**CHRISTOPHER EACHUS, Plaintiff-Appellant,**

**v.**

**MERCURY INSURANCE COMPANY, Defendant-Respondent.**

No. A-1884-11T2.

**Superior Court of New Jersey, Appellate Division.**

Argued December 18, 2012.
Decided May 9, 2013.

Brian L. Katz argued the cause for appellant (Dansky, Katz, Ringold, York, attorneys; Mr. Katz, on the brief).

Paul J. Endler, Jr., argued the cause for respondent (**Methfessel & Werbel**, attorneys; Mr. Endler, Jr., of counsel and on the brief).

Before Judges Messano, Lihotz and Kennedy.

# NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiff Christopher Eachus appeals from the grant of summary judgment to defendant Mercury Insurance Company (Mercury). The litigation arose from a motor vehicle accident that occurred on September 10, 2005. Plaintiff was riding his motorcycle when it was struck by a car driven by Nicole Archibald and owned by her father, Cleve Archibald. The policy insuring Cleve's car, issued by Consumer First Insurance Company (Consumer), contained liability limits of $15,000 per person/$30,000 per accident.[1] Nicole did not own a car and had no coverage under any other policy.

Plaintiff amended his complaint to add Nicole's mother, Gricelda, as a defendant. Gricelda owned an automobile that was insured under a policy issued by Mercury with $100,000/$300,000 coverage limits. Gricelda never entered an appearance in the litigation, and Mercury never filed an answer on her behalf.

Plaintiff settled the litigation for $130,000, pursuant to an agreement whereby Consumer paid plaintiff its policy limit of $15,000 in return for releases in favor of Nicole, Cleve and Consumer, and Nicole assigned her rights under the Mercury policy to plaintiff. Plaintiff then filed this action against Mercury.

We provide additional facts supported by the motion record in a light most favorable to plaintiff. See R. 4:46-2(c) (requiring, on summary judgment, consideration of "the evidence submitted by the parties . . ., together with all legitimate inferences therefrom favoring the non-moving party").

Cleve and Gricelda were divorced and did not live together at the time of the accident. In 2003, Cleve purchased the car involved in the accident, a 2001 Nissan Sentra, and gave it to Nicole as "a gift" when she went to college. The car was registered in Cleve's name, although Nicole used it on a daily basis.

At the scene of the accident, Nicole presented a driver's license with the address of 53 Egbert Street, Pemberton, which was Gricelda's home. Nicole lived there growing up, but had not lived there for about one year prior to the accident, having lived with her "half-sister" in Mount Laurel and with another sister in Browns Mills during that year. Nonetheless, Nicole continued to receive all her mail at Gricelda's home and used it as her voting address and when paying taxes. After the accident, Nicole returned to live with her mother. In their depositions, Gricelda and Cleve essentially corroborated these facts.

Plaintiff also obtained discovery regarding Gricelda's insurance history with Mercury, which began in 2003. Gricelda was the only insured listed on the policy, and no other drivers were listed on the application as residing in the household. Mercury's underwriting department, however, was aware that, in 2001, while driving a car owned by Gricelda, Nicole had been involved in an accident and listed the Pemberton address as her home. A document from the underwriting department's records shows a notation from October 2003, "Who is Nicole Archibald?" The same document contains another notation, dated January 22, 2004, stating Nicole was Gricelda's daughter and "not in [household], at college." During her deposition, Shannon McMasters, a representative from Mercury's underwriting department, acknowledged that, under Mercury's current underwriting policies, "if there's a student away at school they need to be added to the policy."

Plaintiff and Mercury cross-moved for summary judgment. In support of its motion, Mercury included a copy of Gricelda's insurance policy that was issued in May 2005.[2] The declarations page listed Gricelda as the only driver of the single car named, a 2004 Nissan that Gricelda owned. The policy included the following definitions:

> Insured — the persons described as insureds under each coverage.
>
> Non-Owned Car — a car not:
>
> 1. owned by, registered or leased in the name of or furnished or available for the regular or frequent use by:
>
> a. you . . .;
>
> b. a relative . . .;
>
> Relative — means a person related to you by blood, marriage or adoption . . . that resides with you. It includes your unmarried and unemancipated child away at school or in the armed forces.
>
> You or Your — means the named insured as shown on the declarations page. . . .
>
> Your car — means a car . . . listed on the declarations page. . . .

In the "General Exclusions" section that applied to all coverages, the policy provided:

> This policy . . . shall not apply;
>
> 1. To any motor vehicle owned by you or a relative unless such motor vehicle is listed on the declarations page. . . .;
>
> 2. To any motor vehicle furnished or available for the regular or frequent use by you, [or] a relative . . . unless such motor vehicle is listed on the declarations page. . . .

The insuring agreement as to liability coverage provided:

> 1. When we refer to your car, insured means:
>
> a. You;
>
> b. A relative;
>
> . . . .
>
> 2. When we refer to a non-owned car, insured means:
>
> a. You;
>
> b. a relative listed on the declarations page; and

c. Any person . . . wh[o] does not own or hire the car but is liable for its use by you, or a relative.

In denying plaintiff's motion and granting summary judgment to Mercury, the judge concluded that Nicole was not a resident of Gricelda's home, having admittedly not lived there for many months. The judge further determined that Nicole "simply [did not] fit into the definition of an insured under this policy."

Before us, plaintiff argues that the judge misapplied the proper summary judgment standard by not according him all the favorable evidence and inferences available regarding Nicole's residence, and therefore erred in concluding she was not insured under the policy. Alternatively, plaintiff contends that Mercury should be estopped from denying coverage because it knew that Nicole resided with Gricelda yet failed to include her as an insured under the policy.

Mercury counters by arguing that the judge correctly determined that Nicole was not entitled to coverage because she did not reside with her mother; even if coverage for Nicole was "triggered," several exclusions under the policy applied; Mercury should not be estopped from denying coverage; Nicole breached the policy by settling with plaintiff without Mercury's consent; and the "other insurance" clause of the policy applies to exclude coverage for non-owned vehicles.

We have considered these arguments in light of the record and applicable legal standards. We affirm for reasons other than those expressed by the motion judge. See El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169 (App. Div. 2005) ("[A] correct result, even if predicated on an erroneous basis in fact or in law, will not be overturned on appeal.").

## I

Initially, we agree with plaintiff that the motion judge erred to the extent she concluded, as a matter of law, that Nicole was not a resident of Gricelda's home and, therefore, not entitled to coverage. More than two decades ago, we held that "the totality of the circumstances surrounding the relationship of parent and child, as well as the parental obligation, must be considered in determining whether insurance coverage of a parent extends to the child by reason of residency in the parent's household." Sjoberg v. Rutgers Cas. Ins. Co., 260 N.J. Super. 159, 164-65 (App. Div. 1992).

In this case, at the least, there were sufficient factual issues presented such that, applying appropriate summary judgment standards, the mixed question of fact and law, i.e., whether Nicole was a resident of Gricelda's household, could not be resolved on the motion record alone. Therefore, moving forward in our analysis, we assume arguendo that Nicole was a resident of Gricelda's household for purposes of construing the relevant provisions of the Mercury policy.

## II

Plaintiff contends that the Mercury policy was ambiguous and that any ambiguity should, under established precedent, be construed in his favor, i.e., liberally extending coverage and restricting the scope of any exclusionary provisions. Mercury argues the policy provisions were not ambiguous, the policy clearly did not extend liability coverage to Nicole when using Cleve's vehicle, and, even if it did, several provisions exclude coverage in this case.

Interpretation of an insurance contract is a matter of law subject to our de novo review. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div.), certif. denied, 196 N.J. 601 (2008). "An insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled. In considering the meaning of an insurance policy, we interpret the language according to its plain and ordinary meaning." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (citations and internal quotation marks omitted).

"If the terms are not clear, but instead are ambiguous, they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations." Ibid. (citations omitted). "A `genuine ambiguity' arises only `where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.'" Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 274 (2001) (quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979)). And, whether ambiguous or not, when a court construes the terms of a policy of insurance, it "`should not write for the insured a better policy . . . than the one purchased.'" Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530,

537 (1990) (quoting Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529 (1989)); see also Flomerfelt, supra, 202 N.J. 441 ("when considering ambiguities and construing a policy, courts cannot write for the insured a better policy of insurance than the one purchased" (citation and internal quotation marks omitted)).

"[P]olicies should be construed liberally in [the insured's] favor to the end that coverage is afforded to the full extent that any fair interpretation will allow." Hurley, supra, 166 N.J. at 273 (second alteration in the original) (citations and internal quotation marks omitted). Exclusions are generally narrowly construed, and the burden is on the insurer to bring the claim within the exclusionary language. Flomerfelt, supra, 202 N.J. at 442. Nevertheless, "[e]xclusionary clauses are presumptively valid and are enforced if they are specific, plain, clear, prominent, and not contrary to public policy." Id. at 441 (citations and internal quotation marks omitted).

In this case, plaintiff argues the provisions of the Mercury policy extending liability coverage are ambiguous. The insuring provisions differentiated as to who was an "insured" depending on the nature of the vehicle. When the car was listed on the declarations page, it was an "owned" car, and the named insured and a resident relative were entitled to coverage. Since Nicole was not driving an "owned" car, these provisions did not apply. When the vehicle was a "non-owned" car, then those entitled to coverage were the named insured and a resident relative, but only if "listed on the declarations page." Even if Nicole was a resident relative, she was not listed on the declarations page.[3]

Plaintiff focuses on the third class of persons to whom liability coverage was extended if operating a non-owned car. Coverage was provided to "[a]ny person . . . wh[o] d[id] not own or hire the car but [wa]s liable for its use by [the named insured], or a relative." As we see it, this provision extended Mercury's liability coverage to anyone who did not own or hire the car but was liable if Gricelda or Nicole, assuming arguendo that she was a resident relative, were driving it, i.e., under circumstances wherein that "person" would be vicariously liable for Gricelda's or Nicole's actions.

However, under plaintiff's urged construction, the provision would provide coverage to "any person" — here, Nicole — who did not own or hire the car but was liable for its use by "a [resident] relative" — Nicole. Such construction, however, effectively excises the earlier subparagraph — extending coverage only to resident relatives listed on the declarations page — or renders it meaningless surplusage. Under plaintiff's construction, any time a resident relative could be liable for the use of the non-owned car, coverage would be provided whether or not that relative was listed on the declarations page.

It has been said that "[w]here the policy language [of an insurance policy] supports two meanings," ambiguity exists and the policy should be construed in favor of coverage. Hurley, supra, 166 N.J. at 273 (citation and internal quotation marks omitted). "Nevertheless, only genuine interpretational difficulties will implicate the doctrine that requires ambiguities to be construed favorably to the insured." Id. at 273-74. And, only "an objectively reasonable interpretation of the average policyholder is accepted so far as the language of the insurance contract in question will permit." Di Orio, supra, 79 N.J. at 269 (emphasis added). Under these circumstances, plaintiff's urged construction of the insuring provision is not "objectively reasonable."

However, even if we were wrong in our assessment of the insuring agreement, we agree with Mercury that the two clear and unambiguous general exclusions discussed above and applicable to the policy as a whole serve to deny coverage to Nicole. Under those exclusions, the policy simply did not cover "any motor vehicle" "owned by [the named insured] or a relative unless. . . listed on the declarations page." Cleve's car was neither owned by Gricelda nor Nicole and was not listed on the declaration page. The second exclusion provided that the policy did not apply to "any motor vehicle . . . available for the regular or frequent use by . . . a relative . . . unless . . . listed on the declarations page . . . ." As already noted, Nicole used Cleve's car on a daily basis, and the car was not listed on the declarations page.

In sum, we conclude that even if the factual disputes were resolved in favor of plaintiff regarding Nicole's residency, there was no coverage available under the Mercury policy, or, alternatively, the policy exclusions applied to deny coverage.

## III

We lastly consider plaintiff's argument that Mercury should be estopped from denying coverage because it was aware of Nicole's "presence" in Gricelda's household and failed to include her as an additional insured under the policy. In particular, plaintiff cites McMaster's testimony that Mercury's procedures required a household member who was away at college to be added to the insured's policy.

The record reveals that Gricelda applied for coverage from Mercury for the first time in the fall of 2003 through an agent. The application listed no one else as a resident of her household. When queried by Mercury based upon an accident report from 2001, Gricelda advised that Nicole, who was not driving a car owned by Gricelda at the time, was not in the household and was away at college. We accept, arguendo, based upon McMasters' testimony, that Mercury normally would have required that Nicole be added to Gricelda's policy.

However, the policy in place at the time of the accident was issued in May 2005. There is nothing to indicate that Gricelda was asked whether Nicole resided with her at that time, and it is undisputed, based on Nicole's testimony, that she was no longer in college in May 2005. In fact, it is undisputed that Nicole was not regularly living with Gricelda in May 2005. In other words, Gricelda's decision not to provide Mercury with any different information, specifically that Nicole was a member of her household, was entirely understandable. We are hard-pressed to see why Mercury, therefore, should be estopped from enforcing the terms of its policy.

Plaintiff cites only one case, Harr v. Allstate Ins. Co., 54 N.J. 287 (1969), in support of his argument. We acknowledge that, under very different circumstances, Harr held that "equitable estoppel is available to bar a defense in an action on a policy even where the estopping conduct arose before or at the inception of the contract." Id. at 304 (emphasis added). However, Harr's essential statement of the doctrine was "that where an insurer or its agent misrepresents . . . the coverage of an insurance contract, or the exclusions therefrom . . ., and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage." Id. at 306-07 (emphasis added).

The record in this case simply does not support the conclusion that Mercury either misrepresented the coverage or exclusions, or that Gricelda mistakenly relied upon that information. See Martinez v. John Hancock Mut. Life Ins. Co., 145 N.J. Super. 301, 311 (App. Div. 1976) (rejecting any estoppel argument after noting the insured's possession of the policy for a period of time before the loss, and distinguishing Harr based upon the lack of an affirmative misrepresentation that the coverage requested had been supplied), certif. denied, 74 N.J. 253 (1977).

In light of the foregoing, we need not consider the other arguments raised by Mercury.

Affirmed.

[1] To avoid confusion, we shall use the first names of the members of the Archibald family. We intend no disrespect by this informality.

[2] We recognize that there was some dispute as to whether the policy, other than the declarations page, was the actual, or just a form, policy. However, based upon the arguments made before us, there is no dispute that the policy language, which we hereafter reference, was in force.

[3] We are somewhat perplexed by Mercury's concession that Nicole was operating a "non-owned" car at the time of the accident. Under the policy language, a "non-owned" car is one "not owned by, registered or leased in the name of or furnished or available for the regular or frequent use by . . . [the named insured] or . . . relative." (Emphasis added). It was undisputed that Nicole used the car every day. Under the terms of the policy, it would appear the car was neither an "owned" nor "non-owned" car, and not covered at all by the policy. See, e.g., Di Orio v. N.J. Mfrs. Ins. Co., 79 N.J. 257, 264, 269 (1979) (interpreting a similar definition of "non-owned automobile" and concluding that the policy at issue "had no application" to a family's second car that was not listed on the declarations page). As we discuss later, the Mercury policy contained an exclusion from coverage on these same grounds.