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

MICHAEL P. BARONE SR. and	)	
GERTRUDE P. BARONE	)	
Plaintiffs,	)	
	)	
v.	)	**C.A. No. N13C-01-131 MJB**
	)	
PROGRESSIVE NORTHERN	)	
INSURANCE CO.,	)	
Defendant.	)	
	)	
	)	

Submitted: October 2, 2013
Decided: January 29, 2014

Upon Plaintiffs' Motion for Reargument, **DENIED.**

OPINION

Stephen B. Potter, Esq., Tiffany M. Shrenk, Esq., Potter, Carmine & Associates, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

Donald M. Ransom, Esq., Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware, Attorney for Defendant.

BRADY, J.

I. INTRODUCTION

Before the Court is a Motion for Reargument filed Michael P. Barone, Sr. and Gertrude P. Barone ("Plaintiffs") that requests the Court reconsider its previous ruling relating to cross motions for summary judgment. On April 25, 2013, Plaintiffs filed a Motion for Summary Judgment with the Court. Defendant Progressive Northern Insurance Company ("Progressive") responded to Plaintiffs' Motion with a Cross Motion for Summary Judgment on May 30, 2013. The Court heard oral argument on the Motions on June 6, 2013 and reserved judgment. On September 18, 2013, the Court denied Plaintiffs' Motion for Summary Judgment and granted Progressive's Motion for Summary Judgment. Plaintiffs thereafter filed a timely Motion for Reargument on September 25, 2013. Defendant filed a response in opposition to Plaintiffs' Motion for Reargument on October 2, 2013. Upon consideration of parties' respective submissions, Plaintiffs' Motion for Reargument is **DENIED** for the reasons discussed below.

II. FACTS[1]

A. Background

This case arises from a motor vehicle accident that occurred on July 3, 2012. Plaintiff Gertrude P. Barone ("Plaintiff") was driving a car owned by her step-son and daughter-in-law when she was involved in the collision. The step-son's car was registered in Delaware and insured by GEICO. The GEICO policy provided Personal Injury Protection ("PIP) benefits in the amount of $15,000.00. Plaintiff exhausted the $15,000 of PIP benefits available under the GEICO policy.[2]

At the time of the accident, Plaintiff's husband, Mr. Barone, owned a vehicle insured under a Progressive policy with PIP benefits up to $100,000 per person ("Policy"). Plaintiff

[1]The facts section is based, substantially, on the facts as recited in Court's September 18, 2013 decision for which Appellant seeks reargument through the instant motion.
[2]Plaintiff alleged that her medical treatment and wage losses resulting from the accident exceeded $100,000.

sought $85,000 of PIP benefits under her Progressive policy after exhausting the benefits under the GEICO policy.[3] Because Progressive declined to provide the benefits, Plaintiffs filed suit.

Plaintiff asserted in her Motion for Summary Judgment that she is entitled to collect benefits from Progressive, and that her position is supported by Delaware law and public policy.[4] Plaintiff contended that she was entitled to $85,000 in PIP benefits under the policy with Progressive, because "[she] is not attempting a double recovery, and instead is requesting the difference of PIP benefits available under the third-party policy and her own policy be paid to her."[5]

Progressive filed a Cross Motion for Summary Judgment on May 30, 2013. Progressive claimed that 21 *Del. C.* § 2118(a)(2)(c) unambiguously excludes "an occupant of another motor vehicle." Therefore, Progressive argued, because Plaintiff was not occupying the insured vehicle and was the occupant of another vehicle, subparagraph (c) unambiguously does not afford her coverage. Finally, Progressive also asserted that the language of subparagraph (d) plainly demonstrates the General Assembly's intention to mandate an extension of coverage only in the specific situation where an insured is injured by an accident "while occupying any registered motor vehicle *other than a Delaware registered insured motor vehicle*."[6]

In the Court's September 18 decision, which Plaintiffs now seek to reargue, the Court concluded that Plaintiff could not recover the $85,000 in PIP benefits under the Progressive policy. The Court reached this conclusion, relying on Section 2118 and the OMV section of the

[3]PIP benefits provided under her Progressive policy ($100k) less the PIP benefits provided under the GEICO policy ($15k).
[44]Plaintiff cited, and relied on, the following cases: (1) *Mohr v. Progressive N. Ins. Co*., 2010 WL 4061979 (Del. Super. Ct. Sept. 27, 2010), *aff'd Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492 (Del. 2012); (2) *Boling v. All State Ins. Co*., 2006 WL 3240008 (Del. Super. Ct. Oct. 30, 2006); (3) *Jones v. State Farm Mutual Ins. Co*., 1998 WL 473041 (Del. Super. Ct. Jun. 8, 1998); and (4) *Gonzalez v. State Farm Mutual Ins. Co*., 1996 WL 526014 (Del. Aug. 19, 1996). The Court found these cases to be distinguishable from the case *sub judice*.
[5]*Id*. at ¶8.
[6]21 *Del. C.* § 2118(a)(2)(d) (emphasis added).

Progressive policy,[7] because Plaintiff was occupying a Delaware registered and insured motor vehicle at the time of the accident that gives rise to her claim.

III. STANDARD OF REVIEW

Plaintiffs' Motion for Reargument is governed by Superior Court Rule of Civil Procedure 59(e) ("Rule 59(e)"). Rule 59(e) provides:

> A motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision. The motion shall briefly and distinctly state the grounds therefor. Within 5 days after service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion. The Court will determine from the motion and answer whether reargument will be granted. A copy of the motion and answer shall be furnished forthwith by the respective parties serving them to the Judge involved.[8]

A motion for reargument is the proper device for seeking reconsideration by this Court of its findings of fact and conclusions of law.[9] "The manifest purpose of all Rule 59 motions is to afford the . . . Court an opportunity to correct errors prior to an appeal."[10] A motion for reargument will be granted only in the event that "the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[11] A motion for reargument is not an opportunity for a party to re-argue issues already decided by the Court or to present new arguments not previously raised.[12] Further, except in extraordinary circumstances, a motion for

[7]"OMV" is an acronym for "other motor vehicle," and such a provision is used "to deny coverage for a claim arising out of an accident involving a vehicle owned by the insured, but not listed as a covered vehicle under the policy." *Frank v. Horizon Assur. Co*., 553 A.2d 1199, 1201 (Del. 1989).
[8]Super. Ct. Civ. R. 59(e).
[9]*Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).
[10]*Id*.
[11]*Id*.
[12]*Strong v. Wells Fargo Bank*, 2013 WL 1228028, at *1 (Del. Super. Ct. Jan. 3, 2013).

reargument under Rule 59(e) "properly seeks only a re-examination of the facts in the record at the time of the decision."[13]

IV. DISCUSSION

A. "Insured Person"

21 *Del. C.* § 2118(a)(2) provides:

> c. The coverage required by this paragraph shall be applicable to each person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle, *other than an occupant of another motor vehicle*.
>
> d. The coverage required by this paragraph shall also be applicable to the named insureds and members of their households for accidents which occur through being injured by an accident with any motor vehicle other than a Delaware insured motor vehicle while a pedestrian or while occupying any registered motor vehicle *other than a Delaware registered insured motor vehicle*, in any state of the United States, its territories or possessions or Canada.[14]

The language of the PIP portion of the Plaintiffs' policy defines an "Insured person" as

> you, a relative, or any household member . . . when injured: (i) as a pedestrian in an accident involving any land motor vehicle other than a motor vehicle insured under Delaware law; or (ii) while occupying any registered motor vehicle other than a Delaware registered insured motor vehicle.[15]

Considering Section 2118 and the OMV exclusion in Plaintiffs' policy with Progressive, the Court concluded that Plaintiff could not recover the $85,000 in PIP benefits under the

[13]In limited circumstances, a party moving for reargument may introduce new evidence, providing the party seeking to introduce the new evidence demonstrates that the newly discovered evidence could not, in the exercise of reasonable diligence, have been discovered prior to the Court's decision. *See Shaunttel C.L. Draper v. Med. Ctr. of Delaware, Inc*., 1999 WL 1441994, *4 (Del. Super. Ct. Oct. 19, 1999) *rev'd sub nom. Draper v. Med. Ctr. of Delaware*, 767 A.2d 796 (Del. 2001) (reversed on other grounds) ("The time for Plaintiff to have made these new assertions was in response (written and oral) to the motion to dismiss, not in a motion for reargument."); *Reid v. Hindt*, 2008 WL 2943373, *1 (Del. Super. Ct. July 31, 2008) (explaining the movant "has the burden of demonstrating newly discovered evidence, a change in the law or manifest injustice"); *see also Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, *1 (Del. Ch. Dec. 31, 2007) (explaining "new evidence generally will not be considered" in deciding a motion for reargument, which "is only available to re-examine the existing record").

[14]21 *Del. C.* § 2118(a)(2) (emphasis added).

[15]Progressive Policy, p. 7.

Progressive policy, because she was occupying a Delaware registered and insured motor vehicle at the time of the accident giving rise to her claim.

B. Application

In moving for reargument, Plaintiffs contend that the excess PIP benefits of $85,000 is not limited by the OMV exclusion. According to Plaintiffs, "[u]nder the law, the $15,000 mandatory minimum PIP coverage and the additional $85,000 elected by the Plaintiffs are to be treated separately as minimum or primary coverage and excess coverage." Plaintiffs contend that the introductory phrase in subparagraph (c) of Section 2118(a)(2), which states "The coverage required by this Paragraph," refers only to the mandatory minimum amount of PIP coverage, *i.e.*, $15,000, not to the "additional" $85,000 of excess coverage, and caselaw, discussed below, supports permitting insured parties to recover "additional PIP" benefits. According to Plaintiffs, "[t]he Court's decision . . . prevents individuals from protecting themselves if they ride in any motor vehicle other than their own," which is an "absurd" result. Finally, Plaintiffs contends, for a number of reasons, that Delaware's public policy supports Plaintiff recovering the $85,000 in PIP benefits.[16]

i. Delaware Case Law Does Not Support Plaintiffs' Position

Plaintiffs cite two cases, *Wygant v. GEICO General*[17] and *Bell Atlantic-Delaware, Inc. v. Saporito,*[18] as supporting that Plaintiff is entitled under Delaware law to recover the $85,000 as "additional PIP" benefits.[19] However, Plaintiffs' reliance on these cases is misplaced.

[16]Plaintiffs assert the following public policy arguments: (1) it is the public policy of this State to encourage individuals to purchase additional insurance and (2) an important public policy goal of the automobile insurance statute is to promote full compensation to all victims of automobile accidents.
[17]2011 WL 3586488 (Del. Super. Ct. Aug. 16, 2011).
[18]875 A.2d 620 (Del. 2005).
[19]The Court notes that, in moving for reargument, Plaintiffs again rely on *Mohr v. Progressive Northern Insurance Company*. 2010 WL 4061979, *3 (Del. Super. Sep. 27, 2010), *aff'd Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 495 (Del. 2012). As explained previously, *Mohr* is distinguishable from the case *sub judice*, because the plaintiff in *Mohr* was a pedestrian, which prompted both the Superior Court as well as the Delaware Supreme Court to analyze

In *Wygant*, the plaintiff, who at the time had a Delaware policy with GEICO that provided PIP benefits, sustained injuries in a car accident.[20] The plaintiff and GEICO disagreed regarding the amount of PIP benefits to which the plaintiff was entitled under the insurance policy.[21] Specifically, the plaintiff contended that he was entitled to PIP benefits of $40,000 per person/$80,000 per accident, representing the minimum coverage limit of $15,000/$30,000 required by statute plus an *additional* $25,000/$50,000 in PIP benefits.[22] However, GEICO asserted that the policy only entitled the plaintiff to "a total of $25,000 per person/$50,000 per accident, which *includes* the $15,000/$30,000 minimum coverage limits required by law."[23] The Delaware Supreme Court, upon interpreting the policy at issue, concluded that the plaintiff's policy with GEICO clearly explained that the plaintiff was entitled to "PIP coverage up to a *total* of $25,000 per person/$50,000 per accident."[24]

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an entirely different subparagraph of Section 2118(a)(2) than is at issue in the present case, specifically subparagraph (e). *Mohr*, 2010 WL 4061979, at *3 (Superior Court of Delaware); *Mohr*, 47 A.3d at 496 (Delaware Supreme Court). Additionally, the Delaware Supreme Court's decision that the plaintiff was entitled to recover the difference between the PIP policies was based, in part, on concluding that subparagraph (e) is ambiguous. *Mohr*, 47 A.3d at 499. Importantly, in holding that subparagraph (e) is ambiguous, the Delaware Supreme Court explained that subparagraphs (c) and (d), which are at issue in the present case, are unambiguous, stating: "Unlike subparagraphs (c) and (d) . . . subparagraph (e) does not specify whether its coverage mandate applies to an insured pedestrian's insurance policy, or to the striking car's insurance policy, or to both." *Id*. at 492; *see also id*. at n. 19. The Supreme Court further distinguished subparagraph (e) from subparagraph (c) by stating:

> Subparagraph (c) mandates automobile insurance coverage for pedestrians injured in an accident "involving *such* motor vehicle." That language expressly requires that the insured automobile be involved in the accident. That requirement necessarily excludes policies insuring automobiles that are *not* involved in the accident, even if the injured pedestrian is an insured under such a policy. Subparagraph (e), however, refers broadly to "any motor vehicle," and nowhere limits the pedestrian's right to recover under an automobile insurance policy insuring him, in cases where that insured automobile is *not* involved in the accident. The different language employed by these two subsections cannot be viewed as accidental or inconsequential. The legislative choice of the word "any" in subparagraph (e) reasonably could have been intended to expand the coverage mandate beyond that provided by subparagraph (c), which addresses only—and is limited to—the policy insuring the striking car. That is, subparagraph (e) can be reasonably be read to require that Delaware automobile insurance policies cover insured pedestrians who are injured in Delaware by "any motor vehicle."

Id. at 498 (emphasis in original).

[20] *Wygant*, 2011 WL 3586488, at *1.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 2 (emphasis added).

An OMV provision was not at issue in that case. The Delaware Supreme Court in *Wygant* only considered whether the PIP benefits recited in the plaintiff's policy included, or were in addition to, the statutorily-mandated coverage of $15,000/$30,000.

The second decision on which Plaintiffs rely, *Saporito*,[25] is equally unpersuasive. In *Saporito*, the issue before the Court was whether payments made by an employer to a plaintiff-employee, who was involved in a work-related automobile accident, should be characterized as PIP or workers' compensation benefits.[26] The determination was relevant in that case because the plaintiff-employee settled with a third-party tortfeasor, thereby permitting the employer to seek reimbursement of workers' compensation payments.[27] Similar to *Wygant*, the *Saporito* Court did not consider the import of Section 2118 or an OMV provision.

ii. <u>There is No Absurd Result</u>

Plaintiffs contend that the Court's decision creates an absurd result, whereby "individuals [are prevented] from protecting themselves if they ride in any motor vehicle other than their own."[28] The Court disagrees. Insurance coverage is available from the tortfeasor's insurer, and, if that is inadequate to compensate the claimant, under Delaware law, Uninsured and Underinsured Motorist (collectively "UM") coverage follows the policy holder, regardless of what motor vehicle they are operating.[29] As a consequence, a driver in Plaintiff's situation would be protected by maintaining adequate UM coverage. Because Delaware law holds that UM coverage follows the individual regardless of what vehicle they are operating, thereby

[25] *Saporito*, 875 A.2d 620.
[26] *Id*. at 622.
[27] *Id*.
[28] Pls.' Mot. for Reargument, at 3 (Sept. 25, 2013).
[29] *Frank v. Horizon Assur. Co*., 553 A.2d 1119, 1204-05 (Del. 1988).

"protecting [individuals] if they ride in any motor vehicle other than their own,"[30] the Court must reject Plaintiffs' argument that the Court's decision achieves an absurd result.

iii. Consideration of Public Policy is Inappropriate

Plaintiffs make a number of public policy arguments in support of their contention that Plaintiff is entitled to recover $85,000 in PIP benefits under the Progressive policy.[31] It is well-established in Delaware, that when a statute is unambiguous, "there is no room for judicial interpretation and the plain meaning of the statutory language controls."[32] The Court previously concluded, and now reiterates, that the statutory and policy language at issue clearly and unambiguously preclude Plaintiff from recovering the $85,000 in PIP benefits.[33] As a consequence, the Court shall not consider Plaintiffs' public policy arguments. Further, it is equally well-established that, "[i]n our constitutional system, this Court's role is to interpret the statutory language that the General Assembly actually adopts . . . without rewriting the statute to fit a particular policy position."[34] Accordingly, to the extent that Plaintiffs disagree with the holding of this Court, redress is with the legislature, not the Court.[35]

V. CONCLUSION

For the reasons stated above, the Court concludes that it did not overlooked a controlling precedent or legal principles or misapprehend the law or facts such as would have changed the

[30]Pls.' Mot. for Reargument, at 3.
[31]*See supra* note 14 (identifying Plaintiffs' public policy arguments).
[32]*CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2010) (quotations omitted).
[33]As noted *supra*, the Delaware Supreme Court previously concluded that subparagraphs (c) and (d) of Section 2118 are unambiguous. *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 497 (Del. 2012).
[34]*Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 542 (Del. 2011); *see also Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) ("[The Court] do[es] not sit as an überlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.") (citation omitted); *Doe v. Boy Scouts of Am.*, 2013 WL 6040344, at *2 (Del. Super. Ct. Sept. 4, 2013) ("Judges must take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will.") (internal quotation marks omitted) (citations omitted).
[35]*See supra* note 34 and accompanying text.

outcome of the underlying decision. Accordingly, the Plaintiffs' Motion for Reargument is **DENIED**.

IT IS SO ORDERED.

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M. Jane Brady
Superior Court Judge