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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4628-13T2

RONALD J. RICCIO and
NINA M. RICCIO,

Plaintiffs-Appellants,

v.

ALLSTATE NEW JERSEY
INSURANCE COMPANY,

Defendant-Respondent.

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Argued September 22, 2015 – Decided October 22, 2015

Before Judges Yannotti, St. John, and
Guadagno.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Docket No. L-2550-13.

Ronald J. Riccio, appellant, argued the
cause pro se (Kelly Law, P.C., attorneys;
Charles P. Kelly, of counsel and on the
brief; Mr. Riccio, on the brief).

Mark J. Walters argued the cause for
respondent (Donnelly & Associates, P.C.,
attorneys; Mr. Walters, of counsel and on
the briefs).

PER CURIAM

Plaintiffs Ronald J. Riccio and Nina M. Riccio appeal from the May 28, 2014 order of the Law Division denying their motion

for partial summary judgment and granting the summary judgment motion of defendant, Allstate New Jersey Insurance Company (Allstate). Plaintiffs challenge the motion judge's factual findings and her interpretation of the insurance contract.

We glean the following facts from the pleadings, affidavits, and depositions before the court on the motion. Because this case was disposed of on a motion for summary judgment, we review the evidence in the light most favorable to plaintiffs and accord them the benefit of all reasonable inferences that may be drawn in their favor. Wilson v. Amerada Hess Corp., 168 N.J. 236, 240 (2001).

Plaintiffs' primary residence in Little Silver is located near the Shrewsbury River in an area designated as a "Special Flood Hazard Area" by the National Flood Insurance Program. Plaintiffs obtained a flood insurance policy on the property from Allstate and maintained flood coverage until 2008, when they paid off their mortgage and were no longer obligated to carry it. Plaintiffs continued to carry a deluxe homeowners policy with Allstate.

On October 29, 2012, Superstorm Sandy struck New Jersey and between twenty and thirty-six inches of flood water entered plaintiffs' home, causing extensive damage. On October 31, 2012, plaintiffs submitted a claim to Allstate reporting that

they had been mandatorily evacuated, that there had been water in the house, that the house had no power, and that shingles on the roof were missing.

Plaintiffs' homeowners policy provided coverage of up to $328,000 for dwelling protection (Coverage A), $32,800 for other structures (Coverage B), and $229,600 for personal property (Coverage C). The policy covered "sudden and accidental direct physical loss . . . except as limited or excluded in this policy," and contained a flood and flowing substance exclusion:

> We do not cover loss to the property described in [Coverage A and Coverage B] consisting of or caused by:
>
> 1. Flood, including, but not limited to, surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.
>
> . . . .
>
> 4. Water or any other substance on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on, or flows, seeps or leaks through any part of the residence premises.

Initially, plaintiffs attempted to clean the home and began to remove the carpeting. They contacted Servpro of Plymouth/Wareham (SPW), a company specializing in the cleanup and restoration of residential and commercial property, and

certified by the Institute of Inspection Cleaning and Restoration Certification (IICRC).

On November 1, 2012, Kenneth Matejek, the owner of SPW, inspected the Riccio home. Several people were in the home attempting to clean the floors and walls. Matejek told everyone in the home to stop what they were doing because he had determined that the water that entered the home was "very unhealthy and dangerous."

Later that day, Ronald Riccio spoke with Gayla Hamby of Allstate, and told her that they had had one foot of water in their home, the floors were buckled, roof shingles were missing, the contents of the home were damaged, they had removed all the carpeting, and they had hired ServPro to clean the home. Hamby responded that the coverage "triggers have not been met," and that an outside adjuster would determine whether the damage was from flood or wind.

On November 4, 2012, plaintiffs filed an application for disaster assistance with the Federal Emergency Management Agency (FEMA). Plaintiffs' application lists "Flood; Hail/Rain/Wind Driven Rain; Seepage; [and] Sewer Backup" as the cause of damage, although Ronald Riccio now maintains that the form was filled out over the phone by a FEMA representative and he is not certain that he provided the causes of loss as they are listed

on the application. On November 15, 2012, a representative of FEMA informed plaintiffs that they had been approved for a grant of $31,900, for home repair and rental assistance.

That same day, Susan Charlton, an outside adjuster, was assigned by Allstate to inspect plaintiffs' property. Charlton certified that the damage she observed "appeared to be standard flood damage [and] did not appear to contain an unusual amount of substances or material compared with flood damage [she had] witnessed at other properties in New Jersey, Pennsylvania, and Louisiana." Charlton found wind damage and drafted an estimate for the repair of window damage, replacement of roof shingles, replacement of the roof vent cover, and $500 in food loss. After a $500 deductible, the total amount payable for wind damage was $975.22. Allstate sent plaintiffs a check in that amount and closed the file on their claim.

Plaintiffs appealed, claiming that their loss had been "initiated" by a flood, but that "the last event that caused the damage was the [s]ubstance in the water, not a flood." On January 22, 2013, Allstate's appeal panel concluded that "Allstate's payment for wind damage was consistent with the evidence in the file . . . [and] that no coverage existed for the damage caused by flood." Allstate provided a written denial of coverage on January 29, 2013.

On July 1, 2013, plaintiff filed a complaint in the Law Division alleging breach of contract, breach of implied covenant of good faith and fair dealing, and breach of fiduciary duties.

After exchanging written discovery and taking the deposition of Allstate's corporate designee, Daniel Murphy, Allstate moved for summary judgment. Judge Jamie S. Perri rejected plaintiffs' claim that water-borne substances, rather than flooding, caused the damage:

> It is within the ken of the average lay person that flood water that encroaches upon the land carries with it any number of contaminants, whether it be ground matter, such as dirt, sand or vegetation, or potentially hazardous substances such as pesticides, bacteria, petroleum products, animal feces, or other potentially hazardous water borne contaminants.
>
> . . . .
>
> The Court finds that the term ["]property loss caused by or consisting of flood damage["] includes not only damage caused by water such as the saturation of sheet rock or the displacement of a house's foundation, but damage caused by organisms or other particula[te] matter that flows into the insured's property as part of the water and is left behind when the water recedes.

Judge Perri concluded, "[v]iewing the proofs in a light most favorable to the plaintiffs, they have failed to raise a material issue of fact which would preclude summary judgment in favor of Allstate with regard to the flood exclusion. . . . [And

e]ven if the Court were to accept plaintiffs' argument that flood water can be distinguished from the [contaminants] it carries, plaintiffs' claim would still be subject to exclusion under exclusion number 4 of the Allstate policy."

On appeal, plaintiffs raise the following arguments:

> POINT I
>
> ALLSTATE'S FLOOD AND WATER EXCLUSIONS ARE CLEAR IN THAT THEY DO NOT EXCLUDE LOSS PREDOMINANTLY CAUSED BY WATER-BORNE UNHEALTHY SUBSTANCES, DEBRIS AND MATERIALS.
>
> > 1. THE PREDOMINANT CAUSE OF PLAINTIFFS' LOSS WAS NOT A FLOOD OR WATER, BUT WATER-BORNE UNHEALTHY SUBSTANCES, DEBRIS, AND MATERIALS.
> >
> > 2. THIS COURT SHOULD REJECT THE FLAWED REASONING OF THE MOTION JUDGE AND FOLLOW THE SOUND REASONING IN JOHNSON v. ALLSTATE HOLDING THAT ALLSTATE'S FLOOD AND WATER EXCLUSIONS DO NOT EXCLUDE WATER-BORNE MATERIAL.
>
> POINT II
>
> ASSUMING, ARGUENDO, THAT THERE ARE AMBIGUITIES AS TO WHETHER WATER-BORNE UNHEALTHY SUBSTANCES, DEBRIS, AND MATERIALS ARE EXCLUDED BY ALLSTATE'S FLOOD AND WATER EXCLUSIONS, THE MOTION JUDGE ERRED BY RESOLVING THE AMBIGUITIES IN FAVOR OF ALLSTATE.
>
> > 1. AS WRITTEN, THE WORDS AND STRUCTURE OF THE FLOOD AND WATER EXCLUSIONS ARE, AT A MINIMUM, AMBIGUOUS.

2. THE CONTEXT IN WHICH ALLSTATE WROTE THE FLOOD AND WATER EXCLUSIONS IN PLAINTIFFS' POLICY REFLECTS ALLSTATE'S INTENT NOT TO EXCLUDE WATER-BORNE MATERIALS.

3. ALLSTATE'S CONDUCT REFLECTS ITS OWN AMBIVALENCE AS TO THE MEANING OF ITS FLOOD AND WATER EXCLUSIONS.

4. PLAINTIFFS DID NOT REASONABLY UNDERSTAND ALLSTATE'S POLICY EXCLUDED LOSS FROM WATER-BORNE SUBSTANCES, DEBRIS OR MATERIALS.

POINT III

PLAINTIFFS' LOSS IS COVERED EVEN ASSUMING, ARGUENDO, THE MOTION JUDGE'S INTERPRETATION OF ALLSTATE'S FLOOD EXCLUSION IS CORRECT.

POINT IV

ALLSTATE ACTED IN BAD FAITH BOTH IN DENYING PLAINTIFFS COVERAGE FOR THEIR LOSS AND IN THE OUTRAGEOUS MANNER IN WHICH IT PROCESSED PLAINTIFFS['] CLAIM.

We review a ruling on summary judgment de novo and apply the same standard as the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014) (citations and internal quotation marks omitted). We consider, as did the motion judge, "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 (citations and internal quotation marks

omitted). If a review of the record reveals that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law," then a court should grant summary judgment. R. 4:46-2(c). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Plaintiffs first argue that their loss was not caused by a flood but by water-borne unhealthy substances and, since this causation is not an excluded peril, there is coverage for the loss. Allstate responds that plaintiffs reported their initial loss to Allstate as a flood claim, their application to FEMA for federal assistance lists flood as a cause of their damage, and Allstate inspected the property and concluded that the cause was "standard flood damage."

An insurance policy is a contract that "will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Mem'l. Prop., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (quoting Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010)). In determining the meaning of an insurance contract, courts interpret language according to its "plain and ordinary meaning." Ibid. (internal quotation omitted).

Insurance policy exclusions must be "narrowly construed," and the "burden is on the insurer to bring the case within the exclusion" on summary judgment. Flomerfelt, supra, 202 N.J. at 442. Exclusions are "ordinarily strictly construed against the insurer," and if there is more than one meaning, courts apply the meaning that supports rather than limits coverage. Ibid. "If the language of an exclusion requires a causal link, courts must consider its nature and extent because evaluating that link will determine the meaning and application of the exclusion. . . . On the other hand, if the exclusion uses terms that make it plain that coverage is unrelated to any causal link, it will be applied as written." Id. at 442-443 (citation omitted).

In challenging Judge Perri's conclusion that "flood water that encroaches upon the land particularly from rivers and streams is not pristine, but includes that which comes within its path[,]" plaintiffs rely on Johnson v. Allstate Ins. Co., 845 F. Supp. 2d 1170 (W.D. Wash. 2012). In Johnson, the plaintiff owned a waterfront home on Puget Sound. Id. at 1171. When a severe storm struck the area, water and waves carrying debris, including logs, struck the plaintiffs' home and caused severe structural damage, displacing the home both horizontally and vertically. Id. at 1171-72. The plaintiffs had purchased a

deluxe homeowners policy from Allstate, but their claims were denied on the basis that the damage resulted from "water movement or debris in the water" and was not covered. Id. at 1172. The district judge rejected Allstate's argument that there was no distinction between the water and waves, and the material they contain, holding "an average insurance purchaser would distinguish between waves and dangerous physical objects propelled by waves." Id. at 1175. The court held that the logs and waves were "distinct perils." Ibid.

Initially, we observe that a decision of a federal district court judge "is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." Camreta v. Greene, 563 U.S. 692, 131 S. Ct. 2020, 2033 n.7, 179 L. Ed. 2d 1118, 1134 n.7 (2011) (internal citation and quotation marks omitted). Nor is a ruling by a lower federal court, especially a ruling interpreting Washington law, binding on New Jersey courts. See State v. Coleman, 46 N.J. 16, 34-36 (1965) (declining to follow a Third Circuit decision invalidating a confession).

Moreover, we find the facts in Johnson, which involved damage from the unusual confluence of high winds, waves, and logs, distinguishable. Waves had crashed into the plaintiffs' property without incident since it was built in 1947, but they

had never experienced the phenomenon of waves carrying logs propelled by high winds, striking the property and causing damage.

By contrast, there has been no showing that the water that flooded the Riccio home was more toxic or otherwise distinguishable from the flood waters that damaged thousands of other homes along the Jersey shore in October 2012. More specifically, Kenneth Matejek opined that "the water borne material that was deposited into the Riccio house were substances, debris and materials contained in what is classified as Category 3 hazardous water by the IICRC." The IICRC defines Category 3 water as:

> That which is highly contaminated and could cause death or serious illness if consumed by humans. Examples: sewage, rising flood water from rivers and streams, ground surface water flowing horizontally into homes.
>
> [IICRC Storm Damage Restoration Recommendations accessible at http://www.iicrc.org/registrants/industry-perspective/ (emphasis added).]

The Allstate policy defined flood, in pertinent part, as "a general and temporary condition of partial or complete inundation of normally dry land area from . . . [t]he overflow of inland or tidal waters[.]" In his certification, Ronald Riccio stated that when he inspected his home on October 30,

2012, "[i]t was obvious . . . that water had entered my house but had then receded. . . . There was no longer any surface water that I could see. . . . It is my understanding that, during Sandy, water entered my house from the overflow of a creek located a distance behind the property boundaries of my backyard."

Considering these facts in a light most favorable to plaintiffs, we agree with Judge Perri that no reasonable jury could find that the Riccio home had not been flooded. Under the plain terms of the Allstate policy, damages caused by a flood are excluded. We also agree with Judge Perri that property loss caused by flood damage includes not only the damage caused by the water, but must also include the damage caused by the toxic substances carried by the flood waters and left behind after that water recedes. To hold otherwise would provide coverage to homeowners who eschew the high cost of flood insurance and maintain only homeowners policies, and would render the flood exclusion in those policies meaningless.

The remaining arguments raised by plaintiffs lack sufficient merit to warrant discussion in our opinion beyond these brief remarks. R. 2:11-3(e)(1)(E).

We reject plaintiffs' argument that there are ambiguities in the flood and water exclusions because they fail to

specifically mention water-borne unhealthy substances. A provision is ambiguous if "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 (1979). Flood is clearly defined, as are the flood exclusions. While "substance" is not defined in the policy, it must be given its plain and ordinary meaning. Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001). Plaintiffs' theory is that their damage was caused not by the flood water but by the substances contained therein. Exclusion #4 expressly included losses caused by water or any other substances regardless of its source. We find no ambiguity here and agree with Judge Perri that the terms "could not be more clear."

Finally, plaintiffs argue that Allstate breached its duty of good faith and fair dealing both in the processing of plaintiffs' claim of loss and its ultimate denial of coverage. All contracts impose an implied obligation of good faith and fair dealing in their performance and enforcement. Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 553-55 (2015). To establish a first-party bad faith claim for denial of benefits in New Jersey, a plaintiff must show "'that no debatable reasons existed for denial of the benefits.'" Id. at 554 (quoting Pickett v. Lloyd's, 131 N.J. 457, 481 (1993)).

The Court in Pickett held that "a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad-faith refusal to pay the claim." Id. at 473. Even accepting plaintiffs' bad faith claims as true, as we must, they are precluded under Pickett because their claim of loss was properly denied by Allstate.

Affirmed.