

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0577

SIDNEY JOSEPH MABILE, SR.

VERSUS

THE DOW CHEMICAL COMPANY, ET AL.

Judgment Rendered: DEC 22 2016

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APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF IBERVILLE  
STATE OF LOUISIANA  
DOCKET NUMBER 72,095

HONORABLE DONALD M. FENDLASON, JUDGE

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Company f/k/a The Aetna Casualty and  
Surety Company, and Travelers Property  
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Company of Hartford (Successor  
to Transportation Insurance Company),  
and Continental Insurance Company

**BEFORE: PETTIGREW, McDONALD, and CALLOWAY,\* JJ.**

\* Judge Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

## **McDONALD, J.**

In this appeal, a chemical company challenges a judgment dismissing its third party claims against multiple insurance companies based on the trial court's finding that the chemical company had no right of action against the insurers. We affirm in part, reverse in part, and remand this matter for further proceedings.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 2012, Sidney J. Mabile, Sr. filed suit against several defendants for an asbestos-related injury he developed after working most of his life as an electrician in various shipyards and plants in south Louisiana. The named defendants included The Dow Chemical Company (Dow), and Mr. Mabile's former employers, Westgate<sup>1</sup> and its predecessor, Industrial Electrical Constructors, Inc. (IEC). During certain periods from the mid-1970s through about 1993, Mr. Mabile worked for Westgate and IEC at Dow's facility in Plaquemine, Louisiana.

After a jury trial, the jury assessed no liability to Westgate/IEC and Mr. Mabile's claims against these defendants were dismissed. The jury found Dow to be one of three defendants liable to Mr. Mabile for a total of \$5,947,193.50 in damages, and the resulting judgment assessed Dow with one-third of that total, or \$1,982,397.83, together with interest. Dow appealed the merits of the adverse judgment, but this court later dismissed that appeal after Dow settled with Mr. Mabile. **Mabile v. Anco Insulations, Inc., et al.**, 2014 CA 0965 (La. App. 1 Cir. 6/19/15) (unpublished order).

While Mr. Mabile's suit was pending, Dow filed a cross claim against co-defendant Westgate, L.L.C., as successor in interest to Westgate, Inc. and IEC (collectively, Westgate), claiming that Westgate had previously provided electrical and instrumentation services and craftsmen to Dow at its facility in Plaquemine, Louisiana; that Westgate provided such under an Agreement for Services (the Agreement) that required Westgate to indemnify Dow for any claim brought by a Westgate employee against Dow for injury related to Westgate's work on Dow's premises; and that Westgate owed Dow such indemnity for Mr. Mabile's asbestos-related claim.

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<sup>1</sup> Mr. Mabile's petition named "Westgate" as a defendant without specifically identifying whether the reference was to Westgate, L.L.C. or to Westgate, Inc.

Dow also filed a third party petition against multiple purported insurers of Westgate, including Transportation Insurance Company, National Fire Insurance Company of Hartford, and Continental Insurance Company (collectively, Continental); and against Fidelity and Guaranty Insurance Underwriters, Inc., United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Company, Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company, and Travelers Property Casualty Company of America f/k/a The Travelers Indemnity Company of Illinois (collectively, Travelers). Dow alleged that these insurers issued policies to Westgate during relevant times that provided coverage for Mr. Mabile's claims. Dow also alleged that it was an additional insured under the relevant policies.

Continental and Travelers each filed an exception raising the objection of no right of action to Dow's third party claims against it.<sup>2</sup> The insurers argued that Dow had no right of action to sue them directly, because Dow's claims were based solely on its Agreement with Westgate, and were not based on Dow's status as an injured tort victim, as was required for it to proceed under Louisiana's Direct Action Statute, LSA-R.S. 22:1269. In response, Dow argued that the Direct Action Statute was not limited to plaintiffs with tort claims; that Dow's contractual indemnity claim was incidental to Mr. Mabile's tort claim; and, alternatively, that Dow had a right to proceed directly against the insurers as an additional insured or as a third party beneficiary under the respective policies. The order granting Dow's motion to file the cross claim and third party petition provided that the trial of these claims was severed from the trial of the main demand – Mr. Mabile's tort suit.

After a hearing on October 3, 2014, the trial court signed a judgment on October 17, 2014, sustaining Continental and Travelers' exceptions of no right of action. The judgment provided that *all* of Dow's third party claims against Continental were dismissed, and that all of Dow's third party claims against Travelers *under the Direct Action Statute* were dismissed. Travelers filed a separate motion for partial summary judgment seeking a determination that Dow did not qualify as an additional insured

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<sup>2</sup> By order dated October 17, 2014, the trial court deemed Travelers' exception of no right of action to also have been filed by Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company, which had also been named as a defendant in Dow's original third party petition.

under any of the Travelers policies issued to Westgate. A hearing was held on the motion for summary judgment on November 6, 2014. Thereafter, on December 2, 2014, the trial court granted Travelers' motion for partial summary judgment. Dow did not appeal that judgment.

In the instant appeal, Dow challenges the dismissal of its claims against Continental and Travelers. In a related appeal, 2016 CA 0576, also decided this day, Dow challenges an earlier judgment signed on June 12, 2014, granting similar exceptions of no right of action filed by other insurers.<sup>3</sup> After the appeals were lodged, this court granted Dow's motion to have the two appeals assigned to the same panel and on the same docket.

In its appeal, Dow makes the following assignments of error.

1. The District Court erred as a matter of law when it held that Dow has no right of action under the Louisiana Direct Action Statute against the insurers when this matter unquestionably arises out of a personal injury suit filed by Mr. Mabile.
2. The District Court erred as a matter of law in holding that Dow has no right of action against the insurers as additional insureds under their policies.
3. The District Court erred as a matter of law in holding that Dow has no right of action against the insurers as [a] third-party beneficiar[y] of their contracts of insurance with Westgate.

### **THE STANDARD OF REVIEW**

A peremptory exception of no right of action is designed to determine whether the plaintiff has a real and actual interest in the action. **Hood v. Cotter**, 2008-0215 (La. 12/2/08), 5 So.3d 819, 829; La. C.C.P. art. 927(A)(6). Except as otherwise provided by law, an action can only be brought by a person having a real and actual interest which he asserts. La. C.C.P. art. 681. Whether a plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed de novo on appeal. **OXY USA Inc. v. Quintana Production Co.**, 2011-0047 (La. App. 1 Cir. 10/19/11), 79 So.3d 366, 376, writ denied, 2012-0024 (La. 3/2/12), 84 So.3d 536. Where doubt exists regarding the appropriateness of an exception of no right of action, it is to be resolved

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<sup>3</sup> The June 12, 2014 judgment granted exceptions of no right of action filed by Bituminous Casualty Company, Great American Alliance Insurance Company, Gray Insurance Company, and Sentry Insurance Company.

in favor of finding a right of action. See Rebel Distributors Corp., Inc. v. LUBA Workers' Comp., 2013-0749 (La. 10/15/13), 144 So.3d 825, 833.

### **ASSIGNMENT OF ERROR NO. 1**

In this assignment of error, Dow asserts that the district court erred as a matter of law when it held that Dow has no right of action under the Louisiana Direct Action Statute against Continental and Travelers when this matter unquestionably arises out of a personal injury suit filed by Mr. Mabile.

The Direct Action Statute extends a conditional right to file suit, to some parties under some circumstances. An injured party obtains a right of action against another person's insurance company only if all the requirements of the Direct Action Statute have been fulfilled. **Perkins v. Carter**, 2009-673 (La. App. 5 Cir. 12/29/09), 30 So.3d 862, 866.

The Direct Action Statute was created to correct the injustice created by insurers' avoidance of tort victims' direct suits by the use of "no action" clauses in insurance policies. **Quinlan v. Liberty Bank and Trust Co.**, 575 So.2d 336, 350-351 (La. 1990), on rehearing (La. 1991). The Direct Action Statute was enacted to give special rights of action to injured tort victims. **Arrow Trucking Co. v. Continental Ins. Co.**, 465 So.2d 691, 700 (La. 1985). The Direct Action Statute is a mandate for a tort victim to bring a direct suit to recover damages for personal injury or corporeal property damage from the tortfeasor's insurer. **Quinlan**, 575 So.2d at 352. The Direct Action Statute provides that "[t]he injured person or his survivors . . . shall have a right of direct action against the insurer within the terms and limits of the policy." La. R.S. 22:1269(B)(1). It is well settled that the Direct Action Statute is designed to facilitate the recovery of damages *ex delicto*; it does not authorize a direct action based solely on a breach of contract. **Quinlan**, 575 So.2d at 352. In this case, Dow is not the victim of tortious conduct, rather, Dow has been found liable as a tortfeasor.

Dow's claims allege that Westgate performed services at Dow under contract, which it asserts "obligates Westgate to defend, indemnify, and hold Dow harmless from any claim or suit brought by an IEC or Westgate employee against Dow for any injury. . . related to any work performed by IEC or Westgate on Dow's premises." After a *de*

*novo* review, we find that Dow's claims are based in contract; not tort, thus the Direct Action Statute does not provide a right of action to Dow against Continental and Travelers, and we affirm that portion of the judgment.

### **ASSIGNMENT OF ERROR NO. 2**

In this assignment of error, Dow asserts that the district court erred as a matter of law in holding that Dow has no right of action against Continental and Travelers as an additional insured under their policies.

We need not address the issue of whether Dow was an additional insured under Travelers policies issued to Westgate, as the trial court granted Travelers' motion for partial summary judgment on December 2, 2014, finding that Dow did not qualify as an additional insured under any of the Travelers policies issued to Westgate, and Dow did not appeal that judgment, which is now final.

In regards to whether Dow was an additional insured under Continental's policies issued to Westgate, there was no evidence entered into the record at the hearing on the exceptions of no right of action, such as the insurance policy issued to Westgate by Continental. Generally, evidence supporting or controverting an exception of no right of action is admissible; in the absence of evidence, however, the factual averments in the pleadings are taken as true. See La. C.C.P. art. 931. **Niemann v. Crosby Development Co., L.L.C.**, 2011-1337 (La. App. 1 Cir. 5/3/12), 92 So.3d 1039, 1046. The party raising the exception bears the burden of proving that the plaintiff has no right of action to proceed with his claim. **Falco Lime, Inc. v. Plaquemine Contracting Co., Inc.**, 1995-1784 (La. App. 1 Cir. 4/4/96), 672 So.2d 356, 359.

Dow's claim that it is an additional insured under the insurer's policies is set forth in its third party petition, as amended, as follows:

The insurer defendants issued insurance policies to Westgate in the 1970's, 1980's and 1990's that provide insurance coverage, including assumed contractual liability insurance, to Dow and Westgate for the claims asserted by plaintiff in the principal demand. *Dow is an additional insured under the insurance policies issued by the insurer defendants for the losses sustained by Dow described herein* including the attorney's fees, litigation expenses, expert witness fees and any defense costs expended by Dow in defense of the principal demand. Additionally, the insurer defendants provide insurance coverage for any settlement reached by Dow for the claims asserted in the main demand and coverage for any adverse judgment or verdict entered against Dow on the main demand.

(Emphasis added.)

Accepting Dow's allegations as true, we must determine whether Continental bore its burden of proving that Dow was not an additional insured under its policies. At the hearing on the exceptions, Continental's counsel referenced exhibits, but did not offer those exhibits into evidence at the hearing. Continental's insurance policies are not attached to its exception as it appears in the appellate record, and the designation of the record on appeal by Dow does not include Continental's insurance policies.

Thus, in the absence of proof that Dow was not named as an additional insured under any applicable Continental insurance policies and resolving doubt in favor of a right of action, we accept Dow's allegations as true. Thus, after a *de novo* review, we reverse that portion of the trial court judgment sustaining the exception of no right of action and dismissing Dow's additional insured claims against Continental.

### **ASSIGNMENT OF ERROR NO. 3**

In this assignment of error, Dow asserts that the district court erred as a matter of law in holding that Dow has no right of action against Continental as a third party beneficiary of its contract of insurance with Westgate.

As noted above, there was no evidence entered into the record, such as the insurance policy issued to Westgate by Continental. In the absence of proof that Dow was not named as an additional insured under any applicable Continental policy and resolving doubt in favor of a right of action, we accept Dow's allegations as true. Thus, after a *de novo* review, we reverse that portion of the trial court judgment sustaining the exception of no right of action and dismissing Dow's third party beneficiary claims against Continental.

### **CONCLUSION**

For the above reasons, the October 17, 2014 judgment is affirmed in part and reversed in part. The judgment is affirmed insofar as it dismissed The Dow Chemical Company's claims under the Direct Action Statute against Fidelity and Guaranty Insurance Underwriters, Inc., United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Company, and Travelers Property Casualty Company of America

f/k/a The Travelers Indemnity Company of Illinois and Transportation Insurance Company, National Fire Insurance Company of Hartford, and Continental Insurance Company.

The judgment is reversed insofar as it dismissed The Dow Chemical Company's claims as an additional insured or third party beneficiary under policies issued by Transportation Insurance Company, National Fire Insurance Company of Hartford, and Continental Insurance Company. The matter is remanded for further proceedings. Costs of this appeal are assessed one-half against The Dow Chemical Company and one-half against Transportation Insurance Company, National Fire Insurance Company of Hartford, and Continental Insurance Company.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**