SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3030-16T4

EILEEN MACK and JAMES MACK,
w/h,

Plaintiffs-Appellants,

v.

ALLSTATE NEW JERSEY PROPERTY
AND CASUALTY INSURANCE
COMPANY,

Defendant-Respondent.

Submitted February 13, 2018 – Decided April 25, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1577-16.

Dolchin, Slotkin & Todd, PC, attorneys for appellants (Sean P. McCusker, on the brief).

Raymond F. Danielewicz, attorney for respondent.

PER CURIAM

Eileen Mack and James Mack appeal from a February 17, 2017 order dismissing with prejudice their complaint for underinsured

motorist (UIM) benefits against defendant Allstate New Jersey Property and Casualty Insurance Company for failure to state a claim, R. 4:6-2(e). We do not agree that, under the circumstances of this case, dismissal of the complaint was warranted and reverse.

Plaintiff[1] was injured[2] in an automobile accident and filed suit against the other driver, Adam Mortelliti, who had automobile liability insurance coverage in the amount of $25,000. Plaintiff was covered by Allstate under an automobile policy providing UIM coverage with limits of $100,000 per person and $300,000 per accident. After learning of Mortelliti's policy limits, plaintiff notified Allstate of her intention to pursue UIM benefits.

When plaintiff and Mortelliti agreed to resolve the underlying suit through binding arbitration, plaintiff requested Allstate's permission to pursue alternate dispute resolution (ADR). Allstate responded that if plaintiff pursued "binding ADR on the underlying case, [it would] not be bound by any liability

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[1] We refer to Eileen Mack as plaintiff, acknowledging her husband, James Mack, filed a loss of consortium claim against the underlying tortfeasor, and is a named plaintiff in this claim for UIM insurance benefits.

[2] Plaintiff's complaint lists her injuries: "multiple rib fractures, fracture of the right radial styloid, T8-T9 and T9-T10 disc bulges impinging on the thecal sac[,] C4-C5, C6-C7 disc bulges impinging on the thecal sac and sprain and post[-]traumatic stress disorder along with damage to her nerves and nervous system and various other ills and injuries."

[and]/or damages decision made by the arbitrators," and that "unless [plaintiff] receive[d] [sixty percent] or more of the available policy limits for her injuries," she would "have no valid UIM claim."

The arbitration panel[3] found plaintiff and Mortelliti each fifty percent at fault, and that "Eileen and James Mack . . . suffered gross damages in the amount of $47,000, inclusive of all non-economic claims, together with the net wage loss." The panel molded the final binding award, subject to "a previously negotiated . . . High-Low Agreement," to a net amount of $23,500.

Four days after the award, plaintiff advised Allstate that the award represented "more than [sixty percent] of all available liability insurance pursuant to N.J.S.[A.] 17:28-1.1(e)" and of her "present intention to accept the award . . . in exchange for providing [Mortelliti] with a General Release"; plaintiff's letter also requested Allstate to advise of its intention regarding its Longworth options.[4] Allstate responded that, subject to confirming

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[3] The panel unanimously found Eileen Mack was "subject to a Zero or No Limitation Threshold" but was divided — two to one — on the damages award.

[4] The procedure set in Longworth v. Van Houten, 223 N.J. Super. 174, 194-95 (App. Div. 1988), provides:

> [A]s a matter of future conduct, an insured receiving an acceptable settlement offer from

that there were no other insurance policies from which possible contribution could be sought before "any monies" were accepted by plaintiff, plaintiff was authorized "to accept settlement on the underlying case." Less than two weeks later, Allstate denied plaintiff's UIM claim because the arbitration award was less than Mortelliti's $25,000 policy limits. The filing of the now-dismissed complaint followed.

Both parties agree the motion judge ruled plaintiff was collaterally estopped from relitigating the issues decided in the arbitration; the award of less than Mortelliti's $25,000 policy

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> the tortfeasor should notify his UIM carrier. The carrier may then promptly offer its insured that sum in exchange for assignment to it by the insured of the claim against the tortfeasor. While promptness is to be ultimately determined by the circumstances, [thirty] days should be regarded as the presumptive time period if the insured notices his carrier prior to assignment of a trial date. In any event, an insured who has not received a response from his carrier and who is in doubt as to whether acceptance of the tortfeasor's offer will impair his UIM rights may seek an immediate declaratory ruling from the trial court on order to show cause on such notice as is consistent with the circumstances. We further hold that UIM carriers may, if they choose, honor demands from their insureds to proceed to arbitration of the UIM claim prior to disposition of the claim against the tortfeasor.

limits precluded plaintiff's UIM claim. We see no reference — except to acknowledge defendant's collateral estoppel argument — in our reading of the judge's oral decision to that issue. Instead, the judge interpreted the language of N.J.S.A. 17:28-1.1(e) and found "that the UIM benefits will not kick in, because the tortfeasor's liability limits were not lower than the damages that were awarded to the plaintiff in this case."

Our review of the dismissal of a claim under Rule 4:6-2(e) is de novo; we afford no deference to the trial judge's conclusions. Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 287 (App. Div. 2014). When the record is sparse, and the trial court has not excluded matters outside the pleadings, the motion to dismiss on the failure to state a claim becomes one for summary judgment. See R. 4:6-2. Here, the motion judge relied on the tortfeasor's liability limits, which was outside the four corners of plaintiffs' complaint. "Hence, our review proceeds as one of a motion for summary judgment." Cheng Lin Wang v. Allstate Ins. Co., 125 N.J. 2, 14-15 (1991).

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-

2(c). The court must "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).

That portion of N.J.S.A. 17:28-1.1(e)(1) considered by the motion judge provides, "A motor vehicle shall not be considered a [UIM] vehicle . . . unless the limits of all bodily injury liability insurance or bonds applicable at the time of the accident have been exhausted by payment of settlements or judgements." In Longworth, however, we ruled that UIM entitlements are not forfeited if an insured settles the underlying tort case without exhausting the policy limits because, as Judge Pressler expressed,

> [t]he requirement that the insured obtain the tortfeasor's entire policy limits as a condition of prosecuting his right to UIM benefits is so antithetical to the policies underlying the statute that we are constrained to conclude that the Legislature could not have so intended. We thus construe the statute as intended only to limit the amount recoverable under the UIM coverage by requiring deduction of the tortfeasor's full available policy limit, whether or not that limit is actually paid to the victim.
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> [223 N.J. Super. at 192.]

Our Supreme Court endorsed the Longworth holding in Rutgers Casualty Insurance Co. v. Vassas, 139 N.J. 163, 172 (1995), finding it "reflects a fair balance between the competing interests of the parties involved," and noting its practical benefits over time:

> The injured accident victim is afforded reasonably prompt means of obtaining full recovery. The liability insurer for the tortfeasor is afforded at least the opportunity to obtain for its insured a general release, thereby disposing of the claims against its insured in accordance with its good faith responsibilities in that regard. Finally, the UIM insurer is given the ability to exercise its subrogation rights in those situations where a subrogation action against the tortfeasor for reimbursement of UIM payments appears worth pursuing.
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> [Id. at 174 (quoting Craig & Pomeroy, N.J. Auto Insurance Law, § 28:3 (1994)).]

We fully recognize that the Longworth procedures have been applied in cases where "the insured receives a settlement offer or arbitration award that does not completely satisfy the claim . . . because the tortfeasor is underinsured." Vassas, 139 N.J. at 174. Here, in light of Allstate's conduct, we conclude Longworth's principles apply.

We have applied the doctrine of estoppel to "[a]n insurance company which expressly or impliedly acknowledge[d] that its policy provide[d] coverage for a particular claim," holding it "may be estopped from subsequently denying coverage if an insured

has relied upon the availability of that coverage." Barrett v. N.J. Mfrs. Ins. Co., 295 N.J. Super. 613, 618 (App. Div. 1996).

> "Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law." Casamasino v. City of Jersey City, 158 N.J. 333, 354 (1999). The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. Mattia v. N. Ins. Co., 35 N.J. Super. 503, 510 (App. Div. 1955). The doctrine is invoked in "the interests of justice, morality and common fairness." Palatine I v. Planning Bd., 133 N.J. 546, 560 (1993). Estoppel, unlike waiver, requires the reliance of one party on another. To establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment. Miller v. Miller, 97 N.J. 154, 163 (1984).
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> [Marsden v. Encompass Ins. Co., 374 N.J. Super. 241, 249 (App. Div. 2005).]

New Jersey courts have estopped insurers in a variety of cases in which they acknowledged coverage "upon which an insured justifiably relie[d]," including those in which "the only form of reliance on [the insurer's] assurances . . . was the expectancy of the availability of UIM benefits." Barrett, 295 N.J. Super. at 618-19.

Unlike the plaintiff in Ferrante v. N.J. Mfrs. Ins. Grp. ___ N.J. ___, ___ (2018) (slip op. at 18), plaintiff here notified Allstate at the "numerous landmarks" throughout the underlying

action, fully complying with Longworth's notice requirements.[5] After apprising Allstate of her action against Mortelliti and her intention to pursue UIM benefits, she sought permission from Allstate to arbitrate the underlying action. Allstate's response warned plaintiff that it would not be bound by any decision made at the binding arbitration and that UIM benefits would not be paid if plaintiff received an award below sixty percent[6] of the available policy limits. Allstate also authorized acceptance of the "settlement" after plaintiff advised it that the arbitration award exceeded the sixty percent mark set in its prior letter.

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[5] Following the Longworth procedure,

> when an insured under an automobile insurance policy providing UIM benefits is involved in an accident and undertakes legal action against the tortfeasor, the insured must notify the UIM insurer of that action. If, during the pendency of the claim, the tortfeasor's insurance coverage proves insufficient to satisfy the insured's damages, then the insured should again notify the UIM insurer of that fact.
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> [Vassas, 139 N.J. at 174.]

[6] See Ohio Cas. Ins. Co. v. Bornstein, 357 N.J. Super. 282, 287-88 (App. Div. 2003) (holding the insured's acceptance of a settlement equal to sixty percent of the tortfeasor's liability coverage was sufficiently substantial so as not to be per se unreasonable).

It can reasonably be inferred from Allstate's responses that plaintiff would be allowed to claim UIM benefits if the arbitration award — notwithstanding Allstate's stance that it would not be bound by findings made at the binding arbitration — exceeded the sixty percent threshold it set. Had that representation not been made, plaintiff could have foregone arbitration and directly pursued UIM coverage,[7] or settled the case or proceeded to non-binding arbitration to better conform to the factual setting of Longworth and its progeny. Instead, Allstate implicitly acknowledged plaintiff's entitlement to UIM benefits and approved the procedure plaintiff pursued.[8] See Barrett, 295 N.J. Super. at 619 (holding "if an insurer authorizes acceptance of a tortfeasor's settlement offer pursuant to the Longworth procedures, it constitutes at least an implicit acknowledgment of the availability of UIM coverage upon which the injured party should be entitled to rely. Such reliance may take the form not only of the expectancy of receipt of UIM benefits but also of foregoing

[7] "[T]he most efficient procedure and the procedure most nearly comporting with the legislative intent would be to permit the insured victim, at his option, to pursue his remedy under the UIM coverage without first having to conclude his claim against the tortfeasor." Longworth, 223 N.J. Super. at 193.

[8] Allstate's representations render reasonable the amount of the underlying award and plaintiff's reason for accepting it. See Bornstein, 357 N.J. Super. at 287.

the opportunity to pursue a recovery from the tortfeasor in excess of the insurance company's settlement offer."). We recognize that Longworth has never, to our knowledge, been applied after a binding arbitration award. That is of no moment because plaintiff had a right to rely on Allstate's position — as set forth in its letters — recognizing the binding arbitration proceeding, disclaiming coverage if the award fell below the sixty percent threshold, and ultimately authorizing settlement. We conclude Allstate is estopped from denying UIM coverage because that remedy "simply 'denies [the insurer] the right to repudiate an act or position assumed where such repudiation would work injustice to another who rightfully relies thereon.'" Barrett, 295 N.J. Super. at 618 (quoting Bowler v. Fid. & Cas. Co., 99 N.J. Super. 184, 192 (App. Div. 1968), rev'd on other grounds, 53 N.J. 313 (1969)).

Reversed and remanded for further proceedings consistent with this opinion.