IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Progressive Northern Insurance Company, Petitioner	:	
v.	:	No. 383 M.D. 2009
	:	Argued: February 9, 2010
Jason Solano, Carol Gehris, Edison Pares, Brendy Pares, Edward Strobl, Francisco Dipi, and the Department of Public Welfare of the Commonwealth of Pennsylvania, Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: April 27, 2010

Before this court is a motion for summary judgment filed by Progressive Northern Insurance Co. (Progressive) with respect to the petition for review in the nature of a complaint for declaratory judgment (Petition) previously filed by Progressive in our original jurisdiction. The Petition requests a declaration that Progressive is not responsible to defend or indemnify Jason Solano (Solano) against claims arising out of a September 26, 2008, motor vehicle accident, and an injunction prohibiting Solano from coverage under an insurance policy issued by Progressive to

Carol Gehris (Gehris).[1] Because we conclude that material questions of fact relevant to these legal issues remain, we deny summary judgment.

By way of background, on September 26, 2008, Gehris was the owner of a 1995 Ford Mustang, insured by Progressive under an insurance policy issued to Gehris and her husband, Kim Gehris, Sr., who reside in Bethlehem, Pennsylvania.[2] Solano, an unlicensed driver, lived with the Gehris' daughter, Jennifer, in Allentown, Pennsylvania. The accident occurred when Solano, while operating the Mustang with Edison Pares and Francisco Dipi as passengers, collided with a 1999 Chevrolet Cavalier owned by Edward Strobl. Thereafter, Edison Pares, a minor by and through his parent and natural guardian, Brendy Pares, and Brendy Pares, in her own right, filed a civil action complaint (Complaint) against Solano and Gehris, alleging, *inter alia*, that Edison Pares suffered "catastrophic, permanent and disabling injuries," (Petition, Exhibit 3), due to the negligence of both Solano and Gehris. Gehris filed an answer to the Complaint, asserting that she did not give Solano permission to drive her car; she also filed a cross-claim against Solano, asserting that, if liability is found, Solano alone is liable to the Pareses for their injuries. Progressive provided a defense under a reservation of rights to Solano.

Thereafter, Progressive filed its Petition under the Declaratory Judgments Act, 42 Pa. C.S. §§7531—7541, seeking a declaration that it had no liability for

[1] Gehris, Solano and Francisco Dipi have been precluded from filing briefs and participating in oral argument in this matter.

[2] The policy provided liability coverage of $100,000 per person/$300,000 per accident.

claims made in connection with the accident under its insurance contract with Gehris.[3] In relevant part, the policy provides liability coverage to "others" as follows:

> **PART I-LIABILITY TO OTHERS**
>
> **INSURING AGREEMENT**
>
> If **you** pay the premium for this coverage, **we** will pay damages for **bodily injury** and **property damage** for which an **insured person** becomes legally responsible because of an accident.
>
> **We** will settle or defend, at **our** option, any claim for damages covered by this Part I.

[3] Progressive's Petition identified the Department of Public Welfare (DPW) as a respondent but did not assert claims against or request relief from DPW. Therefore, this court, *sua sponte*, issued a rule to show cause why DPW should not be dismissed from the action and the action transferred to Lehigh County Court of Common Pleas. Progressive responded by explaining that DPW had given notice of its intent to assert a subrogation lien against any personal injury award in favor of Edison Pares; DPW was required to be made a party to this action as its claim for reimbursement for funds expended for Pares' medical care will be affected by a declaration that there is no coverage for Solano with respect to the motor vehicle accident; and, because DPW is a necessary party to this action, jurisdiction is proper in this court pursuant to 42 Pa. C.S. §761 (relating to original jurisdiction of all civil actions or proceedings against the Commonwealth government). Because Progressive's reply to the rule to show cause asserted a colorable claim that DPW is a necessary party and that this court has jurisdiction over the action, we discharged the rule without prejudice to the parties' right to raise the issue of jurisdiction at a later time if they so chose.

At this time, in addition to the claims by Gehris, Edison Pares and Brendy Pares, Strobl has demanded $5,000 from Progressive for alleged damage to the Cavalier, which apparently was parked at the time of the incident. DPW, which paid for a portion of Edison Pares' medical care, alleges a lien of over $292,000 against any personal injury award in his favor. Progressive also expects Dipi, who is the son of Solano's mother's boyfriend, to file a claim against Solano.

ADDITIONAL DEFINITION

When used in this Part I:

"**Insured person**" means:
1. **you** or a **relative** with respect to an accident arising out of the ownership, maintenance, or use of an **auto** or **trailer**;

2. any person with respect to an accident arising out of that person's use of a **covered auto** with the permission of **you** or a **relative**[.]

. . . .

(Motion for Summary Judgment, Ex. A.) (Emphasis in original.) The policy defines "You" as the named insured on the declarations page and that person's spouse if residing in the same household at the time of the loss. The term "relative," as defined in the policy, includes persons related to the named insured by blood, marriage or adoption who reside in the insured's household. In addition, "relatives" are "**your** unmarried dependent children who are temporarily away from home if they intend to continue to reside in **your** household." *Id.* (Emphasis in original.)

In its Petition, Progressive alleges that Solano is not an insured person covered by this policy and sets forth the following allegations to support its position: (1) Gehris and her husband, Kim, Sr., were the only named insureds on the declarations page; (2) Jennifer Gehris did not reside with Gehris on or about September 26, 2008, and had not done so for at least two years prior to that time; (3) Jennifer Gehris was not temporarily away from Gehris' home; (4) Solano did not

have Gehris' permission to operate the Mustang;[4] (5) the policy at issue did not authorize Jennifer Gehris to give Solano permission to operate the Mustang because she was not a resident of Gehris' household on or about September 26, 2008.

Edison and Brendy Pares filed an answer to the Petition, asserting that Progressive was liable for claims connected to the accident and alleging that Solano was operating the Mustang with the full knowledge and consent of Jennifer Gehris; Solano was operating the Mustang with Gehris' full knowledge; and Jennifer Gehris was not temporarily away from her mother's home. The Pareses assert that, accordingly, this court should enter an order declaring that Petitioner is required to provide liability coverage, including a defense, on Solano's behalf.[5]

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[4] After completion of discovery relevant to the pleadings, it is clear that Solano did not have Gehris' permission to drive her car because Solano testified as much. For example, Solano testified: "It's just like I already know I shouldn't use the car because her mother is real picky. You know, like, she's skeptical about anything, anybody using her vehicle, even her daughter. So I just took it she don't really want her daughter using the vehicle, she probably wouldn't want me using it either." (Solano dep. at 14.) Solano also testified that neither Gehris nor her husband ever saw him using the vehicle. (Solano dep. at 48.) Therefore, this case is not comparable to *Adamski v. Miller*, 545 Pa. 316, 681 A.2d 171 (1996), where the third party had the owner's implied consent to drive the covered automobile.

[5] DPW also filed an answer to the Petition, praying that the request for declaratory judgment be denied and that this court instead declare that Progressive is liable to DPW under section 1409(b)(1) of what is commonly referred to as the Fraud and Abuse Control Act, Act of June 13, 1967, P.L. 31, *as amended*, added by the Act of July 10, 1980, P.L. 493, 62 P.S. §1409(b)(1) (relating to third party liability). This section provides:

> When benefits are provided or will be provided to a beneficiary under this section because of an injury for which another person is liable, or for which an insurer is liable in accordance with the provisions of any policy of insurance issued pursuant to Pennsylvania insurance laws and related statutes the department shall have the right to recover from such person or insurer the reasonable value of benefits so

(Footnote continued on next page…)

Based on discovery exchanged in the civil action, Progressive filed its Motion for Summary Judgment on the issue of Progressive's liability. Summary judgment may be granted "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report. . . ." Pa. R.C.P. No. 1035.2(b)(1). A court may grant summary judgment only when, viewing the record in the light most favorable to the non-moving party, the right to such judgment is clear and free from doubt. *Shaffer-Doan ex rel. Doan v. Department of Public Welfare*, 960 A.2d 500, 517 (Pa. Cmwlth. 2008).

Progressive contends that it is entitled to summary judgment on its Petition because the undisputed facts establish that Solano is not covered under the policy.[6]

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> provided. The Attorney General or his designee may, at the request of the department, to enforce such right, institute, and prosecute legal proceedings against the third person or insurer who may be liable for the injury in an appropriate court, either in the name of the department or in the name of the injured person, his guardian, personal representative, estate or survivors.

[6] DPW alleges in its answer that summary judgment should be denied even though, in its motion for leave to file a counterclaim, it had agreed that Progressive was not obligated to pay under the liability portion of the policy because Solano was not an insured thereunder. DPW alleged in its counterclaim that Edison Pares is an "insured" under Gehris' policy because he was a passenger in a covered auto under the policy, and the exclusion in the policy that renders the covered auto ineligible as an uninsured vehicle violates the definition of an uninsured vehicle in Section 1702 of the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. C.S. §1702, as well as the coverage requirement of Section 1731(b) of the MVFRL, 75 Pa. C.S. §1731(b). DPW further claims that the law does not permit exclusion of an innocent passenger from Uninsured Motorist (UM) coverage when a covered auto is used without permission. Accordingly, DPW

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Solano is covered under the policy only if Jennifer Gehris qualifies as a relative and permitted Solano to use the Mustang. Therefore, to establish that it is not liable, Progressive must prove that Jennifer Gehris is financially independent, did not intend to return to her parents' household or did not permit Solano to drive the car.

Relevant to this burden of proof, Progressive concedes that Solano *may* have had Jennifer Gehris' permission to use her mother's car. However, Progressive argues that Jennifer Gehris was neither a dependent of her parents nor away from their home temporarily. Progressive points to Jennifer Gehris' testimony that, when the accident occurred, she was employed; she had not lived with her parents for three to four years; and she paid rent and utility bills in order to live at her parents' Allentown property with Solano, to whom she was engaged.

By contrast, the Pareses argue that, because Jennifer lived at a home owned by her parents, drove their car, and did not necessarily pay rent, she should be considered a relative within the terms of the policy.[7] Accordingly, the Pareses argue, Solano was an insured person under the terms of the policy because he had the permission of Jennifer Gehris, who was financially dependent on her parents and

(continued…)

seeks a declaration that Progressive is required to pay $100,000 in UM proceeds for Edison Pares' benefit.

[7] The Pareses contend in this regard that any ambiguity in the policy language of an insurance contract is to be construed in favor of the insured and against the insurer, citing, *e.g.*, *Cohen v. Erie Indemnity Company*, 432 A.2d 596 (Pa. Super. 1981).

lived in their home, to drive the Mustang. Again, DPW is apparently not challenging Progressive's allegations with respect to the issue of liability coverage.

However, based on the evidence gathered during discovery, we conclude that a question remains as to whether Jennifer Gehris could be considered "dependent" on her parents, and whether she intended someday to move home with them, where: Solano testified that Jennifer attended school, (Solano dep. at 16); Jennifer testified that, although she and Solano were supposed to pay her parents rent, some months they could not afford it, (J. Gehris dep. at 12); Kim Gehris testified that Jennifer did not pay rent, (K. Gehris dep. at 7); Carol and Kim Gehris both testified that, when Jennifer's car became inoperable, they loaned her a car, (C. Gehris dep. at 15-16), (K. Gehris dep. at 8); Jennifer testified that her parents paid off her previous car even though she had originally financed it, (J. Gehris dep. at 11); and, approximately seven months after the accident, Jennifer gave her address as the Bethlehem, Pennsylvania, household in which her parents live. (J. Gehris dep. at 5.)[8] Because material questions of fact remain with respect to Progressive's liability under the policy, summary judgment on Progressive's Petition is precluded.

[8] While Jennifer Gehris considered herself engaged to be married at the time of the September 26, 2008, accident, and common sense might therefore dictate that she had no intention to return to her parents' home, we conclude that, for purposes of summary judgment, more information is needed to establish whether Jennifer nonetheless intended to resume living with her parents, as she apparently did in March 2009. In other words, in this case's current evidentiary posture, we are unaware of any "magic question" asked by counsel, elucidating whether Jennifer considered herself temporarily or permanently away from her parents' home in light of the fact that: (1) she was still in school; and (2) she and Solano, whose employment history was erratic, (J. Gehris dep. at 12), planned to be married at some undesignated point in time.

Accordingly, we deny Progressive's Motion for Summary Judgment.[9]

ROCHELLE S. FRIEDMAN, Senior Judge

[9] Although DPW apparently wants us to decide its counterclaim in the context of Progressive's summary judgment motion, such counterclaim is more properly considered in response to the merits of Progressive's declaratory judgment action.

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O R D E R

AND NOW, this 27th day of April, 2010, upon consideration of Progressive Northern Insurance Company's Motion for Summary Judgment and the responses thereto, the Motion for Summary Judgment is denied.

ROCHELLE S. FRIEDMAN, Senior Judge

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HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: April 27, 2010

I respectfully dissent because there is no evidence indicating that Jennifer Gehris (Jennifer) intended to move home with her parents or was dependent upon her parents as required under the Progressive insurance policy to make her a "relative;" therefore, she was not an insured requiring Progressive Northern Insurance Company to defend or indemnify Jason Solano (Solano) against claims arising out of the September 26, 2008 motor vehicle accident.

Solano was involved in a car accident while using Jennifer's mother's (Carol) car without her permission. One of his minor passengers, Edison Pares (Pares), was severely injured. At the time of the accident, Carol had an insurance policy that covered herself or a blood relative using the car with her permission or that of a relative. "Relative" was defined as her "unmarried dependent children who are temporarily away from home if they intend to continue to reside in your household." At the time of the accident, Jennifer was engaged to Solano, but living outside of her parents' household in another home owned by her parents. Jennifer had not lived with her parents for four years prior to the date of the accident; Solano moved in two years prior to the accident; Jennifer was employed and paid rent to her parents and she paid utility bills. She also had her own car which she financed.

After the accident, Pares, through his parent and natural guardian, filed a civil action against Solano and Carol due to their negligence. Progressive provided a defense to Carol under a reservation of rights to Solano. Progressive argued that it had no liability based on its insurance contract because Solano was not an insured person. Progressive also filed a motion for summary judgment on the issue of its liability. It argues that Solano was only covered under the policy if Jennifer qualified as a relative and permitted him to use the car.

To establish that it was not liable, Progressive had to prove that Jennifer was financially independent, did not intend to return to her parents' household and did not permit Solano to drive Carol's car. Progressive conceded that Solano may have had Jennifer's permission to use her mother's car. However, it denies that she was a dependent of her parents or that she intended to return to home.

The majority denies Progressive's request for summary judgment relying on information taken from the deposition transcripts. For example, the majority concludes that the question remains as to whether Jennifer could be considered "dependent" on her parents and whether she intended "someday" to move home with them based on the following testimony:

> Solano testified that Jennifer attended school;
>
> Jennifer testified that some months she could not afford to pay her parents rent;
>
> Jennifer's father testified that Jennifer did not pay rent;
>
> Jennifer's parents testified that when Jennifer's car did not work, they loaned her a car;
>
> Jennifer testified that her parents paid off her previous car even though she originally financed the car;
>
> Seven months after the accident, Jennifer gave her address as that of her parents' residence.

In and of themselves, none of these items indicate that Jennifer was a dependent. In fact, Jennifer testified that she had a job and she paid her parents $500 a month for rent, but "Some months we couldn't afford that." (Hearing transcript at 12.) She also paid electricity, telephone and water. (Hearing Transcript at 12.) As for her car, she testified that she had financed her car "but my parents paid off the last amount of it so it would be paid off for me." (March 23, 2009 Hearing Transcript at 11.) Notably, her parents did not testify that they claimed her as a dependent on their tax returns. They did not testify that they paid for her food and clothing. She was

obviously not living under their roof. There was no testimony that they believed that she would be returning to live with them with Solano after she was married.

Although the majority states that "material questions of fact remain with respect to Progressive's liability under the policy" and then precludes summary judgment, it also states in footnote 8 that "Jennifer considered herself to be engaged to be married at the time of the accident and common sense might dictate that she had no intention to return to her parents' home." (Slip op. at 8.) Nonetheless, it goes on to state that no "magic question" was asked to determine whether Jennifer considered herself temporarily or permanently living away from home, and because that question needs to be determined, summary judgment must be denied. However, short of answering that question, all of the other evidence indicates that Jennifer had no intention of returning home to live with her parents or that she was actually dependent on her parents.

For the above reasons, I respectfully dissent.

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DAN PELLEGRINI, JUDGE