IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER M. KEATING, DANIEL DRAGONETTE AND MARIE DRAGONETTE, HIS WIFE, BRIAN DORSEY, DAVID BOYD, AND ONE BEACON INSURANCE COMPANY,	)	
Plaintiffs,	)	
v.	)	C.A. No. 00C-10-223 WCC
JAMES D. GOLDICK, AND LAPP ROOFING AND SHEET METAL CO., INC., A FOREIGN CORPORATION,	)	
Defendants.	)	
CINCINNATI INSURANCE COMPANY, INC., AN OHIO CORPORATION,	)	
Plaintiff,	)	
v.	)	C.A. No. 01C-11-027 WCC
LAPP ROOFING AND SHEET METAL COMPANY, INC., AN OHIO CORPORATION, GATOR'S BAR, A DELAWARE CORPORATION, NATIONWIDE INSURANCE ENTERPRISE, A FOREIGN CORPORATION, JAMES GOLDICK, BRIAN SHAW, JEFFREY SORRELS, JAMES VALENTINE, TIMOTHY LAYFIELD, DANIEL DRAGONETTE, BRIAN DORSEY, DAVID BOYD, AND CHRISTOPHER KEATING,	)	
Defendants.	)	

Submitted: November 19, 2003
Decided: April 6, 2004

MEMORANDUM OPINION

On Defendant Lapp Roofing and Sheet Metal Company's Motion for Summary Judgment. Granted in Part. Denied in Part.

On Plaintiff Cincinnati Insurance Company's Motion for Summary Judgment. Granted.

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CARPENTER, J.

Defendant Lapp Roofing and Sheet Metal ("Lapp Roofing") has filed a Motion for Summary Judgment pursuant to Superior Court Civil Rule 56 claiming its employee was not acting within the course and scope of his employment at the time of the November 5, 1999 incident which precipitated this litigation and that the evidence does not support the claim they negligently entrusted the company vehicle to their employee. Lapp Roofing's insurer, Cincinnati Insurance Company, Inc. ("Cincinnati Insurance") seeks a declaratory judgment that it has no obligation to provide coverage for damages suffered during the same incident involving this employee as the conduct was intentional and that the employee was not operating the motor vehicle in accordance with the permission that had been granted by his employer. For the reasons set forth below, Defendant Lapp Roofing's Motion for Summary Judgment is **granted in part, denied in part**.[1] Plaintiff Cincinnati Insurance Company's Motion for Summary Judgment is **granted.**

FACTUAL BACKGROUND

This case arises from a motor vehicle accident that occurred on November 5, 1999 at Gators Restaurant and Bar, located at 519 East Basin Road, New Castle,

[1]Plaintiffs asserted two theories of Lapp Roofing's liability and Lapp Roofing moved for summary judgment on both theories. This Court heard argument on May 27, 2003 and denied summary judgment as to whether Lapp Roofing negligently entrusted the vehicle to Goldick. This Court reserved decision as to whether Goldick was acting within the scope of his employment. *See* 05/27/2003 Tr. at 36.

Delaware. Lapp Roofing is an Ohio corporation headquartered in Dayton, Ohio but provides construction services in several states. In October 1999, Lapp Roofing sent James Goldick ("Goldick") and other Lapp Roofing employees to work on a roofing project at Acro Extrusion in Wilmington, Delaware. Lapp Roofing's company policy prohibited employees from driving company vehicles for personal purposes and Lapp Roofing entrusted Goldick, as job foreman, to enforce the company policy while on assignment in Delaware. Lapp Roofing had provided Goldick a white Ford van to transport the workers to the job site and to provide transportation to meals and other necessities.

On Friday evening, November 5, 1999, Goldick and another Lapp Roofing employee, James McNees, went to Gators Bar and Restaurant and Goldick, after eating and drinking for several hours, was ejected from the bar. Shortly thereafter, at approximately 10:50 p.m., Goldick drove the company vehicle onto the curb in front of the bar striking two people in the parking lot and approximately seven individuals on the curb outside the bar. Subsequently, the police stopped the van and apprehended Goldick. Goldick was arrested and plead guilty to two counts of first degree assault, one count of second degree assault and one count of first degree reckless endangering. The injured individuals, Christopher M. Keating, Randall T. Linney, Brian Dorsey, David Boyd, Daniel Dragonette, and Marie Dragonette

("Plaintiffs"), filed a personal injury claim against Goldick and named Lapp Roofing as an additional defendant.

PARTIES' CONTENTIONS

The injured Plaintiffs' theory of Lapp Roofing's liability is two-fold. First they assert that Goldick was in the course and scope of his employment with Lapp Roofing at the time of the incident and as a result, Lapp Roofing is vicariously liable for his negligent acts. Secondly, they argue that Lapp Roofing negligently entrusted the company van to Goldick.[2]

The essence of Lapp Roofing's summary judgment motion is that they did not have a relationship with Goldick that would implicate the principles of vicarious liability because at the time of the incident, Goldick was not acting within the course and scope of his employment. Lapp Roofing argues that Goldick's actions, i.e. being intoxicated, arguing with the owners of Gators, driving the company vehicle on the sidewalk and in the parking lot injuring bystanders, cannot be reasonably considered to be within the scope and course of Goldick's employment because Goldick's presence and actions at the bar were for his personal benefit and not for the benefit

[2]As previously mentioned, at the May 27, 2003 hearing, this Court denied Lapp Roofing's Motion for Summary Judgment on the theory that Lapp Roofing negligently entrusted the company van to Goldick. As such, the Court will not examine the merits of that motion in this opinion.

of Lapp Roofing. Moreover, Lapp Roofing asserts that its company policy prohibited the use of company vehicles for personal purposes and that their employees knew they were not permitted to leave the hotel with the company vehicle on their personal time while on out-of-state jobs.[3]

To counter Lapp Roofing's assertions, the injured Plaintiffs argue that Lapp Roofing's reading of the "dual purpose" doctrine is too restrictive. They assert that in *Wilson v. JOMA, Inc.*, the court stated,

> [f]rom the dual purpose rule it follows that conduct of an employee, although done in part to serve the purposes of the servant or a third person, may be within the scope of employment if the employer's business actuates the employee to any appreciable extent. (citation omitted) The mere fact that the primary motive of the servant is to benefit himself or a third person does not cause the act to be outside the scope of employment.[4]

To that end, they contend that Lapp Roofing's business in Delaware caused its employees to be separated from their usual leisure activities and therefore actuated those employees to an appreciable extent. As such, Plaintiffs argue that it is unrealistic for Lapp Roofing to believe that its employees in Delaware would exclusively use the company vehicle in connection with the roofing project so

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[3] *See id.* (citing W. Reynolds Dep., p. 15-16, C. Batin Dep., p. 28-32, J. Ehresmann Dep., p. 18-19, J. Traynor Dep., p. 20-21).

[4] *See* Plaintiff's Response at 2 (citing *Wilson v. JOMA, Inc.*, 537 A.2d 187 (Del. 1988)).

Goldick's conduct was within the course and scope of his employment with Lapp Roofing and as a result, Lapp Roofing is liable for Goldick's alleged negligent acts.

Cincinnati Insurance is a property and casualty insurer in Ohio who issued two insurance policies to Lapp Roofing. The first policy was issued in March of 1999 and it was a business automobile insurance policy. The second policy, also issued in March of 1999, is a commercial umbrella liability insurance policy. Cincinnati Insurance seeks a declaratory judgment that it has no obligation under these policies to provide coverage to any injured party arising from the incident on November 5, 1999, as the conduct of Goldick is excluded by the policy provisions.

STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact, thus entitling the moving party to judgment as a matter of law.[5] If a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts to clarify the application of the law, summary judgment is not appropriate.[6] When presented with a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party.[7] Moreover, the court is required to examine all

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[5] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

[6] *See Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. 1995).

[7] *See Matas v. Green*, 171 A.2d 916 (Del. 1961).

pleadings, affidavits and discovery materials provided to the court and accept all non-disputed facts as true.[8]

DISCUSSION

(A) Scope of Employment

The first issue before this Court is whether Goldick was acting within the course and scope of his employment with Lapp Roofing when Goldick drove the company vehicle on the curb and in the parking lot of the Gators Restaurant and Bar injuring several individuals. To determine whether an employee is acting within the course and scope of his employment at the time of an incident, the courts in Delaware follow the Restatement (Second) of Agency, Section 228[9]. This section provides,

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.[10]

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[8] *See Camac v. Hall*, 698 A.2d 394 (Del. Super. 1996).

[9] *See Coates v. Murphy*, 270 A.2d 527 (Del. 1970).

[10] Restatement (Second) Agency, § 228.

This event occurred after normal working hours, and it is obvious to the Court that Goldick was not hired to engage in bar fights or to drive into individuals with the Lapp Roofing vehicle. It also appears that the actions of Goldick that evening were not directly beneficial to his employer nor was it reasonably expected conduct by Lapp Roofing employees in the performance of a roofing job. As such, the Court finds that Goldick's actions do not agree with the elements in Section 228(1).

When an employee combines his personal business with that of his employer, courts in Delaware address the dual purpose rule[11]. This rule is followed when the "conduct of an employee, although done in part to serve the purposes of the servant or a third person, may be within the scope of employment if the employer's business actuates the employee to any appreciable extent."[12] In other words, "[t]he mere fact that the primary motive of the servant is to benefit himself or a third person does not cause the act to be outside the scope of employment."[13] In addition, whether an employee is acting within the course and scope of his employment is based on the particular facts and circumstances of each case.[14] Therefore, the Court will consider the facts of this case in light of these standards.

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[11] *See Wilson v. Joma*, 537 A.2d 187, 189 (Del. 1988).

[12] *Id.* (citation omitted).

[13] *Id.* (citation omitted).

[14] *See Screpesi v. Draper-King Cole, Inc.*, 1996 WL 769344, at * 2 (Del. Super.).

There comes a point in every litigation where common sense will make some conclusions obvious. If the injured Plaintiffs were not involved in this litigation and were simply asked whether they believe that an individual who used an employer's truck late at night to go to a bar and consume alcohol was acting within the scope of that employer's employment, they would without hesitation say no. Logic and common sense would lead any reasonable person to that same conclusion. So when one starts from this premise, the question now becomes what is factually different in this case that would discount that conclusion.

One could argue that sending a work crew from Ohio with only a work truck as transportation would be a sufficient deviation. To a degree, the Court agrees this allows the range of covered conduct to be expanded. Obviously a crew who is assigned for several days or weeks to a remote location will need to utilize the company vehicle to get meals or other necessities associated with that stay. Therefore, if this event had occurred as the employees were leaving Happy Harry's after they obtained a needed prescription or from Denny's Restaurant after a meal, the Court believes these foreseeable and logical consequences of a lengthy stay away from home would bring the conduct within the scope of employment under the dual purpose rationale. However, no reasonable person could conclude this limitation on available transportation would provide the mechanism to expand the coverage to a

drunken brawl that occurred after hours and was unassociated with the employee's work or associated with his stay. Such conduct is so adverse to the employer that no conceivable benefit could be derived. It is completely unrelated to the employer's business and does not advance the work for which the employees were sent to this location. Here, Goldick used the van to go drinking with another employee and drove the van in the parking lot and on the curb injuring various individuals. No jury could reasonably conclude that Goldick's conduct was actuated, even in part, by a purpose to serve his employer. The mere fact that Goldick was in Delaware to perform a job on behalf of Lapp Roofing is insufficient to find that Goldick's actions were actuated by a purpose to serve his employer. This incident did not occur during working hours and Goldick decided to go to Gators and become intoxicated for purely personal reasons and not to serve Lapp Roofing's interests whatsoever. As such, the Court finds that Goldick was not acting within the course and scope of his employment when the negligent conduct occurred, and to that issue, the Motion for Summary Judgment is granted.

(B) Insurance Coverage

The next issue raised by this litigation is whether the insurance policies, issued by Cincinnati Insurance, to Lapp Roofing, provide coverage for claims, demands or damages asserted by the injured parties which arose from the November 5, 1999

incident. Specifically, at issue is whether Goldick's actions constituted an "accident" and are therefore covered under the insurance policies and whether the intentional act exclusion of the insurance policies applies thereby preventing recovery. The parties also dispute what jurisdictional law is applicable and controlling as to this event and whether Goldick was an "insured" at the time of the incident because his use exceeded the permission granted by Lapp Roofing.

(1) Conflicts of Law

To begin, this Court must determine which State's law should be applied to this case. The parties disagree about whether Delaware or Ohio law applies to this dispute over insurance coverage, which is a contract action. This is a significant issue in the litigation, as Delaware law holds as a matter of public policy, under our motor vehicle financial responsibility laws, the phrase "caused by an accident" in an insurance policy must be interpreted from the standpoint of the injured party[15] whereas Ohio law views the issue from the standpoint of the insured.[16] When faced with a conflicts of law issue, the Delaware courts follow the most significant relationship test of the Restatement (Second) of Conflicts.[17] Section 188(2) of the

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[15] *See Hudson v. State Farm Mutual Insurance Company*, 569 A.2d 1168, 1169 (Del. 1990).

[16] *See Thompson, et al., v. Ohio Ins. Comp. et al.,* 780 N.E. 2d 1082, 1086 (Ohio Ct. App. 2002)(citing *Kish v. Cent. Natl. Ins. Group of Omaha,* 424 N.E. 2d 288 (Ohio 1981)).

[17] *See* Restatement (Second) of Conflicts, section 188; *Travelers Indemnity Company v. Lake*, 594 A.2d 38 (Del. 1991).

Restatement lists the five contacts to be considered in determining choice of law in a contract action:

> (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.[18]

This case involves an Ohio insurance policy issued in Ohio to an Ohio corporation, Lapp Roofing. The parties negotiated the insurance contracts in Ohio. The Cincinnati Insurance agent in Ohio acquired the insurance policies and Lapp Roofing paid the required premiums in Ohio. The obligations imposed upon Cincinnati Insurance under the insurance polices were to be primarily performed in Ohio. The only connection this case has to Delaware is that the incident occurred in Delaware and that those injured are Delaware residents. Since the insurance policies do not contain a choice of law provision, the Court is required to decide this issue pursuant to the most significant relationship test. The combination of the factors discussed above demonstrates that Ohio has the most significant relationship to this contract action and the Court finds that Ohio law should be applied.

(2) Exclusion for Expected or Intended Injury

Cincinnati Insurance argues that the Business Automobile Policy ("Business

[18]Restatement (Second) of Conflicts, section 188(2).

Policy") does not provide coverage for the incident on November 5, 1999 because assuming Goldick is an insured under the policy, his actions do not constitute an "accident." This particular policy provides coverage for the following:

> A. Coverage
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."[19]

The policy defines an "accident" as "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'" The continuous or repeated exposure language has been interpreted by Ohio caselaw as an event that can occur "quickly or gradually" and both would be covered.[20] The policy further limits the covered events by excluding from bodily injury or property damage any expected or intended events from the standpoint of the insured. In other words, reading these provisions together, if the insured expected that personal injury or property damage would occur from his conduct or if the conduct of the insured was an intentional act, coverage could be denied. However, the decision making process as to these issues are factual in nature and therefore are normally left to the jury to

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[19] Cincinnati Insurance's Motion for Summary Judgment, Ex. C, Section II, A.

[20] *See Hybud Equipment Corp., et al. v. Sphere Drake Ins. Comp., Ltd.*, 597 N.E. 2d 1096, 1102-03 (Ohio 1992).

decide unless the specific factual circumstances of a case presents such a scenario that the minds of fair and reasonable jurors could reach only one conclusion.

Cincinnati Insurance argues that Goldick's guilty pleas to various criminal offenses conclusively establish Goldick's intent to injure and as a result, the insurance policies do not provide coverage.[21] A review of the criminal charges in *State v. Goldick*[22] reveals that Goldick plead to criminal acts where the charged mental state is "reckless." As such, the criminal conduct does not satisfy the "intentional" exclusion under the policy. However, recklessly is defined in the criminal code as follows:

> A person acts recklessly with respect to an element of an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that [injury] will result from the conduct.[23]

As such, the issue now is whether an insured who has admitted he acted recklessly which resulted in serious physical injury to others is a sufficient finding to place the

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[21] *See Allstate Insurance Company v. Cole*, 717 N.E. 2d 816, 818 (Ohio App. 1998) (stating that courts repeatedly hold that criminal convictions may conclusively establish intent for purposes of applying intentional-acts exclusion).

[22] *State v. Goldick*, Criminal ID No. 9911005792, (Del. Super. Ct.).

[23] DEL. CODE ANN. Tit. 11, §232 (2003).

conduct within the "expected" exclusion. Unfortunately for those injured by the conduct of Mr. Goldick, the Court believes the only reasonable conclusion to this question is that it does. If one is "aware of" the nature of his conduct and "consciously disregards" the risks that will result from that conduct, it also suggests that he "expected" and recognized that his conduct would cause injuries and ignored that risk. In other words, when someone runs a vehicle into a crowd of people and by his criminal conviction, he admittedly recognized that at the time of the event there was a risk that injury would occur, the expected injury exclusion is satisfied.

Similarly, Cincinnati Insurance argues that the Commercial Umbrella Liability Policy ("Commercial Policy") does not provide coverage for the November 5, 1999 incident because assuming Goldick is an insured, his actions do not constitute a covered "occurrence" under this policy. This policy provides coverage for the following:

> A. Insuring Agreement
> We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance" or for an "occurrence" covered by this policy which is either excluded or not covered by "underlying insurance" because of:
> 1. "Bodily injury" or "property damage" covered by this policy occurring during the policy period and caused by an occurrence;" or

> 2. "Personal injury" or "advertising injury" covered by this policy committed during the policy period and caused by an "occurrence."[24]

After reviewing the policy provisions, the Court agrees that if the event is excluded by the underlying auto business policy, the exclusion would also flow to the umbrella policy.

As a result of the above, Cincinnati Insurance's Motion for Summary Judgment is granted.[25]

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[24]Plaintiff Cincinnati Insurance's Motion for Summary Judgment, Ex. D, Section I, A.

[25] Since the Court has granted summary judgment based upon the exclusive language, it need not address Cincinnati Insurance Company's additional argument that Goldick was not a covered "insured" as his conduct was beyond the permission granted by the owner of the vehicle.

CONCLUSION

For the reasons set forth in this Opinion, Lapp Roofing's Motion for Summary Judgment relating to Goldick's scope of employment is **granted** and Cincinnati Insurance Company's Motion for Summary Judgment is **granted.**[26]

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.

[26] In the briefing of these issues, the injured parties requested the Court to reconsider its decision to deny access to the Court's presentence investigation file in the case of *State v. Goldick*. The Court continues to believe it would be inappropriate to open the door to civil litigants criminal files prepared for the Court's sentencing of a criminal defendant. The chilling effect of such disclosure would be detrimental to the fact finding process important for effective sentencing. The Court also finds there is no reason to believe that Lapp Roofing, at the time they entrusted their vehicle to Goldick, were aware of the "alleged" motor vehicle offenses that may be included in this file.