NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0576

SIDNEY JOSEPH MABILE, SR.

VERSUS

THE DOW CHEMICAL COMPANY, ET AL.

Judgment Rendered: DEC 22 2016

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APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF IBERVILLE
STATE OF LOUISIANA
DOCKET NUMBER 72,095

HONORABLE DONALD M. FENDLASON, JUDGE

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BEFORE: PETTIGREW, McDONALD, and CALLOWAY,* JJ.

*Judge Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

McDONALD, J.

In this appeal, a chemical company challenges a judgment dismissing its third party claims against four insurance companies based on the trial court's finding that the chemical company had no right of action against the insurers. We affirm in part, reverse in part, and remand this matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012, Sidney J. Mabile, Sr. filed suit against several defendants for an asbestos-related injury he developed after working most of his life as an electrician in various shipyards and plants in south Louisiana. The named defendants included The Dow Chemical Company (Dow), and Mr. Mabile's former employers, Westgate[1] and its predecessor, Industrial Electrical Constructors, Inc. (IEC). During certain periods from the mid-1970s through about 1993, Mr. Mabile worked for IEC and Westgate at Dow's plant in Plaquemine, Louisiana.

After a jury trial, the jury assessed no liability to Westgate/IEC, and Mr. Mabile's claims against these defendants were dismissed. The jury found Dow to be one of three defendants liable to Mr. Mabile for $5,947,193.50 in damages, and the resulting judgment assessed Dow with one-third of the damages, or $1,982,397.83, together with interest. Dow appealed the merits of the adverse judgment, but this court later dismissed that appeal after Dow settled with Mr. Mabile. **Mabile v. Anco Insulations, Inc., et al.**, 2014 CA 0965 (La. App. 1 Cir. 6/19/15) (unpublished order).

While Mr. Mabile's suit was pending, Dow filed a cross claim against co-defendant Westgate, L.L.C., as successor in interest to Westgate, Inc. and IEC (collectively, Westgate), claiming that Westgate had previously provided electrical and instrumentation services and craftsmen to Dow at its facility in Plaquemine, Louisiana; that Westgate provided such under an Agreement for Services (the Agreement) that required Westgate to indemnify Dow for any claim brought by a Westgate employee against Dow for injury related to Westgate's work on Dow's premises; and that Westgate owed Dow such indemnity for Mr. Mabile's asbestos-related claim.

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[1] Mr. Mabile's petition named "Westgate" as a defendant without specifically identifying whether the reference was to Westgate, L.L.C. or to Westgate, Inc.

Dow also filed a third party petition against multiple purported insurers of Westgate, including Bituminous Casualty Company (Bituminous), Great American Alliance Insurance Company (Great American),[2] Gray Insurance Company (Gray), and Sentry Insurance Company (Sentry), alleging that these insurers issued policies to Westgate during relevant times that provided coverage for Mr. Mabile's claims. Dow also alleged that it was an additional insured under the relevant policies.

Each of the insurers filed an exception raising the objection of no right of action to Dow's third party claims against it. The insurers argued that Dow had no right of action to sue them directly, because Dow's claims were based solely on its Agreement with Westgate, and were not based on Dow's status as an injured tort victim, as was required for it to proceed under Louisiana's Direct Action Statute, LSA-R.S. 22:1269. In response, Dow argued that the Direct Action Statute was not limited to plaintiffs with tort claims; that Dow's contractual indemnity claim was incidental to Mr. Mabile's tort claim; and, alternatively, that Dow had a right to proceed directly against the insurers as an additional insured or as a third party beneficiary under the respective policies. The order granting Dow's motion to file the cross claim and third party petition stated that the trial of these claims was severed from the trial of the main demand - Mr. Mabile's tort suit.

After a hearing, the trial court signed a judgment on June 12, 2014, granting the insurers' exceptions of no right of action and dismissing Dow's third party claims against them with prejudice. In the instant appeal, Dow challenges the dismissal of its claims against Bituminous, Great American, Gray, and Sentry (sometimes, the insurers). In a related appeal, 2016 CA 0577, also decided this day, Dow challenges a separate judgment signed on October 17, 2014, granting similar exceptions of no right of action

[2] In its exception of no right of action, Great American identified itself as successor in interest to American Alliance Insurance Company, and Great American Insurance Company of New York, successor in interest to American National Fire Insurance Company (collectively Great American), and mistakenly named as Great American Insurance Company in Dow's third party demand.

filed by other insurers.[3] After the appeals were lodged, this court granted Dow's motion to have the two appeals assigned to the same panel and on the same docket.

STANDARD OF REVIEW

A peremptory exception of no right of action is designed to determine whether the plaintiff has a real and actual interest in the action. La. C.C.P. art. 927(A)(6); **Hood v. Cotter,** 2008-0215 (La. 12/2/08), 5 So.3d 819, 829. Except as otherwise provided by law, an action can only be brought by a person having a real and actual interest which he asserts. La. C.C.P. art. 681. Whether a plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed de novo on appeal. **OXY USA Inc. v. Quintana Production Co.**, 2011-0047 (La. App. 1 Cir. 10/19/11), 79 So.3d 366, 376, writ denied, 2012-0024 (La. 3/2/12), 84 So.3d 536. Where doubt exists regarding the appropriateness of an exception of no right of action, it is to be resolved in favor of finding a right of action. See **Rebel Distributors Corp., Inc. v. LUBA Workers' Comp.**, 2013-0749 (La. 10/15/13), 144 So.3d 825, 833.

RIGHT OF ACTION UNDER DIRECT ACTION STATUTE

In its first assignment of error, Dow contends the trial court legally erred in holding that it had no right of action against the insurers under the Louisiana Direct Action Statute because this matter unquestionably arises out of Mr. Mabile's personal injury suit. In response, the insurers maintain the trial court correctly found that Dow has no remedy against them under the Direct Action Statute.

The Direct Action Statute states, in pertinent part, its intent that "all liability policies within their terms and limits are executed for the benefit of all *injured persons* ... to whom the insured is liable[,]" and that the purpose of all liability policies is "to give protection and coverage to all insureds ... for any legal liability the insured may have *as or for a tortfeasor* ... ." La. R.S. 22:1269(D) (emphasis added). The statute also states

[3] The October 17, 2014 judgment granted: (1) an exception of no right of action filed by Transportation Insurance Company, National Fire Insurance Company of Hartford (Transportation's successor), and Continental Insurance Company, and (2) another exception of no right of action filed by Fidelity and Guaranty Insurance Underwriters, Inc., United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Company, and Travelers Property Casualty Company of America f/k/a The Travelers Indemnity Company of Illinois and Travelers Casualty and Surety Company.

that an *injured person* shall have a right of direct action against the tortfeasor's insurer. See La. R.S. 22:1269(B)(1) (emphasis added). The statute was created to correct the injustice created by insurers' avoidance of tort victims' direct suits by the use of "no action" clauses in insurance policies. **Quinlan v. Liberty Bank and Trust Co.**, 575 So.2d 336, 350-351 (La. 1990), on rehearing (La. 1991). The statute's intended purpose is to give special rights of action to injured tort victims against the tortfeasor's liability insurer. See **Arrow Trucking Co. v. Continental Ins. Co.**, 465 So.2d 691, 700 (La. 1985); see also **Grubbs v. Gulf Intern. Marine, Inc.**, 625 So.2d 495, 497 (La. 1993). Thus, it follows that an opposite and totally different purpose is *not* intended – that is, the statute's purpose is *not* to benefit the tortfeasor responsible for the tort victim's injuries by giving him a direct action against a non-tortfeasor's indemnity insurers.

In applying these principles here, Mr. Mabile was the injured tort victim who could have asserted a direct action against the liability insurers of the tortfeasors he alleged were responsible for his injuries. For example, he could have filed a direct action against Dow's liability insurer(s), because Dow was one of the tortfeasors who was negligently and strictly liable for Mr. Mabile's injuries. But, Dow, the tortfeasor partially responsible for Mr. Mabile's injuries, is clearly not among those to whom the Direct Action Statute provides a remedy. Dow is not an injured tort victim; Dow is not pursuing a claim on behalf of an injured tort victim; and, Dow is not pursuing a claim against a tortfeasor's liability insurer. Rather, Dow asserts claims against a non-tortfeasor's insurers for indemnity.

Further, Dow's third party claims against Westgate's insurers are not based on any tortious conduct by Westgate, because in the main demand, the jury determined Westgate was not a tortfeasor responsible for Mr. Mabile's injuries, and that determination is now final. Rather, Dow's claim against Westgate is based on Westgate's contractual obligations under the Agreement between them, and Dow's claims against the insurers are based on policies they allegedly issued to Westgate during the 1970s, 1980s, and 1990s. In its cross claim and third party petition, Dow alleged that, *under the indemnity provisions* of the Agreement, Westgate and its

insurers were obligated to pay for Dow's defense in the underlying Mabile suit and *to indemnify* Dow for all claims asserted in the action; further, Dow alleged that Westgate and its insurers were *contractually liable* to compensate and reimburse it for any settlement costs, defense costs, administrative costs and to *indemnify* Dow against any adverse verdict or judgment against Dow on the main demand. Thus, the essence of Dow's claims against Westgate's insurers is contractual, based on Dow's contractual Agreement with Westgate, and Westgate's purported insurance contracts with the insurers. And, although Dow is correct that its claims arise out of a tort suit, the fact that Mr. Mabile asserted a tort claim against Dow in the main demand does not change the nature of Dow's contractual indemnity claim against Westgate and its insurers into a tort claim. The Direct Action Statute was enacted to give special rights to tort victims, not to insureds with contract claims against a defendant. **Green v. Auto Club Group Ins. Co.**, 2008-2868 (La. 10/28/09), 24 So.3d 182, 184, citing **Cacamo v. Liberty Mutual Fire Ins. Co.**, 1999-3479 (La. 6/30/00), 764 So.2d 41, 43.

Thus, after a de novo review, and in light of the Direct Action Statute's explicit purpose, we conclude the insurers have proven that the requirements of the Direct Action Statute have not been met and that they are entitled to dismissal of Dow's direct claims against them. See **Diamond v. Progressive Sec. Ins. Co.**, 2005-0820 (La. App. 1 Cir. 3/24/06), 934 So.2d 739, 742. The trial court correctly granted the insurers' exceptions of no right of action as to Dow's claims under the Direct Action Statute, and we affirm that portion of the judgment.

RIGHT OF ACTION AS ADDITIONAL INSURED

In its second assignment of error, Dow contends the trial court erred in finding that it had no right of action against the insurers as an additional insured under their respective policies. In its appellate brief, however, Dow argues its position with respect to only two of the insurers, Great American and Gray, and does not argue that it qualifies as an additional insured under policies issued by Bituminous and Sentry. The record shows that Bituminous and Sentry limited their exceptions of no right of action to Dow's claims under the Direct Action Statute and did not base their exceptions on the alleged policies. So, to the extent the trial court's judgment dismissed *all* of Dow's

claims against Bituminous and Sentry, we conclude that the court erred. The dismissal as to Bituminous and Sentry should have been limited to Dow's Direct Action Statute claims against these insurers. Thus, we reverse that portion of the judgment. We now address the Dow's assignment of error as it relates to Great American and Gray.

Generally, evidence supporting or controverting an exception of no right of action is admissible; in the absence of evidence, however, the factual averments in the pleadings are taken as true. See La C.C.P. art. 931; **Niemann v. Crosby Development Co., L.L.C.**, 2011-1337 (La. App. 1 Cir. 5/3/12), 92 So.3d 1039, 1046. The party raising the exception bears the burden of proving that the plaintiff has no right of action to proceed with his claim. **Falco Lime, Inc. v. Plaquemine Contracting Co., Inc.**, 1995-1784 (La. App. 1 Cir. 4/4/96), 672 So.2d 356, 359.

Dow's claim that it is an additional insured under the insurers' policies is set forth in its third party petition, as amended, as follows:

> The insurer defendants issued insurance policies to Westgate in the [1970s, 1980s, and 1990s] that provide insurance coverage, including assumed contractual liability insurance, to Dow and Westgate for the claims asserted by plaintiff in the principal demand. *Dow is an additional insured under the insurance policies issued by the insurer defendants for the losses sustained by Dow described herein* including the attorney's fees, litigation expenses, expert witness fees and any defense costs expended by Dow in defense of the principal demand. Additionally, the insurer defendants provide insurance coverage for any settlement reached by Dow for the claims asserted in the main demand and coverage for any adverse judgment or verdict entered against Dow on the main demand. (Emphasis added.)

In their exceptions of no right of action, Great American and Gray both alleged that Dow was not named as an additional insured under the policies issued to Westgate. Additionally, Gray alleged that the Agreement between Dow and Westgate did not require that Westgate name Dow as an additional insured. Accepting these allegations, as well as Dow's allegations, as true, we now determine whether Great American and Gray each bore its burden of proving that Dow was not an additional insured under its respective policy.

Great American's Policies

In support of its exception, Great American filed a supporting memorandum in the trial court wherein it referenced exhibits (an affidavit and three insurance policies) that are not contained in the appellate record. At the hearing on the exceptions, Great American's counsel stated that the exhibits were attached to Great American's exception, but he did not offer the exhibits into evidence at the hearing. When Dow appealed the resulting adverse judgment, it designated that Great American's exception and supporting memorandum, including any exhibits, be part of the appellate record. See La. C.C.P. art. 2128. After Dow's appeal was lodged, Great American filed a motion with this court to file these same exhibits as attachments to its appellate brief. Although at that time this court granted the motion, we now determine that we cannot consider the exhibits. Great American's referenced exhibits are not attached to its exception as it appears in the appellate record, and Great American did not introduce the referenced exhibits at the hearing. An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. **Niemann**, 92 So.3d at 1044-45.

Thus, in the absence of proof that Dow was not named as an additional insured under any applicable Great American policy and resolving doubt in favor of a right of action, we accept Dow's allegations as true. To the extent the trial court's judgment dismissed Dow's additional insured claims against Great American, we reverse that portion of the judgment.

Gray's Policies

In support of its exception, Gray also filed a supporting memorandum in the trial court wherein it referenced multiple exhibits (including, the Dow-Westgate Agreement and eight Gray insurance policies) that are also not contained in the appellate record. At the hearing on the exceptions, Gray's counsel introduced the exhibits into the record with no objection from Dow, but the record transmitted from the trial court to this court did not contain the exhibits. After this appeal was lodged, Gray filed a motion to file some of the exhibits (four of the eight Gray policies) as attachments to its appellate brief. Because these exhibits were properly admitted at the trial court's hearing on the

exceptions, and because Dow designated the appellate record to include such, this court granted the motion and Gray filed the four policies with its appellate brief. See La. C.C.P. art. 2188, 2132. We note, however, that when Gray refiled its exhibits with this court, Gray did not refile four other insurance policies it issued to Westgate nor did Gray re-file the Dow-Westgate Agreement.

After reviewing the pertinent allegations and evidence properly before us, we conclude there is insufficient proof to find that Dow has no right of action against Gray as an additional insured under some policy Gray may have issued to Westgate. The Agreement, which sets forth Westgate's indemnity and insurance obligations to Dow, is not contained in the appellate record. Although the parties quote from certain sections of the Agreement, we are unable to perform a proper review of its requirements without a complete copy of the Agreement before us. Further, the appellate record does not contain all of the policies Gray allegedly issued to Westgate, and we cannot consider Gray's assertion in brief that only two of the eight policies it issued to Westgate were in effect when Mr. Mabile worked for Westgate at Dow's facility. Arguments and assertions made in appellate briefs are not part of the record on appeal and are not evidence. **Tessier v. Pratt**, 2008-1268 (La. App. 1 Cir. 2/13/09), 7 So.3d 768, 774 n.2. Thus, based on our de novo review of the trial court's judgment, and resolving doubt in favor of a right of action, we conclude Dow has stated a right of action against Gray as an additional insured. We reverse that portion of the judgment.

RIGHT OF ACTION AS THIRD PARTY BENEFICIARY

In its third assignment of error, Dow contends the trial court erred in finding that it had no right of action against the insurers as a third party beneficiary under the policies the insurers issued to Westgate. As with Dow's additional insured argument, the third party beneficiary argument does not apply to Bituminous and Sentry. As to Great American and Gray, we again note that there is insufficient proof in the appellate record to properly review this issue. Thus, resolving doubt in favor of a right of action, we conclude the trial court erred in dismissing Dow's third party beneficiary claims against the insurers. We reverse that portion of the judgment.

CONCLUSION

For the above reasons, the June 12, 2014 judgment is affirmed in part and reversed in part. The judgment is affirmed insofar as it dismissed The Dow Chemical Company's claims under the Direct Action Statute against Bituminous Casualty Company, Great American Alliance Insurance Company, Gray Insurance Company, and Sentry Insurance Company. The judgment is reversed insofar as it dismissed The Dow Chemical Company's claims as an additional insured or third party beneficiary under policies issued by any of these insurers to Westgate L.L.C, as successor in interest to Westgate, Inc. and/or Industrial Electrical Constructors, Inc. This matter is remanded for further proceedings. Costs of this appeal are assessed one-half against The Dow Chemical Company and one-half against Bituminous Casualty Company, Great American Alliance Insurance Company, Gray Insurance Company, and Sentry Insurance Company.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.