

SUPERIOR COURT

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CIVIL DIVISION
Case No. 21-CV-01859

Estate of James Alger by Virginia Alger, Administrator v. United Ohio Insurance Co.

Opinion and Order on Cross-Motions for Summary Judgment

Mr. James Alger was killed in the course of his employment as a traffic control flagger with LPD Traffic Control LLC when he was struck by a vehicle negligently driven by Ms. Jennifer Bergevin.¹ LPD had in place at the time a business auto coverage policy issued by Defendant United Ohio Insurance Company. The administrator of Mr. Alger's estate, Ms. Virginia Alger, initiated this action seeking, among other things, a declaratory judgment as to whether the United Ohio policy provided uninsured/underinsured (UM/UIM) coverage to Mr. Alger in the circumstances of the injury causing his death. The parties have filed cross-motions for summary judgment addressing this issue only.

This matter requires close attention to 23 V.S.A. § 941 (requiring UM/UIM coverage), the language of the policy, and the factual record.

¹ Ms. Bergevin, originally a named defendant in this case, has since been dismissed with prejudice. Although not detailed by the parties, she presumably was uninsured or underinsured in relation to Ms. Alger's claim in this case.

I. Standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375, 380. Where, as here, there are cross-motions for summary judgment, the parties opposing summary judgment "are entitled to the benefit of all reasonable doubts and inferences." *Montgomery v. Devoid*, 2006 VT 127, ¶ 9, 181 Vt. 154, 156.

II. The Background Facts

The basic contextual facts are not disputed. Mr. Alger was working in the ordinary course of his employment as a traffic flagger when he was struck and killed by Ms. Bergevin. By some arrangement with LPD, Mr. Alger would use his

own vehicle for LPD's business purposes, at least at times.² He used his vehicle on the day of the accident to bring LPD materials to the site and to set up signs and cones in the morning. At the time he was struck and killed, his vehicle was parked away from where he was working and it was not in *active* use, nor was he an occupant of it, or in the process of getting into it or out of it.

III. Framing the Issue as to UM/UIM Coverage

In Vermont, UM/UIM coverage is required by statute. 23 V.S.A. § 941. The Policy has a Vermont Uninsured Motorists Coverage endorsement, but it would have extended coverage to Mr. Alger only if he were *occupying* a covered auto at the time of injury, and there is no dispute that he was not. Section 941, however, more broadly requires, in pertinent part, that any “policy insuring against liability arising out of the ownership, maintenance, or use of any motor vehicle . . . [must provide] *for the protection of persons insured under the policy . . . who are legally entitled to recover damages, from owners or operators of uninsured, underinsured, or hit-and-run motor vehicles, for bodily injury, sickness, or disease, including death.*” 23 V.S.A. § 941(a) (emphasis added). This legislative demand expands the scope of the Policy's coverage. As a result, by statute, the Policy's UM/UIM coverage necessarily extends to one who is insured under the liability portion of the Policy. *See Canedy v. Liberty Mut. Ins. Co.*, 126 F.3d 100, 104 (2d Cir. 1997) (“Unless a party can show that he or she is an insured under the liability policy, the

² The extent and nature of the business use of Mr. Alger's vehicle on the date of the accident is in dispute. *See infra* Part IV.

UIM statute does not come into play. The practical effect of this rule is that while insurers may not deny portable UIM coverage to persons who are insured under the liability policy, they are free to do so with respect to those not.”); 2 Auto. Liability Ins. 4th § 21:31 (“The statutes requiring uninsured motorist coverage to be incorporated into liability policies contemplate that anyone who is insured under the liability coverages of the policy shall also be insured for uninsured motorist coverages under the uninsured motorist coverages of the policy.”). The properly framed question in this case, then, is whether Mr. Alger was an *insured* under the liability portion of the policy.

The basic principles of insurance policy interpretation are as follows:

When interpreting an insurance policy, this Court follows well-established principles “An insurance policy is construed according to ‘its terms and the evident intent of the parties as expressed in the policy language.’” An insurance policy “is to be strictly construed against the insurer.”

Vermont law “requires that policy language be accorded its plain, ordinary meaning consistent with the reasonable expectation of the insured, and that terms that are ambiguous or unclear be construed broadly in favor of coverage.” “Words or phrases in an insurance policy are ambiguous if they are fairly susceptible to more than one reasonable interpretation.” Further, “[w]hen a provision is ambiguous or may reasonably be interpreted in more than one way, then we will construe it according to the reasonable expectations of the insured, based on the policy language.” However, “the fact that a dispute has arisen as to proper interpretation does not automatically render the language ambiguous.” And, “we will not deprive the insurer of unambiguous terms placed in the contract for its benefit.”

Rainforest Chocolate, LLC v. Sentinel Insurance Company, Ltd., 2018 VT 140, ¶¶ 6–7, 209 Vt. 232, 235–36 (citations omitted).

The named insured on the policy is LPD. Mr. Alger is not a named insured or specifically listed “driver” under the Policy, and he privately owned the vehicle that he had onsite on the day of the accident. The Policy’s liability coverage applies to covered autos as defined by symbols 7, 8, and 9. Declarations at 2. The applicable symbol, 9 (non-owned autos), refers to, in pertinent part, “those ‘autos’ you [LPD] do not own . . . that are used in connection with your business. This includes ‘autos’ owned by your ‘employees’ . . . *but only while used in your business or your personal affairs.*” Policy § I.A (emphasis added). As to who is an insured, the Employees as Insureds endorsement provides: “Any ‘employee’ of yours is an ‘insured’ *while using a covered ‘auto’ you don’t own, hire or borrow in your business or your personal affairs.*”³ *Id.* (emphasis added).

The more specific issue in this case arises directly out of the language of these covered-auto and who-is-an-insured provisions. Both include a temporal limitation on use indicated by the term *while*. Mr. Alger’s vehicle was a covered auto *while* being used in connection with LPD’s business purposes, and Mr. Alger was an insured *while* using his vehicle for LPD’s business purposes.⁴ The proper factual inquiry, stated plainly, is whether Mr. Alger was using his car for LPD business affairs when he was struck and killed. If so, he is an insured; if not, he is

³ An employee driving his own auto otherwise would have been excluded from the definition of an insured. Policy § II.A.1.b.2.

⁴ While the Policy refers to LPD’s “business” or “personal affairs,” the record is clear that Mr. Alger’s vehicle was not being used in LPD’s personal, as opposed to business, affairs on the day of the accident.

not. “Use,” “using,” “in connection with,” and “business” are *not* defined terms in the Policy.

Because Mr. Alger’s status as an insured is determined by the scope of those terms in this context, the cases cited by United Ohio that address “occupancy” of an auto are inapposite—the Policy does not define use in terms of “occupancy.” Indeed, such a limit would be unenforceable. Vermont UM/UIM coverage is “portable.” See *Monteith v. Jefferson Ins. Co. of New York*, 159 Vt. 378, 381 (1992) (“The statute does not allow insurers to condition coverage on the location of the insured nor the insured’s status as a motorist, a passenger in a private or public vehicle, or as a pedestrian.”).

Similarly, the cases cited by United Ohio that merely address the “use” of an automobile, typically focusing on use in relation to injury or accident, are not fully on point. As noted above, the question in this case is not merely whether the auto was in use but whether it was being put to some use serving LPD’s business interests.

As posited by United Ohio, one could interpret this Policy provision very narrowly: first examining whether there is use, applying case law such as *Canedy*, which looks to the immediate, active use of the auto, and then secondarily narrowing the scope of coverage further by examining whether that immediate, active use of the auto also served LPD’s business interests. All the relevant Policy terms are undefined, however, and nothing in the Policy otherwise requires such a narrow reading of the first element. Precisely what amounts to the use of an auto

in LPD's business is not defined by the Policy. The question in this case is whether the sort of use Mr. Alger was making of his vehicle at the time of the accident amounts to use in LPD's business. To the extent that the Policy leaves this line-drawing exercise murky in the circumstances presented, it is ambiguous and must be construed in favor of coverage. *See State Farm Mut. Auto. Ins. Co. v. Colby*, 2013 VT 80, ¶¶ 19–24, 194 Vt. 532, 539–42 (broadly construing “use” in context of alleged negligent entrustment).

As a result, the Court rejects United Ohio's proposition that Mr. Alger could not be an insured, as a matter of law, unless his vehicle was in active use at the moment of the accident. Its motion for summary judgment, which is predicated on that constricted interpretation of “use,” is denied.

Nonetheless, the operative terms of the Policy are not without limit or boundary. In the Court's view, resolution of the coverage issue in this case rests somewhere on a continuum. At one pole, assume for the sake of the argument that the sole use of the auto for business purposes was to bring the employer's materials to the worksite in the morning and take them home at night, and the auto serves no business purpose in between. Further assume that to satisfy this obligation, the employee's spouse drove the employee to the worksite in the morning, used the car for private, nonbusiness purposes all day long, and then picked up the employee and the employer's materials at the end of the day. If the accident occurred in the middle of the day when the auto was clearly being used for nonbusiness purposes, it

would be similarly clear under the policy that the employee was not an insured at the time of the accident.

By contrast, assume that an employee consistently but sporadically uses his auto for business purposes all day long, only infrequently not doing so for short periods of time during which the employer still requires the vehicle to remain on the ready for its anticipated business use soon thereafter. Because the auto is reliably available for such use all day, the employer is relieved of the need to supply an employer-owned vehicle to satisfy the same business purposes. In this example, there may be short periods of time during which the employee's auto is not in active use, but the auto is clearly serving the employer's business purposes all day long. That employee would be an insured under the Policy during all portions of the work day regardless of actual use at any given moment.

Accordingly, "use" in relation to the named insured's business activity is a broader concept than the "active use" definition proffered by United Ohio. The remaining question is where the facts of this case sit along the use-in-business continuum and whether the undisputed facts are sufficient for the Court to make a determination in that regard at this stage.

IV. The Facts Regarding the Business Use of Mr. Alger's Auto

There is no dispute that Mr. Alger was a flagger and had additional responsibilities as a "sign package holder." There is little in the record as to the scope of the sign package holder's responsibilities and any other duties and obligations Mr. Alger had regarding the use of his vehicle for LPD's business

purposes. It appears to be undisputed, however, that Mr. Alger would bring signs and cones from home to the worksite in his own car, and at the end of the day, they would be collected, and he would take them home for overnight storage. There was no storage onsite. On occasion, Mr. Alger would use his auto to move signs and materials during the workday. There is no dispute that Mr. Alger's auto was not actively undertaking those responsibilities at the time of the accident.

In summary, Ms. Alger infers that the auto was in continuous use for LPD business purposes because it was required by LPD to be available for the above (and perhaps other) uses all day whenever they needed to be undertaken, and that no other auto (much less any LPD-owned auto) was available or designated to undertake them. In other words, throughout the workday, Mr. Alger's auto was dedicated to LPD's business uses.

United Ohio disputes Ms. Alger's characterization of the nature of his use of his vehicle, particularly on the day of the accident, arguing that the facts asserted by her are largely not supported by the cited record evidence. And to the heavy extent that Ms. Alger relies on the testimony of Alberto Martinez to demonstrate Mr. Alger's specific duties and obligations vis-à-vis LPD, United Ohio objects that he was merely a co-employee of Mr. Alger's (another flagger), much less a representative of LPD designated to describe its business practices, and his testimony as to duties and obligations lacks a foundation supporting admissibility on these issues. Indeed, there appears no evidence in the record as to what LPD required or expected of Mr. Alger's vehicle.

On this record, the propositions asserted by Ms. Alger that tend to support coverage depend on drawing significant inferences in her favor. “[A]ll reasonable doubts and inferences,” however, are drawn in favor of the party opposing summary judgment, United Ohio on this matter.⁵ *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356, 363.

The Court notes that, in this case, inferences from the evidence ultimately may loom large because the record, at least as presented thus far, barely touches on the factual issue that matters most—the business use of Mr. Alger’s auto at the time of the accident. Little in the record explores, among other things: Mr. Alger’s duties and obligations to LPD as far as the use of his auto went; to what extent he was free to make nonbusiness use of his auto during the workday; LPD’s expectations or orders to Mr. Alger concerning the auto; and LPD’s contract obligations on the road construction project to the extent that they may reflect on the issues at bar.

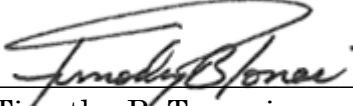
Because the facts are disputed, and not particularly well developed in any event, the Court declines to opine further at this time on what may prove to be a fine line distinguishing between business use triggering UM/UIM coverage and non-business use to which the Policy did not apply.

⁵ The parties have filed cross-motions for summary judgment. United Ohio’s statement of undisputed facts is, in fact, almost entirely undisputed by Ms. Alger. Mostly, it simply recites facts already asserted in the complaint. United Ohio’s motion is not calculated to address the continuity-of-use theory clearly presented by Ms. Alger’s motion, however. Thus, for purposes of summary judgment procedure, analysis of the continuity-of-use issue arises out of Ms. Alger’s motion alone.

Conclusion

For the foregoing reasons, United Ohio's and Ms. Alger's Motions for Summary Judgment are denied.

Electronically signed on Tuesday, March 21, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge