EDGAR GREEN, JR., Plaintiff-Appellant,
v.
MERCURY INSURANCE GROUP, Defendant-Respondent, and
NATIONAL INTERSTATE INSURANCE COMPANY, Defendant.

No. A-4036-11T2.

Superior Court of New Jersey, Appellate Division.

Submitted January 7, 2013.
Decided February 26, 2013.

Reynolds & Scheffler, LLC, attorneys for appellant (Thomas F. Reynolds, on the brief).

Methfessel & **Werbel**, attorneys for respondent (Gina M. Stanziale, on the brief).

Before Judges Espinosa and Guadagno.

NOT FOR PUBLICATION

PER CURIAM.

Plaintiff appeals from an order that granted summary judgment to his automobile insurance carrier, defendant Mercury Insurance Group (Mercury), dismissing his claim for underinsured motorist (UIM) coverage. He argues that the trial court erred in granting summary judgment to Mercury because the policy exclusions relied upon by Mercury were inapplicable and that Mercury waived its right to subrogation. He also argues that the trial court erred in declining to conduct oral argument on the summary judgment motions. Because we find that policy exclusions clearly applied to plaintiff's claim for UIM benefits, we affirm the order granting summary judgment and need not consider whether Mercury waived its right to subrogation. Although we agree that the court erred in failing to hear oral argument on the summary judgment motion, we conclude that such error did not prejudice plaintiff.

On June 20, 2007, plaintiff was driving a school bus owned by his employer, Student Transportation of America, Inc. (STI), when he collided with a car operated by Helene Perugini. Plaintiff, STI, and Perugini were all insured. STI had a policy with National Interstate Insurance Company (National) that provided coverage for both plaintiff and the bus. Perugini had an insurance policy issued by AAA Mid-Atlantic Insurance Company (AAA), which had coverage limits of $50,000 per person/$100,000 per accident. Plaintiff had a personal automobile insurance policy with Mercury that provided UIM coverage up to $100,000 per person/$300,000 per accident.

Plaintiff instituted suit against Perugini and received a settlement offer of $48,500 from her carrier, AAA. By letter dated February 2, 2010, plaintiff's counsel advised Mercury of the offer and provided formal notice that plaintiff would be presenting a claim for UIM benefits in accordance with Longworth v. Van Houten, 223 N.J. Super. 174 (App. Div. 1988). Mercury responded by letter dated February 5, 2010, stating that it could not waive its subrogation rights against Perugini until its investigation was complete. In subsequent correspondence, Mercury requested additional information, including "whether there [were] any other insurance policies that [were] primary or concurrent" to the Mercury policy. Mercury cautioned plaintiff's counsel not to agree to the settlement until Mercury completed its investigation, and that if he entered into the agreement prematurely, it would be "to [his] client's detriment."

Although plaintiff's counsel provided additional information to Mercury, he refused to respond to Mercury's inquiry regarding the existence and applicability of another insurance policy. Nonetheless, as of March 3, 2010, Mercury had confirmed that UIM coverage was potentially available through National and advised plaintiff's counsel further that it remained unable to consent to the settlement offer because its investigation was incomplete.

Plaintiff's counsel wrote to Mercury again on April 5, 2010, advising that plaintiff would execute AAA's Release on April 7, 2010,

if he did not receive a response from Mercury before then, as sixty days had already elapsed from the date that plaintiff first notified Mercury of his UIM claim and AAA's settlement offer. Receiving no response, plaintiff executed the Release on April 9, 2010, dismissed his complaint against Perugini with prejudice, and received $48,500 from AAA.

By letter dated April 28, 2010, Mercury advised plaintiff's counsel that it was aware plaintiff was acting in the course of his employment at the time of the accident. It requested information regarding the frequency and nature of plaintiff's use of the bus.

Mercury denied plaintiff's request for UIM coverage by letter dated June 27, 2010. In the letter, Mercury reviewed provisions of the policy, including certain exclusions, that plaintiff identifies as Exclusions 1 and 5, contained in Part III of the Policy, and General Exclusion 2.

The letter's review of policy provisions included the following regarding uninsured and UIM coverage:

> There is no coverage for damages an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle until the limits of liability of all bodily injury and property damage liability bonds and policies have been used up by payment of judgments or settlements.

The letter advised that plaintiff's claim for UIM benefits was denied, for the following reasons:

> Our investigation has revealed that at the time of the accident... [plaintiff] was within the course of his employment... [and] was operating a yellow school bus owned by [his employer] and insured with [National]. [Plaintiff], as an employee... and as a permissive user of the vehicle, was an insured under the [National] policy. Our investigation has further revealed that the yellow school bus was furnished to [plaintiff] for his regular and frequent use....
>
> Notwithstanding the above, despite having received notice that a question of coverage existed on February 12, 2010, [plaintiff] settled his claim for bodily injury with the tortfeasor without our written consent and without preserving Mercury's right to recover against said tortfeasor.
>
> Based on the foregoing, [plaintiff's] claim for [UIM] benefits is denied....

Plaintiff filed this complaint against both National and Mercury, seeking UIM coverage under both policies. Both carriers filed motions for summary judgment. Plaintiff opposed Mercury's motion, but filed no opposition to National's motion. The trial court granted summary judgment to both Mercury and National without oral argument and without providing a statement of reasons for its decision as required by Rule 4:46-2(c) ("The court shall find the facts and state its conclusions in accordance with R. 1:7-4.") (Emphasis added). Plaintiff filed a motion for reconsideration of the order granting summary judgment to Mercury. The trial court denied the motion and provided a written statement of its reasons for doing so. This appeal followed.

We review motions for summary judgment pursuant to the standards set forth in Rule 4:46-2 and the guidance provided in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995). Applying the same standard as the trial court, ibid., we determine whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, "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); see also Myers v. AT&T, 380 N.J. Super. 443, 451-52 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006).

N.J.S.A. 17:28-1.1(e) provides that a motor vehicle is underinsured

> when the sum of the limits of liability... available to a person against whom recovery is sought... is, at the time of the accident, less than the applicable limits for [UIM] coverage afforded under the motor vehicle insurance policy held by the person seeking that recovery.

Thus, Perugini's vehicle was underinsured within the definition of this statute. We turn to consider whether the exclusions contained in the Mercury policy bar UIM coverage to plaintiff under the facts of this case.

General Exclusion 2 provides that the policy "shall not apply... [t]o any motor vehicle furnished or available for the regular or frequent use by you... unless such motor vehicle is listed on the declarations page or it qualifies as a newly acquired car." (Emphasis deleted).

Exclusions 1 and 5, which are contained in Part III of the policy, state in pertinent part:

> There is no coverage...
>
> 1. For any insured who:
>
> a. without our consent, settles with the owner or operator [of] an... underinsured motor vehicle who may be liable for the bodily injury or property damage and hurts our right to recover from such person or organization, or
>
> ...
>
> 5. For you while occupying a vehicle insured under another policy on which you are an insured.
>
> [(Emphasis deleted).]

Plaintiff argues that Exclusion 5 and General Exclusion 2 are inapplicable.[1] Although he identifies no conflict with statutorily mandated coverage, the thrust of his arguments as to the exclusions is that each violates public policy. He contends that UIM coverage is "personal" to the insured and that the policy underlying such coverage is "to protect those insured with foresight to protect themselves." Thus, he argues that it would violate public policy, legislative intent, and his own reasonable expectation for Exclusion 5 to exclude UIM benefits from the personal policy he purchased "simply because, at the time of the accident, he was operating a vehicle owned by his employer." He makes a similar argument regarding General Exclusion 2.

In interpreting insurance policies, "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). If the policy terms are clear, we interpret the policy as written and avoid writing a better insurance policy than the one purchased. Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 607-08 (2011); Villa v. Short, 195 N.J. 15, 23 (2008); President v. Jenkins, 180 N.J. 550, 562 (2004); Gibson v. Callaghan, 158 N.J. 662, 670 (1999). It is only when the terms of the policy are ambiguous that we will construe the terms against the insurer and in favor of the insured to give effect to the insured's reasonable expectations. Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010).

These principles apply to our review of the UIM coverage here and the exclusions deemed applicable by Mercury.

"If there is ambiguity in the exclusion, it will be construed narrowly and the insurer bears the burden of proving that the exclusion should be enforced." Potenzone v. Annin Flag Co., 191 N.J. 147, 152 (2007). However, an exclusion is enforceable if it is "specific, plain, clear, prominent, and not contrary to public policy." Ibid. And, specifically addressing UIM coverage, the Supreme Court has declared that "the critical factor in UIM coverage litigation is the policy language[.]" N.J. Mfrs. Ins. Co. v. Breen, 153 N.J. 424, 431 (1998); see also Grant v. Amica Mut. Ins. Co., 153 N.J. 433, 437 (1998).

Significantly, plaintiff has presented no argument that any of the exclusions here were ambiguous. Although he contends that the exclusions violate public policy, he has identified no conflict with statutorily mandated coverage. See Potenzone, supra, 191 N.J. at 152. Our review is therefore properly directed to the plain and ordinary meaning of the language of each exclusion.

It is undisputed that, at the time of the accident, plaintiff was operating a school bus owned by his employer that he regularly used in the course of his employment. The bus was neither listed on the declarations page of the subject policy nor a "newly acquired automobile." Thus, the plain and clear language of General Exclusion 2 applies.

Exclusion 5 states there is no coverage for plaintiff "while occupying a vehicle insured under another policy on which [he is] an insured." It is undisputed that the bus plaintiff occupied was insured under the National policy and that plaintiff was an insured under that policy. These facts triggered Exclusion 5.

In arguing that these exclusions should not apply because they violate public policy, the only consideration identified is that the enforcement of these exclusions would defeat his reasonable expectation. However, as we have noted, when the language itself is clear, we are bound to enforce the insurance contract as written and will not reform the policy to comport with plaintiff's claimed expectation. See Gibson, supra, 158 N.J. at 670. We are therefore satisfied that summary judgment was properly granted, dismissing plaintiff's complaint against Mercury.

Plaintiff also argues that the court erred in declining to conduct oral argument on the summary judgment motion. We agree.

Rule 1:6-2(d) provides that requests for oral argument in substantive motions, excluding those made in family actions or involving discovery issues, "shall be granted as of right." See Great Atl. & Pac. Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 497-98 (App. Div. 2000); Filippone v. Lee, 304 N.J. Super. 301, 306 (App. Div. 1997). The rule further states that "[a] party requesting oral argument may... condition the request on the motion being contested." R. 1:6-2(d). In such a scenario, the party filing responsive papers in opposition to the motion is "entitled to rely on [the moving party's] conditional request because the condition [has] been met[,]" Vellucci v. Dimella, 338 N.J. Super. 345, 347 (App. Div. 2001), and "need not make a separate request for oral argument." Pressler & Verniero, Current N.J. Court Rules, comment 5 on R. 1:6-2 (2013).

Mercury's notice of motion for summary judgment stated, "Pursuant to R. 1:6-2(d) [Mercury] requests oral argument only if opposition to the within motion is entered." Plaintiff filed timely opposition to the motion and was entitled to rely upon the conditional request for oral argument made by Mercury. It was, therefore, error for the trial court to conclude that oral argument was not required because there was no affirmative request for oral argument. This error was exacerbated by the trial court's failure to provide a statement of reasons, setting forth its findings and conclusions as required by Rule 4:46-2(c).

In Vellucci, we reversed the trial court's grant of summary judgment "primarily because [the parties] were denied oral argument on the motion." 338 N.J. Super. at 347. However, we are satisfied that a reversal is not required here because plaintiff was not prejudiced by this error.

Plaintiff was required to submit opposition to the summary judgment motion that demonstrated the existence of a genuine issue that would preclude summary judgment. However, his opposition failed to show any ambiguity in the exclusions that would preclude their enforcement. Therefore, this was not a case in which oral argument was necessary to properly understand the positions of the parties. See Great Atl. & Pac. Tea Co., Inc., supra, 335 N.J. Super. at 498. Although we emphasize that oral argument is to be granted as of right when requested, as here, and that courts must comply with Rule 4:46-2(c) in deciding summary judgment motions, we discern no value in reversing this matter for the sole purpose of conducting oral argument when it is clear that summary judgment was appropriate. See Finderne Heights Condo. Ass'n v. Rabinowitz, 390 N.J. Super. 154, 165-66 (App. Div. 2007) (stating that "although [there is] a lack of justification for the trial court's failure to have oral argument... [there is] no prejudice" warranting a remand); Triffin v. Am. Int'l. Grp., Inc., 372 N.J. Super. 517, 524 (App. Div. 2004); Spina Asphalt Paving Excavating Contractors, Inc. v. Borough of Fairview, 304 N.J. Super. 425, 427 n.1 (App. Div. 1997).

Affirmed.

[1] As we have noted, plaintiff also argues that Mercury waived its subrogation rights because it failed to respond to plaintiff's counsel within a reasonable period of time and therefore Exclusion 1 does not apply. Because we are satisfied that coverage was properly excluded under General Exclusion 2 and Exclusion 5, we need not consider whether summary judgment would be appropriate based upon Exclusion 1.

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