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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

AMERICAN FAMILY INSURANCE GROUP, Intervenor/Appellant, v. MILO BERGESON, as Father, Guardian, and Best Friend of CHRISTOPHER BO BERGESON and AMY LYNN BERGESON, the minor children of LYNN RENEE BERGESON, deceased, Plaintiff/Appellee, and WEST FRONTIER CONDOMINIUMS HOA, INC., an Arizona corporation; WEST FRONTIER, LLC, a limited liability company; and DAVID K. LEVENGOOD and JOAN LEVENGOOD, Trustees of the LEVENGOOD FAMILY LIVING TRUST, Defendants/Appellees.	2 CA-CV 2010-0144 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV20080002

Honorable R. Douglas Holt, Judge

AFFIRMED

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B R A M M E R, Presiding Judge.

¶1 Appellant American Family Insurance Group (American Family) appeals from the trial court's denial of its motion to intervene to contest the settlement entered into by Milo Bergeson in the wrongful death action he brought against David and Joan Levengood (Levengoods). Milo and the Levengoods agreed Milo would not execute on the resulting judgment and the Levengoods would assign to him any claims they had against American Family for breach of contract. American Family argues it was entitled to intervene in the wrongful death action for purposes of a reasonableness hearing on the amount of the judgment. We affirm.

Factual and Procedural Background

¶2 Lynn Bergeson died from carbon monoxide poisoning, allegedly because a ceiling fan in the condominium she rented from the Levengoods had been installed improperly and caused the ceiling insulation to combust. Milo brought a wrongful death

action on behalf of Lynn's minor children against West Frontier Condominiums HOA, Inc., West Frontier, L.L.C., and the Levengoods, owners of the condominium. American Family had issued an insurance policy to the West Frontier HOA, under which the individual owners of the condominiums were provided coverage for "liability arising out of the ownership, maintenance or repair of that portion of the premises which is not reserved for that unit-owner's exclusive use or occupancy."

¶3 The Levengoods tendered defense of the action to American Family, who denied the loss was covered under the policy and declined to provide a defense. American Family subsequently was informed that Milo was willing to settle with the Levengoods for the policy's $1,000,000 limit, but that if the settlement offer was rejected by American Family, Milo and the Levengoods would enter into a *Damron*[1] agreement. American Family did not accept the settlement offer. Milo and the Levengoods entered into a *Damron* agreement and stipulated to a judgment in favor of Milo for $4,000,000, and also agreed Milo would not attempt to collect on the judgment against the Levengoods, but instead would attempt to recover the judgment from American Family. The Levengoods assigned to Milo any policy claims they might have had against American Family.

¶4 After the trial court entered judgment against the Levengoods in accordance with their stipulation, American Family filed a motion to intervene for the purpose of challenging the reasonableness of the judgment. The court denied the motion. This appeal followed.

[1]*Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969).

Discussion

¶5 American Family asserts the trial court erred in denying its motion to intervene because it was entitled to a "reasonableness hearing." We review de novo whether a party has a right to intervene under Rule 24(a), Ariz. R. Civ. P. *Purvis v. Hartford Accident & Indem. Co.*, 179 Ariz. 254, 257, 877 P.2d 827, 830 (App. 1994). Rule 24(a) states:

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest . . . .

"[T]he interest which an intervenor must have is a direct and immediate interest in the case, so that the judgment to be rendered would have a direct and legal effect upon his rights, and not merely a possible and contingent equitable effect." *Weaver v. Synthes, Ltd.*, 162 Ariz. 442, 447, 784 P.2d 268, 273 (App. 1989), *quoting Miller v. City of Phoenix*, 51 Ariz. 254, 263, 75 P.2d 1033, 1037 (1938).

¶6 Where an insurer may be bound by the collateral estoppel doctrine to a determination of its insured's liability and damages owed, it typically has the requisite interest under Rule 24(a) entitling it to intervention. *Anderson v. Martinez*, 158 Ariz. 358, 361, 762 P.2d 645, 648 (App. 1988). An insurer loses that right to intervene, however, if it refuses to defend the insured. *See, e.g., Mora v. Phoenix Indem. Ins. Co.*, 196 Ariz. 315, ¶ 14, 996 P.2d 116, 120 (App. 1999) ("[A]n insure[r] forfeits its right to intervene if it breaches its duty to defend."); *McGough v. Ins. Co. of N. Am.*, 143 Ariz.

26, 31, 691 P.2d 738, 743 (App. 1984) ("[I]t appears to be the law in Arizona that an insurer will lose the right to intervene if it breaches its contract by refusing to provide a defense for its insured."); *Manny v. Anderson's Estate*, 117 Ariz. 548, 550, 574 P.2d 36, 38 (App. 1977) ("If the insurer breaches its contract by refusing to defend, . . . the insurer cannot later enter the case without the insured's permission."); *Kepner v. W. Fire Ins. Co.*, 109 Ariz. 329, 332, 509 P.2d 222, 225 (1973) ("If the insurer refuses to defend and awaits the determination of its obligation in a subsequent proceeding, it acts at its peril, and if it guesses wrong it must bear the consequences of its breach of contract.").

¶7 American Family argues that denying it the right to intervene impairs its ability to protect its interests under Rule 24(a) because collateral estoppel generally is applied against insurers and binds them "by the determination of issues that were actually litigated or could have been litigated . . . against their insured." When an insurance company refuses to defend its insured where it has a duty to do so, collateral estoppel binds the insurer to the facts determined at trial that are essential to the judgment against its insured. *Farmers Ins. Co. of Ariz. v. Vagnozzi*, 138 Ariz. 443, 445, 675 P.2d 703, 705 (1983). However, the court in *McGough* stated that although the potential application of the collateral estoppel doctrine to an insurer demonstrates the requisite interest under Rule 24(a), that fact does not end the inquiry as to whether an insurer has the right to intervene. 143 Ariz. at 30-31, 691 P.2d at 742-43. The insurer loses the right to intervene when it refuses to provide the insured a defense. *Id.*

¶8 American Family further argues the principle that an insurer loses its right to intervene by failing to defend its insured rests solely on dicta, and so is not binding on

this court. According to American Family, no Arizona case has applied this principle to deny an insurer the right to intervene and consequently this court "is free to choose the course it thinks best serves public policy." Dictum is "a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication." *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81, 638 P.2d 1324, 1327 (1981). Nevertheless, dicta can be persuasive. *See, e.g., Lamb Excavation Inc, v. Chase Manhattan Mortgage Corp.*, 208 Ariz. 478, ¶ 15, 95 P.3d 542, 546 (App. 2004) (finding dicta persuasive "when viewed in combination with the remainder of the court's analysis").

¶9 In *Mora*, for example, the plaintiff had relied on *McGough* and *Kepner* to argue any breach of one of the primary duties owed by an insurer to an insured forfeits the insurer's right to intervene in an action against the insured. 196 Ariz. 315, ¶ 14, 996 P.2d at 119. The court disagreed, stating that prior case law indicates "only that an insure[r] forfeits its right to intervene if it breaches its duty to defend." *Id.* ¶ 14. The court went on to compare a breach of the duty to defend with a breach of the duty of equal consideration, the specific breach at issue in *Mora*. *Id.* ¶¶ 15-24. The court stated, "Some breaches are deemed so substantial and so antithetical to the essential purpose of the insurance contract that, if committed, they forfeit an insurer's right to appear and be heard at the damages hearing," including, for example, when "an insurer abandons or wrongfully refuses to provide a defense to its insured." *Id.* ¶ 17. The court ultimately concluded that, because the insurer had provided a defense, it "did not abandon its insured and thus the rationale behind forfeiture ha[d] not been triggered." *Id.* ¶ 24.

Accordingly, the court held the insurer had not forfeited its right to intervene by breaching the duty to give due consideration to settlement offers. *Id.*

¶10 The principle that an insurer forfeits its right to intervene by refusing to provide its insured a defense was integral to the court's analysis in *Mora*, and we are reluctant to treat it as dicta. Moreover, we reject American Family's assertion that we should choose a different course based on public policy. The public policy behind this principle is well-reasoned and explicitly stated in our jurisprudence. By refusing to provide a defense, an insurer "has asserted that the policy does not apply and it therefore has no interest in the litigation." *Id.* ¶ 18. Rule 24(a) requires that a party seeking intervention "claim[] an interest relating to the property or transaction which is the subject of the action." "If the insurer has no interest in the litigation, it follows that no policy reason justifies allowing it to intervene and help determine the outcome of the litigation." *Mora*, 196 Ariz. 315, ¶ 18, 996 P.2d at 121. In this case, no public policy rationale warrants a departure from this well-reasoned and long-standing rule.

¶11 American Family also argues it had a right to intervene because the Levengoods neither defended against the merits of Milo's action nor attempted to mitigate their damages. American Family relies on two cases to support this proposition, *Edler v. Edler*, 9 Ariz. App. 140, 449 P.2d 977 (1969), and *Lawrence v. Burke*, 6 Ariz. App. 228, 431 P.2d 302 (1967). In *Edler*, the court stated an insured could reject an offer of the insurer to participate in its defense when the insurer previously had elected not to defend and the insured had retained his own counsel. 9 Ariz. App. at 142-43, 449 P.2d at 979-80. In *Lawrence*, the same court determined the insured had a duty to mitigate

damages such that he could not fail to hire an attorney and refuse the insurer's assistance in setting aside a default judgment, but also noted that, had the insured "employed his own counsel who then sought to protect him, [the court] would be faced with a different picture." 6 Ariz. App. at 235, 431 P.2d at 309. In this case, unlike the insurers in *Edler* and *Lawrence*, American Family refused to defend the Levengoods at all. *See Edler*, 9 Ariz. App. at 142, 449 P.2d at 979 (insurer denied coverage; later sought to intervene to set aside default judgment); *Lawrence*, 6 Ariz. App. at 232, 233, 431 P.2d at 306, 307 (attorney hired by insurer began defense, later withdrew, then sought to intervene to set aside default). In *McGough*, the court relied on *Edler* and *Lawrence* in stating that if an insurer "refused to defend at all it could not force the insured to agree to its intervention later in the suit." 143 Ariz. at 32, 691 P.2d at 744. Neither *Edler* nor *Lawrence* suggest that an insurer has the right to intervene when it has refused, as here, to provide its insured a defense, and when the insured has taken steps to protect himself. In fact, the Levengoods hired their own attorney, thus providing the "different picture" envisioned in *Lawrence*.

¶12 American Family further claims it is entitled to intervene for purposes of a reasonableness hearing because "an indemnitor is only bound to a settlement to the extent that settlement is reasonable."[2] Again, an insurer waives its right to a reasonableness

[2]In support of this argument, American Family cites *Holt v. Utica Mutual Insurance Co.*, 157 Ariz. 477, 759 P.2d 623 (1988), for the proposition that "the judgment would not be enforceable unless reasonable, even if the insurer breached the duty to defend." *Holt* determined only that whether the insured breached the cooperation clause depended in part on whether the insurer breached the duty to defend. *Id.* at 484,

hearing when it refuses to defend the insured. *See Parking Concepts, Inc. v. Tenney*, 207 Ariz. 19, n.3, 83 P.3d 19, 22 n.3 (2004) ("[I]n cases where the insurer has refused to defend and the parties enter into a *Damron* agreement, the insurer has no right to contest the stipulated damages on the basis of reasonableness, but rather may contest the settlement only for fraud or collusion."). American Family characterizes this statement as dicta that we need not follow. Because this is a clear statement from our supreme court that is directly applicable here we will not ignore it.

¶13 American Family also cites *Arizona Property and Casualty Insurance Guaranty Fund v. Helme*, 153 Ariz. 129, 735 P.2d 451 (1987), as requiring that an insured's settlement be reasonable. But *Helme* held that when an insurer commits an anticipatory breach of one of its policy obligations the insured's responsibilities under the cooperation clause narrow and the insured can "take reasonable steps to save himself," including "making a reasonable settlement with the claimant . . . [s]o long as that settlement agreement is neither fraudulent, collusive, nor otherwise against public policy." *Id.* at 138, 735 P.2d at 460. This holding does not entitle American Family to intervene for purposes of a reasonableness hearing under the circumstances presented here but only permits intervention to challenge the stipulated judgment as fraudulent, collusive, or contrary to public policy. American Family has asserted no such claim.

¶14 American Family does assert that permitting a stipulated judgment to stand without the benefit of a reasonableness hearing violates its due process rights when the

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759 P.2d at 630. It does not answer the question posed here, where American Family clearly refused to provide a defense.

judgment may be punitive. This argument suggests a substantive due process claim. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of punitive damages that are grossly excessive or arbitrary. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). But this issue is neither before this court nor ripe for review.[3] No judgment has been imposed against American Family, nor have any issues been litigated from which a court could determine whether Milo's judgment against the Levengoods is excessive or arbitrary. To the extent American Family may be arguing it has been denied procedural due process, we disagree. Procedural due process only requires that a party be provided an opportunity to be heard at a meaningful time and in a meaningful manner. *See Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). American Family has been afforded sufficient opportunity to do both. It could have provided the Levengoods a defense to Milo's action under a reservation of rights, but did not. *See Mora*, 196 Ariz. 315, ¶ 17, 996 P.2d at 120 (insurer defending under reservation of rights retains right to contest reasonableness of settlement). It also had the opportunity to seek relief by way of a declaratory judgment action—which it did. *See Kepner*, 109 Ariz. at 332, 509 P.2d at 225. Moreover, we find no authority suggesting intervention for the purpose of a reasonableness hearing is an exclusive or necessary means by which

[3]American Family contends that restricting its challenge of a stipulated judgment to grounds of fraud or collusion improperly exposes it to punitive damages for a simple breach of contract. However, the trial court's denial of the motion to intervene is the only matter properly before this court. Therefore, we do not address whether the stipulated judgment is punitive and, if it is, whether the damages award violates due process on that basis.

American Family can protect itself from a judgment it asserts may be imposed on it unconstitutionally.

¶15 Finally, American Family maintains that, at minimum, it should be allowed to intervene to determine the reasonableness of that portion of the judgment that exceeds the policy limits, arguing it can be held liable in excess of those limits only if it has breached the duty of equal consideration. We already have determined American Family was not entitled to intervene to challenge the reasonableness of the stipulated judgment. Our analysis is not dependent on whether the judgment exceeds the policy limits, because determination of whether intervention will be allowed "turns on whether there was a complete breach of the duty to defend." *Mora*, 196 Ariz. 315, ¶ 17, 996 P.2d at 120.

Disposition

¶16 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge