NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0441-11T2
A-1403-11T2

WILLIAM BASKAY and AMANDA BASKAY, his wife,

Plaintiffs-Appellants,

v.

FRANKLIN MUTUAL INSURANCE COMPANY,

Defendant-Respondent,

and

THE FMI COMPANIES,[1] COLIN H. BURKE, DECKER ASSOCIATES, and NICHOLAS J. PISANI,

Defendants.

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WILLIAM BASKAY and AMANDA BASKAY, his wife,

Plaintiffs-Respondents,

v.

FRANKLIN MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

and

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[1] Improperly pled in the complaint.

THE FMI COMPANIES,[2] COLIN H. BURKE, DECKER ASSOCIATES, and NICHOLAS J. PISANI,

Defendants.

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Submitted October 9, 2013 – Decided April 23, 2014

Before Judges Sapp-Peterson and Maven.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1747-09.

Theresa C. Grabowski, attorney for appellants.

Sweet Pasquarelli, P.C., attorneys for respondent (Jennifer N. Cortopassi, on the brief).

PER CURIAM

These back-to-back appeals, are consolidated for purposes of this opinion. Plaintiffs, William and Amanda Baskay, appeal from the trial court order dismissing their Consumer Fraud Act, N.J.S.A. 56:8-1 to -195 (CFA) and punitive damages claims against defendant Franklin Mutual Insurance Company (FMI).[3] FMI appeals the trial court order entered directing it to pay $750 in counsel fees and $500 in witness fees, after the jury

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[2] Improperly pled in the complaint.

[3] Plaintiffs' complaint also named Colin H. Burke, Decker Associates, and Nicholas J. Pisani as defendants, whose defense against the claims has been provided by FMI. These defendants, however, are not the subject of these appeals.

returned a verdict favorable to plaintiffs. We affirm the trial court orders dismissing the consumer fraud and punitive damages claims, but reverse the order granting counsel fees and witness fees to plaintiffs.

I.

The factual record from which the court issued its summary judgment ruling, when viewed most favorably towards plaintiffs, disclosed that on August 5, 2007, plaintiffs sustained damage to their property when lightning traveled through their residence, blowing out fixtures, striking the chimney and blowing out their fireplace. Plaintiffs also sustained damage to their well, resulting in their inability to have water. FMI retained Nicolas Pisani, an independent adjustor employed by Decker and Associates, to assess the property damage. Plaintiffs retained Kevin Anderson to repair the damage to their well. Pisani told plaintiffs and Anderson that the repairs were covered under the policy and directed Anderson to proceed with the repairs. Anderson, however, advised the well should be replaced. Pisani insisted that Anderson repair the well. Anderson proceeded to repair the well without success and attempted a second repair, which was also unsuccessful. Plaintiffs, thereafter, had Anderson replace the well. Defendants retained an expert to assess the damage to the well, who opined the damage to the well

was caused by pressure exerted by ground and surface water rather than by lightening. As a result, FMI declined to pay costs plaintiffs incurred in repairing and replacing the well.

Plaintiffs filed a sixteen count complaint against FMI and others, alleging defendants failed "to provide plaintiffs with the benefit of the premiums paid and to compensate [them] for their losses, thereby breaching their contract with plaintiffs as well as being otherwise careless, reckless and negligent and/or in violation of the laws of the state of New Jersey[.]" They additionally alleged violation of the CFA, intentional and wanton behavior with the purpose of causing damage to plaintiffs.

In October 2009, defendants moved for partial summary judgment, dismissing the CFA claims. The court granted the motion "as to the benefit phase, but [kept] it alive as to the amount of money owed to . . . Mr. Anderson until the conclusion of discovery[.]" To clarify its decision the court stated its ruling was limited to holding plaintiffs' claim under the CFA for approximately $15,000 in benefits, was not covered under the CFA, but was denying the motion related to plaintiffs' claim arising out of the work performed by Anderson which the court understood could be "more or less" than $3000.

Thereafter, the parties exchanged discovery and on August 27, 2010, a different judge conducted oral argument on defendant's motion for partial summary judgment, seeking dismissal of plaintiffs' claims for punitive damages and attorneys' fees. Plaintiffs argued defendants' conduct of instructing Anderson to pursue a course of action opposed by Anderson, rose to the level of fraud warranting punitive damages. The motion judge, relying upon Pickett v. Lloyd's, 131 N.J. 457 (1993), concluded she did not "think that a reasonable jury could ever conclude, that [defendants' conduct] was so egregious or outrageous as to bring in punitive damages."

The parties proceeded to arbitration the following month. The arbitrator awarded plaintiffs $19,025.41, of which $10,000 represented attorneys' fees and costs, and $9,025.41 represented costs plaintiffs incurred in repairing and replacing the damage to their well. Defendants filed a timely trial de novo pursuant to R. 4:21A-6(b)(1).

On February 4, 2011, defendants filed a motion seeking partial summary judgment dismissing the remaining CFA claim. Plaintiffs filed a cross-motion for summary judgment seeking a declaration that the damage to their well was covered by the terms of the insurance policy issued by FMI. The motion judge granted defendants' motion, finding Pisani's conduct "in saying

to Mr. and Mrs. Baskay and Mr. Anderson, '[t]he damage to the well is covered by the insurance policy and I want you to repair the well rather than replacing the well'" did not trigger a cause of action under the CFA. The judge also dismissed plaintiffs' counts for counsel fees, finding as matter of law, counsel fees were not available in direct suits but in liability or indemnification actions, neither of which applied to the present case. The court denied plaintiffs' cross-motion for summary judgment on the coverage claim.

Trial commenced on the remaining coverage claim on August 5, 2011. On a motion for directed verdict, the trial court dismissed plaintiffs' complaint against Colin H. Burke, and plaintiffs' breach of contract claims against Pisani and Decker & Associates.[4] The jury returned a verdict in favor of plaintiffs and against FMI in the amount of $9025.

On the verdict sheet, the jury was asked whether Pisani made an incorrect statement and responded, "Yes" to that question by a vote of seven to one. In the question that followed, the jury was asked whether Pisani made the statement in a negligent manner. The jury answered "No" to that question by a vote of seven to one. Based upon these responses on the

[4] Plaintiffs have not appealed the trial court's dismissal of these claims.

verdict sheet, plaintiffs filed a motion for a bifurcated trial to ascertain supplemental damages and sought $750 in counsel fees and $500 in witness fees. Plaintiffs argued that as a result of the jury's response to these questions, additional proofs were necessary in order to award the appropriate damages. Defendants opposed the motion, arguing it was improper and that bifurcation or separate trials are determined prior to trial, not after a verdict. The trial court denied the motion, reasoning that evidence of supplemental damages would not have originally been submitted to the jury because the punitive damages and consumer fraud counts had already been dismissed from the case.

Plaintiffs also sought counsel fees and costs, which defendants opposed arguing they obtained a verdict twenty percent more favorable than the arbitration award pursuant to R. 4:21A-6(c)(1). Defendants further argued the arbitration award was for approximately $19,000, including counsel fees, and had they not filed a trial de novo, they would have been required to pay the full $19,000 judgment awarded by the arbitrator. Additionally, defendants contended the claimed $500 in witness fees for Anderson was unwarranted because he appeared by subpoena.

The trial court rejected defendants' arguments and awarded plaintiffs $750 in counsel fees and the $500 witness fee for Anderson. The court expressed its opinion that the arbitrator should not have included the counsel fees as part of the award because such fees are not permitted on a first party claim. Responding to defendants' contention that had they not filed for a trial de novo, they would have been responsible for the entire award, which included counsel fees, the court responded that plaintiffs would have had to seek confirmation of the award and had that been done, defendants would have more than likely been successful in challenging the counsel fee award. Consequently, the court rejected defendants' claim that it obtained a verdict twenty percent more favorable than the arbitration award. Defendants subsequently sought reconsideration of this ruling, which the court denied. The present appeal ensued.

II.

We begin our discussion by noting that plaintiffs' appellate brief is completely devoid of references to the record in their statement of facts, as required by R. 2:6-2(a)(4). In a prior Notice to the Bar, we stated that "[f]ailure to include adequate references to the statement of facts may be cause for dismissal of the appeal or suppression of the brief whenever discovered, even if after scheduling of the appeal for oral

argument or submission without argument." Notice to the Bar, Brief and Appendix Deficiencies in the Appellate Division, October 25, 2000 (Appendix E6); see also Leibig v. Somerville Sr. Citizens Housing, Inc., 326 N.J. Super. 102, 106 (App. Div. 1999) (noting that failure to comply with Rule 2:6-2(a)(4) resulted in numerous instances where "we were unable to find supporting documentation for the asserted facts").

In Points I and II plaintiffs contend they should have been permitted to submit their CFA and punitive claims to the jury and, therefore, the motion judge erred in granting defendants' summary judgment motions. We disagree.

A.

Although two different judges presided over motions to dismiss plaintiffs' CFA claims, it is only the February 8, 2011 order dismissing the CFA coverage claim that is the subject of this appeal. Plaintiffs' contend the motion judge erred in granting summary judgment because an earlier order of October 22, 2009, denied the exact same motion. As such, plaintiffs urge the law-of-the-case doctrine precluded reconsideration of that issue — especially since "defendants offered no new support for this motion that was not set forth in their prior, unsuccessful motions."

"Under the law-of-the-case doctrine, decisions of law made in a case should be respected by all other lower or equal courts during the pendency of that case." Lanzet v. Greenberg, 126 N.J. 168, 192 (1991). The doctrine is non-binding and discretionary, intended to "prevent relitigation of a previously resolved issue." Lombardi v. Masso, 207 N.J. 517, 538 (2011) (quoting In re Estate of Stockdale, 196 N.J. 275, 311 (2008)). Moreover, "interlocutory orders are always subject to revision in the interest of justice." Id. at 536.

Important to the discussion here is that in addition to the fact the earlier order was interlocutory, the order was entered in response to a motion to dismiss, not summary judgment. The court limited the order to dismissing that part of the CFA claim related to defendants' denial of benefits to plaintiffs. As for the CFA claim related to contract damages sustained by plaintiffs, the motion judge denied the motion without prejudice, noting in his oral statement of reasons that "[s]ubsequent discovery may reveal data to help this [c]ourt on that part."

When a trial court considers a motion to dismiss pursuant to Rule 4:6-2(e), it "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim,

opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). This, however, is not the standard for consideration of a motion for summary judgment pursuant to Rule 4:46-2. That standard requires the motion judge to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Thus, in the present matter, when the second motion judge granted summary judgment dismissing the remaining aspect of plaintiffs' CFA claim, she applied a legal standard different from the standard the motion judge applied in deciding the earlier Rule 4:6–2(e) motion. "In doing so, the [judge] based [her] decision not upon facts as alleged in the complaint but rather upon evidence developed during discovery. The [judge] was not bound to adhere to the [other] motion judge's preliminary assessment of the facts." State v. Cullen, 424 N.J. Super. 566, 580-81 (App. Div. 2014). Consequently, the second

motion judge did not err in considering defendants' summary judgment motion seeking dismissal of the remaining CFA claim.

Turning to the merits of plaintiffs' claims, there was no basis to submit the CFA and punitive damages claims to the jury. The facts, when viewed most favorably towards plaintiffs, established that Pisani intentionally disregarded Anderson's advice that the well could not be repaired and instead directed Anderson to repair the well, resulting in Anderson's unsuccessful efforts, twice, to repair the well and ultimately, plaintiffs' replacement of the well, which Anderson had originally recommended. It was undisputed, for purposes of summary judgment, Pisani told Anderson and plaintiffs that the repairs would be covered under the policy and, in reliance upon these representations, plaintiffs retained Anderson to make the repairs.

To establish a claim for damages under the CFA a plaintiff must prove three elements: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009); accord, Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389 (2007).

Further, while the CFA "encompass[es] the sale of insurance

policies as goods and services that are marketed to consumers," it was not intended as a vehicle to recover damages for an insurance company's refusal to pay benefits. Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 265 (1997); see also In re Van Holt, 163 F.3d 161, 168 (3d Cir. 1998) (holding that "[t]he mere denial of insurance benefits to which . . . plaintiffs believe[ ] they [are] entitled does not comprise an unconscionable commercial practice"). The claim asserted against FMI involved a coverage dispute. The record established nothing more. Therefore, the motion judge did not err in dismissing that claim.

B.

Likewise, to survive a summary judgment motion seeking dismissal of their punitive damages claim, plaintiffs were required to present genuinely disputed issues of fact from which a jury could reasonably conclude that FMI, in refusing to pay plaintiffs' claim for damage to their well, acted not only intentionally, but did so in the sense of an "'evil-minded act' or an act accompanied by a wanton and willful disregard of the rights of [plaintiffs]." Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49 (1984). More specifically, what is contemplated is a "positive element of conscious wrongdoing." Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962). In other

words, an award of punitive damages is appropriate where the wrongdoer's conduct has been especially egregious. Leimgruber v. Claridge Associates, Ltd., 73 N.J. 450, 454 (1977); Berg, supra, 37 N.J. at 412-13.

Because the jury found that Pisani acted intentionally rather than mistakenly in directing Anderson to undertake the repairs, plaintiffs attempt to use that finding as a basis to urge that the court erred in declining to submit their punitive damages claims to the jury. However, because plaintiffs' proofs establish nothing more than the fact that Pisani acted intentionally, the motion judge did not err in granting summary judgment dismissing the punitive damages claim.

Finally, because there was no basis upon which to submit either claim to the jury, plaintiffs' contention that the trial court erred when it denied their application seeking supplemental proceedings following the jury's verdict is without merit. As previously addressed, the jury's finding that Pisani made an incorrect statement and that he did not make the statement in a "negligent manner," would not alter the outcome that plaintiffs failed to establish a cause of action under the CFA or for punitive damages as a matter of law.

III.

Plaintiffs argue that as the prevailing party in the coverage dispute they were entitled to an award of counsel fees. We disagree.

New Jersey courts generally follow the American Rule which requires parties to bear their own attorney's fees. See Litton Industries v. IMO Industries, 200 N.J. 372, 385 (2009). However, pursuant to Rule 4:49-9(a)(6), a successful claimant "[i]n an action upon a liability or indemnity policy of insurance" may recover attorney's fees. See Schmidt v. Smith, 294 N.J. Super. 569, 591 (App. Div.), aff'd, 155 N.J. 44 (1998) (stating that an insured is entitled to attorney's fees even when it is later determined the insured is not entitled to indemnification). The stated intention of this rule is to permit an award of attorney's fees only where an insurer refuses to indemnify or defend its insured's third-party liability to another.

To support their counsel fees claim, plaintiffs rely upon Myron v. Atl. Mutual Ins. Co., 407 N.J. Super. 302 (App. Div. 2009), aff'd, 203 N.J. 537 (2010), where attorneys' fees were granted in an insurance coverage dispute. There, while defending its insured in a third-party liability action, the insurer instituted a declaratory judgment action in Illinois

federal district court, seeking a declaration that the insured was not entitled to defense and indemnification in connection with the New Jersey class action litigation commenced against the insured alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C.A. § 227. Id. at 305. We found the insured's "right to counsel fees stems from its success in the New Jersey litigation." Id. at 312.

Myron is distinguishable because it involved a coverage dispute related to commercial general liability policy for which Rule 4:42-9(a)(6) expressly permits the award of counsel fees. This rule has not been extended beyond its express terms to encompass counsel fee awards sought by an insured who commences a direct suit against the insurer to enforce direct coverage. See Auto Lenders v. Gentilini Ford, 181 N.J. 245, 280 (2004) (finding attorneys' fees not allowable under this rule in successful claim by insured against insurer under dishonest-employee coverage). Thus, the motion judge did not err in dismissing plaintiff's claim for counsel fees.

Moreover, plaintiffs were not entitled to counsel fees because the verdict against defendants was at least twenty percent more favorable to defendants than the arbitration award. See R. 4:21A-6(c)(1). Under Rule 4:21A-6(c)(1), where "a monetary award has been rejected, no costs shall be awarded if

the party demanding the trial de novo has obtained a verdict at least 20 percent more favorable than the award." This rule provides that the party requesting a trial de novo "may be liable to pay the reasonable costs, including attorney's fees, incurred after rejection of the award by those not demanding a trial de novo." Williams v. Shop Rite of Lacey Twp., 309 N.J. Super. 646, 648 (App. Div. 1998) (quoting R. 4:21A-6(c)(1)). Rule 4:21A-6(c)(1) lacks ambiguity and requires a comparison of the trial verdict with the arbitrators' award. Ibid. Any award of attorneys' fees pursuant to this rule must comply with the rule's provisions. R. 4:42-9(b); R. 4:21A-6(d).

Here, the jury's $9025.41 verdict in favor of plaintiffs was twenty percent more favorable to defendants than the $19,025.41 non-binding arbitration award. Although deference will ordinarily be given to the factual findings that undergird a trial court's decision, its conclusions will be overturned if reached under a misconception of the law. McDade v. Siazon, 208 N.J. 463, 473-74 (2011). A decision based on a misapplication of the law will be overturned and the court instead must "adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided." State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); see also Kavanaugh v. Quigley, 63 N.J. Super. 152, 158

(App. Div. 1960). "In any case, a trial court's interpretation of the law and the consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

In this case, the trial judge made factual findings not based upon the record but upon his speculation as to what would have occurred had defendants not sought a trial de novo and had plaintiffs moved to confirm the arbitration award. Specifically, the trial judge expressed the belief that defendants would have successfully challenged the award of counsel fees at that point. In this regard, the trial judge erred because he, in essence, determined the "true" arbitration award by assessing its validity. However, the validity of an award entered as a result of non-binding arbitration is immaterial because the decision and award of the arbitrator is not subject to appeal and the parties have an "absolute and unqualified" right to reject the award. See Peters v. Marriott Corp., 278 N.J. Super. 327, 337 (App. Div. 1994). When calculating the differential between the arbitration award and verdict for purposes of assessing penalties, the arbitration award and the jury verdict are to simply be compared. Williams, supra, 309 N.J. Super. at 648. We agree, as defendants urged before the trial judge that if the award had been confirmed,

judgment would have been entered for the full amount of the award without separation of the categories of the award. See R. 4:21A-6; see also SWH Funding v. Walden Printing Co., 399 N.J. Super. 1, 17 (App. Div. 2008) (noting the binding nature of the quantum of damages fixed in the arbitration award). Consequently, the trial court erred in speculating what would have occurred had the award been confirmed as a basis to conclude defendants did not obtain a verdict at least twenty percent more favorable than the arbitration award.

Affirmed in part, reversed in part and remanded for entry of an amended judgment consistent with this opinion. We do not retain jurisdiction.