

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

ILENE SIVAKOFF,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-02-248 MJB
)	
NATIONWIDE MUTUAL INSURANCE)	
COMPANY, a foreign corporation)	
)	
Defendant.)	

Submitted: July 2, 2009
Decided: December 6, 2010

Upon Defendant's Motion To Dismiss.
GRANTED.

OPINION AND ORDER

Edward T. Ciconte, Ciconte, Wasserman & Scerba, LLC., Wilmington, Delaware,
Attorney for Plaintiffs.

Sean A. Dolan, Newark, Delaware, Attorney for Defendant.

BRADY, J.

Introduction

This is an insurance coverage case. Plaintiff, Ilene Sivakoff, claims that she is entitled to underinsured motorist (“UIM”) benefits from her carrier, Defendant, Nationwide Mutual Insurance Company (“Nationwide”). Nationwide has filed a Motion to Dismiss Plaintiff’s Complaint. In its Motion, Nationwide contends that Plaintiff has failed to exhaust all available insurance, and therefore, the company’s obligation to make UIM benefit payments has not been triggered. The Court agrees, and for the reasons set forth in this Opinion, Nationwide’s Motion is **GRANTED**.

Factual Background

On September 16, 2006, Plaintiff and Jessica Faye Talley (“Talley”) were involved in an automobile collision. Plaintiff alleges that Talley’s negligence proximately caused her personal injuries, mental anguish, and loss of earning capacity. At the time of the collision, Talley was operating a motor vehicle insured by Travelers Indemnity Company of America (“Travelers”) pursuant to a policy issued to her father, Roy Talley, who also owned the vehicle. Plaintiff’s vehicle was insured by Nationwide.

On August 3, 2007, Plaintiff entered into a settlement with Talley. In exchange for payment of Talley’s policy limit of \$15,000.00, Plaintiff executed a release (“Release”). In pertinent part, the Release states:

...Ilene Sivakoff, for the sole consideration of Fifteen Thousand dollars (\$15000.00) ... release and forever discharge the said The Travelers Indemnity Company of America and Roy Talley/Jessica Talley and all other persons, firms, or corporations from all claims, demands, damages, actions, or causes of action, account of damage to property, bodily injuries or death, resulting, or to result, from the accident which occurred on September 16, 2006 at or near Marsh road, Wilmington De [sic] and for all claims or demands whatsoever in law or in equity, which we, our heirs, executors, administrators,

or assigns can, shall or may have by reason of any matter, cause or thing whatsoever prior to the date hereof.

It is Understood and Agreed that this is a full and final release of all claims of every nature and kind whatsoever, and releases claims that are known and unknown, suspected and unsuspected.¹

In addition, Plaintiff's counsel included the following paragraph in the Release:

It is further understood and agreed that this release has no affect on any and all underinsurance claims which the release [sic] may have against any and all insurance companies.² **It is further understood and agreed that the releaser is entering into this release based upon the understanding that Roy Talley has no other insurance coverage available to him covering this claim. If it is determined that Roy Talley has other available insurance coverage, then the terms of this release have no affect to the extent of any additional coverage.**³

Subsequent to the execution of the Release, Plaintiff discovered that Talley's mother, Nancy Talley, had an insurance policy with Progressive Insurance that covered Talley as a resident of her mother's home. Despite the existence of the Release, on July 2, 2008, Plaintiff sued Talley for damages she allegedly sustained resulting from the automobile collision. Talley filed a motion to dismiss and argued that Plaintiff's claim was barred by the terms of the Release because only insurance policies held by Roy Talley were exempted from the Release. In response, Plaintiff contended that the purpose of the language quoted above was to exempt all unknown additional coverage that was available to Talley, the tortfeasor.⁴ The Court held that the explicit terms of the

¹ Def. Mot., Ex. B.

² Plaintiff has not contested that this portion of the Release preserves its claim against Nationwide. Presumably, this statement simply preserves Plaintiff's UIM claim in the event that she has a viable claim under her policy and the underinsured motorist statute.

³ *Id.*

⁴ C.A. No. 08C-07-018, Mot. Dismiss Hr'g Tr. 5, Aug. 4, 2010.

Release precluded all claims against any insurance policies that were not issued to Roy Talley and granted Talley's motion to dismiss.⁵

Plaintiff subsequently filed this suit against Nationwide for UIM benefit payments. The parties have stipulated that Nancy Talley's Progressive insurance policy had a \$100,000 limit, and that the policy would have covered Talley's liabilities arising from the automobile collision.

Parties' Contentions

Nationwide seeks dismissal of Plaintiff's claims on two grounds. First, Nationwide contends Plaintiff has failed to exhaust all insurance coverage available to her, and thus, she has no viable UIM claim. Second, Nationwide claims that Talley is not entitled to UIM benefits because, by definition, she is not an underinsured motorist since the limits of total available insurance coverage was \$115,000, which exceed the limits provided by the \$100,000 Nationwide UIM coverage.

In response, Plaintiff argues that with respect to a UIM claim, only the insurance covering the motor vehicle matters for purposes of UIM eligibility, and not the coverage available to the driver of the vehicle. Plaintiff contends that the extent of coverage available to Talley in connection with the collision was \$15,000, and therefore, Talley is, by definition, an underinsured motorist, which entitles Plaintiff to UIM benefits.

Standard of Review

Defendant moved to dismiss Plaintiff's claim pursuant to Superior Court Civil Rule 12(b)(6). A motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be sustained will not be granted unless the plaintiff will not be able to

⁵ *Id.*

recover under any circumstances given the allegations raised in that document.⁶ Where matters outside of the pleadings are considered, such as affidavits or depositions, the motion is treated as a motion for summary judgment under Superior Court Civil Rule 56.⁷ Because a deposition and stipulation were filed by the parties in support of their respective positions, the Defendant's motion will be considered under Rule 56. Pursuant to that Rule, a motion for summary judgment will only be granted where the moving party establishes that there is no genuine issue of material fact in dispute and that the movant is entitled to judgment as a matter of law.⁸ In this case, there are no genuine issues of material fact.

Discussion

The purpose of Delaware's uninsured/underinsured motorist statute is to fully compensate innocent drivers, and Delaware courts have continuously construed ambiguous portions of the statute to maximize a tort victim's compensation.⁹ However, the Delaware Supreme Court has "limited the insured's recovery in circumstances where the statutory language clearly mandated that result."¹⁰ The exhaustion provision of 18 Del. C. § 3902(b)(3) is clear and unambiguous.¹¹ Pursuant to 18 Del. C. § 3902(b)(3), an insurer is not obligated to make UIM benefit payments "until after the limits of liability under *all bodily injury bonds and insurance policies available to the insured* at the time of the accident have been exhausted by payment of settlement or judgments." (emphasis

⁶ *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

⁷ *The Dow Chemical Company v. MG Industries*, 2003 WL 77009 (Del. Super.)

⁸ Super. Ct. Civ. R. 56(c).

⁹ *Dunlap v. State Farm Fire and Casualty Co.*, 878 A.2d 434, 439 (Del. 2005)

¹⁰ *Id.*

¹¹ *Id.*

added). The failure to exhaust all insurance policies that are available to the insured precludes a claim for UIM benefits.¹²

The parties stipulated that Nancy Talley's Progressive policy was available for purposes of Plaintiff's claims against Talley. Thus, it is indisputable that Plaintiff has not exhausted "all bodily injury bonds and insurance policies available" to her. Therefore, Nationwide's obligation to pay Plaintiff's UIM benefits has not been triggered. Furthermore, the terms of the Release will preclude Plaintiff from ever bringing a UIM claim because Plaintiff will never be able to exhaust all of the insurance coverage that was available to her.

Despite the unambiguous language of 18 Del. C. § 3902(b)(3)¹³, Plaintiff contends that the Court should ignore the existence of the Progressive Insurance policy, and only consider the Traveler's insurance policy for purposes of her UIM claim. According to Plaintiff, to trigger a UIM carrier's obligation to make UIM benefit payments, only insurance that covers the "motor vehicle" involved in the accident must be exhausted. Plaintiff argues that because she has received the full policy limit of the Traveler's policy on the vehicle Talley was driving, she is entitled to receive UIM benefit payments from Nationwide. In support of this argument, Plaintiff points to the definition of an "underinsured motor vehicle" as set forth in the policy, which states:

a motor vehicle for which bodily injury liability coverage or other security or bonds are in effect; however, their total amount is less than the highest limit of uninsured motorist coverage under either (1) this policy...or (2) any other applicable policy.¹⁴

¹² *Id.*

¹³ *Id.*

¹⁴ Pl. Resp. Ex. C.

Plaintiff's argument is flawed. The policy language quoted above tracks the language of § 3902(b)(2), which defines an underinsured motor vehicle. Therefore, the policy definition of an "underinsured motor vehicle" does not create any additional rights to the insured that already exist under the UIM statute. In *Dunlap v. State Farm Fire and Casualty Co.*, the Delaware Supreme Court noted that there are multiple statutory conditions precedent that must be satisfied in order to perfect a UIM claim.¹⁵ Among them, the tortfeasor's vehicle must be considered "underinsured," as that term is defined in the statute, and the insured must recover from all available insurance policies.¹⁶ In this case, Plaintiff argues that the definition of "underinsured motor vehicle" trumps the statutory exhaustion requirement. However, *Dunlap* clearly states otherwise. Both conditions must be satisfied in order to have a viable UIM claim. Thus, Plaintiff's argument is without merit.

Conclusion

Plaintiff is not entitled to payment for UIM benefits from Nationwide because she did not exhaust all insurance coverage available to her prior to bringing a UIM claim. Therefore, Defendant's Motion to Dismiss Plaintiff's claim is **GRANTED**.

IT IS SO ORDERED.

/s/

M. Jane Brady
Superior Court Judge

¹⁵ *Dunlap v. State Farm Fire and Casualty Co.*, 878 A.2d 434, 439 444.

¹⁶ *Id.*