IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

ESSEX INSURANCE COMPANY,

Appellant,

vs.

CASE NO: 4D06-4347

TIMO NUMMELA, JOSEPH CANTU, SOPHIA LEPORE, and KINGDOM CONSTRUCTION AND DEVELOPMENT, LLC

Appellees.
_____/

On Appeal from the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida
Case No. 502005CA006908XXXXMB

ANSWER BRIEF OF APPELLEE TIMO NUMMELA

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STATEMENT OF CASE AND FACTS

In February 2005, Appellee Timo Nummela, who was riding a motorcycle, was hit by a motor vehicle operated by Joseph Cantu while at the intersection of State Road 5 and 3rd Avenue South in Lake Worth. (R 1-2). The views of Nummela and Cantu were allegedly obstructed by bushes located on the property at the southwest corner of that intersection, which is owned by Appellee Kingdom Construction Company. (R 2).

Nummela was so seriously injured in the accident that he had several body parts amputated and has been left disabled. (R 2). To recover for these extensive injuries, he sued Cantu for negligently operating the motor vehicle and sued Kingdom Construction for negligently maintaining the bushes on its property. (R 2).

Kingdom Construction's commercial general liability insurer, Appellant Essex Insurance Company, intervened in the action. (R 87-88). It filed a complaint for declaratory relief in which it argued that it has no duty to defend or indemnify Kingdom in this action because the commercial general liability policy excludes coverage for the allegations raised in the complaint. (R 13-16).

The policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to

which th[e] insurance applies." (R 43, ¶1.a.). The exclusion section of the coverage form has the following language:

> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any . . . "auto". . . owned or operated by or rented or loaned to any insured. Use includes operation and "loading and unloading."

(R 45, ¶g).

An endorsement to the policy changed that language to the following:

> This insurance does not apply to "bodily injury" or "property damage" arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any "auto." Use includes operation and "loading and unloading."

(R 29, ¶2).

Essex moved for summary judgment on the ground that the above exclusion relieves it of any duty to defend or indemnify Kingdom. (R 97-107). Kingdom moved for summary judgment on the ground that the language of the policy establishes that it has coverage for the incident. (R 331-337). The trial court entered summary judgment in favor of Kingdom. (R 356-357). Essex is appealing that order. (R 365-368).

SUMMARY OF ARGUMENT

The allegations made by Plaintiff demonstrate that Kingdom's alleged liability arises solely from its failure to reasonably maintain the bushes on its property. Although Kingdom's negligence caused a motor vehicle accident in which Plaintiff was severely injured, neither Kingdom nor its liability are in any way connected to the motor vehicles involved in that accident. While the motor vehicle exclusionary provision contained in Kingdom's commercial general liability policy purports to exclude coverage for "'bodily injury' or 'property damage' arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any 'auto,' regardless of whether the insured owns the motor vehicle, the law still requires that the insured and the insured's liability bear a connection to the motor vehicle. To do otherwise would eliminate the insured's coverage in any case in which a motor vehicle is tangentially or fortuitously involved, and would create a gap between the coverage provided by automobile policies and general liability policies contrary to public policy.

ARGUMENT

I. Standard of Review

A trial court's entry of summary judgment is reviewed *de novo*. *Garcia ex rel. Garcia v. City of Hollywood*, 948 So. 2d 1000, 1001 (Fla. 4th DCA 2007).

Furthermore, because the construction of an insurance contract involves a question of law, a trial court's interpretation is reviewed de novo on appeal. *Arias v. Affirmative Ins. Co.*, 944 So. 2d 1195, 1197 (Fla. 4th DCA 2006).

II. Construction of Insurance Policies

"In construing an insurance policy for the purposes of determining coverage, the policy must be considered in its entirety. If reasonably possible, the construction to be adopted is the one that will give effect to the total policy and to each of its provisions." *Auto-Owners Ins. Co. v. Marvin Dev. Corp.*, 805 So. 2d 888, 892 (Fla. 2d DCA 2001). "Insurance contracts, just like any other contract, "'should receive a construction that is reasonable, practicable, sensible, and just.'" *The Doctors Co. v. Health Mgmt. Assocs.*, 943 So. 2d 807, 809 (Fla. 2d DCA 2006) (quoting *Gen. Star Indem. Co. v. W. Fla. Village Inn*, 874 So. 2d 26, 29 (Fla. 2d DCA 2004)).

"Insurance policy provisions excluding or limiting the insurer's liability are construed more strictly than coverage provisions." *Id.* (citing *Purrelli v. State*

Farm Fire & Cas. Co., 698 So. 2d 618, 620 (Fla. 2d DCA 1997)). Furthermore, "[t]erms used in a policy should be read in light of the skill and experience of ordinary people." *Gen. Star Indem. Co. v. W. Fla. Village Inn*, 874 So. 2d 26, 29 (Fla. 2d DCA 2004). And, "[i]nsurance policies will not be construed to reach an absurd result." *Id.* at 30 (citing *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.,* 711 So.2d 1135, 1140 (Fla.1998)).

III. For a motor vehicle exclusion in an insurance policy to apply, the law requires a connection between the insured and a motor vehicle. Kingdom had no connection with the motor vehicles involved in Plaintiff's accident. Did the trial court err in finding that the motor vehicle exclusion does not apply to the facts alleged in the complaint?

In the endorsement modifying the motor vehicle exclusionary policy, Essex removed the language limiting the exclusion to motor vehicles "owned or operated by or rented or loaned to any insured." (R 45, ¶g; 29 ¶2). Essex claims the effect of this amendment is that the motor vehicle exclusion now "encompasses bodily injury arising out of the use of *any* auto, not just of any auto owned or operated by the insured." (Initial Brief, p. 9). The use of the "auto," however, must still be connected to the insured and the insured's liability in order to fall under the exclusion. Because Kingdom had no connection to the motor vehicles involved in Plaintiff's accident, and Kingdom's alleged liability for negligently maintaining

the bushes on its premises has no connection to those motor vehicles, the motor vehicle exclusionary policy is inapplicable.

This Court examined a similar exclusionary provision in *St. Paul Fire & Marine Insurance Company v. Thomas*, 273 So. 2d 117 (Fla. 4th DCA 1973). The provision there, contained in a homeowners policy, provided that the policy did not apply "to the ownership, maintenance, operation, use, loading or unloading of . . . automobiles. . . ." *Id.* at 119. This Court found that although there was no language in the exclusion that "expressly states what, if any, nexus or connection must exist between the insured's liability and the use of an automobile . . . [s]ome connecting link is necessarily implied. . . ." *Id.* "[C]onstruing the exclusion in a manner which affords the broadest coverage," *id.* at 120, the Court found that "the [insured's] liability would have to be caused by the use of the automobile" before the exclusion would apply. *Id.*

Upon examining the allegations in the complaint, which dictate whether the insurer has a duty to defend, *id.* at 119 n.2, the Court determined that the exclusionary provision did not apply. The complaint alleged that the insured negligently threw a bottle from a motor vehicle as it was passing another vehicle on the roadway. *Id.* at 118. The insured's action caused the second vehicle to roll over, seriously injuring its passenger. *Id.*

In determining whether the motor vehicle exclusionary provision applied, this Court examined the insured's relationship to the vehicle he was riding in at the time he committed the negligent act, not the plaintiff's relationship to the vehicle she was in at the time she suffered her injuries. *Id.* at 120-121. It found that even if applying the broad "arising out of" test, the insured's "liability did not arise out of the use of the automobile. His location in the automobile at the time of the occurrence was fortuitous, merely the situs of his physical being at the time. His liability arose out of negligently throwing the bottle in the roadway. It would not have been altered or affected had he in a similar manner negligently thrown a bottle into the roadway while seated in a car parked on the shoulder of the road, or while standing outside of the car, or while standing on an overpass above the roadway." *Id.* Thus, this Court found the insured's actions in throwing the bottle and causing a motor vehicle accident, resulting in Plaintiff's injuries, did not fall under the motor vehicle exclusionary provision in the homeowners policy.

Applying *St. Paul Fire* to the instant case supports the trial court's determination that the motor vehicle exclusionary provision in Kingdom's general liability policy does not apply to the allegations in Plaintiff's complaint. Plaintiff has alleged that Kingdom negligently maintained the bushes on its property, which obstructed the view of Plaintiff and Defendant Cantu, causing the accident in which Plaintiff was seriously injured. Kingdom's liability for negligently

maintaining the bushes is in no way connected to the use of any motor vehicle. Kingdom's negligent maintenance of the bushes could have easily caused the obstruction of the view of anyone using the roadway—pedestrians, joggers, bicyclists. As *St. Paul Fire* demonstrates, the issue is not the relationship of the injuries to a motor vehicle, *but the relationship of the insured and the insured's liability to a motor vehicle.* Here, there is no relationship between Kingdom or its liability to any motor vehicle.

Essex has submitted *Underwriters at Lloyd's of London v. McCaul*, 2007 WL 601747 (Fla. 3d DCA Feb. 28, 2007), as supplemental authority. *McCaul* is entirely distinguishable from the instant appeal because it involves allegations demonstrating a direct connection between the insured, the insured's liability, and a motor vehicle. The insured parked a van on the side of the road while its employees worked in the area. *Id.* at *1. Another vehicle collided with the van, resulting in the death of the second vehicle's passenger. The insured was sued for "negligent failure to place traffic cones on the roadway to warn of the presence of the work and the vehicle, rather than the dangerous location of the van itself." *Id.* The district court found the general liability insurer had no duty to defend because the insured's liability arose from its use of the vehicle and was, therefore, within the motor vehicle exclusionary provision. *Id.* at *2. Unlike here, the insured and

its liability were directly connected to the vehicle, and the insured's negligence vis-à-vis the vehicle was the proximate cause of the injuries.

The other cases relied on by Essex also involve allegations of a connection between the insured and a motor vehicle. In *American Surety & Casualty Company v. Lake Jackson Pizza, Inc.,* 788 So. 2d 1096 (Fla. 1st DCA 2001), the insured was sued after its employee was involved in an automobile accident while working. The Court found the motor vehicle exclusion in the insured's policy applied because "the allegations in the complaint revolve[d] around use of a motor vehicle and/or selection and training of persons whose only apparent job function was operation of a motor vehicle to deliver pizzas." *Id.* at 1100 n.3. Similarly, in *Dalrymple v. Ihnen Pool Service & Supply, Inc.*, 498 So. 2d 646 (Fla. 4th DCA 1986), the insured's employee was driving the motor vehicle involved in the accident that caused plaintiff's injuries. This direct connection between the insured and the motor vehicle was enough to place the allegations in the complaint within the motor vehicle exclusionary provision. *See id.* at 647.

In *Johnson v. Unigard Insurance Company*, 387 So. 2d 1058, 1059 (Fla. 5th DCA 1980), the insured was sued for negligently entrusting a motor vehicle to a minor. As this allegation clearly involves a connection between the insured and a motor vehicle, the court found the motor vehicle exclusionary provision in the homeowners policy was applicable. *Id.* at 1060. The connection between the

insured and a motor vehicle in *Alligator Enterprises, Inc. v. General Agent's Insurance Company*, 773 So. 2d 94 (Fla. 5th DCA 2000), also placed the allegations in that complaint within the motor vehicle exclusionary policy. The complaint alleged that one of the insured's employees negligently parked a motor vehicle, which caused the collision in which plaintiff was injured. This direct connection invoked the motor vehicle exclusion in the insured's general liability policy. *See id.* at 95-96.

This Court's decision in *Westmoreland v. Lumbermens Mutual Casualty Company*, 704 So. 2d 176 (Fla. 4th DCA 1997), also supports the trial court's ruling. There, the insured was sued for negligently maintaining the garage door and air conditioning system of a home, resulting in the death of several people inside the home who were poisoned by carbon monoxide after a vehicle was left running in the garage. *Id.* at 177-78. The defendant's homeowners policy contained a motor vehicle exclusion that was "functionally identical" to the one at issue in *St. Paul Fire*. *Id.* at 182. This Court found the exclusionary policy did not apply because the proximate cause of the deaths might have been the defendant's negligence, rather than the motor vehicle:

> Because the kind of claim here said to be covered by the insuring clause and excluded by the exclusionary clause is one founded on negligence, it seems reasonable to us to find an appropriate boundary in the elements of a cause of action for negligence. One of the

> elements of a negligence claim is that the damages be tied to the alleged breach of the duty of care by legal, or proximate causation. Under the element of proximate causation, the use of a motor vehicle would not necessarily be the cause of the injury if some intervening event is found by the finder of fact to have been its legal or proximate cause. Thus, even though a motor vehicle engine may appear in the chain or mosaic of events in which the bodily injuries occurred, if the jury were to find that the use of the motor vehicle itself was not the legal or proximate cause of the injury, then the exclusion would not apply under this strict construction.

Id. at 181-82. *See also Hartford Acc. & Indem. Co. v. Phelps*, 294 So. 2d 362, 364 (Fla. 1st DCA 1974) (finding exclusion in homeowners policy for damages caused by house settling was not applicable where house settled as a result of water from a plumbing leak being pumped from beneath the house because the leak was the "the proximate and efficient cause of the loss").

As Kingdom and its liability for Plaintiff's injuries are in no way connected to any motor vehicle, and Kingdom's negligence is alleged to be the proximate cause of Plaintiff's injuries, the trial court correctly found that the motor vehicle exclusionary policy does not apply to the allegations made in Plaintiff's complaint.

IV. Public policy favors construction of insurance policies in a manner that provides complementary coverage between automobile policies and general liability policies. The construction proposed by Essex would result in a gap in coverage for incidents in which the insured's liability is unrelated to a motor vehicle, but the injuries caused are tangentially related to a motor vehicle. Did the trial court err in finding Kingdom is covered by its general liability policy when the allegations of the complaint demonstrate Kingdom's liability is not in any way related to a motor vehicle?

Florida public policy favors complementary construction of automobile and general liability policies in order to avoid gaps in coverage. The construction proposed by Essex would leave a huge gap in coverage in cases where the proximate cause of injury is not related to a motor vehicle, but the injuries are somehow related to a motor vehicle, because there will be no coverage under either a general liability or automobile policy. The trial court properly construed the motor vehicle exclusionary provision in order to avoid this gap in coverage.

"[A] comprehensive general liability policy should be construed as leaving no gap in coverage between it and an automobile policy. An automobile policy protects its insured for liability arising out of the use of that vehicle, while the general liability excludes coverage arising from the use of the vehicle." *Farrer v. U.S. Fidelity & Guar. Co.*, 809 So. 2d 85, 94 (Fla. 4th DCA 2002). Interpretation of automobile and general liability clauses should be complementary. *Id.* at 95.

When construing the exclusionary provision at issue in *Westmoreland*, this Court examined the interplay between the homeowners policy at issue and an

automobile policy. 704 So. 2d at 183. It reasoned, "In the insuring clauses of most policies in this state, the motor vehicle coverage applies only to occurrences arising out of the use or operation of a motor vehicle, while the homeowner's coverage excludes occurrences arising out of the use or operation of a motor vehicle. Unless the automobile and homeowners policies are consistently construed, there could be a void or gap in the coverage between the two policies. Thus if we were to accept the construction argued here by the insurer, the coverage would not be complementary: some homeowner's liability claims would be left undefended even though legally caused by an act of negligence not arising out of the use of an automobile. This is easily illustrated in the present case by posing the result of excluding coverage for the premises liability claims, followed by a jury verdict finding no proximate causation under the motor vehicle liability claims but finding causation under the premises liability claims." *Id.*

The same is true in this case. If the Court accepts the construction proposed by Essex, the general liability policy will not cover any case of "bodily injury arising out of the use of *any* auto," (Initial Brief, p. 9), regardless of whether the insured's liability bears any connection to a motor vehicle. Thus, if the proximate cause of the injury is not related to a motor vehicle, but the injuries are somehow related to a motor vehicle, there will be no coverage under either a general liability or automobile policy. This result is contrary to the public policy of this state.

Therefore, the trial court properly construed Kingdom's general liability policy in order to avoid a gap in coverage.

Furthermore, an insurance policy "should be read in light of the skill and experience of ordinary people." *Gen. Star Indem. Co. v. W. Fla. Village Inn*, 874 So. 2d 26, 29 (Fla. 2d DCA 2004). If the motor vehicle exclusionary provision was construed in "light of the expectations of a reasonable insured," *Westmoreland*, 704 So. 2d at 187 (J. Gross, concurring specially), it would clearly provide coverage for the bodily injury caused by Kingdom's negligence. No reasonable insured would expect a general liability policy to exclude coverage for injuries merely because they are related to a motor vehicle in some way, regardless of the manner in which the injuries were ultimately caused or the manner of the insured's liability.

CONCLUSION

The trial court properly construed the motor vehicle exclusionary provision in a manner that comports with Florida law, the plain language of the policy, the reasonable understanding and expectations of the insured, and the public policy of the State of Florida when determining that the provision does not apply to the allegations alleged by Plaintiff. This court should, accordingly, affirm the trial court's entry of summary judgment in favor of the insured.

Respectfully submitted this 29th day of March 2007.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Initial Brief of Appellants were served by US Mail, postage prepaid, this 29th day of March, 2007, upon:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellee Timo Nummela's Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Brief being submitted is in Times New Roman 14-point font.

D. Martin

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