2016 WL 3263659
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Vlastimil VRSKOVY, Plaintiff–Respondent/Cross–Appellant,
v.
Guisepe CURCIO and Joanna Curcio, Defendants,
and
Tri–County Agency of Brick, Inc., Defendant–Respondent,
and
Proformance Insurance Company and Palisades Property & Casualty Insurance Company, Defendants–Appellants/Cross–Respondents.

Argued Jan. 12, 2016.
|
Decided June 15, 2016.

Synopsis

Background: Guest brought action against homeowners' and automobile insurer as the insured's assignee of declaratory judgment claims against insurer in connection with guest's injuries that occurred in a single-car accident while he was driving home from the insured's house party after he had been drinking beer. Insurer moved for summary judgment. The Superior Court, Law Division, Ocean County, denied motion. Insurer appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] insured's involvement in an automobile accident was not required to trigger optional excess liability coverage of $1,000,000 that was included in automobile insurance policy;

[2] initial settlement and stipulation of dismissal between insured and social guest was properly voided under the doctrine of mutual mistake, and thus settlement was not an unconditional release of legal liability that extinguished insured's right to indemnification from insurer;

[3] consent judgment in favor of guest against insured, who was the mother of daughter who hosted party at their house, for $2 million dollars was reasonable in amount and free from collusion and bad faith, as required for settlement to be enforceable against insurer; and

[4] guest was a "successful claimant" within the meaning of the rule allowing a successful claimant to recover fees for legal services in an action upon a liability or indemnity policy of insurance.

Affirmed.

West Headnotes (4)

[1] Insurance
Scope of Coverage
Insurance
Limits of Liability
Insurance
Primary and Excess Insurance

Insured's involvement in an automobile accident was not required to trigger optional excess liability coverage of $1,000,000 that was included in automobile insurance policy, in social guest's claims, as the insured's assignee, against homeowners' and automobile insurer in connection with guest's injuries that occurred in a single-car accident while he was driving home from the insured's house party after he had been drinking beer; first page of summary of policy listed "Optional Excess Liability" coverage as a separate and distinct form of coverage, premium for that coverage was "included" in premium for primary automobile liability at no cost to insured, and page three of summary was titled "Optional Excess Liability Coverage Part" and provided a limit per occurrence for "Personal Excess Liability Coverage: $1,000,000."

Cases that cite this headnote

[2] **Insurance**
Fraud or Mistake

Initial settlement and stipulation of dismissal between insured and social guest, who was injured in a single-car accident while he was driving home from the insured's house party after he had been drinking beer, was properly voided under the doctrine of mutual mistake, and thus settlement was not an unconditional release of legal liability that extinguished insured's right to indemnification from automobile and homeowners' insurer, even if stipulation was never vacated; record clearly evinced an intent to renounce initial settlement with the execution of a revised settlement assigning subrogation rights and furnishing a warrant of satisfaction of a consent judgment in exchange for insured's release from personal liability, and judge's acceptance of revised settlement indicated he understood that stipulation would be dismissed.

Cases that cite this headnote

[3] **Insurance**
Settlement by Insured;Insured's Release of Tort-Feasor

Insurance
Bad Faith

Consent judgment in favor of social guest against insured, who was the mother of daughter who hosted a party at their home, for $2 million dollars was reasonable in amount and free from collusion and bad faith, as required for settlement to be enforceable against homeowners' and automobile insurer, in connection with guest's injuries that occurred in a single-car accident while he was driving home from party after he had been drinking beer; guest submitted the police report from accident, a toxicology report establishing his blood alcohol content (BAC) at .205%, and deposition testimony from several acquaintances who attended party, which allowed court to find that liability rested with insured, who court found knew that minors were engaged in underage drinking, had an opportunity to stop it, and failed to do so.

Cases that cite this headnote

[4] **Insurance**
Costs and Attorney Fees

Social guest was a "successful claimant" within the meaning of the rule allowing a successful claimant to recover fees for legal services in an action upon a liability or indemnity policy of insurance, in guest's action as insured's assignee of declaratory judgment claims against automobile and homeowners' insurer in connection with guest's injuries that occurred in a single-car accident while he was driving home from the insured's house party after he had been drinking beer; rule allowed recovery for third-party beneficiaries in which insurer or indemnitor was found to have failed to comply with its contractual undertakings, and guest's action determined that insurer had duty to provide excess liability coverage. R. 4:42–9(a)(6).

Cases that cite this headnote

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L–728–10.

Attorneys and Law Firms

Glenn D. Curving argued the cause for appellants/cross-respondents Proformance Insurance Company and Palisades Property & Casualty Insurance Company (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; Mr. Curving, of counsel and on the brief; Christian A. Cavallo, on the brief).

David M. Freeman argued the cause for respondent/cross-appellant Vlastimil Vrskovy (Mazie Slater Katz & Freeman, LLC, attorneys; Mr. Freeman and David A. Mazie, of counsel and on the briefs).

Marshall D. Bilder argued the cause for respondent Tri–County Agency of Brick, Inc. (Eckert Seamans Cherin & Mellott, LLC, attorneys; Mr. Bilder, of counsel and on the brief; David P. Skand, on the brief).

Before Judges YANNOTTI, ST. JOHN and GUADAGNO.

Opinion

PER CURIAM.

***1** Defendant Palisades Property & Casualty Insurance Company (Palisades) appeals from the June 21, 2013 order denying its motion for a summary judgment dismissal of plaintiff Vlastimil Vrskovy's complaint. Palisades also challenges the court's denial of reconsideration. Plaintiff cross-appeals, arguing that his claims against defendant Tri–County Agency of Brick, Inc. (Tri–County) should be reinstated in the event that we determine Palisades does not have to provide excess liability coverage. Having reviewed the record in light of applicable law, we affirm.

I.

The following facts and procedural history are taken from the summary judgment record on appeal. On November 20, 2009, one of the Curcios' daughters, Jessica, hosted a party at their Toms River residence to celebrate her nineteenth birthday. Jessica contacted an adult friend of Mrs. Curcio, who was over the age of twenty-one, and told him "she was having a couple [of] friends over," and asked if he [c]ould bring beer." The adult friend arrived at the house a short time later with a case of beer. [1] Mrs. Curcio, who was home at the time, denied advance knowledge of both the party and the alcoholic beverages. At the time of the party, Mr. Curcio was in upstate New York.

Plaintiff attended the party and was seen drinking beer. During the early morning of November 21, he left the party and, while driving home, was involved in a single-car accident. Plaintiff suffered a spinal cord injury, resulting in permanent paralysis from the waist down. His blood sample revealed a blood-alcohol content (BAC) of .205%.

The issues before us arise from the assignment of subrogation rights to plaintiff, a third-party beneficiary, seeking indemnification under optional excess coverage of an insurance policy issued by Palisades.

The Curcios maintained homeowner's and automobile insurance policies with Palisades from June 2006 to July 2009. [2] Each policy provided $500,000 in primary liability coverage and $1 million in optional excess liability coverage. On March 10, 2009, the Curcios renewed the Palisades "High Proformance Policy," receiving a five-page coverage summary (Summary) and a twenty-eight page, policy jacket (Jacket). Together, the Summary and Jacket constituted the Policy.

The Summary provided for a full term automobile premium of $2,268, including the "Optional Excess Liability[.]" The Summary also detailed certain coverages pertaining to the Curcios' owned motor vehicles, such as personal liability for covered motor vehicles, uninsured motorists, personal injury protection benefits, and driver information. A subsection entitled "Automobile Liability Section," listed, among other things, "Personal Liability for Covered Motor Vehicles" at $500,000 per accident, "Uninsured Motorists" coverage at $500,000 per accident, and "Optional Excess Liability Coverage" of $1 million per accident. Page three of the Summary was titled "Optional Excess Liability Coverage Part" and provided a limit per occurrence for "Personal Excess Liability Coverage: $1,000,000."

***2** The Curcios also received the Jacket. The Jacket is generally inclusive, and details areas of insurable property, liability coverage options for insurable property areas, and the procedure for settling claims. Specifically, the "LIABILITY COVERAGE" section recites several types of liability protections, including "Optional Excess Liability Coverage." In it, Palisades agreed to provide excess liability coverage if:

> a covered person becomes legally liable due to personal injury, bodily injury or property damage up to the limit of liability shown in the coverage summary for "Optional Excess Liability" subject to the minimum retained limit and to the provisions listed in the "Excess Liability Losses We Do Not Cover" section. Damages include prejudgment interest awarded against a covered person. However, we will pay additional coverages only on that portion of an award covered by this policy....
>
> [(Emphasis removed).]

A "covered person" includes the insured, Mr. Curcio, and any family members residing in the same household, meaning Mrs. Curcio and Jessica.

In August 2009, the Curcios, at the urging of their insurance broker, defendant Tri–County Agency of Brick, Inc. (Tri–County), changed their homeowner's insurer to Harleysville Insurance Company (Harleysville). The Curcios contend Tri–County solicited the change and assured them the Harleysville homeowner's policy would provide the same coverage, for a decreased premium. It did not. The Harleysville policy provided only $500,000 in primary liability coverage and no optional excess coverage. The Curcios also kept the Palisades insurance policy and renewed it for an aggregate $1.5 million in liability coverage.

Plaintiff filed suit in the Law Division, asserting claims for social host liability against the Curcios. Harleysville agreed to indemnify the Curcios pursuant to their homeowner's policy, and assigned them counsel. Palisades, however, denied coverage under the Curcios' Policy. In the March 22, 2011 correspondence disclaiming coverage, Palisades stated,

> [t]he Excess Liability Coverage that is being provided on this policy is for the automobile line of coverage. That coverage is set forth in the declaration page for which a premium is shown and that the premium shown for excess liability coverage was included in other premiums paid namely automobile coverage only.

On May 23, 2011, plaintiff amended his complaint, adding Palisades, Proformance, and Tri–County as named defendants. Plaintiff sought a declaratory judgment with respect to Palisades, asserting (1) coverage not only existed under the primary liability provisions, but also under the excess coverage, and (2) excess coverage was autonomous and broadly provided coverage for any claims against the Curcios for bodily injury, as they reasonably expected general negligence coverage under the excess liability provision. Plaintiff also asserted claims against Tri–County, maintaining it committed professional negligence by obtaining a primary homeowner's insurance policy from Harleysville contrary to assertions made and inconsistent with the Curcios' coverage demands.

***3** On November 28, 2011, December 27, 2011, and January 12, 2012, plaintiff and the Curcios executed a settlement agreement (Initial Settlement), releasing Harleysville and the Curcios from all claims in exchange for $500,000 (the maximum under the Harleysville homeowner's insurance policy), and an assignment of "any and all rights" the Curcio's might have against Palisades and Tri–County. Plaintiff filed a stipulation of dismissal with prejudice in the Law Division as to the Curcios on February 1, 2012.

On May 11, Palisades moved for summary judgment dismissal of plaintiff's complaint. Palisades argued the Initial Settlement was an unconditional release, relieving the Curcios from any liability arising from the birthday party and subsequent automobile accident, thus barring plaintiff from further relief. Plaintiff conceded the Initial Settlement could have been drafted more clearly, but asserted the controlling intent of the parties was only to release the Curcios from personal liability while preserving any remaining causes of action against Palisades and Tri–County. Proceedings were adjourned so plaintiff and the Curcios could submit certifications substantiating their intent for entering into the Initial Settlement.

When the parties reconvened, plaintiff advised the court he was willing to vacate the Stipulation of Dismissal, redraft and modify the Initial Settlement, and enter a consent judgment against the Curcios for a negotiated damages amount. As a result, Palisades' summary judgment motion was denied without prejudice. Thereafter, plaintiff and the Curcios executed a revised settlement agreement (Revised Settlement).

In exchange for a release from personal liability, the Curcios agreed to settle the lawsuit for a $2 million consent judgment, to be entered against Mrs. Curcio, less the $500,000 received by plaintiff from Harleysville under the homeowner's policy. Simultaneously with the execution of the consent judgment, Mrs. Curcio received a warrant of satisfaction, which she could file at any time "to demonstrate that the judgment ha[d] been discharged." The Curcios also agreed to assign any and all claims against Palisades and Tri–County, "including but not limited to, the right to pursue a declaratory judgment action [against Palisades] to compel coverage." Plaintiff

and the Curcios contend the Revised Settlement is a *Griggs* Settlement. *See Griggs v. Bertram,* 88 *N.J.* 347, 364–68, 443 A.2d 163 (1982).

Plaintiff and Palisades then cross-moved for summary judgment. Plaintiff sought to enforce the Revised Settlement and have a declaratory judgment entered against Palisades for improperly denying coverage under the Policy's primary and excess liability coverage. Plaintiff argued the Curcios were entitled to both primary and optional excess liability coverage because the Policy did not distinguish between automobile and homeowner's claims, and the optional excess liability coverage was independent from the underlying automobile coverage. Plaintiff recited "plain language" from the Jacket as "clearly contemplat[ing] standalone excess liability coverage," and maintained the Curcios had a reasonable expectation the excess coverage under the Policy applied. Plaintiff also sought costs and attorney's fees pursuant to *Rule* 4:42–9(a)(6).

***4** Palisades maintained the Revised Settlement was unenforceable as written because it released the Curcios from all claims related to the birthday party and automobile accident; the automobile policy did not afford primary or excess liability coverage for the Curcios against social host liability claims; the Curcios had no reasonable expectation the excess liability coverage under the Policy would cover social host claims; and plaintiff is not entitled to reimbursement for costs and attorney's fees.

Following oral argument, the motion judge granted-in-part and denied-in-part each party's motion. In his oral opinion, the judge granted summary judgment in favor of Palisades, finding the terms of primary coverage under the Policy limited coverage to the Curcios and their immediate family members for "accidents [which] happen under their control and custody." However, regarding Optional Excess Liability Coverage, the judge stated it "should be analyzed through a different lens other than being limited to the underlying automobile policy."

The judge granted plaintiff's motion for summary judgment, finding the terms of the Optional Excess Liability Coverage to unambiguously provide $1 million in coverage for bodily injury independent from the underlying automobile coverage. The judge noted that neither the Jacket nor the Summary stated that Optional Excess Liability Coverage was limited in scope to insurance provided by the underlying automobile coverage.

> [I]t's incumbent upon the person who's drafting the policy to say that if we're only going to apply it when you have available automobile underlying coverage, and it is only for automobile accidents arising out of the operation of your motor vehicle or that you are operating or persons under your control are operating. I think they have to be clear and precise about that. And they're not. They just say that we will pay damages for covered persons, which [the Curcios] are clearly covered persons, when they become legally liable due to personal injury which happened here to the limit of liability shown. It doesn't say only for automobile accidents.

On October 9, 2013, the parties appeared before the court to address the reasonableness and enforceability of the Revised Settlement. The judge determined that the settlement was reasonable under the circumstances and was not the product of bad faith or coercion. Consequently, on November 8, the court entered the consent judgment against Mrs. Curcio, and dismissed all remaining claims against Tri–County, with prejudice.

Mrs. Curcio filed the warrant to discharge the judgment on December 6. On December 20, plaintiff filed an application for costs and attorney's fees, pursuant to *Rule* 4:4–2(a)(6). Following oral argument, the court entered an order awarding plaintiff $66,885.

On February 26, 2014, Palisades moved for reconsideration of the court's June 21, 2013 order, arguing entry of the warrant extinguished Mrs. Curcio's legal liability and, thus, released Palisades from its obligation to indemnify her. The judge disagreed and denied reconsideration.

***5** Palisades appeals from the court's September 5, 2012 order denying summary judgment with respect to plaintiff's claims arising from the Initial Settlement; the June 21, 2013 order denying summary judgment with

respect to plaintiff's claims arising from the Revised Settlement; the November 8, 2013 order approving the $2 million consent judgment; the March 14, 2014 order denying Palisades' motion for reconsideration of the trial court's June 21, 2013 order; and the May 20, 2014 order awarding plaintiff counsel fees and costs pursuant to *Rule* 4:42–9(a)(6).

Plaintiff cross-appeals, arguing, in the event we decline to hold Palisades liable under the Optional Excess Liability Coverage provisions of the Policy, its claims against Tri–County for professional negligence should be reinstated. Tri–County opposes, maintaining the trial judge did not err by granting summary judgment.

II.

Our standard of review is well-established. We review a ruling on a motion for summary judgment de novo, applying the same standard governing the trial court. *Davis v. Brickman Landscaping, Ltd.,* 219 *N.J.* 395, 405, 98 A.3d 1173 (2014). Thus, we consider, as the motion judge did, " 'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.' " *Id.* at 406, 98 A.3d 1173 (citation omitted).

If there is no genuine issue of material fact, we must then " 'decide whether the trial court correctly interpreted the law.' " *DepoLink Court Reporting & Litig. Support Servs. v. Rochman,* 430 *N.J.Super.* 325, 333, 64 A.3d 579 (App.Div.2013) (citation omitted). "As a general proposition, '[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.' " *Polarome Int'l v. Greenwich Ins. Co.,* 404 *N.J.Super.* 241, 260, 961 A.2d 29 (App.Div.2008) (alteration in original), (quoting *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378, 658 A.2d 1230 (1995)), *certif. denied,* 199 *N.J.* 133 (2009). "The interpretation of an insurance contract is a question of law which we decide independently of a trial court's conclusions." *Ibid.* Because the issue in this appeal involves the interpretation of an insurance contract, we review the matter de novo.

An insurance policy must be read as a whole, *Hardy ex rel. Dowdell v. Abdul–Matin,* 198 *N.J.* 95, 103, 965 A.2d 1165 (2009), and will be enforced as written when its terms are clear. *Mem'l Props., LLC v. Zurich Am. Ins. Co.,* 210 *N.J.* 512, 525, 46 A.3d 525 (2012). "[C]ourts 'should not write for the insured a better policy of insurance than the one purchased.' " *Boddy v. Cigna Prop. & Cas. Cos.,* 334 *N.J.Super.* 649, 658, 760 A.2d 823 (App.Div.2000) (quoting *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.,* 116 *N.J.* 517, 529, 562 A.2d 208 (1989)). Absent an ambiguity, courts should not engage in a strained construction to support the imposition of liability. *Flomerfelt v. Cardiello,* 202 *N.J.* 432, 442, 997 A.2d 991 (2010).

***6** If a policy provision is ambiguous, we construe the provision in favor of the insured, considering the insured's reasonable expectations. *Shotmeyer v. N.J. Realty Title Ins. Co.,* 195 *N.J.* 72, 82–83, 948 A.2d 600 (2008). Language in a policy of insurance is genuinely ambiguous when "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." *Weedo v. Stone–E–Brick, Inc.,* 81 *N.J.* 233, 247, 405 A.2d 788 (1979). However, if a provision is not ambiguous or otherwise misleading, we need not consider the "objectively reasonable expectation" of the average policyholder in interpreting the policy. *Ibid.*

[1] Applying these principles to Palisades' policy, we find no ambiguity. We construe the policy to provide coverage of up to $1,000,000 for Optional Excess Liability Coverage, not dependent on an automobile accident. We begin with an analysis of the pertinent Policy provisions. The first page of the Summary lists "Optional Excess Liability" coverage as a separate and distinct form of coverage, the premium for that coverage is "included" in the premium for primary automobile liability, and at no cost to the insured. Page three of the Summary was titled "Optional Excess Liability Coverage Part," and provided a limit per occurrence for "Personal Excess Liability Coverage: $1,000,000." The Jacket provides that Palisades will pay damages under Excess Liability Coverage for which a covered person becomes legally liable due to personal or bodily injury.

Further, page fourteen of the Jacket explains Palisades will provide defense coverage, "[w]hen a claim or suit is covered under the "Excess Liability Coverage" provisions, but not covered by an underlying policy available to a covered person ...." (emphasis removed). The Jacket also advises that the insurer may unilaterally "join, at

[its] expense, with the covered person or any insurer providing underlying insurance in the investigation, defense or settlement of any suit we believe may require payment under the 'Excess Liability Coverages' provisions." (emphasis removed).

Citing *Lehrhoff v. Aetna Casualty and Surety Company,* 271 *N.J.Super.* 340, 638 A.2d 889 (App.Div.1994), Palisades suggests only the Summary should be construed when determining the Curcios' reasonable expectation of coverage.[3] Palisades maintains the inclusion of optional excess liability coverage under the "Automobile Liability Section" on page two, and a subsequent page, entitled "optional excess liability coverage part," which lists excess coverage above the number of insured vehicles, negates any reasonable expectation that the Policy provided broad excess coverage regarding non-automobile claims. We disagree.

The Summary does not restrict "Optional Excess Liability" to claims exclusively derived from the use of insured automobiles. Palisades points to no language in either the Summary or the Jacket that limits the scope of "Optional Excess Liability" thus restricting the types of claims it would be obligated to indemnify. The burden to limit or restrict the breadth of excess liability coverage provided in a given policy clearly rests with the insurer. *See Burd v. Sussex Mut. Ins. Co.,* 56 *N.J.* 383, 399, 267 A.2d 7 (1970); *Dotto v. Russo,* 140 *N.J.* 544, 559–60, 659 A.2d 1371 (1995).

***7** Further, Palisades' reliance on *Lehrhoff* is misplaced. Courts only look to the insured's reasonable expectation of coverage to resolve ambiguities within an insurance policy. *See Jenkins, supra,* 180 *N.J.* at 563, 853 A.2d 247 ("[W]hen an ambiguity exists within an insurance contract, courts should interpret the contract to comport with the reasonable expectations of the insured." (citation and internal quotation marks omitted)); *Dotto, supra,* 140 *N.J.* at 556, 659 A.2d 1371 ("[W]e have recognized the importance of construing contracts of insurance to reflect the reasonable expectations of the insured in the face of ambiguous language and phrasing...."). Here, no ambiguity exists. By its terms, the "Optional Excess Liability" in the Policy furnishes general coverage to the insured and his family members for "bodily injury" claims, in addition to primary automobile coverage. The "Optional Excess Liability" coverage is autonomous, unqualified by terms limiting its scope to claims arising solely from those covered pursuant to the underlying automobile policy.

Even if we limited our review, as Palisades suggests, and considered only the Summary, summary judgment would still be appropriate. Page one of the Summary lists "Automobile" and "Optional Excess Liability" coverage separately, the latter included by Palisades gratuitously with the Policy. Page two again catalogues the two coverages separately, although both are listed underneath a subsection entitled "Automobile Liability Section." Finally, page three of the Summary is titled "Optional Excess Liability Coverage Part" and provides coverage for "Personal Excess Liability Coverage: $1,000,000."

At best, this would create a disparity, conflating the scope of excess liability coverage provided with the policy. When presented with diverging interpretations, each of them viable, courts should resolve disputes in favor of the insured. *See Jenkins, supra,* 180 *N.J.* at 563, 853 A.2d 247 ("When an insurance policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage.").

[2] Next, Palisades contends the Initial Settlement and Stipulation of Dismissal effected an unconditional release of legal liability from the underlying action, extinguishing the Curcios' right to be indemnified and, thus, barring plaintiff from recovering further relief. Palisades maintains this procedural "defect" was not cured by the subsequent execution of the Revised Settlement and entry of a consent judgment because the Stipulation of Dismissal was never vacated as to Mrs. Curcio and she was given "the unfettered right to immediately discharge" the judgment at any time. In the alternative, Palisades argues its legal obligation to indemnify, triggered by the entry of the consent judgment against Mrs. Curcio, was discharged by her filing of the warrant to satisfy.

"A settlement between parties to a lawsuit is a contract like any other contract ..., which may be freely entered into and which a court, absent a demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts." *Jennings v. Reed,* 381 *N.J.Super.* 217, 227, 885 A.2d 482 (App.Div.2005) (citations and internal quotation marks omitted). "The intention of the parties to the instrument governs, of course, and that

intention binds strangers to the instrument." *Deblon v. Beaton,* 103 *N.J.Super.* 345, 349, 247 A.2d 172 (Law Div.1968). The general rule allowing reformation or rescission of an agreement, where it is premised upon mutual mistake, applies to settlement agreements. *Wallace v. Summerhill Nursing Home,* 380 *N.J.Super.* 507, 509–10, 883 A.2d 384 (App.Div.2005) (holding that a compromise resulting from a mutual mistake is "not binding and consent to a settlement agreement is not considered freely given when it is obtained as the result of a mistake"); *see also Lampley v. Davis Mach. Corp.,* 219 *N.J.Super.* 540, 550, 530 A.2d 1254 (App.Div.1987). Mutual mistake capable of invalidating an agreement occurs when both parties "labor[ ] under the same misapprehension as to [a] particular, essential fact." *Bonnco Petrol, Inc. v. Epstein,* 115 *N.J.* 599, 608, 560 A.2d 655 (1989) (quoting *Beachcomber Coins, Inc. v. Boskett,* 166 *N.J.Super.* 442, 446, 400 A.2d 78 (App.Div.1979)). Evaluation of a claim of mutual mistake or fraud requires the court to "look beyond the four corners of the contract ." *Conforti v. Guliadis,* 128 *N.J.* 318, 327, 608 A.2d 225 (1992).

***8** We agree Palisades' challenges to the Initial Settlement should be rejected because, as the motion judge determined, facts within the record support a conclusion the instrument was withdrawn and voided under the doctrine of mutual mistake. Palisades correctly points out that an order was never entered vacating the Stipulation of Dismissal with respect to Mrs. Curcio. Nonetheless, the record clearly evinces the intent by the parties to renounce it with the execution of the Revised Settlement and subsequent entry of the consent judgment. The judge's acceptance of the Revised Settlement indicated he understood the Stipulation would be dismissed. Further, the failure to enter an order vacating the Stipulation of Dismissal as to Mrs. Curcio is harmless as Palisades cannot demonstrate prejudice.

The Revised Settlement provided that, once the consent judgment was entered, plaintiff would "deliver a warrant to satisfy judgment in favor of [Mrs.] Curcio which she may file as necessary to demonstrate that the judgment has been discharged." Palisades argues that the filing of the warrant extinguished Mrs. Curcio's liability and, therefore, its own liability. The filing of the warrant comports with the nature of the settlement, specifically the expressed intent of the parties, as well as terms within the Revised Settlement.

We disagree with Palisade's contention since the "insured tortfeasor should be able to reach an agreement relieving it of liability when its carrier wrongfully declines to defend." *Griggs, supra,* 88 *N.J.* at 370, 443 A.2d 163. The execution of a settlement, assigning subrogation rights and furnishing a warrant of satisfaction, in exchange for a release from personal liability, was precisely the mechanism upheld by the Supreme Court in *Griggs. Ibid.*

[3] Palisades also contends the court erred when it concluded the consent judgment was reasonable in amount and free from collusion and bad faith. We disagree. The Court held that "a settlement may be enforced against an insurer in this situation only if it is reasonable in amount and entered into in good faith." *Id.* at 368, 443 A.2d 163. There are two prongs to the test for enforceability of such a settlement, and both must be established. *Firemen's Fund Ins. Co. v. Imbesi,* 361 *N.J.Super.* 539, 564–65, 826 A.2d 735 (App.Div.), *certif. denied,* 178 *N.J.* 33 (2003). A failure to establish either will relieve the insurer of responsibility. "The initial burden of going forward with proofs of these elements rests upon the insured and the ultimate burden of persuasion as to these elements is the responsibility of the insurer." *Griggs, supra,* 88 *N.J.* at 368, 443 A.2d 163.

At the hearing to determine the reasonableness of the settlement, plaintiff presented documentary evidence to support his position that the settlement amount was reasonable, executed in good faith, and free from collusion. Specifically, he submitted the police report from his accident; the toxicology report establishing his BAC at .205%; an expert report from toxicologist Dr. Robert Pandina, opining about his state of intoxication and level of impairment; an expert report from Dr. Michele Fantasia, describing the nature and severity of his injuries; deposition testimony from several acquaintances who also attended the party; certifications from the Curcios' attorneys; and his medical bills, including a Medicaid lien of $370,165.63. Plaintiff also testified as to events which occurred the night of the party. Palisades did not present any evidence.

***9** Relying on this evidence, the judge found that liability rested with Mrs. Curcio, who knew minors were engaged in underage drinking, at minimum, had an opportunity to stop it, and yet failed to do so. Combined with the serious nature of plaintiff's injuries and his increasing medical expenses, the judge concluded:

> the potential for an adverse verdict on behalf of Mrs. Curcio was enormous, the likelihood ... that the verdict would have exceeded the $2 million settlement amount was substantial, and ... that any reasonable person in Mrs. Curcio's shoes would have acted in the same manner in which she did to protect herself against an excess verdict of $2 million.

The judge also determined the settlement was executed in good faith and free from collusion. Relying on certifications filed by counsel for plaintiff and Mrs. Curcio, the judge found "the intent of the parties was to allow the plaintiff the opportunity to pursue the insurance that Mrs. Curcio had purchased to protect others who may be harmed by her own negligence." Rejecting a finding of bad faith, the judge noted plaintiff received no extraneous relief pursuant to the Revised Settlement and "the parties acted appropriately in entering into the settlement at the time they did." We agree with the judge's well-supported conclusion.

[4] Finally, Palisades challenges the award of costs and attorney's fees, arguing plaintiff is not a "successful claimant" under *Rule* 4:42–9(a)(6). *Rule* 4:42–9(a)(6) provides that a successful claimant may recover fees for legal services "[i]n an action upon a liability or indemnity policy of insurance." "While the failure to defend is the classic basis of an action on the policy, it is by no means the exclusive one." Instead, the rule "is intended to cover all such actions, including those brought by third-party beneficiaries, in which the insurer or indemnitor is found therein to have failed to comply with its contractual undertakings." Pressler & Verniero, *Current N.J. Court Rules,* comment 2.6 on *R.* 442–9 (2016). "[W]hen and under what circumstances to award an allowance" is within the sound discretion of the trial court. *Ibid.*

We therefore reject Palisades' argument that the court erred in awarding fees to plaintiff, since he was a successful claimant within the purview of the rule.

Affirmed.

All Citations

Not Reported in A.3d, 2016 WL 3263659

Footnotes

1 Jessica's boyfriend testified the adult friend brought three cases of beer to the party.

2 Prior to 2008, the Curcios maintained homeowners and automobile insurance through The Proformance Insurance Company (Proformance). Palisades purchased Proformance on August 1, 2008.

3 Palisades also submits the reasonable expectation doctrine is inapplicable, arguing the Curcios "are not the typical policy holder" because they had "specific insurance needs" and the policies were obtained through broker who "was ... uniquely familiar with Palisades' insurance products and [could use that knowledge to acquire a policy which] would best fit the Curcios' specific insurance needs. Nothing in the record evinces optional excess liability insurance for $1 million is a unique request made by an insured. At oral argument before the motion judge, counsel for Palisades conceded the optional coverage was gratuitously included in the policy at no charge. Further, Tri–County neither advised the Curcios it was purchasing automobile-exclusive excess coverage, or was instructed to purchase the same. Lastly, the use of a broker to obtain coverage is uncontroverted as anything but standard practice in the insurance industry.