SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0501-20

KEITH M. WITTE, OLHA WITTE and OLIVIA M. WITTE, a minor, by and through her natural parent and guardian ad litem, OLHA WITTE,

Plaintiffs-Respondents,

v.

MARIA AVINION and ALLSTATE INSURANCE COMPANY,

Defendants,

and

AURORA D. MARZANO and NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Defendants-Appellants.

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Argued September 16, 2021 – Decided November 15, 2021

Before Judges Gilson and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4390-19.

Stephen J. Foley, Jr., argued the cause for appellants (Campbell, Foley, Delano & Adams, LLC, attorneys; Stephen J. Foley, Jr., on the briefs).

Brian D. Barr argued the cause for respondents (Cooper Levenson, PA, attorneys; Brian D. Barr and Jennifer B. Barr, on the briefs).

PER CURIAM

In this insurance coverage dispute, defendants New Jersey Manufacturers Insurance Company (NJM) and its insured, Aurora Marzano, appeal from the May 13, 2020 Law Division order[1] granting summary judgment to plaintiffs Keith and Olha Witte, and their daughter, Olivia, and the June 23, 2020 order deeming plaintiffs successful claimants entitled to an award of counsel fees pursuant to Rule 4:42-9(a)(6).[2] Plaintiffs filed a declaratory judgment action seeking liability insurance coverage from NJM for injuries they sustained in an automobile accident that occurred on December 26, 2018, involving a vehicle

[1] A final order was entered on October 16, 2020, dismissing with prejudice the other named defendants from the case, allowing the appeal as of right of the May 13, 2020 order pursuant to Rule 2:2-3(a).

[2] A counsel fee award of $16,500 was later agreed upon by the parties and memorialized in a September 22, 2020 consent order.

owned by Marzano's son, Brian Avinion, insured by Allstate Insurance Company (Allstate), and operated by Marzano's daughter, Maria Avinion. Both Brian[3] and Maria resided with Marzano. Although Maria was listed as a covered driver on her mother's automobile insurance policy with NJM at the time of the accident, NJM disclaimed coverage, contending Maria was not the named insured and was not operating an auto covered by the NJM policy. In granting summary judgment to plaintiffs on the parties' cross-motions, after examining the policy language, the judge rejected NJM's contention and determined Maria was entitled to coverage for the accident under the NJM policy.

On appeal, defendants raise the following points for our consideration:

> POINT I: THE INSTANT APPEAL IS SUBJECT TO DE NOVO REVIEW FOR WHICH NO DEFERENCE IS DUE TO THE TRIAL COURT'S DETERMINATION OF LAW.
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> POINT II: THE TERMS OF NJM'S EXCLUSION ARE CLEAR AND UNAMBIGUOUS AND SHOULD HAVE BEEN ENFORCED BY THE TRIAL COURT AS WRITTEN.
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> POINT III: THE DECLARATIONS PAGE OF NJM'S POLICY PROVIDED NO BASIS TO EXPECT DEFENDANT MARIA AVINION TO BE COVERED BY NJM FOR HER OPERATION OF HER BROTHER BRIAN'S CAR.

[3] We refer to the Avinions by their first names to avoid any confusion caused by their common surname and intend no disrespect.

> POINT IV: REVERSAL OF THE TRIAL COURT'S ORDER REQUIRING NJM TO PROVIDE LIABILITY INSURANCE COVERAGE TO MARIA AVINION WARRANTS REVERSAL OF THE COURT'S SUBSEQUENT DETERMINATION THAT PLAINTIFFS WERE "SUCCESSFUL CLAIMANTS" ENTITLED TO AN AWARD OF ATTORNEYS' FEES PURSUANT TO [RULE 4:42-9(A)(6)]. (NOT RAISED BELOW).

Having considered the arguments and applicable legal principles, we affirm.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment cross-motions, viewed in the light most favorable to the non-moving parties. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Prior to the accident, Maria resided with her mother and brother in Union Beach since February 2018. In December 2018, there were five vehicles garaged at the residence. Three of the vehicles, consisting of a Chevrolet four-door sedan and two Dodge vans, were listed on an NJM policy issued to Marzano. The listed drivers on the NJM policy were Maria and Marzano. The other two vehicles in the household, one of which was a Nissan Rogue, the vehicle involved in the accident, were owned by Brian and insured by Allstate. During her deposition, Maria testified she drove the Nissan Rogue "[m]aybe two times

a month." In fact, she alternated between driving the Chevrolet and the Nissan Rogue roughly two times a month. While Marzano paid the monthly NJM premiums, Maria testified she contributed periodically by "giving her [mother] [fifty dollars] every time she . . . ask[ed her], but it [was not] really monthly." NJM admitted "charg[ing] a premium for Maria . . . as a driver/operator."

On December 26, 2018, Maria was driving the Nissan Rogue when she struck plaintiffs while they were crossing a street in Red Bank, running over then six-year-old Olivia. As a result, Olivia suffered extensive facial injuries, tissue loss, and other orthopedic injuries and required surgery. Her parents also sustained significant orthopedic injuries. Plaintiffs sued Maria and her brother and Allstate provided liability insurance coverage in connection with that lawsuit. When plaintiffs made a demand on NJM to provide excess liability insurance coverage to Maria, NJM disclaimed coverage based upon the policy's exclusion of coverage for damages arising from an "insured's," other than the "named insured's," operation of a family member's vehicle not listed in the policy declarations.

At the time of the accident, the NJM policy declarations endorsement identified Marzano as the named insured and listed Marzano and Maria as covered drivers. The Chevrolet and the two Dodge vans were listed as covered

vehicles with $500,000 liability coverage for each accident, as well as other limits and deductibles. Accompanying the declarations endorsement was NJM's nineteen-page standard auto policy, divided into seven parts in addition to definitions and endorsements sections.

Part A of the policy described liability coverage as follows:

> A. We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of the policy limits. We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.
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> B. Insured as used in this Part means:
>
> > 1. You or any family member for the ownership, maintenance or use of any auto or trailer;
> >
> > 2. Any person using your covered auto
> >
> > . . . .

Part A also contained the following exclusions relative to the use of a family member's vehicle:

> B. We do not provide Liability Coverage for the ownership, maintenance or use of:

. . . .

3. Any vehicle, other than your covered auto, which is:

a. Owned by any family member; or

b. Furnished or available for the regular use of any family member.

However, this Exclusion (B.3.) does not apply to your maintenance or use of any vehicle which is:

a. Owned by a family member; or

b. Furnished or available for the regular use of a family member.

Part A further limited the scope of liability coverage as follows:

OTHER INSURANCE:

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own, including any vehicle while used as a temporary substitute for your covered auto, shall be excess over any other collectible insurance.

In the definitions section, the policy defined "you and your" as referring to "the named insured shown in the Declarations" and "the spouse" or "civil union" partner of the named insured. "Family member" was defined as "a person related

. . . by blood, marriage, civil union . . . or adoption who is a resident of [the named insured's] household."

On December 13, 2019, plaintiffs filed a declaratory judgment complaint against NJM, Marzano, Maria, and Allstate seeking to have NJM provide excess liability insurance coverage for the accident to Maria as an insured driver under the policy. Following discovery, NJM moved for summary judgment, seeking the dismissal of plaintiffs' claims on the ground that the vehicle Maria was driving when the accident occurred was not one of the covered vehicles insured under Marzano's automobile policy with NJM, and Maria was not the named insured as defined in the NJM policy and therefore did not qualify for the exception to the exclusion contained in B.3. Thus, according to NJM, the B.3. exclusion barred any coverage to Maria under the NJM policy.

Plaintiffs opposed NJM's motion and cross-moved for summary judgment, asserting Maria was expressly included as an insured driver on NJM's declarations page, which did not identify or set forth any exclusions or circumstances where she would not be covered or insured for an automobile accident, NJM charged a premium for Maria as a driver under the policy, Maria had lived with her mother for approximately eight months before the accident,

and Maria expected the NJM liability policy would cover her for any accidents in which she was a driver.

Following oral argument conducted on April 9, 2020, the motion judge entered two orders: one dated May 13, 2020, denying defendants' motion for summary judgment and granting plaintiffs' cross-motion for summary judgment; and another dated June 23, 2020, deeming plaintiffs successful claimants entitled to counsel fees pursuant to Rule 4:42-9(a)(6). In the statement of reasons accompanying the May 13 order, the judge recounted the undisputed facts as agreed to by the parties, detailed the respective arguments, cited the applicable legal principles, reviewed the policy language, and explained her rationale.

The judge cited Lehrhoff v. Aetna Casualty & Surety Co., 271 N.J. Super. 340 (App. Div. 1994), where we declined to apply hidden policy language that departed from reasonable expectations of coverage created by a declarations page "unless the declaration[s] page itself clearly so warns the insured." Id. at 347. We were "convinced that it is the declaration[s] page, the one page of the policy tailored to the particular insured and not merely boilerplate, which must be deemed to define coverage and the insured's expectation of coverage." Ibid. The judge found equally persuasive Araya v. Farm Family Casualty Insurance

Co., 353 N.J. Super. 203 (App. Div. 2002), where we specifically addressed the entitlement to insurance coverage of "the covered drivers listed in the Declarations Page" where the covered drivers were different from the named insured, and again "recognized the singular importance of the Declarations Page as the best indicator of what an insured's reasonable expectations should be." Id. at 209-211 (citing Lehrhoff, 271 N.J. Super at 346-347).

Consistent with the principles in Lehrhoff and Araya, the judge concluded Maria was "entitled to coverage under the NJM policy" as "she reasonably expected in accordance with the declaration[s] page of the policy." The judge explained:

> NJM concedes inclusion of Maria Avinion as a listed insured on its own declaration[s] page. NJM's declaration[s] page does not state[] that the insured information on the declaration[s] page is "subject to the terms of the policy." The specific limits, coverages, deductibles, insured vehicles, and discounts are specifically identified and referenced on the NJM declarations. NJM does not identify, point out, or advise that Maria Avinion would not be covered if she was driving someone else's, or even a different family member's[] vehicle. NJM should not be allowed to "take away coverage" that is specifically identified in the declarations . . . . in a boilerplate exclusion.

The judge was satisfied "the declaration[s] page could reasonably have led Maria Avinion to believe" she was "a covered driver under the policy." The judge elaborated further:

> Maria Avinion was listed on the declaration[s] page as a "covered" driver. Maria Avinion paid premiums as a covered driver under the NJM policy. Even under the terms of the NJM policy, if Aurora Marzano had been operating the vehicle, she would have been covered . . . for this accident. Both Aurora Marzano and Maria Avinion are identified, and the only listed premium paying drivers under the NJM policy . . . . This is not a situation where use of the vehicles increases the risk on the insurance company without increase in the premium. Marzano and [Maria] insured and paid premiums for three . . . vehicles and two . . . drivers – including Maria Avinion. NJM admittedly charged premiums for Maria Avinion's operation of automobiles. [] The mere fact that Maria Avinion was operating her brother's vehicle at the time of the accident does not overcome her reasonable expectations of coverage under the NJM policy. Courts have refused to allow insurance companies to accept premiums and then disclaim coverage – exactly the case before the [c]ourt. NJM's declaration[s] page does not identify any exclusions or specifically reference any exclusions or limits of coverage when its insured driver, Maria Avinion, operates a family member's vehicle.
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> The [c]ourt finds that it would be fundamentally unfair to allow a driver who believed she was covered because she was listed as a "covered" driver, as well as paid premiums into the policy under the belief that she was covered, to be disclaimed coverage under the

> policy because of exclusion language buried deep in the policy.

In this ensuing appeal, NJM argues the judge "erred in [her] application of the law to the undisputed facts of th[e] case." NJM asserts the judge's reliance on Lehrhoff and Araya is misplaced because "neither involved the identification of the vehicles for which those coverages were provided." According to NJM, its "[B.3.] Exclusion . . . bars coverage for [Maria's] operation of her brother's car at the time of the December 26, 2018 accident" and because Maria was not "the policy's 'named insured,'" she does not "fall within the exception to the exclusion" applicable to Marzano. NJM adds "neither [p]laintiffs nor the trial court identified any ambiguity in the exclusion or in the definitional terms of the policy."

We review a grant of summary judgment applying the same standard used by the trial court. Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016). That standard is well-settled.

> [I]f the evidence of record — the pleadings, depositions, answers to interrogatories, and affidavits — "together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.

> [Ibid. (quoting R. 4:46-2(c)) (citing Brill, 142 N.J. at 540).]

Where, as here, there is no genuine issue of material fact, we must "decide whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Turning our discussion to the legal principles governing insurance contract interpretation, two well-settled principles guide our analysis:

> First, in enforcing an insurance policy, courts will depart from the literal text and interpret it in accordance with the insured's understanding, even when that understanding contradicts the insurer's intent, if the text appears overly technical or contains hidden pitfalls, cannot be understood without employing subtle or legalistic distinctions, is obscured by fine print, or requires strenuous study to comprehend.
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> [Zacarias v. Allstate Ins. Co., 168 N.J. 590, 601 (2001) (citations omitted).]

"On this score, under the longstanding 'doctrine of reasonable expectations,' courts should give effect to 'the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of

insurance contracts.'" Cassilli v. Soussou, 408 N.J. Super. 147, 153 (App. Div. 2009) (quoting Zacarias, 168 N.J. at 595). Under the reasonable expectations doctrine, "an objectively reasonable interpretation of the average policyholder is accepted so far as the language of the insurance contract in question will permit." DiOrio v. N.J. Mfrs. Ins. Co., 79 N.J. 257, 269 (1979).

To that end, in Lehrhoff, we held that a policy holder's "reasonable expectations of coverage raised by the declaration[s] page cannot be contradicted by the policy's boilerplate," whether or not in plain language, "unless the declaration[s] page itself clearly so warns the insured." 271 N.J. Super. at 347. In Zacarias, our Supreme Court "share[d] the sentiments expressed" in Lehrhoff that "the one page most likely to be read and understood by the insured [was] the declarations sheet" and urged insurers "to explore ways to incorporate as much information as may be reasonably included in the declarations sheet." Zacarias, 168 N.J. at 602-04.

Thus, the average policyholder does not have a duty to "chart his [or her] own way through the shoals and reefs of exclusions," and may rely solely on his or her reasonable expectations flowing from the representations on the declarations page to determine the extent of his or her coverage. Lehrhoff, 271 N.J. Super. at 347. "Of course, for a policyholder's expectations to govern over

the plain language of an insurance contract, his or her expectations must be objectively reasonable." Cassilli, 408 N.J. Super. at 154 (citing Clients' Sec. Fund of the Bar of N.J. v. Sec. Title & Guar. Co., 134 N.J. 358, 372 (1993)).

Second, "the words of an insurance policy are to be given their plain, ordinary meaning," Zacarias, 168 N.J. at 595, and the plain terms of the contract will be enforced as long as the "'entangled and professional interpretation of an insurance underwriter is [not] pitted against that of an average purchaser of insurance,' or the provision is not so 'confusing that the average policyholder cannot make out the boundaries of coverage.'" Id. at 601 (alteration in original) (first quoting DiOrio, 79 N.J. at 270; then quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)). Thus, where an ambiguity exists, "courts will construe ambiguous language in favor of coverage for the insured." Cassilli, 408 N.J. Super. at 154 (citing Doto v. Russo, 140 N.J. 544, 556 (1995)). "An ambiguity exists in an insurance contract '[w]hen an insurance policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured . . . .'" Ibid. (alterations in original) (quoting President v. Jenkins, 180 N.J. 550, 563 (2004)). However, "[i]n the absence of ambiguity, . . . a court must enforce the policy as written." Ibid. (citing Priest v. Roncone, 370 N.J. Super. 537, 544 (App. Div. 2004)).

These general rules of construction have spawned a universal recognition that "where the policy provision under examination relates to the inclusion of persons other than the named insured within the protection afforded, a broad and liberal view is taken of the coverage extended." Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, Switzerland, 35 N.J. 1, 8 (1961). "But, if the clause in question is one of exclusion or exception, designed to limit the protection, a strict interpretation is applied." Ibid. We have previously distinguished the two classes of covered individuals in an insurance contract as follows:

> [T]he term "named insured" is self-defining. The term refers only to the names so appearing in the declaration[s sheet].
>
> On the other hand, an insured is any one who is entitled to coverage. This coverage may result by virtue of a person's status as an operator or occupier of a covered auto.
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> [Botti v. CNA Ins. Co., 361 N.J. Super. 217, 226 (App. Div. 2003) (citations omitted).]

"In other words, those listed as 'named insureds' are not necessarily the only individuals covered under the policy," and "[o]ther individuals not listed as 'named insureds' may be entitled to liability coverage under certain circumstances enumerated by the policy." Cassilli, 408 N.J. Super. at 155 (internal citations omitted). "Thus, being an 'insured' under a policy 'is a

combination of status and circumstance,'" ibid. (quoting Webb v. AAA Mid-Atl. Ins. Grp., 348 F.Supp.2d 324, 331 (D.N.J. 2004)), and, undoubtedly, being a covered driver would render one "a potential insured," entitled to coverage under the policy. Ibid. (emphasis omitted).

With these principles in mind, we turn to the governing language in the policy at issue. NJM essentially argues coverage should be denied because Maria was not a named insured and was not driving one of the covered vehicles listed on the policy. In our view, several factors support the conclusion that Maria is entitled to coverage for the December 2018 accident under the NJM policy. First, we agree with the judge that the "reasonable expectations doctrine" espoused in Lehrhoff supports providing coverage for Maria. Undeniably, NJM's declarations page listed Maria as a covered driver under the policy and does not identify any exclusions limiting coverage when operating a family member's vehicle. Instead, the exclusionary language is hidden elsewhere in the policy. Under these circumstances, Maria's reasonable expectations of coverage raised by the declarations page cannot be contradicted by the policy's exclusionary language contained elsewhere.[4]

[4] To support its contention that Maria had no expectation of coverage, NJM points to Maria's deposition testimony in which she professed ignorance "about

Further, it is noteworthy that NJM acknowledges that if Marzano had been operating the vehicle, she would have been covered under the exception to the exclusion. Based on the language in the declarations page, as a covered driver, Maria is entitled to the same benefit. The drafters of the NJM policy could have easily and unambiguously disclaimed liability for listed drivers by carving out an exception on the declarations page specifying that unless you are a named insured, the policy only provides you with coverage if you are operating one of the listed covered autos. Because the declarations page provided no such warning to Maria, the "reasonable expectations doctrine" controls. Indeed, as we acknowledged in Lehrhoff, "[t]he interpretation of insurance contracts to accord with the reasonable expectations of the insured, regardless of the existence of any ambiguity in the policy, constitutes judicial recognition of the unique nature of contracts of insurance." Id. at 348 (quoting Sparks v. St. Paul Ins. Co., 100 N.J. 325, 338 (1985)).

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insurance" while acknowledging that "all the[] cars [were] insured" and her expectation that she would be covered by liability insurance when involved in an accident in which she was driving. However, not only does Maria's deposition testimony not support defendants' position but it is the objectively reasonable expectations of "the typical automobile policyholder," Lehrhoff, 271 N.J. Super. at 348, or the "intended beneficiar[y]," Cassilli, 408 N.J. Super. at 153, that controls.

Thus, based on our de novo review, we are satisfied the judge properly granted summary judgment to plaintiffs. After oral argument, we granted NJM's motion to file a supplemental brief citing Cassilli to support its contention that the exclusion is not ambiguous. However, because we affirm the judge's decision based on the "reasonable expectations doctrine," we need not address that contention. Additionally, because defendants' only basis for challenging the award of counsel fees under Rule 4:42-9(a)(6) is the purported "error committed by the trial court in granting [p]laintiffs' cross-motion for summary judgment," we likewise find no error in the award. See R. 4:42-9(a)(6) (allowing a court to award counsel fees "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant").

Affirmed.