

**APPELLATE DIVISION RULES THAT HOMEOWNERS INSURER MAY OWE
COVERAGE FOR INDIVIDUAL RUNNING A DAYCARE CENTER.**

The Appellate Division has reversed a trial court decision ordering Bay State Insurance Company to defend and indemnify its insured under a homeowners policy in connection with a personal injury lawsuit alleging that a child was injured while the company's insured provided daycare services. In reversing the trial court's decision, the Appellate Division remanded this case for a plenary hearing to ascertain whether or not Bay State's insured was watching children for a profit motive which arguably would fall under an exclusion for coverage.

The facts reveal that Carol Collins had a homeowners policy through Bay State Insurance. Normally, Collins would watch Kristen Jennings two days a week when Kristen was not in daycare and her mother was at work. Kristen's mother initially approached Collins about helping care for Kristen when she was pregnant with Kristen since she knew that Collins was at home with her own children. Collins was paid \$35.00 a day when she watched Kristen. There is a dispute with regard to the extent to which the \$35.00 a day constituted compensation and to what extent it was offered to cover the everyday expenses associated with Kristen's care. According to Kristen's mother and Collins, the \$35.00 was to be used for items such as food, diapers and wipes for Kristen, as well as spending money for anything they did. Kristen's mother testified that she never considered Collins to be an employee. Collins testified that she understood that the compensation that she received was in consideration for her time. However, Collins also testified that she considered the \$35.00 as a gift. Ms. Collins further noted that on those occasions when the \$35.00 was not sufficient to cover the costs for a day, she did not ask for additional compensation. Also, when the expenses for the day were less than \$35.00, she did not return the overage.

The factual record also revealed that around the time of the accident, Collins was paid to provide care for another child as a favor for two weeks. Additionally, during the 2004-2005 school year, Collins took care of two other children, for a total of \$40.00 a day. However, at the time of the plaintiff's injury, she was no longer caring for those children. Collins further testified that she occasionally helped a friend out by watching her children. However, she was not paid. Instead, the friend would occasionally "slip her money" for helping her out.

The underlying accident occurred on October 30, 2006. On that date, Collins was watching Kristen. While walking through the parking lot of a Sam's Club, Collins lost her balance and fell, pulling the cart in which Kristen was seated to the ground. Kristen, in turn, sustained an injury to her leg. Kristen, through her parents, filed a personal injury lawsuit against Collins. Collins then forwarded the suit papers to her insurer for a defense and indemnification. Bay State Insurance then filed a declaratory judgment action claiming that under the business exclusion, Collins was not entitled to a defense. Specifically, Bay State focused on the following exclusionary language:

"Personal liability does not apply to bodily injury or property damage (a) which is expected or intended by the insured; (b) arising out of or in connection with a business engaged in by an insured. This exclusion applies but is not limited to an act or omission regardless of its nature or circumstance, involving a service or duty rendered, promised, owed or implied to be provided because of the nature of the business."

Under the policy, business is defined to include “a trade, profession, or occupation.”

Under New Jersey law, in order to determine whether the business exclusion applies in a child care scenario, there is a two step analysis. The first question is whether the pursuit involves continuity or customary engagement by the insured in the activity. The second asks whether the activity involves a profit motive or whether the insured engages in the pursuit as a means of livelihood, a means of earning a living or procuring sustenance or profit.

In the trial court, Bay State Insurance moved for summary judgment declaring that its policy did not provide coverage for the claim asserted by the plaintiff. Collins cross-moved for summary judgment. In the trial court, it was found that Collins’ weekly watching Kristen satisfied the continuity requirement. Accordingly, the focus of the argument was on whether or not Collins’ actions fulfilled the profit motive requirement of the second prong.

The trial court found that based on the record before it, Collins was not watching Kristen with the intentions of earning a living, procuring sustenance or profits. The trial court focused on the fact that based on their agreement, on some days money paid would be sufficient to cover the costs incurred with watching Kristen while on other days, the money was not sufficient. Essentially, the trial court found that Collins broke even on this transaction and as such, the second prong of the requirement was not met.

In reviewing the trial court’s decision, the Appellate Division noted that “the critical issue for the court to decide was not whether Collins took home a profit on the day she watched Kristen, but whether her intent in agreeing to watch Kristen was motivated by financial gain. The burden is on the insured to disprove a profit motive.” The court continued, “even though Collins did not keep a log of her daily expenses for the child, she estimated that she spent only half of the \$35.00 given by the parents each day she worked...this implies that Collins earned a small income.” Further, “Collins cared for several other children for extended periods of time, for compensation, which suggests that her arrangement with the Jennings family also was more than a favor to a friend or casual accommodation. Although this does not by itself establish a profit motive, we find it raises a genuine issue of fact concerning Collins’ intent.” Accordingly, the Order finding that Bay State was required to defend and indemnify Collins in connection with this matter was reversed and remanded to the trial court for a hearing to determine whether Collins had a profit motive in watching the children.

This issue is not the first time the New Jersey Courts have addressed whether or not coverage is afforded under a homeowners policy to an individual who watches children at their house. It is likely that in the coming years, this issue will be heard more often in light of the current economic climate. Specifically, individuals are now opening their homes to watch children to earn extra money. As such, this is an issue which will likely be increasingly presented to insurance companies.