

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-283

Filed: 21 November 2017

Duplin County, No. 14 CvS 380

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY;
NATIONWIDE MUTUAL INSURANCE COMPANY; AND NATIONWIDE
INSURANCE COMPANY OF AMERICA, Third-Party Plaintiffs,

v.

TIMOTHY W. SMITH and TIMOTHY R. SMITH, Third-Party Defendants.

Appeal by Third-Party Plaintiffs from order entered 2 December 2016 by Judge
Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals
7 September 2017.

*Marshall, Williams & Gorham, L.L.P, by William Robert Cherry, Jr., for the
Third-Party Plaintiffs-Appellants.*

*Donald E. Clark, Jr., Attorney at Law, PLLC, by Donald E. Clark, Jr., for the
Third-Party Defendants-Appellees.*

DILLON, Judge.

The Third-Party Plaintiffs (collectively “Nationwide”) appeal from an order of
the trial court dismissing their Third-Party Complaint pursuant to Rule 12(b)(6) of
the North Carolina Rules of Civil Procedure.

I. Background

Plaintiffs George Olsen, Sr., and his wife, Sharon N. Olsen, purchased a
personal automobile underinsurance motorist insurance policy from Nationwide.

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This policy provided coverage to the Olsens should they be injured by an at-fault driver whose liability coverage limits were too low to cover their damages.

In late 2013, Mr. Olsen was walking by the side of the road when he was struck by a car driven by Skylar Wellington (“Defendant”). Defendant had lost control of her vehicle and drifted off of the paved portion of the street. About three hours after the accident, Defendant’s blood alcohol concentration was tested and registered a blood alcohol level of .15.

In 2014, Plaintiffs filed this action against Defendant and Nationwide. Nationwide filed a third-party complaint against Timothy W. Smith and Timothy R. Smith, alleging that the Smiths had negligently served Defendant alcohol and allowed her to drive.¹ Nationwide sought contribution from the Smiths for a portion of their alleged common liability for Plaintiffs’ injuries.

Defendant’s auto liability carrier offered the full limit of their liability coverage to Plaintiffs in exchange for Plaintiffs’ execution of a covenant not to enforce judgment. Defendant’s liability carrier was thus released from further liability and was not obligated to participate in the lawsuit.

Plaintiffs then negotiated a settlement with Nationwide for \$850,000. Following the settlement, Plaintiffs signed a release of all claims and filed a voluntary dismissal of their complaint with prejudice. Accordingly, the only remaining issue in

¹ Nationwide’s answer and third-party complaint referenced in this opinion is its second response to Plaintiffs’ suit, filed in response to Plaintiffs’ second amended complaint.

the case was Nationwide's third-party complaint against the Smiths, who had allegedly served Defendant alcohol shortly before the accident.

The Smiths' moved to dismiss Nationwide's third-party complaint for contribution. The trial court granted the Smiths' motion based on Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Nationwide timely appealed.

II. Analysis

On appeal, Nationwide argues that the trial court improperly granted the Smiths' motion to dismiss Nationwide's claim for contribution, contending that it had a cause of action to seek contribution from the Smiths for their role in causing its insured's injuries.

"A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure presents the question [of] whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). We review a trial court's Rule 12(b)(6) dismissal *de novo*. *Wray v. City of Greensboro*, ___ N.C. ___, ___, 802 S.E.2d 894, 898 (2017).

In its brief, Nationwide asserts that it has the right to recover from the Smiths because Defendant and the Smiths have a common liability for the injury to the Plaintiffs. However, the Smiths contend that Nationwide has no right to assert a

claim based on *contribution* because a claim for contribution is only available among joint tort-feasors and Nationwide, as *Plaintiffs'* insurer, is not a tort-feasor. Based on our jurisprudence, we must agree, and therefore affirm the ruling of the trial court.

Section 20-279.21 of our General Statutes regulates motor vehicle liability policies in North Carolina and allows an underinsured motorist insurer to fully participate in an action by its insured against an underinsured motorist:

[T]he underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and . . . *may participate in the suit as fully as if it were a party*. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and *present therein a claim against other parties*.

N.C. Gen. Stat. § 20-279.21(b)(4) (2015) (emphasis added). However, we have held that the right of a plaintiff's underinsurance motorist insurer to *bring* claims does not extend to a right to seek *contribution* against other tort-feasors who may have contributed to causing the accident. *Johnson v. Hudson*, 122 N.C. App. 188, 468 S.E.2d 64 (1996).

In *Johnson*, we acknowledged that N.C. Gen. Stat. § 20-279.21(b)(4) clearly allows Nationwide to assert a claim against other parties when it appears in its own name. *Id.* at 190, 468 S.E.2d at 66. However, we also noted that our General Statutes provide that “[t]he right of contribution exists only in favor of a *tort-feasor* who has paid more than his pro rata share of the common liability[.]” N.C. Gen. Stat. § 1B-

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1(b) (2015) (emphasis added). In *Johnson*, our Court concluded that “[t]he specific language of N.C.G.S. § 1B-1(b) controls over the more general provision of N.C.G.S. § 20-279.21(b)(4)[,]” ultimately holding that the underinsured insurance carrier was *not* a tort-feasor. Therefore, N.C. Gen. Stat. § 1B-1(b) prohibited the carrier’s claim of *contribution*, specifically. See *Johnson*, 122 N.C. App. at 190, 468 S.E.2d at 66 (“[N.C. Gen. Stat. § 20-279.21] allows the underinsured insurance carrier to assert all claims that could have been asserted *by its insured, the [plaintiff]*.” (Emphasis added.)); see also *McCrary v. Byrd*, 148 N.C. App. 630, 638, 559 S.E.2d 821, 827 (2002) (“An underinsurance motorist carrier is not a tort-feasor and thus has no right of contribution.”).

Here, Nationwide, as the underinsured insurance carrier, has no right to assert a claim against the Smiths for contribution because its insured – the Plaintiffs – never had any right to assert such a claim. Even in Nationwide’s brief to this Court, it acknowledges that “[t]he rights of contribution arise when a *tortfeasor* has paid damages which exceed his pro rata share.” (Emphasis added.) Therefore, as in *Johnson*, we hold that, as a matter of law, Nationwide has no right to seek contribution from the Smiths because neither Nationwide nor its insured is a tort-feasor. Accordingly, the trial court did not err in granting the Smiths’ motion to dismiss Nationwide’s third-party complaint seeking contribution. This holding should not be construed as a restriction on Nationwide’s ability to assert any properly

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preserved direct claim which could have been asserted by its insured, the Plaintiffs. *See Johnson*, 122 N.C. App. at 190, 468 S.E.2d at 66 (“[W]hile N.C. [Gen. Stat.] § 1B-1(b) prohibits a claim of contribution by [the insurer], N.C. [Gen. Stat.] § 20-279.21(b)(4) allows [the insurer] to assert a direct claim that could have been asserted by its insured[.]”).

AFFIRMED.

Judges HUNTER, JR., and ARROWOOD concur.