IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DANIEL SHAW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. U407-09-609
	)	
NATIONWIDE INSURANCE and ROBERT STEINBACH & ASSOCIATES,	)	
	)	
Defendants	)	

Submitted: April 28, 2011
Decided: May 9, 2011

DECISION AFTER TRIAL

Daniel Shaw, *Pro Se,* Wilmington, Delaware.

Robert J. Deary, Law Office of Cynthia Beam, Newark, Delaware, Attorney for Defendants

FRACZKOWSKI, J.

Plaintiff Daniel Shaw ("Plaintiff") filed this lawsuit against Defendants Nationwide Insurance ("Nationwide") and Robert Steinbach & Associates ("Steinbach") seeking benefits for no-fault/personal injury protection ("PIP"), personal injury, pain and suffering, lost wages, automobile replacement and slander. Trial was held on February 14, 2011. At trial, the Court granted the Defendants' motion for a directed verdict in part as to Plaintiff's claims for slander, pain and suffering and lost wages, finding that

Plaintiff failed to put forth evidence to support these claims or damages based on these claims. The Court denied the Defendants' motion as to the remaining claims for PIP, personal injury and property damage. The Court reserved decision after trial.

The parties submitted post-trial memoranda. This is the Court's decision on Plaintiff's remaining claims.

FACTS

This litigation arises from a motor vehicle accident. Evidence established that on September 20, 2005, Plaintiff was traveling southbound in a 1999 Plymouth Breeze in New Castle County on Route 141 ("the Vehicle"). Plaintiff lost control of the vehicle and repeatedly struck a barrier wall. The vehicle flipped onto its roof and came to rest upside down in the roadway. The vehicle was badly damaged.

The Plaintiff stated that an individual named Sue Johnson Murray was at the wheel at the time of the accident and fled the scene thereafter.[1] Plaintiff claimed he was a passenger. He denied any knowledge as to where Ms. Murray went or how she fled the scene.[2] The record contradicts that recitation of events and establishes that Plaintiff was the driver. The medical records from the Christiana Emergency Room, (Plaintiff's Exhibit 7), identify the Plaintiff as the driver. The November 17, 2005 denial letter from Defendant Nationwide, (Plaintiff's Exhibit 12), reflects that the investigation determined that Plaintiff was the driver and that he was at fault for the accident.[3]

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[1] Trial Tr., 168, Feb. 14, 2011.
[2] Trial Tr., 168-169, Feb. 14, 2011.
[3] Trial Tr., 167-170, 193-195, Feb. 14, 2011. The Defense sought to admit the police report into evidence. Initially, the Court sustained the Plaintiff's objection regarding the report and limited its use to cross-examination and impeachment purposes only. Defense counsel established on cross-examination of the Plaintiff that the police report contradicted Plaintiff's testimony that another individual was driving the vehicle at the time of the accident. Instead, the police report identifies Plaintiff as the driver. Despite his own objection, Plaintiff then testified regarding the police officer's summary contained in the report as to who was present at the scene. The Court later had to modify its prior admissibility ruling once the Plaintiff

Plaintiff was convicted of Trafficking in Cocaine, Failure to Maintain a Vehicle, Possession of Drug Paraphernalia, Reckless Driving and Driving While License Suspended or Revoked in the Superior Court of Delaware. The Plaintiff appealed the alcohol-related charges to the Delaware Supreme Court.[4] Plaintiff did not appeal any of the drug-related charges.[5] The convictions were affirmed by the Delaware Supreme Court. Plaintiff filed a writ of habeas corpus as to the matters heard on appeal. Those matters are pending in the United States District Court for Delaware. No findings are made and the Court does not rely upon any alleged facts related to any criminal convictions and/or the police report to make its rulings. The Court limits any consideration thereof to credibility of the witnesses alone.

The parties do not dispute the existence of a valid automobile policy in effect on the date of the accident but their paths diverge on the nature of the coverage in effect at the moment of impact. Plaintiff argues that in addition to the minimum mandatory coverage, he also purchased "optional" coverage including uninsured/underinsured motorist, collision and comprehensive insurance for the subject vehicle. Plaintiff proffered a completed form application entitled "Delaware Motorists' Protection Act Required Statement to Policyholders" dated September 7, 2005 ("Form A"), (Plaintiff's Exhibit 2), to buttress his claim.

Specifically, Plaintiff argued that the Form A, which he completed with Defendant Steinbach's employee, showed unequivocally that he purchased collision and

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proffered the November 17, 2005 letter from Defendant Nationwide. Plaintiff sought to admit the letter to prove the denial was limited to the PIP claim, and that no denial was issued regarding the property damage claim. The Court cautioned Plaintiff that the November 17th letter referenced the results of the police investigation and the report as a basis for the denial. Defendants did concede that the police report was inadmissible.

[4] *See Shaw v. State of Delaware,* C.A. No. 538, 2006, Order (Del. Mar. 23, 2007).

[5] *Id.* at 2.

comprehensive coverage. Plaintiff maintained that Column B on Form A shows that Plaintiff selected the optional coverage for collision and comprehensive coverage by affixing an "X" in the boxes for each. Notwithstanding the "X" markings in Column B, Column C of the Form A does not specify that Plaintiff selected a deductible amount for either collision or comprehensive. Of note is the fact that Plaintiff selected deductible amounts for the no-fault insurance on the Form A, and chose binding policy limits[6] as well as premium amounts for the "optional" uninsured motorist coverage. Yet, for collision and comprehensive, the space dedicated to identify the applicant's chosen deductible amount was left blank. Plaintiff asks the Court to conclude that the blank space means he elected a "zero deductible" for the coverage by virtue of the omission, but the Court is not prepared to make that leap absent a clear manifestation of intent as to the specified terms.

Testimony by Plaintiff's first witness, Defendant Nationwide claims supervisor Paul Current, revealed that the Form A dated September 7, 2005 was "incomplete" because it does not identify a deductible amount in Column C for either collision or comprehensive.[7] Defendant Steinbach, as well as Plaintiff's third witness, Nationwide employee Ms. Tanya Brooks, established that one cannot purchase collision insurance with "zero deductible." Had Defendant Steinbach sold collision insurance, a deductible would have been reflected in Column C.[8] Conversely, Defendant Steinbach conceded

[6] Trial Tr., 152, Feb. 14, 2011.
[7] Trial Tr., 46, Feb. 14, 2011. Mr. Current testified that the Form A appears to be requesting collision coverage and comprehensive coverage, but it also appears to be an incomplete document. He stated that he had never seen a form that looked like that before.
[8] Defendant Steinbach testified that even though Plaintiff may have marked the box expressing a desire to have "collision" insurance, such marking does not equate to an actual purchase of coverage. In essence, a premium would have to be selected and paid for this coverage to be in effect.

that comprehensive coverage can be purchased with a "zero deductible."[9] Defendant Steinbach further stated that the Form A does not constitute the policy itself, nor is it a "binding contract." [10] Rather, he testified that the policy consists of the "Auto Policy Declarations," the "policy booklet," and the "insurance cards."[11]

The "Auto Policy Change Request" dated September 2, 2005, (Plaintiff's Exhibit 6), reflects that for "Vehicle # 2 1999 Plym Breeze 1P3EJ46X5XN612769," Plaintiff purchased the minimum mandatory liability insurance for property damage ($ 10,000) and bodily injury ($15,000/30,000). Plaintiff also purchased "Full" "personal injury protection," with a "zero deductible," as well as Uninsured Motorist for both Bodily Injury ($15,000/30,000) and Property Damage ($ 10,000). The Change Request Form does not reflect that Plaintiff selected Collision and/or Comprehensive coverage for the subject vehicle.

Moreover, the Auto Policy Declarations Page issued September 7, 2005, admitted without objection as Defendants' Exhibit 1, mirrors the policy coverage terms for the subject vehicle outlined in the Change Request. It provides a break down of coverage and corresponding premiums to be paid by Plaintiff for both of his vehicles. Plaintiff paid $ 564.00 for a six month premium for liability insurance and PIP. He also paid $ 67.00 for a six month premium for uninsured motorist coverage. Plaintiff received three discounts: (1) 5 year accident-free; (2) multi-car; and (3) passive restraint. The Declarations page does not reflect that Plaintiff paid a separate premium for either Collision and/or Comprehensive insurance for the subject vehicle. Rather, the evidence shows that Plaintiff paid only for liability, no-fault and uninsured motorist coverage.

[9] Trial Tr., 151, Feb. 14, 2011.
[10] *Id.* at 152
[11] *Id.* at 153-155.

Shortly after the accident, Defendant Nationwide sent Plaintiff the requisite forms and instructions to submit a PIP and/or Lost Wage claim(s) by letter dated October 7, 2005, (Plaintiff's Exhibit 5). Plaintiff did not produce any evidence or copies of a completed application for PIP benefits to corroborate his assertion that he submitted the PIP claim. By letter dated October 7, 2005 (Plaintiff's Exhibit 4), Defendant Nationwide denied Plaintiff's lost wage claim due to lack of substantiation and/or documentation. Because Plaintiff did not produce a copy of any completed application for benefits to Defendant Nationwide, the evidence was unclear what if anything he did submit pertaining to the lost wage claim or the manner in which he submitted it. The evidence reflects that Defendant Nationwide representatives repeatedly advised Plaintiff that he had to submit a completed Application for Benefits to the carrier prior to consideration of any claim for payment.[12]

Emergency Room records from Christiana Care Health services dated September 20, 2005, (Plaintiff's Exhibit 7), included an invoice of charges incurred on September 20, 2005 in the amount of $ 828.00. Plaintiff did not proffer any evidence that he sent these records to Defendant Nationwide, nor did the testimony establish that the carrier received it.[13] The documentary evidence only showed that the carrier continued to request the information from Plaintiff citing non-receipt of the application for benefits. Moreover, Plaintiff submitted no expert testimony with regard to the emergency room records or bills for medical treatment as a result of the accident. The record is devoid of

[12] As part of Plaintiff's case in chief, Defendant Nationwide employee Brenda Terrell testified that assuming a completed application had been received, once the bills are submitted and deemed related, as long as coverage exists, the bills will be reviewed for payment. She further stated that if she is continuing to ask for an application for benefits, it means she does not have it. Furthermore, the mere fact that she may have received information about lost wages does not mean that she received an application for PIP benefits including lost wages.

[13] Trial Tr., 46, Feb. 14, 2011.

any evidence that Plaintiff submitted this invoice to Defendant, or otherwise personally incurred the expense to pay for it.

Defendant Nationwide concedes that that it received one document regarding medical treatment in the amount of $ 151.97, but Plaintiff did not send the invoice -- a third party, Recovery Management Systems, sent it as a collection arm for the provider Delaware Physician's Care. The letter and accompanying invoice were admitted into evidence as Plaintiff's Exhibit 3. The service date is September 20, 2005. It is unclear if this second invoice is part of the initial emergency treatment, and thus a double bill; or if this bill represents the remaining balance after the provider applied an offset due to an established Plan rate with the carrier; or if it reflects an amount owed for non-payment. Indeed, Plaintiff did not submit any testimony, expert or otherwise, regarding medical expenses incurred or the payment status thereof. The nature and extent of Plaintiff's medical expenses remain unknown.

By letter dated February 3, 2006 to Recovery Management Systems, (Plaintiff's Exhibit 10), Defendant Nationwide denied the claim on the grounds that it had yet to receive a completed application for benefits from the Plaintiff. Absent receipt thereof, no claims would be considered. The Court finds the Plaintiff's testimony regarding his alleged submission of a completed Application for Benefits form as unreliable and unpersuasive.

With respect to Plaintiff's property damage claim, testimony established that the claim was initially set up as an "uninsured motorist" claim, not "collision." Plaintiff's witness Tonya Brooks, a Nationwide appraiser at the time, testified that initially Plaintiff reported to Defendant Nationwide that his "friend" was driving the vehicle and that they

were rear-ended by another car pushing the Plaintiff's car into a "jersey" barrier and then it flipped.[14] Ms. Brooks testified however that her inspection of the physical damage to the car as well as witness interviews led her to conclude that the physical damage did not support the Plaintiff's version of how the loss occurred.[15] Thus, the UM property damage claim was "shut down" and the claim "took another turn." Ms. Brooks further stated that the mere fact that an appraisal is prepared does not equate to presumed coverage of the claim.[16]

Plaintiff did not submit any evidence relating to a property damage claim beyond an incomplete repair estimate prepared by Ms. Brooks during the investigation of the claim. Ms. Brooks further stated that the estimate for property damage was incomplete as it did not reflect the odometer reading. She further testified that she would not have mailed out an incomplete appraisal.[17] The odometer reading is necessary as it impacts the value. Plaintiff did not submit any evidence as to fair market value or any other measure of cash value of the vehicle at the time of the loss. The Court concludes such evidence is not dispositive proof of any property damage claim.

CONTENTIONS OF THE PARTIES

Plaintiff brought suit against Defendant Nationwide seeking reimbursement of medical expenses he incurred following an automobile accident. Plaintiff fairly pleads a claim for breach of contract against Defendant Nationwide arguing that it breached its obligation to him by failing to provide PIP benefits under his automobile insurance

[14] Trial Tr., 128-130, Feb. 14, 2011.
[15] Ms. Brooks testified during Plaintiff's case in chief that her inspection revealed that there was no sign that another vehicle had rear-ended Plaintiff's vehicle. She also found no sign of "paint transfer" on the vehicle.
[16] Trial Tr., 117, Feb. 14, 2011.
[17] Trial Tr., 131-132, Feb. 14, 2011.

policy. Plaintiff further argues that Defendant Nationwide breached its agreement to provide collision coverage to Plaintiff by denying the claim for physical damage to his vehicle.

Defendants' response is three-fold. First, Defendants maintain that Plaintiff failed to comply with express conditions precedent prior to coverage being afforded under the PIP policy. Second, Defendants argue that Plaintiff did not purchase collision coverage for the subject vehicle, and thus any claim for collision benefits by Plaintiff should be precluded. Finally, even if the Court finds that collision coverage did exist, Plaintiff should be denied recovery as he failed to meet his burden of proof as to damages. Alternatively Defendants argue that even if the Court somehow determined the existence of collision coverage, any claim pursuant to that optional/excess policy would be precluded by valid policy exclusions.

DISCUSSION

This Court must decide two issues: (1) whether Defendant breached a contractual obligation to Plaintiff under an automobile policy by failing to pay PIP benefits after the September 20, 2005 accident; and (2) whether Defendant breached a contractual obligation by failing to pay for physical property loss sustained during that same automobile accident. The Court, as the trier of fact, must weigh the evidence as presented and make credibility determinations.[18] Plaintiff bears the burden to prove his claims by a preponderance of the evidence, and this is determined by finding which party has carried the greater weight of the evidence.[19]

[18] *Richardson v. A & A Air Services, Inc.*, Graves, J., 2007 WL 2473284, *5 (Del. Super.); *see also* Delaware Superior Court Pattern Jury Instruction § 23.9 "Credibility of Witnesses -- Weighing Conflicting Testimony."

[19] *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).

Breach of Contract Claim
Personal Injury Protection Benefits

Plaintiff alleges a breach of his insurance contract with Nationwide by the delay or denial of PIP benefits. Based on the underlying insurance contract and the alleged breach, Plaintiff seeks recovery of his medical expenses.

To prove the contractual liability of an insurer for an alleged breach of an insurance agreement, a Plaintiff must show that (1) there was a valid contract of insurance in force at the time of the loss; (2) the insured has complied with all conditions precedent to the insurer's obligation to make payment; and (3) the insurer has failed to make payment as required under the policy.[20]

The parties do not dispute that Plaintiff purchased the statutory minimum coverage for PIP ($15,000/$30,000) and that such coverage was in effect on September 20, 2005. A dispute does exist as to the second element -- whether Plaintiff complied with applicable policy conditions. Nationwide contends that Plaintiff was derelict insofar as he failed to comply with the conditions precedent set forth in the applicable insurance policy. By failing to perform as obligated by contract, specifically failing to submit an Application for Benefits, Nationwide maintains that the Plaintiff should be precluded from recovery. The Court agrees.

Under Delaware law, not every refusal to pay a claim of insurance will constitute a breach of contract by an insurer.[21] An insurance company is only obligated to pay "reasonable and necessary" medical expenses as set forth in 21 *Del. C.* § 2118. Plaintiff bears the burden of proof to show that the medical expenses and lost wages are

[20] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 365 (Del. Super. 1982).
[21] *McDuffy v. Kovall*, 226 F.Supp.2d 541, 545 (D. Del 2002); *Casson*, 455 A.2d at 365.

reasonable and necessary as a result of an automobile accident.[22] The Plaintiff insured must also show that he has complied with all conditions precedent to the insurer's performance.[23] Plaintiff is obligated to cooperate with the carrier as far as procedure to submit his medical and lost wage claims.[24]

The Delaware Financial Responsibility Law, specifically section 2118(a)(2)(i) of Title 21, requires that an insured submit expenses "as promptly as practical, in no event more than 2 years after they are received by the insured." The Court finds based upon the evidence that Plaintiff failed to prove by a preponderance of the evidence that he complied with this statutory provision. Indeed, the evidence showed that Plaintiff failed to do so in spite of repeated written requests by the Defendant requesting such information.

In addition to the statutory obligation, the Nationwide Insurance Policy Terms and Conditions ("Policy"), admitted without objection as Defendant's Exhibit 2, defines the parties' obligations, including the insured's duties in the event of a loss. For example, page D2 of the Policy contains a provision entitled "Insured Persons' Duties After an Accident or Loss." Subsection 1 of this provision clearly states "[t]he insured will give us or our agent prompt notice of all losses and provide written proof of claim if required." Subsection 6 further states in pertinent part that "[t]he injured person must grant us authority, at our request, to obtain copies of all wage and medical, dental or other health care provider records."

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[22] *McDuffy*, 226 F. Supp.2d at 545.
[23] *Id.* (citing *Casson*, 455 A.2d at 365).
[24] *Harris v. Prudential Property & Casualty Ins. Co.*, 632 A.2d 1380 (Del. 1993) (held that insurer could not invoke "cooperation clause" to limit claim of a third party to less than the minimum coverage required by statute, but could assert insured's non-cooperation to disclaim any liability beyond the statutory minimum as the "cooperation clause" exclusion did not violate public policy inherent in Financial Responsibility Law).

Moreover, the "No Fault" section of the Policy, at page N5, contains a similar section entitled "Insured Persons' Duties." Within that section, subsections 2 and 3 require Plaintiff to submit written proof of the PIP claim, as well as upon request authorize the carrier to obtain medical reports, copies of records and loss of earnings information upon request.

Finally, at page G2 of the Policy, section "General Policy Conditions," the Policy also contains a provision regarding "Fraud and Misrepresentation" in the context of claim submission, and outlines the circumstances under which the policy provisions will be deemed void.

The Court finds that the Plaintiff failed to show that he complied with the conditions precedent to the insurer's performance. Testimony at trial, letters and exhibits appeared to show that plaintiff did not follow procedure to submit a completed Application for Benefits, nor did he submit any document that could be reasonably viewed as a claim seeking medical benefits under his PIP policy.

Defendant Nationwide declined to pay any PIP benefits because Plaintiff failed or refused to take the first step – he had to complete the requisite Application for Benefits. Indeed, the evidence by and through repeated written requests by Defendant for Plaintiff to simply submit the claim, as well as the corroborating testimony, demonstrate to the Court that Plaintiff did not fulfill his minimal obligation. Because the information needed to process the claim was never submitted, Defendant Nationwide acted reasonably when it denied the claim.

Plaintiff essentially asks this Court to engage in a guessing game which this Court is not prepared to do. First, Plaintiff suggests that by virtue of the Defendant

Nationwide's denial of the "lost wage claim" due to the lack of claim verification that Plaintiff must have submitted something since the application is one page and theoretically why would he submit one without the other. Second, the Plaintiff points to a letter from a third party collection agency dated January 16, 2006 as evidence that the carrier had notice that a medical expense was incurred on September 20, 2005 and should have paid it.

The Court rejects the Plaintiff's argument that such extrinsic evidence satisfies his burden of proof that he complied with statutory and policy procedure. The Court cannot speculate as to what the Plaintiff did or did not submit. The Court can only rule upon the evidence presented and contained in the four corners of the record. No evidence exists to show that Plaintiff followed any discernible procedure to submit his claim. Defendant Nationwide cannot be expected to pay bills that it never received nor verified. It cannot review what it does not have, nor is it obligated to approve any expense on faith. Any lack of information needed by the carrier was due to Plaintiff's own failure to prescribe to established procedure. As such, the Defendant Nationwide's denial was reasonable and justified.

The analysis and conclusions stated in *State Farm Mutual Automobile Insurance Company v. Smith*[25] are dispositive of the issues framed in this case.

Because Plaintiff failed to meet his burden of proof as set forth in 21 *Del. C.* § 2118, or interpretive case law, the Court finds in favor of the Defense as to Plaintiff's claim for breach of contract for denial of PIP benefits.

[25] Quillen, J., 2000 WL 1211153 (Del. Super.).

Breach of Contract
Property Damage Claim

Plaintiff also seeks recovery for property damage loss to his vehicle. Plaintiff argues that on September 7, 2005, he added the subject vehicle to his existing Nationwide automobile policy. Plaintiff contends that in addition to the minimum coverage requirements, he purchased three additional policies: "Underinsured/Uninsured," "comprehensive" and "collision" coverage. Plaintiff argues that because the loss falls within the parameters of the optional coverage, Defendant Nationwide breached the contract of insurance when it denied benefits for the property loss.

As stated previously, to establish a claim for breach of the insurance agreement, plaintiff must show that a valid contract of insurance existed at the time of the loss; that the insured complied with the conditions precedent to the insurer's obligation to pay; and that the insurer failed to make a payment as required by policy.[26]

At the heart of Plaintiff's case lies the presumption that a valid contract existed. Without a valid contract, the cause of action must fail. Thus, as a threshold matter, Plaintiff must establish by a preponderance of the evidence that a valid contract of insurance existed on September 20, 2005, the date of the loss.

Delaware law defines a contract as an agreement upon sufficient consideration to do or not to do a particular thing.[27] The elements necessary to create a contract include: 1) the intent of the parties to be bound; 2) sufficiently definite terms; and 3) the existence of consideration.[28] A key element to a valid contract is "mutual assent" to the terms of the

[26] *Casson*, 455 A.2d at 365.
[27] *Rash v. Equitable Trust Co.*, 159 A. 839, 840 (Del. Super. 1931).
[28] *Carlson v. Hallinan*, 925 A.2d at 524.

agreement, commonly referred to as "meeting of the minds."[29] Consideration is defined as "a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request."[30]

Defendant Nationwide does not appear to dispute that Plaintiff purchased liability coverage for property damage in the amount of $ 10,000 each occurrence. However, this policy only covers property damage caused by the insured to another person's vehicle or other property. It does not cover the insured's car. As Plaintiff's car is the only vehicle damaged here, Plaintiff is not entitled to any coverage under the property damage liability policy.

The Court's analysis now turns to whether any other coverage existed, namely excess or "optional" coverage, whereby Plaintiff himself would be entitled to proceeds. Optional coverage is wholly separate from the statutorily-mandated coverage discussed above. Assuming such other coverage exists, this Court must then determine whether any policy exclusions may apply to bar coverage under an excess policy.

First, with respect to the Underinsured/Uninsured motorist coverage, the parties do not dispute that Plaintiff purchased this coverage. Uninsured Motorist coverage pays if the insured incurs losses from a driver who does not have insurance, or a hit-and-run driver. This coverage, when in effect, takes the place of the insurance that the other driver should have had, but did not. Under-insured motorist coverage protects the insured if he is involved in an accident that is not the insured's fault, but the other driver does not have enough insurance to cover the loss.

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[29] *Quinones v. Access Labor*, 2008 WL 2410170 at *5 (Del. Super.) (citations omitted).
[30] *Paoli v. Whispering Pines*, Clark, J., 2006 WL 2165690 (Del. Com.Pl.) (citing *Ramone v. Lang*, 2006 WL 905347, *14 (Del. Ch.)).

The Court finds based upon the trial testimony and documentary evidence that Plaintiff was the driver of the vehicle at the time of the collision, and that no other vehicle was involved. The Court finds Plaintiff's testimony lacking credibility regarding how the accident occurred. Thus, Plaintiff failed to meet his burden of proof as to the applicability of uninsured motorist coverage.

Second, Plaintiff argued that he purchased "comprehensive" coverage. Under Plaintiff's policy, comprehensive coverage pays for damage to the insured's vehicle not caused by "collision or upset." [31] Coverage typically includes loss caused by fire, flying objects, contact with animals, severe weather, vandalism, flood and theft – anything but a collision.[32] Comprehensive coverage is not required by Delaware law, and thus is elective.

As a preliminary matter, the Court finds Plaintiff failed to meet his burden of proof to show that he even purchased Comprehensive insurance coverage for the subject vehicle. The initial form completed with Defendant Steinbach's employee is inconclusive as it does not identify a premium elected by the Plaintiff. Moreover, the Auto Policy Change Request dated September 2, 2005 and the Auto Policy Declarations effective September 7, 2005 do not specify comprehensive coverage for this vehicle. No premium is identified, and thus, Plaintiff did not pay for that coverage.

Moreover, even if one assumes that Plaintiff opted for a "zero deductible," which would be feasible with comprehensive coverage, the point is moot as this coverage does not apply under these factual circumstances. The loss resulted from a collision, thus any inquiry as to whether comprehensive coverage existed is immaterial.

[31] Defendant's Exhibit 1, Nationwide Automobile Insurance Policy, at P1.
[32] Trial Tr., 120, Feb. 14, 2011.

Finally, Plaintiff argued that because his automobile policy for the subject vehicle included collision insurance, Nationwide's denial of his property damage claim constitutes a breach of his insurance agreement. Before the Court can address whether Nationwide breached any agreement, Plaintiff must show by a preponderance of the evidence that he purchased optional Collision insurance for the subject vehicle. Stated differently, Plaintiff must show that a valid contract for Collision insurance existed between the parties.

The Court finds that based upon the testimony and evidence admitted at trial, Plaintiff failed to meet his burden of proof that he purchased Collision Coverage for the subject vehicle. Plaintiff's Exhibit 1, the Form A that he completed with Defendant Steinbach's employee, is incomplete as it does not reflect a deductible selected by Plaintiff. Testimony established that "zero deductibles" do not exist for Collision coverage, and it was further stated that said form does not constitute the policy terms. Furthermore, the Auto Policy Change Request and Auto Policy Declarations documents corroborate this Court's finding that Plaintiff never purchased Collision coverage for his vehicle as neither document itemizes Collision coverage for either of Plaintiff's vehicles, nor does it specify a correlating premium for said coverage. Plaintiff presumably received each document, the first of which he submitted into evidence, and he did not object to the accuracy of the Declarations.

The Court finds that Plaintiff failed to satisfy his burden of proof as to the requisite elements of a contract for Collision insurance. Plaintiff did not show a manifest intent to be bound by Nationwide. The essential terms are missing as to deductible and the premium to be paid. Most importantly, Plaintiff never paid a premium for Collision

coverage thereby lacking the essential element of consideration. Thus, not only was there no meeting of the minds as to the disputed coverage, no consideration ever changed hands for Collision.[33] The need for such clear and uncertain terms cuts both ways. Consequently, no valid contract can be found. Absent proof of this threshold element -- a valid contract as between the parties upon which Plaintiff could predicate his claim -- the Plaintiff's claim for breach thereof cannot survive. Without a valid contract of collision insurance, no other policy existed to afford coverage for Plaintiff's property loss as liability and uninsured motorists do not apply under these facts. Plaintiff's claim pursuant to collision coverage fails.

The Court finds that Plaintiff failed to prove by a preponderance of the evidence that a valid contractual agreement for collision insurance existed between the parties. Because the Court concludes that the Plaintiff failed to meet his burden to show that a valid contract for collision coverage existed, the Court need not reach the second or third prongs of the analysis as to whether Nationwide and/or Steinbach breached that contract when they denied Plaintiff's property damage claim or whether damages are due and owing. Further, because the Court concludes that Plaintiff never purchased collision coverage for his vehicle, the Court need not decide the issue of whether or not a policy exclusion would apply to bar coverage.

[33] In this case, the Court cannot infer from the record that any discernible fact exists upon which to find that Plaintiff purchased Collision. To the contrary, every fact appears to support a finding that he did not.

CONCLUSION

Based on these findings and conclusions, the Court concludes that Plaintiff has not met his burden of proof to establish Defendants' liability under theories of breach of contract for claims under the personal injury protection or physical damage clauses of the automobile insurance policy. Judgment is entered in favor of the Defendants and against the Plaintiff, with costs assessed against Plaintiff.

IT IS SO ORDERED.

Alfred Fraczkowski[34]

[34] Sitting by appointment pursuant to Del. Const. Art. IV, § 38 and 29 *Del. C.* § 5610.