BAY STATE INSURANCE COMPANY, Plaintiff-Appellant,
v.
KIRSTEN JENNINGS, an infant by her G/A/L KEVIN JENNINGS, KEVIN JENNINGS, individually, and CAROL COLLINS, Defendants-Respondents.
KIRSTEN JENNINGS, an infant by her G/A/L KEVIN JENNINGS, and KEVIN JENNINGS, individually, Plaintiffs-Respondents,
v.
CAROL COLLINS, Defendant-Respondent.

No. A-4915-11T4.

Superior Court of New Jersey, Appellate Division.

Argued March 19, 2013.
Decided May 16, 2013.

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

Kimberly L. Gozsa argued the cause for respondent Kirsten Jennings (Levinson Axelrod, attorneys; Ms. Gozsa, on the brief).

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

Before Judges Harris and Hoffman.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Following a plenary hearing, Bay State Insurance Company (Bay State) appeals from the Law Division order entered on April 26, 2012 rejecting its assertion that that it was not obligated to indemnify or defend its insured, Carol Collins, against a claim that she negligently caused injury to Kirsten Jennings. Bay State further challenges the court's determination of the amount of its obligation under a high-low settlement agreement. We affirm.

I.

On October 3, 2006, then three-year-old Kirsten sustained injuries when the shopping cart she was riding in flipped over after Collins, her babysitter, lost her balance and fell while pushing the cart. Kirsten's father, Kevin Jennings, then brought suit as guardian ad litem for his daughter, claiming negligence against Collins.

Upon receipt of the summons and complaint, Collins submitted the claim to her homeowners insurance company, Bay State, for defense and indemnification.

Following Collins' deposition, where she stated that she typically (but not always) received $35 per day for babysitting Kirsten, Bay State filed a separate action seeking a declaratory judgment that it had no obligation to

defend or indemnify Collins for Kirsten's injuries. Specifically, Bay State claimed that its coverage did not apply because Collins was operating a business at the time of the accident. Collins disputed the characterization by Bay State that her babysitting activities constituted a business.

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 ... do[es] 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[.]"

The policy defines "business" as including a "trade, profession, or occupation."

To determine whether the exclusion applies to childcare, we apply a two-step analysis. 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. (quoting 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 coverage issue first came before the Law Division on June 20, 2008, by way of cross-motions for summary judgment. The motion court found that Collins did not manifest a "profit motive" sufficient to qualify as a business or "means of livelihood" and entered summary judgment against Bay State. Following an unsuccessful motion for leave to appeal, the parties eventually entered into a voluntary high-low settlement on July 30, 2009. The order approving the settlement stated that "all parties have agreed to a settlement of the underlying action ... subject to the rights of Bay State Insurance to pursue an appeal in the [coverage] action[.]"

On June 2, 2011, we decided Bay State's appeal and reversed the grant of summary judgment for Collins. Bay State Ins. Co. v. Jennings, No. A-421-9 (App. Div. June 2, 2011). We held 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, concluding that the issue of "profit motive" was not so one-sided as to justify the granting of summary judgment. Id. at 12. We therefore remanded for a plenary hearing, and noted that the "critical issue for the court to decide [is] 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." Id. at 10.

In addressing Bay State's claims that Collins was engaging in business through her childcare activities, we stated that receiving money for taking care of another's child "does not by itself establish a profit motive[.]" Id. at 10-11. We further noted that the "burden is on the insured to disprove a profit motive." Id. at 10.

On February 10, 2012, a plenary hearing was held by Judge Honora O'Brien Kilgallen to decide whether Collins' babysitting was motivated by financial gain. The only witnesses who testified at the hearing were Collins and Kirsten's mother, Tina Jennings (Mrs. Jennings).

Mrs. Jennings testified that after she gave birth to Kirsten in December 2002, she needed to return to work following her pregnancy leave or she would lose her job. She said that neither she nor her husband believed in putting an infant in daycare. At the time, she considered Collins her best friend; they saw each other daily as their sons played together every day. Mrs. Jennings asked Collins if she would watch Kirsten, and Collins agreed. Collins did not ask for money to do so.

Collins testified that money was not her motive in caring for Kirsten, "[i]t wasn't about the money it was about taking care of a little girl." Collins said that she did not consider watching Kirsten to be a job, that she never advertised that she watched children, and that she had never run any kind of business out of her home.

Collins also testified that some days she would spend more than the $35 Mrs. Jennings provided and other days she would spend less. Collins considered any surplus as a gift. Further, Mrs. Jennings testified, "[a]s Kirsten grew [Collins] would provide all things for Kirsten. She would provide things for her, food, snacks, waters. All the kids, even my son ... he was there every day with her child — with her children, too."

According to Mrs. Jennings, when Kirsten was sick, Collins would take her to the doctor's office, or anywhere else she needed or wanted to go. Mrs. Jennings explained her reasons for paying Collins was that she was

[g]oing out with the kids and using — going to the movies, she would go buy pizza. I would go over there, there would be three pizzas sitting on the counter. I mean, like, you know, just thinking of the items that [Collins] used to do for the children, you know, I would just — I came up with the amount of $35.

She also indicated there were times when she did not pay Collins for watching Kirsten. Between 2004 and 2006, Mrs. Jennings said that Collins babysat Kirsten two days per week.

Collins testified that she never completed a calculation or analysis to determine how the $35 compared to the actual costs incurred, and did not notice any money accumulating in her bank account from it. She did not track the money in any formal or informal way. Collins also did not factor in the money she spent on gifts for Kirsten when making her rough estimate of how the $35 was spent.

In addition to Kirsten, Collins also watched the children of another one of her friends. Collins did not request any money from that friend as she was "going through some really difficult times and ... had to go back to work." Nevertheless, the friend often gave Collins money.

At the conclusion of the hearing, Judge Kilgallen permitted counsel to submit written closing arguments. On March 22, 2012, she announced her decision on the record:

For the reasons that follow, I find that Carol Collins was not motivated by financial gain in agreeing to care for Kirsten Jennings and ... therefore the business exclusion in the Bay State policy does not apply.
Kirsten Jennings was born [in] 2002. At the time of the accident in October of 2006 Kirsten was three years of age.
In or about 2003, 2004 Tina Jennings decided that she needed to return to the workplace to assist in the financial support of her family. She knew Carol Collins, indeed, by all accounts they were best friends. They would see each other every day, their sons were friends, she knew that Carol was a good mother. Thus, when it came time for Tina to return to work it was agreed that Carol would watch Kirsten.
Now Carol has three sons, but no daughters of her own and she adored Kirsten. Carol did not ask to be compensated for the care of Kirsten, but Tina decided to give Carol the sum of $35 per day.
Carol provided all drinks, meals, snacks, diapers, wipes. Carol paid for movie tickets and other entertainment. Carol bought Kirsten clothes and educational items. Carol paid for art supplies and books. There were days when it would cost Carol more than $35 a day to care for Kirsten and there were days when it cost less than $35 a day to care for Kirsten.
Carol credibly testified that she was fortunate that her husband made a good living and that she could be home as a full time homemaker. She testified that she did not make money, she spent money. Although she had helped people in the past, she did not advertise herself as a childcare provider. She confirmed that Tina came up with the [$35] a day figure.
Tina credibly testified that if she did not give Carol some money she would have felt as if she were taking advantage of her friend. This rings true because Carol was providing everything for Kirsten.
....

Both Carol and Tina presented as delightful, loving and caring mothers. It is easy to see why they were best friends. It is tragic that this accident has caused a divide. But their testimony is completely aligned. Carol did not ask to be paid. Tina insisted on paying an amount she thought would cover the cost of food an[d] supplies. Carol was clearly not motivated by financial gain.
....
I find that Carol Collins was motivated by her love for her best friend Tina and Tina's daughter Kirsten. I do not find that Carol's intent in agreeing to care for Kirsten was motivated by financial gain.

II.

Factual findings and legal conclusions of a trial judge are not to be disturbed on appellate review unless "`they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" In re Trust Created by Agreement Dated December 20, 1961, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Thus, the appellate court "ponders whether, on the contrary, there is substantial evidence in support of the [motion] judge's findings and conclusions." Ibid. (emphasis removed).

"Deference is especially appropriate `when the evidence is largely testimonial and involves questions of credibility.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). This is because the "trial courts' credibility findings ... are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999).

III.

Bay State first argues that the record does not support the judge's conclusion that Collins' babysitting was not motivated by financial gain. Based upon her deposition testimony, Bay State contends that Collins was earning a profit of approximately fifty-percent on the revenue received from babysitting, despite the contrary testimony provided at the plenary hearing.

Contrary to Bay State's contentions, the testimony provided during the plenary hearing is essentially consistent with Collins' deposition testimony. In fact, Collins testified at her deposition that she did not always receive payment for babysitting and that the families sometimes exchanged favors instead of money.

In addition, Judge Kilgallen made credibility determinations based in part on the material provided in the record as well as the testimony of Collins and Mrs. Jennings. See ibid. (judges are "influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record" on appeal.)

The record simply contains no convincing support for Bay State's contention that Collins provided babysitting services to make a profit or that she was motivated by financial gain. Judge Kilgallen, after hearing the testimony and reviewing the record, made no such findings. Clearly, the record contains substantial evidence to support the judge's findings and conclusions. See In re Trust, supra, 194 N.J. at 284.

Since there is nothing in the record to suggest that Judge Kilgallen's findings or determinations are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice," her finding that Collins was not engaging in business by babysitting Kirsten must be affirmed. Ibid. (internal quotation marks and citation omitted).

Bay State next argues that Judge Kilgallen erred in concluding that it owed the "high" under the parties high-low settlement agreement, or $225,000, rather than the "low," or $75,000. This claim also lacks merit.

A settlement agreement is a contract. Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div.), certif. denied, 94 N.J. 600 (1983). Judicial review of a contract "is simply interpretive; it is not to rewrite a contract for the parties better than or different from the one they wrote for themselves." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011). Thus, contractual terms should be given "their plain and ordinary meaning." M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002).

According to the final order of settlement, the amount owed would be determined by the outcome of Bay State's coverage appeal. The order states "should Bay State Insurance not be successful in its appeal, that payment shall be rendered to [Kirsten Jennings] by Bay State Insurance in the amount of $225,000.00[.]"

Bay State argues that because the first order granting summary judgment was reversed and remanded for a plenary hearing that its obligation under the settlement agreement should be limited to $75,000, the amount in the final order of settlement "should Bay State Insurance be successful in its appeal." Bay State argues that the affirmance or reversal of the first summary judgment order was the triggering event for the settlement.

The terms of the now disputed high-low settlement agreement were restated several times by Judge Jamie S. Perri at the time she approved of the settlement as part of the friendly settlement hearing:

Bay State ... continues to take the position that it intends to appeal [the coverage] ruling.
In light of that continuing coverage issue the parties decided to settle the case with a high/low, and to have the outcome abide the disposition of Bay State's appeal with regard to coverage, and that is what brings us here today.
....
The proposed gross settlement in this matter is, as I said, a high/low. The high being $225,000 in the event that the plaintiff prevails with regard to the appeal; $75,000 if Bay State ... is found to owe no coverage.
....
The agreement provides that in the event that it is found [by the Appellate Division] that coverage is, in fact, owed... that Kirsten receive a gross amount of $225,000. In the event that the Appellate Division were to determine that no coverage is owed, the company would, nonetheless, pay $75,000 to Kirsten.

Counsel for Bay State was present at the hearing and failed to make any statements to challenge the judge's understanding of the agreement she was approving for the benefit of the minor child. In light of Judge Perri's clear recitation of the settlement terms, Bay State's claim that its liability under the high-low settlement agreement is $75,000 clearly lacks any merit, and warrants no further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.