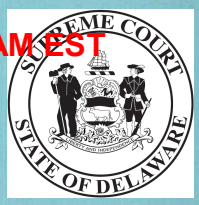

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	No. 10, 2013
Defendant Below, Appellant,	)	On Appeal from the Superior Court of the State of Delaware in and for Sussex County, C.A. No. S10C-09-005 ESB
v.	)	
MELVIN DAVIS,	)	
Plaintiff Below, Appellee.	)	

DEFENDANT BELOW, APPELLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S CORRECTED OPENING BRIEF ON APPEAL

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Dated: February 26, 2013

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NATURE OF PROCEEDINGS

Plaintiff Melvin Davis ("Plaintiff") was involved in a car accident on September 5, 2009. (A057-59) Following the accident, State Farm Mutual Automobile Insurance Company ("State Farm") extended personal injury protection ("PIP") benefits to Plaintiff up to the limit of $15,000. (A059) In accordance with its practice of paying claims in the order in which they are submitted (on a "first in, first out" basis), State Farm paid $15,000 worth of medical expense claims on Plaintiff's behalf, thereby exhausting his coverage. (A060) On September 2, 2010, Plaintiff filed a single-count Complaint asserting four claims: (1) that State Farm breached the insurance contract by paying the $15,000 of PIP benefits under the policy to medical providers rather than reserving that money for lost earnings; and, that in so doing, State Farm (2) breached its covenant of good faith and fair dealing and caused (3) intentional infliction of emotional distress and (4) negligent infliction of emotional distress to Davis. (A039-49) Plaintiff sought $15,000 in lost earnings, general damages for emotional distress, punitive damages, pre- and post-judgment interest, attorneys' fees and court costs. *Id*.

On May 25, 2011, Plaintiff filed an Amended (Proposed) Class Action Complaint, seeking a declaratory judgment concerning State Farm's obligation under 21 *Del. C.* § 2118

(Count I) to reserve lost earnings benefits, and alleging breach of contract, bad faith, and violations of 21 *Del. C.* § 2118B, which assesses penalty interest on claims that go unpaid for more than 30 days (Count II). (*See* A057-70) Pursuant to a stipulation and order entered by the Superior Court on July 12, 2011, the parties filed cross-motions for summary judgment on these issues. (A078 ¶ 1)

On September 26, 2012, the Superior Court entered an order granting Plaintiff's motion for partial summary judgment, and granting in part and denying in part State Farm's motion for summary judgment. (Ex. A at 11) In this order, the Superior Court held that "the PIP statute does allow [Plaintiff] to reserve PIP benefits that have not been previously paid on his behalf for lost earnings because doing so furthers the underlying purpose of the PIP statute, which is to compensate persons injured in motor vehicle accidents regardless of fault." (*Id*. at 2) On October 2, 2012, State Farm timely filed its Motion for Reargument (A755-761), which the Superior Court denied on December 10, 2012 (Ex. B). On December 20, 2012, State Farm filed its Motion for Entry of Final Judgment Under Rule 54(b) or, in the Alternative, Application for Certification of Interlocutory Appeal, in which State Farm sought immediate review on the issue of whether Delaware's PIP statute grants an insured the right to "reserve" benefits for lost earnings before

any such expenses have been incurred. (A836-51) On January 8, 2013, the Superior Court certified the issue for interlocutory appeal (A959-61), and on January 17, 2013, this Court accepted State Farm’s application (A962-63).

SUMMARY OF ARGUMENT

1. The text of 21 *Del. C.* § 2118 does not require an insurer to reserve PIP benefits for lost earnings.

2. The text of 21 *Del. C.* § 2118B does not require an insurer to reserve PIP benefits for lost earnings.

3. State Farm's interpretation of 21 *Del. C.* §§ 2118 and 2118B is consistent with the purposes underlying these statutes.

4. The Superior Court's conclusions about the validity of the assignment of benefits in Plaintiff's case does not control this Court's determination of the reservation issue.

STATEMENT OF FACTS

On September 5, 2009, Plaintiff Melvin Davis was a passenger in a vehicle involved in an accident and insured by State Farm. (A057-58) Plaintiff received medical treatment following the accident, and health care providers began submitting claims for payment to State Farm. (A421-22) Because it was uncertain whether the driver had the named insured's consent to drive the vehicle, State Farm conducted an investigation to determine its liability for the Plaintiff's injuries. (A350) While conducting this investigation, State Farm issued letters to all claimants, including Plaintiff, explaining that there would be no determination of PIP payments until the matter was resolved. (*Id.*) On December 24, 2009, State Farm decided to extend PIP benefits up to the policy maximum of $15,000 per passenger. (*Id.*)

On December 29, 2009, State Farm notified Plaintiff that liability coverage was denied but that $15,000 in PIP benefits would be extended. (*Id.*) On January 6, 2010, State Farm paid the full $15,000 in PIP benefits to various claimants in accordance with its "first in, first out" ("FIFO") payment policy and pursuant to a facially valid assignment of benefits. (*Id.*) Two days later, on January 8, 2010, State Farm mailed to Plaintiff and the remaining PIP claimants letters explaining that PIP benefits had been exhausted. (*Id.*)

On January 11, 2010, State Farm received a letter from Plaintiff's counsel, dated January 6, 2010, requesting a PIP application form.[1] (*Id.)* This was Plaintiff's first letter of representation and request for a PIP application form. (*Id.*) Because benefits had already been exhausted and Plaintiff had been informed that there was no additional coverage, Plaintiff's request was moot. (*Id.*)

On February 5, 2010, Plaintiff's attorney sent to State Farm a facsimile requesting a PIP application form and reservation of lost earnings benefits. (*Id.)* This correspondence was Plaintiff's first request for reservation of lost earnings benefits. (*Id.)* In response to these requests, State Farm sent a letter to Plaintiff's attorney alerting him that it was denying lost earnings benefits because PIP benefits had already been exhausted. (*Id.*)

It is undisputed, and Plaintiff expressly alleges, that State Farm tendered the policy-maximum $15,000 in PIP payments to various claimants for care related to Plaintiff's injuries. (A060)

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[1] The Superior Court found that, on January 5, 2010, Karen Ranck, a paralegal from Plaintiff's attorney's office, contacted State Farm and was informed that "the insurance coverage had been denied in all respects." Ex. A at 3. To the extent relevant, State Farm has disputed that account, since it had previously determined to extend PIP coverage and so notified Plaintiff on December 29, 2009. (A406) In any event, Ms. Ranck herself conceded that she understood from that conversation on January 5, 2010, that *liability* coverage was denied, and she did not know the status of the PIP claim on that day. (A188-91)

ARGUMENT

I. THE TEXT OF 21 *DEL. C.* § 2118 DOES NOT REQUIRE AN INSURER TO RESERVE PIP BENEFITS FOR LOST EARNINGS

A. Question Presented

Does the text of 21 *Del. C.* § 2118 require an insurer to reserve PIP benefits for lost earnings?

State Farm preserved this issue by raising it in its Motion for Summary Judgment, at the hearings before the Honorable E. Scott Bradley, and in its Motion for Entry of Final Judgment Under Rule 54(b) or, in the Alternative, Application for Certification of Interlocutory Appeal. (A342-70; A656-753; A836-A851) The Superior Court also addressed this issue in its decisions denying State Farm's Motions for Summary Judgment. (Ex. A)

B. Standard and Scope of Review

This Court reviews a lower court's decision to grant or deny a motion for summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). The Superior Court's legal determinations, including questions of statutory construction, are subject to *de novo* review. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

C. Merits of the Argument

The Superior Court erred in concluding that 21 Del. C. § 2118 allows an insured[2] to reserve benefits for lost earnings, because this interpretation runs contrary to the text of the statute as enacted by the General Assembly. Section 2118, which sets forth the requirements for legal minimum automobile insurance coverage, states in relevant part that:

> (a) No owner of a motor vehicle required to be registered in this State, other than a self-insurer pursuant to § 2904 of this title, shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum insurance coverage:
>
> * * *
>
> (2)a. Compensation to injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident for:
>
> 1. Medical, hospital, dental, surgical, medicine, x-ray, ambulance, prosthetic services, professional nursing and funeral services. Compensation for funeral services, including all customary charges and the cost of a burial plot for 1 person, shall not exceed the sum of $5,000. Compensation may include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.
>
> 2. Net amount of lost earnings. Lost earnings shall include net lost earnings of a self-employed person.
>
> 3. Where a qualified medical practitioner shall, within 2 years from the date of an accident, verify in writing that surgical or dental procedures will be

[2] As used in this brief, the term "insured" refers not only to the named insured under an insurance policy but also to those individuals otherwise covered by the policy and within the meaning of § 2118.

> necessary and are then medically ascertainable but impractical or impossible to perform during that 2-year period, the cost of such dental or surgical procedures, including expenses for related medical treatment, and the net amount of lost earnings lost in connection with such dental or surgical procedures shall be payable. Such lost earnings shall be limited to the period of time that is reasonably necessary to recover from such surgical or dental procedures but not to exceed 90 days. The payment of these costs shall be either at the time they are ascertained or at the time they are actually incurred, at the insurer's option.

As an initial matter, nothing in the plain language of § 2118 requires an insurer to honor an insured's request for the reservation of lost earnings. Moreover, many of the provisions of § 2118 would conflict with such an interpretation.

First, under the foregoing statutory provisions, an insured is entitled to compensation from an insurer if — and only if — five criteria are met: (1) the insured is an "injured person"; (2) he or she ***incurs*** an enumerated expense; (3) the expense is reasonable; (4) the expense is necessary; and (5) the expense is "***incurred*** within 2 years of the accident." 21 *Del. C.* § 2118(a)(2)a. (emphasis added); *see South v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 5509623, at *1-2 (Del. Super.) (denying summary judgment where fact issues remained as to necessary elements of whether: (1) plaintiff's "injuries were proximately caused by the accident in question; and (2) whether his subsequent medical treatment was reasonable and necessary"); *Barker v. Nationwide Ins. Co.*, 1988 WL 7624, at *1 (Del. Super.)

(granting insurer's motion for summary judgment where there was no evidence the plaintiffs incurred nursing care services for which they sought compensation under § 2118). If any one of these criteria is not satisfied, then the insured is not entitled to benefits. *See, e.g., Barker*, 1988 WL 7624 at *1 (dismissing claim for § 2118 benefits on summary judgment because there was no evidence that they had been "incurred.")

In light of the above, it is clear that Plaintiff's interpretation of § 2118 fails, and that the Superior Court erred in adopting it. At bottom, Plaintiff seeks to control PIP monies before having "incurred" the related enumerated expense. Specifically, Plaintiff wants to "reserve" benefits for future lost earnings expenses. However, because those lost earnings expenses have not yet been "incurred," Plaintiff has no right, under the plain language of § 2118, to compensation for them. *See Barker*, 1988 WL 7624 at *1 (dismissing claim for § 2118 benefits on summary judgment because there was no evidence that they had been "incurred.")

Plaintiff may argue that the term "incurred" should be construed broadly; that an expense for lost earnings two months down the road, for example, should be considered "incurred"

today since the expense is almost certain to arrive.[3] It is clear from the PIP statue, however, that the General Assembly did not mean for the word "incurred" to be construed so broadly. Indeed, the word appears again just three paragraphs later: "The payment of these costs shall be either at the time they are ***ascertained*** or at the time they are actually ***incurred***, at the insurer's option." 21 *Del. C.* § 2118(a)(2)a.3 (emphasis added). This provision clarifies that an insured "incurs" an expense at a time different from when he "ascertains" that he will incur it. "Incurred," therefore, cannot be read so broadly as to include expenses that will be — but have not yet been — actualized.

Moreover, State Farm's interpretation is confirmed by both the Delaware Administrative Code and Delaware Supreme Court precedent. For example, Chapter 603 of the Delaware Administrative Code sets forth various regulations and guidelines adopted pursuant to § 2118. *See* 18 Del. Admin. Code § 603-1.0. The definitions section of that chapter provides that the "[p]ayment of lost earnings is to be at the time they are ***actually lost***." 18 Del. Admin. Code § 603-4.0 (emphasis added). Further, the Delaware Supreme Court has affirmed that,

[3] Even if Plaintiff claims the extent of his injuries will prevent him from returning to work permanently, he seeks to represent a putative class of insureds who will have incurred injuries with a varying degree of severity. Many of those putative class members will not incur lost earnings approaching the $15,000 limit within the statutory period.

under § 2118, "lost earnings are only 'incurred' as losses are experienced through non-payment of such earnings." *United States Fid. and Guar. Co. v. Neighbors*, 421 A.2d 888, 891 (Del. 1980). Thus, although insureds may be able to "ascertain" that they may lose earnings in the future, they are not entitled to any PIP benefits until they actually fail to receive those paychecks. Since the statute requires insurers to honor only "incurred" expenses, it follows that insurers need not honor mere preemptive "requests" to earmark benefits indefinitely.

Second, as further demonstrated by § 2118(a)(2)a.3., the legislature could have provided insureds a mechanism to recover funds for ascertained lost earnings expenses if it wanted to. *See* 21 *Del. C.* § 2118(a)(2)a.3. That is what it did, after all, with regard to surgical and dental expenses to be performed more than two years out, ***as well as any resulting lost earnings*** — it gave insureds a right to control these funds before the expenses are actualized. As the legislature specifically provided:

> Where a qualified medical practitioner shall, within 2 years from the date of an accident, verify in writing that surgical or dental procedures will be necessary and are then medically ***ascertainable*** but impractical or impossible to perform during that 2-year period, ***the cost of such dental or surgical procedures, including expenses for related medical treatment, and the net amount of lost earnings lost in connection with such dental or surgical procedures shall be payable***. Such lost earnings shall be limited to the period of time that is reasonably necessary to recover from such surgical or dental procedures but not to exceed 90 days. ***The payment of these costs***

> ***shall be either at the time they are ascertained or at the time they are actually incurred, at the insurer's option.***

21 *Del. C.* § 2118(a)(2)a.3. (emphasis added).

In other words, the legislature created an exception to the general rule that insureds have no PIP benefits for expenses that are not yet incurred. And even then, the payment of these expenses is to be made "either at the time they are ascertained or at the time they are actually incurred, at the ***insurer's option***." *Id*. (emphasis added). No such carve-out was provided for general lost earnings. Since the legislature knew how to create this type of exception, we must interpret its silence on the reservation of lost earnings as purposeful. *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007)(applying the maxim *expressio unius est exclusio alterius* and noting that "when provisions are expressly included in one statute but omitted from another, we must conclude that the General Assembly intended to make those omissions").

II. THE TEXT OF 21 *DEL. C.* § 2118B DOES NOT REQUIRE AN INSURER TO RESERVE PIP BENEFITS FOR LOST EARNINGS

A. Question Presented

Does the text of 21 *Del. C.* § 2118B require an insurer to reserve PIP benefits for lost earnings?

State Farm preserved this issue by raising it in its Motion for Summary Judgment, at the hearings before the Honorable E. Scott Bradley, and in its Motion for Entry of Final Judgment Under Rule 54(b) or, in the Alternative, Application for Certification of Interlocutory Appeal. (A342-70; A656-753; A836-A851) The Superior Court also addressed this issue in its decisions denying State Farm's Motions for Summary Judgment. (Ex. A)

B. Standard and Scope of Review

This Court reviews a lower court's decision to grant or deny a motion for summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). The Superior Court's legal determinations, including questions of statutory construction, are subject to *de novo* review. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

C. Merits of the Argument

The Superior Court's conclusion that State Farm must honor an insured's request to reserve benefits also runs contrary to the text of 21 *Del. C.* § 2118B. Section 2118B is the only

section of the PIP statute that specifically addresses the "[p]rocessing and payment of insurance benefits," and nothing in the plain language of that section requires an insurer to honor an insured's request for the reservation of lost earnings. Most basically, section 2118B provides for the "processing and payment of sums ***owed by insurers . . . pursuant to § 2118***." 21 *Del. C.* § 2118B(a) (emphasis added). Thus, if an insurer does not yet owe sums under § 2118 — *e.g.*, if the underlying expense has not yet been incurred — then an insured is not entitled to payment of benefits in the first instance. As set forth above, section 2118 does not require State Farm to honor Plaintiff's attempt to earmark benefits for future expenses not yet incurred, and § 2118B does not provide any additional basis for such recovery.

Further, provisions of § 2118B conflict with Plaintiff's interpretation of the PIP statute. For example, subsection (c) imposes a specific schedule for the payment of claims, requiring an insurer to pay documented claims within 30 days of confirmation that the expense "is compensable pursuant to § 2118(a)." 21 *Del. C.* § 2118B(c); *Sammons v. Hartford Underwriters Ins. Co.*, 2011 WL 6402189 (Del. Super. Ct. Dec. 15, 2011), *aff'd* 2012 WL 2922670 (Del. July 18, 2012). The subsection also imposes interest penalties on insurers who fail to pay claims that should have been paid within 30 days. 21

Del. C. § 2118B(c). Here again, future claims for lost earnings are not yet incurred or compensable under § 2118(a). By contrast, claims for medical treatment provided to the insured ***are*** compensable under the statute, and the insurer's receipt of those documented claims triggers the application of the 30-day requirement for payment. *Sammons,* 2011 WL 6402189.

Thus, the Superior Court's decision produces the improper result of: (1) forcing insurers to reserve benefits for lost earnings that are not yet, and may never be, incurred and compensable under the statute; while (2) delaying payment of compensable claims for medical expenses that have been incurred; and (3) exposing insurers to potential liability for interest payments under the statute for the failure to timely pay those claims. This risk is not merely hypothetical, as the decision in *Sammons* recognizes the legal standing of medical providers to recover interest payments from insurers for the failure to timely pay documented claims.[4] *Id*. at *3. As set forth more fully in Section IV, *infra*, Plaintiff's position places insurers in the untenable position of having to honor the insured's request to reserve benefits for lost earnings while at the same

[4] Indeed, Plaintiff's own complaint, filed before the *Sammons* opinion was issued, initially included a claim for statutory interest under § 2118B for interest relating to State Farm's alleged failure to pay claims for medical expenses within the 30-day period. (A061 at ¶ 31) In light of *Sammons*, Plaintiff has since stipulated to the dismissal, with prejudice, of any such claim.

time delaying or denying claims submitted by medical providers to whom the insured has assigned the right to recover benefits.

III. STATE FARM'S INTERPRETATION OF 21 *DEL. C.* §§ 2118 AND 2118B — AND ITS SYSTEM FOR HANDLING CLAIMS — IS CONSISTENT WITH THE PURPOSES UNDERLYING THESE STATUTES

A. Question Presented

Is State Farm's interpretation of 21 *Del. C.* §§ 2118 and 2118B consistent with the purposes underlying these statutes?

State Farm preserved this issue by raising it in its Motion for Summary Judgment, at the hearings before the Honorable E. Scott Bradley, and in its Motion for Entry of Final Judgment Under Rule 54(b) or, in the Alternative, Application for Certification of Interlocutory Appeal. (A342-70; A656-753; A836-A851) The Superior Court also addressed this issue in its decisions denying State Farm's Motions for Summary Judgment. (Ex. A)

B. Standard and Scope of Review

This Court reviews a lower court's decision to grant or deny a motion for summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). The Superior Court's legal determinations, including questions of statutory construction, are subject to *de novo* review. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

C. Merits of the Argument

The Superior Court further erred in concluding that the PIP statute allows an insured to reserve benefits for lost earnings because this determination runs contrary to the important

purposes underlying 21 *Del. C.* §§ 2118 and 2118B. As the statute provides, the purpose of § 2118B is to "ensure reasonably prompt processing and payment of sums owed by insurers to their policyholders and other persons covered by their policies pursuant to § 2118 of this title, and to prevent the financial hardship and damage to personal credit ratings that can result from the unjustifiable delays of such payments." 21 *Del. C.* § 2118B(a). State Farm's FIFO policy is consistent with, and actively furthers, this important purpose. By promptly paying claims upon being presented with proof of expenses as they are incurred, State Farm protects insureds from financial problems that could occur if they did not do so. Moreover, State Farm's FIFO policy furthers the important "social purpose" of the PIP statute recognized by this Court in "assuring to health care providers regardless of the cause of the accident that they will be compensated for care which they provide to those who are injured in an automobile accident." *See Bass v. Horizon Assurance Co.*, 562 A.2d 1194, 1196 (Del. 1989).[5]

State Farm acknowledges that a "fundamental" purpose of § 2118 "is to protect and compensate all persons injured in automobile accidents," *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1171 (Del. 1990), and State Farm's FIFO policy in no

[5] Thus, the Superior Court's observation that "there is no focus whatsoever on making sure that health care providers get paid" under the PIP statute is not accurate. (Ex. A at 9)

way conflicts with this purpose. Through FIFO, State Farm "compensat[es] injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident" for a variety of expenses. 21 *Del. C.* § 2118(a)(2)a. State Farm may make payments directly to an insured or on behalf of an insured. In either case, State Farm furthers the purpose of § 2118 by paying benefits to "compensate all persons injured in automobile accidents." *Hudson*, 569 A.2d at 1171.

In contrast, Plaintiff's interpretation of the PIP Statute and the Superior Court's decision would lead to an absurd and unreasonable outcome at odds with these important purposes. *See Vareha v. Beebe Med. Ctr., Inc.*, 2010 WL 6419552, at *3 (Del. Supr.) ("unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result"); *see also generally State v. Steimling*, 2010 WL 4060300, at *3 (Del. Supr.) ("one statutory provision cannot be construed without regard to the statute's remaining provisions"). Assuming the typical insured may receive medical, lost earnings, and perhaps other benefits throughout the mandated two-year period of coverage, it would be nearly impossible to allocate PIP monies until the end of the coverage period as there is no accurate way to predict what expenses would be incurred.

If insurers were required to reserve PIP benefits for lost earnings which are only payable as they are incurred and proven, then all other claimants (including medical providers, attendant care providers, travel providers, emergency services for fire and ambulance) would remain unpaid until eventually: (1) the lost earnings alone exhaust PIP benefits and there are no funds left for other types of expenses; or (2) the lost earnings are paid until the end of the mandatory two-year coverage and, at that point, remaining funds are allocated to other expenses. This would wreak havoc on the claims-handling process and create significant inefficiencies as insurers must determine which bills to pay and when, all the while awaiting direction from their insureds, whose requests may vary throughout the adjustment process. Setting aside the gross impracticality presented by Plaintiff's interpretation of the PIP statute, allowing insureds to accrue unpaid bills would cause damage to their individual credit ratings and, hence, produce the very result that the General Assembly was trying to avoid and will effectively deny or delay payment to medical providers, which is also a purpose behind the laws.

State Farm anticipates that Plaintiff may attempt to argue, as he did before the Superior Court, that a line of authority relating to the allocation of benefits across multiple sources of coverage requires State Farm to "maximize" benefits by

reserving lost earnings as he requests. (*See, e.g.,* A091-93) (*citing Comm. Sys., Inc. v. Allen*, 1999 WL 1568331 (Del. Super. Ct.); *Cicchini v. State*, 640 A.2d 650, 652-53 (Del. Super. Ct. 1993), *aff'd*, 642 A.2d 837 (Del. 1994); *Lane v. Home Ins. Co*., 1988 WL 40013 (Del. Super. Ct.)). Although the Superior Court found that Plaintiff's argument "goes further than the holdings in these cases," it nevertheless determined that Plaintiff should "be the one to decide how best to maximize his PIP benefits" by requesting State Farm reserve them for lost earnings. (Ex. A at 4, 10)

The Court should reject Plaintiff's anticipated reliance on these cases, as they are plainly inapposite. Each case involves the apportionment of benefits across PIP and workers' compensation coverage, requiring the prioritization of one source of coverage over another to maximize the total amount of recovery. Each case realizes that, to hold otherwise, would prevent the plaintiff from recovering the ***total dollar amount*** available under the two sources of coverage. The concern underlying those cases is not present here where Plaintiff received the full value of the benefits available to him under the single source of coverage. Plaintiff's expansive interpretation of these cases does not authorize the rewriting of the No-Fault Statute, as Plaintiff seeks here.

In its summary judgment opinion, the Superior Court framed these issues – improperly – as a choice between, on the one hand, compelling State Farm to reserve lost earnings benefits (thereby "maximizing" benefits and the insured's freedom of choice), and, on the other, allowing State Farm to pay out the policy limits as soon as possible (thereby benefitting State Farm and its interests of "administrative convenience"). (Ex. A at 9) Respectfully, the Superior Court presented itself with a false choice that does not accurately describe State Farm's position or the purported "competing" interests here.[6] State Farm does not pay documented claims on a FIFO basis to "maximize" its own return or convenience; it does so because this is the best handling system for all parties concerned.[7] In sum, State Farm's FIFO policy in no way conflicts with the General Assembly's goals of promoting wide accident coverage and limiting financial hardship or the important social purpose achieved by compensating health care providers for the care which they provide. FIFO is a system that encourages timely and

[6] In so doing, the Superior Court's decision also ignores that insureds' interests may vary and change over time. Indeed, many insureds' first and primary interest may be in seeking treatment following the accident and obtaining payment for the services provided to them.

[7] Indeed, by requiring timely payment of documented claims under § 2118B, the General Assembly removes any financial incentive insurers might perceive in delaying the payment of claims.

efficient payments while ensuring that injured parties are compensated in the statutorily enumerated ways.

IV. THE SUPERIOR COURT'S UNNECESSARY AND ERRONEOUS CONCLUSIONS ABOUT THE ASSIGNMENT OF BENEFITS IN PLAINTIFF'S CASE DO NOT CONTROL THIS COURT'S CONSIDERATION OF THE RESERVATION ISSUE

A. Question Presented

Do the Superior Court's conclusions about the validity of the assignment of benefits in Plaintiff's case control this Court's determination of the reservation issue?

This issue is preserved for review because it was raised in Plaintiff's Cross-Motion for Summary Judgment, State Farm's Motion for Reargument, and at the hearings before the Honorable E. Scott Bradley. (A081-97; A656-753; A755-61) The Superior Court also addressed this issue in its decisions denying State Farm's Motion for Summary Judgment and granting Plaintiff's Cross-Motion for Summary Judgment and denying State Farm's Motion for Reargument. (Ex. A; Ex. B)

B. Standard and Scope of Review

This Court reviews a lower court's decision to grant or deny a motion for summary judgment *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). The Superior Court's legal determinations, including questions of statutory construction, are subject to *de novo* review. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012). This Court reviews a lower court's finding of fact on cross-motions for summary judgment *de novo*. *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982)

C. Merits of the Argument

The Superior Court erred by reaching unnecessary conclusions about the assignment of benefits in Plaintiff's case. However, those conclusions do not limit or control this Court's consideration of the central legal issue presented here: whether an insurer is required to honor an insured's request to reserve PIP benefits for lost earnings. This legal issue is the focus of Plaintiff's claims in this action, including his putative class action claims for declaratory judgment and breach of contract and bad faith, premised on State Farm's alleged "policy" of paying claimants on a FIFO basis. (*See* A061 at ¶ 28) Further, this legal issue was, by stipulation, the focus of the parties' cross-motions for summary judgment. In his partial motion for summary judgment, Plaintiff contested the validity of State Farm's policy of paying claimants on a FIFO basis, even in the face of a valid assignment of benefits. (*See* A096) Thus, Plaintiff's central legal position is that the PIP Statute obligates insurers to honor requests for the reservation of lost earnings – even in those cases where health care providers have submitted claims for payment pursuant to a valid assignment of benefits.

By granting Plaintiff's partial motion for summary judgment, and denying State Farm's motion, the Superior Court erred by effectively holding that the PIP statute ***does*** require

an insurer to honor such a request. (Ex. A at 1) Plaintiff will no doubt rely on the Superior Court's decision to argue State Farm's liability on a class-wide basis, including to putative class members who do not dispute the validity of any assignment of benefits. This Court can and should resolve the central legal issue raised by the parties' motions notwithstanding any dispute as to the validity of the assignment of benefits in this particular case.

Moreover, as set forth more fully below, the Superior Court's conclusions about the assignment of benefits were erroneous in any event. Plaintiff's argument that the PIP statute requires an insurer to reserve lost earnings even in the face of a valid assignment runs contrary to basic contract law and would expose insurers to liability. Further, the Superior Court erred by holding the particular assignment of benefits involved here invalid because, at best, this is an issue of fact for the jury.

1. Plaintiff's Claim Runs Contrary to Basic Contract Law

By requiring an insurer to honor a request to reserve benefits for lost earnings – even in the face of a valid assignment of benefits – Plaintiff's broad claim for relief runs contrary to basic contract law and may expose State Farm to further liability. An assignment of benefits is a type of contract, through which an assignee "stands in the shoes of the

assignor," and acquires the rights "identified in the contract" and "any statutory rights applicable to the assignor." 6A C.J.S. *Assignments* § 110; *Eclipse Mfg. Co. v. M and M Rental Ctr., Inc.*, 521 F. Supp. 2d 739, 742 (N.D. Ill. 2007) ("an assignment is a type of contract"). Accordingly, an assignee "may pursue legal action predicated on [the] rights arising from an assignment," and "may maintain any action that the assignor may have brought." 6A C.J.S. *Assignments* § 125. Thus, an insurer may become obligated to a health care provider pursuant to an assignment of benefits. Further, requiring an insurer to reserve benefits in the face of a valid assignment may expose the insurer to liability.

For example, in *Marvin v. State Farm Mutual Automobile Insurance Company*, a health care provider, and assignee of a State Farm insured, sued State Farm to recover benefits for medical treatment that State Farm paid directly to the insured. 894 S.W.2d 712 (Mo. Ct. App. 1995). Although presented with a facially valid assignment, State Farm paid the benefits to the insured directly, who in turn kept the proceeds, choosing not to pay the provider. *Id*. The Missouri Court of Appeals held that State Farm was obligated to pay the benefits ***directly*** to the provider by virtue of the assignment. *Id*. at 713 (holding that, by operation of the assignment, the insured "no longer had title or an interest to the insurance proceeds; Midtown Clinic became

the insured for the purposes of receiving the medical benefits”).

Here, Plaintiff interprets the PIP statute as requiring insurers to honor requests for the reservation of lost earnings even when they are faced with assignments of benefits that are facially valid. (A096-97) As such, Plaintiff’s claim contradicts basic contract law by asking insurers to “earmark” benefits in which the insureds may no longer have a valid legal interest and exposes State Farm to the type of potential liability recognized in *Marvin*. Thus, to the extent the Superior Court’s decision requires insurers to reserve lost earnings even when presented with facially valid assignments of benefits, it is erroneous. (*See* Ex. A at 10 (“I hold that the legislature would want the PIP statute to be applied in such a manner that allows the injured person to reserve his or her PIP benefits that have not otherwise been properly paid for his or her lost earnings.”))

Moreover, the Superior Court further erred in its suggestion that insurers must somehow make a determination about the legal validity of an assignment of benefits before paying benefits to health care providers. In dicta, the Superior Court suggested that “a health care provider becomes a ‘claimant’ [within the meaning of § 2118B] only after obtaining a ***valid*** assignment of insurance benefits from the insured and providing health care to the insured.” (Ex. A at 6-7) (emphasis added.)

Although the Superior Court did not cite any authority for that proposition, the statement follows its discussion of *Sammons*.

Nothing in *Sammons*, however, prevents an insurer from relying on the apparent validity of assignments obtained by health care providers. Indeed, although the plaintiff in *Sammons* ***also*** disputed whether there was evidence of a valid assignment of benefits on appeal, the insurer in that case appears to have made payment to health care providers based on the providers' representation that they had the insured's "SIGNATURE ON FILE" to authorize payment. *See* Appellant's Opening Brief at *9, *Sammons v. Hartford Underwriters Ins. Co.*, 2012 WL 1466171 (Del. Supr.); Appellee's Answering Brief, *Sammons v. Hartford Underwriters Ins. Co.*, 2012 WL 2126078 (Del. Supr.) Thus, nothing in *Sammons* prevents an insurer from relying on the facial validity of assignments pursuant to which health care providers submit claims for payment. *See Sammons*, 2011 WL 6402189 at *2. To the extent the Superior Court's decision suggests otherwise, it establishes dangerous precedent, by: (1) raising doubts about otherwise facially valid assignments; and (2) placing a burden on health care providers and insurers to determine whether the assignment is valid for reasons that may not become apparent until well after payment is made.

2. The Superior Court Erred by Holding the Assignment of Benefits Invalid

Finally, the Superior Court erred by holding that the particular assignment of benefits for Plaintiff's care was invalid. Setting aside the assignment's relevance to the central legal issue presented here, the Superior Court should not have made a finding of invalidity based on the existing record. At best, this was a disputed question of fact for the jury.

First, although Plaintiff initially suggested in his Motion that the assignment of benefits executed here ***may*** have been invalid, he did so relying on deposition testimony from another of Plaintiff's attorneys, David Boswell, and his paralegal, Karen Ranck. (A089-90 at n. 1) Plaintiff claims that, according to Ms. Ranck's understanding, "Mr. Davis' mother signed an assignment of benefits form in order to secure treatment during Mr. Davis' hospital stay." *Id*. at n. 1. This is pure hearsay at best, and thus inadmissible. *See* D.R.E. 801, 802; *Wheeler v. State*, 36 A.3d 310, 317 (Del. 2010) (excluding inadmissible hearsay). Plaintiff did not support his motion, or his answer to State Farm's motion, with admissible evidence from anyone with personal knowledge about the circumstances of the assignment. For example, Plaintiff did not submit an affidavit attesting that his mother was unauthorized to execute an

assignment on his behalf, nor did he submit an affidavit from his mother to that effect. Moreover, Ms. Ranck further testified that, despite being aware of the assignment of benefits executed by Davis' mother, her office never wrote to the hospital provider to revoke the assignment. (A220-21)

Second, in oral argument on the parties' motions, counsel clarified his position that Plaintiff ***does not*** contest the legal validity of the assignment itself but rather the reliance on any assignment to recover benefits that Plaintiff claims should have been reserved for lost earnings, stating:

> ***We haven't contested the legality of the assignment***. It's beside the point, because it's an assignment of – ***it's binding***. It's an assignment of medical expenses, not an assignment of wages.

(A678) (emphasis added) Based on this record – consisting of pure speculation and lawyer argument – it was improper for the Superior Court to then determine that the assignment was, in fact, invalid because Plaintiff's mother was unauthorized to sign it. (Ex. A) Thus, to the extent Plaintiff's motion raises issues regarding the validity of the assignment, Plaintiff has failed "to prove clearly the absence of any genuine issue of fact, and any doubt should be resolved against him" – not against State Farm. *Brown v. Ocean Drilling & Exploration*, 403 A.2d 1114, 1115 (Del. 1979).

CONCLUSION

State Farm's policy of paying claims on a first in, first out basis complies with both the letter and spirit of Delaware's PIP statute. As set forth above, no provision of either § 2118 or § 2118B entitles Plaintiff to "reserve" PIP benefits for lost earnings. In fact, the plain language of the existing provisions supports the opposition interpretation. Moreover, State Farm's FIFO policy achieves all the important goals embodied in these sections. By paying claims in the order in which they are received, State Farm ensures that injured people are promptly compensated, that their credit ratings are protected, and that Delaware doctors continue to treat patients.

In contrast, compelling State Farm to earmark funds for expenses not yet incurred undermines these goals and results in an unworkable system. The Superior Court erred by holding that insurers must honor such requests and by drawing erroneous conclusions about the assignment of benefits. This Court should hold that: (1) State Farm's FIFO policy complies with Delaware's PIP statute; and (2) a Delaware insured has no right under §§ 2118 or 2118B to "reserve" PIP benefits for lost earnings benefits. Thus, this Court should reverse the Superior Court's September 26, 2012 order, vacate the entry of partial summary judgment in Plaintiff's favor, and grant summary judgment to State Farm.

Respectfully submitted,

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