

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

ERIE INSURANCE EXCHANGE, :
Plaintiff :
v. : No. 07-0914
ALLAN A. SCHIANO, LORETTA A. :
SCHIANO, AND SHANE A. SCHIANO, :
Defendants :

David R. Friedman, Esquire Counsel for Plaintiff
Gerald F. Strubinger, Jr., Esquire Counsel for Defendants

Civil Law - Underinsured Motorist Coverage/First Party Benefits
- Residency Requirement

1. The terms "domicile" and "residence" have distinct legal meanings. Domicile is the location which a person considers to be his true, fixed and permanent home; the place to which he intends to return when he is away. Residence is the location where a person is physically present and living, *albiet* on a temporary basis.
2. The term "resident relative" as defined and used in the instant automobile policy required the insureds' twenty-seven-year-old son to "physically live" in the insureds' household at the time of his accident in order to qualify for underinsured motorist and first party benefits. Sporadic visits and overnight stays does not satisfy the contractual definition of "physically live."
3. The determination of where a person physically lives is a factually intensive question dependent on the evidence presented in each individual case.
4. Based on the testimony of the claimant's former fiancé and substantial documentary evidence - including hospital records, telephone bills, credit reports, federal and state tax returns, and a worker's compensation claim - the court determined that the claimant physically lived with his fiancé rather than with his parents, the named insureds, at the time of the motor vehicle accident in which he was injured. Because of this determination, the claimant did not qualify for underinsured motorist coverage and/or first party benefits under his parents' policy.

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Gerald F. Strubinger, Jr., Esquire		Counsel for Defendants

MEMORANDUM OPINION

Nanovic, P.J. - December 31, 2009

FACTUAL AND PROCEDURAL BACKGROUND

On June 12, 2006, Shane A. Schiano, then twenty-seven years old, was severely injured when the vehicle in which he was a front-seat passenger struck a tree at high speed. At the time of the accident, Shane's parents, Allan A. Schiano and Loretta A. Schiano (the "Schianos"), were insured through an automobile policy issued by Erie Insurance Exchange ("Erie") under which Shane submitted a claim for underinsured motorist coverage and/or first party benefits (the "Policy"). Erie denied this claim, contending that no coverage existed since Shane was not a resident of his parents' household at the time of the accident. To resolve this dispute, Erie commenced the present declaratory judgment action against Shane and his parents (collectively the "Defendants"). The sole issue in this litigation is Shane's

residency at the time of the accident: if he was then a resident of his parents' household, coverage exists; if not, Shane is entitled to no benefits under the Policy.

Following a two-day hearing held on February 23 and 24, 2009, we found that Shane was physically residing with his fiancée, Danielle McCormick, in her apartment at 211 Gypsy Hill Gardens Apartments, Lehighton, Pennsylvania, at the time of the accident. Since the Schianos then resided at 422 South Street, Jim Thorpe, Pennsylvania, we concluded that Shane was neither covered by nor entitled to benefits under his parents' Policy. This determination formed the basis of our Decree dated February 26, 2009, ruling in favor of Erie.

The Defendants have timely filed a Motion for Post-Trial Relief seeking either judgment notwithstanding the verdict, or in the alternative, a new trial. In short, the Defendants assert either that the verdict was contrary to the evidence, warranting judgment notwithstanding the verdict, or that the weight of the evidence warrants a new trial.¹ For the

¹ In Defendants' Post-Trial Motion, Defendants raise a number of evidentiary issues previously raised *in limine* on which we ruled against Defendants' position. In consequence, we admitted evidence of Shane's address contained in his medical records dated June 12, 2006, and thereafter; of his mailing address provided in conjunction with a worker's compensation claim filed on July 3, 2006; and testimony that he was present at his fiancée's eviction from 211 Gypsy Hill Gardens Apartments on July 5, 2006. All of this evidence tended to show that Shane lived at 211 Gypsy Hill Gardens Apartments and was a resident at this location at the time of the accident.

Although Defendants contend that this evidence is irrelevant to determining Shane's residence at the time of the accident since it documents subsequent conduct and events, we found the evidence was not only recent but clearly

reasons that follow, we deny the Defendants' Post-Trial Motion in full.

STANDARD FOR EVALUATING
DEFENDANTS' CHALLENGES

Instantly we note that "the remedy of entry of judgment in a party's favor is proper only when a party successfully challenges the *sufficiency* of the evidence. On the other hand, the remedy of a new trial is proper when the verdict rendered by the trial court indicates that the trial court abused its discretion when *weighing* the evidence. This distinction is crucial and is repeated *ad nauseum* by the appellate courts of this Commonwealth in both civil and criminal cases." Morin v. Brassington, 871 A.2d 844, 851 (Pa.Super. 2005) (citations omitted; emphasis in original).

"Judgment [notwithstanding the verdict] is an extreme remedy properly entered by the trial court only in a clear case where, after viewing the evidence in the light most favorable to the verdict winner, no two reasonable minds could fail to agree that the verdict was improper." Robertson v. Atlantic Richfield

probative of Shane's residence at the time of the accident. See Comm., Dept. of General Services v. U.S. Mineral Products Co., 927 A.2d 717, 731 (Pa.Cmwlth. 2007) ("The admission or exclusion of evidence is within the sound discretion of the trial court . . . [and] [t]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party."), *aff'd*, 956 A.2d 967 (Pa. 2008). Moreover, the Defendants have failed to cite any law to support their contention that our evidentiary rulings constituted reversible error. "Where [a movant] has failed to cite any authority in support of a contention, the claim is waived." Collins v. Cooper, 746 A.2d 615, 619 (Pa.Super. 2000).

Petroleum Products Co., 537 A.2d 814, 819 (Pa.Super. 1987),
appeal denied, 551 A.2d 216 (Pa. 1988).

In considering a challenge to the sufficiency of the evidence, [we] must view the evidence presented in a light most favorable to the verdict winner, grant that party the benefit of all reasonable inferences, and determine whether the evidence introduced at trial was sufficient to sustain the verdict. A party moving for judgment notwithstanding the verdict (i.e., challenging the sufficiency of the evidence) contends that the evidence and all inferences deducible therefrom, viewed in the light most favorable to the verdict winner, is insufficient to sustain the verdict.

Gorski v. Smith, 812 A.2d 683, 691 (Pa.Super. 2002) (citations and quotations omitted), *appeal denied*, 856 A.2d 834 (Pa. 2004).

In reviewing a request for a new trial based on the weight of the evidence, a new trial will be granted "only where the verdict is so contrary to the evidence as to shock one's sense of justice." Seewagen v. Vanderkluet, 488 A.2d 21, 26 (Pa.Super. 1985). With regard to an appeal challenging the grant or refusal of a new trial, the appellate court will not reverse the trial court's action in the absence of an abuse of discretion or an error of law which controls the outcome of the case. See Allison v. Snelling & Snelling, Inc., 229 A.2d 861, 862 (Pa. 1967).

DISCUSSION

At the time of the accident, the Schianos were the named insureds under the Policy. This Policy provided

underinsured motorist and first-party benefits for the named insureds as well as for any resident relative of the named insurers. The term "relative" as defined in the Policy means:

[A] resident of your household who is:

1. a person related to you by blood, marriage, or adoption, or
2. a ward or another person under 21 years old in your care.

(Plaintiff's Exhibit 32, Pioneer Family Auto Insurance Policy, FAP (4/97), p. 4). The term "resident" is further defined to mean:

[A] person who *physically lives* with you in your household. Your unmarried, unemancipated children under age 24 attending school full-time living away from home will be considered residents of your household.

(Plaintiff's Exhibit 32, Pioneer Family Auto Insurance Policy, FAP (4/97), p. 4) (emphasis added).

This language in the Schianos' policy is both clear and enforceable. In examining this same language, the Court in Erie Ins. Exchange v. Weryha, stated:

We do not find either the term "relative" or "resident" is ambiguous as a matter of law. The term "relative" refers to a blood relative or ward who is a "resident of [the insured's] household." The term "resident" is, in turn, defined as one who "physically lives" in the insured's household. The salient question then, which is apparent from the face of the litigants' briefs, is what constitutes *physically living* with another.

The question of whether one physically lives with another is a factually intensive inquiry and it requires the trial court to look at a host of

factors in reaching a common-sense judgment. We do not find ambiguity in the phrase "physically lives" simply because the policy does not spell out every single factor a court should look at in making this determination.

931 A.2d 739, 742 (Pa.Super. 2007) (citations to record omitted; emphasis supplied), *leave to appeal granted in part*, 958 A.2d 493 (Pa. 2008) (appeal granted to determine whether a child of divorce is *per se* considered a legal resident of both parents' households).

More generally, "[i]n determining the meaning of the word 'residence,' both its object and context must be kept in view." Amica Mutual Insurance Co. v. Donegal Mutual Insurance Co., 545 A.2d 343, 346 (Pa.Super. 1988). In Amica the Court further stated:

The Courts of this Commonwealth have historically recognized the classical definitions of the words domicile and residence. Domicile being that place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.

Residence being a factual place of abode. Living in a particular place, requiring only physical presence.

Though the two words may be used in the same context, the word resident as used in the policy, without additional words of refinement, i.e., permanent, legal, etc., would carry the more transitory meaning.

Id. In Amica, the Court construed the term "resident" to limit coverage to those family members "who actually reside in the household of the insured." Id; see also In re Lesker, 105 A.2d

376, 380 (Pa. 1954) ("[I]n strict technical terminology, a *habitation* may be defined as an abode for the moment, *residence* a tarrying place for some specific purpose of business or pleasure, and *domicile* the fixed, permanent, final home to which one always intends to return." (emphasis supplied)).

Since the familial relationship between the Schianos and Shane has never been disputed, Shane's right to receive benefits under the Policy turns on whether he was physically living with his parents at the time of the accident. On this factual question, we found against the Defendants.

At trial, we were persuaded by the evidence presented that at the time of the accident Shane physically resided and cohabited with his fiancée at 211 Gypsy Hill Gardens Apartments, Lehigh, Pennsylvania. This evidence includes:

- The testimony of Danielle McCormick, Shane's fiancée, that he resided with her full-time from February 2006 through July 2006, applied twice to be added to her lease, had the phone bill in his name, was picked up at her apartment the day of the accident, and only visited his parents a few times at 422 South Street during that time. (N.T. 02/23/2009, pp. 72, 73, 96, 114, 134, 147, 179, 208, 236, 237).
- Pictures showing Shane's clothing and personal property kept at 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibits 27A, 27B, 27C, 27D, and 27E; N.T. 02/23/2009, pp. 85, 87, 89, 90, 92).
- The address listed for Shane and referenced on almost all documents pertaining to the accident in question, including during his hospitalization between June 12 and June 23, 2006, was 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibits 12, 14, 15, 16, 18, 19, 22, 24, 25,

37, 38; N.T. 02/23/2009, pp. 63, 95, 99, 252, 253, 259, 262, 264; N.T. 02/24/2009, pp. 16, 19, 20, 21, 26).

- Hospital records dated June 13, 2006, documenting statements made by Shane's father that Shane "resided with his fiancée." (Plaintiff's Exhibit 15).
- Testimony from the project manager at Gypsy Hill Gardens Apartments that Shane resided with his fiancée at 211 Gypsy Hill Gardens Apartments at the time of the accident in question, and also that Shane's fiancée was evicted from this apartment in part because of her failure to have him properly added to her lease. (N.T. 02/23/2009, pp. 181, 184, 190, 214).
- A credit check performed for the owner of Gypsy Hill Gardens Apartments on May 22, 2006, reflecting Shane's current address as 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibit 34).
- The address Shane provided to his income tax preparer in January of 2006 for purposes of being billed was 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibit 3; N.T. 02/24/2009, p. 41).
- The home address stated in Shane's 2005 1040A federal income tax return, as well as the amendment, both filed with the IRS, is 211 Gypsy Hill Gardens Apartments. This return also claims Shane's fiancée's daughter as a dependent. (Plaintiff's Exhibits 6 and 9; N.T. 02/23/2009, pp. 175, 232, 243, 244, 247; N.T. 02/24/2009, pp. 44, 54).
- Shane's residence as stated in his filed 2005 Pennsylvania income tax return is 211 Gypsy Hill Gardens Apartments. Again, his fiancée's daughter is claimed as a dependent. (Plaintiff's Exhibit 7; N.T. 02/23/2009, p. 176).
- Shane's residence as provided in his filed 2005 local income tax return is 211 Gypsy Hill Gardens Apartments; further, this was filed with Lehigh County, rather than Lehigh Township. (Plaintiff's Exhibit 8; N.T. 02/23/2009, p. 226; N.T. 02/24/2009, p. 53).
- The address provided to All Staffing, Inc., Shane's employer between December 1, 2005, and February 24, 2006, and reflected on his 2005 W-2 was 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibits 4 and 5; N.T. 02/23/2009, pp. 169, 223, 244, 255).

- Statements by Shane's father, Allan Schiano, on or about June 26, 2006, to his insurance agent that Shane did not live at 422 South Street, that Shane stayed at his parents' home approximately three days during the past year, and that Shane was never added to or named in the Policy. (Plaintiff's Exhibits 33 and 36; N.T. 02/23/2009, pp. 23, 25, 34, 39).
- Upon discharge from the hospital, Shane did not return immediately to his parents' home but instead chose to stay with his fiancée. (Plaintiff's Exhibits 20, 21, and 23; N.T. 02/23/2009, pp. 76, 78, 105-106, 265, 266; N.T. 02/24/2009, p. 118).
- A workers' compensation claim form submitted by Shane's counsel approximately one month after the accident for injuries Shane sustained in the accident listed his address as 211 Gypsy Hill Gardens Apartments. The date of the accident was the first day of a new job for Shane; his employer was the driver of the vehicle in which he was injured. (Plaintiff's Exhibit 28; N.T. 02/24/2009, p. 27).

We have no doubt that Shane remained in contact with his parents after moving in with his fiancée. Shane had previously lived at his parents' home in Jim Thorpe beginning sometime in 2004, and began living with Ms. McCormick in September 2005. The fact that he visited his parents, at times bringing his wash and occasionally spending the evening, was not unexpected. The distance between Jim Thorpe and Lehighton is not great; Shane's parents helped him financially; and Shane's relationship with his fiancée, which his parents disapproved of, was volatile. Still, the fact remains that at all times relevant and material to the automobile accident, Shane did not live principally, or even regularly, with his parents.

In Weryha, the Court found that "sporadic visits and overnight stays" by a child were not enough to constitute residency under the child's father's policy and that "the terms 'residence' and 'living' require, at the minimum, some measure of permanency or habitual repetition." 931 A.2d at 744. Similarly, we found in the instant matter that Shane, at most, made sporadic visits and occasionally spent the night at his parents' home.²

² Defendants' evidence included:

- The police accident report, which lists Shane's address as 422 South Street. (Defendants' Exhibit 1).
- Shane's Pennsylvania Driver's License issued in April 2005, which lists his address as 422 South Street. (Defendants' Exhibit 18).
- Medical records of Shane's treatment after the accident with an address of 422 South Street. (Plaintiff's Exhibits 29 and 30).
- Mail addressed to Shane at 422 South Street, consisting of an envelope from 48 Hrs. Video postmarked June 12, 2006, a claim for benefits form from May 2005, and an undated credit card solicitation letter. (Plaintiff's Exhibit 31; N.T. 02/23/2009, pp. 66, 246; N.T. 02/24/2009, p. 133; N.T. 02/24/2009 Volume II, p. 33).
- Testimony by the Schianos that Shane spent considerable time at 422 South Street. (N.T. 02/23/2009, p. 42; N.T. 02/24/2009, p. 130; N.T. 02/24/2009 Volume II, pp. 27, 30).
- Testimony from a next-door neighbor of the apartment at 211 Gypsy Hill Gardens Apartments that she mostly saw Shane at his fiancée's apartment on weekends. (N.T. 02/24/2009, pp. 97, 104).
- Testimony that Shane's fiancée has a poor reputation for telling the truth, had a motive to testify against the Defendants, suffers from both long and short term memory loss, and made prior inconsistent statements to the effect that Shane did not reside with her and that she did not even know him. (N.T. 02/23/2009, pp. 69, 70, 100, 103, 195; N.T. 02/24/2009, p. 99).

The evidence presented by Defendants must be tempered by recognizing the relationship between Shane and his parents and the Schianos' obvious concern for their son's injuries, the Schianos' disapproval of Shane's fiancée, and an understanding that before Shane moved in with his fiancée, he in fact did live with his parents. Additionally, the evidence presented also showed that Shane failed to change the address on his driver's license for more than four months after his parents moved from Jim Thorpe to Coaldale, that the neighbor was preoccupied with taking care of young children and not particularly paying attention to what was happening next door, and that had Shane's fiancée acknowledged to her landlord, a provider of low income housing, that

Viewing this evidence in the light most favorable to the Plaintiff and allowing all reasonable inferences therefrom, the evidence is more than sufficient to support our finding that Shane did not reside at 422 South Street at the time of the accident, and is not entitled to uninsured motorist coverage and/or first party benefits under the Policy. See Robertson, 537 A.2d at 819; see also Gehres v. Falls Tp., 948 A.2d 249, 255 (Pa.Cmwlth. 2008) (“[judgment notwithstanding the verdict] cannot be granted if there is any evidence supporting the verdict” (emphasis ours)); Comm., Dept. of General Services v. U.S. Mineral Products Co., 927 A.2d 717, 723 (Pa.Cmwlth. 2007) (“Judgment notwithstanding the verdict should not be entered where the evidence is conflicting on a material fact”), *aff’d*, 956 A.2d 967 (Pa. 2008).³

Defendants’ request for a new trial based on the weight of the evidence is equally misplaced.

Shane resided with her, her rent would have been substantially increased. When considered in light of all the evidence presented, we are not convinced that our basic finding that Shane physically resided with his fiancée at the time of the accident was in error.

³ The Defendants also argue that at the very least, Shane should have been found to be a dual resident of both 211 Gypsy Hill Gardens Apartments and 422 South Street. First, the Policy only accounts for dual residency as it applies to students who may be living away from home in order to attend school full-time. (Plaintiff’s Exhibit 32). Second, the case law in Pennsylvania as to dual residency for purposes of insurance policies is generally limited to those situations involving children of divorced parents. See, e.g., Erie Ins. Exchange v. Weryha, 931 A.2d 739, 742 (Pa.Super. 2007), *leave to appeal granted in part*, 958 A.2d 493 (Pa. 2008) (appeal granted to determine whether a child of divorce is *per se* considered a legal resident of both parents’ households). Third, as explicitly set forth in the body of this Opinion, the evidence persuasively indicates otherwise. Absent contractual, precedential, or factual justification, we are not prepared to consider Shane a dual resident.

[A] new trial based on weight of the evidence issues will not be granted unless the verdict is so contrary to the evidence as to shock one's sense of justice. A mere conflict in testimony will not suffice as grounds for a new trial. In ruling on a motion for a new trial, the court must review all the evidence.

U.S. Mineral Products Co., 927 A.2d at 723 (citations omitted).

Here, we have reviewed all the evidence. The evidence in support of the February 26, 2009, Decree is voluminous, significant, and persuasive. Under the evidence presented, we believe the Decree is appropriate and should be upheld.

CONCLUSION

For the foregoing reasons, the Defendants' Motion for Post-Trial Relief will be denied in full. Judgment notwithstanding the verdict will not be entered in the Defendants' favor, nor will a new trial be held.

BY THE COURT:

P.J.

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ORDER

AND NOW this 31st day of December, 2009, upon consideration of the Defendants' Motion for Post-Trial Relief, the Plaintiff's Response thereto, and Counsels' submissions and argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Motion is DENIED in full. Judgment is entered in favor of the Plaintiff, Erie Insurance Exchange, and against the Defendants, Allan A. Schiano, Loretta A. Schiano, and Shane A. Schiano.

BY THE COURT:

P.J.