

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

TROY DENGLER and	:	
LYNNEA DENGLER,	:	
Plaintiffs	:	
vs.	:	No. 20-0644
	:	
NATIONWIDE PROPERTY &	:	
CASUALTY INSURANCE COMPANY,	:	
Defendant	:	
	:	

2024 AUG -2 PM 2:54
CARBON COUNTY
PROthonotary
FILED

Gerald Strubinger, Jr., Esquire Counsel for Plaintiffs
John Anastasia, Esquire Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - AUGUST 2, 2024

In this appeal, Plaintiffs, Troy Dengler and Lynnea Dengler (hereinafter "the Denglers") claim that this Court erred in a multitude of ways in denying their motion for partial summary judgment and granting the cross motion for summary judgment filed by the Defendant, Nationwide Property & Casualty Insurance Company, (hereinafter "Nationwide"). After reviewing the Statement of Matters Complained of on Appeal filed by the Denglers, and as explained in this Opinion, and the Opinion addressing those underlying motions for summary judgment, this Court respectfully requests that the Appellate Court find the appeal meritless and affirm our decision.

FACTUAL AND PROCEDURAL BACKGROUND¹

After the Denglers filed their Notice of Appeal on June 10, 2024, this Court issued an Order directing them to file a Concise Statement of the Errors Complained of on appeal. On July 2, 2024, that Concise Statement was filed. In that Concise Statement, the Denglers claimed that:

1. The trial court erred by entering summary judgment against Plaintiffs upon Motion of the Defendant.

2. The trial court erred by denying the Motion for Partial Summary Judgement in favor filed by Plaintiffs.

3. The trial court erred by ruling upon facts that should have been presented to a jury.

4. The trial court erred by ruling upon facts that should have been presented to a jury, in particular, whether Plaintiff Troy Dengler was vehicle-oriented (as to his truck), vehicle-oriented (as to one of the vehicles he was delivering), or highway or sidewalk-oriented.

5. The trial court erred by ruling upon facts that should have been presented to a jury, in particular, whether Plaintiff Troy Dengler was engaged in a transaction essential to the use of the vehicle at the time.

¹ This Court dispenses with the recitation of any further factual or procedural background and simply refer to the attached Memorandum Order and Opinion dated May 21, 2024 which outlines some of that background. This Court also incorporates Troy Dengler's testimony from two separate depositions attached to each parties' Motion for Summary Judgment.

6. The trial court erred in applying the "regular use exclusion" contained in the Plaintiffs' policy.

7. The trial court erred in its application of the facts here to the regular use exclusion.

8. The trial court erred in finding that the regular use exclusion applies to the facts of this case.

9. Alternatively, the trial court erred in finding as a matter of law, and not a question of fact properly reserved for the jury, that the regular use exclusion applies to the facts of this case.

10. The trial court erred by finding as fact, rather than allowing the jury to determine the facts, that Troy Dengler was not "vehicle oriented" at the time of the accident.

11. The trial court erred by finding as fact, rather than allowing the jury to determine the facts, that Troy Dengler was not "engaged in a transaction essential to the use of the vehicle at the time." Nationwide disputes those contentions.

Having determined that a number of these claims have been adequately and appropriately addressed in our attached Memorandum Opinion and Order, this Court will only address Denglers' claim numbers 3, 4, 5, 9, 10 and 11 pertaining to our decision that there were no genuine issues of material fact to present to a jury.

LEGAL DISCUSSION

The Denglers' argument pertaining to these claimed errors contradict their stance at the arguments held on the competing

motions for summary judgment. At that argument held on September 13, 2021, the following colloquy took place between the Court and counsel,

THE COURT: Let me backup one step. Factually, do the parties agree on the facts that happened, as they happened I should say?

MR. STRUBINGER: I think so, Judge.

MR. ANASTASIA: I believe we do. We have both agreed that there's no disputed fact. We both recounted essentially the same version of the facts with the same sources. So one of us may have quoted a paragraph or statement and one did not. But essentially, I don't believe there's any distinction there.

THE COURT: So then from that standpoint, there's no genuine issue of material fact as it related to the facts? This isn't something I can say; well, there might be some dispute as to the facts, so this had got to go to a jury. It is a question of law, period.

MR. STRUBINGER: It's a question of law, Your Honor. This is more or less a declaratory action matter at this stage.

THE COURT: Okay.²

² Notes of transcript from argument held on September 13, 2021, pp. 4-5 lines 24-25, 1-17.

To now argue that the Court erred in not denying both motions for summary judgment and sending this case to a jury because of a factual dispute as to whether Dengler was vehicle oriented or highway oriented is disingenuous and contradicts the position that the Denglers took at that argument when they agreed that there were no genuine issues of material fact and that it was simply a question of law, one this Court decided against the Denglers and in favor of Nationwide.

CONCLUSION

For the reasons stated herein and in the attached Memorandum Opinion and Order, this Court requests the Appellate Court deny the appeal and affirm our decision.

BY THE COURT:



Joseph J. Matika, J.

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

TROY AND LYNNEA DENGLER,	:	
Plaintiffs	:	
	:	
Vs.	:	No. 20-0644
	:	
NATIONWIDE PROPERTY &	:	
CASUALTY INSURANCE COMPANY,	:	
Defendant	:	

Gerald Strubinger, Jr., Esquire	Counsel for Plaintiffs
John Anastasia, Esquire	Counsel for Defendant

FILED
MAY 21 2024
CLERK OF COURT
CARBON COUNTY, PA

MEMORANDUM OPINION AND ORDER

Matika, J. - May 21, 2024

Before the Court are the cross motions of the Plaintiffs, Troy and Lynnea Dengler (hereinafter "Troy Dengler", "Lynnea Dengler", or jointly as "the Denglers") and the Defendant, Nationwide Property & Casualty Insurance Company (hereinafter "Nationwide"). After a lengthy delay awaiting a Pennsylvania Supreme Court decision which impacts this case, this Court is able to address these cross motions. After careful review of the undisputed facts and applicable case law, along with the briefs lodged by the parties, and after argument thereon, the "Plaintiff's Motion for Partial Summary Judgment is DENIED and the "Defendant, Nationwide Property and Casualty Insurance Company's Cross Motion for Summary Judgment is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

On September 8, 2015, Troy Dengler, while in his employ with Brother's Auto Transport, was in the process of unloading his car carrier on Township Line Road, Upper Darby, Delaware County, Pennsylvania, when he was struck by a vehicle driven by Niall McDonald, while in his employ with Kelly General Contracting, Inc. Troy Dengler suffered serious physical and emotional injuries as a result of this accident. Ultimately, in Delaware County, the Denglers settled the action they brought as the tortfeasors, Niall McDonald and Kelly General Contracting Inc. and resolved an additional claim under the Pennsylvania Workers' Compensation Act for lost wage and medical care.

At the time of the accident on September 8, 2015, the Denglers had in place an automobile policy with the Defendant, Nationwide whereon Troy Dengler was named as a policy driver. This policy provided for uninsured and underinsured motor educate with stacked coverage.¹

After the settlement involving the tortfeasors, the Denglers also settled an underinsured claim with the insurance company for Troy Dengler's employer for policy limits.²

The Denglers have instituted this action against Nationwide

¹ In total, the amount of available coverage was \$400,000.00 per person and \$1,200,000.00 per accident.

² That policy paid the Denglers \$15,000.00.

in a two (2) count³ complaint alleging breach of contract for refusing to pay under the terms of their personal vehicle policy. Nationwide has filed an answer and new matter to that complaint along with a counterclaim in declaratory judgment alleging, *inter alia*⁴ that judgment should be declared in favor of Nationwide and against the Denglers on the basis that coverage in this instance is excluded based upon the "regular use exclusion" contained within the Denglers' policy. The Denglers filed a reply to the counterclaim specifically arguing that the "regular use exclusion" is against public policy and even if it were not, the facts of this case do not warrant the application of the regular use exclusion.

The Denglers filed their Motion for Partial Summary Judgment on June 11, 2021 claiming they are entitled to judgment in their favor on the issue of the regular use exclusion as being violative of the Motor Vehicle Financial Responsibility Law. Alternatively, if not a violation, the facts of the case do not support the applicability of the regular use exclusion.

Nationwide has filed a Cross Motion for Summary Judgment alleging that the "regular use exclusion" applies to allow for it

³ One count was brought against Nationwide by Troy Dengler and the other count was brought by Lynnea Dengler, both for the policy limits stacked.

⁴ Nationwide also raised other possible exclusions, including the "car for hire" exclusion but because of our ruling on the regular use exclusion, this Court does not need to address this possible exclusion.

to deny coverage under the Denglers' policy.

Thus, the two issues before the Court are as follows:

1) Does the regular use exclusion contained in the Denglers' insurance policy with Nationwide, violate the Pennsylvania Motor Vehicle Financial Responsibility Law? and

2) Is the regular use exclusion, if it does not violate the Pennsylvania Motor Vehicle Financial Responsibility Law, apply to the facts of this case such that it would allow Nationwide to deny coverage?

The Court will address these issues seriatim.

LEGAL DISCUSSION

"Summary judgment is proper only where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See *Potter v. Herman*, 762 A.2d 1116, 1117 (Pa.Super. 2000) citing *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900 (Pa. 1989); *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757 (Pa.Super. 1989). See also *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). See generally *Pestalozzi v. Philadelphia Flyers, Ltd.*, 576 A.2d 72 (Pa.Super. 1990).

"[S]ummary judgments, like judgments on the pleadings, should only be granted in the clearest of cases[.]" See *Kotwisinski v. Rasner*, 258 A.2d 865, 869 (Pa. 1969). See also *Prince v. Pavoni*,

302 A.2d 452, 454 (Pa.Super. 1973) (internal citations omitted) ("It is well settled and beyond reasonable dispute that such a severe dispositive procedure should not be granted except in the 'clearest' of cases where there is not the least doubt as to the absence of a triable issue of material fact.").

"The burden of proving the absence of any genuine issue of fact is on the moving party and all doubt in reference thereto must be resolved against that moving party." See *Prince v. Pavoni*, 302 A.2d at 454 citing *Schacter v. Albert*, 239 A.2d 841 (Pa.Super. 1968). See also *Potter v. Herman*, 762 A.2d at 1117-1118 citing *Merriweather v. Philadelphia Newspapers, Inc.*, 684 A.2d 137, 140 (Pa.Super. 1996) ("In determining whether to grant a motion for summary judgment, the court must view the record in the light most favorable to the non-moving party and resolve all doubts against the moving party when determining if there is a genuine issue of material fact.").

Here, there do not appear to be any genuine issues of material fact. Rather, the parties argue that it is the application of the law to those facts that is in dispute. Those facts are derived from the deposition of Troy Dengler.⁵

⁵ Apparently, Troy Dengler was deposed twice, once for the litigation involving tortfeasors McDonald and Kelly General Contracting, Inc. and once for the instant litigation. Both depositions are attached to the Motions for Summary Judgment with the original litigation's deposition attached to Nationwide's Motions and the deposition involved here attached to the Denglers' Motion.

I. "Regular Use" Exclusion - Violation of Pa. Motor Vehicle Financial Responsibility Law

The first issue to decide is whether the regular use exclusion violates the Pennsylvania Motor Vehicle Responsibility Law and is therefore unenforceable as it appears in the Dengler vehicle policy. Recently, in *Rush v. Erie Insurance Exchange*, 308 A.3d 780 (2024), the Supreme Court held "that the 'Regular Use' Exclusion is a permissible limitation on of UIM (underinsured motorist) coverage under the MVERL" and is otherwise valid and enforceable. *Id.* at 801.

II. Application of Regular Use Exclusion to Denglers

Next, this Court next turns to the issue of whether the facts of this case are such that the regular use exclusion applies in the Denglers' policy. The "Regular Use" Exclusion reads:

Coverage exclusions

This coverage does not apply to . . .

10. **Bodily injury** suffered while *occupying a motor vehicle*:

a) owned by;

b) furnished to; pr

c) available for regular use of:

you or a **relative**, but in not insured for Auto Liability coverage under this policy. It also does not apply to **bodily injury** from being hit by any such **motor vehicle**.

(Bolding in policy; italics ours)

Thus, if it is found that the regular use exclusion does apply, the Denglers will be unable to recover any uninsured/underinsured benefits from this policy.

Both parties aptly and appropriately cite to the case of *Utica Mutual Insurance Company v. Contrisciane*, 473 A.2d 1005 (1984). This case sets forth a four-part test to determine if a person is in fact "occupying"⁶ a vehicle which could therefore give rise to the application of the regular use exclusion. As a case of first impression, the *Utica* Court stated:

"Among those jurisdictions which have resolved the issue, there seems to be two basic approaches to interpreting the definition of "occupying". The first is the strict literal approach whereby a person cannot be "occupying" a vehicle unless he, or part of him is inside or in physical contact with the vehicle. The second approach, focuses upon whether the person claiming benefits was performing an act (or acts) which is (are) normally associated with the immediate "use" of the auto. (internal citations omitted).

We believe that the second approach represents the better view, for it is most consistent with the Uninsured Motorist Act, which we have held was intended to protect those "persons who while lawfully using the highways themselves suffer grave injuries through the negligent use of those highways by others." (Emphasis added). In light of this purpose we believe a liberal interpretation of the term *336 "occupying" is required and we cannot accept the narrow and restrictive interpretation which has been urged upon us by appellant. (internal citations omitted).

Therefore, we hold that when a person is engaged in the lawful use of an insured vehicle, he will be considered to be "occupying"⁷ that vehicle within the meaning of the policy, provided he can meet the following criteria:

- (1) There is a causal relation or connection between the injury and the use of the insured vehicle;

⁶ Occupying is defined in the Denglers' policy to mean "in, upon, entering or alighting from."

⁷ Occupying in the *Utica* case was defined as "in or upon or entering into or alighting from", language very similar to the language in the case *sub judice*.

- (2) The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;
- (3) The person must be vehicle oriented rather than highway or sidewalk oriented at the time; and
- (4) the person must also be engaged in a transaction essential to the use of the vehicle at the time. *Id.* at 1009.

As to these four criteria, the Denglers acknowledge that the first two (2) elements are met in that: 1) there is a casual relation or connection between the injury and the use of the insured vehicle; and 2) that Troy Dengler was in a reasonably close geographic proximity to the insured vehicle.

The Denglers contend that the other two elements, namely: 1) that Troy Dengler was not "vehicle oriented" and 2) that Troy Dengler was not "engaged in a transaction essential to the use of the vehicle at the time." Nationwide disputes those contentions and believes that the facts establish those other two elements.

A. Vehicle Orientation

The facts are not in dispute as to what occurred with Troy Dengler and the vehicle he was engaged with. As the driver of this car carrier, he was responsible for delivering vehicles to a dealership in Upper Darby, Delaware County. He had already unloaded five vehicles from his carrier and was in the process of releasing pins to lower the upper ramp to drive the remaining vehicles onto the dealership lot. As he walked towards the rear of the carrier

to pull the ramp out, he was struck by the vehicle driven by McDonald.

In *Tyler v. Insurance of H.A.*, 457 A.2d 95 (1983), the court had noted that a person is vehicle oriented and is considered to be occupying a motor vehicle until he severs all connections with it. Likewise, in *McGilley v. Chubb and Son, Inc.*, 535 A.2d 1070 (1987) *allocator denied*, 553 A.2d 964 (1988), the court determined that a cab driver, who left his cab to borrow a cigarette and go into a restaurant for lunch, but was unfortunately struck by a bus, was highway, not vehicle oriented, because he "had severed his relationship with his cab at the time of the incident." *Id.* at 1075-76. Lastly, the court held, in *Schultz v. Nationwide Insurance Co.*, 541 A.2d 397 (1988), that the driver of a vehicle, who was struck by another vehicle while refilling her gas tank after having run out of gas and had returned from obtaining it, was vehicle oriented. The court went on to state "[b]ecause she was engaged in a transaction essential to [her vehicle's] use, it is beyond serious dispute that she was vehicle oriented . . . any other conclusion would be wholly unrealistic." *Id.* at 393.

Clearly, all of Troy Dengler's actions and conduct on the date in question at the time of the accident pertained to his car carrier and was oriented towards that vehicle. Nationwide has met the third prong of the *Utica* test.

B. Transaction Essential to the Use of the Vehicle

Again, the facts here are not in dispute, the Denglers claim that Troy Dengler was not engaged in a transaction essential to the use of the car carrier. Nationwide proves otherwise.

The Denglers argue that his unloading of the vehicles from the company car carrier was extraneous to that parked company car carrier. We disagree. The Denglers conclude that Troy Dengler's job duties required him to unload cars from his truck to deliver them to the dealership. That concession does not make the car carrier extraneous to unloading the vehicles on it. . . . it is part and parcel of the entire operation of the car carrier. Would it be any different than him unloading pallets of merchandise from a box truck or unloading a load of 2B stone from a dump truck? We think not. The fact remains that whatever activity it is, it is a "transaction essential to the use of the vehicle at that time. Thus, this Court believes Nationwide has satisfied this fourth element of the *Utica* test as well.

CONCLUSION

Based upon the foregoing, we enter the following Order:

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

TROY AND LYNNEA DENGLER, :
 Plaintiffs :
 :
 Vs. :
 :
 :
 :
 :
 :
NATIONWIDE PROPERTY & :
CASUALTY INSURANCE COMPANY, :
 Defendant :

No. 20-0644

FILED
MAY 10 10 58 AM '24
PROFFER

Gerald Strubinger, Jr., Esquire Counsel for Plaintiffs
John Anastasia, Esquire Counsel for Defendant

ORDER OF COURT

AND NOW, this ~~21st~~ day of May, 2024, upon consideration of "Plaintiffs' Motion for Partial Summary Judgment", the brief lodged in support thereof, and the Memorandum of Law lodged by the Defendant, Nationwide Property & Casualty Insurance Company, in opposition thereto, and also in consideration of the "Defendant, Nationwide Property & Casualty Insurance Company's Cross Motion for Summary Judgment", the Memorandum of Law lodged in support thereof, and Plaintiffs' brief in opposition thereto, and after arguments thereon, it is hereby **ORDERED and DECREED** as follows:

1. The Plaintiffs' Motion for Partial Summary Judgment is **DENIED**; and
2. The Defendant, Nationwide Property & Casualty Insurance Company's Cross Motion for Summary Judgment is **GRANTED**.

Accordingly, in entering judgment in favor of Defendant, Nationwide Property & Casualty Insurance Company and against Plaintiffs, Troy and Lynnea Dengler, this Court finds that the Defendant, Nationwide Property & Casualty Insurance Company is not obligated to pay underinsured motorist benefits to the Denglers' in relation to the September 8, 2015 motor vehicle accident pursuant to the Nationwide Policy 5837E 834421.

BY THE COURT:



Joseph J. Matika, J.

STRUBINGER LAW, P.C.
BY: GERALD STRUBINGER, JR., ESQUIRE
IDENTIFICATION NO. 65327
505 DELAWARE AVENUE
P.O. BOX 158
PALMERTON, PA 18071
(610)-826-7678

ATTORNEY FOR PLAINTIFFS

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY

TROY AND LYNNEA DENGLER,
Plaintiffs

v.

NATIONWIDE PROPERTY &
CASUALTY INSURANCE COMPANY
Defendant

NO. 20-0644

CARBON COUNTY
PROTHONOTARY

2024 JUN 10 PM 1:18

FILED

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Troy and Lynnea Dengler hereby appeal to the Superior Court of Pennsylvania from the May 21, 2024, Order granting the Defendant's Motion for Summary Judgment. This Judgment has been entered on the docket as evidenced by the attached copy of the docket entry.

Respectfully submitted,

STRUBINGER LAW, P.C.

BY:

GERALD STRUBINGER, JR., ESQUIRE
Attorney for Plaintiffs

Dated: June 10, 2024