

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

GEORGE BARNES,	:	
	:	TRIAL DIVISION- CIVIL
Appellant	:	
	:	May Term, 2010
VS.	:	No. 3918
	:	
WARREN G. KELLER	:	Superior Court No.
	:	2459 EDA 2011
VS.	:	
	:	
WESTFIELD GROUP a/k/a, d/b/a, t/a	:	
WESTFIELD INSURANCE COMPANY	:	
	:	
Appellee	:	
	:	
	:	
	:	

OPINION

PROCEDURAL HISTORY

Plaintiff George Barnes appeals this Court’s Order dated July 27, 2011, granting the Motion for Summary Judgment submitted by Defendant Westfield Group a/k/a, d/b/a, t/a Westfield Insurance Company (hereinafter “Westfield”) and denying the Motion for Summary Judgment submitted by Plaintiff George Barnes, thereby dismissing Plaintiff’s Complaint.

FACTUAL BACKGROUND

At the time of the occurrence giving rise to this litigation, George Barnes (hereinafter “Plaintiff”) was employed by McGovern, Inc. as a field service technician. (Plaintiff’s Amended Complaint, ¶ 4). McGovern, Inc. maintained a policy of insurance with Westfield, and Plaintiff was an insured under the policy. (Plaintiff’s Amended Complaint, ¶¶ 5-6). Plaintiff was assigned to a Wawa convenience store located at 9201

Frankford Avenue, Philadelphia, PA when an unidentified driver backed out of a parking space, striking the Plaintiff. (Plaintiff's Amended Complaint, ¶¶ 7-8).

Dennis McCliver of McGovern had assigned Plaintiff to the Wawa on the date of the accident to unblock a clogged pipe. (Plaintiff's deposition attached as Exhibit "B" to Defendant's Motion for Summary Judgment, pg. 105 ln. 24 and p. 106 ln. 1). Plaintiff was provided with a McGovern-owned cargo van, attached by tow hitch¹ to an FMC, high-powered jetter. *Id.* at pg. 58, ln. 9-16, pg. 61, ln. 12-16).

In his deposition, the Division Manager for McGovern, Alan Tulish describes the jetter as "a portable unit that has to be transported from one point to another with another vehicle." (Alan Tulish's deposition attached as Exhibit "C" to Defendant's Motion for Summary Judgment, pg. 25, ln. 3-5). Mr. Tulish further explains that the jetter has a diesel engine fueled separately from the transporting vehicle and that it is "a self-sufficient unit that basically what it's designed to do is go to locations, be set there and get run by itself and you can just leave it there and use the jetter as needed." *Id.* at pg. 27, ln. 19-23). The van can be positioned anywhere on the site because the jetter is operated separately and independently of the van. *Id.* at pg. 51, ln. 31-24, pg. 52, ln. 19-23, pg. 53, ln. 5-8, 20-21. Mr. Tulish also testified that all of the equipment necessary to clear a drain should be kept with the jetter.

Upon arriving at the job site, Plaintiff testified that he parked the van, turned on the flashers and beacon,² and retrieved his gloves, hooks and cones from the van.

¹ The jetter trailer could also be attached to the van with an electrical connection, which controlled the brake lights and turn signals. *Id.* at pg. 63, ln. 13 and pg. 63, lns. 19-24.

² Mr. Tulish and Mr. Cliver testified that Mc Govern safety procedures do not require technicians to engage the flashers or strobe lights on the van while the jetter is in use. (Alan Tulish's deposition attached as Exhibit "C" to Defendant's Motion for Summary Judgment, pg. 44, ln. 11-13; Dennis Cliver's deposition attached as Exhibit "D" to Defendant's Motion for Summary Judgment, gp. 71, ln. 5-11).

(Plaintiff's deposition attached as Exhibit "B" to Defendant's Motion for Summary Judgment, pg. 134 ln. 20-21 and p. 135-36). He then cordoned off his work area with the cones according to McGovern safety procedure and notified Wawa's manager of his arrival. *Id.* at pg. 197, ln. 11-19.

After Plaintiff spoke with Wawa's manager, Plaintiff then lifted the grate covering the blocked drain, realized he needed a pump truck in addition to the jetter to complete the job, and notified Dennis Cliver of McGovern. (Plaintiff's deposition attached as Exhibit "B" to Defendant's Motion for Summary Judgment, pg. 146, ln. 18-23, pg. 147, ln. 8-10, pg. 144, ln. 20-24). Plaintiff testified that Mr. Cliver instructed Plaintiff to "see what [he] could do" while waiting for the pump truck to arrive. *Id.* at pg. 146, ln. 4-5, pg. 151, ln. 7-10. Plaintiff explained that after he had located the blocked pipe with his hook, he was attempting to feed the hose from the jetter into the pipe when he was struck by an unidentified vehicle. *Id.* at pg. 154, ln. 2-6. Plaintiff could not recall whether or not the pressure on the jetter had been set at the time he was hit. *Id.* at pg. 155, ln. 5-7, pg. 169, ln. 15-18.

When Plaintiff was struck by the unidentified driver, the force of the impact caused Plaintiff to fall to the left of the storm drain, and he proceeded to yell at the driver of the vehicle and then went to retrieve his cell phone from the van. *Id.* at pg. 170, ln. 7-14, pg. 171, ln. 16-24. Following the accident, Ron Yergey, another McGovern employee, arrived at the scene with the pump truck. He notified Mr. Tulish that nothing had been done to clear the drain, and Plaintiff was waiting for him to arrive with the pump truck. (Alan Tulish's deposition attached as Exhibit "C" to Defendant's Motion for Summary Judgment, pg. 56, ln. 12-20).

Plaintiff commenced this action by filing his Complaint on May 28, 2010. (See Docket). After Westfield filed Preliminary Objections to Plaintiff's Complaint on July 6, 2010, Plaintiff filed an Amended Complaint on July 23, 2010. *Id.* Westfield filed Preliminary Objections to Plaintiff's Amended Complaint on August 19, 2010, which were overruled on September 23, 2010. *Id.* Thereafter, Westfield filed an Answer with New Matter and Counterclaim to Plaintiff's Amended Complaint on October 13, 2010. *Id.* Plaintiff filed Preliminary Objections to Westfield's Answer with New Matter and Counterclaim on November 2, 2010, Westfield filed an Answer on November 22, 2010, and Plaintiff filed a Reply on December 2, 2010. *Id.* On December 9, 2010, this Court overruled Plaintiff's Preliminary Objections. *Id.*

Westfield filed a Motion to Dismiss on January 19, 2011, Plaintiff filed an Answer on February 9, 2011, and Defendant filed a Brief in Support of the Motion to Dismiss on February 11, 2011. *Id.*

Westfield filed its Motion for Summary Judgment on June 6, 2011, Plaintiff filed an Answer on July 7, 2011, and Westfield filed a Reply in Opposition to the Motion for Summary Judgment on July 15, 2011. *Id.*

On July 27, 2011, the Court granted the Motion for Summary Judgment submitted by Defendant Westfield and denied Plaintiff's Motion for Summary Judgment, thereby dismissing Plaintiffs' Complaint. *Id.*³ Plaintiffs timely appealed and filed their Statement of Matters Complained of on Appeal on September 19, 2011. *Id.*

The issues for appeal are:

³ The Docket Entry of August 19, 2011 notes that the parties agreed to dismiss Defendant Keller from the case at the Settlement conference on June 9, 2011 as the discovery taken in the case suggested that Keller was incorrectly identified as the driver of the vehicle.

1. Whether this Court erred in concluding that Plaintiff was not vehicle-oriented at the time of the occurrence giving rise to this litigation and thus was not entitled to recover uninsured motorist benefits under his Employer's policy with Westfield.
2. Whether this Court erred in denying the Plaintiff's request for recusal.

LEGAL ANALYSIS

Summary Judgment is governed by Pennsylvania Rule of Civil Procedure 1035.2, which states,

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

- (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. Pa. R.C.P. 1035.2

In determining whether summary judgment is proper, the record is viewed in the light most favorable to the non-moving party, and all doubts as to whether a genuine issue of material fact exists are resolved against the moving party. *Pennsylvania State Univ. v. County of Centre*, 532 Pa. 142, 615 A.2d 303, 304 (1992). The appellate court's scope of review is plenary. *O'Donoghue v. Laurel Savings Ass'n*, 556 Pa. 349, 728 A.2d 914, 916 (1999). A trial court's decision to grant or deny a motion for summary judgment will only be reversed where the lower court committed an error of law or abused its discretion. *Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245, 248 (1995). Moreover, "the proper construction of a policy of insurance is a matter of law which may

properly be resolved by a court pursuant to a motion for summary judgment.” *Frain v. Keystone Ins. Co.*, 433 Pa. Super. 462, 466, 640 A.2d. 1352 (1994).

Plaintiff first contends that this Court erred in concluding that he was not vehicle-oriented at the time of the accident and thus not considered “occupying” a motor vehicle for purposes of uninsured motorist coverage.

Pursuant to the UM Endorsement issued by Westfield to Plaintiff’s employer, William P. McGovern, Inc., when a formal organization is the named insured, then “Anyone else ‘occupying’ a covered ‘motor vehicle’” is also an insured.

The policy defines “occupying” as “in, upon, getting in, on, out, or off.”

A “motor vehicle” is defined as:

A vehicle which is self-propelled except one which is propelled solely by human power or by electric power obtained from overhead trolley wires, but does not mean a vehicle operated upon rails.

Because the jetter is not self-propelled, in order to recover uninsured motorist (UM) benefits under his employer’s policy with Westfield, the Court must find that the Plaintiff was occupying the cargo van at the time of the accident.

The Court in *Utica Mutual Insurance Company v. Contrisciane*, 504 Pa. 328, 473 A.2d 1005 (1984), designated a four prong test to resolve the issue of whether an individual is ‘occupying’ a motor vehicle for purposes of UM coverage. An individual will be deemed to be ‘occupying’ a motor vehicle’ where:

- 1) There is a causal relation or connection between the injury and the use of the insured vehicle;
- 2) The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;
- 3) The person must be vehicle oriented rather than highway or sidewalk oriented at the time; and

- 4) The person must also be engaged in a transaction essential to the use of the vehicle at the time. *Utica*, 504 Pa. 328, 336, 473 A.2d 1005, 1009 (1984).

Although Plaintiff was in reasonably close proximity to the cargo van⁴, the other 3 prongs cannot be met. “Occupancy is not established simply because an injury occurs in or adjacent to a vehicle.” *Huber v. Erie Ins. Exchange*, 402 Pa. Super. 443, 587 A.2d 333 (1991).

First, there is no causal relation between the injuries sustained by Plaintiff and the use of the cargo van. As Mr. Cliver and Mr. Tulish testified at their depositions, McGovern does not have any safety procedures in place concerning the use of flashers on the van while a technician is engaging a jetter to clear a drain. They further testified that the van itself generally does not contain any drain-clearing equipment, and technicians are instructed to keep everything on the jetter. The van was only used to transport the jetter to the site. After Plaintiff removed his gloves, hook and two cones from the back of the van, he did not return to the van until after the accident and had no reason to do so.

Additionally, the jetter is intended to be a self-sufficient unit and is fueled separately from the van. The van can be parked in the parking area while the jetter is placed adjacent to the drain that needs to be cleared. Therefore, there is no causal relation between the injuries sustained by Plaintiff and the use of the cargo van, the covered motor vehicle, because use of the van was incidental to Plaintiff’s assignment.

Second, Plaintiff was not vehicle-oriented at the time of the accident. Generally a person is deemed to be vehicle-oriented for purposes of the test in *Utica* when he or she is in the process of entering the vehicle, but the presence of another vehicle prevents

⁴ Plaintiff testified in his deposition that the storm drain was approximately 3-5 feet from the back of the jetter. (Exhibit “B” to Defendant’s Motion for Summary Judgment at pg. 132, lines 8-13). Westfield concedes that Plaintiff was within 25 feet of the cargo van at the time of the accident. (Defendant’s Brief in Support of Motion for Summary Judgment, pg. 12 n. 6).

entry. See *Utica Mutual Ins. Co. v. Contrisciane*, 504 Pa. 328, 473 A.2d 1005 (1984)(concluding that Plaintiff was vehicle-oriented at the time of the accident because he only exited the vehicle after being instructed to by the police officer who had just stopped him, in addition to the fact that his fiancé remained in the vehicle); *Frain v. Keystone Ins. Co.*, 433 Pa. Super. 462, 640 A.2d. 1352 (1994)(concluding that Plaintiff was vehicle-oriented because she had already placed her purse in the vehicle when she was forced to jump out of the way to avoid being hit by another vehicle); *Fisher v. Harleysville Ins. Co.*, 423 Pa. Super. 362, 621 A.2d 158 (1993)(concluding that Plaintiff was vehicle-oriented because he was removing the shells from his rifle in order to lawfully enter the vehicle).

In contrast, Plaintiff here was merely working in close proximity to the vehicle, but did not intend to reenter the vehicle until after he had completed his assignment.

In *Curry v. Huron Ins. Co.*, 2001 Pa. Super. 234, 781 A.2d 1255 (2001), Plaintiff's employer provided him with a pick-up truck to transport him to and from the project site where he would be supervising and inspecting the construction of a runway paving project at Pittsburgh International Airport. The truck was equipped with a rotating yellow beacon, required by federal regulation to warn nearby aircraft of a worker's position. While in the scope of his employment, Plaintiff in *Curry* was struck by a dump truck and sustained injury. The Court concluded that Plaintiff was not vehicle-oriented and thus the third criterion in *Utica* had not been met because he was not preparing to enter the vehicle. *Id.* at P11, 1258-59. The Court stated, "Notwithstanding any Federal regulation requiring the use of a beacon, Curry's location outside of the truck was

determined primarily by the fact that he was conducting an impact study on the runway.”
Id. at P11, 1258.

It follows that because Plaintiff here was not engaged in an activity in preparation of entering his van, he cannot be said to have been vehicle-oriented at the time of the accident. Plaintiff did not intend to return to the van until his assignment was complete because all of the equipment essential to his assignment was with the jetter.

Third, Plaintiff was not engaged in a transaction essential to the use of the vehicle at the time the accident occurred.

In *Curry*, the Plaintiff argued that he was engaged in a transaction essential to the use of the vehicle because the activation of the truck’s beacon was necessary to comply with Federal regulations. However, the Court distinguished both *Utica* and *Fisher* in that the Plaintiffs in those two cases were complying with statutory mandates just prior to their injuries in order to continue lawfully using their vehicles. *Id.* at P12, 1259. In contrast, in *Curry*, the Plaintiff was outside his vehicle in order to test the compaction of the road surface, which was not an activity essential to the lawful operation of the truck. *Id.*

Therefore, in this case, though not mandated by McGovern procedure, even if Plaintiff had engaged the flashers on the van, he did not do so to continue lawful operation of the vehicle, and the fourth criterion in *Utica* cannot be established. As described above, the jetter is an independently fueled, self-sufficient vehicle containing all of the equipment to clear a drain. The van could be positioned anywhere on the site relative to the jetter and played no role in the process of clearing the drain. Therefore, the Plaintiff was not engaged in a transaction essential to the use of the van at the time of the accident.

Plaintiff's second contention is that this Court erred by denying Plaintiff's request for recusal.

Canon 3C of the Pennsylvania Code of Judicial Conduct provides:

- (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in the household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (d) he, or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Plaintiff's allegation that recusal is warranted is without merit. Recusal is suggested where the Judge's spouse is known to have an interest that could be substantially affected by the outcome of the proceeding. However, Heather Tereshko is employed as an associate attorney with Post & Schell and as such, has no financial interest in the outcome of this litigation, nor has she participated in any way in the preparation of this case.

The official note to Canon 3C of the Pennsylvania Code of Judicial Conduct states that, "The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge." Aside

from the fact of Heather Tereshko's employment, Plaintiff has offered no reasonable basis to question the impartiality of this Court.

In *Welch v. Board of Directors of Wildwood Golf Club*, 918 F. Supp. 134 (W.D. Pa. 1996), eleven months after the Honorable Donald Lee granted summary judgment for Defendant on Plaintiff's federal law claims, Plaintiff brought a motion for relief of judgment on the basis that the Judge could not be impartial because his sons were employed as associates by a law firm that had performed an initial consultation on the litigation.

Judge Lee's sons were employed as associate attorneys and had not performed any legal services for the Defendant or in connection with the litigation, and therefore their compensation and employment were not in any way dependent on the litigation. The Court stated, "[W]e conclude that no reasonable person would harbor doubts concerning Judge Lee's impartiality." *Id.* at 138. *See also In re Appointment of a Sch. Dir. For Region No. 9*, 682 A.2d 871, 1996 Pa. Commw. LEXIS 375 (1996)(concluding that the fact that the judge's daughter worked for the District was insufficient for recusal without a showing that the daughter had a significant financial interest that could be significantly affected by the outcome).

Likewise, Heather Tereshko is an associate attorney in the professional liability department of Post & Schell. She has never represented Westfield in any capacity, and attorneys Allan Molotsky, Joseph Fowler and Frances Lettieri do not work with Heather Tereshko in any capacity. Plaintiff has not alleged any facts tending to support an inference of bias or partiality in this litigation aside from Heather Tereshko's

employment with Post & Schell, which as the comment to Canon 3C of the Pennsylvania Code of Judicial Conduct makes clear, is insufficient to warrant recusal.

“A party who petitions for recusal bears the burden of producing evidence that establishes bias, prejudice, or unfairness.” *Rizzo v. Haines*, 520 Pa. 484, 512, 555 A.2d 58, 72 (1989). Moreover, “[i]f the judge feels that he can hear and dispose of the case fairly and without prejudice, his decision will be final unless there is an abuse of discretion.” *Crawford’s Estate*, 307 Pa. 102, 108-109, 160 A. 585, 587 (1932).

The fact that a party is dissatisfied with the trial Judge’s rulings is not a basis for recusal, nor has the Plaintiff asserted any facts that demonstrate that the litigation cannot be disposed of fairly and without prejudice; therefore, Plaintiff has not met his burden of production.

Moreover, “Once the trial is completed with the entry of a verdict, a party is deemed to have waived his right to have a judge disqualified, and if he has waived that issue, he cannot be heard to complain following an unfavorable result.” *Reilly v. SEPTA*, 507 Pa. 204, 222, 489 A.2d 1291, 1300 (1985) citing *Commonwealth v. Corbin*, 447 Pa. 463, 291 A.2d 307 (1972). The Court in *Reilly* reasoned:

[W]here the challenge is made for the first time after verdict, in post-trial motions or in arguments and briefs before the appellate courts, different considerations come into play.

Charges of prejudice or unfairness made after trial expose the trial bench to ridicule and litigants to the uncertain collateral attack of adjudications upon which they have placed their reliance.... Litigants are given their opportunity to present their cause and once that opportunity has passed, we are loathe to reopen the controversy for another airing, save for the greatest of need. *Reilly*, 507 Pa. 204, 225, 489 A.2d 1291, 1301 (1985).

In the instant matter, Plaintiff failed to request recusal until after this Court granted Westfield’s Motion for Summary Judgment, dismissing the cause of action.

Plaintiff has thus waived the issue by not raising it until after a final disposition was entered. The fact that a party is dissatisfied with the trial Judge's rulings is not a basis for recusal; therefore, this Court's decision should be upheld.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to grant Defendant Westfield Group a/k/a, d/b/a, t/a Westfield Insurance Company's Motion for Summary Judgment be **AFFIRMED**.

BY THE COURT:

2-13-2012

DATE

ALLAN L. TERESHKO, J.

cc:
All counsel
Joseph J. Aversa, Esq., for Appellant
Allan C. Molotsky, Esq. for Appellee Westfield