

JUDITH A. SCHAFFER, ADMINISTRATRIX AD PROSEQUENDUM FOR THE ESTATE OF KENNETH J. SCHAFFER, SR. (DECEASED), Plaintiff,
v.
PARAGANO CUSTOM BUILDING, INC., Defendant/Third-Party Plaintiff-Respondent,
v.
HARLEYSVILLE INSURANCE COMPANY OF NEW JERSEY, Third-Party Defendant-Appellant, and WALNUT ADVISORY CORP., Third-Party Defendant.

Docket No. A-2512-08T3.

Superior Court of New Jersey, Appellate Division.

Argued November 17, 2009.

Decided February 24, 2010.

Lance J. Kalik argued the cause for appellant (Riker Danzig Scherer Hyland & Perretti, attorneys; Mr. Kalik, of counsel and on the brief; Peter M. Perkowski, Jr., and Stephanie M. Panico, on the briefs).

Marc L. Dembling argued the cause for respondent (**Methfessel & Werbel**, attorneys; Mr. Dembling, of counsel and on the brief; Danielle M. Lozito, on the brief).

Before Judges Wefing, Grall and Lewinn.

PER CURIAM.

Third-party defendant Harleysville Insurance Company of New Jersey ("Harleysville") appeals from trial court orders directing it to provide a defense and indemnification to defendant Paragano Custom Building, Inc. ("Paragano") and denying its motion for reconsideration. After reviewing the record in light of the contentions advanced on appeal, we reverse.

Paragano was the general contractor for the renovation of a home in Mendham, and it subcontracted a portion of the work to K&D Builders and Carpenters, Inc. ("K&D"). Kenneth J. Schafer, Sr., was a principal of K&D. On December 30, 2005, the work had progressed to such a stage that Schafer was called upon to install a window in a second-floor bathroom of the residence. Paragano had erected a scaffold in connection with the renovation, but it was not high enough to permit Schafer to complete the installation. Therefore, he placed an A-frame ladder on the top of the scaffold's nineteen inch wide platform and climbed up the scaffold and then the ladder, carrying the window to be installed. While perched on the ladder and trying to fit the window into place, Schafer lost his balance and fell to his death.

This lawsuit was filed, seeking damages. Plaintiff's expert opined that the scaffolding had been improperly erected by Paragano, leading to the fall. Paragano's expert, on the other hand, opined that the fall was the result of Schafer's negligence in placing a ladder atop the scaffolding. In addition, Paragano retained an expert who opined that the fact that Schafer had consumed two to three beers at lunch had contributed to the accident.

The Occupational Safety and Health Administration ("OSHA") investigated the circumstances of the accident. Paragano received a citation for improper construction of the scaffold while K&D received a citation for improperly placing a ladder on the scaffold.

At the time Paragano subcontracted with K&D, it had insisted that K&D name it as an additional insured under K&D's insurance policy with Harleysville. As part of this litigation, Paragano filed a third-party complaint against Harleysville, seeking a defense and indemnification under K&D's policy. It is from the trial court order directing that defense and indemnification that Harleysville has appealed.

Following the trial court's grant of a motion for defense and indemnification to Paragano and denial of Harleysville's motion for reconsideration, the parties negotiated a settlement of Schafer's damages claim, while preserving Harleysville's right to appeal. Under that settlement, Harleysville and Quincy Mutual Insurance Company, Paragano's liability insurer, each paid \$230,000 to

Schafer. The parties agreed that the total sum paid of \$460,000 represented "the full, net value of the Underlying Action . . . taking into account the comparative negligence of Schafer." The parties also agreed as part of the settlement that "outside the acts, errors or omissions of Schafer himself, there is no evidence or claim that any act, error or omission of KD Builders . . . caused Schafer's accident in whole or in part."

The endorsement adding Paragano as an additional insured to K&D's policy contained the following provision.

Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

While Harleysville does not dispute on appeal that Paragano was an additional insured under that endorsement, it does contend that Paragano is not entitled to a defense and indemnification under that language. We agree.

We note first the standard governing our review of the trial court's order. "[T]he interpretation of an insurance contract is a question of law which [the appellate courts] decide independent of the trial court's conclusions." Thompson v. James, 400 N.J. Super. 286, 291 (App. Div. 2008) (quotation omitted). "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. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The endorsement certificate explicitly states that it "CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER [AND THAT IT] DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW." It further states that "THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES." *Ibid.* Thus, the coverage afforded Paragano is determined by reference to the policy itself, and not by reference to the certificate.

By its very terms, the policy issued to KD Builders simply does not cover Paragano for Paragano's own acts of negligence. The policy provided that Paragano was covered

only with respect to liability . . . caused, in whole or in part, by:

1. [K&D Builders'] acts or omissions; or
2. The acts or omissions of those acting on [K&D Builders'] behalf;

in the performance of [K&D Builders'] ongoing operations for [Paragano].

"In the first instance, the words of an insurance policy are to be given their plain, ordinary meaning." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001). Where there is no ambiguity, a court should not write for the insured a better policy than the one he bargained for. Gibson v. Callaghan, 158 N.J. 662, 670 (1999) (citation omitted). Where there is ambiguity, however, courts shall interpret the policy "to comport with the reasonable expectations of the insured." *Id.* at 671.

We perceive no ambiguity. The words of the policy are clear in providing coverage to Paragano only for liability that is caused in whole or in part by the acts or omissions of K&D Builders. The policy does not provide coverage for liability caused by Paragano's own acts or omissions.

The additional insured endorsement issued by Harleysville clearly states that Paragano is covered only as to liability caused by the acts or omissions of K&D Builders. It provides coverage for a claim asserted against Paragano for vicarious liability; it does not provide coverage for a claim against Paragano for its own direct negligence. Coverage for such claims rests with Paragano's own liability insurer, not K&D's.

The order under review is reversed.

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