IN THE SUPREME COURT OF PENNSYLVANIA

NO. 60 MAP 2014

MUTUAL BENEFIT INSURANCE COMPANY,
Appellant

v.

CHRISTOS POLITSOPOULOS, DIONYSIOS MIHALOPOULOS AND MARINA DENOVITZ,
Appellees

BRIEF OF APPELLEES CHRISTOS POLITSOPOULOS AND DIONYSIOS MIHALOPOULOS

Appeal by Allowance from the Order and Opinion of the Superior Court dated September 6, 2013, Reconsideration Denied November 6, 2013, at No. 421 MDA 2012 which Reversed/Remanded the order of the Lancaster County Court of Common Pleas, Civil Division, dated February 2, 2012 at no. CI-10-02578.

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BRIEF OF APPELLEES CHRISTOS POLITSOPOULOS AND DIONYSIOS MIHALOPOULOS

Appeal by Allowance from the Order and Opinion of the Pennsylvania Superior Court Dated September 6, 2013 Reversing the Summary Judgment Entered in Favor of Appellant in the Court of Common Pleas of Lancaster County, Civil Division at No. CI-10-02578

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COUNTER STATEMENT OF THE CASE

The Lease between Politsopoulos[1] and Mihalopoulos (Owners) and Leola Restaurant Corp. (Employer) provides in Paragraph 1(d) that Politsopoulos and Mihalopoulos (Owners) shall be named "as additional insured parties on Lessee's [Leola Restaurant Corp.'s] liability insurance," RR1-00176, not "additional insureds" as stated on page 7 of Appellant's Brief.[2]

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[1] Christos Politsopoulos' name was misspelled on the tort claim and Mutual Benefit continued the mistake resulting in Mr. Politsopoulos' name being misspelled in the caption of the case and in the Superior Court.

[2] Throughout this Brief, the following references shall be used consistent with the Opinions of the lower courts.

Appellant Mutual Benefit Insurance Company: "Insurer"

Appellees Christos Politsopoulos and Dionysios Mihalopoulos: "Owners"

Leola Restaurant Corp.: "Employer"

Appellee Marina Denovitz: "Denovitz"

Pennsylvania Mfr. Assoc. Ins. Co. v. Aetna Casualty and Surety Ins. Co., 233 A.2d 548 (Pa. 1967): "*PMA*"

SUMMARY OF ARGUMENT

The material distinctions between the facts and the policy in the case at hand and that in *Pennsylvania Mfr. Assoc. Ins. Co. v. Aetna Casualty and Surety Ins. Co.*, 233 A.2d 548 (Pa. 1967) (*PMA*)[3] compel a finding that *PMA* does not control here. The Superior Court correctly ruled that the Mutual Benefit Umbrella Policy language in the case at hand is sufficiently clear to establish that the Employers' Liability Exclusion endorsement does not act to bar coverage to Christos Politsopoulos and Dionysios Mihalopoulos (Owners) due to the wording of the definition of insured, the Employers' Liability Exclusion, and the Separation of Insureds clauses, all of which are materially distinct from parallel clauses in the *PMA* policy. The specific language of the Separation of Insureds Provision in the case at hand dictates that in construing the policy, the Employer was not to be considered in determining whether the policy provides coverage for the Owners, but rather to treat each insured as though no other insured exists.

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3 Throughout this Brief, the following references shall be used consistent with the Opinions of the lower courts.

Appellant Mutual Benefit Insurance Company: "Insurer"

Appellees Christos Politsopoulos and Dionysios Mihalopoulos: "Owners"

Leola Restaurant Corp.: "Employer"

Appellee Marina Denovitz: "Denovitz"

Pennsylvania Mfr. Assoc. Ins. Co. v. Aetna Casualty and Surety Ins. Co., 233 A.2d 548 (Pa. 1967): "*PMA*"

This unambiguous policy language must be given the clear meaning of the terms used, and in light of the detailed language of the separation of insureds clause, the Employer's Liability Exclusion does not act to exclude coverage.

Another relevant distinction is that Owners in the case at hand are insureds under the umbrella policy by reason of their agreement with Employer, as distinguished from *PMA* which addressed insureds under an omnibus clause, who generally have no role in the design or negotiation of the insurance contract, or no contract with the insured.

Distinguishing *PMA* does not contravene the Workers' Compensation Act exclusivity of remedy doctrine or necessitate the named insured "to pay for duplicating coverage benefitting an unknown third person" where Owners do not enjoy the benefit of Workers' Compensation immunity and have ample reason to insure themselves against such liability.

ARGUMENT

PMA Does Not Control Because Of The Divergence In Policy Language And The Facts

The Divergence in Policy Language is Material

This case requires close comparison of the *PMA* policy language and that in the Mutual Benefit policy, specifically Paragraph 14, Separation of Insureds, RR1-140, Section III, Who is an Insured, RR1-00135, and the Employers' Liability Exclusion, RR1-00158. Because of the divergence between the wording in the policies, and differing facts including the distinction between coverage under an omnibus provision in automobile liability insurance policy, and coverage as additional insureds by reason of a contract with the named insured, *Pennsylvania Mfr. Assoc. Ins. Co. v. Aetna Casualty & Surety Ins. Co.*, 233 A.2d 548 (Pa. 1967) ("*PMA*") does not control, the Employer's Liability Exclusion does not apply to Owners, and Owners are entitled to coverage.

The employee exclusion clause of the *PMA* policy provides "the policy does not apply: ' * * * to bodily injury * * * of any employee of the Insured * * *.'" *Id.* at 550. The Mutual Benefit Employers' Liability Exclusion is as follows:

EMPLOYERS' LIABILITY EXCLUSION

This insurance does not apply to "bodily injury" (other than liability assumed by the insured under an "insured contract") to:

1. An "employee" of the insured arising out of and in the course of:

   a. Employment by the insured; or
   b. Performing duties related to the conduct of the insured's business;

2. A co-"employee" of the insured arising out of and in the course of such employment when the insured is an "executive officer" of such employer; or

3. The spouse, child, parent, brother or sister of that "employee" as a consequence of 1. or 2. above.

RR1-00158

The *PMA* Court looked to the policy definition of insured:

"III. Definition of Insured (a): With respect to the insurance for bodily injury liability, * * * the unqualified word 'insured' includes the named insured."

PMA at 550.

The parallel provision in the Mutual Benefit policy reads:

SECTION III – WHO IS AN INSURED

1. If **you** are designated in the Declarations as:

* * *

c. An organization other than a partnership or joint

venture, **you** are an **insured**. **Your** executive officers and directors are **insureds**, but only with respect to their duties as **your** officers or directors. Your stockholders are also **insureds**, but only with respect to their liability as stockholders.

2. Except with respect to:

   i. any **auto**; or

   ii. **mobile equipment** registered in **your** name under any motor vehicle registration law;

   each of the following is also an **insured**:

   * * *

   f. Any person or organization for whom **you** have agreed in writing prior to any **occurrence** or **offense** to provide insurance such as is afforded by this policy, but only with respect to operations performed by **you** or on **your** behalf, or facilities owned or used by **you**.

RR1-00135-6 (emphasis in original)

The final relevant provisions are the Severability of Interests clause in the *PMA* policy, "in which the term 'the insured' is used severally and not collectively." *PMA* at 550. Compare with the Separation of Insureds provision in the case at hand.

14. Separation of Insureds

    Except with respect to the Limit of Insurance, and any rights or duties specifically assigned to the first **named insured**, this insurance applies:

a. As if each **named insured** were the only **named insured**; and

b. Separately to each **insured** against whom **claim** is made or **suit** is brought.

RR1-00140 (emphasis in original)

The Mutual Benefit Separation of Insureds clause is worded more particularly than the *PMA* severability clause. As it is titled, the clause separates the insureds with the result that only the insured who is an employer is excluded from coverage, not any insured under the policy. The interests and coverage of Owners are severable from those of Leola Restaurant Corp. – Employer, not in derogation of this Court's holding in *PMA* but because the Mutual Benefit Separation of Insureds clause materially differs from the severability clause in *PMA.* Because of the plain unambiguous language of the "Separation of Insureds" clause, when determining coverage as to any one insured, the policy must be applied as though there were only one insured, that is, the one as to which coverage is to be determined. Accordingly, in evaluating whether Owners are insured under the Mutual Benefit Umbrella Policy, the policy language must be read to provide coverage as though the Owners were the only Insured, and the Employer (Leola Restaurant) does not exist. This means that the Employer or the Employer's relationship to Denovitz, shall not be

considered in construing the effect of the Employers' Liability Exclusion and the policy as a whole. For this reason, *PMA* is distinguishable and does not control.

The facts and policy language specific to the case at hand require an individualized analysis. Advocates of an "expansive" interpretation of Employers Liability Exclusions and broad general reliance on *PMA* fail to appreciate the significance of policy language changes that have been made in the years since *PMA* was decided.

> Notwithstanding *PMA*'s limited holding and unique policy language, various insurers contend that *PMA* speaks to all forms of employer's liability exclusions (regardless of the actual language found in the exclusion itself or the broader policy) and necessarily bars coverage for lawsuits brought by employees of any insured. To the contrary, *PMA* neither excuses nor forecloses the obligation to perform the robust policy language analysis Pennsylvania law requires. Nor does it purport to construe a single, uniform employer's liability exclusion for all purposes, for all insurance policies and for all time, without regard to a policy's actual language.

George Stewart and Mark Sampson, Interpretation of Employer's Liability Exclusions, The Legal Intelligencer, August 26, 2014, http://www.thelegalintelligencer.com/id-1202667788351.

The same policy and factual distinctions were considered by the Court in *Ramara, Inc. v. Westfield Ins. Co.*, 298 F.R.D. 219 (E.D. Pa. 2014). There the policy in question contained Employers' Liability Exclusion and Separation of Insureds clauses identical to the Mutual

Benefit policy in the instant case. The Court concluded that where the separation of insureds clause contains language providing for an analytical framework whereby the Court is to consider each insured as if it were the only insured, *PMA* does not control. *Id.* at 228. The *Ramara* Court also found the *PMA* severability provisions distinguishable because the *PMA* additional insured was provided coverage under an omnibus clause in a motor vehicle policy as opposed to coverage by virtue of a contract as in the case at hand. *Id.*

> We agree with the reasoning in *Politopoulos* [sic] that *PMA* – which dealt with a severability provision where the additional insured was covered by an omnibus clause in a car insurance policy – does not control where, as here, the additional insured is covered by virtue of a contract requiring coverage and where the separation of insureds clause contains language providing for an analytical framework whereby we are to consider leach insured as if it is the only insured. *Id.* at 228-229.

The *Ramara* Court found that there was no Pennsylvania Supreme Court case directly on point and relied upon *Mutual Benefit Ins. Co. v. Politopoulos*, 75 A.3d 528 (Pa. Super. Ct. 2013)[4] as a persuasive predictor of Pennsylvania law. Accordingly, the insurer's motion to dismiss was denied. See also *Ironshore Specialty Ins. Co. v. Haines & Kibblehouse,*

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[4] Christos Politsopoulos' name was misspelled on the tort claim and Mutual Benefit continued the mistake resulting in Mr. Politsopoulos' name being misspelled in the caption of the case and in the Superior Court.

Inc., 2014 WL 981394, n. 25 (E.D. Pa. 2014) (citing *Mut. Benefit Ins. Co.*, 75 A.3d at 531-32, 534 n. 4, in which the efforts of courts to harmonize and reconcile *PMA* and *Luko v. Lloyd's London*, 573 A.2d 1139 (Pa. Super. Ct. 1990)) undercut arguments that Third Circuit Courts have found *PMA* to be controlling in all employer exclusion cases.

The Distinction in Facts informs the Analysis of the Policy Language

Owners submit that the facts in the case at hand are not "virtually identical to those in *PMA*" as argued by Appellant, Mutual Benefit. The *PMA* policy was a standard automobile insurance contract with an omnibus provision. Omnibus provisions are most commonly used in automobile insurance policies, and generally extend coverage to anyone who uses the insured vehicle with the permission of the named insured. The permissive user being extended insurance is not a named insured in the common sense meaning of the term, but rather, is qualified as an insured by virtue of the omnibus clause.

On the other hand, Owners are the landlords of the named insured, Leola Restaurant, and contracted with Leola Restaurant to provide such insurance. Property owners qualifying as additional insureds by virtue of a Lease Agreement have a different status from those qualifying as an

"additional insured" under the omnibus clause of an automobile insurance policy.

As stated by the Superior Court below, and in *Ramara*, the omnibus coverage versus coverage by reason of contractual obligations is another difference warranting distinguishing *PMA*.

The Clear and Unambiguous Policy Language Must Be Given the Plain and Ordinary Meaning of the Terms Used

More important than the finding in *PMA* regarding the effect of the particular policy language is the Court's pronouncement that "[W]here the language of the policy is clear and unambiguous it cannot be construed to mean otherwise than what it says. It must be given the plain and ordinary meaning of the terms used." *PMA* at 551 (citing *Topkis v. Rosenzweig*, 5 A.2d 100 (Pa. 1939) and *Travelers Cas. & Sur. Co. v. Castegnaro*, 772 A.2d 456, 459 Pa. (2001)), the Superior Court in the case at hand stated as much, that as long as the language in an insurance policy is clear and unambiguous, it must be construed consistently with its plain and ordinary meaning, *Mut. Benefit Ins. Co. v. Politopoulos*, 75 A.3d 528 at 531. The language in the Mutual Benefit Policy differs from that in *PMA*. Accordingly, the *PMA* finding that the policy language, "'the unqualified word "insured" includes the named insured,' is clear and unambiguous, cannot be extended to the Mutual Benefit Policy." *Id.*

Furthermore, the intention of the parties is different here from the *PMA* parties. The Court in *PMA* stated that if it were to go outside the four corners of the instrument, the named insured would not intend coverage to benefit an unknown third person. In the case at hand, the intention of the parties is expressly stated in the Lease, and it is that the Owners would be provided liability insurance by the Employer.

The Finding of Coverage Does Not Undermine the Workers Compensation Act's Exclusiveness of Remedy Provisions

Distinguishing *PMA* does not contravene the Workers' Compensation Act exclusivity of remedy doctrine or necessitate the named insured "to pay for duplicating coverage benefitting an unknown third person." *PMA* at 551, where Owners do not enjoy the benefit of Workers' Compensation immunity and have ample reason to insure themselves against such liability. The Superior Court' finding that Owners, who are not employers, have coverage, does nothing to change the fact that an employee's sole remedy against the employer for a workplace injury is under the Act and that the Act does not preclude liability of third parties for workplace injuries. The Employers Liability Exclusion continues to exclude claims brought against an insured brought by its own employees.

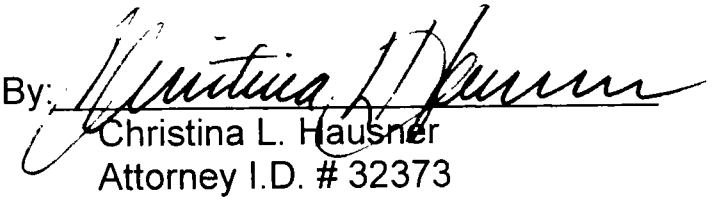
Because the Employers' Liability Exclusion excludes coverage to an employee of the insured, because Denovitz was never employed by

Property Owners, and because the plain language of the Mutual Benefit policy precludes consideration of Employers' relationship to Denovitz, the Employers' Liability Exclusion does not apply to Owners and coverage under the Umbrella Policy is not excluded.

CONCLUSION

For the above stated reasons, Appellees Politsopoulos and Mihalopoulos respectfully request that the appeal of Mutual Benefit Insurance Company be denied, and the September 6, 2013 Order and Opinion of the Superior Court be affirmed, reversing and remanding the case.

RUSSELL, KRAFFT & GRUBER, LLP

By: 

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CERTIFICATION PURSUANT TO PA. R.A.P. 2135

I hereby certify that the Brief attached hereto complies with the word count limit set forth in Rule 2135 and that this Brief does not exceed 14,000 words.

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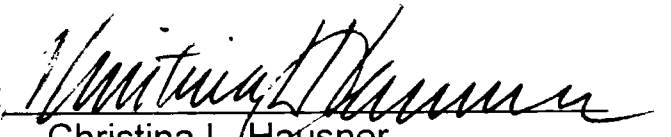
By: 

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the Brief of Appellees Christos Politsopoulos and Dionysios Mihalopoulos upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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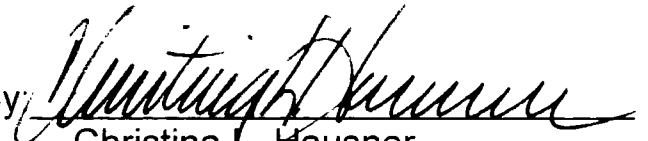
By: 

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