NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RALPH KAYLOR AND MARY THOMPKINS Appellee v. DONEGAL MUTUAL INSURANCE COMPANY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1068 WDA 2012

Appeal from the Order Dated June 19, 2012
In the Court of Common Pleas of Westmoreland County
Civil Division at No(s): 39 of 2011

BEFORE: BOWES, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J. Filed: March 19, 2013

Donegal Mutual Insurance Company (Donegal) appeals from the trial court's order granting in part and denying in part its motion for partial summary judgment.[1] Because Appellee Mary Thompkins' status as a

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* Retired Senior Judge assigned to the Superior Court.

[1] Our standard of review in cases of summary judgment is well settled. This court will only reverse the trial court's entry of summary judgment where there was an abuse of discretion or an error of law. ***Merriweather v. Philadelphia Newspapers, Inc.***, 684 A.2d 137, 140 (Pa. Super. 1996). Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2. In determining whether to grant summary judgment a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. ***Id.*** Summary judgment may only be granted in cases where
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"resident" of the insured's household is supported by substantial evidence, we affirm.

Mary Thompkins and Ralph Kaylor (Mary/Kaylor or Plaintiffs) are long-time partners. Although not married, Mary and Kaylor have resided in the same home for 27 years and have four children together. One of their children, William, resides with them at 294 Union Street, Yukon, Pennsylvania. In September 2006, Mary underwent eye surgery; post-operatively she required oxygen therapy. As a result, Mary was unable to move back to her home after the surgery because the gas used to heat the house created a hazard with her use of oxygen therapy. Therefore, on September 19, 2006, Mary moved into her daughter's house. Mary later moved into a personal care home four miles away from her Yukon home, while continuing her oxygen therapy. On January 5, 2007, Kaylor and Mary sustained serious injuries in an automobile accident; at the time of the accident, Mary was still staying at the personal care home.

Mary and Kaylor settled their third-party tort claims against the driver of the other accident vehicle. They then sought underinsured (UIM) benefits from their insurer, Donegal. At the time of the accident, Kaylor was insured under a Donegal automobile policy that included a $25,000 (UIM) per

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it is clear and free from doubt that the moving party is entitled to judgment as a matter of law. ***Id.***

person/$50,000 per accident coverage limit and stacking of coverage for his three vehicles. The couple's son, William, was also insured by a Donegal automobile policy that provided for $25,000 per person/$50,000 per accident in UIM coverage and permitted stacking for his two vehicles.

On February 23, 2011, Kaylor and Mary filed a complaint alleging breach of contract and bad faith against Donegal after the insurer failed to provide them UIM benefits under the various Donegal policies issued to William and Ralph. Plaintiffs' Complaint, 2/23/2011, at 9-17. Plaintiffs sought compensatory and punitive damages, as well as interest, costs and attorney's fees. ***Id.*** at 18. After filing an answer and new matter, Donegal filed a partial motion for judgment on the pleadings, which the court granted, striking from the complaint Plaintiffs' bad faith claims (Counts III and IV).[2] Subsequently, Donegal moved for partial summary judgment regarding its obligation to provided UIM coverage under its policies with Kaylor and Williams. The trial court granted in part and denied in part Donegal's motion, making the following legal conclusions: (1) Appellee, Mary Thompkins, does not have UIM benefits under Appellee Ralph Kaylor's insurance policy; (2) [Mary] Thompkins can claim UIM benefits under her

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[2] We note that for purposes of finality, the trial court's order disposes of all claims in Plaintiffs' complaint. ***See*** Pa.R.A.P. 341(a)(1); ***but see Bolmgren v. State Farm and Casualty Co.***, 758 A.2d 689 (Pa. Super. 2000) (appeal quashed where order granting partial summary judgment disposed of timeliness and coverage issues under parties' homeowner policy, but damages claim remained).

son, William Thompkins', Donegal policy; and (3) Kaylor is excluded from recovering UIM benefits under William Thompkins' policy.

The instant coverage dispute concerns the court's interpretation of the term "resident" and, more specifically, whether Mary's stay at a personal care home at the time of the accident disqualifies her as a resident of Williams' household for purposes of UIM coverage under his Donegal policy. Donegal argues that a resident is one who is physically staying in a home at the time of the accident. The Plaintiffs and the trial court, however, attach a much more subjective meaning to the word, equating residence to a place where one intends to live permanently.

Under William's policy, an insured is considered "You or any 'family member.'" The term "family member" is defined as "a person related to you by blood, marriage or adoption who is a *resident* of your household." Donegal Personal Auto Policy Definitions, 12/22/06, at F (emphasis added). The term "resident" is not defined in the policy.

As with all questions of law, an appellate court's review of an insurance contract is plenary. ***Burton v. Republic Ins. Co.***, 845 A.2d 889, 893 (Pa. Super. 2004). In interpreting the terms of an insurance contract, the appellate court examines the contract in its entirety, giving all of the provisions their proper effect. ***Id.*** The court's goal is to determine the intent of the parties as exhibited by the contract provisions. ***Id.*** In furtherance of its goal, the court must accord the contract provisions their accepted meanings, and it cannot distort the plain meaning of the language

to find an ambiguity. ***Id.*** Moreover, it will not find a particular provision ambiguous simply because the parties disagree on the proper construction; if possible, it will read the provision to avoid an ambiguity. ***Id.***

Where a term is not defined in an insurance policy, the court applies the common law definition historically used by the courts of that jurisdiction to the facts of the case, with the court examining various factors to arrive at a common-sense decision. ***Wall Rose Mutual Ins. v. Manross***, 939 A.2d 958, 965 (Pa. Super. 2007). Instantly, our Court has defined the term "resident" as meaning one who actually resides or lives in the household of the insured. ***Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.***, 545 A.2d 343, 346 (Pa. Super. 1988). The meaning of the term is to be determined by both the object and context in view. ***Id.***, *citing* ***Robinson v. Robinson***, 67 A.2d 273 (Pa. 1949).

While the courts may narrowly define residence as the place where a person is physically located, under the facts of this case, common sense dictates that Mary is a resident of William's household for purposes of UIM coverage under Donegal's policy.

The majority of insurance coverage cases interpreting the term "resident" analyze the issue with regard to the quantity of contacts an individual has with an insured's household. ***Cf. Miller v. Wall Rose Mut. Ins. Co.***, 45 A.3d 1143, 1146 (Pa. Super. 2012) (where insured's grandson had overnight stay at grandmother's home prior to her death, insufficient evidence existed to establish him as resident of her household); ***Manross***,

supra (deposition testimony of family members and friends supported determination that grandson was not resident of insured's home, where he was a drifter whose visits did not occur with any regularity, but were random at best); ***Amica***, ***supra*** (daughter not resident of father's household when she lived with mother over course of school year and at time of accident; visits to father's residence were "sporadic" at best and personal items kept at father's were for convenience purposes only); ***Krager v. Foremost Ins. Co.***, 450 A.2d 736 (Pa. Super. 1982) (where insured's son spent six months of each year living in his New York mobile home, he was still considered resident of his mother's Pennsylvania home, for coverage under homeowner's policy, when he was living with her when accident occurred).

Unique to the factual circumstances of this case is not the amount of time that Mary spent living at the Yukon home, or even the quality of the contact that she had while living there; rather, we are faced with determining Mary's status under the policy when she was not actually staying in the household at the time of the covered accident.

Courts of this Commonwealth have held the term "resident" to have a more transitory meaning when it does not contain qualifying terms of refinement, like "permanent" or "legal." However, the term "resident" generally requires "at the minimum, some measure of permanency or habitual repetition." ***Erie Exchange v. Weryha***, 931 A.2d 739 (Pa. Super. 2007); ***see also*** **Merriam Webster's Collegiate Dictionary** 681, 996 (10th ed. 1996). In determining a person's residence, courts look at factors

such as where a person sleeps, takes meals, receives mail, and stores personal possessions. In turn, "when a person actually lives in one location, and sporadically visits, or keeps certain personal items at another location, it is the location where he lives that is his residence." ***See Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.***, 545 A.2d 343, 347-48 (Pa. Super. 1988); ***see also Laird v. Laird***, 421 A.2d 319, 321 (Pa. Super. 1980) (generally, distinction is that "domicile" is matter of intention and "residence" is physical fact).

Here, Mary indisputably received her mail and kept all of her personal belongings[3] (save for a clock radio and minimal amount of clothes[4]) at the Yukon address. Her pets also remained at the Yukon address. Although as a question of physical fact, Mary was living at the personal care home at the time of the accident, for all intents and purposes her true and permanent home was the Yukon residence. ***Amica***, ***supra***. To construe the policy language any other way and deny Mary coverage would be unreasonable. ***See Erie Ins. Co. v. Flood***, 649 A.2d 736, 739 (Pa. Cmwlth. 1994). If Donegal wanted to restrict coverage for such individuals, it could have drafted the policy language to effectuate that result.

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[3] Her belongings included furniture, knick-knacks, and photographs.

[4] Mary testified at her deposition that she only had the clothes she needed to live day-to-day with her at the personal care home. Thompkins Dep., 17:8-12, February 11, 2008.

To further support our decision today, we look at the purpose of UIM coverage in an automobile policy: to protect the insured from the risk that a negligent driver of another vehicle will cause injury to the insured and will have inadequate insurance coverage to compensate the insured for his injuries. ***See Eichelman v. Nationwide Ins. Co.***, 711 A.2d 1006 (Pa. 1998). Here, the purpose is neither thwarted nor abused if we permit Mary to recover UIM benefits under William's Donegal policies. In fact, to hold otherwise would render an absurd result where relatives of an insured are away on business, are admitted to a hospital for an overnight stay, or are on vacation. Surely, the policy does not intend to limit recovery under such factual circumstances. ***See Amica***, ***supra*** at 346 (where same insurer, Donegal, faced with interpreting identical policy language, argued that objective of policy was to limit coverage to those family members who actually live in same household as insured).

Order affirmed.