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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-507

Filed: 1 December 2020

Mecklenburg County, No. 13 CVS 2271

RADIATOR SPECIALTY COMPANY, Plaintiff,

v.

ARROWOOD INDEMNITY COMPANY (AS SUCCESSOR TO GUARANTY NATIONAL INSURANCE COMPANY, ROYAL INDEMNITY COMPANY AND ROYAL INDEMNITY COMPANY OF AMERICA); COLUMBIA CASUALTY COMPANY, CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; LANDMARK AMERICAN INSURANCE COMPANY; MUNICH REINSURANCE AMERICA, INC., (AS SUCCESSOR TO AMERICAN REINSURANCE COMPANY); MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; PACIFIC EMPLOYERS INSURANCE COMPANY; ST. PAUL SURPLUS LINES INSURANCE COMPANY; SIRIUS AMERICA INSURANCE COMPANY (AS SUCCESSOR TO IMPERIAL CASUALTY AND INDEMNITY COMPANY); UNITED NATIONAL INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS, Defendants.

Appeal by plaintiff and cross-appeal by defendant Fireman's Fund Insurance Company from judgment entered 27 February 2019 by Judge W. David Lee in Mecklenburg County Superior Court. Appeal by defendant United National Insurance Company from judgment entered 29 January 2016. Heard in the Court of Appeals 12 November 2019.

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Perkins Coie LLP, by Jonathan G. Hardin pro hac vice; and McGuirewoods LLP, by Joshua D. Davey, Esq., Caroline E. Keen, Esq., and Valyce M. Davis, Esq., for plaintiff-appellant and cross-appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg and Troy D. Shelton; and Rivkin Radler LLP, by Michael A. Kotula, Robert A. Maloney, and Robert A. Maloney, pro hac vice, for defendant-appellee and cross-appellant Fireman's Fund Insurance Company.

Teague, Campbell, Dennis & Gorham, LLP, by William Bulfer; and Saul Ewing Arnstein & Lehr LLP, by Thomas S. Schaufelberger and Aaron J. Kornblith, pro hac vice, for defendant-appellee and cross-appellant United National Insurance Company.

Cranfill Sumner & Hartzog, by Jennifer Addleton Welch; and Crowell & Moring LLP, by Laura Foggan pro hac vice, for amicus curiae Complex Insurance Claims Litigation Association.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge, Esq.; and Reed Smith, LLP, by Ann V. Kramer, Esq., for amicus curiae United Policyholders.

Hunton Andrews Kurth LLP, by Nash E. Long; and Pillsbury Winthrop Shaw Pittman LLP, by Mark J. Plumer pro hac vice, for amicus curiae Edison Electric Institute.

Goldberg Segalla LLP, by David L. Brown, Martha P. Brown, and Allegra A. Sinclair; Jackson & Campbell, P.C., by Richard W. Bryan pro hac vice; and Nicolaides Fink Thorpe Michaelides Sullivan LLP, by Jared K. Clapper and Mark J. Sobczak, pro hac vice, for defendant-appellee National Union Fire Insurance Company.

Gallivan, White & Boyd, P.A., by Phillip E. Reeves pro hac vice, Jennifer E. Johnsen pro hac vice, and James M. Dedman, IV, for defendant-appellee Zurich American Insurance Company of Illinois.

Hedrick Gardner Kincheloe & Garfalo, LLP, by M. Duane Jones and Paul C. Lawrence; and Musick, Peeler, & Garrett, LLP, by Stephen M. Green and Steven T. Adams, pro hac vice, for defendant-appellee Landmark American Insurance Company.

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BRYANT, Judge.

Where the terms of the contract, strictly construed, permit an interpretation that an insurance policy triggers when a claimant is exposed to hazardous materials, the trial court did not err in applying an exposure theory of coverage. Where an intermediate order erroneously applied pro rata liability, but a subsequent final judgment rectified this error, plaintiff's arguments as to pro rata liability are moot. Where an insurance policy, strictly construed, clearly provided that its coverage began when other policies were exhausted, the trial court did not err in so interpreting it. Where the trial court determined the duty of parties to indemnify, plaintiff's arguments as to estoppel are moot. A party dismissed from an action is not entitled to appeal from a judgment therein. We affirm the final judgment of the trial court and dismiss those arguments which are moot or have been brought by a non-party.

Factual and Procedural Background

On 6 February 2013, plaintiff Radiator Specialty Company (plaintiff) filed a complaint for declaratory judgment against numerous insurance companies (collectively, defendants). Plaintiff alleged that, between 1971 and 2012, it purchased insurance policies from defendants to protect itself from liability resulting from its business. Said business included the manufacture of products allegedly containing benzene and asbestos, which resulted in numerous legal claims against plaintiff, for

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which defendants did not pay defense costs nor indemnify plaintiff. Plaintiff, therefore, sought declaratory judgments concerning defendants' duties to pay for defense of and indemnify those claims against plaintiff concerning its benzene and asbestos products. Plaintiff subsequently filed an amended complaint, adding a fifth cause of action alleging bad faith failure to settle or pay against defendant National Union Fire Insurance Company of Pittsburgh, PA (National Union), and a sixth cause of action alleging unfair or deceptive trade practices against National Union.

Based on various motions for summary judgment and partial summary judgment by the parties, the trial court entered multiple orders prior to its final judgment.¹ On 27 February 2019, the trial court entered its final judgment. The court held that, regarding the benzene claims, defendants Zurich American Insurance Company of Illinois (Zurich) and National Union were obligated to defend and indemnify plaintiff, and defendant Landmark American Insurance Company (Landmark) was obligated to indemnify plaintiff; regarding the asbestos claims, Zurich was obligated to defend and indemnify plaintiff; and that defendant Fireman's Fund Insurance Company (Fireman's Fund) had no duty to defend or indemnify

¹ The partial summary judgment orders were appealed to this Court and deemed interlocutory and dismissed. *Radiator Specialty Co. v. Arrowood Indem. Co.*, 253 N.C. App. 508, 800 S.E.2d 452 (2017) (hereinafter "*Radiator Specialty I*"). We refer to the background information provided in the *Radiator Specialty I* which describes the parties to the current appeal, their relationship to one another, as well as the underlying conflict that gave rise to the action.

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plaintiff. The trial court certified this judgment as a final judgment under Rule 54(b) of the North Carolina Rules of Civil Procedure.

Plaintiff appealed from the final judgment. Defendant United National Insurance Company (United National) appealed from a 29 January 2016 order regarding cessation of coverage, as well as all intermediate orders and rulings. Additionally, Fireman's Fund raised cross-issues on appeal.

Standard of Review

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

“[I]n a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. We review the trial court’s conclusions of law *de novo*.” *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 596–97, 632 S.E.2d 563, 571 (2006) (citations omitted).

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“We first note the well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto.” *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986) (citations omitted). “[T]his is a case of contract interpretation, and our review is de novo.” *State v. Philip Morris USA Inc.*, 363 N.C. 623, 631, 685 S.E.2d 85, 90 (2009) (citation omitted).

As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Gaston Cnty. Dyeing Mach. Co. v. Northfield Ins. Co., 351 N.C. 293, 299–300, 524 S.E.2d 558, 563 (2000) (citations omitted).

Plaintiff’s Arguments

Plaintiff raises several arguments concerning the trial court’s final judgment. We address each in turn.

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A. Trigger of Coverage

In an intermediate order, the trial court held that “[t]he beginning of the triggered policy period is the date on which the claimant was first exposed to benzene or asbestos” from plaintiff’s products, and that “[t]he end of the triggered policy period is the date on which the claimant was last exposed[.]” This order was referenced in the trial court’s final judgment. On appeal, plaintiff contends that the trial court erred in rejecting plaintiff’s proposal that coverage began with injury-in-fact, and instead applied a proposal that coverage was triggered by exposure. We disagree.

The question of the trigger of coverage determines which policies apply to particular claims. In its order, the trial court held that coverage was triggered only if a claimant was exposed to benzene or asbestos during the policy period. On appeal, plaintiff contends that this was error, and that the trial court should instead have held that coverage was triggered if a claimant suffered any injury, sickness, or disease – an injury-in-fact – during the policy period.

Plaintiff acknowledges that the policies issued by defendants were standard-form policies with materially identical language on the issue of when coverage triggers. These policies provided that the insurer would pay “all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence[.]” The policies generally define “bodily injury” as injury, sickness, or disease sustained by a person, and “occurrence” as an accident including

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exposure. Plaintiff contends, therefore, that the triggering event of the coverage is the “bodily injury” sustained by the claimant, not the “occurrence” that causes the injury.

In support of its position, plaintiff contends that courts of this State have adopted an injury-in-fact trigger. Plaintiff cites our Supreme Court’s decision in *Gaston Cnty. Dyeing Mach. Co.*, 351 N.C. 293, 524 S.E.2d 558. In *Gaston*, the plaintiff, a manufacturer of a pressure vessel that ruptured, sought declaratory judgment against its insurers. The matter proceeded to summary judgment, and the trial court concluded that coverage was triggered by injury-in-fact. The insurers appealed, and this Court reversed, holding that injury-in-fact was not the proper trigger. The plaintiff appealed to our Supreme Court. In its opinion, the Court noted:

Although our Court of Appeals has addressed the trigger of coverage issue, it is an issue of first impression for this Court. We conclude that where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered. This interpretation is logical and true to the policy language. Further, although other jurisdictions have adopted varied approaches in determining the appropriate trigger of coverage, the injury-in-fact approach is widely accepted.

Id. at 303, 524 S.E.2d at 564 (citation omitted). The Court, in applying the language of the contracts at issue, concluded that “property damage occurred for purposes of the applicable policies at the time of the injury-in-fact.” *Id.* at 303, 524 S.E.2d at 565. The Court again clarified its holding, restating that “when, as in this case, the

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accident that causes an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence; and only policies on the risk on the date of the injury-causing event are triggered. We believe this interpretation is the most faithful to the language and terms of the insurance policy.” *Id.* at 304, 524 S.E.2d at 565.

We note, however, that the Court’s decision in *Gaston* was premised upon the notion that a court could determine that “an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event.” Certainly, in such a situation, injury-in-fact would trigger coverage. In the instant case, however, the injury alleged by claimants was exposure to asbestos and benzene. We take judicial notice of the innumerable cases concerning asbestos and benzene exposure and recognize how difficult it is to ascribe a “date certain” or “single event” to such harm. The injuries resulting from benzene and asbestos exposure—progressive disease—may be late to show, or long and lingering.

Instead, we find a different authority more relevant, and more compelling. In *Imperial Casualty*, the Eastern District of North Carolina addressed facts similar to those in the case before us. *Imperial Cas. and Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437 (E.D.N.C. 1994), *aff’d*, 67 F.3d 534 (4th Cir. 1995). And although that case is not binding upon this Court, we find its reasoning persuasive.

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In *Imperial Casualty*, the plaintiff, an insurer, sought declaratory judgment as to its obligations to defend and indemnify the defendant in claims related to exposure to the defendant's asbestos products. The contract language in *Imperial Casualty* was similar to the contract language in the case before us. In applying this language, the court considered four possible theories of coverage: (1) the exposure theory, (2) the manifestation or discovery rule, (3) continuous exposure theory, and (4) injury-in-fact theory. The court, acknowledging the lack of North Carolina cases on point, found that the majority of federal cases on this issue adopted a theory of exposure, and did so accordingly. *Id.* at 1443.

Again, *Imperial Casualty* is not binding upon this Court. And we acknowledge that *Gaston* is the law of North Carolina according to our Supreme Court. But *Gaston* concerned a very different set of facts – it dealt with liability resulting from a ruptured pressure vessel, a discrete event that occurred on a date certain. Injury resulting from benzene or asbestos exposure is neither discrete nor so certain. Reading the contract language and interpreting it by its terms, it seems clear that a “bodily injury” is something caused by an “occurrence,” which can include exposure. As such, we hold that the trial court's ruling, that coverage was triggered by exposure, was not inconsistent with the terms of the insurance policies. We, therefore, hold that the trial court did not err in applying an exposure theory of coverage instead of injury-in-fact.

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B. Allocation

In an intermediate order, the trial court held that “pro rata allocation applies to both defense and indemnity payments based on each insurer’s ‘time on the risk’ ” as providers of plaintiff’s insurance. The court further held that plaintiff “is responsible for its pro rata share of defense and indemnity costs where there has been settled, insolvent or lost policies, as well as periods where [plaintiff] was uninsured, underinsured, or self-insured.” The trial court referenced this order in its final judgment. On appeal, plaintiff contends that the trial court erred in applying pro rata allocation of liability instead of an “all sums” allocation. We agree, but hold that this error was rendered moot by the entry of the final judgment.

Plaintiff contends that the policies at issue require defendants to cover “all sums” resulting from covered occurrences. Plaintiff further contends that, by ordering the parties to cover their pro rata shares of plaintiff’s costs and damages based on their “time on the risk,” the trial court ignored the express language of the policies. Plaintiff is correct. The policies, by their language, are clear – any claims covered by a particular policy must be defended and indemnified by the insurer under that policy. By prorating plaintiff’s costs and damages based upon “time on the risk,” the trial court reallocated those damages, potentially imposing more costs on one party, and removing them from another, who might be differently obligated. We recognize that these policies represent multiple years of coverage, but judicial

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expediency is no excuse. We hold that it was indeed error to prorate these costs where the contracts explicitly imposed those obligations otherwise.

However, the order plaintiff challenges here is an intermediate one. Pursuant to the Rules of Civil Procedure, “in the absence of entry of . . . a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” N.C.R. Civ. P. 54(b). Although the intermediate order allocated costs pro rata, the trial court’s final order assigned costs—both in terms of defense and indemnification—to specific parties based upon their contractual obligations. Specifically, the court held that Zurich and National Union were obligated to defend and indemnify plaintiff, and Landmark to indemnify plaintiff, on the benzene claims “subject to their respective policy limits[.]” Likewise, the court held that Zurich was obligated to defend and indemnify plaintiff on the asbestos claims “subject to its respective policy limits.” This language specifies that the allocation is not pro rata, but is instead subject to the contractual limitations established in the policies.

This final allocation of damages corrected the error in the intermediate order. Thus, although we recognize the error in the intermediate order, we hold that it was rendered moot by the entry of the final judgment. Accordingly, we dismiss this argument as moot.

C. Horizontal Exhaustion

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In an intermediate order, the trial court held that Landmark's excess policies offered a duty to defend only when all other policies had been exhausted. This is called horizontal exhaustion. Plaintiff contends that the trial court erred by applying horizontal exhaustion to Landmark's duty to defend. We disagree.

In its insurance policy, Landmark stated that it had the duty to defend suits when (1) the applicable limits of underlying insurance were used up in the payment of judgments or settlements, or (2) no other valid and collectible insurance was available. In support of its position, Landmark cites the policy, noting that the specific language used here is "other insurance." According to Landmark's interpretation, this language suggests that the policy was only triggered when any other policies held by plaintiff were exhausted. By contrast, plaintiff cites to cases from other states to support its position, but offers no binding precedent.

Ultimately, we read the policy as Landmark does, and as the trial court did in its order. We hold that a proper interpretation of the contract reveals that Landmark offered an excess policy, to be available when all other policies were exhausted. Accordingly, we hold that the trial court did not err in similarly reading the policy.

D. Trigger of Coverage

In an intermediate order, the trial court held that defendants "are not estopped as a matter of law from denying coverage" and that plaintiff was therefore "not entitled to judgment as a matter of law requiring the insurer-defendants to

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indemnify” it. On appeal, plaintiff contends that the trial court erred in holding that National Union, Zurich, and Landmark were not estopped from denying coverage of claims. We hold that this argument is moot, and decline to address it.

Plaintiff notes that, under North Carolina law, an insurer is estopped from denying coverage and must pay any reasonable settlement of a claim it wrongfully fails to defend. That is, if a trial court determines that an insurer had a duty to defend, and that insurer failed to do so, the insurer also has a duty to indemnify. Plaintiff notes that the trial court correctly found that National Union and Zurich owed a duty to defend, but erroneously declined to estop them from disputing the duty to indemnify.

However, this is moot. In its final judgment, the trial court held that National Union and Zurich owed both a duty to defend *and* a duty to indemnify. Regardless of what arguments they may have made, their liability is memorialized in a trial court order. Neither party now challenges that decision on appeal. Accordingly, the question of whether they are estopped is a moot point, which we need not address.

Similarly, plaintiff contends that, if this Court were to reverse the trial court’s ruling on Landmark’s horizontal exhaustion, Landmark would owe both a duty to defend and a duty to indemnify. However, as we held above, the trial court did not err in that decision. Accordingly, this argument is likewise moot, and we decline to address it.

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Fireman's Fund's Argument

Fireman's Fund, similar to plaintiff's first argument, contends that the trial court erred in applying an "exposure trigger" instead of an "injury-in-fact trigger" in determining coverage. As we held above, however, an exposure theory of coverage is neither inconsistent with North Carolina law nor inconsistent with the contracts at issue. Accordingly, we hold that the trial court did not err by applying an "exposure trigger" for coverage.

United National's Argument

In its sole argument on cross-appeal, United National contends that the trial court erred in denying, in an intermediate order, United National's motion for summary judgment on the issue of cessation of coverage. We hold that United National, as a non-party to the action, lacks standing to bring such an argument on appeal, and dismiss it.

On 29 January 2016, the trial court entered an order on United National's motion for summary judgment regarding the cessation of its coverage. The court held that the settlement of an indemnity policy between plaintiff and Arrowood Indemnity Company did not cease United National's coverage. On 29 January 2016, per stipulations of plaintiff and United National, the trial court entered an order dismissing all claims against United National with prejudice. The trial court certified this as a final judgment pursuant to Rule 54(b) of the North Carolina Rules of Civil

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Procedure. Now, on appeal, United National contends that plaintiff has renewed claims against it, and therefore it seeks to revisit the question of cessation of coverage.

Notwithstanding United National's argument, it does not appear that plaintiff has attempted to revive its claim against United National on appeal. Moreover, we fail to see what standing United National has to appeal on its own merits. "North Carolina law does not permit the taking of an appeal by one who is not a party to the action." *Seeley v. Seeley*, 102 N.C. App. 572, 573, 402 S.E.2d 870, 871 (1991); *see also* N.C. Gen. Stat. § 1-271 (2019) ("Whom may appeal"). United National was dismissed with prejudice from this action, and accordingly was no longer a party to it. There is no evidence of any outstanding cross- or counter-claims at the trial level which might maintain United National's status as a party. As such, United National, as a non-party, cannot appeal from a decision which does not involve it. We, therefore, dismiss United National's appeal.

AFFIRMED IN PART, DISMISSED IN PART.

Chief Judge McGEE concurs

Judge BERGER concurs in result only.

Report per Rule 30(e).