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Case Number 315,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	:	No. 315,2014
Defendant Below, Appellant,	:	Appeal from the Decision of the Superior Court of the State of Delaware, in and for New Castle County, C.A. No. N10C-08-246 WCC
v.	:	
MATTHEW KELTY,	:	
Plaintiff Below, Appellee.	:	

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THE INSURANCE POLICY PROVISION WAS VOID AS AGAINST PUBLIC POLICY.

A. Question Presented

Whether the insurance policy provision which provides that excess PIP benefits for pedestrians are available to only the named insured and his relatives is valid under Delaware law and public policy. This question was preserved for appeal by State Farm's Informal Briefing. (A33-39).

B. Scope of Review

Interpretation of an insurance policy is a determination made as a matter of law. *Cubler v. State Farm Mut. Auto. Ins. Co.*, 679 A.2d 66, 68 (Del. 1996). The Supreme Court will review the Trial Court's interpretations as a de novo review. *Id.*

C. Merits of Argument

The issue in the present case is whether the non-relative pedestrian provision contained in Appellant, Defendant-Below State Farm Mutual Automobile Insurance Company's ("State Farm") policy of insurance is enforceable under Delaware law. The provision provides:

> The following provisions apply only to the extent that the limits of liability of this policy exceed the minimum limits of liability required by law.
>
> THERE IS NO COVERAGE:

> * * *
>
> 2. FOR ***BODILY INJURY***
>
> * * *
>
> f. IN EXCESS OF THE MINIMUM LIMITS REQUIRED BY LAW FOR ANY PEDESTRIAN. This does not apply to ***you, your spouse*** or any ***relative***.

(A19). This policy provision only applies to excess personal injury protection ("PIP") coverage. The provision does not distinguish between claimants when applying the statutorily required PIP coverage.

Appellee, Plaintiff-Below Matthew Kelty ("Plaintiff"), was not a named insured on the policy at issue, he was not a relative or a member of the named insured's household.[1] Instead Plaintiff was a stranger to the insurance contract, which was between State Farm and John and Shirley Lovegrove (collectively referred to as the "Lovegroves"). It was the Lovegroves that had contracted for and had paid higher premiums to have excess coverage for themselves. Plaintiff had no way of knowing or anticipating that the Lovegroves had an insurance policy with State Farm, or even that the policy provided for excess coverage. It is unknown if Plaintiff had obtained his own excess coverage.

[1] While Plaintiff asserted that he was a relative in his informal brief before the Trial Court, he has now acknowledged that he is not a relative pursuant to the policy's definition.

While Plaintiff has cited and provided case law regarding the canon for interpreting insurance policy language, there is no dispute in the present case that the provision at issue is clear and unambiguous. Accordingly, the plain meaning of the contract language controls. *O'Brien v. Progressive N. Ins. Co.,* 785 A.2d 281, 288 (Del. 2001).

1. Delaware Case Law Supports Upholding the Policy Provision

Plaintiff asserts that State Farm has failed to fully address the case of *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557 (Del. 1998) which Plaintiff asserts stands for the proposition that there is a blanket wide ban on any exclusions or provisions which in anyway address the relationship between the policyholder and the claimant. Such an assertion, however, fails to consider that the PIP statute itself recognizes and endorses a distinction between the policyholder, his relatives and strangers to the insurance contract.

Wagamon, addressed an absolute household exclusion clause contained in a liability insurance policy. *Id.* Throughout its decision the Court repeatedly emphasized that the purpose of Section 2118 of Title 21 of the Delaware Code was to provide basic insurance coverage. *Id.* at 558, 561. Plaintiff's emphasis on the last page of the *Wagamon* decision is misplaced. At the end of its decision the Court, recognizing the exclusion was not written to allow mandatory minimum coverage,

declined to rewrite the policy language and in finding that the exclusion was severable, decided to sever the exclusion rather than address if the exclusion would apply to coverage above the mandatory minimum. *Id.* Plaintiff interprets the Court's decision to not address the issue as a mandate from the Supreme Court that an exclusion above the mandatory minimum would not be acceptable. Plaintiff does so without acknowledging that the language of the decision states that the purpose of the PIP policy was to provide the basic and required coverage and exclusions that hinder that purpose would be invalid. *Id.* at 561.

In addressing the case law that followed *Wagamon*, Plaintiff cites to *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492 (Del. 2012), which found that an insured should be able to access his own excess coverage when he was involved in a motor vehicle accident as a pedestrian and had already received the statutory required minimum coverage from the alleged tortfeasor. In finding that Mohr should be able to access the excess coverage, the Court noted the important public policy of encouraging the Delaware driving public to purchase more than the statutory minimum required coverage. *Id.* at 500.

In all of Plaintiff's Answering Brief, Plaintiff fails to identify how the non-relative pedestrian provision is contrary to the important and well recognized public policy goal of encouraging the driving public to purchase additional insurance

coverage. Plaintiff fails to address the fact that invalidating the provision will reward individuals for relying upon others to obtain excess coverage, which is contrary to Delaware public policy. If Plaintiff is allowed to access the excess coverage, which was not purchased for his protection nor was it purchased with him in mind, it only serves to encourage him to not protect himself with higher limits. Instead, the Court would be allowing Plaintiff to rely upon others to provide greater insurance coverage, which not only flies in the face of public policy, but also hinders the achievement of the public policy goal.

The *Mohr* decision continues to demonstrate the validity of the non-relative pedestrian provision. As Plaintiff states, the Court was dismayed by the idea that it was the intent of the legislature that a pedestrian, who had taken the time and incurred the costs of obtaining excess coverage, would be unable to access his own excess coverage. *Progressive*, 47 A.3d at 502. The Court found that it could not approve of a statutory interpretation which would have the effect of discouraging an insured from acquiring excess coverage. *Id.* at 502.

Further, Delaware discourages and rejects allowing individuals to rely on strangers for the courtesy of obtaining greater coverage or coverage at all. *See Passwaters v. State Farm Mut. Auto. Ins. Co.,* 1997 Del. Super. LEXIS 145 (Del. Super. March 27, 1997); *Webb v. State Farm Mut. Auto. Ins. Co.,* 1993 Del. Super.

LEXIS 88 (Del. Super. March 17, 1993); *Mason v. State Farm Mut. Auto. Ins. Co.*, 1997 Del. Super. LEXIS 270 (Del. Super. July 21, 1997).

Instead of addressing this well known public policy goal, Plaintiff cites to a new public policy goal of ensuring that medical providers know that they are going to be paid regardless of who was at fault for the accident. This public policy goal is impracticable, as there is no evidence to show that a medical provider is aware of the coverage limits for any particular patient, or even that the limits are greater than the required $15,000. Further, a medical provider should be encouraged to treat an individual based upon his injuries not because he will be able to bill up to the $15,000 amount and know that he will receive compensation for that treatment.[2]

2. The Non-Relative Pedestrian Provision Does Not Lead to Absurd Results and Does Not Disturb the Universal Coverage Requirements.

Plaintiff asserts that this provision would create absurd results if it is applied, as Plaintiff would have been able to obtain $100,000 in PIP coverage had he been a passenger in the Lovegroves' vehicle and yet can only obtain $15,000 in PIP coverage as he is now a pedestrian involved in an accident with this vehicle. What Plaintiff fails to appreciate is that the policyholder has greater control over what individuals will occupy his vehicle than any potential pedestrians.

[2] This public policy goal should also be scrutinized based on the current law requiring individuals to have health insurance, which was not the case when the public policy was first identified.

As argued in State Farm's Opening Brief, insurance coverage is obtained for various reasons. An individual buys liability coverage to protect himself and his assets, all based upon what he thinks he needs and what he is willing to pay for it. He buys UM/UIM coverage to protect himself and his family with the same considerations in mind. He gauges and weighs his needs versus the cost before he purchases PIP coverage. The insurance is not purchased to protect the unknown pedestrian over whom the policyholder would have no control, expect to the extent that Delaware law requires it.

The idea that the pedestrian will obtain coverage from the striking vehicle is a statutory creation, from a statute that states all one must do is obtain $15,000/$30,000 in coverage for that pedestrian. The policyholder does not have an interest in obtaining excess coverage and paying the premium for that excess coverage, so that a stranger, who is beyond his control can access that excess coverage. While Plaintiff asserts that there should be no difference between a pedestrian and an occupant, he overlooks the simple fact that a pedestrian and an occupant are inherently different, not only in the eyes of the statute, but more importantly in the eyes of the individual, who weighs the costs and benefits and pays the premium for this coverage.

Plaintiff asserts that recognizing the difference between a passenger in a vehicle and a pedestrian has been rejected by the Court because it fails to achieve the goal of

"universal coverage." While Plaintiff provides a definition for the word "universal" he fails to establish that universal coverage and excess coverage are the same. Plaintiff has confused the idea of coverage for everyone for the idea of excess coverage for all.

The Delaware legislature in mandating that there should be universal coverage provided that all Delaware registered motor vehicles must carry coverage of $15,000 per person and $30,000 per occurrence. 21 *Del. C.* § 2118. In requiring this specific amount of insurance for every Delaware registered motor vehicle, the legislature created universal coverage. The legislature mandated this overage in three separate statutes. The legislature further stated that while individuals could contract for greater coverage, there is no statutory language which would suggest that greater coverage is required. Now the term is distorted and warped to the point that Plaintiff seeks to assert that there can be no exceptions or exclusions to this coverage. This is contrary to the statute and Delaware case law. Exclusions have been upheld for carrying persons for a charge (*Cubler v. State Farm Mut. Auto. Ins. Co.,* 679 A2d 66 (Del. 1996)), operating a vehicle that was available for regular use but not insured under the policy (*Martin v. Colonial Ins. Co.,* 644 F. Supp. 349 (D. Del. 1986)), failure to cooperate (*Harris v. Prudential Property & Casualty Ins. Co.,* 632 A.2d 1380 (Del. 1993)),operating a vehicle that was owned by a member of the insured's family but

was not insured (*Passwaters v. State Farm Mut. Auto. Ins. Co.*, 1997 Del. Super. LEXIS 145 (Del. Super. March 27, 1997)).

The statute itself emphasizes the intent for full compensation to mean the required minimum. Section (d) states that individuals may contract for coverage more extensive than the minimum coverage required and do not necessarily "require the segregation of such minimum coverages from other coverages in the same policy." 21 *Del. C.* § 2118(d). The statute further provides that "[p]olicies purporting to satisfy the requirements of this section shall contain a provision which states that, notwithstanding any of the other terms and conditions of the policy, the coverage afforded shall be at least as extensive as the minimum coverage required by this section." 21 *Del. C.* § 2118(d).

Plaintiff has confused the idea of basic coverage for everyone for the idea of excess coverage for all. Plaintiff's assertion that State Farm is attempting to create an exception to universal coverage overlooks the $15,000 that was paid to Plaintiff pursuant to the required universal coverage mandated by the Delaware legislature. Plaintiff seeks to adopt the role of the legislature and determine what amount of coverage is required to satisfy the goal of universal coverage, ignoring that the legislature has already stated specifically that required amount.

Universal coverage has been obtained in the present case as Plaintiff was provided the statutory required amount of PIP coverage. Plaintiff relies upon *Wisnewski v. State Farm Mut. Auto. Ins. Co.*, 2005 Del. Super. LEXIS 84 (Del. Super. Feb. 14, 2005), for the proposition that there can be no difference in coverage for a pedestrian versus an occupant. *Wisnewski*, however, does not address this difference, as the Court found that it did not need to determine if the plaintiff was a pedestrian. *Id.* at *3. Instead, the Court found that coverage could be obtained under 21 *Del. C.* § 2118(a)(2)c. Plaintiff's attempt to now assert that he is not a pedestrian, was not an issue raised below and therefore cannot be considered by the Court.

3. If The Non-Relative Pedestrian Provision Is Found to be an Exclusion, the Case Must be Remanded for Further Discovery on Whether the Exclusion is Customary Pursuant to 21 Del. C. § 2118(f).

The first time the question of whether the Non-Relative Pedestrian Provision was a customary exclusion was raised was in Plaintiff's informal brief to the Trial Court below on December 6, 2013. At which time Plaintiff asserted that State Farm had the burden of proving that the provision was customary. In State Farm's response to this argument, it requested that the Trial Court grant additional time so that State Farm could investigate if this provision was customary pursuant to 21 *Del. C.* § 2118(f). (A38). Specifically, State Farm stated it "respectfully requests the opportunity to conduct discovery and supplemental briefing on this issue, to include

submission of depositions, policies, and affidavits." (A38). The Trial Court declined to provide that additional time, instead finding the provision invalid based on public policy.

The discovery process would give State Farm additional time to obtain the necessary evidence to establish that the provision is customary, time that it was not given by the Trial Court below. It should be noted that if State Farm had provided an affidavit in support of the provision being customary with its Opening Brief, Plaintiff would argue that the Court could not consider it as it was not part of the record below. If State Farm had included an affidavit as part of their informal reply brief, Plaintiff would have argued that the Trial Court should provide additional time so that Plaintiff could engage into discovery to verify the affidavit. Given that State Farm did not have time to investigate this new assertion, it requested additional time.

If this provision is to be considered an exclusion and there is any question whether the provision is customary, then the matter must be remanded so that proper discovery can occur, including reviewing insurance policies and obtaining affidavits to determine if the provision is customary. It is not necessary for written discovery to be exchanged, but simply that State Farm be given the additional time that it requested when the issue was first put before the Trial Court.

II. THE QUESTION OF WHETHER PLAINTIFF WAS AN OCCUPANT WAS NOT RAISED BELOW AND CANNOT BE CONSIDERED ON THE APPEAL.

A. Question Presented

Whether Plaintiff properly preserved the argument that he was an occupant of the Lovegroves' vehicle at the time of the accident.

B. Scope of Review

The Supreme Court may only review questions that were presented to the Trial Court pursuant to Supreme Court Rule 8.

C. Merits of Argument

Delaware Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review . . ." Del. Sup. Ct. R. 8. In the present case, Plaintiff agreed that he was a pedestrian and argued that he was a pedestrian when the matter was before this Court the first time. In the decision which State Farm has appealed, the Trial Court noted that Plaintiff conceded his claim fell within the non-relative pedestrian provision. *Kelty v. State Farm Mut. Auto. Ins. Co.,* 2014 Del. Super. LEXIS 339 (Del. Super. May 28, 2014). Specifically the Court stated, "Plaintiff concedes that his claim falls within this [non-relative pedestrian] provision but argues that the provision should not apply for two alternative reasons: (1) the provision is invalid under Delaware law or (2) Plaintiff qualifies as a 'relative' exempt

from the provision." *Id.* at *6.

In Plaintiff's Answering Brief, for the first time he asserts that he was not a pedestrian and was instead an occupant of the vehicle. As Plaintiff conceded this issue before the Trial Court, the question was not fairly presented and may not be presented for review.

Without waiving the fact that the occupancy argument has not been reserved, it should be noted that there are certain requirements, including geographic proximity to establish that an individual was an occupant of a vehicle. *Selective Ins. Co. v. Lyons*, 681 A.2d 1021 (Del. 1996). Since this issue was not argued below, there is no factual record for these factors. Accordingly, there is no factual record to support Plaintiff's argument that he was an occupant of the vehicle.

CONCLUSION

The non-relative pedestrian provision is clear and unambiguous. The provision furthers the public policy goal of encouraging the Delaware driving public to purchase greater insurance coverage. Universal coverage is not encumbered by the provision as Plaintiff received the required coverage based upon what the legislature has defined to be universal coverage. Any distinction that is now created between passengers in the vehicle and pedestrian, is based upon the insured's intentions in purchasing insurance coverage to ensure that he and his family are protected.

As the provision is consistent with Delaware law and public policy, it is valid and applicable in the present case.

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