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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KINGSLEY A. SIMENDINGER, Individually and as Administratrix of the Estate of Christopher Sturmfels, and KINGSLEY A. SIMENDINGER, as Next Friend of BECK STURMFELS, a minor,	)	No. 553, 2011
Plaintiff Below, Appellant,	)	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. NO. N10C-03-221 CHT
v.	)	
NATIONAL UNION FIRE INSURANCE COMPANY,	)	
Intervenor Below, Appellee.	)	

APPELLANT'S REPLY BRIEF

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I. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY CONTRACT PRINCIPLES TO THE RESOLUTION OF THIS MATTER

As an initial matter, Appellee, National Union Fire Insurance Company's ("National Union") Answering Brief makes liberal reference to 19 Del. C. §2362. Upon initial review of National Union's Answering Brief, it was Appellant's belief that this was simply a scrivener's error, however, National Union listed 19 Del. C. §2362 in its table of citations and references this statute throughout its brief. 19 Del. C. §2362 is a statute concerning the required notice of a denial of liability and the attendant penalties. Appellant respectfully submits that the matter *sub judice* does not involve 19 Del. C. §2362 in any way.

National Union contends that the Superior Court properly applied contract principles to the resolution of this matter. In support of its contentions, National Union states that Appellant has failed to cite caselaw supporting the contention that the exclusionary language contained in the policy at issue should control. (Answering Br. at 7). However, this averment cannot withstand scrutiny. At page 9 of Appellant's opening brief, Appellant cites to Delaware Supreme Court caselaw in support of the contention that the policy language controls the instant matter. (Opening Br. at 9).[1] Furthermore, National Union contradicts itself in its

[1] *Graham v. State Farm Mut. Auto. Ins. Co.*, 569 A.2d 908 (Del. 1989).

own brief. Despite National Union's assertion that Appellant failed to cite caselaw in support of the contention that the policy language should control, National Union writes:

> Additionally, Appellant contends that when there are conflicting terms in an insurance policy and a statute that the policy language controls. In Support of that argument, Appellant relies upon *Graham v. State Farm.* (Answering Br. at 10).

National Union cannot have it both ways, and unfortunately, this disjointed logic persists throughout their Answering brief.

In support of their argument that the policy exclusion is invalid, National Union cites to *State Farm Mut. Auto. Ins. Co. v. Washington*[2]. However, National Union's reliance is misplaced and their misplaced reliance is positive indicia of the myopic approach that undermines National Union's position in its entirety. *Washington* is a case regarding a named driver exclusion insurance policy provision that was held invalid as against public policy in light of 18 Del. C. §3902. *Washington* is wholly inapplicable to the instant matter. In fact, National Union's argument in this respect again evidences the disjointed logic of their arguments. The core of National Union's position is that they are entitled to recover the monies they paid under their workers' compensation policy because the Appellant has recovered funds pursuant to an underinsured motorist policy. The

[2] 641 A.2d 449 (Del. 1994).

functional effect of National Union's position would reduce the amount of underinsurance motorist benefits available to the Appellant.

Further, National Union cites two cases from the 1980s[3] in support of their argument; first, *Moore v. General Foods*[4] and second *Nost v. The Home Indemnity Co.*[5] Considering the latter case first, *Nost* is a case regarding PIP exclusions that were being considered before the 1983 amendment of 21 Del. C. §2118.[6] National Union concedes that *Nost* is not on point, but again, the connection between *Nost* and the instant matter is so tenuous it doesn't appear to exist. National Union writes, "while the case is not directly on point it does indicate that the Court has struck down as invalid under the law an insurance policy exclusion that attempted to limit workers' compensation payments." (Answering Br. at 8). The instant matter has nothing to do with limiting workers' compensation payments. Frankly, nowhere in any argument or filing in the entirety of this matter has Appellant contended that certain insurance policy provisions including exclusionary provisions have been held invalid by the Courts of this state and others. The issue here is not that some exclusionary provisions have ever been invalidated, but rather that, the policy exclusion is valid and controlling because this matter sounds in

[3] Thirteen years before the 1993 amendment of 19 Del. C. §2363(e)
[4] 459 A.2d 126 (Del. 1983).
[5] Del.Super., No. 81C-FE-134, Taylor, J. (June 30, 1982),
[6] It should be noted, that it appears to Appellant that *Nost* is cited in two Delaware cases, *Jeffers v. Corridori*, 1985 WL 189293 (Del. Super. Oct. 18, 1985) and *Viehman v. Nationwide*, 1989 WL 1111202 (Del. Com. Pl. Mar. 8, 1989) and the language referenced by National Union is identical to that contained in those two cases, however, Appellant was unable to obtain the actual *Nost* opinion.

contract and not tort. Respectfully, in as much as an analogy means resemblance in some particulars, *Nost* is in no way analogous to the instant matter based on National Union's own sentiment, *Nost* is ostensibly concerned with limiting workers' compensation payments and the instant matter concerns subrogation rights in lieu of an insurance policy exclusion. Without being obtuse, Appellant fails to see the analogy.

National Union's reliance on *Moore* shares a similar tragic flaw. National Union cites to *Moore* to support the proposition that, "subrogation provision[s] prevent a double recovery by the employee for any one industrial injury and permits the employer to recoup its compensation benefits."[7] National Union is wide of the mark again, the instant matter does not involve a "double recovery." The issue in *Moore* was that the claimant suffered a new and distinct injury that the Industrial Accident Board related to the claimant's initial injury. As noted, the issue here is not about double recovery, it is about receiving all of the insurance benefits that one has contracted for. Moreover, there is no basis for imputing double recovery of workers' compensation benefits if the second benefit arises from a source which exists by reason of the employee's payment of a separate consideration.[8]

[7] *Moore* 459 A.2d at 128.
[8] *State v. Calhoun*, 634 A.2d 335, 337 (Del. 1993).

Next National Union urges this Court to follow the Superior Court of Maine[9] and conclude that where the terms of an insurance policy conflict with statutory provisions the latter prevails. (*See* Answering Br. at 9). National Union is correct for matters that sound in tort, however, where a matter sounds in contract, as is the case when considering rights and duties pursuant to an underinsurance policy, the contract provisions control.[10] Further, where the Supreme Court of Delaware has made a distinct unambiguous pronouncement deciding an issue there is no need to look to the instruction of Courts outside this state.[11] Moreover, Appellant's reliance on *Graham* is persuasive for precisely the reasons stated by National Union. The *Graham* Court was considering an arbitration clause policy provision that ultimately constituted an effective waiver of the parties constitutional right to a jury trial.[12] That the *Graham* Court upheld a contractual policy provision to the detriment of a right as sacrosanct as the right of a jury trial is powerfully persuasive indicia of this Court willingness to enforce valid, conscionable contract terms irrespective of statutory or even Constitutional considerations.

[9] Again, National Union cites to a case, *Legassie v. Deane*, 1999 Me. Super. LEXIS 80, but Appellant was not able to locate the actual opinion, the only case that Appellant could locate was *Legassie v. Bangor Publishing*, 741 A.2d 442 (1999) wherein William Deane was a defendant in the lower court case.
[10] *Graham*, 565 A.2d at 913.
[11] We note that the General Assembly has eliminated the ability of an employer's workmens' compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage. *Hurst v. Nationwide Mut. Ins. Co*., 652 A.2d. 10 (Del. 1995).
[12] *Graham*, 565 A.2d at 913.

At the risk of belaboring the point, National Union's argument with respect to *Phillips v. Parts Depot, Inc.*[13] is wide of the mark too. *Phillips* does not address a situation where a claimant has received underinsured benefits. National Union's cite to *Phillips* as instructive evidences a fundamental misapprehension of the issue. The issue is not whether 19 Del. C. §2363(e) creates a right of subrogation from a liability settlement in tort, the issue is whether, when dealing in a matter sounding in contract, does 19 Del. C. §2363(e) create the same statutory right of subrogation when a contractual provision explicitly forbids the same.

Ignoring the reference to 19 Del. C. §2362(e), Appellant respectfully disagrees with National Union's argument that this Court misplaced an inapplicable footnote. Furthermore, despite National Union's contentions, Appellant is not relying on the body of the *Hurst* opinion and agrees with National Union that the body of the *Hurst* opinion involves a discussion of 18 Del. C. §3902. (Answering Br. at 11). However, it strains credulity to suggest, as National Union does, that, "*Hurst* did not in **any way** involve 19 Del. C. §2363." (*Id.* emphasis added) Appellant respectfully suggests that Justice Holland knew precisely what he was writing and why he wrote it when he wrote, "We note 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

[13] 2010 WL 1367756 (Del. Super. Mar. 10, 2010).

payment pursuant to the employer's uninsured motorist coverage."[14] Tellingly, National Union makes no suggestion as to what should be made of the plain language of the Delaware Supreme Court that is directly on point and describes the instant matter exactly. Further, counsel for National Union was aware of the *Hurst* language and its import regarding workers' compensation liens as the matter had been raised in previous unrelated litigation. (Ex. A at 5)

Continuing in its attempt to avoid the obvious, National Union next suggests that this Court not consider the holding of *Erie Ins. Co. v. Curtis*[15] because the Maryland and Delaware workers' compensation statutes are different. Again, myopia hinders National Union apprehension. *Erie* is not offered because it's facts are identical, it is offered as a persuasive authority. It is not offered for a comparison of state statutes, but to gain insight into other court's analysis of the issue of insurance policy exclusions at odds with statutes.

Finally, National Union's reliance on *McDougall v. Air Products & Chemicals*[16] is wholly unfounded. *McDougall* does not sound in contract, and involved a setoff resulting from a third-party recovery in a medical malpractice action.

National Union consistently misses the point, *it is critical* that we are discussing the proceeds of an underinsurance policy. 19 Del. C. 2363(e) produces

[14] *Hurst*, 652 A.2d at footnote 3.
[15] 623 A.3d 184 (Md. Ct. App. 1993).
[16] 2005 WL 2155230 (Del. Super. Aug. 31, 2005).

different results depending on the source of the funds. Furthermore, the purpose underlying 19 Del. C. §2363(e) is to prevent the employee from receiving compensation for wage losses from a third-party tortfeasor when the losses have already been compensated through workers' compensation.[17] Moreover, there is no basis for imputing double recovery of workers' compensation benefits if the second benefit arises from a source which exists by reason of the employee's payment of a separate consideration, i.e. an underinsurance policy.[18] It is undisputed that the matter *sub judice* does not involve remuneration from a third-party tortfeasor, therefore, the double recovery issue is moot.

[17] *Calhoun*, 634 A.2d at 337.
[18] *Id.*

II. THE COURT BELOW ABUSED ITS DISCRETION BY DENYING THE MOTION FOR RE-ARGUMENT

National Union next asserts that the Appellant's adoption of Philadelphia Indemnity Insurance Company's Motion for Re-argument was "late and ineffective." (Answering Br. at 19). However, National Union cites no standard by which to judge an adoption. In contrast to National Union's bald assertion, Appellant respectfully suggests that the dictates of Superior Court Civil Rule 10(c) do not set a time period or objective standards for adoption:

> Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes.

In light of foregoing annunciated rule, there was nothing ineffective about Appellant's adoption of the Motion for Re-Argument and there are no time limitations to speak of in the rules.

Furthermore, Appellant agrees with the standard for considering a Motion for Re-Argument delineated in National Union's Answering Brief. (Answering Br. at 19). However, confoundingly, Appellant does not reach the same result. It is manifest that the Court below did not consider the 1993 amendment of 19 Del. C. §2363(e), further, it is manifest that the plain language contained in *Hurst* was overlooked by the Court below. As a result, the Court below failed to consider a

precedent that would have controlling effect and misapprehended the state of the law such that it affected the outcome of the Court below's decision.[19]

[19] *See Generally Lovett v. Chenney*, 2007 WL 1175049 (Del. Super. Apr. 19, 2007).

III. THIS APPEAL SHOULD NOT BE DISMISSED PURSUANT TO SUPREME COURT RULE 29(b)[20]

National Union asserts that, "neither the August 12, 2011 nor the September 22, 2011 resolved all claims as to all parties in the Superior Court action" (Appelle's Mot. to Dismiss at ¶9) However, National Union cites no support for why or how it reached this conclusion. Contrary to the position of the National Union, Appellant's assert that the Superior Court's rulings of both August 12, 2011 and September 22, 2011 adjudicated all the claims and the rights and liabilities of all the parties.[21]

As a practical matter, the matter has been closed in the Superior Court. (Ex. B) Appellant respectfully submits that the plain fact that the matter is closed in the Superior Court is sufficient proof that no claims remain among the parties after the Superior Court's order of September 22, 2011 and there are no counterclaims, cross-claims or third party claims, the judgment of September 22, 2011 is a final judgment.[22] Additionally, the Second Amended Notice of Appeal states that the case below was decided on September 22, 2011, not that the Appellant only appealed the decision of the Court issued on that day. Further, there is, pursuant to Supreme Court Rule 14(b)(vi)(A)(1), a clear and exact reference to the pages of the appendix where appellant preserved this question in the trial Court.

[20] Appellant is responding to this contention despite the fact that it appears to be a separate argument not properly delineated pursuant to Supreme Court Rule 14

[21] *See Generally*, *Harrison v. Ramunno*, 730 A.2d 653 (Del. 1999).

[22] *Id*. at 653.

Assuming *arguendo* that this matter was not closed in the Superior Court, the Court pursuant to Superior Court Civil Rule 41(e) has the power to dismiss an action for want of prosecution. Neither Bednash defendant has filed a responsive pleading, further, there has been no entry of appearance on their behalf, there is no applicable coverage for either of those defendants and for all intents and purposes, they have been dismissed from this matter for want of prosecution. There has been no action regarding any of the Bednash Defendants in over 7 months, a period sufficient to satisfy the requirements of Superior Court Civil Rule 41(e). Again, assuming *arguendo* that National Union's argument has merit, the Court below would have to re-open the case, and issue additional orders, thereby allowing Appellant the opportunity to file an appeal before this Court again, pursuant to Supreme Court Rule 42(f). This course of action is unseemly, inefficient and would be an exercise in futility as this Court now has the correct parties before it to issue a ruling on the matter.

CONCLUSION

WHEREFORE, the Appellant respectfully request this Court reverse the Superior Court's grant of Summary Judgment in favor of the Appellees or in the alternative reverse the denial of the Motion for Re-Argument and remand this case for further proceeding below including trial.

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