



IN THE SUPREME COURT OF THE STATE OF DELAWARE

VIRGINIA ROBINSON, :
 :
 :
 Plaintiff Below, :
 Appellant, : No. 172, 2017
 :
 :
 vs. :
 :
 :
 :
 STATE OF DELAWARE, : Court Below:
 : Superior Court of the State of Delaware
 : C.A. No. S16C-11-001 ESB
 :
 :
 Defendant Below, :
 Appellee, :

APPELLANT'S AMENDED OPENING BRIEF

DATED: 6/5/17

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NATURE OF PROCEEDINGS

Plaintiff-Below, Appellant, Virginia Robinson (“Appellant”), filed suit against Defendant-Below, State of Delaware (“Appellee” or “the State”), on November 1, 2016. Appellant sustained injuries on April 15, 2016 while in a Fleet Services vehicle, self-insured by the State, when struck by an unknown hit and run driver. The State filed a Motion for Summary Judgment on December 16, 2016 relying on *Simpson v. State*, 2016 WL 425010 (Del. Super. Jan. 28, 2016). Appellant filed a Motion in Opposition on December 21, 2016. The Superior Court heard the Motion on January 6, 2017 and requested a jurisdictional survey as supplemental briefing. The Court granted the State of Delaware’s Motion for Summary Judgment on April 11, 2017. (Ex. A). This is Appellant’s Opening Brief in support of her appeal.

SUMMARY OF ARGUMENT

I. This is a contract case, not a tort case. The case at bar does not deal with employer, employee, or fellow employee negligence. 19 *Del. C.* § 2304 does not bar contractual claims. The language of § 2304, “regardless of the question of negligence and to the exclusion of all other rights and remedies” is a sentence without a comma, and must be read as written. The lower Court erred by excising and ignoring the language, “regardless of the question of negligence.” The lower Court quoted one part of the statute in its Order, “to the exclusion of all other rights and remedies,” but excised the most important part, “regardless of the question of negligence.” “To the exclusion of all other rights and remedies” pertains to negligence claims. The statute does not provide for an exclusion to the universe of the law. Delaware enacted the Workers’ Compensation Act in 1917 (effective 1918) with comparable plain meaning like the current statute. Since then, claimants have been able to recover contractual benefits such as PIP along with Workers’ Compensation benefits. Moreover, aside from contractual benefits, intentional tort claims are also outside the realm of the exclusivity provision of § 2304. The purposes of the exclusive remedy are to protect employers, employees, and fellow employees, from negligence claims. It is not a bar to contractual claims.

II. The Superior Court wrongfully decided *Simpson v. State*, 2016 WL 425010 (Del. Super. Jan. 28, 2016). The Superior Court failed to recognize that Workers' Compensation does not foreclose the availability of contractual workers' benefits. The lower Court misinterpreted 19 *Del. C.* § 2304. Moreover, the statute does not require a claimant to select a remedy. The lower Court construed the statute beyond its scope and wrongfully held that the exclusion provision encompasses all remedies, including contractual remedies, available to a plaintiff.

III. House Bill 308 is a direct focus by the Legislature upon the meaning of the earlier enacted provision. The Bill resolves any ambiguity. The *Simpson* Court requested clarification and the Legislature responded. The synopsis to the amendment states, "this bill is in response to the recent decision in *Simpson v. State.*" House Bill 308 does not alter existing rights or obligations but clarifies what those existing rights and obligations have always been.

STATEMENT OF FACTS

On or about April 15, 2016, Appellant, Virginia Robinson, was in a work-related automobile collision while operating a motor vehicle owned by Fleet Services. (A- 4). The State of Delaware self-insured the vehicle. (A- 4). An unknown hit and run driver swerved into Appellant's lane of travel and struck her center, front bumper. (A- 4). Subsequently, the hit and run driver fled the scene. No one found the driver. (A- 4).

Thereafter, Appellant's personal injury protection (PIP) benefits exhausted. (A- 74). Appellee denied UM coverage based on *Simpson v. State of Delaware*, C.A. No. N15C-02-138 WCC. To date, Appellee has deprived Appellant of uninsured motorist coverage that was part of Appellee's policy.

ARGUMENT

I. APPELLANT HAS UM/UIM COVERAGE.

(1.) QUESTION PRESENTED:

Did the Superior Court err when it granted summary judgment to Appellee on the grounds that 19 *Del. C.* § 2304 excludes all possible claims, including not only negligence suits but also contractual workers' benefits claims? (A- 7-8; A-13-17).

(2.) SCOPE OF REVIEW:

On appeal from a Motion for Summary Judgment granted pursuant to Delaware Superior Court Civil Rule 56, this Court reviews the matter *de novo*. *ConAgra Foods Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). Summary judgment is granted by the trial court upon a showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56 (c). The record must be read in a light most favorable to the party against whom summary judgment is sought. *Matas v. Green*, 171 A.2d 916 (Del. 1961). If there is any evidence supporting a favorable conclusion to the nonmoving party, stating facts in the light most favorable to him, summary judgment must be denied. *Plant v. Catalytic Constr. Co.* 287 A.2d 682 (Del. Super. Ct. aff'd. 297 A.2d 37 (Del. 1971)).

(3.) MERITS OF ARGUMENT:

The State's policy entitles Appellant to UM/UIM benefits. The exclusivity provision contained in 19 *Del. C.* § 2304 focuses narrowly on questions of employer, employee, and fellow employee, negligence, not the entire universe of the law. The exclusivity provision does not preclude UM/UIM claims. See also, 19 *Del. C.* § 2314. The Legislature never declared that the exclusivity provision of § 2304 encompasses contractual claims. It is within the Legislature's province to say so, but until it does, the legislative intent as to this issue is indiscernible. The Courts must apply the statute as written and limit its application to negligence claims.

19 *Del. C.* § 2304 prior to House Bill 308 provides:

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

Not only is the language of the statute plain, but there is a lack of support for the assumption that the Legislature intended that this statute encompass claims against uninsured motorists. § 2304 eliminates questions of employer, employee, and fellow employee, negligence and fault in industrial accidents. *Hill v. Moskin Stores, Inc.*, 165 A.2d 447 (1960). The twin purposes of the Delaware Workmen's Compensation Law are to provide a scheme for assured compensation for work-related injuries without regard to fault (emphasis added) and to relieve employers

and employees of the expenses and uncertainties of civil litigation. *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 231 (Del. 1982). The plain language of § 2304 compels the conclusion that all employee actions against employers for work-related injuries based on any degree of negligence, (emphasis added) from slight to gross, are within the exclusive coverage of the Workmen's Compensation Law. *Id.*

Similar to the case at bar, in *Donahue*, an employee was in a work related automobile collision while driving the employer's vehicle caused by an underinsured third party tortfeasor. *State v. Donahue*, 472 A.2d 824, 826 (Del. Super. Ct. 1983). The employer's underinsured motorist coverage insurer paid \$25,000 to the employee. *Id.* This case provides the notion that the Courts rule under the premise that UM/UIM benefits are recoverable in addition to Workers' Compensation benefits. The *Simpson* Court wrongfully operated under the premise that these contractual benefits are not available. The *Simpson* ruling is contrary to what Delaware's Courts have held for many decades. If plaintiffs were not able to recover contractual benefits because of the Workers' Compensation Act, there would be no case law with plaintiffs recovering benefits such as UM/UIM, PIP, and pension, in addition to Workers' Compensation.

A third-party tortfeasor may assert a claim for indemnification against the injured party's employer for the latter's breach of contract, express or implied, with the third party to perform in a careful and prudent manner, assuming the

employer's breach of such duty was the actual cause of its employee's injury. *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52 (1970). “This ruling, of course, represents an exception to the exclusivity principle of our workmen's compensation law.” *SW (Del.), Inc. v. Am. Consumers Indus., Inc.*, 450 A.2d 887, 888 (Del. 1982). The exclusivity provision of the workmen’s compensation law is no bar to the third party suit against the employer. *Diamond State Tel. Co.*, 269 A.2d at 56-57.

Intentional tort claims also go beyond the realm of the exclusivity provision contained in § 2304. Although factually different from the case at bar, it shows that the exclusivity provision is not a complete bar to all other claims, and that the provision concerns employer, employees, and fellow employees, negligence claims only. In *Rafferty*, this Court noted:

Under these statutes, most courts have held that the exclusivity provision of a Workers' Compensation statute precludes a suit for negligence under the common law, even if the injury was caused by the gross, wanton, wilful, deliberate, reckless, culpable or malicious negligence, or other misconduct of the employer. (Emphasis added)

Rafferty v. Hartman Walsh Painting Co., 760 A.2d 157, 159 (Del. 2000). Claims that involve an intentional act by the employer to injure the employee, fall outside the Workers’ Compensation Act and remain separately actionable as common law tort claims. *Id.* The same rationale holds true for UM/UIM benefits and other contractual claims.

Workers' Compensation payments are a different measure of damages, with independent rights, other than UM/UIM benefits. Moreover, Workers' Compensation from the State does not foreclose coverage for PIP and UIM. *Cicchini v. State*, 640 A.2d 650 (Del. Super. Ct. 1993). "He also received that portion of his wages which were not compensable under the Workmen's Compensation Act, and an additional \$25,000 pursuant to the uninsured motorist provisions of the employer's PIP policy. *Id.* at 652. For decades, Delaware courts have operated under the premise that UM/UIM and other contractual rights are not precluded by the Workers' Compensation Act. Rather, the Act shields employers, employees, and fellow employees, from negligence allegations, and the employee from the burden of proving negligence.

The State had UM/UIM coverage under its policy and Appellant is entitled to its benefits. It would be unreasonable to afford the State additional protections because it chooses to self-insure. The 'exclusive remedy' pertains to questions of fault and negligence of the employer, employees, and fellow employees, not contractual rights available to a plaintiff.

The language of 19 *Del. C.* § 2304, "regardless of the question of negligence and to the exclusion of all other rights and remedies" is a sentence without a comma, and must be read as written. The provision is not a blanket bar to all possible claims. Appellant is seeking a contractual remedy that is a part of her

employment benefits under an insurance contract that covers her. The lower Court erred by declaring that the exclusivity provision is a complete bar to all suits. For up to a century, case law has allowed intentional tort suits, pension, and collection of PIP, beyond the exclusive remedy clause in the Act. Furthermore, this is not a case concerning the employer's negligence, rather, a third party tortfeasor. It just so happens that there is a contractual benefit for UM for which the State is self-insured. The lower Court construed the exclusivity provision beyond its scope; it is not a blanket bar that forecloses contractual rights.

When construing a statute, we must "give effect to the whole statute, and leave no part superfluous." *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1035-36 (Del. 2012). The lower Court, in its Order granting Appellee's Motion for Summary Judgment, ignores the language about claims of negligence. The lower Court's Order excises the language, "regardless of questions of negligence." (Ex. A) This very language is the essence of the statute's scope, showing what is included and excluded. Instead, the lower Court sets the scope of applicability of the exclusivity provision to the universe of the law. The sentence has to be read together, "regardless of the question of negligence and to the exclusion of all other rights and remedies." The lower Court erred by extracting the negligence language in its decision.

The State's policy entitles Appellant to UM benefits. Appellee relies on § 2304 but the case at bar does not concern the employer's negligence; this is a contractual case. The State is not the tortfeasor. It so happens that the State self-insures, and the State should not receive additional benefits because of this. Under most circumstances, the defendant would be an insurance company. In the case at bar, the State steps into the shoes of an insurance company but does not have a claim against it for any of its direct actions regarding the collision. 21 *Del. C.* § 2118 (a); 21 *Del. C.* § 2904. It is not reasonable for Appellee to purchase UM/UIM benefits if it is not going to use them for its employees.

II. THE SUPERIOR COURT WRONGFULLY DECIDED *SIMPSON v. STATE*, 2016 WL 425010 (Del. Super. Jan. 28, 2016) IN THAT IT FAILED TO RECOGNIZE THAT WORKERS' COMPENSATION DOES NOT FORECLOSE THE AVAILABILITY OF CONTRACTUAL WORKERS' BENEFITS.

(1.) QUESTION PRESENTED:

Did the Superior Court in *Simpson* misinterpret 19 *Del. C.* § 2304 by holding that the exclusive provision encompasses all contractual obligations available to a plaintiff? (A- 6-8; A- 11-17).

(2.) SCOPE OF REVIEW:

On appeal from a Motion for Summary Judgment granted pursuant to Delaware Superior Court Civil Rule 56, this Court reviews the matter *de novo*. *ConAgra Foods Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). Summary judgment is granted by the trial court upon a showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56 (c). The record must be read in a light most favorable to the party against whom summary judgment is sought. *Matas v. Green*, 171 A.2d 916 (Del. 1961). If there is any evidence supporting a favorable conclusion to the nonmoving party, stating facts in the light most favorable to him, summary judgment must be denied. *Plant v. Catalytic Constr. Co.* 287 A.2d 682 (Del. Super. Ct. aff'd. 297 A.2d 37 (Del. 1971)).

(3.) MERITS OF ARGUMENT:

The Legislature did not intend that the exclusivity provision contained in 19 *Del. C.* § 2304 encompass contractual obligations available to a plaintiff. The exclusion's primary purpose is to protect employers, employees, and fellow employees, from negligence claims, not act as an umbrella exclusion to all claims. Moreover, the *Simpson* Court failed to consider 19 *Del. C.* § 2363 and 18 *Del. C.* § 3902.

When engaging in statutory interpretation, a court must ascertain and give effect to the intent of the legislature. *Cordero* 56 A.3d at 1035. "When construing a statute, we must 'give effect to the whole statute, and leave no part superfluous.'" *Id.* at 1036. A court cannot construe a statute to an absurdity. *Id.* The Legislature did not intend to bar plaintiffs from contractual obligations that are available to them; furthermore, there is case law that supports this. The *Simpson* Court declared, "it is shocking to the Court that this precise issue has never been decided before in this jurisdiction." *Simpson*, at p. 12. The plain language of § 2304 has had little change from its inception in 1917 to date. (A-44-45, See 3193d § 97). Delaware Court's have always operated under the premise that contractual workers' benefits are available despite Workers' Compensation. The *Simpson* Court is the first to deem § 2304 as an exclusive remedy to all claims.

In *State v. Calhoun*, the Court held that the Court decides whether it can offset State disability pension payments against Workers' Compensation benefits.

State v. Calhoun, 634 A.2d 335 (Del. 1993). As an issue of first impression, the Court looked to *Miller v. City of Wilmington*, 285 A.2d 443 (Del. Chan. 1971) aff'd, 293 A.2d 574 (Del. Super. 1972). The Chancery Court held that a police officer could receive both State disability and Workers' Compensation. The Court reasoned that the awards were independent of each other. (Emphasis added). In the absence of a legislative prohibition against the receipt of dual benefits, the award cannot be offset." *Calhoun*, 634 A.2d at 337. Any decision to force governmental employees to choose between Workers' Compensation payments and pension should be legislatively and not judicially made. *Miller*, 285 A.2d at 445. The WCA does not expressly preclude the receipt of certain duplicate benefits. *Calhoun*, 634 A.2d at 337.

The lower Court erred by declaring that the Workers' Compensation statute requires a claimant to select a remedy. *See Miller*, 285 A.2d at 445.

19 *Del. C.* § 2363 provides, in pertinent part:

(a) Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or the employee's dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with this section... (Emphasis added).

(c) Such settlement and release by the employee shall not be a bar to action by the employer or its compensation insurance carrier to proceed against said third party for any interest or claim it might have, and such settlement

and release by the employer or its compensation insurance carrier shall not be a bar to action by the employee to proceed against said third party for any interest or claim the employee may have.

(d) In the event the injured employee or the employee's dependents or personal representative shall settle their claim for injury or death, or commence proceedings thereon against the third party before the payment of workers' compensation, such recovery or commencement of proceedings shall not act as an election of remedies and any moneys so recovered shall be applied as provided in this section. (Emphasis added).

19 *Del. C. § 2363* (d) provides: in the event the injured employee...shall settle their claim for injury..., or commence proceedings thereon against the third party before the payment of WC, such recovery shall not act as an election of remedies. Section (a) states: where the injury... was caused under circumstances creating a legal liability in some person other than a person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits... shall not act as an election of remedies.

Appellee's payment log shows that all but two payments were for medical bills. (A-63-65) Appellant did not accept the two 'payments' for indemnity. This alone, shows problems with the *Simpson* decision. Even if the law required the plaintiff to select the remedy, Appellant has elected UM, under protest, due to fear of the *Simpson* decision. (A-66-71). Appellee paid medical bills after PIP exhaustion and declared Appellant's election without her consent. (A-72-74). Appellee cannot select the remedy for Appellant. The State's action in this case shows a problem in *Simpson*.

Plaintiff is seeking a contractual remedy that is part of her employer benefits. Workers' Compensation payments are an independent award separate from UM/UIM benefits. Public policy supports protecting plaintiffs from the wrongful conduct of tortfeasors and fully compensating a plaintiff to make her whole again. The Court erred by ruling that the exclusive remedy portion of the statute is meant to protect an employer against all claims, rather than solely negligence claims. The Superior Court wrongfully interpreted the statute to be a complete bar, as contractual rights and intentional tort claims remain recoverable to a plaintiff.

III. THE LEGISLATURE CLARIFIED THE LAW RATHER THAN SUBSTANTIALLY CHANGING IT.

(1.) QUESTION PRESENTED:

Did the Superior Court err in finding that the Legislature substantively changed the law? (A – 7-8; A-11-13).

(2.) SCOPE OF REVIEW:

On appeal from a Motion for Summary Judgment granted pursuant to Delaware Superior Court Civil Rule 56, this Court reviews the matter *de novo*. *ConAgra Foods Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). Summary judgment is granted by the trial court upon a showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c). The record must be read in a light most favorable to the party against whom summary judgment is sought. *Matas v. Green*, 171 A.2d 916 (Del. 1961). If there is any evidence supporting a favorable conclusion to the nonmoving party, stating facts in the light most favorable to him, summary judgment must be denied. *Plant v. Catalytic Constr. Co.* 287 A.2d 682 (Del. Super. Ct. aff'd. 297 A.2d 37 (Del. 1971)).

(3.) MERITS OF ARGUMENT:

House Bill No. 308 resolves any possibility of ambiguity. (A-75). The amendment is a direct focus by the legislature upon the meaning of the earlier enacted provision.

A new rule should not be ‘retroactive’ in its operation if it does not alter existing rights or obligations but merely clarifies what those existing rights and obligations have always been. *Appalachian States Low-Level Radioactive Waste Comm’n v. O’Leary*, 93 F.3d 103, 113 (3d Cir. 1996). “Congress may amend a statute to establish new law, but it also may enact an amendment ‘to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.’” *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004). “Statutes may be passed purely to make what was intended all along even more unmistakably clear.” *United States v. Montgomery County*, 761 F.2d 998, 1003 (4th Cir. 1985).

19 *Del. C.* § 2304 prior to House Bill 308 provides:

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

House Bill 308 provides:

Except as expressly excluded in this chapter and except all contractual obligations available to the employee, including uninsured motorist benefits, underinsured motorist benefits, short-term disability benefits, long-term disability benefits, and personal injury protection benefits, every employer and employee, adult and minor, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

Synopsis: This bill is in response to the recent Delaware Superior Court decision of *Simpson v. State of Delaware and Government Employees Insurance Company*, 2016 WL 425010 (Del. Super. Ct. Jan. 28, 2016). In

the *Simpson* decision, the Court noted the need for clarification, as the exclusivity provision in 19 Del. C. § 2304 could operate to unfairly deprive an employee of much-needed benefits. (Emphasis added).

The amended statute does not alter existing rights or obligations, but clarifies what those existing rights and obligations have always been. The lower Court asked for a jurisdictional survey about clarifying law. Both parties provided the Court with surveys. (See A-76-103; A-104-109). A vast majority of case law shows that retroactive application is proper when an amendment clarifies the law. The amendment, House Bill 308, is a clarification in response to the *Simpson* Court requesting clarification. The synopsis declares that the clarification is needed to protect against unfairly depriving an employee of benefits. Appellant is seeking the contractual benefits that the clarification notes.

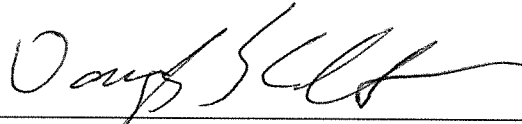
House Bill 308 does not increase worker's compensation benefits. The statute must be applied retroactively to allow Appellant to recover UM benefits under her employer's policy. To date, Appellant has been wrongfully deprived of her contractual UM benefits due to the *Simpson* decision and the lower Court's Order signifying Workers' Compensation as her exclusive remedy.

CONCLUSION

For the aforesaid reasons, the Superior Court's Order granting summary judgment to Defendant should be reversed, and the case should be remanded to the Superior Court for trial by jury.

Respectfully submitted,

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