An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-559
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

NATIONWIDE MUTUAL INSURANCE COMPANY,
Plaintiff-Appellant,

v.

Wake County
No. 10 CVS 4043

ERIE INSURANCE COMPANY and ERIE INSURANCE EXCHANGE,
Defendants-Appellees.

Appeal by Plaintiff from order entered 18 February 2011 by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Court of Appeals 25 October 2011.

The Law Office of Allen Mills, PLLC, by Allen Mills, for Plaintiff-Appellant.

Burton & Sue, LLP, by Stephanie W. Anderson, for Defendants-Appellees.

McGEE, Judge.

A truck operated by Fansler Grading, Inc. (Fansler) was travelling in Davidson County on 7 October 2006 when debris dislodged from the back of the truck and fell onto the roadway. The drivers of two separate vehicles (the drivers) wrecked their vehicles (the accident) when they attempted to avoid the falling

debris. Nationwide Mutual Insurance Company (Plaintiff) was the insurer for both drivers. Erie Insurance Company and/or Erie Insurance Exchange (Defendants) provided a policy of motor vehicle liability coverage to Fansler that was in effect at the time of the accident.

Plaintiff filed an action against Fansler on 17 May 2007 that involved subrogation claims on behalf of the drivers for personal injuries and property damage. Defendants denied liability coverage to Fansler for the accident, did not defend in the 17 May 2007 action, and were not made parties to that action. Plaintiff prevailed against Fansler in the 17 May 2007 action, and judgment was entered against Fansler on 9 November 2009. Fansler failed to pay Plaintiff as ordered in the 9 November 2009 judgment, and Plaintiff filed the present action on 4 March 2010, seeking a declaratory judgment that Defendants were liable for the 9 November 2009 judgment rendered against Fansler. Defendants filed a motion to dismiss and answer on 12 April 2010, arguing, *inter alia*, that Plaintiff had failed to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and that Plaintiff's claims were barred by the applicable statute of limitations. By order filed 18 February 2011, the trial court granted Defendants' motion to dismiss pursuant to

Rule 12(b)(6) and for failure to file this action within the time required by the statute of limitations. Plaintiff appeals.

I. Analysis

Plaintiff argues that the trial court erred in granting Defendants' motion to dismiss. We disagree.

Plaintiff argues for novel interpretations of certain provisions of Chapter 20, Article 9A, of the North Carolina General Statutes, the "Motor Vehicle Safety-Responsibility Act of 1953" (the Act). N.C. Gen. Stat. § 20-279.39 (2009). Foremost, Plaintiff seems to argue that it qualifies as an "innocent victim" of the accident because Plaintiff suffered financial harm therefrom. However, as Plaintiff should rightfully know: "The purpose of the Financial Responsibility Act has always been to protect innocent *motorists* from financially irresponsible motorists. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977)." *Nationwide Mutual Ins. Co. v. Baer*, 113 N.C. App. 517, 522, 439 S.E.2d 202, 205 (1994) (emphasis added). Plaintiff is not an "innocent motorist" under the Act. *Poultry Corp. v. Insurance Co.*, 34 N.C. App. 224, 225-26, 237 S.E.2d 564, 566 (1977).

Therefore, while we agree with Plaintiff that "the Act . . . is to be liberally construed to effectuate its beneficial purpose" and, that "[t]oward that end, we note the

underlying purpose of the Act, which remains unchanged even today, 'is best served when [every provision of the Act] is interpreted to provide the innocent victim with the fullest possible protection[,]'" *Metropolitan Property and Casualty Ins. Co. v. Caviness*, 124 N.C. App. 760, 764, 478 S.E.2d 665, 668 (1996) (citations omitted) (emphasis removed), the Act was not enacted to protect insurers such as Plaintiff. The victims in the underlying tort are not parties to this action, and they will derive no benefit were we to decide in favor of Plaintiff. Plaintiff thus is not given the benefit of "liberal construction" of the Act.

Plaintiff argues that it had the right to proceed directly against Defendants once the liability of Defendants' insured had been established. Plaintiff argues:

> While other forms of insurance may not allow for a direct cause of action against a tortfeasor's carrier, such an outcome is not only implied by the Act, but is discussed in the statute: "As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless . . ." (certain requirements are met). N.C. Gen. Stat. § 20-279.21(f)(1).

However, as Plaintiff acknowledges: "The present case does not involve an assigned risk policy, which is the focus of § 20-

279.21(f)(1)[.]" The present case involves an underinsured motorist policy, which is addressed in N.C. Gen. Stat. § 20-279.21(b)(4). This Court addressed the meaning of N.C. Gen. Stat. § 20-279.21(b)(4) in an opinion involving insurers Nationwide and State Farm:

> N.C.G.S. § 20-279.21(b)(4) . . . provides in pertinent part:
>
> > An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle . . . . No insurer shall exercise any right of subrogation . . . where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election.

> We have reviewed this statutory language and we find nothing that would support Nationwide's assertion that an independent relationship arose between insurers as a result of State Farm's tender. *Nor do we agree with Nationwide that reimbursement by the liability carrier is presumed within the statute*. Instead, we find *the language of § 20-279.21(b)(4) mentions only the rights of assignment and subrogation*, and the only right at issue in the present case is that of subrogation.

Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 109 N.C. App. 281, 283-84, 426 S.E.2d 298, 299 (1993) (emphasis added) (*Nationwide I*). We find nothing in N.C.G.S. § 20-279.21(b)(4) granting Plaintiff a direct cause of action against Defendants. Reimbursement by Defendants to Plaintiff is not presumed in the statute, and under N.C.G.S. § 20-279.21(b)(4), Plaintiff's only relevant right against Defendants related to the accident was subrogation. *Nationwide I*, 109 N.C. App. at 283-84, 426 S.E.2d at 299.

> Subrogation has been defined as an "equitable remedy in which one steps into the place of another and takes over the right to claim monetary damages to the extent that the other could have." This Court has also stated that "in a subrogation action, the rights of the insurer succeed only to the rights of the insured and no new cause of action is created. . . ."

Id. at 284, 426 S.E.2d at 300 (citations omitted). Plaintiff could have filed a declaratory judgment action when it

discovered that Defendants had refused coverage for Fansler - before the statute of limitations had run. Plaintiff could have attempted to bring Defendants into the underlying action. Plaintiff did neither. Plaintiff, having stepped into the shoes of the drivers through subrogation, acquired no greater rights than those of the drivers.

The accident occurred on 7 October 2006. Pursuant to N.C. Gen. Stat. § 1-52, the statute of limitations on the action arising out of the accident was three years. Because Plaintiff stepped into the shoes of the drivers, the three-year statute of limitations applied to Plaintiff. Plaintiff filed its complaint in this matter on 4 March 2010, more than three years after the accident. Because Plaintiff did not file its action within the three-year statute of limitations, the trial court did not err in granting Defendants' motion to dismiss for this reason. See *Nationwide I*, 109 N.C. App. at 284-85, 426 S.E.2d at 300.

Plaintiff argues that this Court's opinion in *Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 533 S.E.2d 501 (2000), *overruled in part as stated in Kubit v. MAG Mut. Ins. Co.*, __ N.C. App. __, 708 S.E.2d 138 (2011), supports its position that it had an independent cause of action against Defendants. However, in *Naddeo* this Court did not address the statute of limitations or whether there could be any independent causes of

action between insurance carriers in fact situations like the one before us, as those were not issues brought forward on appeal. We hold that we are bound by our earlier decision in *Nationwide I*, and affirm the ruling of the trial court.

Affirmed.

Judges HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).