American Economy Insurance Company v. Traylor/Wolfe Architects, Inc. et al Doc. 43

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AMERICAN ECONOMY INSURANCE COMPANY,

Plaintiff,

v. Case No. 3:12-cv-1094-J-32JBT

TRAYLOR/WOLFE ARCHITECTS, INC., a Florida corporation, RICKY LANE TRAYLOR, an individual, and PATRICK WHELAN, an individual,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO EXCLUDE EXPERT WITNESS

The plaintiff insurance company in this declaratory judgment action moves for summary judgment because it believes the automobile accident at the heart of the underlying state court action is not covered by its insurance policy. Plaintiff separately moves to exclude the expert testimony offered by one of the defendants on the grounds that the expert is unqualified to provide the opinion offered and that the opinion is unsupported by the facts. Only one defendant opposes the motions, the individual injured in the accident. The defendant argues that the facts do implicate coverage and that its reliable expert testimony helps prove that.

The Court held a hearing on these motions on June 12, 2014, the record of which is incorporated herein. (Hr'g Tr., Doc. 38.) Upon review of the parties' submissions and oral arguments, the applicable law, and the record, the Court rules as follows.

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I. BACKGROUND

On July 31, 2012, Patrick Whelan filed a personal injury lawsuit against Ricky Lane Traylor and Traylor/Wolfe Architects, Inc. ("Traylor/Wolfe") in the Circuit Court for the Fourth Judicial Circuit in Duval County, Florida relating to a March 7, 2011 automobile accident involving Whelan and Traylor. (Compl. ¶ 8, Doc. 1.) Whelan alleges in his state court complaint that Traylor negligently operated his 2004 Ford Expedition by making an improper left turn in front of Whelan as he was driving his motorcycle, causing the front of Whelan's motorcycle to strike the side of Traylor's vehicle and resulting in personal injuries to Whelan. (Id. at 10-11.) Whelan brings one count for negligence against Traylor and another count for negligence against Traylor/Wolfe based on its alleged vicarious liability for Traylor's negligence as its employee. (Id. at 11-12.) Plaintiff American Economy Insurance Company filed this declaratory judgment suit against Traylor/Wolfe, Traylor, and Whelan seeking a declaration that it had no duty to defend or indemnify either Traylor/Wolfe or Traylor under a business owner's insurance policy it issued to Traylor/Wolfe. (Id. at 2, 8.)

American Economy now moves for summary judgment, arguing that there can be no genuine dispute that it is not obligated under the "Hired Auto and Non-Owned Auto Liability" endorsement and amendatory endorsement to the policy to provide either a defense to Traylor/Wolfe or Traylor in the underlying lawsuit or indemnity for any damages from the accident. (Mot. for Summ. J., Doc. 22; Reply to Mot. for Summ. J., Doc. 32.) Whelan responds that the allegations in the state court complaint and the actual facts developed in discovery do support coverage or at least create a genuine issue of fact preventing the entry of summary judgment for American Economy.

(Resp. in Opp'n to Mot. for Summary J., Doc. 27.)

II. STANDARD OF REVIEW

"When the only question a court must decide is a question of law, summary judgment may be granted." Saregama India Ltd. v. Mosley, 635 F.3d 1284, 1290 (11th Cir. 2011). "The interpretation of an insurance contract is a question of law." N.H. Indem. Co. v. Scott, 910 F. Supp. 2d 1341, 1344 (M.D. Fla. 2012) (quotations omitted). "Summary judgment is appropriate in declaratory judgment actions seeking a declaration of coverage when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." Northland Cas. Co v. HBE Corp., 160 F. Supp. 2d 1348, 1358 (M.D. Fla. 2001) (citation omitted).

Even though American Economy has moved for complete summary judgment in this case, and only Whelan, not Traylor or Traylor/Wolfe, has responded, the Court cannot simply enter summary judgment against a party as unopposed, but must still consider the merits of the motion and the evidence submitted in support to determine whether summary judgment is appropriate. Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1303 (11th Cir. 2009).

III. ANALYSIS

American Economy contends that neither the allegations of the underlying state complaint nor the facts revealed in discovery establish any duty to defend or indemnify on its part. (Doc. 22 at 1-2.) The underlying state complaint alleges that Traylor was an executive officer of Traylor/Wolfe and the owner of the 2004 Ford Expedition at the time of the accident, which, American Economy claims, are enough to exclude

him from qualifying as an insured under the terms of the Hired Auto and Non-Owned Auto Liability endorsement and to establish that there is no duty to defend. (Id. at 9-10; Doc. 32 at 3-4.) American Economy further argues that the actual facts demonstrate that, contrary to the allegations in the state complaint, Traylor was not using the vehicle for a business purpose at the time of the accident, which would also mean he is not an insured and would move the vehicle outside the definition of a "non-owned auto" covered by the endorsement. (Doc. 22 at 11-20; Doc. 32 at 4-10.) Thus, according to American Economy, it has no duty to indemnify either Traylor/Wolfe or Traylor and any prior duty to defend it might have had would cease once it is held to have no duty to indemnify. (Doc. 22 at 9; Doc. 32 at 1.)

In response, Whelan urges the Court to limit its focus to only the allegations in the state complaint and the language of the policy. (Doc. 27 at 6-7, 10.) In his view, the allegations establish that Traylor, not Traylor/Wolfe, owns the vehicle and that he was using it in the course of his work for Traylor/Wolfe at the time of the accident. These allegations sufficiently fall within the language of the policy to trigger a duty to defend, particularly because, in Whelan's view, the policy exclusion of owners of hired and non-owned autos does not apply to an executive officer like Traylor. (Id. at 8-9.) But if the Court must look beyond the state complaint at the actual facts, Whelan argues that there is at least a genuine issue as to whether Traylor was using the vehicle in connection with the business of Traylor/Wolfe.[1] (Doc. 27.)

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[1] Whelan has not filed his own motion for summary judgment, though, at a couple points in his response brief, he does request the Court to enter an order finding that American Economy has a duty to defend the state lawsuit (Doc. 27 at 4, 20).

A. Duty to Indemnify

The parties agree, and the case law confirms, that Florida law applies to this diversity insurance contract case. (Doc. 22 at 7; Doc. 27 at 5); Hartford Accident & Indem. Co. v. Beaver, 466 F.3d 1289, 1291 (11th Cir. 2006). Florida law provides that an insurer's "duty to defend an insured is determined solely from the allegations in the complaint against the insured, not by the true facts of the cause of action against the insured, the insured's version of the facts or the insured's defenses." State Farm Fire & Cas. Co. v. Steinberg, 393 F.3d 1226, 1230 (11th Cir. 2004) (citation omitted); Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 535 (Fla. 1977). The duty to indemnify, on the other hand, "is not determined by the allegations in the complaint, but is instead controlled by the actual facts of the underlying lawsuit." Scottsdale Ins. Co. v. GFM Operations, Inc., 789 F. Supp. 2d 1278, 1285 (S.D. Fla. 2011) (citing Underwriters at Lloyds London v. STD Enters., Inc., 395 F. Supp. 2d 1142, 1147 (M.D. Fla. 2005)); State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1077 n.3 (Fla. 1998).

American Economy has thus far offered a defense under a reservation of rights in the underlying state court action, but contends in its motion that it has no duty to defend or indemnify. Citing to an accurate statement of Florida law that the duty to defend is gleaned from the four corners of the complaint in the underlying action, Whelan suggests that the Court look no further.

It is true that, under Florida law, for there to be a duty to indemnify, there must first be a duty to defend. Wilson ex rel. Estate of Wilson v. Gen. Tavern Corp., 469 F. Supp. 2d 1214, 1218 (S.D. Fla. 2006). But even if there is a duty to defend, it "does

not continue indefinitely" and cuts off once "it is certain that the claim is not covered by the policy at issue." Scottsdale Ins. Co., 789 F. Supp. 2d at 1284. "Put another way, 'the duty to defend ceases when it is shown that there is no potential for coverage, i.e, when there is no duty to indemnify.'" Id. (quoting Underwriters at Lloyds London, 395 F. Supp. 2d at 1146 and citing Sinni v. Scottsdale Ins. Co., 676 F. Supp. 2d 1319, 1329 (M.D. Fla. 2009); First Specialty Ins. Corp. v. 633 Partners, Ltd., 300 F. App'x 777, 777-78 (11th Cir. 2008)).

Discovery in this case is over, and the record is complete. Thus, the Court now must determine if the "actual facts" establish that American Economy has an obligation under the policy to indemnify either Traylor or Traylor/Wolfe.[2] If it does, it must, of course, continue to defend. But if there is no duty to indemnify, American Economy's duty to defend ceases as well.

1. The Insurance Policy

American Economy issued Business Owners policy number BP-761449-3 to Traylor/Wolfe with a policy period of August 27, 2010 to August 27, 2011. (Doc. 1 at 14-101; Doc. 1-1.) The policy includes a "Hired Auto and Non-Owned Auto Liability" endorsement and an amendment to the endorsement that extend the coverage to

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[2] Additionally, American Economy acknowledged at oral argument that a ruling in its favor on the duty to indemnify would render unnecessary a ruling on its argument regarding the application to the allegations in the underlying complaint of policy exclusions for executive officers and other persons operating their own autos. (Hrg. Tr. 10, June 12, 2014, Doc. 38.) Moreover, American Economy concedes in its briefs that these owners exclusions would not resolve the issue of coverage for Traylor/Wolfe anyway. (Doc. 32 at 4.) The Court agrees on both points and therefore resolves the motion based on the duty to indemnify, rather than on the applicability of the exclusions.

include "'bodily injury' or 'property damage' arising out of the maintenance or use of a 'hired auto'[3] by you or your 'employees' in the course of your business" (Doc. 1-1 at 20), or "arising out of the use of any 'non-owned auto' in your business by any person other than you; or any 'non-owned' auto by you or your employees for the purpose of picking up, delivering or road testing the 'non-owned auto.'" (Doc. 1-1 at 4.) The endorsement and the amendatory endorsement together also identify "Who Is An Insured" and what is a "hired auto" and a "non-owned auto":

> **2.** Paragraph **C. Who Is An Insured** in Section II – Liability, is replaced by the following:
>
> Each of the following is an insured under this endorsement to the extent set forth below:
>
> **a.** You;[4]
>
> **b.** Any other person using a "hired auto" with your permission;
>
> **c.** For a "non-owned auto," any partner or "executive officer" of yours, but only while such "non-owned auto" is being used in your business; and
>
> **d.** Any other person or organization, but only for their liability because of acts or omissions of an insured under a., b. or c. above. . . .
>
> . . . .
>
> **C.** The following additional definitions apply:
>
> . . . .

[3] Elsewhere, the policy defines "auto" as "a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But 'auto' does not include 'mobile equipment.'" (Doc. 1 at 69.)

[4] The policy earlier defines "you" as "the Named Insured shown in the Declarations" (Doc. 1 at 28), which is Traylor/Wolfe here (Doc. 1 at 21).

> **2.** **“Hired Auto”** means any “auto” you lease, hire or borrow. This does not include any “auto” you lease, hire or borrow from any of your “employees” or members of their households, or from any partner or “executive officer” of yours.
>
> **3.** **“Non-Owned Auto”** means any “auto” you do not own, lease, hire or borrow which is used in connection with your business. However, if you are a partnership, a “non-owned auto” does not include any “auto” owned by any partner.

(Doc. 1-1 at 21.) The amendatory endorsement includes, among other things, a modified definition of “non-owned auto”:

> Paragraph **C.3** is replaced with the following:
>
> **3.** **“Non-Owned Auto”** means any “auto” you do not own, lease, hire or borrow which is used in connection with your business. This includes “autos” owned by your “employees,” partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business affairs.

(Doc. 1-1 at 4.)

No one disputes that the vehicle here does not qualify as a “hired auto” under the endorsement. For the accident to be covered by the “non-owned auto” liability endorsement, it must have arisen “out of the use of any ‘non-owned auto’ *in [Traylor/Wolfe’s] business* by any person other than you.” (Doc. 1-1 at 4 (emphasis added).) Moreover, an auto can qualify as a non-owned auto only if “used *in connection with [Traylor/Wolfe’s] business*,” and the autos of employees like Traylor only qualify “while used *in [Traylor/Wolfe’s] business affairs*.” (Id. at 4 (emphasis added).) As an executive officer, Traylor himself would only qualify as an insured “while the ‘non-owned auto’ is being used *in [Traylor/Wolfe’s] business*.” (Id. at 21

(emphasis added)).[5]

American Economy argues that Traylor's undisputed testimony shows that the accident did not occur while he was using the vehicle in Traylor/Wolfe business, but while he was on a personal trip. Whelan responds with facts that he feels call into question Traylor's testimony on this issue.

2. The Facts

American Economy and Whelan both rely almost exclusively on Traylor's deposition testimony and, other than their characterizations of the trip he was on at the time of the accident, they agree on nearly all the facts. Thus, unless indicated otherwise, the facts set forth here are undisputed.

At the time of the March 7, 2011 accident, Traylor/Wolfe was an architecture firm that Traylor operated out of an office in his home in Jacksonville, Florida. (Traylor Dep. 5-6, 8, 12, 47, Doc. 20-1.) The firm has since been dissolved, and Traylor is now retired. (Id. at 6, 29-30.) But at the time of the accident, he was the president and the sole architect in the firm. (Id. at 5-6, 45.) The firm's only other employee was his wife Millie, who worked at most ten hours a week as a secretary and bookkeeper. (Id. at 5-7.)

Most days of the week, Traylor would try to work from 8:00 a.m. to 5:00 p.m. so as to be available to the firm's clients, but he did not clock-in or otherwise record his

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[5] Neither American Economy nor Whelan suggests that there is any significance to the differences between "used in your business" and "used in *connection with* your business," or between "business" and "business *affairs*." American Economy stated at oral argument it was unaware of any case law construing these formulations differently and could not think of a way to do so. (Doc. 38 at 18.)

hours on a daily basis. (Id. at 48, 50-52.) As the firm's owner, working out of his home, he would regularly take time out of the day for personal reasons. (Id. at 48, 73, 113.) By 2011, work had fallen off such that Traylor worked perhaps fifteen-to-twenty hours a week. (Id. at 11-12.) At that time, Traylor/Wolfe's sole client was Winn-Dixie, and the sole project the firm had for Winn-Dixie was a large interior/exterior remodeling project in Fern Park, Florida. (Id. at 11.)

In 2004, Traylor bought a 2004 Ford Expedition, using his own personal funds for a down payment and financing the rest through a bank. (Id. at 8-10.) He and his wife were the only names on the title at the time of the accident, and he paid for all its servicing from his personal funds. (Id. at 9, 67.) He also purchased an automobile liability policy for the vehicle from State Farm, naming only him and his wife as insureds. (Id. at 9-10.) Traylor/Wolfe did not own or lease the Expedition (id. at 66), but it was the vehicle Traylor would primarily use for any Traylor/Wolfe business (id. at 60-61).

Traylor kept a mileage log of every work-related trip, whether it was a trip to the post office or a trip to the store to pick up office supplies, so that he could be reimbursed from Traylor/Wolfe. (Id. at 57-60.) Of the approximately seventy-five mileage log entries in 2010 through March 2011, all but three were for trips made in the Ford Expedition. (Id. at 61-62.) The other trips he made in a 2004 Chrysler Sebring he owned that his wife primarily used unless the Expedition was in the shop. (Id. at 10, 61-62.) Still, Traylor did not use the Expedition solely for work, but also regularly for personal purposes. (Id. at 113-14.)

On March 7, 2011, the day of the accident, Traylor's wife was out of town visiting the couple's daughter and her family in North Carolina. (Id. at 19.) Traylor was still in Jacksonville. His plan for the day was to replace his cell phone at a local AT&T store on Southside Boulevard in Jacksonville. (Id. at 14-15.) He had no other business appointments or meetings scheduled that day. (Id. at 19.)

The cell phone was in his wife's name (id. at 15-16, Ex. 5), but he used it for both personal and business purposes (id. at 13, 75-76). For instance, between 8:36 a.m. and 9:38 a.m. that morning, Traylor made or received four calls on his cell phone that related to work on the Winn-Dixie project in Fern Park. (Id. at 68-72.) But the first call he made on that morning on that cell phone was to his wife in North Carolina to see how things were going with their grandsons. (Id. at 67.) The phone number he called for his wife was to a cell phone that at some point was listed to Traylor/Wolfe. (Id. at 54-55.) Relying on a printout from a website and a search on LexisNexis, Whelan posits that the number is still listed as belonging to Traylor/Wolfe. (Id. at Ex. 4; Doc. 27 at 16; Doc. 27-1.)

Traylor left his house on March 7 at approximately 10:00 a.m. and headed straight for the AT&T store, approximately ten minutes away. (Doc. 20-1 at 74, 77.) During his trip to the store, he made another short call to the cell phone his wife uses. (Id. at Ex. 5.) At the store, he bought a replacement for the cell phone he had been using, paying for it with a check on a Traylor/Wolfe checking account. (Id. at 58.) On the firm's 2011 tax return, Traylor listed the cell phone as a company expense (id. at 59); he testified at his deposition that he had intended to reimburse Traylor/Wolfe

for the phone from his personal funds, but never did (id. at 58-59). The phone account was still in his wife's name, though. (Id. at 14-15.) He was at the AT&T store for about twenty-to-twenty-five minutes before he left. (Id. at 15.)

After leaving the AT&T store, Traylor continued to head further away from his house and towards a condominium development in the Palencia neighborhood north of St. Augustine, Florida. (Id. at 14, 16-17.) Palencia was roughly twenty-to-twenty-five minutes away from the AT&T store. (Id. at 16.) Other than the trip to Palencia, Traylor had no other plans for the day. (Id. at 27-28.)

Traylor and his wife had been to the Palencia neighborhood before, and his purpose in going back was to look at the condos in this unfinished development to see if construction had continued and with some eye for possibly investing personally in a unit. (Id. at 17, 78-79, 89.) Traylor/Wolfe had never worked in Palencia, and it had no plans for any work in the neighborhood. (Id. at 18.) Traylor's personal investment idea had not developed much further than a vague idea; he had not made a plan to purchase a unit, had not spoken with any real estate agents, had not gone into a unit, and had not thought about financing beyond that he would have used his personal funds, not Traylor/Wolfe's. (Id. at 79-82.) During his deposition, Traylor described the trip to Palencia that day as "just trying to fill up time." (Id. at 83.)

On the way to Palencia, Traylor spoke with his wife another three times while she was on her cell phone and made one call to his daughter. (Id. at 24-25, 98, Ex. 5.) He described each of these call as personal conversations. (Id. at 24-25.) His call to his daughter started at 10:58 a.m. and he spoke with her and his wife during that call

for four minutes and fifty-nine seconds. (Id. at 98, Ex. 5.) When he hung up, he had nearly arrived at Palencia and had already pulled his vehicle into the left turn lane at the intersection for the neighborhood. (Id. at 98.) Less than a minute later, the accident occurred as he was completing the turn across the opposite lanes of traffic and Whelan's motorcycle collided with the side of the 2004 Ford Expedition. (Id. at 90, 98-99.)

3. "Used in Your Business," "Used in Connection with Your Business," or "Used in Your Business Affairs"

Since it is undisputed that, at the time of the accident, Traylor owned the vehicle and was an employee and executive officer of Traylor/Wolfe, the deciding factor on coverage for Traylor/Wolfe is whether the vehicle was being "used in," or "in connection with," Traylor/Wolfe's business or "business affairs" at the time of the accident.

There is no evidence, other than speculation, to support the conclusion that Traylor's trip to Palencia served any purpose other than his own personal interest. His main purpose in making the trip was to "fill up time" by checking on the status of the Palencia condo development. (Id. at 83.) He had some idea about potentially purchasing a Palencia unit with his own funds, but it is clear from his deposition testimony that he had not taken any steps to make this more than a vague idea. Contrary to Whelan's suggestion, the possibility that, if Traylor decided at some point in the future to purchase a unit, and if he wanted to make some changes to the unit, and if he was allowed to make changes (which was not certain), that he might have used contractor contacts he knew from Traylor/Wolfe, does not somehow insert a

business purpose into his trip. (Id. at 79-85.) Nor does Traylor's guess that, if all these hypotheticals occurred, he might use his architecture license if called upon to do so for some reason. (Id. at 85-86.) Whelan "'cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.'" Hess Corp. v. Moran Towing Corp., No. 3:08-cv-12-J-32MCR, 2009 WL 2365687, at *2 (M.D. Fla. July 30, 2009) (quoting Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)).

Based on the evidence, Traylor's travels on the day of the accident are more properly seen as two separate trips, rather than one trip with a dual purpose. Assuming that traveling to the AT&T store to replace the cell phone was a business trip, once he bought the new phone and left the store, the business purpose was accomplished, and the business trip was over. His second trip to Palencia was purely personal. The auto was no longer being used for a business purpose, and was therefore no longer covered by the endorsement. See El Viejo Arco Iris, Inc. v. Luaces, 395 So. 2d 225, 226 (Fla. 1st DCA 1981) (holding that claimant was no longer in the course of his employment once he had accomplished his assignment). For that reason, Zipperer v. Peninsular Life Ins. Co., 235 So. 2d 473 (Fla. 1970) and the other cases Whelan cites for the "dual purpose doctrine" (see Doc. 27 at 17-19) are distinguishable.

Even if the trip could legitimately be classified as a single trip with the primary business purpose of buying a new cell phone, Traylor's side-trip to Palencia was a clear deviation from that mission. "The established rule in Florida is that when one is engaged in a purely private mission he is not within the scope of his employment until

he returns to the employer's place of business or point of departure." Rodriguez v. Tri-State Carriers, Inc., 792 So. 2d 1253, 1254 (Fla. 1st DCA 2001) (quotations omitted). Though not an insurance coverage case, Sunshine Jr. Food Stores, Inc. v. Thompson, 409 So. 2d 190 (Fla. 1st DCA 1982) provides a useful illustration.[6] There, a district manager for a chain of stores had been inspecting the work of the clerks of one store within his district when he decided to take a drive to "kill time" until he could return after closing. Id. at 190. While on his drive, he was in an accident. Id. The court concluded that, though his initial trip had a business purpose, this drive was a deviation from the course of his employment. Id. at 191.

In this case, Traylor had similarly departed from any business purpose to pursue his own personal interests. As described above, there was no business reason for the trip to Palencia. Moreover, while the AT&T store was about ten minutes from his home, Palencia was another twenty-to-twenty-five minutes further away from his home office. (Doc. 20-1 at 28.)

In the underlying tort action, in which Whelan is the plaintiff, Traylor and Traylor/Wolfe are defendants, and American Economy is not a party, the state court denied a motion for summary judgment filed by Traylor/Wolfe that raised issues similar to those addressed here, but in the context of Traylor/Wolfe's vicarious liability

[6] American Economy and Whelan both cite to authority from the insurance, tort, and worker's compensation contexts in discussing whether Traylor's vehicle was being used in connection with Traylor/Wolfe business. (See Doc. 22 at 11-15; Doc. 27 at 17-20.) While there are important distinctions between these areas of law, such authority is nevertheless helpful in deciding this issue.

for the accident.[7] Reviewing much the same record as this Court,[8] the state court found that "issues of material fact remain on whether Mr. Traylor was within the course and scope of his employment at the time of the accident for the purpose of determining Traylor/Wolfe's vicarious liability to [Whelan]." (3/17/14 4th Judicial Cir. Order, Doc. 40-1 at 67-69.)

While not binding on this Court, the decision of the learned state court judge does give the undersigned pause. Nevertheless, the Court believes its decision here is the right one. Though they both rely largely on the same facts, the legal issue of insurance coverage in this declaratory judgment action is distinct from the issue of vicarious liability in the state tort action. For purposes of coverage under the insurance policy at issue in this action, this Court's reading of the Traylor deposition convinces it that there is no issue of material fact and, as a matter of law, the vehicle was not being used "in Traylor/Wolfe's business," "in connection with Traylor/Wolfe's business," or "in Traylor/Wolfe's business affairs" when the accident occurred. The Court thus concludes that the policy does not provide coverage for the accident. American Economy owes no duty to indemnify, and any duty to defend now comes to an end.[9]

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[7] Whelan provided the Court a copy of the state court order during the hearing (Doc. 38 at 13), and, at the Court's request, submitted after the hearing the parties' state court briefs and the hearing transcript, as well. (See Doc. 40-1.)

[8] The state court materials did include new affidavits from Traylor and Brock, but they do not add anything substantive or otherwise change the Court's analysis of any of the issues addressed in this Order.

[9] American Economy also contends that, in addition to the vehicle needing to have been used in Traylor/Wolfe's business, it needed to have been under Traylor/Wolfe control to some extent for the accident to be covered by the policy. (Doc.

B. Plaintiff's Motion to Strike/Exclude Richard Brock

American Economy separately moves to exclude the testimony of Whelan's accounting expert Richard Brock. Because the Court determines that summary judgment is due to be entered, the motion to exclude is moot. It is worth noting, though, that only American Economy mentions Brock at all in the summary judgment briefing, understandably attempting in its initial motion to preemptively challenge Brock's testimony. (Doc. 22 at 16-19.) Whelan's written response to summary judgment never cites Brock's testimony or even mentions Brock (see Doc. 27), and neither did counsel for Whelan during oral argument (see Doc. 38). In any event, the Court's ruling on summary judgment renders moot the motion to exclude.

Accordingly, it is hereby

ORDERED:

1. Plaintiff's Motion for Summary Judgment (Doc. 22) is **GRANTED**.

2. Plaintiff's Motion to Strike/Exclude Expert Witness Richard Brock and Memorandum of Law in Support (Doc. 21) is **MOOT**.

3. The Clerk is directed to enter judgment in favor of Plaintiff American Economy Insurance Company and against Defendants Traylor/Wolfe Architects, Inc., Ricky Lane Taylor, and Patrick Whelan, stating that each party shall bear its own fees and costs in this case, and declaring that, pursuant to Business Owner policy number

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22 at 11, 20 (citing three out-of-state, unpublished opinions).) Because the Court concludes that the vehicle was not being used for a business purpose at the time of the accident, it does not decide whether this is an accurate statement of Florida law or whether Traylor/Wolfe had exerted a right of control over the vehicle at the time of the accident.

02-BP-761449-3, American Economy Insurance Company owes neither Traylor/Wolfe Architects, Inc. nor Ricky Lane Traylor indemnity for any claims arising out of the March 7, 2011 accident and that any duty to defend has now ended.

DONE AND ORDERED at Jacksonville, Florida this 6th day of August, 2014.

TIMOTHY J. CORRIGAN
United States District Judge

bjb.
Copies:

Counsel of record