

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-983

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY,
Plaintiff

v.

Mecklenburg County
No. 00 CVS 4991

MELISSA KINGS and ALLSTATE
INSURANCE COMPANY,
Defendants

Appeal by plaintiff from judgment entered 3 June 2001 and filed 6 June 2001 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 April 2002.

Golding, Holden, Pope & Baker, L.L.P., by Robert J. Aylward, for plaintiff-appellant.

Morris York Williams Surlles & Barringer, LLP, by Stephen Kushner, for defendant-appellee Allstate Insurance Company.

No brief filed by defendant Melissa Kings.

WALKER, Judge.

On 22 May 1998, Melissa Kings was injured while riding as a passenger in a vehicle being operated by Cassandra Reid with the permission of its owner, Diamond Chevrolet-Geo, Inc. (Diamond). Ms. Kings sued Ms. Reid and Diamond for her injuries. Universal Underwriters Insurance Company (Universal) defended Diamond in the action while Allstate Insurance Company (Allstate) defended Ms. Reid.

When a dispute arose between Universal and Allstate over coverage in that action, Ms. Kings filed the present declaratory judgment action against Universal and Allstate to determine the rights of the parties. The petition alleged the following in part:

11. A civil action was filed by the Petitioner [Ms. Kings] against Cassandra Reid on December 4, 1998 seeking to recover for personal injuries sustained in the accident. (98 CVS 17484 - Mecklenburg County)

12. There is a dispute between the respondents [Universal and Allstate] as to which insurance policy, if any, provides coverage to Ms. Reid or the automobile she was driving. There is also a controversy over whether the umbrella policy of the Respondent, Universal Underwriters Insurance Company, provides coverage for the benefit of the Petitioner [Ms. Kings].

On 16 January 2001, the trial court granted a motion to realign the parties such that Universal became the plaintiff in the case and Ms. Kings and Allstate became the defendants. On 22 June 2001, the trial court granted summary judgment in favor of defendant Allstate in the declaratory judgment action. Subsequent to this grant of summary judgment, Universal settled the underlying action with Kings on behalf of Reid and Diamond.

Our State has consistently held that "an actual controversy between the parties is a jurisdictional prerequisite" to a declaratory judgment action. *Calton v. Calton*, 118 N.C. App. 439, 442, 456 S.E.2d 520, 522, *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 506 (1995) (*citing Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986)). Therefore, a declaratory judgment action must either have litigation pending or

it must appear unavoidable. *Id.* Where there is no such litigation, there is no actual controversy and the courts have no jurisdiction to hear the case. Thus, the underlying action between Ms. Kings and defendants Ms. Reid and Diamond would be critical in being able to pursue this declaratory judgment action.

Here, the petition for declaratory judgment specifically related back to the action by Ms. Kings against Ms. Reid, Diamond, Universal and Allstate. Because the underlying action has been settled, the question of whether either Universal or Allstate are required to pay the damages assessed in the underlying action is now moot. There is nothing in the record to show that the settlement of the claim reserved rights as to any of the parties to the declaratory judgment action or left issues of coverage pending.

Our Supreme Court has held "[i]f the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." *Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (quoting *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994)).

Because the declaratory judgment action has been rendered moot by the settlement of the underlying case, this appeal is

Dismissed.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).