

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA

CAROLE BROOKS, THOMAS
KAZAR and RUBRIGHT'S FRAME
SERVICE, INC.,

Plaintiffs,

vs.

PENN NATIONAL MUTUAL
CASUALTY INSURANCE COMPANY,

Defendants.

CIVIL DIVISION

Case No.: GD 05-6668

**MEMORANDUM IN SUPPORT
OF ORDER AND ORDER OF
COURT**

By:
The Honorable Paul F. Luty, Jr.

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CLERK OF COURT
ALLEGHENY COUNTY
PITTSBURGH, PA

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MEMORANDUM IN SUPPORT OF ORDER

This case was filed as a Declaratory Judgment action. Plaintiffs Carole Brooks, Thomas Kazar ("Kazar"), and Rubright's Frame Service, Inc. ("Rubright's") seek a declaration that Defendant Penn National Mutual Insurance Company ("Penn National") is responsible to indemnify Kazar and Rubright's with respect to a claim for damages asserted in an underlying action at docket number GD 04-8496.¹ Conversely, Penn National seeks a declaration that it owes no duty of indemnity with respect to the underlying claim.

The parties have stipulated that coverage would be available under the Penn National Policy (the policy") if: (a) Kazar was the sole owner of the subject vehicle; and (b) Kazar was not a named insured on the Penn National policy. (Tr. 9/13/06, p. 4-9).

¹ The underlying action arose out of a motor vehicle/pedestrian accident in which Carole Brooks was walking on a sidewalk on March 8, 2004 when Thomas Kazar was operating a Ford F-350 pickup truck, backed out of a parking lot of a car dealership, and struck her. Mr. Kazar was at the dealership because he had just purchased an auto part for use in his Rubright's Frame Service, Inc. business.

Therefore, this Court first considered the issue of whether or not Kazar was the sole owner of the subject vehicle. In doing so, the Court adopted the following findings of fact:

(a) When Kazar purchased the vehicle, he chose to register the vehicle in the name of Rubright's. Accordingly, both the title and the registration card were issued in that name. (TT at 57:9 – 58:1)

(b) One reason why Kazar chose to register the vehicle in the name of Rubright's Frame Service, Inc. was to afford corporate protection for any claim that might be made with respect to the vehicle. (TT at 58:2 – 59:4).

(c) Another reason why Kazar chose to register the vehicle in the name of Rubright's was to permit him to write off the cost of the vehicle, at least in part, as a business expense on Rubright's tax return. (TT at 78:13 – 20).

(d) Kazar did use the vehicle "with some regularity" with regard to Rubright's. (TT at 59:5 – 8).

(e) On the date of the underlying accident, Kazar was using the vehicle on the business of Rubright's. (TT at 59:9 – 12).

(f) When Kazar purchased the vehicle, he chose to satisfy his legal obligation to maintain financial responsibility with respect to the vehicle by purchasing \$25,000.00 worth of liability insurance, under his personal policy, with State Farm Insurance, for a premium of \$132. (TT at 59:17 – 60:23).

(g) When Kazar purchased the vehicle, he could have listed it as a covered auto under his Garage Policy with Penn National, under which he would have purchased

\$500,000.00 in liability insurance and paid approximately \$1,800.00, but chose not to do so. (TT at 60:24 – 61:15).

(h) Penn National was never notified that the vehicle had been purchased in the name of Rubright's. (TT at 61:16 – 62:19).

(i) Neither ownership nor possession of the vehicle was ever transferred from Rubright's to Kazar at any time from the date of purchase through the date of the underlying accident. (TT at 65:7 – 21).

(j) Subsequent to the underlying accident, Kazar did transfer ownership of the vehicle from Rubright's to himself, via a gift process. In several documents filed with the Pennsylvania Department of Transportation, Kazar represented to PennDot that the prior owner of the vehicle, on the date of the underlying accident, was Rubright's. (TT at 65:22 – 70:16).

(k) In order for liability insurance coverage to be provided pursuant to the policy, the conditions of either coverage symbol 27, 28, or 29 must be met. Otherwise, there is no coverage.

(l) At the time of the underlying accident, the vehicle was not specifically listed as a covered auto on the policy. Accordingly, there is no liability coverage afforded under coverage symbol 27.

(m) At the time of the underlying accident, the vehicle was not a "hired auto." Accordingly, there is no liability coverage afforded under coverage symbol 28.

(n) Coverage symbol 29 provides coverage when an insured party uses a vehicle in the course and scope of the insured's business, which vehicle is not owned by a named insured.

(o) Kazar was acting in his capacity as the owner/employee of Rubright's within the course and scope of his business duties.

The Court adopted the following conclusions of law:

(a) The elements of ownership of a motor vehicle are said to be "use, benefit, possession, control, responsibility for and disposition of..." Wasilko v. Home Mutual Casualty Co., 326, 232 A.2d 60 (Pa. Super. 1967).

(b) At the time of the underlying accident, the vehicle was owned, at least in part, by Rubright's because:

- i. Kazar, acting in his capacity as the owner of Rubright's chose to register and title the vehicle in the name of his business;
- ii. Kazar chose to register and title the vehicle in the name of Rubright's in order to afford corporate protection for any claim that might be made with respect the vehicle;
- iii. Kazar also chose to register and title the vehicle in the name of Rubright's in order to permit him to write off at least part of the value of the vehicle on Rubright's tax returns;
- iv. Kazar did use said vehicle "with some regularity" on the business of Rubright's;
- v. On the date of the underlying accident, Kazar was using the vehicle on the business of Rubright's;
- vi. Documents filed by Kazar, in connection with his subsequent gifting of the vehicle from Rubright's to himself, indicate that the prior status of the vehicle (at the time of the underlying accident) was that the vehicle was owned by Rubright's;

(c) The cases which stand for the proposition that evidence of registration or title is not conclusive on the issue of ownership are inapplicable here. All such cases, including Wasilko v. Home Mutual Casualty Company, 232 A.2d 60 (Pa. Super. 1967), Folmar v. Hartford Accident & Indemnity Co., 363 A.2d 1304 (Pa. Super. 1976), and

Aetna Cas. & Sur. Co. v. Duncan, 972 F.2d 523 (3rd Cir. 1992), involved the actual transfer of possession or control of the subject vehicle, from one person to another. Here, there was no transfer of either ownership or control of the vehicle at any time preceding the underlying accident. As such, this does appear to be an effort by Kazar to contend that the vehicle was owned by Rubright's for one purpose, but himself for another.

(d) In addition to the evidence of ownership by registration or title, the evidence described above leads to the conclusion that ownership of this vehicle, at the time of the underlying accident, was at least in part in Rubright's.

Since ownership of the vehicle was, at least in part, in Rubright's and since Rubright's is clearly a named insured on the policy, this Court hereby concludes that the policy provides no liability insurance coverage to Rubright's and/or Kazar for the claim asserted against them by Carole Brooks in the underlying action.²

See Order filed herewith.

11-9-06
Date

BY THE COURT:


Paul F. Luty, Jr.

² As such, this Court will not have to consider the issue of whether or not Kazar was a named insured under the policy because even if Kazar was a named insured under the policy, the vehicle would still not be a covered auto since it was not listed on the policy, it was not a "hired auto," and it was not a "non-owned" auto as defined in the policy.

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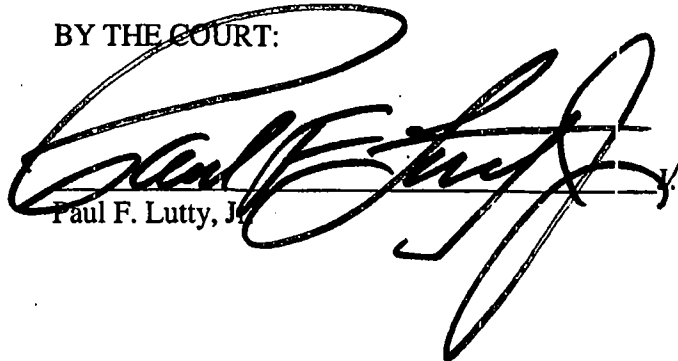
CIVIL DIVISION

Case No.: GD 05-6668

ORDER OF COURT

AND NOW, to wit, this 9th day of November 2006, it is hereby ORDERED,
ADJUGED and DECREED that upon consideration of the trial testimony, deposition
testimony offered and accepted for use at trial and the Proposed Findings of Fact and
Conclusions of Law filed by both parties, this Court hereby declares that the Penn
National policy, identified by policy number GR9 0092289 03 provides no coverage to
either Rubright's Frame Service, Inc. and/or Thomas Kazar for the claim asserted against
them by Carole Brooks in her underlying action filed in the Court of Common Pleas of
Allegheny County at No. GD 04-008496.

BY THE COURT:



Paul F. Luty, Jr.

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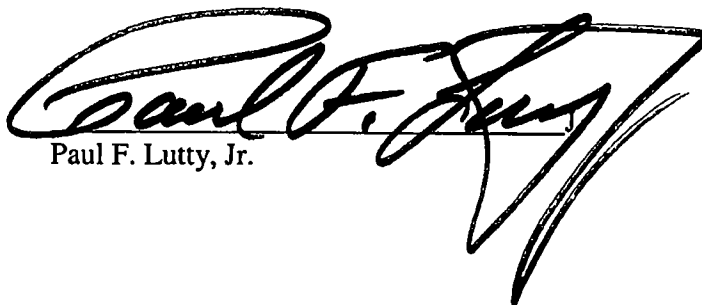
This Court hereby adopts the Memorandum in Support of Order filed on November 9, 2006 wherein it was held that the vehicle driven by Thomas Kazar was not a covered auto under the subject Penn National policy.

Upon consideration of Plaintiffs' Motion for Reconsideration, oral argument, and guidance from other jurisdictions, this Court also finds that no coverage is provided pursuant to Section II of the policy because, as discussed *supra*, the vehicle that Mr. Kazar was operating was not a covered auto under the policy. This Court was not persuaded that the "Garage Operations" language of the policy provides coverage simply because Mr. Kazar was picking up a part for a customer's vehicle. The significant criterion for coverage under a garage operations policy is whether the vehicle involved is an insured vehicle under the policy, and not the nature of its use when the accident occurred. See e.g. Burr v. Nationwide Mut. Ins. Co., 359 S.E.2d 626, 630 (W.V. 1987).

See Order filed herewith.

BY THE COURT:

~~May 2, 2007~~
June 26, 2007


Paul F. Luty, Jr.

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Defendant.

CIVIL DIVISION

Case No.: GD 05-6668

ORDER OF COURT

AND NOW, to wit, this 26 day of June, 2007, it is hereby ORDERED,
ADJUGED and DECREED that upon consideration of the trial testimony, deposition
testimony offered and accepted for use at trial and the Proposed Findings of Fact and
Conclusions of Law filed by both parties, this Court hereby declares that the Penn
National policy, identified by policy number GR9 0092289 03 provides no coverage to
either Rubright's Frame Service, Inc. and/or Thomas Kazar for the claim asserted against
them by Carole Brooks in her underlying action filed in the Court of Common Pleas of
Allegheny County at No. GD 04-008496.

BY THE COURT:


Paul F. Luty, Jr.