NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5224-09T2

CARMEN L. COLON,

Plaintiff-Respondent,

v.

LIBERTY MUTUAL INSURANCE COMPANY, JEANINE GREEN, PATRICIA WHETSTONE, LEVARN WHETSTONE and THE ESTATE OF LEVARN WHETSTONE through Patricia Whetstone, Administratrix of the Estate of Levarn Whetstone,

Defendants-Appellants.

Argued February 9, 2011 - Decided January 20, 2012

Before Judges Axelrad and R. B. Coleman.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4726-09.

William P. Krauss argued the cause for appellants (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, attorneys; Kurt H. Dzugay, on the briefs).

Alan D. Taylor argued the cause for respondent (Taylor, Taylor & Leonetti, P.C., attorneys; Mr. Taylor, of counsel and on the brief; Jeffrey N. Stern, on the brief).

PER CURIAM

Defendant Liberty Mutual Fire Insurance Company[1] (Liberty Mutual) appeals from a May 28, 2010 final order and judgment of the Law Division, Camden County, declaring that a homeowner's policy issued by Liberty Mutual to defendants Patricia and Levarn Whetstone, the parents of defendant Jeanine Green, provides coverage for claims for damages caused by Green when she bit plaintiff Carmen Colon, a police officer, after she stopped Green's automobile.[2] Judge Michael J. Kassel considered the parties' cross-motions and rejected Liberty Mutual's assertion that the automobile exclusion in the homeowner's policy bars coverage. Judge Kassel concluded the bodily injuries sustained by plaintiff did not "arise out of the ownership, maintenance, use, loading, or unloading of a motor

[1] Liberty Mutual Fire Insurance Company was improperly pled as Liberty Mutual Insurance Company.

[2] The May 28, 2010 order is a synthesis of three orders, the first two entered on April 16, 2010, (1) granting plaintiff's motion for summary judgment to compel Liberty Mutual to pay any judgment within the policy limit that she might recover against defendant Green in the underlying personal injury action; and (2) denying the cross-motion of Liberty Mutual for a declaration that the Whetstones's homeowner's policy does not provide coverage; and (3) a third order, entered on April 30, 2010, compelling Liberty Mutual to pay counsel fees and costs incurred by plaintiff in connection with the filing and prosecution of the declaratory judgment action. The declaratory judgment action was consolidated for discovery purposes only with the underlying bodily injury action, Camden County Docket No. 5313-08. That underlying action is not a part of this appeal.

vehicle" because there was not a substantial nexus between the use of the automobile and the biting to bring the incident within the exclusionary provision of the policy. We affirm substantially for the reasons expressed by Judge Kassel in his oral opinion of April 16, 2010.

The essential facts are not in dispute.[3] On May 13, 2007, plaintiff and Patrolman Daniel Battista of the Lawnside Police Department responded to a call from Patricia Whetstone regarding a domestic situation. Whetstone told the officers she and her daughter, Green, had an altercation, after which Green left home in her motor vehicle with Green's three-year old son. Whetstone expressed fear for the safety of both Green and her child because Green was schizophrenic, and she could become aggressive when she had not taken her medication.

In response to those expressed fears, the officers broadcast a "check on the well being" alert for the car Green was driving, and about two hours later, at approximately 3:30 a.m., plaintiff spotted and stopped Green's vehicle.

[3] See Penn Nat'l Ins. Co. v. Costa, 198 N.J. 229, 233 (2009) (noting that where the facts on cross-motions are undisputed, presumptions generally favoring the non-moving party are obviated). The trial court perceived no material disputes of facts, and we perceive none. To the extent there may be any non-material disputes, such as whether either plaintiff or Patrolman Battista reached into the car to remove the keys, we view them on this appeal in the light most favorable to Liberty Mutual.

Plaintiff's objective was to get Green her medication, not allow her to drive away from the scene, and to have a family member drive the car from the scene.

Plaintiff called for assistance, and when a second officer, Patrolman Battista, arrived, they approached Green's car and looked first toward the rear passenger compartment to check on the child. Standing eight feet from Green's vehicle, plaintiff told Green, "[Y]our mom is worried about you. You need to take your medications." Green did not respond at first. She was fidgeting with her hands all over the dashboard. When plaintiff asked for identification, Green responded that her name was Beyonce Knowles.[4] Then, after plaintiff asked Green to turn off her car and provide her vehicle registration, Green began "screaming [and] hollering . . . profanity."

Plaintiff then directed Green to place her keys on top of the vehicle, and Green refused to do so. The keys were attached to a "drawstring" and Patrolman Battista went to get scissors or a knife to cut the drawstring in order to get the keys. As Patrolman Battista was returning, Green "kicked the door open" and moved towards plaintiff, swinging her hands and kicking at her. Green then turned and attacked Patrolman Battista,

[4] Beyonce Knowles is a popular R&B singer and is married to rapper Jay-Z.

knocking him to the ground, straddling him, and punching him. Plaintiff attempted to stop Green's assault on Battista by grabbing her, at which point Green began punching plaintiff's face and chest. Green then grabbed the radio that was strapped around plaintiff's neck and bit plaintiff's arm. Green's teeth pierced the skin, causing plaintiff to bleed heavily. This altercation between the officers and Green took place about "a car length" away from Green's car.

At her deposition, Green testified she did not remember the incident clearly; she recalled it felt "like a dream." She stated she was "upset and scared" when she was pulled over and asked to hand over the keys, and she did not understand why she was being pulled over. Her recollection was she was pulled over for making an illegal right turn. She continued that she was scared for her child's safety when she was pulled over. She did not remember biting, kicking or punching the female officer (plaintiff), but she did recall punching and biting the male officer because she was "scared."

The injuries to plaintiff were severe. On December 9, 2008, plaintiff's counsel notified Liberty Mutual of his belief that Whetstone's homeowner's insurance policy applied to Green and that plaintiff's negligence claims against Green should be covered by the policy. The homeowner's insurance policy

provided coverage up to $300,000 in personal liability, but under Section II, 1(f), it excludes coverage for bodily injury and property damages "[a]rising out of [t]he ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an 'insured.'" Liberty Mutual does not dispute that Green was an insured covered under the policy on the date of the incident. Liberty Mutual denied the claim, however, based on the automobile exclusion.[5]

Plaintiff then filed her complaint against Liberty Mutual in this declaratory judgment action, seeking to establish coverage under the homeowner's policy. Thereafter, plaintiff moved for summary judgment, and Liberty Mutual cross-moved.

At the beginning of oral argument on the motions, plaintiff advanced the theory that the tort here was the "tort of not taking the medicine."[6] The court stated that theory "can't

[5] On the date of the incident, Green was also covered by an automobile insurance policy issued by Liberty Mutual under which Liberty Mutual is defending Green against the underlying tort action filed by plaintiff. The details of the automobile policy are not in the record, and we draw no inferences for or against either party based on Liberty Mutual's agreement to provide a defense to Green in that action.

[6] The pleadings were not provided, so it is unknown what was pled. However, it appears from a letter from plaintiff's counsel to Liberty Mutual that the primary tort alleged was the (continued)

prevail" because the tort was not complete until the injury occurred, and "[t]here could have been a million things that occurred before the tort occurs." The focus of the arguments was then directed at whether there was a "substantial nexus" between Green's use of the automobile and the injuries she caused to plaintiff.

In reaching its decision, the court observed that while the "use of the vehicle played a role in this case, perhaps an important role in setting up the situation[,] [t]he vehicle itself at best was incidental to the actual completion of the tort, i.e. the biting[.]" The court emphasized that "there's a difference between a necessary condition and a sufficient condition[,]" and found Green's operation of the vehicle was not a "sufficient condition" to trigger the exclusionary provision of the policy. The court further reasoned that the vehicle was not used in the assault, it was stopped, the engine was turned off, and Green was out of the vehicle when she assaulted plaintiff. The court concluded "[o]nce you're outside, you're outside of the ambit." The court therefore concluded the vehicle "was not a . . . 'substantial' nexus to the tort."

(continued)
assault, and the "failure to take the medicine" theory seems to have been developed and argued for summary judgment.

The court next decided the issue of attorney's fees, noting that under the comment to Rule 4:42-9(a)(6), third-party beneficiaries are permitted to recover fees. The court determined attorney's fees should be granted because if Green, an acknowledged insured under the policy, had filed an identical declaratory judgment action to the one filed by plaintiff, "it would have been a no-brainer to award" Green attorney's fees, and there was "no reason to have a different standard in awarding counsel fees because everything was argued" by plaintiff's counsel as opposed to Green's counsel.

I.

When an appellate court reviews summary judgment, it employs the same standard as the trial court: it decides first whether there was a genuine issue of fact, and if there was not, it decides whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). The legal conclusions of the trial court are reviewed de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The decision of a trial court to grant attorney's fees is reviewed under the abuse of discretion standard. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443-44 (2001).

II.

Liberty Mutual alleges the trial court erred in finding there was no "substantial nexus" between Green's use of the vehicle and the injury she inflicted upon plaintiff. We disagree.

As we have noted, there are no disputed issues of material fact. Thus, summary judgment was appropriate under Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The critical inquiry turns on whether the court correctly applied the applicable law related to the existence of a substantial nexus between the use of the automobile and the causation of the injuries. See Prudential Prop., supra, 307 N.J. Super. at 167. Our Supreme Court has instructed that "in order to determine whether an injury arises out of the maintenance, operation or use of a motor vehicle thereby triggering automobile insurance coverage, there must be a substantial nexus between the injury suffered and the asserted negligent maintenance, operation or use of the motor vehicle." Penn Nat'l Ins. Co. v. Costa, 198 N.J. 229, 240 (2009).

An injury may "arise out of the use of" an automobile even though the injury is not "'a direct and proximate result, in a strict legal sense of the use of the automobile.'" Id. at 237 (quoting Westchester Fire Ins. Co. v. Cont'l Ins. Cos., 126 N.J.

Super. 29, 37 (App. Div. 1973)), aff'd o.b., 65 N.J. 152 (1974). "The phrase 'arising out of' must be interpreted in a broad and comprehensive sense to mean 'originating from' or 'growing out of' the use of the automobile." Ibid. (quoting Westchester, supra, 126 N.J. Super. at 38). As we explained in Westchester, and as the Supreme Court quoted with approval in Penn National, the determination of a substantial nexus depends upon the circumstances of the particular case:

> [T]here need be shown only a substantial nexus between the injury and the use of the vehicle in order for the obligation to provide coverage to arise. The inquiry should be whether the negligent act which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the automobile, and thus a risk against which they might reasonably expect those insured under the policy would be protected.
>
> [Penn Nat'l, supra, 198 N.J. at 240.]

"The act causing the injury need not be actually foreseen but it must be both a reasonable consequence of the use of an automobile and one against which the parties would expect protection." Lindstrom v. Hanover Ins. Co. ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 138 N.J. 242, 250 (1994).

As we noted, the finding of a substantial nexus depends on the particular circumstances, and a nexus is generally found to

exist where the harm occurs while the actor or the victim is an occupant in a vehicle. For example, in Westchester, supra, 126 N.J. Super. at 39, the seminal case on the formulation of the "substantial nexus" test, we held that throwing a stick from a moving vehicle "was a sufficiently foreseeable consequence of the use of the vehicle" such that a substantial nexus was present, and coverage under the automobile insurance policy was implicated. Similarly, the Supreme Court subsequently found a "substantial nexus" existed between a drive-by shooting and the use of an automobile, reasoning that the automobile allowed the shooter to be at the location of the attack and provide assumed anonymity and mode of escape. Lindstrom, supra, 138 N.J. at 252.

In Smaul v. Irvington General Hospital, 108 N.J. 474, 478 (1987),[7] the Court concluded the use of an automobile was "central" to an assault, and thus a substantial nexus existed, where the driver of the vehicle was assaulted after he stopped to ask for directions. There, the Court reasoned the driver had "sought directions so that he could drive his car to his destination, he was sitting in his car when the assault

[7] Smaul, supra, 108 N.J. at 476, involved the interpretation of the pre-1986 PIP statute, which covered bodily injuries sustained "as a result of an accident involving an automobile," and was analyzed under the substantial nexus test.

occurred, and a purpose of the assailants . . . was to steal the car." In that case, the driver was pulled from his car at the beginning of the altercation and the majority of his injuries were inflicted outside the car. Id. at 475-76. See also Home State Ins. Co. v. Cont'l Ins. Co., 313 N.J. Super. 584, 593 (App. Div. 1998) (finding homeowner's insurance did not cover injuries resulting from an altercation on a school bus because a substantial nexus existed between the use of the automobile and plaintiff's injuries), aff'd o.b., 158 N.J. 104 (1999); Diehl v. Cumberland Mut. Fire Ins. Co., 296 N.J. Super. 231, 236 (App. Div. 1997) (finding recovery from homeowner's policy was barred because of the substantial nexus between a dog bite and use of a vehicle where the dog was on the back of a stopped pickup truck being used to transport the dog); Bartels v. Romano, 171 N.J. Super. 23, 27 (App. Div. 1979) (finding a substantial nexus between the use of an automobile and an incident where an automobile rolled down a driveway and injured the plaintiff, thus excluding coverage under homeowner's policy).

There is no substantial nexus, however, where the use or maintenance of the vehicle is merely incidental to the injury. Penn Nat'l, supra, 198 N.J. at 241. In Penn National, the plaintiff walked by his employer's house and saw him changing a tire in the driveway; the plaintiff walked up the driveway and

offered to assist his employer, who declined the offer. Id. at 233. As the plaintiff walked back down the driveway, he was injured when he slipped on the icy driveway and hit his head on a jack being used to lift his employer's truck to repair the flat tire; plaintiff was not involved in the repair aside from his offer to assist. Id. at 241. The Court held there was no substantial nexus between the injury and maintenance of the automobile because the ice on the driveway caused the injury. The presence of the jack on the driveway was merely coincidental. Ibid.

Evaluating the specific facts of this case, as dictated by Penn National, we agree with the motion judge that there was no substantial nexus between Green's use of the automobile and plaintiff's injuries. Unquestionably, plaintiff's injuries were sustained after she stopped Green's vehicle, but Green's assault upon the two officers occurred outside the automobile and was not "a natural and reasonable incident or consequence of the use of the automobile." As the motion judge explained:

> The car set all of this in motion. I agree with that, but I've indicated repeatedly there's a difference between a necessary condition and a sufficient condition.
>
> The operation of the vehicle was a necessary condition for there to be a "substantial nexus." Given the facts of this case, I don't find that it was a sufficient condition. The vehicle, itself,

> was not used in the assault. The vehicle was stopped. The engine's off. Passenger is - Defendant is out. Allegedly assaults the first officer and then bites the Plaintiff in this particular case . . . .
>
> And this case to me conceptually is not that much different than a situation where because one driver is very unhappy with the other driver's cutting them off or speeding, whatever it is, follows them home, gets out of the car, and knocks on the door and then assaults the person. They're outside the vehicle and it's sometime later. Once it's five seconds, five minutes, five hours, it's outside of it. Once you're outside, you're outside of the ambit, so to speak. At least that's my conceptual framework.
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> So while certainly the use of the vehicle played a role in this case, perhaps an important role in setting up the situation. The vehicle itself at best was incidental to the actual completion of the tort, i.e., the biting in this particular case. And it was not a "substantial," nexus to the tort.

Although plaintiff's plan was, as Liberty Mutual notes, to take control of the car until a family member could collect it and to ensure that Green could not drive from the scene, the plan did not naturally precipitate Green's reaction. Green kicked the door open without provocation and exited the car to perpetrate the unexpected physical assault.

Liberty Mutual suggests the use of the automobile was central to Green's motive in assaulting plaintiff, inasmuch as she testified during her deposition that she was frightened when

she was pulled over and did not understand why she had to surrender her keys. We reject that suggestion because Green's motive to attack the officers was not a natural and reasonable consequence of the prior use of the automobile. Thus, even if the altercation began inside the car and progressed to the outside, as opposed to having occurred completely outside the automobile after Green suddenly forced the door open, that progression does not establish a substantial nexus to the use of the automobile.[8] Moreover, Green's prior use of the automobile following her altercation with her mother was not so intertwined with the assault upon plaintiff that it necessarily triggered the automobile exclusion of the homeowner's policy.

III.

Liberty Mutual next argues the motion court properly rejected plaintiff's theory that Green's failure to take her medication was an independent tort that warranted concurrent coverage under both the homeowner's and automobile policies. By contrast, plaintiff argues we should accept the independent tort theory as an alternate basis for requiring Liberty Mutual to provide coverage under the homeowner's policy. We decline to address the independent tort theory in this appeal.

[8] Green does not contradict the officers' testimony that the assault here occurred outside the vehicle. She had no recollection of the details of the event.

Under Rule 2:3-4(a), a respondent may cross-appeal to the Appellate Division as of right. However, the Appellate Division will not consider a respondent's allegations of error asserted in a brief but not raised by cross-appeal. See, e.g., Reich v. Borough of Fort Lee Zoning Bd. of Adjustment, 414 N.J. Super. 483, 499 n.9 (App. Div. 2010) (declining to address respondent's assertion of error because it was not properly raised by cross-appeal); Walrond v. Cnty. of Somerset, 382 N.J. Super. 227, 231 n.2 (App. Div. 2006) (finding respondent's allegations of error not cognizable on appeal in the absence of a defensive cross-appeal).

Here, plaintiff argues that the court should have granted relief on the alternate grounds that there was an independent tort, but as plaintiff has not raised this issue through cross-appeal, it is not properly before this court. In addition, in light of our disposition of the central argument on the appeal, this issue is moot.

IV.

Finally, Liberty Mutual asserts that the trial court's award of counsel fees was erroneous. We disagree.

Pursuant to Rule 4:42-9(a)(6), a successful claimant may recover counsel fees "[i]n an action upon a liability or indemnity policy of insurance[.]" A third-party beneficiary

bringing a claim against an insurer to establish coverage is covered under the Rule. Pressler & Verniero, Current N.J. Court Rules, comment 2.6 on R. 4:42-9 (2012). The Rule also applies to declaratory judgment actions to determine coverage. See Prudential Prop., supra, 307 N.J. Super. at 174. As "equitable principles govern the trial court's decision, the court should consider the totality of the circumstances in awarding counsel fees." Iafelice ex rel. Wright v. Arpino, 319 N.J. Super. 581, 591 (App. Div. 1999) (citing Enright v. Lubow, 215 N.J. Super. 306, 313 (App. Div.), certif. denied, 108 N.J. 193 (1987)). The trial court is vested with "broad discretion as to when, where, and under what circumstances counsel fees may be proper and the amount to be awarded." Id. at 590 (citing Enright, supra, 215 N.J. Super. at 313).

Here, there is no evidence that Judge Kassel abused his discretion in awarding counsel fees. Liberty Mutual's argument that awarding counsel fees is inequitable because plaintiff is a third-party claimant and thus has not had to incur any fees defending the action is unavailing because third-party beneficiaries are explicitly permitted to recover attorney's fees under Rule 4:42-9(a)(6). In Iafelice, the trial court properly awarded the third-party plaintiff counsel fees incurred in connection with the declaratory judgment action brought by

the third-party plaintiff to establish coverage. Id. at 591. The only difference in this case is that Liberty Mutual agreed to defend and presumably provide coverage for the claim under the automobile policy; however, given the "broad discretion" afforded to the trial judge, this factor alone is not dispositive of the issue.

Affirmed.