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Case Number 25,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTHA E. CONVERSE and DAVID CONVERSE, husband and wife,	:	
	:	No. 25, 2014
Plaintiffs Below, Appellants,	:	
v.	:	Court Below – Superior Court of the State of Delaware in and for New Castle County C.A. NO. N11C-04-028 CLS
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation,	:	
Defendant Below, Appellee.	:	

ANSWERING BRIEF OF APPELLEE STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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NATURE OF PROCEEDINGS

This is an appeal from the Superior Court's grant of summary judgment, in favor of Defendant Below/Appellee, State Farm Mutual Automobile Insurance Company ("State Farm"), based on Plaintiffs Below/Appellants, Martha and David Converse's failure to exhaust primary Underinsured Motorist ("UIM") coverage limits from an available insurance policy covering Appellant at the time of accident, prior to seeking excess UIM benefits from their personal State Farm policy.

Appellants' claims arise from a motor vehicle accident which occurred on June 20, 2007, in the state of Massachusetts while Appellant, Martha Converse, was a passenger in a 1999 Volkswagen Cabrio, a vehicle owned and operated by James Early. Appellants accepted the bodily injury liability policy limits of $25,000.00 from Plymouth Rock Assurance Corporation, the insurer of the tortfeasor/driver of the other vehicle involved in the accident, Patrick S. Lampart. On July 28, 2010, Martha Converse executed a release in favor of Lampart and Plymouth Rock Assurance Corporation.

At the time of the accident, the Early vehicle was insured by a policy of insurance issued by Commerce Insurance Company ("Commerce"), which provided UIM coverage of $100,000.00 per person. Also at the time of the accident, Appellant Martha Converse separately held a personal policy of

automobile insurance with Defendant State Farm that was issued in Delaware and which covered a 1996 Toyota Camry. The State Farm policy also provided UIM coverage of $100,000.00 per person.

On April 5, 2011, Appellants filed this lawsuit against State Farm seeking UIM benefits from their personal UIM policy with State Farm. In response, State Farm filed a motion for summary judgment arguing that, based on a priority of coverage under the language of the applicable insurance policies and the state laws of Massachusetts and Delaware, Appellants were not legally entitled to receive excess UIM benefits from State Farm because the Commerce policy provided primary UIM coverage, which was not exhausted. Appellants argued below that UIM coverage under the Commerce policy was unavailable, despite making no UIM claim or receiving a denial from Commerce, because they did not seek Commerce's consent to settle prior to accepting the $25,000.00 bodily injury liability limits from Plymouth Rock on behalf of Lampart.

In a decision dated October 29, 2013, the Superior Court agreed with State Farm and ruled that Commerce's UIM benefits were primary and that State Farm's UIM benefits were excess. The Court ruled that Appellants are not legally entitled to receive excess UIM coverage, if any, from State Farm until they have exhausted Commerce's primary UIM coverage which was available. The Court held that Appellant's unexplained failure to obtain Commerce's consent prior to settlement

does not justify a departure from the general principle that the UIM insurer of the vehicle is primary.

In an Order dated December 30, 2013, the Appellants conceded that they had not exhausted Commerce's primary UIM coverage limits of $100,000.00, and that their potential damages would not exceed $125,000.00 to allow any possible recovery from State Farm's excess UIM coverage. As a result, a final judgment was entered below.

Appellants filed a Notice of Appeal with the Supreme Court on January 16, 2014. Appellant's Opening Brief was filed on March 4, 2014. This is State Farm's Answering Brief on Appeal, requesting that the Superior Court's grant of summary judgment be affirmed.

SUMMARY OF ARGUMENT

I. Denied. Priority of UIM coverage is undisputed as Commerce is considered primary and State Farm is considered excess. Appellants agree that Commerce's primary UIM coverage limits have not been exhausted. Appellants have not satisfied a condition precedent to UIM coverage under the State Farm policy or Delaware law to trigger State Farm's excess UIM coverage obligations. Appellants cannot demonstrate by reliable evidence the actual unavailability of Commerce's primary UIM coverage at the time of the accident, and should not be allowed to manipulate coverage obligations contrary to policy language and Delaware law. Thus, the Superior Court correctly granted summary judgment in State Farm's favor.

STATEMENT OF FACTS

Appellant, Martha Converse, was involved in a motor vehicle accident on June 20, 2007 in Oak Bluffs, Massachusetts. (A60-61). At the time of the accident, Martha Converse was a front-seat passenger in a 1999 Volkswagen Cabrio owned and operated by James E. Early. (Id.). According to the police report, the Early vehicle was struck by a vehicle driven by Patrick S. Lampart ("Lampart Vehicle"). (Id.).

The Lampart Vehicle was insured through a policy of insurance with Plymouth Rock Assurance Company ("Plymouth Rock"). (A62). Plymouth Rock tendered its bodily injury liability limits of $25,000.00, which the Appellant accepted on or about July 28, 2010. (Id.). As part of this settlement, Martha Converse executed a release in favor of Lampart and Plymouth Rock. (Id.).

At the time of the accident, the Early vehicle was insured through a policy of insurance with Commerce Insurance Company ("Commerce"). (A64-98). The Commerce insurance policy provided UM/UIM coverage with policy limits of $100,000.00 per person/$300,000.00 per accident. (A63). Also at the time of the accident, Appellants separately held a personal policy of automobile insurance with Appellee State Farm Mutual Automobile Insurance Company ("State Farm") that was issued in Delaware and covered a 1996 Toyota Camry. (A99-125). The

policy with State Farm provided UM/UIM coverage with policy limits of $100,000.00 per person/$300,000.00 per accident. (A125).

I. The State Farm Policy

State Farm issued an automobile insurance policy in Delaware to the named insured, Martha E. Converse, under policy number 9 4181-E22-08B, for the period May 22, 2007 to November 22, 2007. (A125)

The policy contains Delaware Policy Form 9808.5 which provides, in pertinent part, as follows:

> **DEFINED WORDS**
> **WHICH ARE USED IN SEVERAL PARTS OF THIS POLICY**
>
> **You** or **Your** – means the named insured or named insureds shown on the declarations page.
>
> **Your Car** – means the **car** or vehicle described on the declarations page.

(A102).

****

> **SECTION III – UNINSURED MOTOR VEHICLE COVERAGE – COVERAGE U**
>
> ****
>
> We will pay damages for ***bodily injury***... an ***insured*** is legally entitled to collect from the owner or driver of an ***uninsured motor vehicle***. The ***bodily injury***...must be caused by an accident arising out of the operation, maintenance or use of an ***uninsured motor vehicle***.

THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OR ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENT OF JUDGMENTS OR SETTLEMENTS.

****

Uninsured Motor Vehicle – means:

3. with respect to damages for ***bodily injury***, a land motor vehicle:

   a. the ownership, maintenance or use of which may be insured or bonded for bodily injury at the time of the accident; but

   b. the limits of liability for bodily injury liability are less than the limits ***you*** carry for uninsured motor vehicle coverage under this policy[.]

****

Who Is an Insured

Insured – means the ***person*** or ***persons*** covered by uninsured motor vehicle coverage.

This is:

1. the first ***person*** named in the declarations;
2. his or her ***spouse***; [and]
3. their **relatives** …

****

If There is Other Coverage

1. Coverage Provided by Us or an Affiliated Company

> If two or more vehicles owned or leased by **you, your spouse** or any **relative** are insured for this coverage under one or more policies issued by us or an affiliated company, the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limits of liability.
>
> ****
>
> 3. Subject to item 1 above;
>
> a. *If an **insured** . . . sustains **bodily injury** while occupying a vehicle which is not owned by **you, your spouse**, or any **relative** . . . our limit of liability applies as excess to any other coverage available from a policy covering the vehicle **occupied** or its driver.*
>
> If coverage from more than one insurer applies as excess, we will pay our share. Our share is the percent of the damages in excess of the primary coverage that our applicable limit of liability bears to the total of all uninsured motorist coverage that applies to the accident as excess coverage.

(A111-13). (emphasis supplied).

By its very definition, under the "Other Coverage" provisions of Section III(3)(a), when an insured is injured while occupying another non-owned vehicle, the State Farm policy applies as excess to any other coverage available from the policy for the vehicle which Martha Converse occupied at the time of the loss. (A113). The policy further provides that the language of any other insurer's policy must be evaluated to determine whether State Farm's UIM coverage applies as excess. (Id.).

II. The Commerce Policy

On the date of the accident, the Early Vehicle was covered by a policy of insurance issued by Commerce under a standard Massachusetts Automobile Insurance Policy (7th Ed.)(the "MAIP").

The MAIP provides, in pertinent part, as follows:

Part 12. Bodily Injury Caused By An Underinsured Auto

****

> We will only pay if the injured person is legally entitled to recover from the owners or the operators of all underinsured autos…
>
> We will pay damages to or for: …
>
> **3.** Anyone else while **occupying your auto.** We will not pay damages to or for anyone else who has a Massachusetts auto policy of his or her own or who is covered by a Massachusetts auto policy of another **household member** providing underinsured auto coverage . . .

(A86-7)(emphasis supplied).

Based on this policy language, Commerce provided available UIM coverage to passengers occupying the Early Vehicle. The only limitation to the availability of UIM coverage is if a passenger has their own Massachusetts auto policy or was covered under another Massachusetts auto policy. In the instant matter, there is no allegation that the Appellants had a Massachusetts auto policy or were otherwise covered under a Massachusetts auto policy of a household member.

The Commerce policy also contains the following language:

> The determination as to whether an injured person is legally entitled to recover damages from the legally responsible owner or operator will be by agreement between us and the injured person. The amount of damages, if any, will be determined in the same way. Arbitration will be used if no agreement can be reached. However, in no event may a demand for arbitration constitute first notice of claim. We must be given sufficient notice of claim to conduct a reasonable investigation and attempt settlement before arbitration can be filed.
>
> If an injured person settles a claim as a result of an accident covered under this Part, we will pay that person only if the claim was settled with our consent. We will not be bound under this Part by any judgment resulting from a lawsuit brought without our written consent. We will not, however, unreasonably withhold our consent.

(A88).

According to Appellants, they did not seek consent from Commerce prior to accepting the $25,000.00 settlement and executing the release in favor of Lampart and Plymouth Rock. (A132). This is despite the fact that Appellants were aware of the existence of the Commerce policy and, through counsel, sought Personal Injury Protection ("PIP") benefits from Commerce *prior* to settling with Lampart and Plymouth Rock. (A169). However, Appellants never actually made a UIM claim or sought UIM benefits from Commerce. Thus, there is no evidence that Appellants were denied UIM coverage or benefits under the Commerce policy. The only indication that Appellants even attempted to pursue UIM benefits under

the Commerce policy is informal email communications between Appellants' counsel and two Massachusetts attorneys beginning in 2012, which merely discusses the viability of a potential recovery from Commerce. (A171-73). Notably, following the Superior Court's October 29, 2013 Decision, Appellants, through counsel, represented to the Court that they decided not to pursue UIM benefits from the Commerce policy because they did not want to negatively affect Early's insurance premiums. (B1).

ARGUMENT

I. IT IS UNDISPUTED THAT DELAWARE AND MASSACHUSETTS LAW AS WELL AS THE UNAMBIGUOUS POLICY LANGUAGE MANDATE THAT COMMERCE'S UIM COVERAGE IS PRIMARY

A. QUESTION PRESENTED

Whether the Superior Court's ruling that Commerce's UIM coverage is primary and State Farm's UIM coverage is excess, which is undisputed, should be affirmed. These issues where preserved in the trial court in State Farm's Opening Brief in Support of Summary Judgment (A7-32) and State Farm's Reply Brief in Support of Summary Judgment (A149-63).

B. SCOPE OF REVIEW

When reviewing a grant of summary judgment by a trial court, the issue on appeal presents a matter of law to be reviewed *de novo*. Newtowne Village Serv. Co. v. Newtowne Road Dev. Co., 772 A.2d 172, 175 (Del. 2001). "Questions of statutory interpretation are questions of law reviewed *de novo*." Delaware Bay Surgical Services, P.C. v. Swier, 900 A.2d 646, 652 (Del. 2006). Furthermore, "[t]he interpretation of insurance contracts involves legal questions and thus the standard of review is *de novo*." Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 742, 744 (Del. 1997)(internal citations omitted).

Summary judgment is appropriate and should be granted where the evidence of record fails to raise a genuine issue of material fact and the moving party is

entitled to judgment as a matter of law. Burkhart v. Davies, 602 A.2d 56 (Del. 1991). The moving party has the burden of showing that no issue of material fact exists and that it is entitled to judgment as a matter of law. Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets this burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. Id. at 681. If the non-moving party is unable to designate specific facts showing a genuine issue for trial, the movant is entitled to summary judgment as a matter of law. Id.

C. MERITS OF ARGUMENT

It is well settled under Delaware law that the insurance policy covering a vehicle involved in an accident is primary over the coverage of any other personal policies of insurance. Courts have held that the UM/UIM policy covering the owner of the vehicle is primary and the passenger's UM/UIM coverage is secondary. St. Paul Fire & Marine Ins. Co. v. Metropolitan Prop. & Cas. Ins. Co., 794 A.2d 601 (table), 2002 WL 511570, *1 (Del. Apr. 3, 2002); Carrington v. Assurance Co. of America, Inc., 1998 WL 733757 (Del. Super. Sept. 15, 1998).

In Carrington, the plaintiff was a passenger in a Pennsylvania insured vehicle when it was involved in a motor vehicle accident with an underinsured motorist. After accepting the policy limits from the underinsured tortfeasor, the plaintiff filed suit against both her personal UIM carrier (Assurance Company of

America) and the UIM carrier for the vehicle in which she was a passenger (Allstate Insurance Co.). The plaintiff's personal UIM carrier (Assurance) was granted summary judgment on the priority of coverage issue, with the court holding that "[a]s a general principle, when there are two UIM carriers potentially responsible for a claim, the carrier which insures the vehicle (here, Allstate) is primary over the carrier which insures the individual (here, Assurance)." Carrington at *1; see also, Garnett v. Liberty Mut. Fire Ins., 2007 WL 241345 (Del. Super. Jan. 30, 2007)(holding vehicle's UIM coverage is primary over plaintiff's personal UIM policy).

Similarly, in St. Paul Fire & Marine, a DART bus driver was injured while operating a bus owned by Delaware Transit Corporation ("DTC"). 2002 WL 511570 at *1. The DART driver filed UIM claims under both his personal policy with Metropolitan and DTC's St. Paul UIM policy covering the vehicle he was operating. Id. St. Paul argued that because UIM is considered "personal" coverage, the driver's personal policy with Metropolitan should be primary coverage. This Court, however, disagreed and held that the UIM policy on the vehicle was primary. Id. at *2. The Court specifically held that it could "find no reason to deviate from the general standard of assigning primary coverage to the vehicle policy." Id.

The same result would also be reached under Massachusetts law, which would apply Delaware law to determine that State Farm's UIM policy coverage is excess. In Hague v. Hanover Ins. Co., 1997 Mass. Super. LEXIS 487 (Mass. Super. Ct. Jan. 22, 1997), the plaintiff was a Virginia resident who sustained fatal injuries while a passenger in a Massachusetts insured vehicle (Hanover Ins. Co.) involved in an accident. Id. at *1. The decedent was not a named insured under the Massachusetts policy and was not insured on a resident relative's Massachusetts policy. Id. at *9. However, the plaintiff was insured under Virginia UIM policies. Id. at *4. The Hague court held that plaintiff may obtain UIM coverage from the named insured's Massachusetts policy (Hanover) covering the vehicle they occupied during the accident. Id. at *11. The court stated that the determination of whether the plaintiff is entitled to UIM coverage from his own out-of-state personal policies, in addition to the Massachusetts policy, turns on the state law where the policy was issued. Id. at *16, n. 9 (citing Searls v. Standard Accident Ins. Co., 56 N.E.2d 127 (Mass. 1944)); see also, Commerce Ins. Co. v. Doherty, 2000 WL 33159241 (Mass. Super. Ct. June 22, 2000)(holding that foreign state law should apply to the interpretation and application of out-of-state insurance policies because "Massachusetts has no substantial interest in this insurance policy claim").

Under the law of both Delaware and Massachusetts, Appellants have the ability to access UIM coverage from the Commerce policy and the State Farm policy. However, under the law of both States regarding the priority of coverage, the Commerce Insurance policy covering the Early vehicle must be considered primary for UIM coverage obligations, and the State Farm policy would provide excess UIM coverage giving effect to the respective "other insurance" clauses.

Moreover, the clear and unambiguous terms of the Commerce and State Farm policies also establish that UIM coverage under the Commerce policy is primary and State Farm's policy is excess. "In interpreting contract language, clear and unambiguous terms are interpreted according to their ordinary and usual meaning." Paul v. Deloitte & Touche, LLP, 974 A.2d 140, 145 (Del. 2009). As in Delaware, Massachusetts courts will apply "other insurance" clauses in policies as written and, where possible, will reconcile the other insurance provisions in two or more policies. Mission Ins. Co. v. United States Fire Ins. Co., 517 N.E.2d 463 (Mass. 1988). Massachusetts' approach to "other insurance" clauses "has been to attempt to effectuate the language of the policies at issue." Id. at 467. "This approach generally has resulted in giving excess clauses preference to escape and pro rata clauses and declaring mutual repugnancy where either excess or escape clauses appear in both policies." U.S. Fid. & Guar. Co. v. Hanover Ins. Co., 632 N.E.2d 402, 403 (1994); see also Republic Franklin Ins. Co. v. United Educators

Reciprocal Risk Retention Grp., 847 N.E.2d 1139 (2006)(rejecting an alternative approach of reading all "other insurance" clauses as mutually repugnant and unenforceable). August A. Busch & Co. of Mass. v. Liberty Mut. Ins. Co., 158 N.E.2d 351 (1959)(holding that a proportional clause in a policy will be primary over another policy with an excess clause).

When reading the plain and unambiguous language of the "other insurance" provision under the State Farm policy at issue, it provides that UIM coverage "applies as excess to any other coverage available from a policy covering the vehicle occupied or its driver" when an insured is injured in a non-owned vehicle. Whereas the Commerce policy only restricts UIM coverage if the injured passenger of the insured vehicle has their own *Massachusetts auto policy* or is covered under a Massachusetts household policy. Appellants have neither. On the face of the two applicable UIM policies, the State Farm policy applies as excess and the Commerce Insurance policy is primary.

Moreover, Appellants do not dispute that under Delaware law and Massachusetts law, and the plain language of the policies, Commerce's UIM coverage is primary and that State Farm's policy is excess. Therefore, applying the facts and holdings in Carrington and St. Paul to the instant matter should lead to that same result. Commerce provided UIM coverage for the vehicle that Martha Converse was occupying as a passenger at the time of the accident. Under

Delaware law, Commerce, as the policy covering the vehicle, would provide primary UIM coverage, and Appellants' personal UIM coverage with State Farm would provide excess UIM coverage. Furthermore, based on Hague and Doherty, the resulting coverage and priority would be the same under Delaware and Massachusetts law.

II. THE SUPERIOR COURT CORRECTLY HELD THAT APPELLANTS ARE NOT ENTITLED TO UIM COVERAGE FROM STATE FARM UNTIL THEY EXHAUST PRIMARY UIM COVERAGE UNDER THE COMMERCE POLICY

A. QUESTION PRESENTED

Whether this Court should affirm the Superior Court's grant of summary judgment, holding that State Farm's excess UIM coverage obligation is not triggered until Commerce's primary UIM coverage is exhausted, and where Appellants agree that the Commerce policy has not been exhausted. These issues where preserved in the trial court in State Farm's Opening Brief in Support of Summary Judgment (A7-32) and State Farm's Reply Brief in Support of Summary Judgment (A149-163).

B. SCOPE OF REVIEW

When reviewing a grant of summary judgment by a trial court, the issue on appeal presents a matter of law to be reviewed *de novo*. Newtowne Village Serv. Co. v. Newtowne Road Dev. Co., 772 A.2d 172, 175 (Del. 2001). "Questions of statutory interpretation are questions of law reviewed *de novo*." Delaware Bay Surgical Services, P.C. v. Swier, 900 A.2d 646, 652 (Del. 2006). Furthermore, "[t]he interpretation of insurance contracts involves legal questions and thus the standard of review is *de novo*." Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 742, 744 (Del. 1997)(internal citations omitted).

Summary judgment is appropriate and should be granted where the evidence of record fails to raise a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Burkhart v. Davies, 602 A.2d 56 (Del. 1991). The moving party has the burden of showing that no issue of material fact exists and that it is entitled to judgment as a matter of law. Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets this burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. Id. at 681. If the non-moving party is unable to designate specific facts showing a genuine issue for trial, the movant is entitled to summary judgment as a matter of law. Id.

C. MERITS OF ARGUMENT

"A claimant may not recover under her UIM policy . . . unless the definition of underinsurance in [18 Del. C. §] 3902(b)(2) has been met." White v. Liberty Ins. Corp., 975 A.2d 786, 788 (Del. 2009). Title 18 Del. C. § 3902(b)(2) states that an underinsured motor vehicle is:

> one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and *insurance policies applicable at the time of the accident* total less than the limits provided by the uninsured motorist coverage. (emphasis added).

Subsection (b)(3) of Delaware's UM/UIM statute further provides that an "insurer shall not be obligated to make any payment under [UIM] 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 the payment of settlement or judgments." 18 Del. C. § 3902(b)(3). (emphasis added).

This Court has expressly stated that "[t]he plain meaning of [§3902(b)(3)] is that UIM carriers are not obligated to pay their insureds until after the insureds exhaust all available liability insurance policies. Dunlap v. State Farm Fire and Cas. Co., 878 A.2d 434, 439-440 (Del. 2005). In Dunlap, this Court held that the UIM carrier was not required to pay UIM benefits until after plaintiff received a policy limits settlement or judgment after trial. Id. at 440. In determining that the plaintiff in Dunlap was not entitled to UIM benefits, this Court stated that while the goal is to fully compensate victims, "this Court has limited the insured's recovery where the statutory language clearly mandated that result." Id. at 439.

Consistent with the holding in Dunlap, this Court has also held that where, as here, a plaintiff has failed to exhaust an available insurance policy, the plaintiff is not underinsured as defined by 18 Del. C. § 3902(b)(2) and, therefore, the UIM insurer had no obligation to provide coverage pursuant to 18 Del. C. § 3902(b)(3). Sivakoff v. Nationwide Mut. Ins. Co., 21 A.3d 597 (table); 2011 WL 1877610, at *4 (Del. 2011). In Sivakoff, the tortfeasor was covered under two policies of insurance; however, plaintiff failed to submit a claim to one of the two insurance policies covering the tortfeasor prior to executing a release in favor of the

tortfeasor. Id. at *2. The plaintiff in Sivakoff, upon learning of this second insurance policy, filed suit against the tortfeasor, which was ultimately dismissed based on the previously executed release. Id. The plaintiff then also sought UIM coverage from her personal insurance policy. Id. The plaintiff contended that the court should disregard the unambiguous language of 18 Del. C. § 3902(b) and ignore the existence of additional insurance policies that were never exhausted, to allow her to access her personal UIM coverage. Id. at *2. In rejecting the plaintiff's argument, this Court held that because the plaintiff did not exhaust all available policies she was not entitled to UIM coverage under a plain reading of the statute. Id. at *4; See also, Garnett, 2007 WL 241345, at *4 (Del. Super. Jan. 30, 2007)(holding that public policy and Delaware law require primary UIM coverage to be provided by the insurer of the motor vehicle and that the primary UIM policy must be exhausted before an insured is entitled to access their personal UIM policy).

In addition, the clear and unambiguous language of the State Farm policy further supports exhaustion before excess UIM coverage obligations can be triggered. The State Farm policy states: "THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OR ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENT OF JUDGMENTS OR SETTLEMENTS." (A111). As explained in Section I above,

the parties do not dispute that Commerce's UIM coverage is primary, and State Farm's UIM coverage is Excess.

Similar to the plaintiffs in Dunlap and Sivakoff, the Appellants here also concede that they have not exhausted all policies of insurance available to them at the time of the accident. Thus, under Delaware law and the clear policy language, State Farm is not required to provide excess UIM coverage until all available policies of insurance are exhausted. Even though Appellants do not dispute that Commerce's UIM coverage is primary and has not been exhausted, they are asking that this Court to overlook the unambiguous language of 18 Del. C. § 3902(b)(3) and the State Farm policy, thus ignoring the existence of the Commerce UIM coverage that was available at the time of the accident. In essence, Appellants are attempting to manipulate the proper legal priority of UIM coverage to elect how, and from whom, they choose to assert a claim. This abuse of the law and the contract, which has been mutually accepted by the parties, should not be permitted. As a condition precedent to coverage, Appellants are required to first exhaust Commerce's primary UIM coverage which was undeniably available to Martha Converse as an insured at the time of the accident, prior to seeking excess UIM benefits from State Farm.

III. COMMERCE'S UIM COVERAGE WAS "AVAILABLE" AT THE TIME OF THE MOTOR VEHICLE ACCIDENT

A. QUESTION PRESENTED

Whether the Superior Court's grant of summary judgment should be affirmed where Commerce's primary UIM coverage was available to the Appellants at the time of the accident, and where Appellants cannot show that Commerce actually enforced the consent to settle provision here. This issue was preserved in the trial court in State Farm's Reply Brief in Support of Summary Judgment (A149-163).

B. SCOPE OF REVIEW

When reviewing a grant of summary judgment by a trial court, the issue on appeal presents a matter of law to be reviewed *de novo*. Newtowne Village Serv. Co. v. Newtowne Road Dev. Co., 772 A.2d 172, 175 (Del. 2001). "Questions of statutory interpretation are questions of law reviewed *de novo*." Delaware Bay Surgical Services, P.C. v. Swier, 900 A.2d 646, 652 (Del. 2006). Furthermore, "[t]he interpretation of insurance contracts involves legal questions and thus the standard of review is *de novo*." Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 742, 744 (Del. 1997)(internal citations omitted).

Summary judgment is appropriate and should be granted where the evidence of record fails to raise a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Burkhart v. Davies, 602 A.2d 56 (Del.

1991). The moving party has the burden of showing that no issue of material fact exists and that it is entitled to judgment as a matter of law. Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets this burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. Id. at 681. If the non-moving party is unable to designate specific facts showing a genuine issue for trial, the movant is entitled to summary judgment as a matter of law. Id.

C. MERITS OF ARGUMENT

Appellants' only challenge to the Superior Court's grant of summary judgment in this case is that Commerce's UIM coverage is unavailable because they failed to obtain consent to settle the bodily injury claim with the tortfeasor. In presenting their argument, Appellants are asking this Court to require State Farm to extend UIM coverage, before it is contractually and legally obligated to do so, based on speculation that Commerce will likely deny a claim for UIM. Despite no UIM claim having been presented or denied by Commerce, Appellants' argument fails to provide the Court with evidence in support of their contention, which was ultimately the direct result of Appellants' alleged failure to obtain consent to settle.

Appellants presume that Commerce's UIM coverage is not "available" to them, which renders the State Farm policy primary. Plaintiffs' argument is misplaced. There can be no dispute that Commerce provided UIM coverage

available to plaintiff *at the time of the accident*. Appellants cannot show that they presented a UIM claim to Commerce. Similarly, there has been no UIM claim denial issued by Commerce.

Contrary to Appellants' argument, State Farm has always maintained that it will honor its contractual obligations to provide excess UIM benefits once Appellants prove their legal entitlement to trigger such coverage based upon the terms of the policy which have been mutually accepted. Rather, Appellants' argument fails as a matter of law, as no genuine issue of material fact has been demonstrated under the requirements of Delaware law.[1]

Appellants have not provided any evidence in support of their argument that UIM benefits were denied, and cannot be recovered under the Commerce insurance policy. See Woodcock v. Udell, 97 A.2d 878, 883 (Del. Super. 1953)(a party opposing a motion for summary judgment is duty bound to disclose evidence which will demonstrate the existence of a genuine issue of fact for submission to the jury, if summary judgment is to be denied). Appellants have not contended or provided reliable evidence, by way of affidavit or other documents, that a claim has ever been submitted to Commerce for UIM benefits as a result of this accident.

[1] Under Delaware Superior Court Rule 56(e), an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Additionally, Appellants have failed to present any evidence to demonstrate that Commerce has, in fact, denied a UIM claim based upon the consent-to-settle provision relied upon in their argument. Nor has any judgment in Commerce's favor been presented to demonstrate Appellant's ineligibility for UIM benefits under that policy, based on an enforcement of the consent to settlement provision.

Under Delaware law, Appellants may not rely upon mere argument in order to show a material issue of fact, and are required to submit record evidence to demonstrate such issues exist. Appellants here have only claimed, without any offer of proof, that their own failure to obtain consent to settle from Commerce renders such coverage "unavailable". Thus, there is no reliable evidence for this Court to rely on in support of a decision in Appellants' favor. However, even assuming the requisite evidence had been submitted by Appellants, their argument is still without legal merit.

Appellants' argument relies entirely upon construction of the word "available" to mean "available [and collectable]." The term "available" is not defined in the policy. The term "Available" has been defined as "legally valid." Black's Law Dictionary (9th ed. 2009). Appellants cannot dispute that Commerce's coverage was "legally valid" and thus available to an insured under the policy at the time of the accident. Further, there is no evidence that

Commerce's insurance coverage was cancelled or ineffective at the time of the accident.

Delaware courts have held that coverage is not rendered "unavailable" solely by the failure of a plaintiff to make a timely claim. In Taber v. Goodwin, 2012 WL 2106374 (Del. Super. June 5, 2012) the plaintiff sought UM coverage after the tortfeasor's policy limits had already been exhausted due to payments made to other injured parties. The Court found that the tortfeasor was not 'uninsured' in the traditional sense given she maintained liability insurance coverage and the carrier had not denied coverage. Id. at *2. Rather, even though liability coverage was acknowledged, the plaintiff's claim for benefits was denied. Id. Similarly here, Appellants cannot contest the fact that Commerce's policy would apply to the accident and would be available to them. Instead, Appellants' theory is based solely on their failure to secure Commerce's consent to settle, without providing any reliable evidence in support that a UIM claim was denied based on this provision.

The Commerce policy would also be considered "available" under 18 Del. C. § 3902(b)(3), which expressly states that the insured must exhaust all "insurance policies *available to the insured at the time of the accident* . . ." Appellants' contention that the Commerce policy is "unavailable" because they did not obtain consent to settle is in direct contravention of the unambiguous language of section

3902(b)(3). Appellants cannot dispute that Commerce's coverage was "legally valid" and thus available insurance at the time of the accident.

In fact, Appellants were aware that Commerce's coverage applied before the settlement with the tortfeasor and actually sought Personal Injury Protection (PIP) benefits under the Commerce policy prior to the tortfeasor settlement. (A169). Appellants now ask this Court to effectively render the Commerce UIM coverage "unavailable", without any evidence that a UIM claim was presented or denied, thus attempting to dictate the processing of claims, which is contrary to policy language and Delaware law.

Appellants devote substantial argument to anticipating a "potential" claim denial in the event that one is made to Commerce as the primary UIM policy. This argument is premised upon the assumption that Appellant's failure to obtain the consent-to-settle renders the Commerce Insurance UIM coverage unavailable, *ipso facto*. Appellants' argument is a red-herring. Nothing has been shown to support that Commerce has relied upon this provision to deny any UIM claim, or been granted a judgment against Appellants for this accident by any court or arbitrator. Furthermore, Appellants' informal e-mail correspondence with attorneys in Massachusetts, over five years after the subject accident, is far from an actual claim denial by Commerce.

Appellants' argument that the failure to obtain consent to settle is detrimental to a potential subrogation claim is also unavailing. This Court should not consider the unsubstantiated contention that Commerce's UIM coverage would be "unavailable" due to a *supposed* prejudice to Commerce for the failure to obtain consent, as there has been no UIM claim presented, or denial issued by Commerce for an alleged breach of the provision.[2] Thus, Appellants' argument cannot be based on any fact in evidence. Even assuming, *arguendo*, a claim for UIM benefits was presented and denied by Commerce based on Appellants' failure to obtain consent to settle, such decision still does not impact the existence of available coverage to Appellants at the time of accident.

The facts of the instant matter are also distinguishable from the cases cited by Appellants in their Opening Brief, which found that plaintiffs could seek Uninsured Motorist ("UM') benefits from their personal insurers after a decision from proper legal authority that the plaintiff failed to meet a statutory verbal threshold requirement under New Jersey's laws which immunizes a tortfeasor for non-economic damages. See, e.g., Kent v. Nationwide Property & Cas. Ins. Co., 844 A.2d 1092 (Del. Super. 2004); State Farm Mut. Auto. Ins. Co. v. Patterson, 7 A.3d 454 (Del. 2010); Kennedy v. Encompass Indem. Co., 2012 WL 4754162

[2] The cases cited by Appellants on this issue are inapposite to the facts of the instant matter. In each case, plaintiffs actually pursued a UIM claim against the specific insurer which alleged prejudice following an actual claim denial based on the consent to settle provision.

(Del. Super.). In each of the cases cited, it was actually determined by a judge or arbitrator that a plaintiff did not meet certain statutory criteria to qualify for benefits under a policy after a claim was presented. Contrary to these holdings, it is Appellants' unproven contention here that they are presumably unable to obtain UIM benefits from Commerce, not because of the lack of coverage or inability to meet certain statutory threshold requirements, but due to circumstances of their own making – i.e. failing to obtain consent to settle and/or deliberately deciding not to make a UIM claim to Commerce. The Court should not take judicial notice that Commerce's coverage is unavailable where no reliable record evidence has been presented to support such contention. Thus, State Farm should not be prematurely forced into its UIM obligations before it is legally and contractually required to do so, simply because the Appellants chose not to adhere to the unambiguous language of the relevant policies and Delaware law.

There is also a distinction between a denial of coverage by an insurer and denial of a claim. Page v. Insurance Co. of N. America, 256 Cal.App.2d 374, 380 (1967). The former involves a determination as to whether the particular claim asserted is one to which the policy was intended to apply, whereas the latter involves a determination as to the viability of the claim itself. Id. Appellants have not demonstrated a coverage denial or actual ineligibility under the Commerce policy. The statute of limitations on UIM claims in Massachusetts is six years

from the date of claim accrual. See Mass. Gen. Laws Ch. 260 § 2. Similar to Delaware, Massachusetts holds that UIM claims accrue from the date of breach of the contract, i.e. the denial of benefits or refusal to arbitrate. Berkshire Mut. Ins. Co. v. Burbank, 664 N.E.2d 1188 (Mass. 1996); Parisi v. State Farm Mut. Auto. Ins. Co., 2012 WL 2161597 (Del. Super.). Further, there is absolutely no evidence to show that Appellants are precluded from seeking the UIM benefits in the proper priority of coverage on the basis of notice or the statute of limitations.

However, whether it is later determined that Commerce is obligated, or relieved from paying benefits once a UIM claim is presented, still does not affect State Farm's coverage obligations here, based on the relevant policy language and Delaware law. Rather, it is Appellants burden to show that either Commerce's coverage did not apply at the time of the accident, or that Commerce's UIM limits have been exhausted, before State Farm's excess UIM obligations are triggered. Appellants cannot meet their burden.

Finally, if Appellants' argument is accepted by this Court, it will result in unfair prejudice to State Farm and all Delaware automobile insurers, which may be required to prematurely extend UIM benefits before the insuring policy and the law require them to do so, at the election of an insured. Appellants cannot argue any reasonable justification for their inaction in this case. Appellants were aware of

the Commerce policy and the benefits available to them before the tortfeasor settlement was completed.

State Farm contracted to provide excess UIM benefits where Appellants had other available UIM coverage as a passenger at the time of the accident. The public policy of Delaware places primary financial responsibility to provide insurance coverage on the vehicle's insurer. In this case, there is no dispute that Appellants had an opportunity to seek UIM benefits from Commerce. Thus, in such situations, State Farm has a reasonable expectation that its insureds will avail themselves of primary UIM benefits from the insurer which covered the vehicle, and thus contracted to provide excess UIM coverage to the Appellants only after the underlying UIM limits have been exhausted.

Appellants' attempt to shift the burden on to State Farm to provide primary UIM coverage, based on an assumed prejudice to Commerce and as a result of circumstances created by Appellants themselves, ignores the language in both insurance policies and Delaware law. The inquiry of potential prejudice to Commerce is not one for these proceedings. Rather, State Farm would be unfairly prejudiced if it is required to prematurely extend UIM benefits to Appellants before it is legally and contractually required to do so, solely as a result of Appellants' actions.

If an insured is permitted to manipulate how certain coverage is to be applied and extended where multiple policies from different insurers are involved, such a decision would undoubtedly have a detrimental effect upon Delaware insurers, and would be contrary to Delaware law, the clear and unambiguous language of the applicable policies, and the laws of equity.

CONCLUSION

For the reasons stated herein, Defendant Below/Appellee, State Farm Mutual Automobile Insurance Company, requests this Court to enter an order affirming the Superior Court's grant of summary judgment in its favor.

TYBOUT, REDFEARN & PELL

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