

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1115-20

KNIGHTBROOK INSURANCE
COMPANY,

Plaintiff-Respondent,

v.

CAROLINA TANDAZO-
CALOPINA and JOSE
SANCHEZ,

Defendants,

and

LIBERTY INSURANCE
CORPORATION,¹

Defendant-Appellant.

APPROVED FOR PUBLICATION

May 16, 2022

APPELLATE DIVISION

Submitted April 25, 2022 – Decided May 16, 2022

Before Judges Sabatino, Rothstadt, and Mayer.

On appeal from the Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-1056-20.

¹ Improperly plead as Liberty Mutual Insurance Company.

Connell Foley LLP, attorneys for appellant (William P. Krauss, of counsel and on the briefs).

Delany Law, PC, attorneys for respondent (Stephen T. Kulp, of counsel and on the brief).

The opinion of the court was delivered by
MAYER, J.A.D.

Defendant Liberty Insurance Corporation (Liberty) appeals from a November 20, 2020 order granting summary judgment to plaintiff KnightBrook Insurance Company (KnightBrook). The motion judge concluded KnightBrook "owe[d] no indemnity or defense for claims presented by any party in connection with the instant June 27, 2013 accident as a result of [its insured]'s deliberate failure to cooperate with the investigation of the claim and the defense of the litigation resulting in breach of the KnightBrook Insurance Company [p]olicy." We reverse.

We provide the facts from the summary judgment motion record in extensive detail to provide context for the issue on appeal. In this matter, we consider whether KnightBrook validly disclaimed coverage for its insured, defendant Carolina Tandazo-Calopina (Calopina), arguing it suffering appreciable prejudice based on Calopina's failure to cooperate as required under KnightBrook's policy.

In August 2012, KnightBrook issued a commercial automobile policy providing liability coverage for Calopina's vehicle associated with her taxi business. KnightBrook's policy contained a provision, known as the duty of an insured to cooperate, governing the duties of an insured in the event of an accident, claim, injury, or suit. Under this provision, Calopina had a contractual obligation to notify KnightBrook of any accident, cooperate and assist KnightBrook in matters relevant to any claim or suit, submit to examination, and provide statements under oath. KnightBrook's policy notified Calopina that "[f]ailure to comply with these (or other conditions) can alter or void our obligations under this policy."

On June 27, 2013, Calopina's taxi rear ended a 1993 Chevy wagon driven by defendant Jose Sanchez (Sanchez).² According to the police report, Calopina stated she "attempt[ed] to brake, but her brakes failed, causing her to rear end" Sanchez's car. Immediately after the accident, Sanchez complained of numbness throughout his body and emergency medical services transported him to a local hospital.

At the hospital, Sanchez reported pain in his neck, back, and right hip. He also complained of a headache. The hospital discharged Sanchez the same

² Calopina had three passengers in her taxi at the time of the accident – a woman and two children. Because Calopina's passengers left the scene of the accident prior to the arrival of the police, their identities are unknown.

day, giving him pain medication and advising he follow-up with his primary care doctor.

In testimony provided under oath, Sanchez described the accident. Sanchez was stopped at a red light at the moment of impact. There were no brake sounds prior to Sanchez hearing and feeling what he described as a "pung." Although Sanchez wore a seatbelt, his chest struck the steering wheel.³ Sanchez described being knocked out for a second or two after the impact. He remained seated in his car after the collision and Calopina came to his driver's side window. According to Sanchez, Calopina explained she was talking to her passengers, got distracted, and lacked sufficient time to brake. After speaking with Calopina, Sanchez got out of his car and took pictures of the damage to both cars. The road where the accident occurred had a posted speed limit of twenty-five miles per hour. However, Sanchez testified people routinely exceeded the posted speed limit, travelling between thirty and forty miles per hour.

³ Sanchez's 1993 Chevy wagon lacked front airbags because automobile manufacturers were required to install airbags only for new cars sold after 1998.

Shortly after the collision, KnightBrook received notice of the accident.⁴ According to internal notes from KnightBrook's claims department dated August 12, 2013, KnightBrook contacted Sanchez and obtained the name of his attorney. The notes further indicated KnightBrook reserved an amount of money for property damage to Sanchez's car, identified as "rear end damage/possible total loss," and Sanchez's bodily injury claim.⁵ KnightBrook's notes confirmed Calopina's car was fully insured on the date of the accident.

Another KnightBrook document, dated June 28, 2014 and entitled "File Summary and Review," confirmed Calopina's car was insured on the date of the accident and there were no coverage issues. The File Summary and Review indicated Sanchez signed medical authorizations for KnightBrook to verify his accident-related treatment with various medical providers.

In a July 28, 2014 internal note from KnightBrook's claims department, the insurance company received an estimate of \$418.27 to repair the damage to Sanchez's car. The same note included the name of Sanchez's attorney and counsel's contact information. According to this note, Sanchez's attorney

⁴ The record lacks information explaining how KnightBrook obtained information regarding the accident.

⁵ The dollar amount KnightBrook reserved for Sanchez's property damage and personal injury claims is redacted.

related his client suffered injuries to his neck, low back, and right hip and received orthopedic and chiropractic treatment for those injuries. The note reiterated there were no coverage issues.

In September 2014, Sanchez filed a personal injury action against Calopina (personal injury action). On October 26, 2014, Calopina's father accepted service of the complaint. Calopina did not notify KnightBrook she was served with the complaint. Nor did she provide a copy of the complaint to KnightBrook.

However, KnightBrook obtained a copy of the complaint in the personal injury action because it sent a letter to Calopina asking her to contact its claims adjuster.⁶ KnightBrook also assigned counsel to represent Calopina in the personal injury action. In a November 5, 2014 letter, based on the repair estimate for Sanchez's car, KnightBrook informed Sanchez's attorney the matter involved "a very minor impact."

Calopina's assigned counsel filed an answer in the personal injury action and propounded discovery. In April 2015, Calopina's counsel responded to Sanchez's interrogatories. Calopina's attorney took Sanchez's deposition on August 11, 2015.

⁶ While not indicated in the record, we presume KnightBrook received a copy of the pleading from Sanchez's attorney.

On December 22, 2015, KnightBrook sent a letter to a person Calopina designated to receive communications.⁷ The letter advised KnightBrook would handle Calopina's defense in the personal injury action under a "strict [r]eservation of [r]ights" based on Calopina's "continued refusal to cooperate with [assigned] defense counsel." Nothing in the reservation of rights letter suggested a dispute concerning coverage for the accident.

The reservation of rights letter also informed Calopina her deposition would be conducted on December 30, 2015 pursuant to a court order and a "Spanish interpreter [would] be provided" The letter stated, "[s]hould you fail to contact [assigned defense counsel] immediately, we will be forced to consider withdrawing your defense and coverage for this claim." Calopina did not appear for her court-ordered deposition. About one week later, based on her failure to appear at the deposition, Sanchez's attorney filed a motion to bar Calopina's testimony at trial.

In a January 13, 2016 letter, KnightBrook informed Calopina it was withdrawing her defense in the personal injury action and would not provide coverage for the accident. The letter confirmed Calopina rejected KnightBrook's efforts to gain her cooperation through "[p]hone calls, letters

⁷ There is a suggestion in the record that Calopina did not read, speak, or understand English and may have designated someone on her behalf to respond to inquiries regarding the accident.

and [KnightBrook's] private investigator[]." Because Calopina violated the conditions of her insurance policy by refusing to cooperate and failing to appear for her court-ordered deposition, KnightBrook declared Calopina forfeited coverage for the personal injury action. About a week later, Sanchez's attorney obtained a court order barring Calopina's trial testimony in the personal injury action.

Because Calopina no longer had insurance coverage, Sanchez filed an amended complaint asserting a claim for uninsured motorist (UM) benefits against his insurance carrier, Liberty. Liberty moved for summary judgment, arguing Sanchez failed to prove Calopina was uninsured and, therefore, Liberty had no obligation to provide UM coverage. The judge denied Liberty's motion, finding Liberty's obligation to pay UM benefits depended on whether KnightBrook validly forfeited Calopina's insurance coverage.

As a result, all counsel in the personal injury action, including Calopina's assigned attorney, agreed to dismiss that litigation. Upon dismissal of the personal injury action, Sanchez intended to file a declaratory judgment action against KnightBrook to resolve the coverage issues. On July 27, 2018, Sanchez's counsel signed and filed a voluntary stipulation of dismissal without prejudice in the personal injury action.

In June 2019, Sanchez filed a declaratory judgment action against KnightBrook, seeking a judicial determination KnightBrook had an obligation to defend and indemnify Calopina (2019 declaratory judgment action). In addition, Sanchez reasserted his personal injury claims against Calopina and his demand for UM coverage against Liberty. Liberty and Calopina filed answers in the 2019 declaratory judgment action.⁸

In February 2020, KnightBrook filed its own declaratory judgment action, requesting the court validate its disclaimer of insurance coverage based on Calopina's failure to cooperate (2020 declaratory judgment action).⁹ In August 2020, KnightBrook moved for summary judgment in the declaratory judgment actions. Liberty and Sanchez opposed KnightBrook's motion.

The motion judge heard the arguments of counsel on November 20, 2020. In an oral decision, the judge found KnightBrook established appreciable prejudice and was entitled to disclaim coverage based on Calopina's failure to cooperate in the personal injury action. The judge explained KnightBrook met its burden by demonstrating it irretrievably lost substantial rights as a result of Calopina's breach of the conditions of the

⁸ KnightBrook retained a different law firm to represent Calopina in the 2019 declaratory judgment action.

⁹ In a February 25, 2020 consent order, the two declaratory judgment actions were consolidated.

insurance policy. She also concluded Calopina's failure to cooperate negatively affected the likelihood of success in defending Calopina in the personal injury action. In granting KnightBrook's motion for summary judgment, the judge "declar[ed] that KnightBrook ha[d] no duty to provide coverage to [Calopina], or to indemnify [Calopina] against the claims being made against her in the underlying action in [the] Superior Court"

The judge made the following factual findings regarding Calopina's refusal to cooperate in the personal injury action. The judge found Calopina failed to notify KnightBrook of the accident, failed to forward a copy of the complaint to KnightBrook, failed to respond to letters sent to her by KnightBrook, failed to appear for deposition on four occasions, and failed to speak with her assigned counsel. The judge explained Calopina's testimony was barred in the personal injury action, causing KnightBrook to suffer prejudice.¹⁰ The judge also relied on the letters from KnightBrook to Calopina advising her it reserved the right to decline coverage and withdraw its representation in the personal injury action if Calopina refused to cooperate.

¹⁰ The only order barring Calopina from testifying at trial related to the personal injury action filed in 2014, which was dismissed without prejudice in 2018. There is nothing in the record indicating Calopina is barred from testifying in either declaratory judgment action.

The judge found Calopina's refusal to cooperate in the personal injury action deprived KnightBrook of the following:

[the] rights to explore defenses, to call witnesses, to be able to assert whether or not they would be able to [t]ake other action, join parties if necessary. . . . They were deprived of the opportunity to obtain available facts, information, to determine what strategy, how they would proceed in the lawsuit to obtain additional discovery that perhaps they would have discovered as a result of [Calopina's] cooperation. They were deprived of having a witness who would assist them at trial, and at any proceeding, in whatever their strategy was in defending their client. They couldn't assert certain defenses without her cooperation. They couldn't determine . . . the manner in which they would proceed in the lawsuit without [Calopina's] cooperation.

The judge found nothing in the record established a language barrier preventing Calopina from cooperating with KnightBrook. Nor did the judge find any evidence that Calopina "requested an accommodation because of a language barrier"

While the judge found KnightBrook suffered appreciable prejudice, the judge stated, "there is no issue before the [c]ourt as to whether [Calopina] was covered KnightBrook has acknowledged that" KnightBrook has not challenged this aspect of the motion judge's ruling.

On appeal, Liberty argues the judge erred in granting summary judgment because KnightBrook failed to demonstrate appreciable prejudice to be entitled to disclaim Calopina's coverage. We agree and reverse.

We review a trial judge's decision on a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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).

New Jersey requires "a showing of prejudice before a contract of insurance may be avoided." Pfizer, Inc. v. Emps. Ins. of Wausau, 154 N.J. 187, 206 (1998). In Cooper v. Government Employees Insurance Co., 51 N.J. 86, 94 (1968), our Supreme Court held it would be unfair for an insured to lose insurance coverage where there is no likelihood the insurer was prejudiced by the policy breach. In Cooper, the Court concluded "the carrier may not forfeit the bargained-for protection unless there are both a breach of the notice provision and a likelihood of appreciable prejudice." Ibid. We extended "appreciable prejudice" to situations where an insured breaches a contractual

duty to cooperate with an insurer.¹¹ See Solvents Recovery Serv. v. Midland Ins. Co., 218 N.J. Super. 49, 55 (App. Div. 1987). The insurer bears the burden of demonstrating appreciable prejudice. Ibid.

To determine whether an insurer suffered appreciable prejudice based on the insured's breach of the duties under an insurance policy, a court must consider two variables: "first, 'whether substantial rights have been irretrievably lost' as a result of the insured's breach, and second, 'the likelihood of success of the insurer in defending against the accident victim's claim' had there been no breach." Hager v. Gonsalves, 398 N.J. Super. 529, 536 (App. Div. 2008) (quoting Sagendorf v. Selective Ins. Co. of Am., 293 N.J. Super. 81, 93 (App. Div. 1996)).

We must determine whether Calopina's failure to cooperate in the personal injury action entitled KnightBrook to disclaim coverage and withdraw its defense and indemnification of Calopina. There appears to be uncertainty among our courts regarding application of the Hager variables to establish appreciable prejudice sufficient to disclaim coverage. To the extent there is any ambiguity in applying the two Hager variables, we conclude an insurer's

¹¹ It is undisputed Calopina breached the duty to the cooperate clause in KnightBrook's insurance policy.

satisfaction of either variable is sufficient to establish appreciable prejudice to disclaim any obligation to provide coverage to an insured.

Under the first variable, an insurer must demonstrate an irretrievable loss of substantial rights based on the insured's breach of the insurance policy. Ibid. Although not expressly stated in Hager, or any other case addressing appreciable prejudice, we conclude the first variable applies to an irretrievable loss of substantial rights related to coverage determinations by an insurer. To conclude otherwise would render the second variable under the appreciable prejudice prong redundant. Clearly, the two variables in Hager were intended to address different aspects of appreciable prejudice. KnightBrook's argument conflates the two variables, rendering the second Hager variable superfluous.

The facts in Hager support this distinction between the two variables. In Hager, the insurer sought information to confirm whether the driver of the insured vehicle involved in an accident was covered under the insurance policy. Id. at 537. Before assigning an attorney to defend against the injured party's claims, the insurer needed to confirm whether the driver of the insured vehicle had the owner's permission to drive the car on the date of the accident. Ibid. The insurer was unable to confirm permissive use of the insured car because the car's driver and the car's owner completely refused to cooperate with the insurer in providing any information. Ibid.

In Hager, we rejected the insurance carrier's appreciable prejudice argument under the second variable based on the police report and witness statement ascribing responsibility for the accident to the driver of the insured car. Id. at 536-37. However, we held the insured's total failure to cooperate resulted in appreciable prejudice under the first variable because the insurance company was unable "to determine whether the policy issued to [the insured] provided coverage to [the driver]" as a permissive user of the insured car. Id. at 537. Thus, we concluded the insurance company "'irretrievably lost' the opportunity to ascertain the true facts relating to whether [the driver] had permission to use [the insured]'s truck, which entitled [the insurer] to disclaim coverage for the . . . accident." Id. at 536-37.

Similarly, in Sagendorf, we addressed the insurance company's irretrievable loss of substantial rights in the context of a coverage determination. 293 N.J. Super. at 95-96. In Sagendorf, the insurance company denied coverage, contending the insured plaintiffs' late notice of the claim rendered it unable to investigate and evaluate coverage for environmental contamination claims. Id. at 95. We held the issues raised by the insurance company, regarding groundwater pollution and cleanup, were "coverage issues that [were] not affected by [the] plaintiffs' late notice" of the claims. Id. at 96. Because the insurance company pointed to no evidence linking the plaintiffs'

failure to give timely notice of the claims with any ensuing prejudice, we held the plaintiffs were entitled to coverage. Ibid.

KnightBrook contends it suffered appreciable prejudice because it irretrievably lost substantial rights under Hager's first variable. We disagree. As we previously noted, the first variable deals with the loss of a substantial right in the context of a coverage determination. Here, there are no issues concerning KnightBrook's ability to determine coverage. During argument before the motion judge, KnightBrook admitted there were no coverage issues. Even without KnightBrook's acknowledgement of coverage, there is sufficient evidence in the motion record confirming the availability of coverage for Sanchez's injuries.

Here, internal notes from KnightBrook's claims department in 2013 and 2014, as well as KnightBrook's 2014 File Summary and Review, confirmed coverage for Calopina's car on the date of the accident.¹² In 2014, based on its confirmation of coverage, KnightBrook assigned counsel to represent Calopina in the personal injury action. From 2013 until December 2015, KnightBrook never indicated its defense of Calopina in the personal injury action was subject to a reservation of rights. In December 2015, after Calopina failed to

¹² KnightBrook's documents confirming insurance coverage for Calopina's car pre-dated the filing of the Sanchez personal injury action.

cooperate, KnightBrook first indicated it was defending Calopina under a strict reservation of rights and would consider withdrawing its defense and indemnification if Calopina continued to refuse to cooperate. On this record, it is undisputed KnightBrook determined Calopina's vehicle was insured on the date of the accident and the policy covered the claims in the personal injury action. Therefore, KnightBrook failed demonstrate appreciable prejudice under the first Hager variable to disclaim coverage.

We next consider whether KnightBrook presented evidence to support a finding of appreciable prejudice under the second Hager variable – the likelihood of KnightBrook's success in defending against Sanchez's personal injury claims had Calopina not breached the cooperation clause in its insurance policy. Based on the detailed facts recited above, we are satisfied KnightBrook failed to demonstrate it is unable to defend against Sanchez's personal injury claims due to Calopina's refusal to cooperate in the personal injury action. Additionally, KnightBrook pointed to no facts or legal theories precluding defenses in the personal injury action.

There is ample evidence on this record to allow KnightBrook to defend against the claims in the personal injury action on the issues of liability, medical causation, and damages. KnightBrook has photographs of the damage to both vehicles taken immediately after the accident. It also has the repair

estimate for Sanchez's car, indicating the necessary work to be less than \$500. Additionally, KnightBrook obtained the police report containing statements made by Sanchez and Calopina immediately after the accident. The police report further noted Sanchez went to the hospital from the accident scene in an ambulance. KnightBrook has copies of the hospital records, indicating Sanchez complained of neck, back, and hip pain but was discharged the same day, given pain medication, and told to follow up with a primary care doctor. KnightBrook also has Sanchez's post-accident treatment records and his medical history, including information regarding an accident ten years before the 2013 accident. KnightBrook obtained the foregoing information despite Calopina's refusal to cooperate.

In determining KnightBrook suffered no appreciable prejudice under the second Hager variable, we emphasize there is no court order barring Calopina's testimony in the consolidated declaratory judgment actions. According to the judiciary's Automated Case Management System, Calopina is represented by KnightBrook's assigned counsel in the consolidated declaratory judgment actions and the trial is presently scheduled for August 8, 2022. Thus, Calopina may testify and bolster KnightBrook's defenses on the issue of liability. Calopina may be able to provide information at trial about the rate of speed of her car prior to the collision, the severity of the impact between the cars, and

the property damage, if any, to her car. Notwithstanding Calopina's ability to testify in the consolidated declaratory judgment actions, based on the facts gleaned from the summary judgment record, we are uncertain whether her testimony would be useful to KnightBrook's defenses on liability and damages.

Based on these facts, KnightBrook has not suffered appreciable prejudice to warrant disclaiming coverage. Calopina remains a named defendant in the consolidated declaratory judgment actions, is represented by counsel assigned through KnightBrook, and is permitted to testify at trial. Nothing precludes KnightBrook's ability to obtain additional facts and information to defend against Sanchez's personal injury claims.

Reversed. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION