Illinois Official Reports

Appellate Court

Old Republic Insurance Co. v. Pro-Agr, Inc., 2021 IL App (4th) 200340

Appellate Court Caption	OLD REPUBLIC INSURANCE COMPANY, Plaintiff-Appellant, v. PRO-AGR, INC., and KYLE DOWDY, Defendants-Appellees.
District & No.	Fourth District Nos. 4-20-0340, 4-20-0365 cons.
Filed	September 14, 2021
Decision Under Review	Appeal from the Circuit Court of Vermilion County, No. 19-MR-194; the Hon. Mark S. Goodwin and the Hon. Karen E. Wall, Judges, presiding.
Judgment	Reversed and remanded with directions.
Counsel on Appeal	Alan L. Farkas, Michael Resis, and Ellen L. Green, of SmithAmundsen LLC, of Chicago, for appellant. Austin Bartlett, of BartlettChen LLC, of Chicago, and Patrick Jennetten, of Peoria, for appellees.
Panel	JUSTICE TURNER delivered the judgment of the court, with opinion. Justices Cavanagh and Harris concurred in the judgment and opinion.

OPINION

¶ 1 On April 28, 2020, the trial court entered an order denying Old Republic Insurance Company's (Old Republic) motion for summary judgment in this declaratory judgment action Old Republic filed against defendants Pro-Agr, Inc. (Pro-Agr), and Kyle Dowdy. The court found Old Republic has a duty to defend and provide insurance coverage to Pro-Agr in Dowdy's underlying personal injury claim against Pro-Agr for bodily injuries Dowdy suffered during a crash while piloting Pro-Agr's airplane. Because the trial court's clerk failed to notify the parties of the court's ruling, the trial court vacated the order on July 13, 2020, by agreement of the parties. On July 30, 2020, the court entered a nearly identical new order with an additional finding of no just reason to delay enforcement or appeal of the court's order existed. In case the trial court did not have jurisdiction of the case on July 13, 2020, to vacate the April 28, 2020, order, Old Republic appealed both the April 28, 2020, order in case No. 4-20-0340 and the July 30, 2020, order in case No. 4-20-0365. On July 31, 2020, this court granted Old Republic's motion to file a late notice of appeal in case No. 4-20-0340 pursuant to Illinois Supreme Court Rule 303(d) (eff. July 1, 2017). On August 19, 2020, this court entered an order granting Old Republic's motion to consolidate the two appeals. On appeal, Old Republic argues the trial court erred in denying its motion for summary judgment and ruling as a matter of law that Old Republic had a duty to indemnify and provide coverage to Pro-Agr in the underlying bodily injury claim brought by Dowdy for injuries he suffered while flying Pro-Agr's airplane. We reverse the trial court's order requiring Old Republic to defend and provide coverage to Pro-Agr in the underlying action and remand this case with instructions for the trial court to grant Old Republic's motion for summary judgment.

¶ 2 I. BACKGROUND

¶ 3 On April 2, 2019, Old Republic filed a declaratory judgment action against Pro-Agr and Dowdy, alleging it had no duty to defend or indemnify Pro-Agr with respect to a lawsuit filed by Dowdy against Pro-Agr for bodily injuries Dowdy suffered while flying Pro-Agr's airplane. In the underlying case, Dowdy filed suit against Pro-Agr; George Camaratta, d/b/a Aerocrop Services; and Connie Camaratta, d/b/a Aerocrop Services. The Camarattas, both doing business as Aerocrop Services, are not parties to Old Republic's declaratory judgment action.

¶ 4 In the underlying case, Dowdy alleged he was injured when Pro-Agr's Air Tractor AT-602 airplane, which Dowdy was flying, crashed because of mechanical failure. Dowdy alleged his injuries were caused by Pro-Agr's breach of its duty (1) to maintain, inspect, and repair its airplane and (2) to "adhere to Airworthiness Directives applicable to the airplane, failed to maintain service and maintenance records for the airplane, and failed to inform Dowdy of service and maintenance issues concerning the airplane."

¶ 5 Pro-Agr sought a defense and indemnification from Old Republic. Old Republic informed Pro-Agr that Dowdy's bodily injury claim was not covered by Pro-Agr's insurance policy and Old Republic had no duty to defend or indemnify Pro-Agr for any settlement, judgment, apportionment of fault, and/or contribution entered against Pro-Agr in the underlying action. Although Old Republic denied it owed Pro-Agr either a defense or indemnity in connection to Dowdy's claim in the underlying case, Old Republic did agree to provide Pro-Agr with a defense subject to a reservation of rights.

¶ 6 On October 17, 2019, Old Republic filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1005 (West 2018)). According to the motion, Dowdy's bodily injury claim was excluded from coverage under the insurance policy because Dowdy qualified as an "insured" under the policy when he suffered his bodily injuries. Old Republic noted its policy excluded coverage for any bodily injury claim brought by any "insured." The exclusionary provision stated:

> "We will not cover *bodily injury* sustained by any insured under this policy. We also will not cover *bodily injury* sustained by any family member of an *insured* under this policy to the extent any such family member's *bodily injury* derives or arises from, relates to or exists because of *bodily injury* sustained by an *insured* under this policy." (Emphases in original.)

The policy defined the term "insured" as follows:

> "*Insured* means you as well as any person while using or riding in your aircraft and any person or organization (except with respect to the persons or organizations excluded from coverage under Part IV and V under their respective 'who is not covered' section) legally responsible for its use, provided the actual use is with your express permission." (Emphasis in original.)

Both Pro-Agr and Dowdy admitted Dowdy was using Pro-Agr's airplane with Pro-Agr's permission at the time Dowdy was injured. Further, Dowdy admitted he was "riding in" the aircraft with Pro-Agr's permission, and Pro-Agr admitted Dowdy was piloting the plane with Pro-Agr's permission at the time of the accident.

¶ 7 On December 13, 2019, Pro-Agr filed its response to Old Republic's motion for summary judgment, arguing it was entitled to coverage pursuant to "Coverage F," which states in relevant part:

> "If this coverage has been purchased, we will pay claims for damages due to *bodily injury* and *property damage* resulting from the ownership, maintenance, or use of your aircraft, except claims for damages due to *bodily injury* to a *passenger* in your aircraft. The combined limit of liability shown on the *Coverage Data Page* is the most we will pay for all damages because of all *bodily injury* and *property damage* resulting from any one (1) occurrence, no matter how many persons or organizations are involved." (Emphases in original.)

¶ 8 Pro-Agr argued Dowdy's claim for bodily injuries was covered by the policy because Dowdy was not a "passenger" as defined by the policy when he was injured during the plane crash. The policy defines "passenger" as follows:

> "*Passenger* means anyone, except the pilot, in, on, or boarding the aircraft for the purpose of riding or flying in the aircraft or alighting from the aircraft following a ride, flight, or attempted flight therein." (Emphasis in original.)

According to Pro-Agr, "Coverage F" provided broader liability coverage than other liability coverage options offered by Old Republic. Specifically, Pro-Agr noted "Coverage C" in the policy, unlike "Coverage F," specifically excluded bodily injury claims brought by both pilots and passengers.

¶ 9 In addition, with regard to the language of the separation of insureds provision found in "Coverage F," Pro-Agr argued:

> "In light of the above separation of insureds provision, Old Republic must treat its named insured, Pro-Agr, as distinct for coverage purposes from its other insured, pilot Dowdy, when evaluating liability coverage for a bodily injury claim asserted against Pro-Agr. See, *e.g.*, *United States Fidelity & Guaranty Co. v. Globe Indemnity Co.*, 60 Ill. 2d 295, 297, 299 (1975) (holding that insurance policy's severability clause afforded separate coverage to each insured, and that severability clause rendered an employer liability exclusion inapplicable to a lawsuit brought by one insured's employee against another insured).
>
> Accordingly, even *assuming arguendo* that the 'bodily injury sustained by an insured' exclusion would bar pilot Dowdy from directly seeking coverage under Part 4, Coverage F for bodily injuries that *he himself sustained* (a first party claim), the exclusion would not in any way bar Pro-Agr from seeking liability coverage under Coverage F for bodily injury claims asserted against Pro-Agr by *someone else—i.e.*, pilot Dowdy (a third party claim). If Old Republic intended the 'bodily injury sustained by any insured' exclusion to foreclose coverage for a lawsuit between two insureds under its policy, it should have expressly said so. It did not. For all of these reasons, the policy exclusion cited by Old Republic is inapplicable." (Emphases in original.)

¶ 10 As for the coverage exclusion provision relied on by Old Republic, Pro-Agr contends this provision was not intended to apply to a bodily injury claim brought by a person injured while piloting Pro-Agr's plane with Pro-Agr's permission. Finally, Pro-Agr argued "[a]t the very least, it is unclear and ambiguous whether the 'bodily injury sustained by any insured' exclusion is intended to apply to the circumstances here and modify the broad policy language in Part 4 and Coverage F."

¶ 11 On December 13, 2019, Dowdy adopted and joined in Pro-Agr's response to Old Republic's motion for summary judgment.

¶ 12 On January 10, 2020, Old Republic replied to the arguments made by Pro-Agr and Dowdy. Old Republic again argued the policy unambiguously barred coverage for claims of bodily injury sustained by any insured, like Dowdy's claim for his alleged injuries. Further, as for Pro-Agr's argument regarding the severability language, Old Republic noted, "[u]nder Illinois law, applying the severability clause to treat Pro[-]Agr and Dowdy as distinct insureds produces the same result—each insured is separately excluded from coverage because the claim is still one for bodily injury sustained by Dowdy, who Defendants admit qualifies as an 'insured.' "

¶ 13 On February 7, 2020, the trial court held a hearing on Old Republic's motion for summary judgment. During the hearing, Old Republic told the court the parties agreed Dowdy qualified as an "insured" as defined by the insurance policy. Old Republic then argued the policy contained "a very clear exclusion for the type of claim presented by the underlying suit." Pro-Agr argued the plain language of the policy clearly provides coverage to Pro-Agr because Dowdy was not a passenger.

¶ 14 On April 28, 2020, the trial court entered an order denying Old Republic's motion for summary judgment. According to the court's written ruling:

> "PRO-AGR purchased Aircraft Liability Coverage for bodily injury claims under Part 4, Coverage F of the insurance policy. That type of coverage provides PRO-AGR with insurance for claims seeking damages due to bodily injury which result from the ownership, maintenance, or use of PRO-AGR's aircraft. According to the complaint

> filed by DOWDY, his permitted use of PRO-AGR's aircraft as a pilot resulted in him being injured due to PRO-AGR's deficient maintenance and repair efforts on the subject aircraft. He was not a 'passenger' of the aircraft at the time, as that term is defined in the policy as being someone other than a pilot. He was also not an 'insured' who is excluded from the coverage purchased by PRO-AGR. The claim made by DOWDY alleges essentially that he was the covered aircraft's pilot and was damaged as a result of PRO-AGR's negligent maintenance of its aircraft. That is a claim that falls within, or potentially within, the coverage purchased by PRO-AGR under the terms of the unambiguous policy. Accordingly, the Motion for Summary Judgment filed herein by OLD REPUBLIC INSURANCE COMPANY is denied. The policy of OLD REPUBLIC INSURANCE COMPANY provides coverage to PRO-AGR on the claim made by DOWDY and said party has a duty to defend PRO-AGR herein."

On July 13, 2020, the trial court vacated the April 28, 2020, order because the clerk failed to notify the parties the order had been entered. On July 30, 2020, the trial court entered a new order on the motion for summary judgment. The parties agreed to the form of the order but did not waive any of their rights or arguments on the merits. The court's substantive ruling was the same as the prior order but included an Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) finding there was no just reason to delay enforcement or appeal of the court's order.

¶ 15 Defendant filed appeals from both the trial court's April 28, 2020, order and the July 30, 2020, order.

¶ 16 II. ANALYSIS

¶ 17 Old Republic argues the trial court erred by denying its motion for summary judgment because Old Republic had no duty to defend or indemnify Pro-Agr in the underlying case pursuant to the plain language of the insurance policy entered into between Old Republic and Pro-Agr. Pro-Agr and Dowdy argue the insurance policy should be read to provide coverage for Dowdy's claim against Pro-Agr. When determining the meaning of an insurance policy, our supreme court has stated the following:

> "Our primary objective when construing an insurance policy is to ascertain and give effect to the intention of the parties, as expressed in the policy language. [Citations.] The construction we give to an insurance policy should be a natural and reasonable one. [Citation.] Undefined terms will be given their plain, ordinary and popular meaning, *i.e.*, they will be construed with reference to the average, ordinary, normal, reasonable person. [Citation.] If the policy language is susceptible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer. [Citation.] Importantly, a policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific." *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393-94, 830 N.E.2d 575, 582 (2005).

¶ 18 According to section 2-1005 of the Procedure Code (735 ILCS 5/2-1005(c) (West 2018)), summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Because this appeal concerns both questions regarding the construction of an insurance policy and a ruling on a motion for summary judgment, we apply a *de novo* standard of review. See

Pekin Insurance Co. v. Wilson, 237 Ill. 2d 446, 455, 930 N.E.2d 1011, 1016 (2010) ("[T]he construction of the provisions of an insurance policy is a question of law for which our review is *de novo*."); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992) ("In appeals from summary judgment rulings, we conduct a *de novo* review.").

¶ 19 Generally, in a declaratory judgment action where the issue is whether an insurance company has a duty to defend its insured, a court first looks at the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy. *Wilson*, 237 Ill. 2d at 455. If the factual allegations either fall within or potentially fall within the policy's coverage, the insurer's duty to defend its insured arises. *Wilson*, 237 Ill. 2d at 455.

¶ 20 In certain circumstances, a court may look beyond the allegations in the underlying complaint to determine whether coverage under an insurance policy potentially exists. *Wilson*, 237 Ill. 2d at 459. In *Wilson*, our supreme court pointed to two appellate court decisions (see *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 886 N.E.2d 1166 (2008); *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 461 N.E.2d 471 (1983)) as setting forth the "proper considerations for a circuit court to use in deciding whether it is appropriate to examine evidence beyond that contained in the underlying complaint in determining the duty to defend." *Wilson*, 237 Ill. 2d at 462.

¶ 21 The supreme court quoted the following passage from *Holabird & Root*:

> " '[C]onsideration of a third-party complaint in determining a duty to defend is in line with the general rule that a trial court may consider evidence beyond the underlying complaint if in doing so the trial court does not determine an issue critical to the underlying action. *** *The trial court should be able to consider all the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend.* After all, the trial court " 'need not wear judicial blinders' and may look beyond the complaint at other evidence appropriate to a motion for summary judgment." [Citations.]' (Emphasis added.)" *Wilson*, 237 Ill. 2d at 460-61 (quoting *Holabird & Root*, 382 Ill. App. 3d at 1031-32).

The court then pointed to the following language from *Envirodyne Engineers, Inc.*:

> " '[W]e find no support for Envirodyne's contention that the court may not look beyond the underlying complaint even in a declaratory proceeding where the duty to defend is at issue. It is certainly true that the duty to defend flows in the first instance from the allegations in the underlying complaint; this is the concern at the initial stage of the proceedings when an insurance company encounters the primary decision of whether to defend its insured. However, if an insurer opts to file a declaratory proceeding, we believe that it may properly challenge the existence of such a duty by offering evidence to prove that the insured's actions fell within the limitations of one of the policy's exclusions. [Citations.] The only time such evidence should not be permitted is when it tends to determine an issue crucial to the determination of the underlying lawsuit [citations] ***. If a crucial issue will not be determined, we see no reason why the party seeking a declaration of rights should not have the prerogative to present evidence that is accorded generally to a party during a motion for summary judgment in a declaratory proceeding. *To require the trial court to look solely to the complaint in the underlying action to determine coverage would make the declaratory proceeding little more than a useless exercise possessing no attendant benefit and would greatly diminish a*

declaratory action's purpose of settling and fixing the rights of the parties.' (Emphasis added.)" *Wilson*, 237 Ill. 2d at 461 (quoting *Envirodyne Engineers, Inc.*, 122 Ill. App. 3d at 304-05).

In this case, when ruling on Old Republic's motion for summary judgment, the trial court should have considered both the allegations in Dowdy's underlying complaint and the admissions made by Pro-Agr and Dowdy in response to Old Republic's requests to admit, as these admissions did not determine an issue crucial to the determination of the underlying lawsuit.

¶ 22 According to Dowdy's complaint in the underlying case, he was injured when Pro-Agr's airplane, which Dowdy was piloting, crashed because of mechanical failure. Dowdy alleged Pro-Agr failed to properly maintain, inspect, and repair the airplane. According to the complaint, one or more of Pro-Agr's negligent acts or omissions was a proximate cause of Dowdy's injuries. In response to Old Republic's requests to admit, Pro-Agr admitted Dowdy was "using" and piloting Pro-Agr's airplane with its permission when the accident occurred. Dowdy also admitted he was "using" Pro-Agr's plane with Pro-Agr's permission at the time of the accident.

¶ 23 Based on the pleadings and admissions in this case, the material facts are not in dispute. Dowdy was piloting and using Pro-Agr's plane with Pro-Agr's permission when his alleged injuries occurred. When comparing these undisputed facts to the insurance policy at issue, Dowdy was an "insured" as defined by the policy when the airplane crashed and he was allegedly injured. The trial court erred in ruling Dowdy was not an "insured." Further, because the insurance policy specifically states Old Republic "will not cover bodily injury sustained by any insured under this policy," the trial court erred both by not granting Old Republic's motion for summary judgment and by ordering Old Republic to provide a defense and coverage to Pro-Agr. Dowdy's liability claim against Pro-Agr sought damages for bodily injuries he allegedly suffered while he was an "insured" under the policy. This type of claim was excluded from coverage by the plain language of the policy.

¶ 24 Pro-Agr and Dowdy would like this court to ignore the exclusionary language discussed above and focus on the fact "Coverage C" in the policy specifically states it will not pay damages based on claims of bodily injuries to pilots and/or passengers, but "Coverage F" in the policy only specifies Old Republic will not pay damages based on claims of bodily injuries to a passenger in the plane. While the language in "Coverage C" is more specific than the language of "Coverage F," this does not affect the exclusionary language that specifically applies to Dowdy's claim for damages. We must interpret the policy as a whole and not only look at the language in one particular provision. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479, 687 N.E.2d 72, 75 (1997). When the policy is read as a whole, it is clear the policy was not intended to cover bodily injuries suffered by pilots flying Pro-Agr's plane with Pro-Agr's permission. This is not a situation where the language used in "Coverage F" specified bodily injuries suffered by pilots flying Pro-Agr's plane with Pro-Agr's permission would be covered.

¶ 25 Pro-Agr and Dowdy also argue the "separation of insureds" provision in the policy shows both parties to the contract intended for the policy to cover a claim like Dowdy's. The provision in question states in part: "If two or more people or organizations are covered by this part of the policy, each one is covered separately. But the most we will pay for all *covered claims* resulting from any one *occurrence*, no matter how many people are covered by this part of the

policy, is the Liability Coverage limit shown on the *Coverage Data Page*." (Emphasis added and in original.) According to Pro-Agr and Dowdy's brief to this court:

> "In light of the above separation of insureds provision, Old Republic must treat the named insured, Pro-Agr, who purchased the policy and paid in excess of $20,000 in total premiums as distinct for coverage purposes from other insureds, such as permissive users of the aircraft like pilot Dowdy, when analyzing coverage for bodily injury claims filed against Pro-Agr and when construing the policy's exclusions."

We note this provision specifically refers to "covered claims." Pursuant to the exclusionary language relied on by Old Republic, Dowdy's claim for bodily injuries he suffered while piloting Pro-Agr's plane is not a covered claim. As a result, the separation of insureds provision does not create coverage for Dowdy's bodily injury claim.

¶ 26 Pro-Agr and Dowdy also argue Old Republic's interpretation of its policy is draconian, unreasonable, and not clearly communicated to Pro-Agr. We disagree. The plain language of the policy clearly provides it will not cover claims for bodily injury brought by a pilot in Dowdy's situation. Further, we do not find it is unreasonable or draconian for an insurance company to offer its customers an insurance policy that does not cover a claim like Dowdy's.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we reverse the trial court's order finding Old Republic had a duty to defend and provide coverage to Pro-Agr and remand this case with instructions for the trial court to grant Old Republic's motion for summary judgment.

¶ 29 Reversed and remanded with directions.