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Insurer Did Not Prove Appreciable Prejudice When Its Insured Failed To Cooperate.

In *KnightBrook Ins. Co. v. Tandazo-Calopina*, ___ N.J. Super. ___ (App. Div. 2022), Carolina Tandazo-Calopina appealed from the grant of summary judgment to KnightBrook Insurance Company, which issued a commercial auto policy to Calopina's business. The Policy required insureds to cooperate in the defense of any claim or suit. Calopina was driving a taxi when she rear-ended a vehicle driven by Juan Sanchez. She claimed that the vehicle's brakes failed; however, Sanchez stated that, after the accident, Calopina admitted that she failed to stop because she was distracted. Sanchez took pictures of the vehicles. Calopina placed KnightBrook on notice of the accident and KnightBrook undertook an investigation by confirming coverage, inspecting Calopina's vehicle, obtaining Sanchez's medical records, and contacting his attorney.

Sanchez filed a personal-injury suit and Calopina failed to notify KnightBrook of it. KnightBrook became aware of the suit, assigned counsel, and reserved its rights to deny coverage based on Calopina's "continued refusal to cooperate with defense counsel." Calopina did not cooperate and failed to appear for a court-ordered deposition. Thereafter, KnightBrook disclaimed coverage based on a violation of the policy's duty-to-cooperate clause. Sanchez filed an amended complaint for UM benefits against Liberty Mutual Insurance Company. Liberty moved for summary judgment, arguing that Sanchez failed to prove that Calopina was uninsured. After motion practice, the trial court found that Liberty's obligation to pay UM benefits depended on whether KnightBrook validly disclaimed coverage.

Sanchez and KnightBrook filed dueling declaratory-judgment actions, and KnightBrook moved for summary judgment, seeking a confirmation of its denial of coverage. The trial court granted summary judgment to KnightBrook, ruling that KnightBrook was entitled to disclaim coverage due to Calopina's failure to cooperate. The trial court held that KnightBrook was prejudiced by the loss of her testimony. On appeal, the Appellate Division reversed, finding that KnightBrook failed to demonstrate appreciable prejudice. The Appellate Division held that KnightBrook failed to show that it suffered an irretrievable loss of substantial rights, such as the loss of information that KnightBrook needed to make a coverage determination. The Appellate Division further held there was ample evidence to allow KnightBrook to defend against the claims in the personal injury action on the issues of liability, medical causation, and damages. KnightBrook had photographs of the damage to both vehicles and obtained the police report containing statements made by Sanchez and Calopina. The Appellate Division distinguished *Hager v. Gonsalves*, 398 N.J. Super. 529, 536 (App. Div. 2008), because there the Appellate Division found that the insured's failure to cooperate rendered the insurer unable to determine whether it owed coverage to the tortfeasor driver as a permissive user of the insured vehicle.

This case is another example of the high burden courts place on an insurer to prove appreciable prejudice based on the insured's failure to cooperate. Should you have any questions about this case, please do not hesitate to contact Kevin Wolff or Julia Talarick.

KINNEY LISOVICZ REILLY & WOLFF PC

Kinney Lisovicz Reilly & Wolff PC represents clients in federal and state courts and handles an extensive variety of matters, including insurance coverage, civil litigation, premises liability, product liability, construction defect, food-borne illnesses, toxic exposure, contract and breach of contract, professional liability, employment litigation, auto and trucking, criminal defense, and appeals.

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