

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

MOTORISTS MUTUAL INSURANCE COMPANY,	:	No. CV 19-01,813
Plaintiff,	:	
vs.	:	
ALEC T. BARNES, THOMAS A. BARNES, and CHRISTINE M. BARNES,	:	
Defendants,	:	
vs.	:	CIVIL ACTION – LAW
STEVEN H. SHANNON, STEVE SHANNON TIRE COMPANY, INC., DAVID SHULTZ, individually and as Administrator of the ESTATE OF PATRICIA SHULTZ, DONALD W. HUFNAGLE, SHARON A. HUFNAGLE, UGI UTILITIES, INC., PENRAC, LLC, a/k/a/ ENTERPRISE FRM TRUST a/k/a ENTERPRISE FLEET MANAGEMENT,	:	
Necessary Party	:	
Defendants.	:	

OPINION AND ORDER

AND NOW, this 13th day of October, 2023, upon consideration of Plaintiff's Motion for Summary Judgment, it is hereby ORDERED and DIRECTED that the Motion is GRANTED, for the reasons explained below:

I. BACKGROUND.

This matter arises out of a fatal motor vehicle accident that occurred on the night of June 21, 2017 (the "Accident"). The Accident occurred when a vehicle operated by Defendant Alec T. Barnes (the "Accident Vehicle") struck the rear end of a vehicle operated by Decedent, Patricia Shultz. Subsequent to the Accident, Alec

Barnes entered guilty pleas to one count of Homicide by Vehicle,¹ one count of Driving Under the Influence, General Impairment/Incapable of Driving Safely,² and one count of Driving While BAC .02 or Greater While License is Suspended.³ The Accident Vehicle was a company vehicle owned by Defendant Steve Shannon Tire Company, Inc. (the "Company") and entrusted to Defendant Thomas Barnes, a manager at Steve Shannon Tire Company, for his use on Company business. Alec Barnes is Thomas Barnes' son and resided with him at the time of the accident.

As a consequence of the Accident, David Shultz, acting individually and as Administrator of the Estate of Patricia Shultz, commenced an action for wrongful death and survival against Alec Barnes and a variety of other defendants, including the Company, which is pending in this Court at Docket No. CV 18-01,308. At the time of the Accident, the Company provided insurance for the Accident Vehicle through a policy of insurance issued by Plaintiff Motorists Mutual Insurance Company (the "Insurance Policy").⁴

Plaintiff commenced this action by civil Complaint filed on October 30, 2019, seeking a declaratory judgment concerning coverage for the accident. Plaintiff alleges (1) that the Insurance Policy will only provide coverage for the Accident if the Accident Vehicle was being operated by a named insured or one given permission to operate it by a named insured; (2) that Alec Barnes was not a named insured and was not operating the Accident Vehicle with permission of a named insured; and (3) that, as a consequence, Plaintiff is not obligated to provide coverage for the Accident.

¹ 75 Pa. C.S. § 3732(a), which was graded as a felony of the third degree here.

² 75 Pa. C.S. § 3802(a)(1), which was graded as a misdemeanor here.

³ 75 Pa. C.S. § 1543(B)(1.1)(i), which was graded as a summary offense here.

⁴ The Insurance Policy is Motorists Mutual Insurance Company Policy No. 33.293886-30E, a copy of which is attached as Exhibit "A" to Plaintiff's Motion.

On August 7, 2023, Plaintiff filed a motion for partial summary judgment,⁵ contending that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law in that it is not obligated to provide insurance coverage in this instance. Only David Shultz timely filed opposition to Plaintiff's Motion;⁶ the remainder of the parties did not file any response. The Court heard argument on Plaintiff's Motion on September 7, 2023, and the matter is now ripe for disposition.

II. LAW AND ANALYSIS.

A. Legal Standard.

A party may move for summary judgment, in whole or in part,

[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial ...

(1) 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, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.⁷

⁵ See (1) Plaintiff's Supplemented Motion for Partial Summary Judgment, and (2) Brief in Support of Plaintiff's Supplemented Motion for Partial Summary Judgment, both filed August 7, 2023. Plaintiff initially filed its Motion for Partial Summary Judgment on February 13, 2023. Due to Plaintiff's failure to attach a Motion Cover Sheet, as required by Lycoming County Local Rule of Civil Procedure L205.2(b)(B), the matter was not scheduled for argument. Plaintiff thereafter submitted a cover sheet with a copy of the Motion pursuant to Local Rule L205.2(b)(B)(3) on March 29, 2023. The Court held a conference on June 12, 2023, at which time it was agreed that a decision on the Plaintiff's Motion would be held in abeyance and that the parties would conduct certain additional discovery. The discovery having been conducted, Plaintiff filed the within Supplemented Motion on August 7, 2023.

⁶ On September 5, 2023, David Shultz filed (1) Necessary Party Defendants David Shultz, Individually and as Administrator of the Estate of Patricia Shultz's Answer in Opposition to Plaintiff's Supplemented Motion for Partial Summary Judgment and (2) Brief in Support of Necessary Party Defendants David Shultz, Individually and as Administrator of the Estate of Patricia Shultz's Answer in Opposition to Plaintiff's Supplemented Motion for Partial Summary Judgment.

⁷ Pa. R. Civ. P. 1035.2.

The relevant pleadings are closed, and Plaintiff filed its Supplemented Motion for Partial Summary Judgment in accordance with this Court's Scheduling Order,⁸ so there is no risk trial will be delayed unreasonably. Accordingly, the Court finds that Plaintiff filed its Motion timely.

Once a party has filed a motion for summary judgment,

(a) ... the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.⁹

The court may enter summary judgment against a party who fails to respond to the motion.¹⁰ "Where a motion for summary judgment has been made and properly supported, parties seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial."¹¹

Necessary Party Defendant David Shultz filed an Answer in Opposition to the Plaintiff's Motion on September 5, 2023, within the time required;¹² however, no

⁸ This Court's Order of June 12, 2023 provided that remaining discovery was to be completed by July 31, 2023 and that Plaintiff could supplement its Motion for Partial Summary Judgment within fifteen days after completion of discovery. Plaintiff filed its Motion on August 7, 2023, within fifteen days after completion of discovery.

⁹ Pa. R. Civ. P. 1035.3(a).

¹⁰ Pa. R. Civ. P. 1035.3(d) ("Summary judgment may be entered against a party who does not respond").

¹¹ *Marks v. Tasman*, 589 A.2d 205, 206 (Pa. Super. 1991) (citing *Overly v. Kass*, 554 A.2d 970 (Pa. Super. 1989); *Tom Morello Construction Co., Inc. v. Bridgeport Federal Savings and Loan Ass'n*, 421 A.2d 747 (Pa. Super. 1980)).

¹² See Pa. R. Civ. P. 1035.3(a) ([T]he adverse party ... must file a response within thirty days after service of the motion...."); this Court's Order of June 12, 2023 ("Any party opposing the

other party responded. David Shultz's Answer in Opposition raises various questions concerning whether Thomas Barnes had authority to permit Alec Barnes to use the Accident Vehicle and whether Thomas Barnes, in fact, had given Alec permission to use it, thereby contending that he has identified "one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion."¹³

When considering a motion for summary judgment, a court must view the record in the light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party.¹⁴

"Summary judgment is properly granted where 'the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law'"¹⁵

A court should grant summary judgment "only in cases where the right is clear and free from doubt."¹⁶ The burden is on the moving party to show that there is no genuine issue of material fact,¹⁷ and the court's function is to ascertain whether a material issue of fact exists rather than to determine the facts.¹⁸

[Supplemented] Motion [for Summary Judgment] shall file a brief in opposition within thirty (30) days after Plaintiff files its brief in support").

¹³ Pa. R. Civ. P. 1035.3(a)(1).

¹⁴ *Sevast v. Kakouras*, 915 A.2d 1147, 1152-53 (Pa. 2007) (citing *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001)).

¹⁵ *Ducjai v. Dennis*, 656 A.2d 102, 107 (Pa. 1995) (quoting *Pennsylvania State University v. County of Centre*, 615 A.2d 303, 304 (Pa. 1992) (citations omitted)), disapproved of on other grounds by *Gardner v. Erie Ins. Co.*, 722 A.2d 1041 (Pa. 1999).

¹⁶ *Marks v. Tasman*, *supra*, 589 A.2d at 206 (citing *Musser v. Vilsmeier Auction Co., Inc.*, 562 A.2d 279, 280 (Pa. 1989)).

¹⁷ *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033, 1035 (Pa. Super. 1999) (citing *Accu-Weather v. Prospect Communications*, 644 A.2d 1251 (Pa. Super. 1994)).

¹⁸ *Swartley v. Hoffner*, 734 A.2d 915, 918 (Pa. Super. 1999) (citing *McDonald v. Marriott Corp.*, 564 A.2d 1296, 1298 (Pa. Super. 1989)).

B. Insurance Coverage.

A motion for summary judgment may be filed in a declaratory judgment action.¹⁹ “In addition, ... whether a particular loss is within the coverage of an insurance policy is a question of law, which may be decided on a motion for summary judgment.”²⁰ Our Supreme Court has explained how a court must interpret a contract of insurance:

The task of interpreting a contract is generally performed by a court rather than by a jury. ... The goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument. ... Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. ... Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.²¹

The Insurance Policy provides that the following are insured: “(1) You for any covered ‘auto.’ (2) Anyone else while using with your permission a covered ‘auto’ you own, hire or borrow....”²² It defines “you” and “your” as a “Named Insured” or any other person qualifying as such under the Insurance Policy,²³ and it declares Steve Shannon Tire Co., Inc., Steve Shannon, Shannon Properties, LP and Shannon Investments to be “Named Insured.”²⁴ The parties do not dispute that the Accident Vehicle is a “covered auto” under the Insurance Policy.²⁵

¹⁹ *Darlark v. Henry S. Lehr, Inc.*, 520 A.2d 1206 (Pa. Super. 1987), *overruled on other grounds*, *Mother's Restaurant, Inc. v. Kryskiewicz*, 861 A.2d 327 (Pa. Super. 2004); *Pennsylvania Public Utility Commission Bar Association v. Thornburgh*, 434 A.2d 1327 (Pa. Commw. 1981), *aff'd per curiam*, 450 A.2d 613 (Pa. 1982).

²⁰ *Equibank v. State Farm Mut. Auto. Ins. Co.*, 626 A.2d 1243, 1245 (Pa. Super. 1993) (quoting *Neil v. Allstate Insurance Co.*, 549 A.2d 1304, 1305 (Pa. Super. 1988)).

²¹ *Standard Venetian Blind Co. v. American Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983) (citations omitted).

²² Insurance Policy, Exh. A to Plaintiff's Motion, p. 219.

²³ *Id.*, p. 141.

²⁴ *Id.*, p. 11.

²⁵ “Covered Autos” are defined in the Insurance Policy. *Id.*, pp. 217-18.

Thomas Barnes was not a named insured under the Insurance Policy,²⁶ but the parties do not dispute that he had permission of a named insured to use the Accident Vehicle. Neither party asserts that Alec Barnes is a named insured under the Insurance Policy. Therefore, under the plain language of the Insurance Policy, Alec Barnes is insured under the Insurance Policy only if he was using the Accident Vehicle at the time of the Accident with the permission of a Named Insured, *i.e.*, with the permission of Steve Shannon Tire Co., Inc., Steve Shannon, Shannon Properties, LP or Shannon Investments. The required permission may be either express or implied.²⁷

1. Express permission to operate the Accident Vehicle.

Steve Shannon testified in his deposition that Company policy at the time of the Accident was that Company vehicles were to be used only by store managers. Managers were not permitted to allow family members to use the vehicles, and non-employees were never permitted to use a Company vehicle for any reason.²⁸ Kelly Shannon, the head of Human Resources for the Company, testified that Company vehicles were for work as far as she knew, but she did not know specifically whether employees were permitted to use them for other purposes. She never spoke to employees about the vehicle use policy, which, she testified, was a matter handled by Steve Shannon.²⁹

The Company policy was communicated orally to managers. There was no written policy in place on the date of the Accident concerning use of Company

²⁶ See *id.*, p. 11.

²⁷ *Federal Kemper Ins. Co. v. Neary*, 530 A.2d 929, 931 (Pa. Super. 1987) (citations omitted).

²⁸ Statement Under Oath of Steve Shannon, February 16, 2018, pp. 6-7, Exh. B to Plaintiff's Motion.

²⁹ Transcript of Deposition of Kelly Shannon, October 21, 2017, pp. 30-31, Exh. 3 to Shultz's Answer in Opposition.

vehicles.³⁰ Furthermore, on the date of the accident, the Company did not have any policies or procedures in place to monitor use of Company vehicles, such as checking mileage or tracking gasoline purchases on Company credit cards provided to employees.³¹

Thomas Barnes testified that he was aware of the Company policy, however, and knew that only he was permitted to use the Accident Vehicle, that his family was not permitted to use it, and that he did not have authority to give any other person permission to use it.³² Steve Shannon confirmed in his testimony at a subsequent deposition that Thomas Barnes did not have authority to allow any other person to use the Accident Vehicle for non-work purposes.³³ Steve Shannon further testified that he did not give Alec Barnes permission to use the Accident Vehicle on the night of the Accident.³⁴

On the day after the accident, Alec Barnes gave a statement to the Pennsylvania State Police. At that time, he stated that his father, Thomas Barnes, gave him permission to use the Accident Vehicle on the night of the Accident.³⁵ He further stated that he had used the Accident Vehicle previously and had always asked for permission.³⁶ He later recanted that testimony, however.³⁷

The only evidence in the record suggesting that Alec Barnes had express permission to operate the Accident Vehicle at the time of the Accident is the

³⁰ Transcript of Deposition of Steve Shannon, May 27, 2017, p. 28, Exh. 2 to Shultz's Answer in Opposition.

³¹ See Shultz's Answer in Opposition, Exh. 2, p. 30; Exh. 3, pp. 34-36.

³² Statement Under Oath of Thomas Barnes, February 16, 2018, Exh. D to Plaintiff's Motion, p. 8;

Transcript of Deposition of Thomas Barnes, Exh. E to Plaintiff's Motion, pp. 27-28.

³³ Deposition of Thomas Barnes, July 19, 2023, Exh. F to Plaintiff's Motion, pp. 19-22.

³⁴ Transcript of Deposition of Steve Shannon, Exh. C to Plaintiff's Motion, pp. 39-40.

³⁵ See Transcript of Deposition of Alec Barnes, October 7, 2021, Exh. 5 to Shultz's Answer in Opposition, pp. 45-48.

³⁶ *Id.*

³⁷ *Id.* Alec Barnes also testified in his Deposition that he gave a statement at the scene of the accident that he had taken the Accident Vehicle *without* his father's permission. *Id.*

Statement that Alec Barnes gave to the State Police on the day after the Accident. As indicated above, however, Alec Barnes later recanted that. Thomas Barnes testified that he did not give Alec Barnes permission to operate the Accident Vehicle on that night or at any other time, and there is no evidence that Steve Shannon gave such permission.

Assuming, *arguendo*, that Thomas Barnes gave Alec Barnes permission to operate the Accident Vehicle, however, there is no evidence in the record to support an allegation that Thomas Barnes had authority from a Named Insured to give such permission. Thomas Barnes is not a Named Insured under the Insurance Policy, and all evidence in the record is that he was not authorized by any Named Insured to give Alec Barnes permission to use the Accident Vehicle. Accordingly, there is no evidence in the record to indicate that Alec Barnes had express permission from a Named Insured to operate the Accident Vehicle.

In his Answer and Opposition to Plaintiff's Motion, David Shultz argues that there is an issue of material fact concerning whether Alec Barnes had permission to operate the Accident Vehicle on the night of the accident. He points to (1) the conflicting testimony of Alec and Thomas Barnes, (2) the Company's entrustment of the Accident Vehicle to Thomas Barnes within the scope of Thomas Barnes' employment with the Company, and (3) the Company's lack of a written vehicle use policy and complete lack of supervision, oversight and enforcement of the vehicle use policy.³⁸

Mr. Shultz also refers the Court to the Opinion and Order the Court issued on December 2, 2022 resolving motions for summary judgment in the underlying action,

³⁸ David Shultz's Answer in Opposition, ¶ 16.

which is pending currently at No. CV 18-1308. There, the Court found that disputed issues of material fact exist concerning whether Thomas Barnes gave Alec Barnes permission to operate the Accident Vehicle on the night of the Accident and, if so, whether he was acting within the scope of his employment at the time.³⁹ That finding is not determinative here, however, as it speaks to the relationship between Thomas Barnes and Alec Barnes rather than to the contractual relationship between the Insurance Company and the Company, who are the parties to the Insurance Policy.

Ultimately, whether Thomas Barnes gave Alec Barnes permission to operate the Accident Vehicle on the night of the Accident and, if so, whether he was acting within the scope of his employment at the time have no bearing on and do not alter the *contractual relationship* between the Company and the Insurance Company. Admittedly, the resolution of these questions may impact whether the Company could be found to be liable to Shultz on a vicarious liability theory, but it does not concern whether the terms of the contract compel the Insurance Company to indemnify the Company in the event a jury determines the Company is liable.

Mr. Shultz's argument seems to conflate the Company's possible liability with the Insurance Company's requirement to provide coverage under the contract of insurance. The only question that controls whether the insurance contract compels coverage is whether Thomas Barnes had actual authority to grant Alec Barnes permission to operate the Accident Vehicle at the time of the Accident. Because there is no evidence in the record that Thomas Barnes had such authority from any Named Insured, there is no coverage under the Insurance Policy for the Accident.

³⁹ *Shultz vs. Barnes, et al.*, No. CV 18-01,308, Opinion and Order, December 2, 2022, p. 20.

2. Implied permission to operate the Accident Vehicle.

Permission may be implied by virtue of the relationship of the parties or by virtue of "a course of conduct in which the parties have mutually acquiesced."⁴⁰ As the Superior Court explained, 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."⁴¹ ... "[T]he critical question will always be whether the named insured said or did something that warranted the belief that the ensuing use was with his consent. There must be 'a connection made' with the named insured's own conduct; proof of 'acts, circumstances, and facts, such as the continued use of the car,' will be insufficient 'unless they attach themselves in some way to the acts' of the named insured."⁴²

Implied consent requires a "nexus between the acts and the voluntary action on the part of him who must consent."⁴³ In a situation where the vehicle operator has obtained the vehicle via one who is a permissive user of a named insured, determining whether such a nexus exists is a factual question determined by analyzing the initial grant of permission to determine whether it was broad enough to allow the permissive user to permit a third party to use the vehicle.⁴⁴

Notwithstanding anything else, however, "permission cannot be implied from possession and use of the automobile without the knowledge of the named insured."⁴⁵

There is no evidence in the record to support a finding of any relationship between any Named Insured and Alec Barnes at the time of the Accident. Alec

⁴⁰ *Federal Kemper Ins. Co. v. Neary*, *supra*, 530 A.2d at 931.

⁴¹ *Id.* (quoting *Blashfield, Automobile Law and Practice* § 315.10, at 608 (3d ed. 1966)).

⁴² *Id.* (quoting *Belas v. Melanovich*, 372 A.2d 478, 484 (Pa. Super. 1977) (quoting *Beatty v. Hoff*, 114 A.2d 173, 174 (Pa. 1955))) (other citations omitted).

⁴³ *Belas, supra*, 372 A.2d at 483.

⁴⁴ *Id.*, at 480.

⁴⁵ *Nationwide Mut. Ins. Co. v. Cummings*, 652 A.2d 1338, 1344 (Pa. Super. 1994) (quoting *Blashfield, Automobile Law and Practice* § 315.10, at 608 (3d ed. 1966)) (other citations omitted).

Barnes had been an employee of the Company, but his employment terminated many months prior to the Accident. Similarly, there is no evidence to suggest "a course of conduct in which the parties have mutually acquiesced" sufficient to support a finding that a Named Insured granted Alec Barnes implied permission to operate the Accident Vehicle at the time of the Accident. There is testimony in the record by Alec Barnes that he may have operated the Accident Vehicle on multiple occasions, but that testimony is disputed and, if true, does not support a finding that a Named Insured granted Alec permission to do so. As indicated above, there is no evidence to support a finding that Thomas Barnes had the authority to grant Alec permission to use the Accident Vehicle. As such, there is no evidence to support a finding that a Named Insured impliedly gave Alec Barnes permission to operate the Accident Vehicle at the time of the Accident.

III. CONCLUSION.

At the time of the Accident, Alec Barnes, the operator of the Accident Vehicle, was not a Named Insured. Similarly, he did not have either express or implied permission of a Named Insured to operate the Accident Vehicle. Accordingly, the Plaintiff's Motion for Summary Judgment is GRANTED for the reasons explained above. The Court finds that there is no genuine issue of material fact and that Plaintiff is entitled to judgment as a matter of law that it has no obligation to provide insurance coverage for the Accident under the Insurance Policy.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/bel

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