IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WEST AMERICAN INSURANCE COMPANY,	)	
v.	)	C.A. NO. 03C-11-217-JRS
CHRISTOPHER BOGUSH, SHERRY BOGUSH, ALYSE MCELRONE, ANTONI DUFAJ, THEODORE F. WORK, JR., individually and as guardian of FRANCES WORK, a minor, and LOIS WORK, individually and as guardian of FRANCES WORK, a minor,	)	
v.	)	
THE HARTFORD INSURANCE COMPANY.	)	

Date Submitted: March 1, 2006
Date Decided: April 12, 2006

MEMORANDUM OPINION
Decision After Bench Trial: Verdict for Defendants.

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SLIGHTS, J.

I.

This declaratory judgment matter was tried to the Court over two days ending August 12, 2005. The trial followed the Court's denial of cross motions for summary judgment. The central issue at trial was whether the defendants, Sherry and Christopher Bogush, and particularly their daughter, Alyse McElrone ("McElrone"), had an insurable interest in a motor vehicle that was involved in a pedestrian accident with Frances Work (a minor represented in this case by her parents, defendants, Theodore and Lois Work). At the time of the accident, the vehicle in question (a 1991 Honda Accord) was driven by McElrone's boyfriend, Antoni Dufaj ("Dufaj"), who was uninsured. Mr. and Mrs. Bogush and McElrone argued that McElrone "owned" the Honda and, therefore, it was covered under the Bogush's automobile insurance policy with the plaintiff, West American Insurance Company ("West American").[1] They demanded coverage under this policy from West American when sued by Mr. and Mrs. Work for the injuries sustained by their daughter in the accident. In response, West American filed this action seeking a declaration that it did not owe coverage for

[1]McElrone was a named insured in the West American policy. Dufaj was not covered under the policy. As explained below, West American argued that Dufaj "owned" the vehicle; defendants argued that McElrone owned the vehicle thereby creating an insurable interest in it that was covered under the West American policy.

the accident.[2]

After considering the cross motions for summary judgment, the Court determined that disputed issues of fact remained regarding the circumstances surrounding the purchase of the Honda and its subsequent use by McElrone and Dufaj. These factual issues related directly to the legal issue of McElrone's "insurable interest" in the automobile which the parties, in turn, argued was dispositive of the question of whether West American owed coverage.[3] The factual issues relating to ownership were to be addressed at trial in the context of a legal landscape that the Court understood from the parties to be well settled and undisputed. Unfortunately, the parties' representation in this regard was not well founded as the legal landscape shifted throughout the trial and post trial proceedings.

During discovery, the parties learned that Dufaj had paid for the Honda and had titled and registered the vehicle in his name. According to McElrone and Dufaj, they both intended that McElrone would use the vehicle almost exclusively because her vehicle had been disabled in an accident and was in need of substantial repair. Dufaj

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[2]The Work's uninsured motorist carrier, The Hartford Insurance Company ("Hartford"), was permitted as intervenor to join in the defense of West American's claim that it owed no coverage. For ease of reference, the Court will refer only to the "defense" or "defendants" unless a separate reference to Hartford is justified in the circumstance.

[3]*See* DEL. CODE ANN. tit. 18, § 2706(a) (1999)("No contract of insurance of property or any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at [sic] the time of the loss.").

testified that he intended to give the vehicle to McElrone and that both he and McElrone intended that McElrone's name would appear on the title and vehicle registration.[4] McElrone and Dufaj claimed that McElrone was unable to accompany Dufaj when he went to DMV to do the title work for the vehicle, and Dufaj learned upon his arrival that McElrone's presence was required for her name to appear on the title and registration. Consequently, DMV placed only Dufaj's name on the documents. Both Dufaj and McElrone testified that they intended to go back to DMV to have the paperwork changed but they never got around to it.

The parties stipulated before trial that the title and registration were *prima facie* evidence that Dufaj, not McElrone, was the legal owner of the Honda.[5] According to the defendants, however, the circumstances surrounding the acquisition of the Honda and its subsequent use by McElrone justified a determination that McElrone

[4]Dufaj is the father of McElrone's child and testified that he wanted McElrone to have a vehicle for the benefit of their child.

[5]At various times during the pretrial proceedings and at trial, the parties characterized the vehicle registration as creating a "presumption" of legal ownership. Prior to trial and during trial, the distinction between *"prima facie*" evidence and "presumption" was not drawn by the parties and did not appear to be meaningful. As discussed below, the distinction took on significance in the closing arguments of the lawyers and in the post-trial submissions. The parties now contend that the burden of proof against which the Court must consider the evidence depends upon whether the Court finds that vehicle title and registration creates *prima facie* evidence of ownership or a presumption of ownership.

was the "equitable owner" of the vehicle.[6] The parties agreed that if the Court concluded that McElrone was the "equitable owner" of the Honda, then McElrone, as a named insured in the West American policy, would have an insurable interest in the vehicle that would trigger coverage under the policy. The parties also agreed that the defendants would bear the burden of proving equitable ownership. This was the issue "teed up" for decision in the pretrial stipulation, and this was the controversy the Court expected to try. As the issue was not addressed pretrial or during trial, the Court assumed that the burden of proof would be proof by a preponderance of the evidence.

The evidence presented at trial was consistent with the parties' pretrial representations. There were few, if any, surprises. The Court was able to evaluate the witnesses' credibility and was prepared to make factual findings at the close of the evidence. During closing arguments, however, counsel for West American argued for the first time that the Court must evaluate the defendants' claim of McElrone's equitable ownership against the heightened clear and convincing evidence burden of proof because the defendants had to overcome a "legal presumption" of Dufaj's ownership (created by virtue of the title and registration being in Dufaj's name).

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[6] *See Malloy v. United States Fid. & Guar. Co.*, 1992 WL 179511, at *3 (Del. Super. Ct. June 16, 1992)(recognizing that ownership can be established in equity based on the circumstances surrounding the acquisition and/or use of property even though legal ownership may lie elsewhere).

Apparently unprepared to address this argument, the defendants acquiesced and offered no meaningful response. Accordingly, the Court applied the clear and convincing burden of proof and concluded that the defendants had not met their burden of proving McElrone's equitable ownership of the vehicle under this standard.[7]

The Court's decision on the single issue that was packaged for trial did not end the controversy. Two additional issues were raised in Hartford's closing remarks. First, Hartford argued that the applicable Delaware statute does not, as the parties had previously argued, require a showing of ownership or equitable ownership to establish an insurable interest in the vehicle.[8] According to Hartford, other legally recognized interests may well suffice. In addition, Hartford argued that coverage was available under the West American policy separate and apart from the equitable

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[7]Specifically, the Court found:

> [W]hen the Court considers the fact that at the end of Ms. McElrone's use of this vehicle Mr. Dufaj took the vehicle, sold the vehicle, on terms that he negotiated without any input whatsoever from Ms. McElrone, and then retained the proceeds, I cannot conclude that the plaintiffs (sic) have established by clear and convincing evidence that Ms. McElrone was the equitable owner of this vehicle and that Mr. Dufaj was merely her agent in transferring this vehicle to whomever the purchaser was. Indeed, the fact that Ms. McElrone was not in any way involved in the transaction suggests, at least in part, some reasonable question as to whether she had any interest in it that could be transferred by her. (D.I. 30, at 3-4).

[8]DEL. CODE ANN. tit. 18, § 2706(b)("'Insurable interest' as used in this section means **any** actual, lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction or pecuniary damage or impairment.")(emphasis supplied).

ownership analysis by virtue of a "temporary substitute vehicle" provision in the policy. According to Hartford, if the evidence established that McElrone's usual vehicle was out of service and that she was using the Honda as a "temporary substitute" at the time of the accident, then the vehicle was covered under the policy notwithstanding that it may have been owned by Dufaj. Having not considered these issues prior to or during the trial, the Court directed the parties to provide further briefing.[9]

True to form, the controversy continued to morph and grow. In addition to addressing the issues identified by the Court, the parties' post-trial briefs raised two entirely new issues. First, West American argued for the first time that certain exclusions in the West American policy precluded Frances Work from seeking personal injury protection benefits under the policy. This drew a response from the defendants that West American's construction of its policy offended Delaware's statutory motor vehicle insurance scheme and public policy. The defendants also raised a new argument that the "insurable interest" doctrine does not apply to liability insurance. According to the defendants, the doctrine applies only in the context of

[9]Not surprisingly, West American called foul when the new argument was raised and urged the Court to reject it as untimely. The Court directed the parties to address this issue as well in the post-trial submissions. Hartford then filed a motion to have the Court reconsider its "decision" (in quotes because the issue was not contested at trial) regarding the applicable burden of proof. This issue also was incorporated in the post-trial briefing.

property or casualty insurance. At the Court's direction, West American has replied to these new arguments and the matter is, at long last, ripe for decision.

II.

A. The Burden of Proof

Defendants have moved for reconsideration of the Court's decision to apply an enhanced burden of proof (clear and convincing evidence) to their claim that McElrone was an equitable owner of the Honda. To be fair, the Court didn't really make a decision in this regard; West American argued that the clear and convincing standard applied and the defendants offered no real resistance to this proposition. The defendants have now had an opportunity to consider the issue and have asked the Court to revisit the question on the ground that the Court misapprehended the applicable law.

On a motion for reargument, the "movant must demonstrate [that] 'the Court has overlooked a decision or principal of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected.'"[10] The Court has reviewed the applicable law and agrees with West American that the presumption of ownership created by a vehicle registration or title must be rebutted by clear and convincing evidence:

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[10] *Mainiero v. Microbyx Corp.,* 699 A.2d 320, 321 (Del. Ch. 1997)(citations omitted).

> In an action to recover damages for injuries resulting from the operation of a motor vehicle, the introduction of evidence relating to the registration of the vehicle or the license plates appearing thereon generally raises a presumption or inference of the ownership of the vehicle by the person sought to be held liable. *Evidence introduced by the defendant to meet and repel the presumption must be undisputed, clear, and convincing.* Evidence that the defendant never owned the vehicle, or that his license plates were attached thereon without his consent, has been held sufficient for such purpose.[11]

Although no Delaware authority is directly on point, our law appears to be consistent with this majority view of the issue.[12] Accordingly, the Court is satisfied that it applied the correct standard of proof at trial on the issue of equitable ownership, and that Hartford's Motion for Reconsideration and/or Reargument must, therefore, be

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[11] 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 1305 (1997) (citing *Bogorad v. Dix*, 176 A.D. 774 (N.Y. App. Div. 1917) (emphasis added)). *See also* F.G. Madara, Annotation, *Presumption and Prima Facie Case as to Ownership of Vehicle Causing Highway Accident,* 27 A.L.R.2d 167, 180 (1953) (§ 5. Evidence to rebut - "The evidence introduced by the defendant to meet and repel the presumption or overcome the prima facie case ... must, according to most courts, be undisputed, clear, and convincing.") (*citing Ford v. Hankins*, 96 So. 349 (Ala. 1923); *Patterson v. Milligan*, 66 So. 914 (Ala. Ct. App. 1914); *Frohoff v. Adams*, 108 S.W.2d 615 (Mo. Ct. App. 1937); *Bogorad*, 176 A.D. 774; *Nemzer v. Newkirk Ave. Auto. Co.*, 154 N.Y.S. 117 (N.Y. App. Term 1915); *Williams v. Bass*, 8 Tenn. App. 482 (Tenn. Ct. App. 1928); *Empire Gas & Fuel Co. v. Muegge*, 143 S.W.2d 763 (Tex. Comm'n App. 1940); *Bode v. Jensen*, 222 N.W. 235 (Wis. 1928); *Kruse v. Weigand*, 235 N.W. 426 (Wis. 1931)).

[12] *See Finbinker v. Mullins,* 532 A.2d 609, 613 (Del. Super. Ct. 1987)("The general rule is that proof that a motor vehicle is registered in the name of a person as owner creates a presumption which makes a *prima facie* case of ownership of the vehicle."); *Hudak v. Procek*, 806 A.2d 140, 147 (Del. 2002)("Delaware courts, in many different contexts, have expressed the burden of proof that the adversely affected party must satisfy in order to rebut a legal presumption to be 'clear and convincing evidence.'").

DENIED.[13] The Court's finding of fact at the conclusion of the trial that McElrone was not an "equitable owner" of the vehicle will stand. As discussed below, however, this factual determination is not dispositive of the "insurable interest" question. Indeed, it now appears that the ownership issue tried in this case, at best, has marginal relevance to the ultimate outcome of this controversy.

B. "Insurable Interest" - Property vs. Liability Coverage

As stated, throughout the pretrial proceedings and at trial, the parties argued that the question of whether McElrone had an insurable interest in the Honda was the key to this dispute and was governed by statute.[14] The statute cited by the parties, entitled "Insurable interest; property,"[15] as its title suggests, requires an insured to have an "insurable interest" in property as a predicate to taking out a policy of

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[13]The fact that the "burden of proof" issue surfaced for the first time during plaintiff's closing argument at trial influenced the Court's decision on the motion for reargument in that the Court paid less deference to its decision at trial than otherwise would have been appropriate under the reargument standard. Neither the Court nor defense counsel were prepared to address West American's eleventh hour argument and, consequently, the proposition that an enhanced standard of proof applied to the defendants' case was left untested. It appears, however, that the law on this question is clear and that it was correctly stated by West American at trial, albeit in a manner that put its adversary and the Court at a distinct disadvantage. In this regard, the Court feels compelled to note that "trial by ambush" seemed to be the order of the day in this case for both parties. Such practices must be discouraged. For its part, Hartford raised a significant policy interpretation argument for the first time in counsel's closing remarks. The fact that this was a bench trial does not excuse these tactics. We have discovery, pretrial stipulations and pretrial conferences for a reason: to avoid "trial by ambush" and to promote the interests of fairness and justice for the benefit of the parties and the Court.

[14]*See* D.I. 16, 17, 23.

[15]*See* DEL. CODE ANN. tit. 18, § 2706 (1999)("Section 2706").

insurance on that property. In the absence of an "insurable interest" in the property, the insurance policy will not be enforced.[16]

In its post trial brief, Hartford argues (for the first time) that Section 2706 does not apply here because the insurance at issue is not property insurance; it is liability insurance.[17] In support of this proposition, Hartford cites to *Schwartz v. Centennial Ins. Co.*,[18] where then Vice Chancellor Hartnett held "[t]here is no definition of insurable interest with respect to liability insurance, therefore giving rise to an inference that the insurable interest required, if any, is something other than that required by §2704(c) and §2706(b) and (c)."[19] In response, West American first attempts to distinguish *Schwartz* and then, alternatively, argues that *Schwartz* is at odds with decisions of this court that have applied Section 2706 in the context of automobile liability insurance policies.[20]

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[16]S*ee Draper v. Delaware State Granger Mut. Fire Ins. Co.*, 91 A. 206 (Del. 1914)(holding that a policy of insurance against a loss of property in which the insured has no interest amounts to an unenforceable "wager.").

[17]Once again, the Court is called upon to address an argument that was not presented before or during trial. And, once again, since *both* parties have cast their arguments into a state of perpetual refinement, the Court will try its best to keep up and decide the issues as they come.

[18]1980 WL 77940 (Del. Ch. Jan. 16, 1980).

[19]*Id.* at *3.

[20]*See e.g. Malloy*, 1992 WL 179511.

After carefully considering the issue, the Court is satisfied that the concept of "insurable interest" does apply to liability insurance, albeit in a manner different than the parties have argued here. Moreover, the Court sees no conflict in existing Delaware law on this issue: *Schwartz* and *Malloy* are easily reconcilable.

Hartford is correct that the "insurable interest" at issue in the property insurance context is not implicated by liability insurance. But this does not mean that the concept of "insurable interest" has no role in liability insurance:

> The nature of the required insurable interest in a liability insurance policy is different from the type of interest necessary to support a property insurance policy; in a property insurance policy, the insurable interest often depends on whether the insured has a legal or equitable interest in the property, while the rule for liability insurance depends on whether the insured may be charged at law or in equity with liability against which insurance is taken out. Thus, an insured may obtain liability insurance despite having no financial interest in the property if he or she may be held liable to third persons arising out of the ownership, maintenance or use of the property. To establish an insurable interest for liability coverage, only the insured's legal accountability for an accident or loss must be shown; liability insurance must only be issued in instances where the insured could be held liable.[21]

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[21] 44 AM. JUR. 2D *Insurance* §1004 (2003). *See also* COUCH ON INS. 3D, §41:25 (1995)("As a general rule, liability insurance, like other forms of insurance, must be supported by an insurable interest in the covered risk. This rule is applicable to automobile ... as well as public and other kinds of liability insurance.... This interest does not depend upon the insured's legal or equitable interest in property, but solely upon whether he or she may be charged at law or in equity with the liability against which the insurance is procured."); R.A. Vinluan, Annotation, *Liability Insurance: Insurable Interest*, 1 A.L.R.3d 1193, 1195 (1965)("the right of the insured to recover [from his automobile liability policy] does not depend upon his being the holder, in fact, of either a legal or equitable title or interest in the property, but whether he is primarily charged at law or in equity with an obligation for which he is liable.")(citation omitted).

Schwartz embraced this distinction and explained its significance:

> Liability insurance must be distinguished from property insurance in order to determine the relevant interest sought to be protected. Property insurance is intended to indemnify the policy holder against loss of the thing insured. An interest in the property insured is therefore required in order to effectuate the policy: it is thought that one put to risk will not intentionally incur that risk. The interest required is a pecuniary loss resulting from loss of the chattel. In liability insurance, on the other hand, the insurance is intended to indemnify the holder against claims asserted against him for certain activity with respect to the chattel. The chattel itself is therefore irrelevant except insofar as it may be used to define the risks covered.
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> Since the risk sought to be protected against by liability insurance is liability and not property, it is both logical and supportive of the general policy requiring insurable interest, to require that there be some risk of liability to which the insured is put. In this context, the liability need not be tied to any specific interest or property, since such a concept would not further any definable goal.[22]

Based on the foregoing, it is clear that defendants need not prove that McElrone owned the Honda, equitably or legally, to establish that she had an insurable interest in the West American liability insurance. If she can be "charged at law or in equity" with liability for the accident, then she has an insurable interest from which coverage in the West American policy may be found.

It is at this step of the analysis where *Malloy* offers guidance. In *Malloy,* the court considered the potential liability of an individual claiming an insurable interest

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[22]*Schwartz*, 1980 WL 77940, at *1-2.

in automobile liability insurance. In doing so, the court looked to whether the individual would have an insurable interest in the vehicle involved in the accident for which the individual sought coverage. The court concluded: "Since Whittington did not have access to, use of, or possession of the Datson, Whittington was not open to the risk of liability occurring from the use or operation of the property, and accordingly, no interest existed which necessitated her to insure against."[23] Thus, contrary to West American's characterization of *Malloy*, the decision does not conflict with *Schwartz*. *Malloy* simply used the "insurable interest" analysis under Section 2706(b) as a means to conclude that the claimant there was not subject to liability for the accident that would give rise to an insurable interest.

In this case, the Court already has determined that defendants have failed to establish that McElrone was an equitable owner of the Honda. At first glance, then, it would appear that, like the claimant in *Malloy,* McElrone had no interest in the Honda from which liability for Dufaj's accident with Frances Work could be found. Yet, unlike the claimant in *Malloy,* the undisputed evidence at trial revealed that McElrone regularly used the Honda while her disabled Mazda remained in the shop for repairs.[24] The question remains whether McElrone's ongoing use of the vehicle,

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[23]*Malloy,* 1992 WL 179511, at *3.

[24]*See Id.* at *2(claimant had no possession of or access to the vehicle involved in the accident).

and Dufaj's use at the time of the accident, were such that coverage for the accident can be found in West American's policy.

C. The Temporary Substitute Provision and "Insurable Interest"

Hartford contends that a "temporary substitute" provision in West American's policy provides coverage here because even though McElrone might not have owned the vehicle, the undisputed evidence at trial demonstrated that she used the Honda temporarily while her vehicle was under repair. Before the Court can consider the effect of the "temporary substitute" provision, however, it must first address West American's argument that Hartford's effort to invoke this provision comes too late. Hartford first raised the argument in its closing argument at trial. Hartford argues that its reliance upon the temporary substitute policy provision was directly responsive to West American's prayer for a declaration that no coverage existed. Hartford notes that the factual predicates for the argument were fully addressed during discovery and at trial. The Court agrees.

In its complaint, West American requested "that the Court declare that [it] has no obligation to defend and/or idemnify defendants ... with respect to any claim arising from the June 8, 2003 motor vehicle accident or to pay any claim made by Theodore or Lois Work individually or on behalf of Frances Work as a result of the

accident."[25] West American attached a copy of the Bogush's entire insurance policy to the complaint.[26] No particular provision of the policy was highlighted by West American and none were excluded. During discovery, testimony was elicited from Dufaj and McElrone which foreshadowed their position that McElrone was using the Honda as a temporary substitute for her damaged Mazda. This same testimony was reiterated at trial along with testimony from Ms. Bogush regarding the temporary substitute provisions of her policy. The policy itself was introduced into evidence without objection.

Under these circumstances, the Court will not strike Hartford's temporary substitute argument as untimely. While it would have been helpful if Hartford had previewed this argument for West American and the Court prior to trial, there were certainly plenty of surprise arguments to go around in this case and this one does not stand out from the others. Indeed, given West American's eleventh hour burden of proof argument, the Court cannot help but conjure up images of the proverbial "goose and gander" when considering West American's position here. Finally, it goes without saying that this is West American's policy and West American is presumed to know what the policy says, what it covers, and what it does not cover.

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[25]D.I. 1.

[26]*Id.* at ¶8.

West American's claim of unfair surprise, raised in response to an argument that urges a particular interpretation of its own policy, rings hollow.

On the merits, Hartford points to the following policy language in support of its argument that the policy provides coverage on the Honda as a "temporary substitute" vehicle:

> A. Throughout this policy, "you" and "your" refer to:
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> 1. The "named insured" shown in the Declarations;[27] and
> 2. The spouse if a resident in the same household.
>
> J. "Your covered auto" means:
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> 4. Any auto or "trailer" you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:
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> a. Breakdown;
> b. Repair;
> c. Servicing;
> d. Loss; or
> e. Destruction.
>
> INSURING AGREEMENT
>
> A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident....

[27]Alyse McElrone is listed as an insured ("Listed Driver") in the Declarations. *See* DX 1.

B. "Insured" as used in this Part means:

1. You or any "family member" for the ownership, maintenance or use of any auto or "trailer."
2. Any person using "your covered auto."[28]

When interpreting insurance policies, Delaware courts will take a "common sense" approach and will give effect to all provisions and read them in accordance with their ordinary meaning.[29] "Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it."[30] It is against this backdrop that the Court must interpret the policy provisions at issue here.

West American argues that the temporary substitute provision was intended to cover insureds, like McElrone, when driving a vehicle temporarily while their covered auto is under repair. According to West American, "[i]t was not meant to provide coverage to individuals other than named insureds while driving the substitute vehicle for their own purposes."[31] West American goes on to argue that the Honda ceased to perform its purpose as a temporary substitute vehicle for McElrone

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[28] *Id.*

[29] *SI Mgmt. L.P. v. Wininger,* 707 A.2d 37, 42 (Del. 1998).

[30] *Rhone-Polenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

[31] D.I. 32 at 13.

when Dufaj, the owner of the vehicle, took it for his own purpose.

West American's argument assumes that the Court should endeavor to learn of its intent when it drafted the language at issue and then attempt to implement or facilitate that intent in its construction of the policy. Such an exercise is appropriate only when the Court confronts ambiguous policy language; extrinsic evidence has no place in the interpretation of clear and unambiguous provisions.[32] And the language at issue here could not be clearer. West American's policy provides liability coverage to "any person using [a named insured's] covered auto and was, therefore, an "insured" under the liability coverage portion of the policy." A "covered auto" includes a "temporary substitute" which, in turn, includes a vehicle used by the insured while the insured's vehicle is out of service because of breakdown or repair. The Honda was a "temporary substitute" and was, therefore, a "covered auto." Dufaj was "any person using [a] covered auto" and was, therefore, an "insured" under the liability coverage portion of the policy."[33] Thus, notwithstanding West American's

[32]*See Rhone-Poulenc*, 616 A.2d at 1195-96 ("When the language of an insurance policy is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.")(citation omitted).

[33]The Court notes that the term "any person" is not defined in the policy. There is, for instance, no effort to exclude an owner of the temporary substitute vehicle from this definition. While certainly a relatively rare occurrence, this policy clearly contemplates circumstances, like the circumstances *sub judice*, where an insured may regularly be operating a vehicle that he/she does not own. If West American intended to exclude the owner of the vehicle under such circumstances from the "INSURING AGREEMENT," it easily could have done so.

after-the-fact statement of its intent, the clear language of its policy speaks volumes and reveals that Dufaj is covered under the circumstances.

Having determined that the "temporary substitute" provision is implicated, the issue of "insurable interest"still remains, albeit in a vastly different form than that which the parties presented to the Court before and during trial. Now we are dealing with insurable interest in the context of liability insurance, not property insurance.[34] Now we are dealing with two "insureds" (McElrone and Dufaj), not just one (McElrone). As to McElrone, it is difficult to see her insurable interest with respect to this dispute. The Court has determined that she did not own the vehicle; Dufaj was the owner. Thus, the Works' claim against her as owner of the vehicle will not expose her to liability.[35] The Works also allege that McElrone negligently entrusted the vehicle to Dufaj.[36] Although it is difficult for the Court to contemplate a circumstance where a person who is temporarily using a vehicle can negligently entrust the vehicle to its owner, the Court has not studied this issue and the parties have not addressed it. This can be handled in the underlying personal injury litigation.

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[34]*See* 44 AM. JUR. 2D *Insurance* §1004.

[35]*See* Complaint in C.A. No. 06C-02-247 CHT, at ¶¶ 10-15.

[36]*Id.*

While the issue is unsettled as to McElrone, it is clear that Dufaj, an insured for purposes of this accident under the "Liability Coverage" of the West American policy, has an interest that is insurable. Plaintiffs allege that Dufaj was negligent in his operation of the Honda and that this negligence proximately caused injury to Frances Work. He is, therefore, exposed to liability in a manner that creates an insurable interest in the West American policy.

D. PIP Coverage Under the West American Policy

West American argues that if the Court finds that its policy provides liability coverage under the temporary substitute provision, then the Court must also conclude that personal injury protection ("PIP") coverage is not available to Frances Work under a separate provision of the policy. Specifically, West American argues that the definitions relating to the PIP coverage differ substantially from the liability coverage provisions and reveal an intent not to offer PIP coverage for accidents caused by individuals other than named insureds who are using a temporary substitute vehicle. The applicable provisions of the PIP policy endorsement state:

> 1. Definitions
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> B. "Insured" as used in this endorsement means:
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> 1. Members of the named insured's immediate family who do not have a separate household; and

2. Persons actually residing with and economically dependent on the named insured.

C. With respect to Personal Injury Protection Coverage:

1. "Your covered auto" means a "motor vehicle", owned by the named insured, to which bodily liability coverage of this policy applies and which is registered in Delaware.
2. "Motor vehicle" means a land motor vehicle, including a trailer or semi-trailer used with such vehicle, required to be registered, licensed and insured under the Delaware Financial Responsibility laws.

Under these clear and unambiguous provisions, there is no PIP coverage for Frances Work because the Honda is not "a covered auto" - - it was not "owned by the named insured" - - and Dufaj is not an "insured." Dufaj's status as an "insured" under the liability provisions of the policy arises from the separate and different definition of "insured" contained in that portion of the policy. This definition of "insured" does not apply to the PIP endorsement which contains its own definition of the term. As stated, Dufaj does not fit the definition for purposes of PIP coverage.

Defendants argue that this result violates Delaware's Financial Responsibility law[37] and public policy to the extent that it potentially denies mandatory PIP coverage to a pedestrian injured in Delaware by a Delaware vehicle. West American counters by arguing that it is "not required to comply with Section 2118 with respect to a vehicle not owned by its insured."[38] The Court agrees.

The West American policy provides the coverage mandated by statute, i.e., all vehicles owned by Mr. and Mrs. Bogush and Ms. McElrone carried the minimum liability and PIP coverage required by statute.[39] The "temporary substitute" coverage was voluntary coverage to the extent that it covered vehicles not owned by the named insureds, and covered drivers other than the named insureds. This coverage was not required by statute.[40] The statutory *obligation* to insure the Honda was Dufaj's and he failed to meet it. Dufaj, Hartford and the Works are, in a practical sense, third party beneficiaries of the very broad scope of the temporary substitute liability coverage in that they are not parties to the West American insurance policy but derive

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[37]*See* DEL. CODE ANN. tit. 21, § 2118 (1995)("Section 2118").

[38]D.I. 40, at 6.

[39]*See* Section 2118(a)("No ***owner*** of a motor vehicle registered in the State ... shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum coverage: [to include liability and PIP].").

[40]*See* Section 2118(d)("Nothing in this section shall be construed to prohibit the issuance of policies providing coverage more extensive that the minimum coverages required by this section or to require the segregation of such minimum coverages from other coverages in the same policy.").

a benefit from it. No such benefit is extended to them in the PIP endorsement, and no such benefit is required by statute or public policy.

III.

Based on the foregoing, the Court's verdict is for the defendants. West American is obligated to defend and indemnify Dufaj for the claims that have been brought against him by Theodore and Lois Work, both individually and on behalf of Frances Work, arising from the June 8, 2003 motor vehicle accident. West American does not, however, owe PIP coverage for this accident.

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary