[*1]

Nationwide Mut. Fire Ins. Co. v Oster
2018 NY Slip Op 51018(U) [60 Misc 3d 1208(A)]
Decided on June 29, 2018
Supreme Court, Putnam County
Grossman, J.
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Decided on June 29, 2018

Supreme Court, Putnam County

Nationwide Mutual Fire Insurance Company, Plaintiff,

against

Lisette M. Oster, CAROL DANIELE, As Executrix of the Estate of DOUGLAS P. DANIELE, Deceased, and CAROL DANIELE, Individually, GABRIELLE M. OSTER, ANDREW J. ABBENE and STATE FARM MUTUAL INSURANCE COMPANY, Defendants.

304/2016

Law Office of Galleonardo & Hartford
950 New Loudon Road, Suite 200
Latham, New York 12110
and
Seiger Gfeller Laurie LLP
Attorneys for Plaintiff Nationwide Mut. Fire Ins. Company
977 Farmington Avenue, Suite 200
West Hartford, Connecticut 08540
Rivkin Radler LLP

Attorneys for Defendant State Farm Mut. Ins. Company
926 RXR Plaza
Uniondale, New York 11556-0927
Collins Fitzpatrick & Schoene, LLP
Attorneys for Defendant Lisette Oster
34 South Broadway, Suite 407
White Plains, New York 10601
Mead, Hecht, Conklin & Gallagher, LLP
Attorneys for Defendant Gabrielle Oster
925 Westchester Avenue, Suite 302
White Plains, New York 10604
Gaines, Novick, Ponzini, Cossu & Venditti, LLP
Attorneys for Defendant Carole Daniele
1133 Westchester Avenue, Suite N-202
White Plains, New York 10604
Andrew Abbene
Defendant, Pro Se

Victor G. Grossman, J.

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INTRODUCTION

In this declaratory judgment action, the Court considers six (6) motions, all arising after a jury verdict in the related wrongful death action.[FN2] The motions address the existence, or absence, and extent of, insurance coverage on the particular facts here. The parties dispute which carrier, or carriers, bears the obligation of contributing to a damage award totaling nearly three million dollars. Counsel agreed to a Joint Record, submitted by Plaintiff's counsel, to facilitate the Court's efforts. Some individual parties supplemented the Joint Record with their own exhibits. The facts, issues, and relief requested comprise a legal Gordian knot.

FACTS

On August 31, 2011, Lisette Oster ("Lisette"), her daughter, Gabrielle Oster ("Gabrielle"), and Andrew J. Abbene ("Abbene") (an Oster family friend), drove to Cycle City on Route 17 in Sloatsburg, New York in two separate cars. Lisette and Abbene rode together in Abbene's 1995 BMW. Gabrielle followed them, driving her family's Honda. Abbene remained at Cycle City while Lisette drove his BMW back to Putnam County. As Lisette and Gabrielle were leaving Cycle City, Abbene instructed them that to return home from Cycle City, they should proceed north on Route 17,

make a U-turn onto Harriman Avenue, and travel back in the opposite direction to get onto the New York State Thruway. Lisette drove Abbene's BMW insured by Defendant State Farm Mutual Insurance Company ("State Farm"). Gabrielle followed in the Honda owned by Lisette and insured by Allstate Insurance Company ("Allstate").

Lisette turned left onto Harriman Avenue and then made a U-turn in a driveway to go back to Route 17 and the New York State Thruway. After making the U-turn, Lisette stopped her vehicle at an angle on or near the shoulder where Harriman Avenue meets Route 17 to wait for her daughter to make the same turn "because we had to go back the opposite direction to get home." The engine was running, but the car was not moving. Lisette could not recall whether the gear was in "park," whether her foot was on the brake, or both.

Lisette saw Gabrielle driving and waved to her through the open driver's side window "to let her see that that's where we were turning around, to make sure...that she saw where we were turning around." Gabrielle saw Lisette and turned left to go onto Harriman Avenue so she could follow her. As Gabrielle changed lanes to make the left turn, Douglas P. Daniele, who was traveling behind Gabrielle on his motorcycle, struck her vehicle, and was fatally injured.

On August 4, 2010, Plaintiff Nationwide Mutual Fire Insurance Company ("Nationwide") issued a Homeowner's Policy to William and Lisette Oster for the policy period September 22, 2010 to September 22, 2011.

On or about December 28, 2011, the Estate of Douglas P. Daniele commenced a lawsuit in Supreme Court, Putnam County (Index No. 3481/2011), entitled "Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, Deceased, and Carol Daniele, Individually, Plaintiffs, against Gabrielle M. Oster, Lisette M. Oster and Andrew J. Abbene, Defendants," seeking damages for the personal injuries and wrongful death of Douglas P. Daniele (hereinafter referred to as "the Wrongful Death Action").

The Wrongful Death Action included a claim that Lisette Oster "while in the course of operating the aforesaid BMW vehicle owned by Defendant Andrew J. Abbene, did signal, motion and/or wave to the Defendant, Gabrielle M. Oster, who was operating the aforesaid Honda vehicle owned by Defendant Lisette M. Oster, to make an illegal u-turn at the stated location." The Wrongful Death Action *also* alleged that Lisette Oster "was negligent, reckless and careless by giving a signal, motion and/or wave to the Defendant Gabrielle M. Oster" without reference to the operation of a motor vehicle. The Wrongful Death Action further alleged that Gabrielle Oster was negligent in the

operation of the motor vehicle she was driving.

On or about December 9, 2011, before the Wrongful Death Action was commenced, Nationwide received notice of that action. By letter dated December 16, 2011, Nationwide issued a disclaimer of coverage to Lisette and Gabrielle for the claims contained in the Wrongful Death Action and provided a copy of the disclaimer to Mrs. Daniele's attorney. In the disclaimer, Nationwide asserted the Homeowner's policy excluded coverage for claims arising out of the use or operation of a motor vehicle by an insured, and asserted the accident occurred from the use of a motor vehicle. State Farm (Abbene's insurer) also denied coverage, asserting the "accident was not the result of the ownership, maintenance or use" of Abbene's BMW from which Lisette waved to Gabrielle.

Allstate provided a defense to Lisette and Gabrielle in the Wrongful Death Action under the Honda's automobile policy. At the time of the accident, Gabrielle drove the Honda owned by Lisette.[FN3]

The issue of liability in the Wrongful Death Action was tried before a jury in December 2015. At the conclusion of the Wrongful Death Trial, the Court charged the jury regarding Lisette's liability, as follows:

> "In appropriate circumstances, a driver may incur a duty to another by waving that it is safe to turn. This duty extends not only to the waved-to driver, but also to all those reasonably within the ambit of potential injury including any party involved in a collision with the waved-to driver.
>
> In the present case, you must first decide whether Lisette Oster waved to Gabrielle Oster to merely indicate where Lisette Oster was located or to signal to Gabrielle to turn.
>
> If you find that Lisette Oster waved to Gabrielle Oster to solely indicate where Lisette Oster was located, then you must find that Lisette Oster was not negligent.
>
> However, if you find that Lisette Oster waved to Gabrielle Oster to turn, then you must determine whether that wave was negligent under the circumstances.
>
> If you find that Lisette Oster's wave was negligent, you must then decide whether that wave was a proximate cause or substantial factor in causing the accident.
>
> If you find that Lisette Oster's wave was not negligent, then you will not decide the question of proximate cause.

> Such a wave can only constitute a proximate cause of the accident where the waved-to driver relied on the wave as an implicit assurance that it was safe to turn.
>
> If you find that Gabrielle Oster relied upon Lisette Oster's wave as an implicit assurance that it was safe to turn, then you may find that Lisette Oster's wave was a substantial factor in causing the accident, but if you find that Gabrielle Oster did not rely upon Lisette Oster's wave as an implicit assurance that it was safe to turn, then you may find that Lisette Oster's wave was not a substantial factor in causing the accident."[FN4]

The jury concluded that Lisette was negligent in the manner in which she waved to Gabrielle, and that Lisette's negligence was a substantial factor in causing the accident. Similarly, the jury concluded that Gabrielle was negligent and her negligence was a substantial factor in causing the accident. The jury also concluded Mr. Daniele was negligent and his negligence was a substantial factor in causing the accident. The jury apportioned the percentage of fault, as follows:

Gabrielle M. Oster	73%
Lisette Oster	20%
Douglas P. Daniele	7%
	100%

Following the May 2016 trial on the issue of damages, the jury awarded the Estate $2,148,000.00 in damages, and with interest, costs, and disbursements, the total damages were $2,976,402.34. Judgment was entered on July 1, 2017.

THE INSTANT ACTION

On March 2, 2016, before the commencement of the damages portion of the Wrongful Death Action, Nationwide commenced the instant action seeking a judgment:

> "(1) declaring that the Nationwide policy does not provide coverage for the incident of August 31, 2011, and the claims set forth in the [Wrongful Death Action] and that Nationwide is not required to defend or indemnify Lisette M. Oster with respect to the incident of August 31, 2011, and the claims set forth in the [Wrongful Death Action] or any claims for contribution or indemnity therein and (2) declaring that the State Farm policy provides coverage for the incident of August 31, 2011, and the claims set forth in

[*2]the [Wrongful Death Action] and that State Farm is required to defend and indemnify defendant Lisette M. Oster with respect to the incident of August 31, 2011, and the claims set forth in the [Wrongful Death Action] and any claims for contribution or indemnity therein together with such other and further relief as to the court may seem just and proper."

Lisette answered and cross-claimed [FN5] against Nationwide, alleging it "has wrongfully refused to fulfill its obligation to defend and indemnify" her in the Wrongful Death Action. Lisette further cross-claimed against State Farm, alleging it too "has wrongfully refused to fulfill its obligation to defend and indemnify" her in the Wrongful Death Action. As to each cross-claim, Lisette sought a declaratory judgment, directing the carrier to defend her in the Wrongful Death Action and to indemnify her against any judgment within the policy limits.

Mrs. Daniele interposed an Answer, containing affirmative defenses, two counterclaims and two cross-claims. She sought a declaration that Nationwide was obligated to defend and to indemnify Lisette within her policy limits. She also asserted a counterclaim, alleging Nationwide acted in bad faith "by wrongfully refusing to defend and indemnify Defendant Lisette M. Oster." In a cross-claim, she asserted State Farm was obligated to defend its insured, Abbene, and the driver of his car, Lisette, and to indemnify them against any judgment within its policy limits. The second cross-claim alleged State Farm's bad faith by wrongfully refusing to defend and indemnify Lisette.

Nationwide replied and denied all counterclaims. State Farm denied the cross claims alleged by Mrs. Daniele and Lisette. Abbene has defaulted in all proceedings. His liability in the Wrongful Death Action was that of a vehicle owner vicariously liable for the negligence of the vehicle operator, Lisette, under VTL §388.

PENDING MOTIONS

The following motions are before the Court:

(A) Plaintiff Nationwide moves for an Order, pursuant to CPLR §§3001, 3212:

(1) Granting summary judgment (1) declaring that the Nationwide policy does not provide coverage for the incident of August 31, 2011, and the claims set forth in the Wrongful Death Action

and that Nationwide is not required to defend or indemnify Lisette M. Oster with respect to the incident of August 31, 2011, and the claims set forth in the Wrongful Death Action or any claims for contribution or indemnity therein (2) declaring that the State Farm policy provides coverage for the incident of August 31, 2011, and the claims set forth in the Wrongful Death Action and that State Farm is required to defend and indemnify defendant Lisette M. Oster with respect to the incident of August 31, 2011, and the claims set forth in the Wrongful Death Action and any claims for contribution or indemnity therein and (3) dismissing Defendant Lisette Oster's counterclaim (improperly designated as a "cross-claim") and Defendant Estate's counterclaim with such other and further relief as to the Court may seem just and proper.

(B) State Farm Mutual Insurance Company moves for an Order, pursuant to CPLR §3212:

(1) Granting the motion of Defendant State Farm Mutual Automobile Insurance Company i/s/h/a State Farm Mutual Insurance Company ("State Farm") for summary judgment dismissing the action against State Farm, including any cross-claims, and declaring that State Farm has no obligation to defend Lisette Oster for the underlying lawsuit and no obligation to pay any portion of the judgment in the underlying lawsuit to Mrs. Daniele or indemnify Lisette Oster for the judgment in the underlying lawsuit; and (2) for such other and further relief as may seem proper to the Court.

(C) Carol Daniele, as Executrix, moves for an Order, pursuant to CPLR §3001 and CPLR §3212:

(1) Granting judgment on the counterclaims and declaring that Plaintiff Nationwide is obligated to indemnify Defendant Lisette M. Oster against the judgment entered in the underlying Wrongful Death Action captioned "Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, deceased, and Carol Daniele, Individually v. Gabrielle Oster, Lisette M. Oster and Andrew J. Abbene" (Supreme Court, Putnam Co.) (Index No. 3482/2011) within the limits of its policy ($1,000,000.00), exclusive of interest and costs; (2) that Defendants Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, Deceased, and Carol Daniele, Individually, recover of Plaintiff Nationwide and Defendant State Farm, reasonable attorneys' fees, as well as costs and disbursements incurred in the prosecution of the instant action; and (3) granting summary judgment dismissing the Complaint herein, together with such other and further relief as may seem just and proper, including but not limited to interest, costs and disbursements.

(D) Carol Daniele, as Executrix, moves for an Order, pursuant to CPLR §3001 and CPLR §3212:

(1) Granting judgment on the Daniele cross-claims and declaring that defendant State Farm is obligated to indemnify defendants Andrew J. Abbene and Lisette M. Oster in the

underlying wrongful death action captioned "Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, deceased, and Carol Daniele, Individually v. Gabrielle Oster, Lisette M. Oster and Andrew J. Abbene" (Supreme Court, Putnam Co.) (Index No. 3482/2011) and indemnify them against the judgment entered against them therein, within the limits of its policy ($100,000.00/$300,000.00), exclusive of interest and costs; (2) that Defendants Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, Deceased, and Carol Daniele, Individually, recover of defendant State Farm, reasonable attorneys' fees, interest, costs and disbursements incurred in the prosecution of the instant action, and (3) granting summary judgment dismissing the State Farm cross-claims herein, together with such other and further relief as may seem just and proper, including but not limited to interest, costs and disbursements.

(E) Defendant Lisette Oster, moves for an Order:

(1) declaring that the Nationwide policy provides Lisette Oster coverage for the incident of August 31, 2011 and the claims set forth in the wrongful death suit and that Nationwide is required to defend and indemnify Lisette Oster with respect to that incident; (2) declaring that the State Farm policy provides Lisette Oster coverage for the [*3]incident of August 31, 2011 and the claims set forth in the wrongful death suit and that Nationwide is required to defend and indemnify Lisette Oster with respect to that incident; (3) granting Lisette Oster's cross and counterclaims, together with such other, additional and different relief which this court may deem just and proper.

(F) Plaintiff Nationwide moves for an Order pursuant to CPLR §3215 granting default judgment in favor of Plaintiff against Defendant Andrew Abbene together with such other and further relief as the Court deems just and proper.

THE NATIONWIDE AND STATE FARM MOTIONS

Nationwide's motion pursuant to CPLR §3215 for a default judgment in favor of Nationwide and against Defendant Andrew Abbene is unopposed and granted.

The essence of Nationwide's motion for summary judgment is that the liability claims against Lisette and Gabrielle arise out of the "use and operation" of the 1995 BMW by Lisette, and the Honda by Gabrielle, and are, therefore, excluded from coverage under the Homeowner's Policy. Nationwide also asserts the "use" of the Honda by Lisette is a claim that is not covered under the Nationwide Homeowner's Policy. Nationwide relies on the following policy provision:

"Coverage E - Personal Liability and Coverage F - Medical Payments to Others do not apply to bodily injury or property damage:

> g) arising out of the ownership, maintenance or *use of*; entrustment or the negligent supervision by an insured of; or statutorily imposed liability on an insured related to the use of:
>
> (2) a motor vehicle . . . owned by or *operated* by, or . . . loaned to an insured."

(Policy Liability Exclusion 1[g][2]) at p. H1)(emphasis added).

Nationwide contends that Lisette's use of the BMW and her wave to Gabrielle constitutes "use" of a motor vehicle and is therefore excluded under their Homeowner's Policy. Nationwide also contends that Gabrielle's driving and left turn constitutes use of the motor vehicle and is therefore not covered. Regardless, if either activity is insured under the Homeowner's policy, they are covered.

The Homeowner's policy, like any insurance policy, is a contract. Policies of insurance or indemnity are construed in favor of the insured and against the carrier. However, the policy must be considered in light of existing law. *State Farm Mut. Auto Ins. Co. v. Westlake*, 35 NY2d 587 (1974). The Court must interpret the contract. Doing so requires an examination of the "plain meaning of its terms", with some caveats. That "plain meaning" "may not be disregarded to find an ambiguity where none exists." *Atlantic Balloon & Novelty Corp. v. American Motorists Inc. Co.*, 62 AD3d 920, 922 (2nd Dept. 2009). The phrase "'arising out of'" is unambiguous and is interpreted broadly to mean "'originating from, incident to, or having connection with.'" *Scottsdale Indemn. Co. v. Beckerman*, 120 AD3d 1215 (2nd Dept.), *lv. denied* 24 NY3d 912 (2014) (citations omitted); *see also Maroney v. New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 (2005). At the same time, an exclusion from coverage "must be specific and clear in order to be enforced." *Essex Ins. Co. v. Pingley*, 41 AD3d 774, 776 (2nd Dept. 2007). In addition, such exclusions are narrowly drawn and interpreted in favor of insureds. *Seabord Sur. Co. v. Gillette Co.*, 64 NY2d 304, 311 (1984). These rules apply with equal force to the State Farm policy, [*4]which uses the term "involves", rather than "arising out of," although it may be argued that "involves" should be interpreted more broadly consistent with a liberal construction.**[FN6]**

The State Farm motion seeks a declaration that it has no obligation to defend Lisette in the underlying lawsuit or to pay any portion of the Judgment to Mrs. Daniele, or to indemnify Lisette, and, as a consequence, it seeks dismissal of the action, including any cross-claims. State Farm urges three points in support of its motion. One, Gabrielle's and Mr. Daniele's accident did not result from

the ownership, maintenance, or use of the Abbene vehicle in which Lisette was seated. Two, the Abbene vehicle's role, in which Lisette was seated, was not the proximate cause of the injuries. Three, the "bad faith" cause of action filed by Mrs. Daniele is without merit because she has no standing to assert a bad faith claim, and the bad faith claim is duplicative of the claim that State Farm wrongly disclaimed coverage.

State Farm relies on the following provision:

Insured means:

1. *you* and *resident relatives* for:

a. the ownership, maintenance, or use of:

(1) your car...

3. any other *person* for his or her use of:

a. *your car*...

4. Any other *person* or organization vicariously liable for the use of a vehicle by an*insured* as defined in 1., 2., or 3. above, but only for such vicarious liability. Thisprovision applies only if the vehicle is neither *owned by*, nor hired by, that other person or organization...

Insuring Agreement

1. *We* will pay:

a. damages an *insured* becomes legally liable to pay because of:

(1) *bodily injury* to others; and

(2) damage to property caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;"

By letter dated March 2, 2012, after the commencement of the Wrongful Death Action, State Farm advised both Abbene, the policyholder, and Lisette (Joint Record, Exh. O):

"....the policy issued to you by State Farm Insurance does not provide insurance coverage for Mr. Abbene, the owner of the vehicle, or to the permissive driver of the vehicle at the time of the accident, Lisette M. Oster.

The State Farm policy of insurance provides coverage for owners of vehicles and

permissive users of those vehicles, but only for liability caused by accident resulting from the ownership, maintenance or use of the vehicle.

State Farm denies coverage for this accident due to the fact that this accident was not the result of the ownership, maintenance or use of your insured car, as those terms have been interpreted by New York law."

Clearly, both State Farm and Nationwide dispute the "use and operation" of the Abbene BMW in which Lisette was seated when she waved to Gabrielle, but for different reasons. If the actions of Lisette constitute solely "use and operation," then Nationwide's motion should be granted, and they should not be liable under the Homeowner's Policy. If it is determined that Lisette's actions constitute "use and operation," State Farm's motion fails and it is obligated to satisfy the Judgment to the extent of the policy limits. However, if Lisette's actions do not constitute "use and operation," then Nationwide may be compelled to pay the Judgment to the extent of its policy limits while State Farm escapes liability. Both Lisette and Mrs. Daniele claim Lisette's actions do not constitute "use and operation." Abbene has defaulted through the proceedings. Gabrielle cannot seriously dispute the "use and operation" of the Honda automobile she was driving, but her "use and operation" is separate from the claims against Lisette.

Both carriers have asserted their policies do not cover the claims involving Lisette. If their positions are accurate, there is no coverage for her role in the loss. *See United Servs. Auto Assn. v. Aetna Cas. & Sur. Co.*, 75 AD2d 1022 (4th Dept. 1980). The jury found Lisette negligent by waving as she did, and her negligence contributed to the injuries and death of Mr. Daniele. The absence of coverage advanced by both carriers would effectively allow a motor vehicle to utilize the roads of the State of New York without protecting others. Such a result is contrary to statute and public policy, and the Court declines such interpretation. VTL §310, *et. seq*., 11 NYCRR §60-1.1. Alternatively, one, if not both, of the carriers will be responsible.

Still, the actions present a close question of unusual facts that requires a review of existing cases to understand and apply the reasoning and judicial experience to the facts of this case.

USE AND OPERATION

The definition and application of "use and operation" language varies with the statutory purposes and policies served. For example, Vehicle and Traffic Law §388(1) defines "use and operation" for purposes of vicarious liability. Insurance Law §3420 addresses "use and operation" for

policy and coverage issues. Vehicle and Traffic Law §1192 defines "operation," at times, with a breadth that promotes safe driving policy, but simultaneously strains the imagination (*see People v. Alaimo*, 34 NY2d 453 [1974]; *People v. Prescott*, 95 NY2d 655 [200l]), but it too has limits. *See People v. O'Connor*, 159 Misc 2d 1072, 1074 (Dist.Ct. [Nassau] 1994); *People v. Moore*, 186 Misc 2d 614 (Dist.Ct. [Suffolk] 2000); *People v. DeSantis*, Vol. 203, No. 97, NYLJ, p. 32, col. 4 (App.Term [9th & 10th J.D.] May 21, 1990). The phrase has anything but a uniform meaning. Various decisions define "use" broadly as "encompasses more than simply driving it, and includes all necessary incidental activities such as entering and leaving its confines." *Matter of Allstate Ins. Co. v. Reyes*, 109 AD3d 468, 469 (2nd Dept. 2013), citing *Rowell v. Utica Mut. Ins. Co.*, 77 NY2d 636, 638 (1991). Moreover, an accident arising from the "use," "must have arisen out of the inherent nature of the automobile and, as such, *inter alia*, the automobile must not merely contribute to the condition which produces the injury, but must, itself, produce the injury." *Matter of Allstate Ins. Co. v. Reyes*, *supra*, at 469. Here, the vehicle was parked, and Lisette waved to her daughter through its open window, similar to the parked car and open window through which the dog in *Reyes* reached out to bite the pedestrian. Historically, "use" was added to denote more than driving to cover those circumstances that were not technically "operation." *Argentina v. Emery World Wide Delivery [*5]Corp*. 188 F.3d 86 (2d Cir. 1999); *Gering v. Merchants Mut. Ins. Co.*, 75 AD2d 321 (2nd Dept. 1980); *Eckert v. G.B. Farrington Co.*, 262 A.D. 9 (4th Dept. 1941), *aff'd* 287 NY 714 (1942).

On the other hand "operation" denotes putting the vehicle into motion, with physical control of the vehicle. A driver is one who "operates or drives or is in actual physical control of a vehicle." VTL §113. A motor vehicle may be in "operation" without motion. *See Bouchard v. Canadian Pac.*, 267 AD2d 899 (3rd Dept. 1999); *Eckert v. G.B. Farrington Co.*, *supra*. So too, it would appear that "operation" includes the cessation of motion, such as by applying a foot brake, or shifting a gear to "park." *People v. O'Connor*, 159 M.2d 1072 (Dist.Ct. [Nassau] 1994); *Matter of Prudhomme v. Hults*, 27 AD2d 234 (3rd Dept. 1967).

The "use" and "operation" both incorporate the intended purpose of the automobile to serve as a means of transportation from one location to another. By doing so, the terms may overlap in their application, and, as a result, they can produce conflicting interpretations. Nevertheless, the imposition of liability on a financially responsible defendant is an expression of policy that affects the definitions. *Continental Auto Lease Corp. v. Campbell*, 19 NY2d 350, 352 (1967).

The "plain language" and meaning of "use" and "operation" encompasses a broad range of activity. The tendency "to know it when one sees it" (to paraphrase Justice Stewart in another

context) yields a long line of decisions that reflect varied forms of human behavior, but provide little guidance where there are close questions of fact. "Not every injury occurring in or near a motor vehicle is covered by the phrase 'use or operation.' The accident must be connected with the use of an automobile *qua* automobile (*Reisinger v. Allstate Ins. Co.*, 58 AD2d 1028 [4th Dept.], *aff'd*. 44 NY2d 881 [1978]." *United Servs. Auto Assn. v. Aetna Cas. & Sur. Co.*, 75 AD2d*, supra* at 510.

In 1979, the Second Department expressly adopted a three-part test to determine an insurer's liability under standard automobile policies:

> "1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the accidental use, loading, or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury;"

Matter of Manhattan & Bronx Surface Transit Operating Authority (Gholson), 71 AD2d 1004, 1005 (2nd Dept. 1979) (internal quotations and citations omitted).

The test was originally set forth in *Goetz v. General Acc. Fire & Life Assur. Corp*., 47 Misc 2d 67, 69 (App. Term, 2nd Dept. 1965), *aff'd*. *without opn*., 26 AD2d 635 (2nd Dept. 1966), *aff'd*. *without opn*., 19 NY2d 762 (1967), and *Gholson* extended it to the issue of no fault benefits. This formulation applies to the collision of Gabrielle's Honda and Mr. Daniele's motorcycle, but it is inapplicable to Abbene's BMW. The BMW was not performing a transportation function at the time of the accident. The accident did not take place within the BMW's natural territorial limits. Finally, the BMW did not "produce the injury." *Levitt v. Peluso*, 168 Misc 2d 239 (Sup.Ct. [Nassau] 1995). This conclusion is troubling from a policy perspective, as it potentially leaves a personal injury victim without protection, in the absence of homeowner's coverage. *See*, *e.g.*, *Farmers Fire Ins. Co. v. Kingsbury*, 118 Misc 2d 735 (Sup.Ct. [*6][Delaware] 1983), *aff'd*. 105 AD2d 519 (3d Dept. 1984).

The *Gholson* standard appears slightly modified in *Eagle Ins. Co. v. Butts*, 269 AD2d 558, 558-59 (2nd Dept. 2000), *lv. to appeal denied* 95 NY2d 768 (2000), by the elimination of the territorial limits of the automobile criterion:

> "Generally, the determination of whether an accident has resulted from the use or operation of a covered vehicle requires consideration of whether, *inter alia*, the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produced the injury" (*see U.S. Oil Ref. & Mktg. Corp. v. Aetna Cas. & Sur. Co.*, 181 AD2d 768, 581

N.Y.S.2d 822) or, in other words, whether the use of the vehicle was a proximate cause of the injury (*see Wausau Underwriters Ins. Co. v. St. Barnabas Hosp*., 145 AD2d 314, 534 N.Y.S.2d 982; *Lumberman's Mut. Cas. Co. v. Logan*, 88 AD2d 971, 451 N.Y.S.2d 804).

Butts is illustrative of the simplicity, and difficulty, of applying the standard. There, a horse was being unloaded from a van. While on the ramp, the horse jumped, throwing the plaintiff to the ground and causing injury. The complaint alleged the negligence of the owner in the training of the horse, *not* in the unloading of the horse. The disclaimer of coverage in *Eagle Ins. Co. v. Butts*, based on the ground that the claim did not arise from the "ownership, maintenance or use" of a motor vehicle was affirmed. The court recognized the act of "loading or unloading" is a "use" and looked to whether the use of the vehicle was a proximate cause of the injury. Concluding the accident was not "the result of some act or omission related to the use of the vehicle (*cf. Argentina v. Emery World Wide Delivery Corp*., 93 NY2d 554 [1999])," the court upheld the disclaimer. As evidenced by the reference to *Argentina v. Emery World Wide Delivery Corp*., the term "use or operation" has multiple meanings, not only in factual interpretation, but also in statutory interpretation.

Applying *Butts*, the "use" of a motor vehicle was found not to exist where a dog reached through an open window and bit a passer-by when the automobile was parked in a "no parking" zone in front of a store (*Matter of Allstate v. Reyes*, *supra*; *Allstate Ins. Co. v. Staib*, 118 AD3d 625 [1st Dept. 2014]); where a hand truck was moving down a truck ramp (*Staker Sheet Metal II Corp. v. Harleysville Ins. Co. of New York*, 2018 WL 654445 [EDNY January 31, 2018]); and where trucks had been stationary for two to three hours and rendered immobile by wheel chocks (*Great American E & S Ins. Co. v. Hartford Fire Ins. Co.*, 2012 WL 3186086 [SDNY August 3, 2012], as amended August 9, 2012). But, "use" was found to exist in the loading of equipment onto a truck. *See Paul M. Maintenance Inc. v. Transcontinental Ins. Co.*, 300 AD2d 209 (1st Dept. 2002).

On the other hand, there was no "use" of a vehicle where a crate fell apart while unloading, resulting in injury. *See ABC, Inc. v. Countrywide Ins. Co.*, 308 AD3d 309 (1st Dept. 2003). Nor was there "use or operation" when a tenant fell from a truck while assisting his four-year-old son. *See Empire Ins. Co. v. Schliessman*, 306 AD2d 512 (2nd Dept. 2003). When a passenger threw a cup from an automobile and struck a pedestrian, the action did not involve the use or operation of the vehicle. "Where the operation or driving function of the automobile or the condition of the automobile itself is not the proximate cause of the injury," the injuries do not "arise from the use or operation of a motor vehicle." *Ciminello v. Sullivan*, 2008 NY Slip. Op. 30911(U) (Sup.Ct. [Suffolk]

2008), *aff'd* 65 AD3d 1002 (2nd Dept. 2009).

The above-cited examples illustrate the conclusion that "use or operation" must be connected to "the use of an automobile *qua* automobile." *Olin v. Moore*, 178 AD2d 517 (2nd Dept. 1991), quoting *United Services Auto Assn. v. Aetna Cas. & Sur. Co.*, 75 AD2d 1022 (4th Dept. 1980). In *United Services Auto Assn. v. Aetna Cas. & Sur. Co.*, the Fourth Department further defined the "use of an automobile *qua* automobile" in the negative by what it did *not* include: "[w]here the operation or driving function of an automobile or the condition of the vehicle itself is not the proximate cause of the injury, the occurrence does not arise out of its use or operation." 75 AD2d, *supra* at 1022. Under that criteria, there is no "use or operation" of the Abbene BMW by Lisette. *Progressive Cas. Ins. Co. v. Yodice*, 180 Misc 2d 863 (Sup.Ct. [Richmond] 1999), *aff'd*. 276 AD2d 540 (2nd Dept. 2000).

However, the Third Department held a disabled vehicle was in "use or operation" where it could not be restarted, and it was pushed to the shoulder where it was struck by two snowmobiles while the driver was returning to the vehicle after making towing arrangements. *Trentini v. Metropolitan Prop. & Cas. Ins. Co.*, 2 AD3d 957 (3rd Dept. 2003). The Third Department focused on the nature of "an unplanned stop due to the temporary disability of his car in a place where the vehicle would not normally be parked," the use of hazard lights, and the seeking of assistance, as constituting an "on-going activity relating to the vehicle," leading to the conclusion the vehicle was "in use." As a result, the plaintiff was entitled to no-fault benefits. *Trentini v. Metropolitan Prop. & Cas. Ins. Co.*, *supra* at 958. The "use" of a vehicle encompasses "more than just driving a car" (*Gering v. Merchants Mut. Ins. Co.*, 75 AD2d 321, 323 [2nd Dept. 1980]), and can include a temporary interruption "directly connected to the continued 'use' of the vehicle." *Id*. at 323.

Further, by way of analogy to those cases where the driver of the vehicle undertakes to stop his vehicle to allow a police car to proceed, or to direct a pedestrian safely across the road in front of his vehicle, it is not claimed that there is an issue of "use" or "operation," but rather the issue, if it arises, is one of whether the driver negligently carried out the duty. *See*, *e.g.*, *Ohlhausen v. City of New York*, 73 AD3d 89 (1st Dept. 2010) and cases cited therein.

There is a line of cases involving motorists, including bus drivers, who motion, or signal to other drivers or pedestrians that they may proceed. Often, those motions, or signals, may be confusing, yielding to unanticipated behavior and injuries. In *Riley v. Board of Educ. of Cent. School Dist. No. 1*, 15 AD2d 303 (3rd Dept. 1962), a school teacher was found negligent where she drove a youngster to his home, and after the child exited the car, she gave a signal, which she said was to warn the child of an oncoming automobile, but which the child might have misunderstood to mean it

was safe to cross the road, and the child upon crossing the road, was struck and killed. In another Third Department decision, summary judgment was denied when a driver's hand motions may have induced a child to cross when it was not safe to do so. *See Thrane v. Haney*, 264 AD2d 926 (3rd Dept. 1999). There, the issue of the driver's gesture in directing the child may result in liability if he failed to exercise reasonable care and his conduct was a proximate cause of the child's injuries. The Third Department again addressed these issues in *Barber v. Merchant*, 180 AD2d 984 (3rd Dept. 1992), where a driver and passenger gestured to the defendant, before the defendant began her turn, and in the process of making a turn, the defendant collided with a station wagon. As recently as 2013, the Third Department restated the proposition that when a gesturing driver signals that it is safe to proceed, he assumes a duty to [*7]pedestrians, other motorists and passengers, as well as to the person who is being signaled, to do so reasonably under the circumstances. *See Dolce v. Cucolo*, 106 AD3d 1431 (3rd Dept. 2013).

The meaning of the gesture is crucial to the issue of negligence. In *Valdez v. Bernard*, 123 AD2d 351 (2nd Dept. 1986), the Second Department reversed a jury verdict and held that the wave of a bus driver's hand was not the proximate cause of an accident where the pedestrian interpreted the "wave" to mean only that the driver would not move the bus while she walked in front of it. *See also Shapiro v. Mangio*, 259 AD2d 692 (2nd Dept. 1999). In 2011, the Second Department reversed an award of summary judgment and reinstated the complaint against a bus driver based on issues of fact as to whether pedestrians relied upon bus driver's wave in crossing the street. *See Kievman v. Philip*, 84 AD3d 1031 (2nd Dept. 2011). Ultimately, the significance attributable to the hand signal is a question for the trier of fact. *See Golding v. Farmer*, 273 AD2d 834 (4th Dept. 2000).

Here, there was testimony that the wave was intended by Lisette to assert "Here I am," *not* that Gabrielle could make the turn safely. Lisette also acknowledged that her waving to Gabrielle "to make a U-Turn" was "a poor choice of words." Gabrielle told the police she saw her mother's wave. She was inconclusive as to whether her mother told her to make a U-Turn at the barrier. She did understand the wave to mean it was safe to cross. She thought the wave was saying "Here I am." At one point, she said she did not remember; but at another point, she said her mother told her to make a U-Turn at the barrier. The jury had the opportunity to hear this testimony, evaluate it, and reach its verdict. It was for the jury to say what effect, if any, Lisette's wave had on Gabrielle's actions. Its verdict compels the conclusion that Lisette waved to Gabrielle to turn, that such wave was negligent under the circumstances, and the wave was a substantial factor in causing the accident. But it cannot be said that the "wave" was essential to the use of the Abbene vehicle.

The "use" or "operation" of a vehicle is not limited to a vehicle in motion. A vehicle is in "use" or being "operated" when stopped in traffic, or not in motion when waiting for a traffic light or the direction of a police officer, or even when it is undergoing repairs while the occupants are traveling. *See Gering v. Merchants Mut. Ins. Co.*, *supra*. Here, Lisette was sitting in the driver's seat of the Abbene BMW at an intersection, with the vehicle in "park" or her foot on the brake, or both, when she waved to her daughter. She had driven from her home to Cycle City, and she was returning home when she stopped moving at Harriman Avenue and Route 17, to make sure her daughter followed her on their journey home. While stopped, her hazard lights were off and the engine was running. Defendant's reliance on *Zaccari v. Progressive Northwestern Ins. Co.*, 35 AD3d 597 (2nd Dept. 2006), overlooks the absence of any connection between Zaccari's use of his automobile and the automobile involved in the accident that led to Zaccari's assistance and injury. The Zaccari vehicle was not "closely related to the injury."[FN7] *Zaccari*, *supra*, at 599, quoted in *Allstate Ins. Co. v. Reyes*, *supra*, at 469. The facts here do not [*8]lend themselves to a strict application of the three-part test [FN8] set forth in *Gholson*, and re-stated in *U.S. Oil Ref. & Mktg. Corp. v. Aetna Cas. & Sur. Co.*, 181 AD2d 768, 768-69 (2nd Dept. 1992), citing 6B Appelman, *Insurance Law and Practice*, §4317 at 367-69. The connection, if any, between events was significantly more remote in *U.S. Oil* than here, notwithstanding the fact that Lisette's automobile did not produce the injury.

Still, Lisette's "actions" and her wave set the events in motion, even if they did not "produce the injury," unlike the remote and unrelated connections alleged in *Zaccari*. Gabrielle claims she did not rely on the "wave" from her mother while operating her vehicle. That testimony presents issues of fact, and also raises issues of proximate cause. *Ohlhausen v. City of New York*, 73 AD3d, *supra*, at 95-96, *Shapiro v. Mangio*, 259 AD2d 692, *supra*. "Proximate cause is generally a factual issue to be resolved by a jury" (*Dolce v. Cucolo*, *supra* at 1432), and there can be more than one proximate cause. *See Burghardt v. Cmaylo*, 40 AD3d 568 (2nd Dept. 2007). Here, the jury's determination is entitled to great weight. Lisette's "wave" was an act independent of the "use and operation" of the Abbene BMW. The fact that it was made from the driver's seat, with the engine running and other indicia of "use and operation" is fortuitous, but it is neither convincing or controlling. "Not every injury occurring in or near a motor vehicle is covered by the phrase 'use or operation.'" *Olin v. Moore*, 178 AD2d 517 (2nd Dept. 1991); *see Horney v. Tisyl Taxi Corp.*, 93 AD2d 291 (1st Dept. 1983). There is no nexus between the wave and the actual operation of the automobile. Lisette's wave could just as easily have been made while standing outside the BMW or 50 feet away from it, without affecting "use and operation." The accident was not "connected with the use of an automobile *qua* automobile." *Reisinger v. Allstate Ins. Co.*, 58 AD2d 1028, *supra*. While it may be

said that the travel plans for Lisette and Gabrielle contemplated continued travel, or use of the BMW (and the Honda) - so as to be a part of a more broad use and operation (*see e.g. Gering v. Merchant's Mut. Ins.*, *supra*), Lisette's wave, which the jury found to be negligent, was not a part of, or reasonably contemplated, within "use and operation," let alone negligent use and operation. *See generally Progressive Ins. Co. v. Yodice*, 276 AD2d 540 (2nd Dept. 2000) (a running engine did not lead to the "use" of the vehicle).

The complaint proffered two alternative theories of liability — ordinary negligence, or negligently operating a motor vehicle. The jury charge focused on Lisette's wave, not her driving, notwithstanding the reference to a "driver" incurring "a duty to another by waving that it is safe to turn." At the moment of the "wave," Lisette was neither driving nor was the BMW in a traffic lane. In 1975, the Fourth Department held a vehicle parked and locked on the street in front of the owner's residence was not being "used" in connection with no-fault benefits. *McConnell v. Fireman's Fund Am. Ins. Co.*, 49 AD2d 676 (4th Dept. 1975). In so holding, the court stated that "while authority broadly interprets the phrase 'use or operation' the determinative predicate in establishing liability therefrom would appear to be the designed purpose *of the use or [*9]activity* of the involved motor vehicle which is the proximate cause of the injury or damage sustained." *Id*. at 677 (emphasis added). While *McConnell* is factually distinct from the instant case, the "use or activity" here is not connected to the motor vehicle.

Riley v. Board of Educ. Of Cent. Sch. Dist. No. 1, 15 AD2d 303, *supra*, does not hold that a "wave" by a motorist constitutes "use and operation" of a motor vehicle. The Third Department has distinguished the alleged negligent act from the use of a motor vehicle. In *Thrane v. Haney*, 264 AD2d 926, *supra*, the court stated, "It being inferable from the child's testimony that defendant voluntarily assumed the duty to direct the child [across the street], defendant may be held liable if he failed to exercise reasonable care and his conduct was a proximate cause of the child's injuries." *Id*. at 927.

In *Williams v. Weatherstone*, 23 NY3d 384 (2014), the Court of Appeals recognized the limitation that must be applied to *Riley* and similar cases: "All of these cases entail some intentional hand motion or gesture directed by the motorist at the pedestrian. Having thereby assumed a duty to guide the pedestrian safely, the motorist must exercise reasonable care in doing so." *Id*. at 402. That duty is "actually a separate duty, one that arises only upon the making of the gesture" and is separate from the duty to operate a vehicle with reasonable care. *Ohlhausen v. City of New York*, 73 AD3d 89, 92-93 (1st Dept. 2010). That duty neither explicitly nor implicitly involves the "use or operation" of a

motor vehicle. Such "use or operation" must still be shown, and negligence in the use or operation must be shown as well. *Argentina v. Emery World Wide Delivery Corp*., 93 NY2d 554, 562 (1999); *Progressive Cas. Ins. Co. v. Yodice*, 276 AD2d, *supra* at 542. Here, it is not disputed that the Abbene vehicle was the location of the "wave" and was incidental to the accident, but no negligence in the operation of the vehicle has been shown. *Empire Ins. Co. v. Schliessman*, *supra*; *United States Auto Assn. v. Aetna*, *supra*.

Accordingly, the Court concludes that Lisette was not "using" the Abbene vehicle when she waved to her daughter. The vicarious liability of VTL §388 does not apply. Instead, the wave, found by the jury as a negligent act, gives rise to coverage under the Nationwide Homeowner's policy, and the exclusion for the use of an automobile does not apply here. In addition, since the "accident was not the result of the ownership maintenance or use" of the Abbene vehicle, but was merely the location for which Lisette waved to her daughter, the denial of coverage by State Farm was not improper. In light of these determinations, the Court need not address the sufficiency of the disclaimers asserted by Nationwide and State Farm. *Matter of Worcester Ins. Co. v. Bettenhauser*, 95 NY2d 185, 188-89 (2000).[FN9]

OBLIGATION TO DEFEND AND INDEMNIFY

Lisette cross-claimed against Nationwide and State Farm, alleging they each failed to fulfill their obligation to defend and indemnify her within policy limits. Mrs. Daniele moved for similar relief, alleging more specifically that Nationwide and State Farm each engaged in bad faith by wrongfully refusing to defend and to indemnify Lisette, and that such actions were a [*10]gross disregard of their responsibilities and obligations under their insurance policies. Mrs. Daniele also asserted she is a third-party beneficiary. Nationwide, *inter alia*, denied the Oster counterclaim and affirmatively asserted it had no obligation to defend or to indemnify. Nationwide also claimed that Mrs. Daniele lacked standing to assert "bad faith." State Farm asserted, *inter alia*, it had no obligation to defend or to indemnify.

Prior to the commencement of the Wrong Death Action, Mrs. Daniele's counsel, David Lever, notified Lisette by certified mail, return receipt requested, of claims against her, arising from the events on August 31, 2011, resulting in Mr. Daniele's death. On Monday, December 12, 2011, Mr. Lever received a telephone call from a Nationwide representative, Cheryl Knight, who had been informed about the pending commencement of the lawsuit. In response to Ms. Knight's inquiry as to

why the claim involved a homeowner's policy and not an automobile policy, Mr. Lever advised her of the claim against Lisette for her negligent waving, or motion, to Gabrielle. Ms. Knight confirmed the conversation by letter dated December 13, 2011. On December 16, 2011, by letter to Lisette, Nationwide denied coverage for the incident, stating (incorrectly), "the accident arose while you were using and occupying your motor vehicle" - a fact true of Gabrielle, but not Lisette. Nationwide also refused to defend Lisette.

On November 3, 2011, Mrs. Daniele's counsel notified State Farm of the accident and the claims against Abbene and Lisette for causing the accident and death of Mr. Daniele. By letter dated February 9, 2012, State Farm denied coverage, asserting that it was "questionable" whether the accident arose out of the ownership, maintenance, or use of the motor vehicle.

In the interim, on December 28, 2011, the Wrongful Death Action was commenced. The complaint alleged two alternative theories of Lisette's negligence. One theory involved the negligent operation of the Abbene BMW; the second theory involved Lisette's negligent wave to Gabrielle. The alternative theories simultaneously supported, and defeated, the conclusions reached by Nationwide and State Farm. The "use" of a motor vehicle, as discussed herein, involves the exclusion relied on by Nationwide and defeats State Farm's position, while Lisette's wave, as a negligent act, involves the Nationwide homeowner's policy and eliminates the State Farm automobile policy. The close factual question further clouds the issue.

The strongest indicia of Nationwide's "bad faith" can be found in the haste by which they reached their decision to deny coverage. Between Monday, December 12, 2011 and Friday, December 16, 2011, it appears that Nationwide investigated and determined that coverage should be denied. It is unknown, at this stage, when Nationwide received the November 8, 2011 letter from Mr. Lever, but Ms. Knight's inquiry suggests either an unfamiliarity with the claim, or the need for factual clarity. How that was established, beyond a telephone conversation with Mr. Lever, is unknown. Indeed, Mr. Lever's Affirmation recites that Ms. Knight advised "she had just received the claim."

Nationwide and State Farm remained on notice with respect to the progress of the litigation, the pre-trial conference, and the liability and damages trials. Nevertheless, they persisted in their positions and did not participate in the proceedings. They were also advised that Plaintiffs would seek to hold them responsible for any excess verdict over the coverage provided by Allstate covering Gabrielle and Lisette. There was neither a tender of the policies nor entry into negotiations on behalf of the respective insured. However, once liability had been determined against Lisette, the exposure

was evident.

Nationwide opted to stay on the sidelines of the Wrongful Death Action. They did so with the knowledge that Insurance Law §3420 grants the victorious plaintiff, here Carol Daniele, as Executrix, and Individually, the right to sue Nationwide to satisfy the Judgment against Lisette. While Nationwide might assert the disclaimer, as it has done here, under Insurance Law §3420, it surrendered the right to challenge the liability or damages contained in the Judgment. *Lang v. Hanover Ins. Co.*, 3 NY3d 350, 356 (2004); *see also Martin v. Safeco Ins. Co. of Am.*, 19 AD3d 221 (1st Dept. 2005).[FN10] The ultimate issue for Nationwide, *i.e*, whether the negligence arose from Lisette's "use and operation" of the Abbene BMW, or whether her wave constituted a "personal negligent act" within the meaning of the homeowner's policy, would be decided at trial, but that does not defeat Nationwide's obligation to defend the action.

Our Courts have long recognized an insurer's duty to defend is:

> "exceedingly broad" (*Colon v. Aetna Life & Cas. Ins. Co.*, 66 NY2d 6, 8). An insurer must defend whenever the four corners of the complaint suggest — or the insurer has actual knowledge of facts establishing — a reasonable possibility of coverage *(Fitzpatrick v. American Honda Motor Co.*, 78 NY2d 61, 66-67; *Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d 304, 311-312). The duty is broader than the insurer's obligation to indemnify: " [t]hough policy coverage is often denominated as 'liability insurance', where the insurer has made promises to defend 'it is clear that [the coverage] is, in fact, 'litigation insurance' as well'" *Seaboard Sur*., 64 NY2d at 310, *supra*.).

Continental Casualty Co. v. Rapid-American Corp., 80 NY2d 640, 648 (1993). That duty encompasses matters of policy, as well as contract interpretation, to virtually all forms of human behavior. *See Automobile Ins. Co. of Hartford v. Cook*, 7 NY3d 131 (2006)(homeowner's policy contains duty to defend in wrongful death action involving a shooting committed in self defense); *Colon v. Aetna Life & Cas. Ins. Co.*, 66 NY2d 6 (1985) (issue of whether driver was operating vehicle with owner's permission required defense where complaint alleged driver had owner's permission, and insurer disputed claim). The allegations in the complaint and the terms of the policy will invoke the duty to defend and will negate exclusions:

> "If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend (*Ruder & Finn v. Seaboard Sur. Co.*, 52 NY2d 663, 669-670). Moreover, when an exclusion clause is relied upon to deny coverage, the insurer has the burden of demonstrating that the 'allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and

further, that the allegations, in toto, are subject to no other interpretation' *(International Paper Co. v. Continental Cas. Co.*, 35 NY2d 322, 325)."

Technicon Electronics Corp. v. American Home Assur. Co., 70 NY2d 66, 73 (1989).

Applying this standard, it is evident the Complaint alleges negligent acts independent of the excluded use and operation of a motor vehicle. The Nationwide Homeowner's policy states:

"**COVERAGE E - PERSONAL LIABILITY**

We will pay damages an insured is legally obligated to pay due to an occurrence resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property. We will provide a defense at our expense by counsel of our choice. We may investigate and settle any claim or suit.

This coverage is excess over other valid and collectible insurance. It does not apply to insurance written as excess over the applicable limits of liability.

Further, "occurrence" means "bodily injury or property damage resulting from an accident..." The phrase "negligent personal acts" is not defined in the policy. Accordingly, the obligation to defend, as stated in the policy ("We *will* provide a defense...") cannot be seriously disputed.

Turning to the duty to defend, the standard has been repeatedly, and recently, stated:

"An insurer's duty to defend its insured is 'exceedingly broad' (*BP A.C. Corp. v. One Beacon Ins. Group*, 8 NY3d 708, 714, 840 N.Y.S.2d 302, 871 N.E.2d 1128 (2007), quoting *Automobile Ins. Co. of Hartford v. Cook*, 7 NY3d 131, 137, 818 N.Y.S.2d 176, 850 N.E.2d 1152 [2006]). An 'insurer will be called upon to provide a defense whenever the allegations of the complaint suggest...a reasonable possibility of coverage' (*id*., quoting *Cook,* 7 NY3d at 137, 818 N.Y.S.2d 176, 850 N.E.2d 1152 [internal quotation marks omitted]). 'If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend' (*id.*, quoting *Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73, 544 N.Y.S.2d 531, 542 N.E.2d 1048 [1989] [internal quotation marks omitted]). This standard applies equally to additional insureds and named insureds (see *id*. at 714-715, 544 N.Y.S.2d 531, 542 N.E.2d 1038, citing *Pecker Iron Works of NY v. Traveler's Ins. Co.*, 99 NY2d 391, 393, 756 N.Y.S.2d 822, 786 N.E.2d 863 [2003])."

Regal Const. Corp. v. National Union Fire Ins. Co., of Pittsburgh, PA, 15 NY3d 34, 37 (2010); *Ruder & Finn v. Seabord Sur. Co.*, 52 NY2d 663, 670 (1981). That duty extends not only to the insured, but to third persons, such as Lisette, in relation to the State Farm policy as well. *Colon v. Aetna Life & Cas. Ins. Co.*, *supra*.

Nationwide's assertion of an exclusion, or State Farm's disclaimer of coverage, does not relieve the insurer of responsibility "to provide a defense," "unless it can demonstrate the pleadings [are] solely and entirely within policy exclusions...and are subject to no other interpretation." *Automobile Ins. Co. of Hartford v. Cook*, 7 NY3d, *supra* at 137, quoting *Allstate Ins. v. Mugavero*, 79 NY2d 153, 159 (1992)(citation omitted). Here, the complaint alleges two theories of liability. One alleges the use and operation of an automobile and the second alleges a personal act of negligence. The Nationwide exclusion applies to the first theory but not the second. The State Farm exclusion applies to the second but not the first. Nationwide has not established that Lisette's wave, for purposes of a duty to defend, could be only attributable to the use of the automobile. Accordingly, Nationwide's duty to defend Lisette has been established. *Physicians Reciprocal Insurers v. Loeb*, 291 AD2d 541, 542 (2nd Dept. 2002).

The duty to defend is broader than the duty to indemnify. Nationwide does not dispute the duty to indemnify, nor could it after the jury's determination of liability (*Servidone Constr. [*11]Corp. v. Security Ins. Co. of Hartford*, 64 NY2d 419 (1985), although the arguments in Nationwide's Memorandum of Law limit the right of indemnification to Lisette, and do not extend to Mrs. Daniele.

Counsel for Nationwide asserts Nationwide was never served with the Judgment with Notice of Entry in the Wrongful Death Action. As such, it is claimed that the requirements of Insurance Law §3420(a)(2), have not been met and the Daniele motions should be denied as to Nationwide. Lever's Affirmation at Paragraph 15 contains the following assertion:

> "On February 15, 2017, on behalf of Daniele, as plaintiff in the underlying wrongful death action, my office served the Notice of Entry of Judgment After Damages Trial by Jury with accompanying Bill of Costs upon all parties. One day later, on February 16, 2017, my office served counsel for the insurer's [sic] in the declaratory judgment action with the entered judgment and by letter dated February 21, 2017, I served said entered judgment upon the insurers, Nationwide and State Farm. (A copy of the February 21, 2017 letter to Nationwide and State Farm serving the Notice of Entry of the Judgment after Damages Trial By Jury and Bill of Costs, as well as Affidavits of Service upon counsel in the wrongful death action and counsel for the insureds, annexed hereto as Exhibit AA)."

The Affidavits of Service attest to service of the Judgment with Notice of Entry upon the firm of

Galleonardo & Rayhill, attorneys for Nationwide. Such an affidavit is *prima facie* proof of proper service, and it is not rebutted by an unsubstantiated denial that lacks factual specificity and detail, such as Claims Manager Mr. Macaluso's conclusory statement, "The Judgment after Damages Trial by Jury was not served upon Nationwide." *Deutsche Bank Nat. Trust Co. v. Quinones*, 114 AD3d 719 (2nd Dept. 2014); *Liriano v. Eveready Ins. Co.*, 65 AD3d 524 (2nd Dept. 2009); *Simonds v. Grobman*, 277 AD2d 369 (2nd Dept. 2000).

The procedural posture here adds to the complexities. Nationwide commenced the action for a declaratory judgment *after* Lisette's liability had been determined, but *before* damages had been established in a bifurcated trial and before Judgment had been entered. It sought a declaration that Nationwide is not required to provide coverage for the August 31, 2011 incident, and they were not required to defend or to indemnify Lisette. Lisette asserts the contrary. Mrs. Daniele, in the declaratory judgment action, interposed a counterclaim, *inter alia*, seeking a declaration that Nationwide is obligated to defend Lisette "against any judgment" with the limits of its policy ($1,000,000.00) exclusive of costs that *may* be recovered. Mrs. Daniele also sought to recover reasonable attorneys' fees as well as costs and disbursements. After the declaratory judgment action was commenced and before the instant motion had been made, the damages in the Wrongful Death Action had been determined and Judgment was entered. These procedural developments raise issues involving CPLR§3001 and Insurance Law §3420. CPLR §3001 authorizes the Court to determine "the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." Further, CPLR §3019 authorizes a counterclaim for "any cause of action." Notably, CPLR §3001 contains a specific provision for declaratory judgment actions where the sole issue is the timeliness of a [*12]disclaimer notice under Insurance Law §3420(a)(6).[FN11] Thus, Nationwide asserts that Mrs. Daniele lacks standing to pursue the counterclaims, and, in effect, there is no justiciable controversy involving Mrs. Daniele and Nationwide. Mrs. Daniele argues that the Judgment resolves the standing issue, but if true, then it begs the question of whether there was standing when the counterclaim was interposed and *before* the Judgment was entered, *i.e.*, after the liability verdict.[FN12]

Clearly, Insurance Law §3420 requires a Judgment as a precondition to a direct action against an insurer on a Judgment, but it is otherwise silent where, as here, Mrs. Daniele is asking the Court for the same type of relief as Nationwide — a determination of the parties' rights and obligations. The Second Department addressed these issues in *Watson v. Aetna Cas. & Sur. Co.*, 246 AD2d 57 (2nd Dept. 1998). There, the plaintiff was injured at the premises of the defendant's insured and the plaintiff obtained a default judgment on the issue of liability. The plaintiff sought a judgment

declaring the defendant insurer must defend and indemnify its insured. There, as here, the defendant asserted the plaintiff lacked standing as no Judgment had been entered. The Court read Insurance Law §3420 "as prohibiting, by its plain terms, only a direct cause of action to recover money damages, and not prohibiting a declaratory judgment action by the Plaintiff in the underlying tort action seeking a declaration that a disclaiming insurance company owes a duty to defend or indemnify the tortfeasor." *Id*. at 62. The court further recognized that the dispute between the plaintiff and the defendant insurer was "a genuine dispute that is justiciable, i.e.'state[s] a real controversy, involving substantial legal interests.'" *Id*. at 64.

Here, the argument supporting Nationwide's action is that it should not be obligated to defend and to indemnify its insured, who has been found liable to Defendant. It is patently obvious that Mrs. Daniele's position is the opposite and where either side stands to benefit from a ruling, it must be said there is "a real controversy involving substantial legal interests." *Id*. at 64 (citation omitted). *See also Tepedino v. Zurich-American Ins. Group*, 220 AD2d 579 (2nd Dept. 1995). Moreover, to entertain only one side of a dispute, as Nationwide argues, by denying the opportunity to Mrs. Daniele, raises issues of *res judicata* and collateral estoppel, especially if Mrs. Daniele were bound by a ruling against Lisette, without the opportunity to be heard. Alternatively, if Mrs. Daniele had to await the entry of Judgment before commencing an action, the interests of judicial economy would be threatened, as multiple duplicative actions would [*13]surround, and prolong, issues of liability and damages.[FN13]

Watson v. Aetna Casualty, *supra*, properly distinguishes between a direct action against an insurer to recover an unsatisfied judgment (*Jimenez v. New York Cent. Mut. Fire Ins. Co.*, 71 AD3d 637 [2nd Dept. 2010]), and an action to declare issues of defense and indemnification. In *Mortillaro v. Public Serv. Mut. Ins. Co.*, 285 AD2d 586 (2nd Dept. 2001), the Second Department stated:

> "A plaintiff need not be privy to an insurance contract to commence a declaratory judgment action to determine the rights and obligations of the respective parties, so long as the Plaintiff stands to benefit from the policy."

Id. at 587. Accordingly, both Lisette Oster, and Ms. Daniele, may assert the obligation to defend and indemnify.

ATTORNEY'S FEES

Lisette Oster is entitled to recover her attorneys' fees in opposing Nationwide's declaratory judgment action and in enforcing her right to a defense and indemnification. Mrs. Daniele is not entitled to recover her attorneys' fees.[FN14] New York has followed the rule that an insured may not recover in an affirmative action to determine its rights, but may do so, where, as here, the insured has been "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations (*see Johnson v. General Mutual Ins. Co.*, 24 NY2d 42; *Glens Falls Ins. Co. v. United States Fire Ins. Co.*, 41 AD2d 869 [3rd Dept. 1973] *aff'd. on opn. below*, 34 NY2d 778 [1974])." *Mighty Midgets v. Centennial Ins. Co.*, 47 NY2d 12 (1979). This holding is in contrast with the so-called American Rule — that absent a contractual provision or statutory basis for recovery, each party is responsible for their own attorneys' fees. In *Johnson*, *supra*, the insured was permitted to recover costs of defending the action, but could not recover the costs of a cross-claim against the insurer, nor could the injured party recovery its costs. The exception is one of policy, and it is not lightly expanded. However, some courts have recognized the recovery also includes not only the costs and expenses of a defense to the insurer's actions, but also the costs and defenses of the counterclaim to assert the right to coverage. *Admiral Ins. Co. v. Weitz & Luxenberg, P.C.*, 2002 WL 31409450 (SDNY October 24, 2002); *Lancer Ins. Co. v. Saravia*, 40 Misc 3d 171, 177 (Sup.Ct. [Kings] 2013). The Second Department has made its position clear:

> "[A]n insured who is 'cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations,' and who prevails on the merits, may recover an attorney's fee incurred in defending against the insurer's action" (*Insurance Co. of Greater NY v. Clermont Armory, LLC* , 84 AD3d 1168, 1171, 923 N.Y.S.2d 661, quoting *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 NY3d 592, 598, 789 N.Y.S.2d 470, 822 N.E.2d 777 [internal quotation marks omitted]; see *Mighty Midgets v. Centennial Ins. Co.*, 47 NY2d 12, 21, 416 N.Y.S.2d 559, 389 N.E.2d 1080; *Johnson v. General Mut. Ins. Co.*, 24 NY2d 42, 298 N.Y.S.2d 937, 246 N.E.2d 713). " 'It is well settled than an insurer's responsibility to defend reaches the defense of any actions arising out of the occurrence, and defense expenses are recoverable by the insured, including those incurred in defending against an insurer seeking to avoid coverage for a particular claim.'" (*RLI Ins. Co. v. Smiedala*, 77 AD3d 1293, 1294-1295, 909 N.Y.S.2d 263, quoting *National Grange Mut. Ins. Co. v. T.C. Concrete Constr., Inc.*, 43 AD3d 1321, 1322, 843 N.Y.S.2d 877 [internal quotation marks omitted]). "Moreover, 'an insured who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured'" (*RLI Ins. Co. v. Smiedala*, 77 AD3d at 295, 909 N.Y.S.2d 263, quoting *U.S. Underwriters Ins. Co. v. City Club Hotel*, LLC, 3 NY3d at 598, 789 N.Y.S.2d 470, 822 N.E.2d 777)."

Farm Family Cas. Ins. Co., v Habitat Renewal, LLC, 91 AD3d 903, 905-06 (2nd Dept. 2012). Accordingly, Lisette Oster may recover her attorney's fees, but Ms. Daniele may not.

BAD FAITH

The Estate interposed a counterclaim alleging Nationwide engaged in "bad faith" in failing to meet its obligations under the policy. The Estate asserts Nationwide engaged in a "gross disregard" of the rights of its insured, Lisette, by such acts as disclaiming coverage, after little or no real investigation, failing to participate in the liability phase of the trial, failing to respond when placed on notice of Lisette's liability, failing to participate in the damages phase of the trial, and otherwise failing to participate in the litigation. Nationwide asserts there can be no independent action for "bad faith," and such action, if any, is one of breach of contract.[FN15] Further, it disputes that its actions were in "bad faith," but were, at most, a coverage dispute concerning the terms of the policy. Having determined there was no coverage under the Homeowner's Policy, it followed that there was no reason for Nationwide to participate in the litigation. However, once liability was determined against Lisette, the damage exposure became apparent.

In *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445 (1993), the Court of Appeals recognized a form of bad faith where an insurer grossly disregarded the insured's interest by failing to settle within policy limits when liability was clear. Somewhat less clear was whether *Pavia* created a new cause of action or simply expanded a contractual basis for relief arising from a breach of its "duty of good faith," but insofar as the duty of good faith was "derived from the [*14]insurance contract," the cause of action suggested one of contract rather than tort. *Id*. at 452. But, the performance of a contractual obligation with reasonable care may give rise to a duty of reasonable care, and "the breach of that independent duty will give rise to a tort claim." *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308, 316 (1995).

The duty imposed on insurers to act in good faith in defending and settling claims derives from their virtually complete control over the settlement and the defense of claims, and reflects, to some degree, a balancing of that control in favor of the insured's interests. That balancing, however, may be slight in light of the high barrier on the insured of establishing a "gross disregard" of the insured's interests, which usually entails a pattern of conduct. Each element of a pattern of conduct must be established to conclude the insurer culpably failed to honor a contract. *Gordon v. Nationwide Mut.*

Ins. Co., 30 NY2d 427, 437 (1972); *CBL Path Inc. v. Lexington Ins. Co.*, 73 AD3d 829, 830 (2nd Dept. 2010). One aspect of that pattern is whether the insurer's obligation to investigate and evaluate the insured's claim was sufficient. *See Pavia v. State Farm Mut. Auto. Ins. Co.*, *supra*; *Gordon v. Nationwide Mut. Ins. Co.*, *supra*. So too, is the notice, participation, or lack of participation in the determination of liability *(Knobloch v. Royal Globe Ins. Co.*, 38 NY2d 471 [1976]), and the risks to the insured of the failure to resolve the matter. *Vecchione v. Amica Mut. Ins. Co.*, 274 AD2d 576 (2nd Dept. 2000). These factual disputes standing alone, are sufficient to deny the motions for summary judgment, based on "bad faith."

However, it is not "bad faith" where, as here, there was an arguable basis for denying coverage. Nationwide conducted some investigation and took a position that a denial of coverage was warranted. Its actions flowed from that decision. To the extent that the decision denying coverage was a close question (as discussed herein), it cannot support a finding of "bad faith". *Sukup v. State of New York*, 19 NY2d 519 (1967). Thus, exclusive of the denial of coverage, any issue of bad faith herein would be based on, among other things, the sufficiency of the Nationwide investigation, and the failure to re-evaluate their position as the facts and litigation progressed.

Accordingly, it is

ORDERED that the motion seeking a default judgment against Defendant Andrew Abbene is granted; and it is further

ORDERED that the Nationwide policy provides coverage for the incident of August 31, 2011, and the claims set forth in the Wrongful Death Action and that Nationwide is required to defend and indemnify Lisette M. Oster with respect to the incident of August 31, 2011, and the claims set forth in the Wrongful Death Action or any claims for contribution or indemnity therein; and it is further

ORDERED that the State Farm policy does not provide coverage for the incident of August 31, 2011, and the claims set forth in the Wrongful Death Action and that State Farm was not required to defend or indemnify Defendant Lisette M. Oster with respect to the incident of August 31, 2011, the claims set forth in the Wrongful Death Action and any claims for contribution or indemnity therein; and it is further

ORDERED that the motion to dismiss Defendant Lisette Oster's counterclaim (improperly designated as a "cross-claim") and Defendant's Estate's counterclaim is denied; and it is further

ORDERED that the motion of Defendant State Farm Mutual Automobile Insurance Company

i/s/h/a State Farm Mutual Insurance Company ("State Farm") for summary judgment dismissing the action against State Farm, including any cross-claims, and declaring that State Farm had no obligation to defend Lisette Oster for the underlying lawsuit and no obligation to pay any portion of the judgment in the underlying lawsuit to Carole Daniele or indemnify Lisette Oster for the judgment in the underlying lawsuit is granted; and it is further

ORDERED that Carol Daniele, As Executrix, is granted judgment on the counterclaims declaring that Plaintiff Nationwide is obligated to indemnify Defendant Lisette M. Oster against the judgment entered in the underlying Wrongful Death Action captioned "Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, deceased, and Carol Daniele, Individually v. Gabrielle Oster, Lisette M. Oster and Andrew J. Abbene" (Supreme Court, Putnam Co., Index No. 3482/2011) up to the limits of its policy ($1,000,000.00), together with interest and costs, and attorneys' fees if covered under the policy or otherwise collectible at law; and it is further

ORDERED that Defendants Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, Deceased, and Carol Daniele, Individually, are not entitled to recover of Plaintiff Nationwide and Defendant State Farm, attorneys' fees, as well as costs and disbursements incurred in the prosecution of the instant action; and it is further

ORDERED that the Complaint herein is dismissed; and it is further

ORDERED that Lisette Oster's cross claims and counterclaims are granted as set forth herein.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York

June 29, 2018

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HON. VICTOR G. GROSSMAN, J.S.C.

Footnotes

Footnote 1: Following the submission of the motions, at counsel's request, the Court entertained oral

argument, and allowed post-argument submissions. The Court permitted counsel to submit responses to decisions relied upon by the attorneys for Carole Daniele, Individually and as Executrix, and provided to the Court during oral argument.

Footnote 2: In the wrongful death action, the issue of liability was tried before Hon. Lewis J. Lubell. The issue of damages was tried before Hon. Robert DiBella. The Judgment has not been appealed.

Footnote 3: Prior to the instant actions, on December 19, 2013, Carol Daniele, as Executrix of the Estate of Douglas P. Daniele, Deceased, and Carol Daniele, Individually (hereinafter referred to as the Estate"), initiated a declaratory judgment action against Nationwide, State Farm, Allstate, Gabrielle, Lisette, and Abbene, in Supreme Court, Putnam County (Index No. 2811/13). On August 8, 2014, the Court granted Nationwide's motion to dismiss the Estate's complaint on the grounds that the Estate lacked standing (Lubell, J.).

Footnote 4: No objection was made to the charge.

Footnote 5: The pleading was labeled as a cross-claim, but in fact, it was a counterclaim.

Footnote 6: None of the parties have cited any authority defining the term "involves" as it used in the State Farm policy.

Footnote 7:*Zaccari* is a weak precedent. The Decision cites a "four paragraph affidavit" that "failed to set forth exactly what caused his injury." 35 AD3d, *supra* at 600. In contrast, the detail in *Encompass Indemn. Company v. Rich*, 131 AD3d 476 (2nd Dept. 2015) established the connection not made in *Zaccari*. *Rich*, however, involved supplemental underinsured/uninsured coverage rather than a liability policy.

Footnote 8: That test states: "1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury"

Footnote 9: In any event, the Court would limit the issue of sufficiency to those exclusions stated in the disclaimer letters. *General Acc. Ins. Group v. Cirucci*, 46 NY2d 862 (1979); *Abreu v. Huang*, 300 AD2d 420 (2nd Dept. 2002).

Footnote 10: The same conclusion is reached when there is a default, in the case of Defendant Abbene, and the insurer remains bound by the Judgment.

Footnote 11: To the extent that Insurance Law §3420 should be construed narrowly as it is in derogation of the common law, the express wording of the statute requires that it be construed

"equally or more favorable to the insured and to judgment creditors."

Footnote 12: While Insurance Law §3420 establishes a Judgment establishing liability as a precondition to recovery, there is a suggestion that a finding of liability may trigger the duty to indemnify. In *Westchester Fire Ins. Co. v. Utica First Ins. Co.*, 40 AD3d 978 (2nd Dept. 2007), the Court observed, "When insurers agree to pay all sums which an insured becomes legally obligated to pay as damages," there must be "an establishment of legal liability for payment of damages" to trigger the insurers' duty to indemnify the insured." *Id*. at 980.

Footnote 13: Here, the Judgment awarding damages was entered while this action was pending. It may have been fortuitous that the instant action had not been resolved. At the very least, if Mrs. Daniele had to await the entry of Judgment, the Court would be faced with a new declaratory judgment action, possible consolidation, possible inconsistent rulings, and a continuation of the seven years of litigation already completed.

Footnote 14: There is a Fourth Department case suggesting the contrary. *RLI Ins. v. Smiedala*, 77 AD3d 1293 (4th Dept. 2010), but the Second Department appears to limit the holding to the right of the insured. *Farm Family Cas. Ins. Co. v. Habitat Rental, LLC*, 91 AD3d 903 (2nd Dept. 2012).

Footnote 15: Nationwide also asserts the Estate lacks standing, an issue previously addressed, *supra*.

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