SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2128-16T2

ERNEST EHRHARDT and BODY MIND NUTRITION,

Plaintiffs-Appellants,

v.

AMGUARD INSURANCE COMPANY,

Defendant,

and

KAPATOES INSURANCE SERVICES and MARK KAPATOES,

Defendants-Respondents.

Submitted November 27, 2017 – Decided December 7, 2017

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0424-15.

Merlin Law Group, PA, attorneys for appellants (Verne A. Pedro, on the briefs).

Zarwin Baum DeVito Kaplan Schaer Toddy, PC, attorneys for respondents (Lisa Z. Slotkin, of counsel and on the brief; Eitan D. Blanc, on the brief).

PER CURIAM

Plaintiffs appeal from the trial court's entry of summary judgment dismissing their claims against defendants Kapatoes Insurance Services, a licensed insurance producer, and Mark Kapatoes (collectively, "Kapatoes"). The dismissal was based on plaintiffs' failure to serve an Affidavit of Merit ("AOM"), pursuant to N.J.S.A. 2A:53A-26 to -29, attesting that defendants' conduct did not comport with applicable professional standards of care.

The trial court rejected plaintiffs' argument that no AOM is needed in this case because their claims against Kapatoes are allegedly founded solely upon "common knowledge" principles that require no supporting opinion from an insurance expert. For the reasons that follow, we affirm.

I.

Plaintiff Ernest Ehrhardt is the owner and operator of a medical practice and nutritional health business known as Body Mind Nutrition, which is the co-plaintiff in this case. The businesses operate out of two commercial properties in Basking Ridge owned by plaintiffs. Prior to April 2012, plaintiffs' businesses and property had been insured by certain insurance companies. That prior coverage included, among other things,

coverage for business interruption, "extra expense," and personal property losses.

Upon learning that their prior insurer would no longer continue coverage, plaintiffs contacted Kapatoes to obtain replacement coverage with a different insurer. After a series of e-mail exchanges and other communications, Kapatoes procured for plaintiffs a commercial business insurance policy with co-defendant, Amguard Insurance Company. The Amguard policy was effective for the one-year period from April 21, 2012 through April 21, 2013. Plaintiffs apparently paid the premiums due under that Amguard policy.

In October 2012, during the Amguard policy period, Superstorm Sandy struck New Jersey. The storm caused considerable damage to plaintiffs' business and property. Plaintiffs have estimated their damages from the storm to exceed $100,000. Accordingly, they presented a claim to Amguard for their losses.

Amguard paid plaintiffs only $8,911.10, a fraction of the claimed losses. Amguard asserted that the remaining portion of plaintiffs' damages were not covered under the terms of its policy. Among other things, Amguard determined that a portion of plaintiffs' claims was for excluded pre-existing damage, that losses resulting from off-site utility interruption were not covered, and that losses to inventory and business-related

personal property likewise were not covered. In addition, Kapatoes explained to plaintiffs that, although their previous insurer may have covered such losses, the Amguard policy did not.

In April 2015, plaintiffs filed a complaint in the Law Division against Amguard and Kapatoes. In Count One, plaintiffs sought a declaratory judgment ruling that their claimed losses were covered under the Amguard policy. In Count Two, plaintiffs asserted breach of contract claims against Amguard. In Counts Three and Four, plaintiffs sought compensatory damages against Kapatoes arising from a failure to procure proper coverage. Count Three asserted negligence and Count Four asserted breach of contract.

Specifically, in Count Three, plaintiffs alleged that if "Amguard is correct in its determination and denial [concerning a lack of coverage] . . . , then Defendant Kapatoes was liable for failing and neglecting to advise and inform Plaintiffs that the Insured Business was not adequately, properly and fully covered for property damage and business interruption loss, including business personal property, as [was] required and requested." Plaintiffs further alleged in Count Three that Kapatoes breached their duty to procure proper coverage, and to inform and advise them about the coverage obtained. As a direct proximate result,

plaintiffs were allegedly deceived about the scope of the actual insurance coverage, and were thereby harmed.

In Count Four of their complaint, alleging a breach of contract, plaintiffs contended they had requested and Kapatoes had agreed to procure from an insurer "replacement coverage . . . as comprehensive as [the policy] previously issued to [them] through prior insurance carriers." The alleged breach of contract caused plaintiff to be wrongfully deprived of an opportunity to purchase the "requested and required" coverage.

As the litigation progressed, plaintiffs voluntarily dismissed their claims against Amguard.[1] Plaintiffs did not obtain and serve an AOM with respect to Kapatoes, the remaining defendants. Although plaintiffs acknowledge that the Kapatoes firm as a licensed insurance producer and its principal Mark Kapatoes are within the ambit of the AOM statute, they maintain their claims against Kapatoes involve matters of "common knowledge" within the ken of a jury and, as such, do not require the service of an AOM.

It is undisputed that plaintiffs, having deliberately taken the position that no AOM is required to support their particular

[1] Given the dismissal, we need not address here the coverage and policy exclusion issues implicated under the Amguard policy.

claims against Kapatoes, did not serve an AOM within the 120-day maximum period prescribed under N.J.S.A. 2A:53A-27.[2] After the statutory 120 days expired, defendants moved to dismiss the claims against them because of the lack of an AOM. Plaintiffs opposed the motion, relying on the common knowledge doctrine. As part of their opposition, plaintiffs' presented the court with copies of various e-mails exchanged between January 2011 and June 2012 before the Amguard policy began. The e-mails generally reflected the efforts of Kapatoes to obtain a new policy for plaintiffs. Although a representative of plaintiffs appears to have been copied as a recipient on some of those e-mails, the parties have not contended that any of the e-mails emanated specifically from plaintiffs.

After hearing oral argument, the trial court granted defendants' motion to dismiss, based on the lack of an AOM. The court's reasons were detailed in a comprehensive written opinion issued by Judge Thomas C. Miller on December 2, 2016.

With respect to plaintiffs' negligence allegations in Count Three, Judge Miller characterized these as being "professional

[2] We note that no conference with the court took place pursuant to Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003), before or after the AOM deadline passed. However, we do not believe that any such Ferreira conference in this matter would have made a difference, in light of plaintiffs' steadfast legal position that no AOM is necessary.

negligence" claims falling within the scope of the AOM statute. The judge noted the undisputed fact that Kapatoes, as an insurance broker and producer, is expressly deemed by the Legislature to be a "licensed person" subject to the AOM requirement. See N.J.S.A. 2A:53A-26(o). As the judge observed, "[t]he purpose of the [Legislature's] inclusion of insurance producers within the realm of the protection offered by the AOM requirements is based upon the proposition that the intricacies of the insurance business are generally thought to be beyond the realm of understanding of the average juror."

Judge Miller rejected plaintiffs' reliance on the common knowledge doctrine. In doing so, the judge closely examined plaintiffs' allegations of negligence, set forth in Count Three of the complaint. The judge pointed out that plaintiffs specifically asserted that Kapatoes owed them "a duty to exercise reasonable skill, diligence and good faith in advising them and procuring specific insurance coverage on their behalf." Given the tenor of those claims, the judge declared them to be "exactly the type that requires an Affidavit of Merit."

The judge additionally dismissed plaintiffs' breach of contract claims in Count Four. Upon examining the nature of these allegations, the judge determined that they, too, implicated professional standards of care within the insurance producer

business and were "tantamount" to the claims of negligence. As the judge elaborated:

> At issue in this claim is whether Defendants breached the standard of care by not advising and assisting Plaintiff to procure an insurance policy which provided appropriate coverage for Plaintiff's business needs. What the standard of care requires of a broker or agent in regard to determining how specific clauses contained in complex insurance policies relate to specific business needs is not a matter within the province of a layperson's common knowledge. Nor is it within the province of a layperson's common knowledge to determine whether an insurance agent breached the standard of care in regard to his analysis and determination of whether a particular insurance policy's complex provisions satisfied his client's needs. Whether the standard of care required Defendants to procure insurance with different policy terms, including exclusions, based on Defendant's knowledge of Plaintiff's business is precisely the type of issue that requires an Affidavit of Merit and expert testimony. Plaintiff's claims, even if couched as a breach of contract claim, require proof of a deviation from a professional standard of care for insurance producers, and therefore required an Affidavit of Merit to be filed.
>
> [(Emphasis added).]

Lastly, the motion judge rejected plaintiffs' request to be granted more time to obtain and serve an AOM. The judge noted in this regard that nineteen months had passed since the filing of the complaint, plaintiffs had never requested an extension to serve an AOM, discovery had already ended, and plaintiffs never

moved to extend discovery. The judge further observed that the court's failure to hold a Ferreira conference did not toll the deadline for an AOM in the context presented here.

II.

Plaintiffs now appeal, arguing that the trial court misapplied the common knowledge exception in concluding that their negligence and breach-of-contract claims necessitated an AOM.

We review the legal issues presented under the AOM statute de novo. Triarsi v. BSC Grp. Servs. LLC, 422 N.J. Super. 104, 113 (App. Div. 2011) (citing Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Having done so, we affirm the trial court's dismissal of plaintiffs' claims, substantially for the thoughtful reasons expressed in Judge Miller's opinion. We add only a few comments.

Our courts have recognized that not all lawsuits against licensed professionals require an AOM. Case law has applied a "common knowledge" exception to the AOM requirement in discrete situations where expert testimony is not needed to establish whether the defendants' "care, skill or knowledge . . . fell outside acceptable professional or occupational standards or treatment practices." Hubbard v. Reed, 168 N.J. 387, 390 (2001). Those situations are limited to where the jurors' knowledge as laypersons suffices to enable them, using their ordinary

understanding and experience, to assess a defendant's alleged negligence without the benefit of specialized knowledge of experts. Id. at 394. "[T]he threshold of merit should be readily apparent from a reading of the plaintiff's complaint." Id. at 395.

Thus, in Hubbard, the Supreme Court ruled that the common knowledge exception applied to a negligence claim against a dentist who had pulled the wrong tooth. Id. at 396-97. As the Court instructed in Hubbard, the common knowledge exception is construed narrowly in order to avoid non-compliance with the legislative objectives of the AOM statute. Id. at 397. See also Triarsi, supra, 422 N.J. Super. at 116-17 (holding that the common knowledge exception did not apply to breach of fiduciary duty claims asserted against an insurance broker and an agent because those claims implicated professional standards of care, but the exception did apply to claims for breach of a "special relationship" with respect to the defendants' conduct in allowing plaintiff's life insurance policy to be cancelled for non-payment).

Here, the trial court logically found that plaintiffs' negligence claims against Kapatoes substantially encompassed professional standards of care within the insurance producer industry, and are not amenable to fair evaluation by lay jurors merely based on their common knowledge.

The selection of appropriate coverage for an insured business, and an understanding of the complexities of insurance policy definitions, exclusions, and exceptions, is patently a subject outside of the understanding of lay jurors lacking the benefit of expert testimony. Indeed, the insurance business in our State is highly regulated by a complex and intricate scheme of statutes and regulations. See generally N.J.S.A. 17:1-1 to 17:52-27; N.J.A.C. 11:17-1.1 to -7.7. See also Triavsi, supra, 422 N.J. Super. at 115-16. The propriety of an insurance producer's conduct in selecting and obtaining appropriate coverage for an insured's business — involving, for example, such technical concepts as "off-site business interruption" — manifestly calls for expert testimony. See N.J.R.E. 702.

We reach the same conclusion respecting plaintiffs' breach of contract claims. The label applied by the plaintiffs to those claims as being "contract-based" rather than "negligence-based" is not dispositive. See Couri v. Gardner, 173 N.J. 328, 340 (2002). What is dispositive to the AOM analysis is the actual substance of the claims, and the extent to which the claims fundamentally concerns whether the professional defendant's conduct "fell outside acceptable professional or occupational standards." Id. at 334.

We agree with Judge Miller that plaintiffs' contract claims here fall within the classification requiring an AOM. We are mindful that Count Four alleges that plaintiffs sought coverage "as comprehensive as those [in the policies] previously issued" to them. However, the assessment of what coverage in a certain insurance policy is equally "comprehensive" as the coverage provided in another insurer's policy can readily entail a sophisticated assessment of policy-specific language, definitions, exclusions, exemptions, and the like. Lay jurors are simply not equipped to make those assessments.

Moreover, plaintiffs have provided no contemporaneous documentation, nor any motion affidavit, to establish that they had specifically requested Kapatoes to furnish identical coverage with a different insurer. As we noted, the e-mails provided in the record do not appear to include any communications from plaintiffs to Kapatoes making such an explicit request, nor any reciprocal promise by Kapatoes to fulfill such request. In fact, at least one of the e-mails suggests a desire to explore a "cheaper" premium, indicating a possible willingness by the insured to accept non-identical coverage for a lower cost. In any event, plaintiffs have failed to demonstrate that these issues of replacement coverage can be litigated fairly and sensibly in the absence of supporting expert opinion.

Finally, we affirm the trial court's denial of an extension of time for plaintiffs to obtain an AOM. This is not a situation in which plaintiffs reasonably could have been caught off-guard by a novel interpretation of an unsettled question of law. Cf. Shamrock Lacrosse, Inc. v. Klehr, Harrison, Branzburg & Ellers, LLP, 416 N.J. Super. 1, 28-29 (App. Div. 2010). Instead, this is a situation in which the established law is clear, and where the need for an AOM should have been apparent from the outset.

Affirmed.