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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0829-09T3

ADAMS-STIEFEL FUNERAL
HOME, INC.,

Plaintiff-Appellant,

v.

ZURICH AMERICAN INSURANCE
COMPANY d/b/a ZURICH NORTH
AMERICA; ASSURANCE COMPANY
OF AMERICA; MARYLAND CASUALTY
COMPANY,

Defendants-Respondents.

Submitted September 20, 2010 - Decided March 10, 2011

Before Judges Rodríguez, C.L. Miniman and
LeWinn.

On appeal from the Superior Court of New
Jersey, Law Division, Gloucester County,
Docket No. L-2071-08.

Holston, MacDonald, Uzdavinis, Eastlack,
Ziegler & Lodge, attorneys for appellant
(Daniel E. Rybeck, on the briefs).

White Fleischner & Fino, LLP, attorneys for
respondents (Benjamin A. Fleischner, on the
brief).

PER CURIAM

This appeal, calendared back-to-back with Memorial Properties, LLC v. Zurich American Insurance. Co., No. A-0109-09T2, which we also decide today, raises the same issues with respect to defendants Assurance Company of America (Assurance) and Maryland Casualty Company (Maryland).¹ We affirm the summary judgment dismissals as to both defendants.

Plaintiff, Adams-Stiefel Funeral Home, Inc.,² was named in a lawsuit filed in Pennsylvania by Robert and Stephanie Samanns, alleging that the body of Robert's deceased father had been subjected to an illegal scheme of human tissue harvesting that came to light through an investigation in New York State in 2006. This criminal activity also triggered the lawsuits at issue in Memorial Properties.

The Samanns complaint alleged that decedent's body had been entrusted to ANCS, which then "negligently and carelessly cared for, disposed of, and/or prepared the corpse . . . for cremation." Specific allegations of ANCS's negligence included

¹ Defendants assert that "Zurich North America" is merely a trade style . . . employed by Maryland . . . ; it is not a legal entity and not [a] proper party." Plaintiff does not dispute this.

² Throughout the Samanns complaint, plaintiff is identified as "Associated National Cremation Services a.k.a. Ellis-Stiefel Funeral Home." All pleadings filed by plaintiff below and with this court, however, refer to it as "Adams-Stiefel Funeral Home[,] . . . operated through Associated National Cremation Service." We shall refer to plaintiff here as "ANCS."

its failure to: (1) "properly request donation of tissue"; (2) "obtain proper and adequate consent from decedent's next-of-kin thereby allowing for the procurement and/or harvesting of tissue from decedent"; (3) "obtain proper and adequate consent from [Samanns] for outsourcing the cremation of decedent's body to" Liberty Cremation, Inc. (Liberty); (4) "assess the legitimacy of Liberty as a business prior to retaining its services"; (5) "inquire into Liberty's business practices in light of the company's costs being considerably lower than market price"; (6) "notify [Samanns] of the transfer of decedent's body to Liberty for cremation"; and (7) "confirm medical information about [decedent], including but not limited to cause of death and age in the preparation of the forms." The complaint also alleged that ANCS "conceal[ed] from [Samanns] the foregoing activities . . . , including the unauthorized entrustment of . . . decedent's body and permitting unauthorized persons access to . . . decedent's body."

The Samanns complaint alleged that the illegal tissue harvesting occurred sometime following decedent's death in March 2005; Robert first learned of that illegal activity in October 2006 when he was notified by law enforcement officials in his home state of Pennsylvania.

Assurance had issued a general liability insurance policy to ANCS for the period of December 19, 2004 through December 18, 2005. That policy provided in pertinent part:

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

The policy also contained an endorsement that excluded "improper handling":

FUNERAL DIRECTORS PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

Commercial General Liability Coverage Form.

A. The following changes are made to Coverage A. Bodily Injury and Property Damage Liability, 2. Exclusions:

. . . .

3. The following exclusion is added:

This insurance does not apply to:

q. Improper Handling

"Bodily injury" or "property damage" arising out of;

(1) Failure to bury, cremate or properly dispose of a "deceased human body" by any insured or anyone for whom the insured is legally responsible;

(2) Disarticulation of any part or parts of a "deceased human body" by any insured or anyone for whom the insured is legally responsible;

(3) Distribution, sale, loaning, donating or giving away any part or parts of a "deceased human body" by any insured or anyone for whom the insured is legally responsible;

(4) Any criminal act or other act prohibited by any law or ordinance committed by any insured or anyone for whom the insured is legally responsible regardless of whether there has been a criminal conviction or other adjudication or administrative ruling.

This endorsement contained the following definition:

"Funeral director services" means those professional services provided by a funeral director including, but not limited to:

a. Preparing the "deceased human body" for burial or interment including arranging transportation of, handling, embalming, cremation and disposition;

b. Arranging and directing of funeral ceremonies;

c. Conducting interment services

The Assurance policy also provided that coverage applied only to bodily injury or property damage that "occurs during the policy period." "Occurrence" was defined "an accident."

On December 19, 2005, Maryland issued a policy to ANCS for a one-year period commencing on that date. Maryland's policy contained substantially the same terms as the Assurance policy, including the identical "improper handling" exclusion.

On December 8, 2008, Assurance notified ANCS that it would not provide a defense or indemnification of the Samanns lawsuit. Assurance stated that the "matter in question involves alleged unauthorized harvesting of tissue from decedent," and enumerated the counts in the complaint specifically charging ANCS, the "named insured[] under this policy." Assurance pointed out the specific exclusion in its Funeral Directors Professional Liability endorsement, stating that coverage did not apply to "[b]odily injury" or "property damage" arising out of the failure to "bury, cremate or properly dispose of a 'deceased human body' by any insured or anyone for whom the insured is legally responsible."

ANCS filed a complaint for declaratory judgment against Assurance and Maryland on December 9, 2008. Both defendants then moved for summary judgment, contending that the Samanns complaint "[a]ny way it's phrased, . . . arises out of the failure to bury, cremate or properly dispose[] of the deceased's body[,]" and, therefore, coverage was not available.

ANCS contended that the improper handling exclusion did not apply because the gravamen of the complaint was against conduct by Liberty and that ANCS was not "legally responsible" for Liberty's conduct within the language of the policy.

Defendants, however, contended that "whether [ANCS was] responsible for the actions of Liberty" did not matter because there were "allegations that [ANCS,] the insured here, . . . is legally responsible [T]he ultimate facts and the truth of whether they're responsible doesn't matter. It's the allegations that count here and that's why there's no duty to defend."

Assurance raised the additional defense that there had been no "occurrence" within its policy period.

The motion judge issued a written decision on September 1, 2009, granting defendants' motions for summary judgment. The judge found that the negligence claims in the Samanns complaint constituted "allegations that [ANCS] itself failed to properly dispose of the body," by "'negligently and carelessly car[ing] for, dispos[ing] of, and/or prepar[ing] the corpse of plaintiffs' [sic] father for cremation.'" The judge found that these claims "fall squarely within the exclusion." The judge further found that Assurance was not obligated to provide coverage because "the 'bodily injury' or 'occurrence' did not

occur within the . . . policy," as "the time when [Samanns'] mental anguish and emotional distress occurred" was in October 2006 when he "learn[ed] of the wrongdoing."

On appeal, ANCS raises the following contentions for our consideration:

I. THE TRIAL COURT ERRED IN RULING THE IMPROPER HANDLING EXCLUSION DENIES COVERAGE.

A. Standard of Review.

B. Insurance Contract Law.

C. The Improper Handling Exclusion Does Not Apply To Negligence In The Samanns Complaint.

1. For Purposes Of The Summary Judgment Motion, Defendants Admitted Adams-Stiefel Was Not Legally Responsible For Liberty.

2. The Trial Court Erred In Ruling New Jersey's Licensing And Enabling Statutes Relative To Funeral Directors Versus Crematories Allow Funeral Directors To Be Vicariously Liable For The Bad Acts Of Independent Third-Party Contractors.

II. THE TRIAL COURT ERRED IN RULING THERE WAS NO "BODILY INJURY" OR "OCCURRENCE" DURING THE POLICY PERIOD.

When weighing an appeal from a grant of summary judgment, we are bound by the same standards as the motion judge and must determine whether there is a genuine issue of material fact and,

if not, whether the judge's application of the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995)), certif. denied, 154 N.J. 608 (1998). The interpretation of an insurance contract is a question of law, "decide[d] independently of a trial court's conclusions." Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 260 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009).

With these standards in mind, we turn to ANCS's arguments regarding the motion judge's interpretation of the policy exclusions. "Exclusionary clauses are presumptively valid and are enforced if they are 'specific, plain, clear, prominent, and not contrary to public policy.' If the words used in an exclusionary clause are clear and unambiguous, 'a court should not engage in a strained construction to support the imposition of liability.'" Flomerfelt v. Cardiello, 202 N.J. 432, 441-42 (2010) (citations omitted).

Whether an insurer has a duty to defend requires an assessment of the complaint and the pertinent language of the policy. Sahli v. Woodbine Bd. of Educ., 193 N.J. 309, 322 (2008). "In making that comparison, it is the nature of the claim asserted, rather than the specific details of the incident

or the litigation's possible outcome, that governs the insurer's obligation." Flomerfelt, supra, 202 N.J. at 444.

"In evaluating the complaint for this purpose, doubts are resolved in favor of the insured, and, therefore, in favor of reading claims that are ambiguously pleaded, but potentially covered, in a manner that obligates the insurer to provide a defense." Ibid. Here, as noted, the Samanns complaint charged ANCS with negligence in: (1) the manner in which it "outsourc[ed] the cremation of decedent's body to" Liberty; (2) failing to "assess the legitimacy of Liberty as a business prior to retaining its services"; (3) making inadequate inquiries into Liberty's business practices; and (4) failing to notify Samanns "of the transfer of decedent's body to Liberty for cremation."

The improper handling exclusion in both policies expressly excluded from coverage "'[b]odily injury' arising out of [the f]ailure to bury, cremate or properly dispose of a 'deceased human body'". (Emphasis added). But for ANCS's conduct in entrusting decedent's body to Liberty for cremation, the tissue harvesting activity that gave rise to Samanns' complaint may never have occurred. Thus, the pivotal inquiry is not whether ANCS was, literally, "legally responsible" for Liberty, but whether ANCS was negligent in utilizing Liberty's services in the first place. That alleged negligence constitutes "the

nature of the claim asserted," and will, therefore, "govern[] the insurer's obligation." Flomerfelt, supra, 202 N.J. at 444.

We are satisfied that the motion judge properly declined to consider either the merits of the underlying claims or whether ANCS could be held liable for Liberty's conduct, and instead compared "the allegations in the complaint with the language of the policy." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 173 (1992). The allegations of ANCS's negligence vis-à-vis Liberty fall squarely within the exclusion of coverage for "bodily injury . . . arising out of" the "[f]ailure to . . . properly dispose of a 'deceased human body.'" When the negligence allegations against ANCS are compared to the policy, the proper conclusion is that those claims "originat[ed] from, gr[ew] out of[,], or hav[e] a substantial nexus[,]" Flomerfelt, supra, 202 N.J. at 452, to the "[f]ailure to . . . properly dispose of" decedent's body. This exclusion is "specific, plain, clear [and] prominent," Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997) (internal quotations omitted), and will, therefore, be enforced, Flomerfelt, supra, 202 N.J. at 441.

We turn briefly to ANCS's second argument. It is well-established that "the time of the 'occurrence' of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining

party was actually damaged." Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 27 (1984) (internal quotations and citations omitted). The Court in Hartford noted that "the important time factor, in determining insurance coverage where the basis of the claim is negligence, is the time when the damage has been suffered." Ibid. (quoting Muller Fuel Oil Co. v. Ins. Co. of N. Am., 95 N.J. Super. 564, 579 (App. Div. 1967)). Here, the "damage" occurred in October 2006, when Samanns first learned of the illegal tissue harvesting from decedent's body. The Assurance policy was in effect from December 2004 to December 2005.

In any event, this claim is without merit, as the motion judge properly held that coverage was barred by the exclusions in both policies. Therefore, ANCS's "occurrence" argument is moot.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION