SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3331-15T4

TYRONE S. HENRY, SR., INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TYRONE S. HENRY, JR.,

Plaintiff,

v.

SANTOSH S. BHOWMIK,

Defendant,

and

CURE AUTO INSURANCE,

Defendant-Appellant,

and

THE NEW JERSEY PROPERTY LIABILITY INSURANCE GUARANTY ASSOCIATION,

Defendant-Respondent.

Argued October 24, 2017 – Decided February 8, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-6636-14.

Chad B. Sponder argued the cause for appellant (Eric S. Poe, of counsel and on the brief; Abbey True Harris, on the briefs).

Mark M. Tallmadge argued the cause for respondent (Bressler, Amery & Ross, PC, attorneys; Mark M. Tallmadge, on the brief).

Matthew R. Major argued the cause for intervenor-respondent AtlantiCare Regional Medical Center (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; Matthew R. Major, of counsel and on the brief).

PER CURIAM

Defendant CURE Auto Insurance (CURE) appeals from an October 26, 2015 Law Division order granting plaintiff's motion for summary judgment, requiring CURE to provide personal injury protection (PIP) benefits, as a matter of law, to plaintiff, administrator of the estate of his late son, Tyrone S. Henry Jr. (Tyrone). CURE argues the trial court erred in its application of the law by finding CURE liable for PIP benefits for an unnamed additional insured under the terms of a voided insurance contract.

At the outset, we note this appeal is interlocutory because CURE filed this appeal before the trial court made findings on damages. Nevertheless, because dismissal of this appeal, at this juncture, would cause further undue delay in the payment of

substantial unpaid medical bills,[1] we therefore sua sponte grant leave to appeal nunc pro tunc the issue of CURE's liability for PIP benefits. R. 2:4-4(b)(2); see also Medcor, Inc. v. Finley, 179 N.J. Super. 142, 144-45 (App. Div. 1981) (holding this court has discretion on whether to grant leave to appeal from an interlocutory order). For the reasons that follow, we affirm and remand for the Law Division to determine damages.

I

On January 31, 2014, Tyrone sustained serious injuries after an automobile driven by defendant Santosh Bhowmik struck him as he walked across an intersection in Pleasantville. Tyrone ultimately died from his injuries on February 8, 2014, after first incurring substantial medical treatment bills at AtlantiCare Regional Medical Center (AtlantiCare).[2] At the time of the accident, Tyrone lived in Ocean City with his cousin, Chanel Pitt, who owned an automobile that CURE insured.

On December 8, 2014, plaintiff filed a complaint in the Law Division, Atlantic County, against defendants, Bhowmik, CURE, and

[1] "The prompt distribution of PIP benefits to accident victims has remained a staple of the no-fault system since that system was first developed." Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, 523 (2008).

[2] According to AtlantiCare's brief, Tyrone spent eight days in intensive care before expiring, resulting in an unpaid treatment bill of $378,042.70.

The New Jersey Property Liability Insurance Guaranty Association (PLIGA). In relevant part, the complaint sought to recover PIP benefits from CURE, or alternatively, from PLIGA, for the injuries and subsequent death of Tyrone.

On January 8, 2015, PLIGA filed an answer with cross-claims denying the material allegations of the complaint. On January 28, 2015, CURE filed an answer with counterclaims and cross-claims, denying the complaint's allegations and seeking a declaration that the CURE insurance policy at issue was void, and thus, PLIGA was liable to plaintiff for PIP benefits. At that time, CURE had already filed a separate declaratory judgment action against Pitt in Cape May County in November 2014, seeking to void her insurance policy for material misrepresentations in failing to disclose all household members as of her March 2, 2012 policy renewal.[3]

On July 6, 2015, plaintiff moved for summary judgment seeking a declaration obligating either CURE or PLIGA to pay PIP benefits, and to consolidate the proceeding with the declaratory judgment action filed by CURE in Cape May County. CURE and PLIGA opposed the summary judgment motion, which the Atlantic County judge initially denied without prejudice on August 26, 2015, finding

[3] On March 2, 2010, Pitt first obtained automobile insurance from CURE; the policy renewed annually.

that a "dispute of fact" remained. The judge also denied the consolidation motion.

In early September 2015, plaintiff filed a motion for reconsideration of the denial of his summary judgment motion, which CURE again opposed. In his motion, plaintiff cited Citizens United Reciprocal Exch. v. Perez, 223 N.J. 143, 151-52 (2015), decided by our Supreme Court the previous month for the proposition that innocent third parties remain eligible to collect PIP benefits, even when a policy is rescinded for a material misrepresentation made by the insured at the inception of the policy.

Meanwhile, CURE requested a proof hearing in its declaratory judgment action after Pitt failed to answer its complaint. On September 16, 2015, a Cape May County judge held a proof hearing and then entered a final judgment declaring the Pitt policy void ab initio, finding Pitt made "material misrepresentations in failing to disclose all household members" at the time of her March 2012 policy renewal.

Thus, CURE agreed with plaintiff that reconsideration of the motion was appropriate, but on a different basis; namely that its insurance policy had been officially declared void ab initio by the Cape May County judge. CURE further asserted that Perez did

not apply, arguing instead that Lovett v. Alan Lazaroff & Co., 244 N.J. Super. 510 (App. Div. 1990) governed this dispute.

On reconsideration, the Atlantic County judge concluded plaintiff was an innocent third party and thus entitled to PIP benefits from CURE for three reasons: (1) Tyrone was unaware of the misrepresentations Pitt made to CURE; (2) there was no assertion that Tyrone benefitted from the misrepresentations; and (3) Tyrone did not have input in the policy's procurement.

Following the grant of summary judgment, on February 22, 2016, a different judge entered an order confirming a settlement between plaintiff and Bhowmik. On March 4, 2016, the court entered an order dismissing plaintiff's claims against PLIGA. On April 1, 2016, the court entered an order permitting AtlantiCare to intervene to pursue its claim for payment of medical expenses arising out of treatment provided to Tyrone. On April 6, 2016, CURE filed a notice of appeal from the October 26, 2015 summary judgment order.

II

We review the trial court's grant of summary judgment de novo, applying the same standard as the trial court. Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh, 450 N.J. Super. 400, 406 (App. Div. 2017). We should affirm summary judgment if the record shows "no genuine issue as to any material fact challenged and

. . . the moving party is entitled to a judgment or order as a matter of law." Ibid. (quoting Templo Fuente de Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46. We afford no special deference to the legal conclusions of the trial court. Templo Fuente, 224 N.J. at 199. Therefore, because no genuine issue of material fact exists in the record, we review de novo the trial court's legal determination that Tyrone, an "additional insured" under the policy under review, is entitled to PIP benefits from CURE as an innocent third party. Ibid.

Our Supreme Court has described the remedy of rescission as follows:

> Rescission remains a form of equitable relief in whatever setting its need arises, and courts wielding that remedy retain the discretion and judgment required to ensure that equity is done. In furtherance of that objective, a court may shape the rescission remedy in order to serve substantial justice. . . . The power to mold the rescission remedy to do justice under the circumstances is perforce available when rescission is employed in the insurance context.
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> [LaCroix, 194 N.J. at 528-29.]

New Jersey's no-fault scheme imposes a requirement that insurers promptly pay PIP benefits to reimburse those injured in

automobile accidents regardless of fault. N.J.S.A. 39:6A-4 in relevant part states:

> [E]very standard automobile liability insurance policy . . . shall contain [PIP] benefits for the payment of benefits without regard to . . . fault of any kind, to the named insured and members of his [or her] family residing in his [or her] household who sustain bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile, or as a pedestrian . . . and to other persons sustaining bodily injury while occupying, entering into, alighting from or using the automobile of the named insured, with permission of the named insured.
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> [(emphasis added).]

More simply stated, there are two main coverage classes for PIP benefits under the statute: (1) the named insured (first-party insured) and family members residing in the household (additional insureds), and (2) other persons injured while occupying, entering into, alighting from or using the vehicle of the named insured with that person's permission. LaCroix, 194 N.J. at 523.

The law in New Jersey is well-settled that when a factual misrepresentation is made in an insurance application, rescission may be justified if the insurer relied on the misrepresentation in determining whether to issue the policy. See, e.g., Perez, 223 N.J. at 150-51; Palisades Safety & Ins. Ass'n v. Bastien, 175 N.J. 144, 148-49, 151 (2003) (affirming the denial of a claim for PIP

benefits by the innocent wife of an insured, when the insured intentionally failed to place his wife's name on the policy to reduce his premium, citing the resident's spouse "unique position to be aware of the other spouse's interactions with the insurer of the household's vehicles.").

However, even if a policy is voided, PIP benefits may nevertheless be awarded to innocent third parties. LaCroix, 194 N.J. at 524. In LaCroix, the court affirmed an equitable remedy fashioned by this court that required payment of PIP benefits to an additional insured even though the underlying policy was voided. Id. at 519. There, the question before the court was "whether a dependent child, newly licensed, only recently of driving age, and living with her parent, stands on different footing when the equities are considered in connection with her claim for PIP benefits under her father's void automobile insurance policy." Id. at 526. Distinguishing its decision from Bastien, where the Court found that awarding PIP benefits "would have served to encourage insurance fraud[,]" the LaCroix court found "room for some consideration of innocence . . . when the fraud is due to the action of the parent of a young driver." Id. at 526-27 (citing Bastien, 175 N.J. at 149,151-52). Noting that it has "never turned a deaf ear to the equities when plainly innocent parties cry out for relief," the Court found "no abuse in the Appellate Division's

molding of the rescission remedy" that entitled the plaintiff to PIP benefits from her father's voided policy. Id. at 530, 532.

III

CURE does not contest the factual findings made by the motion judge in granting summary judgment for plaintiff. Thus, the following facts are undisputed. Tyrone sustained injures in an automobile accident that led to his death on February 8, 2014. At the time, Tyrone, twenty-three years old, resided with his cousin, Pitt, who owned a New Jersey registered motor vehicle that CURE insured. Plaintiff sought PIP benefits under Pitt's policy as an additional insured resident relative. CURE declined PIP benefits and filed an action against Pitt to void the policy ab initio for various reasons, including failing to "provide her true household members."

In the Cape May County action – a suit involving only CURE and Pitt – the judge voided the policy ab initio "for material misrepresentations in failing to disclose all household members as of the renewal of March 2, 2012." If Tyrone were listed on the policy, and the policy was not otherwise voided, he would have been entitled to PIP benefits as an additional insured. Neither party contends that Tyrone was aware of Pitt's misrepresentation, benefitted from the misrepresentation, or had input in the procurement of the policy.

The declaratory judgment action CURE filed in Cape May County named Pitt as the only defendant, even though the New Jersey Declaratory Judgment Act (the Act), N.J.S.A. 2A:16-56, mandates that "all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding." On April 3, 2014, CURE sent a letter to plaintiff's attorney denying plaintiff's claim for PIP benefits under Pitt's policy. This letter clearly established CURE's knowledge that plaintiff had an "interest which would be affected" by the declaratory judgment action. The record contains no explanation for CURE's failure to make plaintiff, PLIGA, and AtlantiCare parties to the declaratory judgment action.

CURE's declaratory judgment complaint alleged that Pitt made misrepresentations concerning her address and household residents with respect to CURE's policy and its renewals. Following Pitt's default, and a proof hearing, the Cape May County judge entered judgment by default, declaring "the policy issued by [CURE] to Chanel Pitt is void ab initio for material misrepresentations in failing to disclose all household members as of the renewal of March 2, 2012." The court's order does not identify the particular misrepresentations. Nor does the record before this court contain any evidence concerning such misrepresentations.

In its responsive pleading in the matter under review, CURE alleged that Pitt obtained insurance from CURE on March 2, 2010, and the policy renewed annually through the time of Tyrone's fatal accident, January 31, 2014. However, the only evidence in the record concerning CURE's policy is a two-page "Summary of Coverage" for the renewal effective March 2, 2014, the policy period following the subject accident. The record does not contain a copy of the CURE policy, the application for the initial policy in 2010, or any of the renewal applications. Nor does the record contain any evidence of Pitt's alleged misrepresentations, only the allegations contained in CURE's unverified pleadings.

The record does include an affidavit from plaintiff that Tyrone moved in with Pitt in June 2013. Because CURE's policy renewed on March 2, 2013 and the subject accident occurred on January 31, 2014, Tyrone did not reside with Pitt at the time when CURE's policy renewed. In addition, because the judge in Cape May County voided the policy for "failing to disclose all household members as of the renewal of March 2, 2012," and Tyrone did not move in with Pitt until June 2013, Tyrone's residence with Pitt could not have constituted the misrepresentation that resulted in the voiding of CURE's policy.

CURE's primary argument on appeal is that an insurer has no liability "to an additional unnamed insured seeking to recover

under the terms of a voided insurance contract," thereby implicitly asserting that it has established "a voided insurance contract" through the declaratory judgment action. However, our cases construing the Act "hold that recourse to the [Act] . . . will settle the policy dispute as to the parties in court. The declaration when granted will not prejudice nonparties." Constant v. Pac. Nat'l Ins. Co., 84 N.J. Super. 211, 221 (Law Div. 1964); see also Condenser Serv. & Eng'g Co. v. Am. Mutual Liab. Ins. Co., 45 N.J. Super. 31, 42 (App. Div. 1957); Weissbard v. Potter Drug & Chem. Corp., 6 N.J. Super. 451, 455 (Ch. Div. 1949), aff'd, 4 N.J. 115 (1949). Moreover, CURE's position ignores N.J.S.A. 2A:16-57, which specifically provides, "No declaratory judgment shall prejudice the rights of persons not parties to the proceeding."

The record on appeal fails to reflect what evidence CURE submitted to the Cape May County judge to support the entry of the order voiding Pitt's 2012 policy – the year before the relevant policy period in the matter under review. Nor does the record contain any evidence that supports voiding Pitt's policy for any policy period. We are constrained to conclude the record lacks any basis for this court to consider that the insurance policy

CURE issued to Pitt was or should be voided vis-à-vis plaintiff, PLIGA, or AtlantiCare.[4] We therefore affirm on that basis.

Nevertheless, the motion judge addressed CURE's voided policy argument and determined that CURE's rescission of its policy issued to Pitt would not preclude plaintiff's recovery of PIP benefits. We therefore add the following comments concerning CURE's argument that the trial judge abused her discretion when she concluded Tyrone was entitled to PIP benefits from CURE.

The record indicates the motion judge carefully reviewed and analyzed the equities and concluded they support molding the rescission remedy to allow plaintiff to collect PIP benefits on behalf of Tyrone's estate under CURE's voided policy. The judge found sufficient similarities to Lacroix to warrant a similar outcome, noting it significant that Tyrone did not know of the misrepresentations Pitt made to CURE, did not benefit from the misrepresentations, and did not have input in procuring the policy. We also cannot conclude that awarding PIP benefits here would

[4] In contrast, the record in LaCroix included an admission by the named insured that he did not list his daughter on the policy application "to secure lower premium payments." LaCroix, 194 N.J. at 519. The record also indicated the policy premium would have increased by approximately $500 if the daughter's name had been disclosed, making the "misrepresentation plainly material to the insurer." Id. at 520.

encourage insurance fraud. See LaCroix, 194 N.J. at 526. Thus, even if the record had established a valid basis for voiding the subject policy vis-à-vis plaintiff, PLIGA, or AtlantiCare, we discern no basis to conclude the trial judge mistakenly exercised her discretion in finding that "equity and precedent requires" CURE to pay plaintiff PIP benefits. See Perez, 223 N.J. 151-52.

Affirmed, and remanded. We do not retain jurisdiction.