STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Beth and David Burbank as p/n/f of Liam Quinn Burbank

v.

Philadelphia Insurance Companies and Manchester Transit Authority

No. 10-E-0066

ORDER

Beth and David Burbank as p/f/n of Liam Burbank ("petitioner") seek a declaratory judgment finding that Philadelphia Insurance Companies ("respondent") must provide underinsured motorist coverage to the minor petitioner. The Court held a bench trial on January 6, 2012, on the narrow issue of whether petitioner was "occupying" the school bus as defined under respondent's insurance policy when Bruce Johnson's ("Johnson") vehicle struck him. Kenna Marie Johnston and Richard Blomberg testified as experts. After consideration of the evidence, arguments, memoranda of law, view and the applicable law, the Court finds and rules as follows.

Findings of Fact

Petitioner lives at 1381 Union Street in Manchester, New Hampshire. His house is on the corner of Union Street and Whitford Street. Whitford Street is perpendicular to Union Street and does not continue past Union Street. Union Street runs north and south and has one lane of traffic traveling in each direction. Traffic on Union Street, in the general vicinity of the intersection is at times moderate to heavy. Access to petitioner's property is blocked by a stone wall that runs parallel to Union Street.

In 2008, petitioner's afternoon designated school bus stop was on Whitford Street at a stop sign at the intersection of Whitford Street and Union Street. The nature of his bus stop required petitioner to exit the bus and walk north on Union Street with his back facing traffic. The area on Union Street in front of petitioner's house where he would walk after his bus stop did not have a sidewalk or paved shoulder.

On May 6, 2008, petitioner, eleven years old at the time, was dropped off at his designated bus stop. After he disembarked petitioner started walking north on Union Street with his back to traffic. He was walking via a grass path that runs alongside Union Street toward his mailbox which was next to his driveway when he was struck from behind by Johnson's vehicle. The parties disagree as to time and distance thus, the Court finds that petitioner was struck between twelve to twenty-seven seconds after exiting the bus and between forty-five to one-hundred feet from the bus stop. At the time of the accident, the bus was stopped at its next designated stop at the southeast corner of Walnut Hill Avenue. Petitioner suffered severe personal injuries as a result of the accident.

The New Hampshire Department of Safety Regulation Saf-C 1306.02 states that the school bus driver shall "[p]roceed only after all persons have cleared the danger zone of the bus and all passengers are properly seated." (Resp't's Ex. A at Tab 11.) The regulation also states that "'danger zone' means the 10 foot area immediately surrounding the stopped school bus." (Id.) Respondent's expert Johnston testified that, according to this regulation, once a student exits the school bus and gets beyond the ten foot danger zone it would be safe for the bus to continue on its way. She also testified that at the time of impact petitioner was outside that ten foot danger zone.

Petitioner's expert Blomberg testified that the purpose of the ten foot danger zone is to prevent the bus from striking one of its own passengers and not to prevent them from being struck by another vehicle. This interpretation is the most reasonable: consider dropping a student off on Interstate 93 and leaving the student there once he or she walked ten feet from the bus.

Blomberg also testified that a student is on the school bus trip from the time he exits the door of the school to the time he returns to a place of safety. Blomberg testified that since there was no sidewalk or paved shoulder the place of safety was petitioner's driveway. Thus, he stated that at the time of the accident petitioner was not at a place of safety because he had not yet reached his driveway.

At all pertinent times, respondent insured the buses owned by the Manchester Transit Authority through two policies: A Business Auto Policy and a Commercial Excess Policy. (Resp't's Ex. A at Tab 10.) The Business Auto Policy provides $100,000 in underinsured motorist coverage. (Id.) The Commercial Excess Liability Policy provides $4,900,000 in underinsured coverage. (Pet'rs Mot. Summ. J. Ex. 10.) The parties have stipulated that: if the Court finds there is coverage under respondent's Business Auto Policy then there is also coverage under the Commercial Excess Liability Policy.

Coverage under respondent's policy depends on whether petitioner was an "insured" at the time of the accident. The policy states that, when the named "insured" is an organization, an insured is defined as "[a]nyone 'occupying' an 'insured motor vehicle.'" (Resp't's Ex. A at Tab 10.) "Occupying" is defined as "in, upon, getting in, on, out or off." (Id.) Petitioner is entitled to coverage under respondent's Business Auto

Policy and the Commercial Excess Liability Policy if he was "occupying" the Manchester Transit Authority school bus when he was struck by Johnson's vehicle.

Analysis

Interpretation of the language in an insurance policy is a question of law. Peerless Ins. v. Vt. Mut. Ins. Co., 151 N.H. 71, 72 (2004). "Where the terms of a policy are clear and unambiguous, [the Court] accord[s] the language its natural and ordinary meaning." Wilson v. Progressive N. Ins. Co., 151 N.H. 782, 788 (2005). "If the language of the policy reasonably may be interpreted more than one way and one interpretation favors coverage, an ambiguity exists in the policy that will be construed in favor of the insured and against the insurer." High Country Assocs. v. N.H. Ins. Co., 139 N.H. 39, 41 (1994). "The fact that the parties may disagree on the interpretation of a term or clause in an insurance policy does not create an ambiguity." Oliva v. Vermont Mut. Ins. Co., 150 N.H. 563, 566 (2004) (quotation omitted). "In addition, policy provisions are not ambiguous merely because it is difficult to apply the factual situation to the specific policy language." Id. (quotation omitted).

In interpreting "occupying" under an insurance policy the New Hampshire Supreme Court has applied the "vehicle-orientation test." See Miller v. Amica Mut. Ins. Co., 156 N.H. 117, 120 (2007). "The vehicle orientation test requires that a claimant be engaged in an activity essential to the use of the vehicle' when the accident occurs." State Farm Mut. Auto. Ins. Co. v. Cookinham, 135 N.H. 247, 249 (1992) (quotations omitted). "[U]nder the vehicle orientation test, 'occupying' may include the process of moving away from the vehicle to a 'place of safety.'" D'Amour v. Amica Mut. Ins. Co.,

153 N.H. 170, 173 (2005). "If, however, a claimant has severed his or her connection to the vehicle, then he or she is no longer occupying the vehicle." Id. at 174-175.

When applying the "vehicle orientation test," the Court finds that petitioner was engaged in activity essential to the use of the vehicle when the accident occurred because he exiting the bus and was moving towards a place of safety. See Kantola v. State Farm Ins., 405 N.E.2d 744, 746 (Ohio Misc. 1979) (holding that exiting from the school bus continues until the pupil reaches a place of safety on the residence side of the road); see also Georgia Farm Bureau Mut. Ins. Co. v. Greene, 329 S.E.2d 204, 208 (Ga. App. 1985) (explaining that unloading the school bus encompasses not only depositing students outside the bus but also assuring that they reach a place of safety, which may include crossing a street).

Petitioner's expert Blomberg testified that a student is still on the school bus trip from the moment he exists the door of the school to the moment he reaches a place of safety. The Court finds that Blomberg was highly qualified to testify as an expert and his opinion was reasonable and logical. (Pet'rs Ex. 3 at 1-21.) The Court accepts Blomberg's findings and observations that in this case petitioner had not reached a place of safety when he was struck. The Court finds Blomberg's rationale compelling because there was no sidewalk, no paved shoulder, it was a busy street, and the designated stop required petitioner to walk with his back to traffic. Therefore, since petitioner had not reached a place of safety when Johnson's vehicle struck him, he was still "occupying" the school bus. Of note is the fact that this minor petitioner had no choice but to disembark at the Whitford and Union street location.

The Court also looks at the cases of D'Amour and Miller for guidance in interpreting "occupying." In D'Amour, the insured drove to her apartment complex, parked in her designated parking space, got out of the vehicle, opened the driver's side rear door to remove several grocery baskets, and proceed to walk along the driver's side toward her apartment when she slipped on ice and fell. D'Amour, 153 N.H. at 170-71. Amica maintained that the insured was not "occupying" the vehicle because a person is "getting out" of, and thus "occupying," a vehicle only while she is engaged in a transaction related to the motor vehicle. Id. at 173. The insured argued that she was "getting out" of the vehicle at the time because she was in the process of moving away from the vehicle to a place of safety. Id. The Supreme Court of New Hampshire held that both Amica and the insured had offered reasonable interpretations of "occupying," but that the insured's conduct did not fit within the definition she offered because the insured had severed her connection with her vehicle and was not removing herself from an unsafe situation when she fell. Id. at 174-75. Unlike D'Amour, in this case, petitioner was exposed to unsafe conditions and was attempting to remove himself from those conditions by walking toward a place of safety. Thus, when Johnson's vehicle struck him, petitioner had not severed his connection to the school bus because he had not yet reached a place of safety.

In Miller, the decedent was operating an uninsured motorcycle, when it hit a rut in the roadway causing him to be thrown forty feet from the motorcycle and then struck by an oncoming vehicle. Miller, 156 N.H. at 118. Amica insurance asserted that the decedent was "occupying" the motorcycle because he had not reached a place of safety and had not severed his connection to the motorcycle. Id. at 119. The administrator of

decedent's estate countered that the plain language of "occupying" and the terms included in its definition did not describe someone who has been thrown forty feet from his vehicle and is laying in the roadway for a period of time before being struck. Miller, 156 N.H. at 119. The Court found that "[n]o one can seriously argue that the decedent was trying—let alone able—to take himself to a place of safety" and that the insured had severed his connection to the vehicle because he was already lying in the road before he was struck. Id. at 121-22. Unlike in Miller, here petitioner was clearly trying and able to take himself to a place of safety after exiting the school bus. Additionally, dissimilar to the insured in Miller, petitioner was not lying on the road for a period of time before he was struck by Johnson's vehicle, but was walking in an attempt to reach a place of safety at the time he was struck. Therefore, petitioner was still "occupying" the bus at the time of the accident because he had not severed his connection to it and was engaged in an activity essential to the operation of the school bus.

The Court holds that the term "occupying" in this case is ambiguous because it is reasonable susceptible to more than one interpretation. See State Farm Mut. Auto. Ins. Co., v. Cookinham, 135 N.H. 247, 250 (1992). Thus, the Court construes the policy in favor of petitioner, finding that he was "occupying" the school bus and is entitled to uninsured motorist coverage. The Court enters judgment for petitioner. As stipulated by the parties, because the Court has found there is coverage under respondent's Business Auto Policy, then there is also coverage under the Commercial Excess Liability Policy.

Since the Court has decided petitioner was an "occupant" and entitled to coverage from respondent, the Court orders that two weeks from the issuance of this

decision, Hartford and respondent submit legal memoranda on the issue of primary and excess coverage. All findings of fact and rulings of law inconsistent with this order are denied. Geiss v. Bourassa, 140 N.H. 629, 630-33 (1996).

SO ORDERED

January 31, 2012

Kenneth Brown
Presiding Justice