



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 Delaware
 : New Castle County
 : C.A. N18C-03-092 ALR
 :
 V. :
 :
 :
 THE CINCINNATI INSURANCE :
 COMPANY, :
 :
 :
 Defendant Below, Appellee. :

PLAINTIFFS-BELOW, APPELLANTS' REPLY BRIEF ON APPEAL

/s/ JONATHAN B. O'NEILL
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TABLE OF CONTENTS

Table of Citations..... ii

Argument.....1

 A. Question Presented1

 B. Scope of Review.....1

 C. Merits of Argument.....2

Conclusion6

TABLE OF CITATIONS

Cases

Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 438–39 (Del. 2005).1

Gadow v. Parker, 865 A.2d 515, 518 (Del. 2005).....1

McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000).....1

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT 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 A-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

Appellee-Defendant Below, Cincinnati appears to raise only three points in support of their position on appeal, none of which refute Appellants' argument that their claim for UIM benefits is controlled by the insurance contract and also the law as it stood when the Appellants' UIM claim arose.

First, with regard to the workers' compensation benefits Appellant, John Henry was entitled to under 19 *Del. C.* § 2304 as discussed at page 7 of the Appellee's Answering Brief, it is axiomatic that his right to workers' compensation benefits was triggered at the moment the employer-related injury was sustained. However, Appellee jumps, without citation or legal analysis to the conclusion that because, consistent with its opinion that the pre-amendment version of the WCA applies to Mr. Henry's workers' compensation benefits, the pre-amendment version of the WCA also applies to Appellants' entitlement to UIM benefits under a separate policy of automobile insurance obtained by the Employer through CIC. Appellee does not address in any way the fact raised by Appellants that the UIM benefits sought from the Employer's automobile insurance carrier are not governed by the WCA, but rather are purely contractual in nature. Appellee also wholly fails to address how CIC's liability under the policy is prohibited by the WCA, or moreover, fails to address Appellants' argument that CIC's liability was only triggered when Appellant exhausted the tortfeasor's liability insurance which

occurred after the amendment to the WCA. Aside from the workers' compensation issue, CIC certainly would take the position that its liability for UIM benefits is not triggered until the injured party exhausts all liability coverage based upon the contract terms. Interestingly, CIC raises no contract provision which excludes coverage for Appellants under the instant facts and further, simply states that the case law raised which was contrary to *Simpson* and *Robinson* should not be considered in this case. In support of their argument, Appellee simply reiterates that under the pre-amendment WCA, Appellants are prohibited from receiving both workers' compensation and UIM benefits from the Employer citing *Simpson v. State*. Furthermore, a critical issue with Appellee's reliance on *Simpson* and *Robinson* is that it is clear, especially in light of the arguments and questions raised at the Supreme Court's Oral Argument on *Robinson v. State* which the Appellee cites in its Answering Brief, that the Superior Court and this Court in those cases were keenly aware that the employees in those cases were seeking benefits from the same self-funded source, the State.

Second, Appellee raises the fact that Mr. Henry did not personally pay for the insurance benefits sought under the Employer's CIC policy in support of the argument that Mr. Henry therefore did not have a "reasonable expectation to coverage." While this was not specifically addressed below, this argument is not factually or logically supported. CIC has no factual understanding of what

Appellant, John Henry's actual expectations were, and furthermore, it cannot be so simply stated that any expectation Mr. Henry had as to whether his employer would provide insurance for him and the employer-owned vehicle he was in while on the job would be unreasonable.

Finally, Appellee quotes Justice Seitz' comments from the Supreme Court Oral Argument in *Robinson* at the conclusion of their Answering Brief for the proposition that the law in effect at all relevant times to this action supports its position. However, Justice Seitz' clearly was posing a theoretical situation and summarizing the arguments at issue and being raised by the State in the *Robinson* case at the time of the quoted language. Specifically, Justice Seitz starts out by stating, "[l]et me just talk just theoretically here for a second..." at the beginning of the quoted language cited by Appellee from the *Robinson* oral argument. Additionally, at the end of the quoted language cited by Appellee, Justice Seitz goes on to state "[n]ow there seems to be a little bit of a carve out in the law if there's private insurance that's been obtained and that's not effected by workers' compensation law..." *State of Delaware Oral Argument Video Recording. Robinson v State*, C.A. No. 172, 217 (October 25, 2017) at 8:05-9:05. Without speculating as to the specific statute or decisional law the Justice was acknowledging at the time of his comments, the argument and questions being

addressed at the oral argument in *Robinson* were different factually and legally than the argument raised by Appellants in this appeal.

As discussed in further detail in Appellants' Opening Brief, given Appellants' claim for UIM benefits arises from an insurance contract, the claim should be controlled primarily by the terms of the insurance contract, but also, the law as it stood when the Appellants' UIM claim arose.

CONCLUSION

Accordingly, for the reasons stated above as well as in Appellants' Opening Brief, the Superior Court erred 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 reverse the decision of the Superior Court's Memorandum Order date July 31, 2018 and remand the case back to the Superior Court.

Respectfully submitted,

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