NO. COA08-1207

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

DAVID JONATHAN MILLER,

Plaintiff,

v. Wake County
No. 03 CVD 9167

PROGRESSIVE AMERICAN
INSURANCE COMPANY,

Defendant.

Appeal by plaintiff from judgment entered 11 June 2008 by Judge Robert B. Rader in Wake County District Court. Heard in the Court of Appeals 11 March 2009.

E. Gregory Stott for plaintiff.

Young Moore and Henderson P.A., by Glenn C. Raynor and Bryan G. Scott, for defendant.

ELMORE, Judge.

David Jonathan Miller (plaintiff) and Amy Miller (Amy) were involved in a two-vehicle accident on 21 December 2000. Plaintiff and Amy were in one vehicle, while Carmelo Lule Martinez and Casimiro Nino were in the other vehicle. Progressive American Insurance Company (defendant) was the automobile insurance carrier for Martinez and Nino. On 24 May 2001, Amy filed a complaint against Martinez and Nino seeking damages from the accident. A jury found for Martinez and Nino, and a judgment was entered

pursuant to the verdict on 4 June 2002. On 28 June 2002, plaintiff filed his own complaint against Martinez and Nino seeking damages from the accident. Martinez and Nino failed to appear, and a default judgment was entered against them. Defendant did not learn about plaintiff's suit against Martinez and Nino until the default judgment was entered; defendant moved to set aside the default judgment and enlarge the time to file responsive pleadings, but the trial court denied the motions.

Plaintiff then filed a separate action against defendant seeking the damages owed by Martinez and Nino pursuant to the default judgment. On 13 October 2005, the trial court ordered defendant to pay all damages awarded to plaintiff by the default judgment. Defendant appealed to this Court, and we filed an unpublished opinion (*Miller I*) on 5 December 2006 reversing the trial court's order and relieving defendant of its obligations to pay the default judgment entered against Martinez and Nino. *Miller v. Progressive Am. Ins. Co.*, 180 N.C. App. 475, 637 S.E.2d 308, 2006 WL 3490461, at *3 (2006) (unpublished). There, the Court found that the insurance policy issued by defendant to Nino was governed by Georgia law, which states that an insured's failure to send "a copy of every summons or other process relating to the coverage under the policy" will, "'if prejudicial to the insurer, relieve the insurer of its obligation to defend its insureds under the policy and of any liability to pay any judgment or other sum on behalf of its insured.'" *Miller I* at *2 (quoting Ga. Code Ann. §§ 33-7-15(a), (b) (2000)). We further held that plaintiff had not

presented evidence showing that there was a genuine issue for trial, and, therefore, Martinez's and Nino's failure to inform defendant of plaintiff's lawsuit was prejudicial to defendant. As such, this Court ordered that defendant "is entitled to summary judgment and is relieved of its obligations under the policy to pay the default judgment entered against Martinez and Nino." *Miller I* at *3.

On 29 February 2008, the trial court granted defendant's motion for entry of judgment pursuant to this Court's ruling. Plaintiff then moved that the trial court vacate and set aside its order. On 11 June 2008, plaintiff's motion was denied by the trial court. Plaintiff appeals to this Court. For the reasons stated below, we affirm the trial court's order.

ARGUMENTS

I.

Plaintiff argues that the trial court erred by holding in its summary judgment order that defendant "affords no liability coverage for and has no duty to defend against any bodily injury claims asserted by plaintiff." We disagree.

Summary judgment is appropriate when

> 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. . . . The standard of review for summary judgment is de novo.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quotations and citations omitted).

Plaintiff argues that this Court's holding in *Miller I* relieved defendant only of its duty to pay the default judgment entered against Martinez and Nino, but did not relieve defendant of its duty to defend Martinez and Nino. As such, plaintiff argues that the trial court's order granting summary judgment should be reversed. Plaintiff's argument is without merit for several reasons.

First, this Court's holding in *Miller I* specifically stated that defendant was "entitled to summary judgment," and we remanded the case to the trial court "for the entry of summary judgment in favor of defendant." *Miller I* at *3. "Upon appeal our mandate is binding upon [the district court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended." *Crump v. Board of Education*, 107 N.C. App. 375, 378-79, 420 S.E.2d 462, 464 (1992) (quotations and citations omitted). As such, the trial court properly entered summary judgment in accordance with this Court's ruling in *Miller I*, and the precise explanation that the trial court employed is not dispositive as to whether the summary judgment order is valid.

Second, the fact that this Court specifically stated in *Miller I* that defendant had no obligation to pay the default judgment – which was the primary issue to be decided on appeal – does not support his argument via the principle of *expressio unius est exclusio alterius*, as plaintiff argues. By relieving defendant of

one particular duty in *Miller I*, we did not hold that defendant still would have to perform another duty that necessarily was disposed of by Georgia statute. In *Miller I*, where our holding was based explicitly on Georgia Code § 33-7-15, this Court stated:

> The Georgia Code requires insurers issuing automobile liability insurance policies covering vehicles principally garaged or used in this state to include in their policies a provision requiring the "*insured to send his insurer, as soon as practicable after the receipt thereof, a copy of every summons or other process relating to the coverage under the policy* and to cooperate otherwise with the insurer in connection with the defense of any action or threatened action covered under the policy."

Miller I at *2 (quoting Ga. Code Ann. § 33-7-15(a) (2000)) (emphasis added). The policy between defendant and Nino had such a provision, but Nino failed to inform defendant that plaintiff had brought a lawsuit relating to Nino's coverage under the policy. Defendant learned of the suit only after default judgment was entered against Martinez and Nino.

Importantly, as we stated in *Miller*,

> failure to comply with such a policy provision will, if prejudicial to the insurer, operate to "*relieve the insurer of its obligation to defend its insureds under the policy and of any liability to pay any judgment or other sum on behalf of its insureds*."

Miller I at *2 (quoting *Chadbrooke Ins. Co. v. Fowler*, 426 S.E.2d 578, 580 (1992); Ga. Code Ann. § 33-7-15(b) (2000)) (emphasis altered).

Therefore, this Court's holding in *Miller I*, relying as it did on these relevant portions of the Georgia Code, was an inherent

finding that defendant had no duty to defend Martinez and Nino under the policy. We spoke specifically on the topic of defendant's duty to pay the default judgment because that was the primary issue on appeal. Specifically stating that defendant had no duty to pay the default judgment did not mean that defendant was still required to defend Martinez and Nino; that duty was specifically disposed of by the section of the Georgia Code quoted in *Miller I*. As such, the trial court was required to enter summary judgment in favor of defendant, relieving it of its duty to defend Martinez and Nino and also relieving it of its duty to pay the default judgment entered against Martinez and Nino.

Plaintiff's argument is overruled.

II.

Plaintiff next argues that the trial court had no jurisdiction to hold that defendant did not have to defend Martinez and Nino against any bodily injury claims asserted by plaintiff because such an order was beyond the relief ordered by this Court in *Miller I*.

As discussed in Section I above, the trial court properly entered such an order, as it was required by this Court's decision in *Miller I*. As such, plaintiff's argument is without merit and is overruled.

III.

Plaintiff finally argues that the trial court erred by failing to join Martinez and Nino as necessary parties to the present action between plaintiff and defendant. We disagree.

"Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined." *Assurance Society v. Basnight*, 234 N.C. 347, 352, 67 S.E.2d 390, 395 (1951). On the other hand, a party is merely "proper" if it is "one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others." *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 452, 183 S.E.2d 834, 837 (1971). Necessary parties must be joined in an action, but the joinder of proper parties lies within the trial court's discretion. *Id.* at 451, 183 S.E.2d at 837. An abuse of discretion occurs where a trial court's decision is "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

In the present case, Martinez and Nino were proper parties, as the outcome of plaintiff's action against defendant will affect Martinez's and Nino's interests. Since defendant does not have to pay the default judgment or defend Martinez and Nino against plaintiff's claims, Martinez and Nino alone will be responsible for the final judgment in plaintiff's case against them. However, Martinez and Nino are not necessary parties to the present case because we do not have to ascertain their rights in order to ascertain the rights between plaintiff and defendant. That is, Martinez and Nino are not "so vitally interested in the controversy that a valid judgment cannot be rendered . . . without [their] presence." *Carding Developments*, 12 N.C. App. at 451-52, 183

S.E.2d at 837. The present case concerns whether defendant will have to continue in plaintiff's litigation against Martinez and Nino; as such, this case deals with the adjudication of rights solely with respect to plaintiff and defendant. Therefore, Martinez and Nino are not necessary parties to the present action; they are, however, *proper* parties. The trial court's failure to include Martinez and Nino as proper parties was not "manifestly unsupported by reason," as the adjudication of the rights between plaintiff and defendant would likely not have been aided by any input from Martinez and Nino, who are still free to separately challenge defendant's denial of coverage.

Therefore, the trial court did not err by failing to join Martinez and Nino, and plaintiff's argument is overruled.

IV.

For the reasons stated above, we overrule all of plaintiff's arguments and affirm the trial court's order.

Affirmed.

Judge BRYANT concurs.

Judge STEELMAN concurs by separate opinion.

Report per Rule 30(e).

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STEELMAN, Judge, concurring.

I fully concur in the majority opinion in this case, but would also impose sanctions upon plaintiff and his counsel. This matter was resolved by our prior decision in *Miller I*, and there was no basis for the instant appeal. Sanctions should be imposed pursuant to Rule 34(a)(1) of the North Carolina Rules of Appellate Procedure.