EFiled: Dec 20 2018 03:19PM EST
Filing ID 62790408
Case Number 565,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES FRITZ, Plaintiff Below, Appellant, v. CINCINNATI INSURANCE CO., Defendant Below, Appellee.	)	No. 565,2018 On Appeal From The Superior Court of the State of Delaware, C.A. No. S16C-11-006 RFS

APPELLANT'S OPENING BRIEF

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Dated: December 20, 2018

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NATURE OF PROCEEDINGS

Appellant-Plaintiff Below Charles Fritz ("Fritz") filed a personal injury complaint against Alex Lopez and Gilberto Lopez on November 9, 2016. Fritz filed an amended complaint on January 24, 2017, adding Cincinnati Insurance Company ("Cincinnati Insurance") as a party and asserting an underinsured motorist claim against Cincinnati Insurance.

On July 11, 2017, Cincinnati Insurance filed a Motion to Dismiss or For Summary Judgment in the Alternative. Fritz opposed the Motion. Initially, the Superior Court advised the parties that oral argument was necessary and scheduled it for August 23, 2018.

However, on the morning of August 22, 2018, the Superior Court cancelled the oral argument. That same morning, Fritz requested that the Superior Court allow the record to be supplemented. But later that day, on August 22, 2018, the Superior Court granted Defendant's Motion For Summary Judgment.

Fritz timely filed Motion for Reargument. On November 5, 2018, the Superior Court denied Plaintiff's Motion for Reargument, and on November 7, 2018, Fritz filed the instant appeal.

This is Plaintiff's Opening Brief on appeal.

SUMMARY OF ARGUMENT

1. The Superior Court committed reversible error when it granted summary judgment against Fritz and barred his ability to recover under his employer's UIM policy. The mere receipt of worker's compensation benefits does not defeat Fritz's reasonable expectation of also collecting UIM benefits under a policy bought and paid by Fritz's employer. The Supreme Court's prior precedent recognizes Fritz's right to collect under his employer's UIM policy. This Court has previously implicitly acknowledged a plaintiff's right to an employer's UIM policy even when they have received workmen's compensation benefits in situations where the Employer was not a self-insured entity.

2. The Superior Court erroneously applied the concept of exclusivity from *Simpson* and *Robinson* because exclusivity only applies with regard to self-insured employers. The employer in the instant case elected to pay an extra premium to obtain UIM coverage from a third party, Cincinnati Insurance, to protect his employees instead of being self-insured. Thus, Cincinnati Insurance stands in the shoes of the tortfeasor and not the employer, in Fritz's current claim.

3. Public policy and statutory intent require that the worker's compensation and UIM statutes be read in favor of innocent, injured workers like Fritz. The purpose of the UIM statute is to place the insured in the same position they would have been if the tortfeasor had carried the same amount of insurance by

providing compensation for general damages, such as pain and suffering and economic loss. Public policy prohibits limitations on coverage. UIM coverage allows an injured employee to become whole again by providing compensation for benefits that are not available under the States Workers Compensation Act ("WCA"). This Court must allow employees who are injured while in the scope and course of their employment, through no fault of their own, in their employer's owned vehicle, to access UIM benefits, not covered under workmen's compensation, of the employer's policy.

4. The Defendant waived its ability to make an exclusivity argument to deny first party benefits of UIM when it already made first party Personal Injury Protection ("PIP") benefits under 21 *Del. C.* § 2118 ("Section 2118") in the same case. Under the equitable doctrine of waiver, the Defendant waived its exclusivity argument when it issued PIP benefits to the Plaintiff from the employer's automobile policy as early as one day after filing its Motion to Dismiss or Summary Judgment in the Alternative.

STATEMENT OF FACTS

On or about October 20, 2015, Plaintiff was traveling eastbound on Vines Creek Road approaching Townsend Road in Sussex County, Delaware, when Alex Lopez who was traveling on Townsend Road failed to remain stopped at a stop sign and pulled out from the stop sign and struck the side of the Fritz's vehicle forcing Fritz into the westbound lane of Vines Creek Road into another vehicle.[1] Fritz suffered personal injuries to his low back, neck, mid back, right and left knees, and right and left shoulders that resulted in multiple surgical interventions; he is currently still totally disabled from work and will continue to suffer wage loss as a result of the accident in question.[2]

The Lopez vehicle was insured by ALFA Vision Insurance with limits of $25,000 per person and $50,000 per accident. The $25,000 limits were tendered to Fritz and accepted.

At the time of the accident, Fritz was in the course and scope of his employment with the Bryant Group ("Bryant"). Fritz was operating a truck that was owned and insured by Bryant. Bryant had a policy that no one other than employees were permitted to be in any Bryant vehicle.[3] At the time of the accident, Bryant

[1] A14-15; A27.

[2] A142-144; A28; A30; A32; A29.

[3] A185.

carried automobile insurance on the truck Plaintiff was driving with Cincinnati Insurance. The coverage with Cincinnati Insurance included uninsured/underinsured motorist coverage for $1,000,000.[4] The coverage under Cincinnati Insurance's policy also included no fault coverage pursuant to Section 2118. No fault benefits were paid to Fritz under Cincinnati Insurance's policy.[5] Bryant also carried workmen's compensation insurance through Cincinnati Insurance. Fritz also received workmen's compensation benefits.[6]

Fritz made a demand for underinsured motorist benefits from Cincinnati Insurance. Cincinnati Insurance denied the claim advising that there was no coverage available to Fritz because he had elected workmen's compensation benefits.

[4] A25 ¶ 6(d).

[5] A186.

[6] A142-A147.

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED SUMMARY JUDGMENT AGAINST FRITZ AND BARRED HIS ABILITY TO RECOVER UNDER HIS EMPLOYER'S UIM POLICY.

A. Question Presented

Does the mere receipt of worker's compensation benefits defeat Fritz's reasonable expectation of also collecting UIM benefits under a policy Fritz's employer bought and paid for and which prior Supreme Court precedent recognizes that Fritz has a right to collect under?

This issue was preserved because it was addressed in Fritz's Answering Brief in the Superior Court, in his Motion for Reargument, and in the Superior Court's decision and decision denying Plaintiff's Motion for Reargument.[7]

B. Scope of Review

On appeal, this Court conducts a *de novo* review of the Superior Court's grant of summary judgment "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment

[7] *See* Ex. A at 1; A181-82.

as a matter of law."[8] Questions of statutory interpretation are also reviewed *de novo*.[9]

C. Merits of Argument

1. Fritz is entitled to recover under his employer's UIM policy because he had a reasonable expectation that the policy would cover a work-related accident in his employer's vehicle.

Aside from the issue of Fritz's receipt of worker's compensation benefits, there is no question that an employee like Fritz is entitled to recover under his employer's UIM policy.

In *Bermel v. Liberty Mutual Fire Insurance Co.*,[10] this Court held that if a policy is ambiguous and an employee is not a named insured under the employer's underinsurance policy, then the question is whether the employee has a reasonable expectation that the insurance policy would provide coverage.[11] In *Bermel*, the plaintiff was not operating the vehicle covered under the employer's policy.[12] The plaintiff was also engaged in personal activities, and as a result, was not within the

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[8] *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010) (citations and internal quotations omitted).

[9] *Id*.

[10] 56 A.3d 1062 (Del. 2012).

[11] *Id.* at 1071.

[12] *Id*. at 1072.

scope and course of employment.[13] Thus, in *Bermel*, the plaintiff did not have a reasonable expectation that the employer's underinsured policy would provide coverage.

Applying *Bermel* to different facts, the Superior Court has found that an employee does have a reasonable expectation of coverage when the employee is injured in the employer's vehicle during the scope and course of the employee's employment. In *Jimenez v. Westfield Insurance*,[14] the plaintiff sustained serious bodily injury in a motor vehicle accident where he was a passenger in the employer's vehicle operated by his co-worker. At the time of the accident, both the plaintiff and co-worker were acting within the course and scope of employment. The *Jimenez* court, relying on the rationale from *Bermel*, found that an employee using a vehicle covered by the employer's insurance policy, while in the scope and course of his employment, has a reasonable expectation that the employer's insurance policy for its vehicle will provide insurance coverage for the employee.

Similarly, in other cases, the Superior Court has followed the principle that policy ambiguity should be resolved in favor of UM or UIM coverage for the injured employee. For instance, coverage is warranted when the employees are listed as

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[13] *Id*.

[14] 2013 WL 5476606 (Del. Super. Ct. Sept. 30, 2013).

designated drivers or when they sustain injuries in furtherance of their employment.[15] These cases demonstrate that the touchstone is whether the employees had a reasonable expectation that the business automobile insurance policies would cover them. As succinctly explained in *Jimenez*, "[a]n employee using a vehicle in the scope and course of his employment has a reasonable expectation that the employer's insurance policy for its vehicles will provide insurance coverage for the employee."[16]

Here, at the time of his accident, Fritz had a reasonable expectation of coverage under his employer's automobile insurance policy issued by the Cincinnati Insurance. As in *Jimenez*, it is uncontroverted that Fritz was within the scope and course of his employment with Bryant. And Fritz was in a vehicle that was covered by Bryant's automobile insurance policy. Notably, Bryant had the option to reject underinsured motorist coverage but instead made the deliberate decision to purchase it. Further, Bryant employees were the only persons who were allowed to operate or be a passenger in Bryant's vehicles covered in the policy in question.[17]

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[15] *See*, *e.g.*, *Harleysville Mut. Ins. Co. v. Grzbowski*, 2002 WL 1859193 (Del. Super. Ct. Aug. 9, 2002); *Fisher v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1997 WL 817893 (Del. Super. Ct. Dec. 11, 1997), *aff'd*, 719 A.2d 490 (Del. 1998).

[16] 2013 WL 5476606, at *1.

[17] A185.

Under *Bermel* and *Jimenez*, as well as the deferential standard of summary judgment, the undisputed facts establish that Fritz had a reasonable expectation of coverage and thus, is entitled to UIM benefits coverage under his employer's automobile policy issued by the Cincinnati Insurance.

2. Receipt of worker's compensation benefits does not defeat Fritz's right to recover under his employer's UIM policy because Fritz's employer is not self-insured.

Because Fritz was otherwise entitled to recover under his employer's UIM policy, the Superior Court erred by denying Fritz the right to do so simply because Fritz also received worker's compensation benefits. As this Court has recognized, an employee has a right to payment of UIM benefits except in the limited situation when the employee's employer is self-insured.

Recently, for example, this Court implicitly acknowledged an employee's right to recover under both a UIM policy and also a worker's compensation policy so long as the employer is not self-insured. In *Simendinger v. National Union Fire Insurance Co.*,[18] two employees of Connections CSP, Inc. were killed in an automobile accident while those employees were in the scope and course of their employment. The employer owned and insured the vehicle that the employees were traveling in. As a result of the accident, Philadelphia Indemnity Insurance Company,

[18] 74 A.3d 609, 610 (Del. 2013).

the employer's UIM carrier, paid out $1,000,000 to the estates of the employees. National Union Fire Insurance Company, the employer's workmen's compensation carrier, also made payments to the employees estates. But in the litigation, National Union Fire Insurance Company sought to enforce a lien on the UIM recovery for the amount of the workers' compensation benefits paid.[19]

This Court rejected the lien as inconsistent with the statutory scheme.[20] The rationale was straightforward, and it aligned with this Court's approach eighteen years earlier in *Hurst v. Nationwide Mutual Insurance Co.*[21] In *Hurst*, this Court addressed the question from the view of uninsured motorist, or UM, coverage rather than underinsured motorist, or UIM, coverage. The Court noted "that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against *an injured employee's right to payment* pursuant to the employer's uninsured motorist coverage."[22]

When this Court in *Simendinger* applied *Hurst*'s rationale to UIM coverage, this Court confirmed that an injured employee has right to payment pursuant to the

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[19] *Id*.

[20] *Id*. at 611.

[21] 652 A.2d 10 (Del. 1995).

[22] *Id*. at 15, n.2 (citing 19 *Del. C.* § 2363) (emphasis added).

employer's underinsured motorist coverage, regardless of whether the employee also recovers worker's compensation benefits.

Although *Hurst* and *Simendinger* are the most similar to the instant case, they are far from the only cases confirming the basic principle that an injured worker has a right to pursue other available benefits in addition to workmen's compensation. For example, prior cases have found that an injured worker has a right to recover under a personal UIM policy,[23] to receive unemployment benefits,[24] and to access Personal Injury Protection ("PIP") benefits.[25] As the statutory scheme itself states, "the acceptance of [worker's] compensation benefits or the taking of proceedings to enforce [worker's] compensation payments shall not act as an election of remedies."[26] The only exception previously recognized was for self-insured, government employers,[27] but that exception is inapplicable to the private employer

[23] *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1055-56 (Del. 2010).

[24] *Harmon v. F & H Everett & Assocs.*, 83 A.3d 737 (TABLE), 2013 WL 6798907 (Del. Dec. 20, 2013).

[25] *Cicchini v. State*, 640 A.2d 650 (Del. Super. Ct. 1993).

[26] 19 *Del. C.* § 2363.

[27] *See Robinson v. State*, 2017 WL 1363894, (Del. Super. Ct. Apr. 11, 2017), *aff'd*, 176 A.3d 1274 (Del. 2017); *Simpson v. State*, 2016 WL 425010 (Del. Super. Ct. Jan. 28, 2016).

here.[28] Thus, contrary to the Superior Court's conclusion, precedent establishes that, even before 19 *Del. C.* § 2304 was amended, an injured worker like Fritz was entitled to access all available sources to ensure that the he or she is made whole.

Here, Fritz has a right to recover from sources, including his employer's UIM policy, regardless of whether he has also received worker's compensation benefits. The Superior Court's contrary decision ignored these earlier precedents from this Court in which this Court implicitly acknowledged an employee's right to an employer's UIM policy even when they have received workers' compensation benefits. Allowing that decision to stand would essentially extinguish the rights established in *Hurst* and *Simendinger*, and recognized in numerous other cases. As a result, this Court should reverse the Superior Court.

3. The Superior Court erred in applying the concept of exclusivity from *Simpson* and *Robinson* to this case because exclusivity only applies with regard to self-insured employers.

Instead of following the precedent that addressed the situation in this case, the Superior Court followed unrelated cases pertaining to self-insured employers. Not only are those cases inapplicable here, but also, they were contrary to Delaware's worker's compensation scheme — and so wrong that the General Assembly was

[28] *See infra*, Argument I(C)(2).

compelled to amend the statutory scheme to abrogate any effect the cases might have had.

The two cases that the Superior Court errantly followed are for present purposes factually identical. First, in *Simpson v. State*, Judge Carpenter held that where an employer is *self*-insured, the exclusivity provision of the workmen's compensation statute, 19 *Del. C.* § 2304, precluded an employee from recovering both workmen's compensation benefits and underinsured motorist coverage.[29] Second, in *Robinson v. State*, Judge Bradley reached the same conclusion on *identical* facts, which was later affirmed by this Court.[30]

But, as this Court made clear from the oral argument in this Court in *Robinson*, neither *Robinson* nor *Simpson* addressed employers who are not self-insured.[31] At that argument, Justice Traynor made it clear that *Simpson* and *Robinson* both strictly turned on the fact that the State was self-insured:

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[29] *Simpson*, 2016 WL 425010.

[30] *Robinson*, 2017 WL 1363894.

[31] *Robinson v. State*, C.A. No. 172, 2017, tr. at 13:25-14:14 (Del. Oct. 25, 2017). Available at: https://livestream.com/accounts/5969852/events/7857624/videos/164898904/player

> This really turns in large part on the fact that the State has chosen, in respect to this risk [UIM] and of course others, to be self-insured. Thereby removed a significant class of potential claimants . . . from making these type of claims [UIM]. Wouldn't that create an incentive for employers in general to consider going self-insured generally.[32]

This case poses just the opposite of what Justice Traynor foreshadowed: an employer who deliberately chose not to take advantage of going self-insured with respect to UIM. In so choosing, Fritz's employer did not (as the State did in *Simpson* or *Robinson*) eliminate claims like Fritz's current claim.

Also notable, in both *Robinson* and *Simpson*, the State of Delaware was the employer. In regards to workmen's compensation, the State of Delaware is a self-insured entity whose claims are handled through the State of Delaware's State Insurance Coverage Office.[33] Likewise, the State is also self-insured for automobile insurance coverage for the State's vehicles, including for PIP and UIM.[34] Because the State of Delaware is self-insured, it acts as both the employer and insurance carrier. As a result, both *Simpson* and *Robinson* were declaratory actions brought by employees of the State of Delaware directly against their employer.

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[32] *Id.* at 21:17 - 21:53.

[33] *Del. Dep't of Human Res.: Ins. Coverage Office Brochure*, https://dhr.delaware.gov/inscov/doc/brochure.pdf.

[34] *Simpson*, 2016 WL 425010 at *1.

Being a self-insured entity puts the employer in a distinct position from an employer that is not self-insured under 21 *Del. C.* § 2904. When the entity is self-insured, this Court has found the entity to be financially responsible for providing its employees with financial security at least equivalent to the insurance contemplated by state law.[35]

And until this case, the Superior Court adopted the same approach. For example, in *State Insurance Coverage Office v. Christenson*,[36] the Superior Court found that the State's self-insurer status indicates that the State functions as a financially-responsible entity.[37] There is simply no precedent that endorses the idea that a worker is not entitled to underinsured motorist benefits when his employer is not self-insured.

This distinction further exemplifies why the rationale from *Simpson* and *Robinson* cannot be cross-applied to this case. In both cases the vehicles were insured under the State's self-administered automobile liability policy, and the

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[35] *See Waters v. United States*, 787 A.2d 71, 73 (Del. 2001) (holding that for the limited purposes of the issue in question the United States is considered the equivalent of a self-insured entity regarding subrogation under 21 *Del. C.* § 2118(g) and thus the finically responsible entity that provides its employees with financial security and required to provide subrogation).

[36] 2014 WL 3045215, at *2 (Del. Super. Ct. June 11, 2014).

[37] *Id*. at *3.

workers were insured under State's worker's compensation plan.[38] In *Simpson*, the Plaintiff was operating a State-owned vehicle as authorized by her employment in the Department of Health and Social Services for the State of Delaware.[39] In *Robinson*, the plaintiff was a social worker for the State of Delaware that was involved in an automobile accident while in the scope and course of her employment.[40] Thus, in both *Simpson* and *Robinson*, the employer functioned as a financially-responsible entity not only for its automobile liability policy of the UIM coverage but also for purposes of worker's compensation as it is also self-insured and it provides its employees benefits under 19 *Del. C.* § 2304.

Contrast *Simpson* and *Robinson* with this case. Here, Fritz is not bringing an action against his employer, Bryant, but instead against the financially responsible entity and the named party, Cincinnati Insurance. Bryant contracted with Cincinnati Insurance to provide these benefits, which they have failed to do.[41] Bryant also elected to further protect its employees by paying for a policy that covered, "[a]ny natural person, but only for injuries that occur while 'occupying' an 'auto' for which

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[38] *See* 19 *Del. C.* § 2304.

[39] *Simpson*, 2016 WL 425010, at *1.

[40] *Robinson*, 2017 WL 1363894, at *1.

[41] Under 18 *Del. C.* § 3902 the employer was free to reject underinsured motorist coverage. Clearly, Bryant elected to purchase underinsured motorist coverage to protect its employees.

coverage is provided…."[42] There is no dispute that the Plaintiff fell under the category of an "insured" as he was a natural person injured while occupying an auto that was covered under this policy.

Yet, the Superior Court ignored or overlooked these significant distinctions. It refused to consider *Simendinger* or *Hurst*. And instead of recognizing the inapplicability of *Simpson* and *Robinson* or the factual dissimilarities, the Superior Court tried to force this case into the *Simpson-Robinson* box via *Henry v. Cincinnati Insurance Co*.[43] That, too, was flawed. The issue raised in this case was not addressed by the Court in *Henry*, a material distinction that the Superior Court acknowledged but then errantly ignored:

> The Court understands that the matter Plaintiff raises in this case was not presented to the *Henry* Court. Nevertheless, as here, the employer in *Henry* was ***self-insured***. Thus, the language of the holding squarely addresses the situation at bar.[44]

The Superior Court thus compounded its own errors. First, it ignored the relevant cases of *Simendinger* or *Hurst* in favor of cases which do not even apply unless the employer is self-insured.

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[42] A149-50.

[43] 2018 WL 3640835 (Del. Super. Ct. July 31, 2018).

[44] Ex. B at 2 (emphasis added).

Second, and more importantly, the Superior Court errantly assumed that the employer in this case is self-insured. The Superior Court's flawed assumption was undisputedly inaccurate. Bryant is not self-insured. But even worse, Judge Stokes was required, for purposes of summary judgment, to assume Fritz's version of the facts. Even if there were some question whether Bryant was self-insured, the Superior Court was required to assume that Bryant was not for purposes of summary judgment.

Here, Fritz is not bringing an action against his employer, nor is Fritz's employer self-insured. And because Fritz's employer is not self-insured, *Simpson* and *Robinson* do not control, so 18 *Del. C.* § 3902 poses no bar to coverage. Under established Delaware law, a UIM carrier stands in the shoes of the insured tortfeasor, not the employer.[45] Accordingly, Bryant is not a named party in this matter; it is strictly the Cincinnati Insurance, which is standing in the shoes of Alex Lopez the driver who caused Fritz's injuries. Given all of this, Fritz is entitled to recover under the Cincinnati Insurance UIM policy.

In ruling the opposite way, the Superior Court was wrong on both the facts and the law. And under the applicable standard of review, this Court owes the

[45] *See Bullock v. State Farm Mut. Auto. Ins. Co*., 2012 WL 1980806, at *7 (Del. Super. Ct. May 18, 2012); *Crumpton v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 249584, at *1 (Del. Super. Ct. Jan. 28, 2004).

Superior Court's decision no deference. The Superior Court relied on inaccurate facts — *i.e.*, that the employer was self-insured — and that reliance was material to the court's decision. That is reversible error. Moreover, the decision law utilized by the Superior Court has no application when the employer is not self-insured. Accordingly, the Superior Court must be reversed.

4. Public policy and statutory intent require that the worker's compensation and UIM statutes be read in favor of innocent, injured workers like Fritz.

Presently this Court is asked to interpret whether recovery under 18 *Del. C.* § 3902, which requires underinsured motorist insurance coverage, is barred to employees who have been compensated under 19 *Del. C.* § 2304, the worker's compensation statute. It is a well settled principle that when asked to interpret a statute, a Court must interpret a statute in a manner that harmonizes two potentially conflicting statutes.[46] In this case, the harmony is clear: an injured worker is entitled to coverage under UIM and worker's compensation in order to make the worker whole.

Under 18 *Del. C.* § 3902, Delaware law requires UIM coverage to be offered for "liability arising out of the ownership, maintenance or use of any motor vehicle." The legislative purpose of this statute is to protect drivers from the negligence of

[46] *State Dep't of Labor, Div. of Unemployment Ins. v. Reynolds*, 669 A.2d 90, 94 (Del. 1995).

unknown or uninsured drivers. The Courts of this State have consistently held that the underlying purpose of § 3902 is to provide significant protection to injured insureds. More simply, the statute ensures that insureds are not to be left worthless, and the statute aims to place the insured in the same position he or she would have been if the tortfeasor had carried the same amount of insurance by providing compensation for general damages, such as pain and suffering, as well as economic loss.[47]

The public policy behind § 3902 goes further and prohibits limitations on coverage.[48] UIM coverage provides additional benefits to injured employees beyond what is covered under 19 *Del. C.* § 2304. For example, it is well established in Delaware that pain and suffering, as well as wages beyond § 2304's maximum compensation rate, are not recoverable under § 2304. But both may be recoverable under a personal injury policy under § 3902.[49]

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[47] *Lomax v. Nationwide Mut. Ins. Co.*, 964 F.2d 1343 (3d Cir. 1992); *State Farm Mut. Auto. Inc. v. Arms*, 477 A.2d 1060 (Del. 1984).

[48] *Frank v. Horizon Assur. Co.*, 553 A.2d 1199 (Del. 1989).

[49] 1 Lex K. Larson, *Larson's Workers' Compensation Law* §1.03 (2018) (internal quotations omitted); *see* 19 *Del. C.* §§ 2322; 2324-2330 *(*An injured employee is only entitled to compensation for medical expenses, total disability, partial disability, diminished earning capacity, certain permanent injuries, subsequent permanent injuries, and death or disability for occupational diseases.).

Like § 3902, § 2304 aims to provide full compensation. The twin purposes of the Delaware worker's compensation statute are: (1) to provide a scheme for assured compensation for work-related injuries without regard to fault; and (2) to relieve employers and employees of the expenses and uncertainties of civil litigation.[50] The exclusive remedy provision of § 2304 is designed to afford fair and equitable adjustment of the employee's and employer's mutual rights and obligations, primarily for the benefit of the employee.[51] The payment of compensation to an injured employee or the employee's representatives is exclusive and precludes the assertion of any other remedies against the employer.[52]

Under these facts, it would subvert the policies and intent of both § 3902 and § 2304 to accept Cincinnati Insurance's position. For example, under Cincinnati Insurance's view, there would never be the potential for a UIM claim even though Cincinnati Group charged and collected the policy premium. And here, the worker, Fritz, has not been fully compensated. Under worker's compensation, Fritz's pain and suffering has not been, and cannot be, compensated. Likewise, Fritz has not

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[50] *See Kelley v. Perdue Farms*, 123 A.3d 150 (Del. Super. Ct. 2015); *see also Poole v. State*, 77 A.3d 310 (Del. Super. Ct. Dec. 4, 2012) (The Delaware Workers' Compensation laws were passed for the benefit of employees injured on the job, and as such, the court will engage in a liberal interpretation to resolve any reasonable doubts in favor of the worker.).

[51] *Silvia v. Scotten*, 122 A. 513 (Del. 1923).

[52] *Diamond State Tel. Co. v. University of Del.*, 269 A.2d 52 (Del. 1970).

recovered his full economic loss because his wage compensation was capped at the State's maximum wage limit and his future potential lost earnings capacity claim is limited to 300 weeks. Such a result is contrary to the intent of the statutes, which aim to provide full compensation to innocent workers like Fritz who are injured in an automobile accident during the scope and course of their employment.

The rules of statutory construction, as well as the policies behind these specific statutes, require this Court to find that under the facts of this case, Fritz is entitled to underinsured motorist coverage as it is the only result that harmonizes the two statutes and the only result that provides him full compensation.

II. EVEN IF EXCLUSIVITY APPLIED HERE, CINCINNATI INSURANCE WAIVED ITS RIGHT TO ASSERT EXCLUSIVITY WHEN CINCINNATI PAID PIP BENEFITS UNDER THE EMPLOYER'S AUTOMOBILE POLICY.

A. Question Presented

Did Cincinnati Insurance waive its ability to argue that Fritz is barred from accessing UIM benefits given that Cincinnati Insurance issued PIP benefits to Fritz from the employer's automobile policy merely one day after filing Cincinnati Insurance filed its Motion to Dismiss or Alternatively for Summary Judgment?

This issue was preserved because it was addressed in Fritz's Answering Brief in the Superior Court, in his Motion for Reargument, and in the Superior Court's decision and decision denying Plaintiff's Motion for Reargument.[53]

B. Scope of Review

The scope of review is set forth in Argument I(B), and it is incorporated here.

C. Merits of Argument

In this case, Cincinnati Insurance argues that worker's compensation is the exclusive remedy available to Fritz and thus, that Fritz is not entitled to collect benefits under his employer's automobile policy. But such an argument belies Cincinnati Insurance's own actions in this case — it paid out PIP benefits under the

[53] *See* A182-83.

employer's policy. Given this, Cincinnati Insurance has waived any ability to argue exclusivity of remedies.

Waiver is "the intentional relinquishment of a known right, either in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power."[54] In the context of a contract, such as an insurance policy, waiver occurs "where (1) there is a requirement or condition to be waived, (2) the waiving party must know of the requirement or condition, and (3) the waiving party must intend to waive that requirement or condition."[55]

In the instant case, all three requirements are met. Cincinnati Insurance contends that Fritz's receipt of his employer's automobile insurance benefits are conditioned on Fritz's refusal of workers compensation benefits for the same accident. Cincinnati Insurance knew of this condition when it filed its Motion on July 11, 2017. And Cincinnati Insurance intentionally waived the asserted condition when, after filing its Motion, Cincinnati Insurance paid Fritz PIP benefits under 21 *Del. C.* § 2118 on July 12, 2017 and then again on August 5, 2017.[56]

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[54] *Nathan Miller, Inc. v. N. Ins. Co. of New York*, 39 A.2d 23, 25 (Del. Super. Ct. 1944).

[55] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

[56] A186. (Fritz was paid wages under the no fault coverage. The amount paid was the difference between Mr. Fritz's net lost earnings and 66 2/3rds of his gross pay.)

These payments establish a waiver of exclusivity because the benefits in question were undisputedly in addition to Fritz's workmen's compensation benefits. As with the UIM coverage, Fritz's employer paid Cincinnati Insurance a separate premium for the PIP coverage. And except for waiver, there is no logical way to reconcile Cincinnati Insurance's payment of PIP benefits to Fritz. Put differently, if Cincinnati Insurance intended exclusivity to apply, then no PIP payments would be required in light of the Defendant's reading of § 2304. Thus, Cincinnati Insurance's payment of PIP benefits is a voluntary acknowledgement that first party insurance coverage, of whatever type, paid for by the employer, is a benefit that is available to an employee regardless of whether that employee has also received worker's compensation benefits.

In sum, even assuming *arguendo* that exclusivity applies to employers who are not self-insured, Cincinnati Insurance has waived the ability to argue that it applies here. As the Superior Court long ago recognized, "[a]ny one may forego a right intended for his own benefit in the absence of some rule of public policy."[57] Section 2304 does not give Cincinnati Insurance the authority to choose which of the first party coverages it will pay or not pay. Therefore, Cincinnati Insurance's

[57] *Nathan Miller, Inc.,* 39 A.2d at 25.

payment of the PIP coverage represents a waiver of its position that § 2304 bars a claim under § 3902.

CONCLUSION

For the reasons above, Appellant, Charles Fritz, respectfully requests that this Honorable Court reverse the November 5, 2018 Order granting Defendant's Motion for Summary Judgment by the Superior Court and remand the case back to the Superior Court.

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Dated: December 20, 2018