NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ATLANTIC STATES INSURANCE COMPANY	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MICHAEL COBB AND PREMIER RIDES AUTO SALES, INC., D/B/A PREMIER RIDES AUTO SALES	:	
Appellant	:	No. 1573 MDA 2012

Appeal from the Order Entered August 3, 2012
In the Court of Common Pleas of Lackawanna County
Civil Division No(s).: 2010-04624

BEFORE: BENDER, SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED AUGUST 06, 2013**

Appellant, Michael Cobb, appeals from the order entered in the Lackawanna County Court of Common Pleas granting the motion for summary judgment of Appellee, Atlantic States Insurance Company. Appellant contends the trial court erred in failing to afford him collision coverage under his personal automobile policy ("Policy") for damage to a vehicle he was driving, which was owned by co-defendant Premier Rides Auto Sales, Inc., D/B/A/ Premier Rides Auto Sales. ("Premier") [1] We affirm.

The trial court summarized the facts of this case as follows:

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* Former Justice specially assigned to the Superior Court.

[1] Premier is not a party in this appeal.

> By way of background, [Appellee] issued a personal auto insurance policy to [Appellant] for the period of September 5, 2005 to September 5, 2006, and during that period, [Appellant] was involved in a single-car accident while test driving a 1997 Ferrari F355 Spider (hereinafter referred to as "Ferrari") which was owned by Premier. The Ferrari sustained $30,740.86 in damages from the accident, for which Premier sued [Appellant] under separate suit.

Trial Ct. Op., 10/18/12, at 1.

> On July 1, 2010, [Appellee filed the instant] complaint for Declaratory Judgment against [Appellant] and Premier, . . . seeking a declaration that it had no duty to provide a defense or indemnification to [Appellant] in connection to an underlying suit.
>
> Default Judgment was entered against Premier on December 9, 2011 for Premier's failure to file an answer or otherwise respond to the Declaratory Judgment Complaint. In June 2012, [Appellee] filed for Summary Judgment, alleging that based upon the policy terms, it had no duty to provide a continued defense or indemnification to [Appellant] in connection with the underlying suit. . . .

Id. at 1-2 (footnote omitted).

On August 3, 2012, the court granted Appellee's motion for summary judgment. This timely appeal followed. Appellant was not ordered to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The trial court filed a Pa.R.A.P. 1925(a) opinion.

Appellant raises the following issue for our review:

> Did the Court of Common Pleas, Lackawanna County, Pennsylvania wrongfully grant Summary Judgment in favor of [Appellee] and against [Appellant] by failing to afford [Appellant] collision coverage under his [Policy] for damage to a non-owned vehicle [Appellant] was driving?

Appellant's Brief at 4.

In the case *sub judice*, the insurance policy provided in pertinent part:

> **Part A—Liability Coverage**
>
> **INSURING AGREEMENT**
>
> A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured." We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle an claim for "bodily injury" or "property damage" not covered under this policy.
>
> B. "Insured" as used in this Part means:
>
> 1. You or any "family member" for the ownership, maintenance or use of any auto or "trailer."
>
> * * *
>
> **EXCLUSIONS**
>
> A: We do not provide Liability Coverage for any "insured":
>
> 3. For "property damage" to property:
>
> a. Rented to;
>
> b. Used by; or
>
> c. In the care of;
>
> that "insured."
>
> * * *

PART D-COVERAGE FOR DAMAGE TO YOUR AUTO

INSURING AGREEMENT

A. We will pay for direct and accidental loss to "your covered auto" or any "non-owned auto," including their equipment, minus any applicable deductible shown in the Declarations. . . .

* * *

If there is a loss to a "non-owned auto," we will provide the broadest coverage applicable to any "your covered auto" shown in the Declarations.

* * *

C. "Non-owned auto" means:

1. Any private passenger auto, pickup, van or "trailer" not owned by or furnished or available for the regular use of you or any "family member" while in the custody of or being operated by you or any "family member", while in the custody of or being operated by you or any "family member"; or

2. Any auto or "trailer" you do not own while used as a temporary substitute for "your covered auto" which is out of normal use because of its:

a. Breakdown; b. Repair; c. Servicing; d. Loss, or e. Destruction.

* * *

EXCLUSIONS:

We will not pay for:

> 11. Loss to any "non-owned auto" being maintained or used by any person while employed or otherwise engaged in the "business" of:
>
> a. Selling; b. Repairing; c. Servicing; d. Storing; or e. Parking;
>
> vehicles designed for use on public highways. This includes road testing and delivery.

Personal Auto Policy Agreement, 9/5/05, at 2, 7-9.

Appellant argues that the trial court committed reversible error because it determined that Part A-Liability Coverage was applicable in the instant case. Appellant concedes that under Part A, he would not be entitled to coverage: "Clearly, the insurance contract, under Section A, Liability, excludes A. 3 b. and c. as the automobile was 'b. Used by' or 'c. in the care of' Appellant." Appellant's Brief at 9. He maintains that Part D-Coverage to Damage to Your Auto was applicable as there is no exclusion under Part D which applies in this case. ***Id.*** at 8-9. Appellant avers that because Part D defined an insured vehicle to include a non-owned auto, he is covered under that section of the policy. ***Id.*** at 11. We find no relief is due.

Our Supreme Court has stated:

> As has been oft declared by this Court, "summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party. In so doing, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party,

> and, thus, may only grant summary judgment "where the right to such judgment is clear and free from all doubt." On appellate review, then,
>
> > an appellate court may reverse a grant of summary judgment if there has been an error of law or an abuse of discretion. But the issue as to whether there are no genuine issues as to any material fact presents a question of law, and therefore, on that question our standard of review is *de novo*. This means we need not defer to the determinations made by the lower tribunals.

Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010) (citations omitted).

> "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement." "Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language."
>
> Describing the hallmarks of ambiguity in an earlier case, we said that:
>
> > Contractual language is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." This is not a question to be resolved in a vacuum. Rather, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.

Prudential Prop. & Cas. Ins. Co. v. Sartno. 903 A.2d 1170, 1174 (Pa. 2006) (citations omitted).

> Words of 'common usage' in an insurance policy are to be construed in their natural, plain, and ordinary sense, and a court may inform its understanding of these terms by considering their dictionary definitions. Moreover, courts

> must construe the terms of an insurance policy as written and may not modify the plain meaning of the words under the guise of 'interpreting' the policy. If the terms of a policy are clear, this Court cannot re-write it or give it a construction in conflict with the accepted and plain meaning of the language used.

Genaeya Corp. v. Harco Nat. Ins. Co., 991 A.2d 342, 347 (Pa. Super. 2010) (citation omitted). Furthermore, "Where the policy contains definitions for the words contained therein, the court will apply those definitions in interpreting the policy." ***Monti v. Rockwood Ins. Co.***, 450 A.2d 24, 25 (Pa. Super. 1982).

In ***Hertz Corp. v. Smith***, 657 A.2d 1316 (Pa. Super. 1995), this Court reasoned:

> With respect to the exclusion from coverage of property damage to property in the "care, custody or control" of the insured, one commentator has noted: "There are several different reasons for such an exclusion in the policy. Fundamentally, were it not for the exclusion there would be a greater moral hazard as far as the insurance company is concerned. . . .

Id. at 1319.

In ***McKuhn v. Aetna Cas. & Sur. Co.***, 664 A.2d 175 (Pa. Super. 1995), a parking garage and its employee sought coverage under a customer's car insurance policy for injuries sustained by the customer. ***Id.*** at 176. When the employee "was attempting to disengage the emergency brake, the brake suddenly and unexpectedly released, causing the vehicle to lurch forward and strike" the customer. ***Id.*** The issue arose as to whether the employee and the garage were covered persons under the customer's

policy. ***Id.*** The policy contained the following exclusion: "For any person while employed or otherwise engaged in the business or occupation of selling, repairing, servicing storing or parking of vehicles designed for use mainly on public highways, including road testing and delivery, . . ." ***Id.*** "The trial court concluded that the facts of the case are clear, the policy language is unambiguous and that the circumstances of the accident fall squarely within the policy exclusion." ***Id.*** This Court agreed and opined:

> We . . . find that the employee in this case . . . was furthering the business of his employer in the parking of vehicles when he attempted to come to the aid of a customer and disengage an emergency brake, which he had set when temporarily parking the car, and which would enable the customer to go on with her travels. We conclude that the trial court rightly held that the exclusion at issue was clearly intended to apply to the circumstances presented in this case.

Id. at 177-78.

In the complaint for declaratory judgment, Appellee averred, *inter alia*, "Donegal[2] has furnished a defense to [Appellant] in the underlying litigation subject to a full reservation of rights as set forth in a letter dated November 6, 2006[.]" Appellee's Compl. at 2. In Appellant's answer to the complaint, in response to this averment, he stated, "admitted." Appellant's Ans. to Appellee's Compl. for Dec. Judg., 3/14/12, at 1. The letter stated in pertinent part:

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[2] We note that Appellee is "A Donegal Company." ***See*** Appellee's Compl., 6/8/11, at Exh. A.

> As counsel for [Appellee], I am writing this letter to advise you that the company is defending this suit subject to what is known as a reservation of rights. That is, there would appear to be a significant question as to whether coverage will be afforded in connection with this incident under your personal auto policy. . . .
>
> However, the company's actions in connection with its investigation and defense of this claim should not be construed as a waiver of any coverage issues, limitations or defenses which it may have under the terms of the policy and shall not be construed as giving rise to an estoppel. The insurer expressly reserves it [sic] right, if any, to disclaim coverage under your policy, to withdraw from the defense of this suit upon reasonable notice and/ or to file at its option an action for declaratory judgment in order to determine the existence or extent of its coverage obligations.
>
> Based upon the limited information currently at hand, the company reserves the right to disclaim any obligation to provide you with a defense or indemnification in connection with this suit under the liability coverage of your policy and the right to disclaim any obligation to afford coverage for the damage to the vehicle on a first-party basis under your collision coverage as well, for the reasons outlined below.

Appellee's Compl. at Exh. C.[3] The letter then quoted the exclusion A.3 in Part A-Liability Coverage and exclusion 11 of the Part D-Coverage for Damage to Your Auto. ***See id.*** The motion for summary judgment also relied upon the November 26th letter. Appellee's Mot. Summ. J., 6/13/12, at 2.

In ***Old Guard Ins. Co. v. Sherman***, 866 A.2d 412 (Pa. Super. 2004), this Court reasoned:

[3] The original complaint for declaratory judgment was filed on July 1, 2010. It was last reinstated on June 8, 2011.

> **The insurer's obligation to defend is fixed solely by the allegations in the underlying complaint.** It is not the actual details of the injury, but **the nature of the claim** which determines whether the insurer is required to defend. The duty to defend is limited to only those claims covered by the policy. **The insurer is obligated to defend if the factual allegations of the complaint on its face comprehend an injury which is actually or potentially within the scope of the policy.**
>
> Thus, the insurer owes a duty to defend if the complaint against the insured alleges facts which would bring the claim within the policy's coverage if they were true. **It does not matter if in reality the facts are completely groundless, false, or fraudulent. It is the face of the complaint and not the truth of the facts alleged therein which determines whether there is a duty to defend.**

Id. at 416-17 (citations omitted and emphasis supplied).

Appellant claims that Part D should control and afford him coverage. In the underlying suit, however, Premier averred that "[a]s the result of the carelessness and negligence of [Appellant, Premier's] vehicle sustained damage in excess of the amount of $30,740.86 . . . ." Premier's Compl., 12/20/06, at 2.

The trial court opined:

> A review of the pleadings indicates [Appellant] is seeking liability coverage for the underlying case, both for [Appellee's] payment of damages as well as for representation in the suit with Premier. In fact, a letter sent to [Appellant] from counsel for [Appellee] on November 6, 2006 indicates [Appellant] had informed [Appellee] of the underlying suit prior to Premier's filing of a complaint. . . . At this time and in this letter, [Appellee] informed [Appellant] of the potential for this very outcome, and that it was defending the suit based upon a reservation of rights, relying upon the very reason and

> exclusion for which this Court has granted Summary Judgment.
>
> Upon review of the policy at issue, the type of coverage being sought by [Appellant] clearly falls within the Part A coverage section of the insurance agreement, and pursuant to the terms of the insurance agreement, is excluded, as the damage was sustained to property "used by" and "in the care of" [Appellant].
>
> Further, [Appellee] submits the only coverage sought by [Appellant] in this case was liability coverage, and to now seek any other type of coverage (i.e. coverage under Part D) would be time-barred by the statute of limitations for filing the claim, as the incident at hand occurred in 2005.[4] As the clear, unambiguous policy language of the insurance policy excluded coverage for [Appellant's] claim, [Appellee] has no duty to defend or indemnify [Appellant] in connection with the claims asserted in the underlying suit with Premier.

Trial Ct. Op. at 5-6.

We agree no relief is due. Premier's complaint in the underlying suit stated a cause of action based upon Appellant's negligence. Therefore, Part A-Lliability Coverage is applicable.[5] ***See Old Guard Ins. Co.***, 866 A.2d at 416-17.

Order affirmed.

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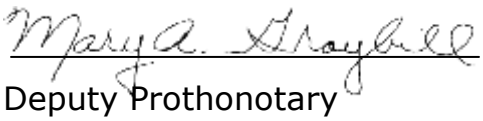
[4] 75 Pa.C.S. § 1721 provides in pertinent part: "If benefits have not been paid, an action for first party benefits shall be commenced within four years from the date of the accident giving rise to the claim." 75 Pa.C.S. § 7521(a).

[5] Even assuming, *arguendo*, that Appellant's claim that Part D was applicable, it would afford him no relief based upon exclusion 11. ***See infra.***

Judgment Entered.



Deputy Prothonotary

Date: 8/6/2013