NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

FRANK CIAVARELLA D/B/A STAR TRANSPORTATION	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ERIE INSURANCE EXCHANGE	:	
Appellant	:	No. 775 MDA 2022

Appeal from the Order Dated November 22, 2021
In the Court of Common Pleas of Luzerne County
Civil Division at No(s): 2021-04168

BEFORE: PANELLA, P.J., BENDER, P.J.E., and McCAFFERY, J.

MEMORANDUM BY PANELLA, P.J.: **FILED: NOVEMBER 22, 2023**

Erie Insurance Exchange appeals by permission from the order overruling its preliminary objections to the complaint filed by Frank Ciavarella d/b/a Star Transportation.[1] Erie argues that the trial court erred in overruling its preliminary objections where it properly denied Ciavarella's claim for coverage based upon the plain language of the insurance policy ("Erie Policy"). After careful review, we reverse and remand.

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[1] An order denying preliminary objections is generally interlocutory and not appealable as of right. ***See Callan v. Oxford Land Dev., Inc.***, 858 A.2d 1229, 1232 (Pa. Super. 2004). Here, however, Erie filed an application for amendment of the order to file an interlocutory appeal by permission pursuant to 42 Pa.C.S.A. § 702(b), which the trial court granted. Additionally, Erie filed a petition for permission to appeal with this Court, which was also granted. ***See Ciavarella v. Erie***, 1 MDM 2022 (Pa. Super. filed May 24, 2022) (*per curiam*).

Ciavarella operates a transportation business under the trade name of Star Transportation.[2] Hanover Area School District and Ciavarella entered into a contract for the 2017-2018 school year for Ciavarella to provide school bus service for the school district's special needs children. During the school year, a district employee entered incorrect mileages in the school district computer which resulted in overpayments to Ciavarella of $244,621. Following an internal audit, Hanover found that it had overpaid Ciavarella for its services. As a result, Hanover repeatedly sought a refund of the overpayments from Ciavarella, but Ciavarella refused the requests.

Ultimately, Hanover submitted its claim for losses to its insurance carrier, American Alternative Insurance Corp. ("American Alternative"), which indemnified Hanover. American Alternative then filed an action, as subrogee of Hanover, against Ciavarella for repayment of the funds. In the complaint, American Alternative asserted counts of breach of contract, unjust enrichment, conversion, and negligence ("underlying action"), and alleged the date of loss to be January 9, 2019. Significantly, in the conversion claim, American Alternative averred that Ciavarella refused to reimburse Hanover the overpayment and Ciavarella converted the overpayments for their exclusive use. In the negligence claim, American Alternative claimed that

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[2] Ciavarella did not allege that Star Transportation was a distinct legal entity. ***See*** Amended Complaint, 6/7/21 at ¶1.

Ciavarella engaged in negligence by failing to realize that the overpayments were made to them and failing to reimburse the monies.

On September 12, 2019, Ciavarella provided Erie notice of the underlying action and sought approval for Erie to provide his defense. Erie denied the claim by letter dated February 2, 2021, finding that the Erie Policy did not provide a defense for Ciavarella on the underlying action, as the claims therein were not covered by the policy. Specifically, Erie noted that the claims in the underlying action were based on breach of contract or conversion, and the policy only provided coverage for bodily injury, property damage liability, personal, and advertising injury liability.

As a result, on April 19, 2021, Ciavarella filed a complaint against Erie, setting forth causes of action for breach of contract, statutory bad faith under 42 Pa.C.S.A. § 8371, and violation of the Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). After Erie filed preliminary objections, Ciavarella filed an amended complaint, raising similar claims and arguing that the underlying claim was covered pursuant to the terms of the Erie Policy. Erie again filed preliminary objections. Following a hearing, the trial court overruled Erie's preliminary objections. Erie timely appealed.

On appeal, Erie raises the following questions for our review:

1. Whether the trial court erred by overruling Erie's Preliminary Objections in the nature of a demurrer when the "four corners" of the third-party underlying Complaint against Frank Ciavarella d/b/a Star Transportation unequivocally disclosed that there was neither "personal and advertising injury" nor any covered, accidental "occurrence" pled against Star

> Transportation, but rather, an alleged intentional misappropriation of money contrary to the terms of a contract between the parties?
>
> 2. Whether the trial court erred in overruling Erie's Preliminary Objections in the nature of a demurrer when the "four corners" of the third-party underlying Complaint against Frank Ciavarella d/b/a Star Transportation did not allege any "bodily injury" or "property damage," as is required under Coverage "A" of the Erie CGL policy?
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> 3. Whether the trial court erred in overruling Erie's Preliminary Objections in the nature of a demurrer when [Ciavarella's] bad faith claims were derived from Erie's denial of liability coverage which, for the reasons set forth herein was not only reasonable but correct, thereby precluding any bad faith claims?
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> 4. Whether the trial court erred in overruling Erie's Preliminary Objections to [Ciavarella's] claims under the UTPA/CPL when the UTPA/CPL does not apply to the handling of insurance claims and, in all events, does not apply to commercial products?

Appellant's Brief at 4-5.[3]

We review an order overruling preliminary objections for an error of law.

See Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011).

> When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court. Preliminary objections in the nature of demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom.

Id. (citation and paragraph break omitted).

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[3] Ciavarella did not file a brief in this case.

We will review Erie's first two claims together, as both address Erie's duty to defend Ciavarella in the underlying action. Preliminarily, in addressing the claims, it is imperative we examine the text of the Erie Policy, which states the following, in relevant part:

> Section I – Coverages
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> Coverage A – Bodily Injury and Property Damage Liability
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> 1. Insuring Agreement
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> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any suit seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. …
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
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> i. The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;"
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> ii. The "bodily injury" or "property damage" occurs during the policy period …
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> Coverage B – Personal and Advertising Injury Liability
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which

this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. …

2. Exclusions

This insurance does not apply to: …

f. Breach of Contract
"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement." …

Section V – Definitions

… 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. …

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury including consequential "bodily injury," arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;
b. Malicious prosecution;
c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premise that a person occupies committed by or on behalf of its owner, landlord or lessor;
d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
f. The use of another's advertising idea in your "advertisement;" or
g. Infringing upon another's copyright, trade dress or slogan in your "advertisement." …

17. "Property damage" means:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Erie Policy, 8/14/18, at 1, 5, 6, 12, 13, 14.

With this in mind, we note that American Alternative asserted, in the underlying action, that Hanover entered into a contract with Ciavarella for transportation services for special needs students within the school district. ***See*** Complaint, 7/22/20, at 4. As part of that contract, a district employee would enter mileage numbers submitted by Ciavarella into a school district computer which would then generate payments to Ciavarella. ***See id.*** At some point, the employee entered incorrect mileages provided by Ciavarella, which resulted in overpayments of $244,121. ***See id.*** at 5. After an internal audit revealed the discrepancy, Hanover repeatedly demanded a refund of the overpayment, but Ciavarella refused to return the money. ***See id.*** American Alternative raised four causes of action, including breach of contract, unjust enrichment, conversion, and negligence, seeking reimbursement of the $244,121. ***See id.*** at 6-10.

More specifically, in its breach of contract claim, American Alternative alleged that the parties' contract specifically stated the mode of payment agreed upon by the parties and that Ciavarella breached the contract by failing to reimburse the overpayments. ***See id.*** at 6-8. In the unjust enrichment

claim, American Alternative argued that the clear and obvious overpayments establish that Ciavarella unjustly enriched himself. ***See id.*** at 8-9. In the conversion claim, American Alternative averred that Ciavarella refused to reimburse Hanover the overpayment and Ciavarella had converted the overpayments for his exclusive use. ***See id.*** at 9-10. Finally, American Alternative claimed that Ciavarella engaged in negligence by failing to realize that the overpayments were made to him and failing to reimburse the monies. ***See id.*** at 10.

Erie contends that it did not have a duty to defend Ciavarella against these claims. ***See*** Appellant's Brief at 16. Erie argues that none of the claims in the underlying action state personal and advertising injury or any accidental occurrence, which are the categories of claims covered by the policy. ***See id.*** Erie highlights that when reviewing the four corners of the complaint, the substance of the factual allegations must be considered, not the legal theory of the cause of action. ***See id.*** at 17-18, 31-32. To that end, Erie notes that all of the counts in Hanover's complaint are premised upon a breach of contractual terms. ***See id.*** at 29-32.

Erie argues that the trial court erroneously relied on the "Personal and Advertising Injury Liability" clause to find that it could provide coverage on the claim that Ciavarella converted the proceeds from the overpayments from Hanover. ***See id.*** at 20-21, 23-27. Erie contends that this coverage is provided for certain enumerated claims against Ciavarella and does not require Erie to

provide a defense just because Ciavarella believes the filing of the underlying complaint itself is defamatory or disparaging. ***See id.*** at 23-25. Erie also argues that the breach of contract claim in the underlying action does not constitute bodily injury or property damage caused by an "occurrence" under Coverage A of the Erie Policy. ***See id.*** at 27-29, 32-34. Erie claims this interpretation is consistent with the principle of law that liability insurance covers accidents and does not serve as a bond for the insured's contractual obligations. ***See id.*** at 28-29, 32-34.

Finally, Erie claims that the trial court improperly found that Ciavarella sustained first-party losses as the victim of alleged disparagement by American Alternative since the claim at issue here is a third-party coverage claim. ***See id.*** at 21-22, 23; ***see also id.*** at 22 (noting the difference between first-party insurance, a contract between the insurer and insured, which protects the insured's own losses and expenses, and third-party insurance, a contract to protect the insured from monetary liability to a third party). Erie highlights that the underlying action does not seek third-pay damages for personal or advertising injury by Ciavarella. ***See id.*** at 26.

> 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. If doubt or ambiguity exists it should be resolved in [the] insured's favor.

Penn-America Ins. Co. v. Peccadillos, Inc., 27 A.3d 259, 264 (Pa. Super. 2011) (*en banc*) (citation omitted). In conducting our review, we are mindful

that "disputes over coverage must be resolved only by reference to the provisions of the policy itself." ***Kramer v. Nationwide Prop. and Casualty Ins. Co.***, 271 A.3d 431, 436 (Pa. Super. 2021) (citation and brackets omitted). "Additionally, the insured has the burden to prove a valid policy claim. On the other hand, where an insurer relies on a policy exclusion as the basis for its denial of coverage..., the insurer has asserted an affirmative defense, and accordingly, bears the burden of proving such defense." ***Consol. Rail Corp. v. ACE Prop. & Cas. Ins. Co.***, 182 A.3d 1011, 1027 (Pa. Super. 2018) (citations and quotation marks omitted).

> An insurer's duty to defend is broader than its duty to indemnify, and the duty to defend is triggered if the factual allegations of the complaint on its face encompass an injury that is actually or potentially within the scope of the policy. The truth of the complaint's allegations is not at issue when determining whether there is a duty to defend; the allegations are to be taken as true and liberally construed in favor of the insured. Whether a claim is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint. And, if any doubt or ambiguity exists, it must be resolved in favor of coverage. Moreover, to the extent there are undetermined facts that might impact on coverage, the insurer has a duty to defend until the claim is narrowed to one patently outside the policy coverage, for example through discovery.

Erie Ins. Exch. v. Moore, 228 A.3d 258, 265 (Pa. 2020) (citations and quotation marks omitted).

Further,

> [t]he particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the factual allegations contained in the complaint. If we were to allow the manner in which the complainant frames the request for damages to control the

> coverage question, we would permit insureds to circumvent exclusions that are clearly part of the policy of insurance. … The insured would receive coverage neither party intended and for which the insured was not charged. The fact that the plaintiffs couched their claims in terms of negligence does not control the question of coverage.

Am. Nat. Prop. & Cas. Companies v. Hearn, 93 A.3d 880, 884 (Pa. Super. 2014) (citations and brackets omitted).

In fact,

> courts are cautious about permitting tort recovery based on contractual breaches. … Although they derive from a common origin, distinct differences between civil actions for tort and contractual breach have been developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.... To permit a promisee to sue his promisor in tort for breaches of contract *inter se* would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions. … The important difference between contract and tort claims is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie from the breach of duties imposed by mutual consensus. In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.

Pittsburgh Const. Co. v. Griffith, 834 A.2d 572, 581-582 (Pa. Super. 2003) (citations, quotation marks, and paragraph breaks omitted).

Here, the trial court found that Erie had a duty to defend Ciavarella based upon the following reasoning:

> As to [Erie's] demurrer to [Ciavarella's] claim for breach of contract, the trial court is able reasonably to infer from the averments of and attachments to [Ciavarella's] amended complaint that Ciavarella suffered an injury related to its dispute with [Hanover] that could potentially fall within the scope of the

> instant policy. … The trial court has compared the four corners of the Underlying Complaint to the four corners of the policy and the language inherent to Coverage B. Such comparison demonstrates the potential for the coverage of the claim in that the trial court is able to infer from, *e.g.*, the averments of the Underlying Complaint—*e.g.*, that Ciavarella converted the proceeds of clear and obvious overpayment for services not rendered the existence of an "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

Trial Court Opinion, 6/10/22, at 6 (citation and footnote omitted).

In comparing the four corners of the Erie Policy to the four corners of the complaint in the underlying action and construing both liberally in favor of Ciavarella, we disagree with the trial court's conclusion. Under Coverage B of the Erie Policy, Erie was required to defend Ciavarella for, in relevant part, "those sums that [Ciavarella] becomes legally obligated to pay because of … written publication, in any manner, of material that … libels a person or organization or disparages a person's or organization's goods, products or services" Erie Policy, at 13. In other words, Coverage B provided coverage for claims that Ciavarella had libeled or disparaged Hanover's goods products or services. In contrast, American Alternative asserted claims that Ciavarella was legally obligated to pay it money based on factual allegations that Ciavarella was wrongfully withholding money that Hanover had mistakenly transferred to him pursuant to a contract. Nowhere in American Alternative's complaint

does it allege any facts that would support a claim that Ciavarella had libeled Hanover. As such, Coverage B is clearly inapplicable to the underlying action.[4]

Even if it were, we note the "Breach of Contract" exclusion excludes coverage for personal and advertising injury "arising out of a breach of contract, except an implied contract to use another's advertising idea in your 'advertisement.'" ***Id.*** at 6. The term of "arising out of" has been construed in broad and general terms to mean "causally connected with" the conduct excluded. ***See Madison Const. Co. v. Harleysville Mut. Ins. Co.***, 735 A.2d 100, 110 (Pa. 1999) (stating that the phrase 'arising out of,' used in policy exclusion, was not ambiguous and indicated 'but for' or 'cause and result' relationship" (citation omitted)); ***Wolfe v. Ross***, 115 A.3d 880, 886 (Pa. Super. 2015) (*en banc*) (construing the phrase "'arising out of' to mean the broader 'causally connected with'" (citation omitted)).

As noted above, American Alternative raises four causes of action: breach of contract, unjust enrichment, conversion, and negligence. However, liberally construing the underlying action in favor of Ciavarella reveals that the gravamen of American Alternative's claims in the complaint, including the

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[4] Likewise, we conclude that Erie had no duty to defend under Coverage A, as the underlying complaint does not articulate bodily injury or property damage, as defined by the Erie Policy. ***See Redevelopment Auth. of Cambria Cty. v. Int'l Ins. Co.***, 685 A.2d 581, 589 (Pa. Super. 1996) (stating that the "purpose and intent of such an insurance policy is to protect the insured from liability for essentially accidental injury to the person or property of another rather than coverage for disputes between parties to a contractual undertaking.").

negligence and conversion claims, sounds in breach of contract. ***See Erie***, 228 A.3d at 266 (noting that allowing "the manner in which the complainant frames the request for redress to control ... would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies." (citation omitted)). In fact, all of these claims, including the tort claims, are premised upon Hanover's attempt to recover the monies it was owed under the contract between Ciavarella and Hanover, and the success of the claims raised in the underlying action flow and originate from the terms of the parties' contract. ***See McShea v. City of Philadelphia***, 995 A.2d 334, 339 (Pa. 2010) (noting that the "gist of the action" doctrine "maintain[s] the conceptual distinction between breach of contract claims and tort claims[,] and precludes plaintiffs from recasting ordinary breach of contract claims as tort claims." (citation and quotation marks omitted)). Put another way, the failure to return the overpayments are causally connected to the breach of the duty imposed by the parties' contract, and not duties imposed by law or society. ***See Hart v. Arnold***, 884 A.2d 316, 339 (Pa. Super. 2005) (noting that a plaintiff cannot recast a breach of contract claim into tort-based claim where "the duties allegedly breached were created and grounded in the contract itself" and the "liability stems from a contract" (citation omitted)); ***see also Griffith***, 834 A.2d at 582.

This then would lead us to conclude that the claims involved in the underlying action "arise out of" the breach of the contract, and, therefore, the

language of the breach of contract exclusion precludes Erie's duty to defend Ciavarella under Coverage B. ***See*** Erie Policy, at 6. In light of the foregoing, we conclude that the trial court abused its discretion in overruling Erie's preliminary objections, as Erie had no duty to defend Ciavarella in the underlying action.

In its third claim, Erie contends the trial court erred in concluding that it acted in bad faith. ***See*** Appellant's Brief at 34-36. Erie argues that it did not act in bad faith and Ciavarella cannot state a claim that grants him relief. ***See id.*** at 36.

> Bad faith applies to those actions an insurer took when called upon to perform its contractual obligations of defense and indemnification or payment of a loss that failed to satisfy the duty of good faith and fair dealing implied in the parties' insurance contract. In order to recover in a bad faith action, the plaintiff must present clear and convincing evidence (1) that the insurer did not have a reasonable basis for denying benefits under the policy and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis.

Berg v. Nationwide Mut. Ins. Co., Inc., 189 A.3d 1030, 1037 (Pa. Super. 2018) (citations, brackets, and quotation marks omitted). "Claims of bad faith are fact specific and depend on the conduct of the insurer toward its insured." ***Wenk v. State Farm Fire & Cas. Co.***, 228 A.3d 540, 547 (Pa. Super. 2020) (citation omitted).

As noted above, Erie had no duty to defend Ciavarella in the underlying action. Accordingly, Erie had a reasonable basis for denying benefits and it did

not act in bad faith. ***See Berg***, 189 A.3d at 1037. Therefore, the trial court erred in overruling Erie's preliminary objections.

In its final claim, Erie asserts that the trial court improperly overruled its preliminary objections as to Ciavarella's claims that it violated the UTPCPL. ***See*** Appellant's Brief at 36, 39. Erie notes that Ciavarella's claim is premised upon an Erie adjuster assuring Ciavarella that the underlying action would be defended, but such claim was later denied. ***See id.*** at 36-37. Erie contends that the UTPCPL applies to consumers in the context of personal purposes, not commercial transactions. ***See id.*** at 37. Erie further argues that the handling of an insurance policy cannot form the basis of a UTPCPL claim, as only the sale of the policy implicates the UTPCPL. ***See id.*** Erie additionally asserts that allegations about an oral promise for coverage do not overcome the language of the insurance contract. ***See id.*** at 38-39.

> The UTPCPL was enacted to protect consumers from fraud and unfair or deceptive business practices. The UTPCPL applies to the sale of an insurance policy, it does not apply to the handling of insurance claims…. Rather, 42 Pa.C.S.[A.] § 8371, [Pennsylvania's Bad Faith Statute,] provides the exclusive statutory remedy applicable to claims handling.

Wenk, 228 A.3d at 550 (citations and quotation marks omitted).

Here, the trial court overruled Erie's preliminary objections based upon the following reasoning:

> [W]ith respect to [Erie's] demurrer to the claim for violation of the Consumer Protection Law, the trial court is able reasonably to infer from the averments of the amended complaint that [Erie] engaged in fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding, ***see*** 73 P.S. § 201-2(4)(xxi), in

> that Ciavarella has averred [Erie's] employee or agent assured Ciavarella of the acceptance of the claim for coverage and provision of defense, but such claim was later denied and no defense was provided. These averments give the trial court pause and, for the purpose of evaluating the instant preliminary objections, all doubt as to sustaining the demurrer with respect to the instant claim for violation of the Consumer Protection Law has not been removed. Accordingly, and without comment as to the potential for such claim to remain viable in the face of any prospective challenge at a later procedural juncture subsequent to the completion of the discovery relative thereto, the trial court has overruled this demurrer.

Trial Court Opinion, 6/10/22, at 8 (citation and footnote omitted).

Here, the sale of the Erie Policy is not at issue, merely the denial of Ciavarella's claim. ***See Wenk***, 228 A.3d at 550. Moreover, the UTPCPL limits private actions under that act to persons who purchase or lease "goods or services primarily for personal, family or household purposes." 73 P.S. § 201-9.2. Here, Ciavarella purchased the Erie Policy for business purposes; therefore, he could not assert a private cause of action under Section 201–9.2(a). Accordingly, the UTPCPL does not apply, and the trial court's overruling of Erie's preliminary objections in this regard was an error of law.

In light of the foregoing, we reverse the trial court's order and remand with direction that Erie's preliminary objections be granted.

Order reversed. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/22/2023