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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. 0174-08T3

ROBERT PHELPS,

Plaintiff-Appellant,

v.

HARTFORD INSURANCE GROUP,

Defendant-Respondent.

Argued May 6, 2009 - Decided July 31, 2009

Before Judges Parrillo and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2842-07.

Gerald H. Baker argued the cause for appellant (Baker, Pedersen & Robbins, attorneys; Mr. Baker, on the brief).

Patrick D. Bonner, Jr., argued the cause for respondent (Menz Bonner & Komar, LLP, attorneys; Mr. Bonner and Heather M. Johnson, on the brief).

PER CURIAM

On December 4, 2003, plaintiff Robert Phelps was injured in an automobile accident while operating a 2001 Ford Econoline van owned by his employer, Specialty Supply Company Inc. (Specialty). Terry Thompson, the driver of the other car, maintained automobile insurance through a policy issued by

Farmer's Insurance (Farmer's) that provided bodily injury liability coverage of $100,000 per injured person. Phelps settled with Farmer's for the policy limit.

Specialty's van was covered under a policy of insurance issued by defendant, Hartford Insurance Group (Hartford), on May 1, 2003, and effective until May 1, 2004. That policy contained uninsured/underinsured (UM/UIM) motorist coverage limits in the amount of $1,000,000. In relevant part, the policy's endorsement stated that if "the Named Insured" was "[a] partnership, limited liability company, corporation, or any other form of organization," anyone "occupying" a covered vehicle was deemed an "Insured." The policy also contained a step-down clause that provided if:

> (1) [a]n "insured" [wa]s not the individual named insured under th[e] policy;
>
> (2) [t]hat "insured" [wa]s an individual named insured under one or more other policies providing similar coverage; and
>
> (3) [a]ll such other policies have a limit of insurance for similar coverage which is less then the [l]imit of insurance for this coverage;
>
> then the most [Hartford would] pay for all damages resulting from any one accident with . . . an 'underinsured motor vehicle' [would] not exceed the highest applicable limit of insurance under any coverage from a policy providing coverage to that "insured" as an individual named insured.

At the time of the accident, plaintiff maintained his own personal automobile insurance through a policy issued by Security Indemnity Company. That policy contained UM/UIM motorist coverage with a limit of $50,000 per person.

Plaintiff notified Hartford on October 22, 2004, that he intended to make a claim for UIM benefits under Specialty's policy. On February 14, 2005, Hartford denied plaintiff's claim, citing the step-down provision. On June 6, 2007, plaintiff filed this complaint seeking declaratory relief that the step-down clause in Hartford's policy was invalid.

On September 11, 2007, the Legislature enacted the so-called Scutari Amendment (the Amendment), now codified at N.J.S.A. 17:28-1.1, which we discuss in greater detail below. Shortly thereafter, plaintiff moved for summary judgment, and Hartford cross-moved for the same relief. Plaintiff argued 1) that the Legislature implicitly intended the amendment be applied retroactively; 2) that the Amendment was "curative," i.e., the Legislature intended to correct the Court's decision in Pinto v. N.J. Mfrs. Ins. Co., 183 N.J. 405 (2005); and 3) that retroactive application was consistent with public policy and the reasonable expectations of the parties. Alternatively, plaintiff contended that defendant's cross-motion should be denied because factual questions remained disputed regarding

"what kind of notice was given to the insured, what kind of duty did the carrier have to inform the insured, [and] what w[ere] the options . . . given to the insured." Hartford argued the step-down provision was valid in light of Pinto, and that the Amendment should not be given retroactive effect for a variety of reasons.

On July 28, 2008, the motion judge denied plaintiff's motion, granted Hartford's cross-motion, and dismissed the complaint. In a brief statement of reasons, the judge, relying upon our holding in Olkusz v. Brown, 401 N.J. Super. 496 (App. Div. 2008), concluded "the statutory prohibition contained in N.J.S.A. 17A:28-1.1 is not retroactive in effect." He also concluded there was no material factual dispute as to the notice issue that would preclude summary judgment because "the Hartford policy involved here expired well before the [] Court's decision in Pinto[,] . . . [and] the 'duty to inform' imposed by the [] Court . . . is not implicated here." This appeal ensued.

Both parties have essentially reiterated their arguments before us, with plaintiff further contending that the panel in Olkusz never engaged in an extensive discussion of the Amendment's actual language. We affirm, but for different reasons 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) (noting "a correct result, even if predicated on an erroneous basis in fact or in law, will not be overturned on appeal").

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006). First, we determine whether the moving party has demonstrated that there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Id. at 230-31. We accord no deference to the motion judge's conclusions on issues of law. Id. at 231 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Here, the essential facts are not in dispute, and the trial judge's decision was purely a legal one to which we apply de novo review. Dep't of Envtl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007).

In Pinto, interpreting similar policy language to that at issue here, the Court characterized the relevant question as "whether the denomination of a corporate entity as the 'named insured' in the employer's policy is so ambiguous as to allow any employee to be [considered] [] a 'named insured' and thus avoid the step-down." Pinto, supra, 183 N.J. at 409. In

affirming our denial of the employee's claim for UIM benefits, the Court held that the "policy language [wa]s not ambiguous[,] [] does not designate [the employee] by name, or by implication, as a 'named insured[,]'" id. at 417, and "the language of the step-down clause [was] enforceable." Id. at 412. The Court "impose[d] on insurers, their agents, and brokers, a duty to inform employers about the necessity" "[of] includ[ing] specific language incorporating employees as 'named insureds' on business automobile policies[.]" Id. at 417.

The Amendment provided:

> [A] motor vehicle liability policy or renewal of such policy of insurance, . . . issued in this State to a corporate or business entity . . . shall not provide less . . . underinsured motorist coverage for an individual employed by the corporate or business entity than the coverage provided to the named insured under the policy. A policy that names a corporate or business entity as a named insured shall be deemed to provide the maximum . . . 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 . . . underinsured motorist coverage.
>
> [N.J.S.A. 17:28-1.1(f).]

The Amendment became effective "immediately." L. 2007, c. 163 § 2. The bill was accompanied by a legislative statement, which provided in relevant part:

> This bill prohibits the use of "step-down" provisions in motor vehicle liability policies issued to corporate or business entities to lower uninsured or underinsured motorist coverage for employees to the limits of coverage available to the employees under their personal policies.
>
> This bill is in response to the New Jersey Supreme Court's decision in Pinto . . . .
>
> This bill reverses the effect of the Pinto decision by prohibiting step-down provisions in these policies. Further, the bill expressly provides that 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 any 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.
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> [Statement accompanying L. 2007, c. 163.]

Although the Amendment undoubtedly had the effect of prohibiting step-down provisions in commercial automobile insurance policies, thus "reversing" Pinto's "effect," the issue raised here is whether the Amendment should be given retroactive effect, and, if so, what is the extent of that retroactivity.

In Olkusz, under slightly different facts, the panel concluded that

> Absent a clear indication from the Legislature as to the effect of [the Amendment], . . . well-established principles of statutory interpretation require that we construe the statute's restriction on the common law right of freedom to contract prospectively. The statutory prohibition at issue cannot be viewed as "curative," because the holding in Pinto was not predicated on a misapprehension of established legislative policy.
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> [Olkusz, supra, 401 N.J. Super. at 499.]

As a result, the panel reversed the trial judge's finding that the Amendment "applied retroactively to any case pending or 'in the pipeline,'" id. at 501, and concluded that all claims based on accidents pre-dating the Amendment's adoption must be decided utilizing the legal principles announced in Pinto. Olkusz, supra, 401 N.J. Super. at 506.[1]

Recently, in Hand v. Philadelphia Ins. Co., ___ N.J. Super. ___ (App. Div. July 1, 2009), we decided the same issue under facts that are identical to those presented here. In Hand, the

[1] We are aware of other unreported decisions by our colleagues that have adopted Olkusz's rationale and reached the same result. See Misner v. N.J. Mfrs. Ins. Co., A-4737-07 (January 15, 2009); Orodenker v. Selective Ins. Co. of Am., A-4240-07 (March 3, 2009); Wall v. Occidental Fire & Cas. Ins. Co., A-4454-07 (March 9, 2009), certif. denied, ___ N.J. ___ (May 7, 2009).

plaintiff was injured while occupying her employer's vehicle, and was denied UIM benefits because of the commercial automobile policy's step-down clause. Id. at 2-4. (slip op. 2-4). The accident occurred while the policy was in effect, the plaintiff's claim was made after its expiration date, and her lawsuit was filed prior to the effective date of the Amendment. Ibid. Although we disagreed with Olkusz's rationale as to the Legislature's intent regarding retroactivity, we nevertheless held that retroactive application of the Amendment to the facts presented would work a "manifest injustice" to the defendant insurer. Hand, supra, slip op. 8.

We conclude that our analysis in Hand controls the resolution of this appeal. We agree with plaintiff that in enacting the Amendment, the Legislature implicitly intended to reform all commercial vehicle insurance policies in existence on the effective date of the Amendment, and thereby provide an "insured" employee with a claim for UIM benefits under his employer's policy in effect as of September 10, 2007. To that extent, we differ with the interpretation accorded to the Amendment by the Olkusz panel.

However, as we explained in detail in Hand, applying the Amendment to all claims made under policies that were issued and expired years before the Legislature acted would be unfair and

manifestly unjust to insurers that acted with reasonable reliance on the existing state of the law. Hand, supra, slip op. at 22-23; see Olkusz, supra, 401 N.J. Super. at 505 (noting the insurer's reliance "must be gauged by the legal principles governing the common law right of freedom to contract prevailing during the time of the accident"). With respect to plaintiff's claim that his reasonable expectations, and those of his employer, would be thwarted unless the Amendment is applied retroactively, we note that at all relevant times, i.e., when the policy was issued, when the accident occurred, when the policy expired, when plaintiff made his claim, and, indeed, when he filed suit, step-down clauses, such as those in this policy, were enforceable. In this regard, we decline, as we did in Hand, to "revisit the historical antecedents of Pinto." Hand, supra, slip op. at 23; see Pinto, supra, 183 N.J. at 412 (citing Magnifico v. Rutgers Cas., 153 N.J. 406, 418 (1998)). To the extent plaintiff and his employer now claim "reasonable expectations" of coverage, we find the argument entirely unpersuasive. See Cassilli v. Soussou, ___ N.J. Super. ___ (App. Div. July 6, 2009) (slip op. at 7) (holding that "for a policyholder's expectations to govern over the plain language of an insurance contract, his or her expectations must be

objectively reasonable") (citing Clients' Sec. Fund of the Bar of N.J. v. Sec. Title & Guar. Co., 134 N.J. 358, 372 (1993)).

The remainder of plaintiff's other arguments, i.e., that the policy language is ambiguous, or conflicts with the declarations page, or is against public policy, are all unavailing. As we noted in Hand, the Court in Pinto essentially rejected these claims. Hand, supra, slip op. at 22-24. Furthermore, we agree with the motion judge's conclusion that there was no factual dispute regarding the notice that Pinto prospectively required all insurers to give their insureds, thereby foreclosing the grant of summary judgment to defendant. The policy in this case was issued and expired well before Pinto was decided.

Affirmed.