IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

ACCIDENT FUND INSURANCE : COMPANY OF AMERICA A/S/O :

VAUGHN HRUSKA AND

RODNEY BETHEA, : C.A. No. N13C-03-264 CLS

:

Plaintiff,

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V.

:

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

ORDER DENYING LEAVE TO APPEAL FROM INTERLOCUTORY ORDER

This 22nd day of April, 2014, upon Defendant Zurich American Insurance Company's ("Defendant") application brought pursuant to Delaware Supreme Court Rule 42 for an order certifying an appeal from the interlocutory order of this Court, the Court finds that its order did not meet the criteria for determining certification and acceptance of an interlocutory appeal.

The plaintiff, Accident Fund Insurance Company ("Plaintiff"), is a workers' compensation carrier who paid certain benefits to two employees who were injured in an automobile accident during the course and scope of

their employment. Plaintiff filed this suit, claiming that it was subrogated to the rights of the injured employees and seeking reimbursement of those benefits from Defendant, the Personal Injury Protection ("PIP") carrier. Defendant moved to dismiss the complaint, arguing that, under Delaware law, a workers' compensation carrier could not recover from a PIP carrier. On October 31, 2013, the Court denied the motion and found that Plaintiff had stated a claim for reimbursement. Defendant filed a motion for reargument and, on February 26, 2013, the Court denied the motion.

Defendant then filed this application for interlocutory appeal of the February 26, 2013 order denying reargument (the "Order), asserting that the Order determined a substantial issue, established a legal right, and involved a case dispositive issue. To support its argument, Defendant asserted that, in *Wright v. Philadelphia Insurance Company*, this Court agreed that PIP is not primary and that workers' compensation carriers have no right to subrogation from PIP carriers.

"Interlocutory appeals are addressed to the discretion of the Court and are accepted only in exceptional circumstances." This Court may certify an interlocutory appeal only if the order at issue "determines a

¹ Wright v. Philadelphia Insurance Company, C.A. No. N13C-08-223 (Parkins, J.).

² DVI Fin. Serv., Inc. v. Imaging Managing Associates, Inc., 1995 WL 269073, at *1 (Del. Super., Apr. 13, 1995)(citing The Wilmington Club v. Maroney, 1989 WL 154708, at *1 (Del. Dec. 1, 1989)).

substantial issue, establishes a legal right *and* meets 1 or more of [the criteria set forth in Supreme Court Rule 42(b)(i)-(v)]."³ An order determines a "substantial issue" if it "decides a main question of law which relates to the merits of the case, and not to collateral matters."⁴ "A legal right is established when a court determines an issue essential to the positions of the parties regarding the merits of the case, *i.e.*, 'where one of the parties' rights has been enhanced or diminished as a result of the order."⁵

The Order, which denied reargument, and its underlying decision did not determine a substantial issue or establish a legal right. In the underlying decision, the Court applied the rationale and settled law in earlier cases to the facts before it.⁶ Furthermore, Defendant wrongly asserts that the Order conflicts with this Court's position in *Wright* because the Court has yet to

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³ Supr. Ct. R. 42(b) (emphasis added). The criteria listed in Rule 42(b) are as follows:

⁽i) Same as Certified Question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

⁽ii) Controverted Jurisdiction. The interlocutory order has sustained the controverted jurisdiction of the trial court; or

⁽iii) Substantial Issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or

⁽iv) *Prior Judgment Opened*. The interlocutory order has vacated or opened a judgment of the trial court; or

⁽v) Case Dispositive Issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

⁴ In re Cogent, Inc. S'holder Litig.,2010 WL 4146179, at *1(Del. Ch. Oct. 15, 2010).

⁶ See King Const., Inc. v. Plaza Four Realty, LLC, 2008 WL 4817081, at *1 (Del. Super. Oct. 14, 2008).

render a decision in that case. Defendant asserts that, during an oral

argument in Wright, this Court agreed that a workers' compensation carrier

does not enjoy a right of subrogation against a PIP carrier. In that case, an

injured employee claimed that, since her PIP carrier failed to provide

benefits after she demanded them, she had to obtain those benefits from her

workers' compensation carrier. As a result, the workers' compensation

carrier obtained reimbursement from the injured employee and the

employee, in turn, filed suit against the PIP carrier for reimbursement.⁸ At

the close of oral argument on the PIP carrier's motion to dismiss, the Court

reserved decision and requested that the workers' compensation carrier be

joined in the suit. Therefore, Defendant's assertion that this Court agreed

with its argument in Wright is incorrect.

IT IS ORDERED that the Court's February 26, 2013 Order is not

certified to the Supreme Court of the State of Delaware for disposition in

accordance with Rule 42 of that Court.

1s/Calvin L. Scott

Judge Calvin L. Scott, Jr.

⁷ Wright, Complaint, ¶¶ 6-8.

⁸ *Id.* at ¶ 8.

⁹Def. Application for Cert., Ex.I, Oral Argument Trans., 23:7-15 (Feb. 10, 2014).

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