SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4410-15T3

RAFAELA A. GUICHARDO,

Plaintiff-Appellant,

v.

NEW JERSEY PROPERTY-LIABILITY INSURANCE GUARANTY ASSOCIATION (NJPLIGA),

Defendant-Respondent.

Argued January 9, 2018 – Decided January 26, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3099-13.

Kathryn Kyle Forman argued the cause for appellant (Piro, Zinna, Cifelli, Paris & Genitempo, LLC, attorneys; Alan Genitempo, of counsel; Kathryn Kyle Forman, on the brief).

Cynthia J. Borrelli argued the cause for respondent (Bressler, Amery & Ross, PC, attorneys; Cynthia J. Borrelli and Michael J. Morris, on the brief).

PER CURIAM

Plaintiff Rafaela A. Guichardo appeals from an order entered by the Law Division on April 26, 2016, which denied her motion to vacate an arbitration award that found plaintiff was not entitled to attorney's fees and costs. We affirm and hold defendant New Jersey Property-Liability Insurance Guaranty Association (PLIGA) is not subject to awards of counsel fees pursuant to Rule 4:42-9(a)(6).

The following facts are taken from the record. On October 19, 1987, plaintiff was in an automobile accident and suffered catastrophic injuries. Plaintiff was insured through a policy underwritten by the New Jersey Automobile Full Insurance Underwriting Association (JUA). At the time, New Jersey's statutory "No-Fault" law provided that a private passenger automobile insurer would be liable for the payment of all of an injured insured claimant's reasonable and necessary medical expenses resulting from a covered automobile accident. Therefore, JUA became liable to pay all of plaintiff's medical expenses from the October 19, 1987 accident.

In 1993, plaintiff successfully filed suit against JUA to compel payment of rents, home modification costs, and home health aide service costs incurred as a result of plaintiff's injuries stemming from the accident. In 2003, plaintiff again filed suit against JUA and the Unsatisfied Claim and Judgment Fund (UCJF).

As a result of that suit, the JUA and UCJF were ordered to pay physical medicine and rehabilitation costs in excess of the then-current maximum allowable fee.

PLIGA became JUA's successor-in-interest and statutory administrator, and pursuant to N.J.S.A. 17:30A-2 fulfills JUA's statutory obligations. In November 2013, plaintiff filed suit against defendant seeking payment and/or reimbursement for: 1) pharmacy expenses; 2) installation of an elevator or stair lift in her home; 3) dental implants; 4) home health aide service; 5) trigger point injection therapy; and 6) physician's bills. On February 20, 2014, the motion judge issued an order compelling PLIGA to pay all of plaintiff's claims.

Defendant moved for reconsideration, asserting the order compelled PLIGA to pay medical providers at rates that were in excess of the New Jersey Personal Injury Protection (PIP) Medical Fee Schedules. The motion judge granted defendant's motion, and compelled arbitration of plaintiff's claims pursuant to the Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to -30. The judge held plaintiff's medical expense claims must be paid in accordance with the applicable fee schedules promulgated by New Jersey Division of Banking and Insurance (NJDOBI) and mandated by N.J.A.C. 11:3-29.1 to -29.6.

Before arbitration, the parties settled all of the claims, except for payment of attorney's fees and costs. Plaintiff submitted her claim for attorney's fees and costs to the assigned dispute resolution professional (DRP). Plaintiff sought $44,419.95 in fees and $3,521.05 in costs. Defendant opposed the request for fees. The DRP issued an award in favor of defendant, denying plaintiff's claim for fees in its entirety.

Plaintiff filed an arbitral appeal in accordance with Rule 25 of the New Jersey No-Fault PIP Arbitration Rules, which was denied. Plaintiff then filed a motion in the Law Division to vacate the arbitration award and the order compelling arbitration, and to reinstate her claims. On April 26, 2016, the motion judge denied plaintiff's motion.

The motion judge found plaintiff's motion was untimely because plaintiff filed it over a year and a half after entry of the order compelling arbitration. The court also found no grounds under the APDRA to vacate the arbitration determination. Specifically, the motion judge found that the DRP did not erroneously apply the law to warrant vacation of the arbitration award pursuant to N.J.S.A. 2A:23A-13(c)(5) because plaintiff had settled her claims with PLIGA and thus was not a "successful claimant" entitled to counsel fees under to Rule 4:42-9(a)(6). This appeal followed.

On appeal, plaintiff argues the motion judge erred in affirming the DRP's decision because the settlement of her claims demonstrate she was a successful claimant entitled to fees pursuant to Rule 4:42-9(a)(6). Plaintiff also argues PLIGA is not statutorily barred from paying counsel fees and costs. Plaintiff asserts the law-of-the-case doctrine applies, and that the prior award of counsel fees to her in the actions against the JUA mandate PLIGA pay her counsel fees.

N.J.S.A. 2A:23A-18(b) provides that once a trial judge reviews an arbitration award under the APDRA "[t]here shall be no further appeal or review . . . ." APDRA therefore precludes further review of decisions "confirming, modifying[,] or correcting an award." N.J.S.A. 2A:23A-18(b). However, the Supreme Court has stated, "when parties proceed under the APDRA, there may be other limited circumstances where public policy would require appellate court review." Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, L.P., 154 N.J. 141, 152 (1998). Such limited circumstances include the review of attorney fee awards. See Allstate Ins. Co. v. Sabato, 380 N.J. Super. 463, 472 (App. Div. 2005).

Generally, Rule 4:42-9(a)(6) permits counsel fee awards "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." Thus, "[t]he purport of [Rule

4:42-9(a)(6)] is to allow a litigant to recover fees where he or she has obtained a favorable adjudication on the merits on a coverage question as a result of the expenditure of such fees." Transamerica Ins. Co. v. Nat'l Roofing, Inc., 108 N.J. 59, 63 (1987).

Here, plaintiff argues that she is entitled to an award of fees under Rule 4:42-9(a)(6) because she is allegedly a "successful claimant" on a liability or indemnity policy of insurance. Defendant argues, however, that it did not dispute its obligation to pay for plaintiff's medical expenses, and it prevailed on its contention that the PIP medical fee schedules applied and plaintiff had to present documentation to support her claims. We need not determine whether plaintiff was a "successful claimant" under the rule because plaintiff's claim against PLIGA is statutorily barred. PLIGA is only permitted to pay "covered claims" and N.J.S.A. 17:30A-5(d) expressly provides that the term "covered claim" does not include counsel fees for prosecuting an action against the Association, and counsel fees and other claim expenses incurred prior to the date of insolvency.

The Supreme Court has explained:

> The Legislature enacted the [PLIGA] Act to "provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, [and] to minimize financial loss to claimants

> or policyholders because of the insolvency of an insurer . . . ." N.J.S.A. 17:30A-2[(a)]. . . . The Legislature also created "a private, nonprofit, unincorporated" Association to implement the Act, N.J.S.A. 17:30A-6, and further required that "[a]ll insurers defined as member insurers . . . shall be and remain members of the association as a condition of their authority to transact insurance in this State." Ibid.
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> The Association is "obligated to the extent of the covered claims against an insolvent insurer . . . ." N.J.S.A. 17:30A-8a(1). . . . The Act defines "covered claim" to mean "an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage, and not in excess of the applicable limits of an insurance policy to which this act applies, issued by an insurer, if such insurer becomes an insolvent insurer . . . ." N.J.S.A. 17:30A-5[(d)].
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> [Thomsen v. Mercer-Charles, 187 N.J. 197, 204-05 (2006) (alterations in original).]

In ARCNET Architects, Inc. v. New Jersey Property-Liability Insurance Guaranty Association, 377 N.J. Super. 102, 104 (App. Div. 2005), we noted that:

> In 2004, the Legislature amended the New Jersey Property-Liability Insurance Guaranty Association Act (Act), N.J.S.A. 17:30A-1 to -20, to exclude specifically from the definition of covered claims "counsel fees and other claim expenses incurred prior to the date of [an insurance company's] insolvency." L. 2004, c. 175, § 2. This amendment, approved on December 22, 2004, also provided that it "shall take effect immediately and shall apply to covered claims resulting from insolvencies occurring on or after that date." Id. at § 9. The amendment thus settled, at least

> prospectively, an ongoing dispute as to whether . . . [PLIGA] should pay counsel fees and claim expenses incurred by an insurer before its insolvency.

We held the exclusion of counsel fee awards from the definition of covered claims also included pre-insolvency counsel fees and claim expenses incurred before the amendment's effective date. Id. at 106. We reasoned:

> PLIGA's responsibility to pay claims under an insolvent insurer's policy is limited to the payment of "covered claims." It is not "a panacea for all problems caused by insurance company insolvencies." It was not designed "as a form of reinsurance for every insurer who becomes insolvent." The Act "requires [PLIGA] to stand in the shoes of its insolvent member insurance companies only in proceedings involving 'covered claims.'"
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> [Ibid. (citations omitted) (alterations in original).]

We concluded the counsel fees incurred by plaintiff's counsel in ARCNET were not payable by PLIGA because:

> The Act's primary purpose is to "minimize financial loss to claimants or policyholders because of the insolvency of an insurer." N.J.S.A. 17:30A-2[(a)]. . . . "[O]nly the claims of insureds and innocent victims of incidents for which insurance coverage was purchased are entitled to recover against the statutorily created fund. Those whose claims arise from separate contracts or dealings with an insolvent insurer are merely creditors whose redress lies elsewhere."
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> [Id. at 109 (citations omitted) (alterations in original).]

In New Jersey Guaranty Association on Behalf of Midland Insurance Company v. Ciani, 242 N.J. Super. 164 (App. Div. 1990), we held N.J.S.A. 17:30A-5(d) barred counsel fees incurred by an insured for prosecuting its claim for coverage against PLIGA. Id. at 169. We concluded

> [t]he authority granted by [Rule] 4:42-9(a)(6) to award counsel fees in policy coverage suits is a discretionary authority, submitted to the court's sound judgment. We hold that, in view of the important legislative purpose of limiting [PLIGA's] liabilities as part of the statutory scheme for relief from insurer insolvency, it is a mistaken exercise of judgment for a court to award counsel fees in policy coverage suits to be paid by [PLIGA].
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> [Id. at 169.]

Plaintiff argues "[a]lthough the statutory definition of covered claims excludes 'counsel fees,' the statute contains no provision to bar or prohibit [PLIGA] from paying a claimant's counsel fees when a claimant is entitled to fees under [Rule] 4:42-9(a)(6)." We disagree.

> The "paramount [judicial] goal when interpreting a statute" is to determine and fulfill the legislative intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005). To achieve that goal, we first look to the statutory language, State v. Pena, 178 N.J. 297, 307 (2004), and interpret the language in accordance with its plain meaning if it is "'clear and unambiguous on its face and admits of only one interpretation.'" State v. Thomas, 166 N.J. 560, 567 (2001) (quoting State v. Butler, 89 N.J. 220, 226 (1982)). If

> the statute's language "is susceptible to different interpretations, the court considers extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the legislature's intent.'" Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 323 (2000) (quoting Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999)); see also DiProspero, . . . 183 N.J. at 492-93; State v. Pena, . . . 178 N.J. at 307-08.
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> [Thomsen, 187 N.J. at 206 (alteration in original).]

The legislative intent of the statute governing PLIGA is to insulate it from counsel fees in fulfilling its role administering claims against insolvent insurers. By enacting N.J.S.A. 17:30A-5(d) the Legislature expressly excluded PLIGA from liability for counsel fees for the prosecution of suits for claims against it, assessments or charges for failure of an insolvent insurer (and presumably PLIGA as successor) to have expeditiously settled claims, and counsel fees and expenses incurred prior to the date of insolvency. Therefore, plaintiff's claim for attorney's fees and costs is statutorily barred.

Lastly, plaintiff argues the law-of-the-case doctrine applies and mandates an award of counsel fees. She notes that orders entered in October 1994 and January 2003, against Hanover AMGRO, Inc., the JUA and the UCJF required those defendants to reimburse her for counsel fees and costs in obtaining those orders. She

also notes that the trial court's order of May 17, 2014 awarded plaintiff counsel fees and costs for this litigation. However, the court granted reconsideration and entered an order dated July 29, 2014, which stated that if plaintiff successfully obtains an award in PIP arbitration, the award should include reasonable attorney's fees and costs associated with this litigation. Therefore, plaintiff argues the prior orders should be treated as "the law of the case and [we] should thereby find that [plaintiff] is entitled to the counsel fees and costs . . . ."

"The [law-of-the-case] doctrine is not an absolute rule as 'the court is never irrevocably bound by its prior interlocutory ruling[.]'" Jacoby v. Jacoby, 427 N.J. Super. 109, 117 (App. Div. 2012) (alteration in original) (quoting Daniel v. N.J. Dep't of Transp., 239 N.J. Super. 563, 581 (App. Div. 1998). The orders entered in 1994 and 2003 against Hanover AMGRO, the JUA, and UCJF were entered in a separate action, and PLIGA was not a party to that case. Moreover, the court's orders of May 17, 2014, and July 29, 2014, were interlocutory and subject to further review and consideration by the court.

We do not interpret the motion judge's order compelling arbitration as a ruling that plaintiff was entitled to attorney's fees against PLIGA. Even if this were the law-of-the-case, the order and the two preceding it are not binding upon us.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION