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**IN THE
COURT OF APPEALS OF INDIANA**

BRAD CURTIS AND RHONDA CURTIS)
)
 Appellants-Plaintiffs,)
)
 vs.)
)
 THE NATIONAL MUTUAL INSURANCE CO.)
 and CELINA INSURANCE GROUP)
)
 Appellees-Defendants.)

No. 01A05-1011-CT-718

APPEAL FROM THE ADAMS SUPERIOR COURT
The Honorable Patrick R. Miller, Judge
Cause No. 01D01-1003-CT-3

August 8, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Plaintiffs, Brad Curtis and Rhonda Curtis (collectively, the Curtises), appeal the trial court's summary judgment in favor of Appellees-Defendants, The National Mutual Insurance Company (National Mutual) and Celina Insurance Group (Celina), on the Curtises' complaint for damages for breach of contract, violation of Indiana insurance law, and bad faith.

We affirm.

ISSUES

The Curtises present three issues on appeal, which we consolidate and restate as the following two issues:

- (1) Whether the trial court properly entered summary judgment on the Curtises' argument for attorney fees by finding that the Curtises' claim was *res judicata*; and
- (2) Whether the trial court properly entered summary judgment on the Curtises' complaint seeking recovery from National Mutual for an alleged tortious breach of the insurer's good faith duty by finding that the Curtises' claim was barred by the statute of limitations.

FACTS AND PROCEDURAL HISTORY

On June 6, 2000, Justin Beaulieu (Beaulieu) attended a party hosted by the Curtises to celebrate their son's graduation from high school. During the party, Beaulieu jumped on the trampoline in the Curtises' backyard, sustaining a compound fracture to his left leg. On June

3, 2002, Beaulieu filed a complaint against the Curtises, seeking damages for his personal injury. The Curtises reported the claim to National Mutual, who had issued their homeowner's insurance policy. National Mutual denied coverage for the incident and refused to defend the Curtises because the homeowner's amended insurance policy excluded coverage for bodily injury arising out of the ownership, maintenance or use of a trampoline.

On May 25, 2005, Beaulieu amended his complaint, adding National Mutual as a party and seeking a declaration that the Curtises' homeowner's insurance policy provide liability coverage for his injuries. Thereafter, on August 11, 2005, National Mutual answered Beaulieu's complaint and, at the same time, filed a counterclaim together with a cross-claim against the Curtises, each requesting a declaration that coverage was excluded under the Curtises' policy for injuries arising out of the ownership, maintenance or use of a trampoline. Subsequently, on September 6, 2006, the Curtises filed an answer to Beaulieu's amended complaint and a cross-claim against National Mutual, seeking coverage under the policy. All parties filed motions for summary judgment regarding their respective coverage positions. On September 26, 2006, the trial court denied National Mutual's motion for summary judgment and declared that the insurance company owed the Curtises a duty to defend against Beaulieu's claim. National Mutual appealed. In *National Mut. Ins. Co. v. Curtis*, 867 N.E.2d 631, 637 (Ind. Ct. App. 2007), we affirmed the trial court and concluded that because of the structural complexity of the policy, the placement of the trampoline exclusion was inconspicuous and amounted to an ambiguity in the policy. Upon receiving the court of appeals opinion, National Mutual undertook the defense of the Curtises.

On November 22, 2006, after the trial court's summary judgment declaring coverage but before the court of appeals issued its decision, the Curtises filed a petition with the trial court seeking reimbursement of their attorney fees, including the fees incurred in prosecuting the coverage issue. The trial court deferred its ruling on the attorney fees until the pending appeal could be completed.

On June 6, 2008, following the court of appeals decision, the Curtises filed a "Motion for Leave to File 2nd Amend [sic] Counterclaim" against National Mutual. *See Curtis v. National Mut. Ins. Co.*, 01A04-0910-CV-593 (Ind. Ct. App. Apr. 26, 2010). In this motion, the Curtises sought damages for breach of contract, violation of insurance statutes, and bad faith in denying coverage. In addition, they also sought attorney fees incurred as a result of the coverage dispute. On November 7, 2008, the trial court denied the proposed amendment, in part, because "the Curtis[es]' petition for attorney fees is already before the [c]ourt." (Appellant's App. p. 148). In addition, the trial court also found that "the Curtis[es] claim for attorney fees should be limited to recovery of only those fees incurred for the defense of the underlying claim brought by [Beaulieu] against the Curtises." (Appellant's App. p. 148).

In the beginning of June 2009, National Mutual settled Beaulieu's claim against the Curtises and both National Mutual and Beaulieu sought a dismissal with prejudice of the litigation. On June 10, 2009, the Curtises filed an objection against the dismissal and requested a hearing. On August 20, 2009, after conducting a hearing, the trial court rendered its judgment on the attorney fees, ordering National Mutual to pay the Curtises \$5,143.00 for their defense against Beaulieu prior to National Mutual assuming the defense.

Thereafter, the Curtises appealed the trial court's denial of its "Motion for Leave to File 2nd Amend [sic] Counterclaim" against National. *See Curtis v. National Mut. Ins. Co.*, 01A04-0910-CV-593 (Ind. Ct. App. Apr. 26, 2010). On appeal, we affirmed the trial court, concluding that because the Curtises' counterclaim had already been adjudicated and appealed in *National Mut. Ins. Co. v. Curtis*, 867 N.E.2d 631 (Ind. Ct. App. 2007) there was no longer any counterclaim left before the trial court that could be amended. *See id.*

Subsequently, on March 11, 2010, the Curtises filed a verified complaint for damages with respect to breach of contract, violation of Indiana insurance law, and bad faith. In their complaint, the Curtises allege that "National Mutual breached its insurance contract with the Curtises by failing to provide a prompt defense. As a result, the Curtises incurred substantial legal expenses, in excess of \$50,000 at the trial and appeal levels, all of which were a foreseeable result of National's conduct. National has paid \$5, 143.00, the Curtises defense cost only." (Appellant's App. p. 12). On April 30, 2010, National Mutual filed its motion for summary judgment, raising *res judicata* and the statute of limitations. On October 21, 2010, after a hearing, the trial court granted summary judgment in favor of National Mutual.

The Curtises now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the

trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *First Farmers Bank & Trust Co. v. Whorley*, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008), *trans. denied*. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* at 607-08. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* at 608. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id.* When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiffs' claim. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id.*

We observe that in the present case, the trial court entered helpful findings of fact and conclusions of law in support of its judgment. Special findings are not required in summary judgment proceedings and are not binding on appeal. *Id.* However, such findings offer this court valuable insight into the trial court's rationale for its review and facilitate appellate review. *Id.*

On March 11, 2010, the Curtises filed their verified complaint alleging breach of contract, violation of Indiana insurance law, and bad faith. Although the complaint indicated three Counts, only two Counts for relief were developed, *i.e.*, a request to recover the attorney fees expended during the insurance policy's coverage issue and a request for

compensatory and punitive damages for National Mutual's perceived breach of the company's duty to deal with its insurer in good faith. We will discuss each count in turn.

II. *Doctrine of Res Judicata and Attorney Fees*

The Curtises contend that the trial court erred by awarding summary judgment to National Mutual based on the doctrine of *res judicata*. Specifically, they claim that *res judicata* cannot apply as there has been no prior judgment on the Counts presently before the court.

The doctrine of *res judicata* bars litigation of a claim after a final judgment has been rendered in a prior action involving the same claim between the same parties or their privies. *Small v. Centocor, Inc.*, 731 N.E.2d 22, 26 (Ind. Ct. App. 2000). The following four requirements must be satisfied for a claim to be precluded under the doctrine of *res judicata*: 1) the former judgment must have been rendered by a court of competent jurisdiction; 2) the former judgment must have been rendered on the merits; 3) the matter now in issue was, or could have been, determined in the prior action; and 4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies. *Id.*

On November 22, 2006, after the trial court's summary judgment in favor of the Curtises declaring that coverage existed under the insurance policy but prior to this court's issuance of its opinion in *National Mut. Ins. Co. v. Curtis*, 867 N.E.2d 631 (Ind. Ct. App. 2007), the Curtises filed a petition with the trial court seeking reimbursement of attorney fees, including the fees in prosecuting the coverage issue. At that time, the trial court deferred its ruling on the petition until the appellate decision would be issued. Thereafter, on

November 7, 2008, the trial court ordered that “the Curtis[es]’ claim for attorney fees should be limited to recovery of only those fees incurred for the defense of the underlying claim brought by [Beaulieu] against the Curtises.” (Appellant’s App. p. 148). Following the trial court’s decision and National Mutual’s settlement with Beaulieu, National Mutual filed a motion to dismiss the lawsuit with prejudice. The Curtises objected and requested a hearing on their petition seeking attorney fees before the dismissal of the suit. The trial court conducted a hearing and on August 20, 2009, the trial court entered judgment against National Mutual in the amount of \$5,143.00 as compensation for the Curtises’ attorney fees incurred during the defense of the coverage issue. On March 11, 2010, the Curtises filed a verified complaint against National Mutual, requesting attorney fees expended as a result of National Mutual’s failure to conduct a prompt defense against Beaulieu’s claim.

We conclude that the Curtises’ current request for attorney fees incurred for the coverage issue is precluded by *res judicata*. The initial judgment on attorney fees to the amount of \$5,143.00 was rendered by a court of competent jurisdiction on the merits, is the same issue as is currently before us, and the judgment was entered between the same parties. Therefore, we affirm the trial court in its summary judgment in favor of National Mutual with respect to the attorney fees.

III. *Statute of Limitations and Good Faith*

Next, the Curtises assert that the trial court erred by awarding summary judgment to National Mutual on its claim that the company breached its duty to deal with them in good faith. Specifically, the Curtises contend that National Mutual acted in bad faith when it

admitted that it did not send the Curtises the amendments, also known as Supplemental Extensions, to their insurance policy which resulted in the lack of notice to the Curtises that the trampoline coverage was no longer part of their homeowner's insurance contract.

In *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 519 (Ind. 1993), our supreme court recognized the existence of “a cause of action for the tortious breach of an insurer’s duty to deal with its insured in good faith.” The applicable statute of limitations for a tortuous action is as follows:

An action for:

- (1) Injury to person or character;
- (2) Injury to personal property; or
- (3) A forfeiture of penalty given by statute

must be commenced within two (2) years after the cause of action accrues.

I.C. § 34-11-2-4. A cause of action accrues, and the statute of limitations begins to run, when a claimant knows or, in the exercise of ordinary diligence, should have known of the injury.

See Rieth-Riley Const. Co., Inc. v. Gibson, 923 N.E.2d 472, 475 (Ind. Ct. App. 2010).

At the very least, the Curtises were aware of National Mutual’s failure to send the amendments by the time this court issued its decision in *National Mut. Ins. Co. v. Curtis*, 867 N.E.2d 631 (Ind. Ct. App. 2007). In our opinion, we clearly stated that “the Supplemental Extensions form was never sent to the Curtises.” *Id.* at 633. As such, the course of action based on bad faith accrued on June 5, 2007. However, the Curtises did not file their

complaint until March 11, 2010, almost three years after the accrual of the cause. Therefore, we agree with the trial court that the Curtises' claim is barred by the statute of limitations.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly entered summary judgment in favor of National Mutual.

Affirmed.

DARDEN, J., and BARNES, J. , concur.