

INTRODUCTION

Before this Court is Plaintiff's, Allstate Insurance Company ("Allstate"), Motion for Summary Judgment. Allstate contends that this Court should grant summary judgment in its favor because pursuant to its policy it is not required to pay a proportionate share of underinsured motorist benefits. Allstate further argues that the breach of the consent-to-settlement provision of the policy precludes the maintenance of the present action. After hearing arguments and reviewing the Motion and Defendants' Response, the Court concludes that Allstate may be required to pay a proportionate share of underinsured motorist benefits. However, the factual disputes which exist as to whether First Delaware Insurance Company's ("First Delaware") policy provided \$1 million or \$100,000.00 of underinsured coverage preclude the granting of summary judgment. Without first knowing First Delaware's policy limits, the court cannot determine whether the settlement was reasonable or whether it prejudiced Allstate. Therefore, a material question of fact exists and Allstate's Motion for Summary Judgment is **DENIED**.

FACTS

Defendant E.A. Fie, Inc. ("E.A. Fie") had a commercial auto policy with First Delaware. This policy provided \$1 million in liability coverage

and \$1 million for uninsured motorist benefits which was effective March 29, 1998, through March 29, 1999. On September 29, 1998, Edward A. Fie (“Edward”) added by telephone a 1998 Ford Mustang to his commercial policy. On October 20, 1998, Edward’s daughter, Rachel was killed in an auto accident involving the Mustang.

Shortly after the accident, First Delaware moved to rescind the \$1 million policy when it learned that the Mustang had been purchased for Rachel’s use and not for any commercial use by E.A. Fie. First Delaware issued a retroactive replacement policy for the Mustang with \$100,000.00 underinsured coverage. The tortfeasor in the auto accident had limits of only fifteen thousand dollars (\$15,000.00). The Fies settled with the tortfeasor for this amount. However, since the damages exceeded \$15,000.00, the Fies then sued First Delaware for underinsured coverage and Insurance Associates. The Fie’s suit against First Delaware and Insurance Associates was settled for \$187,500.00, with \$100,000.00 from First Delaware and \$87,500.00 from Insurance Associates. The Fies also made a claim against Susan Fie’s coverage with Allstate. Allstate then brought this suit seeking declaratory judgment regarding the parties’ rights and obligations.

STANDARD OF REVIEW

The court will grant summary judgment only if there are no genuine issues of material fact “and the moving party must show he is entitled to judgment as a matter of law.”¹ In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the non-moving party.² Summary judgment, therefore, is appropriate only if, after viewing the evidence in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.³

If a case involves the legal interpretation of a contract for insurance, and the questions are legal rather than factual, summary judgment is appropriate.⁴ The Court’s interpretation of Allstate’s policy is a determination of law.⁵ Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning.⁶ The doctrine of *contra proferentum* requires that the language of an insurance contract, when ambiguous, be construed most strongly against the insurance company

¹ *Deakyne v. Selective Insurance Co.*, 728 A.2d 569, 570 (Del. Super. Ct. 1997)(internal citation omitted).

² *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

³ *Guy v. Judicial Nominating Com’n.*, 659 A.2d 777, 780 (Del. Super. Ct. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. Ct. 1994).

⁴ *Robinson v. Allstate Ins. Co.*, 1992 WL 207272 (Del. Super.).

⁵ *Universal Underwriters Ins. Co. v. The Travelers Ins. Co.*, 669 A.2d 45 (Del. 1995).

⁶ *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Inc. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

which drafted it.⁷ However, a contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.⁸ The Court will, therefore, construe the words of the provisions in accordance with their plain and obvious meanings.⁹

DISCUSSION

Allstate's first argument in support of its motion for summary judgment is that the policy language contained in "If There Is Other Insurance" only covered uninsured motorist benefits, not underinsured benefits. Based upon this language, Allstate contends that they are not required to pay a proportionate share of the Defendants' underinsured benefits.¹⁰ The Defendants, however, contend that Allstate's policy does require them to pay a proportionate share of underinsured benefits as well as uninsured benefits.

⁷ *Steigler v. Ins. Co. of North Am.*, 384 A.2d 398, 400 (Del. 1978).

⁸ *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1196.

⁹ *Ed Fine Oldsmobile, Inc. v. Diamond State Tel.*, 494 A.2d 636 (Del. 1985).

¹⁰ Specifically, the policy provides:

If There Is Other Insurance

We will bear our proportionate share with other uninsured motorists benefits.

This applies no matter how many autos or auto policies may be involved whether written by Allstate or another company.

The Court’s interpretation of whether Allstate’s policy requires them to pay a proportionate share of underinsured motorist benefits involves the legal interpretation of a contract for insurance. Since the questions presented are legal rather than factual summary judgment is appropriate. In the present case, the Court focuses upon Part 3 of Allstate’s Insurance Policy which is entitled “Uninsured Motorists Insurance Coverage SS.”¹¹

Specifically relevant to the Court’s present inquiry is the section that defines an uninsured auto. The policy provides as follows:

An Uninsured Auto Is:

1. a motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident.
2. a motor vehicle covered by a bodily injury liability bond or insurance policy which doesn’t provide at least the minimum financial security requirements of the state in which your insured auto is principally garaged.
3. a motor vehicle for which the insurer, other than Allstate under this policy, denies coverage or becomes insolvent.
4. a hit-and-run motor vehicle which causes bodily injury to an insured person or property damage to property of the insured person. The identity of both the operator and the owner of the vehicle must be unknown. The accident must be reported within 24 hours to the proper authorities. We must be notified within 30 days. If the insured person was occupying the vehicle at the time of the accident, we have a right to inspect it.

¹¹ This section is divided into the following twelve subtopics: 1) General Statement of Coverage; 2) An Insured Auto Is A Motor Vehicle; 3) Additional Definitions For Part 3; 4) An Uninsured Auto Is; 5) An Uninsured Auto Or Underinsured Auto Is Not; 6) Exclusions – What Is Not Covered; 7) Limit of Liability; 8) If There Is Other Insurance; 9) Trust Agreement; 10) Payment Of Loss By Allstate; 11) Legal Actions; and 12) If We Cannot Agree.

A motor vehicle for which no evidence of financial security is supplied within 60 days of the accident will be presumed uninsured.

An Underinsured Auto is a motor vehicle which has liability protection in effect and applicable at the time of the accident in an amount equal to or greater than the amounts specified for bodily injury liability by the financial responsibility laws of Delaware, but less than the limits of liability for Uninsured Motorists Insurance shown on the Policy Declarations.

By placing the definition of an underinsured auto under the section entitled “An Uninsured Auto Is” Allstate essentially includes underinsured automobiles within the definition of uninsured automobiles. Therefore, based upon the placement of this provision, the Court concludes that Allstate’s policy for paying a proportionate share if there is other insurance includes paying underinsured motorist benefits as well as uninsured benefits.

Allstate’s second argument in support of its motion for summary judgment is that the Defendants have forfeited their rights to underinsured benefits because they have breached the terms of the consent-to-settlement clause in their policy by executing a release with First Delaware. Allstate claims that they have been prejudiced by the settlement with First Delaware because the Defendants failed to obtain and failed to exhaust First Delaware’s policy which provided \$1 million for uninsured motorist benefits. The effect of a breach of an insurance policy provision on an insured’s right to recover benefits was considered in *Hall v. Allstate*

*Insurance Co.*¹² *Hall* dealt with a settlement and release of a tortfeasor that violated a consent-to-settlement provision of an insurance policy.¹³ The court held that the carrier was not freed from liability on its policy in the absence of a showing that the breach caused the insurer to suffer prejudice.¹⁴ In adopting this test, however, the court further held that when a breach was shown, a rebuttable presumption of prejudice arose.¹⁵ The burden then shifted to the party seeking to impose liability to demonstrate lack of prejudice by competent evidence.¹⁶ Prejudice to the insurer in the context of a violation of a consent-to-settlement provision was the loss of subrogation rights against the tortfeasor released by the settlement. In *Hall*, the court found that there was a material question of fact which precluded the granting of Allstate's motion for summary judgment because in the record before the court there was no evidence that a judgment against the tortfeasor would be worthless, and the burden was upon the plaintiff to prove by competent evidence that Allstate had not been prejudiced by the settlement in violation of the consent-to-settlement provision.¹⁷ Moreover, in *Home v.*

¹² Del. Super., C.A. No. 79C-DE-56, Poppiti, J. (Jan. 11, 1985).

¹³ *Id.* at 14.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 20 (citing *Gould v. Prudential Property & Casualty Insurance Co.*, 443 So.2d 127 (Fla. Dist. Ct. App. 1983)).

¹⁶ *Id.*

¹⁷ *Id.* at 24.

Maldonado,¹⁸ the court held that an underinsured motorist was protected from further liability to an insurance carrier once he paid the insured the amount of his liability coverage in settlement or judgment. The Court found that a settlement and release of an underinsured motorist could not prejudice the insurer because the limitation on subrogation imposed by the Supreme Court converted this right into a nullity.¹⁹

Although *Hall* involved the settlement and release of a tortfeasor, the Court finds the facts and circumstances of the present case to be similar. Like *Hall*, Allstate is concerned that the Defendants' alleged violation of the consent-to-settlement provision of the insurance policy prejudiced them. Allstate does satisfy its initial burden by demonstrating, on the face of the pleadings, that the Defendants did make a settlement without the insurer's consent. However, the presumption of prejudice is rebuttable, and thus is not sufficient to resolve the issue conclusively on a motion for summary judgment.²⁰ The Court finds that Allstate's allegation of a breach of the consent-to-settlement provision creates a rebuttable presumption that Allstate's rights were prejudiced thereby. Therefore, pursuant to *Hall*, the Defendants must prove a lack of prejudice to Allstate in its settlement with

¹⁸ 515 A.2d 690 (Del. 1986).

¹⁹ *Bryant v. Federal Kemper Ins. Co.*, 542 A.2d 347, 350 (Del. Super. Ct. 1988).

²⁰ Del. Super., C.A. No. 79C-DE-56, Poppiti, J. (Jan. 11, 1985) at 20.

First Delaware. Competent evidence satisfies this burden of proof.²¹ In the record before the Court there is competent evidence that Allstate may not have been prejudiced by the Defendants' settlement. If the First Delaware policy coverage for underinsured benefits was \$100,000.00 then the settlement for \$187,000.00, with \$100,000.00 from First Delaware and \$87,500.00 from Insurance Associates, would not have prejudiced Allstate. Since Allstate has no obligation to make any payment under its underinsured motorist coverage until after the limits of liability insurance policies available to the Defendants have been exhausted, 18 *Del. C.* §3902(b)(3),²² Allstate's subrogation rights would have already been rendered moot before it made any payment to the Defendants.²³ Therefore, if First Delaware's underinsured coverage was \$100,000.00, the settlement and release of First Delaware, could not prejudice Allstate because the limitation on subrogation imposed by the Supreme Court would have converted this right into a nullity.²⁴ The Defendants' settlement for the limits of the First Delaware policy would not be prejudicial to the insurers and their failure to seek

²¹ *Id.* at 23.

²² 18 *Del. C.* 3902(b)(3) reads, in pertinent part:

The insurer shall not be obligated to make any payment under this coverage 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.

²³ *Bryant*, 542 A.2d at 350.

²⁴ *Id.*,

consent would be irrelevant. However, if First Delaware's underinsured motorist coverage was \$1 million then the settlement and release of First Delaware may have prejudiced Allstate. The Court finds that it cannot determine, at this time, whether the settlement was reasonable and not prejudicial to the insurer because the parties factually dispute the extent of the coverage. Allstate contends that there was \$1 million in coverage, whereas the Defendants allege that the \$1 million policy coverage had been rescinded and replaced by a retroactive policy of only \$100,000.00. There is, therefore, a material question of fact which precludes the granting of a Motion for Summary Judgment on behalf of Allstate. Accordingly, after viewing the record in a light most favorable to the Defendants, this Court finds that genuine issues of material fact remain and a more thorough inquiry into the facts of this case is desirable. Therefore, Allstate's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.