NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1996-14T4

NJM INSURANCE COMPANY, a Corporation
a/s/o Michael J. Shustyk,

Plaintiff-Respondent,

v.

DIODELCY FERMIN and DANNY R. NUNEZ,

Defendants,

and

CURE/CITIZENS UNITED RECIPROCAL EXCHANGE,

Defendant/Third-Party
Plaintiff-Appellant,

v.

DIODELCY FERMIN, DANNY R. NUNEZ,
KATRINA TOARMINA, LAURA SOLANO,
MICHAEL J. SHUSTYK, and GOVERNMENT
EMPLOYEES INSURANCE COMPANY (GEICO),

Third-Party Defendants.

Argued July 5, 2016 – Decided July 25, 2016

Before Judges Carroll and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3312-13.

Eric S. Poe argued the cause for appellant (Law Offices of Eric S. Poe, attorney; Evan D. Haggerty, on the briefs).

Daniel J. Pomeroy argued the cause for respondent (Pomeroy, Heller & Ley, LLC, attorneys; Mr. Pomeroy and Karen E. Heller, on the brief).

PER CURIAM

This is a coverage dispute between automobile insurance carriers. The underlying facts are essentially undisputed. On August 20, 2012, Danny Nunez, an unlicensed driver, was operating a vehicle owned by Diodelcy Fermin. Nunez had permission to drive Fermin's vehicle, which was insured under a Citizens United Reciprocal Exchange (CURE) policy. While driving, Nunez collided with another vehicle driven by Michael Shustyk, who was insured by plaintiff New Jersey Manufacturers Insurance Company (NJM).

Following the accident, Nunez was convicted of assault by auto, N.J.S.A. 2C:12-1c(2), and causing injury while driving either unlicensed or with a suspended or revoked license, N.J.S.A. 2C:40-22. Nunez was also convicted of the motor vehicle offenses of driving while intoxicated and driving while suspended.

NJM paid Shustyk personal injury protection (PIP) benefits, and for the property damage sustained by his vehicle, in accordance with the NJM policy. On August 26, 2013, NJM filed a

subrogation action seeking to recover the property damage it paid on behalf of Shustyk. CURE filed an answer and third-party complaint, seeking a declaration that it was not obligated to provide liability coverage based on an exclusion in Fermin's policy that reads: "We do not provide Liability Coverage for any 'insured' . . . [u]sing a vehicle without a reasonable belief that that 'insured' is entitled to do so."

On August 7, 2014, CURE moved for summary judgment. Specifically, CURE argued that it was not obliged to provide liability coverage because Nunez did not have a valid driver's license on the date of the accident and therefore he could not form a reasonable belief that he was entitled to operate Fermin's vehicle. NJM opposed the motion, and cross-moved for summary judgment to compel CURE to provide liability coverage for Nunez's negligent operation of the vehicle. On September 19, 2014, Judge David F. Bauman ruled there was coverage under the CURE policy.

On appeal, CURE renews its arguments presented to the trial court. It contends that the plain and unambiguous language of its policy excludes liability coverage when the vehicle's driver does not have a reasonable belief that he or she is entitled to operate the vehicle. Because Nunez did not have a valid license at the time of the accident, CURE submits that he did not have a

reasonable belief he was entitled to drive the vehicle, and therefore, no liability coverage exists. In response, NJM argues that where a vehicle owner grants permission for the use of his or her vehicle, the "reasonable belief" exclusion does not apply to bar claims by third parties who are injured as the result of the negligence of the permissive driver.

When deciding a motion for summary judgment, the court must take all reasonable inferences in the light most favorable to the non-moving party and only grant the motion where "no genuine issue as to any material fact" exists and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). On review of the grant of summary judgment, we utilize "'the same standard [of review] that governs the trial court.'" Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012) (quoting Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010)).

In this matter, there are no material facts in dispute and the issue is purely an interpretation of the applicable law. "The determination of whether an individual is an insured under an insurance policy is a matter of law to be decided by the court." Atl. Mut. Ins. Co. v. Palisades Safety & Ins. Ass'n, 364 N.J. Super. 599, 604 (App. Div. 2003) (citation omitted).

We review matters of law de novo. <u>Manalapan Realty, L.P. v. Twp. Comm. of Manalapan</u>, 140 <u>N.J.</u> 366, 378 (1995).

Judge Bauman appropriately determined that Nunez was a permissive user of a covered automobile. Therefore, he held that injured third parties were covered by the CURE policy, despite the language in the policy known as the "reasonable belief" exclusion. We agree that the "reasonable belief" exclusion, which has been held to limit coverage under first-party insurance provisions, i.e., PIP and under insured motorist (UIM) coverage for a driver, cannot be applied to restrict third-party coverage under the liability section of the policy.

In opposing this result, CURE relies upon our decision in <u>Martin v. Rutgers Casualty Insurance Company</u>, 346 <u>N.J. Super.</u> 320 (App. Div. 2002). That decision, however, is plainly distinguishable. In <u>Martin</u>, the plaintiff was an unlicensed driver of a vehicle owned by her fiancé's stepfather. <u>Martin</u>, <u>supra</u>, 346 <u>N.J. Super.</u> at 322. There, the owner did not know the driver's license had been revoked. <u>Ibid.</u> There was a one car collision. <u>Id.</u> at 321-22. The unlicensed driver sought PIP and uninsured motorist (UM) coverage for her injuries under the Rutgers policy. We held that even if the plaintiff had consent to drive the vehicle, she could not reasonably believe she was entitled to drive any car because she was unlicensed, and

therefore she was not entitled to PIP or UM coverage for her injuries. Id. at 325-26. Although we denied coverage to the unlicensed driver, we stated:

> We also note the very limited question presented to us. We are not confronted with a claim for PIP coverage put forth by an unwitting, injured passenger. Neither are we presented with a claim for liability coverage by an individual injured as a result of a collision with a vehicle driven by plaintiff. Rather, we are asked to conclude that an individual who had to know she was not entitled to drive this automobile is entitled to PIP coverage and UM coverage for injuries she received while driving with complete disregard of her lack of entitlement.
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> [Id. at 325.]

Instead, we find more controlling a line of cases that have adopted the "initial permission" rule in determining that coverage will apply in favor of an innocent third-party where initial permission existed to drive the vehicle. Under the "initial-permission" rule,

> if a person is given permission to use a motor vehicle in the first instance, any subsequent use short of theft or the like while it remains in his possession, though not within the contemplation of the parties, is a permissive use within the terms of a standard omnibus clause in an automobile insurance policy.
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> [Matits v. Nationwide Mut. Ins. Co., 33 N.J. 488, 496-97 (1960).]

In French v. Hernandez, the Court explained that "once an owner gives his vehicle's keys to another person for a drive, the courts ordinarily will find coverage, even if the driver deviates from the expected scope of use of the vehicle, unless the driver's later conduct amounts to a theft or the like of the vehicle." 184 N.J. 144, 152 (2005).

In Rutgers Casualty Insurance Company v. Collins, an unlicensed husband-driver was involved in a one-car accident, which resulted in the death of his passenger-wife. 158 N.J. 542, 545-46 (1999). The accident occurred while the husband was driving, with the wife's permission, a car owned by the husband's stepfather. Id. at 545. Rutgers disclaimed coverage for the wife's estate under an exclusion for persons "'[u]sing a vehicle without a reasonable belief that [the] person is entitled to do so.'" Id. at 546. The Supreme Court disagreed that the "reasonable belief" standard governed the entitlement to coverage. Id. at 547. The Court held that if the wife had permission to use the car, and had in turn given her unlicensed husband permission to drive it, then his reasonable belief became irrelevant as the result of the operation of the initial permission rule. Id. at 551.

In French, supra, the Court reaffirmed the initial-permission rule. 184 N.J. at 152-53. There, the Court allowed

an insurance company to disclaim coverage because there was no evidence that an unlicensed driver ever had permission to drive the insured vehicle. Id. at 147. However, the Court held that had the driver "been given either express or implied permission to drive the truck [that day], then his use of the truck, 'short of theft or the like[,] while it remain[ed] in his possession' would have provided the basis for coverage under the initial-permission rule." Id. at 156-57 (quoting Matits, supra, 33 N.J. at 496-97).

More recently, in Ferejohn v. Vaccari, we again upheld the initial permission rule and found the "reasonable belief" provision of a policy irrelevant where express permission existed. 379 N.J. Super. 82, 90 (App. Div. 2005). There, an unlicensed driver using his father's vehicle was involved in an accident that caused injury to a third-party. Id. at 85. Although the driver exceeded the scope of permission to drive the vehicle, we noted "the initial-permission rule contemplates a situation in which the subsequent use of a car may be inconsistent with and even frustrate the intentions and plans of the person granting permission." Id. at 89 (citations omitted).

In the present case, Nunez had express permission to drive Fermin's vehicle. Therefore, under the line of cases cited above, the initial permission rule applies, and the "reasonable

belief" exclusion cannot be interpreted as eliminating coverage where there was permission of the owner to use the vehicle.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION