

A Tale of Two Cases – The Mystery of Inconsistent Opinions

One would not think that business interruption insurance would give rise to totally opposing decisions from the same court panel, but mysterious and strange things do happen in the law. Such was the situation in *Ungarean vs. CNA & Valley Forge Ins. Co.*, 2022 Pa. Super. LEXIS 467, 2022 WL 17334365 (November 30, 2022) (Panella, P.J.), as opposed to *MacMiles, LLC vs. Erie Ins. Exch.*, 2022 Pa. Super. LEXIS 469, 2022 WL 17332910 (November 30, 2022) (Stabile, J.).

President Judge Panella, in *Ungarean*, addressed the issue in the context of a dental practice. It would not be beyond the ordinary bounds of humor to say that understanding the distinction between these two cases was like pulling teeth. With apologies for the bad pun, in this instance, the description is an apt one.

The dental practice of Timothy Ungarean, DMD, was conducted through Smile Savers Dentistry, PC, (hereinafter “Ungarean”). The business suffered significant losses when it was interrupted by the Covid 19 pandemic. Ungarean sought coverage for its losses under the business interruption provisions of the business insurance policy that Ungarean had bought from CNA and Valley Forge Insurance Company (“CNA”) (“CNA Policy”).

After CNA denied his claim, Ungarean filed a complaint seeking a declaration under the Declaratory Judgment Act, 42 Pa. C.S. §§7531-7541, that the CNA Policy covered his loss. Ungarean followed that complaint with a motion for summary judgment, which the Allegheny County Court of Common Pleas granted.

On appeal, the Superior Court declared Ungarean was entitled to business interruption coverage because Covid 19 and the related governmental orders had caused Ungarean to suffer a direct physical loss of his dental practice, which was within the ambit of coverage provided by the CNA Policy. Moreover, the court found that the exclusions CNA tried to invoke to deny coverage were not applicable to Ungarean’s claim.

The Court stated:

We are in full agreement with the court’s conclusions [the lower court]. We are also in full agreement with the court’s reasoning in support of those conclusions. Therefore, based primarily on the trial court’s thoughtful opinion, we affirm the court’s order granting summary judgment and declaring that coverage is owed to Ungarean for his Covid-related business losses ***under the specific terms of the CNA Policy.***

Ungarean, supra, 2022 Pa. Super. LEXIS 467, at *2 (Emphasis added).

The Court concluded:

We affirm the trial court's order granting Ungarean's motion for summary judgment and its declaration that Ungarean's direct physical loss to his dental practice is covered by the CNA Policy.

Id. at *30-32.

The Superior Court acknowledged that its conclusion ran against the tide of cases finding that an insured was not owed Covid-related business interruption coverage under the applicable policy provisions. CNA had taken great pains to point this out. However, the Court defended itself by saying that its review must be confined to the CNA Policy purchased by Ungarean to determine whether the coverage has been triggered. The Court based its finding that coverage had indeed been invoked based upon the plain language of the CNA Policy. A significant factor was the absence of a definition of "loss" in the policy, which led the trial court to resort to dictionary definitions, an analysis disagreed with by the dissent in the Superior Court. The Court also relied upon the "guiding principle" that ambiguities in insurance policies such as the one identified in the CNA Policy must be construed in the favor of the insured. The Order of the lower court was thus affirmed with the following judges joining in the Opinion: Lazarus, Kunselman, Nichols, and McLaughlin. A dissenting opinion was filed by Judge Stabile in which President Judge Emeritus Bender and Judges Bowes and King joined.

The second case in this tale of two cases, as noted above, was *MacMiles, LLC*. Interestingly, Judge Stabile authored the *MacMiles* opinion.

Appellant, Erie Insurance Exchange ("Erie"), appealed from the May 25, 2021, order, also from the Court of Common Pleas of Allegheny County, granting summary judgment in favor of Appellee, MacMiles, LLC, d/b/a Grant Street Tavern ("MacMiles") and denying Erie's motion for judgment on the pleadings.

MacMiles owns and operates the Grant Street Tavern in Pittsburgh, Pennsylvania. Like many similarly situated parties, MacMiles suffered a significant disruption of its business activity during the Covid-19 pandemic. As with many similarly situated parties, MacMiles believed its economic losses due to the loss of business premises were covered under its commercial property insurance. Erie, like many other insurers who issued policies with substantially similar terms, denied the claim because MacMiles' commercial property did not suffer any physical damage.

The very same issue, according to the Court, has made its way through the nation's federal and state courts. However, it was an issue of first impression in Pennsylvania, apparently not counting *Ungarean*, or Pennsylvania Superior Court decision in that case. In *MacMiles*, the majority held as follows:

Upon review, we reach the same result as the near-universal majority of courts to have addressed this issue: the policy does not cover mere loss of use of commercial property unaccompanied by physical alteration or other condition immanent in the property that renders the property itself unusable or uninhabitable. We therefore reverse the trial court's grant of

summary judgment in favor of MacMiles and direct that judgment on the pleadings be granted in favor of Erie.

MacMiles, supra, 2022 Pa. Super. LEXIS 469, at *2.

Ungarean and *MacMiles* come to absolutely opposite conclusions. In both cases, the business owners have business interruption insurance. The Court in *Ungarean* found that the owner was entitled to business interruption coverage because Covid-19 and the related governmental orders caused Ungarean to suffer a direct physical loss to his dental practice, which was within the ambit of coverage provided by the CNA Policy. In *MacMiles*, the court found just the opposite. MacMiles' commercial premises did not suffer any physical damage. According to the opinion in *MacMiles*, the Erie policy did not cover mere loss of use of commercial property unaccompanied by physical alteration or other condition imminent in the property that renders the property itself unusable or uninhabitable. *MacMiles* was before the same judges as *Ungarean*. In his concurring opinion in *MacMiles*, Judge Panella acknowledged the contrary result in *Ungarean*, "...highlight[ing] that our review of MacMiles's claims is restricted to the 'specific terms employed' in Erie's policy." *MacMiles, supra*, 2022 Pa. Super. LEXIS 469, at *22

Take away bullet points are:

- In *Ungarean v. CNA*, the Superior Court, *en banc*, ruled November 30, 2022, that dentist who had losses during COVID-19 was entitled to business interruption insurance.
- The same court, *en banc*, in *MacMiles*, on the same day, came to the opposite conclusion because MacMiles' commercial property did not suffer any physical damage.
- *MacMiles* determined that upon review, the policy does not cover mere loss of commercial property unaccompanied by physical alteration or other condition immanent in the property which renders the property itself unusable or uninhabitable.
- The specific language used in the policy was critical to the analysis and the ultimate outcome in each case.

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