DEBORAH M. JACOB, Plaintiff-Appellant,

v.

THE NETHERLANDS INSURANCE COMPANY, doing business as PEERLESS Insurance, a New York Corporation authorized to sell insurance in the State of New Jersey; and TRAVELERS OF NEW JERSEY, Defendants-Respondents.

DEBORAH M. JACOB, Plaintiff-Respondent,

v.

THE NETHERLANDS INSURANCE COMPANY, doing business as PEERLESS Insurance, a New York Corporation authorized to sell insurance in the State of New Jersey, Defendant-Respondent, and

TRAVELERS OF NEW JERSEY, Defendant-Appellant.

No. A-1378-11T3, A-1445-11T3.

Superior Court of New Jersey, Appellate Division.

Argued February 13, 2013.
Decided August 28, 2013.

Joseph M. Chiarello argued the cause for appellant Deborah M. Jacob (A-1378-11) (Jacob & Chiarello, L.L.C., attorneys; Mr. Chiarello and Jarad K. Stiles, on the brief).

James P. Lisovicz argued the cause for respondent Travelers of New Jersey (A-1378-11) and appellant Travelers of New Jersey (A-1445-11) (Coughlin Duffy, L.L.P., attorneys; Mr. Lisovicz, of counsel and on the brief; Timothy P. Smith and Brooks H. Leonard, on the brief).

Marc L. Dembling argued the cause for respondent The Netherlands Insurance Company (A-1378-11 and A-1445-11) (**Methfessel & Werbel**, attorneys; Mr. Dembling, of counsel and on the brief; Danielle M. Lozito, on the brief).

Before Judges Axelrad, Sapp-Peterson and Nugent.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

These are back-to-back appeals, consolidated for the purpose of this opinion. At issue in A-1378-11, is what amount, if any, plaintiff, Deborah Jacob, may recover from defendant, Netherlands Insurance Company (Netherlands), the insurer of the vehicle she occupied when injured in a motor vehicle accident, and, in A-1445-11, the coverage obligation, if any, of Travelers Insurance Company, which insured plaintiff's privately owned vehicle. We affirm in part and reverse in part.

These are the facts, which for purposes of summary judgment, are not disputed. On July 8, 2006, plaintiff was injured in a motor vehicle accident while a passenger in a vehicle driven by her husband, Frederick Jacob.[1] The vehicle, a 2006 Jaguar, was owned by her husband's law firm, Jacob & Chiarello, LLC, and was insured by Netherlands under a policy that named Jacob & Chiarello, LLC, as the "named insured."

The declaration page of the Netherlands policy states that "[t]he most we will pay for any accident or loss" for underinsured motorist coverage is $1,000,000. The Netherlands UIM endorsement (endorsement) is contained on a page identified in bold and all capitals as:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NEW JERSEY UNINSURED AND UNDERINSURED MOTORIST COVERAGE.

Section A of the endorsement states that Netherlands will pay all "sums the `insured' is legally entitled to recover as compensatory damages from the owner or driver of an ... `underinsured motor vehicle.'" Section B of the endorsement defines "insured" as:

> If the Named Insured is designated in the Declarations as:
>
> ....
>
> 2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
>
> a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto[.]"

However, under Section D of the endorsement, identified in bold lettering as "Limit of Insurance," the policy provides:

> 1. Regardless of the number of covered "autos[,]" "insureds[,]" premiums paid, claims made or vehicles involved in the "accident[,]" the Limit of Insurance shown in the Schedule or Declarations for Uninsured Motorists Coverage and Underinsured Motorists Coverage is the most we will pay for all damages resulting from any one "accident" with an "uninsured motor vehicle" or an "underinsured motor vehicle[.]"
>
> a. However, subject to our maximum Limit of Insurance for this coverage, if:
>
> (1) An "insured" is not the individual named insured under this policy;
>
> (2) That "insured" is an individual named insured under one or more other policies providing similar coverage; and
>
> (3) All such other policies have a limit of insurance for similar coverage which is less than the Limit of Insurance for the coverage;
>
> [T]hen the most we will pay for all damages resulting from any one "accident" with an "uninsured motor vehicle" or an "underinsured motor vehicle" shall not exceed the highest applicable limit of insurance under any coverage form or policy providing coverage to that "insured" as an individual named insured.
>
> [Emphasis added.]

At the time of the accident, plaintiff and Frederick maintained insurance for their privately owned vehicle, a 2002 Nissan Altima, under a personal automobile policy issued by Travelers. They were identified on the policy as the "named insureds." The Travelers policy provided UIM coverage of $500,000 "each person" and $500,000 "each accident." The UIM section of the policy contained a provision highlighted in bold lettering as "Limits of Liability." This section provides that "[r]egardless of the number of `insureds' [or] claims made ... the most [Travelers] will pay for damages resulting from `bodily injury' ... to all insureds [for UIM coverage] is the applicable limit of liability." The UIM section also contained, in bold print, an "Other Insurance" clause which states:

> An "insured" who is covered by other similar insurance may collect no more than the highest applicable limit of any one policy. Our share of the damages will be in proportion to our share of the total of the applicable policies.
>
> However, for Underinsured Motorist Coverage, if an "insured" suffers bodily injury while "occupying" a vehicle you do not own[,] this coverage applies as excess insurance and then only in the amount by which it exceeds the applicable limits of liability of the other insurance.

The motorist with whom Frederick collided, Albert A. Winther, maintained insurance that had liability coverage limits of $50,000 per individual and $100,000 per accident. Plaintiff recovered $30,000 from Winther, while Frederick recovered $15,000. As a result of other payments made on behalf of Winther arising out of the accident, his policy coverage was exhausted.

In November 2006, Frederick commenced an action against Netherlands seeking personal injury protection (PIP) and UIM benefits. In July 2009, he moved to amend his complaint to include Deborah "as a plaintiff seeking [d]eclaratory judgment" and to add Travelers as an additional defendant. The court denied the motion but ordered that Travelers "may participate... by intervention only." The following month, plaintiff filed her complaint seeking PIP and UIM benefits. She named both Netherlands and Travelers as defendants. She subsequently sought to consolidate her complaint with Frederick's action. The court denied the motion. On November 25, 2009, Netherlands settled Frederick's claim for $485,000.

Netherlands thereafter moved for summary judgment on plaintiff's UIM claim, seeking a "declaration that the step-down clause within [its] policy applies to Plaintiff and that Plaintiff is collaterally estopped from pursuing a judicial declaration to the contrary." Because plaintiff was subject to the step-down clause, Netherlands argued that coverage under its policy had been exhausted with its payment to Frederick.

Travelers filed a cross-motion seeking summary judgment. It agreed with Netherlands that plaintiff was subject to the Netherlands step-down clause, but disagreed that the Netherlands' policy had been exhausted with the satisfaction of Frederick's claim. Travelers urged that the policy language in the step-down clause refers, in the singular, to each person that is insured under the policy, not collectively and, therefore, Netherlands could not treat plaintiff and Frederick collectively.

Plaintiff opposed the motion, urging that as Frederick's spouse, she was deemed "the named insured" under the Netherlands policy. She also agreed with Travelers that the Netherlands policy had not been exhausted, and even if she was subject to the step-down clause, she would be stepped down to the remaining $500,000 available under the $1,000,000 of coverage provided under the Netherlands policy.

Judge Daryl F. Todd, Sr. issued a written opinion on October 12, 2011. He first incorporated two earlier decisions of September 12, 2008 and June 4, 2009 by reference. In the September 12, 2008 decision, he granted the motion for reconsideration filed by Netherlands and held that due to a change in the law, the statutory prohibition on step-down provisions applies prospectively only and, as such, Frederick's coverage under the Netherlands policy was limited by his coverage under the Travelers policy. The June 4, 2009 decision denying Frederick's motion for reconsideration of the September 12 decision rejected Frederick's contention that he is a named insured under the Netherlands policy. Rather, the court found that he is an "insured" and therefore subject to the step-down clause, which limits his recovery to the UIM limits contained in his Travelers policy.

Turning to whether plaintiff was also subject to the step-down clause of the Netherlands policy, the judge, citing Magnifico v. Rutgers Casualty Insurance Company, 153 N.J. 406 (1998), noted that "[o]ur Supreme Court has recognized the legitimacy of step-down clauses based on the existence of other available insurance." He noted further:

> Mrs. Jacob is not designated as a named insured directly or by implication on the Netherlands policy. The Netherlands policy is not ambiguous. The step-down clause is enforceable. Mrs. Jacob was not an employee of the law firm. She is not an attorney. She is not an owner of the law firm. In addition, she was not driving the motor vehicle and was not the primary user of the vehicle. Mrs. Jacob had her own separate personal vehicle insured under her personal automobile policy. Both she and Mr. Jacob were the named insureds of that personal automobile policy.

He concluded the step-down clause was enforceable and that she was only entitled to recover from Travelers, not Netherlands, up to the $500,000, less credit for the $30,000 paid to her on behalf of Winther. The judge rejected Travelers' argument and plaintiff's argument that the Netherlands policy had not been exhausted with the payout to Frederick. Likewise, the judge also rejected Travelers' argument that even if plaintiff's coverage was stepped-down to

$500,000, the $1,000,000 Netherlands UIM maximum coverage had not been exhausted. The present appeal followed.

On appeal, plaintiff, under A-1378-11, raises the following points for our consideration:

> POINT I
>
> THE STEP-DOWN CLAUSE WITHIN THE NETHERLANDS/PEERLESS POLICY DOES NOT APPLY TO DEBORAH JACOB, AS SHE IS DEEMED A NAMED INSURED UNDER THAT POLICY.
>
> POINT II
>
> THE NETHERLANDS/PEERLESS UIM POLICY OF $1,000,000 WAS NOT EXHAUSTED BY THE SETTLEMENT OF FREDERICK JACOB'S CLAIM FOR $500,000.
>
> POINT III
>
> MRS. JACOB STILL HAS $500,000 OF AVAILABLE COVERAGE UNDER THE TRAVELERS OF NEW JERSEY POLICY, AS THIS IS NOT CONSIDERED STACKING UNDER N.J.S.A. 17:28-1.1(c).

In its appeal, Travelers, under A-1445-11, urges:

> POINT I
>
> THE NETHERLANDS[] STEP-DOWN CLAUSE DOES NOT REDUCE THE AGGREGATE LIMITS OF THE NETHERLANDS POLICY, AND THE NETHERLANDS MUST PROVIDE PLAINTIFF WITH UP TO $500,000 IN PRIMARY UIM COVERAGE.
>
> A. BECAUSE UIM COVERAGE IS PERSONAL TO THE INSURED, PLAINTIFF IS ENTITLED TO OBTAIN UIM BENEFITS UNDER THE NETHERLANDS POLICY.
>
> B. ANY AMBIGUITY THAT THE NETHERLANDS ATTEMPTS TO CREATE IN ITS POLICY MUST BE INTERPRETED IN FAVOR OF PLAINTIFF'S REASONABLE EXPECTATIONS OF COVERAGE.
>
> POINT II
>
> BECAUSE THE NETHERLAND POLICY PROVIDES $500,000 IN PRIMARY UIM COVERAGE TO PLAINTIFF, TRAVELERS OWES NO UIM COVERAGE TO PLAINTIFF PURSUANT TO THE ANTI-STACKING PROVISION OF N.J.S.A. 17:28-1c.
>
> POINT III
>
> EVEN IF THIS COURT SHOULD FIND THAT THE STEP-DOWN CLAUSE REDUCES THE NETHERLANDS[] AGGREGATE POLICY LIMIT TO $500,000, THE POLICY AFFORDS PLAINTIFF $15,000 IN UIM COVERAGE, WHICH IS PRIMARY TO THE TRAVELERS POLICY.

I.

The factual issues in this matter are not in dispute. The sole issue before this court is the motion judge's application of the law to the undisputed facts. Because the judge's decision was based upon the legal conclusions he drew from those undisputed facts, we owe no deference to the judge's interpretation of the law. Whitfield v. Bonanno Real Estate Grp., 419 N.J. Super. 547, 552 (App. Div. 2011) (citing Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 231 (App. Div.), certif. denied, 189 N.J. 104 (2006)).

Under the Netherlands policy, the "named insured" is not subject to the UIM step-down provision. On the other hand, a claimant designated as an "insured" is covered only up to the limits of his or her personal insurance. Plaintiff argues the step-down provision in the Netherlands policy does not apply to her because she is deemed a named insured

under the Netherlands policy as the spouse of the principal of Jacob & Chiarello. We disagree.

"The term `named insured' is self-defining." Botti v. CNA Ins. Co., 361 N.J. Super. 217, 226 (App. Div. 2003). It "refers only to the names so appearing in the declaration." Ibid. (citation omitted). By contrast, the term "insured" is defined by the policy at issue as "[a]ny one else `occupying' a covered `auto[.]'" The name appearing on the declaration page is "Jacob & Chiarello," the law firm at which Frederick is a partner. Although earlier decisions from this court concluded that insurance policies designating business entities as the named insured rendered insurance coverage ambiguous or illusory, as in Macchi v. Connecticut General Insurance Co., 354 N.J. Super. 64, 74-75 (App. Div.), certif. denied, 175 N.J. 79 (2002), and Araya v. Farm Family Casualty Insurance Co., 353 N.J. Super. 203, 210-11 (App. Div.), certif. denied, 175 N.J. 77 (2002), the Court in Pinto v. N.J. Manufacturers Insurance Co., 183 N.J. 405, 407 (2005), held that a policy listing two corporate entities as the named insureds was not ambiguous and was, therefore, enforceable.

Subsequent to the Court's decision in Pinto, the Legislature enacted N.J.S.A. 17:28-1.1 (the "Scutari" Amendment), which provides:

> A policy that names a corporate or business entity as a named insured shall be deemed to provide the maximum uninsured or underinsured motorist coverage available under the policy to an individual employed by the corporate or business entity, regardless of whether the individual is an additional named insured under that policy or is a named insured or is covered under any other policy providing uninsured or underinsured motorist coverage.

Thus, with the enactment of the Scutari Amendment, the Court's holding in Pinto has been superseded, but only as it applies to employees. Therefore, Pinto is still controlling law insofar as the factual circumstances present here. As Judge Todd observed, it is undisputed that plaintiff was not an employee of Jacob & Chiarello. It is also undisputed that the Jaguar was not a vehicle registered to her or one that she regularly used. Nor do we conclude there is any merit to the contention that the policy created a reasonable expectation in plaintiff that she is a named insured under the Netherlands policy language. See Murawski v. CAN Ins. Co., 183 N.J. 423, 425 (2005) (recognizing that although a plaintiff is not the named insured on a policy, coverage may nonetheless be afforded if the language of the policy somehow created a reasonable expectation of coverage).

Plaintiff's reasonable expectation is informed by the declarations page or the UIM endorsement. Botti, supra, 361 N.J. Super. at 227. "[W]e will look to the Declarations Page as the best indicator of the insured's reasonable expectations of coverage." Araya, supra, 353 N.J. Super. at 211. The declarations page is purportedly what the court relied on in Macchi, supra, in finding it "clear on the face of the policy that the vehicle at issue ... [was] a personal-use automobile and [was] garaged at a location other than the place where the other vehicles insured under the business auto insurance policy are kept." 354 N.J. Super. at 75.

Here, however, Jacob & Chiarello is the named insured. Plaintiff is not listed on the declarations page or elsewhere in the policy as a driver or user of the firm's vehicle. Plaintiff's name could have been added as a "named insured" in the UIM endorsement, but it was not. Pinto, supra, 183 N.J. at 417; Botti, supra, 361 N.J. Super. at 227. As such, plaintiff is covered as an "insured," not a "named insured," and is thus subject to the step-down provision in the Netherlands policy as one who is not the "named insured" under the Netherlands policy but is the "named insured" under her Travelers policy providing similar coverage, with a limit that is less than that of the Netherlands policy.

II.

Both plaintiff and Travelers argue the Netherlands policy was not exhausted by the company's payment of $485,000 to plaintiff's husband. They contend the clear and unambiguous language of the Netherlands policy requires that it pay up to $1,000,000 in UIM benefits regardless of the number of insureds who make claims arising out of a single accident.

Travelers' additional position is that even if we conclude the step-down clause reduces the Netherlands policy limit to $500,000, the policy was not exhausted by virtue of its $485,000 payment to Frederick. Rather, Travelers, citing Aubrey v.

Harleysville Insurance Company, 140 N.J. 397, 403 (1995), contends UIM is personal to the insured and not linked to the covered auto. Therefore, it urges the amount of UIM coverage available to plaintiff is limited only to the amount she has chosen. Id. at 405. Moreover, relying upon Selective Insurance Company of America v. Thomas, 179 N.J. 616 (2004), Travelers maintains that the Supreme Court has already analyzed and rejected Netherlands' position that plaintiff and Frederick are a single insured unit for purposes of UIM coverage. Thus, it asserts plaintiff is entitled to up to $500,000 in stepped-down UIM benefits from Netherlands as the host vehicle's primary insurer.

Travelers additionally contends, as the Court stated in Selective, supra, 179 N.J. at 624, to the extent there is any ambiguity in the language of the Netherlands policy, the policy must be interpreted in favor of plaintiff's reasonable expectations of coverage. Finally, Travelers asserts that even assuming Netherlands' step-down clause reduces the aggregate amount of coverage to plaintiff and Frederick to a combined $500,000, there remains $15,000 available to plaintiff, which Netherlands is obligated to pay as the primary insurer.

The question of whether the Netherlands policy has been exhausted by virtue of its step-down clause and payment to Frederick requires that we revisit the purpose underlying UIM coverage. It is intended to put the injured party "in as good a position as if the [underinsured] tortfeasor possessed an amount of liability insurance equal to the UIM coverage of an `insured' under the policy in question." Selective, supra, 179 N.J. at 620. Its purpose, therefore, is not to make the injured party whole. Ibid. Moreover, UIM insurance "provide[s] as much coverage as the insured is willing to purchase." Nikiper v. Motor Club of America, 232 N.J. Super. 393, 300 (App. Div.), certif. denied, 117 N.J. 139 (1989) (emphasis added).

Thus, the first question to be resolved is what did plaintiff purchase in the way of UIM coverage. It is without dispute that neither plaintiff nor Frederick purchased the Netherlands policy. That policy was purchased by the law firm of Jacob & Chiarello. Therefore, their entitlement to any recovery under the Netherlands policy is determined, not by their status as the "named insureds" on the declaration page, but by their status as "insureds," which includes "[a]nyone `occupying' a covered `auto[,]'" as were the circumstances here. This is an important distinction between the facts here and those in Selective, supra, where the husband and wife were the named insureds on both of the policies at issue. Thus, neither plaintiff nor Frederick could have had a reasonable expectation that they would be treated as "named insureds" under the Netherlands policy because neither one was the purchaser of that policy.

As "insureds," their coverage was stepped-down to the UIM coverage they purchased from Travelers because: (1) they were not the individual named insured under the Netherlands policy; (2) they were an individual named insured under the Travelers policy; and (3) the Travelers policy has a "limit of insurance... which is less than the limit of insurance [of $1,000,000 of the Netherlands UIM coverage]." Consequently, the most that Netherlands was required to pay in UIM coverage arising out of the accident, irrespective of the number of claims, was "the highest applicable limit of insurance under [the Travelers policy] ... providing coverage to [plaintiff and Frederick] as an individual named insured."

What plaintiff and Frederick, as "named insureds," purchased from Travelers, by way of UIM coverage, was a policy of $500,000 per person and $500,000 per accident. This means that to the extent they were involved in an accident from which they both sustained injuries, each would be entitled to up to $500,000 in UIM benefits, however, capped at $500,000 for all claims. See Gambino v. State Farm Ins. Co., 348 N.J. Super. 204, 210 (2002) ("capping the [aggregate] available coverage to all parties at the $500,000 policy limits" after considering each person's entitlement to UIM benefits based upon the maximum per person limit, but then concluding that the aggregate amount exceeded the $500,000 policy limits per accident for all claims). This construction is consistent with the language in the Travelers UIM endorsement: "Regardless of the number of `insureds' [or] claims made ... the most we will pay for damages resulting from `bodily injury' ... to all `insureds' is the applicable limit of liability." Ibid.

Contrary to Travelers' argument, the Court in Selective did not reject the notion that the definition of an "insured" could include more than one person. Selective, supra, 179 N.J. at 623. Indeed, it recognized, as to one of the husband's and wife's policies at issue, "the policy language [did] operate to limit the [husband and wife] combined recovery from the [insurer]" to the $500,000 limit in that particular policy. However, the Court rejected the notion, under the facts before it, that the husband and wife, who had purchased two separate UIM policies as "named insureds," were a single insured

as to all of the policies, noting that "it is hard to imagine why a `family' unit would purchase more than one UIM policy if the insurers' interpretation is the correct one." Id. at 624 (emphasis added). That is not what occurred here. Plaintiff and Frederick purchased one UIM policy, Travelers, as "named insureds."

The clear and unambiguous terms of their Travelers policy state that the most Travelers will pay, irrespective of the number of claims or insureds, is $500,000. Thus, Netherlands, having paid $485,000 to Frederick, was only required to pay $15,000 to plaintiff. There remained no further benefits payable to plaintiff under the Netherlands policy.

III.

Next, in his written decision, the motion judge concluded that plaintiff was "statutorily prevented from `stacking' the UIM limits of the Netherlands and Travelers policies" and that she "is only entitled to up to $500,000 UIM coverage based on the step-down provision." We agree with this conclusion. Therefore, it is unclear what the judge meant in the sentence that followed wherein the judge stated plaintiff "must look to her own policy from Travelers and her recovery will be limited to the $500,000 UIM limit in the Travelers policy less credit for the $30,000 paid from the Winther policy."

Once Netherlands pays plaintiff the remaining $15,000, the $500,000 in UIM benefits to which plaintiff and Frederick are entitled in the aggregate will be exhausted. Under the statutory anti-stacking provision of N.J.S.A. 17:28-1.1(c), plaintiff is not entitled to seek any UIM coverage benefits from Travelers:

> Uninsured and underinsured motorist coverage provided for in this section shall not be increased by stacking the limits of coverage of multiple motor vehicles covered under the same policy of insurance nor shall these coverages be increased by stacking the limits of coverage of multiple policies available to the insured. If the insured had uninsured motorist coverage available under more than one policy, any recovery shall not exceed the higher of the applicable limits of the respective coverages and the recovery shall be prorated between the applicable coverage as the limits of each coverage bear to the total of the limits. [emphasis added].

Requiring Travelers to pay plaintiff up to $500,000 in UIM benefits would result in plaintiff being afforded greater coverage than that afforded under the UIM limits purchased. See Bauter v. Hanover Ins. Co., 247 N.J. Super. 94, 96 (App. Div.) (stating "[t]he purpose of New Jersey's [anti-stacking statute] is to protect the insured up to the UIM limits purchased and not to make an injured person whole again"), certif. denied, 126 N.J. 335 (1991).

IV.

Finally, plaintiff contends the court erred in ruling that she was collaterally estopped from challenging the step-down clause. We need not address this point because despite the court's ruling, it fully addressed the issue during argument on the motion. Nonetheless, even assuming the judge erred in reaching this conclusion, the error was harmless, as the outcome, that is, plaintiff being subject to Netherlands step-down policy, would be the same. She, like Frederick, held the status of an "insured" rather than a "named insured" under the Netherlands policy.

Affirmed in part and reversed in part.

[1] For ease of reference, where necessary to distinguish between plaintiff and her husband, we refer to the parties by their first names. By doing so, we intend no disrespect.