EFiled: Oct 10 2022 03:12PM EDT
Filing ID 68232478
Case Number 172,2022

IN THE SUPREME COURT OF THE STATE OF DELAWAR

HORIZON SERVICES, INC., and EASTERN ALLIANCE INS. CO.,	:	**No. 172,2022**
Plaintiffs Below, Appellants,	:	**Court Below, Superior Court of State of Delaware in and for New Castle County**
v.	:	**C.A. N21C-10-044 DJB**
JOHN HENRY and THE CINCINNATI INS. CO.,	:	
Defendants Below, Appellees.	:	

APPELLEES JOHN HENRY AND THE CINCINNATI INSURANCE CO.'S JOINT ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This is an appeal to the Supreme Court of the State of Delaware from a Superior Court decision issued on May 2, 2022, in the declaratory judgment action captioned *Horizon Services, Inc., et al. v. John Henry, et al.*, Del. Super. Ct., C.A. No. N21C-10-044-DBB, Brennan, J. The Plaintiffs Below, Appellants are Horizon Services, Inc. ("Horizon") and Eastern Alliance Insurance Company ("Eastern Alliance"; collectively "Appellants"). The Defendants Below, Appellees are John Henry and the Cincinnati Insurance Company ("CIC"; collectively, "Appellees").

The declaratory judgment action is related to an underlying civil action captioned *Henry v. Cincinnati Insurance Co.*, Del. Super. Ct., C.A. No. N18C-03-092 ALR. *Henry* concerns a September 29, 2015, occurrence wherein Mr. Henry sustained injuries in an automobile accident while operating an employer-owned vehicle during the course of his employment with Horizon. Mr. Henry received workers' compensation from his employer's workers' compensation company, Eastern Alliance, under the Delaware's Workers' Compensation Act (the "WCA").[1]

Mr. Henry also recovered damages from the allegedly at-fault third-party tortfeasor and settled with the tortfeasor's liability insurer for its $50,000.00 policy

[1] Complaint for Declaratory Judgment ("Compl.") at 1-2; 19 *Del. C.* §§ 2301-2396.

limit. Mr. Henry reimbursed the balance of his liability claim (after attorney's fees and costs) to Horizon and Eastern Alliance in accordance with the WCA.[2]

The Horizon-owned vehicle that Mr. Henry was operating at the time of the occurrence was covered by an automobile liability insurance policy issued to Horizon by CIC. After exhausting the tortfeasor's policy limits, Mr. Henry sought to recover underinsured motorist ("UIM") benefits under the terms of the CIC automobile liability policy in addition to his workers' compensation benefits. CIC denied Mr. Henry's claim for UIM benefits.[3]

Mr. Henry thereafter filed suit against CIC to recover under the UIM policy. CIC responded to the Complaint with a timely motion to dismiss on the basis that the workers' compensation benefits Mr. Henry received under the WCA constituted his exclusive remedy. The Superior Court granted CIC's Motion to Dismiss on July 31, 2018.[4]

On appeal, the Supreme Court reversed and remanded the decision on the basis that "because Cincinnati is being sued in [this case] in its capacity as a third-party insurance company standing in the shoes of an alleged third-party tortfeasor, [this suit] is permitted under 19 *Del. C.* § 2363" and the WCA exclusivity

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[2] Compl. at 4-5.
[3] *Id*. at 5-6; *see also* CIC Policy UIM Coverage, as attached to Compl. as Exhibit B ("UIM Policy").
[4] Compl. at 6.

provision, as effective at the time of Mr. Henry's collision, was not a defense that was available to CIC.[5]

After the Supreme Court's July 11, 2019, decision, Horizon and Eastern Alliance moved to intervene in *Henry* in order to assert an entitlement to a lien over any UIM benefits CIC pays to Mr. Henry. The motion was denied on the basis that neither statutory law nor decisional precedent supports Horizon and Eastern Alliance's assertion of a lien against recovery by Mr. Henry of UIM benefits. Furthermore, the Superior Court specifically found that UIM carriers do not "step into the shoes of the alleged tortfeasor" except to the extent that fault by the alleged tortfeasor must be established.[6]

After Appellants' application for certification of interlocutory appeal was denied, Appellants filed a Complaint for Declaratory Judgment, "seeking a judicial declaration recognizing that a statutory change to 19 *Del. C.* § 2304 re-establishes their right to recover, from Defendant John Henry, any compensation recovered from Defendant Cincinnati Insurance Company that Plaintiffs paid."[7] On December 3, 2021, CIC moved for Judgment on the Pleadings on the basis that

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[5] Compl. at 6-7; *Henry v. Cincinnati Ins. Co.*, 212 A.3d 285, 290-291 (Del. 2019).
[6] Compl. at 7; *see also* Superior Court Opinion Denying Motion to Intervene, *Henry v. Cincinnati Ins. Co.*, 2021 WL 1545765 (Del. Super. Ct.), *cert. denied,* 2021 WL 1923710 (Del. Super. Ct.), and *appeal dismissed sub nom. E. All. Ins. Co. v. Henry*, 254 A.3d 396 (Del. 2021) ("Super. Ct. Op. on Mot. to Intervene").
[7] Compl. at 2, 8-14.

Appellants' claims are barred by *res judicata* as they have already been resolved by the Court when Appellants sought to intervene in the UIM case; Appellants do not have a statutory right to recover from UIM coverage; and Appellants' claims for recovery are specifically excluded by the terms of the CIC policy.[8] Appellants responded in opposition arguing that an amendment to the WCA and intervening case law provided employers, as defined in the WCA, the right to enforce a workers' compensation lien against UIM benefits.[9] Oral arguments were held on January 31, 2022.

On May 2, 2022, the Superior Court granted CIC's motion on the basis that Delaware decisional law has interpreted pertinent parts of the WCA to deny employers a right of reimbursement from UIM benefits received by an employee under an employer's policy.[10] Appellants filed a Notice of Appeal to the Supreme Court on May 20, 2022, and submitted their Opening Brief. Therein Appellants argue that the Superior Court "erred by declining to recognize that the 2016 Amendment to 19 *Del. C.* § 2304 changes employers' UIM lien recovery rights.

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[8] Def. CIC Mot., Dkt. No. 7 (A-4). The Henrys joined the motion in January 2022. *Id.* at A-3, Def. Henry Mot., Dkt. No. 12.

[9] Pls.' Resp., Dkt. No. 9 (A-4).

[10] Opinion Granting Defendant's Motion for Judgment on the Pleadings, *Horizon Services, Inc. et al. v. Henry, et. al.*, CA No. N21C-10-044 DJB (Del. Super. Ct. Jan. 26, 2016), as attached to Appellants' Amended Opening Brief as "Appellants' Exhibit 1" (hereinafter "Super. Ct. Opinion on Appeal"), at 6 (citing *Simendinger v. Nat'l Union Fire Ins. Co.*, 74 A.3d 609, 611-12 (Del. 2013) & *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10, 15 n. 2 (Del. 1995)).

Title 19 *Del. C.* § 2304 now allows employers to reach outside of the WCA and avail themselves of contracted-for UIM coverage, which contradicts, and overrules, *Simendinger*" and "Title 19 *Del. C.* §2363(e) tailors employers' reimbursement rights to ensure that injured employees have access to unpaid compensation without duplicating employers' damages. The 2016 amendment to 19 *Del. C.* §2304, coupled with 18 *Del. C.* §3902, *Adams*, and the Collateral Source Rule, ensures employers' reimbursement rights only apply when the employer, and not the employee, purchases the sought-after UIM policy."[11] Appellants seek this Court's review of "the legislative history in this case, and recognize the intended and legitimate purpose served by employers' priority lien right against UIM recoveries from their own carriers" and ultimately, "ask This Court to reverse the Superior Court's Opinion Granting Appellees' Judgment on the Pleadings and grant Appellants' request for Declaratory Judgment." [12]

[11] Appellants' Amended Opening Brief ("Am. Op. Brief") at 32.
[12] *Id*.

SUMMARY OF ARGUMENT

1. Denied. Employers did not have UIM lien recovery rights against payments made from their own UIM carriers before *Simendinger*. Appellants wholly misconstrue the Court's reasoning and findings in *Simendinger* and other Delaware decisional case law.

2. Denied.

3. Denied.

4. Admitted, but the 2015 version of the WCA applies in this case, not the 2016 version. The Superior Court did not err as matter of law when it granted CIC's Motion for Judgment on the Pleadings based upon its conclusion that Appellants are not entitled to a lien on any UIM benefits paid to Mr. Henry by CIC under the 2015 version of the WCA, which was the version effective at the time of Mr. Henry's crash. The 2016 amended version of 19 *Del. C.* § 2304 does not apply retroactively in the case *sub judice*.

5. Denied as stated.

6. Denied.

7. Admitted.

8. Denied. Appellants' argument that they are entitled to assert a lien against any UIM benefits received by Mr. Henry from CIC pursuant to the 2016

amendment to 19 *Del. C.* § 2304 wholly misconstrues this Court's reasoning and findings in *Henry* as well as other Delaware decisional case law.

9. Denied. The WCA denies employers a right of reimbursement from UIM benefits received by an employee under an employer's policy.

STATEMENT OF FACTS

On September 29, 2015, Mr. Henry sustained injuries in an automobile accident while operating an employer-owned vehicle during the course of his employment with Horizon. Mr. Henry received workers' compensation from his employer's workers' compensation company, Eastern Alliance, under the WCA. Mr. Henry also recovered damages from the allegedly at-fault third-party tortfeasor and settled with the tortfeasor's liability insurer for its $50,000.00 policy limit. Mr. Henry reimbursed the balance of his liability claim (after attorney's fees and costs) to Horizon and Eastern Alliance in accordance with the WCA. Thereafter Mr. Henry also sought to recover UIM benefits under the terms of the CIC automobile liability policy.[13]

After CIC denied Mr. Henry's claim for UIM benefits, Mr. Henry filed suit against CIC to recover under the UIM policy. CIC responded to the Complaint with a timely motion to dismiss on the basis that the workers' compensation benefits Mr. Henry received under the WCA constituted his exclusive remedy. The Superior Court granted CIC's Motion to Dismiss on July 31, 2018. This Court reversed and remanded the decision on the basis that "because Cincinnati is being sued in [this case] in its capacity as a third-party insurance company standing in the shoes of an alleged third-party tortfeasor, [this suit] is permitted under 19 *Del.*

[13] Compl. at 1-2, 4-6.

C. § 2363" and the WCA exclusivity provision, as effective at the time of Mr. Henry's collision, was not a defense that was available to CIC.[14]

After *Henry* was reinstated, Appellants moved to intervene in the action on the basis that they were entitled to a lien over any UIM benefits CIC pays to Henry. The Superior Court denied Appellants' motion, and Appellants' subsequent application for certification of interlocutory appeal. The certification denial was then appealed and this Court denied Appellants' interlocutory appeal on procedural grounds.[15]

Appellants then filed the instant declaratory judgment action. CIC filed a Motion for Judgment on the Pleadings, joined by Henry, wherein they argued that 1) the claims asserted by Appellants are barred by *res judicata,* as the Superior Court denied Plaintiffs motion to intervene on the same grounds in the Related Civil Action; 2) Appellants do not have a statutory right to recover the UIM benefits they seek; and 3) even if the claims are not barred, the language of the insurance policy at issue here excludes Appellants' recovery.[16]

Appellants disagreed, contending that 1) the action was not barred by *res judicata* because the adjudication in the UIM case did not constitute a final order and left Appellants without a meaningful right to appeal; 2) an amendment to the

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[14] Compl. at 6-7; *Henry v. Cincinnati Ins. Co.*, 212 A.3d 285, 290-291 (Del. 2019).
[15] Compl. at 6-7.
[16] Supra n. 7-9.

WCA and intervening case law provided employers, as defined in the WCA, the right to enforce a workers' compensation lien against UIM benefits; and 3) the contractual language which purportedly excludes their recovery is being contested by Henry as unenforceable in the UIM case, and therefore should not prevent their recovery.[17] Oral arguments were heard on January 31, 2022.

On May 2, 2022, the Superior Court granted CIC's motion on the basis that "Delaware decisional case law is well-established that a Workers Compensation carrier does not have the right to assert a lien on any UIM coverage the injured employee may receive." Specifically, the court found that the WCA does not allow a lien on UIM claims and that this Court's recent decision in *Henry* did not change the well-settled Delaware precedent regarding a potential for a lien.[18]

[17] *Id*.
[18] Super. Ct. Opinion on Appeal at 6-10.

ARGUMENT

I. THE SUPERIOR COURT BELOW PROPERLY INTERPRETED THE WCA AND PERTINENT CASE LAW WHEN IT GRANTED CIC'S MOTION FOR JUDGMENT ON THE PLEADINGS, FINDING THAT THE WCA BARS APPELLANTS' ASSERTION OF A LIEN ON ANY UNDERINSURED MOTORIST BENEFITS RECOVERED BY HENRY.

A. QUESTION PRESENTED

Whether the Superior Court erred as a matter of law in granting CIC's Motion for Judgment on the Pleadings by finding that the WCA, as written on the date of the accident, bars Appellants' assertion of a lien against any UIM benefits paid by CIC?

B. SCOPE OF REVIEW

The Delaware Supreme Court reviews judgments on a motion to dismiss *de novo*.[19] In this context, the Court decides whether the trial judge erred as a matter of law in formulating or applying legal precepts.[20] Dismissal is warranted only if "it appears with reasonable certainty" that the claims asserted would not entitle plaintiff to relief under any provable set of facts.[21]

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[19] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 438–39 (Del. 2005).
[20] *Gadow v. Parker*, 865 A.2d 515, 518 (Del. 2005).
[21] *Dunlap*, 878 A.2d at 439 (citing *McMullin v. Beran,* 765 A.2d 910, 916 (Del. 2000)).

C. MERITS OF ARGUMENT

The Superior Court did not err as matter of law when it granted CIC's Motion for Judgment on the Pleadings based upon its conclusion that Appellants were not entitled to a lien on any UIM benefits paid to Mr. Henry by the CIC policy under the WCA as written at the time of Mr. Henry's crash. The WCA and Delaware decisional case law clearly denies employers the right to assert a lien against UIM benefits received by an employee under an employer's UIM policy.

The sole argument raised by the Appellants is that the 2016 amendment to 19 *Del. C.* § 2304 expressly grants employers the ability to pursue a lien against UIM benefits paid to an employers' injured employees.[22] However, Appellants ignore that the 2016 amended version of 19 *Del. C.* § 2304 does not apply, retroactively or otherwise, in the case *sub judice*. Secondly, Appellants misconstrue this Court's 2019 decision in *Henry* when they assert that "[u]nder *Henry*, employers' UIM carriers are third party liability carriers for recovery purposes under 19 *Del. C.* §2363(e)," allowing lien recovery rights from employer-purchased UIM policies.[23]

[22] Am. Op. Brief at 12.
[23] *Id*. at 6.

Section 2304, as amended and effective in 2016, does not apply in Henry.

Appellants argue that the 2016 amendment of Section 2304 expressly grants employers the right under Section 2363(e) to assert a lien against any UIM benefits received by the employer's injured employee from the employer's UIM carrier.[24] However, Appellants provide no actual argument or support for the premise that Section 2304 as amended in 2016 applies to the case *sub judice*. At most, Appellants assert that this Court confirmed that "under the current version of 19 *Del. C.* §2304: (1) employees can now access their employers' UIM policies for additional compensation".[25] More to the point, this Court determined that the pre-amendment version of Section 2304 (which was effective in 2015) applies in this case:

> … **at the time of Henry's and Fritz's accidents**, the exclusivity provision in the Act provided as follows:
>
> > Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.[26]
>
> …

[24] Am. Op. Brief at 11-12.
[25] *Id*. at 21.
[26] *Henry*, 212 A.3d at 288 (quoting 19 *Del. C.* § 2304 (2015)) (bold and underlined emphasis added); *see also* 212 A.3d at 289, quoting 19 *Del. C.* § 2304 (2016)).

> In September 2016, … the above-quoted exclusivity provision was amended. The language the amendment added is italicized:
>
> …
>
> As mentioned, the Superior Court in *Robinson* found that this amendment was not retroactive and did not apply to injuries occurring prior to its effective date.[27]

This Court then discussed the application of the **pre-amendment** Section 2304 in *Henry*:

> In *Henry*, the Superior Court phrased the issue as being "whether Employee's claim for UIM benefits is subject to **the pre-amendment or post-amendment version** of the [Act]." After discussing *Simpson* and *Robinson,* the court concluded that the Henrys' claims were governed and barred by the pre-amendment version of the exclusivity provision.
>
> We think that an injured worker who receives workers' compensation benefits is not barred by **the pre-amendment version** of the exclusivity clause from recovering underinsured-motorist benefits under an automobile liability policy that his or her employer has bought from a third-party insurance provider.[28]

At no point in its opinion in *Henry* does this Court discuss the application of the 2016 version of Section 2304 in this case, despite Appellants' hollow assertions otherwise.

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[27] *Henry*, 212 A.3d at 289 (citing *Robinson v. State*, 2017 WL 1363894 (Del. Super. Ct.), *aff'd*, 176 A.3d 1274 (Del. Dec. 18, 2017)) (Table).
[28] *Henry*, 212 A.3d at 289 (bold and underlined emphasis added).

As this Court referenced in its opinion, it is clear on the face of Section 2304 that it is not to be applied retroactively. Both the 2015 and 2016 versions of the WCA's exclusivity clause provide that an employee is "bound" to accept workers' compensation for "personal injury or death by accident arising out of and in the course of employment."[29] In other words, once an employee is involved in an employment-related accident, he or she is thereby bound to accept workers' compensation for any injuries sustained therein. In this sense, the WCA is triggered at the moment an employment-related accident occurs.[30] Accordingly, the applicable version of the WCA is the one in effect at the time of a particular employment-related accident. Here, Mr. Henry's accident was on September 29, 2015; as such, the 2015 WCA version applies to Mr. Henry's receipt of workers' compensation benefits and subsequent claim to UIM benefits.

Furthermore, as there is no ambiguity as to which version of Section 2304 applies in this action, a review of the legislative purpose is not necessary or appropriate.[31]

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[29] 19 *Del. C.* § 2304 (2016) [pre-amendment version]; 19 *Del. C.* § 2304 (effective Sept. 6, 2016).

[30] *See Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965) (stating that workers' compensation cannot be awarded unless and until "the claimant establishes by probative evidence that he suffered an injury and that such injury was the result of an accident taking place in the course of his employment").

The WCA does not permit an employer to assert a lien against UIM benefits received by an employee from the employer's UIM carrier.

The Superior Court was correct in finding that Delaware decisional case law is well-established that a Workers Compensation carrier does not have the right to assert a lien on any UIM coverage the injured employee may receive. Section 2363(a) of the Workers Compensation Act provides the right for employees, injured by a third-party tortfeasor, to recover both workers' compensation benefits and damages in tort against the liable third party.[32] Delaware decisional law has interpreted Section 2363(e) to deny employers a right of reimbursement from UIM benefits received by an employee under an employer's policy.[33]

Furthermore, the plain language of Section 2363(e) itself limits an employer's right to reimbursement "**only from the third party liability insurer** and shall be limited to the maximum amounts of the third party's liability insurance coverage awarded for the injured party, after the injured party's claim has been settled or otherwise resolved."[34] As the Superior Court explained in its

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[31] *See Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 496-97 (Del. 2012) (reiterating if a statute is ambiguous "the interpretation that best furthers the legislative purposes underlying the [] statutory scheme must prevail"); *see also* Super. Ct. Op. on Mot. to Intervene, at *2 n.13.

[32] Super. Ct. Opinion on Appeal at 5-6.

[33] *See Simendinger* v. *Nat'l Union Fire Ins. Co.,* 74 A.3d 609, 611-12 (Del. 2013); *Hurst* v. *Nationwide Mut. Ins. Co.,* 652 A.2d 10, 15 n.2 (Del. 1995); *Adams v. Delmarva Power & Light Co.*, 575 A.2d 1103 (Del. 1990).

opinion denying Appellants motion to intervene, this Court did not hold that CIC is "an independent third party liability carrier" for the purposes of Appellants asserting a lien against Mr. Henry's received UIM benefits.[35] Such an assertion takes this Court's statement out of context. Appellants failed to recognize that when this Court referenced "stepping into the shoes" of an alleged tortfeasor, it referenced *Progressive Northern Insurance Co. v. Mohr*, wherein a distinction is made between no-fault insurance (such as PIP) and at-fault insurance such as UIM coverage which requires proving duty, breach, causation and damages. To make a claim for UIM coverage, the UIM carrier stands in the shoes of the other driver (which can at times be an unknown individual, such as in instances of hit and runs) and the injured party must still prove fault.[36]

The CIC Policy excludes any benefit to a workers' compensation carrier and does not cover any benefits covered by workers' compensation.

Even if Appellants could establish they have a statutory right to recover, the UIM Policy prohibits the recovery sought by Appellants. The UIM Policy provides:

> **C. Exclusions**
>
> This insurance does not apply to any of the following:

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[34] 19 *Del. C.* § 2363(e) (bold and underlined emphasis added).
[35] Superior Court Opinion Denying Motion to Intervene, at 7.
[36] *Id*. at 7-8 (citing *Progressive*, 47 A.3d at 503-504);

1. With respect to an "uninsured motor vehicle" any claim settled with the person(s) or organization(s) legally responsible for the "accident" or the insurer or legal representative of such person(s) or organization(s) insurer or legal representative without our consent, if the settlement prejudices our rights to recover payment.

2. The direct or indirect benefit of any insurer or self-insurer under any, workers' compensation, disability benefits or similar law.[37]

Moreover, the Limit of Insurance section of the UIM Policy provides, in part:

D. Limit of Insurance

1. Regardless of the number of policies, covered "autos", "insureds", premiums paid, claims made or "motor vehicles" in- volved in the "accident", the most we will pay for all damages including damages claimed by any person or organization for care, loss of services, or death due to and arising out of anyone "accident" is the limit of Uninsured Motorist Coverage shown in the Schedule or Declarations. We will apply this limit to first provide the separate limits required by the Uninsured Motorist Law of the State of Delaware for:

a. "Bodily injury" to one person in any one "accident";

b. "Bodily injury" to two or more persons in any one "accident"; or

c. "Property damage" in any one "accident".

This provision will not change our total limit of liability.

2. No one will be entitled to receive duplicate payments for the same elements of "loss" under this endorsement and any Liability Coverage Form or Medical Payments Coverage Endorsement attached to this Coverage Form.

We will not make a duplicate payment under this coverage endorsement for any element of "loss" for which payment has been made by or for anyone who is legally responsible,

[37] UIM Policy at 4.

> including all sums paid under the policy's Covered Autos Liability Coverage.
>
> We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law.[38]

The UIM Policy provisions excluding and limiting the Plaintiffs' right to recover from the Policy are valid and enforceable in Delaware.[39] Therefore, not only do Appellants not have a statutory right to recovery, but Appellants' claims for recovery are also specifically excluded by the terms of the UIM Policy.

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[38] *Id*.

[39] *Kearns v. Travelers Property Casualty Co.*, 2019 WL 6704934 (Del. Super. Ct. Nov. 1, 2019).

CONCLUSION

The Superior Court did not err as a matter of law when it granted CIC's Motion to Dismiss holding that the WCA in effect on the date of automobile accident applied and barred Appellants' entitlement and ability to assert a lien against Mr. Henry's receipt of UIM benefits under the automobile policy issued by CIC. Further, even if Appellants ability to assert a lien was not barred, the terms of the UIM Policy exclude any benefits provided under the workers' compensation claim. Thus, there is no duplicate payment under the UIM Policy. Accordingly, Appellants respectfully request that this Honorable Court affirm the decision of the Superior Court's Memorandum Order dated May 2, 2022.

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