IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AMENDED ANSWERING BRIEF OF APPELLEE, NATIONAL UNION FIRE INSURANCE COMPANY

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DATED: March 9, 2012

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NATURE AND STAGE OF THE PROCEEDINGS

This appeal arises from a fatal automobile accident which occurred on February 25, 2010 when a vehicle driven by Mark Bednash struck a vehicle occupied by Christopher Sturmfels and Michael T. Kriner. At the time of the accident, Christopher Sturmfels and Michael T. Kriner were working for Connections CSP, Inc. ("Connections"). The Appellant's estate filed suit on March 22, 2010.

On May 5, 2011, the National Union Fire Insurance Company (Workers Compensation Carrier) ("National Union") filed its Motion for Summary Judgment and Declaratory Judgment ("Summary Judgment Motion") seeking an Order to declare that National Union is entitled to reimbursement and a credit for its workers compensation lien, from the uninsured motorist policy. Plaintiffs filed a Response to National Union's Summary Judgment Motion requesting denial of the Motion on the basis of the exclusionary language in the policy. Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity") did not file a response. Oral argument on the Summary Judgment Motion was held on June 6, 2011. The Superior Court issued an Opinion and Order on August 12, 2011 granting National Union's Summary Judgment Motion.

On August 19, 2011, Philadelphia Indemnity filed a Motion for Reargument

and/or Reconsideration of the Court's Opinion and Order ("Motion for Reargument"). National Union filed their Response to Philadelphia Indemnity's Motion for Reargument on September 16, 2011. On September 19, 2011, Appellant filed late a letter to the Court attempting to endorsing and adopting Philadelphia Indemnity's Motion for Re-Argument.

The Court heard oral argument on Philadelphia Indemnity's Motion for Reargument on September 22, 2011. An Order was entered on September 22, 2011 denying the Motion for Reargument based on lack of standing by Philadelphia Indemnity. While the Superior Court allowed Appellant's counsel to speak at the oral argument it was noted on the record that Appellant could not reargue because he had only filed a late adoption of Philadelphia Indemnity's Motion for Reargument.

On October 17, 2011, Appellant filed a Notice of Appeal to the Delaware Supreme Court requesting that the Court review 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 THE ARGUMENTS

I. Denied. The Superior Court did not commit reversible error when they applied contract principles in this matter. The Superior Court correctly granted National Union Fire Insurance Company's Motion for Summary Judgment and Declaratory Judgment. The Superior Court reviewed the relevant precedent and the plain meaning to 19 Del. C. §2363 when ruling that "it is clear that an employer-payor has a statutory right to recover worker's compensation benefits from any recovery to which its employee is entitled." (Ex. A at 10).

II. Denied. The Superior Court's denial of Philadelphia Indemnity Insurance Company's Motion for Re-Argument and/or Reconsideration was the correct ruling of law. The Superior Court thoroughly analyzed the well-settled Delaware case law which states motions for reconsideration "should only be considered by the Court only under extraordinary circumstances, such as where the Court has obviously misunderstood a party, made an error of apprehension, decided a case on issues not argued, or where there has been a significant change in the law." Crowell Corp. v. Himont USA, Inc., 1994 Del. Super. LEXIS 557 (1994). In this case, none of the accepted reasons for granting reargument were met and therefore the Court was correct in their denial of Philadelphia Indemnity Insurance Company's Motion for Re-Argument and/or Reconsideration.

APPELLEE'S COUNTER STATEMENT OF FACTS

This appeal arises from a fatal automobile accident which occurred on February 25, 2010 while Appellant was on the job working for Connections. Mr. Sturmfels' employer Connections, had an underinsurance policy with Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity") with policy limits of $1,000,000. (A45)

Pursuant to 19 Del. C. §2304, Connections through National Union Fire Insurance Company ("National Union") provided worker's compensation benefits to their employees. A worker's compensation claim was filed for Mr. Sturmfels. 38,711dollars in worker's compensation benefits were paid. (Attachment A at 3) Additionally, a worker's compensation claim was filed for Mr. Kriner. 31,754 in worker's compensation benefits were paid. (Attachment A at 3)

On March 22, 2010, a Complaint was filed on behalf of the estates of the decedents and their families. (A1) Philadelphia Indemnity tendered and interpled the policy limits of $1,000,000 on September 10, 2010. (A4) The Philadelphia Indemnity policy contained the following exclusion "This insurance does not apply to any of the following… 2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law." (A46)

National Union filed a Motion to Intervene on November 19, 2010. (A5) The Motion to Intervene was granted on December 13, 2010. (A5) On May 5, 2011 National Union filed its Motion for Summary Judgment and Declaratory Judgment ("Summary Judgment Motion") seeking an Order to declare that National Union is entitled to reimbursement and a credit for its workers compensation lien, from the uninsured motorist policy pursuant to 19 Del.C., §2363. (A8) Oral argument was held on the Summary Judgment Motion on June 6, 2011. (A9) The Court issued its Opinion and Order on August 12, 2011. (Attachment A)

Philadelphia Indemnity filed a Motion for Reargument and/or Reconsideration of the Court's Opinion and Order ("Motion for Reargument"). (A34) National Union filed their Response to Philadelphia Indemnity's Motion for Reargument on September 16, 2011. On September 19, 2011, Plaintiffs filed late a letter to the Court endorsing and adopting Philadelphia Indemnity's Motion for Re-Argument. (A41) The Court heard oral argument on Philadelphia Indemnity's Motion for Reargument on September 22, 2011. An Order was entered on September 22, 2011 denying the Motion for Reargument. (Attachment B)

Appellant now appeals the August 12, 2011 and September 22, 2011 Orders of the Superior Court.

I. THE COURT BELOW PROPERLY APPLIED CONTRACT PRINCIPLES IN THE GRANTING OF SUMMARY JUDGMENT

A. QUESTION PRESENTED

Whether the exclusionary provision contained in the contract of insurance between Connections and Philadelphia is valid and enforceable?

B. SCOPE OF REVIEW

"We review rulings on motions to dismiss pursuant to Rule 12(b)(6) and motions for summary judgment *de novo*." *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). "We review a grant of summary judgment *de novo*." *Asbestos Worker's Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2006). "The scope of review on appeal of a decision on summary judgment is *de novo*." *Wilmington Trust Co. v. Aetna Cas. & Sur. Co.*, 690 A.2d 914, 916 (Del. 1996).

C. MERITS OF ARGUMENT

1) Enforceability of the Contract Provision

Appellant's argument centers around the exclusionary language in the Philadelphia Indemnity underinsurance policy "This insurance does not apply to any of the following... 2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law."(A46)

Appellant erroneously believes the statutory right of recovery granted by *19 Del. C. §2362(e)* is eviscerated by the language in the underinsurance policy.

19 Delaware Code §2362(e) states:

> 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...

Appellant contends that the exclusionary language in the policy is valid and enforceable however cites no case law to support that contention. While there are no Delaware cases that address the issue of whether the exclusion from the Philadelphia Indemnity policy is valid. There are several cases in Delaware which appear to suggest that that exclusion would be invalid.

As noted by Delaware statutory law and case law, the State has firmly created a right of subrogation for the employer as to subrogation against third parties. As to the issue of the invalidity of the exclusion, the Court has indicated that any insurance policy provisions which reduce or limit underinsured motorist coverage to less than that prescribed by the statute are void. *State Farm v. Washington*, 641 A.2d 449 (Del. 1994). The Court further held that "It is well

settled that the public policy of this State is to narrowly construe exclusions and limitations on statutorily required insurance coverage." *Id.* At 451.

In *Moore*, the Supreme Court states that "The subrogation provision prevents a double recovery by the employee for any one industrial injury and permits the employer to recoup its compensation benefits." *Moore v. General Foods*, 459 A.2d 126,128 (Del. 1983). The Court further notes that a litigating party has the right to settle a third party action however the settlement is a not a bar to another interested party for claims that it may have.

In *Nost*, the Superior Court held that a no-fault insurance policy exclusion that denies coverage to the extent of workers' compensation payments is invalid as a matter of law. *Nost v. The Home Indemnity Company*, Del. Super., No. 81C-FE-134, Taylor, J. (June 30, 1982). While that case is not directly on point it does indicate that the Court has struck down as invalid under the law an insurance policy exclusion that attempted to limit workers' compensation payments. *Nost* would be analogous to this case in that the exclusion in the Philadelphia Indemnity policy attempts to strike down and/or limit the carrier's statutorily prescribed worker's compensation subrogation rights.

Despite Appellant's contentions, the only cited case that has addressed this specific exclusionary language is *Legassie*. The Maine Court addressed in *Legassie* whether an exclusion in the UIM carrier's policy directly conflicts with a

statutorily defined right of the employer or workers compensation carrier to a lien held against any damages subsequently recovered from a liable third party. *Legassie v. Deane*, 1999 Me. Super. LEXIS 80. The policy included a provision in the UIM carrier's policy which is almost identical to the exclusion in the Philadelphia Indemnity policy. That provision stated that this insurance does not apply to "...the direct or indirect benefit of any insurer or self insurer under any workers' compensation, disability benefits, or similar law." The Maine court stated in their opinion "[the provision] of the instant policy unambiguously would operate to defeat this lien by restricting the right of the worker's compensation carrier to obtain repayment of sums paid to the employer on account of the compensable injury. Thus, the terms of this insurance policy conflict with the statutory provisions, and the latter prevail." *Id* at 4.

Similar to the case at bar, the provision in the insurance policy conflicts with a statutorily prescribed right. Insofar as the claimants argue that the Underinsured Policy excludes benefits to a worker's compensation carrier, that provision is unenforceable. It is clear that based on the Court's invalidation of other exclusions which violate Delaware law and the *Legassie* case that Court would invalidate the exclusion indicated in the Philadelphia Indemnity uninsured motorist benefits policy.

Additionally, Appellant contends that when there are conflicting terms in an insurance policy and a statute that the policy language controls. In support of that argument, Appellant relies upon *Graham v. State Farm*, 565 A.2d 908 (Del. 1989). Appellant fails to address that, in the *Graham* case, there was no conflict between the contractual language and statute as there is in this case. In contrast, *Graham* dealt with an arbitration provision in an insurance policy which was not contradicted by statute. It is well-settled Delaware law that a "contract of adhesion may be declared unenforceable, in whole or in part, if its terms are unconscionable." *Id* at 912. The Court goes on to further state that for a contract clause to be unconscionable, its terms must be "'so one-sided as to be oppressive.'" *Id.*

The Superior Court recently held that "absent a waiver of that right, § 2363 is applicable." *Phillips v. Parts Depot, Inc.*, 2010 Del. Super. LEXIS 137, 12. A waiver is a "voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect. It implies knowledge of all material facts and of one's rights, together with a willingness to refrain from enforcing those rights." Id. In the instant action, the workers compensation carrier never had knowledge of the exclusionary language in the Philadelphia Indemnity policy and therefore enforcement of such a provision against them would unconscionable.

2) Appellee has a Statutory Right of Recovery under *19 Del. C. §2362(e)*

Next, Appellant tries to defeat clear well-established case law allowing an Employer or Worker's Compensation Carrier to assert their lien against an employer paid UIM policy. Appellant mistakenly relies on the Hurst case as well as the addition of the following language to *19 Del. C. §2362(e)* in 1993 "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."

Appellant's entire appeal is based off one seemingly misplaced footnote in *Hurst* which states "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. 19 Del. C. §2363." *Hurst v. Nationwide*, 652 A.2d 10, 16 (Del. 1995). To Appellant's great detriment, he fails to acknowledge that the *Hurst* case did not in any way involve *19 Del. C. §2363* and instead was purely a case involving stacking of policies under *18 Del. C. §3902*. The *Hurst* case is frequently cited for the holding "that reduction must be set off against the claimant's total damages for bodily injury, rather than being set off against the limits of the claimant's

underinsurance policy." No prior cases have ever cited *Hurst* for that seemingly misplaced and inapplicable footnote. However, Appellant now attempts to overrule years of well-established case law and an employer and/or worker compensation carrier's statutorily guaranteed right to a lien based on one footnote.

Appellant also relies on the Maryland Court of Appeals case of *Erie Insurance Co.* to support his contention that the employer and/or worker compensation carrier's cannot seek reimbursement of their lien from UIM policy funds. *Erie Insurance Co. v. Curtis* , 623 A.2d 184 (Md. Ct. App. 1993). Appellant fails to address the fact that the Maryland's statute differs greatly from *19 Del. C. § 2363.* The Maryland Court in denying any lien for worker compensation paid held that "the workers' compensation carrier, was entitled to a lien against the uninsured motorist benefits payable to Curtis, after the offset of *Article 48A, § 543(d)* is applied by the uninsured motorist carrier, there are no funds which can be identified with the workers' compensation carrier's lien." *Id* at 191. The applicable Maryland statute requires a reduction of uninsured motorist benefits to the extent of worker compensation received. In contrast, the Delaware statute grants a right of reimbursement for workers compensation benefits paid.

Further, Appellant relies upon the decisions in the out-of-state cases of *Department of Labor v. Cobb*, 797 P.2d 536 (Wash. Ct. App. 1990) and *Knight v. Insurance Co. of North America*, 647 F.2d 127 (10th Cir. 1981) to support his

contention that the workers compensation carrier is not entitled to their statutory right of reimbursement from a UIM policy. This contention however is undermined by the well-established case law in Delaware. Appellant fails to acknowledge the clear precedent in Delaware of allowing a worker's compensation carrier to recover its lien from the proceeds of an employer purchased UIM policy. Delaware law has recognized time and again an employer/worker's compensation carrier's superseding right of reimbursement for workers compensation benefits paid. Despite Appellant's assertions that this matter sounds in contract not tort law and, therefore, *19 Del. C. §2363* reimbursement is not allowed from a UIM policy there is a clear precedent in Delaware to the contrary.

In *Lane*, the Superior Court cited a Supreme Court decision ruling that "the employer/carrier's statutory right of reimbursement for compensation benefits paid to an injured employee has been extended to the employee's recovery of uninsured motorist benefits." *Lane v. The Home Insurance Company*, 1988 Del. Super. LEXIS 142 (Del. Supr.). The court explained that "in light of the *Harris* holding, Home, as the workman's compensation carrier, has a right of reimbursement from the proceeds received by Lane from the employer's uninsured motorist coverage." *Harris v. New Castle County*, 513 A.2d 1307 (Del. Super. 1986). The Court also wrote, "The Delaware Supreme Court found that the words "[A]ny recovery" in § 2363(e) must be taken to intend subrogation to be all-inclusive; in other words, to

include indirect as well as direct recovery of damages from a third-party." Citing *Id* at 1309.

The Superior Court in *McDougall* held that "an employer's right to reimbursement is broader than just recoveries in tort action... the "obvious purpose of *[§ 2363]* is that the recipient of compensation benefits shall not collect both the statutory compensation and also the full damages for the injury." *McDougall v. Air Products & Chemicals, Inc.*, 2005 Del. Super. LEXIS 289, 16 (Del. Supr.). Further, the court stated that the public policy against the claimant recovering twice for a single loss requires that the "underlying legislative intent take precedence over a literal interpretation of statutory language that arguably supports a contrary result." *Id.*

The Supreme Court recently held in *Rapposelli*, "we construe statutes "to give a sensible and practical meaning to [a] statute as a whole in order that it may be applied in future cases without difficulty. Legislative intent takes precedence over the literal interpretation of a statute when the two would lead to contrary results." *Rapposelli v. State Farm*, 988 A.2d 425, 427 (Del. 2010). "A plaintiff should not obtain greater recovery from his underinsured motorist coverage than the amount of his entitlement to recover from a negligent motorist -- we best achieve this result by applying the same principles of tort law to each source of recovery." *Id* at 428. It has been enumerated countless times that the legislative

intent of *19 Del. C. § 2363(e)* is to prevent double recovery by an employee. This Court held in *Calhoun*, "the Workers' Compensation Act does expressly preclude the receipt of certain duplicate benefits. Indeed, the purpose underlying 19 Del. C. § 2363(e) is to prevent the employee from receiving compensation for wage losses from a third-party tortfeasor when the losses have already been compensated through workers' compensation." *State v. Calhoun,* 634 A.2d 335, 337 (Del. 1993). Appellant has failed to give any reason why this Court should contravene the expressed intent of *19 Del. C. § 2363(e)* to preclude double recovery.

While this Court in *Johnson* limited an employer's right of reimbursement to the proceeds of uninsured motorist coverage paid for by the employer, stating that if the employee had paid for the uninsured motorist coverage, the employer would have no reimbursement rights. *State v. Johnson*, 541 A.2d 551 (Del. 1988). This Court in *Calhoun*, stated that *Johnson* "stands for the proposition that an employee cannot secure double recovery for a single loss where both sources of recovery emanate from the employer." *Calhoun*, 634 A.2d 335, 338.

The Superior Court in *Donahue* held that "since the proceeds, pursuant to an uninsured motorist policy, for all intents and purposes, represent the damages an uninsured motorist would be required to pay upon adjudication of guilt in a tort action but for his lack of insurance" therefore UIM proceeds are to be included in the statutory mandate that an employer "may recover any amount which the

employee or his dependents would be entitled to recover in an action in tort." *State v. Donahue*, 472 A.2d 824, 829 (Del. Super. 1983).

Applying these holdings to the case at bar should not only permit but require reimbursement of the workers compensation carrier's lien from the Philadelphia Indemnity policy as it was an employer funded policy. To hold otherwise would be in great contrast to this Court's holdings in *Johnson* and *Calhoun*, as well as the legislative intent of *19 Del. C. § 2363(e)*. Moreover, not allowing the worker's compensation to recover its lien from the proceeds of an employer purchased UIM policy would contradict the public policy which disallows double recovery for the injured party. In the instant matter, Appellant has already received payment from the workers compensation carrier and to permit Appellant to receive the entire proceeds of the employer paid UIM policy would permit such a double recovery. While the legislative intent behind *18 Del. C. §3902* is to "compensate fully innocent drivers" and in this case Appellant has been fully compensated, to now disallow the worker's compensation carriers lien would permit a double recovery which eviscerates the purpose of *19 Del. C. § 2363(e)*. Furthermore, disallowing an employer from recovering its worker's compensation lien from an optional UIM policy would act to discourage employers to purchase such policies for the benefit of their employees and actually limit the universe of benefits available to an injured employee.

Therefore, in accordance with the established precedent in Delaware, this Court should uphold the Superior Court's Order Granting Summary Judgment and Declaratory Judgment in favor of National Union Fire Insurance Company.

II. THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR RE-ARGUMENT

A. QUESTION PRESENTED

Whether the Superior Court abused its discretion by overlooking controlling precedent?

B. SCOPE OF REVIEW

Appellant appeals the Court's Order denying Philadelphia Indemnity's Motion for Reargument and/or Reconsideration of the August 12th Opinion and Order Granting the Intervenor's Motion for Summary Judgment. Motions for reconsideration "should only be considered by the Court only under extraordinary circumstances, such as where the Court has obviously misunderstood a party, made an error of apprehension, decided a case on issues not argued, or where there has been a significant change in the law." *Crowell Corp. v. Himont USA, Inc.*, 1994 Del. Super. LEXIS 557 (1994).

C. MERITS OF ARGUMENT

The Superior Court was correct in the denial of Philadelphia Indemnity's Motion for Reargument and/or Reconsideration of the August 12th Opinion and Order Granting the Intervenor's Motion for Summary Judgment. Appellant contends that the Superior Court erred in denying Philadelphia Indemnity's Motion for Reargument and/or Reconsideration on the basis of standing as Appellant

erroneously believes the late and ineffective adoption of Philadelphia's Motion for Reargument and/or Reconsideration granted them standing to argue.

On August 19, 2011, Philadelphia Indemnity filed a Motion for Reargument and/or Reconsideration of the Court's Opinion and Order ("Motion for Reargument"). Only three days prior to oral argument on Philadelphia's Motion for Reargument, September 19, 2011, Plaintiffs filed a late letter to the Superior Court attempting to adopt Philadelphia Indemnity's Motion for Reargument. (A41)

In denying Philadelphia Indemnity's Motion for Reargument the Superior Court relied upon well-settled case law. "Under Delaware law, reargument will usually be denied unless it is shown that the Court overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended that law or the facts such as would affect the outcome of the decision." *Lovett v. Chenney*, 2007 Del. Super. LEXIS 110 (Del. Supr.). Motions for reconsideration "should only be considered by the Court only under extraordinary circumstances, such as where the Court has obviously misunderstood a party, made an error of apprehension, decided a case on issues not argued, or where there has been a significant change in the law." *Crowell Corp. v. Himont USA, Inc.*, 1994 Del. Super. LEXIS 557 (Del. Supr.). A moving party has the burden of demonstrating "newly discovered evidence, a change in the law or manifest injustice." *Lovett* at 2. The *Lovett* case is very similar to the Superior Court action in that Philadelphia

Indemnity had an opportunity to raise the arguments asserted in their motion for reargument in response to the Summary Judgment Motion and yet they failed to file any response.

Additionally, the Superior Court relied upon *Kirkwood Fitness* which stated that "because the defendants in this case have no interest which would be affected by the declaration, there is no actual controversy, and thus, a declaratory judgment would be inappropriate." *Kirkwood Fitness & Racquetball Clubs, Inc. v. Mullaney*, 2011 Del. Super. LEXIS 386 (Del. Supr.). As of September 10, 2010, Philadelphia Indemnity tendered the policy limits in this case and therefore had no interest which would be affected by this Court's August 12th Order and Opinion, therefore there is no actual controversy. (A4)

Appellant incorrectly asserts that the Court below allowed Appellant to argue at oral argument on Philadelphia Indemnity's Motion for Reargument held on September 22, 2011. While the Court below gratuitously allowed Appellant to speak at the September 22, 2011 oral argument it was made clear numerous times on the record that Mr. Nitsche did not have standing to argue. After the Court ruled that Philadelphia Indemnity lacked standing, the attorney stated to the Court "Then possibly Mr. Nitsche has standing to make the argument, based on *Hurst*, since he adopted my papers." (Attachment D at 9) The Court responded to that by denying Mr. Nitsche's standing to argue stating "unfortunately, it's a little late for

him to raise it, since they didn't do it in the first place..." (Attachment D at 9). Again the Court, speaking to counsel for Philadelphia Indemnity stated "Now, Mr. Nitsche has some argument whereby he can raise it, that's fine, but he didn't move to reargue. It rises or falls on you. Because if he didn't, standing alone, he didn't ask to reargue." (Attachment D at 10). It is clear from the undisputed record of the oral argument held on September 22, 2011 that Appellant/ Plaintiffs' late and defective adoption of Philadelphia Indemnity's Motion for Reargument was insufficient to garner standing to make an argument at that hearing.

Philadelphia Indemnity's Motion for Re-argument and/or Reconsideration did not demonstrate any newly discovered evidence, a change in the law or manifest injustice required. There was no evidence presented that the Court has obviously misunderstood a party, made an error of apprehension, decided a case on issues not argued, or where there has been a significant change in the law. In fact, the case that Appellant is now relying upon as new evidence was a 1994 case in which counsel for the Appellant argued and therefore was clearly aware of and able to raise at oral argument on the Motion for Summary Judgment. In accordance with *Lovett* and *Kirkwood Fitness*, this Court should affirm the Superior Court's denial of Philadelphia Indemnity's Motion for Re-argument and/or Reconsideration.

Finally, Appellant appeal should be dismissed pursuant to Supreme Court

Rule 29(b). Appellant incorrectly asserts that "the Superior Court's rulings of both August 12, 2011 and September 22, 2011 adjudicated all the claims and the rights and liabilities of all the parties." (Appellant's Response ¶ 6). The Supreme Court in *State Farm Mutual Automobile Insurance Company v. Harris*, 744 A.2d 988 (Del. 1999) held "a judgment regarding any claim or any party does not become final until the entry of the last judgment that resolves all claims as to all parties."

According to the certified docket from the Court below, there has been no dismissal of the claims against either Defendants Mark Bednash or Terry Bednash.(A1-A11) Additionally, on July 21, 2011, Appellant/Plaintiff filed a Subpoena to Happy Harry's Inc. a/k/a Walgreen's to procure all pharmacy records pertaining to Defendant Mark Bednash. (A9) Neither Order resolved all claims as to all parties in the Court below since they did not dismiss the litigation still pending against the Bednash Defendants. Appellant failed to file an application for certification of the interlocutory appeal as required by Supreme Court Rule 42(c). Therefore, Supreme Court Rule 29(b) allows for involuntary dismissal of appeals which are defective or untimely filed.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that Appellant's 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 be dismissed.

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