RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3527-15T3

D.G.,[1]

Plaintiff,

v.

B.E.A.,

Defendant/Third-Party
Plaintiff-Appellant,

v.

HARLEYSVILLE INSURANCE
COMPANY OF NEW JERSEY
and HANOVER INSURANCE
COMPANY,

Third-Party Defendants/
Respondents.

Argued October 5, 2017 – Decided March 29, 2018

Before Judges Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3211-14.

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[1] Because this case involved domestic violence, we use initials to identify the parties involved. R. 1:38-3(c)(12).

Darren M. Gelber argued the cause for appellant (Wilentz, Goldman & Spitzer, PA, attorneys; Darren M. Gelber, of counsel and on the brief).

Lance J. Kalik argued the cause for respondents (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; Lance J. Kalik, of counsel and on the brief; Peter M. Perkowski Jr., on the brief).

PER CURIAM

Defendant/third-party plaintiff B.E.A. sought coverage and a defense under a homeowner's policy issued by third-party defendant Harleysville Insurance Company (Harleysville) for a claim for bodily injuries inflicted on his girlfriend, plaintiff D.G., during a domestic violence incident. In granting summary judgment to Harleysville and denying summary judgment to defendant, the motion judge determined defendant's act of domestic violence was not an "accident" within the definition of an "occurrence," but rather a particularly reprehensible act from which an intent to cause bodily injury is presumed by law and insurance coverage is denied. We agree and affirm.

I.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motions, viewed in the light most favorable to defendant. Edan Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 128 (2017).

Plaintiff and defendant began dating in 2009. They had no history of domestic violence or physical abuse until the morning of July 11, 2013. The day before, they went to a casino/hotel in Atlantic City for the weekend to gamble. Defendant consumed alcohol during the day and into the next morning. He was extremely intoxicated when he returned to the parties' hotel room at approximately 3:30 a.m. and viciously assaulted plaintiff. He threw her against a wall and choked and strangled her to the point she almost lost consciousness and thought she was going to die. He also threw her through a doorway, slammed her head into an air conditioning grate leaving a dent, blocked the door as she crawled away in an attempt to escape, and kneed and kicked her in the head and shoulders. Plaintiff eventually escaped into the hallway, followed by defendant. A hotel guest exited his room and called security.

The police arrested defendant for "domestic assault" and issued a supplemental domestic violence offense report. Defendant was charged with simple assault, N.J.S.A. 2C:12-1(a)(1).[2]

[2] The charge was later dismissed after defendant completed an alcohol treatment program pursuant to the Alcohol Treatment and Recovery Act (ATFA), N.J.S.A. 26:2B-17. In granting defendant's application for an AFTA deferment of the charge, the Municipal Court judge found defendant was "a problem drinker who would benefit by treatment." The court later expunged all records relating to defendant's arrest and the criminal proceedings.

Plaintiff obtained an indefinite temporary restraining order against defendant after his repeated attempts to communicate with her after the assault.

Plaintiff sustained a severe right ankle sprain with torn ligaments and was in a cast for eight weeks. She also sustained injuries to her head, neck, throat, left knee, legs, and arms. She has permanent injuries to her vocal cords and ankle, including an approximately two-inch scar on her ankle, and suffers from post-traumatic stress disorder. She filed a complaint against defendant in the Law Division, which defendant eventually settled for $250,000.

Defendant sought coverage and a defense under his homeowner's policy. The policy had "personal liability" coverage of $500,000 per occurrence, and provided as follows:

> SECTION II - LIABILITY COVERAGES
>
> . . . .
>
> COVERAGE E - Personal Liability
>
> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury," "personal injury," or "property damage" caused by an "occurrence" to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which the "insured" is legally liable.
> 2. Provide a defense at our expense by counsel of our choice, even [if] the suit is

> groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the "occurrence" equals our limit of liability.

The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in: . . . 'bodily injury[,]'" and defined "bodily injury" as "bodily harm, sickness or disease, including required care, loss of services and death that results." The policy did not define the term "accident." The policy excluded coverage for bodily injury "which is expected or intended by one or more 'insureds' even if the 'bodily injury' . . . (1) [i]s of a different kind, quality or degree than expected or intended; or (2) [i]s sustained by a different person or entity than expected or intended."

Harleysville disclaimed coverage and a defense, stating the assault was not accidental in nature and thus did not meet the definition of "occurrence" covered under the policy. Harleysville also disclaimed coverage based on the policy exclusion.

Defendant did not dispute he physically assaulted plaintiff or that this was an act of domestic violence. Rather, he claimed he was extremely intoxicated, had no recollection of what happened in the hotel room, and did not intentionally or knowingly cause

plaintiff bodily harm. He argued, as he does on appeal, that he was too intoxicated to form the intent to injure plaintiff, and the totality of the circumstances did not show his conduct was particularly reprehensible to support a finding of presumed intent. He emphasized the parties had a long-term loving and caring relationship with no history of domestic violence or physical abuse, and the assault was a single unexpected, unintended, and uncharacteristic event that occurred because of extreme voluntary intoxication.[3]

Harleysville countered that defendant's violent assault of plaintiff was not an accident under the policy, but rather, a particularly reprehensible act of domestic violence where intent to injure is presumed and insurance coverage is denied. Harleysville posited the parties' prior non-violent history and defendant's intoxication were irrelevant, as by law, there is no insurance coverage for the acts of domestic violence under any circumstance, including intoxication, and single acts have been found to be particularly reprehensible.

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[3] There is no competent evidence in the record supporting defendant's additional assertion that the assault occurred because an unknown third party may have tampered with or "spiked" his drinks causing him to black out. Conclusory and self-serving assertions, such as this, are insufficient to overcome a summary judgment motion. Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted).

The motion judge held defendant's act of domestic violence was a particularly reprehensible act supporting a finding of presumed intent to injure plaintiff without an inquiry into defendant's subjective intent. The judge reasoned as follows:

> [In Harleysville Ins. Co. v. Garitta, 170 N.J. 223 (2001)] . . . the [C]ourt held . . . that when actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure. I read that phrase from the Supreme Court as . . . empowering the [c]ourt to rule as a matter of law, that an act may or may not be or is or is not particularly reprehensible.
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> And I don't need to recount the legislative history of the . . . Prevention of Domestic Violence Statute[4] that the legislature has enacted, but . . . it is quite clear from a policy consideration that that [statute] was enacted with the express purpose of protecting victims of domestic violence. It is the most . . . powerful shield against domestic violence enacted by any legislature in any state of the Union. And with good reason, because it -- domestic violence is a scourge in society.
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> And the [c]ourt does not accept the notion that one must view the . . . circumstances of the case in the totality of the whole. In other words, that [where] -- as here, there's an isolated act of domestic violence, no history of domestic violence, the [c]ourt can nonetheless view the . . . particular act here as attenuated by the fact that there was no prior history. I just don't read either the Prevention of Domestic

[4] N.J.S.A. 2C:25-17 to -35.

Violence Statute or the case law governing coverage to suggest that.

I know that the . . . Cumberland [Mutual Fire Insurance Co. v. Murphy, 183 N.J. 344 (App. Div. 2005] case was cited. There, there was a question of . . . did the assailant in that case . . . grab the victim for safety concerns, which is what he said. In that case, of course, well, maybe there's a genuine issue of fact as to what . . . the intent was, because he did . . . pull off a road. She was intoxicated, he pulled her off the road reportedly to protect her or to save her from . . . further harm.

We don't have any of that here. . . . [T]here was no contention, no allegation, no statement of fact in any answer to the interrogator[ies] that the act of strangling the plaintiff and bashing her head against . . . an air conditioning unit was done for any purpose than to hurt her.

And the argument that, well, he was so drunk at the time that he doesn't even remember what happened, I don't think prevents this [c]ourt from finding, based on the undisputed record evidence on this case, that what he did was particularly reprehensible. And if the [c]ourt makes that determination from the undisputed record in this case, the [c]ourt did not even engage in an . . . inquiry, nor should allow a jury to engage in an inquiry as to what the actor's subjective intent may have been.

The Harleysville policy defines bodily injury as bodily harm. No question that is the case here. Occurrence as an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury. I'll respectfully submit that no reasonable trier of fact would conclude otherwise. That

> is to say that grabbing a female by the neck and strangling that person and then smashing her head against an air conditioning unit would result in nothing other than bodily injury.
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> So I'm making the determination as a matter of law, based on the undisputed record evidence, that this was a particularly reprehensible act, and therefore I'm granting the motion of a summary judgment. I'm denying the cross-motion for summary judgment.

II.

On appeal, defendant argues the judge erred in failing to consider the parties' past relationship in determining whether Harleysville could properly disclaim coverage. Citing Bittner v. Harleysville Insurance Co./Companies, 338 N.J. Super. 447, 454 (App. Div. 2001), defendant posits that the parties' prior non-violent history is relevant in domestic violence matters, cases on which Harleysville relied that found certain acts were particularly reprehensible are distinguishable, and his subjective intent was relevant to the issue of coverage under the facts of this case. Defendant reiterates he did not intentionally or knowingly injure plaintiff, and given his mental state -- his intoxication -- his actions were not expected or intended to cause plaintiff injury so as to apply the policy exclusion.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Conley v.

Guerrero, 228 N.J. 339, 346 (2017). Thus, we consider, as the motion judge did, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). 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." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). "To defeat a motion for summary judgment, the opponent must 'come forward with evidence that creates a genuine issue of material fact.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012)).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). "When no issue of fact exists, and only a question of law remains, [we]

afford[] no special deference to the legal determinations of the trial court." Templo Fuente, 224 N.J. at 199 (citation omitted). Applying the above standards, we discern no reason to disturb the judge's grant of summary judgment to Harleysville.

Defendant does not dispute he assaulted plaintiff and this was an act of domestic violence. Thus, the parties' non-violent history is irrelevant. The issue is whether defendant's act of domestic violence was a particularly reprehensible act supporting a finding of presumed intent to injure plaintiff.

Our Supreme Court has applied an objective approach in the assault and battery context to determine the insured's intent to injure. Garitta, 170 N.J. at 234. In Garitta, the insured admitted he stabbed the victim, but claimed he did not intend to kill him. Id. at 228. The insurer asked the court to declare it was not obligated to provide coverage to or defend the defendant for the victim's wrongful death under the same policy exclusion as here. Id. at 229-30. In reinstating the trial court's grant of summary judgment to the insurer, the Court found that:

> As a general rule, then, policy exclusions of the type at issue here represent enforceable limitations to an insurance contract when free of ambiguity. Courts ordinarily should refrain from summary judgment in respect of whether an insured intended or expected to cause the actual injury to a third party unless the record undisputedly demonstrates that such injury was an inherently probable

> consequence of the insured's conduct. In that latter circumstance, a trial may not be necessary to determine the applicability of the exclusion, provided that there has been a sufficient demonstration of the insured's subjective intent to cause some degree of injury. When the insured's conduct is particularly reprehensible, courts may presume an intent to injure without inquiring into the actor's actual intent.
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> [Id. at 234-35 (emphasis added).]

We applied an objective approach in the domestic violence context to determine the insured's intent to injure. Merrimack Mut. Fire Ins. Co. v. Coppola, 299 N.J. Super. 219, 227 (App. Div. 1997). In Merrimack, the plaintiff brought a Tevis[5] claim against her husband for damages for one incident of physical assault, and for several instances of intentional and negligent emotional abuse, which the plaintiff claimed resulted in bodily injury. Id. at 222, 228. The defendant did not deny his conduct could be considered abusive in some instances, but contended he did not intend to cause injury to the plaintiff. Id. at 228.

We held as a matter of law that the insurer had no duty to indemnify or defend the defendant for one act of domestic assault, reasoning as follows:

> That is not to say, however, that the actor's subjective intent must always be a matter for jury determination simply because the actor

[5] Tevis v. Tevis, 155 N.J. Super. 273 (App. Div. 1978), rev'd on other grounds, 79 N.J. 422 (1979).

> claims he or she had no intent to injure, although fully intending the act. There are occasions where the objective conduct of the actor also determines the actor's subjective intent to injure. Such is the case where the actor engages in assault and battery. The very nature of the conduct imputes the actor's subjective intent to cause some injury to the victim. Where, as here, the plaintiff claims no more than the type of injuries that are inherently probable from such conduct there is no need to inquire into defendant's subjective intent. Thus, we are satisfied that no coverage is afforded defendant as a matter of law for the one act of physical assault that allegedly occurred during the policy period.
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> [Id. at 227-28 (citations omitted) (emphasis added).]

We also held the insurer had no duty to indemnify or defend the defendant for the intentional and negligent emotional abuse, emphasizing that:

> Given the fact that our Supreme Court has recognized the seriousness of spousal abuse, and has even considered the problem of domestic violence to be a 'national epidemic,' allowing spouse abusers insurance coverage for their intentional abuse, whether it be physical or emotional, would contravene the public policy clearly enunciated by our Supreme Court, and the intent of the Legislature in its enactment of the Prevention of Domestic Abuse Act. Clearly, coverage for spousal abuse, in any form, would encourage those who are disposed to commit such reprehensible acts to inflict injury upon their spouses with impunity, knowing that their insurance companies will indemnify them for the money damages recovered by their spouses if only they can convince some jury

> that they did not intend or expect bodily harm to flow from their conduct.
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> [Id. at 230.]

We concluded, without exception, "that spousal abuse in any form is 'so inherently injurious, that it can never be an accident,' and therefore, '[a]s a matter of public policy and logic . . . the better rule warrants application of the objective approach,' to the end that the intent to injure is presumed from the performance of the act." Ibid. (emphasis added) (alterations in original) (quoting Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 166, 185 (1992)). We also determined that spousal abuse constituted "exceptional circumstances," and the objective test for determining intent can be used in "exceptional circumstances" that objectively establish the insured's intent to injure. Id. at 231.

In Bittner, the defendant sought insurance coverage for injuries to his girlfriend resulting from one incident of physical assault, claiming his conduct was reckless, but not intentional. 338 N.J. Super. at 449. We reiterated that public policy precludes insurance coverage for acts of domestic violence, stating, "[a]cts of domestic violence have been identified by the Legislature as particularly reprehensible acts which needed to be addressed by special remedial legislation." Id. at 457 (citing N.J.S.A. 2C:25-18). Although there was no history of domestic violence between

the parties, we affirmed the denial of insurance coverage. Id. at 453-57. We held that a court may determine whether one act is sufficiently egregious to constitute an act of domestic violence with no prior history of abuse. Id. at 457.

Lastly, in Tevis, the defendant's ex-wife sought damages for injuries sustained during a domestic assault. 155 N.J. Super. at 275. We made clear that:

> In a civilized society, wife-beating is, self-evidently, neither a marital privilege nor an act of simple domestic negligence. Neither is any other intentional tort by which one spouse victimizes the other. Nor, moreover, do any of the commonlaw reasons for interspousal immunity pertain to intentional torts. The identity of the spouses is a fiction no longer acceptable on any basis. Insurance coverage for such torts not being available as a matter of public policy[.]
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> [Id. at 278 (citation omitted) (emphasis added).]

Although there was only one incident of domestic violence here, it was sufficiently egregious to warrant the denial of coverage. Defendant brutally assaulted plaintiff, causing her significant and permanent injuries. Defendant's conduct was so egregious as to be "particularly reprehensible," warranting a presumption of intent to injure plaintiff and denial of coverage under the policy exclusion.

Defendant's voluntary intoxication is no defense. Defendant's reliance on Burd v. Sussex Mutual Insurance Co., 56 N.J. 383 (1970) and Garden State Fire & Casualty Co. v. Keefe, 172 N.J. Super. 53 (App. Div. 1980) to argue the contrary is misapplied, as these cases do not involve domestic violence. Where domestic violence is involved, there is no exception. Domestic violence in any form can never be an accident. Merrimack, 299 N.J. Super. at 230. To hold otherwise would allow domestic abusers to become voluntarily intoxicated and then use that voluntary act as a defense to an intent to injure. This would contravene and undermine public policy, case law, and the Prevention of Domestic Violence Act. See ibid.

III.

Plaintiff asserted claims of intentional, reckless, and negligent conduct. Defendant argues the negligence claim triggered Harleysville's duty to defend. We disagree.

"[T]he duty to defend extends only to claims on which there would be a duty to indemnify in the event of a judgment adverse to the insured." Grand Cove II Condo. Ass'n, Inc. v. Ginsberg, 291 N.J. Super. 58, 71 (App. Div. 1996) (quoting Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984)). Therefore, "[i]f an excluded claim is made, the insurer has no duty to undertake the expense and effort to defeat it, however

frivolous it may appear to be." Id. at 72 (quoting Horesh v. State Farm Fire & Cas. Co., 265 N.J. Super. 32, 37 (App. Div. 1993)).

"Regardless of how a 'claim' is framed, if the 'operative facts' constitute an assault and battery, the exclusion applies[,]" and the insurer has no duty to defend. Stafford v. T.H.E. Ins. Co., 309 N.J. Super. 97, 105 (App. Div. 1998). For purposes of the policy exclusion, there is no duty to defend where, as here, the gravamen of plaintiff's action is that a single particularly reprehensible act of domestic violence assault resulted in liability. See Garitta, 170 N.J. at 238.

Affirmed.