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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| HORIZON SERVICES, INC., and EASTERN ALLIANCE INSURANCE COMPANY, | ) | |
| Plaintiffs-Below, Appellants, | ) | No. 172, 2022 |
| v. | ) | |
| | ) | On Appeal from the 5/02/2022 |
| JOHN HENRY and THE CINCINNATI INSURANCE COMPANY, | ) | Decision of the Superior Court |
| | ) | C.A. No. N21C-10-044 DJB |
| Defendants-Below, Appellees. | ) | |

# AMENDED OPENING BRIEF OF APPELLANTS HORIZON SERVICES, INC. and EASTERN ALLIANCE INSURANCE COMPANY

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Dated: September 29, 2022

# TABLE OF CONTENTS

**TABLE OF CONTENTS** ..... i

**TABLE OF CITATIONS** ..... ii

**NATURE AND STAGE OF THE PROCEEDINGS** ..... 1

**SUMMARY OF ARGUMENT** ..... 5

**STATEMENT OF FACTS** ..... 7

**ARGUMENT I: THE SUPERIOR COURT ERRED BY DECLINING TO RECOGNIZE THAT THE 2016 AMENDMENT TO 19 *DEL. C.* §2304 CHANGES EMPLOYERS' UIM LIEN RIGHTS.** ..... 10

A. Question Presented ..... 10

B. Scope of Review ..... 11

C. Merits of Argument ..... 11

a. Historically, the General Assembly has Supported Employers' UIM Lien Reimbursement Rights When Recovery is Sought From Their Own UIM Policies ..... 12

b. The 1993 Amendment to 19 *Del. C.* §2363(e) Addressed a Lien Recovery Problem Specific to PIP Insurance, and not UIM Insurance ..... 15

c. The 2016 Amendment to 19 *Del. C.* §2304 Restored Employers' UIM Lien Recovery Rights ..... 17

d. Contrary to the Superior Court's Opinion on Appeal, it is 19 *Del. C.* §2304, and not *Henry*, that Overrules *Simendinger* ..... 23

e. *Henry's* Statutory Analysis of 19 *Del. C.* §2304 Reflects the First Half of the General Assembly's Intent. ..... 25

**CONCLUSION** ..... **28**

## TABLE OF CITATIONS

**Page**

**Cases**

*Adams v. Delmarva Power & Light Co.*, 575 A.2d 1103 (Del. 1990)..... 3 n.8, ..... 12 n.35, 16 n.48, 26 n.79

*Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199 (Del. 1993)..... 11

*Harmon v. F & H Everett & Assoc.*, 83 A.3d 737 (Del. 2013) ..... 18-19 n. 57

*Harris v. New Castle County*, 513 A.2d 1307 (Del. 1985)..... 12-13, 15, 24

*Henry v. Cincinnati Ins. Co.*, 212 A.3d 285 (Del. 2019).1 n.2, 2, 4, 12, 23, 25

*Hurst v. Nationwide Mutual Ins. Co*., 652 A.2d 10 (Del. 1995) ..... 15-16

*Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492 (Del. 2012). ..... 24

*Rock Pile v. Rischitelli*, 2019 WL 2515533 (Del. Super.)..... 21 n.66

*Simendinger v. Nat'l Union Fire Inc. Co.*, 74 A.3d 609 (Del. 2013).... *passim*

*Simpson v. State*, 2016 WL 425010 (Del. Super.)..... 17 – 19, 23 n.68

*West Coast Opportunity Fund, LLC v. Credit Suisse Securities*, 12 A.3d 1128 (Del. 2010)..... 11

**Statutes**

18 *Del. C.* § 3902 ..... 15, 16, 24, 26

19 *Del. C.* §§ 2301, et. seq. (Workers' Compensation Act)..... *passim*

19 *Del. C.* § 2304 ..... *passim*

19 *Del. C.* § 2363(a)..... 11, 24-25 n.76

19 *Del. C.* § 2363(e)..... passim

21 *Del. C.* § 2118(h).....5 n.16, 13-14

**Legislative Materials**

1955 *Del. Laws Ch.* 339 §21..... 13, 14

1993 *Del. Laws Ch.* 116 § 1 (formerly S.B. 26)..... 13

*An Act to Amend Title 19 of the Delaware Code Relating to Workers' Compensation as an Exclusive Remedy*, 148th G.A. (H.B. 308) .. 19, 20

2016 *Del. Laws Ch.* 420 (H.B. 308) .....17-18 n.54

## NATURE OF PROCEEDINGS

Plaintiffs-Below, Appellants Horizon Services, Inc. (hereinafter "Horizon") and Eastern Alliance Insurance Company were the employer and workers' compensation carrier for Defendant-Below, Appellee John Henry (hereinafter "Henry") on September 29, 2015 when Henry sustained personal injuries in a motor vehicle accident caused by a third party. Appellants paid over $500,000.00 for Henry's medical bills, lost wages, permanent functional bodily impairment, future medical treatment, and other personal injury damages pursuant to Delaware Workers' Compensation Act, 19 *Del. C.* § 2301, et seq. (hereinafter "WCA").[1]

On March 12, 2018, Henry and his wife filed an underinsured motorist ("UIM") complaint against their own UIM carrier, State Farm Mutual Automobile Insurance Company, as well as Defendant-Below, Appellee, The Cincinnati Insurance Company ("Cincinnati"), who is Horizon's UIM insurance carrier.[2] Cincinnati moved to dismiss Henry's UIM complaint on grounds that 19 *Del. C.* § 2304, also known as the WCA's "exclusivity provision," prevented duplicative recovery from its insured, Horizon, who had already paid Henry through its workers'

[1] Exhibit A to Appellants' Complaint for Declaratory Judgment (hereinafter "Complaint").

[2] Henry's UIM action was initially identified as Civil Action No. N18C-03-092 ALR, but is now 18C-03-092 DJB. *See also*, *Henry v. Cincinnati Ins. Co.*, 212 A.3d 285 (Del. 2019).

compensation insurance policy. The Superior Court agreed with Cincinnati and dismissed Henry's UIM Complaint, and Henry appealed.[3]

On June 11, 2019, This Court reversed the Superior Court's Order dismissing Henry's UIM action on grounds that a new 2016 amendment to 19 *Del. C.* § 2304 expressly allows employees to pursue UIM claims, even against their employers' UIM carriers.[4] In analyzing this new amendment, This Court held that Cincinnati effectively "steps into the shoes" of a tortfeasor and becomes a third party liability carrier for recovery purposes under 19 *Del. C.* §2363(e).[5]

On November 24, 2020, Appellants filed a Motion to Intervene in Henry's UIM suit on two main grounds: (1) that 19 *Del. C.* § 2304's amendment now also allows *employers* to pursue UIM claims; and (2) that Cincinnati's designation as a third party liability carrier applies equally to Appellants for recovery/lien reimbursement purposes under 19 *Del. C.* §2363(e).[6]

On April 19, 2021, the Superior Court denied Appellants' Motion to Intervene, on grounds that it was "well-settled law" that Appellants did not have a lien recovery right under *Simendinger v. Nat'l Union Fire Ins. Co.*,[7] and therefore

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[3] *Henry,* 212 A.3d at 287.

[4] *Id.,* at 289-91.

[5] *Id.,* at 290-91.

[6] See Exhibit C to Complaint.

[7] 74 A.3d 609 (Del. 2013).

had no resulting interest to warrant intervention.[8] Appellants moved for certification for interlocutory review pursuant to Supreme Court Rule 42. On May 13, 2021, the Superior Court denied Appellants' certification for interlocutory review, but suggested that "pursuing a separate declaratory judgment action will be less burdensome to the parties in this action."[9] On June 10, 2021, This Court dismissed Appellants' appeal on procedural grounds and confirmed that Appellants' prayer for relief did not warrant interlocutory review.[10]

On October 6, 2021, in accordance with The Superior Court's suggestion, Appellants filed their Complaint for Declaratory Judgment. On December 3, 2021, Cincinnati moved for Judgment on the Pleadings on procedural and substantive grounds. On January 6, 2022, the motion was joined by Henry. On January 31, 2022, the Superior Court entertained oral arguments.[11]

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[8] Exhibit C to Complaint, at 5. The Superior Court also cited *Adams v. Delmarva Power & Light Co.*, 575 A.2d 1103 (Del. 1990), but *Adams* held that the collateral source rule limits employers' UIM lien rights, which were otherwise intact at that time, when employees (and not employers) purchased the UIM policy. The opposite fact is true here.

[9] Exhibit D to Complaint, at 7.

[10] Exhibit E to Complaint, at 4.

[11] A transcript of the oral argument is in the Appendix to Appellants' Opening Brief, (hereinafter cited as "A-_").

On May 2, 2022, The Superior Court granted Cincinnati's Motion for Judgment on the Pleadings on substantive grounds.[12] The Superior Court, citing *Simendinger*, held that This Court's recent decision in *Henry* did not change Delaware precedent governing employers' lien rights.[13] While *Henry* recognized that Cincinnati "stand[s] in the shoes of an alleged third-party tortfeasor"[14] for purposes of permitting UIM suits under 19 *Del. C.* §2363, the Superior Court classified this determination as "dicta" and denied that this language afforded Appellants the same right to sue.[15]

On May 20, 2022, Appellants filed a Notice of Appeal to the Supreme Court.

This is Appellants Opening Brief.

[12] Opinion Granting Defendant's Motion for Judgment on the Pleadings, *Horizon Services, Inc. et al. v. Henry, et. al.*, CA No. N21C-10-044 DJB (Del. Super. Ct. Jan. 26, 2016) (hereinafter "Super. Ct. Opinion on Appeal") at 5. (The Super. Ct. Opinion on Appeal is attached hereto as Appellants' Exhibit 1).

[13] *Id*., at 6.

[14] *Henry*, 212 A.3d at 290-91.

[15] Super. Ct. Opinion on Appeal, at 8.

## SUMMARY OF ARGUMENT

1. Before *Simendinger*, Employers had UIM lien recovery rights against payments made from their own UIM carriers.

2. In 2013, *Simendinger* eliminated this lien right based on its interpretation of a 1993 amendment to 19 *Del. C.* § 2363(e), which solved a specific lien recovery problem that only arises when employers request reimbursement for PIP-eligible WCA payments because PIP-eligible payments cannot be recovered from third party liability carriers.[16] There is no analogous lien recovery problem for UIM.

3. *Simendinger*'s holding, which barred employers from using their own UIM policies to offset their damages, would have conflicted with 18 *Del. C.* §3902 (of the UIM statute) had 19 *Del. C.* §2304 (of the WCA statute) not strictly limited employers' rights and remedies to the WCA.

4. In 2016, the General Assembly amended 19 *Del. C.* §2304 to state that employers' *and* employees' UIM recovery rights and remedies were no longer restricted to the WCA.

[16] PIP-eligible payments are medical treatment and lost wage compensation that were not paid by the Personal Injury Protection carrier, but could have been had the employee elected such coverage in lieu of the comparable WCA payment. Under 21 *Del. C.* §2118(h), PIP payments are not recoverable from the tortfeasor.

5. In 2019, *Henry* held that the amendment to 19 *Del. C.* §2304 allows employees to pursue UIM compensation from their employers' UIM carriers and said that UIM carriers "step into the shoes" of third party liability carriers for recovery purposes under 19 *Del. C.* §2363(e).

6. In drafting the 2016 amendment to 19 *Del. C.* §2304, the General Assembly rejected a revision that would have allowed UIM access to employees (by lifting WCA restrictions), but not employers. The final version of 19 *Del. C.* §2304, as written, grants UIM access to both parties.

7. Title 19 *Del. C.* §2363(e) states that any recovery from a liable third party "shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery."[17]

8. Under *Henry*, employers' UIM carriers are third party liability carriers for recovery purposes under 19 *Del. C.* §2363(e).

9. Allowing lien recovery rights from employer-purchased UIM policies serves to protect employers from paying the same compensation twice: first through their own workers' compensation insurance carrier, and then a second time through their own UIM carrier.

[17] 19 *Del. C.* § 2363(e).

## STATEMENT OF FACTS

Appellants are the employer and workers' compensation carrier who paid no-fault WCA benefits to Henry after a third party tortfeasor rear-ended Henry's work vehicle on September 29, 2015. As a result of Henry's injuries, Appellants paid a total of $584,496.52 in workers' compensation benefits to, and/or on behalf of, Henry pursuant to the Delaware Workers' Compensation Act, 19 *Del. C.* § 2301, et seq. ("WCA").[18] Appellants payments included, but were not limited to: $150,417.04 in medical treatment expenses (which included three surgeries) pursuant to 19 *Del. C.* §2322; $111,864.44 in lost wage benefits pursuant to 19 *Del. C.* §§ 2324 and 2325; $65,951.04 in permanent impairment benefits pursuant to 19 *Del. C.* §2326; and $256,264.00 in commutation benefits (of which $56,264.00 was a dedicated Medicare Set Aside for future medical care) pursuant to 19 *Del. C.* § 2358.[19]

In sum, Appellants, who did not cause this accident, paid all of Henry's medical bills; paid his tax-free lost wage compensation; and paid other WCA-related compensation such that Henry did not incur these expenses himself.

The at-fault tortfeasor held a $50,000.00 liability insurance policy underwritten by Liberty Mutual Insurance Company ("Liberty"), which was

[18] Exhibit A to Complaint.

[19] *Id*.

tendered to Henry.[20] After deducting attorney's fees and costs, Henry repaid the remaining balance of $35,545.00 to Appellants in recognition of their statutory workers' compensation lien recovery right under 19 *Del. C.* § 2363(e).[21] This reduced Appellants' damages down to $548,951.52.

At the time of the September 29, 2015 motor vehicle accident, the work vehicle driven by Henry was covered by a UIM insurance policy for which Horizon was the named insured and Cincinnati was the insurer.[22] On March 12, 2018, Henry filed civil actions against his own UIM carrier as well as Cincinnati.[23] Henry sought compensation for, among other things, personal injury damages including, but not limited to, medical bills, lost wages, permanent bodily injury, and compensation for future accident-related medical care.[24] These items of expense were already paid by Appellants.[25]

As Henry's complaint sought compensation for damages Appellants paid, Appellants filed a Motion to Intervene in Henry's UIM action. The Motion was

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[20] Complaint, at 5; Answer of Defendant John Henry to Plaintiffs' Complaint for Declaratory Judgment (hereinafter "Henry's Answer"), at 3.

[21] *Id*.

[22] Exhibit B to Complaint.

[23] Complaint, at 5; Henry's Answer, at 3.

[24] *Id*.

[25] Exhibit A to Complaint. See also, Complaint, at 6; Henry's Answer, at 3.

denied.[26] Appellants' ensuing appeal was also denied, but on procedural grounds because Henry's UIM action remains pending, and Appellants' concerns did not meet interlocutory review standards.[27] Appellants filed the instant Declaratory Judgment Complaint to recover the expenses claimed by Henry but paid by Appellants, but the Superior Court granted Appellees' Motion for Summary Judgment on the Pleadings.[28]

Appellants now bring the instant appeal to ask This Court to review the true legislative history honoring employers' UIM recovery rights, and to recognize that the 2016 Amendment to 19 *Del. C.* § 2304 revitalized these rights.

[26] Exhibit C to Complaint.

[27] Exhibit E to Complaint, at 4.

[28] Super. Ct. Opinion on Appeal.

## ARGUMENT I:

## THE SUPERIOR COURT ERRED BY DECLINING TO RECOGNIZE THAT THE 2016 AMENDMENT TO 19 *DEL. C.* § 2304 CHANGES EMPLOYERS' UIM LIEN RECOVERY RIGHTS.

The Superior Court erred by declining to recognize that the 2016 Amendment to 19 *Del. C.* § 2304 changes employers' UIM lien recovery rights. Title 19 *Del. C.* § 2304 now allows employers to reach outside of the WCA and avail themselves of contracted-for UIM coverage, which contradicts, and overrules, *Simendinger*. Title 19 *Del. C.* § 2363(e) outlines the lien recovery procedure, and narrowly tailors the lien to ensure that only WCA payments are reimbursed. This balances the recovery interests of employees and employers, both of whom suffered damages caused by a third party.

### A. Question Presented

Does the 2016 amendment to 19 *Del. C.* § 2304, which now allows employers to access UIM remedies outside of the WCA, place *Simendinger* in direct conflict with 18 *Del. C.* §3902, which allows UIM-insured employers to avail themselves of the UIM insurance they purchased and assert lien recovery rights under 19 *Del. C.* §2363(e)?[29]

[29] Complaint at 2, 38 – 54.

## B. Scope of Review

The Scope of Review on a motion for judgment on the pleadings is *de novo*.[30] The Supreme Court's standard of review "is to determine whether trial court committed legal error in formulating or applying legal precepts." [31]

## C. Merits of Argument

Title 19 *Del. C.* § 2363 outlines the rights of, and recovery procedures for, employers and employees when both are injured by an "outside" tortfeasor or "third party" to the employer-employee relationship.[32] This case involves the impact of 19 *Del. C.* § 2304 (the exclusionary provision of the Workers' Compensation Act, hereinafter referred to as "WCA") on 19 *Del. C.* § 2363(e) when employees seek to recover from their employers' UIM carriers. A complete understanding of 19 *Del. C.* § 2363(e)'s history shows that the General Assembly consistently gave employers UIM lien reimbursement rights to protect them from paying duplicative

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[30] *West Coast Opportunity Fund, LLC v. Credit Suisse Securities*, 12 A.3d 1128, 1131 (Del. 2010).

[31] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199 (Del. 1993) (citations omitted).

[32] Title 19 *Del. C.* § 2363 only applies if employers are not "at fault" for the work accident. Title 19 *Del. C.* § 2363(a) states, in pertinent part, "[w]here the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer…" and thereinafter confers, to employers and employees, rights to pursue recovery actions against those third party persons.

compensation, first from their workers' compensation insurance carrier and then again from their UIM carrier.

In *Henry*, This Court held that the 2016 amendment to 19 *Del. C.* § 2304 permits employees to pursue UIM rights and remedies outside of the WCA. Appellants assert that this 2016 amendment expressly grants employers the same ability, and that the history of 19 *Del. C.* § 2363(e) and 19 *Del. C.* § 2304 supports intentional reinstatement of UIM lien recovery rights to protect employers from duplicative damages.

**Historically, the General Assembly has Supported Employers' UIM Lien Reimbursement Rights When Recovery is Sought From Their Own UIM Policies.**

In *Harris v. New Castle County*,[33] This Court correctly held that 19 *Del. C.* §2363(e) granted unencumbered lien rights to employers.[34, 35] This Court recognized that upholding employers' UIM lien rights reflected the legislative intent of § 2363's

[33] 513 A.2d 1307, 1309 (Del. 1985).

[34] The version of 19 *Del. C.* §2363 that *Harris* analyzed was passed in 1955. *See* 1955 *Del. Laws. Ch.* 339 §21 (attached hereto at A-36).

[35] In *Adams*, This Court applied Delaware's longstanding collateral source rule to create a UIM lien recovery exception when the UIM policy was purchased by the employee. 575 A.2d at 1106.

predecessor, and that "underlying legislative intent takes precedence over a literal interpretation of statutory language that arguably supports a contrary result."[36]

When *Harris* was decided, the pertinent section of 2363(e) (hereinafter "Pertinent Harris Section") read as follows:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the workmen's compensation act to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.[37]

In 1993, the legislature amended 19 *Del. C.* §2363(e).[38] However, a comparison of the language before, and after, the 1993 amendment reveals that the Pertinent Harris Section remains replicated, word-for-word, except for added language at the very end that addresses a unique situation involving Personal Injury

[36] *Harris*, 513 A.2d at 1308 (citing *Kohanovich v. Youree*, 147 A.2d 655 (Del. 1959)).

[37] 1955 *Del. Laws. Ch.* 339 §21 (attached hereto at A-36).

[38] 1993 *Del. Laws Ch*. 116 §1 (*formerly* S.B. 26) (attached hereto at A-43).

Protection ("PIP") insurance.[39] Specifically, an employer who paid PIP-eligible expenses (medical bills and lost wages that could have been paid by PIP) would have added said payments to its lien against the employee. However, 21 *Del. C.* § 2118(h) precludes an employee from introducing PIP expenses into evidence at trial.[40] Thus, without the 1993 amendment, employees would have been required to "reimburse" PIP-eligible expenses that they could not recover from the tortfeasor.[41]

The 1993 amendment fixed that PIP problem.[42] The statute now reads:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts

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[39] *Compare,* 1955 Del. Laws Ch. 339 § 21 *to* 1993 Del. Laws Ch. 116 § 1 (formerly S.B. 26).

[40] *See* 21 *Del. C.* § 2118(h) ("Any person eligible for benefits described in paragraph (a)(2) or (3) of this section, other than an insurer in an action brought pursuant to subsection (g) of this section, is precluded from pleading or introducing into evidence in an action for damages against a tortfeasor those damages for which compensation is available under paragraph (a)(2) or (3) of this section without regard to any elective reductions in such coverage and whether or not such benefits are actually recoverable.")

[41] *See* 1955 *Del. Laws. Ch.* 339 §21.

[42] While the General Assembly did not explain why it added the new [emphasized] language, it would make practical sense to infer that, because employees cannot recover PIP expenses from tortfeasors, the Assembly intentionally carved those expenses out of employers' liens, and provided employers with alternative recovery instructions.

> paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, *except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, reimbursement shall be had only from the third-party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved.*[43]

Notably, the added language expressly references 21 *Del. C.* § 2118 (the PIP statute) and not 18 *Del. C.* §3902 (the UIM statute), and the UIM statute does not contain an evidentiary preclusion rule that would cause the same type of lien reimbursement problem as seen with PIP.

**The 1993 Amendment to 19 Del. C. § 2363(e) Addressed a Lien Recovery Problem Specific to PIP Insurance, and not UIM Insurance.**

Even though the express language of 19 *Del. C.* §2363(e) only refers to the PIP statute, and even though the UIM statute does not pose the same lien reimbursement problem as that of PIP, in *Hurst v. Nationwide Mut. Ins. Co.*, This Court overturned *Harris* by eliminating employers' previously-endorsed UIM

[43] Emphasis added to highlight the new language. Appellants note that, in *Simendinger*, This Court emphasized the unchanged portion of the statute. It is unclear why.

reimbursement rights.[44] However, the *Hurst* Court did not analyze 19 *Del. C.* §2363(e) because the sole issue on appeal involved a recovery assertion made by a UIM carrier, who would not be subject to the WCA.[45] Nonetheless, The *Hurst* Court declared in a footnote that "the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[46] The *Hurst* Court did not explain its rationale.

In *Simendinger*, This Court relied on *Hurst*'s dicta[47] to eliminate an employer's UIM reimbursement right even when the employer, and not the employee, purchased the UIM policy.[48] The *Simendinger* Court reasoned that 19 *Del. C.* § 2363(e)'s added PIP language limited all employer reimbursement rights to the third party liability insurer's policy limits.[49] Technically, this result would have conflicted with 18 *Del. C.* §3902, which expressly allows UIM-insured employers to expand their liability coverage past the limits of the third party's policy

[44] 652 A.2d 10 (Del. 1995).

[45] *Id.* at 11.

[46] *Id.* at n.2.

[47] *Simendinger*, 74 A.3d at 611.

[48] *Simendinger* also relied upon *Adams v. Delmarva Power & Light Co.* which, as stated *supra* (n. 6, 30) is a collateral source-based policy that does not apply to this case because Appellants purchased the UIM policy at issue.

[49] *Simendinger*, 74 A.3d at 611.

pursuant to their purchased UIM contract.[50, 51] However, 19 *Del. C.* §2304 (the exclusionary provision of the WCA) eliminated the conflict between *Simendinger* and 18 *Del. C.* §3902 by strictly limiting employers' rights and remedies to the WCA and, by extension, *Simendinger's* interpretation of 19 *Del. C.* §2363(e). Thus, under *Simendinger*, employers, who dutifully paid no-fault compensation for injuries caused by third parties with lesser insurance coverage faced duplicative harm as they paid employees first through their own workers' compensation insurance carriers, and then a second time through their own UIM carriers.

**The 2016 Amendment to 19 *Del. C.* §2304 Restored Employers' UIM Lien Recovery Rights.**

In *Simpson v. State*,[52] the Superior Court held that 19 *Del. C.* §2304 and 19 *Del. C.* §2363(e) barred *employees* from recovering UIM benefits. Although *Simpson* did not expressly reference *Simendinger*, the Superior Court appeared to interpret 19 *Del. C.* § 2363(e) the same way the *Simendinger* Court had, in terms of limiting recovery to the third party liability insurer.[53] Since 19 *Del. C.* §2304 confined employees' rights and remedies to the WCA,[54] the Superior Court's

[50] 18 *Del. C.* §3902(b)(1), (4).

[51] While employees may also be intended beneficiaries under an employer's UIM policy, the employer is indisputably an express beneficiary and the named insured.

[52] 2016 WL 425010 (Del. Super.).

[53] *Id.* at *3-4.

[54] Title 19 *Del. C.* §2304 previously stated, in pertinent part: "Except as expressly excluded in this chapter…every employer and employee… shall be bound by this

interpretation of 19 *Del. C.* §2363(e) controlled employees' UIM recovery rights, just as *Simendinger's* interpretation of 19 *Del. C.* §2363(e) controlled employers' UIM recovery rights.

However, *Simpson* expressed two contrasting concerns with its own holding: (1) *employees* could be unfairly deprived of compensation not otherwise recoverable under the WCA, such as pain and suffering, and wages beyond the WCA maximum compensation rate;[55] but (2) *employers* who had already paid compensation through their workers' compensation carrier could face duplicative payment for the same damages through their UIM carriers.[56] Thus, the Superior Court highlighted an employee-oriented concern, *and* an employer-oriented concern. With respect to the latter concern, the Superior Court correctly observed that:

> [i]f [19 *Del. C.* §2304 was] not there, the injured party would in effect be compensated twice for the same injury: first by workers compensation and second by the employer's UM/UIM insurance policy. While the

chapter respectively to pay and to accept compensation for personal injury or death… to the exclusion of all other rights and remedies," with no UIM or PIP exceptions. *See* 2016 *Del. Laws Ch.* 420 (H.B. 308) (final emphasized edits) (attached hereto at A-47).

[55] Workers' compensation lost wage benefits are tax-free. Therefore, an employee whose workers' compensation disability payment rate is two-thirds of his pre-accident gross average weekly wage likely does not truly have a loss of income because he nets the same amount. However, since workers' compensation disability rates are subject to a maximum payment "cap," an employee who nets less than 2/3 of his pre-accident income may have a limited claim for additional wages. Mr. Henry was such an employee.

[56] *Simpson* at *4.

> 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.[57]

The Superior Court asked the General Assembly to study these insurance coverage concerns and correct legislative inconsistencies.[58]

In 2016, the General Assembly amended 19 *Del. C.* § 2304 in response to *Simpson*.[59] Title 19 *Del. C.* § 2304 now 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.[60]

[57] *Id.*, Citing *Harmon v. F & H Everett & Associates*, 83 A.3d 737 (Del. 2013) (discussing exclusivity clause in context of workers' compensation and unemployment benefits) ("Although the Workers' Compensation Act contemplates full compensation, it is not intended to permit more than one recovery for a single loss.").

[58] *Id*. at 4.

[59] *An Act to Amend Title 19 of the Delaware Code Relating to Workers' Compensation as an Exclusive Remedy*, H.R. Bill No. 308, 148th G.A. (rejected version) (attached hereto at A-46) (see Synopsis).

[60] Emphasis added.

Appellants ask This Court to recognize that the 2016 amendment's express wording equally lifts the WCA's restrictions for *both* employers and employees, so that *both* parties can access UIM rights and remedies outside of the WCA.

Appellants further assert that the General Assembly intended such a result. The General Assembly expressly considered, and rejected, a legislative amendment that would have given UIM recovery access only to employees, but not employers. In particular, a rejected proposal to § 2304 was:

> Except as expressly excluded in this chapter and <u>except all</u> contractual *<u>obligations available to the employee</u>* <u>including</u>, uninsured motorist benefits, underinsured motorist benefits, <u>long-term disability benefits,</u> 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.[61]

Had the above rendition been enacted, then *only* the employee-oriented concern raised by *Simpson* would have been addressed. Instead, the General Assembly chose to additionally address the employer-oriented concern by rejecting the above rendition and implementing one that also allows employers to seek UIM remedies

[61] *An Act to Amend Title 19 of the Delaware Code Relating to Workers' Compensation as an Exclusive Remedy*, H.R. Bill No. 308, 148th G.A. (rejected version) (attached hereto at A-46) (emphasis added).

outside of the WCA.[62] Thus, under the current version of 19 *Del. C.* §2304: (1) employees can now access their employers' UIM policies for additional compensation;[63] and (2) employers can also access their own policies to recoup any duplicated compensation. The proper UIM recovery procedure under 19 *Del. C.* §2363(e) is to recognize employers' priority reimbursement right "for any amounts paid or payable under the Workers' Compensation Act to date of recovery."[64] This properly balances the interests of employers and employees, both of whom were damaged by a third party.

Appellants emphasize the fact that 19 *Del. C.* §2363(e) limits employers' reimbursement rights to "amounts paid or payable under the Workers' Compensation Act."[65] Thus, an employee would not "reimburse" an employer for non-WCA payments, such as emotional pain and suffering, loss of consortium, and wages beyond the WCA maximum compensation rate.[66] By contrast, an employee

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[62] 19 *Del. C.* §2304.

[63] This outcome was confirmed in This Court's related *Henry* Opinion.

[64] 19 *Del. C.* §2363(e).

[65] 19 *Del. C.* § 2363(e).

[66] *Rock Pile v. Rischitelli*, 2019 WL 2515533 (Del. Super.) does not apply to this case because it analyzed a different issue, namely the rights of employers to assert credits to offset *future* WCA payments that have not been paid. The case at bar addresses employers' lien recovery rights to avoid duplicative payments for WCA benefits *already paid*. In the interest of completeness, Appellants note that *Rock Pile* is not inconsistent with their advocated position. Employers should not receive a compensation "credit" against future WCA payments they would never make, such

who recovers the same compensation twice, first from the employer's workers' compensation carrier and then from the employer's UIM carrier, must reimburse the duplicative expense. This outcome honors the express wording of 19 *Del. C.* §2304 (as amended) and 19 *Del. C.* §2363(e), and also satisfies both *Simpson* concerns.

While Appellees maintain that an exclusionary clause contained in Cincinnati's UIM contract already prevents duplicative payments, employers' statutory recovery rights should not be subject to various UIM carriers' contractual verbiage. Moreoever, in this case, Cincinnati and Henry continue to dispute the monetary UIM recovery amount. This continuing dispute implicates duplicative, and/or potentially duplicative, elements of Henry's claim and Appellants note that Henry's UIM Complaint against Cincinnati seeks monetary damages for, among other things, medical treatment expenses, all of which have been paid by Appellants.[67] Appellants have also compensated Henry for lost wages (up to the WCA maximum compensation rate), permanent functional bodily impairment, and future medical treatment needs in accordance with Medicare's federal requirements. Accordingly, Appellants seek a recognized lien right to ensure that Cincinnati's

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as emotional pain/suffering, loss of consortium, and wages beyond the WCA compensation rate. But, WCA payments that employers have already made, such as medical treatment expenses, permanent functional deficit compensation, wages within the WCA rate, and specific sums for future medical treatment, should not be paid twice. To the extent they are, such payments should be reimbursed.

[67] Exhibit A to Complaint.

exclusionary clause is either properly enforced, and/or that Appellants receive reimbursement for duplicative payments made to Henry.[68] While Appellant's lien recovery *amount* may be zero dollars if the courts strictly enforce Cincinnati's exclusionary provision[69], Appellants still seek a lien recovery *right* to protect themselves from duplicative harm and achieve the legislatively-intended result.

**Contrary to the Superior Court's Decision on Appeal, it is 19 *Del. C.* §2304, and not *Henry*, That Overrules *Simendinger*.**

In its Order Granting Defendants' Motion to Dismiss, the Superior Court seemed to identify *Henry* as the instrument that Appellants believed overruled *Simendinger*.[70] However, Appellants asserted that the amendment to 19 *Del. C.* § 2304 was what impliedly overruled *Simendinger*.[71] Before its 2016 amendment, 19 *Del. C.* § 2304 strictly limited employers' (and employees') rights and remedies to the WCA, making it so that UIM-insured employers were bound by *Simendinger*'s

[68] A general statutory right is particularly important to preserve legislative intent because not all UIM contracts are written the same way, thereby opening the door to case-by-case contractual enforceability analyses. *See, e.g., Simpson.* Moreover, UIM carriers generally lack the intimate knowledge of WCA benefits paid because they are different insurance carriers with different adjusters and different defense attorneys. By contrast, workers' compensation carriers possess that knowledge and can assist UIM carriers in properly identifying duplicative claims and expenses assuming, *arguendo,* that the exclusionary provision is even deemed enforceable.

[69] Unlike Cincinnati, Appellants possess intimate knowledge of all WCA payments made for purposes of promoting proper enforcement of that exclusionary provision.

[70] Super. Ct. Opinion on Appeal, at 7-8.

[71] Complaint, at 9; Super. Ct. Opinion on Appeal, at 4-5.

interpretation of 19 *Del. C.* § 2363(e). As a result, UIM-insured employers could not pursue remedies to increase their recoverable damages, such as those codified in 18 *Del. C.* §3902 (or otherwise provided in their own UIM contracts). As discussed *supra*, the General Assembly's 2016 amendment removed the WCA restriction for employers' UIM claims, thereby placing *Simendinger* in direct conflict with 18 *Del. C.* §3902 for those employers who purchased their own UIM policies.[72] As "underlying legislative intent takes precedence over a literal interpretation of statutory language that arguably supports a contrary result,"[73] the 2016 amendment to 19 *Del. C.* § 2304 overrules *Simendinger* because the General Assembly intended to grant employers UIM recovery rights.

The Superior Court's Opinion on Appeal relies on *Progressive Northern Ins. Co. v. Mohr*[74] to classify *Henry's* analysis as dicta.[75] However, dicta or not, a UIM carrier's designation as a "third party" to a workers' compensation claim applies equally to the employer because there are only three possible parties: the employer, the employee, and the third party. Liability in this case was already established, and

[72] *Adams* and the collateral source rule remain unaffected because *Simendinger's* statutory conflict only arises when employers are the UIM policy's insureds.

[73] *Harris,* 513 A.2d at 1308 (citation omitted).

[74] 47 A.3d 492 (Del. 2012).

[75] Superior Court's Opinion on Appeal, at 9.

was a prerequisite to trigger both WCA's third party recovery rights[76] and UIM recovery rights[77]. The theme to all parties' dispute, to include Appellants' Complaint for Declaratory Judgment as well as Henry's UIM action against Cincinnati, focuses on duplicate damages. Initially, Cincinnati attempted to protect itself (and, presumably, Horizon) by raising the WCA exclusivity defense. This Court denied that defense by deeming UIM carriers third parties for liability recovery purposes under 19 *Del. C.*§ 2363(e). Cincinnati is now relying on its contractual verbiage to minimize damages, but 19 *Del. C.*§ 2363(e) provides protection by granting priority lien reimbursement rights for WCA payments made.

**_Henry's_ Statutory Analysis of 19 *Del. C.*§2304's Amendment Reflects the First Half of the General Assembly's Intent.**

In *Henry*, This Court analyzed the statutory change to 19 *Del. C.* § 2304 but only in the context of the employee-oriented concern highlighted in *Simpson*. Appellants now ask this Court to recognize that the General Assembly simultaneously addressed *Simpson's* employer-oriented concern, which is to prevent unwarranted harm to no-fault employers whose UIM policies are being used as duplicative sources of previously-paid compensation. Employers' UIM lien recovery rights operate in tandem with employees' UIM recovery rights to give

[76] *See* 19 *Del. C.* §2363(a).

[77] *See* 18 *Del. C.* §3902(b)(1).

employees' access to compensation, but only to the extent that compensation was not already paid. This was *Simpson's* narrowed concern. If employers' UIM lien rights are not recognized, then employees may receive an unchecked "windfall beyond what would be the reasonable and appropriate cost for the disability caused by the accident"[78] at their employers' expense. This outcome is one that *Simpson* cautioned against, and one that the General Assembly rejected. The final amendment to 19 *Del. C.* §2304 expressly lifts UIM recovery barriers for both employers and employees, so that employees can pursue necessary additional compensation and employers can simultaneously pursue applicable offsets, thereby ensuring that any duplicative compensation paid is properly recovered on the back-end. This result reinstates the pre-*Simendinger* UIM lien reimbursement process in which employers had priority lien rights against recoveries from their own UIM policies for WCA compensation already paid.[79] This outcome also harmonizes 18 *Del. C.* § 3902 with 19 *Del. C.* §2363(e).

Assuming, *arguendo*, that *Simendinger* is not overruled, then *Henry* continues *Simendinger's* analysis by clarifying that "third party insurers" include employers'

[78] *Simpson* at *4 (citing *Harmon v. F & H Everett & Associates*, 83 A.3d 737 (Del.2013).

[79] Under *Adams* and the Collateral Source Rule, employers do not have lien rights when they do not purchase the UIM policy. This remains good law and is consistent with 18 *Del. C.* §3902, which grants UIM recovery rights to policy purchasers.

UIM carriers. Therefore, while employers' lien reimbursement rights remain limited to recoveries from "third party insurers" under *Simendinger*, such third party insurers now include employers' own UIM carriers under *Henry*. Adding *Henry* to *Simendinger* completes the analysis and properly gives employers reimbursement rights when recoveries come from their own UIM carriers. This outcome is consistent with historical legislative intent, properly interprets the amendment to 19 *Del. C.* §2304, and protects all parties involved.

## CONCLUSION

For all of the factual and legal reasons set forth herein, Appellants respectfully request that This Court review the legislative history in this case, and recognize the intended and legitimate purpose served by employers' priority lien right against UIM recoveries from their own carriers. Title 19 *Del. C.* §2363(e) tailors employers' reimbursement rights to ensure that injured employees have access to unpaid compensation without duplicating employers' damages. The 2016 amendment to 19 *Del. C.* §2304, coupled with 18 *Del. C.* §3902, *Adams*, and the Collateral Source Rule, ensures employers' reimbursement rights only apply when the employer, and not the employee, purchases the sought-after UIM policy.

For these reasons, Appellants ask This Court to reverse the Superior Court's Opinion Granting Appellees' Judgment on the Pleadings and grant Appellants' request for Declaratory Judgment.

Respectfully submitted,

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