STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Bruce Unser and Holly Unser
Third-Party Plaintiffs Below, Petitioners

vs) No. 15-1085 (Fayette County 14-C-84)

Prepared Insurance Company
Fourth-Party Defendant Below, Respondent

FILED
April 7, 2017
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Bruce and Holly Unser (hereinafter "petitioners"), by counsel Tim C. Carrico, appeal the October 5, 2015, order of the Circuit Court of Fayette County granting respondent Prepared Insurance Company's (hereinafter "respondent") motion to dismiss the fourth-party complaint for lack of personal jurisdiction. Respondent appears by counsel, Peter T. DeMasters. Petitioner Bruce Unser filed suit against American-Canadian Expeditions, Ltd. (hereinafter "ACE") for injuries suffered by his minor daughter; ACE filed a third-party complaint against petitioners, who sought coverage and a defense under their homeowners' policy with respondent. Respondent denied coverage and petitioners filed a fourth-party declaratory judgment action against respondent arising out of its denial of coverage. The circuit court found that respondent, a Florida corporation, entered into the subject insurance contract in Florida with petitioners, who are Florida residents. Accordingly, the circuit court found that neither the long-arm statute nor due process permit the exercise of personal jurisdiction over respondent for purposes of the fourth-party declaratory judgment action.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented and upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

I. Factual and Procedural History

In September 2011, petitioners, residents of the State of Florida, contracted with respondent, an insurance company incorporated and principally doing business in the State of Florida, for homeowner's insurance coverage that included a provision for liability coverage. In June 2012, petitioners' daughter was riding a bicycle on an unpaved road located on ACE's property located in Fayette County, West Virginia. Petitioners claimed that ACE encouraged bicycling on its property but that there were no warning signs posted regarding the road conditions on the section of roadway where their daughter rode her bicycle. Petitioners claimed that, as a result of the roadway conditions, their daughter lost control of her bicycle at an intersection on the roadway, crashed into a tree, and was injured. Following their daughter's accident, petitioner Bruce Unser filed suit, on his daughter's behalf, against ACE. ACE brought

a third-party complaint against petitioners alleging breach of contract, indemnification,[1] and contribution based on a theory of negligent supervision. Petitioners sought defense and coverage for the third-party complaint under their homeowner's insurance policy with respondent.

Respondent issued a letter to petitioners denying defense and coverage under the homeowner's insurance policy.[2] Thereafter, petitioners filed a fourth-party declaratory judgment action to enforce their rights under the homeowner's insurance policy. Respondent moved to dismiss petitioners' fourth-party complaint arguing that the circuit court lacked personal jurisdiction over respondent. The circuit court found that personal jurisdiction did not lie against respondent under the long-arm statute nor would such an exercise of jurisdiction comport with federal due process given that the policy was issued by a Florida company, to Florida residents, to cover a risk of loss located in Florida. The circuit court made the dismissal order immediately appealable and this appeal ensued.

II. Standard of Review

This Court has held that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc*., 194 W.Va. 770, 461 S.E.2d 516 (1995). With respect to a nonresident defendant's motion to dismiss for lack of personal jurisdiction, we have held that

> "[w]hen a defendant files a motion to dismiss for lack of personal jurisdiction under *W. Va. R. Civ. P.* 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. At this stage, the party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence." Syllabus point 4, *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997).

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[1] ACE relies upon a "Contract & Liability Waiver & Indemnification Agreement" signed by petitioners which purports to release any claims against ACE for injuries sustained and provide for indemnification of ACE. ACE further sought declaratory relief as to the terms of the Agreement and counter-claimed petitioner Bruce Unser on substantially the same basis as the third-party complaint.

[2] Respondent denied coverage on the basis of two policy exclusions. The first excludes coverage for liability "under any contract or agreement." *See* n.1, *supra*. The second excludes coverage for bodily injury to an "insured" under the policy, which includes residents of the household who are relatives.

Syl. Pt. 2, *Bowers v. Wurzburg*, 202 W.Va. 43, 501 S.E.2d 479 (1998).

III. Discussion

In their sole assignment of error, petitioners assert that the circuit court erred in finding that it lacked personal jurisdiction over respondent. In short, petitioners maintain that respondent committed acts which bring it under the long-arm statute[3] and that respondent's actions give rise to the "minimum contacts" necessary to comport with federal due process. In that regard, this Court has recently articulated a two-part test to determine whether a circuit court has personal jurisdiction over a foreign corporation or nonresident:

> A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in *W. Va. Code*, 31-1-15 [Repl. Vol. 2015][4] and *W. Va. Code*, 56-3-33 [Repl. Vol. 2012]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process."

Syl. Pt. 3, *State ex rel. Ford Motor Co. v. McGraw*, 237 W.Va. 573, 788 S.E.2d 319 (2016) (citations omitted) (footnote added).

A.

With regard to the first step of the analysis—examination of our personal jurisdiction statutes—petitioners argue that the exercise of jurisdiction over respondent is permitted by West Virginia Code §§ 56-3-33(a)(3) and/or (7). These provisions of our long-arm statute provide that personal jurisdiction lies against a nonresident who

> (3) Caus[es] tortious injury by an act or omission in this State;
>
> [or]
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> * * *
>
> (7) Contract[s] to insure any person, property or risk located within this State at the time of contracting.

First, as to their claim of personal jurisdiction pursuant to subsection (3), petitioners do not contend that respondent itself caused tortious injury in this state. Rather, they claim the acts or omissions which form the basis for their tender of defense and demand for

[3] West Virginia Code § 56-3-33 (2008).

[4] This statute has been repealed and its equivalent exists at West Virginia Code § 31D-15-1501(d) (2008). Petitioners do not reference this statute; however, its pertinent provisions are largely similar to the subsections of West Virginia Code § 56-3-33(a) discussed *infra*.

coverage occurred in West Virginia. In effect, petitioners claim that *their* alleged tortious actions may be imputed to their insurer for purposes of making their insurer subject to personal jurisdiction. Respondent counters that this subsection requires *respondent* to have committed a tortious act and that in no way are its insureds' actions sufficient to create activity on its behalf which satisfies the long-arm statute. We agree.

The alleged tortious acts or omissions of respondent's insureds provide no basis upon which to impute the statutory act of "causing tortious injury" to respondent. Personal jurisdiction is inherently "personal" to the respondent insurer, not its insured. Respondent simply did not enter into the State and commit a tortious act or omission. Moreover, petitioners provide no legal authority to support the notion that when an insured commits a tort, such conduct is sufficient to then subject *the insurer* to personal jurisdiction for purposes of direct litigation against it. *See OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1093 (10th Cir. 1998) ("The insured and third-party's acts, however, are not relevant to measuring a defendant's minimum contacts with a forum state.").

Secondly, as to West Virginia Code § 56-3-33(a)(7)—providing for personal jurisdiction when a nonresident contracts to insure any person, property or risk located within this state at the time of contracting—petitioners argue that respondent effectively insured a risk in West Virginia because its insureds traveled to West Virginia where they allegedly committed tortious acts. Respondent counters that at the time petitioners' homeowners' insurance policy was issued, the persons, property, and risks covered were all located in Florida and therefore jurisdiction is not established pursuant to this provision. Again, we agree. Petitioners' argument conflicts with the plain language of West Virginia Code § 56-3-33(a)(7), which requires that the person, property or risk insured be "located within this State *at the time of contracting*." (emphasis added). At the time of contracting for insurance with respondent, petitioners resided in their family home located in Florida.

Petitioners feebly[5] suggest that jurisdiction is impliedly established under this provision inasmuch as the insurance policy does not *exclude* "out-of-state" incidents from coverage.[6] This argument improperly conflates the unrelated issues of whether respondent is

[5] Petitioners cite only *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987) in support of this argument. In *Rossman*, the Fourth Circuit Court of Appeals found personal jurisdiction in a coverage action where the subject policy was written, issued, and delivered in Illinois but the insured moved to Virginia where the accident occurred. This opinion, however, has been widely criticized. *See OMI Holdings*, 149 F.3d at 1094 (commenting that analysis in *Rossman* is "troubling" because it is at odds with United States Supreme Court caselaw and that, in using such analysis, Fourth Circuit "'may have stretched the minimum contacts test too far'") (quoting *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1420 n.7 (10th Cir. 1988))). Importantly, the *Rossman* court also found that Virginia had "a compelling interest in providing a forum for *its residents* when insurers refuse to pay a claim." 832 F.2d at 287 (emphasis added). In this case, no West Virginia resident has been denied coverage by respondent.

[6] This is, however, not the basis upon which coverage was denied. *See* n.2, *supra*.

contractually required to provide a defense to an *insured* in a particular forum and respondent being haled into a foreign jurisdiction to defend itself in a direct action against it as a named party defendant. The former issue is one of coverage; the latter is one of jurisdiction.

Moreover, similar approaches to overcoming the due process hurdles of personal jurisdiction have been soundly rejected. The Ninth Circuit rebuffed precisely this argument in *Hunt v. Erie Ins. Grp*., 728 F.2d 1244 (9th Cir. 1984). The *Hunt* court stated that "Erie's failure to structure its policy to exclude the possibility of defending a suit wherever an injured claimant requires medical care cannot, in our view, fairly be characterized as an act by which Erie has purposefully availed itself of the privilege of conducting activities in California." *Id.* at 1247. The Supreme Court of Arizona likewise explained that "[e]xtension of nationwide coverage by an insurer may make lawsuits by insureds in foreign jurisdictions reasonably foreseeable, but state jurisdiction over foreign defendants is impermissible unless the defendant [insurer], not the plaintiff [insured], has purposefully directed its activities at the forum state." *Batton v. Tennessee Farmers Mut. Ins. Co*., 736 P.2d 2, 6 (Ariz. 1986). *See also OMI Holdings*, 149 F.3d at 1094 ("[W]hether a defendant may foresee that a plaintiff may attempt to implead it into an action in a foreign forum is of little relevance in determining whether a defendant has established minimum contacts with that forum."); *Eagle Ins. Co. v. Gutierrez-Guzman*, 801 N.Y.S.2d 328, 329 (N.Y. App. Div. 2005) (concluding "the mere unilateral act" of automobile insurer's alleged insured, in driving into New York State was insufficient to permit the court to exercise long-arm jurisdiction over automobile insurer). Like these courts, we conclude that personal jurisdiction over respondent within the contemplation of our long-arm statute does not rise or fall with the terms of the policies respondent issues; rather, it arises only upon the purposeful actions of the respondent as enumerated in the statute.

As a last resort, petitioners argue that West Virginia Code § 33-44-1 *et seq.* (2001) provides for *in personam* jurisdiction over "unauthorized insurers" and therefore establishes jurisdiction in this matter. However, this argument was not presented to the circuit court and is raised for the first time in petitioners' brief; as such, it is not properly before this Court. *See Zaleski v. W. Va. Mut. Ins. Co*., 224 W.Va. 544, 550, 687 S.E.2d 123, 129 (2009) ("Because this argument is now being raised for the first time on appeal, we must necessarily find that the argument . . . has been waived.").[7]

[7] West Virginia Code § 33-44-1 (the "Unauthorized Insurers Act" or "Act") creates a mechanism by which unauthorized insurers are subject to liability for "transacting insurance" in this State; the Act prohibits such actions and provides a mechanism by which these insurers can be brought within the jurisdiction of our courts and/or the Insurance Commissioner.

The above waiver notwithstanding, we are compelled to emphasize that petitioners made no claim against respondent whatsoever for violation of the Act. More importantly, the Act was created to address the issue of unauthorized insurers "soliciting the sale of insurance and selling insurance to *residents of this state[.]*" W. Va. Code § 33-44-2 (emphasis added). The Act further expressly states that it is designed to address the concern that "many *residents of this state* hold policies of insurance *issued or delivered in this state* by insurers not licensed to transact insurance in this state[.]" (emphasis added). Prior to this 2001 enactment, the Code provided no means by which service of process could be effectuated against unauthorized insurers and this

B.

For much the same reasons articulated hereinabove, petitioners likewise fail the second, "due process" prong of the personal jurisdiction test articulated in *Ford Motor Co*. "The standard of jurisdictional due process is that a foreign corporation must have such minimum contacts with the state of the forum that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice." Syl. Pt. 2, *Ford Motor Co.*, 237 W.Va. 573, 788 S.E.2d 319 (internal quotations omitted) (citations omitted). Such contacts may arise either "generally" or "specifically."

This Court has previously held that "a court may assert general personal jurisdiction over a nonresident corporate defendant to hear any and all claims against it when the corporation's affiliations with the State are so *substantial, continuous, and systematic as to render the nonresident corporate defendant essentially at home in the State*." Syl. Pt. 5, *Ford Motor Co.* (emphasis added). It is clear from the record that respondent is not "at home" in West Virginia. Respondent is a Florida corporation that is not licensed to conduct business in West Virginia. In this matter, the only connection between respondent and the State of West Virginia is the injury to its insured's daughter, which gave rise to ACE's third-party claim against petitioners for failure to supervise. *See Franklin v. Catawba Ins. Co*., 737 N.Y.S.2d 378 (N.Y. App. Div. 2002) (personal jurisdiction lacking in action against insurer for uninsured motorist coverage where insurer not licensed to do business in New York, has no offices, agents, or telephones in New York, and does not solicit any business in New York). As a result, petitioners' counsel conceded during argument that they do not purport to argue the existence of general jurisdiction.

"Specific" personal jurisdiction arises when the "in-state activities of the non-resident give rise to or are related to the subject cause of action." *Ford Motor Co.*, 237 W. Va. at 589, 788 S.E.2d at 335. The declaratory judgment action involves *only* the terms of the subject homeowners' policy. The policy was made in the State of Florida, by a Florida insurer, with Florida residents to cover risks of loss in Florida. In *National Indemnity Company v. Pierce Waste Oil Service, Inc*., 740 F. Supp. 721 (E.D. Mo. 1990), the Eastern District of Missouri found a lack of personal jurisdiction where the insurance policies were issued in Illinois, to Illinois residents, through Illinois insurance agencies. The *Pierce Waste* court noted that the underlying lawsuit "may have *prompted* [the insureds] to seek this declaratory judgment, but [it] did not give rise to the rights at issue in this case. On the contrary, the parties' respective rights and the universe of [the insureds'] liability were established when they entered into a contract for insurance in Illinois." *Id*. at 724 (emphasis in original). Petitioners briefly argue that simply

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Act provides "a method of substituted service of process" against such unauthorized insurers to protect state residents against certain enumerated "[u]nlawful transaction[s]." W. Va. Code §§ 33-44-2, -4. As the statement of purpose clearly sets forth, the purpose of the Act is to enable jurisdiction against unauthorized insurers that presumably have contacts with the state (by soliciting and selling insurance and/or issuing and delivering policies); therefore, jurisdictional requirements are likely demonstrated in the allegations themselves. However and notwithstanding the jurisdictional allowances provided by West Virginia Code § 33-44-1, an action under that statute must nevertheless satisfy due process concerns.

sending a coverage denial letter to their West Virginia lawyer was sufficient to create specific jurisdiction in this matter. However, federal due process is certainly not met by an insurer fulfilling its obligation to respond to a coverage inquiry and timely make its response to its insured's attorney, wherever he or she may be located. Minimum contacts necessary for personal jurisdiction do not arise so fortuitously. *See Waste Mgmt., Inc. v. Admiral Ins. Co.*, 649 A.2d 379, 389–90 (N. J. 1994) ("We recognize both the trend to expand the scope of jurisdiction over nonresidents and the special interest that a state may have in the field of insurance, but those circumstances do not obviate the need to meet the threshold requirement for personal jurisdiction, namely, that the *defendant* create minimum contacts with this state by purposefully availing itself of some benefit of doing business here." (citations omitted) (emphasis in original)).

IV.

Therefore, upon our review, based on the facts and circumstances of this case, we find no error in the circuit court's conclusion that petitioners failed to establish personal jurisdiction over respondent. Finding no error in the dismissal of petitioners' fourth-party complaint for lack of personal jurisdiction, we affirm the circuit court's October 5, 2015, order.

Affirmed.

ISSUED: April 7, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker