NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

THOMAS CANTO AND LINETTE CANTO, HIS WIFE, Appellants v. ERIE INSURANCE COMPANY, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 573 MDA 2013

Appeal from the Order Entered January 31, 2013
In the Court of Common Pleas of Berks County
Civil Division at No(s): 12-17029

BEFORE: BENDER, P.J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 10, 2013**

Thomas and Linette Canto (Appellants) appeal from the order entered January 31, 2013, sustaining the preliminary objections filed by Erie Insurance Company ("Appellee" or "Erie") and dismissing Appellants' amended complaint with prejudice. On appeal, Appellants challenge the enforceability of a "household exclusion" provision of their motor vehicle insurance policy with Erie. After review, we affirm.

The factual history of this case is exceptionally concise. In April of 2009, Mr. Canto was operating his son's motor vehicle in Berks County, Pennsylvania. Mr. Canto was rear-ended by an uninsured driver and was injured. Mr. Canto filed for and received benefits under the son's motor

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* Former Justice specially assigned to the Superior Court.

vehicle insurance policy. Mr. Canto subsequently sought further coverage under his own insurance policy with Erie. Erie denied the claim, under the "household exclusion" provision of Mr. Canto's uninsured or underinsured (UM/UIM) policy. That provision provided, in part, that the policy did not cover damages sustained by Mr. Canto while occupying a motor vehicle owned by a relative, which was not insured for UM/UIM coverage under that policy.[1]

In July of 2011, Appellants filed a complaint in Philadelphia County, which was subsequently transferred to Berks County. Thereafter, Appellants filed an amended complaint. Erie filed preliminary objections. In January 2013, the trial court heard argument on the preliminary objections and subsequently dismissed the amended complaint by order entered January 31, 2013. Appellants timely appealed.

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[1] Specifically, the insurance policy provision at issue provided, in pertinent part:

> **EXCLUSIONS - What We Do Not Cover**
>
> This insurance does not apply to:
>
> * * *
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> 3. damages sustained by **"anyone we protect"** while **"occupying"** or being struck by a **"motor vehicle"** owned or leased by **"you"** or a **"relative,"** but not insured for Uninsured or Underinsured Motorist Coverage under this policy.

R.R. 31a.

On appeal, Appellants present two issues for our review. First, whether the trial court erred in sustaining Erie's preliminary objections, because the household exclusion provision should not be enforced "given the specific facts and circumstances of this case" and as against public policy. Appellant's Brief at 4. Second, whether the trial court erred in precluding discovery. ***Id.***

> [O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
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> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011).

In regard to the enforceability of household exclusions, the Eastern District of Pennsylvania has surmised,

> While the Pennsylvania Supreme Court has held that the enforceability of the exclusion is dependent upon the factual circumstances presented in each case, it has been upheld in nearly all of the cases in which it has been considered. ***See: Paylor v. Hartford Insurance Co.,*** 536 Pa. 583, 640 A.2d 1234 (1994).

Nationwide Mut. Ins. Co. v. Ridder, 105 F. Supp. 2d 434, 436 (E.D. Pa. 2000) (applying Pennsylvania law).

In Appellants' first issue, they argue that, given that the enforceability of a household exclusion depends upon the factual circumstances in each case, their particular situation demands non-enforcement. In a nearly identical situation, however, we have concluded that the exclusion is enforceable.

In ***Estate of Demutis v. Erie Ins. Exch.***, 851 A.2d 172 (Pa. Super. 2004), Demutis perished in a head-on car collision. At the time of his death, he occupied a car driven by his father, with whom Demutis lived. Demutis's estate initially recovered the full limits of the policy of the driver of the striking car and then his father's UIM policy. Demutis's estate then sought additional coverage under Demutis's own policy. We concluded that the household exclusion in Demutis's policy was enforceable, and excluded coverage under Demutis's policy.[2] The facts of the instant case are directly parallel. At the time of the accident, Mr. Canto occupied a vehicle not

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[2] Moreover, the exclusion at issue in ***Estate of Demutis*** was identical to the provision here. The trial court, in that case, quoting the Erie policy at issue there, related: "This exclusion provides that the Erie policy does not apply to 'damages sustained by anyone we protect while occupying or being struck by a motor vehicle owned by you or a relative, but not insured under the uninsured or underinsured motorists coverage under this policy.'" ***Estate of Demutis v. Erie Ins. Exch.***, 65 Pa. D. & C.4th 198, 200 (Allegheny Cty. 2003) (available at 2003 WL 23531294).

insured for UM/UIM coverage under his own policy. Mr. Canto partially recovered under the UM policy of the car's owner, a relative with whom he lived. He then sought additional coverage under his own policy.

Appellants argue that ***Estate of Demutis*** is distinguishable on the following bases. First, they argue that in that case Demutis was the passenger while, here, Mr. Canto was the driver. Second, they argue that in ***Estate of Demutis*** the estate had already recovered an amount greater than the maximum value of Demutis's policy. By contrast, Appellants argue that Mr. Canto has recovered less than he would under his own policy.

We are not persuaded that either fact distinguishes ***Estate of Demutis***. Our decision in that case was based upon the conclusion that an insurer should not be compelled to underwrite a risk for which it had not been compensated. ***Id.*** at 177. As to Appellants' first asserted distinction, the insurance policy at issue, both here and in ***Estate of Demutis***, did not distinguish between passenger and driver. In both cases, it excluded coverage from an insured "occupying" an excluded motor vehicle. The household exclusion provided that the policy did not cover damages sustained by Mr. Canto while occupying a motor vehicle owned by a relative, a vehicle which was not insured for UM/UIM coverage under the Erie policy. Thus, Appellants' policy with Erie specifically excluded the type of coverage that Appellants now seek.

Additionally, our holding in ***Estate of Demutis*** treated the relative coverage available under the various policies as irrelevant. Here, as in that

case, Appellants are not seeking a benefit for which they paid, they are seeking benefits that were specifically excluded from the coverage of the Erie policy. ***See Estate of Demutis***, 851 A.2d at 177. We conclude that the enforceability of a household exclusion on the factual circumstances presented by this case is a matter of *stare decisis*. Consequently, we conclude that trial court properly enforced the exclusion on the instant facts.

Turning to the second part of Appellants' first issue, they argue that our past cases, such as ***Estate of Demutis***, ***supra***, turn on an outdated interpretation of the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa.C.S. § 1701, *et seq.* They claim that, while this Court and our Supreme Court have long held that the purpose of the MVFRL is cost containment, the Supreme Court has also concluded, though never held, that the MVFRL's purpose is, instead, a remedial public policy that promotes the recovery of damages for innocent victims of accidents.

In ***Prudential Prop. and Cas. Ins. Co. v. Colbert***, 813 A.2d 747 (Pa. 2002), our Supreme Court instructed:

> This Court's cautious approach in examining whether a contract provision violates the often formless face of public policy is well established. As we recently reiterated in ***Burstein v. Prudential Property and Casualty Insurance Co.,*** 809 A.2d 204 (Pa. 2002),
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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.
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> ***Id.*** at 207 (quoting ***Eichelman v. Nationwide Ins. Co.,*** 551 Pa. 558, 711 A.2d 1006, 1008 (1998)); ***see also Hall v. Amica Mut. Ins. Co.,*** 538 Pa. 337, 648 A.2d 755, 760 (1994) (quoting ***Muschany v. United States,*** 324 U.S. 49, 66-67, 65 S.Ct. 442, 89 L.Ed. 744 (1945)).

Id. at 752. Additionally, our Supreme Court has long held, "The legislative concern for the increasing cost of insurance is the public policy that is to be advanced by statutory interpretation of the MVFRL." ***Burstein***, 809 A.2d at 207 (quoting ***Paylor***, 640 A.2d at 1235).

Appellants highlight the concurring opinions of the Justices of our Supreme Court in ***Williams v. Geico Govt. Employees Ins. Co.***, 32 A.3d 1195, 1210 (Pa. 2011). Specifically, Appellants emphasize the opinions of Justices Saylor,[3] Baer,[4] and Todd[5] and note Justice McCaffery's joinder of

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[3] "I would also once and for all abandon the rubric that cost containment was the overarching policy concern of the [MVFRL], since the act clearly retained the core remedial objectives of the prior regulatory scheme." ***Williams***, 32 A.3d at 1210 (Saylor, J., concurring).

[4] "I join my colleagues in calling for advocates and the judiciary to cease their continued reliance on the unthinking perpetuation of the long-ameliorated concern for cost containment...." ***Williams***, 32 A.3d at 1211 (Baer, J., concurring). Justice Baer, in addition to penning a concurring opinion, joined in the Majority opinion as the fourth vote.

[5] "I join those Justices who eschew the mantra of cost containment—used by various courts to rotely limit the rights of insureds—in favor of a recognition of other equally important policies and goals that are foundational to the

Justice Todd's concurring opinion therein. Appellants argue that, taken together, the concurrences and joinder of four of the seven Justices, announce our Supreme Court's intention to replace the rationale of cost containment with a rationale of protecting the rights of insureds.[6]

Notwithstanding their persuasive plea, Appellants are asking this Court to depart from binding precedent. In fact, their request for relief would require us to overrule the well-established policy of cost containment, based upon the holding of a quasi majority, *i.e.*, the synthesis of concurring opinions of the Justices of our Supreme Court. Whether to undertake this shift and to overrule the line of cases that interpreted the MVFRL with cost containment as its goal, however, is a question only for that Court. Accordingly, Appellants' first issue is without merit.

With respect to Appellants' second issue, they assert that the household exclusion provision was added to the Erie policy without proper notice to Appellants. They argue that the trial court deprived them of the opportunity to conduct discovery on this issue. Erie counters that Appellants waived this issue by failing to raise it in their complaint, amended complaint,

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MVFRL, such as the remedial objectives of the statute and the coverage rights of insureds." ***Williams***, 32 A.3d at 1213 (Todd, J. concurring).

[6] Appellee correctly notes that these opinions have no precedential value. Appellee's Brief at 19 (citing ***Commonwealth v. Covil***, 378 A.2d 841, 844 (Pa. 1977)).

and in their opposition to Erie's preliminary objections. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302. After review of the record, we agree. Appellants did not assert that the policy changed without notice in their pleadings.

Separately, Appellants argue that discovery was necessary to determine whether Appellants had a "reasonable expectation" of coverage on these facts. Erie counters that Appellants waived this issue by way of omitting it from the Pa.R.A.P. 1925(b) statement of errors complained of on appeal. "Any issues not raised in a 1925(b) statement will be deemed waived." ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998); Pa.R.A.P 1925(b)(4). We agree, and find this argument similarly waived.

Accordingly, for the reasons stated above we affirm the trial court's order sustaining the preliminary objections of Erie Insurance Company and dismissing Appellants' amended complaint.

Order affirmed.

Judge Wecht concurs in the result.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/2013