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ANTHONY C. GIORDANO, III Plaintiffs, v. MARCUS D. FRANCOEUR, and JOHN DOES 1-10 (true names unknown) Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO.: MON-L-3866-17 CIVIL ACTION **ORDER GRANTING DEFENDANT MARCUS D. FRANCOUER'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT PURSUANT TO N.J.S.A. 39:6A-4.5(a)**

THIS MATTER having come before the Court upon the application of John J. Robertelli, Esq., attorney for Defendant Marcus D. Francoeur, for an Order dismissing Plaintiff's Complaint with Prejudice pursuant to N.J.S.A. 39:6A-4.5(a), and the Court having reviewed the moving papers; and having considered the matter and good cause appearing;

IT IS on this 20th day of December 2019:

ORDERED that Plaintiff, Anthony C. Giordano's Complaint be and is hereby dismissed with Prejudice pursuant to N.J.S.A. 39:6A-4.5(a); and it is further

ORDERED that a copy of the within Order shall be deemed served on all Counsel of record via eCourts.

/S/ HENRY P. BUTEHORN, J.S.C.
HENRY P. BUTEHORN, J.S.C.

_xx_ Opposed
Oral argument held December 20, 2016
See Rider to Order.

Rider and Statement of Reasons for December 20, 2019 order granting defendant's motion for summary judgment

Giordano v. Franoeur
MON-L-3866-17

This case arises out of a motor vehicle accident of September 9, 2016. Plaintiff claims injuries resulting from the accident. Defendant asserts discovery revealed plaintiff did not have automobile insurance in effect on the date of the accident. Defendant argues plaintiff was uninsured and cannot pursue a claim for economic and non-economic loss pursuant to N.J.S.A. 39:6A-4.5(a) and Perrelli v. Pastorelle, 206 N.J. 193 (2011). Therefore, defendant seeks an order granting him summary judgment.

In opposition plaintiff argues he did not know his insurance coverage expired prior to the accident. Plaintiff certifies his insurance company, Liberty Mutual, did not advise him the coverage was not in effect. Therefore, plaintiff argues, he was not "culpably uninsured." Plaintiff also argues this motion should be denied upon the doctrine of laches. He points to a discovery response of January 31, 2019 advising defendant of a lapse in coverage. He further states the parties exchanged expert reports, participated in arbitration, conducted settlement conferences, and incurred expenses and defendant did not raise this issue. Thus, he argues, upon viewing "the totality of the circumstances" the doctrine of laches should lead to denial of defendant's motion.

A motion for summary judgment is governed by R. 4:46-2 of the New Jersey Court Rules. The rule provides that summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show 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." R. 4:46-2. Brill v. Guardian Life Ins. Co.

of Am., 142 N.J. 520 (1995) sets forth the standard for a trial court to apply when deciding a summary judgment motion. The Brill court stated:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider 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.
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> 142 N.J. at 540.

Plaintiff admits he presented information to the investigating police officer that he maintained automobile insurance through Liberty Mutual Insurance Company. Plaintiff admits that insurance policy was cancelled three (3) days prior to the accident at issue.[1] It is also without dispute that plaintiff was not insured under the Liberty Mutual policy on the date of the accident. In deciding this motion the court will accept as true plaintiff's statement he was not aware the policy was cancelled until after the accident. The court also accepts plaintiff's certification he believed there was such coverage for him on the date of the accident. Defendant was made aware of the lapse in coverage through plaintiff's discovery response of January 31, 2019.

The owner of a motor vehicles registered or principally garaged in New Jersey is required to maintain minimum amounts of insurance coverage for bodily injury, death, and property damage caused by their vehicles. N.J.S.A. 39:6B-1. Every policy must provide for personal injury protection (PIP) benefits. N.J.S.A. 39:6A-4. PIP benefits are to provide "for the payment of benefits without regard to negligence, liability or fault of any kind." Id. This requirement,

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[1] Plaintiff executed a certification that was submitted with the opposition to this motion. Paragraph five (5) stated "my insurance had been cancelled due to non-payment on September 6, 20**17**." The accident took place on September 9, 20**16**. The reference to 2017 in paragraph five (5) was an obvious typographical error. The 2017 date was followed by the phrase "three days prior to the accident." Paragraph four (4) of the certification also puts the time period referenced in paragraph five (5) into context; that is indicative of 2016 and not 2017. Moreover, the remainder of plaintiff's certification and opposition to this motion indicates the policy was cancelled on September 6, 2016 and not in effect on the date of the accident.

and PIP benefits, was enacted as part of the New Jersey Automobile Reparation Reform Act, N.J.S.A. 39:6A-1 to -35, commonly referred to as the "No Fault Act." See id.; see also Fu v. Fu, 160 N.J. 108, 121 (1999) (explaining the transition to the no fault system for automobile insurance).

PIP benefits guarantee payment of medical expenses without regard to fault. See Caviglia v. Royal Tours of Am., 178 N.J. 460, 466 (2004). They are "intended to serve as the exclusive remedy for payment of out-of-pocket medical expenses arising from an automobile accident." Ibid. As part of the no fault law that they promote the objectives of the overall No Fault Act. See id.; see also Perrelli v. Pastorelle, 206 N.J. 193 (2011). Those purposes include providing prompt benefits, reducing or stabilizing the cost of automobile insurance, and streamlining judicial procedures involving third party claims. Caviglia, ante 178 N.J. at 467. The Act, however, placed certain restrictions on the right to sue considered a "trade-off for lower premiums and prompt payment of medical expenses." Ibid.; see also Roig v. Kelsey, 135 N.J. 500, 511-12 (1994). At issue in this case is N.J.S.A. 39:6A-4.5(a). The statute states:

> Any person who, at the time of an automobile accident resulting in injuries to that person, is required but fails to maintain medical expense benefits coverage mandated by [N.J.S.A. 39:6A-4], [N.J.S.A. 39:6A-3.1] or [N.J.S.A. 39:6A-3.3] shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident while operating an uninsured automobile.

That statue was also put in place to further the cost reduction and judicial objectives of the No Fault Act. Rojas v. DePaolo, 357 N.J. Super. 115, 119 (Law Div. 2002). "[T]he Legislature wanted to ensure that 'an injured, uninsured driver does not draw on the pool of accident-victim insurance funds to which he [or she] did not contribute.'" Perrelli, ante, 206 N.J. at 203 (quoting Caviglia, ante, at 471) (alteration in the original). The statute acts as "'a very powerful incentive to comply with [the requirements of] the compulsory insurance laws . . . or lose the right to maintain a suit for both economic and noneconomic damages.'" Ibid.

In this case plaintiff was the owner of a motor vehicle registered and principally garaged in this state; the vehicle involved in the accident with defendant. Plaintiff was required to maintain certain minimum automobile insurance coverage pursuant to statute. Although plaintiff had the required coverage for a period of time, it is without dispute the insurance was not in place on the date of the accident at issue. The courts have clearly and strictly applied N.J.S.A. 39:6A-4.5(a). The statute does not reference nor take a driver's knowledge and/or fault into account. The prohibition in the statute is triggered simply upon "an accident while operating an uninsured automobile." N.J.S.A. 39:6A-4.5(a).

Plaintiff argues the statute should not prevent this suit as he was not "culpably uninsured."[2] He points to a lack of notice to him of "any threatened or actual cancellation of his policy for any reason until after the accident date." (Plaintiff certification and brief). However, N.J.S.A. 39:6A-4.5(a) does not reference knowledge or culpability and those considerations were never incorporated into the statute.

Plaintiff's argument was also addressed by our Supreme Court within Perelli v. Pastorelle, ante. While not explicitly discussed, the argument raised by plaintiff here was necessarily rejected in the decision. The central issue decided Perelli was whether N.J.S.A. 39:6-4.5(a) bars the owner of an uninsured vehicle from recovering for loss if injured while a passenger in that vehicle. However, one of the arguments raised by the plaintiff in that case was that the statute only applies to a person that is '"culpably" or knowingly uninsured. Perelli, ante at 192. Perelli argued she was not "culpably" uninsured because "it was her belief the vehicle was insured." Id. She pointed to evidence to support that assertion. That court also applied the

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[2] Plaintiff's brief states the statute should not apply as "the insured/Plaintiff was misled to believe he was covered under his policy of insurance through Liberty Mutual." (Plaintiff's brief at page 2). Although plaintiff uses the word "misled," he did not put forth any evidence that might infer or imply Liberty Mutual undertook an affirmative action to "mislead" plaintiff into believing he was insured at the time of the accident. Rather, plaintiff points to a lack of notice from Liberty Mutual that his insurance was cancelled.

same standard as this court must in deciding the present motion. Id.; see also Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012) (indicating appellate review of an order granting or denying summary judgment must be same standard that governs the trial court.); Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). That court must also have based its decision upon the consideration believed she was insured at the time of her accident and not "culpably" uninsured.[3]

Despite Perelli's argument she did not know she was uninsured the Supreme Court did not consider that a question of material fact that needed resolution before granting the defendant's motion for summary judgment. Rather, it found it immaterial and without the need for consideration. The court necessarily indicated culpability or fault as to the lack of insurance is of no significance. Its unanimous decision was that "[t]he matter is therefore remanded to the Law Division for entry of judgment dismissing the complaint." (Emphasis added).

Fifteen years ago, in finding the statute constitutional, our State Supreme Court declined "to second-guess the Legislature's common-sense reasoning that section 4.5[(a)] has the potential to produce greater compliance with compulsory insurance laws and in turn, reduce litigation, and result in savings to insurance carriers and ultimately the consuming public." Caviglia, ante at 477. And this court will not second-guess the Legislature, nor our Supreme and Appellate Courts that apply the statute as written without consideration of driver culpability.[4]

Plaintiff also argues this motion should be denied upon the equitable doctrine of laches. "Laches is an equitable doctrine which penalizes knowing inaction by a party with a legal right from enforcing that right after passage of such a period of time that prejudice has resulted to the other parent so that it would be inequitable to enforce the right." L.V. v. R.S., 347 N.J. Super.

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[3] The defendant in that case appealed the trial court's denial of its motion for summary judgment. As such plaintiff was the non-moving party.

[4] The only consideration of culpability is the "vehicle owners required by statute to maintain PIP coverage but who have failed to do so." Craig & Pomeroy, New Jersey Auto Insurance Law, §15:5-2 (2019) (parenthetically defining "culpably uninsured" and then noting "culpability" in relation to this section is "not meant to incorporate a specific mental state for which the statute does not provide"); see also Perrelli, ante 206 N.J. at 208.

33, 39 (App. Div. 2002). Thus, factors considered in determining whether to apply laches include "'[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay.'" Ibid. (quoting Lavin v. Bd. of Educ. Of City of Hackensack, 90 N.J. 145, 152 (1982)). "The key ingredients" to the applicability of laches "are knowledge and delay by one party," coupled with a detrimental "change of position by the other [party]." L.V., ante 347 N.J. Super. at 39. "While laches does not arise from delay alone," inequity "more often than not, will turn on whether a party has been misled to his harm by the delay." Ibid. (quoting Lavin, 90 N.J. at 153).

Plaintiff argues defendant was aware he did not have the required automobile insurance since January 31, 2019. He asserts defendant was aware there was a denial of coverage as of that that time. Plaintiff points to a supplemental discovery response of that date. He argues the issue was never raised despite continued discovery thereafter including exchange of expert reports. Plaintiff also notes arbitration, settlement conferences, and a motion for summary judgment. Plaintiff argues the "totality of the circumstances, inclusive of the length of delay for filing this application, the lack of reason for the delay, [and] the prejudice befallen onto [p]laintiff because of the delay" require the application of this doctrine. (Plaintiff's brief page 4). The court disagrees.

Form A Interrogatory number 37 asks:

> 37. Do you have insurance coverage and/or PIP benefits under an applicable policy or policies of automobile insurance? As to each such policy provide the name and address of the insurance carrier, policy number, the named insured and attach a copy of the declaration sheet.

Plaintiff's initial response was "to be provided." By letter of January 31, 2019 plaintiff provided a supplemental response stating

> Farmers Insurance Company, see attached standard polic[y] coverage selection form. It was learned that plaintiff's policy elapsed for a period of 24 hours.

> Plaintiff was insured through his private health care provider, Aetna. See attached copy of the ID card.

That response did not indicate, as plaintiff argues, plaintiff was uninsured for the date of the accident at issue. Interrogatory 37 asks whether plaintiff has insurance coverage and/or PIP benefits under an applicable insurance policy. Although plaintiff's initial response was "to be provided," the parties agree the police report identified plaintiff's policy with Liberty Mutual. Plaintiff's supplemental response by letter of January 31, 2019 referenced a different policy. It also referenced a 24 hour lapse in coverage. However it did not indicate the lapse in coverage was for the date of the accident at issue. It did not indicate whether the lapse in coverage was for the policy referenced in the supplemental response or a different policy of insurance. It made no correlation whatsoever to the Liberty Mutual policy or the date of the accident.

First, there was no indication in the letter plaintiff was uninsured on the date of the accident. Defendant even sought clarification about plaintiff's insurance over the months after that response. Defendant's counsel sent a letter on February 27, 2019 asking for "a copy of [p]laintiff's insurance [d]eclaration [p]age in effect at the time of the motor vehicle accident." (Exhibit E, defendant's motion). Another letter was sent on September 11, 2019 was a "follow-up to [defendant's] request for a copy of [p]laintiff's [i]nsurance [d]eclaration [p]age in effect at the time of the motor vehicle accident." (Exhibit F, defendant's motion).

Second, the court could not find there any delay by significant defendant in filing this motion after becoming aware plaintiff was uninsured at the time of the accident. While court might not find the nine and a half months between the January 31, 2019 letter and this motion substantial in itself, there is a justified reason for that time period. As just noted, it was not made clear to defendant plaintiff was uninsured. The present motion would not have been filed absent the evidence to indicate there was a basis for the application. And there was no delay in filing the motion as it was filed upon plaintiff's production of such evidence.

Finally, although plaintiff may have incurred additional expense prosecuting this matter over the past months that was not a knowing delay or anticipated change in position by defendant. Plaintiff was not misled by any (in)action by defendant. Defendant has consistently defended this through the discovery process and subsequent motions for summary judgment. Plaintiff was not misled to believe continuing to pursue this matter might lead to a different posture by defendant. Rather it was plaintiff's failure to provide the information necessary for this motion that prevented it from being filed at an earlier point in time. There is no evidence to suggest defendant would not have filed this motion immediately if the information was clearly relayed by the January 31, 2019 letter. Plaintiff was aware after the accident occurred his coverage from Liberty Mutual was cancelled. Defendant was not aware of that fact until made known by plaintiff. This motion was not withheld for any appreciable period of time upon once made known to defendant. This is not a circumstance where laches applies.

Therefore, upon all the foregoing the court grants summary judgment to the defendant.