NO. COA07-1317

NORTH CAROLINA COURT OF APPEALS

Filed: 21 July 2009

ALLSTATE INSURANCE COMPANY,

Plaintiff,

v.

Mecklenburg County
No. 05 CVS 12239

DONALD L. SHERRILL, BARBARA SHERRILL, EDGEWATER SERVICES, INC., LUCINDA DOSHER, EPIC LOGISTICS, INC., and JOLIE OSGOOD a/k/a JOLI A. OSGOOD,

Defendants.

Appeal by plaintiff from an order entered 27 March 2007 by Judge Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2008.

York, Williams, Barringer, Lewis & Briggs, L.L.P., by John P. Barringer and Angela M. Easley, for plaintiff-appellant.

Poyner & Spruill LLP, by Patrick J. Fogarty, for defendants-appellees.

JACKSON, Judge.

Allstate Insurance Company ("plaintiff") appeals the trial court's denial of its motion for summary judgment and the granting of the motion for summary judgment brought by Donald L. and Barbara Sherrill, and their company, Epic Logistics, Inc. ("defendants"),

declaring that plaintiff is obligated to defend and indemnify defendants in an underlying action against them. For the reasons stated below, we affirm.

On or about 14 February 2005, Edgewater Services, Inc. ("ESI") and Lucinda Dosher ("Dosher") filed a lawsuit ("the underlying suit") in Wake County Superior Court against defendants and Jolie Anne Osgood ("Osgood"). Defendants owned two insurance policies – a general homeowner's policy and a personal liability umbrella policy. Defendants made claims against both policies seeking for plaintiff to provide a defense to the underlying suit and to indemnify them for any resulting damages.

On 7 July 2005, plaintiff brought the instant action for declaratory judgment, seeking to ascertain the extent of its obligation to defend and indemnify defendants in the underlying suit. Plaintiff alleged that the underlying suit was not covered by defendants' homeowner's policy. After defendants answered, alleging coverage pursuant to the personal liability umbrella policy, plaintiff amended its complaint, alleging that the underlying suit was covered by neither the homeowner's policy nor the personal liability umbrella policy.

The parties brought competing motions for summary judgment, which were heard on 29 January 2007. The trial court denied plaintiff's motion and granted defendants' motion, declaring that plaintiff was under an obligation to defend and indemnify defendants for claims arising out of the underlying suit.

In reviewing an order for summary judgment, this Court must make a two-step determination as to whether "(1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law." *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002) (citing *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (per curiam)). Summary judgment is appropriate 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). Here, by submitting cross-motions for summary judgment, the parties have conceded that there is no question of material fact. *See Erie Ins. Exch. v. St. Stephen's Episcopal Church*, 153 N.C. App. 709, 711, 570 S.E.2d 763, 765 (2002). Therefore, we need only determine which party is entitled to judgment as a matter of law.

The parties agree that the homeowner's policy does not provide coverage for the underlying suit. However, they disagree as to whether the personal liability umbrella policy provides coverage. In particular, the parties are concerned with the underlying claims for (1) defamation, (2) civil conspiracy, and (3) unfair and deceptive trade practices.

The personal liability umbrella policy provides in relevant part:

Coverage - When We Pay

Allstate[1] will pay when an *insured* becomes legally obligated to pay for *personal injury* or *property damage* caused by an *occurrence*.

Personal Activities

Coverage applies to an *occurrence* arising only out of:

1. personal activities of an *insured*. Activities related to any *business* or *business property* of an *insured* are not covered.

The policy also provides the following definitions:

1. "*You*" or "*Your*" – means the person named in the declarations.

. . . .

3. "*Business*" – means any full or part-time activity of any kind engaged in for economic gain. . . .

4. "*Business Property*" – means any property on which a *business* is conducted. . . .

5. "*Insured*" – means:
a) *you*, and
b) relatives residing in *your* household.

6. "*Occurrence*" – means an accident or a continuous exposure to conditions. An *occurrence* includes *personal injury*, *property damage* and *bodily injury* caused by an *insured* while trying to protect persons or property from injury or damage.

7. "*Personal Injury*" – means:
a) false arrest, false imprisonment, wrongful detention, wrongful entry, invasion of rights of occupancy, and malicious prosecution; and
b) libel, slander, misrepresentation, humiliation,

[1] All specially defined words in the insurance policy appear in bold type; we have placed those words in italics.

> defamation of character, and invasion of rights of privacy.
>
> 8. "*Property Damage*" – means physical injury to tangible property. It includes resulting loss of use. This also means loss of use of tangible property not physically injured if the loss of use is caused by an *occurrence* during the policy period.

"Donald Sherrill" and "Epic Logistics" are named in the policy declarations as insureds.

The policy specifically excludes from coverage "any act, or failure to act, of any person in performing functions of that person's *business*[,]" as well as "any *occurrence* arising out of a *business* or *business property*." Further,

> This policy will not apply:
>
> . . . .
>
> 8. To any intentionally harmful act or omission of an *insured*, even if:
>
> a) the *personal injury*, *property damage* or *bodily injury* resulting from the act or omission occurs to a person or property other than the person or property to whom the act or omission was intended or is of a different nature or magnitude than was intended; or
>
> b) the *insured* lacks the mental capacity to govern his or her own conduct if the act or omission is substantially certain or probably certain to cause *personal injury*, *property damage* or *bodily injury*.

Originally, this exclusion included a statement that it did not apply to parts of the definition of "personal injury" including the intentional torts listed in section 7(b) above. However, the exclusion was amended by a policy endorsement such that this

additional language was not incorporated into the exclusion applicable to defendants' policy.

Plaintiff argues that the acts or omissions alleged in the underlying suit do not fall within the policy definition of an "occurrence," and that even if they do, they are excluded by either the "business" exclusion or the "intentional act" exclusion. We disagree.

> In determining coverage issues, "[t]he interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction. . . . [T]he policy is subject to judicial construction only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation. In such cases, the policy must be construed in favor of coverage and against the insurer; however, if the language of the policy is clear and unambiguous, the court must enforce the contract of insurance as it is written."

Erie Ins. Exch., 153 N.C. App. at 711-12, 570 S.E.2d at 765 (alterations in original) (quoting *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 816 (1999)), *disc. rev. denied*, 351 N.C. 350, 542 S.E.2d 205 (2000).

In the instant case, the ambiguity begins with "When We Pay." The policy states that "*Allstate* will pay when an *insured* becomes legally obligated to pay for *personal injury* or *property damage* caused by an *occurrence*." It is unclear whether the phrase "caused by an occurrence" modifies only "property damage" or both "personal injury" and "property damage." Either the policy pays (1) when an insured becomes legally obligated to pay for (a) personal injury or (b) property damage caused by an occurrence, or (2) when an insured

becomes legally obligated to pay for (a) personal injury caused by an occurrence or (b) property damage caused by an occurrence. As we must resolve this ambiguity in favor of the insured, we interpret this provision to allow coverage for the former interpretation which is more favorable to the insured.

As we have determined that a claim based upon "personal injury" is not limited to those caused by an "occurrence," the "business" exclusion fails. Although coverage applies only to "personal activities" – not activities related to any business or business property – which give rise to an "occurrence," "personal injury" is not so limited. The policy excludes coverage for "any *occurrence* arising out of a *business* or *business property*." There is no similar exclusion limiting coverage when "personal injury" arises out of a business or business property.

We next address whether the "intentionally harmful act" exclusion applies. Pursuant to the terms of the policy, it does not apply to "any intentionally harmful act or omission of an *insured*[.]" In this case, the insureds are (1) Donald L. Sherrill as a named insured, (2) Barbara Sherrill as a relative residing in his household, and (3) Epic Logistics, Inc. as a named insured.

> "[W]here a third person seeks to recover from an insured on the basis of injuries or damages allegedly caused by an agent of the named insured, in the absence of a showing that the injury complained of was 'at the direction of' the named insured, a liability insurer is not relieved of its obligation to the insured by an 'intentional injury or damage' clause. . . . [A]n 'intentional injury or damage' exclusion clause does not relieve the insurer of its obligations to the 'named' insured where the injured person seeks to recover from

> the 'named' insured rather than the 'additional' insured, at least in the absence of a showing that the injurious acts were directed by the named insured."

Edwards v. Akion, 52 N.C. App. 688, 692-93, 279 S.E.2d 894, 897 (first alteration in original) (quoting 44 Am. Jur. 2d *Insurance* § 1411 (1969)), *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981) (per curiam).

Osgood is not an insured, either named or additional. It is primarily Osgood's acts for which defendants may be found liable. Pursuant to the reasoning in *Edwards*, plaintiff is not relieved of its responsibility to defend and indemnify by way of the "intentionally harmful act" exclusion.

Although some of the complaint's allegations of direct liability may not be covered by the policy, "where a complaint contains multiple theories of recovery, some covered by the policy and others excluded by it, the insurer still has a duty to defend." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 85, 323 S.E.2d 726, 730 (1984) (citing *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220 (Me. 1980)), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986).

Because the intentionally harmful acts of Osgood are not excluded by the policy, at least some of the claims in the underlying suit are covered by the policy. Therefore, the trial court was correct in granting defendants' motion for summary judgment.

Affirmed.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).