

RAYMOND PINTO,

Plaintiff-Petitioner,

vs.

NEW JERSEY MANUFACTURERS
INSURANCE COMPANY,

Defendant- Respondent

:
:
: SUPREME COURT OF NEW JERSEY
: APPELLATE NO. A-002234-02T2
: TRIAL NO. OCN-L-162-02
: DOCKET NO.

:
:
:
: CIVIL ACTION
:

SAT BELOW IN THE APPELLATE
DIVISION: HON. JAMES M.
HAVEY, P.J.A.D., ROBERT A.
FALL, J.A.D., HELEN E.
HOENS, J.A.D.

SAT BELOW IN THE TRIAL
COURT: HON. DONALD F.
CAMPBELL, J.S.C.

PETITION FOR CERTIFICATION AND APPENDIX

ON BEHALF OF PLAINTIFF-PETITIONER RAYMOND PINTO

JOHN M. VLASAC, JR., ESQ.
Gill & Chamas, L.L.C.
655 Florida Grove Road
Post Office Box 760
Woodbridge, New Jersey 07095
Tel. (732) 324-7600
Fax. (732) 324-7606
Attorneys for Plaintiff-Appellant

JOHN M. VLASAC, JR., ESQ.
ON THE BRIEF

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Opinion of the Superior Court of New Jersey, Appellate Division, filed on January 21, 2004 PP1

Notice of Petition for Certification, filed on February 10, 2004 PP51

¹ "Pa" denotes Plaintiff's Appendix filed with his appellate brief.

"Da" denotes Defendant's Appendix filed with its appellate brief.

"Pb" denotes Plaintiff's Appellate Brief.

"Db" denotes Defendant's Appellate Brief.

"PP" denotes Plaintiff's Appendix that is attached hereto.

TABLE OF CITATIONS

Araya vs. Farm Family Cas. Ins. Co.,
353 N.J. Super. 203 (App. Div. 2002)

Machi vs. Connecticut General Insurance,
354 N.J. Super. 64 (App. Div. 2002)

Cook-Sauvageau v. PMA Group,
295 N.J. Super. 620 (App. Div. 1996)

Campbell v. Lion Insurance,
311 N.J. Super. 498 (App. Div. 1998)

Kievit v. Loyal Protective Life Ins. Co., etc.,
34 N.J. 475 (1961)

STATEMENT OF QUESTIONS PRESENTED

1. If a corporation is technically the only named insured in a commercial auto insurance policy, is it implied and is it a matter of public policy that all of the corporation's employees that drive for it are deemed to be named insured's under the policy, especially considering that a corporate entity is not capable of sustaining a personal injury?

2. Does it violate public policy or an insured's reasonable expectations for a commercial auto insurance policy to deny UIM benefits to its insured based only upon the fact that the insured has a personal auto insurance policy that also provides UIM, but of a dramatically lesser amount (e.g., only ten-percent of what the employer's policy provides for)?

STATEMENT OF THE MATTERS PRESENTED

Plaintiff relies upon the merits brief he filed on the direct appeal for the Statement of Facts and Procedural History, except to add the following in very short form.

There are three closely held corporations involved in this action: R. W. Vogel, Inc., Holgate Property Associates and Environmentally Clean Naturally, Inc. Roger and Anita Vogel are the owners and/or primary principals of R. W. Vogel, Inc., and Holgate Property Associates. Their son, Jeffrey S. Vogel, owned and ran Environmentally Clean Naturally, Inc., and was also a principle of R. W. Vogel, Inc. (PA033-034 at T11:19-25, T12:1-7; PA008; PA074 at 2-8)

Despite plaintiff's regular employment with R. W. Vogel, Inc., sometime prior to the auto accident which is the subject of this action Jeffrey S. Vogel allegedly asked plaintiff to assist him with a street cleaning job for Environmentally Clean Naturally, Inc. (PA052-53 at T31:20-25, T32:1-9) Plaintiff was never told by Jeffrey S. Vogel that by doing so he was becoming an employee of ECN. (PA137 at 7-22). Plaintiff was merely asked to perform a job for his employer's son due to a manpower shortage. (Pa129-142 at T45:19-25, T46:15-25, T47:1-25, T48:1-10). No new employee related paperwork and/or documentation was generated or signed by

plaintiff in connection with his performing this duty for ECN. (PA 133-134 at T39:3-25, T40:1-3). Plaintiff at all times believed that he was an employee of R. W. Vogel, Inc.

On December 22, 1997, plaintiff, while in the course of his duties as an employee of R.W. Vogel Inc., was engaged in this street cleaning project on Route 9, in Howell. (PA018-020; PA121 at 18-25; PA133-134 at T39:3-25, T40:1-3) While completely stopped in the left hand lane, as ordered by his supervisor, Mr. Joseph Moore, plaintiff was violently struck in the rear by Theresa Trotter. Id. Mrs. Trotter's policy of automobile insurance provided coverage of \$300,000.00 on a combined single limit basis. (PA153)

The pick-up truck that plaintiff was operating on the date of the accident was the same one regularly assigned to him by Roger Vogel, Sr., during his work for R. W. Vogel, Inc. (PA129-132 at T35:22-25, T36:1-5, 20-25, T37:1-25, T38:1-12). Permission was given to plaintiff by both Roger Vogel and Jeffrey S. Vogel to use the said pick-up truck to perform the street cleaning expedition. Id.

The said pick-up truck was owned by Holgate Property Associates and insured by R. W. Vogel, Inc. The commercial automobile policy of insurance was issued to R. W. Vogel, Inc., by New Jersey Manufacturers Insurance Company having an effective date of August 8, 1997. (PA160-169).

That policy included UIM coverage with a limit of one million dollars (\$1,000,000.00) Id. That UIM coverage section of the NJM policy also contained the following "limiting" language:

D. Limit of Insurance

1. ...

a. However, subject to our maximum Limit of Insurance for this coverage, if:

(1) If an insured is not the individual named insured under this policy;

(2) That insured is an individual named insured under one or more other policies providing similar coverage; and,

(3) All such other policies have a limit of insurance for similar coverage which is less than the limit of insurance for this coverage;

then the most we would pay for all damages resulting from anyone accident with an uninsured motor vehicle or an underinsured motor vehicle shall not exceed the highest applicable of insurance under any coverage form or policies providing to that insured as an individual named insured.

b. However, subject to our maximum Limit of Insurance for this coverage, if:

i. An insured is not the individual named insured under this policy or any other policy

ii. That insured is insured as a family member under one or more other policies providing similar coverage; and,

iii. All such other policies have a limit of insurance for similar coverage which is less than the limit of Insurance for this coverage;

then the most we would pay for all damages resulting from anyone accident with an uninsured motor vehicle or an underinsured motor vehicle shall not exceed the highest applicable of insurance under any coverage form or policies providing to that insured as a family member.

(PA184)

As of the date of this accident, plaintiff possessed a personal automobile policy with Liberty Mutual that included \$100,000 UIM coverage per person. (PA156) However, as of the date of this accident, R. W. Vogel, Inc., and Holgate Property Associates were the only listed named insureds on the relevant NJM commercial automobile policy. (PA161, PA169) Senior administrator of the commercial auto underwriting department of NJM, Theresa Wilson, confirmed this by testifying under oath in her deposition that the only named insureds on the date of this accident in the NJM commercial automobile insurance policy issued to R. W. Vogel, Inc. were R. W. Vogel, Inc., and Holgate Property Associates. (PA207 at T42:15-25, T43:15-25, T44:1-2). Arthur Nelson, licensed insurance broker and authorized agent of R. W. Vogel, Inc., and Holgate Property Associates, testified likewise. (PA285 at T50:17-25,

T51:1-4)² Therefore, as of December 22, 1997 the NJM policy issued to R. W. Vogel Inc., identified no "natural persons" as named insureds. (PA285 at T50:17-25, T51:1-4) Defendant stipulated to this. (Db24)

Plaintiff testified in his deposition that when he chose the policy limits for his personal automobile insurance policy with Liberty Mutual, he did so considering his use of his motor vehicle in daily every day personal life, not for business purposes. (PA129 at T35:14-21). He was never told or made to believe by his employer that if injured during his employment he would be limited to recovering from his own personal automobile policy. (PA144-145 at T50:20-25, T51:1-3, T51:14-21) In fact, Mr. Pinto expected just the opposite. (PA145-146 at T51:22-25, T52:1-4).

Based on the facts, the Honorable Donald F. Campbell, J.S.C. correctly entered Summary Judgment in favor of Respondent, Raymond Pinto, Jr. following the path blazed by this Court in Araya vs. Farm Family Cas. Ins. Co., 353 N.J. Super. 203 (App. Div. 2002) and Machi vs. Connecticut General Insurance, 354 N.J. Super. 64 (App. Div. 2002).

Defendant appealed and the Appellate Division reversed, holding that,

We conclude that because plaintiff was a 'named insured' under his personal auto policy and was not a named insured under his employer's business auto policy issued by NJM, his claims for UIM coverage under the business auto policy was limited by the step-down clause contained in that policy's UM/UIM endorsement to the amount of UIM coverage he elected in his personal auto policy.

Slip Opinion at 2-3.

ERRORS COMPLAINED OF & COMMENTS AS TO APPELLATE OPINION

One of the significant issues raised by the direct appeal in this matter was whether a corporation's employees are implied to be named insured's in a auto insurance policy that technically names only the corporate entity as being the named insured.

It was undisputed that two corporate entities were the only named insureds on the policy. "At all relevant times the only named insureds on the policy declarations of the NJM business auto policy were R.W. Vogel, Inc., and Holgate Property Associates." (Db24) The Appellate Division accepted this as fact in rendering its Opinion. "At the time of the ... accident, the NJM business auto policy identified no natural persons as 'named insured's". Slip Opinion at 5.

The Appellate Division ultimately held that the corporation's employees under such circumstances are not implied to be named insured's under the policy.

We conclude that because plaintiff was a 'named insured' under his personal auto policy and was not a named insured under his employer's business auto policy issued by NJM, his claims for UIM coverage under the business auto policy was limited by the step-down clause contained in that policy's UM/UIM endorsement to the amount of UIM coverage he elected in his personal auto policy.

Slip Opinion at 2-3.

Certification should be granted to determine whether such a insurance policy violates public policy and constitutes breach of contract and good faith and fair dealing when it names only a corporate entity as its named insured when such an entity is not capable of sustaining the personal injuries contemplated by the policy. There are several New Jersey cases that are on-point.

One of those cases is Machi vs. Connecticut General Insurance, 354 N.J. Super. 64 (App. Div. 2002). There, the plaintiff was a permissive operator of a motor vehicle owned by her estranged husband's business (Innovative Packaging Corp). She was injured when she pulled over to assist another injured motorist. Id. at 68. In that case the commercial auto policy (which resembles the one at bar) contained a "step-down" clause that limited the amount of UIM benefits and named only a corporate entity as the named insured. The Panel concluded that the policy created by an ambiguity by failing

to designate a human being that was entitled to receive the UIM benefits. Judges Petrella, Kestin, and Steinberg wrote:

Our interpretation of the terms of the Innovative Policy begins with the understanding that plaintiff is for all intents and purposes an individual named insured under that policy. If it were otherwise, i.e., if the only individual named insured were deemed to be Innovative Packaging Corp., then no claim of the full extent of the personal injury benefit provided by the policy's UM/UIM provision would ever be possible, because an entity cannot suffer the predicate personal injury. That construction would render illusory the term of the policy establishing a 1,000,000.00 UM/UIM limit.

Id. at 74-75 (Emp. Supp.)

Another such case is Araya v. Farm Family Cas. Ins. Co., 353 N.J Super. 203 (App. Div. 2002). There, the plaintiff was employed as a landscaper by Christopher Mahon, a sole proprietor of Mahon Landscaping. The plaintiff was struck by a motorist while he was trimming a client's lawn. Plaintiff made a claim for UIM benefits under his employer's \$500,000 business auto policy issued by Farm Family. Defendant denied coverage arguing that plaintiff was not an insured under the policy because they claimed the policy was personal to Mr. Mahon. Araya, supra. at 206.

The lower court granted summary judgment to the defendant, but the Appellate Panel reversed and granted

summary judgment to the plaintiff, stating that, "In this case **the ambiguity arises from Farm Family's failure to designate a natural person or persons entitled to UIM coverage under the policy.**" Id. at 210 (Emp. Supp.)

Finally, another case is Cook-Sauvageau v. PMA Group, 295 N.J. Super. 620 (App. Div. 1996). The question presented in that case was "whether an employee who was injured while operating his or her employer's motor vehicle during the course of employment is entitled to the underinsured motorist coverage provided under the employer's business policy or is subject to the limits of coverage provided under the employee's own personal automobile policy. Id. at 620.

PMA appealed and argued that UIM insurance is personal to the insured and an injured employee is only entitled to the UIM coverage provided under his or her personal automobile policy. The Appellate Division disagreed, however, holding plaintiff was entitled to UIM benefits under the PMA policy. Id. It found that although plaintiff was not specifically named in the business automobile policy, it was clear that the essential risk for which PMA's business automobile policy was intended to provide coverage was an accident involving an employee's operation of one of the employer's vehicles. Id. at 627. Most noteworthy the Court stated:

This conclusion is reinforced by the fact that if the UIM endorsement of the standard business automobile policy were construed to provide coverage only to the employer, the premium paid for UIM coverage would not provide any meaningful benefits either to the employer or to his employees. In this case, a business automobile policy was issued to a corporate employee, the actual purchaser of the policy cannot itself suffer bodily injury and not maintain a claim for UIM benefits except perhaps in the rather unusual situation where its collision coverage was insufficient to cover the full damages to the vehicle.

Id. at 627-628.

At the very least, the NJM policy in question leaves room for more than one interpretation of the terms, conditions, and most critically, the limitations of the policy. When this is the case, the issue has always been resolved with a finding of coverage.

If the controlling language will support two meanings, one favorable to the insurer and the other favorable to the insured, the interpretation sustaining coverage must be applied. Courts are bound to protect the insured to the full extent that any fair interpretation will allow.

In Campbell v. Lion Insurance, 311 N.J. Super. 498, 504-05 (App. Div. 1998), *citing* Kievit v. Loyal Protective Life Ins. Co., etc., 34 N.J. 475 (1961).

REASONS WHY THE PETITION SHOULD BE GRANTED

Certification should be granted because the citizens of the State of New Jersey who operate motor vehicles for a living have a right to know conclusively whether they will receive UIM insurance coverage from their employer or whether they must take such potential work related accidents into consideration when purchasing their own personal auto policies.

Moreover, public policy dictates that the Court should determine whether all of a company's employees should be deemed to be named insured's on an auto insurance policy that names only the corporation as the named insured.

These are substantial questions that will affect a great deal of the citizens of this State.

CONCLUSION

For all foregoing reasons, and those expressed in plaintiff's Appellate Division brief, this Petition for Certification should be granted.

**Respectfully Submitted,
Gill & Chamas, LLC
Attorneys for Plaintiff-Petitioner**

**BY: _____
John M. Vlasac, Jr., Esq.
For the Firm**

Dated:

CERTIFICATION

I certify, pursuant to R. 2:12-7(a), that this petition presents a substantial question and is filed in good faith and not for purposes of delay.

**_____
John M. Vlasac, Jr., Esq.**

Dated: