



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT I

I. APPELLANT IS ENTITLED TO UIM BENEFITS IN ADDITION TO WORKERS' COMPENSATION BENEFITS.

For years, Delaware courts have allowed for recovery of both Workers' Compensation and UIM benefits. The exclusive remedy portion of 19 *Del. C.* § 2304 focuses on questions of employer, employee, and fellow employee, negligence. The Legislature did not intend that the exclusive provision in § 2304 encompass contractual claims. House Bill 308 augments Ms. Robinson's position. Ms. Robinson is entitled to UIM benefits and Workers' Compensation payments.

The State has no standing or statutory rights different than a private employer as it relates to Appellant's claims for Workers' Compensation and UIM benefits. The State's argument that it would be paying twice is unpersuasive. The State is not afforded additional protection because it self-insures. In fact, the State steps into the shoes of an insurance company by self-insuring. Plaintiffs should not have to forego benefits solely because an employer, in this case the State, chooses to self-insure. If the State chooses to self-insure to save money, it is to its benefit and by its own choosing. When a claim arises for both Workers' Compensation and UIM, it must pay in accordance with the law.

Under Delaware law, the carrier that insures the vehicle involved in an accident is primary regardless of the ownership of the policy or vehicle. *Converse*

v. State Farm Mut. Auto. Ins. Co., No. N11C-04-028 CLS, 2013 Del. Super. LEXIS 498, at *8 (Super. Ct. Oct. 29, 2013), *affm'd*, 99 A.3d 226 (Del. 2014). As the occupant of the vehicle, Ms. Robinson looks to the vehicle she occupied for UIM coverage. Who pays the premium is not at issue.

The State points out that in *Donahue* the State never disputed UM/UIM payment, that is because it followed the law. Workers' Compensation has a different measures of damages than UM benefits. For instance, pain and suffering is included in UM claims but not those of Workers' Compensation.

The Legislature never declared that § 2304 encompasses contractual claims and the *Simpson* Court erred by extending the exclusivity provision as such. After the *Simpson* Court requested a clarification from the Legislature, it responded in favor of Appellant's arguments with House Bill 308.

The insurance policy¹ referenced in Appellee's Answering Brief and Appendix was not in the record below. The State moved for summary judgment without filing an answer or responding to discovery. It is worth noting that under Section B of the policy, 'Who is an Insured,' subparagraph 3 reads, “anyone else “occupying” a covered auto...”² (emphasis added). This policy covers Ms. Robinson and gives her the right to UIM benefits. The State has the choice to

¹ See Appellee's Answering Brief App. B21-24.

² Id. at B24.

reject UM/UIM coverage pursuant to 18 *Del. C.* § 3902 (a) (1), but opted against this. The State reasons that there is no evidence that Appellant paid insurance premiums and that the benefits are not bargained for by employees. This not true as employees acknowledge that part of their compensation is their benefits and select jobs strictly for these benefits. This is especially true with state jobs.

Moreover, see *Converse*. Plaintiff has a reasonable expectation to the benefits that are part of her employment and insurance contract.

REPLY ARGUMENT II

II. THE *SIMPSON* COURT WRONGFULLY ANALYZED THE EXCLUSIVE REMEDY IN 19 *Del. C.* § 2304.

The lower court construed the exclusive remedy provision beyond its scope. The *Simpson* Court is the first and only court to deem § 2304 as an exclusive remedy to all claims. The ruling in *Simpson* ignores case law set by this Court. *Harris*³, *Adams*⁴, and *Simendinger*⁵ allow a plaintiff to collect both Workers' Compensation and UIM benefits. These cases confirm that there can be recoveries for both Workers' Compensation and UIM. The *Simpson* Court is the only Delaware case that bars a UIM claim on the basis that Workers' Compensation is an exclusive remedy.

The lower court erred by declaring that the Workers' Compensation statute requires a claimant to select a remedy. 19 *Del. C.* § 2363 (a) and (c) both expressly state that the acceptance of compensation benefits does not act as an election of remedies. The State cannot be afforded a 'reward' (not having to honor UIM benefits) because it chooses to self-insure.

The *Calhoun* Court reasoned that in the absence of a legislative prohibition against the receipt of overlapping benefits, the award cannot be offset. *State v.*

³ *Harris v. New Castle County*, 513 A.2d 684 (Del. 1986)

⁴ *Adams v. Delmarva Power & Light Co.*, 575 A.2d 1103 (Del. 1990).

⁵ *Simendinger v. Nat'l Union Fire Ins. Co.*, 2013 Del. LEXIS 146 (Del. Mar. 19, 2013).

Calhoun, 634 A.2d 335, 337 (Del. 1993). The Court went on to declare that the WCA does not preclude the receipt of certain overlapping benefits. *Id.* Like *Calhoun*, Ms. Robinson's right to UIM benefits is the result of a contractual arrangement that was bargained for in her employment contract and thus, any offset is not proper.

Appellant included intentional tort cases in her Opening Brief to further show that the *Simpson* Court erred by declaring § 2304 to be Appellant's exclusive remedy. This Court has long held that not even all torts are limited by the exclusive remedy provision, making it even more clear that § 2304 does not limit contractual rights or other statutorily-created rights available to a plaintiff.

REPLY ARGUMENT III

III. HOUSE BILL 308 RESOLVED EARLIER AMBIGUITY IN THE STATUTE.

House Bill 308 emerged in response to the *Simpson* Court's need for clarification. The amendment clears ambiguity of the earlier enacted provision. The amendment does not alter existing rights or obligations. House Bill 308 makes clear was the Legislature intended since its enactment.

The synopsis to the Bill is unmistakably clear. The synopsis deems the amendment a clarification as the exclusivity provision in § 2304 could operate to unfairly deprive an employee of much-needed benefits. Unwavering case law in sister states holds that retroactive application is proper when an amendment such as House Bill 308 clarifies the law.⁶

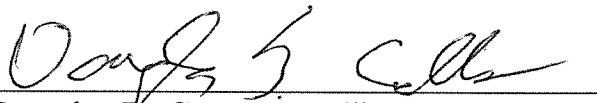
Simpson wrongfully held that § 2304 was a blanket bar exclusion to all claims. House Bill 308 clarified that Workers' Compensation and automobile benefits are both recoverable under the statute. The amendment did not change the law, it simply clarified that UM/UIM, PIP, and other contractual benefits are permitted along with Workers' Compensation. This clarification is aligned with case law that has allowed for these benefits for decades.

⁶ See Appendix to Appellant's Opening Brief at A 76-103.

CONCLUSION

For the reasons set forth herein and in Appellant's Opening Brief, Ms. Robinson respectfully prays this Court reverse the Superior Court's Order granting summary judgment to the State of Delaware and remand the matter to the Superior Court for trial by jury.

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