NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ATLANTIC CASUALTY INSURANCE COMPANY,

Appellee

v.

EDWARD ZYMBLOSKY, EDWARD ZYMBLOSKY, JR., EDWARD ZYMBLOSKY, III AND GAIL ZYMBLOSKY; BOOTS & HANKS TOWING & WRECKING; BOOTS & HANKS TOWING & WRECKING SERVICE; BOOKS & HANKS, INC.; HEIDI HOUSER, ROBERT HOUSER, DOROTHY HOUSER, DELBERT HOUSER, MARY OGDEN, MARY IRWIN AND THOMAS IRWIN, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF E.I., A MINOR; BEN WEITSMAN & SON, INC., BEN WEITSMAN & SON OF SCRANTON, LLC; BEN WEITSMAN OF SCRANTON; UPSTATE SHREDDING, LLC, UPSTATE SHREDDING DISC., INC.,

APPEAL OF: HEIDI HOUSER AND ROBERT HOUSER; DOROTHY HOUSER AND DELBERT HOUSER; MARY OGDEN; MARY IRWIN AND THOMAS IRWIN, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF E.I., A MINOR

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1167 MDA 2016

Appeal from the Order Entered June 15, 2016
In the Court of Common Pleas of Lackawanna County
Civil Division at No(s): 2015 CV 01571

BEFORE: SHOGAN, OTT, and STABILE, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 17, 2017**

Heidi Houser, Robert Houser, Dorothy Houser, Delbert Houser, Mary Ogden, and Mary and Thomas Irwin, individually and as parents and natural guardians of E.I., a minor, ("Appellants") appeal from the order granting Atlantic Casualty Insurance Company's ("Atlantic") motion for summary judgment and entering judgment in favor of Atlantic in this declaratory judgment action. We affirm.

Atlantic filed a declaratory judgment complaint pursuant to 42 Pa.C.S. § 7531, *et. seq*., against Appellants and other involved parties as discussed below, on February 18, 2015. In its declaratory judgment complaint, Atlantic asserted that it had no duty to defend or indemnify any party in the underlying action of ***Heidi Houser, et. al. v. Boots & Hanks Towing & Wrecking Service, et. al.,*** No. 2013 CV 6433 ("The Underlying Action").

The trial court summarized the factual and procedural history of this case as follows:

> The Underlying Action was filed on May 16, 2014 by [Appellants]. [Appellants] allege that [Edward Zymblosky, Edward Zymblosky Jr., Edward Zymblosky III, Gail Zymblosky, and Boots & Hanks Towing and Wrecking Service ("the Zymblosky Defendants")] own property at 1500 North Keyser Avenue in Scranton, Pennsylvania ("the property"), where Defendants Ben Weitsman & Son, Inc., Ben Weitsman & Son of Scranton LLC, Ben Weitsman of Scranton, Upstate Shredding LLC and Upstate Shredding Disc., Inc. ("the Weitsman Defendants") allegedly operate a scrap metal recycling facility pursuant to a lease with one or more of the Zymblosky Defendants. On November 28, 2011, the Weitsman Defendants engaged in an operation involving scrap metal and negligently caused chlorine

gas to release from a cylinder/tank/vessel stored on the property, which, in turn, released the gas into the air and created a cloud of chlorine gas to form. At the same time, [Appellants] Heidi and Dorothy Houser were working in an outdoor lot next to the property, selling Christmas trees, while Mary Ogden, Mary Irwin, and Emilie Irwin were traveling in a vehicle on North Keyser Avenue near the property. All [Appellants] claim they were exposed to the cloud of chlorine gas and as a result, suffered injuries.

Atlantic is involved in the Underlying Action because it issued an insurance policy ("the Policy") for the salvage yard located on the property owned by the Zymblosky Defendants. Christopher Slezak ("Slezak"), owner and insurance agent for CSI & Associates ("CSI"), on behalf of the Zymblosky Defendants obtained the Policy from Atlantic through its Managing General Agent, Aberdeen Insurance Group ("Aberdeen"). Barbara Rosetti ("Rosetti"), a licensed insurance agent who services client accounts at CSI for the past ten years, also worked on the Zymblosky Defendants' account with regard to the Policy. The Policy contained a "Total Pollution Exclusion Endorsement," which allegedly excludes coverage for the event at issue in the Underlying Action. For this reason, Atlantic filed a Complaint on February 18, 2015, for Declaratory Judgment that it has no duty to defend or indemnify any party in the Underlying Action.

Subsequent to Defendants' Answers to the Complaint, Atlantic filed a Motion for Judgment on the Pleadings on May 14, 2015. Thereafter, [the trial court] issued an Order denying [Atlantic's] Motion in order to more fully develop the factual record. By doing so, [the trial court] believed it would better be able to determine whether the Total Pollution Exclusion Endorsement is valid and whether Atlantic correspondingly owes a duty to defend and indemnify the insured in the Underlying Action. Complying with [the trial court's order], the parties conducted discovery and based on the information gathered, [Atlantic] filed a Motion for Summary Judgment on February 25, 2016, asserting again that it had no duty to defend and/or indemnify Defendants in the Underlying Action based on the Policy's Total Pollution Exclusion Endorsement.

The Houser and Zymblosky Defendants filed individual Replies to Atlantic's Motion on March 28, 2016. Notwithstanding

> their continued assertion that chlorine is not a pollutant, the Zymblosky and Houser Defendants also contend that regardless of the exclusion policy, "the Zymbloskys were provided something less than what they had bargained for regarding the insurance coverage (Reasonable Expectation Theory)."

Trial Court Opinion, 6/15/16, at 2-4 (internal citations omitted).

Oral argument was held on Atlantic's motion on May 12, 2016. The trial court issued an order on June 15, 2016, granting Atlantic's motion for summary judgment and entering judgment in favor of Atlantic. On July 12, 2016, the Houser Defendants filed a notice of appeal.[1] A Pa.R.A.P. 1925(b) statement was not ordered. The trial court submitted a statement to this Court, indicating that in lieu of filing a Pa.R.A.P. 1925(a) opinion, it was relying on its June 15, 2016 Memorandum and Order, which granted Atlantic's motion for summary judgment. Trial Court Letter, 9/29/16, at 1.

Appellants present the following issues for our review:

> [1.] Where the total pollution exclusion contained within the Atlantic Casualty policy renders the coverage illusory and as such is void as against public policy?
>
> [2.] Whether [Atlantic's] motion for summary judgment should have been denied as genuine issues of material fact exist that must be determined by the trier of fact?
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> 3. Whether genuine issues of material fact remain as to the insured's reasonable expectations such that [Atlantic's] motion for summary judgment should have been denied?

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[1] The record does not reflect appeals by the other defendants.

Appellants' Brief at 4 (unnecessary capitalization omitted).[2]

"The proper construction of an insurance policy is resolved as a matter of law to be decided by the court in a declaratory judgment action." ***Swarner v. Mutual Ben. Group***, 372 A.3d 641, 644 (Pa. Super. 2013).

> The Declaratory Judgments Act may be invoked to interpret the obligations of the parties under an insurance contract, including the question of whether an insurer has a duty to defend and/or a duty to indemnify a party making a claim under the policy. Both the duty to defend and the duty to indemnify may be resolved in a declaratory judgment action. [***General Accident Ins. Co. of America v. Allen***, 692 A.2d 1089, 1096 (Pa. 1997)] citing ***Harleysville Mutual Ins. Co. v. Madison***, 415 Pa.Super. 361, 609 A.2d 564 (1992) (insurer can seek determination of obligations to insured before conclusion of underlying action) (additional citations omitted).
>
> It is well established that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured. In determining whether an insurer's duties are triggered, the factual allegations in the underlying complaint are taken as true and liberally construed in favor of the insured.
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> The obligation of an insurer to defend an action against the insured is fixed solely by the allegations in the underlying complaint. As long as a complaint alleges an injury which may be within the scope of the policy, the insurer must defend its insured until the claim is confined to a recovery the policy does not cover.
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> The particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the factual allegations contained in the complaint. If we were to allow the manner in which the complainant frames the request for damages to control the coverage question, we would permit insureds to circumvent exclusions that are clearly part of the policy of

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[2] We have renumbered Appellants' issues for ease of disposition.

> insurance. The insured would receive coverage neither party intended and for which the insured was not charged. The fact that the plaintiffs couched their claims in terms of negligence does not control the question of coverage.
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> We focus primarily on the duty to defend because it is broader than the duty to indemnify. If an insurer does not have a duty to defend, it does not have a duty to indemnify. However, both duties flow from a determination that the complaint triggers coverage.

American Nat. Property and Cas. Companies v. Hearn, 93 A.3d 880, 884 (Pa. Super. 2014) (some internal citations and quotation marks omitted).

In reviewing orders granting summary judgment, we note the following:

> Our scope of review of an order granting summary judgment is plenary. We apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered.

National Cas. Co. v. Kinney, 90 A.3d 747, 752 (Pa. Super. 2014) (internal citations and quotation marks omitted). "The appellate Court may disturb the trial court's order only upon an error of law or an abuse of discretion." ***Id.*** at 753.

In their first issue, Appellants argue that the total pollution exclusion contained within the insurance policy renders the coverage illusory and as

such, is void against public policy. Appellants' Brief at 4, 20. Appellants rely on ***Heller v. Pennsylvania League of Cities & Municipalities***, 32 A.3d 1213 (Pa. 2011), in support of this assertion. ***Id.*** at 22-23. Appellants argue that the total pollution exclusion would bar almost all claims by the Zymbloskys due to the nature of their business, rendering the policy useless. ***Id.*** at 23-26. Appellants argue that under the definition of pollutant in the policy, "any substance regardless of form (solid, liquid, or gas) may be considered a pollutant." ***Id.*** at 25. Appellants further assert that the definition includes "waste," which is further defined to include "material to be recycled, reconditioned or reclaimed." ***Id.*** According to Appellants, "[t]he entire nature of the Zymblosky's business is to recycle, reclaim, and/or recondition materials." ***Id.*** "Therefore, almost all foreseeable injury or property damage would have been caused in part by the movement of waste/scrap metal on the property and therefore be excluded from coverage pursuant to the total pollution exclusion." ***Id.*** at 26.

The relevant portion of the pollution exclusion in the policy provides as follows:

TOTAL POLLUTION EXCLUSION ENDORSEMENT

> Exclusion f. under paragraph 2, Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability is replaced by the following:
>
> This insurance does not apply to:
>
> f. Pollution

> (1) "Bodily injury" . . . which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

Insurance policy, 11/24/10, Total Pollution Exclusion Endorsement, at 5.

The policy defines "pollutants" as:

> solid, liquid, gaseous, or thermal irritant or containment or all material for which a Material Safety Data Sheet is required pursuant to federal, state, or local laws, where ever discharged, dispersed, seeping, migrating or released, including onto or into the air or any air supply, water or any water supply or land, including but not limited to petroleum, oil, heating oil, gasoline, fuel oil, carbon monoxide, industrial waste, acid, alkalis, chemicals, waste, treated sewage; and associate smoke, vapor, soot and fumes from said substance. Waste includes material to be recycled, reconditioned or reclaimed.

Id.

The trial court stated the following regarding the determination to define chlorine as a pollutant:

> Here [Appellants] failed to present [] evidence demonstrating why chlorine gas should not be considered a pollutant or contaminant as defined by Atlantic's policy. . . .
>
> In fact, the only evidence presented to this [c]ourt favors defining chlorine as a pollutant. For example, [Atlantic] presented evidence including: (1) dictionary definitions of chlorine state that "chlorine is a gaseous chemical agent which elicits an inflammatory response"; (2) the Sixth Circuit in U.S. Fidelity and Guaranty Co., supra found that chlorine is a pollutant within the meaning of the policy at issue and that the bodily injury did arise from a discharge of this pollutant; (3) federal/state statutes and regulations define and treat chlorine gas as a pollutant; (4) the Policy defines a 'pollutant' as a material requiring a MSDS, which chlorine gas requires; (5) the Underlying Complaint makes specific allegations and admissions that its inhalation caused the Underlying Plaintiffs' physical harm; and (6) it is undisputed that chlorine gas is a dangerous

> and potentially deadly chemical. For these reasons, [the trial court found] that chlorine gas is a potentially hazardous and toxic material. Therefore, chlorine is an irritant or contaminant constituting a pollutant under the Policy.

Trial Court Opinion, 6/15/16, at 27-28. Thus, we agree with the trial court's conclusion that there was no genuine issue of material fact regarding the classification of chlorine as a pollutant under the policy.

Next, we consider whether the pollution exclusion renders the coverage illusory and as a result, contravenes public policy, as alleged by Appellants.

> Generally, courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy. In several recent cases, this Court has examined claims that unambiguous provisions in [] insurance policies are unenforceable because they violate public policies [. . . .] In response, we have affirmed our reticence to throw aside clear contractual language based on "the often formless face of public policy." With regard to the concept of public policy, we have stated:
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> > Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.... Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts ... contrary to public policy. The courts must be content to await legislative action.
> >
> > It is only when a given policy is so obviously for or against the public health, safety, morals or welfare

> that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring that the contract is against public policy.

Heller, 32 A.3d at 153-154 (some internal quotation marks and citations omitted).

As noted, Appellants rely on ***Heller*** in support of their contention that the policy exception resulted in illusory coverage in contravention of public policy. This Court previously summarized the holding in ***Heller*** as follows:

> In ***Heller***, our Supreme Court was asked to determine whether "it [was] a violation of public policy to exclude from underinsured motorist (UIM) coverage a claim by an individual eligible for workers' compensation benefits." ***Heller***, 32 A.3d at 1215. The appellant (Heller) was severely injured in an automobile accident during the course of his employment as a police officer for Sugarcreek Borough. ***Id.*** Subsequently, Heller sought UIM benefits from the borough under a policy issued by the appellee [an insurer], who ultimately denied Heller's claim under a policy exclusion providing that UIM coverage did not apply to "any claim by anyone eligible for workers' compensation benefits." ***Id.***
>
> The Supreme Court noted that the borough voluntarily elected to purchase the optional UIM coverage and paid a premium to the appellee for the coverage. ***Id.*** at 1222. The Supreme Court therefore found persuasive Heller's argument that the borough purchased illusory coverage. ***Id.*** at 1223, 1228. As the Supreme Court observed:
>
> > Instantly, we are presented with the situation where a mandatory offering under the Motor Vehicle Financial Responsibility Law (MVFRL) was accepted by the borough, who paid a premium for UIM coverage to provide additional protection to its employees who operate or occupy its vehicles. The vehicles in question are used by borough employees during the course and scope of their employment. Thus, **the vast majority of all UIM claims likely**

> **will be made by borough employees who are eligible for workers' compensation**. The subject exclusion, however, operates to deny UIM benefits to anyone who is eligible for workers' compensation. **Therefore, we find that [the appellee] sold the borough additional coverage that, in effect, will not attach by virtue of an exclusion**. Under the facts of this case and as applied to borough employees, **the exclusion renders the coverage illusory**. Further, the exclusion operates to convert the appellee's statutory obligation into a sham offering. The appellee received a windfall by charging the borough a premium for the coverage.

Heller, 32 A.3d at 1223 (emphases in original). The court further remarked:

> To uphold the exclusion would thwart the purpose of the [law] by allowing an insurer to deny benefits for which their insured paid a premium. Thus, permitting the exclusion to stand provides a disincentive for insureds to pay premiums for coverage that is not statutorily required and relieves the insurer of its obligation to provide benefits for which the insured paid. While the borough may have received a reduced premium in exchange for what the appellee deems "limited" coverage, an insured cannot contract for illusory coverage.
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> ***Id.*** at 1225.

Westfield Ins. Co. v. Astra Foods Inc., 134 A.3d 1045, 1053 (Pa. Super. 2016).

In ***Westfield***, this Court found ***Heller*** inapplicable because the policy exclusion at issue was not aimed at foreclosing the majority of expected claims; rather, it only excluded a claim under the factual circumstances of that particular case. ***Westfield Ins. Co.***, 134 A.3d at 1054. Additionally, in ***TIG Ins. Co. v. Tyco International Ltd.***, 919 F. Supp. 2d 439, 466 (M.D.

Pa. 2013),[3] the court presented the following tenets regarding illusory insurance coverage:

> Insurance coverage is considered "illusory" where the insured purchases no effective protection. An insurance policy is not illusory if it provides coverage for some acts; it is not illusory simply because of a potentially wide exclusion. Coverage under an insurance policy is not illusory unless the policy would not pay benefits under any reasonably expected set of circumstances. Contracts are illusory when one party exploits the other; where the contracts are hopelessly or deceptively one-sided.

Id. at 466 (internal citations and quotations omitted). Indeed, the ***TIG Ins. Co.*** Court cited ***Heller*** for the principle that: "Whether coverage is illusory must be determined under the specific facts of each case." ***Id.*** at 466. (citing ***Heller***, 32 A.3d at 1223. "The relevant inquiry is whether a particular coverage provision is swallowed-up by an exclusion, not whether the policy as a whole provides some degree of coverage despite the existence of an exclusion." ***TIG Ins. Co***., 919 F. Supp. 2d at 466.

In the case *sub judice*, we agree with the trial court's conclusion that ***Heller*** is not applicable. Trial Court Opinion, 6/15/16, at 35. We can anticipate many types of incidents that could occur on the subject property that would not be excluded by the policy's total pollution exclusion. Indeed, Atlantic has presented two such potential scenarios where the policy would

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[3] "While we recognize that federal district court cases are not binding on this court, Pennsylvania appellate courts may utilize the analysis in those cases to the extent we find them persuasive." ***Umbelina v. Adams***, 34 A.3d 151, 159 n.2 (Pa. Super. 2011).

provide coverage: 1) where a customer or invitee suffered a slip and fall on the premises due to an irregular physical condition of the premise's surface area due to poor maintenance; or 2) where a customer or invitee was on the premises while the insured was doing demolition work on a vehicle and the customer or invitee was injured by such process. Atlantic's Brief at 32. Further, we cannot agree with Appellants' interpretation of "waste" as it is presented in the policy's definition of "pollutants." "Waste" as used in that definition refers to waste resulting from the discharge, dispersal, seeping, migrating or release of a pollutant. Insurance Policy, 11/24/10, Total Pollution Exclusion Endorsement, at 5. Thus, we do not interpret "waste" as used in the "pollutants" definition to apply to any and all recycled, reclaimed, or reconditioned substances in the salvage yard, as argued by Appellants.

Accordingly, we conclude that the total pollution exclusion would not bar "almost all claims" made under the policy. Even assuming, *arguendo,* that the pollution exclusion is a potentially wide exclusion, the coverage still is not illusory because it will provide coverage under other reasonably expected sets of circumstances. Thus, the exclusion does not render the coverage illusory in contravention of public policy. Appellants' claim therefore fails.

In their second issue, Appellants argue that the trial court erred in granting Atlantic's motion for summary judgment. Appellants' Brief at 20. After setting forth statements of law regarding the standard for entry of

summary judgment in the argument section of their brief on this issue, Appellants simply state: "The evidence in this matter demonstrates that genuine issue of material fact remain regarding whether [Atlantic] has a duty to defend and indemnify the Zymblosky Defendants. As such, the lower Court erred in granting [Atlantic's] Motion for Summary Judgment." ***Id.*** at 20. Appellants do not further develop this argument nor do they identify those remaining genuine issues of material fact.

"Where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived." ***Umbelina v. Adams***, 34 A.3d 151, 161 (Pa. Super. 2011); Pa.R.A.P. 2119(a). "This Court will not act as counsel and will not develop arguments on behalf of an appellant." ***Irwin Union Nat. Bank and Trust Co. v. Famous,*** 4 A.3d 1099, 1103 (Pa. Super. 2010). It is not this Court's responsibility to comb through the record seeking the factual underpinnings of a claim. ***Id.*** When deficiencies in a brief hinder our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived. ***Id.***; Pa.R.A.P. 2101. Because Appellants' failure to sufficiently develop their argument significantly hinders our ability to conduct meaningful review of this issue, we find this claim waived. ***Id.***; Pa.R.A.P. 2101.

In their final issue, Appellants maintain that summary judgment was improperly entered because there are genuine issues of material fact that remain as to the insured's reasonable expectations regarding insurance coverage. Appellants' Brief at 29. In support of their position, Appellants argue that the trial court focused solely on the representations made by Slezak to the Zymbloskys and failed to consider the representations made directly by Atlantic to the Zymbloskys. ***Id.*** at 31. Appellants contend that Atlantic directly represented to the Zymbloskys that they would be covered for activities inherent in operating a salvage yard. ***Id.*** Appellants further argue that the trial court erred in concluding that Slezak was the exclusive agent of the Zymbloskys. ***Id.*** at 35. Appellants contend that there is a genuine issue of material fact as to whether Slezak was a dual agent working for Atlantic and therefore representations by Slezak can be attributed to Atlantic. ***Id.*** Additionally, Appellants assert that the Zymbloskys reasonably relied on the representations made by Slezak, who was acting as an agent for Atlantic, and that the Zymbloskys reasonably expected that their business was covered. ***Id.*** at 38.

The trial court concluded that the reasonable expectations doctrine is inapplicable and does not void the total pollution exclusion endorsement in the policy. Trial Court Opinion, 6/15/16, at 28. Specifically, the trial court found that Slezak's alleged deception did not cause the Zymbloskys to reasonably believe that the injuries due to pollutant exposure were covered

under the policy, as there was no ambiguity in the policy's exclusion of coverage for bodily injury caused by a pollutant. ***Id.*** at 28-31. Moreover, the evidence supports the conclusion that Slezak was not an agent of Atlantic who could bind Atlantic by his representations, but rather was an agent of CSI and the Zymbloskys. ***Id.*** at 28-33. Furthermore, Appellants present no evidence of representations made directly by Atlantic to the Zymbloskys. ***See*** Appellants' Brief at 31-35. The trial court addressed Appellants' claims in great detail in its opinion entering summary judgment, and the trial court's determinations on these issues are supported by the evidence of record. Accordingly, we affirm the trial court's decision and do so based on the thorough trial court opinion entered on June 15, 2016, granting Atlantic's motion for summary judgment.[4] Because there was no genuine issue of material fact regarding these matters, the trial court properly entered summary judgment.

Order affirmed.

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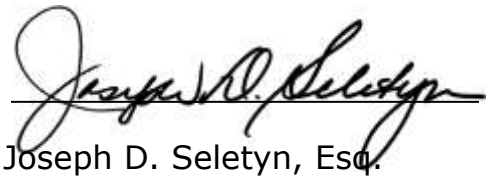
[4] The parties are directed to attach copies of this opinion to future filings in the event of further proceedings in this matter.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/17/2017