

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DONEGAL MUTUAL INSURANCE
COMPANY,

Appellant

v.

KIMBERLY SMITH, MATTHEW GARLAND,
NATHAN SMITH,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 219 WDA 2013

Appeal from the Order of November 19, 2012,
in the Court of Common Pleas of Westmoreland County,
Civil Division at No. 620 of 2010

BEFORE: FORD ELLIOTT, P.J.E., ALLEN and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: FILED: December 13, 2013

Appellant Donegal Mutual Insurance Company ("Donegal") attempts to appeal from an order that purported to deny its motion for summary judgment. We dismiss this appeal.

The trial court summarized the background underlying this matter in the following manner.

In the present case [Appellee] Matthew Garland sustained injuries as a result of an October 21, 2007 motor vehicle accident in which he was injured while a passenger in a vehicle driven by [Appellee] Nathan Smith. Mr. Smith lost control of the vehicle and it left the roadway and collided with numerous pine trees and a utility pole. Matthew Garland sustained serious injuries as a result of the accident. The vehicle was owned by

*Retired Senior Judge assigned to the Superior Court.

James Dzambo, Jr. and was being operated by Mr. Smith without Mr. Dzambo's permission.

On that date, [Appellee] Kimberly Smith, the mother of Matthew Garland, was insured under a policy of insurance issued by [] Donegal. Kimberly Smith elected uninsured motorist coverage benefits and paid a premium for this coverage. A request was made for uninsured motorist benefits on behalf of Matthew Garland as a result of the injuries he sustained in the accident. Donegal denied the request for uninsured motorist benefits because they alleged that Matthew Garland and Nathan Smith were using the vehicle without permission at the time of the accident. Donegal commenced the instant [declaratory judgment] action, seeking a judgment that the damages resulting from the accident are not covered because of [an] exclusion under the policy for using a vehicle without the permission of the owner. This exclusion provides:

EXCLUSIONS

- B. We do not provide Uninsured Motorists Coverage for "bodily injury" sustained by an "insured:"
- 3. Using a vehicle without permission of the owner.

Trial Court Opinion, 02/01/12, at 1-2.

Donegal filed a motion for summary judgment, and Appellees answered the motion. The trial court summarized the parties' arguments as follows.

[Appellee] Matthew Garland maintains that he was not "using" the vehicle because he was not driving the vehicle at the time of the crash and therefore the exclusion is not applicable to the case herein. Furthermore, Matthew Garland submits that the Pennsylvania Superior Court held in Erie Insurance Exchange v. Lowry, 941 A.2d 1270 (Pa. Super. 2008) that the term "use" in a "non-permissive use" exclusion is ambiguous and where ambiguity exists in the interpretation in an insurance policy, the ambiguity must be construed in favor of insurance coverage.

Donegal maintains the term “use” does not require operation of the vehicle, and is interpreted to include an occupant or passenger. Nationwide Mutual Insurance Company v. Cummings, 652 A.2d 1338 (Pa. Super. 1994). Donegal asserts Matthew Garland was “using” the automobile by employing it for its intended purpose, transportation. Donegal argues Matthew Garland not only knew that the car in which he was riding was stolen, but he helped steal it and, at times, even drove it. Donegal asserts Mr. Garland’s active conduct establishes his “use” of the vehicle, as that term was interpreted in Nationwide. Accordingly, Donegal argues Mr. Garland was excluded from recovering uninsured motorists benefits because the injuries were sustained when Garland was using a vehicle without the owner’s permission.

Id. at 2-3.

On February 1, 2012, the trial court denied Donegal’s motion for summary judgment. In its opinion in support of its decision, the court first analyzed this Court’s decision in ***Belser v. Rockwood Casualty Insurance Co.***, 791 A.2d 1216 (Pa. Super. 2002). Relying on ***Belser***, the court concluded, “Since [Matthew Garland] was not physically operating the vehicle at the time of the accident, he should not be considered a ‘user’ of the vehicle.” Trial Court Opinion, 02/01/12, at 4. The court went on to highlight that the policy in question does not define the word “use.” The court determined that the word “use” in the relevant policy exclusion is ambiguous; thus, the law required the court to resolve the ambiguity in favor of the insured.

The certified record reflects that, on November 21, 2012, Donegal filed a motion in the trial court wherein it requested that the court “enter an order granting an amendment to its order to include the statements specified in 42 Pa.C.S.[A.] §702(b).” Donegal’s Motion to Certify Interlocutory Order for

Appeal, 11/21/12, at WHEREFORE paragraph. Donegal clearly was asking the trial court to amend its February 1, 2012, order. *Id.* at ¶11. (“Pursuant to Pennsylvania Rule of Appellate Procedure 1311, the party may file a petition for permission to appeal from this Honorable Court’s February 1, 2012 order only if this Court amends that order to include the statement in 42 Pa.C.S.A. § 702(b)[.]”).

Subsection 702(b) provides as follows:

Interlocutory appeals by permission.--When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa.C.S.A. § 702(b).

Despite the fact that Donegal’s motion was not filed until November 21, 2012, the record reflects that the court entered an order on November 19, 2012, wherein in the court again denied Donegal’s motion for summary judgment. The order further stated:

This [c]ourt finds that there exists a substantial ground for difference of opinion as to whether the language of the policy was ambiguous and whether Matthew Garland was a permissive user at the time of the accident. As this Court has determined these issues as a matter of law, thereby curtailing further litigation of issues that will be subject to appeal following any final order, this [c]ourt finds that an immediate appeal will materially advance the termination of this action. Therefore, pursuant to Pa.C.S.A. § 702, this [c]ourt certifies the above

issues for appeal pursuant to Pennsylvania Rule of Appellate Procedure 1311.

Trial Court Order, 11/19/12.

Rule 1311 provides, in pertinent part, as follows.

Petition for permission to appeal. Permission to appeal from an interlocutory order containing the statement prescribed by 42 Pa.C.S. § 702(b) may be sought by filing a petition for permission to appeal with the prothonotary of the appellate court within 30 days after entry of such order in the lower court or other government unit with proof of service on all other parties to the matter in the lower court or other government unit and on the government unit or clerk of the lower court, who shall file the petition of record in such lower court. **An application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b) shall be filed with the lower court or other government unit within 30 days after the entry of such interlocutory order and permission to appeal may be sought within 30 days after entry of the order as amended.** Unless the trial court or other government unit acts on the application within 30 days after it is filed, the trial court or other government unit shall no longer consider the application and it shall be deemed denied. If the petition for permission to appeal is transmitted to the prothonotary of the appellate court by means of first class, express, or priority United States Postal Service mail, the petition shall be deemed received by the prothonotary for the purposes of Rule 121(a) (filing) on the date deposited in the United States mail, as shown on a United States Postal Service Form 3817 Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified. The certificate of mailing or other similar Postal Service form from which the date of deposit can be verified shall be cancelled by the Postal Service, shall show the docket number of the matter in the lower court or other government unit and shall be either enclosed with the petition or separately mailed to the prothonotary. Upon actual receipt of the petition for permission to appeal the prothonotary of the appellate court shall immediately stamp it with the date of actual receipt. That date, or the date of earlier deposit in the United States mail as prescribed in this subdivision, shall constitute the date when

permission to appeal was sought, which date shall be shown on the docket. The prothonotary of the appellate court shall immediately note the appellate docket number assignment upon the petition for permission to appeal and give written notice of the docket number assignment in person or by first class mail to the government unit or clerk of the lower court, to the petitioner and to the other persons named in the proof of service accompanying the petition.

Pa.R.A.P. 1311(b) (emphasis added).

On December 18, 2012, Donegal filed in this Court a petition for permission to appeal. This Court granted the petition on February 4, 2013. For the reasons that follow, we dismiss this appeal.

Ordinarily, an order denying summary judgment constitutes an unappealable interlocutory order, as such an order typically indicates that genuine issues of material fact still must be resolved. However, an order that affirmatively or negatively declares the rights and duties of the parties to a declaratory judgment action constitutes a final and appealable order pursuant to Pa.R.A.P. 341(b)(2).¹ ***Nationwide Mutual Insurance Company v. Wickett***, 763 A.2d 813 (Pa. 2000).

¹ Rule 341(b)(2) states, "A final order is any order that . . . is expressly defined as a final order by statute[.]" Pa.R.A.P. 341(b)(2). Section 7532 of the Declaratory Judgment Act provides, in pertinent part:

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. **The declaration may be either affirmative or negative in form and effect,**
(Footnote Continued Next Page)

Donegal instituted this action as one in declaratory judgment. More specifically, Donegal asked the trial court to declare that it “does not owe uninsured motorists benefits to [] Matthew Garland[] for his injuries and damages sustained in the accident of October 21, 2007.” Donegal’s Complaint For Declaratory Judgment, 01/28/10, at WHEREFORE paragraph. Donegal’s complaint put forward one theory in support of its position that it is not required to provide uninsured motorists benefits in this case: the applicability of the above-mentioned exception. *Id.* at ¶11. (“Because the claimant, Matthew Garland, stole the vehicle which he was using at the time of the accident he did not have the vehicle owner’s permission to use it and, therefore, he is not entitled to receive uninsured motorists benefits from Donegal.”).

Donegal tested its theory in its motion for summary judgment, and Appellees responded by arguing that the exclusion does not preclude coverage in this case. The trial court ruled in favor of Appellees. Thus, in its February 1, 2012, order, the court ruled on the only issue it was asked to address in this case, declaring that the exclusion is inapplicable and, therefore, that Donegal must provide uninsured benefits Mr. Garland. For these reasons, the February 1st order constituted a final, appealable order.

(Footnote Continued) _____

and such declarations shall have the force and effect of a final judgment or decree.

42 Pa.C.S.A. § 7532 (emphasis added).

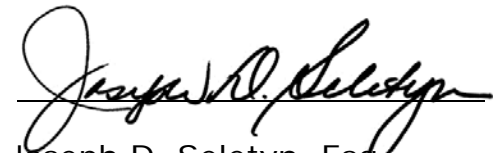
Consequently, Donegal had thirty days from February 1st in order to timely file a notice of appeal. Pa.R.A.P. 903(a).

Donegal failed to take this action. Instead, in November of 2012, Donegal moved to have the trial court amend its February 1st order to include the Subsection 702(b) language provided above. Donegal clearly filed this motion in an untimely manner. Pa.R.A.P. 1311(b) ("An application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b) shall be filed with the lower court or other government unit within 30 days after the entry of such interlocutory order and permission to appeal may be sought within 30 days after entry of the order as amended."). Thus, the trial court acted outside of its authority by granting the motion, and this Court improvidently granted Donegal's petition for permission to appeal.

Appeal dismissed.

President Judge Emeritus Ford Elliott concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013

