SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0875-16T1

HERIBERTO CABALLERO-GONZALEZ,

Plaintiff-Appellant,

v.

HARCO NATIONAL INSURANCE COMPANY, ADMINISTRATOR FOR STATE NATIONAL INSURANCE COMPANY,

Defendant-Respondent.

Argued May 9, 2017 – Decided December 29, 2017

Before Judges Leone and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-0846-13.

Dennis G. Polizzi argued the cause for appellant (Pitts & Polizzi, LLP, attorneys; Dennis G. Polizzi, of counsel and on the brief).

Kirsten J. Orr argued the cause for respondent (White Fleischner & Fino, LLP, attorneys; Gregory S. Pennington, on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Plaintiff Heriberto Caballero-Gonzalez appeals the August 26, 2016 order granting summary judgment to defendant Harco National Insurance Company (Harco), Administrator for State National Insurance Company (State National). Plaintiff argues auto insurance coverage was improperly denied based on his ownership of a Cadillac he did not operate. We reverse and remand.

I.

Plaintiff was involved in an accident on May 10, 2009. According to the police report, plaintiff was driving a bus owned by Genesis Bus Lines LLC (Genesis) when a car driven by Kulikowski Miroslaw improperly turned right in front of him, causing the bus to strike the car. Plaintiff claimed he suffered bodily injury.

Plaintiff alleged Miroslaw was uninsured, and sought uninsured motorist coverage under Genesis's business auto policy issued by State National. Harco denied coverage as State National's administrator of claims, and plaintiff filed this complaint against Harco.

The trial court dismissed the complaint with prejudice based on discovery issues. We vacated and remanded. Caballero-Gonzalez v. Harco Nat'l Ins. Co., No. A-2378-14 (App. Div. June 9, 2016). On July 25, 2016, the trial court denied the parties' motions for summary judgment, ruling "[a] trial is necessary as to whether plaintiff owned an operable car at the time of this accident."

Both parties filed motions for reconsideration. On August 26, 2016, the court granted Harco's motion for reconsideration, vacated the July 25 order, granted summary judgment to Harco, and dismissed plaintiff's complaint with prejudice. He appeals.

II.

Harco contends plaintiff's appeal is untimely. Plaintiff's notice of appeal challenging the August 26 order was filed October 31, 2016. An appeal must be filed "within 45 days of the[] entry" of a final order. R. 2:4-1(a).

However, plaintiff filed a motion for reconsideration of the August 26 order. "The running of the time for taking an appeal . . . shall be tolled . . . by the timely filing and service of a motion" for "reconsideration seeking to alter or amend the judgment or order pursuant to R. 4:49-2." R. 2:4-3, -3(e). Such a motion "shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it." R. 4:49-2.

Harco sent the August 26 order to plaintiff in a September 1, 2016 letter. Within twenty days, plaintiff filed his motion for reconsideration on September 20, 2016. Thus, plaintiff's motion for reconsideration was timely under Rule 4:49-2. See Eastampton Ctr., LLC v. Planning Bd. of Twp. of Eastampton, 354 N.J. Super. 171, 187-88 (App. Div. 2002).

Nonetheless, Harco argues plaintiff's motion did not toll the running of the time for appeal because it was an improper second motion for reconsideration.[1] However, plaintiff's August 2, 2016 motion sought reconsideration of the July 25 order denying his motion for summary judgment. Plaintiff's September 20 motion sought reconsideration of the August 26 order, which for the first time granted summary judgment to Harco. Therefore, the September 20 motion was the first motion for reconsideration concerning the August 26 grant of summary judgment, and indisputably tolled the running of the time for appeal of that order. As that motion was not denied until October 17, 2016, the October 31 appeal of that order was timely. See Hartford Ins. Grp. v. Marson Constr. Corp., 186 N.J. Super. 253, 261 (App. Div. 1982).

Plaintiff's September 20 motion also sought reconsideration of the July 25 order denying his motion for summary judgment. The trial court considered it as "the 2nd motion for reconsideration," but considered it on the merits. However, we need not consider whether the running of the time for an appeal of the July 25 order

[1] Harco cites criticism of second motions for reconsideration. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (stating that "'motion practice must come to an end at some point'" and discouraging "'repetitive bites at the apple'") (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

would be tolled by a second motion for reconsideration, because plaintiff has not appealed the July 25 order.

Plaintiff's notice of appeal designated only the August 26 order as the order "appealed from." R. 2:5-1(f)(3)(A). Similarly, his appellate case information statement (CIS) attached only "a copy of [the August 26 order as] the final judgment, order, or agency decision appealed from." R. 2:5-1(f)(2). Moreover, his CIS stated he was appealing only the "[s]ummary judgment in favor of the defendant," and referenced only the September 20 "motion for reconsideration of the order that dismissed the complaint with prejudice."

We have made clear "it is only the judgment or orders designated in the notice of appeal which are subject to the appeal process and review." 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004). We refuse to consider an order if the appellant "did not indicate in his notice of appeal or case information statement that he was appealing from the order." Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 460-61 & n.1 (App. Div. 2002). Moreover, "[o]rders denying motions for summary judgment are intrinsically interlocutory," Rendon v. Kassimis, 140 N.J. Super. 395, 398 (App. Div. 1976), and "do not come within any of the classes enumerated in [R.] 2:2-3(a) in which appeals may be taken as of right," United Cannery Maint.

v. United Packinghouse Workers, 16 N.J. 264, 265 (1954). Accordingly, we do not consider the arguments in plaintiff's appellate brief challenging the denial of his motion for summary judgment. We address only his timely appeal of the grant of summary judgment to Harco.

III.

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

An appellate court "review[s] the trial court's grant of summary judgment de novo under the same standard as the trial court." Cypress Point Condo. Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 414 (2016). We must hew to that standard of review.

IV.

The State National policy's uninsured motorist endorsement treated anyone "occupying" a covered vehicle as an "insured." This would include plaintiff, as he was operating the covered bus. However, the policy excluded coverage for "'[b]odily injury' or 'property damage' sustained by any 'insured' who is an owner of a motor vehicle . . . [r]equired to be insured in accordance with New Jersey law or regulation, but not insured for this coverage or any similar coverage."

At his deposition, plaintiff testified as follows. He owned a 1993 Cadillac DeVille. When he lived in Florida, the Cadillac was registered and insured. When he moved to New Jersey in 2008, the Cadillac was still operational, but "I was always traveling by bus, and I didn't need a car." Because he was not using the Cadillac, he terminated its registration, turned in its license plates, and cancelled the insurance. He had the Cadillac parked off the street in the yard of a friend's house in Paterson at the time of the May 10, 2009 accident.

Because the Cadillac was operable, Harco argues that plaintiff had to insure it under New Jersey law, and thus that plaintiff was not entitled to coverage under the policy. However, operability is not the determining factor under New Jersey law.

"[E]very owner or registered owner of an automobile registered or principally garaged in this State shall maintain automobile liability insurance coverage." N.J.S.A. 39:6A-3 (emphasis added); see N.J.S.A. 39:6A-3.1, -3.3(b); N.J.S.A. 39:6B-1. Similarly, "[e]very owner or registrant of an automobile or autocycle registered or principally garaged in this State shall maintain uninsured motorist coverage. N.J.S.A. 39:6A-14 (emphasis added); see N.J.S.A. 17:28-1.1. It is not disputed the Cadillac was principally garaged in New Jersey.

"The language of N.J.S.A. 39:6A-3, read literally, would require any owner or registered owner of a vehicle 'registered or principally garaged' in New Jersey to maintain . . . coverage." Carmichael v. Bryan, 310 N.J. Super. 34, 42 (App. Div. 1998). However, in Carmichael we examined both the purpose and objectives of the statute, and cases under comparable statutes. Id. at 42-46. Such statutes do not require insurance coverage if "'there can be no concern of injury by a financially irresponsible or uninsured motorist.' . . . [W]hen one has taken a vehicle off the road with no intention of operating the uninsured vehicle, disqualification . . . would 'extend its scope beyond that intended by the Legislature.'" Id. at 44 (quoting Foxworth v. Morris, 134 N.J. 284, 289-91 (1993) (quoting Caldwell v. Kline, 232 N.J. Super. 406, 412 (App. Div. 1989))).

"[T]he issue really centers on 'the intent of the owner with regard to operation of the vehicle in or around the time of the accident.'" Id. at 46 (quoting Gibson v. N.J. Mfrs. Ins. Co., 261 N.J. Super. 579, 585 (App. Div. 1993)). "Accordingly, in those instances where the owner's intent not to operate his uninsured motor vehicle is manifest, the owner is not required to maintain automobile insurance coverage under N.J.S.A. 39:6A-3[.]" Id. at 46-47 (citing Lilly v. Prudential Ins. Co., 246 N.J. Super. 357, 360 (Law Div. 1990), aff'd o.b., 246 N.J. Super. 280 (App. Div. 1991)).

In analyzing the intent not to operate, we did not restrict the inquiry to inoperability:

> An owner without an intent to operate his vehicle, whether it be because of temporary inoperability or otherwise, is not the type of person the Legislature wanted to exclude. Without the intent to operate and without registration and license plates, the vehicle could be no danger to anyone. Moreover, when the absence of insurance is the result of a decision to remove the vehicle from operation, there can be no concern of injury by a financially irresponsible or uninsured motorist.
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> [Id. at 46 (emphasis added) (quoting Lilly, 246 N.J. Super. at 361 (quoting Caldwell, 232 N.J. Super. at 412)).]

In Carmichael, where the vehicle was inoperable, we held N.J.S.A. 39:6A-3 was "not meant to apply to owners of vehicles

which are not operable at the time of the accident so long as there was no intent to operate them in or around that time." Id. at 46, 48-49; see id. at 43-44 (noting that the vehicles were inoperable in Foxworth and Caldwell). However, we also relied on the broader principles set forth above, which looked to the owner's "intent to operate his vehicle, whether it be because of temporary inoperability or otherwise." Id. at 46 (quoting Lilly, 246 N.J. Super. at 361). We also relied on Lilly and Gibson, where the vehicles were operable but were not being operated. Id. at 42-43, 45-48.[2]

In Lilly, the trial court ruled insurance was not required as the operable automobile "had not been operating for at least three months prior to the accident" because the owner "was financially unable to pay either the financing charges or the liability insurance on the automobile." 246 N.J. Super. at 359. The court observed:

> There are numerous situations in which an owner's intent not to operate his motor vehicle is manifest. Some examples are: the student who stores his automobile while away at school; the businessman living in Europe for a short period of time; the driver who has lost his license; the owner of an antique but

[2] We distinguished a case which denied coverage to an owner of an uninsured vehicle who "had operated his vehicle up until the time of the accident." Id. at 45 (quoting Kennedy v. Allstate Ins. Co., 211 N.J. Super. 515, 518 (Law Div. 1986), aff'd o.b., 213 N.J. Super. 137 (App. Div. 1986)).

> operable automobile and the elderly person who has decided not to drive any longer.
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> [Id. at 360.]

We affirmed on the basis of the trial court's opinion. Lilly v. Prudential Ins. Co., 246 N.J. Super. 280 (App. Div. 1991).

In Gibson, the plaintiff's affidavit attested that, because his auto insurance had lapsed, he had not operated his vehicle for almost two months before the accident but instead parked the vehicle in his allotted parking space at his house and left it stationary there for that period. 261 N.J. Super. at 582. The motion judge dismissed the complaint because the vehicle was operable and parked at the plaintiff's residence. Id. at 583. We reversed because the judge "erred in concluding on the papers that 'the factual picture here does not warrant the findings of non-intent to operate the motor vehicle.'" Id. at 585-86.

We recognize that the cases on which we relied in Carmichael were decided under statutes and policies whose language differed from N.J.S.A. 39:6A-3 and the policy here. Some cases were decisions under statutes allowing benefits from the Unsatisfied Claim and Judgment Fund only if the injured person "was not at the time of the accident, the owner or registrant of an uninsured motor vehicle." Foxworth, 134 N.J. at 285 (quoting N.J.S.A. 39:6-70(d)); Caldwell, 232 N.J. Super. at 408 (quoting N.J.S.A. 39:6-

78(c)). Other cases were decided under a statute or policies which allowed an insurer to exclude from Personal Injury Protection (PIP) benefits the owner of an automobile "that was being operated without personal injury protection coverage." Gibson, 261 N.J. Super. at 581 (quoting N.J.S.A. 39:6A-7(b)(1)); see Lilly, 246 N.J. Super. at 359-60; Kennedy, 211 N.J. Super. at 517.

Although those cases did not address N.J.S.A. 39:6A-3, we nonetheless ruled in Carmichael that they "shed light on the legislative intent behind statutes requiring an owner's vehicles to be insured as a condition of eligibility for various benefits." 310 N.J. Super. at 42. We specifically found "[f]urther insight into the legislative purpose behind the statutes mandating automobile insurance coverage is provided by the line of cases interpreting N.J.S.A. 39:6A-7b(1)." Id. at 45. The same is true here, as the policy incorporates the requirements of N.J.S.A. 39:6A-3.

Therefore, we hold that "'whether it be because of temporary inoperability or otherwise,'" "where the owner's intent not to operate his uninsured motor vehicle is manifest, the owner is not required to maintain automobile insurance coverage under N.J.S.A. 39:6A-3[.]" Id. at 46-47 (quoting Lilly, 246 N.J. Super. at 361 (quoting Caldwell, 232 N.J. Super. at 412)). Thus, if plaintiff's intent not to operate the Cadillac "in or around the time of the

accident" was manifest, he was not required to insure the Cadillac under N.J.S.A. 39:6A-3, and was not excluded from the policy's coverage. Id. at 46. Thus, that was the required inquiry here.

V.

Plaintiff claims that inquiry is not required. He contends the policy's exclusion is repugnant to N.J.S.A. 17:28-1.1's requirement that all policies have uninsured motorist (UM) coverage. He cites Motor Club of Am. Ins. Co. v. Phillips, 66 N.J. 277 (1974), and Rider Ins. Co. v. First Trenton Cos., 354 N.J. Super. 491 (App. Div. 2002).

However, the Legislature overruled Phillips by amending N.J.S.A. 17:28-1.1. Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406, 420 (1998). One of the amendments provides that "[u]ninsured and underinsured motorist coverage shall be subject to the policy terms, conditions and exclusions approved by the Commissioner of Banking and Insurance." N.J.S.A. 17:28-1.1(d). "There is no suggestion here that such approval did not occur." Hardy ex rel. Dowdell v. Abdul-Matin, 397 N.J. Super. 574, 587 (App. Div. 2008), rev'd on other grounds, 198 N.J. 95 (2009). Indeed, this exclusion is included in the "typical policy endorsement, approved by the Commissioner of Insurance pursuant to N.J.S. 17:28-1.1(d)," quoted in Craig & Pomeroy, New Jersey Auto Insurance Law § 19.3 (2018). "In such situations, a reviewing court should typically defer to

an administrative agency's expertise." MetLife Auto & Home v. Palmer, 365 N.J. Super. 293, 299, 303 (App. Div. 2004) (distinguishing Rider).

Plaintiff raises "nothing that would suggest that the exclusion was invalidly included in the policy at issue." Hardy, 397 N.J. Super. at 587. No provision of N.J.S.A. 17:28-1.1 bars such an exclusion. See Christafano v. N.J. Mfg. Ins. Co., 361 N.J. Super. 228, 236 (App. Div. 2003) (distinguishing Rider because there the policy exclusion made N.J.S.A. 17:28-1.1(c) "surplusage").

Nor is the policy exclusion contrary to the purposes of the statute, which "is designed to 'provide maximum remedial protection to the innocent victims of financially irresponsible motorists' and to 'reduce the drain on the financially-troubled Unsatisfied Claim and Judgment Fund.'" Palmer, 365 N.J. Super. at 301 (quoting Shaw v. City of Jersey City, 174 N.J. 567, 571 (2002)). If plaintiff failed to carry insurance on the Cadillac when required to do so, he was not an innocent victim and would have no claim on the Fund.

Indeed, the policy's exclusion "supports the statutory 'policy of cost containment by ensuring that an injured, uninsured driver does not draw on the pool of accident-victim insurance funds to which he did not contribute.'" Aronberg v. Tolbert, 207

N.J. 587, 601 (2011) (citation omitted).[3] "Permitting uninsured vehicle owners to recover without contributing premiums to the insurance pool would increase premiums for those motorists who fulfill their statutory obligations by insuring their vehicles." Monroe v. City of Paterson, 318 N.J. Super. 505, 510-11 (App. Div. 1999).

Plaintiff argues that, even if he was required to insure the Cadillac, he was not precluded from recovery of non-economic loss, citing Dziuba v. Fletcher, 382 N.J. Super. 73 (App. Div. 2005), aff'd o.b., 188 N.J. 339 (2006). However, Dziuba was construing a narrower statutory provision barring only "loss sustained as a result of an accident while operating an uninsured automobile." Id. at 81 (quoting N.J.S.A. 39:6A-4.5(a)). Here, the policy took the broader approach of excluding all coverage for an owner of a motor vehicle which was uninsured when it was required to be insured. Our courts have sustained statutory exclusions of similar breadth. Perrelli v. Pastorelle, 206 N.J. 193, 204-05 (2011). "'[W]hen the terms of an insurance contract are clear, it is the

[3] Cf. Phillips, 66 N.J. at 292-94 (finding a policy's UM anti-stacking exclusion was repugnant to N.J.S.A. 17:28-1.1 because it denied an insured passenger "any recourse whatever to the UM coverage on his own car"); Rider, 354 N.J. Super. at 494-95, 500 (finding a policy's UM multi-policy exclusion repugnant because it denied an insured driver recourse to a policy in which he was a named insured).

function of a court to enforce it as written and not to make a better contract for either of the parties.'" Cypress Point, 226 N.J. at 415 (citation omitted); Christafano, 361 N.J. Super. at 235.

VI.

The trial court apparently failed to make the required inquiry whether plaintiff's intent not to operate the Cadillac in or around the time of the accident was manifest. Indeed, the court issued its summary judgment order without any oral or written opinion, in violation of Rule 4:46-2(c) and Rule 1:7-4(a). "When, as here, summary judgment disposing of the case is granted, the basis for the trial court's decision must be set forth clearly." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 n.8 (2010). "Failure to make explicit findings and clear statements of reasoning 'constitutes a disservice to the litigants, the attorneys, and the appellate court.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (citation omitted). Here, rather than remand for findings, we reverse because summary judgment was inappropriate on this record.

In Gibson, and again in Carmichael, we recognized that intent generally poses an issue of fact requiring resolution at trial:

> We recognize the difficulty of enforcing the exclusion in circumstances where the issue centers on the intent of the owner with regard

> to operation of the vehicle in or around the time of the accident. . . . An examination of the surrounding facts and circumstances is required in such an undertaking. The dispute is a factual one which generally cannot be decided based merely upon review of affidavits, certifications, or pleadings. . . .
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> We hold that when an insurer comes forward with proof that [the claimant is] the owner or registrant of an automobile registered or principally garaged in this State, who . . . lacks . . . coverage, a prima facie case of exclusion has been established. The . . . claimant must then come forward and show that the vehicle was not being operated in or around the time of the accident, based on a conscious determination to prevent use of the uninsured vehicle as demonstrated by the conduct of the owner or registrant. Although the burden of producing evidence that the vehicle was purposely not being operated shifts to the claimant, the ultimate burden of persuasion as to the appropriateness of the exclusion should not shift from the insurer.
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> [Carmichael, 310 N.J. Super. at 47-48 (quoting Gibson at 585-86).]

In Carmichael, we emphasized that "a court should be 'particularly hesitant' to apply the summary judgment model when dealing with a 'subjective element[] such as intent.'" Id. at 47 (alteration in original) (quoting Stanley & Fisher, P.C. v. Sissleman, 215 N.J. Super. 200, 212 (App. Div. 1987)). We reversed summary judgment because "[a]s in Gibson, the judge in this case decided the issue of intent based on certifications and deposition testimony without the benefit of a plenary hearing. Although

there was evidence to support the judge's conclusion, there was also evidence the other way[.]" Id. at 48.

Here, there was evidence pointing both ways. The evidence that the Cadillac was operable and parked near plaintiff's house suggested an ability and thus an intent to operate the Cadillac. However, plaintiff testified that, because he was traveling by bus, he stopped operating the Cadillac after moving to New Jersey some months before the accident, terminated its registration, turned in its license plates, cancelled the insurance, and parked the Cadillac off the street in a friend's yard.

The court could not simply discredit plaintiff's evidence. On summary judgment, "'"the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord [that party] the benefit of all legitimate inferences which can be deduced therefrom."'" Brill, 142 N.J. at 535 (citation omitted).

As in Carmichael, the conflicting evidence in "this case presented a genuine issue of material fact, the intent of the plaintiff at various times, which ought not to have been resolved on a motion for summary judgment," but must be determined at trial. 310 N.J. Super. at 49.

Reversed and remanded. We do not maintain jurisdiction.