NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PROGRESSIVE PREFERRED INSURANCE COMPANY Appellee v. ANTHONY KALMANOWICZ AND ANITA KALMANOWICZ, H/W Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 848 MDA 2012

Appeal from the Order Entered April 4, 2012
In the Court of Common Pleas of Wyoming County
Civil Division at No(s): 2010-01165

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.: Filed: March 21, 2013

Anthony and Anita Kalmanowicz appeal from the order entered on April 4, 2012 in the Court of Common Pleas of Wyoming County granting summary judgment in this declaratory judgment action in favor of Plaintiff/Appellee, Progressive Preferred Insurance Company. Progressive filed suit to obtain a declaration of whether the "regularly used vehicle" exclusion found in the Kalmanowicz's automobile insurance policy was applicable to the facts surrounding Anthony Kalmanowicz's motor vehicle accident. Kalmanowicz was operating a Mack truck in the course and scope of his employment when another car hit his truck. After the close of discovery, Progressive filed a motion for summary judgment that was granted. Kalmanowicz claims there are still genuine issues of material fact

that preclude summary judgment. After a thorough review of the submissions by the parties, the official record and relevant law, we affirm.

> By way of background, Defendant Anthony Kalmanowicz was involved in a motor vehicle accident on June 1, 2009[1] while operating a 2006 Mack truck towing a 2007 Rogers (lowboy) semitrailer hauling an Ingersoll Rand roller, all of which were owned by his employer. (Kalmanowicz dep., 3/15/11, p. 21). The Mack truck was purchased by Eastern Industries in 2006, brand new and the trailer was purchased the following year, in 2007, when the tractor and trailer were permanently linked together. (Kalmanowicz dep., 3/15/11, p. 38). At the time of the accident, Mr. Kalmanowicz was operating the tractor and trailer in the course of his employment as a truck driver and heavy equipment operator with Eastern Industries, Inc. (Kalmanowicz dep., 3/15/11, p. 13-4).
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> At the time of the accident, Defendants maintained automobile insurance coverage with Plaintiff Progressive Preferred Insurance (hereinafter "Progressive") for their personal vehicles. Progressive instituted this declaratory judgment action seeking to have Defendants' claim denied based upon an exclusion clause.

Trial Court Opinion, 4/4/12, at 2-3 (footnote omitted).

> Additionally, the trial court determined,
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> Defendant Anthony Kalmanowicz testified during his deposition that he has been employed by the Northern Division of Eastern Industries, Inc. for approximately eight (8) years with duties including driving truck, operating heavy equipment and multiple other tasks. (Kalmanowicz dep., 3/15/11, pp. 14-5, 19-20). His work hours up until the time of the accident were between thirty

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[1] A Volkswagen Golf, travelling in the opposite direction, crossed the center line and stuck Kalmanowicz's truck head on. The driver of the Golf was killed and the truck came to rest on its left side in the ditch at the side of the highway. ***See*** State Police Accident Report, Motion for Summary Judgment, Exhibit B.

> (30) to fifty (50) hours per week on a full time basis, Monday through Saturday and sometimes Sunday. (Kalmanowicz dep., 3/15/11, p. 17). Prior to the accident, Mr. Kalmanowicz spent approximately thirty (30) to thirty-five (35) percent of his work time hauling equipment from one site to another in the very tractor and trailer he was driving on the date of the accident. (Kalmanowicz dep., 3/15/11, p. 23). The remainder of his time was spent operating the equipment and laboring. Approximately one week out of the month, Mr. Kalmanowicz did not have to haul any equipment. (Kalmanowicz dep., 3/15/11, p. 24).
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> Although there were three (3) other truck drivers employed by Eastern Industries, Inc. that were responsible for hauling equipment throughout the northern division geographical area, these drivers spent less than ten (10) percent of their time hauling equipment. (Kalmanowicz dep., 3/15/11, p. 22, 25). Mr. Kalmanowicz never operated any other tractor and trailers to haul equipment other than the one he was operating at the time of the accident on September 1, 2009[2] and he drove that truck approximately 20 hours per week. (Kalmanowicz dep., 3/15/11, pp. 26-7, 44). No one other than Mr. Kalmanowicz operated the tractor and trailer unless Mr. Kalmanowicz was ill, on vacation or busy on a project. (Kalmanowicz dep., 3/15/11, p. 27).
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> Mr. Kalmanowicz was responsible for filling the truck[']s gas tank at the end of each day and taking the truck for maintenance and service. (Kalmanowicz dep., 3/15/11, p. 42). Mr. Kalmanowicz put about eighty thousand (80,000) miles on the truck during the three years that he drove it. (Kalmanowicz dep., 3/15/11, p. 42).[3] On occasion, Mr. Kalmanowicz would drive the tractor and trailer to and park it near his home until the next day. (Kalmanowicz dep., 3/15/11, p. 35).

Trial Court Opinion, 4/4/12, at 9-10.

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[2] This appears to be a typographical error. According to Progressive's Complaint and the State Police Accident Report, ***supra***, the accident occurred on June 1, 2009.

[3] The testimony reflects the truck was driven approximately 80,000 miles in the three years prior to the accident with Kalmanowicz responsible for approximately 90% (approximately 72,000) of those miles.

After the accident, Kalmanowicz sought underinsured motorist (UIM) benefits from the Progressive policy insuring his personal vehicles. Progressive, however, sought to disclaim coverage due to the "regularly used vehicle" exclusion, which provides that UIM benefits are not owed if the insured was injured while occupying a regularly used vehicle not insured under the Progressive policy.[4] This declaratory judgment action was filed and summary judgment was ultimately granted in favor of Progressive.

> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof [...] establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review 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.
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> Whether a claim for insurance benefits is covered by a policy is a matter of law which may be decided on a summary judgment motion.
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> We may disturb the entry of summary judgment only where it is established that the court committed an error of law or abuse of discretion.

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[4] The validity and actual language of the exclusion are not at issue in this appeal.

Rother v. Erie Insurance Exchange, 57 A.3d 116, 117 (Pa. Super. 2012) (internal citations omitted).

Additionally,

> Several principles guide our review. Generally, exclusions from coverage are to be narrowly construed. ***Eichelberger v. Warner***, 290 Pa. Super. 269, 434 A.2d 747 (1981). The regular use exclusion has been held enforceable and not void as against public policy, ***Williams v. GEICO***, ---Pa.----, 32 A.3d 1195 (2011), and the Rothers did not challenge the exclusion on this basis. The term "regular use" has been held to be unambiguous, ***Crum & Forster Personal Ins. Co. v. Travelers Corp.***, 428 Pa.Super. 557, 631 A.2d 671, 673 (1993), and where the language of the "regular use" exclusion is clear and unambiguous, the reasonable expectations of a party are not controlling. ***Brink v. Erie Ins. Group***, 940 A.2d 528, 536 (Pa. Super. 2008) (following ***Donegal Mutual Insurance Company v. Baumhammers***, 893 A.2d 797, 819 (Pa. Super. 2006) (*en banc*)).
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> In Pennsylvania, the test for "regular use" is whether the use is "regular" or "habitual." ***Crum***, ***supra*** at 673. We held in ***Crum*** that "[t]he words 'regular use' suggest a principal use as distinguished from a casual or incidental use[.]" ***Id***. As we recognized in ***Crum***, "courts struggle" with application of the regular use exclusion "because each case must be decided on its own facts and circumstances[.]" ***Id***. Therein, grandson drove a car owned by his grandparents "an average of five times per week for and during the entire four years preceding the accident." ***Id***. at 674. This Court observed that while usually coverage issues are jury questions, "where the facts are not in dispute ... and reasonable minds cannot differ regarding the result, the issue of coverage can be decided as a matter of law by the court." ***Id***. at 673-74.

Id. at 118.

Kalmanowicz claims the trial court erred in granting summary

judgment because there are still genuine issues of material fact to be decided. He claims the evidence shows that at least two other people drive the truck in question and that Eastern Industries limited the scope of use by only allowing work-related use of the truck and trailer. Kalmanowicz cited ***Dixon v. GEICO***, 1 A.3d 921 (Pa. Super. 2010) and ***Rother v. Erie Ins. Exchange***, No. 14656 of 2008 (Luzerne Co., 2011) in support of these claims. However, these arguments are unavailing.

First, ***Dixon*** does not stand for the proposition that if people other than the claimant are also using the vehicle in question, then it cannot be regularly used by the claimant. Rather, in ***Dixon***, a post office mechanic who fixed postal vehicles, sometimes drove the vehicles back to the office from which they came.[5] There was no evidence, however, of how often that took place or how much of a typical workday or workweek was taken up by driving the vehicles. Therefore, there was still genuine questions of material fact to be determined that precluded the grant of summary judgment.

There are no equivalent questions of fact here. Evidence shows that other people did use the Mack truck, but Kalmanowicz was the primary operator of the vehicle. He drove the truck 30% of his workday,[6] for a total

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[5] It was during one of those trips that Dixon's accident occurred.

[6] Thirty per cent is the lowest estimate of his use of the truck. Kalmanowicz gave a number of estimates, including 20 hours of a 50 hour work week (40%), 20 hours of a 60 hour workweek (33%), or 30 to 35%.

of 24,000 miles per year. The other drivers used that truck only if Kalmanowicz was out sick or otherwise occupied. Kalmanowicz was responsible for the servicing the truck and making sure the gas tank was filled. The facts which required reversal of summary judgment in ***Dixon*** are not applicable to the instant matter.

Kalmanowicz also relies on ***Rother***, where the trial court refused to grant summary judgment because the claimant's father, who owned the car in question, had placed limits on his son's (the claimant) use of the car. The trial court believed those limitations created a genuine issue of material fact. However, a panel of our court disagreed and reversed. Our Court stated,

> [W]e agree with Erie that the restrictions on Patrick's [Claimant] use of his vehicle and regular use are not mutually exclusive. Patrick routinely and habitually used the vehicle within the scope of his father's permission to go to and from work four days per week. We find this type of restriction on use comparable to the situation involving fleet or employer-owned vehicles where use is limited to work-related activities, and despite restriction on use, we have found the use to be regular within the meaning of the exclusion.

Rother, 57 A.3d at 119.

We find no error of law in the trial court's determination that Kalmanowicz's use of the vehicle, which amounted to approximately 30% of his workday and equaled 72,000 miles of driving in three years, represented regular use and was not merely casual or incidental. The work-related limitations placed on the Kalmanowicz's use of the vehicle are compatible

with the determination that the truck was regularly used. ***See Rother***; ***Crum***, ***supra***.

Order granting judgment in favor of Progressive Preferred Insurance Company is affirmed.