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NO. COA11-227  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

NORTH CAROLINA FARM BUREAU  
MUTUAL INSURANCE COMPANY,  
Plaintiff,

v.

Gaston County  
No. 10 CVS 2999

JARVIS SENTELL LYNN and  
MICHAEL ADAMS,  
Defendants.

Appeal by defendant from order entered 10 November 2010 by Judge Mark E. Klass in Gaston County Superior Court. Heard in the Court of Appeals 30 August 2011.

*Caudle & Spears, P.A., by Harold C. Spears, attorneys for plaintiff.*

*Devore, Action, & Stafford, P.A., by Fred W. Devore, III, attorneys for defendant.*

ELMORE, Judge.

Michael Adams (defendant) appeals an order granting summary judgment in favor of North Carolina Farm Bureau Mutual Insurance Company (plaintiff). After careful consideration, we reverse the decision of the trial court.

On 21 December 2007, defendant was visiting the home of Ricky and Pamela Cole. Defendant was in the garage of the home with several other guests. Ricky and Pamela Cole had converted their garage into a recreation room with a pool table. Jarvis Lynn, son of Ricky and Pamela Cole, entered the garage and initiated a verbal confrontation with a third party. The verbal confrontation then escalated into a physical altercation. Defendant observed Lynn reach into his right back pocket and retrieve a pearl-handled .22 pistol. Defendant then attempted to exit the garage. While attempting to exit, defendant was shot in the shoulder. The bullet severed his spine and paralyzed him from the chest down.

On 22 February 2008, defendant filed an action for personal injuries against Jarvis Lynn, Ricky Cole, and Pamela Cole in the Gaston County Superior Court. The parties to that suit stipulated that if Jarvis Lynn, Ricky Cole, or Pamela Cole were found negligent, defendant's damages would be \$100,000.00. On 6 May 2010, the Gaston County Superior Court entered an order granting directed verdict in favor of defendant. In that order, the superior court made several conclusions of law, stating in sum that: 1) Jarvis Lynn breached a duty of reasonable care owed to defendant; 2) Jarvis Lynn failed to use the highest degree of

care in the handling of a firearm while in close proximity to others; 3) the negligence of Jarvis Lynn was a proximate cause of defendant's injury; 4) defendant is entitled to a judgment of \$100,000.00, arising from the accidental shooting and negligence of Jarvis Lynn. The superior court then ordered that Lynn pay defendant the amount of \$100,000.00.

Next, Lynn contended that he was entitled to be fully covered by Ricky Cole's homeowner's insurance policy issued by plaintiff. The policy provided liability insurance coverage in the amount of \$100,000.00 for bodily injury occurring on the premises to which the policy applied. During the preceding action, plaintiff provided counsel for Lynn. However, after the superior court entered a judgment in that suit, plaintiff denied that any coverage under the policy was afforded for the injury to defendant. On 17 June 2010, plaintiff filed suit for declaratory judgment to determine if coverage existed for the injury to defendant. On 6 August 2010, defendant filed a motion for summary judgment. On 19 October 2010, plaintiff also filed a motion requesting summary judgment. Plaintiff argued that the bodily injury sustained by defendant was not covered by the policy, because the bodily injury resulted from the intentional acts of Lynn. Plaintiff further argued that since the injury

was the result of an intentional act, the injury did not constitute an "occurrence" as defined in the policy. On 10 November 2010, the trial court entered an order granting summary judgment in favor of plaintiff, finding that the policy does not provide coverage for the personal injuries sustained by defendant. Defendant now appeals.

An appellate court reviews the trial court's order allowing summary judgment de novo. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Id.* (quotations and citations omitted).

Defendant first argues that the doctrines of res judicata and collateral estoppel prevent the trial court from relitigating Lynn's negligence, because the trial court previously found that Lynn negligently injured defendant. We disagree.

"Under the doctrine of res judicata, or claim preclusion, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996) (quotation

and citation omitted). "Under the doctrine of collateral estoppel, or issue preclusion, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Id.* at 414, 474 S.E.2d at 128 (quotation and citation omitted). With regards to both doctrines, the parties in both the prior suit and subsequent suit must be the same, or connected in privity. Our Supreme Court has established that "privity involves a person so identified in interest with another that he represents the same legal right." *Id.* at 417, 474 S.E.2d at 130 (citations omitted). "Privity is not established, however, . . . because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action." *Id.* (quotations and citations omitted).

Here, the parties in the prior suit and the suit at issue are not the same. However, defendant contends that plaintiff is in privity with Lynn, because plaintiff participated in the prior suit by providing counsel to Lynn. We do not find support for defendant's argument in the law. In *Frinzi*, our Supreme Court clearly established that in order for two individuals to be connected in privity, they must be closely identified in

interest. The Court further held in that case that privity is not established merely by the fact that the question litigated might later affect the liability of the other individual. Thus, privity between Lynn and plaintiff is not established here merely because the determination of Lynn's negligence in the prior suit later affected plaintiff's liability to defendant. Therefore, defendant's first argument fails.

Defendant next argues in the alternative that the trial court erred in denying coverage for defendant's injury, because plaintiff failed to show that Lynn intended to commit both the act and the injury to defendant. We agree.

This Court has held that "in order to avoid coverage on the basis of the exclusion for expected or intended injuries in [an] insurance policy . . . the insurer must prove that the injury itself was expected or intended by the insured. Merely showing the act was intentional will not suffice." *Miller v. Nationwide Mut. Ins. Co.*, 126 N.C. App. 683, 687, 486 S.E.2d 246, 248 (1997) (citation omitted). Furthermore, "an insurer must demonstrate not only that the insured intended the act, but also that he intended to cause harm or injury." *Id.*, 486 S.E.2d at 249 (citation omitted).

Here, in plaintiff's motion for summary judgment plaintiff argued that the shooting did not constitute an "occurrence" as defined in the policy. Plaintiff explained that the injury sustained by defendant was the result of the intentional acts of Lynn. Plaintiff argued that therefore, the policy denied or excluded coverage for defendant's injury. Plaintiff's entire argument is based on the fact that Lynn intended to fire his weapon. However, plaintiff makes no argument that Lynn intended to shoot defendant in the shoulder, or that defendant's resulting paralysis was an expected result. In short, plaintiff has only argued that Lynn intended to fire his weapon, but plaintiff has failed to establish that defendant was the intended victim. This Court has established the rule that in order to avoid coverage for intended injuries, the insurer must prove that 1) the insured intended the act and 2) the insured intended the injury. Here, plaintiff has failed to establish the second requirement in that two-part test. Therefore, we conclude that the trial court erred in granting summary judgment in favor of plaintiff, and we remand to the trial court for entry of summary judgment in favor of defendant.

Reversed.

Judges McGEE and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).