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Bacon Construction Co. v. Arbella Protection Insurance Co., 208 A.3d 595 (R.I. 2019)

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Insurance Liability Law. *Bacon Construction Co. v. Arbella Protection Insurance Co.,* 208 A.3d 595 (R.I. 2019). If a general contractor, listed as an additional insured party in its subcontractor's commercial general liability policy, voluntarily dismisses claims against its subcontractor and settles with the injured subcontractor's employee, the general contractor cannot subsequently demand insurance coverage from the liability policy, nor can the general contractor force the insurance company to defend it in litigation.[1]

FACTS AND TRAVEL

Neither party disputed the material facts in this case.[2] On December 12, 2014, an employee of U.S. Drywall (Drywall), Thiago Almeida (Almeida), suffered severe physical injuries while working at a construction site.[3] The plaintiff, Bacon Construction Co., Inc. (Bacon) was the general contractor and Drywall served as Bacon's subcontractor.[4] Prior to the injury, Bacon subcontracted Drywall's services to perform structural work on the University of Rhode Island campus and, as part of that work, subcontractor Drywall was required to purchase a commercial general liability insurance policy from Arbella Protection Insurance Co. (Arbella), which contained a provision naming Bacon as an additional insured party.[5] The policy also stipulated that Arbella would provide defense and indemnification costs to Drywall for lawsuits arising from its portion of the work on the project (the clause).[6]

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1. Bacon Const. Co. v. Arbella Prot. Ins. Co., 208 A.3d 595 (R.I. 2019).
2. *Id*. at 597.
3. *Id*.
4. *Id*.
5. *Id*.
6. The related text of the policy, as highlighted by the Court, reads:

Who is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in

On June 25, 2015, Almeida filed a complaint in Rhode Island Superior Court against Bacon, alleging that Almeida was injured due to Bacon's negligence.[7] Almeida admitted that he was injured during the course of his subcontracting work, but Almeida did not allege that Drywall, his employer, was negligent.[8] In response, Bacon filed a third-party complaint against Drywall, charging that the latter was obligated to both defend and indemnify Bacon.[9] On June 27, 2017, Bacon voluntarily dismissed all of its claims against Almeida and Drywall with prejudice.[10] Simultaneously, Bacon tried to recover indemnity and defense costs from Drywall's insurer, Arbella, by filing an action requesting declaratory judgment against Arbella on May 13, 2016.[11] Bacon then moved for summary judgment.[12] In response, Arbella filed an objection and a cross-motion for summary judgment.[13] On July 26, 2017, the Superior Court justice heard each party's arguments, then issued a bench decision.[14] The justice determined that Arbella's insurance policy was clear in that it limited Bacon's coverage to actions resulting from Drywall's negligence and, because there was no evidence that Almeida's injury was caused by Drywall's negligence, Bacon could not recover.[15] Therefore, the justice granted Arbella's cross-motion

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a contract or agreement, executed prior to an 'occurrence', that such person or organization be added as an additional insured on your policy. Such person or organization *is an additional insured only with respect to liability* for 'bodily injury'; 'property damage' or 'personal and advertising injury' *caused, in whole or in part, by:*

1. *Your acts or omissions; or*

2. *The acts or omissions of those acting on your behalf*; in the performance of your ongoing operations for the additional insured. *Id.* at 599 (emphasis added).

7. *Id*. at 597.

8. *Id*. *See also id.* at n.1. Almeida collected workers' compensation from Drywall's insurer.

9. *Id*.

10. *Id*. at 598.

11. *Id*.

12. *Id*.

13. *Id*.

14. *Id*.

15. *Id*.

for summary judgment and denied Bacon's motion for summary judgment on September 1, 2017.[16] Bacon appealed.[17]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court (the Court) reviews the grant of motions for summary judgment *de novo*.[18] In addition, the Court adhered to precedent with regard to reviewing a trial justice's interpretation of a contract *de novo*, because "[w]hether an ambiguity exists in an insurance policy is a question of law[.]"[19] Bacon advanced four arguments of error: (1) Bacon was afforded additional insurance coverage under a plain interpretation of the contract; (2) the insurance policy did not include a "negligence trigger"; (3) the Superior Court justice incorrectly combined the analysis of an indemnity clause contained within the Drywall-Bacon contract with the clause in the Arbella policy; and (4) Arbella did have a duty to defend Bacon in litigation.[20] The Court declined to reach Bacon's third issue, finding it irrelevant to the Arbella policy at issue on appeal because the Drywall-Bacon contract was not at issue on appeal and, more importantly, because Bacon dismissed all of its claims against Drywall.[21]

The Court first rejected Bacon's assertions that Bacon was entitled to insurance coverage under the Arbella policy and that the Arbella policy did not contain a negligence trigger.[22] The Court determined that the clause referred specifically to Drywall as the "named insured," while referring to Bacon as the "additional insured."[23] Following precedent on contract interpretation, the Court stated that it "would not depart from the literal language of the policy absent a finding that the policy is ambiguous."[24] To determine whether an ambiguity exists in contractal language, the

16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*. at 598–99 (quoting Merrimack Mut. Fire Ins. Co. v. Dufault, 958 A.2d 620, 625 (R.I. 2008)).
20. *Id*. at 599.
21. *Id*. at 599, n.3.
22. *Id*. at 599–600.
23. *Id*. at 599.
24. *Id*. at 600 (quoting Lynch v. Spirit Rent-A-Car, Inc., 965 A.2d 417, 425 (R.I. 2009)) (brackets omitted).

Court must "read a policy in its entirety, giving words their plain, ordinary, and usual meaning."[25] The Court found it clear that the clause placed a firm limitation on Bacon's availability for coverage, specifically, that Bacon may only receive coverage arising from situations where Drywall's actions or omissions make Drywall liable.[26] Although, as Bacon contended, the clause did not contain the word negligence, the Court was convinced that there was a negligence trigger in place because the clause included phrases like, "caused, in whole or in part," and "liability for 'bodily injury'" on the part of Drywall.[27] Furthermore, the clause mandated that a party must show how the named insured's actions or omissions caused the bodily injury, heavily implying the existence of a negligence trigger.[28] Finally, the Court opined that, were it to follow Bacon's argument on liability coverage to its logical conclusion, Bacon would end up with a greater amount of insurance coverage than Drywall because Bacon would be covered for personal injury claims based on negligence while Drywall, the named insured, would be excluded from such protections.[29]

Having rejected Bacon's arguments regarding coverage and the negligence trigger, the Court next rejected Bacon's assertion that Arbella had a duty to defend Bacon.[30] The Court applied the "pleadings test" to an insurer's duty to defend.[31] Under the pleadings test, an insurer has a duty to defend the insured if, when looking at the content of the complaint, "[the] complaint contains a statement of facts which bring the case within or potentially within the risk coverage of the policy[.]"[32] Bacon hung its hat on the word "potentially," arguing that because Almeida slipped while working at the construction site, there was a potential for some apportionment of contributory negligence to Almeida, and that such contributory negligence was covered by the language of the

25. *Id*. (quoting Peloquin v. Haven Health Ctr. of Greenville, LLC, 61 A.3d 419, 431–32 (R.I. 2013)).

26. *Id*.

27. *Id*.

28. *Id*.

29. *Id*.

30. *Id*. at 601.

31. *Id*.

32. *Id*. (quoting Med. Malpractice Joint Underwriting Ass'n of R.I. v. Charlesgate Nursing Ctr., L.P., 115 A.3d 998, 1004 (R.I. 2015)).

clause.[33] The Court rejected this argument for the simple fact that the Almeida complaint only alleged negligence against Bacon and, by voluntarily dismissing its claims against Drywall while reaching a settlement with Almeida, Bacon fatally closed the door to any vicarious-liability claims Bacon could have raised.[34]

COMMENTARY

The crux of the case rested on two principal points: first, on the specific language of the contractual clause, and second, on the procedural fact that Bacon dismissed its claims against Drywall while settling separately with Almeida.[35] The Court was correct to uphold the lower court's grant of summary judgment in Arbella's favor. As the Court pointed out, it seems antithetical for a general contractor to receive greater insurance protection when the main signatory to the insurance policy is the subcontractor, presumably a corporation with less financial means and therefore a more vested interest in receiving protection for whatever it can considering that the policy explicitly would not cover the subcontractor if a personal injury resulted from the subcontractor's negligence.[36] Furthermore, had the Court allowed Bacon's arguments to seize the fort, the Court would be torturously twisting the plain language of the clause which clearly laid out the very narrow circumstances under which Bacon would be covered by the insurance policy.[37] In effect, the Court would be rendering the clause meaningless. Bacon would essentially be receiving a 'free pass' for making what in retrospect appears to be an error in procedural legal judgment. Indeed, both the Superior Court justice and the Court indicated that had Bacon not voluntarily withdrawn its claims against Almeida and Drywall, the result would be different altogether hanging on vicarious liability.[38] Finally, this case illustrates what a poor strategic decision it was for Bacon to voluntarily dismiss its claims against the other parties because the Court appeared to leave the door open for vicarious liability as an avenue for Bacon's

33. *Id*. at 601.
34. *Id*. at 601–02.
35. *See id*. at 602.
36. *See id*. at 600.
37. *See id*.
38. *Id*. at 602.

recovery, an avenue that was effectively closed by Bacon's own actions.

CONCLUSION

The Rhode Island Supreme Court affirmed the judgment of the Superior Court, holding that (1) Bacon, as general contractor, was not entitled to coverage under the "additional insured" clause of Arbella's commercial insurance policy, and (2) Arbella, the insurer, did not have a duty to defend Bacon in the underlying action.[39]

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39. *Id*. at 595.