SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2445-20

WENDY KIRK, as assignee,

Plaintiff-Appellant,

v.

STATE FARM INSURANCE COMPANY, AMICA MUTUAL CAR INSURANCE COMPANY and JOSEPH CIRAULO,

Defendants-Respondents.

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Argued December 6, 2022 – Decided January 13, 2023

Before Judges Gilson, Gummer, and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0519-18.

Evan L. Goldman argued the cause for appellant (Goldman Davis Krumholz & Dillon, PC, attorneys; Evan L. Goldman and Kristen Ragon, on the briefs).

Thomas W. Matthews argued the cause for respondents State Farm Indemnity Company[1] and Joseph Ciraulo (Bennett, Bricklin & Saltzburg, attorneys; Thomas W. Matthews, of counsel and on the brief).

PER CURIAM

Plaintiff Wendy Kirk appeals from orders granting summary judgment to defendants State Farm and Joseph Ciraulo based on immunity pursuant to N.J.S.A. 17:28-1.9(a) and denying her reconsideration motion. Because genuine issues of material fact exist as to whether defendants were grossly negligent, we reverse the orders and remand the case.

I.

Defendants moved for summary judgment following the completion of discovery. Accordingly, we discern the material facts from the summary-judgment record, viewing them in the light most favorable to plaintiff, the non-moving party. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

In 2013, plaintiff was injured when, as a pedestrian, she was struck by a car driven by Michael Spagnola. At the time of the accident, Spagnola was insured under an automobile insurance policy issued by State Farm. The policy

[1] According to defendants, plaintiff improperly pleaded State Farm Indemnity Company as "State Farm Insurance Company." We refer to the defendant insurer as "State Farm."

had a bodily injury single policy limit of $100,000. Plaintiff sued Spagnola, alleging she had sustained permanent injuries as a result of the accident. During the course of that lawsuit, State Farm tendered the $100,000 policy limit to the clerk of the court. After a bench trial, the court entered a $5,225,000 judgment in favor of plaintiff and against Spagnola. Spagnola subsequently assigned to plaintiff his legal rights against State Farm and its agents, and plaintiff agreed not to pursue any action seeking to collect from Spagnola the remaining amount of the judgment.

In 2018, plaintiff as assignee filed a complaint against State Farm and Ciraulo.[2] State Farm, State Farm and Ciraulo admitted in their answer that Ciraulo "was a State Farm agent." Plaintiff pleaded causes of action sounding in negligence, breach of fiduciary duties, breach of contract, and mutual and unilateral mistakes of fact based on the purported failure of State Farm and Ciraulo to advise Spagnola to obtain more insurance coverage to protect his assets. Plaintiff sought a declaratory judgment that she was "entitled to an amount that is determined to be the amount of coverage that should have been

[2] Plaintiff also named as a defendant Amica Mutual Car Insurance Company (Amica), which, according to plaintiff, had issued an automobile insurance policy insuring Spagnola's wife, Ann Marie Spagnola. Plaintiff did not appeal the order granting Amica's summary-judgment motion.

provided by STATE FARM and/or [Ciraulo], in either automobile liability coverage and/or excess coverage." She also sought reformation of the State Farm policy "to include entitlement to . . . $300,000.00 in liability/bodily injury benefits" and "to fully insure and indemnify . . . Spagnola . . . ."

Spagnola obtained his first automobile insurance policy through a State Farm agency owned by his father more than forty years ago. After Spagnola's father retired, in 1991 or 1992 Ciraulo took over the agency and certain files and policies he had serviced, including Spagnola's policies. Ciraulo was Spagnola's State Farm agent since that time. Spagnola renewed his insurance with Ciraulo, receiving and paying a bill every six months. According to Spagnola, Ciraulo "knew everything" Spagnola had and "never offered to update or . . . tell [him] that [he] needed to increase [his] coverage . . . ." Instead, Ciraulo "just kept saying you're fine, you're fine, you're fine."

Spagnola accumulated assets since originally obtaining insurance from State Farm. Spagnola purchased a house, which was mortgage-free by 2012. In 2004, Spagnola acquired a second house, which also was mortgage-free. Ciraulo was the issuing agent on the State Farm homeowner's insurance policies Spagnola had on those properties from 2012 to 2015. In 2012, when he moved from one house to the other, Spagnola discussed with Ciraulo the homeowners'

coverage for each house. Ciraulo knew about the houses and knew Spagnola owned them free of any mortgage but did not tell him to increase his insurance coverage. According to Spagnola, Ciraulo never offered him the opportunity to obtain an umbrella insurance policy.

When Spagnola was in the area, which was approximately once every six months, he would stop in Ciraulo's State Farm agency and say hello. On those occasions, according to Spagnola, Ciraulo would look at his policies, review them with him, and tell him "your coverage is fine" and "no changes should be made."

During the operation of his agency, Ciraulo received training and participated in seminars dealing with the selling of umbrella insurance policies to individuals with homeowner's and auto insurance. As part of his ownership of the agency, Ciraulo conducted surveys of his clients to determine their insurance needs. According to Ciraulo, "part of our business" and "[p]art of our job is to talk to customers about their coverages and perhaps explain to them and guide them that perhaps they need more insurance in certain areas . . . ." However, according to Ciraulo, he never conducted a survey of Spagnola's insurance needs because Spagnola "was not interested." Ciraulo testified, contrary to Spagnola, that he had asked Spagnola "[n]umerous times" whether

he wanted to obtain umbrella coverage. Although he thought it was important for Spagnola to have an umbrella policy, Ciraulo did not document those inquiries or Spagnola's decision not to purchase umbrella coverage.

State Farm and Ciraulo moved for summary judgment, arguing defendants had immunity, no special relationship existed between Spagnola and Ciraulo, and Spagnola had not suffered any damages. In her opposition to the motion, plaintiff included a report prepared by Armando Castellini, a proposed expert in the insurance field. In that report, Castellini opined, among other things, that defendants had failed to conform to the generally accepted standards and practices in the insurance industry by failing to conduct "a reasonably complete and accurate survey of the exposures that their clients had" given their assets and had "failed to offer their clients . . . a limit of personal liability insurance commensurate with the very high settlement and jury awards seen in our legal system." He also opined it was "gross negligence" for an insurance producer not to offer and quote premiums for higher umbrella polices.

After hearing argument, the judge granted defendants' motion and dismissed plaintiff's claim with prejudice in an order with a two-page rider. In the rider, the judge concluded State Farm and Ciraulo were statutorily immune from plaintiff's action pursuant to N.J.S.A. 17:28-1.9(a) and that "[n]o

reasonable jury could assess Ciraulo's actions or inactions in this case as being willful or grossly negligent under [N.J.S.A. 17:28-1.9(a)] so to negate the immunity given under the same statute."

Plaintiff moved for reconsideration. In support of that motion, plaintiff submitted Spagnola's certification. In that certification, Spagnola testified Ciraulo was "intimately familiar with [his] assets," the combined value of his property was approximately $736,800, Ciraulo knew the properties were not mortgaged, and between 2009 and 2012, he had had at least two conversations with Ciraulo in which he specifically asked for Ciraulo's opinion as to whether he had adequate insurance coverage in light of his assets and Ciraulo "assured" him he was "adequately insured." The judge denied the motion.

On appeal, plaintiff argues the judge erred in granting summary judgment when genuine issues of material fact existed, holding defendants had statutory immunity, and finding no special relationship between the parties.

II.

We review de novo the grant of summary judgment, applying the same standard as the motion judge. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). That standard requires us to "determine whether '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.'" Ibid. (quoting R. 4:46-2(c)). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "The 'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). We review a trial court's denial of reconsideration for an abuse of discretion. Branch, 244 N.J. at 582.

N.J.S.A. 17:28-1.9(a), which is the basis of the statutory immunity found by the motion judge, provides in pertinent part:

> [N]o person, including, but not limited to, an insurer, an insurance producer . . . shall be liable in an action for damages on account of the election of a given level of motor vehicle insurance coverage by a named insured as long as those limits provide at least the minimum coverage required by law or on account of a named insured not electing to purchase underinsured motorist coverage, collision coverage or comprehensive coverage. Nothing in this section shall be deemed to grant immunity to any person causing

> damage as the result of his willful, wanton or grossly negligent act of commission or omission.

See also Strube v. Travelers Indem. Co., 277 N.J. Super. 236, 237 (App. Div. 1994) ("N.J.S.A. 17:28-1.9(a) provides that no person shall be liable in an action for damages due to a named insured's selection of a given level of motor vehicle insurance"), aff'd o.b., 142 N.J. 570 (1995).

The Legislature enacted N.J.S.A. 17:28-1.9(a) "to abrogate prior judicial decisions holding insurers, agents, and brokers liable for failing to advise their customers of the availability of additional underinsured and uninsured motorist coverage" and to quell the "explosion of litigation by providing blanket immunity except in cases of willful, wanton, or gross negligence." Id. at 237, 242. "[T]he Legislature meant the statute to confer immunity in circumstances relating to an insured's election of [underinsured motorist] coverage when the insured attempts to later shift the blame for a decision to opt for any level of coverage less than the maximum back onto the insurer . . . ." Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 268 (2008).

To be entitled to the immunity afforded by N.J.S.A. 17-28-1.9(a), an insurer must show: "(1) the named insured had at least the minimum coverage required by law; (2) the insurer did not cause the insured's alleged damages by any willful, wanton or grossly negligent act of commission or omission; and (3)

the insurer complied with the coverage selection requirements of N.J.S.A. 17:28-1.9(b)." James v. State Farm Ins. Co., 457 N.J. Super. 576, 585 (App. Div. 2019). Plaintiff contends defendants failed to meet that standard because the facts, viewed in a light most favorable to her, demonstrate defendants were grossly negligent.

Gross negligence is not ordinary negligence; it is something more. Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 363-64 (2016). Unlike ordinary negligence, gross negligence "is commonly associated with egregious conduct . . . ." Kain v. Gloucester City, 436 N.J. Super. 466, 482 (App. Div. 2014). It is "an indifference to another by failing to exercise even scant care or by thoughtless disregard of the consequences that may follow from an act or omission." Steinberg, 226 N.J. at 364-65. It is "more than inattention or mistaken judgment." Franco v. Fairleigh Dickinson Univ., 467 N.J. Super. 8, 37 (App. Div. 2021). "[G]ross negligence includes acts that are a 'deviation from the standard of reasonable professional conduct expected from an insurance carrier.'" James, 457 N.J. Super. at 588 (quoting Pizzullo v. N.J. Mfrs. Ins. Co., 391 N.J. Super. 113, 126 (App. Div. 2007), rev'd on other grounds, 196 N.J. 251 (2008)).

Castellini, plaintiff's insurance-industry expert, opined, among other things, that defendants had failed to conform to the generally accepted standards and practices in the insurance industry by failing to conduct "a reasonably complete and accurate survey of the exposures that their clients had" and that it was "gross negligence" for an insurance producer not to offer and quote premiums for higher umbrella policies. Ciraulo testified that as part of his ownership of the agency, he conducted surveys of his clients to determine their insurance needs and that it was "part of our business" and "[p]art of our job is to talk to customers about their coverages and perhaps explain to them and guide them that perhaps they need more insurance in certain areas . . . ."

Ciraulo conceded he never conducted a survey of Spagnola's insurance needs. He blamed the failure to conduct that survey on Spagnola, claiming Spagnola "was not interested." He thought it was important for Spagnola to have umbrella coverage and faulted Spagnola for his lack of umbrella coverage, testifying he had asked Spagnola "[n]umerous times" whether he wanted to obtain umbrella coverage. Spagnola's testimony directly contradicted Ciraulo's testimony. Spagnola testified Ciraulo never offered him the opportunity to obtain an umbrella insurance policy. He also testified that on the numerous

occasions he had stopped by Ciraulo's State Farm agency, Ciraulo told him "your coverage is fine" and "no changes should be made."

From Ciraulo's testimony about his and his agency's standard business practices and Castellini's opinions about insurance-industry standards, a reasonable factfinder could conclude a failure to conduct a survey of a client's insurance needs and to guide the client when he needed more insurance was gross negligence. A reasonable factfinder also could conclude that, if Ciraulo told Spagnola that his coverage was "fine" and "no changes need to be made," that statement was a misrepresentation and Ciraulo was grossly negligent in making it. Spagnola's and Ciraulo's directly contradictory testimony create genuine issues of material fact regarding whether Ciraulo had conducted a survey of Spagnola's insurance needs and, if not, why he had not conducted that survey; whether Ciraulo had offered more insurance coverage to Spagnola and the reasons why Spagnola did not have that coverage; and whether Ciraulo misrepresented that Spagnola's coverage was "fine" and "no changes should be made." On this record, viewing the facts in a light most favorable to plaintiff, we conclude that defendants were not entitled to immunity under N.J.S.A. 17:28-1.9(a), reverse the order granting defendants' summary-judgment motion, and remand the case.

In addition to considering immunity under N.J.S.A. 17:28-1.9(a), the motion judge also addressed "the pre-immunity statute" case of Wang v. Allstate Ins. Co., 125 N.J. 2 (1991), even though he was "not clear if this precedent continues post-immunity." The judge described the holding in Wang as being that "there is no common law duty of a carrier or its agents to advise an insured concerning the possible need for higher policy limits upon the renewal of a policy, unless a special relationship exists" and found "[t]hese facts do not suggest a special relationship existed."

The motion judge did not analyze whether "the pre-immunity statute" Wang actually applies to any aspect of plaintiff's case. And, although they argued about the existence of a special relationship, the parties did not brief that issue. Accordingly, we decline on this record to determine the application of Wang to this case. See Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014) (Court declines to address issue in light of party's "failure to argue or brief the issue, or develop the type of record that would assist the Court in resolving" it). We note, however, contrary to the motion judge's finding, the record evidence demonstrates a genuine issue of material fact exists as to whether Spagnola and defendants had a special relationship. In Wang, the Court included as evidence of a special relationship "an inquiry or request by the insured or a specific

representation by the agent or broker." Id. at 18. That evidence is contained in this record, and, viewing the facts in a light most favorable to plaintiff, a reasonable factfinder could conclude a special relationship existed.

Plaintiff also contends defendants are not entitled to immunity under N.J.S.A. 17:28-1.9(a) because they failed to demonstrate compliance with the coverage selection requirements of N.J.S.A. 17:28-1.9(b) in accordance with the third James prong. 457 N.J. Super. at 585. In support of their summary-judgment motion, defendants submitted the certification of Jennifer Kika, who is employed by State Farm in its underwriting department and certified she was familiar with the underwriting documents maintained by State Farm regarding the automobile insurance policies it issued to Spagnola. She attached to her certification a copy of a coverage selection form that was executed by Spagnola on October 12, 1998, and included the language required by N.J.S.A. 17:28-1.9(b). She further certified Spagnola had renewed the policy every six months and that each renewal notice sent to him included a New Jersey Buyer's guide and a blank coverage selection form that were statutorily compliant and in the required form.

In his deposition testimony, Spagnola acknowledged receiving the renewal package every six months. He did not deny receiving a statutorily-

compliant coverage selection form but testified only that he could not remember whether he had reviewed a Buyer's Guide or coverage selection form included in the renewal packages. He did not submit in opposition to defendant's summary-judgment motion an affidavit or certification denying Kika's factual assertions. See R. 4:46-5(a) (in response to a summary-judgment motion, "an adverse party may not rest upon the mere allegations of denials of the pleading, but must respond by affidavits . . . setting forth specific facts showing that there is a genuine issue for trial"). Based on this record, we discern no genuine issue of material fact regarding defendants' compliance with the third James prong.

We note plaintiff argued orally before us that the immunity provided by N.J.S.A. 17:28-1.9(a) applies only "in an action for damages on account of the election of a given level of motor vehicle insurance coverage" and does not apply to plaintiff's claim based on Spagnola's lack of umbrella coverage. The record contains no indication plaintiff raised that argument before the motion judge. See Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 145 (App. Div. 2018) (applying "well-settled" principle that appellate court will not consider an issue that was not raised before the trial court).

Reversed and remanded. We do not retain jurisdiction.