BAY STATE INSURANCE COMPANY, Plaintiff-Appellant,

v.

KIRSTEN JENNINGS, an infant by her G/A/L KEVIN JENNINGS; KEVIN JENNINGS, individually, CAROL COLLINS, Defendants-Respondents.

KIRSTEN JENNINGS, an infant by her G/A/L KEVIN JENNINGS; and KEVIN JENNINGS, individually, Plaintiffs,

v.

CAROL COLLINS, Defendant-Respondent.

No. A-0421-09T3.

Superior Court of New Jersey, Appellate Division.

Argued September 29, 2010.
Decided June 2, 2011.

Paul J. Endler, Jr., argued the cause for appellant Bay State Insurance Company (**Methfessel** & **Werbel**, attorneys; Mr. Endler, of counsel and on the brief; Amanda J. Schmesser, on the brief).

Kimberly L. Gozsa argued the cause for respondents Kirsten and Kevin Jennings (Levinson Axelrod, P.A., attorneys; Ms. Gozsa, on the brief).

Terrence J. Bolan argued the cause for respondent Carol Collins (Bolan Jahnsen Dacey, attorneys; Elizabeth A. Wilson, on the brief).

Before Judges R. B. Coleman and J. N. Harris.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

In this declaratory judgment action, plaintiff Bay State Insurance Company (Bay State) appeals from two June 20, 2008 orders (1) denying plaintiff's motion for summary judgment and (2) granting summary judgment in favor of defendants Kirsten Jennings, Kevin Jennings and Carol Collins. The effect of the orders is that plaintiff Bay State is required to provide a defense and indemnify Collins in an underlying negligence action brought by Kirsten and Kevin Jennings against her. Because we believe there is a dispute as to whether Collins was engaged in a business, we reverse the grant of summary judgment in her favor and remand for a plenary hearing consistent with this opinion.

This appeal arises in the following context. Kevin Jennings filed a personal injury complaint, individually and as guardian ad litem for his daughter Kirsten Jennings, against Carol Collins, to whom plaintiff Bay State had issued a homeowner's insurance policy and under which Collins had presented a claim for defense and indemnification. In response to Collins's claim, plaintiff filed a declaratory judgment action pursuant to the Uniform Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, in which it sought to void or rescind the subject homeowner's insurance coverage pursuant to the policy's "business exclusion." Kirsten and Kevin Jennings were also joined as defendants in this declaratory judgment action. Following a default judgment against Collins, Bay State moved for summary judgment against the Jenningses. Thereafter, Collins moved to vacate the default judgment, and she cross-moved for summary judgment. The motion court denied Bay State's motion for summary judgment, vacated Collins's default judgment and granted her motion for summary judgment. In other words, the court found that the business exclusion in the policy did not apply in this case.[1]

I.

Our review of an order granting summary judgment is de novo, applying the same legal standard as the trial court. Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009). Thus, we consider, as the motion judge did, "whether the evidence presents a sufficient disagreement to require submission to a jury [or trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). 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).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). However, a court should deny summary judgment if "the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues `to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" D'Amato v. D'Amato, 305 N.J. Super. 109, 114 (App. Div. 1997) (quoting Brill, supra, 142 N.J. at 523).

The following facts are based on our consideration of the evidence in the light most favorable to the party opposing summary judgment, in this case, plaintiff. On October 3, 2006, Kirsten injured her leg when the shopping cart in which she was seated tipped over. Collins, who was pushing the cart in a Sam's Club parking lot in Freehold, lost her balance and fell. As Collins fell, she pulled the cart down with her. On that date, Collins was caring for two minor children, Kirsten and Ariana.

The parties do not dispute that Collins would normally watch Kirsten two days a week, when Kirsten was not in daycare and her mother, Tina Jennings (Mrs. Jennings), was at work. Mrs. Jennings initially approached Collins about helping care for Kirsten when she was pregnant with Kirsten since she knew Collins was at home with her own child.

Collins was paid to provide care for other children at various times as well. For instance, she received twenty-five dollars a day for watching Ariana, the granddaughter of Kirsten's mother, Mrs. Jennings. However, this was a temporary arrangement, lasting only two weeks, and was done as a favor to Mrs. Jennings. Collins had previously taken care of two other children during the 2004-05 school year for a total of forty dollars a day, but was no longer caring for those children at the time of Kirsten's injury. Collins also testified at her deposition that she occasionally helped out a friend named Cathy with her children. Although she was not compensated for her time, Cathy would "slip [her] money" for lending a hand. Additionally, Collins was compensated for watching her own grandfather at one point "way before the incident." The greatest number of children or adults Collins cared for at one time was four.

Mrs. Jennings gave Collins thirty-five dollars per day for watching Kirsten. The parties dispute the extent to which this sum constituted consideration and to what extent it was offered to cover the everyday expenses associated with Kirsten's care. According to both Mrs. Jennings and Collins, the thirty-five dollars was to be used for items such as "food, diapers, and wipes," for Kirsten, as well as spending money for "anything [they] did." Mrs. Jennings testified that she never considered Collins to be an "employee."

As Collins understood the arrangement, the compensation she received was "in consideration for [her] time." At times, she characterized it as "a gift." Collins further explained that because Mrs. Jennings permitted her to leave her house and "go about [her] day, . . . [Mrs. Jennings] would pay [her] for that because she felt that it was the considerate thing to do." Mrs. Jennings also stated that she "wouldn't say that none of it was for her time."

The amount of money Collins would spend on Kirsten varied, but was usually around one-half the thirty-five dollar amount. Some days Collins spent more than the thirty-five dollars while other days she spent less. If less than thirty-five dollars was spent on Kirsten on a given day, Mrs. Jennings did not request that unspent money be returned. Likewise, if Collins spent more than thirty-five dollars, she was not reimbursed. Collins also testified that she would occasionally receive household help from Kevin Jennings or reciprocal childcare from Mrs. Jennings in lieu of the thirty-five dollars. However, Mrs. Jennings disputes that her husband performed household work for Collins.

II.

The homeowner's policy at issue in this case contains a clause that excludes coverage for bodily injuries that arise out of or in

connection with a business. The exclusionary clause reads, in relevant part:

> Personal [l]iability . . . does not apply to "bodily injury" or "property damage":
>
> a. Which is expected or intended by the "insured";
>
> b. Arising out of or in connection with a "business" engaged in by an "insured." This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed or implied to be provided because of the nature of the "business[.]"

"Business" is defined to include a "trade, profession, or occupation." To determine whether the exclusion applies to childcare, we apply a two-step analysis. See Carroll v. Boyce, 272 N.J. Super. 384, 386 (App. Div. 1994). The first question "is whether the pursuit involves `continuity, or customary engagement [by the insured] in the activity.'" Ibid. (citing Sun Alliance Ins. Co. of Puerto Rico, Inc. v. Soto, 836 F.2d 834, 836 (3d Cir. 1988)). The second asks "whether the activity involves a `profit motive' or whether the insured engages in the pursuit `as a means of livelihood, a means of earning a living, [or] procuring subsistence or profit[.]'" Ibid.

The motion court found that the Jennings and Collins weekly schedule satisfied the continuity requirement, but concluded that the actions of the insured, Collins, did not manifest a "profit motive" sufficient to qualify as a business or "means of livelihood." Specifically, the court opined:

> [T]here's little doubt in my mind that this insured did not baby-sit this child as a means of a livelihood, a means of earning a living or procuring sustenance or profit. Not only — not only raising doubt in favor of her. To me, it's clear that's not what she was doing. Especially when we get to this one — one answer.
>
> Is it also fair to say on some days you may spend more money on her daughter than was being paid and then on other days you would spend less?
>
> Oh, that is — oh yes.
>
> That's not a business. That's not a business, as far as this [c]ourt is concerned. Not the way it works.
>
> In fact, she was losing every day, she — it evened out is what when all is said and done.
>
> . . . .
>
> These are indicia that it wasn't — at least her reasonable expectation wasn't that this was a profit making situation. . . . One day she would spend [forty dollars], the next day she'd spend [thirty dollars]. And it would even out. That's what this was. This was — I do not find that this — that I can find that there are questions of facts as to whether or not this is a business.
>
> Frankly, I'm leaning more towards saying it is not a business and it was not done as a profit motive at all. I certainly can't find that . . . [it was] livelihood. This wasn't her means of livelihood at all. As a means of earning a living. Not even close. Or procuring sustenance or profit. I do not find that that's what this was all about based upon the later discovery of relevant facts . . . .

Based on this assumption, the court granted defendants' motion for summary judgment. At that point in the proceeding, the court was obliged to view the facts in the light most favorable to plaintiff.

The critical issue for the court to decide was not whether Collins took home a profit on the days she watched Kirsten Jennings, but whether her intent in agreeing to watch Kirsten was motivated by financial gain. The burden is on the insured to disprove a profit motive. Carroll, supra, 272 N.J. at 388 n.2 (explaining that while insurance carriers "generally have the burden of proving an exclusion," the insured was in a better position to disprove a profit motive). Our review of the record shows that, while the motion court may have initially questioned the extent to which defendant Collins was in fact being compensated for her time and effort, it appeared to abandon this query by the end of the decision, summarily finding that Collins was simply "breaking even."

Even though Collins did not keep a log of her daily expenses for the child, she estimated that she spent only half the thirty-five dollars given by Mrs. Jennings each day she worked. This implies that Collins earned a small income. Furthermore, Collins

cared for several other children for extended periods of time, for compensation, which suggests that her arrangement with the Jennings family also was more than a favor to a friend or casual accommodation. Although this does not by itself establish a profit motive, we find it raises a genuine issue of fact concerning Collins's intent.

Similarly, the fact that the unspent monies were never returned to Mrs. Jennings suggests a profit motive. "[T]he court should be particularly hesitant in granting summary judgment where questions dealing with subjective elements such as intent, motivation and duress are involved." Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 212 (App. Div. 1987) (citing Ruvolo v. Am. Cas. Co., 39 N.J. 490, 500 (1963)). Due to inconsistent testimony, we find it is a genuine issue of fact whether Collins had a "profit motive."

We recognize that in Carroll, we found it unnecessary to investigate the intent of the parties because the plaintiffs had submitted no evidence that the compensation "was all consumed by expenses." Carroll, supra, 272 N.J. Super. at 387. However, we do not perceive our decision in Carroll to create a bright-line rule which would require caregivers to present documentary evidence showing a lack of profit, such as business records, to stave off summary dismissal of their claim against an insurer.

Accordingly, we hold that the motion court made a factual finding that failed to view the evidence in a light most favorable to the party opposing the motion. Here, the issue of "profit motive" is not so one-sided as to justify the granting of the summary judgment. We therefore reverse and remand for a plenary hearing.

Reversed and remanded.

[1] Before Bay State filed this appeal, the parties entered into a high/low settlement agreement that will dictate the sums to be paid to Kirsten and Kevin Jennings. The amount of the actual recovery will depend upon our decision.