TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00088-CV

In re Progressive County Mutual Insurance Company

ORIGINAL PROCEEDING FROM FAYETTE COUNTY

M E M O R AN D U M O P I N I O N

Relator Progressive County Mutual Insurance Company filed a petition for writ of mandamus challenging the district court's order denying Progressive's motion to sever. Progressive sought to sever a declaratory-judgment action on its policyholders' underinsured-motorist coverage from the policyholders' pending friendly suit on a minor's personal-injury claim. We will conditionally grant the petition.

BACKGROUND

Real parties in interest Darren and Nikki Wied are the parents of L.W., a minor who was injured as a passenger in the vehicle Nikki was driving when it hit another vehicle. The Wieds have an automobile-insurance policy with Progressive covering the vehicle. Darren filed a friendly suit against his wife Nikki on behalf of their daughter seeking court approval of Progressive's

payment of $30,000, the minimum policy limits for bodily injury under the liability portion of the Wieds' policy.[1]

The district court appointed Marcus S. Schwartz as guardian ad litem for L.W. Based on his interpretation of the available insurance coverage,[2] Schwartz demanded payment under the policy of the liability limits of $50,000 and the underinsured-motorist limits, another $50,000.[3] However, Progressive contends that the payment demanded is not recoverable under the specific terms and exclusions of the Wieds' policy. Progressive filed a petition in intervention seeking a declaratory judgment that under these circumstances, the $30,000 liability limit is the only amount available under the policy and that underinsured-motorist coverage is not available. Agreeing with Schwartz's interpretation of the policy—i.e., that the policy's terms and exclusions did not apply and that the Weids had underinsured themselves—the district court denied Progressive's petition in intervention, stated that up to $50,000 in underinsured-motorist coverage was available, and reserved a determination of damages for a later date.

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[1] No claims have been asserted on behalf of L.W. against the driver of the vehicle that Nikki hit.

[2] Schwartz supported his interpretation of the Wieds' policy coverage by citing to an opinion that was withdrawn by an appellate court. *See Verhoev v. Progressive Cty. Mut. Ins. Co.*, 300 S.W.3d 803 (Tex. App.—Fort Worth 2009, no pet.), *op. withdrawn*, No. 02-08-00055-CV, 2009 Tex. App. LEXIS 9295, at *1 (Tex. App.—Fort Worth Dec. 3, 2009, no pet.) (mem. op.); *cf. Continental Cas. Co. v. Street*, 364 S.W.2d 184, 188 (Tex. 1963) (noting that opinion withdrawn by appellate court has no binding effect); *Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 226-27 (Tex. App.—Dallas 2015, no pet.) (noting that withdrawn opinions have no precedential value). The district court appears to have not been informed that the cited opinion had been withdrawn.

[3] Darren filed no pleadings for L.W. claiming underinsured-motorist benefits; only Schwartz raised this claim.

Progressive filed a motion to sever the $30,000 friendly suit claims for Nikki's alleged negligence from the claims related to Progressive's petition in intervention on underinsured-motorist coverage. The district court denied the motion to sever, and Progressive filed this petition for writ of mandamus. Nikki filed a response agreeing with Progressive's petition and requesting that this Court grant mandamus relief.

DISCUSSION

In its mandamus petition, Progressive contends that the denial of its motion to sever was an abuse of discretion that will cause undue prejudice at trial. Nikki contends that the full bodily injury policy limits of $30,000 have been offered and accepted but cannot be distributed to L.W. without the requested severance, and that she will incur unnecessary fees and expenses associated with the determination of underinsured-motorist benefits under the same policy.

To obtain mandamus relief, a relator must show that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal. *In re Southwestern Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex. 2007) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004)). An order denying severance is not a final judgment, and unless a severance order creates a final judgment, it is not appealable. *In re Reynolds*, 369 S.W.3d 638, 646 (Tex. App.—Tyler 2012, orig. proceeding) (citing *Beckham Grp., P.C. v. Snyder*, 315 S.W.3d 244, 245 (Tex. App.—Dallas 2010, no pet.)). Thus, mandamus is the appropriate avenue for seeking review of a trial court's interlocutory severance order. *Id.*; *Snyder*, 315 S.W.3d at 245; *In re Liu*, 290 S.W.3d 515, 518 (Tex. App.—Texarkana 2009, orig. proceeding).

Under Texas Rule of Civil Procedure 41, "[a]ny claim against a party may be severed and proceeded with separately." Tex. R. Civ. P. 41. Rule 41 affords a trial court broad discretion in the severance of causes of action. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *In re Reynolds*, 369 S.W.3d at 650. A trial court's decision on severance will not be disturbed absent an abuse of discretion. *Horseshoe Operating Co.*, 793 S.W.2d at 658. "A claim is properly severable if: (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *Id*. Controlling reasons for a severance are to do justice, avoid prejudice, and further convenience. *Id*.

However, a trial court's discretion as to severance is not unlimited. *In re Reynolds*, 369 S.W.3d at 650; *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 671 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (citing *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956)). The court has a duty to order a separate trial when all the facts and circumstances unquestionably require a separate trial to prevent manifest injustice, when there is no fact or circumstance supporting or tending to support a contrary conclusion, and when the legal rights of the parties will not be prejudiced. *In re Reynolds*, 369 S.W.3d at 650; *Millard*, 847 S.W.2d at 671 (quoting *Womack*, 291 S.W.2d at 683) (noting that "[a]lthough refusal to order a separate trial under these circumstances is usually termed a clear abuse of discretion, it is nevertheless a violation of a plain legal duty").

Determining whether a trial court erred in denying severance requires consideration of (1) whether the claims were properly severable, and if so, (2) whether the circumstances of the case required granting the severance. *In re Essex Ins. Co.*, No. 01-16-00552-CV, 2016 Tex. App. LEXIS 12045, at *5 (Tex. App.—Houston [1st Dist.] Nov. 8, 2016, orig. proceeding) (citing *In re Ben E. Keith Co., Inc*., 198 S.W.3d 844, 850 (Tex. App.—Fort Worth 2006, orig. proceeding)); *see In re Arcababa*, No. 10-13-00097-CV, 2013 Tex. App. LEXIS 13571, at *18-19 (Tex. App.—Waco Oct. 31, 2013, orig. proceeding) (conditionally granting mandamus relief after concluding that plaintiff's claims for uninsured/underinsured motorist benefits against insurer were "necessarily insurance claims . . . subject to severance" and that plaintiff's negligence claims against defendant were separate and distinct claims); *see also F.A. Richard & Assocs. v. Millard*, 856 S.W.2d 765, 767 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (conditionally granting mandamus relief requiring severance of plaintiff's negligence claim against motorist from plaintiff's bad-faith claim against insurance adjuster). Here, severance is proper because: (1) the controversy involves more than one cause of action, i.e., Darren's liability claims on behalf of L.W. against Nikki for her negligence, and Darren's unpled claims for breach of contract against Progressive under the Wieds' own policy for underinsured-motorist benefits; (2) Darren's liability claim and the claim of underinsured-motorist coverage under the Wieds' own policy with Progressive could have been brought as separate lawsuits from one another; and (3) these claims are not so interwoven that they involve "the same facts and issues"—one is based on Nikki's liability for her negligence in the collision and the other is based on the issue of whether underinsured-motorist coverage is available

under the Wieds' own policy. *See Horseshoe Operating Co.*, 793 S.W.2d at 658; *see also In re Reynolds*, 369 S.W.3d at 652.

Not only was severance of the claims proper, severance of the claims was necessary to avoid prejudice. *See In re Reynolds*, 369 S.W.3d at 652 (noting that courts must consider whether severance is proper and whether severance is necessary to do justice, avoid prejudice, or further convenience). When two claims are tried simultaneously but evidence of liability insurance is admissible as to only one of the claims, detailed evidence of insurance is prejudicial. *Id*. at 653, 655-56 (conditionally granting mandamus relief after concluding that severance of underinsured motorist claim was required to prevent prejudice). As Progressive points out, at trial the jury would hear that Progressive is Nikki's insurer for both the negligence claims and the underinsured-motorist claims, but because Progressive's declaratory judgment was denied, it would be unable to introduce evidence supporting the unavailability of underinsured-motorist coverage on these facts and under this policy. Thus, Progressive would have to defend the case as to the extent of L.W.'s damages beyond the $30,000 policy limit and the denial of L.W.'s claim for underinsured-motorist benefits without presenting evidence to the jury explaining its interpretation of certain policy exclusions in the Wieds' policy and why the claim was denied. This situation would be prejudicial to Progressive. Nikki would also be prejudiced at trial by the introduction of insurance. While evidence of insurance would be necessary to establish L.W.'s underinsured-motorist claim against Progressive, allowing evidence of insurance would violate Nikki's "substantial right to have [her] liability decided without any mention of insurance." *See id.* at 653 (noting that evidence of insurance would not be admissible in trial of plaintiff's negligence claims against motorist and his employer but evidence of motorist's

and his employer's insurance and plaintiff's UIM coverage was required to establish plaintiff's UIM claims, creating "irreconcilable conflict" and showing prejudice from denial of severance); *see also In re Arcababa*, 2013 Tex. App. LEXIS 13571, at *23-24 (noting that evidence of insurance would not be admissible in the trial of plaintiff's personal-injury claims against defendant but evidence of defendant's insurance and plaintiff's UM/UIM coverage was required to establish plaintiff's UM/UIM claims, showing prejudice from denial of severance); *cf.* Tex. R. Evid. 411 (evidence that person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully). Finally, the severance would cause no prejudice to Darren on behalf of L.W., who may resolve the claims against Nikki at any time by proceeding with the settlement that Nikki states has been offered and accepted, but Schwartz has refused to finalize.

We conclude on this record that the district court abused its discretion by not granting the motion to sever. The facts and circumstances require a separate trial to prevent manifest injustice, no facts or circumstances support a contrary conclusion, and the legal rights of the parties will not be prejudiced. *See Millard*, 847 S.W.2d at 671 (citing *Womack*, 291 S.W.2d at 683).

CONCLUSION

Having concluded that the denial of Progressive's motion to sever was an abuse of the district court's discretion and that Progressive lacks an adequate remedy by appeal, the petition for writ of mandamus is conditionally granted. *See* Tex. R. App. P. 52.8(c). The writ will issue in accordance with this opinion only if the district court fails to vacate its January 9, 2017 order denying severance.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Filed: May 26, 2017