SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3300-21

EDWIN SILVA,

Plaintiff-Appellant,

v.

SELECTIVE FIRE AND CASUALTY INSURANCE COMPANY,[1]

Defendant-Respondent.

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Submitted April 17, 2023 – Decided April 24, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2240-20.

Hector I. Rodriguez, attorney for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for respondent (Michael J. Marone and Eric G. Siegel, of counsel and on the brief).

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[1] Improperly pled as Selective Insurance Company of America.

PER CURIAM

Plaintiff Edwin Silva appeals from a May 16, 2022 order granting defendant Selective Fire and Casualty Insurance Company's motion for reconsideration and summary judgment dismissing plaintiff's complaint. We affirm.

Plaintiff was employed by a landscaping company. Defendant insured the company's vehicle, which plaintiff used to get to a job site where he was to clear debris with a leaf blower. Plaintiff arrived at the job site, parked the vehicle near a curb, walked to the back of the vehicle, and retrieved the blower. He took approximately two steps away from the vehicle and placed the blower on the roadway to prime and start it before strapping it to his back. As he was bending to start the blower, he was struck by a car.

The tortfeasor's insurance settled for the full amount of the policy, totaling $15,000. Plaintiff sought underinsured motorist (UIM) coverage for his injuries from defendant. Defendant denied coverage because, pursuant to the policy, plaintiff was not occupying his employer's vehicle when the accident occurred. The policy covered damages resulting from bodily injury sustained by an insured, who is "[a]nyone . . . 'occupying' a covered 'auto' . . . . 'Occupying' means in, upon, getting in, on, out or off [of a covered auto]."

Plaintiff sued for damages. After an initial round of discovery—including plaintiff's deposition—defendant sought summary judgment, arguing that. as a matter of law, the policy did not cover plaintiff. Plaintiff argued summary judgment was inappropriate because a jury could find he was an occupant of the vehicle if there was a substantial nexus between his proximity to the vehicle and the accident. The motion judge agreed the matter was a factual question for the jury, not a question of law, and denied summary judgment.

Following further discovery, which included the depositions of the tortfeasor, the officer who responded to the accident, and plaintiff's employer, defendant moved for reconsideration. It argued that, viewing the facts in a light most favorable to plaintiff, the evidence showed plaintiff: was not in the vehicle; had closed the door to it; removed the equipment he needed to complete the job; had stepped away from the vehicle and was not touching it; and was about to begin his work. Therefore, there was no nexus between plaintiff and the vehicle when he was struck by the tortfeasor.

The motion judge found plaintiff failed to establish a substantial nexus and granted the reconsideration motion. He found:

> [P]laintiff was not in the vehicle[or] in the process of exiting the vehicle[] when he was struck by the tortfeasor. Plaintiff had already exited the vehicle, closed the doors of the truck, shut off the truck, . . .

> removed his equipment from the truck, and was in the process of starting up the piece of equipment he needed to perform the task that he had been assigned by his employer.
>
> The fact that there was close proximity to the vehicle, in and of itself, does not carry the day, if it appears that the intention of the plaintiff was to begin his work and he had already completed his operation of the truck in getting to the site. There are two different discrete tasks, they're not interrelated. One is not dependent on the other.
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> . . . And the facts don't support that he was packing up his vehicle and getting ready to go . . . back into his truck.

Further,

> plaintiff had not yet begun to use the . . . blower and . . . he cannot argue that he was in the process of using the truck to store debris created by the . . . blower when he was injured.
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> What's critical to this [c]ourt's analysis is the covered vehicle was not being used for any purpose at the time of the accident.
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> . . . .
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> . . . [H]is departure from the vehicle was not momentary or unanticipated.

On appeal, plaintiff argues the judge erred because he initially correctly denied summary judgment and did not overlook facts to warrant granting reconsideration. Plaintiff asserts material facts remain in dispute regarding

whether his proximity to the vehicle established enough of a nexus to show he was an occupant. He claims he was an occupant because he was "alighting from or using" the vehicle when the accident occurred.

We review a trial court's grant of a reconsideration motion for an abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467-68 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). Reconsideration should be granted where "1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Dennehy v. E. Windsor Reg'l Bd. of Educ., 469 N.J. Super. 357, 363 (App. Div. 2021) (alterations in original) (quoting Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010)).

"However, we owe no deference to a trial court's interpretation of the law," and review such issues de novo. Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016). Likewise, "[o]ur review of a summary judgment ruling is de novo." Conley v. Guerrero, 228 N.J. 339, 346

(2017) (citing Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)).

An insurance policy's words should be given "their plain, ordinary meaning." President v. Jenkins, 180 N.J. 550, 562 (2004) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). Where a policy's terms are clear, it should be interpreted as written. Ibid. (citing Gibson v. Callaghan, 158 N.J. 662, 670 (1999)).

As of 1998, our Legislature has required "every standard automobile liability insurance policy issued or renewed" must "contain personal injury protection [(PIP)] benefits" for those "who sustain bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile . . . ." N.J.S.A. 39:6A-4. The statute applies whether the dispute involves PIP, uninsured motorist, or, as here, UIM claims. Severino v. Malachi, 409 N.J. Super. 82, 93 (App. Div. 2009).

However, the plaintiff bears the burden to "establish a substantial nexus between the insured vehicle and the injury sustained." Torres v. Travelers Indem. Co., 171 N.J. 147, 149 (2002). "'Mere proximity' to a covered vehicle is insufficient to establish entitlement to" coverage. Severino, 409 N.J. Super. at 94 (quoting Aversano v. Atl. Emp. Ins. Co., 290 N.J. Super. 570, 575 (App. Div.

1996), aff'd o.b., 151 N.J. 490 (1997)). " A [m]ere coincidental connection between the accident and some touching of the car would not be enough." Torres, 171 N.J. at 149 (alteration in original) (quoting Mondelli v. State Farm Mut. Auto. Ins. Co., 102 N.J. 167, 172 (1986)).

Coverage has been found where a plaintiff was injured: adding water to their vehicle's radiator, Newcomb Hospital v. Fountain, 141 N.J. Super. 291, 295 (Law Div. 1976); retrieving a roadway sign they were loading, along with cones, onto their employer's vehicle, De Almeida v. General Accident Insurance Company, 314 N.J. Super. 312, 314, 317 (App. Div. 1998); by a hit and run driver while leaning on a vehicle, Mondelli, 102 N.J. at 168-73; walking back to a vehicle they left running, Torres, 171 N.J. at 149-50; and stopping to help another driver involved in an accident, leaving their car running, and telling their child they "would be right back[,]" Macchi v. Connecticut General Insurance Company, 354 N.J. Super. 64, 68, 72 (App. Div. 2002).

However, we have found no coverage where a plaintiff walked away from a vehicle they were fueling and was struck by a tortfeasor because use of the vehicle was "merely coincidental" to the accident. Thompson v. James, 400 N.J. Super. 286, 295 (App. Div. 2008). In Thompson, we held the plaintiff's departure from the vehicle was unrelated to the reason for the stop and "was not

so brief for him to be considered to have occupied the car continuously." Id. at 295-96. We reasoned it was not enough for the plaintiff to assert they would "eventually return" to the vehicle because "[n]one of the governing cases support such a broad test of 'occupying' without reference to temporal duration, distance or reason for exiting the vehicle." Id. at 296.

Having reviewed the record pursuant to these principles, we are convinced the motion judge did not abuse his discretion when he reconsidered his decision and granted defendant summary judgment. The facts show plaintiff was not occupying his employer's vehicle either under the policy or the statute's definition of occupancy. Moreover, the case law does not support plaintiff's assertion there was an issue to present to a jury. Therefore, the motion judge correctly concluded reconsideration was appropriate. Indeed, viewing the facts in a light most favorable to plaintiff shows he separated himself from the vehicle with the intention to begin his work. The record does not support the conclusion the accident had anything to do with his employer's vehicle, such that defendant's UIM coverage applied.

Affirmed.