NOT FOR PUBLICATION

In the

United States Court of Appeals

For the Eleventh Circuit

No. 25-11139
Non-Argument Calendar

JAMES RIVER INSURANCE COMPANY,

Plaintiff-Appellee,

versus

R.I.C., INC., et al.,

Defendants,

YALONDA VENTURA,
as Personal Representative of the Estate of,
Desmond Eugene Owens,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:23-cv-22907-BB

Before JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

PER CURIAM:

In this insurance coverage action, James River Insurance Company sought a declaratory judgment against Yalonda Ventura that a sublimit to the insurance policy applied and the policy had been exhausted via a state-court settlement which paid that sublimit. The district court granted summary judgment for James River. After careful review, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

James River issued a surplus lines insurance policy to RIC, Inc., which owned a shopping center. The policy provided $1,000,000 per occurrence and $2,000,000 aggregate limits for damages from bodily injury, with a $2,500 deductible.

But under the policy's assault and battery sublimit, "the most [James River] w[ould] pay" for bodily injury "arising out of, resulting from, or in connection with . . . [a]ssault or battery" was $25,000 per occurrence up to $50,000 total, after which it had no "duty to defend any claim or 'suit' or to pay any settlement or judgment or defense costs." The sublimit defined "[a]ssault" as "any threatened harmful or offensive contact" and "[b]attery" as "any actual harmful or offensive contact" between two or more people and covered negligence actions. And if "payment of settlements . . . prior to final settlement, judgment or award" exhausted the sublimit, James River had the "right to withdraw from any further defense."

This dispute arises from a tragic mass shooting at a Hialeah shopping center owned by RIC. Three people died and at least twenty were injured. Ventura is the personal representative of the estate of one of the decedents. Ventura and others sued RIC for negligence in Florida state court. James River paid one of the state-court plaintiffs, Charlene Michelle Peterson, the full $50,000 assault and battery sublimit to settle her claim.

While the state-court lawsuits were pending, James River sought declaratory relief in federal court against RIC and the remaining state-court plaintiffs. James River asked the district court to declare that: (1) the assault and battery sublimit, not the general limit, applied to the remaining state-court lawsuits; and (2) the Peterson settlement had exhausted the sublimit, so James River had no further obligation to defend or indemnify RIC.

James River moved for summary judgment. It argued that the shooting was an assault or battery, so the $50,000 sublimit applied and the Peterson settlement exhausted the sublimit. In support, James River included a declaration from Gary Korner, its claims examiner for the shooting, who averred that James River paid the sublimit to settle Peterson's claim.

After discovery closed, Ventura moved to extend the discovery deadline to: (1) depose Korner and RIC; and (2) compel production of the claims file for the shooting. The district court denied the motion because Ventura did not show good cause to modify the scheduling order.

Ventura then responded to James River's summary-judgment motion. She argued that: applying the deductible and sublimit made the policy illusory; her claims were for pain and suffering and "not necessarily" for bodily injury; and the summary-judgment motion should be stricken because James River didn't file a separate exhibit index as the scheduling order required. Ventura attached two affidavits: (1) one from her explaining that she read the policy and it did not exclude coverage for pain and suffering; and (2) one from her attorney swearing that, on the attorney's review, the insurance policy was illusory. James River moved to strike the affidavits as improper legal conclusions.

The district court granted James River's motions to strike and for summary judgment. The district court determined that: (1) portions of Ventura's affidavits were legal conclusions not based on personal knowledge; (2) there was no timely discovery dispute before the court; and (3) James River was entitled to summary judgment because the assault and battery sublimit applied to claims arising from the shooting, and the Peterson settlement exhausted the $50,000 sublimit and the policy.

Ventura moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that Korner's affidavit should've been stricken because it was "inadmissible hearsay" made without personal knowledge. The district court rejected the hearsay argument as improper because it was raised for the first time in a postjudgment motion.

STANDARD OF REVIEW

We review for abuse of discretion the denial of a motion to alter or amend a judgment under rule 59(e), provided that the motion does not turn on a question of law. *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1343 (11th Cir. 2016). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Savoia-McHugh v. Glass*, 95 F.4th 1337, 1342 (11th Cir. 2024) (citation modified). Discovery and evidentiary rulings are reviewed under the same standard, and we will reverse only in cases where substantial prejudice exists. *See Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1259 (11th Cir. 2004); *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1306 (11th Cir. 2011).

We review de novo a district court's grant of summary judgment. *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013). We apply the same legal standard used by the district court, drawing all inferences in the light most favorable to the non-movant and recognizing that summary judgment is only appropriate when there are no genuine issues of material fact. *Id.* We review de novo the interpretation of an insurance contract under Florida law. *Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993).

DISCUSSION

Ventura raises five issues on appeal. She argues that the district court erred by: (1) not striking Korner's declaration; (2) not reopening discovery; (3) striking portions of Ventura's affidavits; (4) ruling the assault and battery sublimit didn't render coverage illusory; and (5) finding no genuine dispute of material fact that the applicable sublimit had been exhausted.

Korner declaration and additional discovery

To start, Ventura contends that the district court abused its discretion by not striking Korner's declaration and by denying an extension of the discovery deadline. We disagree.

<u>Korner declaration</u>

"The only grounds for granting" a motion to alter or amend the judgment under rule 59(e) "are newly-discovered evidence or manifest errors of law or fact." *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999). "[A] [r]ule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005). The denial of a rule 59(e) motion raising new arguments is "especially" sound "when the party has failed to articulate any reason for the failure to raise [an] issue at an earlier stage in the litigation." *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990).

The district court did not abuse its discretion in denying Ventura's motion to alter or amend. *See St. Joseph's Hosp., Inc.*, 842 F.3d at 1343. Ventura never asked the court to strike the Korner declaration until after the judgment, and she did not explain why she didn't raise the issue earlier. *See Lussier*, 904 F.2d at 667.

But even if Ventura could explain her failure to raise the hearsay argument before judgment was entered, it would still fail. Ventura maintains that Korner's declaration should've been stricken because he reviewed "documents [from the claims file] prepared by other unknown third parties." And Korner's LinkedIn page showed his employment at James River began in March 2022, so he couldn't have been the claims examiner assigned to the claim in May 2021, when the shooting occurred. But Korner needn't have been the first claims examiner assigned to the shooting claim to have personal knowledge of how James River handled the claim. For example, the part of his declaration the district court relied on in granting summary judgment was about the Peterson settlement, which happened after the shooting when Korner was assigned as the claims adjuster.

Discovery extension

A party seeking the extension of an already-expired scheduling order deadline must show both good cause and excusable neglect. Fed. R. Civ. P. 6(b)(1), 16(b)(4). To establish good cause, the party seeking the extension must establish that the schedule could not be met despite the party's diligence. *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1232 (11th Cir. 2008).

In determining whether a party has shown "excusable neglect" warranting an extension, a court must consider all pertinent circumstances—what we call the *Pioneer* factors—including "the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Advanced Estimating Sys. v. Riney*, 77 F.3d 1322, 1325 (11th Cir. 1996) (citation modified); *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395 (1993). "Primary importance should be accorded to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration." *Riney*, 77 F.3d at 1325.

The district court did not abuse its discretion in denying Ventura's request to extend the discovery deadline because she did not show good cause for why the schedule could not have been met before the deadline. *See Oravec,* 527 F.3d at 1232. Korner's declaration tracked the allegations in James River's complaint. Nothing he said was new, and Ventura has not given any reasons she could not have sought discovery on these same allegations. And: (1) James River would have been prejudiced by additional discovery because it had already filed its motion for summary judgment; (2) the interest in judicial economy weighed against granting the motion; and (3) Ventura presented no valid reason for the delay. *See Riney*, 77 F.3d at 1325; *Pioneer,* 507 U.S. at 395.

Pushing back, Ventura asserts that by denying further discovery, the district court prevented her from uncovering what James River's claims expenses were—a fact she alleges was "material" to her opposition. She also discusses *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992), where a district court abused its discretion by granting summary judgment while wholly ignoring a pending motion to compel. But here, unlike *Dean*, there was no discovery motion pending when the district court granted summary judgment. And the amount of James River's claims expenses wasn't material to Ventura's argument that coverage under the policy was illusory because whether coverage under an insurance policy is illusory is a question of law. *See Dahl-Eimers*, 986 F.2d at 1381. In any event, Ventura never told the district court why she wanted more discovery. Instead, she made a vague request to depose Korner and RIC and to compel production of the claims file without explaining how it was relevant to her summary-judgment response. Without knowing more, the district court did not abuse its discretion in denying further discovery. *See Josendis*, 662 F.3d at 1307.

Ventura affidavits

Next, Ventura contends that the district court wrongly struck portions of her affidavits in support of her summary-judgment response. We disagree.

Because the "interpretation of a contract is a question of law," *Horizons A Far, LLC v. Plaza N. 15, LLC*, 114 So. 3d 992, 994 (Fla. Dist. Ct. App. 2012), testimony—even from an expert—about how to interpret a contract is improper, *see Palm Beach Cnty. v. Town of Palm Beach*, 426 So. 2d 1063, 1070 (Fla. Dist. Ct. App. 1983). Ventura's affidavits were improper. Ventura and her attorney gave their opinions on whether coverage under the policy was illusory and whether the assault and battery sublimit excluded damages based on pain and suffering. But these are questions of law for the court, and not issues of fact, *see Horizons*, 114 So. 3d at 994, so the district court was right not to consider the affidavits.

Ventura responds that her affidavits were "based on direct perception" because both she and her counsel read the policy. But there's no direct perception of the law. Interpreting an insurance contract is a legal question for the court, and not a point of fact for a jury. *See Allstate Ins. Co. v. Ortho. Specialists*, 212 So. 3d 973, 975–76 (Fla. 2017) (requiring courts to interpret insurance policies).

Substantive issues on summary judgment

Finally, Ventura asserts that coverage under the policy was illusory and there was a fact dispute about whether the assault and battery sublimit was exhausted, precluding summary judgment. We take these arguments in turn.

<u>Coverage under the policy was illusory</u>

Ventura argues that the policy is illusory because the sublimit effectively eliminated all coverage. "Coverage is illusory under Florida law only if the insurance policy grants coverage with one hand and then with the other completely takes away the entirety of that same coverage." *Travelers Indem. Co. of Connecticut v. Richard Mckenzie & Sons, Inc.*, 10 F.4th 1255, 1265 (11th Cir. 2021). "[W]here a limitation on coverage does not completely swallow the insuring provision, the policy is not illusory." *Warwick Corp. v. Turetsky*, 227 So. 3d 621, 625 (Fla. Dist. Ct. App. 2017) (citation modified).

The assault and battery sublimit did not completely swallow the insuring provision. The sublimit applies only to a small subset of claims—those arising out of an assault or battery—and, even then, it does completely take away coverage. The insured is still entitled to relief—just less. The district court was thus correct to rule that the sublimit did not render coverage illusory. *See Travelers*, 10 F.4th at 1265.

Policy exhaustion

Nor did the district court err in ruling that the Peterson settlement exhausted the policy. James River provided Korner's declaration that the $50,000 settlement was paid. And there was no evidence to the contrary.

Ventura contends, however, that "payments of . . . claims expenses and [] application of the deductible" created genuine issues of material fact as to exhaustion that precluded summary judgment. But there is no evidence that anything other than the Peterson settlement met the $50,000 coverage sublimit. Because the sublimit applied and there was no dispute about exhaustion, we affirm the district court's summary judgment for James River.

AFFIRMED.