



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN HENRY and DARLENE HENRY, : No. 437,2018
: :
Plaintiffs Below, Appellants, : Court Below, Superior Court
: of State of Delaware in and for
v. : New Castle County
: C.A. N18C-03-092 ALR
CINCINNATI INSURANCE CO. :
: :
Defendant Below, Appellee. :

**APPELLEE CINCINNATI INSURANCE COMPANY'S CORRECTED
ANSWERING BRIEF ON APPEAL**

FRANKLIN & PROKOPIK

/s/ Krista E. Shevlin

KRISTA E. SHEVLIN (4526)
WILLIAM A. CRAWFORD (5600)
500 Creek View Road, Suite 502
Newark, Delaware 19711
(302) 594-9780
*Attorneys for Appellee Cincinnati
Insurance Company*

Date: January 16, 2019

TABLE OF CONTENTS

Table of Citations	ii
Nature of Proceedings.....	1
Summary of Argument	3
Statement of Facts	4
Argument.....	6
I. THE SUPERIOR COURT PROPERLY GRANTED CIC’S MOTION TO DISMISS FINDING THAT APPELLANTS’ UIM CLAIM WAS BARRED BY THE WCA	6
A. Questions Presented.....	6
B. Scope of Review.....	6
C. Merits of Argument.....	6
Conclusion	12

TABLE OF CITATIONS

	<u>Page</u>
 Cases	
<i>Dunlap v. State Farm Fire & Cas. Co.</i> , 878 A.2d 434, 438–39 (Del. 2005) ...	6
<i>Gadow v. Parker</i> , 865 A.2d 515, 518 (Del. 2005)	6
<i>Harmon v. F & H Everett & Associates</i> , 83 A.3d 737 (Del.2013)	9
<i>Johnson v. Chrysler Corp.</i> , 213 A.2d 64, 66 (Del. 1965)	7
<i>Robinson v. State of Delaware</i> , CA. No. 172, 217 (October 25, 2017) at 20:43-21:54	10
<i>Simpson v. State of Delaware</i> , 2017 WL 425010, at *4.....	8
<i>Simpson v. State</i> , 2016 WL 425010, at *1 (Del. Super. Ct. Jan. 28, 2016)	8
<i>State of Delaware Oral Argument Video Recording. Robinson v. State of Delaware</i> , CA. No. 172, 217 (October 25, 2017) at 8:05 – 9:00.	11
 Statutes	
19 Del. C. § 2303(b)	7
19 Del. C. § 2304 (2016) [pre-amendment version]	7
19 Del. C. § 2304 (effective Sept. 6, 2016)	7

NATURE OF PROCEEDINGS

This is an appeal to the Supreme Court of the State of Delaware from a Superior Court decision dated July 31, 2018, in the case of *John Henry and Darlene Henry v. The Cincinnati Insurance Company*, Del. Super. Ct., C.A. No. N18C-03-092 ALR, Rocanelli, J. (July 31, 2018). The Plaintiffs Below, Appellants are John and Darlene Henry (hereinafter “Henry”). The Defendant Below, Appellee is The Cincinnati Insurance Company (hereinafter “CIC”). On September 29, 2015, Plaintiff Below-Appellant, John Henry was operating a motor vehicle in the course of his employment with Horizon Services (“Employer”) when he was rear-ended by a third-party tortfeasor. Mr. Henry sustained injuries to his neck, back, and right shoulder. The tortfeasor was insured by Liberty Mutual with a policy limit of \$50,000.00 per occurrence. The Employer’s vehicle was insured under a policy with Cincinnati Insurance Company (“CIC”) that included underinsured motorist (“UIM”) coverage with limits of \$1,000,000.00 per accident. Employer was insured through a separate insurance carrier for workers’ compensation insurance.

Following the accident, Mr. Henry accepted workers’ compensation for his injuries. In addition, on or about January 11, 2018, Mr. Henry settled his liability claim with the tortfeasor and received the tortfeasor’s \$50,000.00 policy limit.

Mr. Henry then made a claim with CIC for UIM coverage under Employer's underinsured motorist policy, which CIC denied. On March 12, 2018, Mr. and Mrs. Henry filed a lawsuit with the Superior Court seeking underinsured motorist benefits from CIC. Mrs. Darlene Henry's claim against CIC is for loss of consortium.

CIC filed a motion to dismiss the Superior Court action in lieu of an answer on April 23, 2018. CIC argued that the workers' compensation benefits Mr. Henry received under the Delaware Workers' compensation Act ("WCA") constituted his exclusive remedy against Employer. The Henry's opposed CIC's motion to dismiss. On July 31, 2018, the Superior Court issued its decision granting CIC's Motion to Dismiss.

The Henrys filed their Notice of Appeal to this Court on August 24, 2018 and submitted *Appellant's Opening Brief* on December 5, 2018. This is the *Answering Brief of Appellee Cincinnati Insurance Company*.

SUMMARY OF ARGUMENT

- I. ***DENIED.* THE SUPERIOR COURT BELOW PROPERLY INTERPRETED 19 DEL. C. 2304 AND PRECLUDED UNDERINSURED MOTORIST BENEFITS TO APPELLANT WHEN IT GRANTED CIC'S MOTION TO DISMISS FINDING THAT APPELLANTS' UIM CLAIM WAS BARRED BY THE WCA.**

STATEMENT OF FACTS

On September 29, 2015, Plaintiff-Below, Appellant John Henry was operating a motor vehicle in the course of his employment with Employer, Horizon Services when he was rear-ended by a third-party tortfeasor. (Appellant's Appendix 4-7). Mr. Henry sustained injuries to his neck, back, and right shoulder. (Appellant's Appendix 4-7). The tortfeasor was insured by Liberty Mutual with a policy limit of \$50,000.00 per occurrence. (Appellant's Appendix 4-7).

The Employer's vehicle was insured under a policy with Cincinnati Insurance Company ("CIC") that included underinsured motorist ("UIM") coverage with limits of \$1,000,000.00 per accident. (Appellant's Appendix 39-40). Following the accident, Mr. Henry received workers' compensation benefits for his injuries. (Appellant's Appendix 14-20).

On or about January 11, 2018, Mr. Henry settled his liability claim with the tortfeasor and received the tortfeasor's \$50,000.00 policy limit. Mr. and Mrs. Henry then made a claim with CIC for UIM coverage under Employer's policy. (Appellant's Appendix 4-7).

CIC denied coverage arguing that Mr. Henry was not entitled to UIM benefits under Employer's automobile policy based upon his acceptance of workers' compensation benefits. (Appellant's Appendix 8-13).

On March 12, 2018, Mr. and Mrs. Henry filed a lawsuit with the Superior Court seeking underinsured motorist benefits from CIC. (Appellant's Appendix 4-7). Mrs. Henry's claim against CIC is for loss of consortium. (Appellant's Appendix 4-7).

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED CIC'S MOTION TO DISMISS FINDING THAT APPELLANTS' UIM CLAIM WAS BARRED BY THE WCA.

A. QUESTION PRESENTED

Whether the Superior Court erred as a matter of law in granting CIC's Motion to Dismiss by finding that the Workers' Compensation Act as written the date of the accident, September 29, 2015, applied to bar Appellants' UIM claim against CIC? (issue preserved at Appellant's Appendix-170-174).

B. SCOPE OF REVIEW

The Delaware Supreme Court reviews judgments on a motion to dismiss *de novo*. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 438–39 (Del. 2005). In this context, the Court decides whether the trial judge erred as a matter of law in formulating or applying legal precepts. *Gadow v. Parker*, 865 A.2d 515, 518 (Del. 2005). Dismissal is warranted only if “it appears with reasonable certainty” that the claims asserted would not entitle plaintiff to relief under any provable set of facts. *Dunlap*, 878 A.2d at 439 (citing *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000)).

C. MERITS OF ARGUMENT

Denied. The Superior Court did not err as matter of law when it granted CIC's Motion to Dismiss based upon its conclusion that Appellants were not

entitled to UIM benefits under the CIC policy given the version of the WCA in place on the date of the motor vehicle accident.

The sole issue raised by the Appellants in the underlying action is that the pre-amendment and not the post-amendment version of the WCA should apply to the current litigation.

Both the pre-amendment and post-amendment versions of the WCA's exclusivity clause provide that an employee is "bound" to accept workers' compensation for "personal injury or death by accident arising out of and in the course of employment." 19 *Del. C.* § 2304 (2016) [pre-amendment version]; 19 *Del. C.* § 2304 (effective Sept. 6, 2016).

In other words, once an employee is involved in an employment-related accident, he or she is thereby bound to accept workers' compensation for any injuries sustained therein. In this sense, the WCA is triggered at the moment an employment-related accident occurs. *See e.g.*, 19 *Del. C.* § 2303(b) (connecting the calculation of workers' compensation wages to the date of the injury); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965) (stating that workers' compensation cannot be awarded unless and until "the claimant establishes by probative evidence that he suffered an injury and that such injury was the result of an accident taking place in the course of his employment").

Accordingly, the applicable version of the WCA is the one in effect at the time of a particular employment-related accident.

In the current situation, Mr. Henry was involved in an accident arising out of and in the course of his employment on September 29, 2015, approximately one year prior to the effective date of the amendment to the WCA. Therefore, the pre-amendment version of the WCA applies to Employee's receipt of workers' compensation benefits, and subsequent claim to UIM benefits. Under the exclusivity clause of the pre-amendment version of the WCA, Employee is prohibited from receiving both workers' compensation benefits and UIM benefits under Employer's insurance policy. *Simpson v. State of Delaware*, 2017 WL 425010, at *4.

The only question that needs to be answered by this Court is whether the lower court erred when applying the *Simpson/Robinson* decisions to the current litigation.

In *Simpson v. State*, 2016 WL 425010, at *1 (Del. Super. Ct. Jan. 28, 2016), Judge Carpenter was asked on first impression to address the issue. In *Simpson*, Carletta Simpson was injured in the course and scope of her employment with the State of Delaware. She received worker's compensation from the state and then attempted to collect from the State's UM/UIM policy. In reviewing the statute and

the language of the policy, Judge Carpenter opined that the Plaintiff was not legally entitled to recover from the underinsured motorist policy.

Under 2304 of the WCA, “[e]very employee ... shall be bound ... to accept compensation for personal injury ... 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.” *Id.*

Identical to the State’s UM/UIM policy in *Simpson*, the CIC UM/UIM policy in the case *sub judice* tracks the language of the statute and provides that it will provide insurance protection to an insured for compensatory damages which the insured “is *legally entitled* to recover from the owner or operator of an uninsured [or] underinsured motor vehicle because of bodily injury sustained by the insured....” (Appellant’s Appendix 59).

As discussed in detail by Judge Carpenter in *Simpson*:

In this context, the exclusivity provision makes sense. If not there, the injured party would in effect be compensated twice for the same injury: first by the employer’s workers compensation insurance policy and second by the employer’s UM/UIM insurance policy. While the legislature clearly intended to protect injured parties from underinsured tortfeasors, it did not intend it as a windfall beyond what would be the reasonable and appropriate cost for the disability caused by the accident. *See Harmon v. F & H Everett & Associates*, 83 A.3d 737 (Del.2013).

Appellants’ arguments that a self-insurer and insurer should be treated differently are also in error. It is important to note that Mr. Henry did not pay

insurance premiums for automobile benefits provided by his employer. The employer's UM/UIM benefits are not bargained for by an employee and the employee does not pay a premium in exchange for certain policy limits. As such, any argument that Plaintiff had a reasonable expectation to coverage is without merit.

More importantly, these arguments were considered and rejected by the *Simpson* Court. There are a plethora of reasons and employer would opt for underinsured motorist coverage (i.e. passengers in the vehicle who would not be entitled to worker's compensation benefits).

Notwithstanding the fact that self-insured employers and insured employers have never been treated differently with regard to worker's compensation exclusivity, as pointed out by Justice Seitz during oral argument, doing so now "would create an incentive for employers to consider going self-insured." *Robinson v. State of Delaware*, CA. No. 172, 217 (October 25, 2017) at 20:43-21:54.

Further, the Appellants argument that the law was different prior to the holding in *Simpson* and *Robinson* is irrelevant. The fact that parties incorrectly interpreted and applied the law improperly prior to *Simpson* and *Robinson* is immaterial to this litigation. This Court affirmed the decisions confirming that the law as applied in *Simpson* and *Robinson* was correct.

Section 2304 of the Worker's Compensation Act contains the exclusivity language and makes no distinction between self-insured employers and non-self-insured employers. Rather the section states every employee entitled to worker's compensation is subject to the exclusivity provision. In order for Appellants' argument to have merit, the section would have to differentiate between employees of self-insured employers and non-self-insured employers.

During the Supreme Court Oral Argument in *Robinson*, Justice Seitz summarized the law in effect at all times relevant to this action.

The whole scheme of worker's compensation is to have exclusive remedy between employer and employee. If a client can get worker's compensation benefits, so the argument is, he/she shouldn't also get a second recovery because worker's compensation is exclusive.
State of Delaware Oral Argument Video Recording. Robinson v. State of Delaware, CA. No. 172, 217 (October 25, 2017) at 8:05 – 9:00.

CONCLUSION

The Superior Court did not err as a matter of law when it granted CIC's Motion to Dismiss holding that the WCA in effect on the date of automobile accident applied and barred Appellants' entitlement and ability to recover UIM benefits under the automobile policy issued by CIC. Accordingly, Appellants respectfully request that this Honorable Court affirm the decision of the Superior Court's Memorandum Order date July 31, 2018.

FRANKLIN & PROKOPIK

/s/ Krista E. Shevlin

KRISTA E. SHEVLIN (4526)
WILLIAM A. CRAWFORD (5600)
500 Creek View Road, Suite 502
Newark, Delaware 19711
(302) 594-9780
*Attorneys for Appellee Cincinnati
Insurance Company*

Date: January 16, 2019