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## New Jersey Supreme Court Allows Injured Party to Recover Counsel Fees Incurred in Declaratory Judgment Action Even Though Insured was Exonerated in Jury Trial

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In *Occhifinto v. Olivo Construction Co.*, the New Jersey Supreme Court ruled that an injured party is entitled to counsel fees against the tortfeasor's insurance company where the Court rules that the claims alleged by the injured party are covered by the tortfeasor's insurance policy — even if the jury finds in favor of the tortfeasor at trial. In so doing, the Court expanded the scope of New Jersey's fee shifting rule allowing an award of counsel fees in "an action upon a liability or indemnity policy of insurance by a successful claimant." *Rule 4:42-9(a)(6)*.

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In *Occhifinto*, the injured party brought suit against an insured tortfeasor, alleging that the insured's negligence caused a concrete floor to fracture and fail. The insured's carrier — Mercer Mutual Insurance Company ("Mercer") — defended under a reservation of rights, but brought a declaratory judgment action, alleging that it had neither a duty to defend nor indemnify the insured under a policy exclusion which disclaimed coverage for a failure to perform an agreement or contract pursuant to its terms. The injured party de-

defended the declaratory judgment action and counterclaimed for coverage and for the counsel fees incurred in the declaratory judgment action.

On cross-motions for summary judgment, the trial court ruled in favor of coverage, finding that, on the proofs presented, there was a duty to provide indemnification in the event there was a finding of liability at trial. The judge reserved the question of counsel fees until the conclusion of the liability case and consolidated the fees claim with the underlying action.

Ultimately, the jury determined the insured's conduct was not the proximate cause of the damages sought and found against the injured party. Following the verdict, the injured party moved for the counsel fees incurred in defending the declaratory judgment action. The trial judge denied the request, finding that the injured party was not a "successful claimant" with in the meaning of *Rule 4:42-9(a)(6)* as the jury found the insured not liable. The Appellate Division affirmed.

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The Supreme Court started its analysis by affirming New Jersey's long standing adherence to the "American Rule" under which each party is responsible for its own attorney's fees — subject to certain narrowly tailored exceptions, such as the one at issue here allowing a successful claimant to recover fees in an action upon a liability policy. *Rule 4:42-9(a)(6)*. According to the Court, this *Rule* seeks to "discourage insurance companies from filing declaratory judgment actions to avoid their contractual obligations to provide coverage for which their insured's have contracted."

The Court first addressed the meaning of "successful claimant" as used in the *Rule*, finding that the term must be broadly defined to include within its scope any party that "succeeds on a significant issue in litigation which achieves some benefit the parties sought in bringing suit." In the insurance context, a successful claimant includes a party injured by an insured's conduct, thus becoming a third party beneficiary of the insurance policy: "We authorize trial courts to award counsel fees in favor of third party beneficiaries of insurance contracts because an insurer's refusal to provide liability coverage may also, as a practical matter, preclude an innocent injured party from being able to recover for the injury."

The Court then turned to whether the duty to defend is, in fact, a coverage question. In answering this issue in the affirmative, the Court looked to its decision in *Schmidt v. Smith*, 713 A.2d 1014 (1998), a case involving various work place torts. In *Schmidt*, the carrier filed a declaratory judgment action as to coverage which the Court stayed until the conclusion of the liability trial. At the end of the evidence, the jury found that the defendant employer's conduct was unintentional, but found the defendant employee had engaged in intentional acts. Nonetheless, the Court awarded counsel fees to both defendants, finding that, given the claims alleged and the proofs at trial, the carrier owed both defendants a duty to defend. In so holding, the Court ruled that "a party to a declaratory judgment action qualifies as a successful claimant when the insurance carrier's duty to defend is proven, even if there is no duty to indemnify."

Turning to the instant case, the Supreme Court had no hesitancy in expanding the *Schmidt* rule from the insured to a third party injured by an insured's conduct, especially, where as here, the injured party was forced to defend declaratory judgment brought by the carrier. Central to the Court's conclusion was the trial judge's ruling that Mercer would be required to indemnify its insured if the jury ultimately found the insured liable — which decision had the practical effect of reinforcing Mercer's duty to defend. Thus, the injured party "succeeded in the declaratory judgment action by forcing Mercer to continue to defend in the liability action" making the injured party a successful claimant for purposes of *Rule 4:42-9(a)(6)*, even though the jury ultimately found in favor of the insured.

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*New Jersey Supreme Court Allows Injured Party to Recover Counsel Fees continued...*

The lessons of *Occhifinto* are twofold: first, a “successful claimant” under New Jersey’s fee shifting rule is not limited to the insured, but rather can extend to a third party beneficiary of the insurance contract, such as a injured party; and second, a jury verdict against the insured tortfeasor is not a prerequisite to the recovery of counsel fees in a declaratory judgment action. Under *Occhifinto*, all that is necessary for recovery of counsel fees is a holding that the claims alleged against the insured — if proven — fall within the insuring agreement. Insurance companies doing business in New Jersey must factor the teaching of *Occhifinto* into any decision to bring a declaratory judgment action, and may well be advised to address and settle the issue of counsel fees before bringing such an action where the merits of coverage are open to debate and on which reasonable minds may differ.

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