IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ELOURDE COLIN,

Appellant,

v.

CASE NO.: CVA1 09-16
Lower Court Case No.: 2008-CC-7009-O

PROGRESSIVE AMERICAN INSURANCE COMPANY,

Appellee.
_____/

Appeal from the County Court,
for Orange County,
Deb S. Blechman, Judge.

Herbert V. McMillan, Esquire,
for Appellant.

Daniel P. Osterndorf, Esquire,
for Appellee.

Before DAWSON, T. SMITH, and BLACKWELL, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Elourde Colin ("Colin") timely appeals the trial court's Amended Final Judgment granting summary judgment in favor of the Appellee, Progressive American Insurance Company ("Progressive"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Colin filed suit against Progressive seeking a declaration that Progressive has a duty to

defend her in another lawsuit and damages for breach of contract. She alleges that Progressive breached its contractual obligation to defend her, thus causing her to suffer damages in the form of legal fees and costs.

In another lawsuit, State Farm Automobile Insurance Company ("State Farm") is suing Colin and her daughter, Stacey Colin ("Stacey"), in subrogation. It paid benefits to its insured for bodily injuries sustained during an accident resulting from Stacey's operation of Colin's automobile, which is insured by Progressive. State Farm alleges that Colin is vicariously liable because she consented to Stacey's use of the automobile.

Colin notified Progressive and demanded that Progressive provide her with a defense. Progressive advised Colin that, based upon her election to exclude Stacey from coverage, as detailed in the "Named Driver Exclusion," there is no coverage available to Colin for any bodily injury liability arising from the accident.[1] Furthermore, Progressive refused to defend Colin in the State Farm lawsuit. The present action followed.

The parties filed competing motions for summary judgment, and the trial court granted Progressive's motion. Colin timely appeals.

The standard of review for an order granting summary judgment is *de novo*. Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 130 (Fla. 2000). This Court must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Krol v. City of Orlando, 778 So. 2d 490, 491-492 (Fla. 5th DCA 2001) (citing Fla. R. Civ. P. 1.510(c)).

Both parties agree that there are no genuine issues of material fact.[2] However, the parties

[1] Insured parties execute "Named Driver Exclusions" to lower their cost of automobile insurance. The insured agrees that coverage will be limited, or not provided at all, if a loss arises out of the operation of the insured vehicle by an "excluded driver." In exchange, the insurance company charges a lower premium.

[2] Though there may be a genuine issue as to whether Colin gave consent or was aware that Stacey was driving the

disagree on one question of law. That is, whether the undisputed facts of this case establish that Progressive has a duty to defend Colin in the State Farm lawsuit. Therefore, under the applicable standard of review, this Court must now determine whether Progressive is entitled to a judgment as a matter of law.

"It is well settled that an insurer's duty to defend its insured against a legal action arises when the complaint alleges facts that fairly and potentially bring the suit within policy coverage." Jones v. Florida Ins. Guar. Ass'n, Inc., 908 So. 2d 435, 442-443 (Fla. 2005) (citing State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1077 n.3 (Fla. 1998)). The duty to defend must be determined solely from the allegations in the complaint against the insured. Id. at 443. When the actual facts, or the insured's version of the facts, are inconsistent with the allegations in the complaint, the allegations in the complaint control in determining the insurer's duty to defend. Id. "An insurer has no duty to defend a lawsuit where the underlying complaint does not allege facts that would bring the complaint within the coverage of the policy." Wellcare of Florida, Inc. v. Am. Int'l Specialty Lines Ins. Co., 16 So. 3d 904, 906 (Fla. 2d DCA 2009) (quoting Auto-Owners Ins. Co. v. Marvin Dev. Corp., 805 So. 2d 888, 891 (Fla. 2d DCA 2001)).

In its complaint, State Farm alleges that Colin is vicariously liable for bodily injuries sustained by its insured during the accident resulting from Stacey's operation of Colin's automobile. Bodily injury liability to others, such as that alleged by State Farm, would normally be covered under "Part I – Liability to Others" of the Progressive policy. However, under the "Named Driver Exclusion," no coverage is provided for any claim under "Part I – Liability to Others" for bodily injury arising from an accident involving an automobile being operated by an "excluded driver," *including any claim for damages against any named insured that is*

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insured automobile, that fact is not material to the issue of whether Progressive has a duty to defend Colin in the State Farm lawsuit.

vicariously liable. Colin voluntarily named Stacey as an excluded driver under the policy. Therefore, there is clearly no coverage available to Colin under the allegations in State Farm's complaint.

Although Colin admits that Progressive will not be liable to indemnify her in the State Farm lawsuit,[3] she asserts that Progressive still has a duty to defend her because the duty to defend is broader than the duty to indemnify. Colin further argues that the "Named Driver Exclusion" does not exclude the duty to defend and that the policy's exclusions pertaining to the duty to defend are inconsistent. This inconsistency, she contends, should be construed in her favor.

Colin misapplies the legal standard that the duty to defend is broader than the duty to indemnify. She correctly asserts that the duty to defend is not diminished merely because an insurance company *may not* ultimately be liable to indemnify. She also correctly states that an insurer is required to defend even if the facts *later* show that there is no coverage. However, Colin construes this standard to mean that even if there is *no possibility* that an insurer will be liable to indemnify, it still has a duty to defend. This assertion is unfounded and inaccurate.

Because there is no possibility for coverage under the allegations in State Farm's complaint, Progressive has no duty to defend Colin in that lawsuit. Furthermore, because the duty to defend never arises in this case, Progressive has no need to demonstrate that the policy excludes the duty to defend. Thus, Colin's argument concerning the inconsistency of the policy's exclusions pertaining to the duty to defend, including the failure of the "Named Driver Exclusion" to specifically exclude the duty to defend, is irrelevant. Therefore, Progressive is entitled to a judgment as a matter of law, and we find that the trial court properly entered

[3] In her Motion for Summary Judgment, Colin admits that Progressive has no liability to pay any claim for bodily injuries caused by Stacey's operation of the insured automobile. Colin further admits that "Progressive does not have a duty to pay any claim for bodily injury brought by State Farm."

summary judgment in favor of Progressive.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's "Amended Final Judgment," entered on April 3, 2009, is **AFFIRMED**; "Appellant's Motion for Attorney's Fees and Costs" is **DENIED**; and the "Reply Brief of the Appellant Elourde Colin" is **STRICKEN** because it was not timely served.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the __14__ day of _____May_____, 2010.

_____/S/_____
DANIEL P. DAWSON
Circuit Judge

_____/S/_____
THOMAS B. SMITH
Circuit Judge

_____/S/_____
ALICE L. BLACKWELL
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Herbert V. McMillan, Esq., Law Office of Herbert McMillan, P.A.**, Post Office Box 681777, Orlando, Florida 32868 and **Daniel P. Osterndorf, Esq., Latham, Shuker, Eden & Beaudine, LLP,** 390 North Orange Avenue, Suite 600, Orlando, Florida 32801 on the ___18_____ day of _____May_____, 2010.

_____/S/_____
Judicial Assistant