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NO. COA01-293

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

PEERLESS INSURANCE,
Plaintiff,

v.

Caldwell County
No. 99 CVS 1703

SHIRLEY ANN CORNETT, MICHAEL
CORNETT, JACK CORNETT AND
GRANITE HOMES, INC.,
Defendants.

Appeal by defendants from order entered 11 December 2000 by Judge Claude S. Sitton in Caldwell County Superior Court. Heard in the Court of Appeals 11 February 2002.

Morris York Williams Surles & Barringer, LLP, by Gregory C. York, for plaintiff appellee.

Cannon & Correll, P.A., by J. Michael Correll, for Michael Cornett, Jack Cornett and Granite Homes, Inc., defendant appellants.

Wilson, Palmer, Lackey & Rohr, P.A., by Timothy J. Rohr, for Shirley Ann Cornett defendant appellant.

McCULLOUGH, Judge.

On 30 June 1998, defendant Shirley Ann Cornett was seriously injured when a car driven by Michael Cornett struck and ran over her. The accident occurred in the parking lot of Granite Homes, Inc. (Granite Homes), a North Carolina corporation located in Caldwell County, North Carolina. Jack Cornett was the President of

Granite Homes, and also operated a separate proprietorship known as Jack W. Cornett d/b/a Jack W. Cornett Mobile Home Movers (Mobile Home Movers). At the time of the accident, Ms. Cornett was an employee of Granite Homes, and Michael Cornett was an employee of Mobile Home Movers. After the accident, Ms. Cornett filed a civil lawsuit against Michael Cornett, the driver of the car (and alleged tortfeasor) and Jack Cornett, alleging that she sustained personal injury as a proximate result of their negligence.

Some time before the accident, Jack Cornett purchased a liability insurance policy for Granite Homes. The policy, number BA 9234575, was issued by plaintiff Peerless Insurance (Peerless) and was in effect from 3 June 1998 to 3 June 1999, a period which encompassed Ms. Cornett's accident on 30 June 1998. Though the policy was issued by Peerless Insurance, the paperwork was done at Hudson Insurance Agency in Hudson, North Carolina. Pursuant to the policy and the North Carolina Financial Responsibility Act, N.C. Gen. Stat. § 20-279.1 (1999), Peerless paid Ms. Cornett \$25,000.00 for injuries she sustained in the accident. In return, Ms. Cornett executed a covenant not to sue in favor of Granite Homes. When Ms. Cornett later sought additional money beyond the \$25,000.00 already paid, Peerless refused to pay, citing the following exclusion contained in the policy:

B. EXCLUSIONS

This insurance does not apply to any
of the following:

. . . .

5. FELLOW EMPLOYEE

"Bodily injury" to any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business.

On 21 October 1999, Peerless filed a request for declaratory judgment, asking the trial court to determine its liability under insurance policy BA 9234575. Peerless maintained (1) that its \$25,000.00 payment to Ms. Cornett satisfied its duties under the North Carolina Financial Responsibility Act, N.C. Gen. Stat. § 20-279.1 (1999); and (2) that Ms. Cornett fell within a policy exclusion because she was an "employee" of the "insured" who suffered "bodily injury." Specifically, Peerless asked the trial court for the following remedies:

1. That the Court enter a declaratory judgment that Plaintiff insurer has no further obligations, liability, or duty to defend, pursuant to Policy Number BA 9234575, regarding the damages complained of in 99-CVS-788 or any other alleged damages or injuries sustained by the Defendant SHIRLEY ANN CORNETT arising out of the accident of June 30, 1998;

2. That the Court stay the proceedings in 99-CVS-788 until such time as a decision has been rendered regarding the Plaintiff insurer's action for declaratory judgment;

3. That all issues of fact be tried by a jury; and

4. For such other and further relief as the Court deems just and proper.

On 12 November 1999, Ms. Cornett answered Peerless' request

for declaratory judgment. In her answer, she denied that the policy insured Granite Homes, denied that the employee exclusion applied to her, and denied that the policy did not cover bodily injury of the type she suffered on 30 June 1998. However, Ms. Cornett admitted she was employed by Granite Homes on 30 June 1998 and that Peerless had already paid her \$25,000.00 for her injuries. Defendants Michael Cornett, Jack Cornett, and Granite Homes filed an answer on 10 January 2000; their answer mirrored the aforementioned statements made by Ms. Cornett.

On 12 June 2000, Peerless filed a motion for summary judgment. Ms. Cornett filed a response asserting her right to recovery and denying that Granite Homes was involved with the lawsuit or with the underlying accident. Defendants Michael Cornett, Jack Cornett, and Granite Homes adopted Ms. Cornett's response as their own when they filed their response to Peerless' motion for summary judgment on 11 July 2000. On 3 August 2000, defendants collectively filed their own motion for summary judgment, along with a portion of the insurance policy and an affidavit from Jack Cornett. The affidavit stated that policy BA 9234575 was issued to Mobile Home Movers, not Granite Homes, and was the only policy insuring Mobile Home Movers. He also clarified that Mobile Home Movers was a separate entity from his other business, Granite Homes.

On 14 August 2000, Peerless answered defendants' motion for summary judgment and attached several documents, including the entire insurance policy, certification of the policy from Peerless' Underwriting Department, and an affidavit from Ms. Shirley Walker,

the office manager of Hudson Insurance Agency, who dealt with the Peerless policy issued to Jack Cornett. Ms. Walker's affidavit stated that the policy was originally issued to Mobile Home Movers. However, on 8 June 1998, Ms. Cornett requested that the insured's name be changed from Mobile Home Movers to Granite Homes. Ms. Walker's affidavit further stated that the change was made, and Granite Homes remained the named insured on the policy until 16 December 1998, when Ms. Walker was instructed to change the named insured back to Mobile Home Movers. Attached to Ms. Walker's affidavit were two exhibits, which included a memo from Hudson Insurance Agency. Ms. Walker attested she wrote a notation on that memo, which read:

Amend name to read Jack Cornett DBA
Cornett Mobile Home Movers -- changed to
Granite Homes Inc. by mistake -- Thank you.
/s/ Shirley Walker.

The effective date of the change was 16 December 1998.

After considering the parties' cross-motions for summary judgment, the trial court entered an order on 11 December 2000 denying defendants' motion for summary judgment and granting summary judgment in favor of plaintiff. All defendants filed written notice of appeal on 21 December 2000.

In their sole assignment of error, defendants challenge the trial court's grant of summary judgment in favor of Peerless. After careful review of the proceedings below, we affirm the decision of the trial court.

"The purpose of Rule 56 is to provide an expeditious method of

determining whether a genuine issue as to any material fact actually exists, and if not, whether the moving party is entitled to judgment as a matter of law." *Schoolfield v. Collins*, 12 N.C. App. 106, 108-09, 182 S.E.2d 648, 650 (1971), *rev'd on other grounds*, 281 N.C. 604, 189 S.E.2d 208 (1972). N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999) states that

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

"On appeal from an order granting summary judgment, we must review the pleadings, affidavits and all other materials produced by the parties at the summary judgment hearing to determine whether there existed any genuine issue of fact and whether one party was entitled to judgment as a matter of law." *Bradley v. Wachovia Bank & Trust Co.*, 90 N.C. App. 581, 582, 369 S.E.2d 86, 87 (1988). See also *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. review denied*, 354 N.C. 371, 555 S.E.2d 280 (2001).

We note that

[a]n issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action."

Carolina Place Joint Venture v. Flamers Charburgers, Inc., 145 N.C. App. 696, 698, 551 S.E.2d 569, 571 (2001) (citations omitted).

"The party moving for summary judgment has the burden of

establishing the absence of any triable issue of fact. [The materials offered to support his motion] are meticulously scrutinized and all inferences are resolved against him." *Boyce v. Meade*, 71 N.C. App. 592, 593, 322 S.E.2d 605, 607 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 390 (1985). See also *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). "The movant may meet its summary judgment burden by showing either (1) an essential element of the non-movant's claim is nonexistent, or (2) the non-movant cannot produce evidence to support an essential element of his claim." *Dalton Moran Shook Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 714, 440 S.E.2d 585, 590 (1994). Finally, "[i]n construing insurance policies, the burden is on the insured to show coverage. If the insurer relies on a clause of the policy which excludes coverage, the burden is on the insurer to establish the exclusion." *Insurance Co. v. McAbee*, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966). With these principles in mind, we turn to the case at hand.

Peerless first moved for summary judgment and based its motion on the pleadings and the language of policy BA 9234575. The pleadings included Ms. Cornett's 12 November 1999 answer to Peerless' request for declaratory judgment. In that answer, Ms. Cornett stated

8. It is admitted that at the time of the accident which gives rise to 99-CVS-788, this answering defendant was an employee of Granite Homes, Inc. and that she sustained personal injuries on June 30,

1998.

The pleadings also contained an undisputed statement that Ms. Cornett suffered bodily injury as a result of the accident on 30 June 1998. Thus, the only potential issue of material fact was the identity of the insured at the time of the accident.

Defendants made their own motion for summary judgment on 3 August 2000. In support of their motion, defendants presented the affidavit of Jack Cornett, as well as a portion of the insurance policy. Peerless answered defendants' motion for summary judgment by presenting the affidavit of Ms. Walker, the entire insurance policy, and certification of the policy from Peerless' Underwriting Department. Thus, at the time the trial court made its determination regarding summary judgment, it had before it the policy, as well as supporting documents from both parties.

The insurance policy showed that the initial insured party was Mobile Home Movers, but that the insured was changed to Granite Homes on 8 June 1998. The policy remained in the name of Granite Homes until 16 December 1998, when it was changed again, this time in favor of Mobile Home Movers. Based on this evidence, Granite Homes was the named insured on 30 June 1998, the date of the accident. The policy and the other documents tendered by the parties showed that Ms. Cornett suffered bodily injury on 30 June 1998, and that she was an employee of Granite Homes at that time. The policy and documents also showed that Granite Homes was the named insured at the time of the accident, such that Ms. Cornett fell under the policy's exclusion and was not entitled to further

recovery. The sum total of the evidence left no genuine issue of material fact, and summary judgment was properly entered in favor of Peerless, because it carried the burden of proving the existence of a policy exclusion. See *McAbee*.

Based on the foregoing, we believe the trial court correctly granted summary judgment in this case. We have carefully reviewed the remaining arguments of defendants and find them to be without merit. The trial court's order granting summary judgment in favor of Peerless Insurance is therefore

Affirmed.

Chief Judge EAGLES and Judge BIGGS concur.

Report per Rule 30(e).