NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0200-11T2

NEW JERSEY INTERGOVERNMENTAL
INSURANCE FUND as SUBROGEE
to RAYMOND PICCOLINI,

Plaintiff-Appellant,

v.

RICHARD SAROKIS,

Defendant-Respondent.

Submitted April 18, 2012 - Decided November 4, 2013

Before Judges Fuentes, Graves, and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Special Civil Part, Monmouth County, Docket No. SC-1747-11.

James M. LaBianca argued the cause for appellant (De Yoe, Heissenbuttel & Buglione, L.L.C., attorneys; Albert C. Buglione, of counsel; Mr. LaBianca, on the briefs).

Lauren E. Chaump argued the cause for respondent (Campbell, Foley, Delano and Adams, L.L.C., attorneys; Ms. Chaump, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Plaintiff New Jersey Intergovernmental Insurance Fund (NJIIF or the Fund) filed a small claims complaint in the Law Division, Special Civil Part, against defendant Richard Sarokis, seeking $907.23. This is a subrogation claim for workers' compensation benefits paid to plaintiff's insured, Township of Freehold Police Officer Raymond Piccolini. Plaintiff also sought prejudgment interest, counsel fees, and costs. The trial judge held plaintiff did not have a cognizable claim because Piccolini could have recovered his medical expenses from his own automobile insurance carrier under the policy's Personal Injury Protection (PIP) coverage. We agree with the trial court and affirm.

On May 20, 2009, Piccolini stopped Sarokis' car based on an alleged Title 39 infraction. Sarokis had a Chihuahua dog on his lap at the time. Piccolini asked Sarokis to produce his driving credentials. As Piccolini reached to receive Sarokis' credentials, the dog bit him on his left hand. The bite caused three puncture wounds; Piccolini was treated at CentraState Medical Center and cleared to return to regular duty on May 26, 2009.

Piccolini filed a "First Report of Injury" with the Township of Freehold and NJIIF paid him worker's compensation benefits through its third-party administrator, Inservco. On

February 22, 2010, Inservco filed a $907.23 subrogation claim, (representing Piccolini's medical expenses), against Sarokis' automobile insurance carrier, New Jersey Manufacturers Insurance Company (NJM).

By letter dated March 16, 2010, NJM denied coverage, claiming that under N.J.S.A. 34:15-40,[1] "your [NJIIF] rights of recovery are the same as the rights of recovery of the injured party." Because Piccolini was not pursuing a bodily injury claim against Sarokis, NJM claimed NJIIF was not entitled to pursue its subrogation claim against Sarokis' automobile insurance carrier. By letter dated May 10, 2011, NJIIF notified Sarokis' that "[p]ursuant to N.J.S.A. 34:15-40 and a result of

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[1] N.J.S.A. 34:15-40 provides, in pertinent part:

> Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. In the event that the employee or his dependents shall recover and be paid from the said third person or his insurance carrier, any sum in release or in judgment on account of his or its liability to the injured employee or his dependents, the liability of the employer under this statute thereupon shall be only such as is hereinafter in this section provided.
>
> [(Emphasis added).]

your negligence, the Fund has the right to prosecute a subrogation claim against you on behalf of Officer Piccolini . . . as a result of the May 20, 2009 incident." NJIIF concluded the letter by "recommending" that Sarokis provide a copy of this letter to his insurance carrier and attorney.

When its "recommendation" to Sarokis did not result in any change in NJM's legal position as to the validity of its claim, NJIIF filed a small claims subrogation complaint directly against Sarokis in the Monmouth County Law Division, Special Civil Part. After hearing the arguments of counsel, Judge James J. McGann concluded NJIIF's subrogation claim was barred pursuant to the Automobile Insurance Cost Reduction Act (No-Fault Act), N.J.S.A. 39:6A-1.1 to -35, because Piccolini had an independent right to recover the cost of his medical treatment under the PIP coverage provided in his automobile insurance policy.

Relying on our decision in Diehl v. Cumberland Mut. Fire Ins., 296 N.J. Super. 231 (App. Div.), certif. denied, 149 N.J. 144 (1997), Judge McGann found there was a "substantial nexus between the injury [suffered by Piccolini], and the . . . use of the motor vehicle in this case, and it certainly was a reasonably foreseeable consequence of . . . the use of the motor vehicle." Judge McGann also rejected what he characterized as

NJIIF's "secondary argument," that it was also entitled to recover from Sarokis under the collateral source rule codified in N.J.S.A. 39:6A-6.

On appeal to this court, NJIIF argues Sarokis should not be subject to the limitations of the No-Fault Act because there was no "substantial nexus" between Piccolini's injury and the use of an automobile. We disagree. Before addressing this issue directly, we will first briefly describe the legal basis for the claim.

Under N.J.S.A. 39:6A-4, all automobile liability insurance policies must provide PIP benefits coverage to an insured for any injury sustained

> as a result of an accident while occupying, entering into, alighting from or using an automobile, or as a pedestrian, caused by an automobile or by an object propelled by or from an automobile, [and] to other persons sustaining bodily injury while occupying, entering into, alighting from or using the automobile of the named insured, with permission of the named insured[.]
>
> [N.J.S.A. 39:6A-4.]

To trigger coverage, there must be a "substantial nexus between the accident and the use of an automobile." Diehl, supra, 296 N.J. Super. at 236 (quoting Lindstrom v. Hanover Ins. Co., 138 N.J. 242, 250 (1994)) (holding that there was a substantial nexus between an injury resulting from a drive-by

shooting and the shooter's use of the vehicle); see also Smaul v. Irvington Gen. Hosp., 108 N.J. 474, 478 (1987) (holding that a driver who was assaulted by pedestrians when he stopped his car to ask directions was entitled to PIP benefits because the incident "directly involv[ed] the use of his automobile").

To make this determination, a court must decide

> 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. Whether the requisite connection or degree of relationship exists depends upon the circumstances of the particular case.
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> [Diehl, supra, 296 N.J. Super. at 236, aff'd o.b., 65 N.J. 152 (1974) (quoting Westchester Fire Ins. Co. v. Continental Ins. Co., 126 N.J. Super. 29, 37-38 (App. Div. 1973)) (holding that automobile insurance coverage was triggered when a cyclist was injured by a passenger throwing a piece of wood out of the car window).]

Under this test, it is not necessary for it to "appear that the injury is a direct and proximate result, in a strict legal sense, of the use of the automobile," for coverage to exist. Westchester, supra, 126 N.J. Super. at 37.

In Diehl, we held that a dog bite to the face, where the dog was kept in the open cargo area of the defendant's pickup

truck, was sufficiently related to the use of the vehicle to trigger automobile insurance coverage. Id. at 236. The pickup truck was associated with the accident within the meaning of N.J.S.A. 39:6A-4 because the injury "arose out of the use of the vehicle to transport the dog[,]" and "the bite incident was facilitated by the height and open design of the deck." Ibid.

NJIIF's attempts to distinguish Diehl by emphasizing that the "open design" of the defendant's pickup truck in that case was more likely to result in a dog attack than was the situation here, where the dog was held in the driver's lap, is simply unavailing. A driver seated behind the wheel of his car, holding a dog on his lap as he interacts with a police officer through the car's open window, facilitates an ensuing attack by the dog against the officer to an even greater extent than having an unrestrained dog in an open truck bed. At the very least, it is indisputably foreseeable that a dog is capable of biting someone who approaches a car, with its driver-side window open, while the dog is being held on the lap of the driver, within a foot or two of the person standing on the outside of the vehicle. The particular facts here are even more compelling because the dog bit Piccolini's hand as the officer reached to receive Sarokis' driving credentials.

Plaintiff nevertheless argues that N.J.S.A. 39:6A-12 authorizes an injured insured to seek from "the tortfeasor, [an] uncompensated economic loss sustained by the injured party." N.J.S.A. 39:6A-2k defines "economic loss" as "uncompensated loss of income or property, or other uncompensated expenses, including, but not limited to, medical expenses."[2] (Emphasis added); see also Patterson v. Adventure Trails, 364 N.J. Super. 444, 448 (Law Div. 2003).

However, under the No-Fault Act,

> PIP benefits are paid by the injured party's insurance company, not the tortfeasor's insurance company. 'Accordingly, all persons injured while using an automobile are entitled to receive PIP benefits from their own insurance company regardless of who is at fault for the accident.'
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> [Loftus-Smith v. Henry, 286 N.J. Super. 477, 484 (App. Div. 1996) (quoting Gerald H. Baker, A Look at No Fault in 1994, 140 N.J.L.J. 236 (April 24, 1995)).]

Indeed, an injured insured is specifically precluded from suing the tortfeasor for the amount of PIP benefits received

[2] Medical payments, as an economic loss, are not subject to the verbal threshold, which controls only suits for "non-economic losses." Haywood v. Harris, 414 N.J. Super. 204, 212 (App. Div.), certif. denied, 204 N.J. 38 (2010) ("We have held that plaintiffs need not satisfy the [verbal] threshold to recover for economic loss.") (quoting Miskelly v. Lorence, 380 N.J. Super. 574, 578 (App. Div.), certif. denied, 185 N.J. 597 (2005)).

from his own auto-insurance carrier under N.J.S.A. 39:6A-12. Thus, because PIP benefits are paid by the injured party's insurance carrier, such benefits do not constitute "uncompensated" expenses and cannot be recovered from the tortfeasor under N.J.S.A. 39:6A-12.

As correctly noted by Judge McGann, plaintiff's invocation of the collateral source rule is equally unavailing. Codified in N.J.S.A. 39:6A-6, the collateral source rule shifts the burden of providing PIP benefits from the automobile insurance carrier to the workers' compensation carrier, if the automobile related injury occurs within the scope of the injured person's employment. That provision states:

> [t]he benefits provided in sections 4 and 10 . . . shall be payable as loss accrues, upon written notice of such loss and without regard to collateral sources, except that benefits, collectible under workers' compensation insurance . . . shall be deducted from the benefits collectible under sections 4 and 10 . . . .
> If an insurer has paid those benefits and the insured is entitled to, but has failed to apply for, workers' compensation benefits . . . the insurer may immediately apply to the provider of workers' compensation benefits . . . for a reimbursement of any benefits pursuant to sections 4 and 10 . . . it has paid.
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> [N.J.S.A. 39:6A-6 (Emphasis added).]

As Judge Pressler noted twenty-five years ago in Lefkin v. Venturini, when workers' compensation benefits are determined to

be available, PIP benefits are considered to be "neither collectible nor paid" under N.J.S.A. 39:6A-12, and so an injured insured is not precluded by the No-Fault Act from seeking to recover these expenses from the tortfeasor. 229 N.J. Super. 1, 9 (App. Div. 1988). This principle of law remained unchanged by the 2003 legislative revisions to N.J.S.A. 39:6A-2k, which specifically included medical expenses in the definition of an economic loss. Patterson, supra, 364 N.J. Super. at 448-49.

Finally, plaintiff argues that it is entitled to recover its subrogation claims against the tortfeasor because the Legislature abrogated the common law doctrine known as the "Fireman's Rule." See Ruiz v. Mero, 189 N.J. 525, 527 (2007); N.J.S.A. 2A:62A-21. This argument is irrelevant to the central issue raised in this appeal and lacks sufficient merit to warrant any further discussion in this written opinion. R. 2:11-3(e)(1)(E).

Affirmed.