DOTTY FORTENBERRY WIFE OF/AND
ALVIN L. FORTENBERRY

VERSUS

SCOTTSDALE INSURANCE COMPANY,
LIBERTY MUTUAL INSURANCE COMPANY,
JYD TRUCKING, L.L.C., DAVID LYLE
SCOTT, SR., AND UNITED SERVICES
AUTOMOBILE ASSOCIATION

NO. 17-CA-25

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 738-827, DIVISION "G"
HONORABLE E. ADRIAN ADAMS, JUDGE PRESIDING

October 25, 2017

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Stephen J. Windhorst

APPEAL DISMISSED REMANDED

SJW
SMC

CONCURS WITH REASONS

FHW

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WINDHORST, J.

Appellant, United Services Automobile Association (USAA), in its capacity as Liberty Mutual Fire Insurance Company's insured (LM's insured), seeks review of the trial court's August 1, 2016 judgment denying its motion to quash the 1442 deposition of USAA. Appellees/plaintiffs, Dotty and Alvin Fortenberry, filed a motion to dismiss appellant's appeal of the trial court's August 1, 2016 interlocutory discovery order. For the reasons that follow, we find appellant is a party to this litigation and therefore, appellant does not have a right to appeal the trial court's interlocutory discovery order. Accordingly, appellees' motion to dismiss appeal is granted and the matter is remanded to the trial court to comply with this Court's instructions.

Facts and Procedural History

Appellee, Alvin Fortenberry, was employed by USAA as an automobile re-appraiser. As a long time employee of USAA, Alvin Fortenberry received various employment and fringe benefits, including a company vehicle that was provided for his use. The vehicle was rendered a total loss as a result of a rear-end collision in which Dotty and Alvin Fortenberry were seriously injured.

On May 23, 2014, appellees filed suit against USAA and other defendants as a result of the rear-end collision that occurred on November 15, 2013. A first supplemental, amending and restated petition for damages was filed on September 18, 2014. The petitions named USAA as a defendant that "had in full force and effect a policy of liability insurance which insured the plaintiffs for losses of the nature and kind made basis of this suit." The petitions alleged Alvin Fortenberry's long time employment with USAA prior to and at the time of the accident, and stated that USAA provided automobile insurance for his company vehicle as a benefit of his employment. The petitions further provided that at the time of the accident,

appellees were also insured for accidents caused by underinsured motorists by USAA (UM insurer). USAA answered appellees' petitions without making any distinction as to USAA's alleged capacity or capacities as a named defendant and without filing any exceptions to the petitions.

Appellees filed a notice of deposition and notice of "C.C.P. 1442" deposition with request for production of documents requesting "non-party" USAA in its capacity as Alvin Fortenberry's former employer, benefits plan administrator, and LM's insured to appear for the deposition.

USAA (LM's insured) filed a motion to quash the 1442 deposition of USAA, arguing that it was an independent third party and not a party in this lawsuit. USAA (LM's insured) argued that this lawsuit was only against USAA in its capacity as the appellees UM insurer and not against USSA in its capacities as Alvin Fortenberry's former employer, benefits plan administrator, and LM's insured. Appellees opposed the motion to quash arguing that USAA was named as an original party defendant in this litigation. The trial court denied USAA's (LM's insured) motion to quash. Appellant filed this appeal and appellees filed a motion to dismiss the appeal. On February 1, 2017, after careful consideration of the motion to dismiss and opposition thereto, this Court entered an order referring appellees' motion to dismiss to the merits of this appeal. Fortenberry v. Scottsdale Insurance Company, 16-610 (La. App. 5 Cir. 02/01/17).

Discussion

Initially, this Court must determine whether this is an appealable judgment. A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment. La. C.C.P. art. 1841. An interlocutory judgment is appealable only when expressly provided by law. La. C.C.P. art. 2083 C. Generally, a judgment involving preliminary discovery matters is interlocutory and non-appealable. Gariepy v. Evans Indus., 06-106 (La. App. 5

Cir. 09/25/07), 968 So.2d 753, 754; Larriviere v. Howard, 00-186 (La. App. 3 Cir. 10/11/00), 771 So.2d 747. However, a judgment resolving a discovery issue against a non-party is appealable as it resolves all of the issues between the non-party and the party seeking discovery. Gariepy, 968 So.2d at 755. Thus, this Court must decide if USAA (LM's insured) is a party or non-party.

Pleadings must be construed reasonably as to afford litigants their day in court, to arrive at the truth, and to do substantial justice. La. C.C.P. art. 865; Dep't of Children & Family Servs. Ex rel. A.L. v. Lowrie, 14-1025 (La. 05/05/15), 167 So.3d 573, 578. Fact pleading advances several goals of the petition, such as satisfying the defendant's constitutional guarantee of due process by providing the defendant with fair notice, limiting the issues before the court, and notifying the defendant of the facts upon which the plaintiff bases his claims. Fitzgerald v. Tucker, 98-2313 (La. 06/29/99), 737 So.2d 706, 713; Schnell v. Mendoza, 12-272 (La. App. 5 Cir. 11/13/12), 105 So.3d 874, 877-878. Plaintiff need not plead a theory of the case, but only facts that would support recovery. Ramey v. DeCaire, 03-1299 (La.3/19/04), 869 So.2d 114, 118. Moreover, every pleading must be construed so as to do substantial justice. La. C.C.P. art. 865.

In their motion to dismiss, appellees argue that USAA is currently named as a defendant in the petitions. At the time of the accident, USAA was Alvin Fortenberry's employer, administrator of benefit plans, owner of the vehicle involved in this accident, LM's insured, and appellees' personal UM insurer. Therefore, appellant does not have a right to appeal the trial court's interlocutory discovery judgment.

A review of the record shows that the petitions for damage are vague as to which capacity or capacities USAA was named as a defendant. The petitions provided that USAA was 1) a named defendant; 2) the former employer of Alvin Fortenberry; 3) the administrator of Alvin Fortenberry's employee benefit plans; 4)

the owner of the vehicle provided for his use; 5) the entity that procured and placed automobile insurance on Alvin Fortenberry's company vehicle (LM's insured); and 6) the entity which issued a personal underinsured motorists insurance policy that insured appellees (UM insurer). The petitions further provided that USAA had "in full force and effect a policy of liability insurance which insured the plaintiffs for losses of the nature and kind made basis of this suit." This allegation, read with the other allegations in the petitions, could potentially apply to USAA in its capacity as UM insurer or USAA in its capacities as Alvin Fortenberry's former employer/benefits plan administrator/owner of vehicle/LM's insured, or USAA in multiple capacities. USAA did not file, in *any* capacity, an exception of vagueness or exception of no cause of action contesting the allegations as stated against USAA in the petitions.

In opposition to the motion to dismiss, USAA (LM's insured) argues that appellees acknowledged that it was not a party in the notice of deposition. Contrary to the allegations in appellees' petitions, appellees issued a notice of deposition to "non-party" USAA in its capacity as Alvin Fortenberry's former employer, benefits plan administrator, and LM's insured to appear for the deposition. While the notice of deposition appears to make a distinction between USAA in its capacity as UM insurer versus USAA in its capacities as Alvin Fortenberry's former employer, benefits plan administrator, and LM's insured, the subject matters and documents to be produced in connection with the deposition were in reference to USAA in its capacities as Alvin Fortenberry's former employer, benefit plans administrator, LM's insured, and UM insurer. Moreover, the record shows that appellees previously filed numerous discovery requests directed to USAA, without naming USAA's capacity or capacities, and only after numerous delays and refusal by

USAA to comply with discovery,[1] did appellees issue a notice of deposition to "non-party" USAA (employer/benefit plans administrator/LM's insured) in order to facilitate discovery. We note that USAA in *any* named capacity has not been dismissed as a party to this lawsuit.

Under the circumstances of this case, we find that USAA is a named party defendant. The allegations in the petitions concerning the rear-end collision provided USAA with adequate notice that it is potentially liable and involved in its capacities as Alvin Fortenberry's former employer/owner of the vehicle/benefit plans administrator/LM's insured, and in its capacity as UM insurer. Because USAA is a party to this litigation, the trial court's August 1, 2016 judgment is an interlocutory, non-appealable judgment. Accordingly, appellees motion to dismiss appeal is granted. The matter is remanded to the trial court to consider the motion for appeal as a notice of intent to seek supervisory review of the trial court's August 1, 2016 judgment.

Conclusion

For the reasons stated above, appellees motion to dismiss appeal is granted. The matter is remanded to the trial court to comply with this Court's instructions.

APPEAL DISMISSED; REMANDED

[1] Appellees issued discovery requests to USAA, without distinction as to capacity or capacities, on September 3, 2014, and on May 12, 2015. When USAA refused to answer discovery, appellees filed a motion to compel. The trial court granted appellees' motion and USAA sought supervisory review of the trial court's judgment. Fortenberry v. Scottsdale Insurance Company, 16-19 (La. App. 5 Cir. 03/01/16) (unpublished writ disposition). This Court granted USAA's writ application in part and denied it in part. Id. This Court held that *to the extent* appellees sought discovery from USAA related to its insurance coverage with Liberty Mutual (LM), USAA was not the *appropriate* party to produce the requested information. Id. Thus, only that portion of the judgment was vacated. Id. The judgment compelling USAA to respond to all other remaining discovery requests was denied. Id. At no point in the writ disposition did this Court determine that USAA was not a party defendant nor did this Court determine what capacity or capacities USAA was named as a defendant in the petitions.

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WICKER, J., CONCURS WITH REASONS

I concur in the outcome but write separately only to emphasize that by dismissing this appeal at this juncture in this case, given its long and tortured procedural history and the nature of the documents at issue, I do not intend to infer that plaintiff is not entitled to obtain the documents currently sought from USAA.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **OCTOBER 25, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-CA-25

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
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