

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

PRUDENTIAL PROPERTY & CASUALTY : CIVIL ACTION
INSURANCE CO. :
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 v. :
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 VICTOR DASH, :
 JANICE HARMON, :
 BRUCE FLOYD, :
 LOIS WILLIAMS, Administratrix of :
 the Estate of Natasha Michelle :
 Williams, :
 & PENNSYLVANIA FINANCIAL :
 RESPONSIBILITY ASSIGNED CLAIMS :
 PLAN : NO. 97-6326

MEMORANDUM and ORDER

Norma L. Shapiro, J.

May 20, 1998

Plaintiff Prudential Property & Casualty Insurance Company ("Prudential") filed this declaratory judgment action under 28 U.S.C. § 2201, et seq., against defendants Victor Dash ("Dash"), Janice Harmon ("Harmon"), Bruce Floyd ("Floyd") and Lois Williams ("Williams") as administratrix of the estate of Michelle Williams. Pennsylvania Financial Responsibility Assigned Claims Plan (the "Plan") was added as a party defendant. Prudential filed a motion for summary judgment, which the court granted at oral argument. This Memorandum follows the court's oral grant of summary judgment.

BACKGROUND

Harmon leased a 1989 Mercedes Benz ("Mercedes") from Fleetway Leasing Company. The Mercedes was insured under a Prudential automobile liability policy issued to Harmon,

effective from November 23, 1994 to May 23, 1995. (Policy, attached as Ex. B to Pltff.'s Brief). The policy provides liability coverage for the following drivers:

You and a resident relative are insured while using your car or a substitute car covered under this part.

Other people are insured while using your car or a substitute car covered under this part if you give them permission to use it. They must use the car in the way you intended.

(Policy at 8).

Harmon frequently drove the Mercedes from her home in Upper Darby to her boyfriend Floyd's residence in Philadelphia where she left the car while at work. (Dep. of Janice Harmon at 30, attached as Ex. E to Pltff.'s Brief ["Harmon Dep."]). On occasion, after Harmon had left the car with Floyd, Floyd rented the Mercedes to third-parties in exchange for money and supplies of crack cocaine. (Dep. of Victor Dash at 9-10, 47, attached as Ex. F to Pltff.'s Brief ["Dash Dep."]). In one instance, Harmon left the car in Floyd's possession with permission to drive the vehicle. When Floyd did not return the vehicle at the appointed time, Harmon reported it stolen. (Harmon Dep. at 28-29). Occasionally, Floyd would ask Harmon's permission to use the Mercedes. Sometimes she gave him permission, but other times she did not. (Id. at 31-32). On the occasions when Harmon knew Floyd had driven the car, Harmon had given him permission. There is no evidence that Harmon was aware of Floyd's use of her car

when she had not given him express permission to do so. (Id. at 31-34). (Id.). Harmon had never met Dash and neither knew him nor gave him permission to drive her car at any time. (Id. at 32).

On April 30, 1995, at about 5:00 p.m., Harmon drove the Mercedes to Floyd's residence and left it with Floyd. (Harmon Dep. at 14). Harmon left the car keys in Floyd's kitchen and asked Floyd to clean the car if he had time. (Harmon Statement at 1-2, attached as Ex. A to the Plan's Brief). Floyd admits that Harmon did not give him permission to drive the car or allow anyone else to drive it on that date. (Dep. of Bruce Floyd at 19, 31-32, attached as Ex. D to Pltff.'s Brief ["Floyd Dep."]; Harmon Dep. at 31). Floyd stated that Harmon "didn't allow me to drive it. She definitely would not allow anyone else to drive it." (Floyd Dep. at 31-32).

Floyd claims he was washing Harmon's car in front of his residence that evening when Dash approached him and sat in the passenger seat of the Mercedes. Floyd, leaving Dash in the car, walked to a store across the street to purchase cigarettes. (Floyd Dep. at 15). Floyd does not recall whether he left the keys in the Mercedes, but when he returned from the store, Dash and the Mercedes were missing. (Id. at 18).

Dash has disputed Floyd's allegations. Accepting the facts most favorable to the non-movant, Floyd delivered the car to

Dash's house that evening, where Dash rented the Mercedes from Floyd for \$20.00 in cash and \$40.00 worth of crack cocaine.

(Dash Dep. at 8-13). Floyd represented to Dash that he was the owner of the Mercedes, (Id. at 10), and instructed him to return the car by 11:00 p.m. (Id. at 48).

Dash picked up Natasha Williams ("Natasha"), a fourteen year old girl, and drove around Philadelphia with her. At about 9:10 p.m. that night, Dash, traveling on Henry Street at an excessive rate of speed, lost control of the vehicle. The Mercedes spun out of control, hit a utility pole and continued rotating until the passenger side was crushed by a large tree. Natasha was killed by the impact. (Police Reports, attached as Ex. A to Pltff.'s Brief).

Prudential, arguing Dash did not have Harmon's permission to drive the car, disclaimed coverage for the accident. Williams, administratrix for Natasha's estate, initiated an action in the Philadelphia County Court of Common Pleas against Dash, Floyd, Harmon and the Plan (for uninsured motorist coverage).

Prudential, seeking a declaration that it has no duty to defend Dash or Floyd in the pending state court action, filed the present action. Dash, Harmon and Floyd failed to answer Prudential's Complaint; default was entered against Dash and Harmon, although default was not sought against Floyd.

Prudential filed this motion for summary judgment; only Williams

and the Plan filed responses in opposition. At oral argument on May 19, 1998, the court granted Prudential's motion for summary judgment.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only

when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

II. The Insurance Policy

An insurer has an obligation to defend a lawsuit against an individual "whenever the complaint filed by the injured party may potentially come within the coverage of the policy." Gedeon v. State Farm Mut. Aut. Ins. Co., 188 A.2d 320, 322 (Pa. 1963); see Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484, 488 (Pa. 1959). Interpretation of a contract is a question of law for the court. "The goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument." Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). Where the contractual language is clear, the court must give that language its plain and ordinary meaning, unless contrary to public policy. See Windrim v. Nationwide Ins. Co., 641 A.2d 1154, 1157 (Pa. 1994); Antanovich v. Allstate Ins. Co., 488 A.2d 571, 575 (1985).

Under Pennsylvania law, permission to use an automobile must come from the named insured. See Brower v. Employers' Liability Assurance Co., Ltd., 177 A. 826, 828 (1935); Belas v. Melanovich,

372 A.2d 478, 481 (Pa. Super. 1977). The permission may be either express or implied. There is no dispute that Harmon did not give express permission to either Floyd or Dash to use her Mercedes on April 30, 1995; the issues are whether Harmon gave implied permission to Floyd to use the vehicle and, if so, whether the implied permission was limited to Floyd or covered someone driving with Floyd's permission on the night of the accident.

In Belas, the named insured lent her car to her nephew Samuel for personal use. Samuel drove to a restaurant where he met his friend Craig. Craig, in turn, asked Samuel if he could borrow the car to visit his friend Rosemarie; Samuel agreed. While Craig was driving the car with Rosemarie, he was involved in an accident. See id. at 479-80. The named insured did not know Samuel was planning to lend the car to another and gave only Samuel use of the car. The court held there was insufficient evidence to support a finding that the named insured gave implied permission for Samuel to lend the car to his friend. See id. at 484.

In Federal Kemper Ins. Co. v. Neary, 530 A.2d 929 (Pa. Super. 1987), an insurer sought a determination of its duty to defend a driver involved in an accident. The named insured lent his car to his step-son on the condition that the step-son not permit any non-licensed driver to operate the vehicle. The step-

son permitted a non-licensed, underage third-party (who fraudulently represented that he had a license) to operate the car. See id. at 929. The court held that because the named insured had explicitly forbidden his step-son to allow any non-licensed driver to use the car, the driver was not insured under the policy.

Implied permission can arise from the "course of conduct in which the parties have mutually acquiesced." Id. at 931. "However, 'permission' requires something more than mere sufferance or tolerance without taking steps to prevent the use of the automobile, and permission cannot be implied from possession and use of the automobile without the knowledge of the named insured." Id.; see Nationwide Mut. Ins. Co. v. Cummings, 652 A.2d 1338, 1344 (Pa. Super. 1994), appeal denied, 659 A.2d 988 (Pa. 1995). The court must look to the grant of permission given by the named insured. Here, Harmon's grant of permission to Floyd was limited to his washing the car and driving it behind the house if necessary. Floyd admitted he did not have permission to drive the car or permit anyone else to do so. Regardless of Floyd's misrepresentation of ownership to Dash, Harmon's grant of permission did not include Dash's use of the Mercedes.

It is clear that, as a matter of law, the Prudential liability policy did not cover either Floyd or Dash on April 30,

1995 and summary judgment in Prudential's favor is required. See, e.g., Gift v. Nationwide Ins. Co., No. 97-6934, 1998 WL 164997, at *3 (E.D. Pa. Apr. 9, 1998) (passenger riding in stolen vehicle that he thought belonged to driver not covered where named insured had not authorized the driver to use the car); Allstate Ins. Co. v. Davis, 977 F. Supp. 705, 710 (E.D. Pa. 1997) (insufficient nexus between the named insured's grant of permission and the action taken to find implied permission).

Defendants contend that material issues of fact preclude summary judgment. There is an issue of fact regarding whether Dash stole the Mercedes or rented it from Floyd, but the issue is not relevant because under either set of facts, neither Floyd nor Dash had Harmon's permission to use her car.

Defendants also attempt to impute the concept of apparent authority from tort law into this contractual context. But insurance coverage is a contractual matter and the insurance contract is clear that coverage extends to those using the automobile only with the permission of the named insured in the way the insured intended.

An appropriate Order follows.

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ORDER

AND NOW, this 20th day of May, 1998, upon consideration of plaintiff Prudential Property & Casualty Insurance Company's ("Prudential") motion for summary judgment, the responses by Lois Williams and the Pennsylvania Financial Responsibility Assigned Claims Plan, Prudential's reply, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Plaintiff Prudential's motion for summary judgment is **GRANTED**. Judgment is **ENTERED** in favor of Prudential.

2. It is **DECLARED** that plaintiff Prudential has no duty to defend or indemnify defendants Bruce Floyd or Victor Dash in connection with the April 30, 1995 automobile accident.

Norma L. Shapiro, J.