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Case Number 553,2011

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KINGSLEY A. SIMENDINGER, Individually and as Administratrix of the Estate of Christopher Sturmfels, and KINGSLEY A. SIMENDINGER, as Next Friend of BECK STURMFELS, a minor,	)	No. 553, 2011
Plaintiff Below, Appellant,	)	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. NO. N10C-03-221 CHT
v.	)	
NATIONAL UNION FIRE INSURANCE COMPANY,	)	
Intervenor Below, Appellee.	)	

APPELLANT'S AMENDED OPENING BRIEF

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DATED: March 8, 2012

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NATURE OF PROCEEDINGS

On February 25, 2010, an automobile collision occurred between two cars on Route 13 Northbound in New Castle County. One of those cars was occupied by both Christopher Sturmfels and Michael T. Kriner, both of whom suffered fatal injuries as a result of the collision.

On March 22, 2010, a Complaint was filed on behalf of the estates of the decedents and their families. On September 9, 2010, a check for $1,000,000, the proceeds of an underinsurance policy purchased by Messrs. Sturmfels and Kriner's employer, was issued payable to the State of Delaware and deposited with the Prothonotary by counsel for Philadelphia Indemnity Insurance Company for ultimate distribution among the decedent's spouses and dependants. On October 8, 2010, an Order granting Mr. Kriner's dependants' Motion to Intervene was granted without opposition. Thereafter, on October 13, 2010, a Partial Stipulation of Dismissal dismissing all claims against Philadelphia Indemnity Insurance Company was submitted to the Court below.

By means of a Motion to Intervene, Messrs. Kriner and Sturmfels' employer, Connections CSP, Inc. ("Connections") asserted a claim against the proceeds of the Philadelphia UIM policy that had been paid into the Court pursuant to 19 Del. C. § 2363. The Motion to Intervene was granted on December 13, 2010. On February 16, 2011, National Union Fire Insurance Company ("National") filed

a Motion to Substitute for the intervening party, Connections because National, as Connections workers' compensation insurance carrier was the real party in interest. The Motion to Substitute was granted by the Court below on March 15, 2011. National filed a Motion for Summary Judgment and Declaratory Judgment on May 5, 2011, argument was heard on the matter on June 6, 2011. The Court below issued an Opinion and Order granting National's Motion for Summary Judgment on August 12, 2011.

As a result of the Opinion and Order granting National's Motion for Summary Judgment a Motion for Re-Argument and/or Reconsideration was filed by Philadelphia Indemnity Insurance Company on August 19, 2011. Philadelphia Indemnity Insurance Company's Motion for Re-Argument and/or Reconsideration was adopted by the Plaintiffs via letter to the Court below dated September 19, 2011. Philadelphia Indemnity Insurance Company's Motion for Re-Argument and/or Reconsideration was denied by Order dated September 22, 2011.

This is the Appellant's opening brief on appeal of the Court-below's Opinion and Order of August 12, 2011 granting summary judgment and the Court-below's September 22, 2011 Order denying the Motion for Re-Argument and/or Reconsideration.

SUMMARY OF ARGUMENT

I. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY CONTRACT PRINCIPLES TO THE RESOLUTION OF THIS MATTER

II. THE COURT BELOW ABUSED ITS DISCRETION IN DENYING THE MOTION FOR RE-ARGUMENT AND/OR RECONSIDERATION.

STATEMENT OF FACTS

On February 25, 2010, Christopher Sturmfels and Michael Kriner were killed in an automobile collision when the car they were riding in was struck by a car being driven by Mark Bednash. As a result of the collision, Mr. Bednash was sentenced to 25 years at Level V. (A21) At the time of the collision, both Mr. Sturmfels and Mr. Kriner were working for Connections CSP, Inc. ("Connections"). (Exhibit A at 2) ("Ex.") At the time of the accident, the decedents were acting within the course and scope of their employment with Connections. (Ex. A at 2) Connections owned the vehicle in which the decedents were travelling when the accident occurred and had purchased an Underinsured Motorist insurance policy ("UIM") for the vehicle issued by Philadelphia Indemnity Insurance Company ("Philadelphia") with coverage limits of $1,000,000 which was valid and enforceable at the time of the collision. (A45) A check for $1,000,000, the policy limit, was issued payable to the State of Delaware and deposited with the Prothonotary by letter dated September 9, 2010 by Counsel for Philadelphia for ultimate distribution among the decedent's spouses and dependants. (A4)

Pursuant to 19 Del. C. §2304, Connections provided workers' compensation benefits to its employees via a policy of insurance with National Fire Insurance Company ("National"). (Ex. A at 2) Workers' compensation claims pursuant to

the National policy were submitted and paid in the amounts of $38,711 for Mr. Sturmfels and $31,754 for Mr. Kriner. (Ex. A at 3)

Plaintiffs filed a complaint on behalf of the decedents on March 22, 2010. (A1) Connections, seeking to enforce a lien in the amount of the total amount of workers' compensation benefits that had been paid by National, intervened in this litigation on November 19, 2010. (A5) National, as the real party in interest, was substituted for Connections on March 15, 2011. (A8) In an attempt to perfect its claim and enforce its lien, National filed a Motion for Summary Judgment and Declaratory Judgment on May 5, 2011 seeking to recover the workers' compensation benefits it had paid to the decedents' families from the proceeds of Philadelphia's UIM policy which had previously been paid into the Prothonotary's office. (A8) Oral argument was heard by the Court below on June 6, 2011. (A8) On August 12, 2011, the Court below issued an Opinion and Order granting National's Motion for Summary Judgment. (Ex. A at 11) One week after the issuance of the Opinion and Order on National's Motion for Summary Judgment, on August 19, 2011, counsel for Philadelphia filed a Motion for Re-Argument or Reconsideration. (A10) By letter dated September 19, 2011 Appellant endorsed and adopted Philadelphia's Motion for Re-Argument or Reconsideration. (A10) After oral argument on the Motion for Re-Argument or Reconsideration was heard

by the Court below, the Motion was denied for the reasons stated at oral argument on September 22, 2011. (A10) Subsequently, Plaintiffs brought this appeal.

ARGUMENT

I. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY CONTRACT PRINCIPLES TO THE RESOLUTION OF THIS MATTER

A. Question Presented

Whether the exclusionary provision contained at C(2) in the contract of insurance between Connections and Philadelphia is valid and enforceable? This issue was raised in oral argument on Appellee's Motion for Summary Judgment. (Ex. B at 34)

B. Scope of Review.

This is Appellant's appeal from the decision of the Court below on Appellee's motion for summary judgment. On an appeal from a summary judgment decision, this Court's scope and standard of review is one of *de novo* consideration.[1] "The entire record is reviewed, including the trial court's opinion."[2] If this Court determines that the court below's findings are wrong, the Court will draw their own conclusions as to the facts.[3]

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[1] *Wilson v. Joma, Inc.*, 537 A.2d 187, 188 (Del. 1988) (citing *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982)).
[2] *Id*.
[3] *Id.*

In this litigation, summary judgment may only be granted if Appellee demonstrates, on undisputed facts, that it is entitled to judgment as a matter of law.[4] In deciding Appellee's motion for summary judgment, the court below must not weigh evidence and accept that evidence which appears to have the greater weight.[5] "If it appears from the evidence there is any reasonable hypothesis upon which Appellant, as the non-moving party, may recover, the motion for summary judgment must be denied."[6]

C. Merits of Argument

1. Enforceability of the Contract Provision

The interpretation and applicability of 19 Del. C. §2363(e) and its interplay with the contract of insurance between Connections and Philadelphia is at the core of the dispute between the parties to the present litigation. Appellant contends that because this matter sounds in contract, the contract provision precluding the workers' compensation carrier from recovering benefits already paid is valid and enforceable. The policy exclusion at issue states:

> This insurance does not apply to any of the following: the direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefit or similar law. (A71)

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[4] *Id.* (citing *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718, 720 (Del. 1970)).
[5] *Id.* (citing *Continental Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969).
[6] *Id.*(citing *Vanaman*, 272 A.2d at 720).

Whereas 19 Del. C. §2363(e) provides:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensations benefits, except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, reimbursement shall be had only from the third party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved.

When confronted with conflicting terms in an insurance policy and a statute this Court has previously held that the provisions of the insurance contract control.[7] Insurance policies are contracts of adhesion and this fact does not give rise to a presumption of unenforceability.[8] The adhesive factor is an aid in contract interpretation[,] [i]f there is an ambiguity in the terms of the contract, that

[7] *Graham v. State Farm Mut. Auto. Ins. Co.*, 569 A.2d 908 (Del. 1989).
[8] *Id*.

ambiguity will be resolved against the party who drafted the contract.[9] Appellant respectfully submits that because this is a matter that sounds in contract as opposed to tort, and the contract clause contains no ambiguity that the exclusion clause in the contract is valid and enforceable. Furthermore and importantly applying the Appellee's argument would lead to a result that would solely benefit the workers' compensation carrier. In the instant matter there were $70,465 in workers' compensation benefits paid out and the Appellee wants to reduce the recovery for the spouses and dependents of the decedents by this amount by attacking the proceeds of a UIM policy that they simply are not a party to.

An examination of this Court's jurisprudence on the issue of whether insurance contract interpretation sounds in tort or contract is helpful in the apprehension and resolution of this matter; five cases present themselves as most instructive however, only four of those cases were used as the primary foundation to support the reasoning of the Court below: *State v. Donahue;*[10] *Harris v. New Castle County;*[11] *Lane v. Home Ins. Co.;*[12] *Adams v. Delmarva Power & Light Co.;*[13] However, this line of four cases fails to include the most recent and

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[9] *Id*.
[10] 472 A.2d 824 (Del. Super. 1983).
[11] 513 A.2d 1307 (Del. 1986).
[12] 1988 WL 40013 (Del. Super. Ct. Apr. 14, 1988).
[13] 575 A.2d 1103 (Del. 1990).

precedential case on the matter, *Hurst v. Nationwide Mut. Ins. Co.*[14] In contrast to the holding of the Court below, Appellant submits that the 1993 amendment of 19 Del. C. § 2363(e) renders the reliance of the Court below on the pre-1993 cases ineffective.[15] As such, in 1995, when this Court next examined the issue of a reduction of uninsured motorist benefits in favor of a workers' compensation carrier, the *Hurst* Court proclaimed, "We note that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[16] This was this Court's interpretation of the 1993 Amendment to 19 Del. C. § 2363(e) which thereby rendered invalid any previous holding regarding the limitations and application of the old 19 Del. C. § 2363(e) as it pertained to recovery of benefits paid by a workers' compensation carrier from an uninsured or underinsured carrier. When interpreting a statute, [the Court] aim[s] to ascertain and give effect to the intent of the legislature.[17] This is precisely what this Court has done in *Hurst*.

This Court has consistently held that the public policy consideration of UIM as provided by 18 Del. C. § 3902 are paramount. The weight of authority and

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[14] 652 A.2d 10 (Del. 1995). Appellant concedes that it inadvertently did not initially bring this case to the Court's attention; however as is explained *infra* Appellant believes it is entitled to rely on the Supreme Court's *Hurst* decision.
[15] Del. Laws ch. 116 § 1 (1993) (amending 19 Del. C. § 2363(e)).
[16] *Hurst*, 652 A.2d fn 2.
[17] *Hoennicke v. State*, 13 A.3d 744 (Del. 2010).

sound public policy support our decision that motorist coverage is properly considered personal to the insured.[18] If as the Appellee suggests this matter sounds in tort and not contract, and 19 Del. C. § 2363(e) works to reduce the amount of UIM benefits available to the insured, this would completely violate the well established public policy provisions of 18 Del. C. § 3902.

Unsurprisingly, as Courts across the nation have handled the issue of whether a statutory right to subrogation exists for benefits realized pursuant to a UIM policy various results have been reached. In fact, Appellee cited to a case from Maine that supported the proposition that a statutory right of subrogation exists where the Legislature has codified such a provision. (Ex. B at 12-13) However, the Appellee's inquiry into the state of this issue falls short. Consider for example the Washington Court of Appeals conclusion in *Department of Labor & Industries v. Cobb.*[19] The issue before the Washington Court of Appeals was whether a right to reimbursement exists for a workers' compensation carrier pursuant to Washington law when a claimant has recovered through her employer's underinsured motorist coverage, the Court held that the workers' compensation carry maintained no right to reimbursement.[20] Further, Appellant respectfully submits that the Court of Appeals of Maryland's holding in *Erie Ins.*

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[18] *Frank v. Horizon Assur. Co.*, 553 A.2d 1199 (Del. 1989)
[19] 797 P.2d 536 (Wash. Ct. App. 1990).
[20] *Id.* at 537-538.

Co. v. Curtis[21] a case which is substantially similar in its facts is persuasive. In *Erie*, the Maryland Court of Appeals held that a workers' compensation insurer cannot assert a statutory lien for compensation paid to an injured worker against that worker's recovery of uninsured motorist benefits,[22] irrespective of whether the worker's uninsured motorist coverage is provided under a policy issued to the worker or one issue to his employer.[23] In support of its holding, the Maryland Court of Appeals wrote, "Nonetheless, we agree with the rationale provided by those courts which have held that the workers' compensation carrier is not entitled to a lien on uninsured motorist benefits provided by an employer's insurance policy."[24] Among the reasons stated by these courts are: (1) the insurance proceeds are not converted from contract payments to damages simply because the employee is the intended beneficiary rather than the contracting party; (2) the uninsured motorist coverage remains a contractual liability regardless of who pays the premium; (3) the uninsured motorist carrier does not insure the tortfeasor against liability, but insures the employee against the risk of inadequate compensation if he is injured in an accident with an uninsured motorist; (4) payments made by the uninsured motorist carrier are not payments made by or on

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[21] 623 A.2d 184 (Md. Ct. App. 1993).
[22] For the purpose of these analyses, Appellant submits that there is no functional difference between uninsurance or underinsurance benefits. *See Lane v. Home Ins. Co.*, 1988 WL 40013 (Del. Super. Ct. Apr. 14, 1988).
[23] *Erie Ins. Co. v. Curtis*, 623 A.2d 184, 190 (Md. Ct. App. 1993).
[24] *Id.*

behalf of the uninsured motorist tortfeasor, nor do such payments discharge *pro tanto* the liability of the uninsured motorist; and (5) the workers' compensation carrier is not a third-party beneficiary under the uninsured motorist contract.[25] The United States Court of Appeals for the Tenth Circuit distilled the principles found throughout these cases when it stated:

> Although [Kansas] Courts have not confronted this issue, many other jurisdictions have, and all seem to give the same answer: a workman's compensation carrier's subrogation rights do not extend to actions based on uninsured motorist polices. The common thread of analysis in all these cases is that under workmen's compensation statutes with similar language subrogation is allowed only for actions in tort; and actions based on uninsured motorist polices sound in contract not tort.[26]

To be sure, whether this matter sounds in tort or contract was an issue that was raised before the Court below. (Ex. B at 4)

At the Motion hearing held on June 6, 2011, in an effort to persuade the Court that there were no contractual implications in the matter *sub judice* Appellee stated, "As explained, State Farm incorrectly classifies underinsurance motorist

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[25] *Erie*, 623 A.2d at 190 citing, *Holmes v. Washington Metropolitan Area Transit Authority*, 731 F. Supp. 1115 (D. Wash. D.C. 1990); *Cooper v. Younkin*, 339 N.W.2d 552 (Minn. 1983); *Barker v. Palmarin*, 799 S.W.2d 117 (Mo. Ct. App., W.D. 1990); *Merchants Mut. Ins. Group v. Orthopedic Professional Association*, 480 A.2d 840 (N.H. 1984) superseded by statute as stated in *Wolters v. American Republic Ins. Co.*, 827 A.2d 197 (N.H. 2003); *State Farm Mut. Auto Ins. Co. v. Board of Regents*, 174 S.E.2d 920 (Ga. 1970); *State Compensation Ins. Fund v. Gulf Ins. Co.*, 628 P.2d 182 (Co. Ct. App., 2nd Div. 1981).

[26] *Id.* citing *Knight v. Insurance Co. of North America*, 647 F.2d 127 (10th Cir. 1981).

claims as purely contractual, which is what Mr. Nitsche was arguing before." (Ex. B at 37) Appellee was citing to *Miller v. State Farm Mut. Auto Ins. Co.*[27] to support the proposition that the instant matter sounds in tort and not contract, however, the Appellee's rationale cannot withstand scrutiny. In order to appreciate the tort/contract distinction, an examination of this Court's holding in *Rapposelli v. State Farm Mut. Auto Ins. Co*[28] is helpful. In *Rapposelli* this Court stated:

> Our precedent charts a circuitous, but consistent and equitable path: tort law applies to proceedings that result from the accident, and contract law governs only those aspects of the underinsured motorist claim that are not controlled by the resolution of facts arising from the accident. We could determine this occasionally narrow distinction by considering whether the determination of fault and the extent of damages arising from the accident affect resolution of the parties' disputed issue. For example, parties could resolve the existence of coverage or length of the statute of limitations before or without knowledge of the accident. On the other hand, damages and fault require knowledge of the accident and its results. While the former set of issues constitutes a contract action, tort governs the latter set.[29]

In the case *sub judice* a determination of whether policy exclusions are valid, which is for all intents and purposes a coverage matter, could be resolved before or without knowledge of the accident and is therefore a contract matter. Because this is a matter that sounds in contract, the exclusionary language of the UIM policy

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[27] 993 A.2d 1049 (Del. 2010).
[28] 988 A.2d 425 (Del. 2010).
[29] *Id.* at 429.

must be given its full effect. Stated differently, neither fault nor measure of damages are at issue in the instant matter, and as such, under the *Rapposelli* holding, the matter *sub judice* sounds in contract.

In light of the foregoing, Appellant respectfully suggests that this Court reverse the Court below and hold that the fairness, equity, public policy and precedent all weigh in favor of the Appellant.

2. Lien vs. Credit

Assuming *arguendo* that this Court affirms on the matter of the enforceability of the contract provision, the matter of credits and liens is ripe for adjudication and clarification. 19 Del. C. § 2363(e) addresses the issue of liens, i.e. the reimbursement of monies already paid and credits, i.e. future payments. The statute requires that future payments be treated, "as an advance payment by the employer on account of any future payment of compensation benefits, except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, reimbursement **shall be had only from the third-party liability insurer**…"[30] Therefore, because the instant matter only involves a UIM policy and not a liability policy, 19 Del. C. § 2363(e) does not apply to the credit, specifically the death benefit. Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the

[30] 19 Del. C. § 2363(e) *emphasis added*.

English language.[31] Accordingly, the phrase, "shall be had only from the third-party liability insurer" must be construed according to the common and approved usage of the English language and under no common or approved usage of the English language is third-party liability insurer synonymous with first-party UIM insurer. Therefore, inasmuch as §2363(e) is silent with respect to a credit for a UIM policy; it does not govern the distribution or allocation of the credit in the instant matter.

Accordingly and in light of the foregoing, the Court below erred in granting the National's Motion for Summary Judgment in at least 2 critical aspects. First, the Court failed to recognize that this matter sounds in contract and not in tort, thereby rendering an otherwise proper and appropriate exclusionary clause ineffective. Second, the Court erred by failing to apprehend the inapplicability of 19 Del. C. § 2363(e) to a workers' compensation credit in the context of a UIM policy.

[31] 1 Del. C. § 303

II. THE COURT BELOW ABUSED ITS DISCRETION IN DENYING THE MOTION FOR RE-ARGUMENT.

A. Question Presented

Whether the Superior Court abused its discretion by overlooking controlling precedent? This issue was raised in oral argument on the Motion for Re-Argument and/or Reconsideration. (Ex. D at 16).

B. Scope of Review

This is Appellant's appeal from the decision of the Court below denying the Motion for Re-Argument. On appeal from the Superior Court's denial of a Motion for Re-Argument and/or Reconsideration, this Honorable court must review the Superior Court's denial under an abuse of discretion standard.[32] When an act of judicial discretion is under review, this Court may not substitute its own judgment for that of the trial court if the trial court's ruling was based on conscience and reason as opposed to capriciousness or arbitrariness.[33]

C. Merits of Argument

In denying the Motion for Re-argument and/or Reconsideration, the Court below focused primarily on the standing of the movant, Philadelphia and concluded that because there was no standing, the motion for argument should be

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[32] *Williams v. Williams*, 862 A.2d 386 (Del. 2004).
[33] *Crews v. Townsend*, 567 A.2d 419 (Del. 1989).

denied.[34] (Ex. D at 22) Appellant's adoption of the Motion to Re-Argue and or Reconsider vitiates the standing issue because it is not disputed between the parties that the Appellant had standing to file a Motion for Re-Argument and/or Reconsideration and the effect of the adoption makes the Motion for Re-Argument and/or Reconsideration effectively that of the Appellant.[35] Apparently the Court below reached its conclusion but failed to consider the effect Appellant's adoption of Philadelphia's Motion for Re-Argument and/or Consideration.

A motion for Re-Argument is not a device for raising new arguments or stringing out the length of time for making an argument.[36] It will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.[37] A party seeking to have the Court reconsider the earlier ruling must demonstrate newly discovered evidence, a change in the law or manifest injustice.[38]

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[34] The Court below went on to state that the *Hurst* decision did not apply, this will be discussed in greater detail *infra*.
[35] *State v. Nieves-Torres*, 2011 WL 2083958 (Del. Super. Ct. Apr. 25, 2011) *See also Black's Law Dictionary* 45 (5th ed. 1979) Appellant further notes that did not independently file the Motion for Re-argument and/or Reconsideration because it was the position of the Appellant that this was and remains a matter that requires clarification from this Court. (Ex. D at 15).
[36] *Eden v. Oblates of St. Francis de Sales*, 2007 WL 3380049 (Del. Super. Ct. Mar. 30, 2007).
[37] *Id*.
[38] *Id.*

In the case *sub judice* the record is manifest that neither the Appellee nor the Court below considered the General Assembly's 1993 amendment of 19 Del. C. § 2363 and accordingly misconstrued the *Hurst* opinion, "How [19 Del. C. §2363(e)] interacts with an employer-purchased policy that expressly precludes recovery of workers' compensation benefits appears to be a question of first impression." (Ex. A at 6)

We note that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage.[39] This statement of the Delaware Supreme Court is in direct contravention with the preceding statement of the Delaware Superior Court in its August 12, 2011 Opinion and Order on the Motion for Summary Judgment. (Ex. A) Furthermore, this Court's proclamation in footnote 2 of *Hurst* when examined in light of the underlying facts of this litigation is precedential and controlling. Consider the following argument of the Appellee made at oral argument on the Appellee's Motion for Summary Judgment which was the first opportunity for the Appellee to raise *Hurst*:

> Mr. McKenty: Well, Judge, if you look up 2363(e) - - I'll tell you why it's important. If you look up 2363(e) - - I've got it here somewhere - - and you look at the footnotes under the statute - - here it is.

[39] *Hurst*, 652 at fn(2).

> THE COURT: I have it right here.
>
> Mr. McKenty: And then you go back to the footnotes. Subrogation Against Uninsured Motorist Benefit. This section says: "Conferred upon the employer-payor of compensation benefits a right of subrogation against uninsured motorist benefits received by an employee under a policy procured by the employer." Harris versus New Castle County. And that's one of the principal cases that we're relying on. (Ex. B at 18)

At oral argument counsel for National cited to one footnote of the statute relating to subrogation rights but apparently ignored, overlooked or incorrectly determined inapplicable the very next footnote which cites the Supreme Court's holding in *Hurst*.[40] When the *Hurst* language was brought to the Appellee's attention the Appellee contended that because the *Hurst* language is contained in a footnote, it is not controlling, "and to suggest that that footnote would vitiate and turn on its head an entire statute is ridiculous." (Ex. D at 22) However, Appellee fails to address the fact that the *Hurst* language is cited **immediately** after the language in the comments to 19 Del. C. §2363 and carries the same weight. In contrast to the Appellee's contention that the language in *Hurst* vitiates 19 Del. C. §2363(e), Appellant respectfully submits that what this Court has done with the *Hurst* language goes to the core of the role of the Supreme Court, to say what the law is.

[40] *See* 19 *Del*. *C*. § 2363.

In light of the foregoing, should the Court Order denying the Motion for Re-Argument and/or Reconsideration be affirmed, manifest injustice would result. More specifically, manifest injustice would result if there is a payment to the Workmen's Compensation Insurance Carrier in direct contravention of the laws of the State of Delaware as written by the Delaware General Assembly and as interpreted by the Delaware Supreme Court.[41]

[41] *See Hurst*, 652 A.2d at fn 2.

CONCLUSION

For the reasons set forth in the attached Brief, Appellant respectfully requests that the Order Granting the Appellee's Motion for Summary Judgment be REVERSED or in the Alternative that the Order Denying the Motion for Re-Argument and/or Reconsideration be REVERSED.

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