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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0109-09T2

MEMORIAL PROPERTIES, LLC
and MOUNT HEBRON CEMETERY
ASSOCIATION, INC. d/b/a
LIBERTY GROVE MEMORIAL PARK,

Plaintiffs-Appellants,

v.

ZURICH AMERICAN INSURANCE CO.
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, Monmouth County, Docket No. L-2347-08.

Katz & Dougherty, LLC, attorneys for appellants (George T. Dougherty, on the brief).

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

PER CURIAM

Plaintiffs, a cemetery and crematory, appeal from the May 1 and July 30, 2009 orders of the trial court granting summary judgment to defendant insurance companies dismissing their complaint for defense and indemnification. We affirm.

Between 2006 and 2007, seven civil actions were filed against plaintiffs by family members of decedents buried or cremated at plaintiffs' facilities who had been the "subject of unlawful tissue removal" as part of an illegal scheme of harvesting body parts and tissues that came to light through an investigation in New York in 2006. All of the unlawful activity had occurred in 2002 and 2003; the litigants in the civil actions first learned of their family members' involvement in 2006. Their complaints asserted claims of negligent and intentional infliction of emotional distress, negligent and intentional misrepresentation and negligence.

Defendant Assurance Company of America (Assurance) had issued a general liability insurance policy to plaintiffs effective December 23, 2002 to December 23, 2003. That policy provided coverage for

> (1) bodily injury (including mental anguish) or property damage to which this insurance applies arising out of any malpractice, error or mistake committed by your cemetery operations.
>
> (2) mental anguish arising out of the performance or non-performance of any

> contract made in the usual course of your cemetery operations for the care, burial or other disposition of a deceased human body, the conduct of memorial services or the transportation of a deceased human body by another, excluding, however, any specific agreement to pay for such mental anguish.
>
> (3) property damage to deceased human bodies, the clothing or other personal effects or cremated remains, or to urns, caskets cases, crypts, mausoleums or other property used for the care or burial of a deceased human body, owned by others and in your care, custody or control for the purpose of caring for or burying of a deceased human body[.]

During the period from December 23, 2005 to December 23, 2006, plaintiffs were insured by a policy issued by Maryland Casualty Company (Maryland). That policy provided coverage for "damages because of 'bodily injury' or 'property damage,'" but contained the following exclusion for "improper handling":

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

Plaintiffs requested defense and indemnification of the civil actions from Assurance and Maryland.[1] Assurance claimed that the actions were not covered under its policy, because the date of the "occurrence" of the purportedly insurable events was in or about April 2006 when family members discovered the allegations of wrongful conduct.

[1] Assurance and Maryland represent to us that "'Zurich North America' is merely a trade style that has been employed by Maryland . . . ; it is not a legal entity and not [a] proper party." Plaintiffs have not disputed this.

Maryland denied defense and indemnification, claiming that "all of the allegations . . . are excluded from coverage under the Cemetery Professional Liability Endorsement [in the policy] which expressly excludes coverage for claims for the alleged failure to properly bury or cremate a body or for the alleged improper harvesting or distribution of body parts."

Plaintiffs filed suit against Assurance and Maryland on May 14, 2008, and moved for summary judgment on February 2, 2009. Assurance and Maryland filed cross-motions for summary judgment on March 24, 2009. On May 1, 2009, the court entered an order denying plaintiffs' motions and granting defendants' motions for summary judgment. In a bench decision rendered on that date, the court stated:

> The time of accrual of the insurer's liability is the determining factor not the time of the event which eventually results in liability.
>
> I find that that is the public policy and the judicial policy as set forth by the [c]ourts in the State of New Jersey. . . .
>
> Therefore, when we have a situation such as this, where somebody finds out that there has been this adulteration of the remains of loved ones, that is when the occurrence occurs. They have an infliction of emotional distress at that period of time and not when the act actually occurs.
>
> . . . I therefore rule that the occurrence in this case was when the phone call came in from the detective alerting the

> families to what had happened and that is the policy period which will cover . . . .

With leave of court, plaintiffs thereafter filed a second amended complaint adding three additional civil lawsuits; plaintiffs also filed a motion for summary judgment on their defense and indemnification claims in those matters. Maryland filed a cross-motion for summary judgment on July 2, 2009. The court entered two orders on July 30, 2009, one granting Maryland's cross-motion for summary judgment and the other denying plaintiff's motion. The court stated the following reasons for its decision:

> Notwithstanding the language in the complaints, this is clearly a situation where the entire cause of action, no matter what words are used on it, involves the improper disposition of the bod[ies] entrusted to [plaintiffs].
>
> . . . .
>
> [Maryland has] issued a comprehensive general liability policy. And readily admits that [it] will cover any loss that comes within the ambit of that policy. There is however a very specific exclusion. And the insurance does not apply to any bodily injury or property damage arising out of [the] failure to bury, cremate, or properly dispose of a deceased body by an insured or anyone for whom the insured is legally responsible.
>
> . . . .
>
> I find that the exclusion does apply. I find that the exclusion is very specific.

> And I find that the motion brought by [plaintiffs] . . . is inadequate for me to deny the position with reference to discarding the exclusion.
>
> The allegations in these complaints . . . all clearly come back to failure to bury, cremate or properly dispose[] of a deceased body.
>
> The exclusion is put in there specifically so that the general liability carrier does not have to cover these type[s of] entities. . . .
>
> . . . .
>
> If there's going to be a policy issued to protect against any potential liability for what occurred in this case, it would have to be in the form of a rider or a separate policy.

On appeal, plaintiffs raise the following contentions for our consideration:

> POINT I
>
> AS ADJUDICATED BY THE COURTS OF NEW JERSEY AN "OCCURRENCE" GIVING RISE TO DEFENSE OBLIGATION IS FIXED AT THE TIME WHEN AN INSURED FIRST BECOMES LIABLE TO A POTENTIAL CLAIMANT, NOT WHEN A CLAIMANT LEARNS OF THE LIABILITY-GENERATING ACT OR OMISSION.
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> POINT II
>
> MOTION JUDGE CLEARLY MISCONSTRUED AND MISAPPLIED NEW JERSEY PRECEDENT IN DETERMINING "OCCURRENCE" TO BE CLAIMANTS' RECEIPT OF REPORT FROM POLICE AUTHORITIES AS TO WRONGFUL TREATMENT OF DECEDENTS' REMAINS YEARS EARLIER.

POINT III

UNDER NEW JERSEY AND NEW YORK LAW, STANDING TO SUE FOR EMOTIONAL DISTRESS DAMAGES ARISING FROM MISHANDLING OF DECEASED REMAINS IS ROOTED IN THEORY OF QUASI-PROPERTY RIGHT IN REMAINS OF DECEASED, MAKING ANY SUCH CLAIM INEXORABLY LINKED TO AND DEPENDENT ON PRIOR OCCURRENCE.

POINT IV

COMPLAINTS FILED AGAINST CEMETERY ALLEGE GENERAL NEGLIGENCE IN THE PERFORMANCE OF ITS SERVICES TO THE FAMILY OF THE DECEASED, THEORIES WHICH ARE VIABLE ABSENT PROOF OF ACTUAL COMPLICITY IN UNLAWFUL TREATMENT [OF] CORPSE REQUIRING DEFENDANT INSURER TO DEFEND.

POINT V[]

DEFENDANT INSURER IS CLEARLY OBLIGATED TO REIMBURSE THE PLAINTIFFS FOR DEFENSE COSTS INCURRED IN SUCCESSFUL DEFENSE OF THE TWO VOLUNTARILY DISMISSED CLAIMS.

The first three contentions relate to the Assurance policy, the latter two to the Maryland policy.

On appeal from a grant of summary judgment, we apply the same standard as the trial court did in deciding the motion. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). In conducting our review of the motion record, we accord plaintiffs the benefit of all favorable evidence and inferences. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). However, "[t]he interpretation of an insurance

contract is a question of law which we decide independently of a trial court's conclusions." Polarone Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 260 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009). Therefore, "we review the judge's rulings in this case de novo." Ibid.

With these principles in mind, we turn first to plaintiffs' contentions regarding Assurance. The Assurance policy provided, in pertinent part, that it "applies to 'bodily injury' and 'property damage' only if: (1) [t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and (2) [t]he 'bodily injury' or 'property damage' occurs during the policy period." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Plaintiffs contend that the "occurrence" for which they seek coverage took place at the time the alleged wrongdoing was committed, and not at the time when the plaintiffs in the underlying civil lawsuits subsequently learned of that wrongdoing. We disagree.

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 Miller Fuel Oil Co. v. Ins. Co. of N. Am., 95 N.J. Super. 564, 579 (App. Div. 1967)).

Plaintiffs contend that the occurrences in this case were "complete" upon performance of "the last acts alleged to have been negligent and ultimately injurious to the family members of the deceased." As support for this position, plaintiffs rely substantially on our unreported decision in Steinbauer v. E. Coast Acquisitions LLC, No. A-0807-06 (App. Div. September 11, 2007), and a decision from Ohio, State Farm Fire & Cas. Co. v. Condon, 839 N.E.2d 464 (Ohio Ct. App. 2005).

Steinbauer does not "constitute precedent" nor is it "binding upon" this court. R. 1:36-3. Moreover, we are satisfied that Steinbauer is factually distinguishable to a degree rendering it inapposite to this case.

Plaintiffs' reliance on Condon, supra, is similarly misplaced. There, the court found that the language of the policy at issue presented "no requirement . . . that the harm to third persons be completed during a covered period[]" and

concluded that the occurrence took place at the time of the wrongful conduct, not at the time the injuries occurred. 839 N.E.2d at 467.

New Jersey law, however, clearly establishes that an "occurrence" takes place "'not at the time the wrongful act was committed but at the time when the complaining party was actually damaged.'" Hartford, supra, 98 N.J. at 27. Condon, thus, lends no support to plaintiffs' position.

Plaintiffs also contend that the underlying claimants' emotional distress claims are rooted in "quasi property rights" and as a result, those claims "must tie back into the damaging occurrence[s] which were complete in 2003 with the cremation of the deceased." We reject this argument, as it misconstrues the nature of the allegations in the underlying complaints; the causes of action alleged therein are for "severe pain and suffering, severe emotional distress and harm."

The gravamen of those complaints is the harm to "the personal feelings of the survivors," as "the tort contemplates the wrongful infliction of mental distress." Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 531 (1988). Thus, it is the harm "to the survivors," ibid., not the property rights of the deceased, that is implicated in the underlying complaints.

For the foregoing reasons, we conclude that the court properly determined that the "occurrence" at issue took place in 2006, when the underlying complainants learned of the desecration of their loved ones. Therefore, Assurance has no obligation to provide a defense and indemnification to plaintiffs.

Turning to plaintiffs' claims against Maryland, for the reasons that follow we are satisfied that the court properly dismissed those claims pursuant to the policy language that excludes from coverage the "improper handling" of a "deceased body" and defines the types of conduct which fall within this exclusion. The causes of action in the underlying civil complaints stemmed directly from the types of conduct described in the exclusion. Therefore, no coverage exists that would impose a defense and indemnification obligation upon Maryland.

An insurer's duty to defend "arises when the complaint states a claim constituting a risk under the policy." Aetna Cas. & Sur. Co v. Ply Gem Indus., Inc., 343 N.J. Super. 430, 452 (App. Div.), certif. denied, 170 N.J. 390 (2001). When interpreting an insurance policy, the words of that policy are given their plain, ordinary meaning. Nav-Its, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110, 118 (2005). The policy should be interpreted as written where the language is clear. Ibid.

Whether an insurer has a duty to defend requires an assessment of the complaint and the language of the policy. Sahli v. Woodbine Bd. of Educ., 193 N.J. 309, 322 (2008).

> An insurer's duty to defend an action brought against its insured depends upon a comparison between the allegations set forth in the complainant's pleading and the language of the insurance policy. 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 v. Cardiello, 202 N.J. 432, 444 (2010) (citations omitted).]

As noted, the underlying complaints asserted claims of intentional infliction of emotional distress, misrepresentation, and negligence. The gravamen of the claims addressed specifically to plaintiffs were "negligently and carelessly car[ing] for the corpses" and making "alleged misrepresentations . . . that [plaintiffs] would treat with care and respect the corpse of the . . . decedent, not falsify records and information concerning . . . decedent, [and] follow acceptable and ethical funeral home . . . standards of conduct."

Plaintiffs contend that Maryland has a duty "to defend at least that portion of the complaint[s] which is not embraced by the exclusion for body part harvesting." Specifically, plaintiffs assert that Maryland has "[i]gnore[d] the alternate

allegations of negligence liability grounded in allegations of the insureds' breach of contract and duty of care to the family regarding the disposal of the remains," and "focuse[d] exclusively on the weaker complicity allegations to invoke its . . . exclusion for Improper Handling." In short, plaintiffs contend, "the exclusionary language cannot be interposed as grounds for denying a defense merely because the complaint includes an alternative theory of intentional wrongdoing in addition to the more specific and prevalent allegations of negligence and breach of duty."

The distinction between intentional and negligent conduct, however, is not dispositive here. Rather the issue is whether the claims "arise out of" certain conduct, namely the conduct described in the policy's "Improper Handling" exclusion. Here, "the nature of the claim asserted, rather than the specific details of the incident or the litigation's possible outcome," Flomerfelt, supra, 202 N.J. at 444, is outcome-determinative. "[T]he exclusion is specific, plain, clear, prominent, and not contrary to public policy," and, therefore, "will be enforced as written." Nav-Its, Inc., supra, 183 N.J. at 119 (citations and internal quotations omitted). The policy exclusion specifically and broadly eliminates coverage for any claim that "aris[es] out

of . . . [f]ailure to . . . properly dispose of a 'deceased body.'"

In sum, we conclude that "the words used in [the] exclusionary clause are clear and unambiguous," Flomerfelt, supra, 202 N.J. at 442, and we will not, therefore, "'engage in a strained construction to support the imposition of liability.'" Ibid. (quoting Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990)).

Affirmed.