[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 19-11943

B. JODY SULLIVAN, CINDY SULLIVAN,

Plaintiffs-Appellants,

versus

EVERETT CASH MUTUAL INSURANCE CO.,

Defendant-Appellee,

WESLEY GREEN, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 4:18-cv-00207-HLM

Before JORDAN, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

B. Jody Sullivan and Cindy K. Sullivan, who are citizens of Georgia, were sued in Georgia superior court in two separate tort actions—one by Wesley and Beverly Green (also citizens of Georgia) and the other by Manuel Gilbert and other family members (also citizens of Georgia). The Greens and the Gilberts asserted continuing trespass and nuisance claims against the Sullivans and alleged that the value of their respective properties had decreased due to the operation of the Sullivans' poultry farm. Everett Cash Mutual, the Sullivans' farm insurer, denied coverage in the *Green* and *Gilbert* actions, forcing the Sullivans to retain counsel and pay their own legal fees and costs for the defense of those actions.

The Sullivans sued Everett Cash Mutual in the same Georgia superior court, and named the Greens and the Gilberts as additional defendants. The Sullivans alleged that Everett Cash Mutual had breached the insurance contract by failing to tender a defense. They sought bad faith statutory damages and requested a declaratory judgment that Everett Cash Mutual had an ongoing duty to defend and indemnify them in the *Green* and *Gilbert* actions.

Everett Cash Mutual then removed the Sullivans' action to federal court on diversity grounds. Following removal, the district court (1) denied the Sullivans' motion to remand after realigning the Greens and Gilberts as plaintiffs and (2) granted Everett Cash Mutual's motions (a) to dismiss the declaratory judgment claim and (b) for judgment on the pleadings. The Sullivans now appeal on a number of procedural and substantive grounds. Following oral argument and a review of the record, we reverse. Everett Cash Mutual did not establish that the amount in controversy exceeded $75,000, and as a result the district court should have remanded the action to Georgia superior court.

I

The Sullivans challenge the district court's denial of their motion to remand on a number of grounds. We generally review *de novo* whether the district court properly exercised removal jurisdiction, *see McGee v. Sentinel Offender Services, LLC*, 719 F.3d 1236, 1241 (11th Cir. 2013), and with that standard in mind we address the issues presented.

II

The Sullivans argue that, contrary to the district court's ruling, the Greens and the Gilberts were indispensable—and not nominal—parties in their declaratory judgment action against Everett Cash Mutual. We agree based on our binding decision in *Ranger Insurance Company v. United Housing of New Mexico, Inc.*, 488 F.2d 682, 683-84 (5th Cir. 1974) (holding that, in an insurer's

declaratory judgment action against its insured to determine coverage for claims arising out of an airplane crash, the tort claimants who had sued the insured were indispensable parties under Rule 19(b)).

But that does not end the matter. Even if the Greens and Gilberts were indispensable (and not nominal) parties, there was diversity jurisdiction if the district court correctly realigned them as plaintiffs with the Sullivans and the amount in controversy exceeded $75,000. We therefore turn to the realignment and amount-in-controversy issues.

III

The Sullivans named the Greens and the Gilberts as additional defendants when they sued Everett Cash Mutual. Because the Sullivans, the Greens, and the Gilberts are all citizens of Georgia, complete diversity did not exist unless the Greens and the Gilberts were realigned as plaintiffs with the Sullivans. The Sullivans contend that the district court erred in realigning the Greens and the Gilberts as plaintiffs.

The Supreme Court has said that when the question is whether the parties should be realigned "the answer is to be found not in legal learning but in the realities of the record." *City of Indianapolis v. Chase Nat'l Bank of N.Y.C.*, 314 U.S. 63, 69 (1941) (citation omitted). The circuits seem to be somewhat divided as to the appropriate standard of review for realignment determinations. The majority view appears to be that realignment involves fact-

specific inquiries which trigger clear error review. *See, e.g., Prudential Real Est. Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 872-73 (9th Cir. 2000). Some courts, however, review only the underlying factual findings on realignment for clear error while conducting plenary review as to the ultimate realignment decision. *See Palisades Collection LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008). For our part, we have held that the denial of a motion to remand based on realignment is reviewed *de novo* but that jurisdictional findings are reviewed for clear error. *See City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1313 (11th Cir. 2012). It may be, therefore, that our rule is much like that of the Fourth Circuit.

We need not make any definitive pronouncements today as to the appropriate standard of review for ultimate realignment decisions. The Sullivans and Everett Cash Mutual agree that the clear error standard governs, and we therefore do not have adversarial briefing on the issue. *See* Br. for Appellants at 12; Br. for Appellee at 11. And even under *de novo* review, the Sullivans cannot prevail on their challenge to the district court's realignment decision.

Generally, "[w]hen an insured tortfeasor brings an action against his insurer for a declaratory judgment as to his coverage and names the person suing him as a defendant along with his insurer, the tort claimant will be realigned as a plaintiff, since the injured party and the insured have an identical interest in having it held that the insurance covers the accident in question." Mary Kay Kane, 20 Fed. Prac. & Proc. Deskbook § 32 (2d ed & Apr. 2022

update). The few circuits that have opined on the issue seem to agree with this proposition. *See Home Ans. Co. of Ill. v. Adco Oil Co.*, 154 F.3d 739, 741 (7th Cir. 1998) ("[T]he normal alignment of parties in a suit seeking a declaration of non-coverage is Insurer versus Insured and Injured Party."); *White v. U. S. Fid. & Guar. Co.*, 356 F.2d 746, 748 (1st Cir. 1966) ("If [the tort claimant] is a proper party in this action, he does not belong on the [insurer's] side of the fence. His interest is identical with that of [the insured]."). *See also* 32A Am. Jur. 2d Fed. Courts § 722 (Nov. 2022 update) ("In an action by an insured against the insurer and a claimant for a declaratory judgment, the claimant will be realigned with the insured when they have the same interests with respect to the issue involved.").

On this record, the district court correctly realigned the Greens and the Gilberts (the tort claimants) with the Sullivans (the insureds) as plaintiffs against Everett Cash Mutual. The filings of the Greens and the Gilberts make clear that their interests as to the issue of coverage were aligned with those of the Sullivans. First, the Greens and the Gilberts adopted the Sullivans' arguments as to remand, and incorporated all of the Sullivans' initial disclosures, including those concerning their lay and expert witnesses and documents. *See* D.E. 8 at 2; D.E. 27 at 3-4; D.E. 27-1, 27-2, & 27-3. Second, the Greens and the Gilberts expressly told the district court that "their interests are aligned with [the Sullivans] in this matter, and they have no objection to the [c]ourt granting any relief sought" against Everett Cash Mutual. *See* D.E. 27 at 2-3. Third,

the Greens and the Gilberts incorporated the Sullivans' arguments in opposition to Everett Cash Mutual's motion to dismiss the declaratory judgment claim. *See* D.E. 22 at 1-2. Fourth, the Sullivans did not seek any relief from the Greens or the Gilberts, and we have said that this is a relevant factor in the realignment calculus. *See Vestavia Hills*, 676 F.3d at 1314.

IV

Because the Sullivans "ma[de] an unspecified demand for damages in state court, [Everett Cash Mutual had to] prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the . . . jurisdictional requirement." *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1061 (11th Cir. 2010) (internal quotation marks omitted). In applying this burden of proof, a court can use its "judicial experience and common sense in determining whether the case stated in a complaint meets federal jurisdictional requirements." *Id.* at 1062. The Sullivans argue, as they did below, *see* D.E. 7-1 at 20, that Everett Cash Mutual did not satisfy its burden.

In defending its removal of the Sullivans' state-court action to federal court, Everett Cash Mutual asserted that the amount in controversy exceeded $75,000 because the underlying complaints filed by the Greens and the Gilberts—as a matter of "common sense"—more likely than not satisfied the amount in controversy requirement. Significantly, however, Everett Cash Mutual did not make any arguments in its opposition to remand about the

Sullivans' claim for statutory bad faith damages under O.C.G.A. § 33-4-6. *See* D.E. 11 at 4-5.

In their state-court complaint against Everett Cash Mutual, the Sullivans sought damages for breach of contract and damages for the bad-faith denial of a defense and indemnification. They also requested a declaratory judgment that Everett Cash Mutual had a duty to defend and indemnify them in the actions filed by the Greens and the Gilberts. For removal purposes, then, two types of claim are at issue—the damages claims and the declaratory judgment claim. As noted, however, Everett Cash Mutual did not make any arguments about the damages claims below. So we focus only on the declaratory judgment claim.[1]

Everett Cash Mutual argued that the Sullivans' action exceeded $75,000 because of the value of the claims of the Greens and the Gilberts against the Sullivans. In "actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Adv. Comm'n*, 432 U.S. 333, 347 (1977). And the value in such actions is assessed from the plaintiff's point of view: "When a plaintiff seeks injunctive or declaratory relief, the amount in controversy is the monetary object of the litigation from the plaintiff's perspective." *Fed. Mut. Ins. Co. v. McKinnon*

[1] Issues not raised below are forfeited, *see, e.g., Ramirez v. Sec'y, U.S. Dept. of Transp.*, 686 F.3d 1239, 1249-50 (11th Cir. 2012), and we see no reason to depart from the general rule here.

Motors, LLC, 329 F.3d 805, 807 (11th Cir. 2003) (citation and internal quotations omitted). Here the "value of that right is measured," *Hunt*, 432 U.S. at 347, by two things.

The first is the cost of defending the Sullivans in the actions filed against them by the Greens and the Gilberts. *See Stonewall Ins. Co. v. Lopez*, 544 F.2d 198, 199 (5th Cir. 1976) ("The pecuniary value of the obligation to defend the separate lawsuit is properly considered in determining the existence of the jurisdictional [diversity] amount[.]"); 8 Fed. Proc. Forms § 21:5 (June 2022 update) ("The cost to defend an insured is considered in determining whether the amount in controversy required for diversity jurisdiction is satisfied in a declaratory action concerning insurance coverage."). *See also Ga. Farm Bureau Mut. Ins. Co. v. Martin*, 444 S.E.2d 739, 742 n.4 (Ga. 1994) (suggesting that the "appropriate measure of damages" in a breach of contract action against the insurer for failure to defend is "that which [is] 'traceable to the [insurer's] refusal to defend the action'") (citation omitted). But Everett Cash Mutual made no arguments (and presented no evidence) to the district court about what it would cost to provide a defense for the Sullivans in the *Green* and *Gilbert* actions, so it did not meet its burden on this first point.

The second, which Everett Cash Mutual did rely on, is the value of the underlying claims by the Greens and the Gilberts against the Sullivans. The problem for Everett Cash Mutual is that, in this circuit, a declaratory judgment claim with respect to indemnification is generally not ripe until (and if) the insured has been

held liable to a third party. *See Mid-Continent Cas. Co. v. Delacruz Dry Wall Plastering & Stucco, Inc.*, 766 F. App'x 768, 770 (11th Cir. 2019); *Am. Fid. & Cas. Co. v. Penn. Threshermen & Famers' Mut. Cas. Ins. Co.*, 280 F.2d 453, 461 (5th Cir. 1960). *Accord* R. Steven Rawls et al., 1 Law & Prac. of Ins. Coverage § 12:11 (July 2022 update) ("[A]s a general rule, the duty to indemnify is not ripe for adjudication unless and until the insured is held liable in the underlying suit."). The reason is that, until there is an adverse judgment against the insured, "the liabilities are contingent and may never materialize." *Allstate Ins. Co. v. Emps. Liab. Assur. Co.*, 445 F.2d 1278, 1281 (5th Cir. 1971).[2]

As several district courts have held, a claim that is not ripe under federal law has a value of zero for amount-in-controversy purposes. *See, e.g., Jensen v. State Farm Fire & Cas. Co.*, No. 3:20-CV-01486-IM, 2021 WL 5915117, at *4 (D. Or. Dec. 13, 2021); *Republic Vanguard Ins. Co. v. Russell*, No. 2:20-CV-1317-RDP, 2021

[2] Georgia law seems to allow, in at least some cases, for declaratory judgment claims relating to indemnification to be resolved along with declaratory judgment claims relating to the duty to defend under O.C.G.A. § 9-4-2. *See ALEA London Ltd. v. Woodcock*, 649 S.E.2d 740, 746-47 (Ga. App. 2007); *Edmond v. Cont'l Ins. Co.*, 548 S.E.2d 450, 452-53 (Ga. App. 2001). *But see* J. Stephen Barry, Ga. Prop. & Liab. Ins. Law § 13:1 (Aug. 2022 update) ("Generally, 'an insurer's duty to indemnify is not ripe for adjudication in a declaratory judgment action until the insured is first held liable in the underlying suit.'") (citation omitted). Whatever the state of Georgia law may be, we are bound by Eleventh Circuit precedent, such as *Threshermen & Farmers*, as to the ripeness of a declaratory judgment claim relating to indemnification.

WL 794464, at *3-4 (N.D. Ala. Mar. 2, 2021); *Brown v. Safeco Inc. Co. of Ill.*, No. 6:13-CV-1982-ORL-31, 2014 WL 1478833, at *1 (M.D. Fla. Apr. 14, 2014). That approach makes sense to us. A claim that is not ripe fails to present a "case or controversy" within the meaning of Article III, and the "ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). If a claim is not ripe, and cannot be heard by a federal court, its value means nothing insofar as the amount-in-controversy requirement is concerned.

V

We conclude the district court should have remanded the Sullivans' action to state court because Everett Cash Mutual failed to establish that the amount-in-controversy threshold for diversity jurisdiction was satisfied.

REVERSED.