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

LIZA G. O'DONNELL as Assignee of the rights of William N. King, Michael C. King, Evelyn N. King,	)	
Plaintiff,	)	C.A. No. 11C-06-157 JAP
v.	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION

Appearances:

Joseph J. Rhoades, Esquire, Wilmington, Delaware
Attorney for Defendant Liza G. O'Donnell

Colin M. Shalk, Wilmington, Delaware
Attorney for Defendant State Farm Mutual Automobile Insurance Company

JUDGE JOHN A. PARKINS, Jr.

The primary issue presented here is whether an insurance carrier is obligated to provide post-accident coverage to an excluded driver when the carrier failed to comply with 18 *Del.C.* §3909. The court holds that under the unusual facts in this case the carrier had no such obligation.

Facts

Plaintiff Liza O'Donnell was seriously injured when she was a passenger in a car operated by William King. Allegedly William King was driving a Buick Regal in a northerly direction on Paper Mill Road when it suddenly veered across the south-bound lanes, left the road and struck a utility pole. No other vehicles were involved in the accident.

William King, who was an adult at the time of the accident, resided with his parents Michael and Evelyn King. Mrs. King had automobile insurance with defendant State Farm, which listed William (the son) as an excluded driver because of his poor driving record. On two occasions, the Kings unsuccessfully tried to persuade State Farm to change William's designation as an excluded driver. William King was not without insurance, however. His father had a policy with Progressive Direct Insurance. At various times, William King was insured under his own policy with Progressive and at other times (including the date when the accident occurred), he and his Buick Regal were insured through his father's policy. The coverage provided by Progressive was the same

as that which would have been provided under the State Farm policy had William King not been an excluded driver under that policy.[1]

Plaintiff O'Donnell sued William King and his parents for injuries she alleged when William King negligently drove off the road his vehicle in which she was a passenger. She also alleged that his parents negligently entrusted the vehicle to their son. After this suit was filed, Progressive paid its policy limits to Plaintiff on behalf of William and his father. Ms. O'Donnell dismissed her claims against William and his father in exchange for the proceeds of the Progressive policy and an assignment of any rights the Kings may have had against State Farm.[2]

Ms. O'Donnell now brings this claim asserting the rights of William King, in the form of a declaratory judgment action, against State Farm. She contends that State Farm did not comply with the Insurance Code when it designated William King as an excluded driver. According to Ms. O'Donnell, William King's remedy is the retroactive issuance of a policy to Mr. King, the proceeds of which would be available to satisfy her claims.[3] State Farm filed a Motion for Summary Judgment arguing State Farm owed no duty to defend or indemnify the Kings. Plaintiff has countered with a cross-Motion for Partial

[1] The policies, as might be expected, were not identically worded. There is no claim, however, there was any material difference between them.

[2] Ms. O'Donnell previously alleged a negligent entrustment claim against the mother, Mrs. King. In its motion for summary judgment, State Farm argued that Mrs. King could not negligently entrust a vehicle she did not own. At oral argument, Ms. O'Donnell's counsel advised the court she was no longer pursuing the negligent entrustment claim against the mother.

[3] No judgment has been entered in favor of Ms. O'Donnell in her underlying personal injury claim. William King's liability and the damages (if any) to be awarded to Ms. O'Donnell are therefore yet to be determined.

Summary Judgment, asserting that William King was entitled to coverage from State Farm. These cross motions are now before the court.

Standard of Review

In considering a motion for summary judgment the court views the facts in the light most favorable to the nonmoving party and will only grant summary judgment when "the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[4] If both parties file motions for summary judgment, the parties "implicitly concede the lack of disputed material facts and acknowledge adequacy of the record to support the party's respective motion."[5] Irrespective of any such implicit concession, the court finds there is no genuine dispute of material fact here.

Analysis

The issue before the court is whether Mrs. King's State Farm insurance coverage extended to her son William King. When interpreting an insurance policy, the court treats each dispute as a matter of law and interprets the policy "in a common sense manner." In other words, the court gives "each term its plain meaning within the contract."[6] If the language within the insurance contract is "clear and unequivocal," the parties "will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had

[4] *Bantum v. New Castle County Co-Tech Educ. Ass'n*, 21 A.3d 44, 48 (Del. 2011) (citations omitted).
[5] *Adams-Baez ex rel. Adams v. General Acc. Co.*, 2005 WL 2436220, at *1 (Del. Super. 2005).
[6] *Id.*

not assented."[7] Ambiguity in an insurance policy exists when the language in a contract permits two or more reasonable interpretations.[8] If ambiguity exists, the court will typically construe the language against the drafter and "in accordance with the reasonable expectations of the insured."[9]

Plaintiff sets forth two arguments upon which the court could find that State Farm's coverage extended to William King. First, she argues State Farm did not properly exclude William King from Mrs. King's policy. Second, Plaintiff argues that coverage must be extended to the Buick Regal William King was driving at the time of the accident under the "non-owned car" provision of the policy and the "reasonable expectations doctrine" adopted by the Delaware Supreme Court.

1. State Farm's failure to comply with the exclusion statute does not give rise to coverage for William King

18 *Del. C.* §3909 requires an insurance company to follow procedures for exclusion before it excludes someone from their policy, and 18 *Del. C.* §3905 requires notice to the excluded party by way of certified mail. Plaintiff argues State Farm failed to properly exclude William King in that (1) William King had no contact with State Farm agent regarding the exclusion form; (2) State Farm failed to offer William King separate coverage. Plaintiff also contends that State Farm did not provide notice of the exclusion to William King via certified mail.

Defendant admits for purposes of these motions that an agent did not meet with William King and he was not offered his own policy. It counters

[7] *Hallowell v. State Farm Mut. Auto. Ins. Co*., 443 A.2d 925, 926 (Del. 1982).
[8] *Id.*
[9] *Bermel v. Liberty Mut. Fire Ins. Co.*, 56 A.3d 1062, 1070 (Del. 2012).

instead that it is irrelevant whether William and Michael King were properly excluded from the State Farm policy because William and Michael King obtained the same coverage with Progressive Insurance Company. It is uncontested that at the time of the accident William King and his Buick Regal were insured by Progressive for the same limits previously provided by State Farm. State Farm further contends that its failure to send a notice of the exclusion by certified mail is a technical failure at worst because William King acknowledges he had notice of the exclusion at or about the time it was made.

The Insurance Code does not provide a remedy for the failure of an insurance carrier to comply with the exclusion provisions of the code, nor does Plaintiff explain why William King is entitled under that Code to what amounts to double coverage, that is from *both* Progressive and State Farm. There being no remedy in the Code for violation of the exclusion provisions, the court must look to the purpose of those provisions to fashion an appropriate remedy. From the earliest days of independence Delaware incorporated the common law of England to the extent it was not inconsistent with the General Assembly's legislative acts. The Delaware Constitution of 1776 provided:

> Art. 25. The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, *& c.* agreed to by this convention.

Similarly, the 1831 constitutional provision creating this court tied its jurisdiction to the common law: "This court shall have jurisdiction of all causes of a civil nature, real, personal and mixed, at common law, and all other

the jurisdiction and powers vested by the laws of this State in the Supreme Court or Court of Common Pleas."[10] Statutes in derogation of the common law must, of course, be strictly construed. Therefore, where, as here, a statute creating a private right does not also provide a remedy, courts must apply a common law remedy. Almost sixty years ago Judge (later Chief Justice) Herrmann wrote that when the General Assembly enacted legislation the "[f]ailure to amend the common law must be taken as legislative intent to retain the rule which seems to have been well settled under the common law."[11]

At common law a remedy was generally limited to making the injured party whole. This principle encompasses contract actions such as this:

> Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:(a) his expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.[12]

In other words,

> Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach.[13]

This principle, often referred to as "make whole" damages is used in devising remedies for violation of rights created by statute. In *Ed Stinn*

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[10] Del. Const. 1831, art. VI, section 3.

[11] *Associated Transport v. Pusey,* 118 A.2d 362, 364 (Del. Super. 1955).

[12] Restatement (Second) of Contracts, sec. 344.

[13] *Id.,* comment.

Chevrolet v. National City Bank[14] the Ohio Supreme Court relied upon the common law for a UCC remedy:

> The cardinal common-law rule of awarding damages to make the plaintiff whole for the wrong done to him by the defendant has been embodied in the Uniform Commercial Code as adopted by this state. Likewise, the basic principle of law that a party may not recover damages if he has not suffered an injury is applicable to contract breaches governed by the Act.

An award limited to so-called "make whole" damages does not frustrate the purpose of the statute. According to the Supreme Court, the purpose of the exclusion provisions of the Delaware Code is to "ensure continued coverage of an automobile where the driving record of a household member warrants nonissuance or cancellation."[15] The exclusion provisions of the Code did not contemplate that replacement coverage would necessarily come from the original insurer. Rather the General Assembly understood that the excluded insured would often obtain replacement coverage from a different insurer. For example, section 3909(e) requires an excluded driver to "accept this offer [from the original carrier], to furnish proof that *such coverage is carried with another company*, or to surrender his/her license."[16]

The court holds, therefore, that William King's recovery is limited to the amount of money necessary to place him in the same position he would have been in if State Farm had complied with the statute. It is undisputed that William King, who was aware he had been excluded from his mother's policy, obtained identical coverage from Progressive. Thus at most he is entitled to

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[14] 503 N.E.2d 524, 534 (Ohio 1987).
[15] *State Farm Automobile Insurance Co. v. Washington*, 641 A.2d 449, 451-52 (Del. 1994).
[16] 18 *Del. C.* sec 3909(e) (emphasis added).

recover any premium he paid Progressive in excess of that which he would have had to pay State Farm if State Farm had complied with the statute. As is to be expected, there is no evidence of increased premiums, and therefore Mr. King, and therefore Ms. O'Donnell, suffered no compensable injury as a result of State Farm's failure to comply with the exclusion statutes.

2. The State Farm policy did not provide coverage to William King once Mr. King was excluded from coverage.

As an alternative argument, Plaintiff urges that even if the exclusion of William King was valid, he was still covered under the State Farm policy's non-owned vehicle provision. Under State Farm policy, according to Plaintiff, coverage is extended to accidents resulting from the "ownership, maintenance or use of your car." She argues that the term "your car" includes not only the car listed on the declarations page of Ms. King's policy, but also "extends to the use by an insured of a newly acquired car, a temporary substitute car or a *non-owned car*."[17] In turn, a "non-owned car" is defined in the policy as "a car not (1) owned by, (2) registered in the name of, or (3) furnished or available for the regular or frequent use of . . . you, your spouse, or any relatives." Because William King's Buick was "available for the regular or frequent use of a relative [William King]" it does not qualify as a "non-owned car" under the State Farm policy and therefore no coverage is provided under the unambiguous terms of that policy.

Plaintiff seeks to circumvent the language of the policy by invoking the reasonable expectations doctrine. That doctrine provides that "an insurance

[17] Emphasis added.

policy should be construed 'to effectuate the reasonable expectations of the average member of the public who buys it....'"[18] Assuming, but not deciding, that the reasonable expectations doctrine applies to claims made by a stranger to the insurance contract (in this case William King), Plaintiff's argument is barred by the unambiguous language of the policy. A predicate to the application of this doctrine is the existence of an ambiguity in the insurance contract. As the Delaware Supreme Court has explained:

> [T]he Court will look to the reasonable expectations of the insured at the time when he entered into the contract if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print. But the doctrine is not a rule granting substantive rights to an insured when there is no doubt as to the meaning of policy language."[19]

The State Farm policy is unambiguous and therefore the reasonable expectations doctrine does not apply here.

Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment is **DENIED** and State Farm's motion is **GRANTED**. The case is therefore **DISMISSED.**

Date: June 28, 2013

John A. Parkins, Jr.

oc: Prothonotary

[18] *Hallowell v. State Farm Mutual Automobile Ins. Co*., 443 A.2d 925, 926 (Del. 1982) (citations omitted).
[19] *Id.* at 927.