IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

THE PHILADELPHIA CONTRIBUTIONSHIP INSURANCE COMPANY,	:	
Plaintiff	:	
v.	:	No. 22-1119
BRAD MENAKER and MELISSA NAPOLETANO, Individually and as Administratrix of the Estate of LISA NICOLE NAPOLETANO, Deceased,	:	
Defendants	:	

Robert J. Cahill, Esquire and Christopher S. Regan, Esquire	Counsel for Plaintiff
Alfred J. Merlie, Esquire	Counsel for Brad Menaker
Daniel W. Munley, Esquire	Counsel for Melissa Napoletano

MEMORANDUM OPINION

Serfass, J. - April 6, 2023

Here before the Court is the appeal of our Order of January 6, 2023, denying the Motion for Judgment on the Pleadings filed by The Philadelphia Contributionship Insurance Company against Brad Menaker and Melissa Napoletano. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate

Procedure 1925(a), respectfully recommending that our Order of January 6, 2023, be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of the April 5, 2020 death of Lisa Marie Napoletano. On March 17, 2022, Melissa Napoletano, Individually and as Administratrix of the Estate of Lisa Nicole Napoletano, filed a wrongful death and survival action against Brad E. Menaker in the Court of Common Pleas of Lackawanna County alleging negligent and reckless conduct which resulted in the fatal injuries sustained by Miss Napoletano.[1] The underlying civil complaint alleges that Mr. Menaker was the owner of a 2016 Polaris Sportsman 520 all-terrain vehicle (hereafter "ATV") which was operated at all times by a minor, J.M. According to the complaint, Mr. Menaker is the owner of certain real property situated at 19 Sokoki Circle, Jim Thorpe, Carbon County, Pennsylvania. That property is covered by a policy of insurance issued by The Philadelphia Contributionship Insurance Company.[2]

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[1] Melissa Napoletano was appointed Administratrix of the Estate of Lisa Nicole Napoletano by the Register of Wills of Carbon County on November 2, 2020.

[2] Brad Menaker made a claim for defense in indemnity under two Philadelphia Contributionship Insurance Company policies. One such policy is a homeowner's policy which was issued relative to Mr. Menaker's Philadelphia residence. The other policy is a dwelling policy which was issued relative to his Carbon County vacation home. The parties agree that the homeowner's policy would not provide coverage for the subject accident.

The complaint alleges that on March 18, 2020, J.M. was operating the Menaker ATV and Lisa Nicole Napoletano was a passenger on that ATV. Prior to that date, it is alleged that Mr. Menaker regularly permitted minors to use his ATV on roads adjacent to/connected to/leading to and/or necessary to access his real property. It is further alleged that at the time of the accident on March 18, 2020, J.M. was operating the ATV on School House Road in Penn Forest Township, Carbon County, Pennsylvania, which is adjacent to/connected to/leads to and/or is necessary to travel on to access the Menaker property, when he negotiated a left-hand curve and the ATV's right-side tires entered gravel on the berm causing the ATV to exit the roadway and strike two trees. Miss Napoletano sustained serious bodily injuries and died eighteen days later.

On July 5, 2022, The Philadelphia Contributionship Insurance Company (hereafter "Appellant"), filed a Declaratory Judgment Complaint in this Court against Brad Menaker and Melissa Napoletano, Individually and as Administratrix of the Estate of Lisa Nicole Napoletano, (hereinafter "Appellees"), alleging that it has no duty to defend because there is no coverage under the dwelling policy. Appellant contends that the Motor Vehicle Liability Exclusion forecloses coverage. Appellees argue that

Appellant has failed to prove that the ATV crash did not occur on an insured location and that the instant motion for judgment on the pleadings should be denied accordingly.

Procedurally, the Declaratory Judgment Complaint was reissued on August 22, 2022. On September 14, 2022, Appellee Napoletano filed an Answer and New Matter to Appellant's Complaint. On September 19, 2022, Appellant filed a Reply to Appellee Napoletano's New Matter. On October 3, 2022, Appellee Menaker filed an Answer and New Matter to Appellant's Complaint. On October 13, 2022, Appellant filed a Reply to Appellee Menaker's New Matter.

On October 27, 2022, Appellant filed the instant Motion for Judgment on the Pleadings. Appellant argues that there are no disputed issues of material fact and that it is entitled to relief because (1) all claims under the homeowner's policy are excluded by the "motor vehicle" exclusion; (2) all claims for negligent entrustment under the dwelling policy are excluded by the "motor vehicle" exclusion; and (3) the "owned premises" exclusion is a separate bar to coverage. (Appellant's Motion for Judgment on the Pleadings, 10/27/22). Following the submission of briefs, oral argument on Appellant's motion was held before this Court on December 8, 2022. On January 6, 2023, Appellant's Motion for

Judgment on the Pleadings was denied without prejudice to Appellant's right to file further pre-trial motions following the completion of discovery.

On February 2, 2023, Appellant filed a Notice of Appeal to the Pennsylvania Superior Court. On February 8, 2023, we ordered Appellant to file of record and serve a concise statement of the matters complained of in its appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). (Court's Order of 02/08/23). In compliance with our order, Appellant filed its concise statement on February 24, 2023.

ISSUES

In its "Concise Statement of Errors Complained of on Appeal", Appellant raises the following issues which we will address seriatim:

1. Whether the Court erred in finding that a public road could qualify as an "insured location" under the Appellant's homeowner policy;
2. Whether the Court erred in distinguishing the case law on this issue based on the fact that those cases involved Motions for Summary Judgment, under Rule 1035.1, et. Seq., and the instant motion was one for Judgment on the Pleadings; and

3. Whether the Court erred in failing to take judicial notice that School House Road is a public road and a significant distance from the insured premises in Jim Thorpe, Pennsylvania.

DISCUSSION

Pursuant to Pennsylvania Rule of Civil Procedure 1034(a), a motion for judgment on the pleadings may be filed at any time after the relevant pleadings are closed. In evaluating a motion for judgment on the pleadings, all averments of fact properly pleaded in the adverse party's pleadings, and every reasonable inference that we can draw therefrom, must be taken as true, or admitted, unless their falsity is apparent from the record. Pocono Summit Realty, LLC v. Ahmed Amer, LLC, 52 A.3d 261, 267 (Pa.Super. 2012). The parties cannot be deemed to admit either conclusions of law or unjustified inferences. Jones v. Travelers Insurance Company, 514 A.2d 576 (Pa.Super. 1986). Further, the trial court must confine its review to "the pleadings themselves and any documents or exhibits properly attached to them." Consulting Engineers, Inc. v. Ins. Co. of N. America, 710 A.2d 82, 84 (Pa.Super. 1998). Judgment on the pleadings may be granted "...only where the moving party's right to succeed is certain and the case is so free from doubt that trial would clearly

be a fruitless exercise." Conrad v. Bundy, 777 A.2d 108, 110 (Pa.Super. 2001).

In its motion for judgment on the pleadings, Appellant argues that the exception to the motor vehicle liability exclusion in Appellee Menaker's dwelling policy is inapplicable and, therefore, it owes no duty to defend and indemnify Appellee Menaker in the underlying wrongful death and survival action filed against him by Appellee Napoletano. In that action, Appellee Napoletano argues that Appellee Menaker negligently entrusted J.M. with the ATV when he known or should have known that the minor driver would operate the ATV on roads adjacent to/connected to/or leading to the property, including School House Road, which is used in connection with the residence property. Specifically, Appellant asserts that the site of the ATV accident, (Schoolhouse Road, located in Penn Forest Township, Carbon County, Pennsylvania), is a public roadway and thus cannot be an "insured location" under the dwelling policy. (Appellant's Motion for Judgment on the Pleading, 10/27/22). However, Appellees argue that Appellant has failed to demonstrate that the crash did not occur on an insured location and that, in any event, the pending matter is not so clear on the face of the pleadings that the case can be disposed of

without an opportunity to conduct pretrial discovery. We agree with Appellees.

A. "Public Road" Qualifying as Insured Location

We note that an insurer's obligation to defend does not arise every time an insured is sued. Instead, an insurer need only defend an insured in a claim "when the underlying lawsuit falls within the coverage of the policy". The Philadelphia Contributionship Insurance Co. v. Shapiro, 798 A.2d 781, 786 (Pa.Super. 2002). Moreover, the obligation of an insurer to defend an action against its insured is fixed solely by the allegations contained in the third party's underlying complaint. Erie Insurance Exchange v. Fidler, 808 A.2d 587, 590 (Pa.Super. 2002).

At the time of the ATV crash, Appellee Menaker was insured by Appellant under the terms of a dwelling policy for the property located at 19 Sokoki Circle, Jim Thorpe, Pennsylvania. Under the Personal Liability Section of that policy, Coverage L-Personal Liability holds that: "If a claim is made or a suit is brought against an 'insured' for damages because of 'bodily injury'...caused by an 'occurrence' to which this coverage applies we will pay up to our limit of liability for the damages for which the 'insured' is legally liable.

However, the policy is subject to several exclusions. Under the exclusions:

> 1. Coverage L-Personal Liability and Coverage M-Medical Payments to Others do not apply to "bodily injury" or "property damage:"
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> ...
>
> e. arising out of:
>
> (1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers owned or operated by or rented or loaned to an "insured;"
>
> (2) the entrustment by an "insured" of a motor vehicle or any other motorized land conveyance to any person; or
>
> (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) or (2) above.
>
> This exclusion does not apply to:
>
> ...
>
> (2) a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and:
>
> (a) not owned by an "insured": or
>
> (b) owned by an "insured" and on an "insured location".

Therefore, while there is a general exclusion for accidents arising out of the use of a motor vehicle, there is an exception for ATV vehicles also known as motorized land conveyances

designed for recreational use off public roads, not subject to motor vehicle registration. There is coverage for the subject crash if the ATV was owned by an "insured" which in this case, it was, and on an "insured location".

The policy defines "insured location" as:

a. The "residence premises":

b. The part of other premises, other structures and grounds used by you as a residence and;

(1) which is shown in the Declarations or

(2) which is acquired by you during the policy period for your use as a residence;

c. Any premises used by you in connection with a premises in 4a and 4b above;

...

Here, Appellees contend that the use of the area in which the accident occurred constitutes an insured location because the premises was used by Appellee Menaker in connection with his residence premises. In her civil complaint, Appellee Napoletano pled that Mr. Menaker regularly permitted minors, including J.M., to use his ATV on roads adjacent to/connected to/leading to and/or necessary to access his property including School House Road. Therefore, considering only the pleadings, the exception to the

exclusion applies to permit a finding of coverage because the crash location area was used by Appellee Menaker in connection with his residence premises and therefore constitutes an insured location.

In support of their argument, Appellees cite to and rely upon State Farm Fire & Cas. Co. v. MacDonald, 850 A.2d 707 (Pa.Super. 2004). In MacDonald, the Superior Court upheld the trial court's finding that the homeowner's insurance policy provided coverage for a pending wrongful death suit filed against the insured, David McDonald.

Mr. MacDonald owned ATV vehicles that he rode on his property and in an adjacent field. *Id.* at 708. Additionally, Mr. MacDonald's guests would use the ATV vehicles on the MacDonald property and on a field adjacent to the property. *Id.* On one occasion where a guest was riding the ATV on the field adjacent to the property, the guest collided with some trees resulting in the guest's death. *Id.* Mr. MacDonald's homeowner's insurance was issued by State Farm which filed a declaratory judgment action averring that the homeowner's policy neither provided coverage for the crash nor obligated it to provide a defense on MacDonald's behalf. *Id.*

The Superior Court found that Mr. MacDonald was entitled to coverage under the policy. *Id.* at 712. After reviewing the

policy and the facts, the Court held that for coverage to apply, Mr. MacDonald must have "used" the adjacent field "in connection with" his residence premises in order for the adjacent field to qualify as an insured location. *Id.* at 710. The Court found that the insured used an adjacent field in connection with his residence premises when MacDonald repeatedly rode his ATV from his property onto the field and back. *Id.* at 711.

The Court in MacDonald defined the terms "use" and "in connection with" by their plain and ordinary meanings because, as in this case, the policy failed to define the terms. *Id.* at 711. As defined in MacDonald:

> 'use' means 'continued or repeated exercise or employment' or 'habitual or customary practice'. 'Connection' means 'the act of connecting: a coming into or being put in contact' and 'with' is defined as 'alongside of: near to'.

Id.

Within its decision, MacDonald cited to Nationwide Mut. Ins. Co. v. Prevatte, which involved an ATV crash on a trail between the insured's property and a neighbor's property. Nationwide Mut. Ins. Co. v. Prevatte, 108 N.C.App., 152, 423 S.E.2d 90, 91 (N.C.App. 1992). In that case, the testimony established that the insured's children regularly rode ATVs on the trail where the crash occurred; that the family used the trail for walking;

and that the family had been walking and riding on the trail for several years and that the walks or ride began and ended on the insured's property. *Id.* at 92.

In the instant matter, Lisa Nicole Napoletano was on the Menaker property when J.M. started to drive the ATV. While J.M. was riding the ATV with Miss Napoletano as the passenger, he negotiated a left-hand curve and the right side tires of the ATV entered gravel on the berm and the ATV exited the right side of the roadway and struck two (2) trees. The road where Miss Napoletano was injured is a roadway adjacent to the Menaker property located at 19 Sokoki Circle, Jim Thorpe, Pennsylvania. Appellee Napoletano had pled that Mr. Menaker regularly permitted minors, including J.M., to use his ATV on roads adjacent to/connected to/leading to and/or necessary to access his property including School House Road. Based upon the facts of this case as pled, Appellee Menaker used the roads surrounding his property, including School House Road, in connection with his residence premises. At the current stage of litigation, we must accept as true all facts pled by Appellees. Therefore, we find that Appellee Napoletano has sufficiently alleged that the area where the crash occurred was regularly used in connection with the residence premises for coverage to apply under the policy.

B. Distinguishing Summary Judgment and Judgment on the Pleadings

In its Concise Statement of Errors Complained of on Appeal, Appellant also claims that we erred in distinguishing "substantially similar, persuasive case law" based on the fact that those cases involved motions for summary judgment, under Pa.R.Civ.P. 1035.2, while the instant motion seeks judgment on the pleadings, under Pa.R.Civ.P. 1034. In its Concise Statement, Appellant argues that "there is no functional difference between a summary judgment motion and judgment on the pleadings motion when evaluating a carrier's duty to defend, and, on the facts pled, the denial of PCIC's motion had the functional effect of converting a dwelling policy into a motor vehicle liability policy."

Appellant cited several cases with factual scenarios similar to the instant matter in support of its motion for judgment on the pleadings. However, in those cases, and as referenced in our Order of January 6, 2023, the procedural history indicates that the trial courts addressed summary judgment motions following the close of discovery. See Nationwide Mut. Ins. Co. v. Fardner, 79 PA. D. & C. 4th 150, 16-64 (C.C.P. Huntington 2006); Haines v. State Auto Prop. and Cas. Ins. Co., No. 08-CV-5715, 2010 WL 1257982

(E.D.Pa. Mar. 25, 2010); O'Brien v. Ohio Casualty Ins. Co., 2002 MDA 2015, 2016 WL 6237891 (Pa.Super. Oct. 25, 2016).

As previously indicated, a motion for judgment on the pleadings is proper where the pleadings evidence that there are no material facts in dispute such that a trial would be unnecessary. Pennsylvania Financial Responsibility Assigned Claim Plan v. English, 664 A.2d 84, 86 (Pa. 1995). In reviewing such a motion, the trial court looks only to the pleadings and any documents properly attached thereto. Id. When considering a motion for summary judgment, the record and any inferences therefrom must be viewed in the light most favorable to the non-moving party and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Davis v. Pennzoil, 264 A.2d 597 (Pa. 1970). However, "...parties seeking to award entry of summary judgment against them may not rest upon the averments contained in their pleadings. On the contrary, they are required to show, by depositions, answers to interrogatories, admissions or affidavits, that there is a genuine issue for trial." Washington Fed. Savings and Loan Ass'n v. Steins, 515 A.2d 980 (Pa.Super. 1986).

While only the pleadings between the parties to a motion for judgment on the pleadings must be closed prior to the filing

of the motion, a motion for summary judgment requires that the adverse party be given adequate time to develop the case and such a motion will be premature if filed before the adverse party has completed discovery relevant to the action. The purpose of [Rule 1035.2] is to eliminate cases prior to trial when a party cannot make out a claim or a defense after relevant discovery has been completed, the intent is not to eliminate meritorious claims prematurely before relevant discovery has been completed. See Pa.R.Civ.P. 1034(a) Note and Pa.R.Civ.P. 1035.2 Explanatory Comment -1996.

Here, in order to properly evaluate Appellant's duty to defend in the underlying action, this court requires the benefit of a full evidentiary record which can only be compiled following the completion of relevant discovery.

C. Judicial Notice

Finally, Appellant claims in its Concise Statement: "...*even* if accepting the defendant's contention that the proximity of this *public* road to the insured premises could somehow be a proper consideration, on the "four corners" of the Complaint *vis-à-vis* the "four corners" of the policy, these locations are not adjacent, and, in any event, the court can properly take judicial notice that School House Road is a public road a

significant distance from the insured premises in Jim Thorpe, Pennsylvania." We find that Defendant's claim of error based on judicial notice lacks merit because counsel never requested that this Court judicially notice any such matter. See Ware v. McKnight, 534 A.2d 771, 772-773 (Pa.Super. 1987).

Pennsylvania Rule of Evidence 201 provides that "[t]he courts may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Pa.R.E. 201. Rule 201 further provides that "[t]he court: (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information." Id.

In the instant matter, Appellant did not request that this Court take judicial notice of the proximity between School House Road and the insured premises. Furthermore, Appellant never supplied this Court with the information necessary to take judicial notice of the proximity of the road to the Menaker property. As a result, this court was neither requested nor required to judicially notice any fact relevant to Appellant's motion for judgment on the pleadings. Hence, the court had full discretion

to decide whether or not to take judicial notice of the proximity of the road and did not err by failing to do so.

CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be denied and that our Order of January 6, 2022 be affirmed accordingly.

BY THE COURT:

Steven R. Serfass, J.

A TRUE AND CORRECT COPY:
ATTEST:
Kayla M. Summel
PROTHONOTARY