ATTORNEY FOR APPELLANT

Kevin D. Koons
Kroger, Gardis & Regas, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Frances Barrow
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Ohio Casualty Insurance Company,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 8, 2021

Court of Appeals Case No. 19A-PL-2794

Appeal from the Dearborn Superior Court

The Honorable Sally A. McLaughlin, Judge

Trial Court Cause No. 15D02-1706-PL-31

May, Judge.

[1] Ohio Casualty Insurance Company (hereinafter "Ohio Casualty") appeals the trial court's grant of summary judgment to the State of Indiana in the State's action against Ohio Casualty to recover on two employee crime insurance policies that Ohio Casualty issued to the City of Lawrenceburg, Indiana ("Lawrenceburg"). Ohio Casualty raises two issues, one of which we find

dispositive: Whether the trial court erred when it denied summary judgment for Ohio Casualty because the State's claim was untimely pursuant to the relevant provisions in the insurance contracts. We reverse and remand for the entry of summary judgment to Ohio Casualty.

Facts and Procedural History

[2] "[S]everal years prior to January 1, 2009[,]" Theresa Bruening began employment as a deputy in the Clerk-Treasurer's office in Lawrenceburg. (App. Vol. III at 173.) Beginning in January 2012, Bruening became responsible for processing payroll checks and for reconciling accounts. (*Id.*) On April 30, 2013, the Clerk-Treasurer placed Bruening on paid administrative leave after discovering discrepancies in the payroll records. (*Id.* at 184.) At the same time, the State Board of Accounts ("SBOA") and the Indiana State Police began investigating the payroll discrepancies. (*Id.*) On June 14, 2013, the Clerk-Treasurer, in conjunction with the Mayor's Office and Common Council, placed Bruening on unpaid administrative leave. (*Id.* at 185.)

[3] On August 14, 2014, the U.S. Attorney's Office for the Southern District of Indiana brought federal charges of wire fraud against Bruening based on her issuance of duplicate and excess payroll checks to herself in 2012 and 2013. (App. Vol. II at 171-74.) The charges alleged Bruening diverted over $40,500 to herself. That same day, Bruening pled guilty. (*Id.* at 175-82.) On October 31, 2014, the U.S. District Court entered judgment against Bruening, placed her on

supervised probation, and ordered her to pay $40,551.78 in restitution to Lawrenceburg. (*Id*. at 183-6.)

[4] On April 16, 2015, the SBOA finished its preliminary report regarding discrepancies that occurred during Bruening's term in the Clerk-Treasurer's office. (*Id*. at 149.) The SBOA discussed the report with Bruening that same day. (*Id*. at 158.) That same month, an SBOA Field Examiner exchanged emails with Lawrenceburg's insurance agent about the crime insurance policies, indicating only that there were "some issues" at the Clerk-Treasurer's office. (App. Vol. III at 186.) The agent's response included the following reminder to file notice of loss:

> We have heard rumors of a defalcation at the [City of Lawrenceburg] and read some things in the newspaper but I don't believe that any formal loss notice was received and/or filed with Ohio Casualty unless it was done directly by the City [or] the [SBOA] on behalf of the State of Indiana.

(*Id*. at 188.) On August 28, 2015, an Ohio Casualty Claims Specialist sent a letter to the City acknowledging knowledge of the claim and providing a blank Proof of Loss form for the City to complete and return. (*Id*. at 189-96.) The SBOA's preliminary report was provided to Lawrenceburg officials on November 18, 2015. (App. Vol. II at 158.) On December 3, 2015, when the Claims Specialist had not received a Proof of Loss form from Lawrenceburg or the State, she closed the claim file. (App. Vol. III at 197.)

[5] On December 29, 2016, the SBOA filed its final verified report regarding Bruening. The report indicated Bruening misappropriated $32,745.07 through unauthorized payroll checks in 2012 and 2013; misappropriated $6,308.92 through duplicate payroll payments in 2012 and 2013; caused Lawrenceburg to pay $1,497.29 in excess employer payroll contributions in 2012 and 2013;[1] caused Lawrenceburg to incur liquidated damage charges of $138,737.58 by failing to remit withholdings and contributions to a union pension fund in 2012 and 2013; caused Lawrenceburg to incur penalties and interest of $72,742.79 by failing to properly file reports and withholdings to the Internal Revenue Service, Indiana Department of Revenue, and Indiana Department of Workforce Development between 2009 and 2013; and paid herself an excess $100.00 under the union shoe allowance in 2012. The report also indicated the cost incurred by the State to investigate Bruening had been $22,651.25. The total of all these damages attributable to Bruening is $274,782.60. (App. Vol. II at 159.)

[6] On March 3, 2017, the State and Lawrenceburg submitted proof of loss to Ohio Casualty. On June 15, 2017, the State filed a Complaint to Recover Public Funds against Bruening and Ohio Casualty seeking compensation for the losses caused by Bruening's "malfeasance, misfeasance, and/or nonfeasance." (App. Vol. II at 23.) Under Count I of the complaint, the State sought $274,782.60 from Bruening for the amounts represented in the SBOA's report. Count III

[1] The first three amounts discussed in the SBOA report are the three takings for which Bruening was convicted of wire fraud in federal court in 2014 and for which she was ordered to pay restitution to Lawrenceburg pursuant to the criminal judgment.

sought recovery from Ohio Casualty "jointly and severally . . . with Bruening in the amount of $252,131.35[,]" (*id*. at 29), which reflected the amount sought from Bruening in Count I minus the cost of the SBOA audit.[2]

[7] On July 31, 2017, Ohio Casualty filed a motion to dismiss under Trial Rule 12(B)(6) in which it alleged the State failed to timely file its action. The trial court held a hearing and then, on November 13, 2017, denied Ohio Casualty's motion to dismiss based on there being issues of fact about when notice of loss occurred. That same day, the trial court entered default judgment against Bruening.

[8] On December 12, 2018, the State filed a motion for partial summary judgment against Ohio Casualty. Ohio Casualty filed a response and a cross-motion for summary judgment in which it alleged that the State was time barred from filing its complaint and, in the alternative, that certain of the damages sought by the State are "indirect costs" not covered by the insurance policies at issue. (*Id*. at 15.) The trial court determined the State's claim against Ohio Casualty was timely because it was filed within two years of the SBOA's report, citing "*Robertson v. State ex. rel. Hill*, 121 N.E.3d 588 (Ind. Ct. App. 2019)."[3] (*Id*. at

---

[2] Count II sought from Bruening "the relief described in Ind. Code § 34-24-3-1, including three times the actual loss, which is $121,953.84, court costs, and a reasonable attorney's fee." (App. Vol. II at 27.) This count is not at issue in this appeal.

[3] On July 8, 2019, when the trial court entered its written order, a transfer petition was pending before the Indiana Supreme Court in the *Robertson* case, but it had not yet been granted. *See Robertson v. State*, 130 N.E.3d 1137 (Ind. 2019) (transfer table indicating transfer granted on July 25, 2019).

16.) The trial court also determined all damages sought from Ohio Casualty were "losses directly related" to Bruening and thus covered by the policy. (*Id.* at 18.) The trial court accordingly entered summary judgment against Ohio Casualty, jointly and severally with Bruening, in the amount of $224,690.08,[4] plus costs and eight percent post-judgment interest per year.

[9] Ohio Casualty filed a motion to correct error that alleged the trial court's summary judgment order was erroneous because: (1) it relied on the Court of Appeals opinion in *Robertson*, for which transfer had since been granted, vacating the Court of Appeals opinion on which the trial court relied; and (2) it failed to require the State to update Ohio Casualty and the court regarding any further payments Bruening had made pursuant to the restitution order in the federal criminal case. The trial court denied the motion to correct error as to the *Robertson* issue, but it corrected the judgment "to reflect that the Judgment owed by Ohio Casualty to [the State] shall be offset by any additional payments made by [Bruening] since May 9, 2017." (*Id.* at 22.)

Discussion and Decision

Standard of Review

[10] "When reviewing the grant or denial of a motion for summary judgment we stand in the shoes of the trial court." *Supervised Estate of Kent*, 99 N.E.3d 634,

[4] This amount represents the $252,131.35 sought by the State in Count III of its complaint, reduced by the $27,441.27 in criminal restitution that Bruening had paid as of May 9, 2017. (App. Vol. II at 19.)

637 (Ind. 2018) (quoting *City of Lawrence Utils. Serv. Bd. v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017)). Summary judgment should be granted "if the designated evidentiary matter shows 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." Ind. Trial Rule 56(C).

> The party moving for summary judgment bears the burden of making a prima facie showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. The burden then shifts to the non-moving party to show the existence of a genuine issue.

Burton v. Benner, 140 N.E.3d 848, 851 (Ind. 2020). Any doubts about the facts, or the inferences to be drawn from the facts, are resolved in favor of the non-moving party. *Id*. Findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *Supervised Estate of Kent*, 99 N.E.3d at 637. Nor is our standard of review or analysis altered by the parties' filing of cross-motions for summary judgment – we simply "consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law." *Erie Indemnity Co. v. Estate of Harris*, 99 N.E.3d 625, 629 (Ind. 2018) (quoting *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675, 677 (Ind. 2015)).

[11] Interpretation of contractual language is a question of law that we review *de novo*. *See Erie Indemnity Co.*, 99 N.E.3d at 629 ("disputed insurance policy terms present legal questions").

> Insurance policies are contracts subject to the same rules of judicial construction as other contracts. When confronted with a dispute over the meaning of insurance policy terms, Indiana courts afford clear and unambiguous policy language its plain, ordinary meaning. By contrast, courts may construe—or ascribe meaning to—ambiguous policy terms only.

Id. at 630 (internal citations and quotations removed).

[12] The trial court determined the State timely filed its action against Ohio Casualty pursuant to Indiana Code section 5-11-5-1, which provides in part:

> If an examination discloses malfeasance, misfeasance, or nonfeasance in an office or of any officer or employee, a copy of the report, signed and verified, shall be placed by the state examiner with the attorney general and the inspector general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer, or upon the officer's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

Ind. Code § 5-11-5-1(a) (2012).[5] The statute also provides:

---

[5] We cite the 2012 version of Indiana Code section 5-11-5-1 because it was the version in effect when Bruening was last employed by Lawrenceburg. Nevertheless, we note that, despite multiple amendments to this section in the intervening years, the text of those two sentences have been modified only by two minor additions, which we italicize in this quote:

> If an examination discloses malfeasance, misfeasance, or nonfeasance in office or of any officer or employee, a copy of the report, signed and verified, shall be placed by the state examiner with the attorney general and the inspector general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer *or employee*, or upon the officer's *or employee's* official bond, or both, and against any other proper

> After receiving a preliminary report under subsection (d), the state examiner may provide a copy of the report to the attorney general. The attorney general may institute and prosecute civil proceedings against the delinquent officer or employee, or upon the officer's or employee's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

Ind. Code § 5-11-5-1(e) (2012).[6]

[13] Our Indiana Supreme Court recently discussed the application of that statute in *Robertson v. State*, 141 N.E.3d 1224 (Ind. 2020). Cathy Jo Robertson was bookkeeper for the Clerk of the Jennings Circuit Court from 2009-2011, and she misappropriated $61,000 through a "checks substituted for cash" scheme. *Id*. at 1226. In 2014, SBOA conducted a special investigation of the Clerk's records for 2009-2011. *Id*. In December 2014, SBOA asked Robertson to return the money, and it sent a letter and preliminary report to Jennings County officials, the Jennings County prosecutor, and the Office of the Attorney General ("OAG"). *Id*. On January 21, 2016, the SBOA's final report was verified, and it was filed with the OAG on January 22, 2016. On May 5, 2017, the OAG filed a complaint to recover the public funds from Robertson pursuant to

---

> person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

Ind. Code § 5-11-5-1 (2020) (italics added).

[6] The text of this subsection remains unchanged to date. *See* Ind. Code § 5-11-5-1(e) (2020).

Indiana Code section 5-11-5-1 and to collect treble damages from Robertson pursuant to the Crime Victims Recovery Act ("CVRA"). Robertson filed a motion to dismiss claiming the complaint had been filed outside the two-year statute of limitations period,[7] which had begun no later than December 2014, when SBOA produced its preliminary report and asked Robertson to return the money. *Id*. The OAG argued the statute of limitations began to run on January 22, 2016, when the OAG received the verified report. *Id*.

[14] Our Indiana Supreme Court began by reviewing Indiana's law regarding the accrual of a cause of action:

> Under Indiana's discovery rule, a cause of action accrues, and the limitations period begins to run, when a claimant knows or in the exercise of ordinary diligence should have known of the injury. It is not necessary under this rule that the full extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred. However, our discovery rule does not apply where our Legislature intends that another rule should apply.

Id. at 1227. Our Indiana Supreme Court then held the general discovery rule did not apply to the OAG's misappropriation claim under Indiana Code section 5-11-5-1 because the Legislature had provided a different rule in the statute. *Id*. at 1228. Whereas the OAG's filing of a claim was permissive under subsection

---

[7] Out Indiana Supreme Court noted that, although it applied the two-year statute of limitations from Indiana Code section 34-11-2-4 by agreement of the parties, the appropriate limitations period may instead have been the five or six years provided by Indiana Code section 34-11-2-6 for actions against a public officer. *Robertson*, 141 N.E.3d at 1227 n.1. The parties herein have not urged us to apply a different statute of limitation.

(e) when the OAG received the preliminary report, filing a claim became mandatory under subsection (a) when the OAG received the final, verified report. *Id.* Thus, the State's misappropriation claim did not accrue until the OAG received the verified final report on January 21, 2016, and its cause of action against Robertson, which was filed on May 5, 2017, was timely.[8] *Id.*

[15] Ohio Casualty acknowledges *Robertson* and its application to the claims brought against Bruening herself, but it asserts that it is in a position distinct from Bruening because it was not the tortfeasor.

> The State's Brief fails to recognize that its claim against Ohio Casualty here (Count III) is not a statutory misappropriation claim under Ind. Code § 5-11-5-1. Ohio Casualty engaged in no misappropriation. Rather, it merely issued a crime insurance policy—whose terms and conditions are prescribed by statute—which defines the scope and parameters of its liability. . . . [T]he fact that the statute authorizes the OAG to pursue separate claims under the Policies does not convert those insurance claims into statutory misappropriation claims.

(Appellant's Reply Br. at 21.)

[16] Instead, Ohio Casualty argues the State's ability to recover under the policies is limited by the pertinent language in the insurance contracts. Those contracts

---

[8] The State's claim under CVRA was untimely, however, because its limitations period was controlled by Indiana Code section 34-24-3-1, which contains no indication the Legislature intended other than the discovery rule to control the limitations period. *Robertson*, 141 N.E.3d at 1229.

provided the following Conditions, which were applicable to "All Insuring Agreements":

> **6. Discovery of Loss**
>
> Discovery of loss occurs when you first become aware of facts which would cause a reasonable person to assume that a loss covered by this insurance has been or will be incurred, even though the exact amount or details of loss may not then be known.
>
> Discovery also occurs when you receive notice of an actual or potential claim against you alleging facts that if true would constitute a covered loss under this insurance.
>
> **7. Duties in the Event of Loss**
>
> After you discover a loss or a situation that may result in loss, of, or loss from damage to, money, securities or other property you must:
>
> a. Notify us as soon as possible;
>
> b. Submit to examination under oath at our request and give us a signed statement of your answers;
>
> c. Give us a detailed, sworn proof of loss within 120 days; and
>
> d. Cooperate with us in the investigation and settlement of any claim.

* * * * *

11. Legal Action Against Us

You may not bring legal action against us involving loss:

a. Unless you have complied with all the terms of this Policy; and

b. Until 90 days after you have filed proof of loss with us; and

c. Unless brought within 2 years from the date you discover the loss.

(App. Vol. II at 227-29.)

[17] The State asserts Ohio Casualty's contractual

> agreements with the City do not affect the accrual date of the State's statutory cause of action. . . . The State was not a party to the contracts which, instead, were agreements between Ohio Casualty and the City. The statute of limitation may have run on any claim by the City regarding Bruening's misconduct, but the State's action was governed by the statute under which it sought to recover public funds.

(State's Br. at 13-14 (internal citation to the record omitted).) (*See also id*. at 14 ("the OAG's statutory action in this case provides a different context for recovery than an action by the City, which would be directly subject to the insurance policies' provisions").)

[18] However, as Ohio Casualty notes, this argument by the State is illogical.[9] The contracts themselves indicate the State of Indiana is an additional named insured, (App. Vol. II at 210, 213-14, & 219), as is required by the very statutes that permit the purchase of these contracts. *See* Ind. Code § 5-4-1-18(d) (2016) ("For the sole purpose of recovering public funds on behalf of a local government unit, the state is considered to be an additional named insured on all crime insurance policies and endorsements obtained under this subsection."). An additional named insured does not have more rights to recover under an insurance contract than the original named insured.[10] *See*, *e.g.*, *Progressive Southeastern Ins. Co. v. Smith*, 140 N.E.3d 292, 298 (Ind. Ct. App. 2020) ("Clayton's interests are entirely aligned with Smith's because the two men are entitled to precisely the same amount of coverage under the policy—namely, none."), *reh'g granted* (March 4, 2020) (correcting immaterial factual misstatement). Thus, the State cannot recover under the contracts that the State acknowledges prevent recovery by Lawrenceburg.

---

[9] Even more perplexing is the State's attempt to assert that the OAG is not synonymous with the State for the purposes of the lawsuit brought by the OAG against Ohio Casualty. (*See* State's Br. at 23 ("The State's claims are not barred under the limitations periods of the policies because it is not the City or the "State of Indiana for the Use and Benefit of the City of Lawrenceburg, Indiana" who are seeking recovery . . . . The OAG, which is the plaintiff in this case, was not a party to the policies.").) Prosecuting and defending "all suits instituted by or against the state of Indiana" is the first of the Attorney General's enumerated Powers and Duties. Ind. Code § 4-6-2-1(a).

[10] Nor can the State toll the contractual limitations period by suggesting it did not have knowledge as early as 2013 of losses attributable to Bruening that may have been covered by the crime insurance policies, because the policy imputes "knowledge of any information relevant to this insurance [to] every Insured." (App. Vol. II at 228.)

[19] While *Robertson* gives the State the right to file its complaint against Bruening and Ohio Casualty, the only way Ohio Casualty can be liable under the contract is pursuant to the contract's terms. Pursuant to the terms of the contracts purchased by Lawrenceburg, Ohio Casualty is not liable for losses unless proof of loss was filed within 120 days and a lawsuit was brought within two years of the discovery of the losses. Lawrenceburg discovered the direct losses in 2013, notified the SBOA, and had federal criminal charges brought against Bruening in 2014. However, formal notice of the losses was not given to Ohio Casualty until 2017, three months before the complaint naming Ohio Casualty as a defendant was filed. Accordingly, we hold the trial court erred when it granted summary judgment to the State rather than to Ohio Casualty.[11] *See*, *e.g.*, *Sheehan Const. Co., Inc. v. Continental Cas. Co.*, 938 N.E.2d 685, 689-90 (Ind. 2010) (failure to give notice required by insurance policy entitled insurer to summary judgment).

Conclusion

[20] The trial court erred when it entered summary judgment for the State rather than for Ohio Casualty. We reverse the trial court's entry of summary

---

[11] The second issue raised by Ohio Casualty was whether the "Indirect Loss" exclusion in the insurance policies would prohibit the State's recovery of penalties and interest owed to governmental authorities for unpaid taxes and liquidated damages owed to the union pension fund for late deposits. We need not address the merits of this argument as we grant summary judgment to Ohio Casualty based on its first argument; however, we were dismayed that the State failed to acknowledge the "Indirect Loss" exclusions in the contracts, (State's Br. at 25 ("The crime insurance policies do not even address indirect loss.")), even though Ohio Casualty had quoted and cited the exclusions in its brief. (*See* Appellant's Br. at 43-44 (quoting exclusion and citing record).)

judgment for the State and order entry of summary judgment for Ohio Casualty.

[21] Reversed and remanded.

Robb, J., and Vaidik, J., concur.