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Case Number 25,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTHA E. CONVERSE and DAVID CONVERSE, wife and husband,	)	No. 25, 2014
Plaintiffs Below, Appellants,	)	Court Below---Superior Court of the State of Delaware
v.	)	in and for New Castle County
	)	C.A. No. N11C-04-028 CLS
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation,	)	
Defendant Below, Appellee.	)	

APPELLANTS' OPENING BRIEF

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Dated: March 4, 2014

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NATURE OF PROCEEDINGS

On April 5, 2011, the Plaintiffs Below, Appellants, Martha E. Converse and David Converse ("Plaintiffs"), instituted an action for underinsured motorist ("UIM") benefits against their personal insurance company, Defendant Below, Appellee State Farm Mutual Automobile Insurance Company ("State Farm"), for personal injuries sustained by Martha Converse as the result of a June 20, 2007 motor vehicle collision, and for loss of consortium by David Converse (A57–A59). The collision in question occurred in the Commonwealth of Massachusetts while Mrs. Converse was riding as a passenger in a vehicle operated by James Early ("Early") that was struck by a vehicle driven by Patrick Lampart ("Lampart") (A60-A61).

Lampart's vehicle maintained bodily injury liability limits of $25,000 through Plymouth Rock Assurance Corporation ("Plymouth Rock"). Plymouth Rock subsequently tendered its bodily injury liability policy limits to settle Martha Converse's direct claim against Lampart (A62). At the time of the collision, the Early vehicle was insured under a Massachusetts automobile insurance policy issued by Commerce Insurance Company ("Commerce"), which provided UIM coverage of $100,000 per person and $300,000 per accident (A63). Plaintiffs did not obtain Commerce's consent-to-settle the claim against the tortfeasor prior to accepting the liability policy limits from Plymouth Rock, nor did Plaintiffs provide Commerce with notice of a UIM claim. At the time of the accident, Plaintiffs' were covered by

their personal Delaware automobile insurance policy with State Farm, which provided UIM coverage of $100,000 per person and $300,000 per accident (A125).

State Farm moved for summary judgment, contending that Plaintiffs are not legally entitled to recover UIM benefits from State Farm because they failed to exhaust primary UIM coverage through Commerce in order for State Farm's UIM coverage to be triggered (A7–A32). Plaintiffs opposed State Farm's motion, contending that they are legally entitled to recover UIM benefits under their personal State Farm policy since they are precluded from seeking UIM benefits from Commerce based on the consent-to-settlement provision of its policy, thereby making the UIM benefits under the State Farm policy primary (A127–A148). State Farm replied that Plaintiffs failed to demonstrate that they were ineligible for coverage under the Commerce policy (A149-A163).

On October 29, 2013, the Superior Court issued its Order granting summary judgment, finding that the Commerce UIM coverage is primary and State Farm's UIM coverage is excess; and therefore, the Court determined that Plaintiffs are not entitled to excess UIM coverage from State Farm until they have exhausted the Commerce UIM limits (Exhibit A). The Superior Court held a status conference on November 18, 2013 to discuss whether the its Order disposed of the case since the exhaustion of the primary Commerce UIM policy and damages in excess of those limits had not been established at the time the Court decided State Farm's motion

(A174–A175). During the conference, Plaintiffs' counsel advised that in light of the Court's holding that State Farm's UIM coverage is excess over the primary Commerce UIM limits, Plaintiffs' potential damages were insufficient to allow a recovery from State Farm's excess coverage and therefore Plaintiffs would not be moving forward to establish damages and that a final order would need to be entered (A175). On December 30, 2013, the Superior Court entered the final Order, confirming that the October 29, 2013 Order granting summary judgment constitutes a final judgment on the merits (Exhibit B). On January 16, 2014, Plaintiffs timely appealed the Superior Court's Orders. The following constitutes Plaintiffs' opening brief.

SUMMARY OF ARGUMENT

I. Plaintiffs are legally entitled to recover UIM benefits under their personal insurance policy with State Farm since they are precluded from seeking UIM benefits from Commerce due to the lack of Commerce's written consent to settle with the tortfeasor as required by the consent-to-settlement provision of its policy, thereby making the UIM benefits under the State Farm policy primary.

STATEMENT OF FACTS

The Commerce policy was issued on the standardized Massachusetts Automobile Insurance Policy, Seventh Edition, which contains 12 difference coverages, of which 4 are compulsory with the remaining 8 being optional (A63–A98). The Commerce policy afforded UIM coverage in the amount of $100,000 per person and $300,000 per accident (A63). Coverage for UIM benefits is one of the optional coverages and is found in Part 12 of the policy (A86). The relevant policy language provides as follows:

> **Part 12. Bodily Injury Caused By An Underinsured Auto**
> Sometimes an owner or operator of an auto legally responsible for an accident is underinsured. Under this Part, we will pay damages for bodily injury to people injured or killed as a result of certain accidents caused by someone who does not have enough insurance.
> We will only pay if the injured person is legally entitled to recover from the owners or the operators of all underinsured autos. Such injured person has a claim under this Part when the limits for automobile bodily injury liability insurance covering the owners and operators of the legally responsible autos are:
> 1. Less than the limits shown for this Part on your Coverage Selections Page; and
> 2. Not sufficient to pay for the damages sustained by the injured person.
> We will pay damages to or for:
> 1. You, while occupying your auto, while occupying an auto you do not own, or if injured as a pedestrian.
> 2. Any household member, while occupying your auto, while occupying an auto not owned by you, or if injured as a pedestrian. If there are two or more policies which provide coverage at the same limits, we will only pay our proportionate share. We will not pay damages to or for any household member who has a Massachusetts auto policy of his or her own or who is covered by a Massachusetts auto policy of another household member providing underinsured auto insurance with higher limits.

> 3. Anyone else while occupying your auto. We will not pay damages to or for anyone else who has a Massachusetts auto policy of his or her own or who is covered by a Massachusetts auto policy of another household member providing underinsured auto coverage.
> 4. Anyone else for damages he or she is entitled to recover because of injury to a person covered under this Part.
>
> * * * *
>
> The determination as to whether an injured person is legally entitled to recover damages from the legally responsible owner or operator will be by agreement between us and the injured person. The amount of damages, if any, will be determined in the same way. Arbitration will be used if no agreement can be reached. However, in no event may a demand for arbitration constitute first notice of claim. We *must be given sufficient notice of claim* to conduct a reasonable investigation and attempt settlement before arbitration can be filed. *If an injured person settles a claim as a result of an accident covered under this Part, we will pay that person only if the claim was settled with our consent*. We will not be bound under this Part by any judgment resulting from a lawsuit brought without our written consent. We will not, however, unreasonably withhold our consent.
>
> The limits of two or more autos or policies shall not be added together, combined or stacked, to determine the limits of coverage available to anyone covered under this Part, regardless of the number of autos involved, persons covered, claims made, or premiums shown on the Coverage Selections Page.
>
> We will not make payments under this Part which duplicate payments under the underinsured auto insurance of any other auto policy.

(A86–A88) (emphasis added). Plaintiffs' personal automobile insurance policy with State Farm also provides UIM coverage applicable to the June 20, 2007 collision, with limits of $100,000 per person and $300,000 per accident (A125). The policy contains certain defined words used throughout the policy. "***You*** or ***Your*** – means the named insured or named insureds shown on the declarations page. ***Your Car*** – means the ***car*** or the vehicle described on the declarations page." (A102). State

Farm's policy contains the following language concerning its UIM coverage:

> We will pay damages for ***bodily injury*** and ***property damage*** an ***insured*** is legally entitled to collect from the owner or driver of an ***uninsured motor vehicle***. The ***bodily injury*** or ***property damage*** must be caused by accident arising out of the operation, maintenance or use of an ***uninsured motor vehicle***.
> THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENT OF JUDGMENTS OR SETTLEMENTS.
> ***Uninsured Motor Vehicle*** – means:
>
> * * * *
>
> 3. with respect to damages for ***bodily injury***, a land motor vehicle:
>   a. the ownership, maintenance or use of which may be insured or bonded for bodily injury liability at the time of the accident; but
>   b. the limits of liability for bodily injury liability are less than the limits ***you*** carry for uninsured motor vehicle coverage under this policy;
>
> * * * *
>
> **Who Is an Insured**
> ***Insured*** – means the ***person*** or ***persons*** coverage by uninsured motor vehicle coverage.
> This is:
>
> 1. the first ***person*** named in the declarations;
> 2. his or her ***spouse***;
> 3. their ***relatives***; ….
>
> * * * *
>
> **Limits of Liability**
>
> * * * *
>
> 7. The following applies if the vehicle in the accident is an ***uninsured motor vehicle*** as defined in item 3 under the heading "***Uninsured Motor Vehicle*** – means":
>   The most we pay will be the lesser of:
>   a. the difference between the amount of the ***insured***'s damages for ***bodily injury***, and the amount paid to the ***insured*** by or for any ***person*** or organization who is or may be held legally liable for the ***bodily injury***; or
>   b. the limits of liability of this coverage.
> **When Coverage U Does Not Apply**

THERE IS NO COVERAGE:

1. FOR ANY ***INSURED*** WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY ***PERSON*** OR ORGANIZATION WHO MAY BE LIABLE FOR THE ***BODILY INJURY*** OR ***PROPERTY DAMAGE***. This does not apply to an ***insured*** who settles with the owner or operator of a vehicle described in item 3 of the definition of ***uninsured motor vehicle***.

* * * *

If There is Other Coverage

1. Coverage Provided by Us or an Affiliated Company
   If two or more vehicles owned or leased by ***you***, ***your spouse*** or any ***relative*** are insured for this coverage under one or more policies issued by us or an affiliated company, the total limit of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability.

* * * *

3. Subject to item 1 above:
   a. If an ***insured*** as defined in item 1, 2, or 3 of the definition of ***insured*** sustains ***bodily injury*** while ***occupying*** a vehicle which is not owned by ***you, your spouse*** or any ***relative***, our limit of liability applies as excess to any other coverage available from a policy covering the vehicle ***occupied*** or its driver.
   if coverage from more than one insurer applies as excess, we will pay our share. Our share is that per cent of the damages in excess of the primary coverage that our applicable limit of liability bears to the total of all uninsured motor vehicle coverage that applies to the accident as excess coverage.

(A111–A114).

ARGUMENT

I. PLAINTIFFS ARE LEGALLY ENTITLED TO RECOVER UIM BENEFITS UNDER THEIR PERSONAL STATE FARM POLICY SINCE THEY ARE PRECLUDED FROM SEEKING UIM BENEFITS FROM THE COMMERCE POLICY BY OPERATION OF A CONSENT-TO-SETTLEMENT PROVISION

A. QUESTIONS PRESENTED

Whether the Superior Court erred in finding that the Commerce UIM coverage is primary and State Farm's UIM coverage is excess, and that Plaintiffs are not entitled to excess UIM coverage from State Farm until they have exhausted the Commerce UIM limits. These issues were raised below in State Farm's Opening Brief in Support of Summary Judgment (A7–A32); Plaintiffs' Answering Brief in Opposition to Summary Judgment (A127–A148); State Farm's Reply Brief in Support of Summary Judgment (A149–A163); and in the Superior Court's October 30, 2013 Order granting summary judgment (Ex. A).

B. SCOPE OF REVIEW

This appeal is from the trial court's grant of summary judgment, which is reviewed *de novo*. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996). "A grant of summary judgment cannot be sustained unless there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006) (citing *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997)). In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.

Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991).

C. MERITS OF ARGUMENT

The instant case involves a UIM coverage question concerning Plaintiffs' personal insurance policy with State Farm. Resolution of the instant controversy will require this Court to interpret the parameters of 18 *Del. C.* § 3902 and the extent to which an insurer may restrict UIM coverage. State Farm contends that its UIM coverage is excess over the primary UIM coverage available from the Commerce policy and therefore State Farm's obligation to pay UIM benefits is only triggered if Plaintiffs exhaust the UIM coverage from Commerce. This argument is premised on the mistaken assumption that the Commerce UIM coverage is "available" to Plaintiffs.

Plaintiffs are named insureds under the State Farm policy and have paid premiums for that coverage. It is hard to imagine a more absurd result than to permit State Farm to exclude statutorily mandated coverage for which Plaintiffs paid a separate premium and which they are entitled to receive. Precluding Plaintiffs' from seeking UIM coverage from State Farm conflicts with Delaware's strong public policy as set forth in 18 *Del. C.* § 3902 and the tenets of statutory construction.

Consumers in the State of Delaware are entitled to receive the full amount of UIM coverage purchased without reduction, offset or limitation, consistent with Delaware's UIM statute, which provides, in relevant part:

> (b) Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident…. Such additional insurance shall include underinsured bodily injury liability coverage.
>
> (1) Acceptance of such additional coverage shall operate to amend the policy's uninsured coverage to pay for bodily injury damage that the insured or his/her legal representative are legally entitled to recover from the driver of an underinsured motor vehicle.
>
> (2) An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage. These limits shall be stated in the declaration sheet of the policy.
>
> (3) The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement or judgments.

18 *Del. C.* § 3902(b). The legislative intent of 18 *Del. C.* § 3902 is "to compensate insured motorists injured by financially irresponsible drivers who failed to purchase insurance and whose personal financial resources were insufficient to satisfy damage claims." *State Farm Mut. Auto. Ins. Co. v. Arms*, 477 A.2d 1060, 1063 (Del. 1984). "The overriding purpose of section 3902 is to 'fully compensate innocent drivers.'" *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 439 (Del. 2005) (citing *Deptula v. Horace Mann Ins. Co.*, 842 A.2d 1235, 1237 (Del. 2004)). The coverage contemplated by section 3902 is designed to place the insured in the same position he or she would have been in had the tortfeasor carried the same liability coverage

which the insured carried, up to the maximum amount permitted by statute. *Brown v. Comegys*, 500 A.2d 611 (Del. Super. 1985). But this Court has also "limited the insured's recovery in circumstances where the statutory language clearly mandated that result." *Id.* The plain meaning of 18 *Del. C.* § 3902(b)(3) "is that UIM carriers are not obligated to pay their insureds until after the insureds exhaust all available liability insurance policies." *Id.* at 439-40.

UM/UIM statutes are generally held to be remedial in nature and are to be liberally construed with strict and narrow construction given to exclusions, limitations or reductions so as to provide the desired remedy. 9 *Couch on Insurance* § 122:7 (3d ed. 2012); Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance*, § 4.19 rev. (Rev. ed. 2000); 8C *Appleman on Insurance Law and Practice* § 5067.45 (1981). "The goal of statutory construction is to determine and give effect to [the] legislative intent." *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007). Courts are required to give to statutory language a reasonable and suitable meaning; it is to be presumed that the Legislature did not intend an unreasonable, absurd, or unworkable result. *Opinion of the Justices*, 295 A.2d 718, 722 (Del. 1972). Statutes must be given a reasonable and sensible meaning, having in mind the purpose and intention of the Legislature. *Application of Penny Hill Corp.*, 154 A.2d 888, 892 (Del. 1959). When a statute is interpreted, "[u]ndefined words ... must be given their ordinary, common meaning." *Oceanport Indus., Inc. v.*

Wilmington Stevedores, Inc., 636 A.2d 892, 900 (Del. 1994). Those words "should not be construed as surplusage if there is a reasonable construction which will give them meaning." *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) (citing *Oceanport Indus., Inc.*, 636 A.2d at 900). Where the statutory language is clear on its face and is fairly susceptible to only one reading, the unambiguous text will be construed accordingly, unless the result is so absurd that it cannot be reasonably attributed to the legislature. *LeVan*, 940 A.2d at 933.

The construction of an insurance contract is a question of law. *Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992). Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning. *Johnston v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del. Super. 1973). Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. Super. 1982). "[W]hen the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented." *Id.* To the extent that ambiguity does exist, the doctrine of *contra proferentem* requires that the language of an insurance contract be construed most strongly against the insurance company that drafted it. *Steigler v. Ins. Co. of North America*,

384 A.2d 398, 400 (Del. 1978).

It is undisputed that the Lampart vehicle was an "underinsured motor vehicle" as defined by 18 *Del. C.* § 3902(b)(2) as well as the State Farm policy. "An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage." 18 *Del. C.* § 3902(b)(2).

Generally, the UIM policy covering the vehicle is primary and a passenger's personal UIM coverage is secondary. *St. Paul Fire & Marine Ins. Co. v. Metro. Prop. & Cas. Ins. Co.*, 2002 WL 511570 (Del.); *Krutz v. Harleysville Mut. Ins. Co.*, 766 F. Supp. 219 (D. Del. 1991). State Farm's policy contains an "other coverage" clause limiting the application of its UIM coverage "as excess to any other coverage *available* from a policy covering" a non-owned vehicle being occupied by an insured at the time of injury (A113) (emphasis added). By its plain terms, State Farm's "other insurance" provision only applies if there is other UIM coverage actually "available." It follows then, that if there is no UIM coverage available to Plaintiffs from the Commerce policy, then the State Farm "other insurance" provision is inapplicable and State Farm's UIM coverage is primary. Nothing in the "other insurance" provision can be read to rebut this conclusion. *See St. Paul Fire & Marine Ins. Co.*, 2002 WL 511570.

UIM coverage under the Commerce policy was not available to the Plaintiffs due to the lack of Commerce's prior written consent to settle with the tortfeasor's liability insurer. The lack of written consent and notice operates as a complete bar to a UIM claim under Massachusetts law. State Farm contends that Plaintiffs have not provided any evidence in support of their argument that UIM benefits cannot be recovered under the Commerce insurance policy (A157). Counsel for State Farm was aware that Plaintiffs' counsel attempted to refer this matter to Massachusetts counsel to attempt to assert a UIM claim against Commerce (A166-A167), however, both attorneys declined to take the case on the merits due to Commerce's lack of notice and lack of consent (A171-A173).

The Commerce policy requires as a condition precedent to coverage that an insured give sufficient notice of claim and that an insured must obtain Commerce's consent-to-settle with the tortfeasor. The relevant Commerce policy language states:

> We must be given sufficient notice of claim to conduct a reasonable investigation and attempt settlement before arbitration can be filed. If an injured person settles a claim as a result of an accident covered under this Part, we will pay that person only if the claim was settled with our consent. We will not be bound under this Part by any judgment resulting from a lawsuit brought without our written consent. We will not, however, unreasonably withhold our consent.

(A88). Plaintiffs were unaware of the existence of these requirements under the Commerce policy when they accepted the tortfeasor's liability insurance carrier's offer to tender its policy limits, nor were Plaintiffs aware at that time that UIM

coverage even existed under the Commerce policy. In Massachusetts, the insured must receive an insurer's permission before any settlement can be entered, regardless of the number or status of potential tortfeasors. *Aetna Cas. & Sur. Co. v. Poirier*, 356 N.E.2d 452, 454 (Mass. 1976) (settlement with third party absent consent of insurer resulted in forfeiture of benefits even when the third party was later found not liable). A consent-to-settlement provision is valid in the UM and UIM provisions of a Massachusetts policy. *MacInnis v. Aetna Life & Cas. Co.*, 526 N.E.2d 1255, 1257 (Mass. 1988).

Like Commerce, State Farm's policy contains a "consent-to-settlement" exclusion, disclaiming coverage for an insured who, without State Farm's written consent, settles with any person who may be liable for the insured's bodily injury (A113). However, unlike the Commerce policy the "consent-to-settlement" provision in State Farm's policy does not apply in the UIM context (A113). The rationale behind this is clear because an insured is required to exhaust all applicable liability insurance as a condition precedent to recovering UIM benefits and this Court has expressly limited an insurer's statutory right of subrogation against an underinsured motorist to the amount of coverage required by the Financial Responsibility Law. *Home Ins. Co. v. Maldonado*, 515 A.2d 690 (Del. 1986).

In Massachusetts, however, an insurer's subrogation rights are not limited to the policy limits of a tortfeasor's liability insurance coverage. The Massachusetts

UM/UIM statute provides that an insurer making a payment under UM/UIM coverage "shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made." Mass. Gen. Laws ch. 175, § 113L(4). "A release of the tortfeasor from any obligation in return for a settlement amount, prior to the insurer's having made any payment to the injured party, defeats the insurer's right to repayment." *Lighter v. Lumbermens Mut. Cas. Ins. Co.*, 683 N.E.2d 297, 299 (Mass. App. Ct. 1997). An insurer's loss of its subrogation rights due to an insured's untimely notice of a UM/UIM claim constitutes a material prejudice to the insurer such that the UM/UIM coverage us forfeited. *Byron v. Nationwide Ins. Co.*, 1998 WL 374919 (Mass. Super.), *aff'd*, 735 N.E.2d 1278 (Mass. App. Ct. 2000).

Delaware Courts have reached similar results when considering "consent-to-settlement" provisions. *See, e.g., Hall v. Allstate Ins. Co.*, 1985 WL 1137299 (Del. Super.); *Bryant v. Federal Kemper Ins. Co.*, 542 A.2d 347 (Del. Super. 1988); *Dukes v. Allstate Indem. Co.*, 1992 WL 332079 (Del. Super.); *Allstate Ins. Co. v. Fie*, 2006 WL 1520088 (Del. Super.); *WSFS v. Stewart Guar. Co.*, 2012 WL 5450830 (Del. Super.); & *U-Haul Co. of Pennsylvania v. Utica Mut. Ins. Co.*, 2013 WL 1726192 (D. Del.). *Hall v. Allstate* dealt with a settlement and release of a tortfeasor that violated a "consent-to-settlement" provision of an insurance policy. 1985 WL

1137299. The Court held that the insurer was not freed from liability on its policy in the absence of a showing that the breach caused the insurer to suffer prejudice. *Id.* at *9. The court further held that when a breach was shown, a rebuttable presumption of prejudice arose. *Id.* The burden then shifted to the party seeking to impose liability to demonstrate lack of prejudice by competent evidence. *Id.* Prejudice to the insurer in the context of a violation of a "consent-to-settlement" provision was the loss of subrogation rights against the tortfeasor released by the settlement. *Id.* at *8. In *Hall*, the court found that there was a material question of fact which precluded the granting of Allstate's motion for summary judgment because in the record before the court there was no evidence that a judgment against the tortfeasor would be worthless, and the burden was upon the plaintiff to prove by competent evidence that Allstate had not been prejudiced by the settlement in violation of the consent-to-settlement provision. *Id.*at *11.

In *Dukes v. Allstate*, which is analogous to the facts herein presented, then Judge Ridgely, applying Virginia law which recognizes the validity of consent-to-settle clauses, granted summary judgment in favor of the insurer because of the insured's violation of the consent-to-settle provision in the context of a UIM claim. 1992 WL 332079. The court also found that the insurer was prejudiced by the insured's settlement for the tortfeasor's policy limits undermined the insurer's ability to look beyond the tortfeasor's insurance policy and to the personal assets of the

tortfeasor in order to recover any amount paid to its insured. *Id.* at *3.

Based upon the foregoing, it is clear that under Massachusetts law, the lack of Commerce's written consent to settle precludes Plaintiffs from claiming UIM benefits under the Commerce policy as a matter of law. The plain meaning of 18 *Del. C.* § 3902(b)(3) "is that UIM carriers are not obligated to pay their insureds until after the insureds exhaust all available liability insurance policies." *Dunlap*, 878 A.2d at 439-40. Since UIM coverage under the Commerce policy was not available to the Plaintiffs, the "other insurance" provision of the State Farm policy and 18 *Del. C.* § 3902(b)(3) are inapplicable. As a result, State Farm's policy is primary because it contains the only UIM coverage available to the Plaintiffs.

Delaware Courts have reached an analogous result in the context of uninsured motorist ("UM") benefits. For instance, Delaware Courts have determined that the application of New Jersey's verbal threshold, which immunizes a tortfeasor from certain claims for noneconomic damages by an injured person, renders the tortfeasor an "uninsured motorist" such that the injured person was legally entitled to recover damages under his or her uninsured motorist coverage. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Patterson*, 7A.3d 454 (Del. 2010); *Kent v. Nationwide Property & Cas. Ins. Co.*, 844 A.2d 1092 (Del. Super. 2004); and *Kennedy v. Encompass Indem. Co.*, 2012 WL 4754162 (Del. Super.) *appeal refused*, 55 A.3d 838 (Del. 2012). Since the Legislative intent of 18 *Del. C.* § 3902 is to protect insureds injured by

underinsured motorists, the objective of the statute would be promoted by allowing Plaintiffs to seek recovery for UIM benefits under their personal State Farm insurance policy. Conversely, allowing the Superior Court's determination to stand will ensure that Plaintiffs are without any recourse to pursue UIM benefits for the injuries caused by an underinsured motorist.

CONCLUSION

WHEREFORE, the Plaintiffs Below, Appellants respectfully request that this Court reverse the decision of the Superior Court since it constitutes legal error.

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Dated: March 4, 2014