

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1298

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

NORTH CAROLINA FARM BUREAU  
MUTUAL INSURANCE COMPANY,  
Plaintiff,

v.

Durham County  
No. 08 CVS 6393

CHARLIE SUTTON,  
Defendant.

Appeal by plaintiff from order entered 22 April 2009 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 10 March 2010.

*Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for plaintiff-appellant.*

*Perry, Perry & Perry, P.A., by Robert T. Perry, for defendant-appellee.*

BRYANT, Judge.

Plaintiff North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) appeals from a trial court order denying Farm Bureau's motion for summary judgment and declaratory judgment. For the reasons stated herein, we affirm.

On 22 December 2006, defendant Charlie Sutton was injured in a collision with an unknown vehicle that occurred while Sutton was riding as a passenger in the owner's vehicle. On 29 December 2006, Sutton filed a claim for uninsured motorist coverage with the

vehicle owner's insurance carrier, Farm Bureau. Farm Bureau alleges that it notified Sutton he was scheduled to be examined under oath on 1 February 2007 pursuant to the terms of the insurance policy and that Sutton failed to attend the examination. On 29 April 2008, Sutton retained legal representation and, on 12 June 2008, offered to give a statement to Farm Bureau provided Farm Bureau would not use the statement against him should the matter go to trial. Farm Bureau declined to accept the condition.

On 29 July 2008, Sutton filed a complaint against Farm Bureau in Durham County District Court seeking to recover damages from the uninsured motorist coverage for personal injuries and medical expenses occurring as a result of the alleged collision. A stay was entered in the district court action, and on 26 November 2008, Farm Bureau filed the current declaratory judgment action in Durham County Superior Court. Farm Bureau sought a determination that the insurance policy does not provide uninsured motorist coverage for Sutton or, in the alternative, that Sutton violated the terms of the policy and was not entitled to coverage. On 3 April 2009, along with an affidavit and a transcript from an interview conducted on 12 June 2008, Farm Bureau filed a motion for summary judgment.

At a hearing on Farm Bureau's motion for summary judgment, Sutton asserted that he consented to having his statement recorded for investigatory purposes on the condition that the recording would not be used to impeach him should the matter go to trial and that Farm Bureau refused to proceed with recording his statement.

After hearing the arguments of counsel, the trial court denied Farm Bureau's motion for summary judgment and declaratory judgment. In addition, the trial court found that Sutton did not refuse to cooperate with Farm Bureau, and that the policy referenced did provide coverage for Sutton. However, Sutton was ordered to submit, upon proper notice, to an oral examination under oath. Farm Bureau appeals.

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In this appeal, Farm Bureau challenges the trial court's denial of its motion for summary judgment. Farm Bureau argues that the trial court erred in determining that Sutton did not refuse to cooperate and in concluding that the Farm Bureau policy provided coverage for Sutton. We affirm the trial court.

*Standard of Review*

A party against whom a claim is asserted or a declaratory judgment is sought, "may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." N.C. R. Civ. P. 56(b). "Summary judgment is proper 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." *Stott v. Nationwide Mut. Ins. Co.*, 183 N.C. App. 46, 49, 643 S.E.2d 653, 656 (2007) (citation omitted). At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. *See Dobson*

*v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). If there is any genuine issue of material fact, a motion for summary judgment should be denied. See *Smith v. Harris*, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007). The standard of review on appeal from a summary judgment order is de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

A

Farm Bureau maintains that the trial court erred in finding the uninsured motorist section of the policy covered Sutton after he breached the cooperation agreement.

"When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court . . . and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (1986) (internal citations omitted).

Here, the insurance policy states that "insured" under the uninsured motorist coverage section includes "(1) You or any family member[;] [and] (2) [a]ny other person occupying: (a) your covered auto[,], or (b) any other auto operated by you." The contract clearly and unambiguously provides for coverage of any person occupying the insured's vehicle. Sutton was the policy holder's passenger. Therefore, we hold the trial court did not err by determining that Sutton is considered an insured under the policy.

B

Farm Bureau argues in the alternative that because Sutton is considered an "insured" under the policy, the cooperation clause was binding upon him and his failure to cooperate was a breach of the clause and thereby materially prejudiced Farm Bureau's investigation. Whether there has been a material failure to comply with the cooperation clause of an insurance agreement is a question of fact. *Henderson v. Rochester American Ins. Co.*, 254 N.C. 329, 118 S.E.2d 885 (1961). An insured's failure to cooperate must have "materially prejudiced [the insurer's] ability to investigate and defend the [UM] claim" as a result of the delay. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 580-81, 573 S.E.2d 118, 124 (2002). An insurer claiming the forfeiture of coverage by the insured's breach of the cooperation clause has the burden of proof. *Henderson*, 254 N.C. 329, 118 S.E.2d 885.

The uninsured motorist section of the insurance policy at issue states that a person seeking uninsured motorist coverage must comply with the following:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.
3. Submit as often as we reasonably require:
  - a. to physical exams by physicians we select. We will pay for these exams.
  - b. to examinations under oath and subscribe the same.
4. Authorize us to obtain:
  - a. medical reports; and
  - b. other pertinent records;.
5. Submit a proof of loss when required by us.

The policy requires that the insured to "cooperate with [Farm Bureau] in the investigation, settlement or defense of any claim or suit" and to submit to "examinations under oath." Farm Bureau scheduled an interview and/or examination of Sutton for 12 June 2008. Before Sutton would give his statement, he asked that Farm Bureau promise that the statement would not be used against him in court. Farm Bureau refused to accept Sutton's condition and refused to proceed with recording Sutton's statement.

In the instant case, the trial court found that Sutton had not refused to cooperate. Farm Bureau asserts that Sutton's failure to give a statement under oath had a material and adverse effect on the insurance company's ability to investigate the claim. However, Farm Bureau has not shown that the trial court erred in not finding and concluding that Sutton failed to cooperate. Moreover, the trial court ordered defendant upon proper notice to submit to oral examination under oath within twenty days from the date of order denying summary judgment. This portion of the trial court's order vitiates much of plaintiff's argument regarding defendant's failure to cooperate. Accordingly, Farm Bureau's arguments are overruled.

The judgment of the trial court is affirmed.

Affirmed.

Judge BEASLEY concurs.

Judge STEELMAN concurs in separate opinion.

Report per Rule 30(e).

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STEELMAN, Judge concurs in separate opinion.

I concur in the result because plaintiff failed to demonstrate material prejudice before the trial court.