NO. COA05-1043

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

SHELBY INSURANCE COMPANY,
Plaintiff,

v.

Mecklenburg County
No. 02 CVS 10490

ETHEL GOODWIN, ADMINISTRATRIX OF The Estate of JAMES WALTON, SIMON LAREDO MANCILLA, R. SIERRA CONSTRUCTION, INC., SANDRA SIERRA and RODOLFO Sierra, individually and d/b/a R. SIERRA CONSTRUCTION,
Defendants.

Appeal by defendant Goodwin from judgment entered 27 April 2005 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 February 2006.

Hill, Evans, Duncan, Jordan & Beatty, PLLC, by Polly D. Sizemore and Joseph P. Gram, for plaintiff-appellee.

Fraim & Fiorella, by Edward A. Fiorella, Jr., for defendant-appellant.

STEELMAN, Judge.

Plaintiff initiated this declaratory judgment action seeking a declaration that the insurance policy it issued to Rodolfo Sierra, d/b/a R. Sierra Construction, owned by Rodolfo and Sandra Sierra, did not provide coverage for an automobile accident involving a truck owned by R. Sierra Construction, and driven by an employee of R. Sierra Construction. Plaintiff subsequently

determined that the correct name of Rodolfo Sierra's business was R. Sierra Construction, Inc., and it moved to reform its policy to include the correct name. The trial court allowed this amendment, and ruled that the policy did not provide coverage for the accident involving the truck and employee of R. Sierra Construction, Inc. We affirm.

R. Sierra Construction, Inc. (business) was incorporated in the State of North Carolina on 3 July 1997. It is the only business ever owned by defendant Rodolfo Sierra (Sierra). Sierra met with John Melius (Melius) of JEMCO Insurance in November of 1997 for the purpose of procuring insurance coverage for the business. JEMCO is an independent insurance agency representing several insurance companies, including plaintiff. On 7 November 1997, Sierra signed a commercial insurance application completed based on information that he provided to Melius. On this application, the name of the business was incorrectly listed as "R. Sierra Construction, Rodolfo Sierra DBA." JEMCO then completed an artisan package program application specifically for plaintiff with the information contained in the commercial insurance application. This program application listed the business name as "R. Sierra Construction." Based on this application, plaintiff issued a commercial artisan policy to "R. Sierra Construction, an individual business," providing general liability coverage. This policy did not cover bodily injury or property damage "arising out of the ownership, maintenance, use or entrustment to others of any ... auto ... owned or operated by or rented or loaned to any insured."

Plaintiff subsequently received a commercial policy change request form from JEMCO dated 23 January 1998 requesting that the named insured under the policy be amended to "Rodolfo Sierra DBA R. Sierra Construction." This amendment was endorsed on 24 March 1998, retroactively effective to 26 November 1997.

On 8 August 1998, a van owned by R. Sierra Construction, Inc. and driven by Simon Mancilla, an employee of the business, struck a vehicle driven by James Walton. Walton was seriously injured, and died in early 2002, apparently as a result of injuries sustained in the accident. Mancilla was convicted of driving while impaired in connection with the accident. The van driven by Mancilla was insured pursuant to a policy issued to Sandra Sierra by Nationwide Mutual Insurance Company. The Nationwide policy is not implicated in this action.

Prior to his death, Walton filed an action against Mancilla, R. Sierra Construction, Inc., and Rodolfo and Sandra Sierra for monetary damages arising out of injuries received in the accident. After having been advised of the lawsuit, plaintiff informed Sierra that the policy provided by plaintiff did not cover automobile related accidents, and therefore would not cover damages resulting from the accident. This initial action was voluntarily dismissed by Walton without prejudice on 1 June 2000. The action was re-filed on 20 February 2001, and defendants did not file an answer. Default judgment was entered against Mancilla on 14 December 2001. On 18 April 2002, the complaint was amended to include a claim for wrongful death as a result of Walton's death, and to substitute the

administratrix of Walton's estate as plaintiff. On that same date, consent judgment was entered against the Sierras and the business in the amount of $1,000,001.00. This consent judgment limited the personal liability of the Sierras and the business to $25,000.00, but did not prevent Walton's estate from pursuing "any available insurance proceeds." The judgment further stated: "nothing in this judgment shall prevent Plaintiff from pursuing collection and/or judgment against the Shelby Insurance Company, its assigns, heirs, parents, subsidiaries and/or its successors in interest...."

Plaintiff filed this declaratory judgment action on 30 May 2002. The complaint requested that the trial court declare the policy issued by plaintiff to the Sierras' construction company did not provide coverage for the claims of Walton or his estate (defendant). Plaintiff subsequently filed a motion to amend its complaint to seek reformation of the insurance policy based on mutual mistake. Plaintiff sought reformation of the policy to include the correct name of the Sierras' business, R. Sierra Construction, Inc. This motion was granted by order filed 11 August 2003. Plaintiff filed its amended complaint on 13 August 2003. The case was heard before Judge Johnston, sitting without a jury, on 17 and 18 May 2004. The trial court filed judgment on 27 April 2005 declaring that plaintiff's policy issued to R. Sierra Construction, Inc. did not provide coverage for the automobile accident of 8 August 1998. The judgment set forth specific findings of fact and conclusions of law. From this judgment, defendant appeals.

In defendant's first argument, she contends that the trial court erred in ruling that plaintiff's attempt to reform the insurance contract was not barred by the statute of limitations. We disagree.

"[T]his Court's scope of review on appeal is limited to a consideration of those assignments of error set out in the record on appeal . . . . N.C.R. App. P. 10(a) (1994); *see also* N.C.R. App. P. 28 (1994)." *Wiggins v. Triesler Co.*, 115 N.C. App. 368, 370-71, 444 S.E.2d 245, 246 (1994). Defendant bases her argument on her first two assignments of error, which state in full: "1. The Trial Court's conclusion regarding when the statute of limitations commenced is contrary to the law and evidence." And: "2. Shelby Insurance Company's attempt to reform the contract is barred by the statute of limitations." We first note that neither of these assignments of error specifically excepts to any of the trial court's findings of fact, and they are thus binding on appeal. *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). Additionally, defendant does not assign as error any failure on the part of the trial court to make material findings of fact. *Lamond v. Mahoney*, 159 N.C. App. 400, 407, 583 S.E.2d 656, 661 (2003). We are therefore limited on appeal to determining whether the trial court's findings of fact support its conclusion of law that "The statute of limitations does not bar the reformation claim as the statute did not begin to run until Shelby learned of the mutual mistake on April 2, 2003. The motion was filed June 16, 2003,

granted August 11, 2003 and filed August 13, 2003 before the statute of limitations expired."

The relevant statute of limitations is three years as found in N.C. Gen. Stat. § 1-52(9) (2004) ("For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."). The trial court's findings of fact state that plaintiff first learned of the mistake concerning the name of the business at the depositions of Rodolfo and Sandra Sierra on 2 April 2003; that plaintiff moved to amend its complaint to assert reformation of the policy on 16 June 2003; and that the order allowing this motion to amend was filed on 13 August 2003. These findings of fact, which are binding on appeal, support the trial court's conclusion of law that the three year statute of limitations did not bar the reformation of the policy. This argument is without merit.

In her second argument, defendant contends that the mistake in the name on the policy was unilateral, not mutual, and that a unilateral mistake is insufficient to warrant reformation of the policy. We disagree.

The assignment of error upon which this argument is based reads as follows: "Unilateral mistake on the part of Shelby Insurance Company is insufficient to warrant reformation of the contract." This purported assignment of error merely states defendant's legal argument; it does not point to any alleged error on the part of the trial court. It preserves nothing for appellate

review. N.C. R. App. P. Rule 10(c)(1). Further, defendant did not assign as error the trial court's conclusions of law stating: "Based on the clear, cogent and convincing evidence presented, the mistake as to the name of the business insured under the Shelby policy was a mutual mistake as both parties believed they were contracting to insure the framing business operated by Rodolfo Sierra as of November, 1997 and located at 219 Union Road, Matthews, North Carolina." And: "The intent of the parties was to insure R. Sierra Construction, Inc. and reformation is necessary to give effect to the parties' intent." These conclusions of law are therefore not before us for appellate review, and are binding. *Wiggins*, 115 N.C. App. at 370-71, 444 S.E.2d at 246.

Assuming *arguendo* that this argument was properly preserved for appellate review, it still fails. The unchallenged findings of fact in this case state that plaintiff first learned of the mistake involving the business name at the 2 April 2003 depositions of Rodolfo and Sandra Sierra; that Rodolfo Sierra's intent had been to insure R. Sierra Construction, Inc.; that there was no such business as Rodolfo Sierra d/b/a R. Sierra Construction; and that Rodolfo Sierra signed a commercial insurance application requesting insurance for "R. Sierra Construction, Rodolfo Sierra DBA", which was provided to plaintiff. The findings of fact further state that it was the intent of plaintiff to insure Rodolfo Sierra's construction business, and that R. Sierra Construction, Inc. was the only business Rodolfo Sierra ever owned. These findings of fact support the trial court's conclusions of law, stated above,

that the mistake concerning the name of the business was a mutual mistake, and that plaintiff did not discover this mistake until 2 April 2003. These findings of fact and conclusions of law support the judgment of the trial court allowing reformation of the insurance policy to list the insured as R. Sierra Construction, Inc. As defendant has not challenged by any assignment of error in the record that portion of the trial court's judgment declaring that the policy, as reformed, does not provide coverage for the automobile accident of 8 August 1998, it stands. *Wiggins*, 115 N.C. App. at 370-71, 444 S.E.2d at 246. This argument is without merit.

We further note that defendant attempts to argue additional issues not made assignments of error in the record. These issues are not properly before this Court, and have been abandoned. *Id.* In light of our resolution of defendant's arguments, we do not address plaintiff's cross-assignment of error.

AFFIRMED.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).