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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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INTRODUCTION

In its Opening Brief, Appellant State Farm Mutual Automobile Insurance Company ("State Farm") established, based on the construction of the No-Fault Statute, that: (1) no provision of 21 *Del. C.* § 2118 or § 2118B requires an insurer to reserve PIP benefits for lost earnings; and (2) the plain language of the existing provisions of the statute supports the opposite interpretation. Thus, there is simply nothing unlawful about State Farm's policy, applied in Plaintiff's case, of paying PIP claims on a first-in, first-out ("FIFO") basis. To the contrary, State Farm's FIFO policy comports with both the letter and spirit of the No-Fault Statute and furthers its several purposes.

Although Plaintiff concedes that the principal issue before this Court is one of statutory construction, his Answering Brief ignores State Farm's statutory construction arguments entirely. Indeed, Plaintiff fails to provide any statutory support for the expansive interpretation of the No-Fault Statute that he asks the Court to adopt here. Instead, Plaintiff advances incorrect and irrelevant arguments based on inadmissible evidence and inapposite case law. As such, Plaintiff's Answering Brief provides no basis for upholding the Superior Court's order. Accordingly, for the reasons set forth below and more fully in State Farm's Opening Brief, this Court should reverse the

Superior Court's order, vacate the entry of partial summary judgment in Plaintiff's favor, and grant summary judgment to State Farm.

ARGUMENT

I. PLAINTIFF FAILS TO RESPOND TO STATE FARM'S ARGUMENTS REGARDING THE STATUTORY CONSTRUCTION OF 21 *DEL. C.* §§ 2118 AND 2118B

As Plaintiff concedes in his Answering Brief, the principal issue presented by this appeal is whether, "as a matter of statutory construction," the No-Fault Statute requires an insurer to honor an insured's request to reserve PIP benefits for lost earnings. (*See* Plaintiff's Answering Brief ("Ans. Br.") at 4, agreeing that "this Court can and should resolve the issue on appeal as a matter of statutory construction . . . . ") State Farm established in its Opening Brief that: (1) the plain language of 21 *Del. C.* §§ 2118 and 2118B contains no requirement obligating an insurer to honor a request for the reservation of lost earnings; and (2) the existing provisions of the statute are inconsistent with such a requirement.

First, the plain language of sections 2118 and 2118B authorizes and provides only for the compensation of covered expenses that have been "incurred" by insureds and are "owed" by insurers. (Op. Br. at 8-17.) Plaintiff seeks to write into the statute an obligation on insurers to reserve or "earmark" benefits for future expenses for lost earnings that have not yet been, and may never be, incurred. This reading of sections 2118 and 2118B finds no support in the statutory language, particularly when – as in Plaintiff's case – claimants have

submitted documented claims for expenses that have already been incurred. *Id*.

Plaintiff provides no response whatsoever to State Farm's arguments regarding the construction of these provisions but, instead, erects a straw man, accusing State Farm of misinterpreting Plaintiff's position and the Superior Court's opinion as somehow requiring the ***prepayment*** of benefits for lost earnings. (Ans. Br. at 18.) Prepayment is not the issue here — Plaintiff's claim is that State Farm must ***reserve*** PIP benefits for lost earnings. Plaintiff's response thus misses the mark and, most importantly, fails to provide the Court with any statutory underpinning for his argument that these sections should be interpreted to ***require*** the reservation of PIP benefits for lost earnings.

Second, the General Assembly certainly was capable of providing a mechanism for the general reservation of PIP benefits for lost earnings, if so inclined, because that is precisely what it did in subsection (a)(2)a.3 with regard to expenses for surgical and dental procedures, including any resulting ***lost earnings***. (Op. Br. at 12 (citing 21 *Del. C.* § 2118(a)(2)a.3.).) Under recognized principles of statutory construction, the General Assembly's silence on the general reservation of lost earnings must be deemed purposeful.

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").

Again, Plaintiff ignores these arguments entirely. Plaintiff does not even ***cite*** subsection (a)(2)a.3 in his Answering Brief, let alone provide this Court with any counter to State Farm's argument. Accordingly, this Court should reverse the Superior Court's order and hold that insureds have no right under the No-Fault Statute to reserve PIP benefits for lost earnings.

II. PLAINTIFF'S MISPLACED RELIANCE ON PIP STATUTES OUTSIDE DELAWARE UNDERCUTS HIS POSITION

Rather than addressing State Farm's arguments regarding the construction of the Delaware statute at issue here, Plaintiff instead advances irrelevant arguments about PIP statutes in other states, presumably urging this Court to adopt some version of statutes enacted by other legislatures. However, Plaintiff's reliance on these statutes only undercuts the position he advances here.

First, Plaintiff cites the Kentucky PIP statute, claiming incorrectly that it "expressly authorizes insureds to ***reserve*** benefits for lost wages or medical expenses as they see fit."

(Ans. Br. at 29 (emphasis added).) While that section provides that "[a]n insured may ***direct*** the payment of benefits among the different elements of loss," Ky. Rev. Stat. Ann. § 304.39-241 (emphasis added), it contains no provision, much less an "express authorization," that an insured may reserve benefits for lost wages that have not yet been incurred, as Plaintiff seeks here.

Moreover, Kentucky law suggests that an insured may not make such a reservation of benefits under its No-Fault statute because the benefits are payable only when accrued. Specifically, Section 304.39-210(1) provides that "[b]asic and added reparation benefits are payable monthly ***as loss accrues***. Loss accrues not when injury occurs, but as work loss, replacement services loss, or medical expense ***is incurred***." Ky. Rev. Stat. Ann. § 304.39-210(1) (emphasis added). Courts have interpreted this provision to hold that the Kentucky PIP statute does not permit an insured to recover for expenses that may be anticipated in the future but have not yet been incurred. *See Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987) (credit applied to jury verdict in personal injury action awarding, *inter alia*, damages for permanent impairment to power to earn money and future medical expenses, was properly limited under the Kentucky statute to the amount of the accrued benefits paid or payable at the time of trial rather than the maximum potential no-fault

benefits); *Korthals v. Grange Ins.*, 2006 WL 3306843, at *3 (W.D. Ky. 2006) (claim for proposed medical expenses not yet incurred was not compensable under Kentucky statute: "[b]y definition, basic reparation benefits are reimbursement for accrued costs," and "[a]s Korthals incurred no such costs, she has no claim for basic reparation benefits"). Thus, the Kentucky statute does not support, and certainly does not "expressly authorize," the expansive relief Plaintiff seeks here.

Second, Plaintiff's reliance on the Kentucky PIP statute is further misplaced given that its plain language permits an insured to direct the payment of incurred lost earnings on a "***prospective*** basis" only.[1] (Ans. Br. at 29 (citing Ky. Rev. Stat. Ann. § 304.39-241) (emphasis added).) As set forth in its Opening Brief, State Farm did not receive any request for the reservation of lost earnings until after it had already paid the full $15,000 in PIP benefits to various claimants for care related to Plaintiff's injuries. (Op. Br. at 5-6.) Putting aside Plaintiff's allegations concerning the factual record in

[1] Plaintiff criticizes State Farm for failing to adduce evidence of problems for the claims-handling process imposed by the PIP statutes in Kentucky and New York. (Ans. Br. at 30.) Plaintiff's argument ignores the fact that he cited the Kentucky statute for the first time in his summary judgment reply (A622), as well as the dissimilarities between the requirements of that PIP statute and Delaware law discussed above. Further, as set forth in the *amici curiae* brief submitted by NAMIC and PCI, the New York statute actually ***provides*** for the payment of benefits on a first-in, first-out basis in most cases. (*Amici Curiae* Br. at 5.)

this case,[2] his Answering Brief is silent on what an insurer must do when it receives a request for the reservation of lost earnings only ***after*** it has tendered PIP benefits to other claimants.

Finally, in further distinction, the Kentucky legislature only enacted the provision cited by Plaintiff as part of a comprehensive set of changes to its PIP statute that also: (1) explicitly eliminated any assignment of a right to benefits; and (2) divested medical providers of their right of direct action against insurers. *See Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321, 325-26, 329-30 (Ky. 2008). Of course, the Delaware General Assembly has taken no such action with respect to the assignment of benefits, and this Court has previously recognized the legal standing of medical providers as claimants under the No-Fault Statute. *See Sammons v. Hartford Underwriters Ins. Co.*, 2011 WL 6402189, at *3 (Del. Super.), *aff'd* 2012 WL 2922670 (Del. Supr.). Thus, careful

[2] The statement of facts in Plaintiff's Answering Brief contains numerous inaccuracies and distortions of the record. For example, although Plaintiff suggests State Farm acted improperly by paying PIP claims before notifying him that coverage was available (*see* Ans. Br. at 7-8), Plaintiff ignores that State Farm did indeed notify him of its coverage decision one week before paying any claims. (Op. Br. at 5.) Plaintiff further criticizes State Farm for failing to provide a PIP application (Ans. Br. at 6), but he ignores that State Farm had already paid the policy maximum on his behalf before ever receiving Plaintiff's request for an application. Because many of these "facts" are irrelevant to the Court's resolution of this appeal, State Farm will not endeavor to address them all in this reply and, instead, refers the Court to its own statement of facts. (Op. Br. at 5-6.)

analysis of the Kentucky PIP statute reveals its dissimilarities to Delaware law and, instead, hints at the problems that may be presented by rewriting the No-Fault Statute on an *ad hoc* basis, as Plaintiff seeks to do here.

III. STATE FARM'S INTERPRETATION DOES NOT FRUSTRATE THE PURPOSE OF THE NO-FAULT STATUTE

In sidestepping State Farm's arguments regarding construction of the actual ***language*** of the No-Fault statute, Plaintiff devotes much of his Answering Brief to the argument that State Farm's FIFO policy somehow violates public policy and frustrates the ***purpose*** of the No-Fault Statute. These arguments fail.

As an initial matter, Plaintiff's arguments rest largely on "facts" derived from materials not previously presented to the Superior Court and thus outside the record. (*See* Ans. Br. at 23 n.7; 25 n.8.) Since, however, an appeal must be heard on "the original papers and exhibits" alone, Del. Supr. Ct. R. 9(a), this Court should disregard Plaintiff's new "facts" concerning Delaware's insurance and disability statistics. *See, e.g., In re Celera Corp. Shareholders Litig.*, 59 A.3d 418, 427 n.5 (Del. 2012).

In any event, Plaintiff has failed to rebut the clear conclusion that State Farm's FIFO policy actually supports all the important goals of the No-Fault Statute. As State Farm

detailed in its Opening Brief, its FIFO policy "ensure[s] reasonably prompt processing and payment of sums owed by insurers to their policyholders and other persons covered by their policies . . . [and prevents] the financial hardship and damage to personal credit ratings that can result from the unjustifiable delays of such payments." 21 *Del. C.* § 2118B(a). By promptly paying claims upon being presented with proof of expenses as they are incurred, State Farm protects insureds from financial problems that could result if it instead waited to pay them. Indeed, the statute's explicit reference to the goal of protecting an insured's credit ratings obviously is accomplished where, as here, an insurer makes a payment to creditors of the insured rather than to the insured herself.

Moreover, State Farm's FIFO policy furthers the No-Fault Statute's important "social purpose" of "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). Plaintiff's Answering Brief dismisses this recognized purpose entirely and, as set forth below, his untenable position on the assignment of benefits actually frustrates it. Further, the payment of benefits on a first-in, first-out basis also supports No-Fault's "fundamental" purpose of "protect[ing] and compensate[ing] all

persons injured in automobile accidents," *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1171 (Del. 1990), by making payments directly to, or on behalf of, insureds for whichever PIP expenses they incur, as they incur them.

While there is no denying that Plaintiff has experienced many difficulties since his accident, the particulars of his experience do not compel a wholesale rejection of State Farm's FIFO policy. To the contrary, all verified claims were paid promptly until coverage was exhausted. Plaintiff may have preferred if the General Assembly provided claimants the right to reserve funds for certain types of benefits over others, but neither State Farm nor FIFO is to blame that it did not.

Further, though Plaintiff contends that other Delaware insurers voluntarily grant requests for the reservation of benefits, that "fact" is of no moment. ***First***, Plaintiff's "empirical evidence" of insurers honoring requests is nothing more than unauthenticated hearsay. (*See* Ans. Br. at 20-21 (citing various attorney statements and unauthenticated correspondence).) Since a court should not consider inadmissible evidence when deciding a motion for summary judgment, this Court should disregard Plaintiff's alleged "support" for this argument. *See Cont'l Cas. Co. v. Ocean Acc. & Guar. Corp.*, 209 A.2d 743, 747 (Del. Super. 1965). ***Second***,

setting aside these significant evidentiary issues, Plaintiff's anecdotal "evidence" — that ***some*** insurers ***may*** honor such a request under ***some*** set of circumstances — in no way controls the issue presented here — i.e., whether the No-Fault Statute ***requires all*** insurers to honor ***every*** request to reserve PIP benefits for lost earnings. Indeed, and contrary to the inadmissible and anecdotal support Plaintiff cites, the *amici* PCI and NAMIC — member organizations representing hundreds of insurers operating both in Delaware and nationwide — have forcefully argued why the courts should not impose such requirements on an *ad hoc* basis in the absence of action from the General Assembly. (*See Amici Curiae* Br. at 14-15.)

In sum, because State Farm's FIFO policy comports with the No-Fault Statute's several purposes, and because the alleged voluntary behavior of a handful of other insurers does not dictate what the law requires, this Court should reverse the Superior Court's order and hold that insureds have no right under the No-Fault Statute to reserve PIP benefits for lost earnings.

IV. PLAINTIFF'S INAPPOSITE CASE LAW DOES NOT SUPPORT HIS INTERPRETATION OF THE NO-FAULT STATUTE

Plaintiff also relies heavily on a line of cases purportedly holding that, under the No-Fault Statute, "the guiding principle must always be the maximization of the

insured's financial recovery." (Ans. Br. at 13.) This authority does not support Plaintiff's position in this case, however, because it concerns "maximization" in the sense of providing claimants with the greatest total dollar amount of recovery in instances involving ***multiple sources*** of coverage. *See Johnson v. Fireman's Fund Ins. Co.*, C.A. No. 82C-OC-63 (Del. Super. Aug. 8, 1983) (Ans. Br. Ex. D at 1) (holding claimant was entitled to have workers' compensation insurance pay for medical expenses instead of PIP, thereby freeing up additional dollars of PIP benefits for lost earnings); *Lane v. Home Ins. Co.*, 1988 WL 40013 (Del. Super.) (holding claimant was entitled to have expenses paid under PIP coverage instead of under workers' compensation, in order to avoid (to some extent) a lien against claimant's recovery from tortfeasor); *Cicchini v. State*, 640 A.2d 650 (Del. Super. 1993), *aff'd* 642 A.2d 837 (Del. 1994) (same); *Community Sys., Inc. v. Allen*, 1999 WL 1568331 (Del. Super.) (holding claimant could seek lost earnings benefits under workers' compensation instead of under PIP, because there were fewer dollars of benefits available under the latter source of coverage).

Seizing on language about liberal construction and the "maximization" of benefits, Plaintiff asks this Court to extend the holdings of these cases to "maximize" what he presumes to be the preference for one type of PIP benefit over another. But

this same reasoning could be used to write almost any requirement into the No-Fault Statute, depending on the subjective wish of the insured. Moreover, the important concern underlying this line of cases is not present here, where Plaintiff has received the full value of the benefits available to him under the ***single source*** of existing coverage.[3] Indeed, even the Superior Court agreed with State Farm that Plaintiff's strained interpretation of these cases extends beyond their holdings. (*See* Op. Br. Ex. A at 4 ("[Plaintiff's] argument. . . goes further than the holdings in these cases.").)

Strangely, Plaintiff chides State Farm for failing to discuss another inapposite case – *Steager v. United States Auto. Ass'n*, 1997 WL 719087 (Del. Super.) – which Plaintiff now describes as "foremost among" the cases supporting his position. (*See* Ans. Br. at 13.) However, State Farm did not discuss *Steager* for the simple reason that – like *Johnson*, *Lane*, *Cicchini*, and *Allen* – the opinion in that case does not address any issue *sub judice*. Indeed, in granting the application preceding this appeal, the Superior Court ***rejected*** Plaintiff's

[3] Both Plaintiff and the Delaware Trial Lawyers Association suggest that because an insured might also have health insurance, he or she should be able to reserve PIP benefits for other expenses. (*See* Ans. Br. at 25-26; *Amicus* Br. at 4.) Of course Plaintiff, and presumably members of the class he seeks to represent, had no such insurance. (A694.) Further, this argument again ignores the recognized purpose of the No-Fault Statute of "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*, 562 A.2d at 1196.

interpretation of *Steager*, finding the opinion "hardly dispositive of the issues in this case." (*See* A959 (noting that *Steager* merely "stands for the proposition that once a plaintiff obtains a judgment against a defendant that recovery flows to the plaintiff and not to the plaintiff's creditors").) Thus, because his "foremost" and other cases are inapposite, Plaintiff has failed to provide this Court with a single Delaware[4] authority supporting his interpretation of sections 2118 and 2118B.

V. PLAINTIFF'S POSITION REGARDING THE ASSIGNMENT OF BENEFITS IS UNTENABLE

Finally, Plaintiff has not adequately addressed the issue of the assignment of benefits or responded to State Farm's arguments that the Superior Court's conclusions on this issue were erroneous. Plaintiff contends that an insurer must honor a request to reserve lost earnings even in the face of a valid assignment of benefits. (Ans. Br. at 32.) In its Opening Brief, State Farm demonstrated that such a position runs contrary to basic contract law and would expose insurers to

[4] Plaintiff's Florida authority – *Bennett v. State Farm Mut. Auto. Ins. Co.*, 580 So. 2d 217 (Fla. Dist. Ct. App. 1991) and *Holloway v. State Farm Mut. Auto. Ins. Co.*, 370 So. 2d 452 (Fla. Dist. Ct. App. 1979) – is equally inapplicable because it too involves the allocation of benefits across two sources of coverage: PIP coverage and medical payments coverage under the operative policy. In each case, the court allowed the plaintiff to limit or reapportion his claim under the PIP coverage for lost income because to do otherwise would prevent the plaintiff from recovering the maximum total dollar amount under the two sources of coverage at issue.

liability (Op. Br. at 27-28), and Plaintiff's attempts to defend this argument in his Answering Brief are unavailing.

First, Plaintiff seeks to limit the scope of any assignment of benefits by arguing that the type of assignment at issue here "cannot sensibly be read as an assignment of lost-wage benefits." (Ans. Br. at 10, 31-32.) However, Plaintiff's argument rests on the faulty premise that the No-Fault Statute parses PIP benefits between lost earnings and health care expenses (or other PIP benefits). The assignment at issue is a legal assignment of benefits provided by PIP coverage. State Farm's obligation is to pay PIP benefits of ***all*** types – including health care expenses and lost earnings – up to policy limits based on the claims submitted to it. Thus, there is only ***one source*** of compensation for ***all*** PIP benefits, and Plaintiff has no separate entitlement to benefits for lost earnings.

Second, Plaintiff argues that State Farm will not be exposed to liability for failing to pay documented claims submitted by care providers pursuant to assignments[5] because

[5] Relatedly, Plaintiff's efforts to distinguish *Marvin v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 712 (Mo. Ct. App. 1995), are also unavailing, as that case stands for the simple proposition that an insurer may be subject to liability for failing to honor an assignment of policy benefits. The court in that case did not draw any distinction between the assignment or reservation of "species of benefits" (*see* Ans. Br. at 32), but rather held that State Farm should not have paid benefits directly to the insured when she had assigned her rights to policy benefits to the plaintiff provider. *Marvin*, 894 S.W.2d at 713.

insurers may simply respond that benefits have been reserved for lost earnings. (Ans. Br. at 19-20.) However, no provision of the No-Fault Statute permits State Farm to deny, or to delay indefinitely, the payment of otherwise valid and documented claims in favor of requests for the reservation of benefits. *See, e.g.*, 21 *Del. C.* § 2118B(c). The risk that insurers like State Farm will be liable for delaying payments under § 2118B(c) is neither idle nor imaginary – that provision of the statute has been the subject of many suits brought against insurers in Delaware courts, including suits brought by "claimants" such as medical providers whose entitlement to PIP benefits would be thwarted by the "reservation of lost wages" scheme Plaintiff urges here.[6] Moreover, Plaintiff tacitly admits that State Farm cannot cite a reservation of lost wages to ignore valid claims under the No-Fault statute ***as written***, since he suggests State Farm will not be liable for denying other claims ***only after*** a putative ruling in Plaintiff's favor in this appeal. (Ans. Br. at 19 ("Should this court affirm, then the moment an insured instructs her insurer to reserve PIP benefits for lost wages,

[6] *See, e.g., Spine Care Delaware, LLC v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 495899, at *1 (Del. Super.); *Sammons v. Hartford Underwriters Ins. Co.*, 2011 WL 6402189, at *1 (Del. Super.); *Johnson v. Geico Cas. Co.*, 673 F. Supp. 2d 255, 257 (D. Del. 2009); *Baker v. Hartford Underwriters Ins. Co.*, 490 F. App'x 467, 468 (3d Cir. 2012); *Davidson v. Travelers Home and Marine Ins. Co.*, 2011 WL 7063521, at *2 (Del. Super.); *Bracken-Bova v. Liberty Mut. Fire Ins. Co.*, 2011 WL 5316600, at *1 (Del. Super.); *Colbert v. Goodville Mut. Cas. Co.*, 2010 WL 2636860, at *1 (Del. Super.); *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, at *1 (Del. Super.).

the insurer will be vested with a valid legal basis to deny or defer . . . .").)

Finally, Plaintiff has failed to demonstrate that the Superior Court's invalidation of the assignment in Plaintiff's own case was free from error. As set forth in State Farm's Opening Brief, the validity of the assignment was a fact issue, at best, and the Superior Court further erred in suggesting that insurers should make a determination about the validity of an assignment before paying benefits to providers. (Op. Br. at 29-31.) Plaintiff responds by arguing that State Farm "has not contended that a mother can lawfully enter into contracts or incur debts on behalf of her adult son." (Ans. Br. at 10.) This argument is not persuasive, given that a mother could do these things if she held a health care power of attorney, for example. In any event, it was the hospital's job, not State Farm's, to determine whether the assignment was valid, and dicta from the Superior Court suggesting otherwise is erroneous.

CONCLUSION

For the foregoing reasons and those set forth more fully in State Farm's Opening Brief, 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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