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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5591-08T1

GENERAL SECURITY NATIONAL INSURANCE
COMPANY as attorney-in-fact for
GENERAL SECURITY PROPERTY AND
CASUALTY COMPANY,

Plaintiff-Appellant/
Cross-Respondent,

v.

NEW JERSEY INTERGOVERNMENTAL
INSURANCE FUND,

Defendant-Respondent/
Cross-Appellant,

and

SPECIALTY NATIONAL INSURANCE
COMPANY c/o AMERICAN MOTORISTS
INSURANCE COMPANY, THE NORTH
RIVER INSURANCE COMPANY, and
STATE NATIONAL INSURANCE COMPANY,
INC.,

Defendants-Cross-Respondents.

NEW JERSEY INTERGOVERNMENTAL
INSURANCE FUND,

Plaintiff-Respondent/
Cross-Appellant,

v.

GENERAL SECURITY NATIONAL INSURANCE
COMPANY and GENERAL SECURITY
PROPERTY AND CASUALTY COMPANY,

Defendant-Appellant/
Cross-Respondent.

Argued: January 10, 2011 – Decided: August 25, 2011

Before Judges Grall, C.L. Miniman and
LeWinn.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Docket Nos. L-
2792-07 and L-2868-07.

Steven I. Lewbel argued the cause for
appellant/cross-respondent General Security
National Insurance Company (Melito & Adolfsen,
attorneys; Mr. Lewbel, of counsel and on the
briefs).

Andrew L. Indeck argued the cause for
respondent/cross-appellant New Jersey Inter-
governmental Insurance Fund (Weber Gallagher
Simpson Stapleton Fires & Newby, LLP, attorneys;
Mr. Indeck, of counsel; Mr. Indeck and
Kathleen J. Devlin, on the briefs).

Vincent M. Carita argued the cause for
cross-respondent Specialty National Insurance
Co. (Hoagland, Longo, Moran, Dunst & Doukas,
LLP, attorneys; Charles T. Kane, of counsel
and on the brief).

Margaret F. Catalano argued the cause for
cross-respondent The North River Insurance
Company, Inc. (Carroll, McNulty & Kull LLC,
attorneys; Ms. Catalano, Christopher R.
Carroll, and Shaun I. Blick, on the brief).

Walter J. Andrews (Hunton & Williams, LLP)
of the Virginia bar, admitted pro hac vice,
argued the cause for cross-respondent State
National Insurance Company, Inc. (Harwood

Lloyd, LLC, Mr. Andrews, and Erin P. Thompson (Hunton & Williams, LLP) of the Virginia bar, admitted pro hac vice, attorneys; Peter E. Mueller, Mr. Andrews, and Ms. Thompson, on the briefs).

PER CURIAM

This is a declaratory judgment action growing out of an underlying hostile work environment claim against a municipal employer alleging federal and state civil rights violations over a five-year period from 2000 to 2004. Five insurers issued multiple policies during this period; four were excess carriers. Plaintiff General Security National Insurance Company (General), as attorney-in-fact for General Security Property and Casualty Company, in this declaratory judgment action, appeals a June 17, 2009, order (1) granting summary judgment to defendant New Jersey Intergovernmental Insurance Fund (the Fund) and denying General's motion for summary judgment; (2) declaring that the claims asserted in an underlying action comprised one claim under the first-issued General policy; (3) declaring that one self-insured retention applied; (4) finding that the settlement of the underlying action was reasonable and requiring General to indemnify the Fund for settlement and post-judgment interest in the amount of \$976,705.04; (5) granting the Fund's request for attorneys' fees, and awarding it \$181,518.83 for attorneys' fees, disbursements, and costs together with post-judgment

interest; and (6) deeming moot all other motions between General and defendants Specialty National Insurance (Specialty), The North River Insurance Company (North), and State National Insurance Company, Inc. (State) in light of the preceding relief. The Fund cross-appeals from the partial denial of its application for attorneys' fees and costs. We now affirm.

I.

To place this insurance coverage dispute in context, we begin with the facts relevant to the underlying action, Spagnola v. Town of Morristown, No. 05-577(JLL) (D.N.J. Dec. 7, 2006). Anne Marie B. Spagnola, an information technology manager for the Town of Morristown (the Town), worked with the mayor and other managers, including the business administrator, Eric Maurer. On multiple occasions from November 2000 through June 2004, Spagnola encountered sexually explicit material on Maurer's work computer. Spagnola, supra, (slip op. at 4).

General admits that on August 8, 2001 Spagnola "complained to the Town's [m]ayor" about Maurer's conduct. Additionally, Spagnola alleged retaliation throughout this period, including one occasion in January 2003 when she tendered her resignation to the mayor; he persuaded her to remain in the Town's employ; but he took no action to end the harassment. Finally, after Spagnola attempted to resign in 2003, she met with town counsel,

informing him of Maurer's sexual activities, and turned over sexually explicit materials found in Maurer's possession at work. She was dissuaded from resigning by town counsel's misrepresentations in an opinion letter to the mayor dated April 10, 2003, that the Town had no duty to protect her because Maurer's conduct did not satisfy the legal definition of harassment. On August 13, 2004, she resigned due to the hostile work environment.

In January 2005, Spagnola filed a complaint against the Town, the mayor, Maurer, and town counsel. She claimed gender discrimination in the form of a hostile work environment in violation of federal civil rights law and the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -49, and the intentional and negligent infliction of emotional distress. Spagnola alleged that she repeatedly complained to the mayor and town counsel from August 2001 through July 2004, yet no one ever took any effective action and, instead, engaged in retaliatory conduct that included permitting Maurer to reduce Spagnola's responsibilities. She sought compensatory and punitive damages. Spagnola amended the complaint three times, in ways that are not relevant to the issues on appeal. The underlying defendants demanded defense and indemnification from the carriers who are parties in this action.

II.

General issued the Fund Excess Public Officials and Employees General Liability Insurance (POL) policy MP980021 for 2000 and then issued renewal policy 23MP27000044 for 2001; both contained policy limits of \$5 million and Self-Insured Retentions (SIR) of \$100,000 per occurrence. Neither policy was effective after January 1, 2002. Specialty issued excess policy 3XZ167626-00 for 2002 with a limit of \$10 million per occurrence and a SIR of \$250,000 per occurrence. North issued excess multi-risk policy 544-000169-7 for 2003, which contained a limit for each occurrence of \$6 million and a SIR of \$250,000 per occurrence. State issued its multi-risk policy MDB 02191 82 for 2004 with policy limits of \$15 million per occurrence and a SIR of \$500,000 per occurrence. All policies required covered insureds to expend the SIR before the insurer would commence coverage. The Fund is a self-insurance fund that provides primary insurance coverage to the Town and other municipalities in New Jersey, who are additional insureds under the excess policies, for the amount of their SIR. It provided such coverage for the period from January 1, 2000, through January 1, 2005.

The excess policies required the insurers to pay "those sums that the insured becomes legally obligated to pay as damages because of a 'wrongful act'" committed by a public

official. The North and State policies were identical policies except for the policy limits and SIRs discussed above. All of the policies shared a general understanding of the definition of "wrongful act."

The excess policies differed in how they dealt with covered conduct that was sporadic and with related wrongful conduct that occurred outside of the policy period. The General policies stated: "All claims against any Insureds arising out of the same Wrongful Act, or logically or casually [sic] connected Wrongful Acts, will be considered one Claim" and were "considered first made at the time the earliest such Claim was made against any Insured." Likewise, Specialty's policy stated that the wrongful act had to occur during the policy period, but "[c]laims based on or arising out of the same act or interrelated acts of one or more INSURED(S) shall be considered a single WRONGFUL ACT," to which only one SIR would apply.

In contrast, the North and State policies covered a "Wrongful Act" that occurred "prior to the inception date of [the] policy. . . . only if the 'Wrongful Act' was unknown to you as a public official or to your employees until on or after the inception date of this policy. In addition, the 'Wrongful Act' must have occurred within 1 year prior to the inception date of this policy."

Additionally, the General policies provided that the insured would not settle any claim without the prior written consent of General, and General had no obligation to indemnify for a settlement without its consent.

On October 1, 2004, Eric J. Nemeth, General Counsel, on behalf of the Fund wrote to the Town acknowledging receipt of a copy of the Tort Claim Notice the Town received from Spagnola.¹ The Fund apparently agreed to defend under a reservation of rights. On March 4, 2005, Nemeth again advised that the Fund would provide a defense to the Town, the mayor, and Maurer subject to a reservation of rights. Coverage was not extended to town counsel because he and his firm were not insureds under the policies. Coverage was limited to \$100,000.

On September 8, 2005, General acknowledged receipt of the Spagnola complaint and agreed to handle and investigate the matter under the POL coverage, but reserved the right to deny coverage to the extent any acts "d[id] not constitute an 'occurrence' . . . or to the extent the claim falls within any . . . exclusions." Additionally, the SIRs had to be exhausted by the Fund and no coverage was available for acts occurring after January 1, 2002, when General's policies lapsed.

¹ Page 2 of this three-page letter is missing from the appendix.

On December 1, 2005, North acknowledged receipt of the Spagnola claim but on December 7, it denied coverage on the ground that the alleged wrongful acts began in mid-2000, which was more than one year prior to its policy's inception.

On December 8, 2005, State issued a reservation of rights, noting that only unknown wrongful acts occurring within one year prior to the policy inception on January 1, 2004, would be covered; therefore, on the face of the Complaint, coverage would not be extended.

On April 7, 2006, Specialty issued a reservation of rights letter to the Town agreeing to investigate and defend subject to its right to disclaim coverage because many of the allegations in Spagnola's complaint fell outside the policy period.

On January 10, 2007, General advised the Town that it would "continue with the handling, investigation, and defense" of the Spagnola action under the POL coverage "subject to a complete reservation of rights." Coverage was "limited to 'wrongful acts' caused by an 'occurrence' that takes place during the period of [General's] coverage." No coverage was available for wrongful acts occurring after January 1, 2002, when the policies lapsed. It noted that Specialty "has agreed to participate in the defense of the action" and "reserve[d] the right to seek an allocation of defense costs as against Specialty."

On February 19, 2007, after the first settlement conference before a federal magistrate, Nemeth on behalf of the Fund wrote to the three other insurers to report his impression that settlement would "not be a simple or inexpensive process," and that the magistrate urged mediation. While Nemeth considered Spagnola's settlement demand for \$1.6 million "extreme," he noted that she could claim attorney fees if she prevailed, which would be minimized if the case settled before discovery.

On April 23, 2007, General wrote to Specialty, North, and State advising that North denied coverage and Specialty and State acknowledged potential coverage for the Spagnola action. General demanded that all carriers share in the defense of the matter. It asserted that the POL language in the North policy was the same as that in the other policies and it had wrongfully denied coverage. General demanded that North withdraw its disclaimer and agree to participate in the defense. It reserved all rights to pursue them for contribution.

On June 5, 2007, North prospectively withdrew its denial of coverage once the \$250,000 SIR applicable to its policy was exhausted. However, it noted that POL coverage did not apply to acts occurring more than one year prior to policy inception on January 1, 2003, and as to that one-year period, only if the acts were unknown to the insured prior to January 1, 2003.

On August 15, 2007, on the basis of the limited discovery to date, the defense counsel retained by General for the Town estimated the "verdict value" of Spagnola's case at \$500,000 inclusive of attorney fees and costs.

On October 1, 2007, General instituted this declaratory judgment action against the Fund, Specialty, North, and State seeking allocation of the costs of defense and indemnification. On October 5, 2007, the Fund filed its own declaratory judgment action² against General seeking a determination "that the alleged acts, errors, and omissions of the Town . . . and its employees be considered one occurrence and one claim" and declaring that General was required to provide a defense and indemnification. The Fund answered General's complaint on December 21, 2007.

The first mediation of the Spagnola action occurred in 2008 before a retired state judge, who "informally" determined that "the case might settle for one million with a lot of effort." Afterwards, the Fund notified Specialty, North, and State on June 11, 2008, that it had agreed to participate in a second round of mediated settlement discussions before a retired federal district court judge. It requested the participation of each carrier "under a structured contribution agreement" without prejudice to reallocation in the declaratory judgment action.

² These two actions were consolidated on January 18, 2008.

The judge at the second mediation thought a jury verdict in the case might approach \$3 million. However, Spagnola settled her compensatory damages claims for \$950,000.

On July 10, 2008, the Fund advised General that the matter had settled for \$950,000 and sought General's participation in the settlement. The Fund suggested that "each excess carrier contribute on a per capita basis to the settlement." The Fund considered the amount reasonable, and since this declaratory-judgment action had already been filed, the Fund advised that if contribution was not forthcoming, it would seek prejudgment interest and legal fees pursuant to Rule 4:42-9(a)(6). Similar letters were sent to the other excess carriers. General replied the next day, advising that it adhered to its view that a reasonable settlement was between \$400,000 and \$500,000, the agreed-to \$950,000 settlement was excessive, and therefore it would only pay twenty percent of \$500,000 or \$100,000. It reserved the right to contest the reasonableness of the settlement and the right to reallocate all defense and indemnity payments made in the matter.

On November 10, 2008, State sought a voluntary dismissal of the declaratory judgment action against it because its policy excluded coverage for illegal discrimination, on which each of Spagnola's claims was based. In any event, its \$500,000 SIR as

to any covered claims would not be exhausted as State's required contribution towards such claims was "likely to be minimal." Even if the exclusion for illegal discrimination was not applied, the SIRs for 2000-2005 totaled \$1.2 million, the matter settled for \$950,000, and defense costs totaled \$383,593.97, making total defense and indemnity \$1,333,593.97. State posited that a court might allocate vertically, horizontally, or pro rata by time and limits. It noted that its policy would never be reached with a vertical allocation and that the New Jersey Supreme Court had expressly rejected horizontal allocations. Even if a court were to apply a continuous trigger of coverage³ and allocate pro rata, State and North would still have no obligation to contribute.

General responded on November 25, 2008. It rejected State's position that coverage was excluded, but agreed to a pro rata allocation method. Specifically, if the Fund agreed to accept \$1,136,890 as its exposure and Specialty accepted the allocation suggested by State, General would agree to dismiss its claims against North and State. It rejected the vertical allocation analysis and noted that there had been no

³ "[T]rigger of coverage" is "a shorthand expression for identifying the events that must occur during a policy period to require coverage for losses sustained by the policyholder." Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 441 (1994).

determination of the policy year in which the loss occurred because Spagnola alleged occurrences in each of the policy years on the risk. It urged that this could leave State exposed for 2004. On December 11, 2008, General wrote to the attorneys of record in this action advising, as a supplement to interrogatory answers, that it had expended a total of \$355,560.05 defending the Spagnola action.

III.

The following day, General moved for a summary judgment declaring that the Spagnola action stated occurrences throughout the period July 1, 2000, through August 12, 2004. It sought a declaration that the continuous-trigger doctrine applied, that the Fund had to exhaust all five SIRs, and that the loss be allocated pro rata by time on the risk and limits of coverage. It also sought a declaration that the amount of the settlement was excessive. It further sought to recover its costs and fees in prosecuting this action. Alternatively, it sought a declaration that Spagnola's injuries and damages occurred in 2004 and that State was liable for all costs of defense and indemnification above its \$500,000 SIR. In support of General's motion, Gary R. Bukowski certified that General had incurred

defense costs and legal expenses in the total amount of \$355,560.05.⁴

On December 12, 2008, State moved for summary judgment, responded to General's statement of material facts, and served a supplemental statement of material facts. On December 22, 2008, North moved for summary judgment seeking a declaration that the Spagnola action did not state any covered occurrence, wrongful act, or damages under the North policy. To the extent that it did, it sought a vertical allocation requiring the Fund to exhaust its \$1.2 million in SIRs for the period from January 1, 2000, to January 1, 2005. Otherwise, it sought a pro rata allocation by time and limits of coverage for the same period. Alternatively, it sought allocation of all losses to General's 2000 policy or to State's 2004 policy. It sought a declaration that its policy did not cover the loss or defense costs, that Exclusion I of the policy applied, that town counsel and his firm were not insured, that its policy did not cover emotional distress, that General's complaint be dismissed with prejudice, and that it be declared a prevailing party entitled to recover its costs and fees in defense of this action.

⁴ On February 25, 2009, he supplemented his certification to state that the \$7264.84 payment General made to the Fund was not made "as an acknowledgment that only one self-insured retention of \$100,000 applie[d]" and that the payment was made merely as an accommodation to the Fund.

On January 30, 2009, the Fund moved for summary judgment seeking a declaration that all of the allegations and claims asserted in the Spagnola action comprised one claim under the policy in question with only one SIR to be exhausted. Nemeth certified that he notified General in December 2005 that the SIR under its policy would soon be exhausted. He further certified that no portion of the \$950,000 settlement was for punitive damages and that the Fund never agreed to provide a defense for town counsel and his firm or allocate any settlement monies on their behalf, although they would benefit from the settlement as it was a global one. Specialty also moved for summary judgment on or about January 29, 2009.

The motions were argued and decided on March 31, 2009. The judge found the facts set forth in the various motions and opposing papers. First, he found that General had exposure under its Enhanced Employment Liability Endorsement. As to General's continuous-trigger theory for allocating the loss, the judge found that governing case law limited that theory to asbestos exposure, environmental claims, and mass tort litigation where the harmful effects are not manifested until long after the initial exposure and the harm was progressive and indivisible. He noted such claims were clearly different from the facts of the Spagnola action because the evidence

established exactly when the pornography was viewed. He found that the first "occurrence" was in 2000 under General's policy language with "similar acts occurring in the following years." He viewed subsequent acts as "all the same." He rejected 2004, when Spagnola was constructively discharged, as the date of the claim. He granted the Fund's motion to treat 2000 as the manifestation year and denied General's motion in that respect. He continued:

That essentially moots out the issue regarding Specialty, [North], and [State] in that respect. [North] didn't have any exposure under [General's] theory in any event, but I understand what [General] was saying to me about if the [c]ourt had determined that the deductibles would only be applicable for one year for [the Fund] that there might be some exposure by [North] and, therefore, could not have dismissed them prior to this [c]ourt's ruling on that.

But in any event, even if I were to apply a trigger theory which I'm not, but even if I were, the allocation of costs as proposed by [General] is what would apply, and [North] would have no exposure in that regard. In addition, . . . I believe their policy had an exclusion clause as did Specialty's policy in that regard at least in part as I understand it.

And [State] has already indicated that their top exposure is some \$15,000 even under a trigger theory. The [c]ourt [in] not finding a trigger theory essentially is saying that [General] is the excess carrier here and is the only excess carrier that would apply in this particular circumstance

which takes me to the 950,000-dollar settlement in that regard.

Under Griggs v. Bertram^[5] which was cited, the insured has the primary burden of proving that the settlement was prima facie reasonable in amount, not entered into in bad faith. And then the burden shifts to the insure[r] to prove that the settlement was not reasonable and not entered in good faith here.

As indicated, there was no assignment in this particular case. In addition, as the facts as I've recited them clearly, clearly support a settlement here of . . . close to \$1 million, the mediator put this over \$1 million up to \$3 million. This before a jury would be a very, very sympathetic case for the plaintiff in this respect. And I find no bad faith here. I find that it was prima facie reasonable in terms of the settlement. There is no showing that this could be unreasonable simply because the defendants' attorneys say it's worth less.

The objective facts of this case and the liability exposure of the [T]own and the fact that you're dealing with a town, the fact that you're dealing with a mayor who took no action, the fact that you're dealing with a business administrator who . . . took no action and was confronted would be extremely sympathetic to a jury and, of course, . . . you have the exposure of paying attorney[s'] fees in this respect as well.

So the [c]ourt finds that the settlement was reasonable in that regard.

⁵ Griggs v. Bertram, 88 N.J. 347 (1982).

I don't really need to reach the waiver issue. The waiver issue may, indeed, I think have already additional facts that could not be determined . . . on summary judgment in this respect. So I wouldn't be granting summary judgment on the waiver.

The application for counsel fees and costs of suit was argued on June 17, 2009. A final judgment was entered that day denying General summary judgment, granting the Fund summary judgment, determining that the allegations and claims in the Spagnola action comprised one claim under the General 2000 policy, and declaring that one SIR applied and the settlement was reasonable. The order entered judgment in favor of the Fund in the amount of \$976,705.04 together with interest thereon. It also granted attorneys' fees in the amount of \$177,518.83, including \$7949.83 in disbursements, plus \$2000 for mediation fees with interest thereon.⁶ All other motions were deemed moot.

IV.

Both General and the Fund appealed from the judgment of June 17, 2009. General first contends that Spagnola's complaint alleges wrongful acts occurring continuously during the entire period from July 1, 2000, through August 13, 2004, triggering every policy on the risk. As such, the loss should be allocated

⁶ On August 6, 2009, the judge entered another order correcting the amount of fees to \$175,756. No appeal was taken from this order.

under the continuous-trigger doctrine employed when progressive, indivisible injury or damage results from injurious conditions and, thus, the judge erred in failing to allocate the loss pro rata among the five excess policies. Second, it urges that the Fund must exhaust each of its five SIRs before the excess policies must defend and indemnify. Third, alternatively, it asserts that Spagnola's injury occurred in 2004 when she was constructively discharged and, thus, the excess loss should be allocated to the State policy. Finally, it urges that the \$950,000 settlement and the fees awarded to the Fund were both excessive.

The Fund responds that the judge correctly rejected the continuous-trigger doctrine because the Spagnola action asserted a single occurrence under the language of General's policy and, in any event, that doctrine does not apply to an employment case because the injuries occur immediately. Furthermore, the known-loss doctrine precludes coverage from Security, North, and State as the Spagnola loss was known to the insured prior to the subsequent policy inceptions. As a consequence, the judge correctly determined that a single SIR applied to the loss. The Fund also urges that the \$950,000 settlement amount and the counsel fees awarded were reasonable and should be affirmed.

Specialty, North, and State essentially agree with these arguments.

On the Fund's cross-appeal, it urges that the judge erred in refusing to award counsel fees for services rendered by Nemeth in defense of the Spagnola action and in the declaratory-judgment actions. General responds that no factual or legal basis exists to make such awards and, even if such fees are recoverable, a fee hearing would be required. It points out that the Fund has abandoned its appeal from the quantum of fees awarded to its other counsel.

In reviewing a ruling on a summary-judgment motion, we apply the same standard as that governing the trial court. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); Antheunisse v. Tiffany & Co., 229 N.J. Super. 399, 402 (App. Div. 1988), certif. denied, 115 N.J. 59 (1989).

Summary judgment "is designed to provide a prompt, businesslike and inexpensive method of [resolving cases]." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Summary judgment is appropriate if there is "no genuine issue as to any material fact" in the record. R. 4:46-2(c).

The judgment or order sought 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.

[Ibid.]

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Supreme Court outlined the standard for deciding a summary-judgment motion:

[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.

Therefore, the motion must be considered on the basis that the non-moving parties' assertions of fact are true, and the court must "grant all the favorable inferences to the non-movant." Id. at 536. The determination is whether the evidence "'is so one-sided that one party must prevail as a matter of law.'" Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

v.

We begin our review of the issues before us by rejecting application of the continuous-trigger theory to determine the allocation of the loss at issue here. We are mindful that we

must enforce unambiguous policy terms and may not impose a duty on an insurer that the policy does not provide. Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 259 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009).

"As a general rule the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged" because that is when the tortfeasor becomes liable and when its insurer is obligated to defend and indemnify. Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 27 (1984) (internal quotation marks omitted). Where occurrence-based policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in [b]odily [i]njury or [p]roperty [d]amage neither expected nor intended from the standpoint of the [i]nsured," Owens-Illinois, supra, 138 N.J. at 447 (internal quotation marks omitted), the Supreme Court has found that such language is not ambiguous, id. at 457. "What is not so easily understandable is the point at which the law will say that injury requires indemnity." Ibid.

The issue was a difficult one in Owens-Illinois because the injured parties suffered from mesothelioma, a disease that silently progresses over a prolonged period from first exposure

to manifestation.⁷ Id. at 454. Policies from different insurers were in effect at various times during the period between the injured parties' first exposure to inhalable asbestos fibers, which in itself causes silent continuing injury, and the first signs of the disease. Id. at 443-44, 454. The policies were occurrence-based policies closely resembling a standard CGL policy. Id. at 447.

The Supreme Court noted that there are three theories for the trigger of coverage where "the injury process is not a definite, discrete event," id. at 450: "(1) the exposure theory, (2) the manifestation theory, and (3) the continuous-trigger theory," id. at 449. The first theory "holds that the date of occurrence is the date on which the injury-producing agent first contacts the body." Id. at 450 (internal quotation marks omitted). The manifestation theory holds that the date a disease is manifested is the date of occurrence. Ibid. An "occurrence" with a continuous trigger is one in which coverage is triggered continuously from the date of first exposure until the date of manifestation, ibid., and is based on the notion "that injury occurs during each phase of environmental contamination—

⁷ Property damage from asbestos also progresses silently over a prolonged period. Id. at 455-56.

exposure, exposure in residence . . . , and manifestation of disease." Id. at 451.

The Supreme Court determined that the continuous-trigger theory was the most appropriate "for long-term environmental damage," id. at 474, because "any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure," id. at 475. Thus, the losses should be allocated "among the carriers on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage." Ibid.; accord Benjamin Moore & Co. v. Aetna Cas. & Sur. Co., 179 N.J. 87, 99 (2004); Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312, 321-22 (1998) (applying continuous-trigger theory to "progressive environmental property damage"). The Court also emphasized that the deviations from traditional causation principles and the traditional application of generally understood policy language did not arise from a general change in our jurisprudence, but rather as an adaptation that was necessary for the "'peculiar characteristics'" of toxic-exposure injuries. Owens-Illinois, supra, 138 N.J. at 459 (quoting Ayers v. Jackson, 106 N.J. 557, 581 (1987)). We have found no case that extends the continuous-trigger theory for allocation of loss beyond cases of long-term environmental damage and do not find it appropriate to do so in

this case. The loss may readily be allocated based on the plain language of the policies before us.

VI.

We must begin our analysis of coverage by determining the point in time when Maurer's conduct became actionable under the NJLAD. Our Supreme Court first considered a hostile work environment claim in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993). We need not delve into the niceties of whether a cause of action had accrued in early 2000 or on November 14, 2000, because on August 8, 2001, Spagnola objected to Maurer and the mayor about what had become to her a hostile work environment. The Lehmann Court held that an employer could be liable for a hostile work environment either (1) if a supervisor acted within the scope of his or her authority, in circumstances in which the employer had delegated that authority and the NJLAD violation was aided by the grant of authority, id. at 619-20, or (2) when the supervisor acted outside the grant of authority, "if the employer had actual or constructive notice of the harassment, or . . . negligently or recklessly failed to have an explicit policy that bans sexual harassment and that provides an effective procedure for the prompt investigation and remediation of such claims," id. at 624.

It cannot reasonably be argued that Maurer was acting within the scope of his authority in using town facilities to indulge his fascination with pornography and in exposing that pornography to a woman in the workplace. Thus, the mayor and the Town would not be vicariously liable for Maurer's acts in 2000 and much of 2001. However, the mayor and the Town had actual notice of the harassment on August 8, 2001, when Spagnola complained to the mayor. What then triggered a claim and a loss was the notice of Maurer's conduct and the Town's failure to prevent it in the future. The basis for such liability is the recognition that an employer may be "tacitly approv[ing]" the supervisor's conduct. Id. at 623. "When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile." Ibid.; see also Taylor v. Metzger, 152 N.J. 490, 504 (1998) ("An employer has a clear duty not only to take strong and aggressive measures to prevent invidious harassment, but also to correct and remediate promptly such conduct when it occurs."); Payton v. N.J. Tpk. Auth., 148 N.J. 524, 537 (1997) (holding that "the efficacy of an employer's remedial program is highly relevant to both an employee's claims against the employer and the employer's defense to liability"). Even a single racial epithet by a

supervisor may be sufficient to create a hostile work environment. Taylor, supra, 152 N.J. at 506-08. The same can be said about a single exposure to pornography at the hands of a supervisor.

Our Supreme Court has held that a hostile work environment can be created by a series of wrongful acts that cumulate to a unitary "continuing violation" of the NJLAD. Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 18-22 (2002); Wilson v. Wal-Mart Stores, 158 N.J. 263, 272-74 (1999). While the statute of limitations on a continuing violation does not begin to run until the series of acts has ended, Roa v. Roa, 200 N.J. 555, 566 (2010), that has no bearing on the interpretation of the term "occurrence," the timing of which the parties contracted to define as that of the first in a set of related events, rather than of the last.

General's policy defined "wrongful act" as "any . . . omission of an Insured constituting a breach of a duty imposed by law." The mayor and the Town were under a duty imposed by the NJLAD to take effective action to stop Maurer from exposing coworkers and subordinates to pornography and they "omitted" to perform that duty. The "occurrence" took place during the policy period because Spagnola was subjected to "continuous or repeated exposure to substantially the same general harmful

conditions," i.e., a hostile work environment where sexual harassment was permitted, from and after August 8, 2001, by virtue of that omission. It is of no moment that the next specific exposure she could date was March 7, 2002, because the inaction of the mayor and the Town "sen[t] the harassed employee the message that the harassment is acceptable and that the management supports the harasser." Lehmann, supra, 132 N.J. at 623. That message was sent in 2001 and was actionable then.

It is of course true that there were further acts of harassment from 2002 until August 2004, when Spagnola was constructively discharged. The Fund contends that General was on the loss for the entire period because the 2001 General policy defined a "claim" as a demand for money damages and provided that "[a]ll claims against any Insureds arising out of the same Wrongful Act, or logically or casually [sic] connected Wrongful Acts, will be considered one Claim" and were "considered first made at the time the earliest such Claim was made against any Insured." (Emphasis added.) The Fund urges the inaction of the mayor and the Town continued uninterrupted for almost three years and thus constituted one claim, relying on Scirex Corp. v. Fed. Insurance Co., 313 F.3d 841, 844, 851-52 (3d Cir. 2002) (course of dishonest conduct spanning two years constituted one occurrence causing a single loss), and Transport Insurance Co.

v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325, 1326, 1329-30 (N.D. Tex. 1980) (pattern of racial discrimination comprised one occurrence).

We agree with the Fund that whether there were a series of logically or causally related wrongful acts that occurred between August 8, 2001, and January 1, 2002, or one wrongful act triggering multiple claims during the policy period, the policy would treat them all as one claim, but it did not provide coverage for wrongful acts occurring after January 1, 2002, although it would provide coverage for damages arising thereafter from wrongful acts occurring during the policy period.

This is so because coverage for a wrongful act includes damages caused by that act after the policy lapses. See, e.g., Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61 (3d Cir. 1982) (discriminatory employment policies causing injuries over time constituted one occurrence when the discriminatory policies were adopted); Polarome, supra, 404 N.J. Super. at 266-67 (observing that "an insurer must indemnify for all damages attributable to an accident, even though the full extent of the injuries might not be realized until after the policy lapses" (emphasis removed)); Champion Dyeing & Finishing Co. v. Centennial Ins. Co., 355 N.J. Super. 262, 276 (App. Div. 2002) (finding same). Here, the damage from the failure of the mayor

and the Town to remedy the hostile work environment was the continued exposure to pornographic materials from August 8, 2001, until Spagnola was constructively discharged in August 2004. It is in this sense that General is liable for damages incurred after its policy lapsed. We must next determine whether Specialty, North, and State are also on the risk.

VII.

We begin with North's 2003 policy because General explicitly acknowledged in its brief "that under either the continuous[-]trigger [theory] or manifestation rule, [North] has no exposure for defense or indemnity reimbursement in the [Spagnola] [a]ction." Additionally, the Fund did not appeal the judge's finding that North had no responsibility to defend or indemnify.

As to Specialty and State, we will assume that omissions of the mayor and the Town in failing to remedy the hostile work environment constituted ongoing wrongful acts within the language of both policies. Nonetheless, the known-loss clauses in the Specialty and State policies bar resort to their policies.⁸ That known-loss doctrine is an anti-fraud concept that developed in toxic-exposure cases and which prevents the insured from

⁸ North and State expressly incorporated this doctrine into their definitions of "wrongful act."

committing fraud by converting what should be insurance against the unknowable into indemnity for a presently identifiable potential liability, Astro Pak Corp. v. Fireman's Fund Insurance Co., 284 N.J. Super. 491, 498 (App. Div.), certif. denied, 143 N.J. 323 (1995). When the policies were issued, the insureds knew or should have known that Spagnola was being subjected to an actionable hostile work environment that they had failed to remedy. Thus, the risk was known, not unknown, and could not be insured.

VIII.

In the alternative, General claims that the judge erred by choosing the wrong event as the manifestation of Spagnola's injury. It argues that, if Spagnola must be deemed to have suffered a single injury, its occurrence must be measured not by the date of the first wrongful act giving rise to liability, but rather the date when she actually sustained harm. It urges that Spagnola's resignation was the date of her "actual injury," and also its first manifestation, because "[h]ad Spagnola and the Town settled their differences, Spagnola would have remained in her position and withdrawn her grievance." We disagree.

Spagnola's injury was manifested when she presented her initial grievance to the mayor and the Town in 2001 and they failed to remedy the hostile work environment. See Polarome,

supra, 404 N.J. Super. at 268-69 (even for a toxic exposure, the "initial manifestation" ends whatever obscurity was preventing awareness of the injury). Over time, that omission caused the ultimate damages she suffered in 2004 when she was constructively discharged. As the judge found, Spagnola's first complaint to the Town gave it knowledge of its potential liability, which, as the judge found, made the date of that complaint "the date that controls."

While it is conceivable that an appropriate response to Spagnola's first complaint to the mayor might have persuaded her to remain in her job, her resignation proved that she eventually felt unable to do so. It is entirely speculative of General to posit that the Town could have persuaded her to stay without compensating her for the harms she sustained as of the end of its second policy period, let alone as of her resignation nearly three years later. There was accordingly no basis to treat some event other than Spagnola's first complaint as the manifestation of her injury.

IX.

General claims that the judge erred by failing to make the Fund prove that the settlement was not excessive for Spagnola's compensatory damages claims. It argues that the Fund had the burden of showing that the settlement amount was reasonable and

that the Fund failed to show that the amount reflected the actual injuries that Spagnola could prove and also attribute to actions by the Town and its employees rather than to actions of town counsel and his firm.

The judge reviewed Spagnola's allegations of repeated exposure to sexually explicit material and repeated unavailing complaints about it, and observed that the defendants' "egregious" conduct would have made a jury trial "extremely problematic to the Town." He explained that the insured had to make a prima facie showing that the settlement was reasonable in amount and made in good faith, with the insurer then having the burden of persuasion that it was not. He found that a jury would have been highly sympathetic to a plaintiff struggling against "a mayor who took no action" so he agreed with the mediator who estimated that the exposure on liability and counsel fees could have approached \$3 million. He concluded that the facts "clearly" supported the settlement and that there was "no bad faith here."

Where a judge has made findings of fact, our review is limited by well-settled, controlling principles. Sebring Assocs. v. Coyle, 347 N.J. Super. 414, 424 (App. Div.), certif. denied, 172 N.J. 355 (2002). "We are not to review the record from the point of view of how we would have decided the matter

if we were the court of first instance." Ibid. On a motion for summary judgment, a trial judge's "factual findings 'should not be disturbed if there is sufficient credible evidence in the record to support the findings.'" Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 397 (2009) (quoting State v. Adams, 194 N.J. 186, 203 (2008)); accord Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 163-64 (2004).

When an insurer violates its contractual obligations, whether in contravention of specific policy provisions or its obligation of good faith and fair dealing, it forfeits whatever contractual right the policy gave it to control settlements. Fireman's Fund Ins. Co. v. Sec. Ins. Co. of Hartford, 72 N.J. 63, 71-73 (1976). The insurer becomes liable "'for the amount of the judgment obtained against the insured or of the settlement made by him,' the only required elements being 'that the amount paid in settlement be reasonable, and that the payment be made in good faith.'" Id. at 71 (quoting N.J. Mfrs. Indem. Ins. Co. v. U.S. Cas. Co., 91 N.J. Super. 404, 407-08 (App. Div. 1966)).

"The initial burden of going forward with proofs of these elements rests upon the insured and the ultimate burden of persuasion as to these elements is the responsibility of the insurer." Griggs, supra, 88 N.J. at 368. The insured must

"marshall [sic] the basic facts relating to the settlement" and "identify the critical issues and relevant evidence" that the insurer needs to make its own assessment of the settlement's "reasonableness and fairness." Id. at 367. The insured's production must make a prima facie showing that the settlement was "reasonable in amount and untainted by bad faith." Ibid. The insurer may then try to show by a preponderance of the evidence that it was not. Id. at 368.

The court is "obliged to consider the facts in a light most favorable to" the insured, and to realize that the question before it is "the reasonableness of a business decision" to "settle particular litigation for a given amount." Pasha v. Rosemount Mem'l Park, Inc., 344 N.J. Super. 350, 358-59 (App. Div. 2001), certif. denied, 171 N.J. 42 (2002). Reasonableness reflects the "defendants' potential liability and the possibility of recovery substantially in excess of the settlement amount." Vargas v. Hudson Cnty. Bd. of Elections, 949 F.2d 665, 675 (3d Cir. 1991). The "degree of probability of [the] claimant's success against" the insured is another important factor. Damanti v. A/S Inger, 314 F.2d 395, 397 (2d Cir.), cert. denied, 375 U.S. 834, 84 S. Ct. 46, 11 L. Ed. 2d 64 (1963).

Here, the Fund made the necessary prima facie showing, and General bore the burden of persuasion. It failed to meet that

burden. The judge's findings respecting the reasonableness of the settlement were supported by sufficient evidence. Brunson, supra, 199 N.J. at 397. We will not disturb them on appeal.

X.

After carefully reviewing the record in the light of the written and oral arguments advanced by the parties, we conclude that the remaining issues presented by General and the issues raised by the Fund on its cross-appeal are without sufficient merit to warrant discussion in this opinion, Rule 2:11-3(e)(1)(A), (E), and we affirm substantially for the reasons expressed by the trial judge in his oral opinion delivered on March 31, 2009. We perceive no abuse of discretion in his award of attorneys' fees, including his refusal to award fees to the Fund for the services of its General Counsel, as his findings were supported by the record. See Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 25 (2004); Rendine v. Pantzer, 141 N.J. 292, 317 (1995).

The motion of the Fund to suppress portions of State's brief is hereby denied.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION