PEARSON LONG	*	**NO. 2014-CA-0889**
VERSUS	*	**COURT OF APPEAL**
EAGLE, INC., ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-06132, DIVISION "C"
Honorable Sidney H. Cates, Judge
* * * * * *
Judge Roland L. Belsome
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Paul A. Bonin, Judge Sandra Cabrina Jenkins)

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REVERSED

FEBRUARY 25, 2015

This appeal is taken from the trial court's grant of a summary judgment in favor of OneBeacon America Insurance Company and OneBeacon Insurance Company (collectively OneBeacon) annulling a settlement agreement between Eagle, Inc. (Eagle) and United States Fidelity and Guaranty Company (USF&G). For the following reasons we reverse the trial court's judgment.

OneBeacon, as the insurer of Eagle, is a named defendant in the underlying asbestos exposure lawsuit. Pearson Long filed a petition for damages against his employers and various manufacturers of asbestos containing products alleging asbestos exposure from 1958 to 1979. During the years of alleged exposure, OneBeacon issued several primary Comprehensive General Liability (CGL) policies of insurance to Eagle. USF&G issued the primary CGL policies to Eagle from 1977 to 1980.

The coverage in the CGL policies issued by OneBeacon and USF&G to Eagle provided for defense costs.[1] OneBeacon and USF&G shared in the defense

[1] The law provides for defense costs to be shared pro rata among the insurers based on policy periods.

costs of this litigation until USF&G notified OneBeacon that all funds associated with the policies issued to Eagle had been exhausted and USF&G was no longer obligated to pay costs and expenses for Eagle's defense. That assertion was based on the terms and conditions agreed upon by USF&G and Eagle in a 2003 Settlement Agreement. Subsequent to USF&G's withdrawal from participating in Eagle's defense, OneBeacon filed a third party demand against USF&G[2] seeking to have the trial court declare that USF&G was obligated to pay its share of the defense costs and for reimbursement of expenses expended on USF&G's behalf.

In its answer to the third party demand, USF&G offered the Settlement Agreement as a defense to the claims asserted by OneBeacon. OneBeacon responded by filing a motion for summary judgment seeking to void the effects of the Settlement Agreement and order USF&G to participate in its pro rata share of Eagle's defense costs. USF&G's opposition was in the form of a cross-motion for summary judgment requesting that the trial court find the Settlement Agreement relieves USF&G of any obligation for Eagle's past, present, or future defense costs.

After hearing oral argument and taking the matter under advisement, the trial court rendered judgment in favor of OneBeacon, granting its motion for summary judgment. According to the trial court's judgment, it concluded that pursuant to La. R.S. 22:1262 and *Washington v. Savoie,*[3] the Settlement Agreement violated Louisiana law. USF&G appeals that judgment.

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[2] USF&G was not a named party in the Petition for Damages.
[3] 634 So.2d 117 (La. 1994).

On appeal, this Court reviews the granting of a motion for summary judgment *de novo.*

The trial court relied on *Washington v. Savoie* and La. R. S. 22:1262 as grounds to annul the Settlement Agreement between USF&G and Eagle. In *Washington*, the Louisiana Supreme Court discussed Louisiana's law and public policy relating to the reformation of insurance policies, when the reformation adversely affects a tort victim. The Court recognized that Louisiana law allows for reformation of an insurance contract to correct a mistake within the policy so that the mutual intent of the insurer and insured are reflected. However, based on the facts of *Washington*, the Court found that Louisiana's public policy broadly precludes post-injury contract reformation—even for mutual mistake—when reformation would prejudice an injured third party.[4]

The *Fruge v Amerisure* case discussed the application of *Washington,* under factually similar circumstances.[5] In the *Fruge* case, a drilling accident injured the plaintiff. The company that was allegedly responsible for the incident, Ulterra MWD (MWD), was covered by a CGL insurance policy issued by Chubb. In addition to that policy, MWD was named as an insured on a CGL insurance policy issued by Amerisure to Ulterra Drilling Technologies.[6]

Subsequent to the filing of suit against MWD, Chubb and Amerisure assumed the company's defense. At some point thereafter, Amerisure issued two policy change forms deleting MWD as a named insured, asserting that the addition

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[4] In *Washington,* the insurer sought to correct a clerical error that changed the effective date of an uninsured motorist rejection form. The correction would adversely affect three injured plaintiffs that had been involved in accidents caused by uninsured motorists.

[5] 663 F3d 743 (5th Cir. 2011).

[6] Ulterra Drilling Technologies and Ulterra MDW were both owned by Rockbit Holdings. Ulterra Drilling Technologies was initially named as a defendant in the suit brought by Mr. Fruge, but was dismissed.

of MWD's name on the policy was a clerical error. Amerisure withdrew from MWD's defense. Chubb filed a cross-claim against Amerisure seeking, among other things, a declaration of Amerisure's obligation and duty to defend as per the CGL policy. Amerisure filed a motion for summary judgment on the grounds that there was no valid insurance contract and Chubb did not have standing to compel Amerisure to defend MWD. Chubb was successful on its cross-claim and Amerisure's motion for summary judgment was denied in the district court. Amerisure appealed to the Fifth Circuit.[7]

The district court in *Fruge,* like the trial court in the instant case, relied on *Washington* and La. R.S. 22:1262 to conclude that Louisiana law and public policy does not allow for post-accident reformation of insurance policies. On appeal, the Fifth Circuit found that the district court erred by applying the *Washington* holding to the facts of *Fruge.* The Court held that Louisiana law does not disallow all post-accident reformation,[8] and because the third party seeking coverage in *Fruge* was an insurance company, not a tort victim, the reformation would not be barred.[9]

We find the analysis is *Fruge* persuasive and supportive of USF&G's position. In this case, OneBeacon argues that the Settlement Agreement is analogous to a reformation of the insurance policy. Assuming that the Settlement Agreement can be characterized as a reformation of the original insurance policy between Eagle and USF&G, we find the instant case to be distinguishable from *Washington.* Like in *Fruge,* the party challenging the Settlement Agreement in this case is not the injured tort victim. The third party attempting to assert rights here is

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[7] *Id.*
[8] *See Samuels v. State Farm Mut. Auto. Ins. Co.,* 06-0034 (La. 10/17/06), 939 So.2d 1235.
[9] *Id.*

an insurance company that contracted with Eagle for coverage, including the duty to defend without consideration of other policies. For that reason, we cannot extend the public policy protections in *Washington* to this matter. However, it is worth noting that had Pearson Long challenged the Settlement Agreement under *Washington*, our finding may be different.

The trial court also supported its decision by citing to La. R.S. 22:1262, which provides:

> No insurance contract insuring against loss or damage through legal liability for the bodily injury or death by accident of any individual, or for damage to the property of any person, shall be retroactively annulled by any agreement between the insurer and insured after the occurrence of any such injury, death, or damage for which the insured may be liable, and any such annulment attempted shall be null and void.

The plain language of La. R.S. 22:1262 prohibits insurers and insureds from retroactively rescinding or annulling policy contracts by agreement post-occurrence. The *Fruge* court also addressed the applicability of this statute to reformation actions suggesting that the statute is irrelevant to reformation actions. We disagree. Given that the statute relates to post-occurrence annulment of coverage, there may be reformation actions that would factually support the application of this statute.[10] However, the issue currently before this Court is whether the Settlement Agreement between USF&G and Eagle violated La. R.S. 22:1262.

USF&G's duty to defend and pay defense costs is a contractual obligation owed to Eagle. In response to a suit on coverage between those parties, Eagle

[10] *cf. Washington, supra.*

agreed to the terms and conditions of the Settlement Agreement. A condition of the Settlement Agreement was that once the designated sum of funds allocated to paying claims was exhausted, USF&G would no longer be responsible for defense costs. Essentially, Eagle is left uninsured for defense costs related to the years that USF&G's policies provided coverage.

The explicit language of La. R.S. 22:1262 indicates that its purpose is to prevent insurers and insureds from agreeing to annul or rescind contracts to the detriment of an injured third party. Similar to the *Washington* holding, the focus of the statute is to protect third party tort victims, not insurance companies that contracted to cover a particular risk. Simply put, the protections set forth in *Washington* and La. R.S. 22:1262 do not apply to OneBeacon. Again, if Pearson Long was challenging the Settlement Agreement pursuant to the provisions of this statute, this Court's opinion may differ.

Accordingly, under these principles of law, we do not find that OneBeacon can have the Settlement Agreement between USF&G and Eagle declared null and void. Therefore, the ruling of the trial court is reversed.

REVERSED