IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-735

Filed: 17 September 2019

Wake County, No. 17CV010688

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff,

v.

DON'S TRASH COMPANY, INC., DON'S HARNETT TRASH CO., INC., and DJ'S TRASH COMPANY, INC., RACHEL BULL, As Administrator of The ESTATE OF WALTER L. BULL, III, CAREY DEAN LIKENS, LOUIS HORTON, and DON L. HORTON, Defendants.

Appeal by plaintiff from order entered 3 May 2018 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 16 January 2019.

Waters Law, PLLC, by Dena White Waters, for plaintiff-appellant.

Martin & Jones, PLLC, by Huntington M. Willis, for defendants-appellees.

BERGER, Judge.

On May 3, 2018, the trial court granted summary judgment against State Farm Mutual Automobile Insurance Company ("State Farm") and ordered State Farm to defend and indemnify its insured, Don's Trash Company, Inc. ("Don's Trash"), against an anticipated wrongful death action pursuant to their insurance policy agreement. State Farm appeals, arguing that the trial court misinterpreted

two provisions of that insurance policy, which State Farm claims expressly exclude liability coverage for the occurrence at issue here. We agree, and reverse the trial court's finding of insurance coverage.

Factual and Procedural Background

Louis Horton and his son, Don Horton, each owned and operated garbage collection businesses that worked collaboratively from the same address. Louis owned and operated Don's Trash, while Don owned and operated DJ's Trash Company, Inc. ("DJ's Trash"). The companies routinely shared employees, but each employee was exclusively paid by their usual employer regardless of which company the employee worked for at the time. Additionally, the companies would routinely share vehicles, and all of the vehicles were insured by State Farm under one policy (the "Insurance Policy"), which listed Don's Trash as the named insured.

On October 8, 2015, Don and two employees of DJ's Trash, Walter Lee Bull III ("Bull") and Carey Likens ("Likens"), were scheduled to collect trash on DJ's Trash's regular route. Don was sick that day, so Louis assigned Christopher Donaldson ("Donaldson"), an employee of Don's Trash, to serve as Don's substitute driver. While Donaldson was driving along their route, Donaldson accidentally drove off the right shoulder of the road, overcorrected, and lost control of the garbage truck. Bull was killed as a result of the accident, and Donaldson and Likens were seriously injured.

On September 5, 2017, State Farm filed a declaratory judgment action. In its complaint, State Farm sought a declaration of whether it was liable under the Insurance Policy for the death, personal injuries, and property damage that resulted from the October 8, 2015 accident. On September 11, 2017, Bull's Estate filed a wrongful death claim against Don's Trash and Donaldson. Then, on February 21, 2018, Bull's Estate moved for summary judgment on State Farm's declaratory judgment claim seeking liability coverage for its loss.

Following an April 30, 2018 hearing, the trial court entered summary judgment in favor of Bull's Estate on May 3, 2018. The trial court found that the Insurance Policy covered Bull's death and the policy exclusions did not operate to exclude coverage. State Farm was therefore ordered to indemnify and defend Don's Trash and its employee against the claims filed by Bull's Estate. State Farm appeals from this order, arguing that the trial court erred in finding that the two exclusionary provisions in the Insurance Policy did not remove State Farm's liability to defend and indemnify its insured.

Analysis

> The Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.*, affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments and for clarifying litigation. North Carolina courts have held that summary judgment is an appropriate procedure in an action for declaratory judgment. Summary judgment may be entered under Rule 56 of the North Carolina Rules of Civil Procedure, and the Rule applies in an action for

> declaratory judgment. Therefore, on review of a declaratory judgment action, we apply the standards used when reviewing a trial court's determination of a motion for summary judgment.

Hejl v. Hood, Hargett & Assocs., Inc., 196 N.C. App. 299, 302-03, 674 S.E.2d 425, 427-28 (2009) (*purgandum*).

> Summary judgment exists to eliminate the need for a trial when the only questions involved are questions of law. Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is based on two underlying questions of law, and may be granted when: (1) there are no genuine issues of material fact and (2) any party is entitled to judgment as a matter of law. Alleged errors in the application of law are subject to *de novo* review on appeal. On appeal, review of summary judgment is limited to whether the trial court's conclusions as to these two questions of law were correct ones.
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> An issue is deemed "genuine" if it can be proven by substantial evidence, and a fact is "material" where it constitutes or establishes a material element of the claim. In determining that there are no genuine issues of material fact, it is not the trial court's role to resolve conflicts in the evidence. Rather, the court's role is only to determine whether such issues exist. Furthermore, in considering whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the nonmovant.

Plum Props., LLC v. N.C. Farm Bureau Mut. Ins. Co., ___ N.C. App. ___, ___, 802 S.E.2d 173, 175 (2017) (*purgandum*).

> As with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued. If the parties have defined a term in the agreement, then we must ascribe to the term the meaning the parties intended. We supply

> undefined, nontechnical words a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise. We construe all clauses of an insurance policy together, if possible, so as to bring them into harmony. We deem all words to have been put into the policy for a purpose, and we will give effect to each word if we can do so by any reasonable construction.
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> This Court resolves any ambiguity in the words of an insurance policy against the insurance company. We do so because the insurance company is the party that selected the words used. Furthermore, this Court construes liberally insurance policy provisions that extend coverage so as to provide coverage, whenever possible by reasonable construction, and we strictly construe against an insurance company those provisions excluding coverage under an insurance policy.
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> However, we only apply the preceding rules of construction when a provision in an insurance agreement is ambiguous. To be ambiguous, the language of an insurance policy provision must, in the opinion of the court, be fairly and reasonably susceptible to either of the constructions for which the parties contend. If the language is not fairly and reasonably susceptible to multiple constructions, then we must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.

Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC, 364 N.C. 1, 9-10, 692 S.E.2d 605, 612 (2010) (*purgandum*).

First, coverage must be established pursuant to the terms of the Insurance Policy. State Farm does not challenge whether or not the vehicle involved in this accident was a covered automobile. In addition, it is uncontroverted that the

Insurance Policy grants coverage to any person or entity using the vehicle as an insured. Section II of the Insurance Policy defines an insured as "any other person while using an owned automobile or temporary substitute automobile with permission of the named insured." It is unquestioned that DJ's Trash and Donaldson qualified as being the insured for this occurrence, and that they were using a covered automobile. We must therefore look to the Insurance Policy to see if any provisions exclude any of the losses sustained from liability coverage.

State Farm argues that two provisions of the Insurance Policy exclude coverage for the occurrence that resulted in Bull's death. Therefore, State Farm asserts it is not obligated to defend and indemnify Don's Trash against the wrongful death claim.

The first of these two exclusion provisions excludes liability coverage for:

> *bodily injury* to any employee of the *insured* arising out of and in the course of his employment by the *insured* or to any obligation of the *insured* to indemnify another because of damages arising out of such injury; but this exclusion does not apply to any such injury arising out of and in the course of domestic employment by the *insured* unless benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law . . . .

The plain language of this term excludes coverage for bodily injury to any employee injured during the course of his employment where the insured company either has workers' compensation insurance, or that company is required to have workers' compensation insurance. Under the North Carolina Workers' Compensation Act,

both companies involved in this action were required by law to carry workers' compensation insurance because both companies had "three or more employees [that were] regularly employed in the same business or establishment." N.C. Gen. Stat. § 97-2(1) (2017). The plain language of the exclusion removes liability coverage for employees that were required by law to have workers' compensation coverage provided by their employer. Bull was excluded from coverage by this provision.

The second provision at issue defines who does not qualify as an insured. It states, in pertinent part:

> None of the following is an insured: (i) any person while engaged in the business of his employer with respect to *bodily injury* to any fellow employee of such person injured in the course of his employment . . . .

Bull's estate has argued that Bull and Donaldson were not fellow employees, and so this provision does not exclude coverage for Bull's death. It is not contested that Bull was an employee of DJ's Trash or that the work being performed was on a DJ's Trash route. If Donaldson qualifies as an employee of DJ's Trash, then this employee exclusion would withdraw liability coverage for Donaldson's actions "in the business of his employer" that resulted in Bull's death.

To make this determination, "[t]his Court has recognized the 'special employment' or 'borrowed servant' doctrine which holds that under certain circumstances a person can be an employee of two different employers at the same time." *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 759, 460 S.E.2d 356, 360

(1995) (citation omitted). "[T]he courts have long recognized that a general employee of one can also be the special employee of another while doing the latter's work and under his control." *Henderson v. Manpower of Guilford Cnty., Inc.*, 70 N.C. App. 408, 413, 319 S.E.2d 690, 693 (1984).

> Whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned depends on whether he passes under the latter's right of control with regard not only to the work to be done but also to the manner of performing it. A servant is the employee of the person who has the right of controlling the manner of his performance of the work, irrespective of whether he actually exercises that control or not.

Harris v. Miller, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994) (*purgandum*).

On the day of the accident, Donaldson had been assigned by Louis to replace Don because Don was sick and could not work. In replacing Don, Donaldson became the employee of DJ's Trash, the entity to whom he had been loaned. DJ's Trash controlled both Donaldson's work and the manner in which it was to be performed. As stated in *Harris v. Miller*, a servant is the employee of the person who has the right of control, irrespective of whether that control is exercised. Donaldson, at the time of the accident, was the employee of DJ's Trash and, therefore, a fellow employee of Bull. Thus, the second employee exclusion provision at issue here also excludes coverage.

Conclusion

We are well aware that, in a case such as this with loss of life going uncompensated, "the urge is strong to write into [an insurance policy] exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad law.'" *Congleton v. City of Asheboro*, 8 N.C. App. 571, 574, 174 S.E.2d 870, 872 (1970). Here, the law of our State compels the reversal of the trial court.

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).