SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0615-15T2
A-0651-15T2

COLLEEN BORUCH and
ROBERT BORUCH,

Plaintiffs-Respondents/
Cross-Appellants,

v.

PHUONG VO a/k/a KEVIN VO
t/a GORGEOUS NAILS,

Defendant-Appellant/
Cross-Respondent,

and

BASSER-KAUFMAN LLC, BASSER-KAUFMAN
REAL ESTATE DEVELOPERS INC.,
BASSER-KAUFMAN MANAGEMENT CORP.,
BASSER-KAUFMAN OF MATAWAN LLC,
THUONG VAN NGUYEN, and HOAI HOANG,

Defendants,

and

PHUONG VO a/k/a KEVIN VO
t/a GORGEOUS NAILS,

Third-Party Plaintiff,

v.

FRANKLIN MUTUAL INSURANCE COMPANY,

Third-Party Defendant/
Respondent.

COLLEEN BORUCH and
ROBERT BORUCH,

Plaintiffs-Appellants,

v.

PHUONG VO a/k/a KEVIN VO
t/a GORGEOUS NAILS,
THUONG VAN NGUYEN, and
HOAI (HEIDI) HOANG,

Defendants-Respondents,

and

BASSER-KAUFMAN LLC, BASSER-KAUFMAN
REAL ESTATE DEVELOPERS INC.,
BASSER-KAUFMAN MANAGEMENT CORP., and
BASSER-KAUFMAN OF MATAWAN LLC,

Defendants,

and

PHUONG VO a/k/a KEVIN VO
t/a GORGEOUS NAILS,
THUONG VAN NGUYEN, and
HOAI (HEIDI) HOANG,

Third-Party Plaintiffs,

v.

FRANKLIN MUTUAL INSURANCE COMPANY

Third-Party Defendant.

Argued November 14, 2017 – Decided December 22, 2017

Before Judges Yannotti, Leone, and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket Nos. L-4947-11 and L-2874-12.

Leonard S. dePalma argued the cause for appellant/cross-respondent in A-0615-15 and respondents in A-0651-15 (The dePalma Law Firm, LLC, attorneys; Leonard S. dePalma, of counsel and on the brief).

James J. Pieper argued the cause for respondents/cross-appellants in A-0615-15 and appellants in A-0651-15 (Anglin, Rea & Cahalane, PA, attorneys; Patrick H. Cahalane, on the brief).

Richard J. Mirra argued the cause for respondent in A-0615-15 (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Richard J. Mirra, of counsel and on the brief).

PER CURIAM

Defendant Phuong Vo t/a Gorgeous Nails (collectively "Vo") appeals from orders entered on February 24, 2015, dismissing the third-party complaint against Franklin Mutual Insurance Company (FMI); a final judgment entered by the Law Division on August 12, 2015, following a jury trial; and an order dated September 18, 2015, denying a motion for a new trial. Plaintiffs Colleen and Robert Boruch cross-appeal from the final judgment. We affirm the February 24, 2015, and September 18, 2015 orders, and we affirm

the final judgment except we remand to the trial court to mold the judgment and the verdict to reflect its entry against Vo trading as Gorgeous Nails.

The following facts are taken from the record. Plaintiff Colleen Boruch alleged she was cut and injured by defendant Thuong Van Nguyen during a pedicure at the Gorgeous Nails salon on May 5, 2010. Nguyen was employed by Vo. Boruch claimed Nguyen used a metal tool that felt like a razor to cut a corn from her foot, despite her instructions to Nguyen there was to be no cutting. Boruch alleged she was injured and subsequently suffered from an infection as a result of Nguyen's negligence. Thereafter, Boruch and her husband, plaintiff Robert Boruch, filed a complaint in the Law Division naming, among others, Vo, Nguyen, and Hoang as defendants.

FMI insured Vo. Vo filed an answer and a third-party complaint for insurance coverage against FMI. FMI disclaimed coverage on the ground that Boruch's injuries were caused by conduct excluded from coverage, namely, the "[k]nowing violation of penal law," the "removal or attempted removal of growths, moles, or warts," and "bodily injuries arising out of . . . piercing of any skin or body part."

FMI moved for summary judgment. The motion judge denied the motion, finding that there were genuine issues of material fact

as to whether Boruch's injuries were the result of the removal of a growth. Indeed, Nguyen had denied the incident ever occurred, and testified at deposition that he did not remove a corn from plaintiff's foot. He also denied he ever used a razor blade or a similar tool to cut anyone while he was employed at the salon.

With no involvement by FMI, plaintiffs and defendants Vo, Hoai Hoang (Vo's wife), and Nguyen reached a settlement for $775,000. A second judge conducted a "fairness hearing" pursuant to Griggs v. Bertram, 88 N.J. 347 (1982), and found the settlement was unreasonable and unenforceable as to FMI.

FMI moved to dismiss the third-party complaint based on the court's ruling. A third motion judge denied the motion. Thereafter, plaintiffs and Vo, Hoang, and Nguyen agreed to dismiss plaintiff's complaint without prejudice.

Vo then moved for a declaratory judgment, seeking to compel FMI to honor the terms of its policy. FMI again moved for summary judgment. The third motion judge denied Vo's motion for a declaratory judgment, but reconsidered her earlier decision denying FMI's motion for summary judgment, and this time granted it and dismissed the third-party complaint. The motion judge found the Griggs hearing ended the case as to FMI.

As a result, plaintiffs moved to reinstate the complaint against defendants. Plaintiffs' motion was granted and a jury

trial ensued, which resulted in a verdict for plaintiffs in the amount of $100,000, finding only Gorgeous Nails liable.

The trial judge entered the judgment against Gorgeous Nails, because the jury did not find Vo, Hoang, or Nguyen individually liable. Plaintiffs and Vo each filed motions to amend the judgment, or in the alternative for a new trial. Both motions were denied on September 18, 2015. Vo's appeals and plaintiffs' cross-appeals followed.

In appeal A-0615-15, Vo challenges the granting of summary judgment to FMI. In appeal A-0651-15, plaintiffs cross-appeal, arguing the judgment should have been molded to be against Vo as the sole proprietor of Gorgeous Nails.

Our review of an order granting summary judgment is de novo. Graziano v. Grant, 326 N.J. Super. 328, 338 (App. Div. 1999). "[W]e review the trial court's grant of summary judgment . . . under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). The court considers all of the evidence submitted "in the light most favorable to the non-moving party," and determines if the moving party is entitled to summary judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The court may not weigh the evidence and determine the truth of the matter. Ibid. If the evidence presented "show[s] that there is no real material issue, then summary judgment should be granted." Walker v. Atl. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987) (citing Judson v. Peoples Bank and Tr. Co. of Westfield, 17 N.J. 67, 75 (1954)). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome [summary judgment]." Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

Vo argues the trial court erred in granting FMI summary judgment because its policy covered the claims asserted by plaintiffs. Vo argues the FMI policy did not exclude accidental coverage and the policy should be "construed liberally to the end that coverage is afforded to the full extent that any fair interpretation will allow." Vo asserts any ambiguity in the policy should be construed in the insured's favor. He argues the denial of summary judgment by the first motion judge demonstrates why the motion judge who granted summary judgment erred. Vo also claims the judge who granted summary judgment erred in concluding coverage was forfeited because the judge who held the Griggs hearing concluded the settlement was unreasonable. Vo contends the motion judge erred in finding no coverage because he did not find that the parties acted in bad faith in settling the case.

The duty of an insurer to defend is determined by a side-by-side comparison of the policy and the complaint, and is triggered when the comparison demonstrates that if the complaint's allegations were sustained, an insurer would be required to pay the judgment. Sears Roebuck & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 340 N.J. Super. 223, 241-42 (App. Div. 2001); see also Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953). Facts developed in discovery may trigger the duty to defend or establish that there is no such duty under the policy in question. Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 274 (App. Div. 2008).

"It is the nature of the claim for damages . . . [that] triggers the obligation to defend." L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 490 (App. Div. 2004). The insurer remains obligated to defend even if the claims are meritless, fraudulent, or "poorly developed and almost sure to fail." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 174 (1992). However, that obligation does not extend to "claims which would be beyond the covenant to pay if the claimant prevailed." Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 389 (1970); see also Danek, 28 N.J. Super. at 77 (drawing a distinction between groundless actions and ones that, "even if successful, would not be within the policy coverage"). Neither the duty to defend nor the duty

to indemnify "exists except with respect to occurrences for which the policy provides coverage." Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984).

As we noted, the first motion judge denied summary judgment to FMI concluding that while the FMI policy clearly excluded removal of a growth, a material dispute of fact existed regarding whether a growth had been removed from Boruch's foot because Nguyen denied doing so. However, coverage is measured by plaintiffs' allegations, not defendants' denials.

FMI argues plaintiff's claim falls within the exclusions denying coverage for the removal of growths, the piercing of the skin, and the knowing violation of penal laws, namely N.J.S.A. 45:5B-13(e) and N.J.A.C. 13:28-2.15(b). N.J.S.A. 45:5B-13(e) states "it shall be unlawful for a licensed shop or shop owner to . . . [m]aintain a shop in a manner which is unsafe or unsanitary[.]" N.J.A.C. 13:28-2.15(b) provides a practitioner within a shop shall not "[u]se or offer to use a credo blade, skin scraper, lancet, or other comparable implement."

Boruch testified at deposition that she was a cosmetology school graduate and had been employed as a cosmetologist for twelve years. She testified she "knew the rules and regulations . . . as far as cutting." She then described the incident, stating that "it burned like hell, it felt like a razor," "[o]n [Nguyen's] lap,

I saw something metal," and "[h]e said I cut your corn off." Boruch's answers to interrogatories stated "[t]he pedicurist improperly performed a surgical procedure utilizing a razor device/credo blade to cut a corn off my foot."

FMI's insurance policy with Vo extends professional liability coverage, subject to the following exclusion:

> Liability Not Insured — We do not provide insurance for the following:
>
> > Acts of unlicensed practitioners required to be licensed.
> >
> > . . . .
> >
> > Face lifting; plastic surgery; removal or attempted removal of growths, moles, or warts or hair from any such; removal of hair by electrolysis or diathermy or from eyelids or nostrils; hair implanting, transplanting or attempts at such.

We conclude summary judgment should have been granted on the basis of the policy exclusions by the second motion judge. Although the complaint merely set forth claims of negligence, plaintiff's answers to interrogatories and her deposition testimony made clear that she was asserting claims based on the injury sustained when the pedicurist used a razor or credo blade and cut the corn from her foot. The policy provided no coverage for such a claim. Based on the claims asserted by plaintiffs, FMI

had no obligation to defend Vo. Moreover, the plain language of the policy was not ambiguous. Because plaintiffs' claims could not result in liability unless the jury found that defendants removed or attempted to remove a corn, or knowingly used a credo blade or comparable implement in violation of N.J.A.C. 13:28-2.15(b), FMI's policy was inapplicable to the dispute. Therefore, FMI had no duty to defend or indemnify Vo with regard to the claims asserted in this action. We need not reach the "piercing" exclusion or the alleged violation of N.J.S.A. 45:5B-13(e).

Because our review of summary judgment is de novo, we conclude summary judgment in FMI's favor was appropriate based upon the policy exclusions. Thus, on that ground the entry of summary judgment for FMI in the February 24, 2015 order was proper, even though the court expressed other grounds for its order. We review the propriety of summary judgment de novo, and review the order, not the opinion. Templo Fuente 224 N.J. at 199; Credit Bureau Collection Agency v. Lind, 71 N.J. Super. 326, 328 (App. Div. 1961).

Vo also appeals the $100,000 jury verdict. The jury found Gorgeous Nails negligently caused plaintiff's injury. The jury assessed no liability to Vo, Hoang, or Nguyen. Therefore, Vo argues the jury verdict was inconsistent and should be vacated. In their cross-appeal, plaintiffs argue the judgment should have

been molded to be against Vo as the sole proprietor of Gorgeous Nails.

A jury verdict is entitled to a presumption of correctness. Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977). A jury's evaluation of a disputed factual issue must be afforded "the utmost regard." Love v. Nat'l R.R. Passenger Corp., 366 N.J. Super. 525, 532 (App. Div. 2004). A jury verdict will not be set aside "unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly appears that there was a miscarriage of justice under the law." Dolson v. Anastasia, 55 N.J. 2, 6-7 (1969) (quoting R. 4:49-1(a)).

A "miscarriage of justice" has been described as a "pervading sense of 'wrongness' needed to justify [an] appellate or trial judge undoing of a jury verdict . . . '[which] can arise . . . from manifest lack of inherently credible evidence to support the finding, obvious overlooking or underevaluation of crucial evidence, [or] a clearly unjust result[.]'" Lindenmuth v. Holden, 296 N.J. Super. 42, 48 (App. Div. 1996) (alteration in original) (quoting Baxter, 74 N.J. at 599).

Here, the jury received the following instruction regarding negligence:

> You must understand that a business enterprise, such as Gorgeous Nails, acts only through people who are its officers,

> employees, or agents. To prove her claim, . . . Boruch must establish, by the preponderance of the evidence, that the negligence of one or more defendants was a proximate cause of the injury which she suffered.

The jury returned a verdict in favor of plaintiffs. The jury answered the first interrogatory in the affirmative finding plaintiffs had proved that "any or all of the defendants were negligent on May 5, 2010." In response to the second interrogatory, the jury found plaintiffs had proved that "the negligence of the defendant(s) was the proximate cause of [Boruch's] injuries." The jury answered interrogatory three of the verdict sheet as follows:

> If you have answered both Questions 1 and 2 "Yes", state which of the defendants were negligent and which defendants' conduct constituted a proximate cause of harm to Mrs. Boruch by stating "Yes" as to each such defendant ["Yes" must appear at least once]:
>
> Phuong Vo: NO
>
> Hoai T. Hoang: NO
>
> Thuong Van Nguyen: NO
>
> Gorgeous Nails: YES

Vo argues the trial court should not have instructed the jury to determine its liability where all three individual defendants were not found liable. Vo asserts "it is logically impossible for

the proprietorship to have been liable independent of the liability of its owner or its agents."

Under the doctrine of invited error, trial errors which were induced, encouraged, acquiesced in, or consented to by a defendant generally are not a basis for reversal on appeal. State v. A.R., 213 N.J. 542, 561 (2013). At the outset, we note the parties agreed to place Gorgeous Nails on the verdict sheet. The jury was presented with a claim of negligence on the part of the parties named in the verdict sheet. Although Gorgeous Nails should not have been named separately from Vo, Vo's argument the verdict sheet was incorrect is barred by invited error.

The proper party was Vo, trading as Gorgeous Nails. Therefore, the jury's finding of liability on the part of Gorgeous Nails was essentially a finding against Vo trading as Gorgeous Nails. Although the jury did not specifically find negligence on the part of the three individual defendants, there is no doubt the jury determined the proprietorship was negligent. Since Vo is the proprietor, the verdict should be entered against him personally.

Lastly, there is no dispute Vo traded as Gorgeous Nails. We have stated "a sole proprietor is neither an employer nor an employee, but works for his or her own benefit[.]" Aetna Ins. Co. v. Trans Am. Trucking Serv., Inc., 261 N.J. Super. 316, 320 n.5 (App. Div. 1993). Therefore, with Vo as the sole proprietor

operating a business under a "trading-as" name, the jury verdict should have been molded to reflect the proper defendant. For these reasons, we affirm the final judgment, except we remand to the trial court to mold the judgment and the verdict as against Phuong Vo trading as Gorgeous Nails.

Affirmed in part, remanded in part. We do not retain jurisdiction.