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Case Number 692,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EPIPHANY STOMS, Individually and as the 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. N14C-01-163 MJB
FEDERATED SERVICE INSURANCE COMPANY,	:	
Defendant Below/ Appellee.	:	

CORRECTED
ANSWERING BRIEF ON APPEAL OF DEFENDANT BELOW/APPELLEE FEDERATED SERVICE INSURANCE COMPANY

April 24, 2015

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NATURE OF PROCEEDINGS

This is an appeal to the Supreme Court of the State of Delaware from an Order with Opinion of the Superior Court of Delaware in and for New Castle County 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, 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, (hereinafter "Stoms" or "Plaintiff"). The Defendant Below/Appellee is Federated Service Insurance Company (hereinafter "Federated" or "Defendant"), on whose behalf this brief is submitted.

On January 18, 2014, Plaintiff, filed her Complaint against Federated and against Co-Defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") seeking uninsured motorist insurance ("UM") coverage under policies issued by both companies for her and the 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. Ch. 37, in an amount to be determined by a jury, plus costs and interest.[2] On March 10, 2014, Federated filed its Answer to the Complaint denying liability and raising several Affirmative

[1] Opinion of Hon. M. Jane Brady, in *Stoms v. Federated Insurance Company*, N14C-01-163 MJB, (November 20, 2014), B000129-153 (hereinafter Trial court p. "__," "B0000__").
[2] B000001-06.

Defenses.[3] On May 29, 2014, Federated filed a Motion for Summary Judgment and an Opening Brief in support thereof.[4] On June 6, 2014 the Superior Court entered an Order approving a Stipulation of Partial Dismissal as to Liberty Mutual.[5] On June 30, 2014, Stoms filed a Response in Opposition to Federated's Motion for Summary Judgment and a Cross-Motion for Summary Judgment, as well as a Brief in support thereof.[6] On July 15, 2014, Federated filed a Responding Brief in Opposition to Plaintiff's Cross-Motion for Summary Judgment.[7] On July 30, 2014, Plaintiff filed a Reply Brief in Support of her Cross-Motion for Summary Judgment.[8] On November 20, 2014, the Superior Court entered an Opinion and Order granting Federated's Motion for Summary Judgment and denying Stoms' Cross–Motion for Summary Judgment.[9]

On January 5, 2015, Stoms filed a Notice of Appeal in the Superior Court. On March 5, 2015, Stoms filed her Opening Brief on Appeal and Appendix in this Court. This document is Federated's Answering Brief on Appeal.

[3] B000013-19.
[4] B000020-24 & B000025-50, respectively.
[5] B000051-53.
[6] B000054-57 & B000058-78, respectively.
[7] B000079-108.
[8] B000109-128.
[9] B000129-153.

SUMMARY OF ARGUMENT

I. Denied. The trial court properly granted Federated's Motion for Summary Judgment and Denied Stoms' Cross-Motion for Summary Judgment, finding that the provision in the Federated Policy whereby Diamond Motor acquired uninsured motorist coverage solely for key company personnel did not violate public policy.

II. Denied. The Superior Court did not commit reversible error when it found that the provision in Federated's uninsured motorist insurance policy limiting coverage exclusively to Diamond Motor's directors, officers, partners or owners was neither ambiguous nor contrary to Stoms' reasonable expectation of coverage.

STATEMENT OF FACTS

A. The Underlying Loss[10]

On November 3, 2012, David W. Stoms, ("Decedent") was killed and his daughter, minor Alexis D. Stoms, was injured in a two car collision (the "Loss") occurring in Kent County Delaware. The other driver was an uninsured. The uninsured driver was a Delaware resident, with a Delaware driver's license, operating a Delaware registered vehicle.

On the date of the Loss, Decedent was employed as a finance manager at Diamond Motor Sports Inc.,[11] ("Diamond Motor") an automotive dealership located in Dover Delaware. Decedent was an employee, not a director, officer, partner or owner of Diamond Motor, (nor were any of his family members). At the time of the Loss, Decedent was driving a company owned 2010 Toyota Yaris registered and principally garaged in Delaware. Also, Decedent was a Delaware resident with a Delaware drivers license. Decedent was on a family outing with his daughter who was the sole passenger in the vehicle. Decedent was permitted by his employer to use the company vehicle for personal purposes during non-business hours.

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[10] All facts set forth herein are undisputed. See generally, PLAINTIFF BELOW, APPELLANTS CORRECTED OPENING BRIEF ON APPEAL, pp. 4-5 (hereinafter, "Opening Brief pg. __").

[11] Diamond Motor is one of four affiliated businesses, three automobile dealerships and an auto body shop, who are all Named Insureds under the Policy. B000038; see also Affidavit of Diamond Motor's President, Warren A. Price, B000093-94.

Liberty Mutual issued a personal automobile insurance policy to Decedent and to Plaintiff, his wife. As explained in greater detail below, Federated issued a Delaware commercial automobile insurance policy to Decedent's employer, Diamond Motor.

B. The Policy

On or about May 26, 2009, the President of Diamond Motor Sports Inc., Warren A. Price, purchased a Commercial Package Policy (the "Policy") on behalf of the company.[12] Federated issued the Policy to Diamond Motor in Delaware. Federated and Diamond Motor intended that the Policy be governed by Delaware law.[13] The Policy was in effect on the date of Loss.

Subsection "B.2." of the Delaware Uninsured Motorist Coverage Endorsement to the Policy sets forth the definition of an "insured" when the Named Insured is a business entity:

> (a) "anyone occupying a covered auto..."
>
> (b) "anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured." [14]

[12] Policy number 9361613. Pertinent portions of the Policy and Federated correspondence are set forth in the Appendix at B000036–49; B000072–77. *See also* Affidavit of Warren A. Price, B000093-94.
[13] *See e.g.,* B000036.
[14] B000045, (*Internal quotation marks omitted*).

The Delaware Commercial Automobile Uninsured Motorists Coverage Option Form incorporated into the Policy ("the DE UM option form") provides, in pertinent part, that:

> Delaware law requires that Uninsured Motorists Insurance must be provided for limits of at least equal to the State Financial Responsibility limits on every Automobile Liability Insurance Policy issued or delivered to the owner of a motor vehicle registered or principally garaged in Delaware...
>
> Delaware law allows you to select higher limits up to $300,000 but not greater than the policy's liability limit, or you may REJECT this coverage.[15]

Out of several "Limit Options" offered, Diamond Motor selected a $300,000 UM/UIM[16] limit for:

> "...directors, officers, partners or owners of the Named Insured and family members who qualify as insureds."

In contrast Diamond Motor rejected, in writing, UM/UIM coverage for all other insureds:

> "Limit for any other person who qualifies as an insured...:"
>
> > "I hereby REJECT Uninsured Motorist Insurance including Underinsured Motorist Insurance for this group of persons only."[17]

In other words, Mr. Price, acquired $300,000 in UM coverage for Diamond Motor's directors, officers, partners or owners and their qualifying family

[15] B000036.
[16] "UIM" = underinsured motorist benefits coverage, which is not at issue in this case.
[17] B000036.

members.[18] However, the Mr. Price declined to obtain any UM coverage on all other insureds, including any Diamond Motor employee who was not a director, officer, partner or owner (and their family members) such as Decedent or a permissive occupant such as Decedent's daughter. Daniel Powers, an insurance underwriter at Federated, made an uncontroverted attestation that the annual premium charged to Diamond Motor for UM coverage exclusively for key personnel was $816.[19] Whereas, UM coverage for all insureds under the Policy would have cost $11,943.[20]

It is undisputed that the $30,000 single limit on the Personal Injury Protection ("PIP") benefits coverage afforded under the Policy was exhausted by payments made on Plaintiff's behalf.[21] There was $500,000 in third party liability coverage for all insureds under the Policy.[22]

[18] Sometimes hereinafter referred to collectively as "key personnel."
[19] Affidavit of Federated underwriter Daniel Powers, B000096-98.
[20] *Id.*
[21] B000072-73; Opening Brief pg. 5.
[22] B000075.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED FEDERATED'S MOTION AND DENIED PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE THE PROVISION IN THE FEDERATED POLICY WHEREBY DIAMOND MOTOR REJECTED UM COVERAGE FOR ALL INSUREDS, EXCEPT FOR KEY PERSONNEL, DID NOT VIOLATE PUBLIC POLICY.

A. QUESTION PRESENTED

Did the trial court err in finding, as a matter of law, that it was not a violation of public policy for Federated to afford Diamond Motor the option to acquire uninsured motorist coverage solely for the company's directors, officers, partners or owners?

B. SCOPE AND STANDARD OF REVIEW

Both parties moved for Summary Judgment as to the enforceability of the provision in the Federated Policy whereby Diamond Motor acquired uninsured motorist coverage solely for key personnel of the company. Neither party asserted that disputed issues of material fact precluded the entry of judgment on the issue of whether the terms of the uninsured motorist coverage issued by Federated violated public policy. Pursuant to Superior Court Civil Rule 56(h):

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is a genuine issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision

> on the merits based on the record submitted with the motions.[23]

By presenting no argument as to an issue of fact on plaintiff's public policy contentions, the parties implicitly conceded the absence of any material factual disputes precluding disposition of either motion.[24] The trial court properly decided the public policy issues on the basis of the record submitted with the motions.

Stoms has, therefore, waived any right to a remand for resolution of any issues of fact relating to her public policy argument. In fact, as relief, Stoms does not even request a remand for trial but only "that this 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."[25] This Court's scope of review is, therefore, limited to determining whether the trial court erred in finding that Federated is entitled to judgment as a matter of law.[26] The Court does not have the discretion to review whether the record reflects the existence of material factual disputes.[27]

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[23] Del. Super. Ct. Civ. R. 56(h); *Gallaher, v. USAA Casualty Ins. Co.*, 2005 WL 3062014, *1 (Del. Super. Ct. Nov. 14, 2005); *Browning-Ferris, Inc., v. Rockford Enterprises, Inc.*, 642 A.2d 820, 823 (Del. Super. Ct. 1993).
[24] *See Browning-Ferris*, 642 A.2d at 823.
[25] Opening Brief pg. 23.
[26] *See Merrill, v. Crothall-American, Inc.*, 606 A.2d 96, 100 (Del. 1992) *citing Fiduciary Trust Co., v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982).
[27] *Merrill, v. Crothall-American,* 606 A.2d at 100.

Uncontroverted evidence submitted in support of a motion must be accepted as true.[28] A Motion for Summary Judgment filed pursuant to Superior Court Civil Rule 56 is appropriately granted where there is no genuine issue as to any material fact and the movant is entitled to judgment in its favor as a matter of law.[29]

This appeal requires the interpretation of contractual terms. Accordingly, the Delaware Supreme Court's review is *de novo.*[30] The proper construction of any contract, including an insurance contract, is purely a question of law.[31] To the extent this Court's decision turns on public policy grounds, it implicates purely a question of law over which *de novo* review is appropriate.[32]

C. MERITS OF ARGUMENT

Federated's DE UM option form does not violate public policy. Rather, it permits a Delaware business to deliberately and intelligently decide whether to purchase uninsured motorist coverage for a select class of insureds at a cost that the parties deem to be commensurate with the risk.

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[28] *See Oliver B. Cannon & Sons, Inc., v. Dorr-Oliver Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[29] *Matas, v. Green*, 171 A. 2d 916, 918 (Del. Super. Ct. 1961).
[30] *Oberly, v. Kirby,* 592 A.2d 445, 457 (Del. 1991).
[31] *Aetna Cas. and Sur. Co., v. Kenner*, 570 A.2d 1172, 1174 (Del. 1990); *Rhone-Poulenc, v. American Motorists Ins*., 616 A. 2d 1192, 1195 (Del. 1992).
[32] *Jones, v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1353 (Del. 1992).

1. The Policy Meets Or Exceeds Delaware Statutory Minimum Coverage Requirements.

The Federated Policy meets or exceeds the statutory minimum coverage requirements under Delaware law.[33] Delaware insurance policies must cover bodily injury and property damage with limits of at least those proscribed by 21 Del. C. § 2118(a)(2)(b), the Financial Responsibility Law of Delaware.[34] Under §2118(a)(2)(b), the minimum first party PIP coverage limit is $15,000 for any one person and $30,000 for all persons injured in any one accident.

In the instant case, the Policy carried a $30,000 single limit of PIP coverage, which actually exceeds the per person minimum requirement.[35] It is undisputed that Federated paid the full $30,000 in PIP policy limits on behalf of Plaintiff as a result of the Loss.[36] Furthermore, while not needed in connection with the Loss, the Policy had a $500,000 limit for third party liability coverage, exceeding the $15,000/$30,000 statutory minimum required by 21 Del. C. §2902(b).[37]

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[33] The motor vehicle collision occurred in Delaware. The vehicle operated by Decedent was registered in Delaware. The Policy issued by Federated is a Delaware policy. Also, Decedent was a Delaware resident with a Delaware drivers license. The uninsured driver's vehicle was registered in Delaware. Also, the uninsured driver was a Delaware resident with a Delaware drivers license. Delaware law applies. *See generally Travelers Indem. Co., v. Lake*, 594 A. 2d 38 (Del. 1991).

[34] Trial court p. 12, B000140.

[35] B000073.

[36] B000006, Complaint Prayer for relief seeks minor's general and special damages, medical bills and funeral expenses in excess of PIP.

[37] B000075.

2. Federated's Offer Of Coverage And, The Policyholder's Rejection Thereof, Satisfied Delaware Statutory Requirements As To UM Coverage.

Federated simply issued a policy in accordance with the choices of a sophisticated businessman, Warren A. Price, who wanted to pay (on behalf of his four companies) for certain uninsured motorist coverages and not others. Delaware law affords Mr. Price the discretion to do so.

The first of only two requirements under Delaware law regarding uninsured motorist insurance is that, upon the purchase of an automobile policy, an insurer must *offer* the purchaser UM coverage, (not exceeding liability limits), up to $300,000.00, 18 Del. C. §3902(b). The DE UM option form sets forth an unambiguous offer of UM coverage in accordance with Delaware law.[38] Indeed, Mr. Price attested that Federated made him a written offer to afford up to $300,000 in UM coverage under the Policy.[39] Mr. Price accepted Federated's offer to purchase $300,000 in UM coverage exclusively for "directors, officers, partners or owners of Diamond Motor and their family members who qualify as insureds under the Policy."[40]

The second requirement under Delaware law is that a policyholder's rejection of an insurer's offer to provide uninsured motorist coverage must be in

[38] B000036
[39] B000093–94
[40] *Id.*

writing on a form furnished by the insurer, §3902(a)(l). Mr. Price used the DE UM option form supplied by Federated to knowingly and intentionally reject (in writing) uninsured motorist coverage for all other insureds under the Policy, including Diamond Motor employees and their family members such as Decedent and his daughter.[41] Given that the Policy is consistent with § 3902, it cannot be deemed to have inappropriately limited coverage or in any way be deemed void as against public policy.[42]

There was a legitimate reason for Mr. Price's decision to reject UM coverage for all other insureds under the Policy. The undisputed attestation from Federated underwriter, Daniel Powers, is that the UM coverage for key personnel purchased by Mr. Price cost $816.00 annually.[43] Whereas, purchasing UM coverage for all insureds under the Policy would have cost $11,943.00.[44] This dramatic increase in premium is commensurate with the increase in risk to Federated inherent in covering a substantially larger class of insureds, namely any person permissibly operating or occupying a vehicle owned by any one of four affiliated automotive businesses who were the Named Insureds under the Policy.[45]

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[41] *Id.*
[42] *Shuba v. United Services Auto. Ass'n.*, 77 A.3d 945, 948 (Del. 2013).
[43] B000096-98
[44] *Id.*
[45] B000038; *see also Bermel v. Liberty Mutual Fire Insurance Company,* 56 A.3d 1062, 1070 (Del. 2012) (insurer entitled to additional premium for increased risk if additional insureds added to UM policy).

3. The Federated Policy Does Not Violate Public Policy.

Plaintiff's public policy argument should not even be considered given that the Policy language is unambiguous, (as discussed *infra*). It is well-established in Delaware law, that when a statute is unambiguous, "there is no room for judicial interpretation and the plain meaning of the statutory language controls." [46]

Given the express language of § 3902(a)(1), Plaintiff cannot in good faith challenge Diamond Motor's right to reject UM/UIM coverage *per se*. Rather, Plaintiff 's argument must be limited to the proposition that the DE UM option form violates Delaware public policy by permitting the policyholder to treat its directors, officers, partners or owners (and their family members) differently than all other insureds. However, Plaintiff can cite no Delaware legal authority compelling a policyholder like Diamond Motor to buy (against its will) UM coverage for every insured under a policy even though that policyholder is not required to buy any UM coverage at all for any insured in the first place.

Rather, Delaware law permits policyholders to buy higher levels of UM coverage for themselves (and, in a business setting, for key personnel) while acquiring less coverage or, no coverage, for other permissive users of covered autos. As the trial court correctly pointed out, the Delaware Superior Court's

[46] *Barone v. Progressive Northern Insurance Co.*, 2014 WL 686953. *4 (Del. Super. Ct. Jan. 29, 2014) *quoting CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2010).

rulings in *Davis, v. State Farm Mutual Automobile Insurance Company*[47] and *Lukk v. State Farm*,[48] permit a policyholder to purchase different levels of UM coverage for different categories of insureds.

The pertinent question presented in *Davis, v. State Farm* was whether the named insureds and, their household members, could be afforded higher levels of UM/UIM coverage under multivehicle policies than the coverage afforded to third party permissive drivers and guests injured in a mishap involving one of multiple covered autos.[49] The *Davis* Court held that Delaware law permits separate classifications of coverage for different types of insureds in the area of UM/UIM insurance. The *Davis* Court pointed out that:

> 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 multivehicle 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.[50]

[47] Trial court p. 17, B000145; *Davis, v. State Farm Mutual Automobile Insurance Company*, 2011 WL 1379562 *1, *5 (Del. Super. Ct. Feb. 15, 2011), *affirmed* 29 A.3d 245 (Del. Sept. 26, 2011), (Table).
[48] Trial court p.15, B000143; *Lukk v. State Farm Mut. Auto. Ins. Co.,* 2014 WL 1891000 (Del. Super. Ct. May 12, 2014).
[49] *Davis, v. State Farm* at *5.
[50] *Id.* at *7.

The *Davis* Court found that the UM/UIM coverage for a named insured (and household members) is "personal" to them because they are the ones who acquired such coverage from the insurance company.[51] The named insured should have the benefit of the higher insurance coverage purchased.

Plaintiff's attempts to distinguish *Davis* are unsuccessful. First, Stoms argues that the plaintiffs in *Davis* received a lesser amount of coverage than the named insureds but still received some coverage. Whereas, Decedent and his daughter are left with "absolutely no protection against uninsured motorists whatsoever."[52] Plaintiff's characterization of the protection afforded by the Policy against uninsured motorists is not accurate. The trial court correctly found that Diamond Motor employees, including Decedent, were protected by the mandatory coverages set forth in the Delaware Financial Responsibility Law.[53] In fact, as previously indicated, the Policy carried more than the statutory minimum PIP and Liability coverages. Federated paid the full $30,000 in PIP policy limits on behalf of Plaintiff as a result of the Loss. Decedent and his daughter were afforded protection under the Policy, albeit different than the protection afforded key personnel.

[51] *Id.* at *6, *8.
[52] Opening Brief pg. 10.
[53] Trial court p. 21, B000149.

Second, Plaintiff argues that the Policy "arbitrarily excludes an entire class of individuals..."[54] However, as explained in greater detail below, the fact that Diamond Motor opted not to purchase UM coverage for all insureds is not an "exclusion" under the Policy. Also, given the differential between the cost of UM coverage for key personnel only and the cost for all insureds, it cannot be said that Mr. Price's decision to limit the amount purchased was "arbitrary."

Likewise, in *Lukk v. State Farm*,[55] the Court rejected plaintiff's public policy argument that a "resident relative clause," restricting UM/UIM coverage to family members who reside primarily with the named insured was void because the clause "creates a class of persons, then restricts the scope of the insurance coverage for such persons."[56] The trial court in the instant case properly noted the *Lukk* court's recognition of 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.[57] The *Lukk* Court found that it was permissible for the insurer to offer uninsured motorists coverage to the members of named insured's family residing with him, without extending coverage to other relatives who did not reside with the named insured.[58] Just like in *Davis,*

[54] Opening Brief pg. 11.
[55] *Lukk, v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 1891000 (Del. Super. Ct. May 12, 2014).
[56] *Id.* at *2; Trial court p. 15, B000143.
[57] Trial court p. 16, B000144
[58] *Id.*

the *Lukk* Court held that it is permissible for named insureds to select and purchase a policy that affords more protection against uninsured motorists to some insureds than others.

The fact that *Davis* and *Lukk* pertained to personal auto policies and the instant case relates to a commercial auto policy is immaterial. As the court below stated, "there is no compelling reason why disparate treatment of different classes of insureds would be permissible in the family context but not the corporate context."[59] Nevertheless, Plaintiff contends that, since Decedent was given permission to use the company car, it was reasonable to presume that Decedent would be entitled to the same coverage on the vehicle as the officers, directors, partners or owners of the business.[60] However, Plaintiff fails to appreciate that UM coverage is personal to the insured and does not follow the vehicle.[61] Diamond Motor and its affiliates bought UM coverage for its own key personnel just as Delaware law requires that Liberty Mutual give Mr. and Mrs. Stoms an opportunity to acquire UM coverage for themselves under their personal policy.

The Delaware Superior Court has repeatedly refused to adopt a uniform UM coverage rejection requirement for all insureds under a personal auto policy. There is even less of a reason require the uniform rejection of UM coverage in the

[59] Trial court p. 20, B000148.
[60] Opening Brief pg. 13.
[61] *Davis,* at *7.

commercial policy context. Generally, the interpersonal relationships between named insureds and users of vehicles covered under personal policies are much more likely to be closer than the mostly business relationships typically relevant to the commercial policy context.

4. The Case Law Cited By Plaintiff Does Not Support Her Public Policy Argument.

Plaintiff contends that Diamond Motor's purchase of UM coverage for one class of insureds but not for all insureds is discriminatory and therefore the Policy is void as against public policy. However, Plaintiff's reliance on the Delaware case law in support of her public policy argument is misplaced. Generally these cases hold that, once motor vehicle insurance is purchased, then policy terms cannot be more restrictive than the coverage requirements set forth in the Delaware Code. However, the case at bar is not a situation where Federated seeks to provide less than statutorily mandated minimum coverage. Instead, upon purchase of the Federated Policy, Diamond Motor simply exercised its right to not acquire any amount of non-mandatory UM coverage for a certain class of insureds, which included Decedent and his daughter.

Plaintiff cites the landmark Delaware Supreme Court case of *Frank, v. Horizon Assurance Company*[62] for the undisputed general proposition that uninsured motorist coverage must be made available to all members of the

[62] *Frank, v. Horizon Assurance Company*, 553 A.2d 1199, 1201 (Del. 1989)

public.[63] In *Frank, v. Horizon,* this Court held that "Other Motor Vehicle" ("OMV") exclusions are void on public policy grounds. Under an OMV exclusion, an insured who would otherwise be entitled to previously acquired UM coverage is deemed ineligible when injured in a vehicle owned by the named insured but not insured under the policy in question. The *Frank* Court adopted the majority rule that OMV exclusions are "incompatible with statutorily created uninsured motorist insurance, because the insurance is personal to the insured, and public policy prohibits the limiting of this coverage based on the manner in which the insured is injured."[64] The primary principle enunciated in *Frank* and its progeny is that an insurer cannot, through policy exclusions, reduce or limit UM coverage to less than that prescribed by 18 Del. C. § 3902 **after** UM insurance is purchased by the insurance consumer.[65] Similarly, in *Cropper v. State Farm Mutual Automobile Insurance Company*,[66] the Delaware Superior Court held that, **"(o)nce uninsured motorist coverage is purchased**, the insurance consumer is

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[63] Opening Brief pg. 7.
[64] *Frank, v. Horizon Assurance,* 553 A.2d at 1202.
[65] *Id.* at 1202, (emphasis added); *See also State Farm Mutual Automobile Insurance Company, v. Abramowicz,* 386 A.2d 670 (Del. 1978) (hit-and-run motor vehicle physical contact requirement void), [Opening Brief at pg. 7]; *State Farm Mutual Automobile Insurance Company, v. Washington,* 641 A.2d 449 (Del. 1994), (named driver exclusion void), [Opening Brief at pg. 9]; *Pankowski, v. State Farm Mutual Automobile Insurance Co.*, 2013 WL 5800858 *3 (Del. Super. Ct. Oct. 10, 2013), (other insurance escape clause void); *Jimenez, v. Westfield Insurance*, 2013 WL 5476606 (Del. Super. Ct. Sept. 30, 2013), (leased company vehicle exclusion void); *State Farm Mut. Auto. Ins. Co., v. Wagamon,* 541 A. 2d 557 (Del. 1988), (household exclusion void), [Opening Brief at pg. 9].
[66] *Cropper, v. State Farm Mutual Automobile Insurance Company*, 671 A.2d 423, 426 (Del. Super. Ct. 1995).

entitled to secure the full extent of the benefit which the law requires to be offered."[67]

The opinions cited by Plaintiff, are not on point. The instant case, does not involve an attempt by Federated to rely on a policy exclusion to deny coverage for a class of insureds, including Decedent and his daughter, from otherwise existing UM coverage purchased by Diamond Motor. Rather, Diamond Motor intentionally rejected the option to purchase UM coverage for Decedent and his daughter at the outset. The *Frank* Court did not hold that Delaware law requires the existence of UM coverage under all circumstances of loss. Indeed, the version of the § 3902(a)(1) governing the Delaware Supreme Court's 1989 opinion in *Frank* expressly provided, as it still does today, that UM coverage is not required when rejected in writing on a form furnished by the insurer.[68]

Neither *Frank, Cropper* nor any other case cited in the Opening Brief, supports a public policy compelling a named insured to buy coverage beyond the minimum amounts required by the Delaware Financial Responsibility Law.[69] Nor do these cases hold that an insurer is obligated to afford uninsured motorist benefits to a class of insureds if the policyholder validly opts not to purchase such coverage for that class. In the instant case, the trial court correctly determined that

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[67] *Id.,* (emphasis added).
[68] *Frank, v. Horizon Assurance,* 553 A.2d at 1201, fn. 2.
[69] Trial court p. 15, B000143.

there is simply no prohibition against an insurance consumer opting to afford the full UM benefits available under § 3902 to a select class of insureds while not providing such coverage for all other insureds.[70] Indeed, the *Frank* Court specifically held that "the public policy underlying § 3902 is to permit an insured to **protect himself** from an irresponsible driver causing injury or death."[71]

Adopting Plaintiff's position would in fact lead to a violation of the Delaware public policy in §3902 permitting unfettered rejection of UM coverage by the insurance purchaser. Placing restrictions on the right to reject UM coverage that are not expressly set forth in the statute impinges upon the insurance consumer's discretion to purchase the desired amount of UM insurance. If Plaintiff were to prevail, the practical result would be to force many businesses purchasing a Delaware commercial auto policy to choose whether (i) to buy more UM coverage than desired [and more than the law requires] or (ii) to refrain from purchasing any UM coverage at all. A substantial percentage of cost-conscious Delaware businesses will undoubtedly choose the latter course. Consequently, granting the relief requested by Stoms will probably result in *less* UM coverage being generally available under Delaware commercial policies, not more. The better public policy would be to permit (both personal and commercial) named insureds to voluntarily purchase uninsured motorist insurance for individuals of

[70] Trial court pp. 16-17, B000144-145.
[71] *Frank, v. Horizon,* at 1205, (emphasis added).

their choosing without impairing their statutory right to reject UM coverage for others.

Also, misplaced is Stoms' reliance on the Indiana Court of Appeals case of *Balagatas v. Bishop*,[72] wherein the plaintiff argued that a commercial auto policy provision granting uninsured/underinsured motorists coverage for some employees using a company car but, not others, was contrary to law and public policy under Indiana Code § 27-7-5-2(b).[73] However, the court below correctly considered the difference between the Indiana and the Delaware statutes to be so profound that the *Balagatos* opinion provides no support for Plaintiff's public policy argument in the instant case. [74] First, the Indiana statute expressly mandates that a policyholder reject coverage "on behalf of all other named insureds and all other insureds." In other words, Indiana Code § 27-7-5-2(b) sets forth an express requirement that all insureds should be treated as a single class and given the same benefits. As

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[72] *Balagtas v. Bishop*, 910 N.E.2d 789 (Ind. Ct. App. 2009).

[73] *Id.* at 794. Indiana Code § 27-7-5-2(b) provides:

> 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.

[74] Trial court p. 19, B000147, *citing Balagatos* at 795.

established above, neither the Delaware Code nor the Delaware case law mandate that all insureds must be treated alike with respect to uninsured motorist coverage.

Second, as the trial court in the instant case explained, the Indiana statute explicitly spells out two options with regard to uninsured/underinsured motorists coverage that are not present in the Delaware Code.[75] Under the Indiana statute, the named insured may reject coverage for both uninsured and underinsured motorists *or* the name insured may reject only one. This feature shows that the drafters of the Indiana statute 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 the trial court below properly drew the inference that, "had the drafters (of the Indiana statute) 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."[76] Given that the Indiana Court based its decision upon language in the Indiana statute that is not contained in the Delaware statute, the *Balagatos* opinion is inapplicable to the instant case. It is well-established that, "[i]n our constitutional system, this

[75] *Id.*
[76] *Id.*

Court's role is to interpret the statutory language that the General Assembly actually adopts without rewriting the statute to fit a particular policy position."[77]

In summary, the terms of the DE UM option form in the Federated Policy are enforceable under Delaware law and thereby afford $300,000 in coverage to the directors, officers, partners or owners (and qualifying family members) of Diamond Motor but reject uninsured motorist coverage for any other insured, including Decedent and his daughter. Plaintiff has failed to raise any credible public policy basis for finding that the Federated Policy is void in any respect.

[77] *Barone v. Progressive*, 2014 WL 686953. at *4, *quoting Taylor v. Diamond State Port Corp.,* 14 A.3d 536, 542 (Del. 2011).

II. THE TRIAL COURT PROPERLY GRANTED FEDERATED'S MOTION AND DENIED PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE THE POLICY WAS NEITHER AMBIGUOUS AS TO WHETHER DECEDENT QUALIFIES AS A "DIRECTOR" OR "OFFICER" OF DIAMOND MOTOR NOR CONTRARY TO PLAINTIFF'S REASONABLE EXPECTATION OF COVERAGE.

A. QUESTION PRESENTED

Did the trial court err in finding, as a matter of law, that the Policy was neither ambiguous as to whether Decedent qualifies as a "director" or "officer" of Diamond Motor nor contrary to Stoms' reasonable expectation as to uninsured motorist benefit coverage under the Policy?

B. SCOPE AND STANDARD OF REVIEW

The Superior Court's interpretation and construction of an insurance contract is subject to *de novo* review.[78] The scope of the coverage obligation is determined by the language in the insurance policy. When interpreting an insurance policy, the court treats each dispute as a matter of law and interprets the policy "in a common sense manner."[79] When the language of an insurance contract is clear and

[78] *Oberly, v. Kirby,* 592 A.2d at 457.
[79] *O'Donnell v. State Farm Mutual Automobile Insurance Company*, 2013 WL 3352895 *2 (Del. Super. Ct. June 28, 2013).

unequivocal, a party will be bound by its plain meaning.[80] The proper construction of any contract, including an insurance contract, is purely a question of law.[81]

C. MERITS OF ARGUMENT

1. There Are No Issues Of Material Fact As To Whether Decedent Was A Director Or Officer Of Diamond Motor.

As a threshold matter, Plaintiff does not contend that Decedent was an owner or a partner of Diamond Motor, (or a family member of a qualifying insured). Moreover, Plaintiff does not factually contend that Decedent was truly an officer or director of Diamond Motor. In any event, the uncontroverted attestation of Warren A. Price, President of Diamond Motor, is that Decedent was an employee of the company and nothing more.

2. The Policy Is Not Ambiguous.

According to Plaintiff, Decedent "had some "managerial" duties in his capacity as a business manager at Diamond Motor. Plaintiff contends such employment duties render the Policy ambiguous as to whether Decedent qualifies for UM coverage as a "director" or an "officer" as those terms are used in the DE UM option form. As a result of this purported ambiguity, Plaintiff contends that the Policy should be strictly construed against Federated, thereby affording her

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

[81] *Aetna Cas. and Sur. Co. v. Kenner*, 570 A.2d 1172, 1174 (Del. 1990); *Rhone-Poulenc v. American Motorists Ins*., 616 A. 2d 1192, 1195 (Del. 1992).

$300,000 in UM coverage. However, the Policy is not ambiguous when the terms "director" and "officer" are interpreted in accordance with their plain meaning in the context of a commercial automobile insurance policy.

The terms "director" and "officer" are not defined in the Policy. Nevertheless, the fact that terms are not defined in a policy do not render them ambiguous. Rather undefined terms in an insurance policy are to be given their plain meaning.[82] The general rule requiring that terms of an insurance policy are to be construed against an insurer does not apply unless there is some ambiguity in the contract language.[83] If the language is clear and unambiguous, a Delaware court will not destroy or twist the words under the guise of construing them.[84] When the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.[85] An ambiguity exists only when the language in a contract permits two or more reasonable interpretations.[86] In interpreting a term in an insurance policy, the court must look to its context within the larger policy

[82] *Hallowell v. State Farm,* 443 A. 2d at 926.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

document. A court must "examine all relevant portions of the policy, rather than reading a single passage in isolation."[87]

Contrary to these well established rules of insurance contract construction under Delaware law, Plaintiff contorts the definitions of "director"[88] and "officer"[89] set forth in Black's Law Dictionary instead of applying the plain meaning of these terms as used in the Policy. Clearly Plaintiff views these dictionary definitions in isolation rather than in the overall context of a commercial auto insurance policy.[90] The disputed references to "director" and "officer" appear on the "Delaware Commercial Automobile Uninsured Motorists Coverage Option Form"[91] The Named Insured listed on the form is a corporation, Diamond Motor. The first of the two "Limit Options" selections that 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." The trial court recognized these provisions are

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[87] *Sherman v. Underwriters at Lloyd's, London,* 1999 WL 1223759, *4 (Del. Super. Ct. Nov. 2, 1999) (citation omitted).

[88] Black's Law Dictionary 232 (4th Pocket Ed. 2011), A Director is one who manages, guides or orders, a chief administrator.

[89] Black's Law Dictionary 536-537 (4th Pocket Ed. 2011), An Officer is a person holding office of trust, authority or command in public affairs, government or a corporation.

[90] Plaintiff asserts that it is an "unnecessarily burdensome task" for her to "deduce that the terms in the policy were to be governed by their definitions under the law of contracts." Opening Brief pg. 20. There are just too many troublesome implications of Plaintiff's statement to discuss them all. The rule of contract construction being discussed is simply that undefined terms must be ascribed their "plain meaning" in the context of a commercial insurance policy. This is hardly an esoteric aspect of contract law that places an unnecessarily burdensome task on anyone.

[91] B000036, (heretofore sometimes referenced as the "UM/UIM Endorsement").

clearly in the corporate context; the form concerns coverage for a corporation and discusses limits for "directors, officers, partners or owners" of the organization.[92]

Assuming for the purposes of argument that Decedent "managed" others in his capacity as a business manager of the Company, that does not make him a "director." In the business context, the Plain meaning of the term "director" is a person who is a member of the Board of Directors of a corporation with overall control of a company.[93] Persons on a Board of Directors are either elected or appointed the such a position.[94] To reiterate, Mr. Warren attested that Decedent was not a director of the company. The fact that Decedent may have had "managerial duties" does not render ambiguous the use of the term "director" in the Policy.[95]

Similarly, the fact that Decedent' may have had "managerial" duties does not give rise to an ambiguity in the Policy over whether he was an "officer" of the company. The terms "officer" and "manager" are not interchangeable. The plain meaning of the term "officer" is established by the Delaware Corporations Law as one who fills a position established in accordance with a specific process set forth

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[92] Trial court p. 24, B000152.

[93] The business and affairs of every corporation organized under this chapter (the Delaware Corporation Law) shall be managed by or under the direction of a board of directors, 8 Del. C. § 141(a).

[94] 8 Del. C. §§ 102(a)(6), 141.

[95] Trial court p. 22, B000150; *see also* B000100-107, *United Fire & Casualty Insurance Company v. Thompson,* Slip Opinion, C. A. No. 13-2352, pp. 5-7 (8th Cir. July 11, 2014), (Person who "directed" employment activities of others was not a "Director" as plain meaning of term was used in Commercial Policy). (Exhibit "A" hereto).

in the bylaws and/or adopted by the Board of Directors of a corporation.[96] Mr. Warren has attested that Decedent was not an officer of the company. The fact that he may have had managerial duties does not thereby render the Policy ambiguous as to whether Decedent was an officer of the corporation. Consequently, the terms of the UM insurance provisions in the Policy are not ambiguous and the plain meaning of the language controls.

3. The Policy Is Not Contrary To Plaintiff's Reasonable Expectation As To Uninsured Motorist Benefit Coverage Under The Policy.

Plaintiff does not have a reasonable expectation of coverage under the Policy in the instant case. As Plaintiff acknowledges, the court below cited *Hallowell v. State Farm* for the proposition that "an insurance policy should be construed to effectuate the reasonable expectations of the average member of the public who buys it."[97] However, Plaintiff completely ignores the undisputed fact that the Decedent did not buy the Federated Policy. Rather, Mr. Price bought the Policy on behalf of Diamond Motor and its affiliates. Mr. Price did not reasonably expect that Decedent and his daughter would be entitled to UM coverage. In fact, he specifically intended that persons in the same class of insureds as Decedent and his daughter would not have any UM coverage under the Policy. Likewise, the Court in *Bermel* held that an employee's authority to use a company owned car did not

[96] 8 Del. C. § 142(a) & (b).
[97] Opening Brief pg. 20, *citing Hallowell*, 443 A.2d at 926.

give rise to a reasonable expectation of UM coverage under the employer's commercial auto policy.[98] The employee in *Bermel* was not a named insured under, and **did not pay premiums on**, the employer's commercial auto insurance policy.[99]

In the instant case the policyholder, Diamond Motor, was not under any obligation to purchase UM coverage for the class of insureds which included Decedent and his daughter. Decedent was not a named insured and did not pay premiums and therefore had no reasonable expectation of UM coverage under the Policy. Given that Decedent and his daughter were strangers to the insurance contact between Diamond Motor and Federated, Plaintiff lacks standing to reform the Policy and thereby obtain the $300,000 in uninsured motorist benefits she now seeks.[100]

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[98] *Bermel v. Liberty Mutual,* 56 A.3d at 1068.

[99] *Id.* Granted, unlike the instant case, the plaintiff in *Bermel* was not using the company car at the time of loss. Nevertheless, Decedent's and his daughter's use/occupancy of a company owned vehicle at the time of the Loss is not determinative as to the availability of UM coverage under the Policy. Rather, it is well established that UM coverage is personal to the insured and therefore UM coverage follows the person, not the vehicle. "Central to our holding in *Frank* is the requirement that the plaintiff be a named insured to have an expectation of benefits (including UM/UIM coverage) under a relevant policy." *Id.* at 1067-1068 (*discussing Frank v. Horizon*). *See also Davis, v. State Farm* at *5. In the instant case, Plaintiff must look to her family's Liberty Mutual policy for any extant UM coverage.

[100] *Davis, v. State Farm* at *7.

Plaintiff cites the Delaware Superior Court's opinion in *Fisher v. Nat'l Union Fire Ins. Co. of Pittsburgh*[101] for the proposition that an employee of a corporation can "reasonably expect" their employer to carry UM insurance for its employees. However, Plaintiff ignores the well established threshold limitation on the application of the reasonable expectation doctrine. As the trial court in the instant case pointed out, the interpretation of the a policy under the reasonable expectation doctrine 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."[102] 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."[103]

The named insured in *Fisher* was a local governmental entity who could not sustain bodily injury or have family members. As such, the policy definition of an "insured" was ambiguous given that the Delaware Financial Responsibility Law requires coverage for persons who can sustain, or have a family member who can sustain, bodily injury.[104] In strictly construing this ambiguity against the insurer,

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[101] *Fisher v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1997 WL 817893 (Del. Super. Ct. Dec. 11, 1997).
[102] Trial court p. 22, B000150; *Hallowell* at 927 (internal quotation, citation omitted).
[103] *Id.*
[104] *Fisher* at *3;

the *Fisher* Court employed the reasonable expectation doctrine to find that UM coverage was available to a police office injured while exiting his patrol car.[105]

However, the *Fisher* opinion is inapposite to the instant matter. In the case at bar, Federated avoided the ambiguity in the definition of an "insured" that rendered the commercial auto policy ambiguous in *Fisher* and in other Delaware cases.[106] Under the Federated Policy, if the named insured is a business entity, then the definition of insured with regard to recovery for bodily injury and, bodily injury to another, is expressly reserved for human beings.[107] In *Bermel v. Liberty Mutual Fire Insurance Company,* this Court held the exact same definition of an "insured" as set forth in the Federated Policy to be unambiguous, precluding application of the reasonable expectation doctrine.[108] Given the lack of ambiguity as to the definition of an "insured" in the Federated Policy, the reasonable expectation doctrine does not come into play in the instant case.[109] Rather the unambiguous terms of the Policy apply to afford UM coverage to key personnel but not to the class of insureds that includes Decedent and his daughter.

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[105] *Id.* at *1.
[106] *See e.g., Reese v. Wheeler*, 2003 WL 22787629, *5 (Del. Super. Ct. Nov. 4, 2003) (citations omitted).
[107] B000045.
[108] *Bermel v. Liberty Mutual Fire Insurance Company,* 56 A.3d 1062, 1070-1071 (Del. 2012).
[109] *O'Donnell v. State Farm*, 2013 WL 3352895 at*4 (predicate to application of reasonable expectations doctrine is existence of ambiguity in insurance contract).

CONCLUSION

Based on the foregoing, *Defendant Below/Appellee, Federated Service Insurance Company*, respectfully requests that this Court affirm the trial court's grant of summary judgment in its favor and denial of *Plaintiff Below/Appellant Stoms' cross*-motion for summary judgment and for such other relief as this Court deems necessary and just.

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Respectfully submitted,
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