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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4747-15T3

CITIZENS UNITED RECIPROCAL EXCHANGE,

Plaintiff-Appellant,

v.

JOSE LUIS RAMIREZ ESPINOZA, JOSEPH WEBER, U-HAUL COMPANY OF AMERICA, MANUFACTURERS INSURANCE COMPANY, and REPUBLIC WESTERN INSURANCE COMPANY,

Defendants,

and

JAISHANKA ARANALA,

Defendant-Respondent.

Argued April 19, 2018 – Decided May 2, 2018

Before Judges Simonelli, Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7438-11.

Chad B. Sponder argued the cause for appellant (Bright & Sponder, attorneys; Chad B. Sponder, on the brief).

Andrew T. Fede argued the cause for respondent (Archer & Greiner, PC, attorneys; Patrick Papalia, of counsel; LisaAnne R. Bicocchi, on the brief).

PER CURIAM

This matter returns to us after remand proceedings directed by our previous decision. Cure United Reciprocal Exch. (CURE) v. Espinoza, No. A-5841-12 (App. Div. Jan. 23, 2015) (slip op. at 14). In compliance with our instructions, the trial judge conducted a bench trial on the issue of whether CURE was obligated to provide insurance coverage and a defense to defendant Jaishanka Arnala for an accident involving a U-Haul van he had rented to transport plants for his home.

On June 30, 2015, the judge rendered a comprehensive written opinion, concluding that CURE should have provided coverage, and ordering CURE to pay Arnala $21,561.59 for his defense costs in the liability action. On May 27, 2016, the same judge entered an order awarding Arnala $80,765 in attorney's fees, and $4,516.88 in costs in the coverage action.

CURE now appeals from both orders. For the reasons that follow, we affirm the June 30, 2015 order in all respects, substantially for the reasons set forth in the judge's written opinion. However, we reverse the May 27, 2016 counsel fee order and remand for further proceedings.

The salient facts of this case are undisputed and are fully set forth in the judge's decision. Therefore, we need only briefly summarize them here.

CURE issued an auto insurance policy to Arnala. In pertinent part, the policy stated that CURE "will pay damages for 'bodily injury' or 'property damage' for which any '[i]nsured' becomes legally responsible because of an auto accident." As used in the policy, the term "Insured" was defined as:

> 1. You or any "family member" for the ownership, maintenance <u>or use of any auto</u> or "trailer".
>
> 2. Any person using "your covered auto".
>
> 3. For "your covered auto", any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.
>
> 4. For any auto or "trailer", other than "your covered auto", any other person or organization but only with respect to legal responsibility for acts or omissions of you or any "family member" for whom coverage is afforded under this Part. This Provision . . . applies only if the person or organization does not own or hire the auto or "trailer".
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> [(Emphasis added).]

The policy defined the term "covered auto" as meaning:

> 1. Any vehicle shown in the Declarations.
>
> 2. A "newly acquired auto".

3. Any "trailer" you own.

4. Any auto or "trailer" you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:

   a. Breakdown;
   b. Repair;
   c. Servicing;
   d. Loss; or
   e. Destruction.

Arnala had only one vehicle listed on the Declarations page of the policy, a 2004 Volvo sedan.

On July 29, 2007, Arnala's wife asked him to purchase some plants for their yard. Arnala decided to rent a U-Haul van[1] and use it to pick up the plants at a garden store and return them to his house. He asked his friend, Jose Espinoza, to accompany him. The men drove in Arnala's Volvo to the U-Haul facility and Arnala rented the van. He asked Espinoza to drive the van and follow Arnala back to his house as he drove in his Volvo. Their plan was to leave the Volvo at Arnala's house, and then go to the garden store in the van, buy the plants, and bring them back home. On

[1] The record is not clear whether Arnala rented a van or a pick-up truck but, like the trial judge, we refer to the vehicle as a van. Under the definitions used in Arnala's insurance policy, the term "auto" includes both a "van" and a "pickup."

the way to Arnala's house, Espinoza was involved in an accident with defendant Joseph Weber, who allegedly sustained injuries.

As part of the rental agreement, U-Haul provided insurance to Arnala for the van. Shortly after the accident, Arnala paid U-Haul the deductible for the property damage to the van.

On July 23, 2009, Weber filed a personal injury action against Espinoza and U-Haul. On December 16, 2010, Weber filed an amended complaint, adding Arnala as a defendant. Weber alleged that Arnala should be held vicariously liable for his injuries.

On January 12, 2011, Arnala called CURE and advised an agent of the accident. CURE opened a property damage claim file. Five days later, CURE sent Arnala a letter asking for additional information. However, it went to the wrong address. When Arnala did not respond, CURE closed its file.

Arnala retained an attorney on his own and filed an answer in the personal injury action. He also advised U-Haul of the suit. On April 6, 2011, Arnala's attorney faxed a copy of Weber's amended complaint to CURE and asked it to "please advise immediately as to coverage." On April 25, 2011, U-Haul provided counsel to Arnala, and his personal attorney left the case.

On April 27, 2011, CURE sent a reservation of rights letter to Arnala, but still did not provide Arnala with representation

despite his attorney's requests that it do so. During this period, Arnala gave a deposition.

On August 16, 2011, CURE assigned an attorney to represent Arnala. On August 25, 2011, however, CURE sent a letter to Arnala denying coverage, although it continued to provide him with legal representation. CURE's letter stated that "Espinoza was not an 'Insured' pursuant to the terms of the . . . auto policy" and, therefore, "there is no coverage for this claim." Of course, however, Arnala was looking for coverage for himself, rather than Espinoza, under the provision of his insurance policy that stated he was covered "for the ownership, maintenance or use of any auto."

In October 2011, CURE filed a declaratory judgment complaint against Arnala.[2] CURE sought an order determining that it "owe[d] no obligation [to] afford insurance coverage or a defense to" Arnala. Arnala filed a counterclaim alleging, among other things, that CURE breached its agreement to provide coverage, together with its duty of good faith and fair dealing, when it later denied coverage.

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[2] CURE also named Espinoza, Weber, Weber's insurance company, U-Haul, and U-Haul's insurance company as defendants, but only served Weber's insurance company with its complaint. Therefore, the unserved defendants were dismissed from the case, and Weber's insurance company never participated in the matter, except as an observer.

The matter was scheduled for trial on June 11, 2013 but, on that date, the judge responsible for managing the matter at that time decided sua sponte to grant summary judgment to CURE rather than conduct a trial. In so ruling, the judge failed to consider any of Arnala's exhibits or proposed testimony, and did not fully explain the rationale for his decision. Arnala appealed and, on January 23, 2015, we reversed the grant of summary judgment and remanded the matter for a trial on the issue of coverage. CURE, slip op. at 10-14.

On remand, the matter was assigned to a new judge,[3] who conducted a bench trial on April 6, 2015. As discussed above, the judge thereafter rendered a thoughtful written decision, concluding that Arnala was entitled to coverage.

Arnala asserted he was covered by the provision of the policy that said he was insured "for the ownership, maintenance or use of any auto." He argued that he rented the U-Haul van to use to transport plants to his house and was using it for that purpose when Espinoza was driving it as part of the overall task. On the

[3] This judge had previously conducted a bench trial on September 30, 2013, concerning Weber's claim that Arnala was vicariously liable for Espinoza's negligence in driving the U-Haul van. The judge determined that Arnala was not liable and dismissed Weber's complaint against him.

other hand, CURE alleged that because Arnala was not driving the van or in the van as a passenger, he was not entitled to coverage.

The judge rejected CURE's constricted interpretation of its policy. Citing Boswell v. Travelers Indemnity Company, 38 N.J. Super. 599, 607 (App. Div. 1956), a case referenced in our earlier decision, CURE, slip op. at 13, the judge found that the policy unambiguously covered Arnala for his use of any auto. As we noted in Boswell, the word "use" has been defined "as a purpose served; a purpose, object or end for useful or advantageous nature[,] . . . and many other meanings. Practically every activity of mankind . . . would amount to a 'use' of something, in the broadest sense of that word." Id. at 607.

The judge also observed that our Supreme Court held almost sixty years ago that contrary to CURE's contention, "use" and "operation" of an auto are two different things. Indemnity Ins. Co. v. Metro. Cas. Ins. Co., 33 N.J. 507, 513 (1960). In that case, the Court explained that

> [t]he use of an automobile denotes its employment for some purpose of the user; the word "operation" denotes the manipulation of the car's controls in order to propel it as a vehicle. Use is thus broader than operation. One who operates a car uses it, but one can use a car without operating it.
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> [Ibid. (citations omitted).]

Thus, the judge dismissed CURE's contention that Arnala had to be driving or riding as a passenger in the van in order to have coverage under the policy. The judge explained:

> [Arnala] rented the U-Haul to accomplish a simple task – to effectuate domestic tranquility – he was going to get some large plants his wife wanted him to stick in the ground at their home. Had Arnala decided to leave his personal vehicle at the U-Haul location, and accomplish the task by having Espinoza drive the U-Haul with Arnala as the passenger, would Arnala's "use" of the vehicle been any less in the eyes of the insuring agreement? This [c]ourt is of the opinion that whether the Insured is the driver, passenger or competent acquirer of the vehicle being used, it is within the ambit of "use" and the policy should respond thereto.

The judge also ruled that CURE's assertion that the U-Haul van was not a "covered auto" went wide of the mark. Arnala was not seeking coverage for the property damage to the van; that had already been provided by the U-Haul policy. Nor was he seeking coverage for Espinoza. Instead, Arnala sought legal representation in Weber's vicarious liability action against him for his use of the van on the day of the accident. As the judge found, Arnala was entitled to such representation because CURE's policy stated he would have coverage in connection with his "use of any auto."

In sum on this point, the judge stated:

> The [c]ourt does not believe that the language of [the policy] is ambiguous. It is a provision that clearly spells out the limits of coverage; that is, an Insured is covered for claims arising out of his/her use of a vehicle. Whether it is the covered auto, or another vehicle, coverage is dependent on the facts and circumstances of the vehicle's use. In this case, the [c]ourt finds that Arnala was using the vehicle in question for the purpose of obtaining plants at a local [garden center] to install at his home. Had Espinoza gone somewhere else, or done something else, beyond the project he agreed to help Arnala with, the outcome might well be different. But under this policy language, Arnala was a named insured (the "you" in the provision) and the claim was for damages arising from Arnala's use of the U-Haul vehicle to further his personal interests at home.

CURE also argued that even if the policy covered Arnala's use of the van, coverage should still be denied because he did not promptly advise CURE of the accident as required by the policy. As discussed above, the accident occurred on July 29, 2007, and Arnala did not call CURE to report it until January 12, 2011, after Weber sued him.

The judge found that although Arnala did not promptly notify CURE of the accident, this failure was not fatal to his claim under the Supreme Court's decision in Cooper v. Government Employees Insurance Company, 51 N.J. 86, 94 (1968). In that case, the Court held that despite unambiguous notice provisions in insurance policies, the "'public interest' require[s] the

insurance company to show prejudice to 'forfeit coverage' for an insured's breach of the notice provisions of the policy." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 203 (2016) (quoting Cooper, 51 N.J. at 94).

The judge found that CURE failed to present any evidence at the trial that it was prejudiced in any way by Arnala's late notice of the accident. Prior to Arnala's receipt of Weber's complaint, there was no litigation pending against him. The judge further found that Arnala gave CURE "almost all of the salient facts . . . in the First Notice of Loss [he filed] that it would eventually acquire during the next two years of litigation, and [CURE] could have easily obtained the remaining information from the other defendant[s] involved, namely U-Haul."

Therefore, the judge rejected CURE's contention on this point and held that CURE had been required to provide coverage to Arnala. Because it did not, the judge ordered CURE to pay Arnala $21,561.59 for the counsel fees and costs he incurred in defending against Weber's vicarious liability suit.[4]

Arnala also sought counsel fees and costs from CURE in connection with his defense of its declaratory judgment action. In his June 30, 2015 opinion, the judge directed Arnala to submit

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[4] CURE does not contest this portion of the judge's ruling on appeal.

his attorney's certification of services for review, and gave CURE the opportunity to respond.

On August 19, 2015, Arnala's attorney submitted a certification seeking a total of $85,281.88 in counsel fees and costs. In opposition, CURE submitted a lengthy response, contesting over 100 items for which Arnala was billed by his attorney.

On May 27, 2016, the judge issued an order granting Arnala all of the counsel fees and costs he sought. The judge made no specific findings of facts supporting this decision, and merely stated that he had "determined the rates to be reasonable and the hours spent as reasonable per RPC 1.5." This appeal followed.

On appeal, CURE argues that: (1) it's "policy does not provide coverage to Arnala for the loss at issue"; (2) "Arnala's breach of his insurance contract with CURE also precludes coverage"; and (3) "the trial court erred in awarding counsel fees and costs [on May 27, 2016] irrespective of the outcome of the matter."

We begin with a review of the principles governing insurance contract interpretation. "An insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." <u>Flomerfelt v. Cardiello</u>, 202 N.J. 432, 441 (2010). An insurance policy should

be interpreted in accordance with its terms "plain and ordinary meaning[.]" Mem'l Props. v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (citing Flomerfelt, 202 N.J. at 441). Because insurance policies are contracts of adhesion, they should be construed liberally in favor of the insured, "to the end that coverage is afforded 'to the full extent that any fair interpretation will allow.'" Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990) (citation omitted).

The standard of review from the court's findings in a bench trial is limited. We owe "deference to those findings of the trial judge which are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 146, 161-62 (1964)). Thus, we will "not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created by Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)).

However, "[t]he interpretation of an insurance contract is a question of law for the court to determine[.]" Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 473 (App. Div. 1996) (citing Weedo v. Stone-E-Brick, Inc., 155 N.J. Super. 474, 479 (App. Div. 1977), rev'd on other grounds, 81 N.J. 233 (1979)). Such purely legal questions are entitled to no deference. 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006).

Applying these principles, we discern no basis for disturbing the judge's conclusion that Arnala was entitled to coverage under CURE's insurance policy. We therefore affirm the June 30, 2015 order substantially for the reasons the judge stated in his cogent written opinion, and add the following brief comments.

CURE's policy specifically and unambiguously stated that Arnala was covered for his "use of any auto." As the Supreme Court has consistently held, "use" is a much broader concept than "operation." Indemnity Ins. Co., 33 N.J. at 513. Thus, "'use' of an automobile generally falls within [the Indemnity Ins. Co.] rule's purview when such use is rationally connected to the vehicle for the purpose of providing transportation or satisfying some other related need of the user." Jaquez v. Nat'l Cont'l Ins. Co., 178 N.J. 88, 96 (2003) (emphasis added).

That test was clearly satisfied in the case at hand. Arnala rented the U-Haul van to use it to pick up flowers for his yard, and he was using it for this purpose by having Espinoza follow him from the rental facility when the accident occurred. As the judge also correctly found, the policy did not require Arnala to be maintaining, operating, or using his "covered vehicle" or a "temporary substitute vehicle" in order to be protected. Instead, the policy extended coverage to him for his use of "any" auto, including the U-Haul van he rented to transport plants. Therefore, Arnala was clearly entitled to coverage under the idiosyncratic circumstances of this case.

The judge also properly ruled that Arnala's failure to immediately apprise CURE of the accident did not excuse CURE's obligation to provide him a defense in connection with Weber's vicarious liability action. As the Supreme Court made clear in Cooper,

> [t]he insurance contract not being a truly consensual arrangement and being available only on a take-it-or-leave-it basis, and the subject being in essence a matter of forfeiture, we think it appropriate to hold that the carrier may not forfeit the bargained-for protection unless there are both a breach of the notice provision and a likelihood of appreciable prejudice. The burden of persuasion is the carrier's.
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> [51 N.J. at 94.]

CURE did not meet its burden in this case. As the judge correctly concluded, CURE presented no non-speculative evidence supporting its claim that it was prejudiced by Arnala's late notification at trial and, absent such evidence, it was required to provide coverage. Therefore, we affirm the June 30, 2015 order in all respects.

However, we are constrained to reverse the judge's May 27, 2016 order awarding $85,281.88 in counsel fees and costs to Arnala because the judge did not adequately explain his reasons for doing so.

Generally, the assessment of attorney's fees and costs is left to the sound discretion of the trial court and is reviewed under an abuse of discretion standard. Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 443-44 (2001); Rendine v. Pantzer, 141 N.J. 292, 317 (1995). A court has abused its discretion "if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

Here, the judge did not set forth his reasons for awarding fees or for the amount awarded. Rule 1:7-4(a) provides that a trial judge "shall, by an opinion or memorandum decision, either written or oral, find the facts and state [his or her] conclusions

of law thereon in all actions tried without a jury . . . ." "The rule requires specific findings of fact and conclusions of law . . . ." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:7-4 (2018).

"Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Strahan v. Strahan, 402 N.J. Super. 298, 310 (App. Div. 2008) (quoting Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990)). A trial court must "analyze the [relevant] factors in determining an award of reasonable counsel fees and then must state its reasons on the record for awarding a particular fee." R.M. v. Supreme Court of N.J., 190 N.J. 1, 12 (2007) (alteration in original) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)).

We agree with CURE that the judge did not adequately explain the award of counsel fees and costs memorialized in the May 27, 2016 order. He merely stated that he found the rates and hours "reasonable." This was insufficient, especially in view of the fact that CURE submitted a lengthy list of objections to the fees Arnala sought that were not addressed by the judge.

We therefore reverse the May 27, 2016 order and remand the case to the trial court to make findings of fact and conclusions of law consistent with R. 1:7-4(a) regarding Arnala's request for fees and costs in the declaratory judgment action.

Affirmed in part; reversed in part; and remanded. 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