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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3254-16T4

LIONEL POWELL and LP TRUCKING,
INC.,

Plaintiffs-Respondents,

v.

LASTING LEGACY, JENNA ZERINGO,
VIRGILLO, AAA MIDLANTIC,
GEICO, NJM a/s/o MARY DAMPF,
ROCHDALE INSURANCE COMPANY, and
WESTERN UNITED INSURANCE COMPANY,

Defendants,

and

NATIONAL LIABILITY & FIRE
INSURANCE COMPANY,

Defendant-Appellant.

Argued September 19, 2017 – Decided September 28, 2017

Before Judges Fisher and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Docket No.
L-0875-15.

John T. Coyne argued the cause for appellant
(McElroy, Deutsch, Mulvaney & Carpenter, LLP,

attorneys; Mr. Coyne and Diana M. Hendry, on the brief).

Richard M. Pescatore, argued the cause for respondents Lionel Powell and LP Trucking (Richard M. Pescatore, PC, attorneys; Mr. Pescatore, on the brief).

Audrey L. Shields argued the cause for respondents Lasting Legacy and Jenna Zeringo (Golden, Rothschild, Spagnola, Lundell, Boylan & Garubo, PC, attorneys; Ms. Shields, on the brief).

PER CURIAM

We granted the motion of defendant, National Liability & Fire Insurance Company (NLF), for leave to appeal an order disqualifying its attorneys McElroy, Deutsch, Mulvaney and Carpenter (McElroy). We are compelled to vacate the court's order and remand the motion because the judge failed to provide a rationale for his ruling.

Plaintiffs, Lionel Powell and LP Trucking, Inc., were sued following a motor vehicle accident. NLF, subject to a reservation of rights,¹ retained the law firm of Tompkins, McGuire to defend plaintiffs in the action brought by a party injured in the accident.

McElroy filed a declaratory judgment action in federal court on NLF's behalf seeking a judicial determination that plaintiffs'

¹ NLF claimed plaintiffs' insurance agent, Lasting Legacy, LLP, cancelled plaintiffs' insurance coverage by emailing a signed request for cancellation prior to the accident.

insurance policy through NLF was cancelled, and that NLF did not cover or owe plaintiffs a duty to defend or indemnify.

Richard Pescatore, now and then, represents plaintiffs in a suit brought against plaintiffs' insurance agent in the Superior Court of New Jersey seeking indemnification for damages resulting from the agent's unauthorized cancellation of NLF's policy.²

Both McElroy and Tompkins, McGuire were involved in a mediation of claims related to the motor vehicle accident. Neither plaintiffs nor Pescatore participated. Although mediation did not result in an immediate settlement, NLF later settled the underlying claims brought by the injured party. McElroy admits that it "took the lead" in negotiating that settlement, explaining the settlement involved a coincident assessment of the tort claim and coverage issues. To that point, McElroy negotiated with the injured party's uninsured motorist (UM) carrier and obtained contribution from them, ostensibly because of the UM carrier's potential exposure if NLF prevailed in the declaratory judgment action. The injured party, and his UM carrier, signed releases in favor of both NLF and, as NLF's potential insured, plaintiffs. Plaintiffs' claims, including those against NLF, were not

² The initial complaint was thrice amended to add other defendants, including NLF.

resolved, and this motion was made to disqualify McElroy from representing NLF in that pending action.

Plaintiffs made numerous arguments to the motion judge, some of which were not germane to the issue of disqualification; rather they pertained to substantive claims involving the alleged cancellation of NLF's coverage, and other coverage-related issues. According to plaintiffs, the motion to disqualify McElroy "was based upon a variety of reasons including conflict of interest, violation of Rules of Professional Conduct and the conduct of NLF's principal adjuster . . . wherein Powell claimed prejudice and estoppel."

Plaintiffs contend "[a]ny one of several transgressions by counsel in the [McElroy] firm provided more than a sufficient basis to support [the judge's] order of disqualification. After two extensive oral arguments and a review of extensive documentation, the [c]ourt appropriately entered an order of disqualification and barred McElroy from further participation." Echoing the motion judge's decision, plaintiffs claim, "[t]he basis for the disqualification is contained in the record below."

More specifically, plaintiffs advance that the McElroy attorney falsely stated in a certification that he "never spoke with or had any conversations with Powell's representative." In the certification, counsel asserted that he had "never spoken with

Lionel Powell or any representative of LP Trucking."³ Despite plaintiffs' argument that the "false certification was obviously considered by the court below in conjunction with the same attorney's undisputed communications with Powell's representative/counsel," and that McElroy's counsel's false representation "was viewed as especially egregious by the [motion] court," we do not know if the motion judge found the certification false. He never made a credibility finding, nor could he since he did not conduct an evidentiary hearing. We do not know if his decision was even based on that statement.

Plaintiffs also claim that the McElroy attorney settled the claims at mediation after making the "false and misleading" statement to plaintiffs' personal counsel that he would "not proceed with the settlement if it will still have to defend your client's affirmative claim." Plaintiffs assert that the motion judge considered emails between the McElroy attorney and plaintiffs' personal counsel that buttress this claim. Again, we do not know which of plaintiffs' arguments the judge adopted.

³ The McElroy attorney admits that he spoke with plaintiffs' counsel, but considered that discussion one between attorneys; he did not view plaintiffs' counsel as a "representative of LP Trucking." Plaintiffs contend their counsel was a "representative" and that MDMC counsel's statement is false.

The foregoing is but a sampling of the reasons plaintiffs proposed for McElroy's disqualification. We do not know which of the many legal grounds advanced by plaintiffs formed the basis for the judge's ruling. We cannot ascertain if the facts supported the judge's unspoken legal conclusion because he provided no rationale for his decision.

We cannot assess the judge's findings of fact and conclusions of law unless we know what they are. See Magill v. Casel, 238 N.J. Super. 57, 65 (App. Div. 1990) (holding, in the context of an application for judicial recusal, the "challenged judge who hears the motion should painstakingly set forth the . . . bases for the ultimate decision" in order to allow proper appellate review).

We vacate the order and remand the case to another judge for further proceedings in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION