NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

THERESA M. WOLFE, ADMINISTRATRIX OF THE ESTATE OF KEVIN T. WOLFE, Appellant v. ROBERT ROSS, Appellee v. STATE FARM FIRE AND CASUALTY COMPANY, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1048 WDA 2012

Appeal from the Order Entered June 21, 2012
In the Court of Common Pleas of Butler County
Civil Division at No(s): 10-30444

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.: FILED: December 24, 2013

Theresa M. Wolfe, Administratrix of the Estate of Kevin T. Wolfe, ("Administratrix"), appeals from the trial court's grant of summary judgment in favor of State Farm Fire and Casualty Company ("State Farm") and its corresponding denial of her motion for summary judgment in this garnishment action. The issue before us is whether the motor vehicle exclusion in Robert Ross's homeowner's policy with State Farm operates to preclude recovery on the facts herein. The trial court concluded that it did. After careful review, we affirm.

Administratrix commenced this civil action for wrongful death and survival against Robert Ross. She alleged the following. In late June 2002, Mr. Ross was the host of a graduation party at his residence at which alcoholic beverages were furnished or made available to nineteen-year-old Kevin Wolfe. Kevin became impaired due to alcohol consumption, and he left the party on a dirt bike owned by Mr. Ross's son, Justin Ross. Complaint, ¶8. "As a direct and proximate result of the impairment caused by the alcohol," the decedent's "vehicle left the road and struck a stationary object." ***Id***. Kevin suffered fatal injuries in the collision. All allegations against Mr. Ross sounded in negligence and arose from the furnishing of alcohol to the minor.

State Farm, Mr. Ross's homeowner's carrier, refused to defend the claim and denied coverage based on the policy's exclusion for injuries arising out of the maintenance and use of a motor vehicle owned by an insured. Prior to trial, the parties agreed that a $200,000 consent judgment would be entered against Mr. Ross. Mr. Ross assigned to Administratrix all of his rights under his homeowner's policy with State Farm, including the right to sue the insurer for breach of contract and bad faith. Administratrix agreed to forego execution against any other assets of Mr. Ross, and to accept any verdict or settlement from any proceeding against State Farm in full satisfaction of the judgment.

On March 8, 2010, the $200,000 judgment was entered in favor of Administratrix, and she proceeded via garnishment against State Farm to attempt to collect the proceeds of Mr. Ross's homeowner's policy. State Farm and Administratrix stipulated to certain facts. It was agreed that, "The plaintiff's decedent, while operating a motor vehicle, struck a fixed object off the insured location, and suffered fatal injuries in the collision." Joint Stipulation ¶ 3. "[Administratrix] contends that coverage is afforded under the terms of the State Farm policy, because [her] decedent died as a direct and proximate result of the impairment caused by the alcoholic beverages allegedly furnished and/or made available to him at a graduation party for Ross' son, which was hosted by Ross, which was covered under the State Farm policy, the policy limits of which are $100,000.00." ***Id***. at ¶ 12. "Ross denied that alcohol was provided to the guests, and State Farm contends that even if furnishing alcohol otherwise were covered, the fact that the decedent's death arose out of the operation of a motor vehicle triggers an exclusion which precludes coverage." ***Id***. at ¶ 13. Finally, the parties stipulated that "this case is now ripe for a decision as to whether there is coverage for Ross under the State Farm policy for the claims made in the underlying lawsuit[.]"[1] ***Id***. at ¶ 16.

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[1] Originally, State Farm retained the right to litigate whether its insured furnished alcohol, and, if so, whether it was a legal cause of the accident, and whether the agreement between Administratrix and Mr. Ross was fair
(Footnote Continued Next Page)

Both parties filed motions for summary judgment. The trial court entered summary judgment in favor of State Farm, and denied same as to Administratrix. Administratrix appealed and filed a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal, and the trial court issued its Pa.R.A.P. 1925(a) opinion.

Administratrix presents two issues:

> A. Whether the trial court erred in failing to find that the motor vehicle exclusion in a homeowner's insurance policy was ambiguous in that it did not state whether the injury must be proximately caused by use of the motor vehicle or simply causally connected with use of the motor vehicle.
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> B. Whether the trial court erred in failing to find that the motor vehicle exclusion in a homeowner's insurance policy was inapplicable to claims where the motor vehicle was operated by the victim and where the only claim of negligence against the insured was that he had negligently furnished alcoholic beverages to the underage operator of the vehicle.

Appellant's brief at 4.

In reviewing the grant of summary judgment, we "may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary." ***Murphy v. Duquesne University***, 777 A.2d 418, 429 (Pa. 2001) (citations omitted). "Our purpose in interpreting insurance

(Footnote Continued) ———————————

and reasonable. State Farm subsequently withdrew that position and stipulated that if the court determined that the policy covered the claim, judgment could be entered against State Farm for the policy limits of $100,000 without further proceedings. State Farm's Motion for Summary Judgment, at n.1.

contracts is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy." ***Babcock & Wilcox Co. v. Am. Nuclear Insurers & Mut. Atomic Energy Liab. Underwriters***, 2013 PA Super 174 *23. Where the contract language is clear and unambiguous, we must give effect to that language unless it violates a clearly expressed public policy. ***Adamitis v. Erie Ins. Exch.***, 54 A.3d 371 (Pa.Super. 2012). A policy provision is ambiguous only when it is "reasonably susceptible of different constructions and capable of being understood in more than one sense" when applied to a particular set of facts. ***Allstate Fire and Casualty Insurance Co. v. Hymes***, 29 A.3d 1169, 1172 (Pa.Super. 2011). Where a policy provision is ambiguous, it is to be construed in favor of the insured and against the insurer. ***Penn-America Ins. Co. v. Peccadillos, Inc.***, 27 A.3d 259, 265 (Pa.Super. 2011) (*en banc*).

Herein, State Farm bases its defense on a policy exclusion. Thus, the burden is on the insurer to establish its application. ***Donegal Mut. Ins. Co. v. Baumhammers***, 938 A.2d 286, 290 (Pa. 2007).

The homeowner's policy in question provides that

> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable.
>
> 7. "Occurrence," when used in Section II of this policy, [Exclusions] means an accident, including exposure to conditions, which results in:

a. bodily injury; or

b. property damage;

during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one occurrence."

The exclusion at issue provides:

Coverage L [liability] and Coverage M [medical payments] do not apply to

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e. bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of:

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(2) a motor vehicle owned or operated by or rented or loaned to any insured.

The trial court held that the policy provision was not ambiguous on the facts herein and upheld the plain meaning. Administratrix assigns this as error and directs our attention to ***Eichelberger v. Warner***, 434 A.2d 747 (Pa.Super. 1981), where identical language was held to be ambiguous because it did not define whether it excluded coverage for injuries proximately caused by the motor vehicle or causally connected with the motor vehicle. Since that finding of ambiguity rested upon very different facts, the facts therein are pertinent to our analysis.

In ***Eichelberger***, the decedent was the driver of a motor vehicle that stopped running on a highway, presumably having run out of gasoline. Decedent and her passenger walked to a gasoline station and, upon their

return with fuel, two men stopped to assist the women. All four persons were gathered near the rear of the vehicle, the decedent positioned partially on the highway. Another vehicle approached and was about to pass the decedent's vehicle at the precise moment when the decedent stepped to the left into its path. That vehicle struck decedent and, in the aftermath, the men who had stopped to render assistance were also injured. At trial, the jury found both the driver and decedent to be negligent.

At issue on appeal was whether the liability provisions of decedent's vehicle policy and/or her homeowner's policy provided coverage. Under the terms of the auto policy, the insurer agreed to pay on behalf of its insured all damages due to bodily injury or death sustained by any person "arising out of the ownership, maintenance, or use of the owned vehicle." ***Eichelberger***, ***supra*** at 749. We construed the words "arising out of" to mean the broader "causally connected with" and not "proximately caused by," in accordance with the Supreme Court's decision in ***Manufacturers Casualty Insurance Co. v. Goodville Mutual Casualty Co.***, 170 A.2d 571 (Pa. 1961). We held that "but for" causation, *i.e.*, a cause and result relationship, was enough to satisfy the vehicle policy provision. The decedent's act of unwittingly stepping into the path of an oncoming car while overseeing the refueling of her vehicle was causally connected with ownership, maintenance and use of her vehicle. ***See Manufacturers Casualty***, ***supra*** (holding a cause and result relationship is enough to

satisfy the "arising out of" provision of an automobile insurance policy). Thus, there was coverage under the decedent's automobile insurance policy.

Under the terms of the decedent's homeowner's policy, the insurance company agreed to pay all damages its insured became legally obligated to pay as damages for bodily injury "caused by an occurrence." ***Eichelberger***, ***supra*** at 750. An occurrence was defined as "an accident, including injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage." ***Id***. However, the policy contained an exclusion for liability for bodily injury "arising out of the ownership, maintenance, operation, use, loading or unloading of (2) any motor vehicle owned or operated by or rented or loaned to any insured." ***Id***.

For purposes of the exclusionary clause in the homeowner's policy, there were joint causes of the accident: the negligence of the passing driver, and the decedent's non-auto related negligent conduct as a pedestrian. We found the policy to be ambiguous because it did not state whether the injury had to be proximately caused by the auto or simply causally connected with the auto. Noting the "different canons of construction applied to exclusionary clauses as distinguished from coverage clauses" and relying upon the rule in ***Manufacturers Casualty***, ***supra***, we held that "for purposes of an exclusionary clause, when the words 'arising out of' the use of an automobile are read strictly against the insurer, then it must be concluded that this clause acts to exclude only those injuries which are

proximately caused by the automobile." ***Eichelberger***, ***supra*** at 752. The negligent driver argued, and we agreed, that when this exclusion was read strictly against the insurer, it did not apply to the decedent's conduct. The injuries were proximately caused by the decedent's movement, not by the use of her vehicle.

State Farm contends that there is no ambiguity surrounding the words "caused by" on the facts herein as the motor vehicle was both the proximate cause and the cause in fact of the injury to decedent. The insurer directs our attention to ***Wilcha v. Nationwide Mut. Fire Ins. Co.***, 887 A.2d 1254, 1259 (Pa.Super. 2005) and ***Allstate Property and Cas. Ins. Co. v. Filachek***, 2011 WL 2111219 (E.D. Pa. 2011), where identical policy language was held to be unambiguous and enforced on similar facts.

In addition, State Farm contends that in ***Eichelberger***, this Court ignored the policy language referring to the cause of the bodily injury, and instead focused on the act that caused liability. The insurer maintains that in ***Wilcha*** and ***Filachek***, both decided decades after ***Eichelberger***, it was the cause of the injury, not the conduct of the insured, which determined whether the exclusion applied. According to State Farm, that is why additional claims based on the insured's conduct, such as negligent entrustment, negligent supervision, and furnishing alcohol to a minor, do not escape the effect of the exclusion.

In ***Wilcha***, parents sued the operator of a motor vehicle that collided with the dirt bike operated by their thirteen-year-old son. The driver brought claims of negligent entrustment against the parents. The parties did not dispute that the homeowner's policy excluded coverage for accidents involving a motor vehicle and that their son was using and/or operating a "motor vehicle," as that term was defined in the homeowner's policy, when the accident occurred. This Court relied upon ***Pulleyn v. Cavalier Insurance Corporation***, 505 A.2d 1016, 1020 (Pa.Super. 1986) (*en banc*), *appeal denied sub nom,* ***Petition of Davis***, 526 A.2d 1190 (Pa. 1987), where we held that the vehicle exclusion in the employer's insurance policy excluded coverage even though the claim was made that the employer negligently entrusted his vehicle to his employee. In denying coverage, we reasoned that it was not the negligent entrustment of the vehicle that caused the plaintiff's injuries, but rather, the use of the vehicle by the employee that caused the harm.[2]

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[2] In ***Pulleyn v. Cavalier Insurance Corp.***, 505 A.2d 1016, 1019-21 (Pa.Super. 1986), this Court surveyed the evolving case law regarding the applicability of vehicle use exclusions to negligent entrustment claims. We acknowledged that some state courts hold that such exclusions do not bar coverage when an insured is sued for negligent entrustment. However, Pennsylvania courts have rejected that approach, reasoning that "although the act of negligently entrusting a motor vehicle is an essential (if not the primary) element of the tort [of negligent entrustment], liability giving rise to the tort is not actually triggered until the motor vehicle is used in a negligent manner resulting in injury." ***Id***. at 1020.

A federal district court applying Pennsylvania law in ***Motorists Mutual Insurance Company v. Kulp***, 688 F. Supp. 1033 (E.D.Pa. 1988), *affirmed*, 866 F.2d 1411 (3d Cir. 1988), arrived at the same conclusion in a case involving injuries sustained by a minor on a mini-bike. The court held that it was not the negligent supervision or negligent entrustment of the mini-bike, but the use of that bike, which triggered the insured's alleged liability, and that the motor vehicle exclusion in the homeowner's policy applied to preclude coverage. In ***Wilcha***, we called this reasoning "sound" and "consistent with more recent Pennsylvania jurisprudence." ***Wilcha***, ***supra***, at 1264.

Filachek involved some alcohol-related claims and claims for negligent supervision that were not limited to use of a motor vehicle. Filachek was a passenger in a vehicle owned and operated by Maher, which struck and killed Mr. Kap. Prior to getting into the vehicle that night, Filachek and Maher spent the evening drinking, and Maher was legally intoxicated. Mr. Kap's personal representative commenced an action for wrongful death and survival against Maher, Filachek, and a bar that they had frequented. Liability against Filachek was premised on claims that he provided Maher with alcohol and encouraged Maher to drink to excess and failed to supervise Maher's driving. Allstate, Filachek's homeowner's carrier, retained counsel on his behalf, but also filed a declaratory judgment action seeking a declaration that it was not obligated to defend Filachek because

the policy excluded coverage on two bases: for injuries arising from the use, or supervision of the use, of a motor vehicle. The first provision excluded coverage for "bodily injury or property damage arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motor vehicle or trailer." It also contained a vehicle supervision exclusion, which excluded coverage "for bodily injury arising out of an insured's negligent supervision of another or statutorily imposed liability arising from the ownership, maintenance, use . . . of any aircraft, vehicle or trailer not covered under that policy."

Filachek argued, as Administratrix argues herein, that the terms of the policy were ambiguous. Mr. Kap's representative asserted, as Administratrix asserts herein, that the exclusions were inapplicable because Filachek's actions were unrelated to the vehicle and constituted a separate, non-automobile-related cause of injury. The court rejected both arguments, finding the liability to be "undeniably intertwined with Maher's use of the vehicle that actually gave rise to the injury." ***Filachek***, ***supra*** at *4. The court continued that the vehicle "was the instrumentality of the injury and the death 'arose out of the use' of a motor vehicle." ***Id***. The court relied upon ***Wilcha*** for the proposition that "any liability-inducing conduct which occurred before such use cannot be divorced from the negligent driving that led to the fatal car accident." ***Id***.; ***Wilcha***, ***supra*** at 1263 n.3.

The court noted that, "the vehicle use exclusion is not directed at those liability-inducing *actions* which relate to the ownership, maintenance, use, or occupancy of a motor vehicle. Instead, the exclusion bars coverage for all 'bodily injury or property damage' which arises out of 'the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motor vehicle or trailer.'" (emphasis original). ***Filachek***, ***supra*** at *4. The court concluded that Allstate was not obligated to defend or indemnify Filachek under these circumstances.

As these cases illustrate, the proper focus of our inquiry is the cause of the injuries rather than the conduct of the insured, contrary to the approach advocated by Administratrix. She maintains that since liability was premised on the fact that Mr. Ross provided alcohol to decedent, not on the decedent's use of the dirt bike, the operation of the dirt bike was "only a fortuitous circumstance under which the injury occurred." Appellant's brief at 14. It was Mr. Ross's non-vehicle related conduct, according to Administratrix, that was the proximate cause of the accident, and the liability provision of the homeowners' policy is concerned only with the conduct of the insured, not with the conduct of the decedent.

State Farm suggests that Administratrix is merely trying to divert attention away from the language of the exclusion, which refers to cause of injury, not the basis for liability. The insurer asserts that there is no dispute that decedent's death was caused by the dirt bike collision. ***See*** Stipulation

¶3 ("The plaintiff's decedent, while operating a motor vehicle, struck a fixed object off the insured location, and suffered fatal injuries in the collision."). Furthermore, the furnishing of alcohol to the minor decedent is the type of liability-inducing conduct that preceded the use of the motor vehicle, which we held in ***Wilcha*** could not be separated from the negligent driving that culminated in the accident. ***Wilcha***, ***supra*** at 1263 n.3. Hence, we agree with State Farm that Administratrix's focus on the insured's conduct rather than the cause of the injury is misplaced and contrary to the policy language and our jurisprudence.

Alternatively, Administratrix urges us to follow the lead of the Supreme Court of New Jersey in ***Salem Group v. Oliver***, 590 A.2d 1194 (N.J.Super. 1990), *affirmed,* 607 A.2d 138 (N.J. 1992), a case virtually identical on its facts. Therein, the uncle furnished alcohol to his nephew, a minor, while he was riding the uncle's ATV. There was an accident and the nephew was injured. At issue was whether the uncle's homeowner's insurance company had a duty to defend a claim based on his furnishing of alcohol to his nephew on these facts. After recognizing that insurers are generally obligated to defend their insureds on social host claims, the court framed the question as whether the insurer can avoid that obligation simply because a separate excluded risk, the operation of an all-terrain vehicle (ATV), constituted an additional cause of the injury. It distinguished negligent entrustment or supervision cases, finding that those claims, in

contrast to social host liability claims, could not be isolated from the ownership and operation of the insured automobile.

The ***Salem*** Court held that the insurer had a duty to defend the social host count as it provided an additional basis for liability independent of the insured's ownership or use of the ATV. In essence, it adopted a concurring causation test for determining whether the insurer had a duty to defend. The court declined, however, to go as far as the California Supreme Court did in ***State Farm Mutual Automobile Insurance Co. v. Partridge***, 514 P.2d 123, 128 (Cal. 1973), holding that "when two such risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy." The court qualified, "[w]e hold not that the insurer may ultimately be liable under the policy, but only that it must honor its duty to defend." ***Salem***, 607 A.2d 138, 140.

State Farm contends that the court's approach in ***Salem*** ignores the clear language of the exclusion and the fact that the injury would not have occurred absent a motor vehicle. Furthermore, there is no question herein that the decedent's death was caused by the dirt bike collision. More importantly, the issue herein is coverage, not the duty to defend.

With regard to the duty to defend, ***Salem*** is consistent with Pennsylvania jurisprudence. We hold that in ascertaining whether there is a duty to defend, it is the nature of the claim that is determinative. ***Penn-America Ins. Co. v. Peccadillos, Inc.***, ***supra***. In ***Penn-America***, this

Court held that allegations that a bar ejected a patron from its premises in so inebriated a condition as to render him a danger behind the wheel of a car were to be taken as true and liberally construed in favor of the insured and stated a claim subject to coverage under that establishment's commercial general liability policy. ***Id***. We recognized that

> The duty to defend is a distinct obligation, separate and apart from the insurer's duty to provide coverage. Moreover, the insurer agrees to defend the insured against any suit arising under the policy even if such suit is groundless, false, or fraudulent. Since the insurer agrees to relieve the insured of the burden of defending even those suits which have no basis in fact, the obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy.***American and Foreign Ins. Co. v. Jerry's Sport Center, Inc. (Jerry's Sport Center I)***, 2008 PA Super 94, 948 A.2d 834, 845-846 (Pa. Super. 2008) (quoting ***Wilcha v. Nationwide Mut. Fire Ins. Co.***, 2005 PA Super 395, 887 A.2d 1254, 1258 (Pa. Super. 2005) (emphasis added)).

Penn-America Ins. Co. v. Peccadillos, Inc., ***supra*** at 265. The duty to defend remained until the insurer "clearly defeats every cause of action averred in the underlying complaint." In that case, the liquor liability exclusion, which clearly excluded liability based on the bar having caused or contributed to the intoxication" of the patron, did not limit liability that could be assessed for other reasons. ***See also Donegal Mut. Ins. Co. v. Baumhammers***, 938 A.2d 286 (Pa. 2007) (fact that injuries were caused by intentional conduct of an insured did not absolve insurer of duty to defend other insureds whose negligent conduct allegedly enabled that conduct).

At issue in ***Salem*** was the duty to defend, not coverage. Even the ***Salem*** Court did not extend its concurrent causation rationale to coverage, which is the issue herein.[3] As State Farms notes, even those jurisdictions recognizing concurrent causes, the presence of a concurrent proximate cause only escapes an exclusion such as the one herein, if it is truly separate and distinct from the excluded cause. ***See Allstate Insurance Company v. Blount***, 491 F.3d 903, 911 (8th Cir. 2007) (Missouri courts determine whether there are concurrent proximate causes of an injury by determining whether each cause could have independently brought about the injury). Administratrix does not suggest that Mr. Ross's furnishing of alcohol to her son could have independently caused his death.

Finally, Administratrix claims that the motor vehicle exclusion applied only where tortious use of the motor vehicle resulted in harm to someone other than the operator of the vehicle. A variation of this argument was advanced and rejected in ***Wilcha***, *i.e.*, that the exclusion was limited to injuries that arise from the insured's use of a motor vehicle, and provides coverage for injury or damage arising out of another's use. The insurer agreed to pay damages for which its insured was legally liable. However, it

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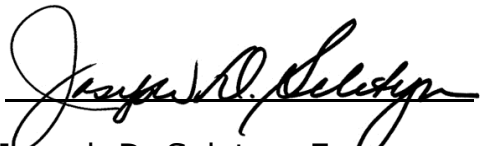
[3] While we are not bound by the district court's decision in ***Allstate Property and Cas. Ins. Co. v. Filachek***, 2011 WL 2111219 (E.D. Pa. 2011), we note that it declined to apply the concurrent proximate cause rationale in that case, finding it inconsistent with Pennsylvania law interpreting the words "arising out of" in connection with a motor vehicle exclusion in a homeowner's policy.

excluded damages for bodily injury arising out of the use of any motor vehicle either owned by an insured **or** operated by an insured. We would have to disregard the clear policy language, specifically the use of the disjunctive, in order to credit Administratrix's proposed construction, and we decline to do so.

Order affirmed.

Judge Mundy files a Concurring Memorandum in which Judge Donohue joins. Judge Donohue files a Concurring Statement in which Judge Mundy joins.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013