

SUPERIOR COURT  
of the  
State of Delaware

James T. Vaughn, Jr.  
President Judge

Kent County Courthouse  
38 The Green  
Dover, Delaware 19901  
Telephone (302) 739-5332

E. Martin Knepper, Esq.  
Knepper & Stratton,  
1228 North King Street  
Wilmington, Delaware 19801

Thomas P. Leff, Esq.  
Casarino, Christman & Shalk  
P.O. Box 1276  
Wilmington, Delaware 19899

Jennifer R. Hurvitz, Esq.  
White & Williams  
P.O. Box 709  
Wilmington, Delaware 19899

***Re: Penny Kimball, et al., v. Penn Mutual Insurance Company, et al.,  
C.A. No. 05C-06-052 (JTV)***

*Submitted: June 18, 2008*

*Decided: August 29, 2008*

Counsel:

This matter was heard by the Court as a bench trial.

I begin with the conflict between the testimony of Douglas R. Dorsey and the testimony of Jenna Shirley as to who was driving the vehicle when they departed Mr. Dorsey's house in Virginia Beach on the day of the accident. Mr. Dorsey testified that he was driving and drove approximately 15 or 20 miles before asking Ms. Shirley to drive. Ms. Shirley testified that she drove from the very beginning when they left Mr. Dorsey's house. After carefully considering the testimony of both, I find that Mr. Dorsey is more credible. Prior to that day, Mr. Dorsey always drove when they traveled together except for one occasion. I am persuaded that on the day of the accident, Mr. Dorsey believed he could drive, despite his headache, to the destination

***Kimball et al. v. Penn Mutual Insurance Company, et al.***

C.A. No. 05C-06-042 (JTV)

August 29, 2008

at Chincoteague Naval Base. He testified that he thought he might call in sick once he arrived there, but this is not inconsistent with a decision that he believed that he could, at least, make the drive to the naval base, his assigned military duty location for that day. I find that he drove until he concluded that he was no longer able to drive. His testimony was that “[o]nce I started driving, it got worse. That’s when my eyes got really sensitive to light. So that is why I asked Ms. Shirley to drive.” I accept this testimony as fact.

Turning to the legal principles involved, ordinarily, under Virginia’s “omnibus clause,” automobile liability insurance coverage is limited to persons using a motor vehicle with the express or implied consent of the insured.<sup>1</sup>

The Supreme Court of Virginia has recognized an emergency circumstances exception to this general rule under which a person who does not have the owner’s permission to operate the vehicle may become an implied permissive driver.<sup>2</sup>

To establish a *prima facie* case for the emergency circumstances exception, the following circumstances must be proven: (1) that there was an unforeseen incapacity to the driver; (2) which required a substitution of drivers; (3) that the incapacitated driver acted as a reasonable person under the circumstances; (4) and the exception is permitted only while the emergency circumstances exist.<sup>3</sup>

“Emergency” is defined as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.”<sup>4</sup> An emergency, does not require that

---

<sup>1</sup> *State Farm Mut. Auto. Ins. Co. v. GEICO Indem. Co.*, 402 S.E.2d 21, 22 (Va. 1991) (citing the Virginia Omnibus Clause, VA. CODE ANN. § 38.2-2204).

<sup>2</sup> *Id.* at 23.

<sup>3</sup> *Nationwide Mut. Ins. Co. v. Welcome Corp.*, 2001 Va. Cir. LEXIS 388, at \*4.

<sup>4</sup> *State Farm*, 402 S.E.2d at 23 (citation omitted).

*Kimball et al. v. Penn Mutual Insurance Company, et al.*

C.A. No. 05C-06-042 (JTV)

August 29, 2008

the “combination of circumstances” be a life threatening event, but requires more than a mere convenience.<sup>5</sup> Each case must be evaluated to determine whether the reason for the original driver’s incapacity was unforeseen and a substitution of drivers was required.<sup>6</sup> The driver’s evaluation of his ability to drive and the subsequent use or destination of the vehicle are probative evidence of an emergency circumstance, but ultimately, the main concern is whether the driver acted reasonably under the circumstances.<sup>7</sup> Not all emergencies require medical attention or even an altered destination.<sup>8</sup> The act of substituting drivers does not, in and of itself, have to alleviate the original driver’s incapacitating circumstances.<sup>9</sup> However, once an emergency subsides, the implied permission terminates.<sup>10</sup>

In explaining the emergency circumstances exception, the Virginia Supreme Court has stated:

[W]e have repeatedly held that the omnibus clause is remedial and must be liberally interpreted to subserve the clear public policy reflected in it, which is to broaden the coverage of automobile liability policies.

.....

. . . If a driver becomes incapacitated for some reason, concerns over whether a subsequent driver would be covered by insurance should not be a factor in the decision to place a qualified, able driver behind the wheel.

---

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 23–24.

<sup>8</sup> *Id.* at 24.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

***Kimball et al. v. Penn Mutual Insurance Company, et al.***

C.A. No. 05C-06-042 (JTV)

August 29, 2008

. . . The remedial purpose of the omnibus clause is served by fostering drivers decisions to insure the safe operation of vehicles on the roadways. The ultimate issue, however, is whether the driver acted as a reasonable person under the circumstances.<sup>11</sup>

Only three cases in Virginia have evaluated the emergencies circumstances exception to the omnibus clause.<sup>12</sup> In *State Farm v. GEICO*, a daughter was permitted to drive her parents' car, but she was expressly prohibited from allowing anyone else to drive.<sup>13</sup> The daughter became ill during the drive and allowed her friend to drive. The friend had an accident shortly thereafter. The Virginia Supreme Court adopted the exception in that case, but remanded the case to the trial court because there were factual questions that should have been sent to the jury. In *GEICO v. State Farm*, the Virginia Circuit Court recognized an emergency exception when the driver became incapacitated by smoking marijuana.<sup>14</sup> In that case, the driver's mother permitted her to drive and there was no evidence that anyone else was permitted to drive the family vehicle.<sup>15</sup> The Circuit Court found that the daughter reasonably asked the only person

---

<sup>11</sup> *Id.* at 22–23.

<sup>12</sup> *Id.* at 24; *Nationwide Mut. Ins. Co. v. Welcome Corp.*, 2001 Va. Cir. LEXIS 388; *GEICO v. State Farm Mut. Auto. Ins. Co.*, 2000 Va. Cir. LEXIS 151. Notably, one Fourth Circuit Court case arising out of Virginia suggested that it could conceive of an emergency circumstances exception but there was no evidence presented in those cases to go into in depth analysis. *Hopson v. Shelby Mut. Cas. Co.*, 203 F.2d 434, 439 (4th Cir. 1953). Other states have also considered such an exception. *Farmers Ins. Co. v. Schiller*, 597 P.2d 238, 242 (Kan. 1979); *Devall v. State Farm Mut. Ins. Co.*, 249 So.2d 282, 286 (La. Ct. App. 1971); *Mullin v. Fid. & Cas. Co.*, 136 N.W.2d 613, 615 (Minn. 1965).

<sup>13</sup> *State Farm*, 402 S.E.2d at 21.

<sup>14</sup> *GEICO*, 2000 Va. Cir. LEXIS 151, at \*3.

<sup>15</sup> *Id.* at \*1.

***Kimball et al. v. Penn Mutual Insurance Company, et al.***

C.A. No. 05C-06-042 (JTV)

August 29, 2008

in the car who had not smoked marijuana to drive.<sup>16</sup> In *Nationwide Mutual Ins. Co. v. Welcome Corp.*, the Circuit Court recognized an emergency exception when the renter became ill while driving a van full of passengers to a change of command ceremony.<sup>17</sup> The renter suffered back pains prior to making the trip to the ceremony in New Jersey.<sup>18</sup> While in New Jersey, the renter suffered a headache and thus took pain medication Naporsyn, a prescription drug that warned of potential drowsiness.<sup>19</sup> On the return trip, the renter became ill and felt unable to drive.<sup>20</sup> The renter asked her mother to drive.<sup>21</sup> In this case, the exception was invoked in spite of the express rental contract language prohibiting the renter from allowing anyone else to operate the vehicle.<sup>22</sup>

Applying the above-stated principles to this case, I find that Mr. Dorsey experienced an unforeseen incapacity. Although he knew he had a headache, he believed he could make the drive, and it was only after the headache intensified and his eyes “got really sensitive” to the light during the trip that he concluded that it was unsafe for him to drive. I am persuaded that he reasonably concluded that his increased distress during the trip impaired his ability to see and drive safely. I am also persuaded that under the Virginia law as stated above, the condition was sufficient to require a substitution of drivers.

---

<sup>16</sup> *Id.* at \*3.

<sup>17</sup> *Nationwide*, 2001 Va. Cir. LEXIS 388, at \*1.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at \*4–5.

***Kimball et al. v. Penn Mutual Insurance Company, et al.***

C.A. No. 05C-06-042 (JTV)

August 29, 2008

I am also persuaded that he acted reasonably under the circumstances. Relevant to this point is the fact that Ms. Shirley did not have a driver's license. Whether Mr. Dorsey acted unreasonably in turning the keys over to Ms. Shirley must be determined by what he knew or should have known when he did so. He testified that he did not know that Ms. Shirley did not have a driver's license. There is evidence that she had driven on one prior occasion when he was a passenger. There does not seem to be any evidence that she ever informed him that she did not have a license. I find that Mr. Dorsey's testimony on this point is credible. Even if he simply took it for granted that she could legally drive, the fact that he was unaware that she did not have a license, coupled with the remedial purpose of the exception as explained by the Virginia courts, and his conclusion that he could not safely drive, render his conduct reasonable.

For the foregoing reasons, the prayer of Penn Mutual Insurance Company and Harleysville Mutual Insurance Company for a declaratory judgment is ***granted*** as requested.

**IT IS SO ORDERED.**

---

President Judge

oc: Prothonotary  
cc: Order Distribution  
File