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Case Number 565,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES FRITZ,	:	**No. 565,2018**
	:	
Plaintiff Below, Appellant,	:	**Court Below, Superior Court of State of Delaware in and for**
v.	:	**Sussex County**
	:	
CINCINNATI INSURANCE CO.	:	**C.A. No. S16C-11-006 RFS**
	:	
Defendant Below, Appellee.	:	

APPELLEE CINCINNATI INSURANCE COMPANY'S CORRECTED ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This is an appeal to the Supreme Court of the State of Delaware from a Superior Court decision dated August 22, 2018, in the case of *Charles Fritz v. The Cincinnati Insurance Company*, Del. Super. Ct., C.A. No. S16C-11-006 RFS, Stokes, (August 22, 2018). The Plaintiff Below, Appellant is Charles Fritz (hereinafter "Fritz"). The Defendant Below, Appellee is The Cincinnati Insurance Company (hereinafter "CIC").

Appellant-Plaintiff Below Fritz filed a personal injury complaint against Alex Lopez and Gilberto Lopez on November 9, 2016. Fritz filed an amended complaint on January 24, 2017, adding CIC as a party and asserting an underinsured motorist claim.

On July 11, 2017, CIC filed a Motion to Dismiss or For Summary Judgment in the Alternative. Fritz opposed the Motion. On August 22, 2018, the Superior Court granted Defendant's Motion for Summary Judgment.

This is Appellee's *Answering Brief on Appeal*.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court did not commit reversible error when it granted summary judgment against Fritz and barred his ability to recover under his employer's UIM policy.

2. Denied. The Superior Court did not erroneously apply the concept of exclusivity from *Simpson* and *Robinson* because the Worker's Compensation Act including its exclusivity applies equally to self-insured and insured employers.

3. Denied. The Superior Court decision should not be disturbed for public policy reasons.

4. Denied. The Defendant did not waive its ability to make an exclusivity argument to deny first party benefits of UIM simply because it paid Personal Injury Protection ("PIP") benefits under 21 *Del. C.* § 2118 in the same case.

STATEMENT OF FACTS

On January 24, 2017, Fritz commenced the instant litigation seeking underinsured motorist benefits from CIC. Specifically, Plaintiff seeks underinsured motorist ("UIM") coverage from his employer's insurance carrier, CIC, for injuries sustained while in the course of his employment in a motor vehicle accident with a third-party tortfeasor even though he already received worker's compensation benefits from the same provider for the same accident. (Appellant's Appendix pages 14-16).

On October 20, 2015, the Plaintiff was injured in a multi-vehicle automobile collision caused by Alex Lopez. Mr. Lopez was driving a vehicle owned by Gilberto Lopez and insured by Alpha Vision with a policy limit of $50,000.00 per occurrence. Fritz was operating a vehicle owned by his employer and insured under his employer's automobile liability policy, which includes UM/UIM motorist coverage with limits of $1,000,000.00 per accident and he recovered workers' compensation benefits for those injuries. (Appellant's Appendix pages 14-16).

As a result of the accident, Fritz suffered injury to his upper and lower back. In connection with those injuries, he received and continues to receive workers' compensation benefits from his employer pursuant to 19 *Del. C.* § 2304. The

tortfeasor's insurer, Alpha Vision, paid the $50,000.00 policy limits to settle all claims on behalf of all potential plaintiffs. (Appellant's Appendix pages 14-16).

ARGUMENT

I. THE SUPERIOR COURT DID NOT COMMITT REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT AGAINST FRITZ AND BARRED HIS ABILITY TO RECOVER UNDER HIS EMPLOYER'S UIM POLICY.

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 at the date of the accident, October 20, 2015, applied to bar Appellant's UIM claim against CIC?

B. Scope of Review

On appeal, this Court conducts a de novo review of the Superior Court's grant of summary judgment "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *State Farm Mut. Auto Ins. Co. v. Patterson,* 7A.3d. 1062 (2012). Questions of statutory interpretation are also reviewed *de novo*. *Id.*

C. Merits of Argument

1. Fritz is not entitled to recover under his employer's UIM policy because his exclusive remedy against his employer are the benefits he received under the Delaware Worker's Compensation Act ("WCA") and as a result, he is not

"legally entitled to recover" UIM benefits against his employer's policy.

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 as to whether an employee was to able recover from his employer's worker's compensation and UM/UIM policies or whether he was barred from UM/UIM coverage because the benefits received pursuant to the WCA are the exclusive remedy.

In *Simpson*, Carletta Simpson was injured in the course and scope of her employment with the State of Delaware, a self-insured entity. 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.

Specifically, he opined that: 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....” (See Appellant’s Appendix at 149-150).

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). *Id.*

Further, the Appellant’s 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.

Likewise, the Delaware Superior Court has, in fact, applied worker’s compensation exclusivity to insured employers and insurance companies. In *Littlejohn v. State Farm Mut. Auto. Ins. Co*., 2010 WL 2029058, at *1 (Del. Super. Ct. May 21, 2010), the Delaware Superior Court barred a Plaintiff from seeking uninsured motorist coverage from Defendant State Farm Mutual Automobile Insurance Company, her insurance carrier, for injuries sustained while travelling as a passenger with a co-employee from Dover to Wilmington for work. The Court

held that the Plaintiff was barred from receiving uninsured motorist benefits because she previously sought and accepted worker's compensation benefits in connection with the same accident.

In *Littlejohn,* the policy language is identical to the language in the case *sub judice* and tracked the statute. Specifically, Judge Parkins held that because of the plain language of the UM statute and the policy in question, Plaintiff was not "legally entitled to recover" uninsured motorist benefits because of the exclusive nature of the worker's compensation benefits she was already receiving. *Littlejohn v. State Farm Mut. Auto. Ins. Co.,* 2010 WL 2029058, at *3 (Del. Super. Ct. May 21, 2010).[1]

Further, Plaintiff's reliance on *Bermel v. Liberty Mutual Fire Insurance Co.,* 56 A. 3d 1062 (Del 2012) and *Jimenez v. Westfield Insurance Company, 2013 WL 5476606* (Del. Super. Ct. Sept. 30, 2012) is misguided. (Pgs. 7-10 of Appellant's Opening Brief). Notwithstanding the glaringly obvious fact that both decisions pre-date the *Robinson* and *Simpson* decisions[2], they also differ in other ways.

[1] In fact, in *Petrochko v. Nationwide Mut. Ins. Co*., 2010 WL 5571396 (Pa. Com. Pl. Aug. 27, 2010), aff'd sub nom. *Petrochko v. Nationwide Mut.*, 38 A.3d 917 (Pa. Super. Ct. 2011), the Pennsylvania Court of Common Pleas noted that: "Of the 22 other states that have decided this specific issue, 21 jurisdictions have concluded that the injured employee is ineligible to recover UM/UIM benefits since the employee is not "legally entitled to recover" compensatory damages.

[2] All of the "precedent" cited in Plaintiff's Opening Brief pre-date the *Robinson* and *Simpson* decisions.

Specifically, all of Plaintiff's claims alleging that the insurance policy was ambiguous must fail. The Delaware Supreme Court has held already held that the phrase "legally entitled to recover" is unambiguous and should be interpreted literally. The fact remains that the under the plain language of the UM statute, Plaintiff is not "legally entitled to recover" from his employer's insurer because of the exclusive nature of the worker's compensation benefits he is receiving. *Nationwide Mut. Ins. Co. v. Nacchia*, 628 A.2d 48, 52 (Del.1993). *Littlejohn v. State Farm Mut. Auto. Ins. Co*., 2010 WL 2029058, at *3 (Del. Super. Ct. May 21, 2010).

In *Bermel,* the Plaintiff/employee was driving a company vehicle but not in the course and scope of his employment at the time of the accident thus would not be bound under the exclusivity of the WCA. This is the exact type of situation where the Plaintiff would be "legally entitled to recover" UIM benefits and highlights the reasons an employer would opt for UIM benefits. Further, in the current litigation, the policy is not ambiguous, it clearly states that an employee is only entitled to UIM benefits when they are "legally entitled to recover." (See Appellant's Appendix at 149-150). *56 A. 3d 1062 (Del. 2012).*

In *Jimenez,* while the employee did receive worker's compensation and UIM benefits there was no discussion as to the language of the policy and whether the language of the policy tracked the WCA as the State's policy did in *Simpson,*

Robinson and *Littlejohn* as CIC's policy did in the case *sub judice.* *2013 WL 5476606* (Del. Super. Ct. Sept. 30, 2012).

As for the other cases cited by Appellant in his Opening Brief, again there is no ambiguity in the policy in the current case. As such, the Plaintiff is not entitled to recover.

Appellant's argument that Appellant's employer had the option to reject underinsured motorist coverage but instead made the deliberate decision to purchase it is irrelevant. This argument was discussed and rejected by the *Simpson* Court explaining that there are other reasons that an employer would opt for UIM coverage other than to give employees a chance to double dip. One of those reasons is set forth *Bermel* (i.e. An employee driving an employer vehicle while not in the course and scope of his employment thus not entitled to worker's compensation benefits). 56 A. 3d 1062 (Del 2012).

Here, based on the interplay between the exclusivity of the WCA and the language of the policy, Appellant is not entitled to recover. In other words, precedent dictates that Appellant's exclusive remedy against his employer are the benefits he received under the Delaware Worker's Compensation Act ("WCA"). As such, under the language of the policy, he is not "legally entitled to recover" UIM benefits against his employer's policy.

2. Receipt of worker's compensation benefits bars Fritz's right to recover under his employer's UIM policy regardless of whether Fritz's employer is self-insured.

Appellant's argument set forth in (I)(C)(2) of the Opening Brief indicating the Delaware Superior Court in *Simpson* and/or the Delaware Superior or Delaware Supreme Court in *Robinson* "implicitly acknowledged an employer's right to recover under a UIM policy and worker's compensation policy so long as the employer is not self-insured" is misleading. (Appellant's Opening Brief page 10, Paragraph 2-3). While the Appellees in those cases were admittedly self-insured, neither the Delaware Superior Court nor the Delaware Supreme Court made an "implicit" distinction between the two in their holdings. *Simpson v. State, 2016 WL 425010, (Del. Super. Ct. Jan. 28, 2016); Robinson v. State of Delaware, CA. No. 172, 217 (Del. Supr. October 25, 2017).*

Rather the Superior Court in *Simpson* and later *Robinson* (affirmed by the Delaware Supreme Court) held that the exclusivity provision of the WCA precluded the Plaintiff from receiving benefits under the State of Delaware's self-administered insurance policy because "every employee entitled to worker's compensation is subject to the exclusivity provision of the WCA." *Id.*

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. 19 *Del. C.* § 2304. In order for Appellants' argument to have

merit, the exclusivity provision of the WCA would have to differentiate between employees of self-insured employers and non-self-insured employers. It does not.

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.

Notably, Mr. Fritz 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. Further, there is no ambiguity in the policy. 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). *Simpson v. State, 2016 WL 425010, (Del. Super. Ct. Jan. 28, 2016).*

Notwithstanding the fact that self-insured employers and insured employers have never been treated differently with regard to the worker's compensation exclusivity provision of the WCA, as pointed out during Delaware Supreme Court

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.

Also, Plaintiff's reliance on *Simendinger v. National Insurance Company*, 74 A. 3d 609 (Del. 2013) and *Hurst v. Nationwide Mutual Insurance Company*, 652 A.2d. 10 (Del. 1995) are misguided.

First, both these cases pre-date the *Robinson* and *Simpson* decisions. Second, both cases involved priority of liens and there is no discussion of the language of the UM/UIM policies in either case. In fact, there is no discussion at all in these cases regarding the interplay of the worker's compensation exclusivity and the language of the UM/UIM policies. Particularly whether the UIM/UIM policies in those cases tracked the statute as they did in the state administered policy in *Robinson* and *Simpson* and the CIC policy in the case *sub judice*. *Simpson v. State, 2016 WL 425010, (Del. Super. Ct. Jan. 28, 2016); Robinson v. State of Delaware, CA. No. 172, 217 (Del. Supr. October 25, 2017).*

3. The Superior Court did not err in applying the concept of exclusivity from Simpson and Robinson to this case because exclusivity does not only apply with regard to self-insured employers.

Contrary to Plaintiff's arguments set forth under Argument (I)(C)(3) the only difference between the holdings in *Simpson* and *Robinson* and the case *sub judice,* are that the former involved the State of Delaware, which holds a state

administered policy and the employer in the current action holds a policy issued by CIC. Other than the distinction regarding the types of insurance held, the factual circumstances and the UM/UIM policies are identical. *Id*.

Further, the Plaintiff's argument that the Superior Court made a decision that was "so wrong that the General Assembly was compelled to amend the statutory scheme to abrogate any effect the cases might have had", is incorrect and irrelevant. (Appellant's Opening Brief, pg. 13-14). The decisions that led to the amendment to the statutory scheme were affirmed by this Court. *Robinson v. State of Delaware, CA. No. 172, 217 (Del. Supr. October 25, 2017).* The fact the General Assembly prospectively amended the statutory scheme further supports the argument the Court properly interpreted the law.

Appellee again submits that for purposes of the worker's compensation exclusivity provision, there has never been a distinction between employers who are self-insured and those who are insured and Plaintiff has pointed to no precedent establishing same.

Appellant's citations regarding the CIC insurance policy on page 18 of his Opening Brief is also misleading. (Appellant's Appendix at 149-150). While citing the definition of an insured, Appellant completely ignores the crux of the UM/UIM endorsement which states that CIC will pay all sums the "insured" is legally entitled to recover as compensatory damages. Under the *Robinson* and

Simpson holdings, the employee is not legally entitled to recover compensatory damages, because he is bound by the exclusivity provision of the WCA.

Appellant's argument in Argument (I)(C)(3) that the Superior Court should have relied on *Simendinger* and *Hurst* which are factually distinguishable as discussed in detail above and pre-date the holdings of *Simpson* and *Robinson* is incorrect. The factual scenarios and insurance policies in *Simpson* and *Robinson* and the case *sub judice* are identical. *Simpson v. State, 2016 WL 425010, (Del. Super. Ct. Jan. 28, 2016); Robinson v. State of Delaware, CA. No. 172, 217 (Del. Supr. October 25, 2017).*

The Appellee submits that this Court only needs to make a determination as to whether the exclusivity provision of the WCA applies equally to employees of insured and self-insured entities.

4. Public policy and statutory intent require that the worker's compensation and UIM statutes be read in favor of innocent, injured workers like Fritz.

Appellant's arguments in Argument I(C)(4) of his Opening Brief is without merit. The public policy and statutory intent arguments were raised and rejected in *Robinson* and those rejections were affirmed by the Supreme Court. *Robinson v. State of Delaware, CA. No. 172, 217 (Del. Supr. October 25, 2017).*

II. CIC DID NOT WAIVE ITS RIGHT TO ASSERT WORKER'S COMPENSATION EXCLUSIVITY WHEN IT PAID PIP BENEFITS UNDER THE EMPLOYER'S AUTOMOBILE POLICY.

A. Question Presented

Did CIC waive its ability to argue that Fritz is barred from accessing UIM benefits given that CIC issued PIP benefits to Fritz from the employer's automobile policy merely one day after CIC filed its Motion to Dismiss or Alternatively for Summary Judgment?

B. Scope of Review

The scope of review is set forth in Argument I(B), and it is incorporated here.

C. Merits of Argument

First, Appellant's argument that CIC seemingly waived its exclusivity argument when it paid PIP benefits was not properly raised during summary judgment and only improperly raised for the first time in its Motion for Reconsideration and thus not properly raised before the trial court and should be considered waived for purposes of this appeal. *Delaware Supreme Court Rule* 8(a).

Nonetheless, Appellant's argument is an improper characterization of the interplay between PIP and worker's compensation. Unlike the interplay between UM/UIM and worker's compensation where worker's compensation is the exclusive remedy, PIP and worker's compensation benefits have always been

intertwined. *Accident Fund Ins. Co. of Am. v. Zurich Am. Ins. Co.*, 2013 WL 6039914, at *1 (Del. Super. Ct. Oct. 31, 2013).

Delaware precedent has long held that a Plaintiff is entitled to both PIP and worker's compensation. The purpose of the no-fault statute is to "impose upon the no-fault carrier ... not only primary but ultimate liability for the [injured party's] covered medical bills to the extent of ... unexpended PIP benefits." Thus, in circumstances where no-fault and workers coverage overlap, no-fault coverage is primary over worker's compensation coverage.

Just because an insurer fulfills an obligation to pay PIP, it does not mean that it waived its right to contest a personal injury/underinsured/uninsured motorist claim.

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, Appellee respectfully requests that this Honorable Court affirm the decision of the Superior Court's Memorandum Order dated August 22, 2018.

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