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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES FRITZ, Plaintiff Below, Appellant, v. CINCINNATI INSURANCE CO., Defendant Below, Appellee.	)	No. 565,2018 On Appeal From The Superior Court of the State of Delaware, C.A. No. S16C-11-006 RFS

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT AGAINST FRITZ AND BARRED HIS ABILITY TO RECOVER UNDER HIS EMPLOYER'S UIM POLICY.

A. Merits of Argument

1. Fritz is entitled to recover under his employer's UIM policy because he had a reasonable expectation that the policy would cover a work-related accident in his employer's vehicle.

Cincinnati Insurance's position that the decision in *Simpson* controls the case in question is incorrect. In its Answering Brief, Cincinnati Insurance's only contention as to why Fritz is not "legally entitled to recover" UIM benefits against his employer's non-self-insured policy is because it claims Fritz's exclusive remedy is benefits he received under the Delaware Worker's Compensation Act ("WCA") pursuant to *Simpson*.

However, the *Simpson* Court makes it clear throughout its opinion that they are strictly facing an issue where the employer, the State of Delaware, is a self-insured entity. In the first section of his discussion section, Judge Carpenter presents the issue the Court has been asked to decide. He states, "The Court is asked to decide whether Plaintiff may pursue a UIM claim against her *self-insured employer*, the State of Delaware. . ."[1] Later in his opinion, Judge Carpenter further

[1] *Simpson v. State*, 2016 WL 425010 (Del. Super. Ct. Jan. 28, 2016) (emphasis added).

clarifies that the issue he addressed deals with only self-insured employers. He later stated, "However, the issue presently before the Court, whether § 2304 precludes an employee's recovery of UIM benefits from a *self-insured employer* in addition to workers' compensation paid by the employer, appears to be one of first impression."[2] Finally, in his conclusion in *Simpson*, Judge Carpenter also acknowledges the holding strictly involves the State of Delaware's Self-insured UM/UIM policy. He finds that ". . . the phrase 'exclusion of all rights and remedies' in 19 *Del. C.* § 2304 prohibits the Plaintiff from gaining access to the *State's* UM/UIM policy."[3]

In the case at hand, the employer was not a self-insured employer, so *Simpson* does not apply. The employer ("Bryant") elected to purchase additional benefits through Cincinnati Insurance that covered Fritz. As such, Fritz had a reasonable expectation that the policy would cover a work-related accident in his employer's vehicle. Cincinnati Insurance improperly disregards the importance of prior case law that demonstrates that UIM/UM and worker's compensation benefits have always been intertwined.

For years, Delaware law has implicitly acknowledged a Plaintiff's right to an employer's UIM policy even when they have received workers compensation

[2] *Id*. at *3 (emphasis added).

[3] *Id*. at *4 (emphasis added).

benefits where the employer is not a self-insured entity. This Court in *Hurst* acknowledged an injured employee's right to payment pursuant to the employer's uninsured motorist coverage[4] and later in *Simendinger*, the employer's underinsured motorist coverage.[5] In both *Hurst* and *Simendinger*, the employer was not a self-insured employer— a direct contrast to *Simpson* and *Robinson*.

Further, Cincinnati Insurance's reliance on *Littlejohn v. State Farm Mut. Auto. Ins. Co.* is misguided because it does not apply to injuries caused by third parties. In *Littlejohn*, the plaintiff was the passenger of a vehicle driven by a co-employee while in the scope and course of their employment.[6] The plaintiff was injured as a result of the co-employee's negligence in the motor vehicle accident and attempted to recover from their employer's UM coverage after the co-employee's personal policy denied coverage. Because the employer's UM coverage would step in the shoes of the uninsured tortfeasor (*i.e.*, the co-employee), the Court ruled the Plaintiff's exclusive remedy was workers compensation.[7] The Court found under § 2363 of the WCA, an injured employee may recover against a third party tortfeasor when the third party is "other than a

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[4] *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10 (Del. 1995).

[5] *Simendinger v. Nat'l Union Fire Ins. Co.*, 74 A.3d 609, 610 (Del. 2013).

[6] *Littlejohn v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2029058, (Del. Super. Ct. May 21, 2010).

[7] *Id*.

natural person in the same employ."[8] This followed the general rule that co-employees are not included as third parties who may be sued by an injured employee and therefore suits against co-employees are barred under the WCA when the co-employee is acting in the course of employment.[9]

In the present case, though, Fritz was not injured by a co-employee but by a third party. Even the *Simpson* Court found the State's reliance in *Littlejohn* to be misplaced when it was offered for the same proposition that Cincinnati Insurance currently offers this Court. The *Simpson* Court stated, "Plaintiff . . . was not injured by the negligence of a co-worker but by that of a third party . . . . Thus, *Littlejohn* cannot be read to preclude an employee like Plaintiff from recovering from a third party tortfeasor."[10] The employer's UIM policy is not stepping in the shoes of a co-employee that is barred by the WCA but instead is stepping into the shoes of a third party tortfeasor, which a plaintiff has an explicit right to do under the WCA. Therefore, *Littlejohn* simply does not apply.

Cincinnati Insurance also misplaces reliance on *Bermel v. Liberty Mutual Fire Insurance Co.*[11] In response to Fritz's argument that there would never be the potential for a UIM claim even though Cincinnati Insurance charged and collected

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[8] *Id*.

[9] *See Grabowski v. Mangler*, 956 A.2d 1217, 1220 (Del. 2008).

[10] *Simpson*, 2016 WL 425010 at footnote 24.

[11] 56 A.3d 1062 (Del. 2012).

the policy premium, Cincinnati Insurance cites to *Bermel* as "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."[12] Ironically, the situation that Cincinnati Insurance states is the exact situation that it would find as legally entitled to recover, this Court found to be a situation that would not be covered under the employer's UIM coverage. In *Bermel*, the plaintiff was not operating the vehicle covered under the employer's policy, was engaged in personal activities, and as a result, was not within the scope and course of employment.[13] For these reasons, this Court ruled that the plaintiff was not covered under the employer's UIM policy.

Cincinnati Insurance also points to other reasons stated in *Simpson* for which an employer would opt for UIM coverage. However, the reasons stated in *Simpson*, independent contractors operating State vehicles, students on school busses, arrestees transported by police, prisoners transported by the Department of Corrections,[14] are only applicable to State owned vehicles and would never be anticipated to occur in the policy in question. Cincinnati Insurance's only other example, *Bermel*, that it provides as a situation in which the employer would opt for underinsured motorist coverage is in a situation where the passengers in the

[12] Appellee's Answering Brief at 9.

[13] *Bermel,* 56 A.3d at 1072.

[14] *Simpson*, 2016 WL 425010.

vehicle who would not be entitled to worker's compensation benefits. Yet, the Bryant's employment policy on the persons who were permitted in any employer's vehicle undercuts this argument because the only people allowed in the employer's vehicle are persons entitled to workers' compensation benefits; other employees only.[15] This strengthens the argument that in Cincinnati Insurance's view, there would never be the potential for a UIM claim even though Cincinnati Group charged and collected the policy premium.

2. Receipt of worker's compensation benefits does not defeat Fritz's right to recover under his employer's UIM policy because Fritz's employer is not self-insured.

The only question the Superior Court addressed in *Simpson* was whether a Plaintiff may pursue a UIM claim against her *self-insured employer.* Therefore, Cincinnati Insurance's assertion that neither *Simpson* nor *Robinson* made a distinction between self-insured and non-self-insured employers is incorrect.

In addition to the instances identified in Fritz's Opening Brief, there are other instances where this Court made it clear that the decisions in both *Robinson* and *Simpson* strictly turned on the fact that the State was self-insured. In the argument for *Robinson*, Justice Seitz, in speaking to Plaintiff's counsel whose employer was the State, clarifies that private non-self-insured employers are not bound by the decision at hand:

[15] A185.

> Now there seems to be a little bit of a carve out in the law if there is private insurance that has been obtained, and that is not effected by the workers compensation law but here isn't the statute really saying you get one recovery from the State and that's the scheme the State has in place right now.[16]

In *Robinson*, even counsel for the State acknowledged that this Court was only dealing with self-insured UIM policies. When distinguishing pre-*Simpson* case law in Delaware that references payment of UIM benefits in cases that workers compensation has already been paid like, *Simendinger*, she states:

> As the Court has already pointed out, those cases that *Simpson* considered are where UM/UIM has been paid by a separate policy, not a self-insured policy either by a policy that is provided by an employer that is applicable to the vehicle at issue or is a personal policy of the insured.[17]

This prompted Justice Seitz to ask the central question that is currently before this Court, "Would this case be different if the State was not self-insured?"[18] To this question, counsel for the State answered, "I would submit to the Court that it would be different, it would follow the law that is already in

[16] *Robinson v. State*, C.A. No. 172, 2017, tr. at 08:31-08:52 (Del. Oct. 25, 2017). Available at: https://livestream.com/accounts/5969852/events/7857624/videos/164898904/player

[17] *Id.* at 13:21 – 13:43.

[18] *Id.* at 13:44 – 13:51.

place."[19] Thus, even the State accepted that a different outcome would have resulted had the State not been self-insured.

In fact, counsel for the State distinguished a pre-*Simpson* case, *State v. Donahue*, because of the fact at the time of *Donahue* the State was not self-insured.[20] The question in *Donahue* was whether the workers compensation carrier of the employer had a right of subrogation against proceeds paid to an employee pursuant to uninsured motor vehicle coverage, which had been purchased by the employer.[21] At that time, the State had a separate policy that was insured through Pennsylvania Manufactures Association.[22] At the time of *Simpson* and *Robinson*, the State no longer had a separate policy and was self-insured. To further clarify the difference from a self-insured and a policy purchased by an employer, counsel for the State makes it clear that in the self-insured policy in question in *Robinson* and *Simpson*, the plaintiff did not pay any contribution to the UM/UIM policy. Unlike the prior-*Simpson* case law where the Court gives deference to UM/UIM policies that are paid by the insured or employee.

For the reasons stated above, *Robinson* and *Simpson* are distinguishable from the case presently before the Court. Since *Simpson* and *Robinson* do not

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[19] *Id.* at 13:52 – 13:57.

[20] *State v. Donahue*, 472 A.2d 824, 826(1983).

[21] *Id*. at 825-826.

[22] *Id*. at 826.

address this situation, much less control it, this Court must defer to the premium that the employer paid in purchasing a UIM policy to cover employees in their company vehicles.

3. The Superior Court erred in applying the concept of exclusivity from *Simpson* and *Robinson* to this case because exclusivity only applies with regard to self-insured employers.

In its Answering Brief in response to this particular argument, Cincinnati Insurance makes the same argument that *Simpson* and *Robinson* control, which has already been discussed above. In reply, Fritz points out that the key difference in being self-insured as opposed to purchasing an outside UM/UIM policy is the premium the employer paid to obtain UIM coverage for its employees who operated their company's vehicle. As stated previously, the employer in this specific case had a policy that only employees were allowed to occupy any company vehicle. If this Court adopts Cincinnati Insurance's view, there would be no instant that their policy would apply and the employer's paid premium would be meaningless and would provide a windfall for the insurance company. Further, Fritz relies on the arguments stated above and in its Opening Brief.

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.

In its Answering Brief, Cincinnati Insurance again relies on *Simpson* and *Robinson* to reject any public policy and statutory intent arguments. However, in

Cincinnati Insurance's reliance on *Simpson* and *Robinson*, it once again fails to address the concerns before the Court today. In neither *Simpson* nor *Robinson* did the Court address the public policy issue for non-self-insured employers' policy failing to provide injured employees UIM benefits paid through the premium of the employer. As stated and argued earlier, under Cincinnati Insurance's view, there would never be the potential for a UIM claim even though Cincinnati Insurance charged and collected the policy premium. Cincinnati Insurance charged and collected a policy premium that has no scenarios that it will pay out.

Further, it must be emphasized that here, the worker, Fritz, has not been fully compensated. Under worker's compensation, Fritz's pain and suffering has not been, and cannot be, compensated. Likewise, Fritz has not recovered his full economic loss because his wage compensation was capped at the State's maximum wage limit and his future potential lost earnings capacity claim is limited to 300 weeks. This goes against public policy for both § 3902 and § 2304, that aims to provide full compensation. Lastly, Fritz again relies on its argument in his Opening Brief.

II. EVEN IF EXCLUSIVITY APPLIED HERE, CINCINNATI INSURANCE WAIVED ITS RIGHT TO ASSERT EXCLUSIVITY WHEN CINCINNATI PAID PIP BENEFITS UNDER THE EMPLOYER'S AUTOMOBILE POLICY.

A. Merits of Argument

Fritz fairly presented to the trial court the question of whether Cincinnati Insurance waived its exclusivity argument when it paid PIP benefits in the same matter pursuant to Rule 8(a). Although this argument was not included in Fritz's initial response to summary judgment, it was intended to be argued in oral arguments that the Superior Court called for and scheduled for August 23, 2018. On August 22, 2018, the Court issued a notification that oral argument was no longer needed. The same day Fritz filed a request with the Court for time to file a supplemental response. The Court never addressed Fritz's request and on August 22, 2018, issued its order granting Cincinnati Insurance's Motion for Summary Judgment. On August 27, 2018, Fritz presented this argument in its Motion for Reargument. Pursuant to Delaware Supreme Court Rule 9, Fritz's Motion for Reargument in which its waiver argument is preserved, is part of the certified docket entries constituting the record by the Prothonotary of Sussex County.

Further, Cincinnati Insurance erroneously argues that UM/UIM and worker's compensation have not always been intertwined. Cincinnati Insurance once again ignores the plethora of pre-*Simpson* decisions that showed how

UIM/UM and workers compensation have always been intertwined. In addition, it was understood that based on the *Simpson* decision, in addition to UIM/UM benefits being subjected to the WCA exclusivity, PIP was also subject to WCA exclusivity. For this reason the new § 2304 also now exempts PIP benefits from workers compensation exclusivity, along with underinsured and uninsured motorist benefits.[23]

Cincinnati Insurance attempts to differentiate its PIP obligation to Fritz, with its UIM obligation to Fritz. However, both PIP and UIM benefits in the present case are both first party benefits established in the same Cincinnati Insurance Policy, for the same insured, for the same employee, for the same accident in question. Regardless, Cincinnati Insurance expects a different result and expects to have the ability to pick and choose which benefit is excluded by the WCA and which one is not, to the detriment of its insured and the injured employee, Fritz.

[23] 19 *Del. C.* § 2304 States: Except as expressly excluded in this chapter and except as to uninsured motorist benefits, *underinsured motorist 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. (emphasis added).

CONCLUSION

For the reasons above, Appellant, Charles Fritz, respectfully requests that this Honorable Court reverse the August 22, 2018 Order granting Defendant's Motion for Summary Judgment by the Superior Court and remand the case back to the Superior Court.

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