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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-441

Filed: 5 June 2018

Catawba County, No. 16-CVS-1023

CITY OF HICKORY, Plaintiff,

v.

WILLIE JAMES GRIMES, NATIONAL CASUALTY COMPANY, TRAVELERS INDEMNITY COMPANY, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, ARGONAUT GREAT CENTRAL INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY and TIG INSURANCE COMPANY, Defendants.

Appeal by Plaintiff, City of Hickory, and Defendant, Willie James Grimes, from an order entered 23 September 2016 by Judge Michael L. Robinson in Catawba County Superior Court. Heard in the Court of Appeals 31 October 2017.

Young, Morphis, Bach & Taylor, by Paul E. Culpepper, for plaintiff-appellant City of Hickory.

Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh, and Paul E. Smith, for defendant-appellant Willie James Grimes.

Young, Moore & Henderson, P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for defendant-appellee Argonaut Great Central Insurance Company.

MURPHY, Judge.

At its core, this case requires us to interpret an exclusion in a Law Enforcement Liability Policy ("the Policy") that the City of Hickory[1] purchased from Defendant, Argonaut Great Central Insurance Company ("Argonaut"), providing coverage starting in 2003.

The City of Hickory and Willie James Grimes (collectively "Appellants") disagree with Argonaut on whether two wrongful acts occurring approximately 16 years apart are "substantially the same or are in any way directly or indirectly related – either logically, causally, or temporally." What is at issue is that different individuals in the Hickory Police Department ("HPD") committed two distinct wrongful acts, one occurring from 1987-1988 and the other from 2003-2011. In addition, the City of Hickory was covered by two separate Law Enforcement Liability Policies issued by two different companies during these time periods. Argonaut argues that these acts are related or substantially the same, and the Policy treats them as one wrongful act. Therefore, the HPD's 2003-2011 wrongful act is not covered by the Policy. As a result, Argonaut contends it had no duty to defend or indemnify the City of Hickory in Mr. Grimes' 2015 federal lawsuit.

After careful review and narrowly interpreting the exclusionary language of the Policy, we hold that the wrongful act committed by the HPD from 2003-2011 and the wrongful act committed by the HPD from 1987-1988 are not substantially the

[1] All references to the City of Hickory include the Hickory Police Department as a branch of the city.

same, or directly or indirectly related, either logically, causally, or temporally. Accordingly, we reverse the trial court's order granting Argonaut's motion to dismiss and motion for judgment on the pleadings and conclude that, based on the language of the Policy, Argonaut was required to defend the City of Hickory in Mr. Grimes' federal lawsuit. We remand this matter for entry of judgment in favor of the City of Hickory on Argonaut's duty to defend and further proceedings as to Argonaut's duty to indemnify.

BACKGROUND

A. Mr. Grimes' Wrongful Conviction (1987-1988)

On 24 October 1987, an elderly woman was raped in Hickory. The HPD collected the rapist's hair and fingerprints from the crime scene. The rape victim provided HPD officers with a physical description of the rapist, and, based upon this information, the HPD identified Albert Turner as the primary suspect. However, when the victim was shown a photo lineup, she was unable to identify Turner. Turner's photo was taken two years prior to the incident, and his hair style had changed significantly. In addition, the lead detective on the case was friends with Turner's brother who was also an officer in the HPD.

Subsequently, the victim spoke with her neighbor (who was a confidential informant for the HPD), and changed her story and informed the police that the rapist had physical characteristics that matched those of Mr. Grimes. She then picked Mr.

Grimes out of a photo lineup. The neighbor received $1,000 as a reward, and Mr. Grimes was identified as a suspect by the HPD. Despite not matching the victim's original description of the assailant and corroborative evidence that Mr. Grimes was with four other people the night of the rape, the HPD issued a warrant for Mr. Grimes' arrest, and he turned himself in on 27 October 1987. Moreover, HPD determined that the fingerprint evidence collected at the crime scene did not match Mr. Grimes'. The State Bureau of Investigation later determined that these fingerprints belonged to Turner. Mr. Grimes was then indicted and tried for the rape.

During Mr. Grimes' trial, HPD officers wrongfully withheld the exculpatory fingerprint evidence from the Catawba County District Attorney's Office. Mr. Grimes' defense attorney never received any of the exculpatory evidence. As a result, Mr. Grimes was convicted and sentenced to life in prison in July of 1988. While Mr. Grimes was imprisoned, Turner continued to commit violent crimes and was convicted of six assaults on a female and several rape offenses.

Throughout the course of these events, from 1987 to 1997, the City of Hickory was covered by a Comprehensive Law Enforcement Liability Policy with National Casualty. However, the City of Hickory switched providers in 2003 and was covered by Argonaut from September of 2003 to January 2015.

B. HPD Withholds Evidence of Actual Innocence (2003-2011)

While in prison, Mr. Grimes maintained his innocence. In early 2003, Mr. Grimes contacted the North Carolina Center on Actual Innocence ("the Center") who formally requested that the HPD provide all remaining crime scene evidence from the 1987 rape.[2] From 2003 until 2011, the Center continued to ask the HPD for evidence related to Mr. Grimes' case but never received any evidence. Then, on 5 October 2011, the North Carolina Innocence Inquiry Commission ("the Commission"), a neutral fact-finding state agency, contacted the HPD Chief, Tom Adkins, and inquired about crime scene evidence related to Mr. Grimes' case. In response to the Commission's inquiry, the HPD acknowledged that it had the fingerprint card with the fingerprints lifted from the crime scene in 1987. The fingerprint card had been in the custody of the HPD since 1987.

Seven years elapsed between the Center's first request to the HPD and the ultimate disclosure that the exculpatory evidence had been in the HPD's possession for the past 24 years. Based on this evidence, on 5 October 2012, a three-judge panel found that Mr. Grimes had proven by clear and convincing evidence that he was innocent. Mr. Grimes spent 24 years incarcerated for a rape and kidnapping he did not commit.

C. Mr. Grimes' Federal Lawsuit

[2] Evidence related to the case was destroyed without a court order in 1990.

After being exonerated and released from prison, Mr. Grimes sued the City of Hickory in federal court. *Grimes v. City of Hickory*, No. 5:14-CV-160, 2015 WL 3649106, (W.D.N.C. June 11, 2015). The City of Hickory requested that Argonaut provide legal defense under the Policy at issue in this appeal. Argonaut refused, and Hickory paid for its own legal defense.

D. The Present Action

In response to Argonaut's refusal to defend, the City of Hickory filed the instant litigation. The complaint alleged that Argonaut and other insurers breached their duties to defend and indemnify the City of Hickory in Mr. Grimes' lawsuit. Argonaut answered and contended that the City of Hickory had failed to state a claim upon which relief could be granted and that it had no duty to defend or indemnify any claims arising from Mr. Grimes' lawsuit. Argonaut filed a motion to dismiss and a motion for judgment on the pleadings. After a hearing on these motions, the trial court entered an order granting Argonaut's motion to dismiss and motion for judgment on the pleadings. Appellants timely appealed.

ANALYSIS

"On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conducts a de novo review[.]" *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014) (citation omitted). "This Court reviews a trial court's grant

of a motion for judgment on the pleadings *de novo*." *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 2, 745 S.E.2d 316, 319 (2013) (citation omitted).

"Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). "When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Id.* "[I]n determining whether an insurer has a duty to indemnify, the facts as determined at trial are compared to the language of the insurance policy." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010). In addition, "[e]xclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 542-43, 350 S.E.2d 66, 71 (1986). "Provisions which exclude liability of insurance companies are not favored and any ambiguities will be construed against the insurer and in favor of the insured." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 736, 504 S.E.2d 574, 579 (1998).

"The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *Allstate Ins. Co. v. Runyon Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999). However, a contract

must be ambiguous for a court to apply these rules of construction. *Harleysville,* 364 N.C. at 10, 692 S.E.2d at 612. "[A] mere disagreement between the parties over the language of the insurance contract does not create an ambiguity." *Eagle Eng'g, Inc. v. Cont'l Cas. Co.*, 191 N.C. App. 593, 598, 664 S.E.2d 62, 65 (2008) (citation omitted). In order for a contract to be ambiguous, the court must find that that the language of a policy is "fairly and reasonably susceptible to either of the constructions for which the parties contend." *Harleysville*, 364 N.C. at 10, 692 S.E.2d at 612 (citation omitted). "As with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Id.* at 9, 692 S.E.2d at 612 (citation and quotation marks omitted). In addition, the burden is on the insurance company to use clear and unambiguous definitions "that eliminates guesswork on the part of its insured." *N. Carolina Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 448, 491 S.E.2d 656, 660 (1997).

A. The Argonaut Policy

From September of 2003 to 2015, the City of Hickory was covered by a Law Enforcement Liability Policy with Argonaut. The Argonaut policy states:[3]

> We will pay those sums that the insured becomes legally obligated to pay as "damages" resulting from a "wrongful act" to which this insurance applies that is committed during the course and scope of "law enforcement activities" . . . .
>
> * * *

[3] This Court was only provided with the following excerpt of the insurance policy that Argonaut issued to the City of Hickory.

> "Wrongful Acts" means any act, error or omission flowing from or originating out of a "law enforcement activity." All acts, errors or omissions committed by one or more insured that are substantially the same or are in any way directly or indirectly related – either logically, causally, or temporally – shall be deemed to constitute one "wrongful act," regardless of the number of claims or claimants.
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> * * *
>
> "Law Enforcement Activity" means administration of the criminal justice system and/or any act, error or omission of your law enforcement agency, its officials, officers, employees or volunteers. "Law Enforcement Activity" also includes the operation of any premises by your law enforcement agency.
>
> * * *
>
> We will have the right and duty to defend the Insured against any "suit" seeking those "damages". However, we will have not [sic] duty to defend the insured against any "suit" seeking "damages" for a "wrongful act" to which this insurance does not apply. We may, at our discretion investigate any "wrongful act" and settle any claim or "suit" that may result.
>
> * * *
>
> This insurance applies to "damages" arising out of a "wrongful act" only if the "wrongful act" was first committed or alleged first committed:
>
> a. By an insured in the course of his or her "law enforcement activities" and
> b. During the policy period.
>
> * * *
>
> "Suit" means a civil proceeding in which "damages" to which this insurance applies are alleged.
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> * * *
>
> "Damages" means money damages.

"If the parties have defined a term in the agreement, then we must ascribe to the term the meaning the parties intended." *Harleysville*, 364 N.C. at 9, 692 S.E.2d

at 612. Unless indicated otherwise by the policy, nontechnical words have the same meaning as they do in ordinary speech. *Id.* We have reasoned that "standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries." *Nationwide Mut. Ins. Co. v. Dempsey*, 128 N.C. App. 641, 643, 495 S.E.2d 914, 915 (1998) (citation and quotation marks omitted); *see also Runyon*, 135 N.C. App. at 95, 518 S.E.2d at 817 ("Use of the ordinary meaning of a term is the preferred construction, and in construing the ordinary meaning of a disputed term, it is appropriate to consult a standard dictionary.").

B. Exclusion from the Policy

Argonaut does not dispute that HPD's failure to provide the fingerprint evidence to Mr. Grimes from 2003-2011 meets the definition of a wrongful act. However, Argonaut maintains that "[t]here is no coverage under [the Policy] because the 'damages' claimed in the Grimes Complaint are all deemed one 'wrongful act' that was first committed or alleged to have been first committed decades prior to the first Argonaut policy period." In support of its argument, Argonaut relies on the following "exclusionary clause" of the Policy: "[a]ll acts, errors or omissions committed by one or more insured that are substantially the same or are in any way directly or indirectly related – either logically, causally, or temporally – shall be deemed to constitute one 'wrongful act,' regardless of the number of claims or claimants." As a

result, Argonaut argues that the 2003-2011 wrongful act by the HPD is excluded from coverage because,"[t]his insurance applies to 'damages' arising out of a 'wrongful act' only if the 'wrongful act' was first committed or alleged first committed[] . . . [d]uring the policy period."

As the insurer, it was Argonaut's burden to use clear and unambiguous terms and language in the Policy. The Policy defines the words "wrongful acts," "suit," and "damages." Both parties have provided us with definitions of the remaining relevant terms from cases outside our jurisdiction. We do not find these definitions to be persuasive nor the best way to interpret the Policy. We apply the plain meaning of the words in order to determine whether the two wrongful acts are substantially the same or directly or indirectly logically, causally, or temporally related. Argonaut argues that the two wrongful acts are "substantially the same" and are "logically, causally, or temporally" related.

1. Substantially the Same

"Substantial" is defined by Webster's New World College Dictionary (5th ed. 2014) as "with regard to essential elements." We do not find the elements of the wrongful acts to be "substantially the same." While both wrongful acts are associated with Mr. Grimes' wrongful imprisonment, the wrongful act from 1987-1988 includes Mr. Grimes' being identified as a suspect due to the HPD's dubious investigation and failure to turn over the fingerprint and other evidence which led to Mr. Grimes'

wrongful arrest, prosecution, and conviction. The wrongful act from 2003-2011 includes the HPD's failure to check and recognize that it still had the fingerprint evidence in its possession. The failure to turn this evidence over to the Center prolonged Mr. Grimes' incarceration by approximately 8 years. We find that these two separate wrongful acts are not "substantially the same."

2. Logically Related

"Logically" is defined by the same dictionary as "necessary or to be expected because of what has gone before; that follows as reasonable." We do not find that it is necessary or expected that the HPD's wrongful act from 1987-1988 would reasonably result in the HPD's wrongful act from 2003-2011. Likewise, the HPD's failure to turn over exculpatory evidence from 1987-1988 and the failure to produce evidence related to the case when asked from 2003-2011 does not follow as reasonable. Accordingly, we do not find the acts to be logically related.

3. Causally Related

"Causally" is defined as "relating to cause and effect." While the 2003-2011 wrongful act could not have happened without the 1987-1988 wrongful act, the 2003-2011 wrongful act is not an effect of the 1987-1988 wrongful act. The 2003-2011 wrongful act is the result of the HPD's protocols for handling archived evidence, which is totally unrelated to withholding exculpatory evidence from a district attorney. The wrongful act of the HPD from 1987-1988 did not cause the HPD's

actions in 2003-2011. Therefore, we do not find that there is a cause and effect relationship between the two wrongful acts, and they are not causally related.

4. Temporally Related

"Temporally" is defined as "of or limited by time." In this case, the two wrongful acts occurred approximately 16 to 24 years apart. Whether wrongful acts are temporally related will depend on the facts and circumstances of each situation. *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 683, 535 S.E.2d 357, 362 (2000) (finding two events not to be temporally related when the events were separated by more than a year). In this case, because of the amount of time that has elapsed between the two wrongful acts, we do not find that there is a temporal connection between them.

Using the plain meaning of the words in the Policy, we do not find the language to be ambiguous. We determine that the HPD's wrongful act from 1987-1988 is not substantially the same or directly or indirectly related, either logically, causally, or temporally to the wrongful act committed by the HPD from 2003-2011.[4]

C. Argonaut's Duty to Defend and Indemnify

Having determined that the wrongful act committed by HPD from 2003-2011 is not excluded by the Policy, Argonaut therefore has a duty to defend the City of

[4] Because the policy language states it only applies to "acts, errors or omissions" that are "directly or indirectly related – either logically, causally, or temporally," we interpret this exclusionary language narrowly and decline to consider any potential direct or indirect relationship between the two wrongful acts that are not logically, causally, or temporally related.

Hickory in Mr. Grimes' federal lawsuit and breached this duty when it failed to do so. Argonaut's interpretation of the exclusionary clause is contrary to the primary objective of the Policy. Our interpretation provides both parties the insurance coverage intended when the Policy was issued. *See Harleysville*, 364 N.C. at 9, 692 S.E.2d at 612.

However, because the facts of the underlying case have not been determined, we cannot reach Argonaut's duty to indemnify the City of Hickory. *Id.* at 7, 692 S.E.2d at 611 ("If the insurance policy provides coverage for the facts as found by the trier of fact, then the insurer has a duty to indemnify.").

CONCLUSION

Based on the specific facts of this case, we conclude that the HPD's wrongful act occurring from 2003-2011 is not related to, or substantially the same as, the wrongful act committed by HPD from 1987-1988 based on the plain meaning of the Policy. We thereby conclude that the Policy does not exclude coverage for the wrongful act committed by HPD from 2003-2011 and that Argonaut was obligated to defend the City of Hickory in Mr. Grimes' federal lawsuit. We reverse the order below and remand for entry of judgment in favor of the City of Hickory on Argonaut's duty to defend and for further proceedings to determine Argonaut's duty to indemnify the City of Hickory.

REVERSED AND REMANDED.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).