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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2497-20

ARGONAUT INSURANCE COMPANY, and the COUNTY OF MIDDLESEX,

Plaintiff-Appellant,

v.

EVANSTON INSURANCE COMPANY,

Defendant-Respondent.

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Argued January 10, 2023 – Decided July 5, 2023

Before Judges Whipple, Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1732-20.

Julia C. Talarick argued the cause for appellant (Kinney Lisovicz Reilly & Wolff PC, attorneys; James P. Lisovicz, of counsel and on the briefs; Timothy P. Smith and Kathleen J. Devlin, on the briefs).

Eduardo DeMarco argued the cause for respondent (Kennedys CMK LLP, attorneys; Christopher R.

Carroll and Eduardo DeMarco, of counsel and on the brief).

PER CURIAM

Argonaut Insurance Company (Argonaut) and Middlesex County (County) (collectively, plaintiffs) appeal from the trial court's entry of summary judgment dismissing their complaint for indemnification against defendant Evanston Insurance Company (Evanston) in a wrongful death action brought against the County by the family of an inmate who died at the county jail. On appeal, plaintiffs argue the trial court erred in finding they were not entitled to coverage as "additional insureds" under an insurance policy issued by Evanston to CFG Health Systems, LLC (CFG).

For the reasons that follow, we affirm.

I.

A.

On October 31, 2014, decedent David Yearby (Yearby), a twenty-seven-year-old diagnosed paranoid schizophrenic and asthmatic, experienced a psychotic episode and was arrested by the Piscataway police. He was charged with assault and resisting arrest. The police transferred him to Middlesex County jail, despite Yearby's family requesting he be taken to a psychiatric facility.

At 6:25 p.m. the next day, corrections officers discovered Yearby had a clogged toilet in his cell. He had stuffed his clothes into the toilet. When Yearby refused to leave his cell so that maintenance staff could fix the toilet, an officer pepper sprayed him. Officers removed him from the cell and brought him, handcuffed, to the jail's medical unit for evaluation.

By 7:25 p.m. corrections officers decided to place Yearby in an inmate restraint chair with a hood over his head. They strapped his limbs to the chair and "secured his head toward his legs." Medical unit video surveillance revealed that the corrections officers pushed Yearby's head down and to the side with force while he remained strapped in the chair and in their custody.

Yearby remained restrained in the chair for nine consecutive hours while in the care of three nurses employed by CFG. The CFG nurses, Angela Ward, Gideon Thuo, and Nicole Tuesday, maintained they properly monitored Yearby during this time period as reflected in medical records. Several corrections officers were also assigned to conduct range of motion checks on decedent every two hours. Despite the monitoring of the three CFG nurses as well as the periodic presence of corrections officers, Yearby experienced hypoxia, resulting in organ failure and his eventual death.

An autopsy revealed that Yearby suffered blunt force trauma to his head, neck, torso and extremities. Pathologist Dr. Lauren Thoma concluded decedent's cause of death was "blunt force trauma of head and neck with cervical fracture and spinal cord injury."

B.

In November 2014, the County was insured under commercial general liability policies issued by Argonaut. CFG held a medical staffing professional liability insurance policy issued by Evanston.

The Evanston policy stated it would pay, on behalf of its insured, all sums (in excess of the deductible) which the insured became legally obligated to pay as damages as a result of certain claims. In pertinent part, the policy provided: CFG's "Employed and Contracted Physicians and Allied Healthcare professionals providing Medical Services" were protected against "individual professional liability because of Malpractice or Professional Personal Injury, sustained by a patient and committed by them" (Coverage A); and that "CFG Health Systems, LLC; Center for Family Guidance, P.C." was insured against organizational liability because of malpractice or professional personal injury committed by "any person" for whom it was "legally responsible, arising out of the conduct of the Insured's Professional Healthcare Services" (Coverage B).

The Evanston policy contained certain exclusions, including: "any Malpractice, Professional Healthcare Services or Professional Personal Injury committed in violation of any law or ordinance"; and "any Claim based upon or arising out of any dishonest, fraudulent, criminal, malicious, knowingly, wrongful, deliberate, or intentional acts, errors or omissions committed by or at the direction of the Insured."

CFG's contract with the County required it to defend and hold the County harmless from "all claims, demands, or judgments deriving from alleged professional malpractice of any of its employees or subcontractors," and to "carry professional liability insurance . . . evidenced by [an] additional insured endorsement adding the County and its officers and employees as additional insured[s] with said insurance being primary."

The additional insured endorsement (AI Endorsement) included in CFG's professional liability insurance policy reads, verbatim, as follows:

> 1. Section The Insured is amended by the addition of the following:
>
> > Whenever used in this Coverage Part, the unqualified word Insured shall also mean Additional Insured.
>
> 2. Additional Insured means, whenever used in this endorsement, the following:

> Any organization or entity that the Insured is required to include under the policy as an Additional Insured or required to indemnify by a written contract or written agreement in effect before or during this policy period and executed prior to the occurrence of the Professional Personal Injury.

3. Coverage provided to any Additional Insured as defined herein shall apply solely to an occurrence or offense involving the Professional Healthcare Services covered by this Coverage Part and only as respects liability in rendering Professional Healthcare Services caused by the negligence of any Coverage A or Coverage B insured.

4. No coverage shall be afforded to the . . . Additional Insured for Professional Personal Injury to any Employee or to any obligation of the Additional Insured to Indemnify another because [of] Damages arising out of such injury.

. . . .

6. Where no coverage shall apply herein for the Named Insured, no coverage or defense shall be afforded to the above Additional Insured.

7. In accordance with the terms and conditions of the policy . . . as soon as practicable, each Additional Insured must give the Company prompt notice of any act, error or omission which may result in a claim, forward all legal papers to the Company, cooperate in the defense of any actions, and otherwise comply with all the policy's terms and conditions. Failure to comply with this provision may, at the Company's option, result in the claim or suit being denied.

. . . .

> 9. This insurance shall be primary and non-contributory insurance over any other insurance afforded to the Additional Insured.
>
> [(Emphasis added).]

C.

On September 29, 2015, Yearby's estate (Estate) sued the County in a wrongful death action, naming fourteen corrections officers and the three CFG nurses. The suit alleged negligence and civil rights claims against the various defendants, however CFG, the nurses' employer, was not named by the Estate as an individual defendant. Argonaut undertook the County's defense.

On July 8, 2016, the trial court dismissed the negligence claims against the three CFG nurses with prejudice because the Estate had failed to timely file an affidavit of merit in support of its claims against the nurses. Although the trial court restored the negligence counts after reconsideration, we granted the nurses' leave to appeal and reversed, thereby reinstating the dismissal. Est. of Yearby v. Middlesex Cnty., 453 N.J. Super. 388 (App. Div. 2018).

Over two years later, on July 12, 2018, the Estate filed an amended complaint adding CFG as a defendant and an additional count alleging negligent hiring and supervision on CFG's part.

On November 9, 2018, CFG successfully moved for dismissal of the Estate's claim. The trial court made findings, including that: the Estate's 2018 claims against CFG violated the statute of limitations; and the law of the case barred the Estate's claims of respondeat superior where the CFG nursing defendants had been dismissed and the Estate could not re-litigate its claims against the nurses through claims against CFG.

On July 26, 2019, the trial court granted the Estate leave to amend its complaint to add a breach of contract claim against CFG for failure to provide proper medical services to decedent. CFG moved for reconsideration, and on November 12, 2019, the trial court granted reconsideration and dismissed the Estate's contract claim.

The County filed a third-party complaint against CFG alleging negligence, specifically that CFG and its employees failed to provide adequate medical care to Yearby. The trial court dismissed the County's third-party negligence claim on the same day it dismissed plaintiff's breach of contract claim. On the County's negligence claim, the trial court found the County failed to serve an

affidavit of merit. The trial court concluded that, in the event of a jury verdict which allocated damages to CFG, the County could pursue a credit.[1]

While the trial court wrestled in 2019 with the Estate's motion to amend and the County's third-party complaint, plaintiffs sent Evanston a demand for indemnification against the wrongful death action. Plaintiffs also sought reimbursement for counsel fees incurred in defense of the Estate's wrongful death action. On October 17, 2019, Evanston denied coverage, arguing the policy's AI Endorsement applied only to County liability caused by CFG's negligence, and that CFG and its employees had been dismissed from the case. Plaintiffs countered, arguing the Estate's complaint contained numerous allegations that decedent's death was caused by an "occurrence 'involving' Professional Healthcare Services covered by the Evanston policy, and that the alleged liability of [the County] relates to the negligent rendering of professional healthcare services by both CFG, CFG's employees and [the County]." The County informed Evanston that it reserved its right to settle with the Estate and seek reimbursement from Evanston.

[1] See Burt v. W. Jersey Health Sys., 339 N.J. Super. 296 (App. Div. 2001).

On January 4, 2020, the County, Argonaut and the Estate entered into a settlement agreement whereby the Estate agreed to dismiss its claims against the County in return for $5,000,000 to be paid by Argonaut. The agreement identified a number of non-settling defendants, including the fourteen corrections officers, jail warden Mark J. Cranston, pathologist Dr. Thoma, and the Middlesex County Medical Examiner's office. In the settlement agreement, CFG and the CFG nurses were not identified as non-settling defendants. The agreement noted that the plaintiff's Estate voluntarily dismissed its complaint with prejudice as to the non-settling defendants. The agreement further provided the settlement was subject to the right of the County and Argonaut to seek reimbursement from CFG and Evanston for all or some of the $5,000,000 paid to the Estate. The agreement attempted to preserve any claims the Estate asserted against CFG and its employees.

D.

On March 16, 2020, plaintiffs filed a declaratory judgment action against Evanston seeking coverage under Evanston's AI Endorsement.

Evanston moved for summary judgment, and submitted an expert report by Wayne Robbins, a retired law enforcement officer. Concluding the jail staff "displayed a deliberate indifference for the safety and security of Yearby and

institutional policy by deliberately ignoring obvious consequences of staff actions," Robbins opined the staff which interacted with Yearby violated standards of care regarding use of force, care of inmates, use of restraints including a hood, and ascertainment of a detainee's mental health and medical status.

On February 23, 2021, the plaintiffs cross-moved for summary judgment on the declaratory judgment action. In support of their position, plaintiffs submitted expert reports regarding the culpability of both the County and the CFG nurses for decedent's death. One expert, Jennifer Graney, R.N., opined the three CFG nurses failed to adhere to basic nursing standards of care in assessing decedent's condition, preparing accurate documentation of their care of decedent, and in ensuring decedent's safety. A second expert report, by forensic pathologist Dr. Ian Hood, opined Yearby died

> "slowly and painfully over a period of several hours in increasing distress from asphyxia caused by improper and prolonged restraint and a painful and paralyzing cervical spine injury that should never have been inflicted on him [by corrections officers] followed by almost completely inadequate and almost non-existent monitoring [by corrections officers and the CFG nurses] while he was allowed to die in those miserable circumstances."

A third expert offered by plaintiffs, anesthesiologist Dr. Peter Salgo, concurred in decedent's cause of death. He opined that as a result of his treatment by corrections staff and the CFG nurses, decedent experienced extreme pain and suffering as his condition worsened, as well as fear and terror because of his decreasing ability to breathe.

E.

The trial court entered summary judgment for Evanston on March 30, 2021. It made several findings. First, plaintiffs were not entitled to additional insured (AI) coverage under the Evanston policy, because the CFG nurses had been dismissed with prejudice from the wrongful death action due to the Estate's failure to timely file an affidavit of merit. The trial court also found there could be no vicarious liability against CFG when its employees had been dismissed with prejudice. Finally, the trial court noted that it had already found the statute of limitations barred the Estate's untimely claims against CFG. The trial court concluded, "in the absence of any viable claims against CFG, the duty to defend and indemnify under the Evanston policy is non-existent."

It stated:

> In reviewing the policy at issue, it is clear that additional [insured] coverage for Middlesex County is dependent upon whether CFG employees are present in the underlying action. That is not the situation in this

> case, and their absence precludes Middlesex County from incurring damages for CFG employee actions. There is no independent obligation in the Evanston policy to provide insurance coverage to Middlesex County. Summary judgment is granted in favor of Evanston[.]

Plaintiffs appealed, arguing the trial court erred by finding the County was not entitled to coverage under Evanston's policy as an additional named insured.

II.

Pursuant to Rule 4:46-2, summary judgment shall only be granted in the absence of a genuine issue as to any material fact challenged and where the moving party is entitled to judgment as a matter of law. We review a trial court's summary judgment order de novo, applying the same standard that governs the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015).

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to 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.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

We owe no deference to the trial court's interpretation of the law and the legal consequences that flow from established facts. Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"Insurance policies are construed in accordance with principles that govern the interpretation of contracts; the parties' agreement 'will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled.'" Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (quoting Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010)). "The terms of insurance contracts are [to be] given their 'plain and ordinary meaning . . . .'" Ibid.

Where there is no ambiguity, a court "should not write for the insured a better policy than the one he purchased." Gibson v. Callaghan, 158 N.J. 662, 670 (1999). Consequently, an insurance policy will not be construed to indemnify an indemnitee against losses resulting from its own independent fault, active wrongdoing or tortious conduct, unless such an intention is expressed in unequivocal terms in the policy. New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358, 386-87 (App. Div. 2018).

Plaintiffs argue the County's coverage as an additional insured was not limited to coverage for vicarious liability for the named insured's fault. Rather,

they posit the AI Endorsement, as written, provided the County with coverage for liability for its own wrongful acts and any vicarious liability for the wrongful acts of CFG and its nurses because the Estate's complaint alleged decedent "died in part because he failed to receive proper medical care" by the CFG nurses. They further argue the County's coverage for vicarious liability was not dependent on CFG and its nurses remaining parties to the suit and being found liable in whole or in part. Plaintiffs insist that dismissal of the CFG defendants did "not alter the fact that Mr. Yearby's death was caused in part by" those defendants. Citing to both the Estate's complaint and the Agreement, they assert the County "became legally obligated to pay damages to the Estate because of liability from the negligence of CFG nurses in failing to provide medical care" to decedent and as such, they are entitled to indemnification under the AI Endorsement. We are not persuaded.

The contract between the County and CFG required that CFG defend and hold the County harmless from "all claims, demands, or judgments deriving from alleged professional malpractice of any of its employees." Paragraph three of the Evanston policy's AI Endorsement stated the coverage provided to the County applied "solely to an occurrence or offense involving the Professional Healthcare Services covered by this Coverage Part and only as respects liability

in rendering Professional Healthcare Services caused by the negligence of any Coverage A or Coverage B insured." (Emphasis added).

A plain reading of the relevant AI Endorsement language confirms that coverage for the County was limited to coverage for vicarious liability based upon the named insured's fault. Although the initial use of the word "involving" suggests the potential for a broad interpretation, the following language immediately limits coverage specifically to "liability" "caused by" the negligence of the named insured. We perceive no language in the AI Endorsement which conveys an intent by the parties to indemnify the County against losses resulting from its own independent acts. See Rosario v. Haywood, 351 N.J. Super. 521, 531 (App. Div. 2002) (holding there was no coverage for additional insured's own negligence pursuant to contractual provision requiring indemnification of additional insured for damages "arising from or out of actions of [named insured] occasioned wholly or in part by any act or omission to act of [named insured]"). A careful reading of the "only as respects" language in the AI Endorsement reveals it to be language which limits the County's coverage to situations where it is held vicariously liable for CFG and its nurses' conduct.

We turn to the plaintiff's argument that coverage for vicarious liability for the fault of CFG and its nurses did not require that these defendants remain party

to the suit or otherwise be found legally liable in part for decedent's wrongful death. Paragraph three of the AI Endorsement expressly limited coverage to "liability" caused by the named insured. Paragraph six of the AI Endorsement specifically provides that "[w]here no coverage shall apply herein for the Named Insured, no coverage or defense shall be afforded to the above Additional Insured".

The Estate's negligence claims against CFG and its nurses were dismissed with prejudice. Moreover, the County was barred from bringing a third-party action against CFG because it did not file an affidavit of merit in support of the claim and did not appeal the order. The County's AI coverage under the Evanston policy could not be activated without the fault, at least in part, of CFG or its nurses.

Plaintiffs rely upon Appellate Division precedent for the proposition that we impose, under certain circumstances, coverage for additional insureds when the named insured has no liability for the loss in dispute. Erdo v. Torcon Constr. Co., Inc., 275 N.J. Super. 117 (App. Div. 1994), and Est. of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80 (App. Div. 2015). Both cases are distinguishable. In Erdo, we held that the insurance policy at issue specifically provided vicarious liability coverage for an additional insured when the named

insured was not, due to an applicable exclusion, afforded coverage. 275 N.J. Super. at 122-23. In D'Avila, we found that the indemnity provision in a contract between a general contractor and a subcontractor contained language that was "sufficiently plain and unequivocal" to require coverage for damages caused by the general contractor's own negligence. 442 N.J. Super. at 114-115. Neither case applies on the facts before us.

Plaintiffs also cite Harrah's Atl. City, Inc. v. Harleysville Ins. Co., 288 N.J. Super. 152, 157 (App. Div. 1996), for the same proposition. In Harrah's we held the language used in the commercial policy which named the property owner as an additional insured "only with respect to liability arising out of the . . . use of that part of the premises leased to [the tenant]" was sufficient to cover the property owner in a personal injury case where plaintiffs were pedestrians leaving Harrah's property and were struck by a car operated by the valet employee of the tenant. Id. at 156. There is no such open-ended language in the endorsement before us. The record shows that Evanston worded the AI Endorsement so as to make its AI coverage contingent on whether the named insured, CFG or its nurses, had any liability. Harrah's is not applicable to the facts before us. Ibid.

We conclude the County was not entitled to coverage as an additional insured under Evanston's policy. Consequently, we see no need to reach plaintiffs' other points on appeal. Any arguments not addressed here lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION