

RECORD NO. 20-1549

In The

**United States Court Of Appeals
For The Fourth Circuit**

**SKYLINE RESTORATION, INC., as assignee of First
Baptist Church of Lumberton, North Carolina,**
Plaintiff – Appellant,

v.

CHURCH MUTUAL INSURANCE COMPANY,
Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
AT WILMINGTON**

REPLY OF APPELLANT

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ARGUMENT

Plaintiff-Appellant Skyline Restoration, Inc. (“Skyline”), pursuant to Fed. R. App. P. 28(c), in reply to the Answer Brief of Defendant-Appellee Church Mutual Insurance Company (“Church Mutual”), respectfully shows the Court as follows:

I. NORTH CAROLINA LAW PROVIDES THAT FOR LOSSES OTHER THAN THOSE INSURED IN THE STANDARD FIRE POLICY, STATUTES OF LIMITATION RUN FROM THE DATE OF BREACH, NOT THE DATE OF LOSS.

North Carolina has a straightforward framework for how to construe the language of an insurance policy and how it should be reconciled with statutes regulating the insurance industry. Under North Carolina law, statutes governing what provisions are authorized in an insurance policy are read into the language of the policy. *Lunsford v. Mills*, 367 N.C. 618, 629, 766 S.E.2d 297, 305 (2014). The rule is that the language of an insurance policy controls, except those provisions in conflict with a statute, and when in conflict, the language of the statute predominates over the language of the policy. *Ibid.*

Church Mutual issued the insurance policy in question in this appeal to the First Baptist Church of Lumberton (“First Baptist”). The policy, bearing Policy No. 0045802-02-912110 (“the Policy”), provided first party property coverage to First Baptist for all buildings and personal property identified in the declarations. J.A. at 29-221. On October 7, 2016, Hurricane Matthew passed through

Lumberton, North Carolina, and the Complaint alleges that First Baptist's property sustained damage covered by the Policy. J.A. at 5, 7, ¶¶ 1, 9-10; J.A. at 29.

The parties disagree as to whether the Policy language is in conflict with, or consistent with, three statutes: N.C. Gen. Stat. § 1-52, N.C. Gen. Stat. § 58-44-16, and N.C. Gen. Stat. § 58-3-35. The language of each statute is clear. Following North Carolina law, where the language of the Policy is not in conflict with the statute, the Policy applies. Where the language of the Policy is in conflict with the statute, the statute controls.

The limitations on actions contained in various sections of the Policy are in conflict with N.C. Gen. Stat. § 58-3-35 as it relates to the loss complained of in the Complaint, and the district court erred in enforcing the limitations on actions from the Policy to dismiss Skyline's claims against Church Mutual. Because the district court did not read N.C. Gen. Stat. § 58-3-35 into the Policy, it failed to see how it conflicted with the terms of the Policy and erred in giving the language of the Policy primacy over the conflicting statute.

The Policy includes, as required by North Carolina law, form A188.1 (5-91) "North Carolina Standard Fire Policy Provisions". J.A. at 120-22. The coverage form provides that "[t]he provisions of the Standard Fire Policy are stated below. State law still requires that they be attached to all policies." J.A. at 120 [emphasis in original]. In the form, Church Mutual agrees to insure its insured "against all

DIRECT LOSS BY FIRE, LIGHTNING AND OTHER PERILS INSURED
AGAINST IN THIS POLICY ... EXCEPT AS HEREINAFTER PROVIDED.”

J.A. at 120 [emphasis in original]. The Standard Fire Policy also provides:

Other perils or subjects.

Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

J.A. at 121.

If First Baptist Church of Lumberton had suffered a loss caused by *fire*, coverage for the loss would have been found in the Standard Fire Policy portion of the Policy, and the limitation on actions against Church Mutual would have been three years from the date of loss. Coverage for such losses is set out in the Standard Fire Policy, and the Standard Fire Policy coverage form complies with the requirements of N.C. Gen. Stat. § 58-44-16(f). Moreover, N.C. Gen. Stat. § 1-52(12) would exempt losses covered by the Standard Fire Policy from the operation of N.C. Gen. Stat. § 58-3-35. However, since Skyline does not seek coverage under the Standard Fire Policy coverage part of the Policy, neither N.C. Gen. Stat. § 58-44-16(f) nor N.C. Gen. Stat. § 1-52(12) would apply to shorten the statute of limitations to a period of time less than three-years from the date of breach.

Again, the statute regulating limitations on actions in insurance policies is N.C. Gen. Stat. § 58-3-35, which provides as follows:

Stipulations as to jurisdiction and limitation of actions.

(a) No insurer, self-insurer, service corporation, HMO, MEWA, continuing care provider, viatical settlement provider, or professional employer organization licensed under this Chapter shall make any condition or stipulation in its contracts concerning the court or jurisdiction in which any suit or action on the contract may be brought.

(b) **No insurer**, self-insurer, service corporation, HMO, MEWA, continuing care provider, viatical settlement provider, or professional employer organization licensed under this Chapter **shall limit the time within which any suit or action referred to in subsection (a) of this section may be commenced to less than the period prescribed by law.**

(c) **All conditions and stipulations forbidden by this section are void.**

[Emphasis added].

The Policy provides in two locations a limitation on actions by the insured against the insurer to three years from the date of loss: (1) The North Carolina Standard Fire Insurance Policy, J.A. at 122; and (2) North Carolina Changes Endorsement, J.A. at 118. The North Carolina Standard Fire Policy, per N.C. Gen. Stat. § 58-44-16, is mandatory and required to be attached to any property insurance policy issued in North Carolina. The “North Carolina Changes” modifies the “Property Coverage Part” of the Policy, providing insurance against perils other than those covered by the Standard Fire Policy. J.A. at 118, *and see* N.C. Gen. Stat. § 58-44-20(6).

The loss sustained by the First Baptist Church of Lumberton, as alleged in the Complaint, was due to “wind”, a peril not covered under the Standard Fire Insurance Policy, but instead under the Property Coverage Part, Causes of Loss-Special. J.A. at 94-99. The question before the Court is whether the district court applied North Carolina law correctly in finding that the three-year statute of limitations ran from the date of loss caused by a peril other than fire, instead of the date of the alleged breach of the Policy. Church Mutual argues in their brief that regardless of the language of the policy, a statute of limitations running from the date of loss is not in conflict with N.C. Gen. Stat. § 58-3-35 because it is otherwise permitted by N.C. Gen. Stat. § 1-52(12). (A.B. at 9-11)

N.C. Gen. Stat. § 1-52(12) cites directly to N.C. Gen. Stat. § 58-44-16, which outlines “standard fire insurance policy provisions” and allows a statute of limitations to run from the date of the loss in that instance. Church Mutual cites three published opinions, and one unpublished opinion from another district, in support of their contention that N.C. Gen. Stat. §§ 58-44-16 and 1-52(12), apply regardless of the cause of the loss: (1) *Marshburn v. Associated Indem. Corp.*, 84 N.C. App. 365, 353 S.E.2d 123 (1986) – lightning strike (A.B. at 11); (2) *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 628 S.E.2d 427 (2006) – ruptured underground septic/sewer pipeline; (3) *State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 471, 234 S.E.2d 720 (1977) – deeming

“Homeowners insurance to be fire insurance”; and (4) *Quillen v. Allstate Corp.*, 2014 U.S. Dist. LEXIS 163577 (W.D.N.C. 2014) – explosion (A.B. at 12-13).

Each matter is distinguishable from the case at the bar, and further deviates from the manifest language of the statutes at hand.

In *Marshburn*, the Supreme Court, in examining a homeowners’ policy that tracked the language of the actual standard fire policy, wrote that the policy at issue “included coverage against direct loss to plaintiff’s property caused by fire or lightning.” 84 N.C. App. at 368, 353 S.E.2d at 125. In *Page*, again examining a homeowners’ policy, the applicability of the limitation on actions in the standard fire policy to causes of loss other than fire is addressed only in dicta and is not expressly addressed.¹ In *State ex rel. Commissioner*, the Supreme Court wrote that for purposes of rate-making, homeowners insurance was fire insurance. 292 N.C. at 485, 234 S.E.2d at 728.

None of these cases address a commercial property owners’ policy providing business and personal property coverage, such as the coverage provided by Church Mutual under its Policy with First Baptist Church of Lumberton. J.A. 64-71, 80-93, 100-107, and 118-19. The cases cited by Church Mutual are readily

¹In *Quillen v. Allstate Corp.*, in an unpublished opinion examining a homeowners’ policy, the trial court in the Western District of North Carolina cited approvingly *Marshburn* and *Page* in justifying their decision to apply the statute of limitations in a claim arising out of an explosion deeming “Homeowners insurance to be fire insurance within the meaning of G.S. 58-131.2” (citations omitted).

distinguishable from coverages provided to its insured. Again, Skyline is not pursuing a fire-loss claim, but a wind-loss claim, and coverage for a wind-loss claim does not fall within the insurance provided by a fire insurance policy. Coverage for a wind-loss claim does not derive from a fire insurance policy, and is, in fact, authorized by a completely different statute.

Article 44 of Chapter 58 of the North Carolina General Statutes regulates “Property Insurance Policies”. Section 58-44-20, sets out permissible variations to the standard fire insurance policy, providing under subsection (6) that:

Appropriate forms of supplemental contract or contracts or extended coverage endorsements and other endorsements whereby the interest in the property described in such policy shall be insured against one or more of the perils which the company is empowered to assume, in addition to the perils covered by said standard fire insurance policy may be approved by the Commissioner, and their use in connection with a standard fire insurance policy may be authorized by him. In his discretion the Commissioner may authorize the printing of such supplemental contract or contracts or extended coverage endorsements and other endorsements in the substance of the form of the standard fire insurance policy. The first page of the policy may in form approved by the Commissioner be arranged to provide space for listing of amounts of insurance, rates and premiums, description of construction, occupancy and location of property covered for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached or printed therein, and such other data as may be conveniently included for duplication on daily reports for office records.

N.C. Gen. Stat. § 58-44-20(6).

For the insured property of First Baptist Church of Lumberton, per the declarations, Church Mutual provided building coverage for perils other than fire

pursuant to the Causes of Loss-Special Form of the Policy. J.A. at 34, 100-107.

The Causes of Loss-Special Form of the Policy is not the Standard Fire Insurance Policy described in N.C. Gen. Stat. § 58-44-16 that the Commissioner requires to be included within all property insurance policies. It is, instead, authorized by the Commissioner and N.C. Gen. Stat. § 58-44-20 to provide coverage against perils other than fire or lightning covered by the Standard Fire Insurance Policy. It is, therefore, subject to N.C. Gen. Stat. § 58-3-35, and not saved by the limitation of N.C. Gen. Stat. § 1-52(12) as argued by Church Mutual.

The coverage provided under the Special Form Causes of Loss and Property Conditions of the Policy is, like the “(i) automobile fire, theft, comprehensive, and collision or (ii) marine and inland marine insurance”, an exception to the requirements of N.C. Gen. Stat. § 58-44-16. N.C. Gen. Stat. § 58-44-20. Meaning that the appropriate guide as to whether the contractual limitation is effective against First Baptist Church of Lumberton, and Skyline, is *F&D Co. v. Aetna Ins. Co.*, 305 N.C. 256, 287 S.E.2d 867 (1982). As explained previously in Skyline’s initial brief, in *F&D Co.* the North Carolina Supreme Court held the attempt by the defendant to limit an insured’s cause of action under a marine policy to a time period less than authorized by North Carolina statutes was void.

N.C. Gen. Stat. § 58-44-16(f)(19), provides that a “standard fire insurance policy” must include a provision reading:

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law unless all the requirements of this policy have been complied with and unless commenced within three years after inception of the loss.

Church Mutual relies on N.C. Gen. Stat. § 1-52(12) in arguing that the limitation of action in the Policy from three years from date of loss is authorized by N.C. Gen. Stat. 58-3-35. Notably, Section 1-52(12) only addresses Section 58-44-16, and not the additional coverages or contracts allowed by Section 58-44-20. Because it is not elsewhere authorized by law, i.e. N.C. Gen. Stat. § 1-52(12), the limitations on actions in the Property Coverage Part of the Policy is in conflict with N.C. Gen. Stat. § 58-3-35 and therefore void. Consequently, the statute of limitations applying to Skyline's cause of action is N.C. Gen. Stat. § 1-52(1), which runs for three years from the date of breach.

Skyline alleges that Church Mutual breached the terms of the Policy by denying coverage, by at the earliest November 28, 2016. J.A. at 8, ¶ 23. Skyline filed suit against Church Mutual on November 22, 2019, less than three years from the earliest possible alleged date of breach. As such, Skyline's Complaint was timely filed, the district court erred in dismissing the Complaint, and the district court's dismissal should be overturned.²

² A limitation period running from date of loss which, under Church Mutual's reasoning, presumably could be not only three years from the date of loss but written to be two years, one year, or 90 days from the date of loss. This inherent unfairness is compounded by the fact that these large property loss claims move at a sluggish pace to begin with – inspections, adjuster document requests, engineers, contractors etc.... Then, ostensibly, the insurer could still assert that appraisal would be required as a condition precedent to filing suit. *Buchanan v. N.C. Farm Bureau Mut.*

II. CONTRARY TO THE ARGUMENTS OF CHURCH MUTUAL, POST-LOSS ASSIGNMENTS ARE VALID AND ENFORCEABLE WITHOUT THE CONSENT OF THE INSURER.

Church Mutual cites in support of multiple arguments for upholding the district court's decision that the Standard Fire Policy prohibits assignments. A.B. pp. 32, 35 of 38 ("the policy itself precludes any assignment without Church Mutual's written consent."). Such an argument does not accurately explain North Carolina on the subject of assignments.

In *First-Citizens Bank & Trust Co. v. Universal Underwriters Ins. Co.*, the North Carolina Court of Appeals adopted the rule followed by most jurisdictions that prohibitions against assignment are ineffective when applied to assignments that occur after the loss has been incurred. 113 N.C. App. 792, 796, 440 S.E.2d 304, 307 (1994). The Court of Appeals adopted the rule and reasoning stated in two treatises on insurance law, that wrote:

The great weight of authority supports the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply to assignments before loss only, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely assignment of the policy, as distinguished from a claim arising thereunder, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim.

Ins. Co., ___ N.C.App. ___, 841 S.E.2d 598 (2020). The clock gets run on the insured who has no control of the agenda or pace; not what N.C. Gen. Stat. § 58-3-35 envisioned.

Id. at 796-97, 440 S.E.2d at 307, *citing* 16 George J. Couch *et al.*, *Couch on Insurance 2d*, § 63.40 at 763-65 (Rev. ed. 1983) (footnotes omitted). *See also* 5A John A. Appleman and Jean Appleman, *Insurance Law and Practice*, § 3458, at 408-09 (1970).

The Complaint alleges that Church Mutual's insured, First Baptist Church of Lumberton, sustained a loss with the passage of Hurricane Matthew, and thereafter assigned its rights to collect proceeds under its property coverage with Church Mutual to Skyline. J.A. at 5, ¶ 30. While Church Mutual is correct that the Standard Fire Policy coverage part provides "[a]ssignment of this policy shall not be valid except with the written consent of this Company", J.A. at 123, that provision is only effective to preclude assignments that pre-date a loss covered by the policy. Therefore, First Baptist Church of Lumberton was free to assign any rights it had against Church Mutual under the Policy to Skyline, as both assignments attached by Church Mutual occurred after the loss occurred.

As argued in Skyline's initial brief, "[i]n equity the assignee stands absolutely in the place of his assignor, and it is the same, as if the contract had been originally made with the assignee, upon precisely the same terms as with the original parties." *Smith v. Brittain*, 38 N.C. 347, 354, (1844). As alleged in Skyline's Complaint, the offending conduct of Church Mutual occurred after its insured assigned its right of recovery under the Policy to Skyline. While the

general rule, as argued by Church Mutual, is that claims for unfair and deceptive trade practices are not assignable, Church Mutual does not cite any case prohibiting such a claim where, as here, the offending conduct occurred after assignment and the insured and assignee's interests are aligned and have always been in opposition to the insurer.

Each case cited by Church Mutual in their response brief relies on the claimant and insured being adverse parties at the time settlement demands were made of the insurer. *See USA Trouser, S.A. v. Williams*, 258 N.C. App. 192, 812 S.E.2d 373 (2018); *Terrell v. Lawyers Mut. Liab. Ins. Co.*, 131 N.C. App. 655, 507 S.E.2d 923 (1998). Moreover, the carriers identified in each case were liability insurers, and not providing property insurance to their insureds. *Ibid.* While privity was required in both cases in order to assert a claim for violation of N.C. Gen. Stat. § 75-1.1, Church Mutual has not identified any authority requiring privity where, as here, the allegedly offending conduct occurred after the insured assigned its rights under a property insurance policy to another party.

Again, the Rules of Civil Procedure require only that a plaintiff state a claim that is plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Skyline asserts that Church Mutual's conduct in handling its claim under the Policy amounted to an unfair assertion of unequal power that proximately caused it to suffer damages. Skyline's cause of action met all the elements of a claim for

violation of N.C. Gen. Stat. § 75-1.1, and the district court erred when it dismissed it. Therefore, the district court's ruling should be overturned, and this matter should be remanded for further proceedings.

CONCLUSION

For the reasons set forth above, the district court erred in dismissing Skyline's Complaint, and its dismissal should be overturned.

Respectfully submitted, this the 27th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2020, I electronically filed this document with the Clerk of Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

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