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

GEORGE E. WILHELM and PAMELA A. WILHELM	)	
Plaintiffs,	)	
v.	)	**C.A. No. 09C-07-155 MJB**
NATIONWIDE GENERAL INSURANCE COMPANY	)	
Defendant.	)	

Submitted: April 26, 2011
Decided: May 11, 2011

Upon Defendant's Motion for Summary Judgment.
GRANTED.

OPINION AND ORDER

Gary S. Nitsche, Esq., Weik Nitsche & Dougherty, Wilmington, Delaware, Attorney for Plaintiffs.

Carol J. Antoff, Esq., Law Office of Cynthia G. Beam, Wilmington, Delaware, Attorney for Defendants.

Brady, J.

INTRODUCTION

Before the Court is Defendant's Motion for Summary Judgment. On July 16, 2009, Plaintiffs, George and Pamela Wilhelm ("Plaintiffs"), filed this breach of contract action against their insurer, Defendant, Nationwide General Insurance Company ("Defendant"), for failure to provide uninsured motorist ("UM") coverage pursuant to their insurance policy. Plaintiffs claim to be entitled to UM coverage for damages arising out an accident that occurred in July 1998.

Defendant contends that it is entitled to Summary Judgment for two reasons: (1) Plaintiffs' action is barred by 10 *Del. C.* § 8106, Delaware's three year statute of limitations applicable to all contract claims, and (2) Plaintiffs failed to provide written notice of their UM claim to Defendant "as soon as practicable," as required under the terms of the insurance policy, and 18 *Del. C.* § 3902(a)(3)(c).

Upon review of the record,[1] the Court finds that the eleven year delay between the 1998 accident, and Plaintiffs' claim for UM benefits is, as a matter of law, not "as soon as practicable," and that Plaintiffs' delay has prejudiced Defendant's position. Therefore, Defendant's Motion for Summary Judgment is **GRANTED**.

FACTUAL BACKGROUND

On or about July 16, 1998, George Wilhelm, while employed by Delmarva Power, was working on a downed utility pole when he was struck by a vehicle driven by

[1] On September 22, 2010, this Court held a hearing on the instant Motion, and the parties were instructed to provide an interim status report by January 21, 2011. On February 18, 2011, after not receiving a report from either party, the Court instructed the parties to comply with the Court's previous request. The parties subsequently complied with the request. Thereafter, the Court requested a hearing regarding the issue of prejudice that may have resulted from Plaintiffs' delayed notification. Defense counsel then supplemented its argument with a brief letter on April, 26, 2011, which is when this matter was officially taken under advisement.

an unidentified driver.[2] Following the incident, Mr. Wilhelm retained the services of an attorney from Doroshow, Pasquale regarding a potential workers' compensation claim.[3] Mr. Wilhelm claims that, at that time, he was not advised about any potential UM claim he may have had under his insurance policy with Defendant.[4]

In June 2009, Plaintiffs met with their present counsel, who informed Plaintiffs that they may be entitled to UM benefits coverage pursuant to their insurance policy with Defendant.[5] On June 16, 2009, Plaintiffs filed their Complaint against Defendant,[6] which was Defendant's first notice of Plaintiffs' UM benefits claim with respect to the 1998 accident.[7]

In the Complaint, Plaintiffs alleged that Mr. Wilhelm suffered potentially permanent personal injuries, pain and suffering, uncovered present and future medical expenses, and mental and emotional anguish as a result of the 1998 accident.[8] Plaintiffs additionally alleged that Defendant is contractually and statutorily liable to Plaintiffs for injuries and damages under the uninsured/underinsured motorist coverage in the Plaintiffs' insurance policy with Defendant.[9]

PARTIES' CONTENTIONS

A. Defendant's Contentions

Defendant contends that this Motion for Summary Judgment should be granted for three reasons: (1) Plaintiffs failed to bring their UM claim within three-years of the

[2] Pl. Res. to Def. Motion for Summary Judgment.¶¶ 3-4.
[3] Pl. Compl. ¶¶ 3-4.
[4] Id.
[5] It is undisputed that at the time of the collision, Plaintiffs owned a vehicle insured under a policy of automobile insurance that provided uninsured/underinsured motorist coverage with Defendant. Pl. Compl.¶6 and Def. Res. to Pl. Compl. ¶ 6.
[6] Def. Motion for Summary Judgment ¶ 1.
[7] Pl. Res. to Def. Motion for Summary Judgment ¶ 13.
[8] Pl. Compl. ¶ 9. In addition, Pamela Wilhelm asserted a loss of consortium claim.
[9] Pl. Compl.¶ 6-7.

1998 accident, and thus, they are barred by the applicable Delaware statute of limitations,[10] (2) Plaintiffs failed to provide Defendant "written notice of their claim as soon as practicable" as required under the insurance contract as a condition precedent as a matter of law,[11] and (3) Plaintiffs failed to notify Defendant of the accident "within 30 days, or as soon as practicable thereafter" as required by Delaware statute.[12] Further, Defendant contends that as a result of the eleven-year delay in filing this claim, it is unduly prejudiced in its ability to investigate and defend against this claim.[13]

Defendant also claims that Plaintiffs lack standing to bring this lawsuit because they never made a UM benefits claim under their policy, rather, they filed the instant suit for damages. According to Defendants, there was no denial of coverage, and thus, this suit is not ripe for judicial review.

B. Plaintiffs' Contentions

Plaintiffs contend that Defendant's Motion for Summary Judgment should be denied for two reasons: (1) UM claims sound in contract and not tort, and therefore, the cause of action did not accrue until Defendant breached the contract by denying payment of a UM claim, thereby rendering the current Complaint timely,[14] and (2) Defendant is not prejudiced, despite the eleven-year delay in Plaintiffs' bringing their UM claim, because the delay was reasonable (due to reliance upon previous counsel) and any investigative evidence required by Defendant was preserved by previous counsel's workers' compensation claim investigations.[15]

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[10] Def. Mot. for Summary Judgment ¶¶ 2-9.
[11] *Id*. ¶¶ 10-14.
[12] *Id*. ¶¶ 15-17.
[13] *Id*. ¶¶ 18-19.
[14] Pl. Res. to Def. Motion for Summary Judgment ¶¶ 2-6
[15] *Id*. ¶¶ 3-4.

In response to Defendant's claim that it will suffer prejudice, Plaintiffs argue that Defendant's ability to investigate and defend the UM claim, including relevant material facts relating to the accident, cause of injury, and subsequent treatment, were preserved through records and proceedings with the State of Delaware Industrial Accident Board under Delaware's workers' compensation laws.[16] Alternatively, Plaintiffs argue that prejudice is a question of fact for a jury, not a matter of law.[17]

Plaintiffs note that their Complaint was filed within 30 days of their meeting with current counsel in 2009.[18] Further, Plaintiffs argue that the Court should apply Superior Court Civil Rule 60(b) to provide relief from Summary Judgment as a result of mistaken reliance on prior counsel's failure to advise, which Plaintiff argues constitutes excusable neglect in causing delay.[19]

STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[20] The moving party bears the initial burden of proof in showing that no material issues of fact are present.[21] The burden then shifts to the nonmoving party to show that there are material issues of fact in dispute.[22] In

[16] *Id*. ¶10.
[17] *Id*. ¶¶11-12.
[18] *Id*. ¶ 8.
[19] *Id*. ¶13; For more information on Superior Court Civil Rule 60(b): Relief from Judgment or Order, *see infra* note 39.
[20] Del. Super. Ct. R. 56(c).
[21] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[22] *Id*.

considering the motion, the court must view the record in a light most favorable to the nonmoving party, in this case, the Plaintiff.[23]

DISCUSSION

Defendant's Motion for Summary Judgment requires the Court to consider whether, under Delaware law, a UM claim filed by an insured eleven years after the underlying incident is barred by: (1) 10 *Del. C.* § 8106, Delaware's three year statute of limitations applicable to contract claims, or (2) the terms of the insurance policy, and 18 *Del. C.* § 3902(a)(3)(c), which both require written notice of a claim "as soon as practicable."[24]

A. The Statute of Limitations

i. The Statute of Limitations does not bar Plaintiffs' UM claim.

Under Delaware law, an action to recover UM benefits pursuant to an insurance policy is a contract claim, and therefore, is subject to a three year statute of limitations.[25] In addition, the statute of limitations is triggered by the alleged breach of contract, not the underlying injury.[26] Specifically in the context of a UM claim, the statute of limitations begins to run upon the insurer's denial of payment.[27]

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[23] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[24] Specifically, the policy requires, among other things, "in making a bodily injury claim under this coverage, the insured must: (a) submit written proof of the claim to us *as soon as practicable*…" (emphasis added). Def.'s Br. Ex. 3, U-3. Title 18, Section 3902(a)(3)(c) requires notice within "30 days, or as soon as practicable." However, for obvious reasons, the only issue with regard to that Section is whether the notice was made as soon as practicable.

[25] *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287-90 (Del. 1982) (holding that "an action by an insured against his automobile insurance carrier to recover uninsured motorist benefits essentially sounds in contract rather than in tort. Hence, the timeliness of a suit for uninsured motorist benefits is controlled by § 8106, our statute of limitations applicable to actions for breach of contract rather than 10 Del. C. § 8119, our limitations statute controlling tort claims for personal injury."); See also, *Bradford, Inc. v. Travelers Indemnity Co.*, 301 A.2d 519, 524-25.

[26] *Spinelli*, 443 A.2d at 1290.

[27] *Id.* at 1289-90.

Defendant argues that Plaintiffs' suit is barred by the statute of limitations because it was filed more than three years after the 1998 accident. However, in this case, the limitations period was not triggered until Defendant's denial of coverage, which did not occur until 2009 when Defendant filed an Answer to Plaintiffs' Complaint.[28] Therefore, Plaintiffs' claim is not barred by the statute of limitations because Plaintiffs' cause of action did not accrue until 2009.

ii. Standing: Ripeness of the Claim

During oral argument, Defendant contended that Plaintiffs lack standing to bring this suit because there was no denial of coverage. According to Defendant, since Plaintiffs' Complaint was the first attempt to recover UM benefits, only an action for declaratory judgment would be ripe for judicial review. Defendant claimed that since no breach had occurred when this suit was initiated, there was no basis for a breach of contract claim.

While Defendant's position is technically correct, the proper time to make such an objection to the suit would have been in the form of a motion to dismiss. However, at this juncture, Defendant, by contesting Plaintiffs' basis for liability, has denied an obligation to provide UM benefits, and the dispute is ripe for judicial review.

B. Notification of Claim

Both Plaintiffs' insurance policy and 18 *Del. C*. § 3902 (a)(3)(c) require an insured to notify its insurer of any claim under a policy "as soon as practicable."[29] Thus, whether Plaintiffs complied with the policy or statutory notice requirements is resolved

[28] Defendant contends that there was never a denial of coverage because Plaintiffs never made a claim under their policy. This issue is addressed below.

[29] The Delaware Code provides notification to be made within "30 days, or as soon as practicable." The thirty day requirement is not at issue. *Supra* n. 24.

by the same analysis. To escape liability under a notice clause, an insurer must demonstrate: (1) that the insured did not provide notice "as soon as practicable," and (2) that it suffered prejudiced as a result of the delay.[30] In *State Farm Mutual Automobile Ins. Co. v. Johnson*, the Delaware Supreme Court held that an insured's failure to provide timely notice as required by the policy is not sufficient to relieve the insurer's coverage obligation for a claim that would otherwise fall within the policy.[31] The Court explained that an insured's failure to comply with a notice provision is not a typical breach of contract, because

> … the terms of an insurance policy are not talked out or bargained for as in the case of contracts generally, that the insured is chargeable with its terms because of a business utility rather than because he read or understood them, and hence an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as its language will permit.[32]

The Court primary concern was forfeiture of the insured's right to coverage.[33]

In the instant case, there is nothing in the record to suggest that Plaintiffs' claim is not an otherwise valid UM claim, and thus, the only issue is whether or not Plaintiffs failed to both provide notice to Defendant "as soon as practicable," and if so, whether that failure prejudiced Defendant.

i. Plaintiffs' notice was not, as a matter of law, "as soon as practicable"

Whether an insured has failed to provide notice "within 30-days, or as soon as practicable" may be an issue for the trier of fact, however, in some cases it is an issue of

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[30] *Falcon Steel Co., Inc. v. Maryland Casualty Co.,* 366 A.2d 512, 514-17 (Del. Super. 1976) (this 2-part test is clearly delineated and applied in *Falcon Steel* to determine that a nine-month delay in notification given to the insurer was unreasonable, but that the insurer failed to show prejudice). *See also Allstate Ins. Co., v. Lazarczyk,* 1996 WL 944906 (Del. Super.) (noting he differences and similarities in contract and statutory requirements for notice).
[31] 320 A.2d 345, 346.
[32] *Id*. at 347.
[33] *Id*.

law to be decided by the court.[34] The notice requirement provides for a reasonable person standard to be applied, contemplating the facts surrounding the claim and reasons for the delayed notification to the insurer.[35] However, Delaware courts have generally held that unexcused delays of a substantial time period do not constitute "as soon as practicable" as a matter of law.[36] In *Bradford, Inc. v. Travelers Indemnity Company*, the court held that the insured's notice to the insurer, eighteen and seventeen months after the occurrence giving rise to coverage, did not constitute notice "as soon as practicable" as a matter of law.[37] Similarly, in *Johnson*, the Supreme Court of Delaware held that a thirty-four week delay in reporting an incident to an insurer was not "as soon as practicable" as a matter of law.[38] In this case, we are faced with a situation where the delay was well beyond a matter of weeks or months; here, we have a delay that exceeds a decade.

Plaintiffs rely on *Drainer v. AIG*, where the court held that the issue of whether an insured reported an accident to an insurer "as soon as practicable" was an issue of fact for a jury to decide. Similarly to this case, in *Drainer*, the plaintiff was the victim of a hit-and-run accident while he was working. However, *Drainer* is distinguishable from the case *sub judice*. The plaintiff's employer carried a primary policy, and the plaintiff carried a secondary policy. Plaintiff reported the accident to his employer, however, he did not notify his insurer for nearly a year and half after the accident. The employer's insurance did not provide coverage for such an accident, which prompted plaintiff to sue

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[34] *Falcon Steel*, 366 A.2d at 514-15.
[35] *Marckese v. Taylor*, 599 A.2d 1090, 1092 (Del. Super. 1991). Factors which may be taken into consideration in determining whether an insured has provided notification to the insurer "as soon as practicable" include physical and mental condition of the insured, their awareness that they were covered, and awareness that there had been an occurrence which might result in a claim. *Lewis v. Home Ins. Co.,* 314 A.2d 924, 926 (Del. Super. 1973).
[36] *See Bradford*, cf *Drainer*. (Note: There are no cases locatable within Delaware where the wait in delay for an insurance claim has reached eleven years, as in the instant case)
[37] 301 A.2d 519, 523 (Del. Super. 1972).
[38] 315 A.2d 585 (Del. 1973).

his insurer, which was the first notice his insurer received. The plaintiff argued that he was under the impression that his employer's insurer would provide coverage. The court concluded that, "under these circumstances," whether the plaintiff had reported the accident to his insurer "as soon as practicable" was a question of fact for a jury to decide. The fact that the plaintiff may have reasonably relied on his employer's insurance to cover his costs was a central factor in the court's decision. In this case, there are two important distinctions from *Drainer*. First, the plaintiff in *Drainer* waited only a year and a half before filing an action against the defendant-insurer. Second, the plaintiff had reasonable cause for delay, namely, the attempted claiming of benefits on his employer's primary policy.

Plaintiffs contend that their delay should be excused because their original counsel failed to advise them of their potential entitlement to UM benefits. In *Johnson*, the insured argued that her delay in reporting an accident to her insurer should be excused because, among other things, she received advice from a layman that her policy did not provide coverage, and because she relied upon advice from her attorney, which led her to believe that she should not report the accident to her insurer.[39] The Court held that neither the reliance upon the advice of a layman, nor the unreasonable interpretation of the attorney's advice, was sufficient to excuse the insured's delay.[40] In this case, Plaintiffs' position is even weaker because there is no allegation that anyone, including their prior counsel, instructed them not to file a UM claim. Here, they simply did not exercise any potential rights under their policy for more than a decade.

[39] 315 A.2d 585.
[40] *Id*. at 587-588.

In sum, the Court finds, as a matter of law, Plaintiffs' eleven year delay in notifying Defendant, violates the "as soon as practicable" requirement in both the insurance policy and Delaware Code.

ii. Defendant is Prejudiced as a result of Plaintiffs' Eleven Year Delay in Filing

In *Johnson*, the Delaware Supreme Court held that "an insured's breach of the notice provision, without prejudice to the insurer, will not relieve the company of its liability under the contract."[41] The Court further stated that the purpose of a notice provision is to protect an insurance company from any prejudice resulting from an inordinate lapse of time between an accident and the company's awareness thereof." (emphasis added).[42] This Court must consider whether Defendant is in a less favorable position to defend Plaintiffs' claim than it would have been had the notification been "as soon as practicable."[43] The burden of proving prejudice is upon the insurer.[44]

In this case, Defendant contends that they have suffered prejudice as a result of Plaintiffs' delay in two way primary ways: (1) it was unable to investigate Mr. Wilhelm's pre-accident condition because certain older medical records are no longer available, and (2) it was unable to have an expert examine Mr. Wilhelm at a time close to the 1998 accident so that it could asses what injuries were attributable to that accident as opposed to other accidents and the lapse of time in general.[45]

Plaintiffs note that some information related to the accident, subsequent injuries, and medical treatment was preserved through the records and proceedings that were held before the State of Delaware Industrial Accident Board pursuant to the prior workers'

[41] 320 A.2d 345, 346.
[42] *Id*. at 346-347.
[43] *Falcon*, 366 A.2d 516.
[44] *Id.*
[45] Def.'s Letter, Apr. 26, 2011.

compensation claim. However, Defendant has not been provided all of Mr. Wilhelm's prior medical records, and has been further prejudiced by the fact that it was not able to have its own medical expert examine Mr. Wilhelm soon after the injuries were sustained. The Court finds those facts, along with the "inordinate lapse of time" between the accident and notification, demonstrate that Defendant is in a less favorable position in defending this suit as a result of Plaintiffs' delayed notice. Defendant has suffered prejudice as a matter of law, and thus, is not obligated to provide coverage pursuant to its policy.

C. Superior Court Civil Rule 60(b) does not provide a basis for relief

In Response to Defendant's Motion for Summary Judgment, Plaintiffs request the Court to exercise its authority under Superior Court Civil Rule 60(b) to relieve a party from final judgment, order, or proceeding as a result of prior counsel's failure to advise Plaintiffs' of their possible UM claim.[46] Rule 60(b) provides the Court with discretionary authority to relieve a party from final judgment, order or proceeding for significant attorney errors, including mistake, excusable neglect, or any other reason justifying relief from the operation of judgment.[47] However, a motion pursuant to Rule 60(b) should not be entertained if brought after "unreasonable delay."[48] In this case, the Court finds no reason to use its discretionary authority to relieve a party based on the unreasonable delay in bringing such a request.

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[46] Superior Court Civil Rule 60(b) reads, in relevant part:

> On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) Mistake, inadvertence, surprise, or excusable neglect . . . or
> (6) any other reason justifying relief from the operation of the judgment.

[47] *Id*.; *Hardy v. Harvell*, 200 WL 3095947 (Del. Super.).
[48] *Ramirez v. Rackley*, 70 A.2d 18 (1949).

CONCLUSION

For the reasons discussed above, this Court finds that the Plaintiffs' UM claim is not barred by the 3-year Statute of Limitations, but that the Plaintiffs' lawsuit, filed eleven years after the accident, is not in compliance with 18 *Del. C*. § 3902(a)(3)(c), or the policy language, and creates undue prejudice to the Defendant in their ability to investigate and defend against the UM charges, the parties' discovery notwithstanding. Therefore, the Defendants' Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/
M. JANE BRADY
Superior Court Judge