NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1523-12T4

HARLEYSVILLE INSURANCE COMPANY
OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILLIAM BURNETT, ANITA BURNETT,
WR BURNETT, INC., PENN
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY, ROCHDALE
INSURANCE COMPANY,

Defendants-Respondents,

and

JEFFREY CASEY and SARAH CASEY,

Defendants.

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Argued November 7, 2013 – Decided July 21, 2014

Before Judges Sapp-Peterson, Maven and Hoffman.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-128-11.

Stephanie M. Panico argued the cause for appellant (Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys; Lance J. Kalik, of counsel and on the brief; Ms. Panico, on the brief).

Kenneth M. Portner argued the cause for respondent Penn National Mutual Casualty Insurance Company (Weber, Gallagher,

Simpson, Stapleton, Fires & Newby, LLP, attorneys; Mr. Portner, of counsel and on the brief; Megan K. Murphy, on the brief).

Colleen M. Ready argued the cause for respondent Rochdale Insurance Company (Margolis Edelstein, attorneys; Ms. Ready, on the brief).

PER CURIAM

In this insurance coverage dispute, plaintiff Harleysville Insurance Company of New Jersey (Harleysville) appeals from the trial court order denying its motion for summary judgment and granting the cross-motions of defendants Penn National Mutual Casualty Insurance Company (Penn) and Rochdale Insurance Company (Rochdale), dismissing its complaint with prejudice. We affirm.

I.

Harleysville provided homeowners' insurance to defendants William and Anita Burnett[1] for their residential property located in Monmouth Junction. William also operated a truck rental and asphalt paving business, WR Burnett, Inc. (WR Burnett) on the property. William was the sole owner of this business. The Burnetts entered into a lease agreement with WR Burnett for its use of a portion of their property, but that lease agreement did not become effective until January 1, 2010.

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[1] Because William and Anita Burnett and Jeffrey and Sarah Casey share the same last name, we refer to them by their first names where necessary and intend no disrespect in doing so.

On June 24, 2009, defendant Jeffrey Casey, an employee of WR Burnett, sustained injuries when a tree fell on him as he was taking a cigarette break. At the time the tree fell on Jeffrey, William and his cousin, Philip Jackson, who was not a WR Burnett employee, were cutting down dead trees on the property to allow for additional space to store trucks.

On July 28, 2009, Jeffrey and his wife, Sarah, commenced a personal injury action against the Burnetts asserting that their negligence caused the resulting injuries they each sustained.[2] The complaint did not name WR Burnett. In October 2009 Harleysville offered to defend the Burnetts in this action, but reserved its right to deny coverage under the business pursuits exclusion, which provided:

> 1. **Coverage E — Personal Liability** and **Coverage F — Medical Payments to Others** do not apply to "bodily injury" or "property damage":
>
> . . . .
>
> b. Arising out of or in connection with a "business" engaged in by an "insured." This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business[.]"

[2] Sarah asserted a per quod claim.

In December 2010, while this action was pending, Jeffrey filed a worker's compensation petition with WR Burnett's employer's liability insurer, Rochdale. Under that policy, Rochdale agreed that it would pay damages to its insured "because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer." Rochdale answered the petition, admitting that "a compensable accident took place" but denied that Jeffrey suffered permanent disability and put him to his proofs.

On January 20, 2011, Harleysville filed a motion for summary judgment in the Caseys' personal injury action, arguing that the cause of action was barred by the exclusivity provisions of the Worker's Compensation Act, N.J.S.A. 34:15-1 to -142. Judge John J. Coyle, Jr. denied the motion, finding an issue of fact existed as to whether William removed the trees in his capacity as a business owner or a landowner. That factual dispute, however, was never resolved because the Caseys and the Burnetts entered into a settlement agreement on May 24, 2011. The agreement did not preclude Jeffrey from continuing to pursue his worker's compensation claim. In addition, the agreement did not preclude Harleysville from continuing to pursue its declaratory judgment action it instituted against Rochdale and Penn in January 2011. In that regard, the Burnetts, under the

agreement, assigned to Harleysville all of their rights and claims, "whether contractual, contribution, indemnity, or in tort, that the Burnetts had, currently have, or will have, against any current or future parties to the Coverage Action, including but not limited to [Rochdale] and [Penn] . . . ."

Harleysville subsequently filed a summary judgment motion in the declaratory judgment action, urging that because Jeffrey's injuries arose out of the course of his employment, his claims were subject to resolution through worker's compensation and WR Burnett's employer's liability policy. Harleysville additionally argued the provision in the Rochdale policy providing coverage for claims made "in a capacity other than as employe[r]" was applicable; therefore, since the Burnetts were sued in their landowner capacity and not as employers, that provision should afford coverage.

Penn and Rochdale filed cross-motions for summary judgment. Rochdale argued the insured under its policy was WR Burnett, not the Burnetts, who were sued in their individual capacities in the underlying action; consequently, it had no obligation to defend them. It additionally contended because William was not sued both individually and through his corporate capacity, the dual capacity doctrine, a doctrine disfavored in New Jersey, was inapplicable. Rochdale emphasized that WR Burnett was never a party in the underlying action and that the complaint asserted

no allegation of liability against William as an employer. Penn argued it was entitled to summary judgment because Jeffrey contended he was acting within the scope of his employment at the time he sustained his injuries and its policy expressly excluded coverage for bodily injuries sustained during the course of employment.

Following oral argument, Judge Coyle issued a well-reasoned, written opinion. He expressed the parties framed the issue before the court as whether William, when removing trees on his property, was acting as a homeowner or business owner. The judge concluded resolving this question was irrelevant because Harleysville was not entitled to recover in either instance. He noted that if William had been acting within his capacity as a landowner, Harleysville would not be entitled to summary judgment and would be responsible for bearing the defense costs the Burnetts incurred, as their homeowner's insurer. Judge Coyle also noted the Caseys sued William individually and not in his corporate capacity; however, even if William were acting in his corporate capacity, Rochdale would have a complete defense in the form of the worker's compensation statute's exclusivity bar. He further found Harleysville's arguments against Penn lacked merit because there was no indemnification agreement at the time of the accident, and thus Penn was not required to defend the Burnetts. Finally, the

judge concluded the statute of frauds barred any claim the Burnetts asserted arising out of the unwritten, implied lease and indemnification provision. He ultimately found Harleysville was not entitled to subrogation from Rochdale or Penn.

Harleysville filed a motion for reconsideration and the court heard arguments on September 28, 2012. The parties did not raise any additional arguments. Judge Coyle reaffirmed his summary judgment decision, but modified it to exclude mention of the statute of frauds.

On appeal, Harleysville contends because Jeffrey's injuries arose within the course of his employment, his claims are covered under the Rochdale policy. In addition, plaintiff urges the Burnetts are contractually entitled to indemnification from WR Burnett pursuant to the provisions of the Penn policy. We reject these contentions and affirm the denial of summary judgment to plaintiff and the grant of such relief to defendants.

II.

The issues implicated in this appeal are largely legal and involve the interpretation of contractual provisions in insurance policies. As such, our review is de novo and we owe no deference to the motion judge's conclusions on issues of law. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998).

Insurance policies are contracts of adhesion, and any ambiguities in the language of the policy are to be resolved against the drafter, the insurer. Pinto v. N.J. Mfrs. Ins. Co., 365 N.J. Super. 378, 386-87 (App. Div. 2004), aff'd, 183 N.J. 405 (2005). Thus, an ambiguous insurance policy is ordinarily resolved as a question of law, in favor of the insured. Cruz-Mendez v. ISU/Ins. Servs., 156 N.J. 556, 571 (1999). The policy is interpreted liberally to afford coverage to the "fullest extent that fair interpretation will allow." Christafano v. N.J. Mfrs. Ins. Co., 361 N.J. Super. 228, 234 (App. Div. 2003)(citing Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961); see also Lundy v. Aetna Cas. & Sur. Co., 92 N.J. 550, 559 (1983)(holding that "[w]here the policy language supports two meanings, one favorable to the insurer and the other to the insured, the interpretation favoring coverage should be applied").

"[W]hen the language of an insurance policy is clear, we must enforce its terms as written." Conduit & Found. Corp. v. Hartford Cas. Ins. Co., 329 N.J. Super. 91, 99 (2000). Thus, the court will not draft a better insurance policy than the one purchased. Christafano, supra, 361 N.J. Super. at 234-35 (quoting Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989)).

The relevant provision of the Rochdale policy states: "You are an insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees." Where a corporation is the named insured in an insurance policy, New Jersey courts have found that the individual owners of the corporation are not implicitly insured. See Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72, 85 (2008)(finding that where a partnership is the named insured, the only two individuals connected to the partnership are not implicitly insured because the partnership is separate and distinct from its partners). "A professional corporation and its sole owner are separate entities and the immunity of the workers' compensation laws that shields the corporation from tort liability to employees does not extend to the owner of the corporation." See Lyon v. Barrett, 89 N.J. 294, 304 (1982). A corporation is an entity which is also separate from its stockholders and in the absence of fraud or injustice, courts generally will not pierce the corporate veil to impose liability on the corporate principals. Frank v. Frank's, Inc., 9 N.J. 218, 224 (1952).

A. The Rochdale Policy

In reviewing and interpreting the plain language of the Rochdale policy, the terms of the policy are not ambiguous. The

named insured is WR Burnett. Although Burnett is the sole owner of WR Burnett, the corporation is an entity separate and distinct from William, who Jeffrey sued in his individual capacity. See Lyon, supra, 89 N.J. at 304. No reading of the Rochdale policy could lead to the conclusion that its terms were intended to apply to principles, shareholders, and employees of WR Burnett. See Shotmeyer, supra, 195 N.J. at 85 (stating that even where the policy specifies the named insureds as "Henry J. Shotmeyer and Charles P. Shotmeyer, Partners trading as Beaver Run Farms, a General Partnership," the individual partners are not individually insured).

Nor do we find merit to Harleysville's argument that the motion judge failed to appreciate the clear and unambiguous language of the Rochdale policy. The operative language in the Rochdale policy upon which Harleysville relies to assert its entitlement to coverage is addressed in Part 2- Employers' Liability Insurance:

> B. We Will Pay:
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> We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.
>
> The damages we will pay, when recovery is permitted by law, include damages:

. . . .

> 4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

Harleysville cites two unpublished opinions to support its contention that insurers are required to defend and indemnify insureds when they are sued in capacities other than as employers: Ionbond, Inc. v. Valley Forge Ins. Co., No. A-3370-09 (App. Div. Dec. 6, 2010) and Estate of Hart v. Singer, No. A-5950-06 (App. Div. Nov. 28, 2008).[3]

In Hart, the plaintiff slipped on ice while leaving work. Id. at slip op. at 2. The plaintiff received worker's compensation for her injuries and sued her employer individually, alleging premises liability. Ibid. The defendant's worker's compensation insurer denied the employer's claim for defense. Id. at 3. We found the insurer had a duty to defend because the policy language stated the defendant would be defended if sued in a capacity other than as employer. Id. at 11. Unlike the policy in Hart, the language in the Rochdale

[3] These unpublished opinions do not constitute precedent and are not binding on us. R. 1:6-3. We discuss these opinions because Harleysville relies upon these decisions as a basis for reversal.

policy does not provide coverage to William if sued in a capacity other than as Jeffrey's employer. See id. at 1-2.

In Ionbond, Inc., the plaintiff was injured during the course of her employment and received worker's compensation. Ionbond, supra, slip op. at 1. The plaintiff also filed a personal injury action against Ionbound in its capacity as a tenant under a premises liability theory of recovery. Id. at 2. We reversed the trial court order dismissing the action because of the exclusivity of the worker's compensation provisions. Id. at 10. We noted the plaintiff's recovery would implicate the dual capacity doctrine, which is disfavored in New Jersey. Id. at 9. Nonetheless, we reversed because we concluded the defendant "policyholder such as Ionbond could reasonably read that provision" which stated its insurer would pay damages claimed against an insured in a capacity other than as employer for the employee's work-related injuries, as "triggering coverage for, and obligating Valley Forge to provide a defense to, [the insured's] 'dual capacity' tort claim, regardless of the ultimate merits of the action." Id. at 10. WR Burnett was not a tenant of the Burnetts at the time Jeffrey sustained his injuries, as the lease agreement did not become effective until after the incident, and there is no evidence that the period of coverage was retroactive to a date that would have included coverage for the June 24, 2009 accident.

Likewise, we find no merit to Harleysville's contention the trial court erred in failing to give credence to its business risk exclusion, which precludes coverage for the benefit of its insured for personal injuries sustained which arise out of

> or in connection with a "business" engaged in by an "insured." This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business[.]"

Harleysville concedes this provision has no application to Anita, but asserts that it is applicable to William. Because William, in his individual capacity, is not an insured, this provision was not applicable to him. Once again, the Rochdale policy insured the corporation, not William.

In short, Rochdale was under no obligation to defend and indemnify the Burnetts. In light of this conclusion, the trial court properly determined Rochdale was under no duty to reimburse Harleysville for legal fees and costs it incurred in defending the Burnetts in the underlying action.

B. The Penn Policy

Harleysville asserts the trial court erred when it concluded the Burnetts were not entitled to contractual indemnification from WR Burnett under the Penn policy based upon the lease agreement between the Burnetts and WR Burnett.

Harleysville's claim against Penn is based upon an indemnity provision appearing in an undated, unsigned written lease between the Burnetts as landlord and WR Burnett as tenant on a portion of the Burnetts' property. The lease covered a period of three years commencing on January 1, 2010. The indemnity provision provides:

> Indemnification: The Tenant [WR Burnett] will hold harmless and indemnify the Landlord [William and Anita Burnett] from and for any and all payments, expenses, costs, reasonable attorney fees . . . and from any and all claims and liability for losses or damage to property or injuries to persons occasioned wholly or in part by or resulting from any acts or omissions by the Tenant [WR Burnett] or the Tenant's agents, employees, guests, licensees, invitees, subtenants, assignees or successors, or for any cause or reason whatsoever arising out of or by reason of the occupancy of the Premises by the Tenant [WR Burnett] or the business of the Tenant [WR Burnett].

In granting summary judgment to Penn, Judge Coyle found the lease, by its own terms, was not in effect at the time of the accident, and even if the court were to find the existence of an implied contract, the statute of frauds would preclude enforcement. We agree.

Harleysville presented the Burnetts' 2009 income tax return, which reported rental income for the Burnetts from WR Burnett's garage. In addition, Harleysville produced a November 22, 2010 letter from Penn to the Burnetts. The letter stated:

> We have been provided with new information and our investigation continues. We have received the lease for the premises at 195 New Road[,] "outbuildings and surrounding area". The lease term commenced January 1, 2010. We have been advised the terms of the lease were also in effect on the date of the above accident. Please provide a copy of the lease in effect in 2009 or your 2009 income tax returns for the business and your individual returns for our review.

The tax return does not definitively establish that rent was being collected at the time of the accident. The letter merely advises the Burnetts of Penn's ongoing investigation, what it has been advised of during the course of its investigation, and the need for additional documentation from them. The letter does not establish that the lease was in effect at the time of the accident. As such, this evidence does not establish a genuinely disputed issue of fact that the lease agreement was in effect before January 1, 2010.

Nor does the alternative argument, namely, the parties by their conduct established an implied contract, raise a genuinely disputed issue of fact sufficient to defeat summary judgment. An implied contract may be manifested by conduct. Wanague Borough Sewage Auth. v. Twp. of West Milford, 144 N.J. 564, 574 (1996). Terms may be implied if the contractual relationship between the parties demonstrates an intention to include the absent terms. Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965). However, even if it can be determined an implied

lease existed between WR Burnett and the Burnetts, evidenced by the Burnetts' tax return showing rental income, there is nothing in the record which evinced an intent on the part of the parties that WR Burnett would hold harmless and indemnify the Burnetts. At most, the record merely establishes the Burnetts collected rent from WR Burnett.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION