IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

KYLIE A. SHUBA and MICHAEL D. SHUBA, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, a foreign corporation, Defendant.	: : : : : : : : : : : :	C.A. No. 09C-03-015 WLW

Submitted: February 22, 2013
Decided: March 7, 2013

ORDER

Upon Plaintiffs' Motion to Enter Final Judgment
Granted.

I. Barry Guerke, Esquire of Parkowski Guerke & Swayze, P.A., Dover, Delaware; attorney for the Plaintiffs.

Stephen P. Casarino, Esquire and Joshua H. Meyeroff, Esquire of Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware; attorneys for the Defendant.

WITHAM, R.J.

INTRODUCTION

Pending before the Court is a Motion to Enter Final Judgment filed on November 7, 2012 by Kylie A. Shuba and Michael D. Shuba ("Plaintiffs") in this underinsured motorist ("UIM") action. Plaintiffs wish to appeal an order of this Court issued on May 14, 2010 granting partial summary judgment in favor of Defendant United Services Automobile Association ("USAA" or "Defendant") as to Plaintiffs' wrongful death claim on the grounds that Plaintiffs could not recover wrongful death damages under the policy in question because the decedent, their mother, was not insured under the policy.[1] Although it dismissed Plaintiffs' wrongful death claim, the Court acknowledged that their claim for personal injuries remained viable.[2] The parties thereafter settled Plaintiffs' personal injury claim, and Plaintiffs drafted and tendered a stipulation and order of dismissal to USAA, which USAA refused to sign because it considered the May 14, 2010 summary judgment order the final disposition of the litigation.

Now, nearly two years later, Plaintiffs ask this Court to enter a final judgment in this case so that they may proceed with an appeal. Because the Court finds that its May 14, 2010 summary judgment order was not a final, appealable order, Plaintiff's

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[1] *See Shuba v. United Servs. Auto. Assoc.*, 2010 WL 8250754, at *2 & n.8 (Del. Super. Ct. May 14, 2010) (finding that Plaintiffs could not recover for the wrongful death of their mother under their stepmother's policy because "18 *Del. C.* § 3902(b) limits recovery to bodily injuries suffered by the policy's insured ... [or] his/her legal representative.") (quoting *Temple v. Travelers Indemnity Co.*, 2000 WL 33113814, at *6 (Del. Super. Ct. 2000).

[2] *See id.* at *3.

motion is hereby granted.

FACTUAL AND PROCEDURAL HISTORY

This case has a lengthy procedural history, the pertinent portions of which are reiterated here. Plaintiffs sued USAA to recover damages arising from an automobile collision in which Plaintiffs' mother, Linda Ann Banning (the "Decedent"), and stepfather, Lester E. Banning, III ("Banning"), were killed.[3] Plaintiff Michael Shuba was a backseat passenger in the car in which his mother and stepfather were traveling, and sustained injuries as a result of the accident. On July 1, 2004, Michael brought both a personal injury action against the tortfeasor-driver to recover damages for his own injuries and an action for the wrongful death of his mother. Plaintiff Kylie Shuba was not a passenger in the Decedent's vehicle at the time of the accident, but joined in the wrongful death claim.

On January 11, 2005, binding arbitration was held to resolve the wrongful death action, *R. Duane Shuba et al. v. Gatto,* C.A. No. 04C-07-003 JTV. USAA did not participate in the arbitration. The arbitrator awarded $791,000 to Michael for the wrongful death of his mother, the Decedent, and $7,000 for his personal injuries. The arbitrator also awarded Kylie $648,000 for the wrongful death of her mother, the Decedent. In addition, Michael and Kylie were awarded $100,000 each for Banning's wrongful death.

As a result of the arbitration award, the tortfeasor-driver's automobile

[3] For a full recitation of the underlying facts of Plaintiffs' claim, see *Shuba*, 2010 WL 8250754, at *1-2.

insurance carrier, New Jersey Manufacturers Insurance Company, paid its combined single bodily injury coverage policy limits of $100,000 to all claimants, exhausting that coverage. A release was executed thereafter expressly preserving any underinsured motorist claims.

Nationwide General Insurance Company, the automobile insurance carrier covering the Decedent's vehicle, paid its UIM coverage policy limits of $300,000 to all claimants, exhausting that coverage. A release was executed thereafter expressly preserving any further UIM claims.

At the time of the accident, Plaintiffs' stepmother, Gloria Shuba ("the policyholder"), maintained an automobile insurance policy (the "Policy") through USAA. The Policy provides UIM coverage in the amount of $300,000 per person/ $500,000 per accident. The Policy further provides that UIM coverage exists for "BI [bodily injury] sustained by a covered person and caused by an auto accident."

On March 12, 2009, Plaintiffs sued USAA, alleging that the carrier breached its obligations under the express terms of the Policy and 18 *Del. C.* § 3902 by denying Plaintiffs' UIM benefits claim. On February 26, 2010, the parties filed cross-motions for summary judgment on the issue of whether Kylie and Michael may pursue their claims for UIM benefits for the Decedent's wrongful death against USAA, even though the Decedent was not a member of the policyholder's household and, therefore, was not insured under the policy.

By an Order dated May 14, 2010, this Court granted USAA's Motion for Summary Judgment. The Court granted Defendant's summary judgment motion on

the basis that Plaintiffs cannot recover UIM benefits for the wrongful death of a non-insured decedent.[4] The Court's Order, however, expressly reserved judgment on the issue of whether USAA is liable to Michael Shuba, as an insured, for the bodily injuries he sustained as a result of the accident.[5] The Court dismissed all of Plaintiffs' claims for wrongful death benefits against USAA with prejudice.

Plaintiffs and USAA, through their attorneys, thereafter negotiated a settlement of Michael Shuba's personal injury claim for $5,298.32. Because there was no pending action, USAA paid Plaintiffs, through their attorney, via a check issued on August 18, 2010.[6] The check was endorsed by Michael Shuba, and deposited in his attorney's escrow account. However, Plaintiffs never executed a release of their potential claims against USAA.

Plaintiffs tendered a Stipulation and Order of Dismissal to the Defendants on August 17, 2012. By a letter dated October 23, 2012, Defendant's counsel declined to sign the stipulation. Plaintiffs now seek to appeal the May 14, 2010 Order and moves the Court to enter a final judgment. The Court herein reviews the merits of Plaintiffs' motion.

Parties' Contentions

Plaintiffs argue that the Court's May 14, 2010 order granting summary

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[4] *See id.* at *2.

[5] *See id.* at *3 ("Consequently, the amount of personal injury damages allegedly sustained by Michael as a result of the automobile accident remains at issue.").

[6] *See* Def. Resp. to Pl.'s Mot. to Enter Final J., Ex. A.

judgment in favor of the Defendant was not a final order, because it left open the issue of the amount of damages for which USAA was liable for the injuries Michael Shuba sustained as a result of the accident. The parties have since settled the only outstanding claim, Plaintiff argues, and, consequently, it is now appropriate for the Court to render its May 14, 2010 order a final judgment. I n its response, Defendant contends that the May 14, 2010 order was final on the date of its issuance because it resolved the only matter before the court, namely, whether USAA was liable for those damages arising from the wrongful death action. Defendant argues that the May 14, 2010 evinces the Court's intention that the summary judgment be the final act in the matter, an intention buttressed by the fact that the docket lay dormant for more than two years. Accordingly, Defendant asks that the Court deny Plaintiffs' motion.

DISCUSSION

The central issue in the pending motion is whether this Court's May 14, 2010 order granting summary judgment in favor of USAA was a final, appealable decision at the time that it was entered. After all, an aggrieved party can appeal to the Supreme Court, as a matter of right, only after a final judgment is entered by the trial court.[7] "A 'final decision' is generally defined as one that ends the litigation on the merits and leaves nothing for the trial court to do but execute the judgment."[8] The policy underlying the final judgment rule is one of efficiency, forbidding "piecemeal

[7] Del. Const. art. IV, § 11(1)(a); *Harrison v. Ramunno*, 730 A.2d 653 (1999).

[8] *Emerald Partners v. Berlin*, 811 A.2d 788, 790 (Del. 2001) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L.Ed 911 (1945)).

disposition on appeal of what for practical purposes is a single controversy."[9] In short, a final judgment is one that determines all the claims as to all the parties. The test for whether an order is final and therefore ripe for appeal is whether the trial court has clearly declared an intention that the order be the court's "final act" in a case.[10]

Plaintiffs assert that this Court's May 14, 2010 order did not dispose of his claim for personal injury damages, and, therefore, that order was not the trial court's final act in the case. A case cited in Defendant's motion, *Limehouse v. Steak & Ale Restaurant Corporation,*[11] proves instructive for resolving the issue of finality. In *Limehouse*, the plaintiff filed an appeal of a decision of this court dismissing his claim for intentional infliction of emotional distress.[12] The defendant moved to dismiss the appeal on the ground that the trial court did not dismiss Limehouse's wrongful termination claim, and thus, the court's order was not the trial court's final act in the case.[13] The Supreme Court denied the defendant's motion to dismiss the

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[9] *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S. Ct. 540, 84 L.Ed 783 (1941). *See also Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 580 (Del. 2002) (adding that "if discrete rulings are of such significance that immediate review is warranted, and the criteria for interlocutory review are met, [Superior Court Civil Rule] 42 offers relief.").

[10] *See J.I. Kislak Mortg. Corp. v. William Matthews Builder, Inc.*, 303 A.2d 648, 650 (Del. 1973) (holding that an order is deemed final if the decision is the trial court's last act in disposing of all judiciable matters within its jurisdiction).

[11] 850 A.2d 302 (Del. 2004) (unpublished table decision).

[12] *Id.* at *1.

[13] *Id.*

appeal on the grounds that the plaintiff's complaint did not assert a claim for wrongful termination, and, therefore, there was nothing pending before the Superior Court for further consideration.[14] In doing so, the Court stated that

> Given Limehouse's unequivocal expression of his intent to neither *plead nor pursue* a claim for wrongful termination, however, we can only conclude that the Superior Court's dismissal of Limehouse's complaint for intentional infliction of emotional distress resolved the only claim pending before it, and, therefore, constitutes a final, appealable order.[15]

The facts of *Limehouse* are in stark contrast to those in the instant case, wherein Plaintiffs sufficiently plead two claims in their complaint — one for damages incurred by the wrongful death of their mother and a separate claim for damages Michael incurred as a result of the accident.[16] Therefore, the May 14, 2010 summary judgment order was not a final, appealable decision, even with respect to the one claim challenged in the parties's cross-motions for summary judgment, as another claim for damages remained pending.

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[14] *Id.*

[15] *Id.* (emphasis added).

[16] *See* Compl. ¶ 8 ("As a further direct and proximate result of the misconduct of the tortfeasor, Daniel V. Gatto, Plaintiff Michael D. Shuba suffered serious and permanent bodily injuries and sustained great pain, suffering fear, fright, terror and mental anguish ... due to the death of his mother, the decedent, Linda Ann Banning). While perhaps not a model of clarity, Plaintiffs' complaint is detailed and pointed enough to satisfy the requirements of Superior Court Civil Rule 9(g) and state two independent claims for damages. *See Twin Coach Co. v. Chance Vought Aircraft, Inc.*, 52 Del. 588, 603 (1960) (defining general damages as "those necessarily and naturally resulting from the wrongful act or omission or which may be legally implied within"and noting that Superior Court Rule 9(g) imposes no heightened pleading requirement for general damages).

Moreover, the Court did not evince an intent to end the litigation of this outstanding claim by its summary judgment order. In fact, the Court expressly noted that "the amount of personal injury damages allegedly sustained by Michael as a result of the automobile accident *remains at issue*."[17] The May 14, 2010 order did not end the litigation leaving nothing but execution, as required for a final judgment. Rather, it expressly left the door open for the parties to negotiate a settlement of Michael Shuba's personal injury claim.

Defendant argues that it will suffer prejudice if a final judgment is now entered in this case as it will be subject to a potentially lengthy appeal process. Although the Court recognizes that the litigation of this case has been protracted, it was needlessly prolonged by a degree of dilatoriness of the parties. Defendant could have expedited a potential appeal of the May 14, 2010 order by signing the stipulation of dismissal pursuant to Superior Court Civil Rule 41(a)(1).[18] Alternatively, Plaintiffs could have, in a more expeditious manner, unilaterally pursued a voluntary dismissal of the matter pursuant to Rule 41(a)(2). Nonetheless, it is clear to the Court that any prejudice that might have inured to Defendant because of the protraction of this litigation may have been mitigated by a more timely notification of the parties' settlement agreement.

In any event, "the finality of a court's order is determined ... by the court

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[17] *Shuba*, 2010 WL 8250754, at *3 (emphasis added).

[18] Rule 41(a)(1) provides that "[a]n action may be dismissed by the plaintiff without order of court ... by filing a notice of dismissal signed by all parties who have appeared in the action." Super Ct. Civ. R. 41(a)(1)(II).

itself."[19] By all indications, the Court did not intend for the May 14, 2010 order to be a final, appealable decision. As such, Plaintiffs' motion to enter final judgment in this case is hereby GRANTED.

The Court will now enter an order dismissing Plaintiffs' personal injury claim resolved by settlement. As the entry of this dismissal resolves all remaining claims in this case, this Order will constitute a final judgment. Pursuant to Delaware Supreme Court Rule 6, the time to file a notice of appeal of any and all claims in this matter, including those dismissed by the May 14, 2010 summary judgment order, begins to run upon the entry of this Order.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[19] *Tyson Foods*, 809 A.2d at 581.