

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

JUDI KENNEDY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N09C-06-271 MMJ
)	
ENCOMPASS INDEMNITY CO.,)	
)	
Defendant/Third-Party)	
Plaintiff,)	
)	
v.)	
)	
GOVERNMENT EMPLOYEES)	
INSURANCE CO.,)	
)	
Third-Party Defendant.)	

Submitted : October 19, 2012

Decided: October 31, 2012

ORDER GRANTING LEAVE TO APPEAL
FROM INTERLOCUTORY ORDER

(1) Defendant Encompass Indemnity Company has moved for an order certifying an interlocutory appeal to the Delaware Supreme Court. The determination of whether to certify an interlocutory appeal lies within the discretion of the Court and is analyzed under the criteria set forth in Supreme

Court Rule 42(b).¹ An interlocutory appeal will not be certified unless the Court finds that its decision: (1) determines a substantial issue; (2) establishes a legal right; and (3) satisfies one of the five criteria set forth in Rule 42(b)(i)-(v). Under Rule 42(b)(i), the Court may look to the criteria established by Rule 41.

(2) By Opinion dated September 28, 2012, this Court held:

“...[T]hat Plaintiff Kennedy may pursue an [uninsured motorist] claim against Encompass, her insurer. A New Jersey arbitrator determined that Kennedy’s injuries did not satisfy New Jersey’s “verbal threshold.” Plaintiff has exhausted her other remedies and the tortfeasor’s insurance carrier has denied coverage.

THEREFORE, Encompass’s Motion for Summary Judgment is hereby DENIED.

(3) Defendant argues that interlocutory appeal pursuant to Supreme Court Rule 42(b)(v) is justified because review may terminate the litigation.

Additionally, Defendant requests review under Supreme Court Rule 41(b)(iii), through Rule 42(i), on the following unsettled questions of law:

(1) whether a person can file an uninsured motorist claim when the tortfeasor is actually insured; (2) whether mere allegations of failure to pierce New Jersey’s Verbal Threshold Statue triggers [sic] a Delaware uninsured motorist claim; (3) If both questions outlined above are in the affirmative, then who decides if the threshold has been pierced and (4) whether an insured motorist carrier can subrogate against the tortfeasor’s insurance directly.

¹See, e.g., *Tortuga Cas. Co. v. Nat’l Fire Ins. Co. of Pittsburgh*, 1991 WL 247813, at *2 (Del.); *State v. Superior Court*, 141 A.2d 468, 471 (Del. 1968).

(4) Plaintiff Judi Kennedy and Third-Party Defendant Government Employees Insurance Company oppose certification of the interlocutory appeal. As to questions 1, 2 and 4, the Court finds that these issues do not involve unsettled questions of Delaware law.

(5) Question 3, however, involves an issue of first impression interpreting 18 *Del C.* § 3902, the uninsured motorist statute. Specifically, the September 28th Opinion addresses public policy concerns also considered by the Delaware Supreme Court in *State Farm Mutual Automobile Insurance Company v. Patterson*.²

(6) The relevant portion of this Court’s opinion is as follows:

Coverage Denied

In determining whether summary judgment is appropriate in this case, the Court’s inquiry must focus on whether, as a matter of law, Kennedy is entitled to UM coverage as provided by Section 3902(a)(3)(b). The Court’s inquiry must focus on two issues: (1) whether a New Jersey arbitrator or other authorized adjudicator determined whether Kennedy’s injuries satisfied New Jersey’s “verbal threshold” standard; and (2) whether GEICO denied coverage for Kennedy’s injuries such that Delaware’s Uninsured Motorist Statute was triggered.

The undisputed record establishes that GEICO, the tortfeasor’s insurer, denied Kennedy’s claim for personal injury. According to GEICO, the “objective evidence relative to [] Kennedy’s alleged

²⁷ A.3d 454 (Del. 20120)(Steele, C.J., and Jacobs, J., dissenting).

damages [did] not meet the statutory requirements for recovery” under New Jersey’s Verbal Tort Threshold Statute. Specifically, GEICO concluded that the soft tissue injuries sustained by Kennedy did not satisfy the standard of a “permanent injury” as set forth in the Statute.

Following GEICO’s denial, Kennedy filed suit in New Jersey, and the matter proceeded to arbitration on February 10, 2011. The arbitrator determined that although Kennedy was still receiving treatment at the time of arbitration, she did not sustain permanent injury from the accident as required by N.J. Stat. Ann. § 39-6A-8(a). Therefore, the arbitrator found that Kennedy’s injuries did not pierce New Jersey’s Verbal Threshold Statute. Shortly thereafter, the New Jersey action was dismissed without prejudice.

The Court finds that Kennedy is entitled to UM coverage under 18 *Del. C.* § 3902. Under New Jersey law, only an arbitrator or other neutral decision maker is authorized to make a determination as to whether the injured party satisfies New Jersey’s verbal threshold.³ “[W]hether the verbal threshold is met is a question to be decided by the arbitrator and not by the judge.”⁴ Allowing only arbitrators to resolve coverage issues effectuates the purpose of the New Jersey legislature in “reduc[ing] significantly the burden of the automobile personal injury litigation upon the courts.”⁵

In the case *sub judice*, a New Jersey arbitrator determined that Kennedy’s injuries did not satisfy New Jersey’s Verbal Threshold Standard. Contrary to Encompass’s argument, this determination sufficiently resolves the issue of coverage. Under New Jersey law, for purposes of the verbal threshold, the arbitrator’s ruling is the final

³ *Whitaker v. USAA*, 2007 WL 2812998, at *3 (Del. Super.) (citing *Dicks v. N.J. Auto. Full Underwriting Ass’n*, 604 A.2d 239, 242 (N.J. Super. Ct. 1992)).

⁴ *Dicks*, 604 A.2d at 242.

⁵ *Id.*

decision at the trial court level. Therefore, Kennedy has exhausted her remedies against the tortfeasors and may seek recovery from her own UM carrier.

GEICO denied Kennedy's personal injury claim on the basis that Kennedy's injuries were not permanent in nature,⁶ and thus, did not pierce New Jersey's "verbal threshold." The Court finds that GEICO's denial of coverage triggered Delaware's Uninsured Motorist Statute, rendering Hios an "uninsured motorist."⁷ Kennedy, therefore, may pursue a claim for UM benefits from her own insurer, Encompass. Whether Kennedy is legally entitled to recover such benefits will depend upon her ability to prove fault and damages.⁸

(7) As argued by Plaintiff in her Response to Defendant's Motion for Interlocutory Appeal:

This brings into focus question (3) regarding who decides if the verbal threshold has been pierced. *Patterson* only requires a denial of coverage by the New Jersey liability carrier in order to trigger a Delaware UM claim. To the extent this Court's Order requires an injured Delaware motorist to file suit in New Jersey and have the claim adjudicated by an arbitrator, as a prerequisite to a Delaware UM claim, it departs from *Patterson*.

(8) The Court finds that the September 28, 2012 Opinion decides a question of law of first instance in Delaware;⁹ involves the application of a

⁶ It is settled New Jersey law that neither an insurance company nor its claims adjusters are empowered to determine whether a plaintiff satisfies the verbal threshold. *Whitaker*, 2007 WL 2812998, at *3 (citing *Dicks*, 604 A.2d at 242). However, in order to trigger Delaware's Uninsured Motorist Statute, the insurance company must deny coverage to the injured party.

⁷ See *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454 (Del. 2010).

⁸ *Kent v. Nationwide Prop. & Cas. Ins. Co.*, 844 A.2d 1092, 1098 (Del. Super.).

⁹ Supr. Ct. R. 41(b)(i).

Delaware statute which has not been, but should be, settled;¹⁰ and determines substantial issues and establishes legal rights.¹¹ Further, interlocutory review in this case may substantially reduce further litigation and otherwise serve considerations of justice.¹²

THEREFORE, IT IS ORDERED that the Court's Opinion of September 28, 2012, is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

¹⁰Supr. Ct. R. 41(b)(iii).

¹¹Supr. Ct. R. 42(b).

¹²See Supr. Ct. R. 42(b)(iii).