NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LORI ANN CURTIS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FRANK CURTIS, DECEASED	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	
THE CINCINNATI INSURANCE COMPANY; DAVID W. SHAFER; GEORGE DAVID SHAFER	
HEARTLAND EQUIPMENT, INC. AND HEARTLAND EXPRESS, INC. OF IOWA AS SUBROGEE OF FRANK D. CURTIS, DECEASED	
V.	
THE CINCINNATI INSURANCE COMPANY; DAVID W. SHAFER; GEORGE DAVID SHAFER	No. 1150 WDA 2012
APPEAL OF: THE CINCINNATI INSURANCE COMPANY	

Appeal from the Order June 25, 2012
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2010-6994

BEFORE: BOWES, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: **FILED JUNE 20, 2013**

Appellant, the Cincinnati Insurance Company (Cincinnati), appeals from the June 25, 2012 order granting the motion for summary judgment filed by Appellees, Heartland Equipment, Inc. and Heartland Express, Inc. of Iowa (collectively, Heartland). After careful review, we affirm.

As the underlying facts of this case are undisputed, we summarize the factual and procedural history of this case as follows. Cincinnati issued an auto insurance policy to George Shafer that was to provide coverage from June 30, 2006 until June 30, 2007. The policy covered five vehicles, one Ford, one Audi, one Volkswagen, and two BMWs. The policy in question was issued and delivered to George Shafer in Virginia. On April 27, 2007, Shafer purchased a 2004 Nissan 350Z and titled the car in his name on April 30, 2007. The Nissan was titled in Virginia. The Nissan was used by his adult son David Shafer, who had just moved to Virginia to live with his father. The Shafers insured the Nissan through GEICO. The GEICO policy listed David Shafer as the only driver and the Nissan was the only vehicle listed on the GEICO policy. The part of Cincinnati's policy that is at issue in this case is section K of the policy's special provisions for Virginia, which reads in relevant part as follows.

> K. "Newly acquired auto" … :
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> 1. "Newly acquired auto" means any of the following types of vehicles on the date "you" or "your" living trust becomes the owner of during the policy period:
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> a. A private passenger auto; or
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> b. A pickup or van for which no other policy provides coverage.
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> 2. If the vehicle acquired by "you" or "your" living trust replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced. "You" must ask "us" to insure a replacement vehicle within 30 days only if it is a pickup or van used in

> any "business" or occupation, other than farming or ranching.
>
> 3. If neither the vehicle being replaced or any other covered auto on "your" policy has Part D - Coverage for Damage To Your Auto, "we" will provide Collision and Other Than Collision coverage for the replacement or additional vehicle owned by "you" or "your" living trust subject to a $250 deductible for a period of 30 days after "you" or "your" living trust becomes the owner. If "you" do not notify "us" within 30 days after "you" or "your" living trust becomes the owner of "your" intention to add physical damage coverage for the acquired vehicle, this physical damage coverage will expire.
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> 4. If the vehicle acquired by "you" or "your" living trust is in addition to any shown in the Declarations, it will have the broadest coverage "we" now provide for any vehicle shown in the Declarations. However, "you" must ask "us" to insure it:
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> a. During the policy period; or
>
> b. Within 30 days after "you" or "your" living trust becomes the owner.
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> 5. If "you" ask "us" to insure a "newly acquired auto" which is in addition to any vehicle shown in the Declarations after the specified time period described above has elapsed, any coverage "we" provide for the "newly acquired auto" will begin at the time "you" request the coverage.

Cincinnati's Motion for Summary Judgment, 1/24/12, Exhibit A at 22.

On May 24, 2007, David Shafer was driving the Nissan and collided with a tractor-trailer. The tractor-trailer was owned by Heartland. The tractor trailer suffered severe damage and its driver, Frank Curtis was killed as a result. The Shafers notified GEICO of the accident and GEICO paid out

the bodily injury liability limit of the policy to Curtis and the property damage liability limit to Heartland. It is undisputed that the Shafers at no point requested that Cincinnati provide coverage for the Nissan. It is also undisputed that the accident occurred within 30 days of the Shafers' purchasing the Nissan.

On August 31, 2010, Heartland and the Estate of Frank Curtis, began this declaratory judgment action against Cincinnati by writ of summons. Heartland sought a declaration that Cincinnati must provide coverage for the Nissan vis-à-vis the aforementioned accident. On January 24, 2012, Cincinnati filed a motion for summary judgment. Heartland, joined by George Shafer and Lori Curtis, Frank Curtis' wife, filed a cross-motion for summary judgment on February 29, 2012. The trial court held a hearing on all motions on April 3, 2012.

On June 25, 2012, the trial court granted Heartland's motion, denied Cincinnati's motion and declared that Cincinnati must provide bodily injury and property damage coverage under George Shafer's auto policy for the May 24, 2007 accident. The trial court concluded that the Nissan was a "newly acquired auto" within the meaning of the policy. Trial Court Opinion,

8/20/12, at 4.[1] The trial court interpreted the above-mentioned policy sections as follows.

> [T]he notice requirement in the policy endorsement at issue is a condition subsequent to coverage that cannot be activated until after the first 30 days from the date of purchase. Paragraph 4 of the endorsement does require notice from the insured for an additional "newly acquired auto" to receive coverage. However, paragraph 4 also gives the insured 30 days from the date of purchase to give that notice. If an insured fails to give notice within the 30 days set forth in paragraph 4(b), then paragraph 5 controls and coverage for the additional "newly acquired auto" begins precisely at the time notice is given. When paragraph 4 and 5 of the "newly acquired auto" provision are considered in *para materia*, it becomes clear that the language requiring notice in paragraph 4 is a condition subsequent and the insured has a 30-day grace period, where coverage is extended to the new vehicle regardless of whether notice has yet to occur. Only a failure by the insured to give notice within the 30-day period will activate the condition subsequent. From that point forward, the language of paragraph 5 controls and the insured can receive coverage for the "newly acquired auto" only after notice is given.

Id. at 4-5. Because the May 24, 2007 accident occurred within the 30-day window prescribed by paragraph 4(b), the trial court concluded that the

[1] The record reflects that the August 20, 2012 opinion of the trial court does not contain pagination. For the ease of our discussion, we have assigned each page a corresponding number.

Nissan qualified for coverage under the policy. ***Id.*** at 5. On July 23, 2012, Cincinnati filed a timely notice of appeal.[2]

On appeal, Cincinnati raises five issues for our consideration.

> 1. Did the trial court err as a matter of law by finding that George David Shafer was not required to ask Cincinnati to insure the Nissan in order for it to qualify as a covered "newly acquired auto"?
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> 2. Did the trial court err as a matter of law by finding that the [p]olicy requirement that an insured "must ask" Cincinnati to insure an additional vehicle purchased by the insured is a condition subsequent to coverage under Virginia law?
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> 3. Did the trial court err as a matter of law by determining that Cincinnati's interpretation of subsection 4(b) and 5 of the "newly acquired auto" provision renders them "meaningless and unnecessary"?
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> 4. Did the trial court err as a matter of law by finding that subsection 4(b) and 5 of the "newly acquired auto" provision created automatic liability coverage for the Nissan?
>
> 5. Did the trial court err by granting summary judgment in favor of Heartland, Curtis, and George David Shafer, rather than Cincinnati, regarding whether Cincinnati must provide [the Shafers] bodily injury and property damage liability coverage under the [p]olicy as a result of the accident that occurred on May 24, 2007[?]

Cincinnati's Brief at 2-3.

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[2] Cincinnati and the trial court have complied with Pa.R.A.P. 1925.

We begin by noting our well-settled standard of review. "On appeal from an order granting a motion for summary judgment our review is plenary, and we may reverse the order of the trial court only if that court committed an error of law or abused its discretion." ***Miller v. Poole***, 45 A.3d 1143, 1145 (Pa. Super. 2012) (citation omitted).

We elect to address all of Cincinnati's claims on appeal together, as they are interrelated. Cincinnati avers that the trial court legally erred when it concluded that it was obligated to provide bodily injury and property damage coverage to the Shafers for the May 24, 2007 accident. Specifically, Cincinnati argues that the policy's notification requirement is a condition precedent to coverage under Virginia law.[3] Cincinnati's Brief at 14-15.

Under Virginia law, insurance contracts are generally construed in favor of providing coverage rather than denying it.

> It is axiomatic that when the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. Words that the parties used are normally given their usual, ordinary, and popular meaning. No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly.
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> Courts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in

[3] The parties agree that Virginia law controls the substantive legal issues in this case.

> the document. Each phrase and clause of an insurance contract should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done, so as to effectuate the intention of the parties as expressed therein.
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> Furthermore,
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> [i]nsurance policies are contracts whose language is ordinarily selected by insurers rather than by policy-holders. The courts, accordingly, have been consistent in construing the language of such policies, where there is doubt as to their meaning, in favor of that interpretation which grants coverage, rather than that which withholds it. Where two constructions are equally possible, that most favorable to the insured will be adopted. Language in a policy purporting to exclude certain events from coverage will be construed mostly [sic] strongly against the insurer.

TravCo Ins. Co. v. Ward, 736 S.E.2d 321, 325 (Va. 2012) (internal quotations marks and citations omitted). Additionally, "an insurance policy is not ambiguous merely because courts of varying jurisdictions differ with respect to the construction of policy language." ***PBM Nutritionals, LLC v. Lexington Ins. Co.***, 724 S.E.2d 707, 713 (Va. 2012). Therefore, "where the exclusion is not ambiguous, there is no reason for applying the rules of *contra proferentem* or liberal construction for the insured." ***Id.*** (citation omitted).

Cincinnati avers that the trial court legally erred when it held that the policy's notice requirement was a condition subsequent to receiving coverage. Cincinnati's Brief at 12. Rather, Cincinnati argues that under

Virginia law, the notice requirement is more properly construed as a condition precedent to coverage, and therefore the Nissan would not qualify because the Shafers did not provide Cincinnati with said notice before the May 24, 2007 accident. ***Id.***

In support of its position, Cincinnati relies heavily on the Supreme Court of Virginia's decision in ***Celina Mut. Ins. Co. v. Cohen***, 133 S.E.2d 311 (Va. 1963). In ***Celina***, the Celina Mutual Insurance Company had issued the owners a policy for a 1952 Willys sedan, the only car owned by the family at the time, effective from March 11, 1961 until March 11, 1962. ***Id.*** at 312. On March 24, 1961, the family purchased a 1961 Plymouth station wagon under an installment contract, but the family did not receive title until January 29, 1962. ***Id.*** at 312-313. On February 28, 1962, the Plymouth was involved in a three-car accident, which the family reported to Celina on March 16, 1962. ***Id.*** at 313. Celina began a declaratory judgment action to determine whether it had to provide coverage for the Plymouth for the February 28 accident. ***Id.*** The policy in question contained several conditions for coverage.

> 2. *Premium.* If the named insured … acquires ownership of … a private passenger … automobile … *he shall inform the company during the policy period of such change.*
>
> …
>
> 6. *Action Against Company - Part I.* No action shall lie against the company unless, *as a condition*

> *precedent thereto,* the insured shall have fully complied with all the terms of this policy ….

Id. (emphasis in original). The Virginia Supreme Court concluded that the Plymouth was not eligible for coverage arising from the February 28 accident due to the family's failure to notify Celina of its purchase prior to the policy's expiration.

> We are not unmindful that it has been held, in construing family automobile insurance contracts containing substantially the same notice requirement as that of Condition 2, that such notice is a condition subsequent rather than a condition precedent, and that such coverage is automatically effective upon the acquisition of a new automobile and remains in effect until the end of the specified period, irrespective of whether notice is given or not.
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> However, under Condition 6 of the policy in the present case, [no] action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy.
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> The named insured did not notify Celina of the acquisition of the 1961 Plymouth station wagon during the policy period as required by the unambiguous first sentence in Condition 2. Hence there was no full compliance with all the terms of the policy, which was a condition precedent to any action on the policy against the company. The provision for notice to the insurance company during the policy period if a named insured disposes of, acquires ownership of or replaces a private passenger automobile is most liberal. Under the terms of the policy Jacobs had coverage on the station wagon immediately upon obtaining title to it. All he was required to do was to notify the insurance company of its acquisition at any time during the policy period. But since he did not notify the company until five days after the policy had expired, Celina has no

> liability under the family policy it issued to Mrs. Jacobs.

Id. at 314.

We agree with the trial court that ***Celina*** is distinguishable from the present case. First, we observe the Virginia Supreme Court noted that the default position of courts was that "notice [of acquisition] is a condition subsequent rather than a condition precedent" to coverage. ***Id.*** However, the ***Celina*** Court concluded that the outcome of the case turned on Condition 6 of that specific policy, which required full compliance with the policy's conditions **as a condition precedent** to coverage. ***Id.*** Cincinnati's policy does not contain the same condition precedent language as Condition 6 in Celina's policy. ***Compare*** Cincinnati's Motion for Summary Judgment, 1/24/12, Exhibit A at 44 (stating, "[n]o legal action may be brought against [Cincinnati] until there has been full compliance with all the terms of this policy[]"), ***with Celina***, ***supra*** at 313 (stating, "[n]o action shall lie against the company unless, *as a condition precedent thereto,* the insured shall have fully complied with all the terms of this policy[]") (emphasis in original). We agree with the trial court's interpretation, the policy in this case contains subsection 4(b) which provides a 30-day grace period following the time that the insured becomes the owner of the automobile in question. ***See*** Trial Court Opinion, 8/20/12, at 3. If no notice is given after the 30-day grace

period ends, the insured's coverage lapses and the status quo prescribed by subsection 5 is reinstated.[4] ***See Md. Cas. Co. v. Toney***, 16 S.E.2d 340, 342-343 (Va. 1941) (holding that no coverage existed for newly acquired replacement vehicle where policy required notice of acquisition be provided within 10 days and collision took place **after** said 10-day period had run). This construction gives effect and meaning to both subsections 4(b) and 5 and is fully consistent with the Virginia Supreme Court's policy of

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[4] Although not a conclusive statement of Virginia law, at least one federal district court in Virginia has followed the trial court's construction, after ***Celina*** was decided. ***See Brown v. Security Fire & Indem. Co.***, 244 F. Supp. 299, 305-306 (W.D. Va. 1965). We further observe that this represents the majority view of state courts regarding either replacement vehicles or newly acquired vehicles. ***See generally Daniels v. State Farm Mut. Auto. Ins. Co.***, 868 P.2d 353, 354-355 (Ariz. Ct. App. 1994); ***Birch v. Harbor Ins. Co.***, 272 P.2d 784, 788 (Cal. Ct. App. 1954); ***Ga. Mut. Ins. Co. v. Criterion Ins. Co.***, 206 S.E.2d 88, 90 (Ga. Ct. App. 1974); ***Am. Freedom Ins. Co. v. Smith***, 806 N.E.2d 1136, 1140-1141 (Ill. App. Ct. 2004); ***Pendleton v. Ricca***, 232 So. 2d 803, 807-808 (La. Ct. App. 1970); ***Progressive Cas. Ins. Co. v. Dunn***, 665 A.2d 322, 325 (Md. Ct. Spec. App. 1995); ***Badger State Mut. Cas. Co. v. Swenson***, 404 N.W.2d 877, 879 (Minn. Ct. App. 1987); ***Canal Ins. Co. v. C.I.T. Financial Servs. Corp.***, 357 So. 2d 308, 312 (Miss. 1978); ***Mo. Managerial Corp. v. Pasqualino***, 323 S.W.2d 244, 248-249 (Mo. Ct. App. 1959); ***Glacier Gen. Assurance Co. v. State Farm Mut. Auto. Ins. Co.***, 436 P.2d 533, 536 (Mont. 1968); ***State Farm Mut. Auto. Ins. Co. v. Carpenter***, 367 A.2d 609, 610 (N.H. 1976); ***Grant v. Emmco Ins. Co.***, 243 S.E.2d 894, 903 (N.C. 1978); ***McCarty v. Grange Mut. Cas. Co.***, 273 N.E.2d 345, 347-348 (Ohio Ct. App. 1971); ***Baker v. Unigard Ins. Co.***, 523 P.2d 1257, 1260 (Or. 1974); ***Shelby Mut. Ins. Co. v. Kistler***, 500 A.2d 487, 489-490 (Pa. Super. 1985); ***Palmer v. State Farm Mut. Auto. Ins. Co.***, 614 S.W.2d 788, 790-791 (Tenn. 1981); ***Auto-Owners Ins. Co. v. Rasmus***, 588 N.W.2d 49, 54 (Wis. Ct. App. 1998).

harmonizing each clause and section of an insurance contract.[5] ***See TravCo Ins. Co.***, ***supra***.

Cincinnati argues that the trial court's construction of sections 4 and 5 is unreasonable because in its view, notice is required under all circumstances. Cincinnati's Brief at 11.

> As long as an insured asks Cincinnati to insure a newly acquired auto (purchased in addition to the vehicles already insured under the Policy) within 30 days or the policy period, coverage is provided retroactive to the date of purchase. That is, as long as an insured asks for coverage within the timeframe described in K.4, the vehicle will be covered beginning at the date of purchase. If, however, an insured does not ask within that timeframe, paragraph K.5 provides that instead of the vehicle being covered retroactively, coverage begins from the date of the request.

Id. at 15. However, we agree with the trial court that if we were to accept Cincinnati's position, subsections 4(b) and 5 would be meaningless.

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[5] Cincinnati argues that the trial court's analysis is flawed because it does not harmonize subsections and 4 and 5 with subsection 3. Cincinnati's Brief at 15-16. However, subsection 3, as spelled out above, only pertains to **replacement** vehicles, which is not applicable in this case. The trial court's construction fully harmonizes and gives effect to all relevant provisions pertaining to **newly acquired** vehicles.

Furthermore, Cincinnati argues that the view of the Iowa Supreme Court in ***Farm & City Ins. Co. v. Anderson***, 509 N.W.2d 487 (Iowa 1993) should control here. Cincinnati's Brief at 17-18. We note that in ***Anderson***, the Iowa Supreme Court took Cincinnati's position and held that notice of acquisition is a condition precedent to coverage. ***Id.*** at 490-491. However, as illustrated above, this is the minority view, which we do not find persuasive.

> If notice was a condition precedent to coverage, then language in the [insurance] contract allowing an insured 30 days to give notice (section 4(b)), or an explanation as to when coverage applies if an insured fails to give notice within that time frame would be unnecessary, as coverage would always apply immediately following the point at which notice was given.

Trial Court Opinion, 8/20/12, at 5.

Additionally, Heartland points out that "Cincinnati … mistakenly interpret[s] the term 'ask' as the operative language." Heartland's Brief at 9. If Cincinnati were correct in that assertion, "the language of the policy could simply end after the language in paragraph 4 which states 'you must ask us to insure it.'" ***Id.*** (some internal quotation marks omitted). However, the policy's language goes on to explain to the insured "when coverage applies if an insured fails to give notice beyond the specified timeframe [of] thirty (30) days or the policy period." ***Id.*** (some internal parentheses omitted); ***see also*** Trial Court Opinion, 8/20/12, at 5. Since the accident involved in this case occurred within 30 days of the acquisition of the Nissan, we agree with Heartland that "any lack of notice was immaterial …."[6] Heartland's Brief at 9. We further note that Cincinnati's

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[6] We note that the Virginia Supreme Court has consistently held that a failure to notify an insurance company of an accident, as opposed to an acquisition, **is** a condition precedent to coverage.

> [If an] insurance polic[y] … contain[s] a common provision mandating that in the event of an accident

(Footnote Continued Next Page)

interpretation would also run counter to the Virginia Supreme Court's longstanding policy of giving meaning to every section of a contract. ***See Matthews v. PHH Mortg. Corp.***, 724 S.E.2d 196, 201 (Va. 2012) (stating, "[n]o word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly[]") (citations omitted). We therefore conclude that Cincinnati has not shown that the trial court abused its discretion or committed an error of law. ***See Miller***, ***supra***.

Based on the foregoing we conclude that the trial court properly granted Heartland's motion for summary judgment. Accordingly, the trial court's June 25, 2012 order is affirmed.

Order affirmed.

Judge Bowes files a Dissenting Memorandum.

(Footnote Continued) ———————————

> written notice … shall be given … to the company or any of its authorized agents as soon as practicable, … compliance with such a notice provision is a condition precedent to coverage, with which the insured must substantially comply.

Craig v. Dye, 526 S.E.2d 9, 11-12 (Va. 2000) (Internal quotation marks and citations omitted). However, we observe that Cincinnati did not raise this argument or this line of cases below. ***See*** Pa.R.A.P. 302(a) (stating, "[i]ssues not raised in the lower court are waived").

Judgment Entered.

Nicholas V. Cosetti

Deputy Prothonotary

Date: 6/20/2013