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

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| **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

**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 Tory 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

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[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) count[3] 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

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[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 dispository procedure should not be granted except in the 'clearest' of cases where there if 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;

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[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 A2d 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 serous 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:

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| **Defendant** | : | |

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.**