

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PRUDENTIAL PROPERTY & :
CASUALTY INSURANCE CO. : CIVIL ACTION
: :
v. : :
: :
JEFFREY D. ARMSTRONG : NO. 03-4575

Padova, J.

MEMORANDUM

March 24, 2004

Plaintiff Prudential Property and Casualty Co. has filed a declaratory judgment action against Defendant Jeffrey Armstrong, seeking a judgment from this Court that Plaintiff does not owe Defendant benefits pursuant to an automobile insurance policy issued to Defendant's father. Specifically, Plaintiff seeks a declaratory judgment that precludes Defendant from recovering under the uninsured motorist (UIM) provisions of the insurance policy.

Plaintiff has filed a Motion for Summary Judgment, asserting that, given the undisputed facts in this case, no reasonable factfinder could determine that Defendant was entitled to coverage under the terms of the policy. For the following reasons, the Court will grant Plaintiff's Motion for Summary Judgment.

I. RELEVANT BACKGROUND

The facts of this case are in relevant part uncontested. On June 13, 2001, Defendant was employed by the Fairmont Park Commission, an agency of the City of Philadelphia, as a Park Ranger. On this date, Defendant was riding as a passenger in a Fairmont Park Commission vehicle when it was struck from behind by a paratransit bus. Defendant sustained injuries as a result of

this accident. Defendant thereafter filed an uninsured motorist (UIM) claim with his father's automobile insurance policy, which was issued by Plaintiff. At the time of the accident, Defendant was named on his father's policy as a licenced resident operator, and Defendant asserts that he lived at his father's residence during this period.

Defendant testified at his deposition that, at the time of the accident, he had been employed with the Fairmont Park Commission for only three weeks, and was working in the Burholme district of the park. (Armstrong Dep. at 9, 11.) At the time of the accident, Defendant and his co-worker, Sahlee Brown, were returning to the Burholme district after picking up mail at Memorial Hall. (Armstrong Dep. at 19.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id. A party seeking summary judgment always bears

the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). When considering a motion for summary judgment, the court must view all evidence in favor of the non-moving party and must resolve all doubts in favor of the non-moving party. SEC v. Hughes Capital Corp., 124 F.3d 449, 452 (3d Cir. 1997).

III. DISCUSSION

The policy under which Defendant claims coverage provides that UIM coverage will be provided, in certain circumstances, when an insured is driving a non-owned car. However, the policy contains a provision specifically excluding UIM coverage for non-owned vehicles which are "furnished or made available for the regular use" of an insured (hereinafter referred to as the "regular use exclusion.") The regular use exclusion provides as follows:

3. Non-owned motor vehicles

We will not pay for bodily injury caused by anyone using a non-owned motor vehicle or trailer not insured under this Part, that is furnished or made available for the regular use by you or a household resident.

See Pl's Mot. Summ. J., Ex. D, § 4(E). The parties do not dispute that Pennsylvania law applies to this case. The Pennsylvania Supreme Court has upheld such exclusions in insurance contracts against attacks that they are violative of public policy, and thus there is no dispute as to the enforceability of this provision of the contract. See Burstein v. Prudential Prop. and Casualty Ins. Co., 809 A.2d 204 (Pa. 2002).

"An insurance policy's language that is clear and unambiguous should be given its plain and ordinary meaning, unless the parties indicate that another meaning was intended." Automobile Ins. Co. of Hartford v. Curran, 994 F. Supp. 324, 329 (E.D. Pa. 1998) Courts considering the issue have held that the term "regular use" is unambiguous. See Prudential Prop. and Casualty Co. v. Peppelman, Civ. A. No. 02-1515, 2003 U.S. Dist Lexis 7650, at *7 (E.D. Pa. April 25, 2003)(collecting cases). Accordingly, the Court will interpret the term "regular use" in accordance with its plain and ordinary meaning. One court has defined the provisions in a regular use exclusion clause as follows:

In common usage, "furnished" means "to provide or supply"; "available" means "suitable or ready for use" and "readily obtainable, accessible"; and "regular" means "usual, normal or customary." Pursuant to these definitions, . . . the test of a regular use exclusion is not use but availability for use or ownership by a member of a group who would be likely to make their cars available for each other's use.

Curran, 994 F. Supp. at 330; see also Nationwide Mut. Ins. Co. v.

Shoemaker, 965 F. Supp. 700, 706 (E.D. Pa. 1997)(holding that regular use exclusion applies when use is "habitual rather than incidental or casual.") Determining whether a vehicle was available for the insured's "regular use" is a fact-intensive inquiry. Prudential Prop. and Casualty Co. v. Hinson, 277 F. Supp. 2d 468, 474 (E.D. Pa. 2003). However, "where the facts are not in dispute, and reasonable minds cannot differ as to the result, the issue of coverage can be decided as a matter of law by the Court." Crum & Forster Personal Ins. Co. v. Travelers Corp., 631 A.2d 671, 673 (Pa. Super Ct. 1993).

Courts have held that the regular use exclusion applies when a fleet of vehicles, as opposed to a specific vehicle, are available for the use of an insured. See Peppelman, 2003 U.S. Dist Lexis 7650, at *13 (Sears service technician who regularly drove one of a fleet of service vans in connection with his work excluded from UIM coverage under his own automobile insurance policy by virtue of regular use exclusion); Hinson 277 F. Supp. 2d at 475 (holding that regular use exclusion applied to fleet of police cruisers). Additionally, the test for regular use does not consider how often a vehicle, or fleet of vehicles, was actually used, but rather considers whether this vehicle or group of vehicles was regularly available for use. See Curran, 994 F. Supp. at 330 (denying UIM coverage to an insured who was operating a vehicle which was available for his use at any time that he needed

it, notwithstanding the fact that he rarely used it).

Plaintiff claims that the Park Commission vehicle that Defendant was riding in at the time of the accident qualifies as a non-owned vehicle available for Defendant's regular use, thereby precluding coverage. Defendant disputes this contention. Defendant submits that he was not allowed to drive a Park Commission vehicle at the time of the accident, because he had not yet completed a driver training program. Defendant therefore argues that Park Commission vehicles were not regularly available for his use at the time of the accident. There is inconsistent testimony in the record, and therefore a disputed issue of fact, concerning whether this driver training requirement was actually enforced, or whether employees were allowed to operate a vehicle without such training. (See Booker-Harris Dep. at 11.) However, this issue is essentially irrelevant, as courts interpreting Pennsylvania law have uniformly defined "use" to include riding in, as well as operating, motor vehicles. See Allstate Ins. Co. v. Davis, 977 F. Supp. 705, 709 (E.D. Pa. 1997) ("the Motor Vehicle Financial Responsibility Law . . . defines 'use' in such a way as to incorporate occupants and passengers.") (citation omitted). Furthermore, the record does not indicate that there were any restrictions upon new employees riding as passengers in vehicles before they had completed the driver training program.

Defendant next asserts that he cannot remember whether he ever

rode as a passenger in or drove a Park Commission vehicle before the date of the accident, which occurred when Plaintiff had only been employed with the Park Commission for three weeks. (Armstrong Dep. at 13-15.) Defendant further asserts that, during the first two weeks of the job, his training included only office work, and he did not have occasion to travel in Park Commission vehicles. (See Booker-Harris Dep. at 19.) However, regardless of whether Defendant had been relegated to office work during the first two weeks of his employment, it is clear that, beginning in the third week, Defendant's job responsibilities included riding in and/or operating Park Commission vehicles on a regular basis. (Armstrong Dep. at 17.) Indeed, the park rangers' human resources representative testified that Defendant would be expected to ride with other employees as a trainee to learn his duties. (Griffith Dep. at 22, 27.) According to the record, at least one Park Commission vehicle was available to employees at each district at all times if they needed it to perform their duties, unless multiple vehicles were out of service due to maintenance or repair. (Griffith Dep. at 24.) Accordingly, the mere fact that Defendant's ride in a Park Commission vehicle on the date of the accident may have been the first of many such trips in a Park Commission vehicle does not provide support for Defendant's assertion that this vehicle was not available for his regular use at the time of the accident. Cf. Shoemaker, 965 F. Supp. at 706 n.8 (holding that the

time during which a driver made use of a vehicle for purposes of determining the applicability of the regular use exclusion should be calculated by reference to the time that the driver planned to use the vehicle, rather than by reference to the amount of time that the driver had actually used the vehicle at the time of the accident.)

In a similar vein, Defendant argues that, because he had only been employed with the Park Commission for three weeks on the date of the accident and cannot remember riding in a Park Commission vehicle before that date, he could not have anticipated that Park Commission vehicles would be available for his regular use, and that UIM coverage on these vehicles would therefore be excluded. Defendant further argues that, as the insured, his reasonable expectation of coverage should govern the scope of the coverage provided. “‘The proper focus regarding issues of coverage under insurance contracts is the reasonable expectation of the insured.’ The Court must look at the totality of the circumstances in determining what expectations are reasonable.” Peppelman, 2003 U.S. Dist Lexis 7650, at * 10 (quoting Curran, 994 F. Supp. at 328-29). Defendant’s assertion that, because he may have been using a Park Commission vehicle for the first time on the day of the accident, he could not have reasonably anticipated that such vehicle was available to him for his regular use, is baseless. The record is clear that the regular use of a Park Commission vehicle

was part of the job requirements for all park rangers. Indeed, the Human Resources Coordinator, Ms. Booker-Harris, testified that any new employee was required to have a driver's license at the time he was hired, because a part of each park ranger's responsibilities was vehicle patrol. (Booker-Harris Dep. at 10.) Ms. Booker-Harris further testified that a job description was given to all new employees during the interview process, and that a policy and procedure manual was gone over in its entirety with new employees at the start of their employment. (Booker-Harris Dep. at 14.) Accordingly, reasonable minds cannot differ as to the conclusion that Defendant should reasonably have expected that his job responsibilities would include the regular use of a Park Commission vehicle.

Defendant further argues that this case is distinguishable from prior cases in which UIM coverage was denied, because he was expected to use Park Commission vehicles relatively less frequently than the parties seeking coverage in those prior cases. See Peppelman, 2003 U.S. Dist Lexis 7650 (coverage denied to an insured who used a Sears service vehicle every working day for over 30 years). According to Defendant, his job responsibilities at the time of the accident did not require him to use a Park Commission vehicle every day. (Armstrong Dep. at 14-15.) Moreover, the record indicates that Park Commission vehicles were not available to Park Commission employees for their own personal use. (See Def's Mot.

Summ J. Ex. D.)

However, this distinction is ultimately irrelevant. Both Defendant and his supervisors testified that Defendant was required to use a Park Commission vehicle on a regular basis, for the purpose of traveling to parts of the park which could not be easily reached on foot. (Griffith Dep. at 16; Booker-Harris Dep. at 11.) Moreover, Defendant has not cited, and the Court has not found, any case which has interpreted the term regular use under Pennsylvania law to require that the vehicle in question be used on a daily basis. To the contrary, the term regular use simply requires that the vehicle in question be available to the insured on a "usual, normal or customary" basis. Curran, 994 F. Supp. at 330. Accordingly, the mere fact that Defendant and other park rangers did not necessarily use a Park Commission vehicle every day does not mean that Park Commission vehicles were not available for their regular use.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is granted in its entirety.

An appropriate order follows.

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| v. | : | |
| | : | |
| JEFFREY D. ARMSTRONG | : | NO. 03-4575 |

ORDER

AND NOW, this 24th day of March, 2004, upon consideration of Plaintiff's Motion for Summary Judgment (Docket # 8), and all related submissions, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in its entirety. Judgment is hereby entered in favor of Plaintiff and against Defendant. **IT IS FURTHER ORDERED** that Defendant is not entitled to collect Uninsured Motorist Benefits under Prudential car policy # 282A476929, issued to John E. Armstrong, for the motor vehicle accident occurring on June 13, 2001.

BY THE COURT:

John R. Padova, J.