okla. 1993) (upholding medical payments coverage exclusion when insured had been covered by workers' compensation, noting that conclusion "finds support in the majority of jurisdictions," and citing nearly twenty cases); *Hanover Ins. Co. v. Ramsey*, 539 N.E.2d 537, 537-38 (Mass. 1989) (concluding that medical payments benefits were properly excluded under the contract where the insured was "entitled to payment or benefits under the provisions of the Massachusetts Workers' Compensation Act"); *accord Atkins v. Pilot Life Ins. Co.*, 630 S.W.2d 50, 52 (Ark. Ct. App. 1982); *Bailey v. Interinsurance Exch.*, 122 Cal. Rptr. 508, 509-10 (Ct. App. 1975).

¶ 20 The workers' compensation exclusion is also consistent with the general recognition that, when an employee is injured in the course and scope of employment, workers' compensation insurance

is primary. *Budnella*, 2021 WL 288763, at *4; *accord* 8A Grund, Miller & Werber, § 58:2. Indeed, the fundamental purpose of the Workers' Compensation Act of Colorado (the Act), §§ 8-40-101 to 8-47-209, C.R.S. 2022, is to "provide a remedy for job-related injuries, without regard to fault." *Finlay v. Storage Tech. Corp.*, 764 P.2d 62, 63 (Colo. 1988); *accord Am. Fam. Mut. Ins. Co. v. Ashour*, 2017 COA 67, ¶ 13. To accomplish that, the legislature enacted comprehensive and exclusive remedies for work-related injuries. *See Finlay*, 764 P.2d at 63; *Ryser v. Shelter Mut. Ins. Co.*, 2021 CO 11, ¶ 20; *see also* § 8-41-104, C.R.S. 2022 (accepting that workers' compensation benefits result in a surrender of an employee's rights to any other method or form of relief). Because an employee injured in a car accident while at work has the security of obtaining workers' compensation benefits in the first instance, the workers' compensation exclusion is consistent with the strong public policy underlying the Act.

¶ 21 That leaves us with Del Valle's contention that the workers' compensation exclusion violates public policy because he speculates that the claims he submitted to California Casualty would not have been "authorized by his workers' compensation

insurer." The record, however, says nothing about whether medical expenses incurred after Del Valle voluntarily settled his workers' compensation claim would have been covered by workers' compensation. Even assuming Del Valle is correct that some medical expenses may not have been covered by workers' compensation (or that he miscalculated his risk when he settled his workers' compensation claim), we don't see how that could render an otherwise clear and enforceable policy exclusion void on this record.

¶ 22 For all these reasons, we conclude the workers' compensation exclusion is valid and enforceable and does not violate public policy. The district court therefore properly dismissed Del Valle's complaint.

## III. Attorney Fees

¶ 23 On cross-appeal, California Casualty contends that the district court erred by denying its request for attorney fees under sections 13-17-201 and 10-3-1116(5). We disagree.

### A. Standard of Review

¶ 24 We generally review the district court's decision regarding an award of fees for an abuse of discretion. *In re Estate of Fritzler*,

2017 COA 4, ¶ 24. But we review de novo whether attorney fees are recoverable at all. *Id.*

### B. California Casualty is Not Entitled to Attorney Fees Under Section 13-17-201

¶ 25 Under section 13-17-201, a defendant is entitled to reasonable attorney fees when a district court dismisses a tort action under C.R.C.P. 12(b). *Mohammadi v. Kinslow*, 2022 COA 103, ¶ 30. To determine if section 13-17-201 applies when a plaintiff has pleaded tort and non-tort claims, "a court must determine, as a matter of law," *Gagne v. Gagne*, 2014 COA 127, ¶ 81, whether the "essence of the action was one in tort," *Luskin Daughters 1996 Tr. for Benefit of Ackerman v. Young*, 2019 CO 74, ¶ 22. In making that determination, the court "should focus on the manner in which the claims were pleaded," *id.*, and "rely on the pleading party's characterization of its claims," *Gagne*, ¶ 81.

¶ 26 In denying California Casualty's motion for attorney fees, the district court reviewed Del Valle's complaint — which included claims for breach of contract, bad faith breach of contract, statutory bad faith, and declaratory relief — and found that "the essence of Del Valle's claims against California Casualty [were] contractual in

nature." In so ruling, the court acknowledged that Del Valle sought damages for personal injuries, but it explained that "California Casualty would only owe such damages as a result of a contractual obligation not an independent tort duty."

¶ 27 We agree with the district court. Del Valle asserted four claims, and only one — bad faith breach of contract — is a tort claim. *See Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 119 (Colo. 2010). Quantitatively then, Del Valle's complaint sounds predominantly in non-tort claims. *See Gagne*, ¶¶ 81, 84 (in determining whether the essence of a party's claims is in tort, we begin by evaluating the number and type of claims asserted).

¶ 28 Beyond that though, we are persuaded that the essence of Del Valle's action lies in contract. After all, insurance policies are contracts. *Craft v. Phila. Indem. Ins. Co.*, 2015 CO 11, ¶ 34; *see also Bailey*, 255 P.3d at 1042, 1045-46, 1050-51 (treating insurance coverage dispute as a contract dispute). And Del Valle's claims rise and fall on the enforceability of the workers' compensation exclusion in his automobile insurance policy. Indeed, even California Casualty admits that "all four claims" were

dismissed because the court found the workers' compensation exclusion enforceable.

¶ 29 Because we agree that the essence of Del Valle's action didn't sound in tort, the district court correctly concluded that California Casualty isn't entitled to attorney fees under section 13-17-201.

### C. California Casualty is Not Entitled to Attorney Fees under Section 10-3-1116(5)

¶ 30 A court must award attorney fees and costs to the defendant in an action for unreasonable delay or denial of benefits if the action was "frivolous." § 10-3-1116(5). An action is frivolous if a party is unable to present a rational argument supporting it. *Black v. Black*, 2020 COA 64M, ¶ 133; *see* § 13-17-102, C.R.S. 2022.

¶ 31 But as the district court correctly acknowledged, "[m]eritorious actions that prove unsuccessful and good faith attempts to extend, modify, or reverse existing law are not frivolous." *In re Parental Responsibilities Concerning D.P.G.*, 2020 COA 115, ¶ 24 (quoting *City of Aurora v. Colo. State Eng'r*, 105 P.3d 595, 620 (Colo. 2005)). And attorney fees may not be awarded if a plaintiff makes a good faith presentation of an arguably meritorious legal theory upon which no determinative authority in Colorado exists. *Id.*

¶ 32 Because Del Valle presented rational, good faith arguments to support his position, we are unpersuaded that the statutory bad faith claim was frivolous. Thus, the district court properly denied California Casualty's request for attorney fees under section 10-3-1116(5).

## IV. Appellate Attorney Fees

¶ 33 Finally, California Casualty seeks appellate attorney fees under section 13-17-201 "for prevailing on its [m]otion to dismiss," under section 10-3-1116(5) "for defeating a frivolous statutory claim," and under C.A.R. 38 for a frivolous appeal.

¶ 34 Because we conclude that the district court properly rejected California Casualty's request for attorney fees under sections 13-17-201 and 10-3-1116(5), we necessarily reject its request for appellate attorney fees that rely on the same arguments.

¶ 35 We also disagree that Del Valle's appeal was frivolous. Although Del Valle did not prevail on appeal, we do not consider his appellate contentions so lacking in substance as to be frivolous. *See In re Estate of Shimizu*, 2016 COA 163, ¶ 34.

¶ 36 We agree, however, that California Casualty is entitled to its costs under C.A.R. 39.

## V. Conclusion

¶ 37 The judgment and order are affirmed.

JUDGE KUHN and JUDGE CASEBOLT concur.