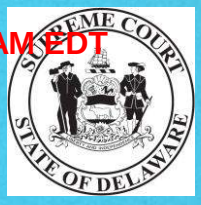

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EPIPHANY STOMS, individually and as Administratrix of the Estate of DAVID H. STOMS, decedent, and as Guardian Ad Litem of ALEXIS D. STOMS and CHAD D. STOMS,	:	No: 692, 2014
Plaintiff Below, Appellant	:	Court Below-Superior Court of the State of Delaware in and for New Castle County
	:	C.A. N14C-01-163 MJB
v.	:	
FEDERATED SERVICE INSURANCE COMPANY,	:	
Defendant Below, Appellee	:	

PLAINTIFF BELOW, APPELLANT'S CORRECTED OPENING BRIEF ON APPEAL

JONATHAN B. O'NEILL, ESQUIRE
Bar ID: 4442
Kimmel, Carter, Roman, Peltz, & O'Neill, P.A.
56 W. Main Street, Fourth Floor
Plaza 273
Christiana, DE 19702
(302) 565-6100
Attorney for Plaintiff Below, Appellant

Dated: March 23, 2015

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NATURE AND STAGE OF PROCEEDINGS

This is an appeal to the Supreme Court of the State of Delaware from a Superior Court decision dated November 20, 2014, in the case of Stoms v. Federated Service Insurance Company, Del. Super. Ct., C.A. No. N14C-01-163, Brady, J. (November 20, 2014).[1] The Plaintiff Below, Appellant is Epiphany F. Stoms (hereinafter "Appellant"). The Defendant Below, Appellee is Federated Service Insurance Company (hereinafter "Appellee").

On November 3, 2012, Appellant's husband was killed in an automobile accident. On January 18, 2014, Appellant filed a Complaint seeking Uninsured Motorist Insurance coverage under a policy issued by Appellee, Federated Service Insurance Company.[2] Appellant demanded judgment against Appellee for her and her minors' general and special damages, medical bills and funeral expenses in excess of PIP, punitive damages, as well as benefits under the wrongful death statutes, pursuant to 10 Del. C. 3704, in an amount to be determined by a jury, plus costs and interest.

On March 10, 2014, Appellee filed its answer to the Complaint denying liability and asserting several Affirmative Defenses. On May 29, 2014, Appellee filed a Motion for Summary Judgment, based on policy language which attempts to

[1] Reference to the Superior Court Decision dated November 20, 2014 is attached hereto as "Exhibit D."

[2] See the Superior Court Docket which will be denoted "A-20-27" and is attached in Appellant's Appendix to her Opening Brief.

limit uninsured/underinsured ("hereinafter UM/UIM") motorist benefits exclusively to "officers, directors, partners, owners, or family members of a company." On June 30, 2014, Appellant filed her response to Appellee's Motion for Summary Judgment and Appellant's Cross-Motion for Summary Judgment. On July 15, 2014, Appellee filed its Responding Brief in Opposition to Appellant's Cross-Motion for Summary Judgment. On July 30, 2014, Appellant filed her Reply Brief in Support of her Cross-Motion for Summary Judgment.

On August 14, 2014, the Superior Court heard oral arguments on the Motions for Summary Judgment. The Court rendered its decision on November 20, 2014, granting Appellee's Motion for Summary Judgment and denying Appellant's Cross-Motion for Summary Judgment. Appellant filed her Notice to Appeal to this Court on December 17, 2014. A briefing schedule was issued on February 3, 2015, setting a deadline for the filing of Appellant's Opening Brief and Appendix on March 5, 2015. This is the Appellant's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

I. **THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO FIND THE PROVISION OF THE APPELLEE'S POLICY WHICH LIMITS UM/UIM COVERAGE EXCLUSIVELY TO COMPANY OFFICERS, ETC. IS VOID AGAINST PUBLIC POLICY.**

II. **THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO FIND THE LANGUAGE IN THE PROVISION OF APPELLEE'S POLICY LIMITING UM/UIM COVERAGE EXCLUSIVELY TO COMPANY OFFICERS, ETC. AMBIGUOUS AND/OR AT THE VERY LEAST CONTRARY TO APPELLANT'S REASONABLE EXPECTATION.**

STATEMENT OF FACTS

This case arises from a fatal motor vehicle accident on November 3, 2012, which occurred along northbound Delaware Route 1 in Kent County, Delaware. The fiery crash killed David H. Stoms (hereafter "Decedent") and severely injured his and Appellant's minor daughter, Alexis D. Stoms. Alexis D. Stoms, a passenger, suffered severe injuries including numerous broken bones and internal injuries.[3] (A-1-13). The decedent was pronounced dead at the scene of the accident. Appellant is the widow of decedent and mother of Alexis D. Stoms and Chad D. Stoms.

The accident was due to the negligent and reckless conduct of the tortfeasor, Mathew E. Bair (hereafter "tortfeasor"). (A-1-13). The tortfeasor was speeding on the wrong side of a dark roadway at 10:15 p.m. when he struck the decedent's vehicle. According to the police report, he was under the influence of cocaine and alcohol, and had a blood alcohol level of 0.16%. (A-1-13). The tortfeasor was uninsured.

The decedent and Alexis D. Stoms were traveling in decedent's company-owned 2010 Toyota Yaris registered in Delaware. The decedent worked as a business manager at Price Toyota, a subsidiary of Diamond Motor Sports, Inc. (A-1-13). The use of the vehicle was part of his benefits package. He was permitted

[3] Reference to the Hearing Transcript dated August 14, 2014 will be denoted "A-1-13" and is attached in the Appellant's Appendix to her Opening Brief.

to use the vehicle for personal purposes. (A-1-13). The Appellant's family was on their way home from an event in Sussex County, Delaware when the crash occurred. At the time of the crash, the Appellant was in a different vehicle in front of the decedent and Alexis D. Stoms.

The decedent's vehicle was insured by Appellee with $300,000 in UM/UIM coverage and $30,000 in Personal Injury Protection (hereinafter "PIP") coverage. (A-1-13). The named insured on the Appellee's policy is Diamond Motor Sports, Inc. as part of a commercial package policy (policy number 9361613), which was in effect on the date of the accident. (A-14-19). Federated has paid PIP benefits to the Appellant's family, but denied coverage of additional benefits due to an alleged technicality, which limits UM/UIM coverage to "directors, officers, partners or owners of the Named Insured and family members who qualify as insureds." (A-14-19).

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO FIND THE PROVISION OF THE APPELLANT'S POLICY WHICH LIMITS UM/UIM COVERAGE EXCLUSIVELY TO COMPANY OFFICERS, ETC. IS VOID AGAINST PUBLIC POLICY.

A. QUESTION PRESENTED

Did the Superior Court commit reversible error in upholding a provision limiting UM/UIM coverage to only company officers, directors, partners, owners, or family members of a company? (issue preserved at A-25).

B. STANDARD AND SCOPE OF REVIEW

The Superior Court's interpretation and construction of an insurance contract is subject to de novo review. "The scope of the coverage obligation is determined by the language in the insurance policy. Where the language is unequivocal, the parties are bound by its clear meaning. If the language is ambiguous, it will be construed most strongly against the insurance company that drafted it." Woodward v. Farm Family Casualty Insurance Company, 796 A.2d 638, 641-42 (Del. 2002). When parties make motions for summary judgment, a judge should not grant—and the Supreme Court will not affirm—summary judgment for one party unless no genuine issue of material fact exists and that party is entitled to judgment as a matter of law. Timothy J. Wygant v. Geico General, 27 A.3d 553 (Del. 2011).

C. MERITS OF ARGUMENT

Appellee's policy, which fails to provide Decedent with UM/UIM insurance, is repugnant to the clear public policy interest in favor of uninsured motorist coverage and against any limitations on this protection. Cropper v. State Farm Mut. Auto. Ins. Co., 671 A.2d 423, 427 (Del. Super. Ct. 1995). Technical and limiting terminology used as an attempt to circumvent the statutory policy of requiring insurance coverage for all persons entitled to recover from negligent, uninsured drivers will not be enforced by the court. State Farm Mut. Ins. Co. v. Abramowicz, 386 A.2d 670, 672 (Del. 1978). Delaware courts have made clear that insurance provisions designed to reduce or limit the coverage to less than that prescribed by statute are void. Bermel v. Liberty Mut. Fire Ins. Co., 56 A.2d 1062, 1067 (Del. 2012).

The UM/UIM motor vehicle coverage, under Delaware law, is codified at 18 Del. C. § 3902. In addition, Delaware has passed a financial responsibility law codified at 21 Del. C. § 2118, which states that all victims of a motor vehicle accident must be compensated "up to a minimum amount." 21 Del. C. § 2118. This Court has explained and stressed that the purpose of this legislation is to protect innocent drivers who are injured by the negligence of others who have no means for recompensing the injured parties. Abramowicz, 386 A.2d at 675.

This Court noted the significance that the Delaware uninsured motorist

statute mandates coverage, unless the insured affirmatively executes a waiver of coverage. Frank v. Horizon Assurance Co., 553 A.2d 1199 (Del. 1989). This Court agreed with the rationale applied by the Supreme Court in Georgia in Doe v. Rampley that the statute allows waiver, *not modification,* and that there is no allowance for a substitution for a lesser coverage. Frank, 553 A.2d at 1203. (citing Doe v. Rampley, 351 S.E.2d at 205, 206 (1987). The Plaintiff in Frank argued that while the purchase of uninsured motorist coverage is an option that may be affirmatively waived by the insured, once the option is exercised, the carrier may not restrict the class of persons, which the statute is intended to benefit. Frank, 553 A.2d at 1202. This Court agreed and explained that legislative history in this state clearly suggests a legislative disinclination to authorize such exclusions and that the primary basis for such a refusal to approve an insurer's initiative to limit uninsured motorist coverage is grounded in public policy. Id. at 1203. This Court further recognized that an insured may decline uninsured motorist protection through a waiver of all coverage but established that public policy dictates that once uninsured motorist is purchased, the insurance consumer is entitled to secure the full extent of the benefit, which the law requires to be offered. Id. at 1205.

Furthermore, this Court stated that "attempts by insurers to reduce this benefit by hyptertechnical language or exclusion clauses are equally repugnant to the public policy of protecting innocent persons injured in automobile accidents."

Id. (See also Abramowicz, 386 A.2d at 673 (stating that "...technical and limiting terminology used to circumvent the statutory policy of requiring insurance coverage for all persons entitled to recover from negligent, uninsured drivers..." will not be enforced by the court.)).

Appellee contends that Delaware law permits different levels of coverage for different types of insureds in the area of UIM/UM insurance. Davis v. State Farm Mut. Auto. Ins. Co., Del. Super. Ct., C.A. No. S09C-09-012, Graves, J. (February 15, 2011). However, Delaware courts have consistently failed to uphold policy exclusions tbat violate public policy. See State Farm Mut. Ins. Co. v. Washington, 641 A.2d 449 (Del. 1994); State Farm Mut. Ins. Co. v. Wagamon, 541 A.2d 557 (Del. 1988). In Wagamon, this Court held that household exclusions are void against public policy. Wagamon, 541A.2d at 560. In Wagamon, the plaintiff and her mother were injured by an uninsured driver while the plaintiff was permissibly driving a family member's vehicle. Id. at 558. The insurance company denied coverage to the mother as part of a household exclusion, reportedly to prevent interfamilial discord. Id. at 559. This Court found the exclusion violated public policy and stated that this Court would "admi[t] of no exclusion intended to deny compensation to a portion of the class of victims which the statut[e] was enacted to protect." Id. at 560; See also Frank, 553 A.2d at 1204-05. This Court in Frank stated that, although the holding in Wagamon was directed to policy exclusions

that had the effect of limiting mandatory liability insurance, the public policy articulated in Wagamon to protect persons injured in automobile accidents is also pertinent in the area of uninsured/underinsured motorist insurance. Frank, 553 A.2d at 1204-05.

The case presented here is notably distinguishable from Davis v. State Farm which Appellee relied on to demonstrate that persons who purchase an automobile insurance policy may have higher levels of coverage than third-party permissive users of the vehicles covered by the policy. Appellee contends that ordinary employees are akin to the third party permissive drivers or guests in Davis. The court in Davis found that automobile insurance coverage is "personal" to the one who purchases tbe policy; and, for this reason, the purchaser should be allowed the benefit of higher coverage (than third party permissive drivers or guests) if he so chooses. Davis, at *12-13. The court further explained that it is reasonable to *limit* a third party permissive user's UM/UIM coverage to the coverage on the involved vehicle. Id. at *20. The court stated that Dclaware law and public policy permit this type of classification. Id.

Contradictorily, in the present case, mere employees are given *absolutely no* protection against uninsured motorists whatsoever. This is significantly distinct from plaintiffs in Davis who were given a *lesser* degree of coverage. The court in Davis stated that a policy that differcntiates between the classes of users is

permissible under Delaware law; however, here the policy excluded entirely a class of users. Appellant submits to tbis Court that excluding employees simply because tbey are not officers, directors, or owners of the company is repugnant to the intent of the statute as it arbitrarily excludes an entire class of individuals, which the statute intended to protect.

The Superior Court below relied beavily on its decision in Lukk v. State Farm, where it held that it was pcrmissible for the insurer to offer supplemental uninsured motorists coverage to plaintiff's father and the relatives residing with bim, without extending covcrage to other relatives not residing with the insured. Lukk v. State Farm Mut. Auto. Ins. Co., 2014 Del. Super. Ct. LEXIS 238 (Del. Super. Ct.). The Superior Court stated in its opinion in this case that "there is no compelling reason why disparate treatment would be permissible in the family context but not the corporate context. The Court below further states that the provision in the instant case is similar because it distinguishes between two different categories of individuals and provides additional coverage only for one category. Appellant submits that is the extent of the similarities. The plaintiff in Lukk was the victim of an underinsured motorist and sought compensation under his father's supplemental uninsured/underinsured motorist coverage. Lukk, 2014 Del. Super. Ct. LEXIS 238 at *2. At the time of tbe accident, the plaintiff's father's policy contained a "resident relative clause," restricting coverage to family

members who reside primarily with the insured. Id. at *5-6. The court held the "resident relative clause" enforceable because it did not act as the type of "broad, categorical exclusions disfavored by Delaware law." Id. at *14.

In determining the enforceability of insurance policy provisions, Delaware Courts balance the language and nature of the insurance policy, the language, framework, and history of the applicable statute, and the overall policy concerns. Id. In Lukk, the court determined that the "resident relative clause" did not reduce or limit coverage minimums and was not otherwise inconsistent with the requirements of 18 Del. C. § 3902. Id. at *14-15. The Court further stated that the provision merely defined who was eligible for coverage under the terms of the policy. Id. at *14. Appellant submits that there are notable differences between the situation in Lukk and the situation presented currently before this Court, most significantly, a key difference being the involvement of a corporate context rather than a family context, which is in direct contradiction to the Superior Court's position that such a difference is inconsequential.

In this case, the practice of covering some employees, but not others, is overly arbitrary and is abhorrent to the purpose of the statute in question. Appellee in the case at hand is attempting to uphold an exclusion which effectively alienates and excludes nearly all of the company's employees who will be operating the insured's vehicles. This effect is why Appellant submits to this Court that the

corporate context is, in fact, significantly different from a family context. Here, the insured held a policy which covered its vehicles as well as certain employees who operated the vehicles, while specifically excluding other employees who also operated the insured's vehicles; unlike the insured in Lukk who held a policy for himself and the primary residents of his home, *who would also for all relevant purposes be the primary individuals operating the insured's vehicles*. In Lukk, the plaintiff was injured as a passenger in a friend's vehicle not covered by the insured's policy. However, it is reasonable to presume that if the plaintiff was operating or a passenger in one of the insured's vehicles covered under the policy that he would have at the very least been entitled to the insured's coverage protecting the automobile.

In the case at hand, the decedent was employed by the insured, was given permission to use the insured's automobile for both work and personal purposes, and drove the insured's vehicle presumably to the same extent that the other employees, whether they were officers, directors, partners, owners or mere employees, drove the insured's vehicles. This is significantly different from a family situation in which an insured's policy provision does not extend to people living outside of the insured's home who generally would not be operating the insured's vehicles on a regular basis. In the situation now before this Court, Appellant submits that there is no compelling reason for this type of arbitrary

classification in a corporate context.

Moreover, this Court has acknowledged that "the legislative purpose embodied in the requirement that uninsured motorist coverage be available to all members of the public is clear: the protection of innocent persons from the negligence of unknown or impecunious drivers." Washington, 641 A.2d at 451 (citing Frank, 553 A.2d at 1201). Moreover, this Court examined the legislative intent behind 18 Del. C. § 3902(c) and concluded that uninsured coverage shall not be undercut by restrictive policy provisions, unless such restrictions are specifically authorized by statute. Frank, 553 A.2d at 1203. Arbitrary requirements may not be used to frustrate the intent of the statute which is to protect innocent persons entitled to recover from negligent, uninsured drivers. Abramowicz, 386 A.2d at 675. To further emphasize this point, this Court made clear that insurance policy provisions designed to reduce or limit coverage to less than that prescribed by statute are void. Id. at 673.

It is well settled that the public policy of this State is to narrowly construe exclusions on statutorily required insurance coverage. Washington, 641 A.2d at 450. This Court in Washington held that a named driver exclusion is inappropriate in the context of an accident involving said driver and an uninsured motorist who was one-hundred percent at fault. In Washington, State Farm excluded the insured driver's son from the policy in any accident in which he was the driver, due to the

son's poor driving record. Id. at 450. This Court held this exclusion to be superfluous in the context of a UM/UIM claim. This Court reasoned that in terms of liability insurance, the experience, driving record and negligence of the insured driver defines the risk to the insurer, but in terms of UM/UIM insurance, the risk is defined by the negligence of the public at large. Id. at 452. This Court found that the restriction bears no logical relationship to public policy considerations served by uninsured motorist protection. Id. It further stated that "if there was an accident for which another driver is responsible, neither logic nor fairness support a result that denies an innocent victim of that occurrence protection merely because he was behind the wheel of a car, but assures such protection if he were a passenger or pedestrian on the street." Id.

In addition, an Appellate Court in Indiana considered an almost identical factual situation involving extremely similar legislation to the situation presented now before this Court. Balagtas v. Bishop, 910 N.E.2d 789 (Ind. Ct. App. 2009). In Balagtas, plaintiff was in a motor vehicle accident with an underinsured motorist while driving a vehicle owned by his employer corporation. Plaintiff was permitted to use the vehicle for both business and personal use. Id. at 791. The employer had executed an insurance form almost identical to the one in this case which excluded UM/UIM coverage for all employees who were not directors, officers, partners, or owners. Id. at 792. The Appellate Court found that the

language of the statute required that any election or rejection of supplemental UM/UIM coverage must apply equally to "all...insureds," on whose behalf the named insured had the right to select coverage. Id. at 796. The Appellate Court held that the election or rejection of coverage must apply to all insureds stating that the statute does not state that the named insured may reject coverage for some, but not all of the named insureds or other insureds. Id. at 795.

The Delaware Superior Court below distinguished the Indiana statute from the Delaware statute by finding significant the language in the Indiana statute stating that the right to reject is "on behalf of all other named insureds and all other insureds" which is not found anywhere in the Delaware statute. Appellant submits that it is *at least* equally significant, if not more so, that the Delaware statute, like the Indiana statute, is also absent of any language permitting the named insured to reject coverage for some but not all of the named insureds or other insureds. Plaintiff contends if the legislature intended to allow for such "partial waivers" it would have provided language to that effect in the statute. The lack of such language is more indicative that the permissible waiver of UM/UIM coverage is an "all or nothing" tool.

In this case, the decedent, Alexis D. Stoms, and Appellant were innocent victims of the tortfeasor's negligent and reckless conduct, and this exclusion should not be enforced. In Washington, this Court found that the insurance

company could not limit UM/UIM benefits to a plaintiff with a poor driving record when the accident was solely the result of the negligence of someone else. It determined that the reason for the exclusion, to protect the insurance carrier from the risk associated with drivers with poor driving records, was not applicable in such a situation. In this case, it is simply illogical to completely exclude Appellant from coverage simply by alleging the decedent and minor daughter are not company officers, etc., or family members of this class of people. As Appellant previously asserted, there is no compelling reason for such a distinction, and more importantly, the decedent, as a business manager, was no more or less likely to be involved in an accident with an uninsured driver, than a company officer, owner, etc.

In summary, the provision which limits UM/UIM coverage to corporate officers, directors, partners, or owners and the family members of Diamond Motor Sports, Inc. violates public policy. It is well-established that when a contract provision is void against public policy, the Court will follow the rules of construction that if the infringing provision is separable, it should be stricken, while the remaining provisions should be enforced. Wagamon, 541 A.2d at 561. Because this provision is severable, the invalid exclusion should be stricken, while the remainder of the contract should remain in tact, granting Appellant the relief the law entitles her to receive.

II. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO FIND THE LANGUAGE IN THE PROVISION OF THE DEFENDANT'S POLICY LIMITING UIM/UM COVERAGE EXCLUSIVELY TO COMPANY OFFICERS, ETC., AMBIGUOUS AND/OR AT THE VERY LEAST CONTRARY TO APPELLANT'S REASONABLE EXPECTATION.

A. QUESTION PRESENTED

Did the Superior Court err in finding a provision limiting UIM/UM coverage to only officers, directors, partners, owners, or family members constitute unambiguous language and/or not contrary to the reasonable expectation doctrine? (issue preserved at A-25).

B. STANDARD AND SCOPE OF REVIEW

The Superior Court's interpretation and construction of an insurance contract is subject to de novo review. "The scope of the coverage obligation is determined by the language in the insurance policy. Where the language is unequivocal, the parties are bound by its clear meaning. If the language is ambiguous, it will be construed most strongly against the insurance company that drafted it." Woodward V. Farm Family Casualty Insurance Company, 796 A.2d 638, 641-42 (Del. 2002). When parties make motions for summary judgment, a judge should not grant—and the Supreme Court will not affirm—summary judgment for one party unless no genuine issue of material fact exists and that party is entitled to judgment as a matter of law. Timothy J. Wygant v. Geico General, 27 A.3d 553 (Del. 2011).

C. MERITS OF ARGUMENT

The policy language used here is ambiguous. It is well settled in Delaware, that if the language is ambiguous, it will be construed most strongly against the insurance company that drafted it. Woodward, 796 A.2d at 641-42. When the policy language is ambiguous, the parties will be bound by the plain meaning of the insurance policy. Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 936 (Del. 1982). In addition, the court in Lukk stated that in determining the common meaning of insurance terms, courts have examined and adopted dictionary definitions. Lukk v. State Farm Mut. Auto. Ins. Co., 2014 Del Super. Ct. LEXIS 238 at *18 (Del. Super Ct.). The decedent was in a managerial position at the time of the crash. Black's law dictionary defines an officer as: Person holding office of trust, authority or command in public affairs, government or a corporation. Black Law's Dictionary at 536-37 (4th Pocket Ed. 2011). Director is defined as: One who manages, guides, or orders; a chief administer. Black Law's Dictionary at 232 (4th Pocket Ed. 2011).

The language in a policy is ambiguous if the provision in controversy is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." Woodward, 796 A.2d at 642. Here, the policy language is ambiguous as to what constitutes an "officer" or "director," and Appellant was

not provided with a copy of policy language defining same. The Superior Court below noted that Delaware law requires a court to "examine the entire contract and apply meanings a person of average intelligence and education would understand" to determine whether an ambiguity exists. See Exhibit D at *23. (citing United Fire & Cas. Ins. Co. v. Thompson, 758 F.3d 959, 962 (8th Cir. 2014). The Superior Court then went further to assert that Appellant should have deduced that the terms in the policy were to be governed by their definitions under the law of contracts. Appellant submits that this is an unnecessarily burdensome task, which Appellant should not have been expected to undertake.

The Superior Court below also stated that "an insurance policy should be construed to effectuate the reasonable expectations of the average member of the public who buys it." See Exhibit D at *22. (citing Hallowell, 443 A.2d at 926). A fundamental premise of the reasonable expectation doctrine is that the policy will be read in accordance with the reasonable expectations of the insured so far as its language will permit. Id. In practice, the rule is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though a painstaking study of the insurance provisions would have negated those expectations. Steven Plitt et. al., The Insurance Contract: § 22:11. Reasonable and natural construction—Reasonable expectations; unconscionability, 2 Couch on Ins. § 22:11, 2014. Some

jurisdictions have allowed recovery based on a reasonable expectations analysis even when the language is not found to be ambiguous. Id.

Moreover, the Delaware Superior Court concluded that when a corporation or business entity purchases additional uninsured motorist coverage, an employee of said corporation could reasonably assume that the corporation expected to insure the users of its vehicles from the very type of harm caused to a plaintiff who is injured by an uninsured motorist. Fisher v. Nat'l Union Fire Ins. Co. of Pittsburgh, 1997 Del. Super.LEXIS 515 at *12-13 (Del. Super. Ct.). In Fisher, a police officer was struck by an uninsured motorist while on duty and sought to recover uninsured motorist coverage from his employer's insurance coverage. The insurer denied plaintiff coverage reasoning that the named insured was New Castle County. Id. at *3. In determining whether the language in the policy was ambiguous, the Superior Court specifically found that the reasonable expectation of the parties was to include the employees who were "authorized to drive the vehicles." Id. at *12-13. The court held Plaintiff was to be included as an insured and entitled to recover uninsured motorist coverage under the policy.

In this case, decedent had a reasonable expectation that if he were to drive the insured's vehicle for business purposes or otherwise, as he was authorized to do, that he would be entitled to uninsured motorist coverage if he were injured in an accident involving an uninsured driver. Decedent was in a managerial position

at the time of the accident. He was permitted to drive the vebicle for company purposes as well as for personal use. It is completely illogical for decedent to have thought that he would be completely unprotected while stepping into a vehicle owned by his employer if hit by a negligent driver who was uninsured and severely injured, or killed. Yet, this is the outcome of the decision by the Superior Court in this case. Appellant submits that this outcome is completely repugnant and should not be upheld.

CONCLUSION

For the foregoing reasons, the Plaintiff Below, Appellant respectfully requests that this Honorable Court reverse the decision of the Superior Court's Order of November 20, 2014 granting Appellee's Motion for Summary Judgment and denying Appellant's Cross-Motion for Summary Judgment.

Respectfully Submitted,

/s/ JONATHAN B. O'NEILL
JONATHAN B. O'NEILL, ESQUIRE
Bar ID: 4442
Kimmel, Carter, Roman, Peltz, & O'Neill, P.A.
56 W. Main Street, Fourth Floor
Plaza 273
Christiana, DE 19702
(302) 565-6100
Attorney for Plaintiff Below, Appellant

DATE: March 23, 2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EPIPHANY STOMS, individually and as Administratrix of the Estate of DAVID H. STOMS, decedent, and as Guardian Ad Litem of ALEXIS D. STOMS and CHAD D. STOMS,	:	No: 692, 2014
Plaintiff Below, Appellant	:	Court Below-Superior Court of the State of Delaware in and for New Castle County
v.	:	C.A. NI4C-0I-163 MJB
FEDERATED SERVICE INSURANCE COMPANY,	:	
Defendant Below, Appellee	:	

CERTIFICATE OF SERVICE

I, Jonathan B. O'Neill, Esquire, of Kimmel, Carter, Roman, Peltz, & O'Neill do hereby certify that on the 23rd of March, 2015, I have caused to be served via *File & ServeExpress* and first class mail, copies of Plaintiff Below, Appellant's Corrected Opening Brief on Appeal on:

James S. Yoder, Esquire
White and Williams LLP
P.O. Box 709
Wilmington, DE 19899-0709

/s/ JONATHAN B. O'NEILL
JONATHAN B. O'NEILL, ESQUIRE
Bar ID: 4442
Kimmel, Carter, Roman, Peltz, & O'Neill, P.A.
56 W. Main Street, Fourth Floor
Plaza 273
Christiana, DE 19702
(302) 565-6100
Attorney for Plaintiff Below, Appellant

Dated: March 23, 2015

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

MICHELE DAVIS, SCOTT DAVIS, CHERYL GRAY, CHRISTOPHER GRAY, VIRGINIA MARIONI, PAULINE SILVESTRI and CHARLES SILVESTRI, on behalf of themselves and all others similarly situation, *et al.*,	:	
Plaintiffs,	:	C.A. No. S09C-09-012 (Consolidated)
v.	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,	:	
Defendants.	:	

Submitted: December 21, 2010
Decided: February 15, 2011

On Defendants' Combined Motions for Summary Judgment: **GRANTED**

MEMORANDUM OPINION

John S. Spadaro, Esquire, John Sheehan Spadaro, LLC, Hockessin, Delaware, Attorney for the Plaintiffs, on behalf of themselves and all others similarly situated.

Colin M. Shalk, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware, Attorney for Defendant State Farm Automobile Insurance Company.

Cari K. Dawson, Esquire, *admitted pro hac vice*, Kyle G.A. Wallace, Esquire, *admitted pro hac vice*, Alston & Bird, LLP, Atlanta, Georgia, Attorneys for State Farm Automobile Insurance Company.

Danielle S. Blount, Esquire, Fox Rothschild LLP, Wilmington, Delaware, Attorney for Defendant Harleysville Preferred Insurance Company.

Katharine V. Jackson, Esquire, Duane Morris LLP, Wilmington, Delaware, Attorney for Defendant Donegal Mutual Insurance Company.

Lewis R. Olshin, Esquire, *admitted pro hac vice*, Duane Morris LLP, Philadelphia, Pennsylvania, Attorney for Defendant Donegal Mutual Insurance Company.

Nicholas E. Skiles, Esquire, Swartz Campbell LLC, Wilmington, Delaware, Attorney for Defendants

Encompass Insurance Company of America, Allstate Insurance Company, Hartford Underwriters Insurance Company and IDS Property Casualty Insurance Company.

Peter J. Valeta, Esquire, *admitted pro hac vice*, Meckler Buger Tilson Marick & Pearson LLP, Chicago, Illinois, Attorney for Defendants Encompass Insurance Company of America and Allstate Insurance Company.

Cindy Mitchell, Esquire, *admitted pro hac vice*, Shoemaker Ghiselli & Schwartz LLC, Boulder, Colorado, Attomey for Defendants Hartford Underwriters Insurance Company and IDS Property Casualty Insurance Company.

David R. Hackett, Esquire, Griffin & Hackett, P.A., Georgetown, Delaware, Attomey for Defendant Travelers Commercial Insurance Company.

Neil J. Dilloff, Esquire, *admitted pro hac vice*, Brett Ingerman, Esquire, *admitted pro hac vice*, Michael O'Day, Esquire, *admitted pro hac vice*, DLA Piper LLP (US), Baltimore, Maryland, Attomey for Defendant Travelers Commercial Insurance Company.

Robert J. Leoni, Esquire, Shelsby & Leoni, Stanton, Delaware, Attorney for Defendants Nationwide Mutual Insurance Company and Nationwide General Insurance Company.

J.Graves

PART I: PROCEDURAL AND FACTUAL BACKGROUND

This decision encompasses ten proposed class action lawsuits against nine insurance companies providing automobile insurance coverage for vehicles requiring Delaware insurance coverage.

All plaintiffs are represented by one attorney and the insurance companies all have multiple counsel. Defendant insurers all moved to dismiss plaintiffs' complaints. Due to the common complaints and the common defenses, the cases were consolidated for purposes of the Motions to Dismiss. Post briefing, plaintiffs unilaterally and without notice to the defendants or the Court, filed with the Court correspondence from the Insurance Commissioner of the State of Delaware ("Insurance Commissioner") and argued the contents of that correspondence supported plaintiffs' position. Defendants objected to the submission. In the interest of considering all potentially relevant information, however, I have not rejected or stricken the filing putting forth the Insurance Commissioner's position and I permitted defendants an opportunity to respond thereto. Due to the expansion of the record, the Motions to Dismiss must he considered as Motions for Summary Judgment.[1]

There are no material facts in dispute. All plaintiffs claim that defendant insurers improperly charge premiums for greater-than-minimum uninsured and underinsured motorist coverage (UM and UIM coverage, respectively; UM/UIM coverage, collectively) when two or more vehicles within the same household are insured under the same policy. Plaintiffs complain this practice constitutes

[1] Counsel were notified of this change in procedural posture by correspondence from the Court dated January 10, 2011.

"double dipping." Plaintiffs seek a declaratory judgment that defendant insurers' charging practice runs afoul of Delaware law and also allege the practice constitutes a breach of contract, a bad faith breach of contract, a breach of the duty of fair dealing, consumer fraud, and a violation of public policy. Plaintiffs seek a declaratory judgment clarifying the parties' rights, duties, status and other legal obligations under 18 *Del. C.* § 3902. Plaintiffs ask the Court to find defendant insurers' "regime of premium charges" is in violation of public policy. Plaintiffs also seek compensatory damages, punitive damages, attorneys' fees and costs. Defendants deny the charging and collecting of any improper or excessive premiums and specifically deny "double dipping." Defendants also argue for various reasons that plaintiffs' claims have no legal basis and that this Court does not have jurisdiction over insurance rate matters.

PART II: STANDARD OF REVIEW

The defendants have filed consolidated Motions to Dismiss. However, because the record has been supplemented with the opinion of the Insurance Commissioner and defendants' response thereto, it is appropriate for the Court to consider the pending motions as Motions for Summary Judgment.[2] In keeping with the requirements of Superior Court Civil Rule 12(b), all parties have been given a reasonable opportunity to present to the Court any and all material they consider pertinent to the pending motions.

Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[3] The moving party

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[2] Super. Ct. Civ. R. 12(b); *see also Venables v. Smith*, 2003 WL 1903779 (Del. Super.).

[3] *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).

bears the burden of establishing the non-existence of material issues of fact.[4] Once the moving party has met its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.[5] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[6] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.[7] If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.[8]

PART III: SUBJECT MATTER JURISDICTION

Defendants argue the Court lacks jurisdiction over plaintiffs' claims because they are barred by the filed rate doctrine and plaintiffs' failure to exhaust their administrative remedies. Because both arguments involve the framework for review established in the Insurance Code, the Court will consider them together.

The Delaware Supreme Court has embraced the filed rate doctrine.[9] The filed rate doctrine "forbids a regulated entity from charging rates other than those filed with the regulatory agency and,

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[4] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[5] *Id.* at 681.

[6] Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

[7] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991); *Celotex Corp., supra.*

[8] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[9] *See Brown v. United Water Delaware, Inc.*, 3 A.3d 272 (Del. 2010).

accordingly, prevents varying or enlarging the rights as defined by the tariff ... by either contract or tort of the carrier."[10]

UM/UIM insurance is a form of casualty insurance governed by Title 18 of the Delaware Code. Pursuant to statute, an automobile insurer's rates are prohibited from being excessive.[11] Chapter 25 of Title 18 of the Delaware Code governs the Insurance Commissioner's responsibilities in approving rates. The Code provides that rates "shall not be excessive, inadequate or unfairly discriminatory".[12] A corollary to that provision is the requirement that rates be reasonable in relation to the premium charged. Every insurer in Delaware is required to file with the Insurance Commissioner "every manual, minimum, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use".[13] If the Insurance Commissioner does not have sufficient information to determine whether a filing meets the requirements of the Code, she *shall* require the insurer to file the information.[14] In support of a filing, an insurer may file any relevant information.[15] The filing and all supporting data must be made available to parties in interest for inspection.[16] The Insurance Commissioner shall disapprove

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[10] *Id.* at 274 (internal quotation marks and citation omitted).

[11] 18 *Del. C.* § 2501; 18 *Del. C.* § 2502(a)(1).

[12] 18 *Del. C.* § 2503(2); 18 *Del. C.* § 2501.

[13] 18 *Del. C.* § 2504(a).

[14] 18 *Del. C.* § 2504(b).

[15] *Id.*

[16] *Id.*

a rate if it does not meet the requirements of the Code.[17] The Insurance Commissioner is required to specify the reason for disapproval and provide the insurer with the opportunity for a hearing on the matter.[18] Any person who is aggrieved with respect to any filing in effect may request a hearing before the Insurance Commissioner.[19] The Insurance Commissioner shall hold a hearing upon the issue with notice to all parties "[i]f the [Insurance] Commissioner finds that the application [for a hearing] is made in good faith, that the applicant would be so aggrieved if his/her grounds are established, and that such grounds otherwise justify holding such a hearing".[20] Any person negatively affected by any order or decision of the Insurance Commissioner concerning rates may appeal such order or decision to the Court of Chancery.[21]

Pursuant to 18 *Del. C.* § 2712(a), insurers must also submit all policy forms to the Insurance Commissioner. The Insurance Commissioner *must* disapprove a form if it contains or incorporates by

reference "any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract."[22] Any order of the Insurance Commissioner disapproving a policy form must state the grounds for the

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[17] 18 *Del. C.* § 2507.

[18] *Id.*

[19] 18 *Del. C.* § 2520(a).

[20] 18 *Del. C.* § 2520(b).

[21] 18 *Del. C.* § 2531.

[22] 18 *Del. C.* § 2713(2).

disapproval and "the particulars thereof in such detail as reasonably to inform the insurer thereof."[23]

The Insurance Commissioner has the power to conduct an examination or investigation of any company as she deems proper to determine whether a violation of the Insurance Code has occurred.[24] The Insurance Commissioner has jurisdiction to investigate and hear claims based on misrepresentations of benefits, advantages or conditions of any insurance policy.[25] The Court of Chancery has appellate jurisdiction over any order of the Insurance Commissioner finding an insurer engaged in misrepresentative or deceptive business practices.[26]

Defendants cite to a case out of Alabama, *Ex parte The Cincinnati Insurance Co.*,[27] that the Court finds very persuasive. In that case, the plaintiff claimed he (and others similarly situated) had been overcharged for unnecessary and illusory coverage. The plaintiff sought damages in the form of restitution or the return of monies paid for the allegedly illusory coverage. The defendant moved to dismiss arguing that the trial court lacked subject matter jurisdiction based on the filed rate doctrine and the plaintiff's failure to pursue administrative remedies through the insurance commissioner and the Department of Insurance. The plaintiff countered that he did not challenge the defendant's rates or rating systems but its "business practice" of applying those rates. The plaintiff also contended that the defendant's rates, approved by the insurance commissioner, did not provide the plaintiff (and others similarly situated) with sufficient notice of its challenged practice.

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[23] 18 *Del. C.* § 2712(c).

[24] 18 *Del. C.* § 317; 18 *Del. C.* § 318.

[25] 18 *Del. C.* § 2304(1)(a); 18 *Del. C.* § 2306; 18 *Del. C.* § 2307.

[26] 18 *Del. C.* § 2309.

[27] 2010 WL 2342418 (Ala.).

After considering the Alabama statutory scheme and the plaintiff's prayer for relief, the Court concluded the plaintiff was directly challenging the premiums and rates defendant applied to UM coverage pursuant to rates approved by the insurance commissioner. "Specifically, by alleging that [the defendant] 'overcharges' for UM coverage, [the plaintiff] claims that [the defendant's] rates are excessive – a matter squarely within the exclusive jurisdiction of the commissioner."[28] The court concluded that the filed rate doctrine required dismissal of the plaintiff's claims, as did the plaintiff's failure to exhaust his administrative remedies with the commissioner and the Department of Insurance.

Plaintiffs in this case note that they, unlike the plaintiff in *Ex parte Cincinnati Insurance Co.*, seek a declaratory judgment as to the legal interpretation of the UM/UIM statute. Plaintiffs assert only the Court may interpret the parties' rights and obligations under the UM/UIM statute and, therefore, the filed rate doctrine and exhaustion of administrative remedies do not bar their claims.

The filed rate doctrine "does not necessarily foreclose all avenues of injunctive relief."[29] A recognized exception to the exhaustion of administrative remedies is when the question raised is one requiring the interpretation of a statute.[30] Nevertheless, plaintiffs' claims do not revolve around the interpretation of Delaware's UM/UIM statute and are virtually identical to those claims presented in the *Ex parte The Cincinnati Insurance Co.* case. Moreover, in that case, the plaintiff did, in fact, seek a declaratory judgment that the imposition and collection of additional UM premiums was illusory and that the insurer's receipt and retention of such money was improper. The court found

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[28] *Id.* at *9.

[29] *McCray v. Fidelity Nat'l Title Ins. Co.*, 636 F. Supp.2d 322, 327 (D. Del. 2009).

[30] *Ex parte The Cincinnati Ins. Co.*, 2010 WL 2342418, at *10.

that all of the plaintiff's claims were barred by the filed rate doctrine or, alternatively, the plaintiff's failure to exhaust his administrative remedies. Alabama's statutory language regarding the insurance commissioner's duty to review rates and insurance contracts is substantively the same as Delaware's and the complaints lodged by plaintiffs in this case substantively mirror those made by the plaintiffs in *Ex parte The Cincinnati Insurance Co.* Accordingly, I find the analysis of the Supreme Court of Alabama in *Ex parte The Cincinnati Insurance Co.* directly on point. The Insurance Code sets up a statutory scheme that provides adequate review of both rates and the substantive content of insurance contracts. The Insurance Commissioner is in a far better position than the Court to assess whether the rates charged by defendant insurers are improper and whether their business practices violate any provision of the Insurance Code. Although plaintiffs' claims do not explicitly challenge the rates imposed by defendant insurers, plaintiffs' underlying assertion is that the rates charged are unreasonable, given the benefits received. Because the Insurance Code gives the Insurance Commissioner the *affirmative responsibility* to determine the reasonableness of rates charged by insurers, the filed rate doctrine applies. Moreover, given the Insurance Commissioner's jurisdiction to review insurance contracts, as a whole, and ascertain whether the contents therein are in keeping with statutory requirements – among those requirements that the contract not violate any provision of the Insurance Code, including its ban on unfair or deceptive practices – plaintiffs have not exhausted their administrative remedies by filing a complaint with the Insurance Commissioner.

In sum, the Court accepts defendant insurers' argument that the Court does not have jurisdiction over plaintiffs' claims because they are barred by the filed rate doctrine or, alternatively, hy plaintiffs' failure to exhaust their administrative remedies.

PART IV - A: THE ESSENCE OF THE COMMON CLAIM

If an appellate court finds I do have jurisdiction to hear plaintiffs' claims, defendants' Motions for Summary Judgment are granted on substantive grounds. Plaintiffs' claim that defendant insurers' charging practice runs afoul of Delaware law can best be illustrated by a hypothetical. Husband and wife have automobile insurance from one insurer for four vehicles they own. Husband, wife and their two children reside in the same household and drive these four vehicles.

Insurer must affirmatively offer UM/UIM coverage that mirrors the personal liability on the vehicles.[31] The minimum personal liability coverage that may be purchased under Delaware law is $15,000 per person and $30,000 per accident.[32] Therefore, the minimum UM/UIM coverage required is $15,000 per person and $30,000 per accident ($15,000/$30,000).[33]

If the insured purchases liability coverage higher than the minimum $15,000/$30,000, then the insurance company must offer the same amount of UM/UIM coverage up to $100,000 per person and $300,000 per accident ($100,000/$300,000).[34] An insured may opt out of UM/UIM coverage but only if the rejection is registered in writing.[35] If an insurer fails to offer affirmatively the

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[31] 18 *Del. C.* § 3902(a)(2) ("The amount of [UM/UIM] coverage to be so provided shall not be less than the minimum limits for bodily injury and property damage liability insurance provided for under the motorist financial responsibility laws of this State...."); *see also Travelers Indemnity Co. v. Lake*, 594 A.2d 38, 42 (Del. 1991) ("Section 3902 permits a Delaware motorist to 'mirror' his own liability coverage and take to the roads knowing that a certain amount of protection will always be available.") (internal quotation marks and citations omitted).

[32] 21 *Del. C.* § 2902(b)(2).

[33] 18 *Del. C.* § 3902(a)(2).

[34] 18 *Del. C.* § 3902(b) ("Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.").

[35] 18 *Del. C.* § 3902(a)(1) ("No [UM/UIM] coverage shall be required in or supplemental

increased UM/UIM coverage available, it risks the post-accident reformation of the policy to permit the higher UM/UIM coverage.[36]

Delaware case law also holds that the UM/UIM insurance is "personal" to the insured and not vehicle specific.[37] This premise simply means the insured's UM/UIM coverage follows the insured regardless of the vehicle he or she may be occupying or driving when an accident occurs. The insured enjoys the coverage even as a pedestrian if he or she is injured by an uninsured motor vehicle.[38]

In the hypothetical case of husband, wife and their children, insurer offers

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to a policy when rejected in writing, on a form furnished by the insurer or group of affiliated insurers describing the coverage being rejected, by an insured named therein, or upon any renewal of such policy or upon any reinstatement, substitution, amendment, alteration, modification, transfer or replacement thereof by the same insurer unless the coverage is then requested in writing by the named insured. The coverage herein required may be referred to as uninsured vehicle coverage.").

[36] *State Farm Mutual Automobile Insurance Co. v. Arms* held:

> [I]t is clear that State Farm breached its section 3902(b) duty to offer increased uninsured motorist coverage to [the plaintiff] ... when he was issued a new policy. Accordingly, we conclude that State Farm's failure to observe that duty resulted in an implied extension of a continuing offer of additional uninsured motorist coverage to the extent of the lesser of $300,000 or the bodily injury limits in [the plaintiff's] policy. Because he had a 100/300 policy, we agree that the Superior Court properly revised his uninsured motorist coverage to an equivalent amount.

477 A.2d 1060, 1065-66 (Del. 1984) (citation omitted).

[37] *See Frank v. Horizon Assurance Co.*, 553 A.2d 1199 (Del. 1989); *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10 (Del. 1995); *Castillo v. Clearwater Ins. Co.*, 2010 WL 4705132 (Del.).

[38] *See State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449, 452 (Del. 1994) (observing the difference in risk to an insurer for purposes of liability coverage as compared to UM/UIM coverage; in the case of UM/UIM coverage, "the risk is defined by the negligence of the public at large").

$100,000/$300,000 UM/UIM coverage on each of the four household vehicles, matching their liability coverage. The family elects $100,000/$300,000 coverage on one vehicle and $15,000/$30,000 coverage on the other three vehicles. Insurer charges X dollars for one vehicle and Y dollars for the remaining vehicles.[39] An essential premise of plaintiffs' argument is that the amount charged for the $100,000/$300,000 coverage is greater than the cost for $15,000/$30,000 coverage.

Plaintiffs' theory is that, because UM/UIM coverage is personal or travels with the insured, plaintiffs need only carry $100,000/$300,000 coverage on one household vehicle and the statutory minimum on any other household vehicle. By offering and receiving premiums for coverage for $100,000/$300,000 on more than one household vehicle, defendant insurers are providing illusory coverage thereby receiving excessive premiums. This practice is unfair, plaintiffs complain, because only one vehicle at the higher coverage limit is necessary to provide the higher protection. Plaintiffs argue that insurers are getting something-for-nothing; that is, insurers are receiving additional premiums for greater-than-minimum coverage when they do not assume additional risk on the additional vehicles.

Insurers counter that the entire basis of plaintiffs' theory is faulty because the household

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[39] Attached hereto as Appendix A is a table setting forth the number of household vehicles and the charges for the UM/UIM coverage for each of the plaintiffs in the ten cases consolidated before the Court for this Motion for Summary Judgment. The amount may be expressed on a per vehicle basis (*i.e.*, in the case of State Farm) or on a lump sum basis (*i.e.*, in the case of Donegal).

policy that provides for the higher UM/UIM coverage on each vehicle provides the higher coverage limits to non-relative permissive users and occupants. Insurers agree that under the Court's hypothetical there is no additional benefit to the insured and his or her family because the highest coverage is personal regardless of which vehicle a family member may be operating at the time of an accident. Insurers argue that the benefit to an insured and therefore the increased risk to the insurer for higher UM/UIM coverage is for those persons occupying the vehicle that are not a part of the insured's family; *i.e.*, permissive drivers or guests. As to a permissive driver or guest, the insurance coverage is based upon the UM/UIM coverage for the specific vehicle he or she occupies. The Court agrees.

The Delaware Code requires UM/UIM insurance for all occupants of the vehicle at a minimum level or at a level that mirrors liability coverage. The insured and his household members may have additional personal coverage up to the highest UM/UIM coverage on any vehicle insured under the policy because that coverage is "personal" to them. The household members are the ones contracting with the insurer for coverage. The coverage is personal to the household members because they, personally, chose and purchased higher policy coverage. All of the policies before the Court distinguish between the insured and his or her household members from third party permissive drivers and guests.[40] The Court concludes the UM/UIM coverage is *not* personal to a third party

[40] A common example of the definition of an "insured" under the UM/UIM coverage portion of a policy is contained herein: "We will pay damages, including derivative claims, which are due by law to you or a relative from the owner or driver of an uninsured motor vehicle because of bodily injury suffered by you or a relative, and because of property damage." Nationwide Auto Policy Declarations, attached hereto as Appendix B, at p. U1.

driver or guest. To allow a third party driver or guest to obtain the higher coverage than the insurance limits on the vehicle he occupies by considering coverage on a vehicle to which he is a legal stranger as "personal" to the third party would turn contract law on its head.

Frank v. Horizon Assurance Co.[41] held that the coverage on a higher insured vehicle was available to an insured even if that vehicle was not involved in the collision or accident from which injuries resulted because the coverage is *personal to the insured.* There is, however, nothing in *Frank* to suggest this personal coverage somehow becomes personal to third parties.

Plaintiffs argue that in any multi-vehicle policy the insured need only have one vehicle insured at $100,000/$300,000 with the remaining vehicles insured at the statutory minimum of $15,000/$30,000. But an insured can opt out of UM/UIM coverage if done so in writing.[42] As plaintiffs frame the issue, an insured would not need or want *any* UM/UIM, including the statutory minimum, on a household vehicle so long as at least one household vehicle carried the maximum coverage. An insured could opt out of all UM/UIM coverage on the other household vehicles and not only would the insured get the higher benefits of the coverage on a vehicle not involved in the accident but so would third parties.[43]

Plaintiffs' theory of the case also defies business common sense. Pursuant to plaintiffs' position, the higher coverage on a single vehicle provides the higher coverage on *all* occupants and users of *all* household vehicles. While this is true as to the insured as defined by the policy, because

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[41] 553 A.2d 1199 (Del. 1989).

[42] 18 *Del. C.* § 3902(a)(1).

[43] Whether or not any insurer would enter into such an insurance contract seems doubtful but that is not the issue before the Court.

it is personal coverage, the insurer's risk is known and limited to those persons covered by the policy definition.[44] In the above hypothetical, the insured would include husband, wife, and their two children. Theoretically, three vehicles could be involved in accidents that would trigger their personal coverage based upon the maximum insurance only on the fourth vehicle ($100,000/$300,000). The insurer can assess this risk of the personal coverage and make a business decision as to the appropriate premium to charge for such coverage. But the plaintiffs would have the insurer provide the same coverage for every other potential third party user and guest for the same premium, or up to sixteen additional insureds, using the Court's hypothetical and assuming one household driver per vehicle and four passengers per vehicle. If the insurer must provide the higher coverage for all of these third parties then certainly the insurer would charge a higher premium for the potential risk posed by this example. This fact simply means that even if the insurer had to provide the higher coverage because it was somehow personal to the third party occupants, the insurer would charge a higher premium regardless if that premium was on the single vehicle with $100,000/$300,000 coverage or spread out among all the household vehicles.[45] This reality, in turn,

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[44] *See* Nationwide Auto Policy Declarations, attached hereto as Appendix B, at p. U1.

[45] Whether the expanded costs to the insured are carried on one vehicle or divided among multiple vehicles, the bottom line is the risk exposure and premiums charged should be in line. This question is not to be answered by a judge or jury. Nevertheless, I note the premiums for the multi-vehicle households do not appear out of balance regardless of whether the premium is charged on a per vehicle basis or in a lump sum basis.

takes us back to defendant insurers' argument that the Court lacks subject matter jurisdiction because this area is the Insurance Commissioner's bailiwick; this argument was considered *supra*, Part III.

Case law from the Delaware Supreme Court and Superior Court has established that UM/UIM coverage is personal to the insured; that is, higher coverage on one vehicle on a multi-vehicle policy provides personal coverage not only on the remaining vehicles but personally follows the defined insureds to accidents not even involving any of the vehicles covered by the policy. Personal pertains to the person purchasing the coverage.[46] Case law permits this personal coverage to be reformed to the maximum amount permitted by law in the event the insurer did not offer the insured the opportunity to purchase the higher coverage.[47] Nothing in these consolidated cases before the Court suggests that a third party stranger to the insurance contract who is a permissive driver or guest would have the right to reform the contract to allow the third party higher coverage. Indeed, Delaware courts have held otherwise. In *Garnett v. One Beacon Insurance Co.*, the plaintiff was an occupant in a vehicle owned by the insured.[48] The plaintiff was injured as the result of a hit-and-run motor vehicle collision. The plaintiff sought reformation of an insured's policy to provide UM benefits. Judge Cooch held the plaintiff did not have standing to seek reformation. There was "no contract but only a right to create a contract. That right belongs to the person who contracted for the insurance in the first place, not to someone who would be covered under the policy if the

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[46] *See Cropper v. State Farm Mut. Auto. Ins. Co.*, 671 A.2d 423, 426 (Del. Super. 1995) ("Once uninsured motorist coverage is purchased, *the insurance consumer* is entitled to secure the full extent of the benefit which the law requires to be offered.") (emphasis added).

[47] *Arms*, 477 A.2d at 1065-66.

[48] 2002 WL 1732371 (Del. Super.)

contracting party exercises that right."[49] Judge Cooch relied upon another Superior Court case, *Menefee v. State Farm Mutual Automobile Insurance Co.*,[50] in his decision. In *Menefee*, a permissive third party driver sought a declaratory judgment that the UM/UIM coverage on the vehicle that she was driving was equal to the liability coverage on the vehicle instead of UM/UIM coverage provided by the policy. The plaintiff's argument was premised on case law finding an insurer is deemed to have left a continuing offer of coverage outstanding unless and until the insurer complies with the statutory requirement that it offer additional UM coverage. The court observed:

> It thus appears that the purpose of [§ 3902(b)] is to promote informed decisions on uninsured motorist coverage. This is why the remedy is a continuing offer of greater coverage, which the contracting party may choose to accept or reject. Although it would seem highly unlikely that a contracting party would ever reject such an offer after a collision with an uninsured motorist, the possibility of rejection might be greater when the injured person is a third party. There might be, at least in theory, countervailing considerations, such as the cost of the premiums for the period for which the additional coverage would be retroactively provided and the effect of a claim on later premiums.[51]

The court ultimately concluded that the defendant insurer had not violated a right of the plaintiff by failing to comply with the statute and, therefore, the plaintiff did not have standing to sue.

The Court of Chancery has also found third party beneficiaries do not have standing to seek to reform an automobile insurance policy to provide for UM/UIM benefits at a higher rate due to a

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[49] *Id.*, at *4 (quoting *Menafee v. State Farm Mut. Auto. Ins. Co.*, 1986 WL 6590 (Del. Super.)).

[50] 1986 WL 6590 (Del. Super.)

[51] *Id.*, at *2 .

violation of the defendant insurer's obligation to offer additional coverage.[52]

[52] *Malone v. United States Fid. & Guar. Co.*, 1987 WL 18107 (Del. Ch. 1987).

Plaintiffs' approach *would* permit a third party to so reform the policy. However, the above-cited cases clearly recognize there is a difference between the benefits to the named insured and the benefits to others who may have coverage as third party beneficiaries.

Plaintiffs also argue that by limiting third party permissive users to the UM/UIM vehicle policy limits the Court is impermissibly treating those insureds in the vehicle as "class one" persons and the third party users as "class two" persons. Class one persons would be those persons who are named insureds who may obtain the advantage of higher UM/UIM coverage carried on another household vehicle. Class two persons would be those persons injured in an accident who are limited to the vehicle-specific UM/UIM coverage limits.

Plaintiffs contend that Judge Herlihy rejected such classifications in *State Farm Mutual Automobile Insurance Co. v. Harris.*[53] *Harris* involved the purchase of insurance by a union and the question before the court was whether or not a business agent fell within the definition of an "insured" under the union's policy. If so, "stacking"[54] would be permitted because the union had purchased separate policies of insurance for its two vehicles. Judge Herlihy found the policy to be ambiguous[55] and ultimately decided the business agent was an expected insured. His rejection of classifications of insureds was limited to the facts of that case. Those facts are not present here and Judge Herlihy's comments regarding the appropriateness of classification are not implicated in the cases pending before the Court. Judge Herlihy noted, "A 'class one' insured is entitled to stack but a

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[53] 1996 WL 280770 (Del. Super.).

[54] "Stacking" is the ability of an insured to add the insurance coverage provided under one policy to that provided under another policy to obtain higher coverage.

[55] Judge Herlihy so found because the term "person" as used in the policy to define the insured did not apply when the insured is an unincorporated association.

'class two' person cannot. This Court *at this point* sees no need to create such classifications nor any current Delaware authority to do so."[56] I find the statute and case law do permit classification in the area of UM/UIM coverage. As noted *supra*, minimum insurance is required by statute unless rejected in writing. Case law treats a person acquiring UM/UIM coverage as acquiring it personally. Thus, the insured may have the benefit of his or her personally purchased higher insurance. A permissive occupant who is injured must rely on the insurance purchased for the vehicle he or she occupies. Moreover, the case law rejecting a third party's standing to reform an insurance policy to provide for higher UM/UIM coverage supports classification in this area.

Insurers argue that Judge Ableman's decision in *Lewis v. American Independent Insurance Co.*,[57] should end the debate as she recognized that, by making premium payments for insurance coverage on multiple vehicles under the same policy, the insured derived multiple benefits. As in *Harris*, the ruling by Judge Ableman must be considered in the context of the issue before the court at the time. Judge Ableman denied the defendant insured's application to stack UM/UIM coverage based upon the language of 18 *Del. C.* § 3902(c). She rejected the insured's argument that, if stacking is unavailable, then the premiums for UM/UIM on multiple vehicles insured under the same policy are not worth the price paid. This finding is helpful to insurers but, because the anti-stacking statute controlled that case's outcome, Judge Ableman's language is dicta. Her comments were limited to the rejection of the argument that payment of multiple UM/UIM premiums entitled one to get additional coverage by way of stacking.

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[56] *Harris*, 1996 WL 280770, at *5 (emphasis added).

[57] 2004 WL 1426964 (Del. Super.).

All of the above leads the Court to reject plaintiffs' argument that defendant insurers' practice of offering and providing greater-than-minimum UM/UIM coverage on more than one household vehicle violates Delaware law. In summary, the following principles apply to UM/UIM coverage under Delaware law:

(a) The insured and his relatives residing in his household have UM/UIM for personal injuries caused by any uninsured or underinsured driver. This coverage is personal and does not require one of the insured's vehicles to be involved in the accident causing the personal injuries.

(b) UM/UIM coverage for other persons provides benefits while the persons occupy the insured's automobile. Here, there is a direct connection to a requirement that the insured's automobile be involved in the accident.

It is reasonable to limit a third party's UM/UIM coverage to the UM/UIM coverage on the involved vehicle. Moreover, it is *unreasonable* to insert third party permissive users into the shoes of the insured.[58] The policies clearly differentiate coverage between the class of users. The classification of insureds simply recognizes that the person purchasing the policy and his household relatives are acquiring greater-than-minimum coverage that is personal and would even provide coverage if the insured were a pedestrian but injured by an uninsured motor vehicle. Delaware law and public policy permit this classification.

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[58] *See Harris*, 1996 WL 280770, at * 4 (discussing reasonable expectation of the parties); *Ruggiero v. Montgomery Mut. Ins. Co.*, 2004 WL 1543234, at * 3 (Del. Super.) (contemplating the insured's reasonable expectation of coverage); *Garnett*, 2002 WL 1732371.

Plaintiffs' position defies basic tenets of contract law, insurance law, and common sense. The bottom line is that an insurer's provision of increased policy coverage for "other persons" is not illusory and provides a meaningful benefit to the insured.

PART IV - B: PLAINTIFFS' "IN THE ALTERNATIVE" ARGUMENT

Plaintiffs also argue that if the Court accepts defendant insurers' theory that they are, in fact, providing a meaningful benefit to plaintiffs, plaintiffs have nevertheless successfully pled claims of bad faith breach of contract and statutory consumer fraud. Plaintiffs contend insurers need to disclose explicitly the nature of the benefit received by the purchase of additional UM/UIM coverage on more than one household vehicle. Specifically, plaintiffs argue defendants must inform consumers that the additional coverage would only benefit non-household members. The Court finds plaintiffs' contention without merit. The policies submitted to the Court clearly state that a permissive user or guest passenger is entitled to UM/UIM coverage in the limits applicable to the vehicle from which his status as an insured arises. Plaintiffs have not identified any specific misrepresentation or omission by the defendant insurers. Communication regarding the extent of coverage provided is best left to the interaction between the customer, the insurance company, and the Insurance Commissioner. The Court will not interfere, absent extraordinary circumstances. Traveling down this path would create a nightmare of ever-expanding required "disclosures" for every policy of insurance.

In sum, should an appellate court conclude this Court has jurisdiction over plaintiffs' complaints, defendants' Motions for Summary Judgment are granted on their merits because the Court rejects plaintiffs' claim that insurers provide illusory UM/UIM coverage.

PART V: CONCLUSION

For the reasons set forth herein, defendant insurers' Consolidated Motions for Summary Judgment are granted on procedural or, in the alternative, substantive grounds.

IT IS SO ORDERED.

EXHIBIT B

*1997 Del. Super. LEXIS 515, **

John **Fisher** v. **National** Union Fire Insurance Company of Pittsburgh

C.A. No. 95C-06-307-WTQ

SUPERIOR COURT OF DELAWARE, NEW CASTLE

1997 Del. Super. LEXIS 515

September 3, 1997, Submitted
December 11, 1997, Decided

SUBSEQUENT HISTORY: **[*1]** Released for Publication by the Court January 16, 1998.

DISPOSITION: Opinion and Order on Cross-Motions for Summary Judgment -- PLAINTIFF'S MOTION GRANTED; DEFENDANT'S MOTION DENIED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff patrolman and defendant insurer filed motions for summary judgment in the patrolman's action seeking a declaratory judgment that he was entitled to personal injury (PIP) and uninsured motorist (UM) benefits under a policy issued by the insurer.

OVERVIEW: The patrolman was dispatched to investigate a suspicious vehicle in a parking lot. The patrolman exited his patrol car and approached the vehicle. The driver, who was uninsured, began to drive away. The patrolman was returning to his patrol car to give chase when the driver ran him over. The patrolman sustained serious injuries. He filed a claim with the insurer, which provided coverage for the county's patrol vehicles, for PIP and UM benefits. The insurer denied the claim. The patrolman filed an action seeking a declaratory judgment that he was entitled to such benefits. The trial court granted summary judgment to the patrolman, holding that he was entitled to benefits because he was "occupying" his patrol car when he was struck. The decision was reversed on appeal. The patrolman filed a second motion for summary judgment, claiming that he fell within the definition of an "insured" under the policy's PIP and UM provisions. The court granted the motion, holding that the policy was ambiguous as to who qualified as an "insured," that the policy was thus to be construed against the insurer, and that it was reasonable to include the patrolman as an insured under the policy.

OUTCOME: The court granted the patrolman's motion for summary judgment and denied the insurer's motion for summary judgment.

CORE TERMS: insured, coverage, ambiguous, family member, endorsement, bodily injury, insurance policy, uninsured motorist, motor vehicle, insurance contract, personal injury, ambiguity, pertinent part, uninsured, named insured, driver, reasonable expectations, underinsured, construe, insurer, patrol cars, occupying, underinsured motorist, insured motor vehicle, contract language, loss of use, self-propelled, watercraft, inclusion, aircraft

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COUNSEL: Richard A. Zappa, Esquire, Matthew P. Denn, Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, DE.

William J. Cattie, III, Esquire, Heckler & Cattie, Wilmington, DE.

JUDGES: WILLIAM T. QUILLEN, JUDGE.

OPINION BY: WILLIAM T. QUILLEN

OPINION

Letter Opinion and Order on Cross-Motions for Summary Judgment

This is the Court's decision after oral argument on the Cross-Motions for Summary Judgment. For the reasons stated herein, Plaintiff's Motion is GRANTED and Defendant's Motion is DENIED.

FACTS

On December 7, 1993, Plaintiff John Fisher ("Plaintiff" or "Fisher" herein), while on duty as a New Castle County Police patrolman, was injured as a result of being struck by an uninsured motorist. There is no material dispute surrounding the circumstances of the collision itself. Fisher had been dispatched by radio to investigate a suspicious vehicle in an apartment complex parking lot. Fisher and his backup, Patrolman Kastner ("Kastner"), arrived at the scene to investigate. The officers exited the patrol cars **[*2]** and left the engines running. The officers approached the vehicle. Upon tapping the driver's side window, the driver of the parked vehicle started the car and proceeded to move the car in reverse out of the parking space. The driver then changed direction and headed towards Fisher. Fisher was struck and pinned underneath the vehicle. At the time Fisher was hit, he was returning to his patrol car to pursue the fleeing vehicle and was ten to twenty-five feet from the patrol car.

Fisher suffered serious injuries to his spine and head and incurred hospital, medical and rehabilitative care expenses. Fisher brought a claim against the Defendant, New Castle County's patrol vehicle insurer, National Union Fire Insurance Company of Pittsburgh ("Defendant" or "National Union" herein). The National Union policy provided uninsured/underinsured motorist coverage ("UM coverage") in the amount of $ 1,000,000. Additionally, the policy provided Personal Injury Protection coverage ("PIP coverage") in the amount of $ 300,000. [1]

FOOTNOTES

1 The amount of the coverage obviously makes the case very important to Fisher, who was, as noted, severely injured and would hardly be made even financially whole by workers' compensation.

[*3] Fisher claimed UM and PIP coverage under National Union's policy for uninsured benefits.

National Union denied coverage asserting that this was a business insurance policy and the named insured was New Castle County, Delaware. Fisher filed for a declaratory judgment seeking a declaration that National Union must legally provide $ 1,000,000 UM coverage and $ 300,000 PIP coverage. Fisher argued that he was "occupying" his vehicle in the context of insurance coverage. This Court granted Fisher's Motion for Summary Judgment, finding that Fisher was "occupying" his vehicle at the time of the accident and therefore is entitled to UM and PIP benefits. The Supreme Court of Delaware helpfully clarified the murky area of law surrounding the issue of "occupancy" as used in the insurance context. [2] The Supreme Court reversed the Superior Court's ruling finding that Fisher's proximity to the vehicle at the time of the accident did not qualify him as "occupying" the vehicle in the insurance context.

FOOTNOTES

2 The Supreme Court of Delaware in *Fisher v. National Union Fire Ins.* Del. Supr., 692 A.2d 892, 896-98 (1997) held that an individual must be either within a reasonable geographic perimeter of an insured vehicle or engaged in a task related to the operation of the vehicle at the time injuries are sustained in order to qualify as an "occupant" of that vehicle for purposes of Personal Injury Protection and Uninsured Motorist/Underinsured Motorist Insurance.

[*4] Fisher has now filed a second Motion for Summary Judgment asserting that he is eligible for coverage under the "Who Is An Insured" provision of the National Union policy because the policy is ambiguous.

The provisions of the National Union policy which are in dispute are the "Who Is An Insured" sections of both the Delaware Personal Injury Protection Endorsement and the Delaware Uninsured Motorists Coverage Endorsement. *See* Pl.'s Mot. Summ. J., Ex. A. The named insured in the National Union policy is New Castle County, Delaware.

Subsection B of the Delaware Personal Injury Protection Endorsement states in pertinent part:

> Who Is An Insured
>
> 1. You.
>
> 2. If you are an individual, any "family member."

The Personal Injury Protection Endorsement also sets forth a specific definition of "insured" which includes "you or any 'family member' injured while a pedestrian."

Subsection B of the Delaware Uninsured Motorists Coverage Endorsement states in pertinent part:

> Who Is An Insured
>
> 1. You.
>
> 2. If you are an individual, any "family member."

The Delaware Uninsured Motorist Coverage Endorsement clause reads in pertinent part:

> We will pay all sums the **[*5]** "insured" is legally entitled to recover as damages from the owner or driver of:

> a. An "uninsured motor vehicle" or an "underinsured motor vehicle" because of "bodily injury" sustained by the "insured" caused by an "accident;" . . . .

DISCUSSION

The first line of analysis in an insurance contract dispute is whether the contract is ambiguous. This Court will give clear and unambiguous language its plain meaning. *Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co.*, Del. Supr., 616 A.2d 1192, 1196 (1992). When an ambiguity is found in an insurance contract, it is construed against the insurer. *See National Union Fire Ins. Co. of Pittsburgh v. Stauffer Chem. Co.*, Del. Super., 558 A.2d 1091, 1093 (1989); *Delledonne v. State Farm Mut. Auto. Ins. Co.*, Del. Super., 621 A.2d 350, 352 (1992). However, an insurance contract is not rendered ambiguous solely because parties do not agree as to its construction. *Rhone-Poulenc*, 616 A.2d at 1196. Instead, contract language must be susceptible to two or more reasonable interpretations to be deemed ambiguous. *Id.* (citing *Derrickson v. American National Fire Ins. Co.*, 1987 Del. Super. LEXIS 1198, *3, Del. Super., C.A. No. 84 C-SE-14, **[*6]** Ridgely, J., 1987 WL 14884 (June 30, 1987)). If language in an insurance contract is deemed to be ambiguous, the Court will construe the language in a manner that would reflect the reasonable expectations of the insured. *Hallowell v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 443 A.2d 925, 927 (1982). [3]

FOOTNOTES

3 While this opinion perhaps does not show it, the author is very sympathetic with the drafting problems faced by insurers and understands that each insurance policy cannot be tailored for each insured. But judicial opinions seem sometimes to suggest otherwise and the precedent cited herein pays little, if any, tribute to the mass drafting problems in an age of compulsory insurance.

Fisher argues that the contract language is ambiguous insofar as the definition of an "insured" is concerned, and thus should be construed against the drafter, National Union. Fisher points to the provision defining insured in both the UM and PIP portions of the policy. Both sections of the policy identify "New Castle **[*7]** County, Delaware" as the named insured. The policy, however, lists those persons who are covered as including "you" and "if 'you' are an individual, any family member'." Fisher asserts that the use of the personal pronoun "you" in a business insurance policy renders the provision ambiguous as a matter of law.

By way of response, National Union asserts that the "Who Is An Insured" provision is made clear by way of the face sheet of the policy which, after describing the insured as New Castle County, Delaware contains the headline: "FORM OF BUSINESS: []CORPORATION []PARTNERSHIP [] INDIVIDUAL OR []OTHER." National Union argues that because the "Form of Business" has been checked off as "Other," the "If you are an individual, any 'family member'" provision in the Delaware Uninsured Motorist Coverage Endorsement is made inapplicable. Defendant asserts that this provision should not be construed by this Court because the prerequisite for Subsection B.2 of that Endorsement to apply (the named insured being designated as an individual) has not occurred.

"[A] court must construe [an] agreement as a whole giving effect to all provisions therein." *E.I. du Pont de Nemours & Co.* **[*8]** *v. Shell Oil Co.*, Del. Supr., 498 A.2d 1108, 1113 (1985). Taking a broad view of this insurance contract, the Court finds the National Union policy to be unclear and ambiguous. This Court in *Nationwide Mutual Ins. Co. v. Hockessin Const. Inc.*, 1996 Del. Super. LEXIS 263, Del. Super., C.A. No. 93C-03-057-SCD, DelPesco, J. (May 15, 1996), found this "if you are an individual, any 'family member'" language, identical to that of the National Union policy, to be ambiguous. The Court, relying on the Connecticut case of *Hansen v. Ohio Cas. Ins. Co.*, 1995 Conn. Super. LEXIS 3246, Conn. Super., WL 731666, Meadow, J. (Nov.

16, 1995), found that the "if you are an individual" language did not overcome the ambiguity in question created by utilizing family member language in a policy insuring a corporation. *Hockessin Constr. Inc.*, 1996 Del. Super. LEXIS 263, *7. *And see Agosto v. Aetna Casualty and Surety Co.*, Conn. Supr., 239 Conn. 549, 687 A.2d 1267 (1996). The Connecticut Court further found the use of the term "bodily injury" in the UM endorsement to be ambiguous because a corporation cannot sustain bodily injury. *Hansen*, 1995 Conn. Super. LEXIS 3246, *10, WL 731666.

Delaware Courts have noted that a business entity such as a corporation or governmental entity cannot sustain bodily injury **[*9]** or have family members. *Derrickson v. American Nat'l Fire Ins. Co.*, Del. Supr., 538 A.2d 1113, 1988 Del. LEXIS 4, *5 (1988) (ORDER) (finding commercial automobile policy ambiguous because corporations cannot have family members); *Hockessin Constr. Inc.*, 1996 Del. Super. LEXIS 263, *7 (finding insurance policy ambiguous because corporations cannot have "family members" or suffer "bodily injury"); *contra DelCollo v. Houston*, 1986 Del. Super. LEXIS 1236, Del. Super., C.A. No. 83C-JA-121, Christie, C.J. (May 7, 1986) (finding ambiguity does not exist because "[a] reasonable person would know that a corporation cannot sustain bodily injury"). National Union argues that although New Castle County cannot recover for bodily injury, it is necessary that it be an insured under the policy because it is mandated by statute that it be able to recover for other forms of damage such as damage to the insured motor vehicle, aircraft, watercraft, or self-propelled mobile equipment. [4] National Union is essentially arguing that its hands are tied, and the inclusion of the bodily injury language in the endorsements should be overlooked in light of its compliance with a legislative mandate. The Court, however, is not disputing **[*10]** the requirements for coverage; instead the Court is taking issue with the inclusion of the term "bodily injury" in a business insurance policy in which the insured cannot suffer bodily injury. This language only injects confusion and ambiguity into the insurance policy. Presumably, there is an expectation that someone should be able to recover for personal injury.

FOOTNOTES

4 *See* 21 *Del. C.* § 2118(a)(3) and (4) (1995), which states in pertinent part:

> (a) No owner of a motor vehicle registered in this State, other than a self-insurer pursuant to § 2904 of this title, shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum coverage:
>
> (3) Compensation for damage to property arising as a result of an accident involving the motor vehicle, other than damage to a motor vehicle, aircraft, watercraft, self-propelled mobile equipment and any property in or upon any of the aforementioned, with the minimum limits of $ 10,000 for any 1 accident.
>
> (4) Compensation for damage to the insured motor vehicle, including loss of use of the motor vehicle, not to exceed the actual cash value of the vehicle at the time of the loss and $ 10 per day, with a maximum payment of $ 300, for loss of use of such vehicle.

[*11] The Court finds the policy construed here to be virtually identical to the policy in *Hockessin Constr. Inc.* Following the precedent set in *Hockessin Constr. Inc.*, the Court holds that the National Union Policy is ambiguous.

The Court next turns to the issue of interpretation of a written contract. "The proper construction of any contract, including an insurance contract, is purely a question of law." *Rhone-Poulenc*, 616 A.2d 1192 at 1195; *see also Klair v. Reese*, Del. Supr., 531 A.2d 219, 222 (1987); *Pellaton v. Bank of New York*, Del. Supr., 592 A.2d 473, 479 (1991); *Playtex FP, Inc. v. Columbia Casualty*

Co., Del. Super., 622 A.2d 1074, 1076 (1992). When a contract is found to be ambiguous, it should be construed against the drafter. *See* Restatement (Second) of Contracts, § 206 (1981); *Hallowell*, 443 A.2d at 926. Further the Court will construe ambiguous language in a manner that would reflect the reasonable expectations of the insured. *Hallowell*, 443 A.2d at 927. Due to the ambiguity caused by the use of family-oriented language in a business insurance policy, this Court finds that Fisher should reasonably be included as an insured under the **[*12]** National Union policy. New Castle County cannot sustain bodily injuries. Further New Castle County cannot have families. Therefore the terms "you" and "individual" can both be construed to include plaintiff Fisher who was assigned to the insured vehicle during which time he was injured.

Additionally, by purchasing additional coverage through the Delaware Uninsured Motorist Coverage Endorsement, it is reasonable to assume that New Castle County expected to insure the users of its vehicles from the very type of harm caused to Fisher by an underinsured motorist. National Union argues that reading the policy to include Fisher would increase the amount of persons covered under this insurance policy. National Union asserts that the "if you are an individual, any 'family member'" language could conceivably include a total of 3,120 persons for uninsured and underinsured coverage under the National Union Policy. [5] The Court rejects National Union's assertion as to the potentially astronomical number of individuals to be insured based upon the construction given to the National Union policy by this Court. In *State Farm Mut. Auto. Ins. Co., v. Harris*, 1996 Del. Super. LEXIS 164, Del. Super., C.A. No. 94C-04-048, Herlihy, **[*13]** J. (Mar. 18, 1996), the Court found that the reasonable expectation of the parties was not to include the entire 1,000 to 1,100 Union members as insureds but to include only those employees authorized to drive the vehicles. Similarly, in the case at bar, the coverage provided to "you" or "If 'you' are an individual, any 'family member'," would be include only those individuals who New Castle County reasonably expected to be insured while using its motor vehicles.

FOOTNOTES

5 By way of affidavit, the Defendant presented statistics by Kristin Dorothy that New Castle County has approximately 1,200 employees. According to the *State of Delaware Consolidated Plan* May 1995, the average number of persons in a household in New Castle County is 2.6.

CONCLUSION

The Court finds and declares that Plaintiff John Fisher was included as an insured under the National Union policy on December 7, 1993. The Plaintiff's Motion for Summary Judgement is GRANTED and Defendant's Cross-Motion for Summary Judgment is DENIED. IT IS SO **[*14]** ORDERED.

William T. Quillen

EXHIBIT C

*2014 Del. Super. LEXIS 238, **

COTTY JAAK **LUKK,** Plaintiff, v. **STATE** FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.

C.A. N12C-06-161 PRW

SUPERIOR COURT OF DELAWARE, NEW CASTLE

2014 Del. Super. LEXIS 238

March 31, 2014, Submitted
March 31, 2014, Decided
May 12, 2014, Opinion Issued

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

SUBSEQUENT HISTORY: Related proceeding at, Summary judgment proceeding at Lukk v. State Farm Mut. Auto. Ins. Co., 2014 Del. Super. LEXIS 430 (Del. Super. Ct., Aug. 27, 2014)

PRIOR HISTORY: [*1]
Upon Plaintiff's Motion for Summary Judgment.

DISPOSITION: DENIED.

CASE SUMMARY

OVERVIEW: HOLDINGS: [1]-The adjective "primarily" included in the "Resident Relative" provision of plaintiff's father's policy, which limited UIM coverage to relatives who resided primarily with him, merely defined who was eligible for coverage under the terms of the policy and did not reduce or limit coverage minimums prescribed by Del. Code Ann. tit. 18, § 3902, nor was it inconsistent with other requirements of § 3902; [2]-Under the policy, plaintiff could "reside primarily" only in one residence; [3]-There was a genuine issue of material fact as to whether plaintiff resided primarily with his father or his mother.

OUTCOME: Motion for summary judgment denied.

CORE TERMS: coverage, resident, insured, public policy, summary judgment, insurance policy, household, reside, named insured, registered, uninsured, void, underinsured, issues of material fact, custody, genuine, primary residence, motor vehicle, supplemental, motorist, driver, dictionary, underinsured motorist benefits, bodily injury, statutory minimum, enforceable, adjective, insurance coverage, policy provisions, class of persons

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COUNSEL: Joseph J. Longobardi, III, Esquire, Longobardi & Boyle, LLC, Wilmington, Delaware, Attorney for Plaintiff.

Colin M. Shalk, Esquire, Casarino, Christman, Shalk, Ransom & Doss, P.A., Wilmington, Delaware, Attorney for Defendant.

JUDGES: Paul R. Wallace, Judge.

OPINION BY: Paul R. Wallace

OPINION

MEMORANDUM OPINION

WALLACE, J.

I. INTRODUCTION

Plaintiff Cotty Jaak Lukk ("Mr. Lukk") has filed a claim against State Farm Mutual Automobile Insurance Company ("State Farm") for breach of contract for failing to pay underinsured motorist benefits pursuant Mr. Lukk's father's State Farm insurance policy (the "Policy").[1] Mr. Lukk alleges that he is entitled to benefits under a "Resident Relative" clause in the Policy.[2] He has moved for summary judgment, urging, *inter alia*, the Court to interpret the Policy's primary residency requirement as void against public policy.[3] State Farm argues that: (1) the Policy's language is valid and enforceable; (2) that language does not allow Mr. Lukk's father to claim that his son "resides primarily" in more than one household; and (3) the evidence demonstrates that Mr. Lukk did not primarily reside with his father as the Policy requires.[4] For **[*2]** the following reasons, Mr. Lukk's Motion for Summary Judgment is **DENIED**.

FOOTNOTES

1 Complaint, dated Jun. 19, 2012, at ¶10 [hereinafter "Complaint"].

2 Complaint at ¶9.

3 Pltf's Mot. For Summary Judgment, dated Jan. 17, 2014, at 3 [hereinafter "Pltf's MSJ"].

4 Deft's Response to Pltf's MSJ, dated Feb. 27, 2014, ¶7 [hereinafter "Deft's Resp to Pltf's MSJ"].

II. FACTUAL AND PRDCEDURAL BACKGRDUND

On June 6, 2010, Mr. Lukk was seriously injured in an accident that took place in Indiana County,

Pennsylvania while he was the passenger in a friend's truck.[5] Mr. Lukk's friend was liable for the one-vehicle accident and Mr. Lukk collected the $35,000.00 policy limit from his friend's insurance company.[6] He then made a claim for Underinsured Motorist Coverage ("UIM") through the Policy.[7] State Farm denied coverage alleging that if Mr. Lukk's primary residence was with a parent, it was with his mother and, thus, he was not covered under the Policy.[8]

FOOTNOTES

5 Complaint at ¶3-4; *See* Lukk. Dep. Ex. 2 to Pltf's MSJ at 39-40.

6 Pltf's MSJ at ¶2.

7 Pltf's MSJ at ¶2; Deft's Resp to Pltf's MSJ at ¶1.

8 Pltf's MSJ at ¶2; Deft's Resp to Pltf's MSJ at ¶1.

At the time of the accident, Mr. Lukk was an adult, living in his own apartment and **[*3]** attending a technical college in Western Pennsylvania.[9] During Mr. Lukk's childhood, his parents shared equal custody and he alternated between their houses week-by-week.[10] During his childhood and into adulthood, Mr. Lukk maintained a bedroom with furniture, clothing and personal effects in both his father's and his mother's home.[11] Mr. Lukk's father and mother jointly shared his expenses including his car insurance payments, cell phone payments and spending money.[12] Mr. Lukk had access to two vehicles, one registered to his father and the other registered to his mother.[13] Mr. Lukk's primary source of income was from both his parents and was additionally supplemented by student loans.[14]

FOOTNOTES

9 Pltf's MSJ at ¶5; Deft's Resp to Pltf's MSJ at ¶2.

10 Pltf's MSJ at ¶5; Deft's Resp to Pltf's MSJ at ¶2. In 1996, the Delaware Family Court entered a custody order requiring Mr. Lukk's parents to share joint custody of Mr. Lukk. Pltf's MSJ at ¶5.

11 *See* Pltf's MSJ at ¶5. At the time of the accident, Mr. Lukk's mother resided in Chadds Ford, Pennsylvania. His father then-resided in Wilmington, Delaware, but has since moved to Kennett Square, Pennsylvania. Deft's Resp to Pltf's MSJ at ¶2.

12 *See* Lukk Dep. **[*4]** Ex. 2 to Pltf's MSJ. Mr. Lukk's mother paid for his cell phone at the time of the accident, but his father paid for it at other times. The breakdown of which parent paid which particular expenses at what time is not exactly clear, beyond a few specific examples. Nor is it clear what is the percentage breakdown of Mr. Lukk's total economic burden carried by each. No matter what the exact breakdown is, it can be fairly inferred from the record that both Mr. Lukk's mother and father made a good faith effort to divide his expenses and bills equally. Lukk Dep. Ex. 2 to Pltf's MSJ at 2-3.

13 *See* Lukk Dep. Ex. 2 to Pltf's MSJ at 7. Mr. Lukk's primary automobile, a Ford F-150 pickup truck, was registered in his mother's name and was under his mother's insurance policy, although his father helped pay the insurance payments. Mr. Lukk's secondary automobile, a Datsun 280-ZX, was registered in his father's name and was under his father's insurance policy, but was stored in a garage at his mother's house. Lukk Dep. Ex. 2 to Pltf's MSJ at 7-8.

14 Lukk Dep. Ex. 2 to Pltf's MSJ at 9. Mr. Lukk testified that he believed both parents co-signed for his student loans. Lukk Dep. Ex. 2 to Pltf's MSJ at 9.

Mr. **[*5]** Lukk has filed a breach of contract action in this Court against State Farm. [15] Mr. Lukk claims that he incurred substantial medical injuries from the accident while he was an insured resident relative pursuant to the Policy.[16] According to Mr. Lukk, State Farm breached the Policy when it refused to pay him underinsured motorist benefits and he demands full payment of those underinsured motorist benefits, costs and interest.[17] He now seeks summary judgment on this claim.[18]

FOOTNOTES

15 Complaint at ¶10.

16 Complaint at ¶5, 8-10.

17 Complaint at ¶10.

18 Pltf's MSJ at ¶1.

III. PARTIES' CONTENTIONS

Mr. Lukk says that he is entitled to summary judgment because, in his view, the Policy improperly restricts access to uninsured/underinsured motorist benefits and is therefore void as against public policy.[19] Mr. Lukk challenges the Policy's "Resident Relative" definition which states:

> **Resident Relative** means a **person** other than **you**, who resides primarily with the first **person** shown as a named insured on the Declarations Page and who is:
>
> 1. related to that named insured or his or her spouse by blood, marriage, or adoption, including an unmarried and unemancipated child of either who is away at school or otherwise **[*6]** maintains his or her primary residence with that named insured; or
>
> 2. a ward or a foster child of that named insured his or her spouse, or a **person** described in 1. above.[20]

This express language of the Policy, he contends, creates a class of persons, then restricts the scope of the insurance coverage for such persons, and in doing so improperly reduces the minimum coverage benefits provided under 18 *Del. C.* § 3902.[21] Mr. Lukk argues that Delaware's public policy requires this Court to interpret any attempt to limit any person's claim to uninsured/underinsured motorist protection narrowly and against imposing any limitations on coverage.[22] He argues further that he is entitled to UIM benefits because he satisfies the Policy's "Resident Relative" definition which he suggests should account for any person living in more than one residence.[23]

FOOTNOTES

19 Pltf's MSJ at ¶ 6-9.

20 State Farm Car Policy Booklet, at 4, Ex. B to Deft's Resp to Pltf's MSJ (italics and bold in original, underlining added).

21 Eighteen *Del. C.* § 3902(b) states:

> Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident **[*7]** or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.

[22] Pltf's MSJ at ¶7.

[23] Pltf's MSJ at ¶12. In an alternative argument, Mr. Lukk asserts that the Policy language is impermissible because it creates a separate class of persons — children of parents with equal joint custody. He asserts that children raised under an equal joint custody agreement would necessarily have two primary residences. In the instant case, Mr. Lukk was not a minor child whose living circumstances were governed by a custody order at the time of the accident, but an adult. Thus, the Court need not and does not address this argument; it inapplicable here and the Court's ruling here does not decide that issue.

According to State Farm, "the Policy is unambiguous, is not against public policy and, therefore, is enforceable."[24] The Policy's language, State Farm "argues, does not allow Mr. Lukk to claim that he "reside[d] primarily" in more than one household or with more than one parent."[25] Lastly, State Farm "contends that if at the time of the accident he resided primarily with **[*8]** one parent or the other, then the evidence presented demonstrates that Mr. Lukk's primary residence is with his mother. This is so because, among other things, his mother's address was that listed on the Complaint, was listed on his driver's license, was used to determine his school district, and was used for his school loans."[26]

FOOTNOTES

[24] Deft's Resp to Pltf's MSJ at ¶7.

[25] Deft's Resp to Pltf's MSJ at ¶6-7.

[26] Deft's Resp to Pltf's MSJ at ¶2, 7.

IV. Standard of Review

Summary judgment is appropriate where the record indicates that there are no genuine issues of material fact and where, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to summary judgment as a matter of law.[27] The moving party has the burden of proof to show that there are no genuine issues of material fact.[28] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[29] Here the burden did not shift, but even if it arguably did, State Farm "provided sufficient evidence showing a genuine issue of material fact."[30]

FOOTNOTES

[27] Del. Super. Ct. Civ. R. 56(c).

[28] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[29] *Id.* at 681.

[30] This **[*9]** is the case no matter whether the contested language is operable or not. But because determination of the validity and enforceability of that language will be critical to properly instructing the jury in this case, the Court must fist address that question of law.

V. Discussion

A. The adjective "primarily" used in a "Resident Relative" requirement is not *per se*

contrary to Delaware statutory insurance requirements.

Section 3902(a) of Title 18 requires that uninsured motorist coverage be "provided" in or "supplemental" to every automobile insurance policy, unless such coverage is expressly rejected by the insured.[31] And Section 3902(b) requires that each insured be offered the option to purchase additional underinsured bodily injury liability coverage.[32] As a whole, Section 3902 advances the longstanding public policy of ensuring the availability of uninsured and underinsured motorist coverage to "protect innocent persons from impecunious tortfeasors."[33] Section 3902 has been interpreted to include statutory minimum coverage — addressing both monetary and party concerns — which insurance companies must offer to all insureds.[34] Delaware courts have consistently held that policy provisions **[*10]** which reduce or limit uninsured motorist coverage to less than the prescribed amounts are void.[35] And in Delaware, insurance policies may not carve out classes of potential claimants "**based upon the relationship of the tort victim/plaintiff to the tortfeasor/defendant**," for special exclusion from UIM coverage.[36] But that means only that, the Delaware Financial Responsibility Laws and the statute mandating insurance on registered vehicles prohibits the exclusion or restriction of claims of a "household" claimant *against* the tortfeaseor/insured. The operative language here does neither, but instead defines who is covered by the insured's Policy.

FOOTNOTES

31 Eighteen *Del. C.* § 3902 (a) states:

> No policy insuring against liability arising out of the ownership, maintenance or use of any motor vehicle shall be delivered or issued for delivery in this State with respect to any such vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operator of uninsured or hit-and-run vehicles for bodily injury, sickness, disease, including death, **[*11]** or personal property damage resulting from the ownership, maintenance or use of such uninsured or hit-and-run motor vehicle.
>
> Eighteen *Del. C.* § 3902 (a)(1) states in pertinent part: "No such coverage shall be required in or supplemental to a policy when rejected in writing. . ."

32 *See supra* text accompanying note 21.

33 *Frank v. Horizon Assurance Co.*, 553 A.2d 1199, 1201 (Del. 1989). *See* DEL. CODE ANN. tit.18, § 3902 (2013).

34 DEL. CODE ANN. tit.18, § 3902 (2013).

35 *See Frank*, 553 A.2d at 1201-02 (citing *State Farm Mut. Auto. Ins. Co. v. Abramowicz*, 386 A.2d 670, 673 (Del. 1978)).; *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10, 12 (Del. 1995).

36 *Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915, 918 (Del. 1997) (citing *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 560 (Del. 1988)) (emphasis supplied).

Mr. Lukk argues that the adjective "primarily" included in the "Resident Relative" provision of the Policy is impermissible and void because it restricts a class of persons covered by UIM.[37] Mr. Lukk reasons that the adjective acts as a disqualifying exclusion void against public policy.[38] Not so.

FOOTNOTES

37 Pltf's MSJ at ¶¶ 6-9.

[38] Pltf's MSJ at ¶¶ 6-9.

Whether this definition of "Resident Relative" **[*12]** *per se* violates Delaware public policy is a matter of first impression in this Court. This State's well-established case law prohibits broad, categorical exclusions that degrade coverage such that if falls below statutory minimums or excludes an injured's claims because of his or her affiliation to the policy holder who injured him or her.[39] However, the same case law certainly does not void all express insurance policy provisions that may limit coverage.[40] In determining the enforceability of insurance policy provisions, Delaware courts balance the language and nature of the insurance policy, the language, framework and history of the applicable statute, and the overall public policy concerns.[41]

FOOTNOTES

[39] *See Bass v. Horizon Assurance Co.*, 562 A.2d 1194, 1196 (Del. 1989) (rejecting an insurance provision that had an exclusion which completely denied coverage when the insured was convicted of driving of under the influence); *Wagamon*, 541 A.2d at 560 (holding that a broad household exclusion that precluded any claim for bodily injury against the insured when brought by an insured's family member residing with the insured was impermissible because it was in direct conflict with Sections 2118 **[*13]** and 2902); *Seeman*, 702 A.2d at 918 (rejecting a modified household exclusion which limited the liability coverage for household members to the statutory minimum because it violated the public policy encouraging Delaware drivers to purchase more than the statutory minimum); *State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449, 452 (Del. Super. Ct. 1994) (that application a named driver exclusion was "repugnant to the statutory requirements and clear public policy" when it excluded underinsured coverage only when the named driver was driving but not while he was a passenger or pedestrian).

[40] *See* e.g. *Washington*, 641 A.2d at 451 (Our law permits named driver exclusions applicable to household members).

[41] *See Progressive v. Mohr*, 47 A.3d 492, 495-96 (Del. 2012) (reasoning that the language of an insurance policy ran counter to the statute's language, the "apparent purpose" of the statute, and the relevant public policy and concluded that the insurance provision in question was void because it would discourage the insured from acquiring the coverage needed to fully protect himself and his family); *Frank*, 553 A.2d at 1201-02 (interpreting the legislative purpose, the requirements of **[*14]** the statute, and the coverage provided in the insurance policy to conclude that an "other motor vehicle" exclusion would impermissibly deny coverage for all claims arising out of an accident involving a vehicle owned by the insured but not listed on the policy).

The Policy's "Resident Relative" language does not act as the type of broad, categorical exclusions disfavored by Delaware law. The Policy's "Resident Relative" provision merely defines who is eligible for coverage under the terms of the Policy; the adjective "primarily" operating as a qualifying standard for such coverage.

Other states accept just such "resident relative" requirements when considering the availability of UIM coverage.[42] The Policy does not reduce or limit coverage minimums prescribed by Section 3902, nor is it inconsistent with other requirements of Section 3902. In turn, this Court is not convinced that "primarily" used in this "Resident Relative" provision violates any Delaware public policy, but is instead a valid and fully enforceable part of this insurance contract.

FOOTNOTES

[42] See, e.g., *State Farm Mut. Auto. Ins. Co. v. Brown*, 26 So. 3d 1167 (Ala. 2009); *Cole v. State Farm Ins. Co.*, 128 P.3d 171 (Alaska 2006); *Parsons v. State Farm Mut. Auto. Ins. Co.*, 319 Ga. App. 616, 737 S.E.2d 718 (Ga. Ct. App. 2013); **[*15]** *Gaudina v. State Farm Mut. Auto. Ins. Co.*, 2014 IL App (1st) 131264, 380 Ill. Dec. 418, 8 N.E.3d 588 (Ill. App. Ct. March 28, 2014); *Hall v. Shelter Mut. Ins. Co.*, 45 Kan. App. 2d 797, 253 P.3d 377 (Kan. Ct. App. 2012); *Haydel v. State Farm Ins. Co.*, 935 So. 2d 171 (La. Ct. App. 2006); *Wallace v. State Farm Mut. Auto. Ins. Co.*, 2007-Ohio-6373, 2007 WL 4216132 (Ohio Ct. App. 2007); *Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 656 S.E.2d 784 (S.C. Ct. App. 2008); *Bauer v. USAA Cas. Ins. Co.*, 2006 WI App 152, 295 Wis. 2d 481, 720 N.W.2d 187 (Wis. Ct. App. 2006).

Lastly, Mr. Lukk notes that Delaware's overwhelming public policy "establish[s] that the fundamental purposes of 21 *Del. C.* §2118(a) and of 21 *Del. C.* Ch. 29 generally, is to compensate fully victims of car accidents. . . . [and that] [o]ne way to achieve that purpose is to encourage the Delaware driving public to purchase more than the statutorily minimum amount of coverage."[43] While he suggests that the Policy frustrates the overall purpose of Delaware's insurance statutes to require minimum insurance coverage, Mr. Lukk overlooks some salient facts. First, UIM coverage offered under Section 3902 is not a statutorily mandated minimum found in 21 *Del. C.* §2118. Second, the requirement to offer this supplemental coverage [44] was followed **[*16]** here; State Farm offered UIM coverage to Mr. Lukk's father for himself and those relatives who "reside[d] primarily with [him]."

FOOTNOTES

[43] *Mohr*, 47 A.3d at 501-02. Twenty-one *Del. C.* §2118(a) states:

> No owner of a motor vehicle required to be registered in this State, other than a self-insurer pursuant to § 2904 of this title, shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum insurance coverage. . .

[44] *Hurst*, 652 A.2d at14-15 (describing the supplemental and optional nature of Section 3902).

B. There is a genuine issue of material fact with respect whether Mr. Lukk "reside[d] primarily" with his father at the time of the accident.

Delaware courts have noted that generally the determination of "residence . . . is a question of fact, to be answered by an examination of the circumstances of each individual case."[45] A factual determination will only be made on a motion for summary judgment when the underlying facts are not disputed and the inferences drawn from those facts "point inescapably to a single conclusion."[46] Here they do not.

FOOTNOTES

[45] *Fisher v. Novak*, 1990 Del. Super. LEXIS 218, 1990 WL 82159, at *2 (Del. Super. Ct. June 11, 1990). **[*17]** *See Davenport v. Aetna Casualty and Surety Co. of Illinois*, 144 Ga. App. 474, 241 S.E.2d 593 (Ga. Ct. App. 1978) (holding that place of residence is a jury question); *Griffith v. Security Insurance Co. of Hartford*, 167 Conn. 450, 356 A.2d 94, 97 (Conn. 1975) (reasoning that the issue of deciding whether a person is a resident of a household is a factual decision).

[46] *Fisher*, 1990 Del. Super. LEXIS 218, 1990 WL 82159, at *2.

This case is a breach of contract matter and the Court has held that the contested language of the Policy is valid and enforceable. The Policy provides UIM coverage for a "Resident Relative," that is, one who "resides primarily with the first person shown as a named insured on the Declarations Page and who is: (1) related to that named insured . . . including an unmarried and emancipated child of either who is away at school and otherwise maintains his or her primary residence with that named insured."[47] Mr. Lukk believes that he can meet that definition even if he resided equally with his mother and father.[48] State Farm argues that Mr. Lukk can "reside primarily" only in one residence and that the evidence demonstrates that if Mr. Lukk resided primarily with either parent, it was with his mother.[49]

FOOTNOTES

47 State Farm Car Policy Booklet, at 4, **[*18]** Deft's Resp to Pltf's MSJ, Ex. B (emphasis added).

48 Pltf's Rply to Ptfs MSJ, dated Mar. 24, 2014, at ¶4.

49 Deft's Resp to Pltf's MSJ at ¶7.

In determining the common meaning of insurance policy terms, courts have examined and adopted dictionary definitions.[50] The Oxford English Dictionary defines "primarily" as "to a great or the greatest degree; for the most part, mainly."[51] Established case law broadly defines the term "reside" to mean "to live with."[52] Reading these two definitions together, this Court concludes, as have many others construing such language, Mr. Lukk can "reside primarily" only in one residence only and the jury will be so instructed.

FOOTNOTES

50 *Fisher*, 1990 Del. Super. LEXIS 218, 1990 WL 82159, at *2.

51 *Oxford English Dictionary Online*, 2014, *http://www.oed.com/view/Entry/151277?redirectedFrom=primarily#eid* (last visited May 12, 2014); *Merriam-Webster Online Dictionary*, *http://www.merriam-webster.com/dictionary/primarily*) (last visited ay 12, 2014) (defining "primarily as "for the most part").

52 *Fisher*, 1990 Del. Super. LEXIS 218, 1990 WL 82159, at *2; *See also Powell v. State Farm Fire and Cas. Co.*, 1996 Del. Super. LEXIS 94, 1996 WL 190023 (Del. Super. Feb. 27, 1996) (adopting the definition of "reside" articulated in *Fisher*).

The record demonstrates that **[*19]** Mr. Lukk had a designated bedroom in each of his parents' residences, had furniture, clothing and personal effects at each residence, and split his time evenly between his mother and father. Furthermore, Mr. Lukk's parents testified that they attempted to split all of his expenses evenly. While State Farm argues that Mr. Lukk used his mother's address as his address-of-record for school and licensing purposes, these facts are not conclusive as to where Mr. Lukk "reside[d] primarily."

This Court in deciding a summary judgment motion must identify disputed factual issues whose resolution are necessary to decide the case, but the Court must not decide those issues.[53] And "[u]nless the [] Court is reasonably certain that there is no triable issue, it is within the [] Court's discretion to decline to decide the merits of the case in a summary adjudication, and to remit the parties to trial."[54] There exists here a genuine issue of material fact and the jury, as finder of fact, must resolve this issue.

FOOTNOTES

53 *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

54 *Cross v. Hair*, 258 A.2d 277, 278 (Del. 1969) (internal citations omitted).

VI. CONCLUSION

For the foregoing reasons, there remains **[*20]** a genuine issue of material fact and Mr. Lukk has failed to demonstrate he is entitled to summary judgment as a matter of law. Consequently, his Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Paul R. Wallace

Paul R. Wallace, Judge

EXHIBIT D

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

EPIPHANY F. STOMS, individually and as Administratrix of the Estate of DAVID W. STOMS, decedent, and as Guardian ad Litem of ALEXIS D. STOMS and CHAD D. STOMS,	)	
Plaintiff	)	
v.	)	**C.A. No. N14C-01-163 MJB**
FEDERATED SERVICE INSURANCE COMPANY	)	
Defendant	)	

Submitted: August 14, 2014
Decided: November 20, 2014

Upon Plaintiff's Motion for Summary Judgment, **DENIED.**

Upon Defendants' Motion for Summary Judgment, **GRANTED.**

OPINION

Jonathan B. O'Neill, Esquire, Kimmel, Carter, Roman, Peltz & O'Neill, P.A., 56 W. Main Street, Plaza 273, 4th Floor, P.O. Box 8149, Newark, Delaware 19714, *Attorney for Plaintiff.*

James S. Yoder, Esquire, White and Williams LLP, 824 N. Market Street, Suite 902, Wilmington, Delaware 19899, *Attorney for Defendant.*

BRADY, J.

I. INTRODUCTION

On November 3, 2012, David W. Stoms ("Decedent") was involved in an automobile accident with an uninsured driver. Decedent was killed in the accident, and Decedent's minor daughter was seriously injured. At tbe time of his death, Decedent was driving a car owned by his employer, Diamond Motor Sports, Inc. ("Diamond Motor"). The vehicle was insured by Federated Service Insurance Company ("Fedcrated").

Plaintiff Epiphany F. Stoms was married to Decedent and lived with Decedent until his death. Alexis D. Stoms ("Alexis") and Chad D. Stoms ("Chad") are the minor children of Plaintiff and Decedent. On January 18, 2014, Plaintiff filed the instant action on bebalf of herself, on behalf of Decedent's estate, and on behalf of Alexis and Chad, demanding that Federated pay supplemental uninsured motorists benefits, beyond the statutory minimum, to compensate the family for medical expenses, funeral expenses, pain and suffering, and punitive damages against the uninsured motorist.

The parties have both moved for Summary Judgment. A hearing in this Court was held on August 14, 2014, at which the Court determined that the Plaintiff's claim for punitive damages is proper. The Court now finds that Plaintiff's cause of action against Federated is precluded as Decedent did not have supplemental uninsured/underinsured motorists coverage under the Federated policy. For this reason, Plaintiff's Motion for Summary Judgment is **DENIED**; Defendant's Motion for Summary Judgment is **GRANTED**; and Plaintiff's claim for punitive damages is **MOOT**.

II. FACTS

A. The November 3, 2012 Accident

On November 3, 2012, at approximately 10:15 p.m., Decedent and Alexis were involved in a two-car automobile accident (the "Accident") on Delaware Route 1, near Dover, in Kent County, Delaware. Decedent was killed in the Accident, and Alexis was severely injured. It is undisputed that the Accident was caused by the negligent and reckless conduct of the other driver, Matthew E. Bair ("Bair"), an uninsured motorist.

At the time of Accident, Decedent was employed as a "finance manager" at Diamond Motor located in Dover, Delaware. When the Accident occurred, Decedent was driving a 2010 Toyota Yaris, owned by Diamond Motor and registered in Delaware. Decedent was permitted to use the company car for personal use during non-business hours. At the time of the Accident, Decedent and Alexis, who was the sole passenger in the car, were returning from a family outing.

B. The Insurance Policy

Defendant Federated provided uninsured motorist coverage to Diamond Motor as part of a Commercial Package Policy (policy number 9361613), which was in effect on the date of the Accident ("Policy"). There is a provision of the Policy that specifically addresses supplemental uninsured motorists coverage. This provision is contained in a document entitled, "Delaware Commercial Automobile Uninsured Motorists Coverage Option Form."[1] This provision states, "Delaware law requires that Uninsured Motorists Insurance must be provided for limits at least equal to State Financial Responsibility limits... Delaware law allows [the insured] to select higher limits up to $300,000[,] but not greater than the policy's liability limit, or [the insured]

[1] Delaware Commercial Automobile Uninsured Motorists Coverage Option Form ("Option Form"), Exhibit A to Defendant's Corrected Motion for Summary Judgment (July 10, 2013) at 1.

may REJECT this coverage."[2] The document directs the insured to indicate its choice by checking boxes below and signing and dating the form.

The section below, entitled "Limit Options," contains two selections that the insured must make. The first reads, "Limit for directors, officers, partners or owners of the named insured and family members who qualify as insureds." This first selection is followed by four check-boxes, indicating different monetary amounts that the insured may select. In this case, Diamond Motor selected a $300,000 limit for "directors, officers, partners or owners."[3] The second selection reads, "Limit for any other person who qualifies as an insured." This selection is followed by five check-boxes, four of which indicate monetary amounts and the fifth of which indicates that coverage is declined. Diamond Motor checked the fifth box, which says, "I hereby REJECT [supplemental] Uninsured Motorists Insurance including Underinsured Motorists Insurance for this group of persons only."[4]

C. The Instant Action

On January 18, 2014, Plaintiff filed the instant action on behalf of herself, on behalf of Decedent's estate, and on behalf of Alexis and Chad.[5] Plaintiff demands damages including damages for the wrongful death of Decedent and resulting damages to herself and her children, medical expenses and pain and suffering for Alexis, and funeral and other expenses for Decedent.[6] Plaintiff also demands punitive damages for the tortuous conduct of Bair.[7] Plaintiff originally brought suit against both Federated and Liberty Mutual Fire Insurance Company

[2] Option Form at 1.
[3] Option Form at 1.
[4] Option Form at 1.
[5] Complaint at 1.
[6] Complaint at 2-3.
[7] Complaint at 3.

("Liberty Mutual"), who was believed to have provided uninsured motorists coverage for Decedent. However, Plaintiff subsequently voluntarily dismissed Liberty Mutual.[8]

On March 10, 2014, Federated filed an Answer. In the Answer, Federated argues that the Policy does not provide coverage for punitive damages.[9] Federated also argues that imposing punitive damages against Federated would violate various Constitutional provisions as well as public policy.[10] Additional defenses include that Plaintiff's claims may be barred by the terms of the insurance contract,[11] barred by Diamond Motor's failure to fully comply with its obligations under the policy,[12] and barred by Plaintiff's failure to demonstrate the non-existence or exhaustion of the tortfeasor's insurance.[13]

III. PRESENT MOTIONS

A. Federated's Motion for Summary Judgment

On May 29, 2014, Federated filed the instant Motion for Summary Judgment. Federated filed a Corrected Brief in Support of the Motion for Summary Judgment on July 10, 2014. Federated argues that (a) the Policy is valid and enforceable, and (b) the Policy does not provide any supplemental uninsured motorists coverage (beyond mandated "limits at least equal to State Financial Responsibility limits"[14]) for Decedent or his daughter.[15] Specifically, Federated maintains that the contractual provision contained in the "Delaware Commercial Automobile Uninsured Motorists Coverage Option Form" is valid; that the provision unequivocally indicates Diamond Motor's rejection of supplemental coverage for "any other person who qualifies as an

[8] Order (June 6, 2014), "Stipulation of Partial Dismissal".
[9] Answer at 2.
[10] Answer at 3.
[11] Answer at 3.
[12] Answer at 3.
[13] Answer at 4.
[14] Option Form at 1.
[15] Federated's Corrected Brief in Support of Motion for Summary Judgment at 5-6.

insured" who is not included in the category of "directors, officers, partners or owners of the Named Insured and family members who qualify as insureds"; and Decedent as "finance manager" did not qualify as a director, officer, partner, or owner. Federated's position is that "Decedent was an employee[,] but not a director, officer, partner or owner (or a family member) of the Named Insured [i.e., Diamond Motor]," and hence Decedent and Alexis are not eligible for the additional coverage.[16]

Federated argues that the provision in the Policy is valid because Delaware law allows an insured to opt out of supplemental uninsured motorists coverage under 18 *Del C.* §3902(a) so long as the rejection is in writing. Federated maintains that the provision in the instant case constitutes Diamond Motor's unambiguous rejection of supplemental uninsured motorists coverage for employees other than directors, officers, partners, or owners.[17] In anticipation of Plaintiff's primary argument, Federated argues that it is not against public policy for an insured employer such as Diamond Motor to have a policy that treats directors, officers, partners, and owners more favorably than other employees.

Federated cites *Davis v. State Farm* for the proposition that persons who purchase an automobile insurance policy may have higher levels of coverage than third-party permissive users of the vehicles covered by the policy.[18] The *Davis* court found that automobile insurance coverage is "personal" to the one who purchases the policy; and, for this reason, the purchaser should be allowed the benefit of higher coverage (than third party permissive drivers or guests) if he so chooses.[19] Although *Davis* involved natural persons as insureds rather than businesses,

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[16] Federated's Corrected Brief in Support of Motion for Summary Judgment at 6.
[17] Federated's Corrected Brief in Support of Motion for Summary Judgment at 6.
[18] Federated's Corrected Brief in Support of Motion for Summary Judgment at 6 (*citing Davis v. State Farm Mutual Automobile Insurance Company*, 2011 WL 1379562, at *5 (Del. Super. Ct. Feb, 15, 2011)).
[19] *Davis*, 2011 WL 1379562, at *6.

Federated argues that the same reasoning should be applied to the instant case.[20] Directors, officers, partners, and owners act on behalf of the business; and the actions which they perform include purchasing insurance. For this reason, they stand in the shoes of the individual purchasers of insurance in *Davis*. Ordinary employees, argues Federated, are different; they do not act on behalf of the business in the capacity of purchasing insurance. Hence, argues Federated, ordinary employees are more akin to the third party permissive drivers or guests in *Davis*.[21]

Federated further argues that there is no legal basis for Plaintiff's prayer for punitive damages. Federated maintains that punitive damages would only be appropriate if Plaintiff could demonstrate that Federated acted in bad faith, which Plaintiff has not alleged.[22] Claims by insureds against insurers are governed by contractual analysis, and the Delaware Supreme Court has held that punitive damages are not available in contract absent as showing of bad faith.[23]

B. Plaintiff's Motion for Summary Judgment

On June 30, 2014, Plaintiff responded in opposition to Federated's Motion for Summary Judgment and cross-moved for Summary Judgment.[24] Plaintiff advances two main arguments. First, Plaintiff contends that the provision limiting supplemental coverage to company officers, directors, partners, or owners is void as contrary to public policy.[25] Second, Plaintiff argues that even if the provision is not void, it is at least ambiguous and should be construed against the

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[20] Federated's Corrected Brief in Support of Motion for Summary Judgment at 7-8.
[21] Federated argues that, "Directors, officers, partners or owners are the types of individuals who are typically authorized to purchase a commercial auto policy on behalf of a business entity. As such, persons falling within this classification of insureds under a commercial policy are equivalent to the individual named insureds under the personal auto policies at issue in *Davis v. State Farm*." Federated's Corrected Brief in Support of Motion for Summary Judgment at 8.
[22] Federated's Corrected Brief in Support of Motion for Summary Judgment at 9.
[23] Federated's Corrected Brief in Support of Motion for Summary Judgment at 9 (*citing Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254, 266 (Del. 1995)).
[24] To avoid confusion, the Court will cite Plaintiff's briefs concerning Plaintiff's cross-motion for Summary Judgment by their submission dates. The June 30, 2014 brief will be cited as "Plaintiff's June 30 Brief."
[25] Plaintiff's June 30 Brief at 7.

insurance company who drafted it and in favor of Decedent.[26] Specifically, Plaintiff argues that Decedent "arguably fits the definition as an officer or director, as he was in a managerial position at the time of the crash."[27] Concerning Federated's argument that punitive damages are not proper, Plaintiff responds that Delaware law provides that a plaintiff who would have been entitled to collect punitive damages from an uninsured motorist may collect the same damages from the insurance carrier.[28]

In support of her argument that the exclusion in the Policy is contrary to public policy, Plaintiff relies primarily on *State Farm v. Washington* for the proposition that exclusions in uninsured motorists coverage are contrary to public policy.[29] In *Washington*, the insured agreed to have his son specifically excluded from his automobile insurance policy due to the son's poor driving record under a "named driver exclusion." The son was subsequently involved in an accident while driving his aunt's car, which was not covered by the father's policy. The accident was caused by the negligence of an uninsured driver, and the parties agreed that the son was not negligent in a manner proximately causing or contributing to the accident.[30] The son argued that, as a relative residing with the father, he should be covered under his father's uninsured motorists policy. The insurer agreed that the son would have been covered under the policy had he been a passenger in another car but argued that the named driver exclusion excluded the son from coverage when he was the driver.[31] The Court found the exclusion invalid on the grounds that (a) the parties agreed that the son would have been covered had he been a passenger; and (b) the purpose of the named driver exclusion was to insulate the insurer from the son's negligence,

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[26] Plaintiff's June 30 Brief at 11.
[27] Plaintiff's June 30 Brief at 11.
[28] Plaintiff's June 30 Brief at 12 (*citing Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1354 (Del. 1992)).
[29] *State Farm Mut. Auto Ins. Co. v. Washington*, 641A.2d 449 (Del.1994).
[30] *Id.*
[31] *Id.* at 450.

and the son was not negligent in the instant case.[32] Plaintiff argues that Decedent and Alexis, like the son in *Washington*, were innocent victims of an uninsured motorist and thus should not be excluded from coverage.[33]

Plaintiff initially conceded that "Delaware law permits different levels of coverage for different types of insureds in the area of [supplemental uninsured motorists] insurance," arguing instead that it is the *complete exclusion* of a class of insureds from supplemental uninsured motorists coverage that is contrary to public policy. [34] In support of this position, Plaintiff cited *State Farm v. Wagamon*, in which the Court found invalid a "household exclusion," which excluded the payment of a liability insurance claim when the injured party was a member of the insured's household.[35] The claimant in *Wagamon* was the insured's mother, who was injured while her daughter was driving. The mother sued the daughter, and the insurance company declined to pay any benefits on the grounds of the "household exclusion."[36] Plaintiff suggests that the instant case is analogous to *Wagamon*, as it concerns the exclusion of an entire class of claimants from coverage.

Plaintiff later revised her position, citing the Indiana case of *Balagatas v. Bishop* for the proposition that all employees must be covered equally.[37] In *Balagatas*, the Indiana Court of Appeals held that a contractual provision (nearly identical to the one in the instant case) allowing an employer-insured to elect additional uninsured motorists coverage for officers and directors but reject additional coverage for other employees was invalid as contrary to the intent of the applicable Indiana statute, which mandated equal coverage for all insureds.[38]

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[32] *Id.* at 452-453.
[33] Plaintiff's June 30 Brief at 8.
[34] Plaintiff's June 30 Brief at 9.
[35] *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 558-559 (Del. 1988).
[36] *Id.*
[37] Plaintiff's July 30 Brief at 8-9 (*citing Balagtas v. Bishop*, 910 N.E.2d 789 (Ind. Ct. App. 2009)).
[38] *Id.* at 795.

In support of her argument that the exclusionary provision is ambiguous, Plaintiff cites Black's Law Dictionary's definition of "officer" as: "Person holding office of trust, authority[,] or command in public affairs, government[,] or a corporation," and "director" as: "One who manages, guides, or orders; a chief administrator."[39] Plaintiff argues that Decedent, who was a "finance manager," arguably fits the description of an officer or director; and the Policy does not explicitly define the terms "officer" or "director" otherwise.

C. Defendant's Arguments in Response

In Defendant's Response Brief in Opposition to Plaintiff's cross-motion, Defendant renews its argument that "Decedent was just an employee, not a director, officer, partner or owner of Diamond Motor."[40] Defendant says that this position is supported by the affidavit of Mr. Warren, the owner of Diamond Motor, who affirmed that a person holding the job of Finance Manager is merely an employee and nothing more.[41]

Defendant maintains that, contrary to Plaintiff's contention, there is no ambiguity in the terms "officer" or "director" as they appear in the Policy.[42] As "officer" and "director" are corporate terms, their plain meaning comes from corporate law. Defendant argues that, under Delaware Corporations Law, these terms have precise technical definitions, which do not apply to Decedent. According to Defendant, a "director" is "a person who is a member of the Board of Directors of a corporation with overall control of a company."[43] The fact that Decedent's job as Finance Manager may have included "directing" people, does not make him a "director" under

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[39] Plaintiff's June 30 Brief at 11 (*citing Black's Law Dictionary* at 536-537, 232 (4th Pocket Ed. 2011)).
[40] Defendant's July 15 Brief at 1.
[41] Defendant's July 15 Brief at 7.
[42] Defendant's July 15 Brief at 7.
[43] Defendant's July 15 Brief at 7 (*citing* 8 *Del. C.*§141(a)).

the corporate definition.[44] In support of its argument that merely "directing" people does not make an employee a "director" for insurance purposes, Defendant cites an Eighth Circuit case, *United Fire v. Thompson*, holding that the meaning of "director" is defined by corporate law and an employee is not a "director" merely because his job includes "directing' people.[45] Similarly, Defendant argues that Decedent was not an "officer," as the meaning of that term is established by Delaware Corporations Law, which provides that, "Every corporation organized under this chapter shall have sucb officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors..."[46]

IV. LEGAL STANDARD

The Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[47] A motion for summary judgment, however, should not be granted when material issues of fact are in dispute or if the record lacks the information necessary to determine the application of the law to the facts.[48] A dispute about a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[49] Thus, the issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[50]

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[44] Defendant's July 30 Brief at 7.
[45] *United Fire & Casualty Insurance Company v. Thompson*, 758 F.3d 959 (8th Cir. 2014).
[46] Defendant's July 15 Brief at 7-8 (*citing* 8 *Del. C.* §142)
[47] Super. Ct. Civ. R. 56(c).
[48] *Bernal v. Feliciano*, 2013 WL 1871756, at *2 (Del. Super. Ct. May 1, 2013) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 468 (Del. 1962)).
[49] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986).
[50] *Id.*

Although the party moving for summary judgment initially bears the burden of demonstrating that the undisputed facts support his legal claims,[51] once the movant makes this showing, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[52] When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party.[53]

V. DISCUSSION

A. The Provision Denying Additional Uninsured Motorists Coverage to Regular Employees is not Void as a Matter of Public Policy

i. The Relevant Statutory Authority and Case Law do not Support a Finding that the Provision is Void

18 *Del. Admin. C.* §603[54] provides that insurance policies must cover bodily injury and property damage with limits of at least those proscribed by the financial responsibility law of Delaware.[55] In addition, insurers must offer additional coverage for damages resulting uninsured or underinsured motorists.[56] 18 *Del. C.* §3902(a)(1) expressly and unequivocally provides that this additional uninsured motorists coverage shall not be required "when rejected in writing."

Plaintiff does not dispute the insured's right to reject uninsured motorists coverage as provided by 18 *Del. C.* §3902(a)(1). Plaintiff also initially concedes, but later denies, that it is

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[51] *Hughes ex rel. Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *2 (Del. Super. Ct. Jan. 7, 2008) (citing *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. Ct. 2005)).
[52] *Id.*
[53] *Joseph v. Jamesway Corp.*, 1997 WL 524126, at *1 (Del. Super. Ct. July 9, 1997) (citing *Billops v. Magness Const. Co.*, 391 A.2d 196, 197 (Del. Super. Ct. 1978)).
[54] Delaware Administrative Code is a collection of regulations promulgated by various state administrative agencies. Title 18 of the Code contains regulations promulgated by the Delaware Insurance Commissioner. *Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*, 2009 WL 4895120, n.58 (Del. Ch. Dec. 10, 2009).
[55] 18 *Del. Admin. C.* §603-2.1. The applicable financial responsibility statute is 21 *Del. C.* §2118(a)(2)(b).
[56] 18 *Del. Admin. C.* §603-2.2.

permissible under Delaware law for a business to provide different levels of uninsured motorists coverage for different classes of employees, but that it is impermissible for a business to provide some additional uninsured motorists coverage for one class of employees but provide no additional coverage for another class of employees.[57] Plaintiff's most recent position is that unless an employer completely rejects supplemental uninsured/underinsured motorists coverage, all employees must be covered equally.[58]

The Court finds no case law on point in Delaware. The Delaware cases cited by Plaintiff in support of her position and the Indiana case are distinguishable in either fact or law from the instant case.[59]

State Farm v. Washington involved a family in which the father was the insured.[60] Because of the son's poor driving record, the father agreed to exclude the son as a driver on the father's insurance policy in a provision called a "named driver exclusion."[61] While driving a car not on the policy, the son was a non-negligent victim of an uninsured motorist tortfeasor. The insurance carrier denied the son coverage on the grounds of the named driver exclusion. However, crucially, the parties agreed that the son would have been covered for damages by an uninsured motorist had the son been a passenger at the time of the accident.[62] In other words, there was an inconsistency in the policy: the parties agreed that the son was covered against uninsured motorists generally, but the insurer maintained that the named driver exclusion negated this coverage if the son was driving at the time of the accident.[63]

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[57] Plaintiff's June 30 Brief at 9.
[58] Plaintiff's July 30 Brief at 8-9.
[59] *Balagtas v. Bishop*, 910 N.E.2d 789 (Ind. Ct. App. 2009).
[60] *State Farm Mut. Auto Ins. Co. v. Washington*, 641A.2d 449 (Del.1994).
[61] *Id.* at 450.
[62] *Id.* at 452.
[63] *Id.*

In order to resolve this inconsistency, the court looked to the purpose of the named driver exclusion, which the court found to be to insulate the insurer from the risk of the son's poor driving record.[64] Since this purpose was not applicable under the circumstances presented, in which the son was not negligent, the court refused to apply the exclusion in that case. The *Washington* court found that, as a matter of public policy and Delaware law, exclusions to uninsured motorists coverage should be narrowly construed.[65] In the instant case, unlike in *Washington*, there is no inconsistency. The Policy unequivocally states that supplemental uninsured motorists coverage is rejected for employees other than directors, officers, partners, or owners.

State Farm v. Wagamon involved an automobile insurance provision commonly known as a "household exclusion."[66] The household exclusion denies liability insurance coverage for any personal injury claim brought by a member of the insured's family who resides with the insured.[67] The insured in *Wagamon* was a daughter who was driving an automobile with her mother as the sole passenger when they were in an accident. The mother later sued her daughter for personal injuries sustained in the accident.[68] The Delaware Supreme Court found such household exclusions to be in violation of both Delaware's financial responsibility law and public policy. The Court found that the exclusion violates the financial responsibility law, 21 *Del. C.* §2118, because it completely denies both liability and no-fault compensation coverage for injured parties who are members of the insured's family and reside with the insured.[69] The Court found that a household exclusion "conflicts with the basic requirement of providing

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[64] *Id.*
[65] *Id.* (*citing Frank v. Horizon Assur. Co.*, 553 A.2d 1199, 1201 (Del. Super. Ct. 1989)).
[66] *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 558 (Del. 1988).
[67] *Id.*
[68] *Id.*
[69] *Id.* at 559-560.

minimum legal liability coverage for claims by victims of an automobile accident, regardless of their relationship to the insured."[70]

The court in *Wagamon* discussed the history of household exclusion provisions as an attempt by insurers to guard against collusive suits by family members.[71] The court acknowledged that the threat of collusive suits is a legitimate concern.[72] However, the court found the passage of a financial responsibility law evinced the clear legislative intent that all victims, regardless of their relationship, be compensated "up to a minimum amount"[73] and suggested it was the passage of financial responsibility laws in several jurisdictions that spurred courts to invalidate household exclusion provisions.[74] There is no support for the claim that the *Wagamon* holding supports a public policy requiring coverage beyond the minimum coverage required by the state financial responsihility law. The statute, 18 *Del. C.* §3902(a)(1), expressly provides that additional uninsured motorists coverage may be waived, and Plaintiff concedes this point.[75]

The Court finds the case of *Lukk v. State Farm*, more applicable to the instant facts.[76] The plaintiff in *Lukk* was the victim of an underinsured motorist and sought compensation under his father's supplemental uninsured/underinsured motorists coverage. At the time of the accident, the plaintiff's father's policy contained a "resident relative clause," restricting coverage to family members who reside primarily with the insured.[77] There was evidence in the record that the plaintiff did not reside primarily with his father at the time of the accident, but this fact

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[70] *Id.* at 561.
[71] *Id.* at 559.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Plaintiff's June 30 Brief at 9.
[76] *Lukk v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 1891000 (Del. Super. Ct. May 12, 2014).
[77] *Id.* at *2.

was disputed.[78] The plaintiff argued, that putting aside the factual dispute of where he primarily resided, the resident relative clause was void as matter of public policy because the clause "creates a class of persons, then restricts the scope of the insurance coverage for such persons, and in doing so improperly reduces the minimum coverage benefits provided under 18 *Del. C.* §3902."[79] The court pointed out the straightforward flaw in the plaintiff's argument: uninsured/underinsured motorists coverage offered under 18 *Del. C.* §3902 is not a statutorily mandated minimum found in 21 *Del. C.* §2118.[80] The court found that it was permissible for the insurer to offer the supplemental uninsured motorists coverage to plaintiff's father and the relatives residing with him, without extending coverage to other relatives not residing with the insured.[81]

Like in *Lukk*, the instant case does not deal with an attempt by an insurer to deny the minimum coverage mandated by 21 *Del. C.* §2118. Both cases concern limitations on supplemental uninsured/underinsured motorists coverage, which insurers are statutorily required to offer, and insureds may choose to purchase or decline under 18 *Del. C.* §3902. The court in *Lukk* found it permissible for an uninsured motorists provision to discriminate between relatives residing with the insured and relatives residing elsewhere and to provide additional coverage only for the former category. The provision in the instant case is similar in that it distinguishes between two different categories of individuals and provides additional coverage only for one category.

The principle that it is permissible for insurers and insureds to contract for additional coverage for some, but not all, parties covered by the policy is also supported by the court's

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[78] *Id.* at *5.
[79] *Id.* at *2
[80] *Id.* at *5.
[81] *Id.*

reasoning in *Davis v. State Farm.*[82] *Davis* concerned a class action by insureds against insurance providers, who assessed premiums for greater than minimum uninsured/underinsured motorists coverage for each vehicle in households where multiple vehicles were insured under the same policy.[83] The plaintiffs argued that, as Delaware law has established that uninsured/underinsured motorists insurance is "personal" to the insured and not vehicle-specific, a person in a household that carries uninsured/underinsured motorists protection on one of its vehicles receives the same uninsured/underinsured motorists coverage regardless of which vehicle the person is driving.[84] Thus, argued the plaintiffs, insurers that allow customers to select and pay for different uninsured/underinsured motorists coverage for different vehicles are "double dipping" by making customers pay for an illusory benefit.[85]

The insurers in *Davis* counter-argued, and the court agreed, that the higher coverage did confer a real benefit. Even though the insured and members of the insured's family would receive the same uninsured/underinsured motorists coverage regardless of which vehicle was involved, permissive drivers or guests would receive uninsured/underinsured motorists benefits as per the amount of supplemental coverage purchased for the particular vehicle involved.[86] Thus, the *Davis* court, like the court in *Lukk*, affirmed that it is permissible under Delaware law to have different levels of uninsured/underinsured motorists coverage for different vehicle users.

The Court now turns to the Indiana Court of Appeals case, *Balagatas v. Bishop*, upon which Plaintiff now relies.[87] The facts in that case are nearly identical to the instant case. The victim was an employee of a motor vehicle dealer, who was given a demo vehicle that he was

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[82] *Davis v. State Farm Mutual Automobile Insurance Company*, 2011 WL 1379562 (Del. Super. Ct. Feb, 15, 2011
[83] *Id.* at *1.
[84] *Id.* at *5.
[85] *Id.*
[86] *Id.*
[87] *Balagtas v. Bishop*, 910 N.E.2d 789 (Ind. Ct. App. 2009).

permitted to drive for both business and personal use.[88] The victim was involved in a collision with an underinsured motorist and sustained serious injuries. The dealer, the victim's employer, had executed a "Commercial Auto Coverage Option Form" with the insurer, Federated Mutual Insurance Company.[89] The employer selected $500,000 in uninsured/underinsured motorists coverage for "directors, officers, partners or owners" and rejected uninsured/underinsured coverage for all other insureds.[90] The plaintiff in *Balagatas* admitted that he was not a director, officer, partner, or owner. The plaintiff's sole argument was that the provision granting supplemental uninsured/underinsured motorists coverage for only some employees was contrary to law and public policy.[91] The Indiana statute in question, Indiana Code section 27-7-5-2(b), provided,

> Any named insured of an automobile or motor vehicle liability policy has the right, *on behalf of all other named insureds and all other insureds*, in writing, to:
>
> (1) reject both the uninsured motorist coverage and the underinsured motorist coverage provided for in this section; or
>
> (2) reject either the uninsured motorist coverage alone or the underinsured motorist coverage alone, if the insurer provides the coverage nor rejected separately from the coverage rejected.[92]

The Court of Appeals found that the language of the statute required that any election or rejection of supplemental uninsured/underinsured motorists coverage must apply equally to "all… insureds," on whose behalf the named insured had the right to select coverage.[93]

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[88] *Id.* at 791.
[89] *Id.* at 792.
[90] *Id.*
[91] *Id.* at 794.
[92] *Id.* at 794 (*citing* Indiana Code section 27-7-5-2(b)) (emphasis added).
[93] *Id.* at 796.

The Indiana statute had two important features, not present in the corresponding Delaware statute, which were the basis for the *Balagatos* court's decision. First, the statute says that the right to reject is "on behalf of all other named insureds and all other insureds." The court interpreted this language to mean that all of the insureds should be treated as a single class and given the same benefits.[94]

Second, the Indiana statute then goes on to explicitly spell out two options with regard to supplemental uninsured/underinsured motorists coverage—that the named insured may reject coverage for both uninsured and underinsured motorists *or* that the name insured may reject only one. This feature shows that the drafters contemplated and chose to explicitly address some options that allow the named insured to limit coverage (by choosing only uninsured motorists coverage or by choosing only underinsured motorists coverage). In light of this language, it is reasonable to infer that had the drafters intended to provide the option of rejecting supplemental uninsured/underinsured motorists coverage for only some insureds, that would have been made explicit in the statute.

The Delaware statute, 18 *Del. C.* §3902(a) is importantly different. The Delaware statute provides,

> (a) No policy insuring against liability arising out of the ownership, maintenance or use of any motor vehicle shall be delivered or issued for delivery in this State with respect to any such vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from

[94] *Id.* at 795. The current version of the Indiana statute makes it explicit that the election or rejection of coverage must be on behalf of all insureds. The statute provides, "A rejection of coverage under this subsection by a named insured is a rejection on behalf of all other named insureds, all other insureds, and all other persons entitled to coverage under the policy." Indiana Code section 27-7-2-2(b)(2013).

> owners or operators of uninsured or hit-and-run vehicles for bodily injury, sickness, disease, including death, or personal property damage resulting from the ownership, maintenance or use of such uninsured or bit-and-run motor vehicle.
>
> (1) No such coverage shall be required in or supplemental to a policy when rejected in writing, on a form furnished by the insurer or group of affiliated insurers describing the coverage being rejected, by an insured named therein, or upon any renewal of such policy or upon any reinstatement, substitution, amendment, alteration, modification, transfer or replacement thereof by the same insurer unless the coverage is then requested in writing by the named insured. The coverage herein required may be referred to as uninsured vehicle coverage.[95]

Unlike the Indiana statute, the Delaware statute contains no language that could be interpreted as creating a class of "all insureds." Also unlike the Indiana statute, the Delaware statute does not explicitly contemplate options for partial rejection of supplemental uninsured/underinsured motorists coverage.

ii. Public Policy does not Demand a Departure from the Case Law in the Instant Case

As stated previously, there is no case law precisely on point. The most applicable Delaware case, *Lukk v. State Farm*, established that it is permissible for an insurance policy to distinguish between two categories of relatives—those that reside with the insured and those that do not—and provide a benefit only to the former.[96] Plaintiff claims it is not permissible to treat different classes of insureds in a corporate structure differently in providing coverage beyond the statutory minimums required, but there is no compelling reason why disparate treatment would be permissible in the family context but not the corporate context.

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[95] 18 *Del. C.* §3902(a).
[96] *Lukk v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 1891000 (Del. Super. Ct. May 12, 2014).

Plaintiff has conceded that it is acceptable for the employer to decline supplemental uninsured motorists coverage as long as it is uniformly declined for all employees. However, Plaintiff argues that allowing the employer to decline supplemental uninsured motorists coverage for a class of employees is bad public policy because it leaves some employees completely unprotected when they are the victims of uninsured or underinsured motorists. The Court does not accept that logic. Further, employees, including Decedent, were not completely unprotected. The financial responsibility law of the state, 21 Del. C. §2118(a)(2)(b), still requires all vehicles to have a policy that provides $15K for any one person and $30K for all persons injured in an accident. While Plaintiff may argue that this amount is inadequate, Decedent is not left with no coverage.

B. Decedent was not a Director or Officer

Plaintiff's second argument is that the Policy is at least ambiguous as to whether Decedent qualifies as a "director" or "officer." As it is a general rule that an ambiguity in an insurance policy is to be construed against the insurer, Plaintiff argues that coverage should be extended to Decedent. The Court finds that the language in the Policy was not ambiguous, and Decedent was not a "director" or "officer" within the unamhiguous meaning of the Policy terms.

The Delaware Supreme Court has affirmed the "general rule" that "an insurance contact is construed strongly against the insurer, and in favor of the insured, because the insurer drafted the language that is interpreted."[97] However, this rule is only applicable when there is an independent amhiguity in the contract language; "if the language is clear and unambiguous a Delaware court will not destroy or twist the words under the guise of construing them."[98] In

[97] *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982) (citations omitted).
[98] *Id.* (citations omitted).

interpreting a term in an insurance policy, the court must look to its context within the larger policy document. A court must "examine all relevant portions of the policy, rather than reading a single passage in isolation."[99]

The Delaware Supreme Court has interpreted these general principles to be consistent with the further interpretive doctrine that "an insurance policy should be construed to effectuate the reasonable expectations of the average member of the public who buys it."[100] However, the Court has also made clear that the interpretation of the policy is still limited by the policy language. "[A] fundamental premise of the [reasonable expectation] doctrine is that the policy will be read in accordance with the reasonable expectations of the insured so far as its language will permit."[101] The reasonable expectation doctrine "is not a rule granting substantive rights to an insured when there is no doubt as to the meaning of policy language."[102]

Again, there is no Delaware case directly on point cited by the parties or known to the Court. However, in *United Fire v. Thompson*, the Eighth Circuit affirmed the trial court's award of summary judgment to an insurer, finding that a policy affording coverage to "directors" was unambiguous, and further,did not cover a managerial employee merely because his job included "directing" other employees.[103] In *United Fire*, the insurance policy limited coverage to the corporation itself, as well as "executive officers," "directors," and "stockholders" with respect to their duties under these titles.[104] The employee in question was a supervisor who allegedly allowed the plaintiff, an employee, to operate a dump truck despite the knowledge that a

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[99] *Sherman v. Underwriters at Lloyd's, London*, 1999 WL 1223759, *4 (Del. Super. Ct. Nov. 2, 1999) (citation omitted).
[100] *Hallowell*, 443 A.2d at, 926 (internal quotation, citation omitted).
[101] *Id.* at 927 (internal quotation, citation omitted).
[102] *Id.*
[103] *United Fire & Cas. Ins. Co. v. Thompson*, 758 F.3d 959, 962 (8th Cir. 2014).
[104] *Id.* at 961.

hydraulic pump on the truck was defective.[105] The plaintiff argued that the policy was ambiguous, and that his supervisor is a director because the supervisor "often 'directed' people and processes as part of his job."[106] The court applied Missouri state law, which, like Delaware, holds that a contract is only ambiguous when "it is reasonably open to different constructions."[107] Also, like in Delaware, Missouri law requires a court to "examine the entire contract and apply meanings a person of average intelligence and education would understand" to determine whether such an ambiguity exists.[108]

The coverage provision at issue in *United Fire* appears in a part of the policy which separates out different types of insureds, depending on what kind of business organization was the named insured.[109] The court reasoned that, as the term "directors" appears in section 1(d), which discusses coverage for corporations, it is implied that the term is used in the context of corporations.[110] Like in Delaware, Missouri law says that corporations are controlled and managed by a board of directors who are elected by the corporation's shareholders.[111]

In the instant case, like in *United Fire*, the Court finds that the provision limiting supplemental coverage to "directors, officers, partners or owners of the named insured and family members who qualify as insureds" is unamhiguous when read in context and does not apply to Decedent. The provision appears on a document entitled, "Delaware Commercial Automobile Uninsured Motorists Coverage Option Form."[112] The named insured listed on the form is a corporation, Diamond Motor.[113] The first of the two "Limit Options" selections that

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[105] *Id.* at 960.
[106] *Id.* at 962.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 961, 963.
[110] *Id.* at 963.
[111] Mo. Ann. Stat. §§351.310, 351.315.
[112] Option Form at 1.
[113] Option Form at 1.

are to be made on the form is the "Limit for directors, officers, partners or owners of the named insured and family members who qualify as insureds."[114] These characteristics make clear the context of the provision is the corporate context; the form concerns coverage for a corporation and discusses limits for "directors, officer, partners or owners" of the organization. Thus, this Court, like the court in *United Fire*, finds that the definitions in Delaware Corporations Law, rather than dictionary definitions, control. Under Delaware Corporations Law, directors are members of the board of directors,[115] and officers are persons with specific titles and duties as set out in the corporation's bylaws or in a resolution by the board of directors.[116] While Decedent's job may had included "directing" or "managing" persons or processes, the Court finds that the terms in the Policy bave specific, unambiguous definitions that do not include Decedent.

C. Plaintiff's Claim for Punitive Damages is Proper Under Delaware Law

As this Court ruled at the hearing held on August 14, 2014, Plaintiff's claim for punitive damages is proper. Delaware law provides that a plaintiff wbo would have been entitled to collect punitive damages from an uninsured motorist may collect the same damages from the insurance carrier.[117] However, as the Court has found that Decedent is excluded from coverage by a valid and unambiguous Policy provision, the claim for punitive damages against Federated is **MOOT**.

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[114] Option Form at 1.
[115] 8 *Del. C.* §141(a).
[116] 8 *Del. C.* §142.
[117] *Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1354 (Del. 1992).

VI. CONCLUSION

For the forgoing reasons, Plaintiff's Motion for Summary Judgment is hereby **DENIED**. Defendant Federated's Motion for Summary Judgment is hereby **GRANTED**, and the claim for punitive damages is **MOOT**.

IT IS SO ORDERED.

/s/
M. JANE BRADY
Superior Court Judge