J. A14004/13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

ATLANTIC STATES INSURANCE COMPANY	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ERIK BUBECK,	:	No. 1949 MDA 2012
Appellant	:	

Appeal from the Order Entered October 2, 2012,
in the Court of Common Pleas of Schuylkill County
Civil Division at No. S-1687-2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND PLATT,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED OCTOBER 17, 2013**

Erik Bubeck appeals from the order of October 2, 2012, granting Atlantic States Insurance Company's motion for summary judgment and dismissing appellant's counterclaims for breach of contract and bad faith. We affirm.

Appellee, Atlantic States Insurance Company, brought this declaratory judgment action to determine whether appellant is entitled to collect underinsured motorist ("UIM") benefits under his parents' policy. Appellee denied coverage on the basis that appellant was not a household resident. As the trial court has aptly summarized the history of this matter,

> The Plaintiff is an insurance carrier licensed to transact business within the Commonwealth of Pennsylvania with its principal place of business located at 1195 River Road, P.O. Box 302, Marietta,

* Retired Senior Judge assigned to the Superior Court.

> PA 17547-0302. The Defendant is Erik Bubeck, an adult individual, allegedly residing at 44 South St. Peter Street, Apartment B, Schuylkill Haven, Schuylkill County, Pennsylvania 17972, but whose residence is in dispute.
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> On December 8, 2010, Defendant was involved in a motor vehicle accident with another driver, Jenna Donmoyer, near 2575 Panther Valley Road, Pottsville[,] Schuylkill County, PA, wherein he sustained personal injuries. Jenna Donmoyer had an insurance policy with AAA Mid-Atlantic Insurance Corporation with policy limits of $50,000.00. AAA Mid-Atlantic Insurance paid the policy limits of $50,000.00 unto Defendant to satisfy all liability claims against Jenna Donmoyer.
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> Defendant is now pursuing an underinsured motorist claim against Plaintiff under Policy No. PAG-3129928 which had been issued to Deborah and Robert V. Bubeck, Defendant's parents.

Trial court opinion, 10/2/12 at 1-2.

The trial court determined that appellant was not a "family member," as that term is defined in the policy, because he was not a resident of his parents' household. Appellant was living at his girlfriend's apartment at the time of the accident. Therefore, he was not an insured under his parents' policy entitled to collect UIM benefits. As such, the trial court granted appellee's motion for summary judgment.

Appellant filed a timely notice of appeal on November 1, 2012. On November 2, 2012, appellant was ordered to file a concise statement of errors complained of on appeal within 25 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. Appellant timely complied on November 26,

2012; and on November 28, 2012, the record was transmitted to this court, with the trial court apparently relying on its prior opinion and order of October 2, 2012.

Initially, we note:

> Our scope of review of a trial court's order disposing of a motion for summary judgment is plenary. Accordingly, we must consider the order in the context of the entire record. Our standard of review is the same as that of the trial court; thus, we determine whether the record documents a question of material fact concerning an element of the claim or defense at issue. If no such question appears, the court must then determine whether the moving party is entitled to judgment on the basis of substantive law. Conversely, if a question of material fact is apparent, the court must defer the question for consideration of a jury and deny the motion for summary judgment. We will reverse the resulting order only where it is established that the court committed an error of law or clearly abused its discretion.
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> ***Grimminger v. Maitra***, 887 A.2d 276, 279 (Pa.Super.2005) (quotation omitted). "[Moreover,] we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Evans v. Sodexho***, 946 A.2d 733, 739 (Pa.Super.2008) (quotation omitted).

Ford Motor Co. v. Buseman, 954 A.2d 580, 582-583 (Pa.Super. 2008), ***appeal denied***, 601 Pa. 679, 970 A.2d 431 (2009). "The proper construction of a policy of insurance is resolved as a matter of law in a

declaratory judgment action." ***Alexander v. CNA Insurance Co.***, 657 A.2d 1282, 1284 (Pa.Super. 1995), ***appeal denied***, 543 Pa. 689, 670 A.2d 139 (1995) (citation omitted).

> We consider the trial court's determinations mindful of the following principles. "Insurance policies are contracts, and the rules of contract interpretation provide that the mutual intention of the parties at the time they formed the contract governs its interpretation. Such intent is to be inferred from the written provisions of the contract." ***Penn–America Ins. Co. v. Peccadillos, Inc.***, 27 A.3d 259, 264 (Pa.Super.2011) (quoting ***American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.***, 606 Pa. 584, 2 A.3d 526, 540 (2010)).
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> "When the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement, . . . which will be given its commonly accepted and plain meaning[.]" ***LJL Transp., Inc. v. Pilot Air Freight Corp.***, 599 Pa. 546, 962 A.2d 639, 647 (2009) (citations omitted). "When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances." ***Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.***, 588 Pa. 470, 905 A.2d 462, 468 (2006).
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> "A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." ***Id.*** at 468-469. Additionally, "[t]he provisions of an insurance contract are ambiguous if its terms are subject to more than one reasonable interpretation when applied to a particular set of facts." ***Kropa v. Gateway Ford***, 974 A.2d 502, 508 (Pa.Super.2009) (internal quotation omitted). "When a provision in a policy is ambiguous, . . . the policy is to be construed

> in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." ***Erie Ins. Exchange v. Conley***, 29 A.3d 389, 392 (Pa.Super.2011) (quoting ***Government Employees Ins. Co. v. Ayers***, 955 A.2d 1025, 1028-29 (Pa.Super.2008)).

Miller v. Poole, 45 A.3d 1143, 1146-1147 (Pa.Super. 2012).

> The Courts of this Commonwealth have historically recognized the classical definitions of the words domocile [sic] and residence. Domicile being that place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.
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> Residence being a factual place of abode. Living in a particular place, requiring only physical presence.
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> Though the two words may be used in the same context, the word resident as used in the policy, without additional words of refinement, i.e., permanent, legal, etc., would carry the more transitory meaning.
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> The [insurer] having written the contract, any ambiguity in its terms will be construed against it.

Krager v. Foremost Ins. Co., 450 A.2d 736, 737-738 (Pa.Super. 1982), citing ***Miller v. Prudential***, 362 A.2d 1017 (Pa.Super. 1976). In the absence of a policy definition, the common law definition of "resident" is to be applied to the facts of the case, examining various factors to arrive at a common-sense decision. ***Wall Rose Mutual Ins. Co. v. Manross***, 939 A.2d 958, 965 (Pa.Super. 2007), ***appeal denied***, 596 Pa. 747, 946 A.2d 688 (2008) (citations omitted). "[T]he term 'resident' or 'residency'

requires, at the minimum, some measure of permanency or habitual repetition. Also, [s]ince resident status is a question of physical fact, intention is not a relevant consideration." ***Id.*** (citations and quotation marks omitted).

Appellant's parents' policy provides, with respect to UIM coverage: "We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of 'bodily injury': 1. Sustained by an 'insured'; and 2. Caused by an accident." (Declaratory Judgment Complaint, 8/5/11, Exhibit "C" at 1.) The UIM endorsement defines an "insured" as, "You or any 'family member'[.]" (***Id.***) The policy further defines "family member" as, "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." (***Id.***, Exhibit "D" at 1 (emphasis added).) Therefore, appellant is only covered by the policy if he is a resident of his parents' household.

Appellee took recorded statements from appellant, his girlfriend, Erin McCaull ("McCaull"), and his parents, Deborah and Robert Bubeck. It was established through these statements that for a period of at least six months prior to the December 8, 2010 motor vehicle accident, appellant was sleeping at his girlfriend's apartment located at 44 South St. Peter Street in Schuylkill Haven. (Trial court opinion, 10/2/12 at 3-4.) Appellant was 24 years old at the time of the accident and working full-time as a

computer technician. (Declaratory Judgment Complaint, 8/5/11, Exhibit "E" at 1-2.) McCaull was 27 years old and has two children from a prior relationship. (***Id.*** at 2, 7.) While appellant spent time at his parents' house and had a furnished bedroom there, he was sleeping exclusively at his girlfriend's apartment for more than six months prior to the accident. (Trial court opinion, 10/2/12 at 6.) Although appellant was not on his girlfriend's lease and did not have a key to the apartment, he slept there every night. (***Id.*** at 7.) Deborah Bubeck confirmed that appellant had not slept at their home since the spring of 2010, when he began dating McCaull. (Declaratory Judgment Complaint, 8/5/11, Exhibit "F" at 6-7.)

Notably, when Deborah and Robert Bubeck applied for the policy on October 12, 2010, they listed appellant's address as St. Peter Street in Schuylkill Haven, which is McCaull's address. (***Id.***, Exhibit "A" at 3.) Appellant was listed as a "family member no longer in household." (***Id.***)

We find the case of ***Amica Mutual Ins. Co. v. Donegal Mutual Ins. Co.***, 545 A.2d 343 (Pa.Super. 1988), to be instructive. In that case, Donegal denied coverage for 18-year-old Elizabeth Hagerty on the basis that she was not a resident of her father's household. ***Id.*** at 344. Elizabeth's parents were divorced, and she was living with her mother. Donegal had issued a liability policy to Elizabeth's father, Dr. Robert Hagerty. ***Id.*** The trial court found that at the time of the accident, Elizabeth resided with her mother and Donegal had no duty to provide coverage. ***Id.*** at 344-345.

This court affirmed, finding that although Elizabeth kept clothes at her father's house, 40 pairs of shoes, books, cosmetics, stuffed animals, tennis equipment, and a pet rabbit, and received mail there, she was not a "resident" for purposes of the policy. ***Id.*** at 345. Elizabeth testified that she stayed overnight at her father's house three to five times a month; her father testified that she only stayed overnight twice during the entire school year prior to the accident in June 1984. ***Id.*** This court upheld the trial court's findings that she made only "sporadic" visits to her father's house, did not spend any significant time there, and the personal items she kept at her father's house were for convenience and did not evidence that she physically lived there. ***Id.*** at 346. We found that the evidence supported the conclusion that Elizabeth ***had*** lived at her father's house and ***intended*** to live there again; however, these considerations were irrelevant. ***Id.*** at 349. The policy limited coverage to those who actually reside in the household of the insured; her intention was not the litmus test to determine residency status. ***Id.*** at 346-347.

Similarly, here, although appellant received mail at his parents' house, ate some meals there, played video games, kept clothing there, ***etc.***, he could not be considered a "resident" of the household where he slept every night somewhere else. In the six months leading up to the accident, appellant rarely, if ever, spent the night at his parents' house. We find no

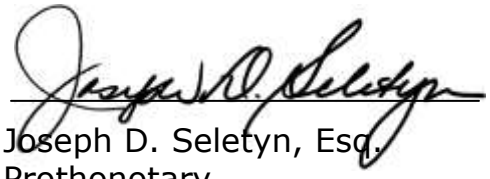
error in the trial court's determination that, as a matter of physical fact, appellant did not reside at his parents' house at the time of the accident.

Particularly important is the fact that on their insurance application, Deborah and Robert Bubeck list appellant as a "family member no longer in household" and his address as "St. Peter Street, Schuylkill Haven," which is McCaull's apartment. Clearly, they did not consider him a household resident. Indeed, forcing appellee to provide coverage would represent a windfall for appellant, where his parents did not list him as a household resident on their application and presumably paid lower premiums as a result. For these reasons, the trial court did not err in finding appellant was not entitled to UIM coverage under his parents' policy and granting summary judgment in favor of appellee.[1]

[1] We note that appellant also complains that the unsworn, recorded statements of McCaull and his parents constituted inadmissible hearsay and should not have been considered by the trial court in making its decision. From our review of the record, appellant did not preserve this issue in the trial court. In his response to appellee's summary judgment motion, he claims that the transcripts are inaccurate, without elaboration; or, in the alternative, that the recorded statements "speak for themselves." Appellant did not object to the statements on the basis of hearsay. To the extent the issue may have been addressed in appellant's brief in support of his response to the summary judgment motion, the briefs do not appear in the record. Appellant does not direct our attention to any place in the record where the issue is preserved. ***See*** Pa.R.A.P., Rule 2119(e), 42 Pa.C.S.A. ("Statement of place of raising or preservation of issues"). As such, we consider the matter waived. Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A. ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). At any rate, even in appellant's own recorded statement, which can be considered a party admission, he concedes that he does not sleep at his parents' house. That fact, and his parents' insurance application

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary
Date: 10/17/2013

in which they list him as a family member no longer in household, were crucial to the trial court's analysis.