IN THE SUPREME COURT OF THE STATE OF DELAWARE

HORIZON SERVICES, INC., and EASTERN ALLIANCE INSURANCE COMPANY,	)	
Plaintiffs-Below, Appellants,	)	No. 172, 2022
v.	)	
JOHN HENRY and THE CINCINNATI INSURANCE COMPANY,	)	On Appeal from the 5/02/2022 Decision of the Superior Court C.A. No. N21C-10-044 DJB
Defendants-Below, Appellees.	)	

REPLY BRIEF OF APPELLANTS, HORIZON SERVICES, INC. and EASTERN ALLIANCE INSURANCE COMPANY

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In their Answering Brief, Appellees contend that: (1) the pre-2016 amendment to Section 2304 applies to the case *sub judice* because the motor vehicle accident occurred in 2015, before the amendment's enactment; (2) Section 2304 applies differently to injured employers because UIM carriers can only be third parties to employees; (3) Section 2304's impact on employers' UIM lien rights should be ignored because of the "well established" *Simendinger* case; and (4) statutory recovery rights should be replaced by UIM carriers' individual insurance policies.

Appellants encourage This Court to reject Appellees' arguments for the following reasons: (1) Appellees waived their right to argue that the pre-amendment version of Section 2304 applies because they raised it against Appellants for first time on appeal; (2) assuming, *arguendo*, that Appellees did not waive this argument, This Court already held that Section 2304 does not bar UIM claims in the case *sub judice*, and Section 2304's express wording (both before, and after, the 2016 amendment) mandates uniform application to employers and employees; (3) Delaware's truly well-established legal history shows that employers had UIM lien recovery rights from their own policies until 2013, when *Simendinger* endorsed an unprecedented interpretation of a twenty-year-old statutory amendment and created further legal confusion that later required legislative correction; and (4) carrier-specific insurance policies do not usurp statutory recovery rights.

Appellees' argument that the pre-2016 amendment to Section 2304 applies cannot be fairly considered on appeal because it was not previously presented.

In their Answering Brief, Appellees contend that Section 2304, as amended in 2016, does not apply to the case *sub judice*.[1] This is the first time Appellees have jointly asserted that the 2015 version of Section 2304 applies to Appellants. The position of Appellee John Henry[2] is particularly perplexing because Henry presumably argued the opposite (meaning, he argued that the 2015 version of Section 2304 did *not* apply) in the underlying *Henry* case, in response to the Cincinnati Insurance Company's[3] initial Motion to Dismiss his UIM Complaint.[4] Under Delaware case law and This Court's Rules of Civil Procedure, "only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[5] Appellees did not question the application of the 2016 amendment to Section 2304 in any of the underlying proceedings involving

[1] Appellees John Henry and The Cincinnati Insurance Co.'s Joint Answering Brief on Appeal (hereinafter "Answering Brief"), at 6.

[2] Appellee John Henry will hereinafter be referred to as "Henry," distinguishable from the *Henry* case, which will appear in italics.

[3] Appellee The Cincinnati Insurance Company will hereinafter be referred to as "CIC."

[4] In *Henry*, This Court observed that the Superior Court phrased the issue as whether or not the pre-amendment or post-amendment version of Section 2304 applied. *Henry v. Cincinnati Ins. Co*., 212 A.3d 285, 289 (Del. 2019). Presumably, the Superior Court identified this central dispute based on Henry and CIC's arguments. Although Appellants were not a party to the case, it makes logical sense that Henry would have advocated against the pre-2016 amendment because it barred his UIM claim, as the Superior Court correctly held.

[5] Supr. Ct. R. 8; *Protech Mins., Inc. v. Dugout Team*, LLC, No. 288, 2021, 2022 WL 4004606, at *6 (Del. Sept. 2, 2022) ("The Court will apply this narrow exception "if it finds that the trial court committed plain error requiring review in the interests of justice." "[T]he doctrine of plain error is limited to material defects ... which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.") Internal citations omitted.

Appellants, and did not explain why the interests of justice require This Court to either consider the question now, or reconsider this question now with a different outcome than the one reached in *Henry*. Accordingly, the question is waived because This Court cannot fairly consider it.[6]

[6] *Id.* ("The Appellants offer no convincing argument that the trial court made a plain error that had the effect of depriving them of a substantial right or clearly shows a manifest injustice.")

Contrary to Appellees' argument, This Court held that the pre-amendment version of Section 2304 does not apply to the case.

Assuming, *arguendo*, that Appellees did not waive the aforementioned argument, This Court already held that the pre-amendment version of Section 2304 does not apply to this case. In *Henry*, This Court held that Section 2304 did not prevent employees from recovering UIM from employer-purchased policies.[7] While the Superior Court granted CIC's Motion to Dismiss Henry's UIM Complaint because "Henry's claims were governed and barred by the pre-amendment version of the exclusivity provision [Section 2304]],"[8] This Court reversed, stating that Henry was "*not barred* by the pre-amendment version of the exclusivity clause[.]"[9] Thus, contrary to Appellees' assertion, the pre-amendment version of Section 2304 does apply to the case.

The reason for declining to apply the pre-amendment version of Section 2304 has little bearing on Appellants' argument. By express language (both before and after the 2016 amendment), Section 2304 applies uniformly to employers and employees. It governs when "*every* employer and employee" shall be bound by the WCA "to pay and to accept compensation for personal injury or death… to the exclusion of *all* other rights and remedies."[10] [11] At no time did the legislature

[7] *Henry*, 212 A.3d at 287.

[8] *Id*., at 289.

[9] *Id*. (emphasis added).

[10] 19 *Del. C.* § 2304 (emphasis added).

[11] If the WCA applies, then each party's substantive recovery rights are dictated elsewhere in the WCA.

contemplate disparate party treatment, wherein the WCA binds an employer, but not an employee. In fact, the General Assembly expressly rejected such a result when it rejected a version of the 2016 amendment that would have enabled employees, but not employers, to reach "outside" the WCA and avail themselves of UIM remedies, as discussed in Appellants' Opening Brief.[12] Therefore, if the 2015 version of Section 2304 does not apply to Henry, then it does not apply to Appellants. The reason does not matter. This is the same accident, with the same factual circumstances and the same parties, and Section 2304's express wording requires uniform WCA application.

For example, to the extent This Court in Henry declined to apply the 2015 version of Section 2304 because CIC is a third party with a separate recovery "bucket," then the same reasoning applies to Appellants because the parties and circumstances are the same. Appellees' argument that Section 2363(e) nonetheless requires a different result and strictly limits Appellants' recovery to a "third party liability carrier" must fail because Section 2304 no longer applies.[13] Once Section 2304 no longer applies, Appellants' rights and remedies are no longer strictly limited to the WCA. This means Section 2363(e), and *Simendinger's* interpretation of that Section, no longer applies. Instead, just as Henry can reach "outside" the WCA to substantively access a UIM policy under 18 *Del. C.* § 3902(b), so too can Appellants

[12] Amended Opening Brief of Appellants, at 20-21.

[13] Appellees' argument in this regard applies *Simendinger*, although they appear reluctant to use the case's name.

reach "outside" the WCA to access the UIM policy purchased by Appellant Horizon Services, Inc.[14, 15]

As another example, to the extent This Court in *Henry* declined to apply the 2015 version of Section 2304 because its 2016 amendment clarifies that employees should be able to access "outside" remedies like UIM insurance policies, then this same holding applies to Appellants for the same reason. Appellees do not appear to dispute this result. In fact, Appellees seem to concede to this result when they state, in their Answering Brief that, "[t]o make a claim for UIM coverage, the UIM carrier stands in the shoes of the other driver . . . and the injured party must still prove fault."[16] Since fault in this case was established, and since UIM is fault-based, CIC now stands in the shoes of the third party under *Henry* and *also* 18 *Del. C.* § 3902 (b). Horizon, as CIC's insured, has the right to recover UIM compensation.[17] The UIM compensation Horizon now seeks is reimbursement for anything paid to Henry that Appellants already paid under the WCA.

[14] Appellant Horizon Services, Inc. will hereinafter be referred to as "Horizon."

[15] Appellants emphasize a distinction between substantive and procedural UIM policy access. Substantive UIM recovery right is conveyed by 18 *Del. C.* § 3902, and would only apply to employers if they purchased the UIM policy. Procedural recovery rights are outlined in 19 *Del. C.* § 2363(e).

[16] Appellees' Answering Brief, at 17.

[17] To qualify for UIM benefits under 18 *Del. C.* § 3902, employers must be express beneficiaries, which will only occur if they purchase the available UIM policy. By contrast, employees are routinely considered intended beneficiaries. For example, in the case *sub judice*, Henry also filed a claim against his own UIM carrier seeking duplicated compensation. Appellants would not have the right under 18 *Del. C.* § 3902 (or *Adams*, or the Collateral Source Doctrine) to assert a reimbursement claim from Henry's policy.

As a final example, if the 2015 version of Section 2304 applies (as Appellees' suggest for the first time in their Answering Brief) then, per its express wording, it equally applies to Henry. This means that both Henry and Appellants are strictly bound by the WCA, and neither one can reach "outside" of Section 2363 to access CIC's UIM policy because Section 2363(e) strictly limits recovery for *both parties* to the third party liability carrier, as discussed in *Simpson*.[18] This Court already rejected such a result for Henry. Appellants now ask This Court to reject this result for Appellants. Appellants are also innocent parties injured by a stranger in this case, and Section 2304 requires uniform WCA application. Whatever the reason, if Section 2304 does not apply to Henry, then it does not apply to Appellants. And, if Section 2304 does not apply, then Appellants are no longer strictly bound by Section 2363(e) and can reach "outside" the WCA to avail themselves of contractual and statutory UIM rights and remedies under 19 *Del. C.* § 3902.

[18] *Simpson v. State*, 2016 WL 425010, at *3-4 (Del. Super.).

Contrary to Appellees' contention, employers had been afforded UIM lien rights from their own policies until 2013, when *Simendinger* endorsed an unprecedented interpretation of a 1993 amendment to 19 *Del. C.* 2363(e).

While Appellees claim that it 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,"[19] legislative and case law history reflects that this had only been true since 2013, when the *Simendinger* Court adopted *dicta* from a twenty-year-old footnote in *Hurst*. For decades before *Simendinger*, employers asserted UIM liens against recoveries from policies they purchased.[20]

Simendinger, which is less than ten years old, is inherently problematic. Appellants' Opening Brief outlined the history of employers' UIM lien rights to clarify their true evolution, and to highlight UIM recovery problems first created by *Simendinger* that, in turn, created problems for employees. Since Section 2304 uniformly bound both parties to the WCA, both parties were bound by *Simendinger's* interpretation of 2363, which expressly limited the recovery "bucket"

[19] Appellees' Answering Brief, at 16.

[20] Appellees' disparate claim is perplexing, given workers' compensation industry practices before 2013. Appellees did not cite anything to support their contention that employers did not have any UIM lien rights before 2013, which makes it difficult for Appellants to pinpoint the disagreement. Appellants agree that there may be very few published cases on-point between 1995 (when *Hurst* was decided) and 2013 (when *Simendinger* was decided). However, *Simendinger* addressed the Superior Court's enforcement of a UIM lien, consistent with Appellants' understanding of pre-2013 industry practices. *Simendinger*, 74 A.3d at 610. *Simendinger* also noted several cases that supported UIM reimbursement rights under policies purchased by employers, although This Court observed that all cases pre-dated the 1993 amendment to Section 2363(e). *Simendinger*, 74 A.3d at 612. Appellants use *Simendinger* here to support their belief that UIM liens were customarily honored when employers purchased the UIM policy up until 2013, consistent with *Harris v. New Castle County*, 513 A.2d 1307 (Del. 1986) and *Adams v. Delmarva Power & Light Co.*, 575 A2d 1103 (Del. 1990) (hereinafter, the "*Harris-Adams* line of cases").

to "the third party liability carrier."[21] The Superior Court highlighted this problem in *Simpson*, and asked the General Assembly to address it.[22] The General Assembly responded by *continuing* to equally apply the WCA to employers and employees (and expressly rejecting a proposed disparity), but *equally* lifting the WCA's restrictions for "outside" remedies like UIM. Appellants assert that this exception, created for both employers and employees, effectively overruled *Simendinger* and reinstated the *Henry-Adams* line of cases by "re-granting" employers' UIM lien rights for employer-purchased policies.

[21] *Simpson*, 2016 WL 425010 (Del. Super.).

[22] Amended Opening Brief of Appellants, at 17-19.

CIC's UIM Policy does not supplant Appellants' statutory UIM lien recovery rights.

It appears, from arguments advanced in their Answering Brief, Appellees agree that Appellants will have UIM lien recovery rights if the 2016 amendment to Section 2304 applies. Instead of arguing against that outcome, Appellees argue that the 2016 amendment does not apply and, if it does, that a specific exclusion in CIC's UIM contract (hereinafter "the non-duplication clause") adequately protects Appellants.

Appellants disagree. As This Court knows, contractual policy language is not infallible. Moreover, as a matter of public policy, it is highly prejudicial to piecemeal recovery rights so that employees receive blanket UIM access, while employers are subjected to individual UIM contracts that have a myriad of different verbiage and/or enforcement results.

In the case *sub judice*, Henry does not deny that he seeks duplicative compensation for personal injury damages that Appellants already paid. Despite CIC's non-duplication clause, Henry has been permitted to proceed with these claims. Thus, the integrity of the non-duplication clause remains disputed. If the non-duplication clause is properly enforced, then Appellants will recover nothing. But, if the non-duplication clause is not properly enforced, then Appellants will have

no remedy while Henry receives double damages.[23] This is not the result the General Assembly intended, under 18 *Del. C.* § 3902, or 19 *Del. C.* §§ 2304 and 2363.

Even if Henry agrees to apply the non-duplication clause, Appellants still have the right to ensure he strictly adheres to this agreement.[24] Henry's main litigation objective is to recover as much money as possible. Including duplicated expenses supports that objective. The fact that Henry's UIM claim against CIC remains "active" suggests that Henry and CIC cannot agree on the case's value, which implicates the "duplicative damages" claim. Unlike Henry and CIC, Appellants are not as concerned by the recovery *amount*. Rather, Appellants are solely concerned with *what* the recovery includes. If Henry recovers compensation that Appellants already paid, then Appellants are entitled to reimbursement.

[23] Improper enforcement of the duplication clause could occur in a number of ways. The Court may decline to enforce it, in whole or in part. Or, CIC could elect to waive it, wholly or partially, by including a monetary settlement compromise in lieu of litigation. Or, an award could intentionally or inadvertently include a duplicative expense. Appellants are in a better position than CIC to identify duplicative expenses because CIC has not been a party to, or otherwise involved in, Henry's workers' compensation case. Henry has no incentive to enforce the non-duplication clause because his interest is in a higher monetary amount.

[24] As noted *supra*, Henry's zealous advocacy in this case has resulted in flip-flopping positions. In response to CIC's initial Motion to Dismiss his UIM complaint, Henry argued that the 2016 amendment to Section 2304 applied to allow his UIM claim to proceed. Now, in response to Appellants' request for a commensurate lien, Henry argues that the *2015 version* of Section 2304 applies.

CONCLUSION

Appellees' argument that the pre-amendment version of 19 *Del. C.* § 2304 applies has been waived under DRCP Rule 8. Assuming, *arguendo*, that this argument was not waived, then This Court already held that the pre-amendment version of 19 *Del. C.* § 2304 does not apply to this case. If Section 2304 does not apply to Henry, then it does not apply to Appellants because the General Assembly intended Section 2304 to be uniformly applied.

Since This Court already held that Section 2304 does not bind Henry to the WCA for purposes of permitting recovery from his employer's UIM policy, Appellants, as Henry's employer (and workers' compensation carrier) are not bound to the WCA. Accordingly, 19 Del. C. § 2363(e) (and *Simendinger*'s interpretation of 19 *Del. C.* § 2363(e)) does not apply because Appellants' rights and remedies are not strictly limited to the WCA. Under 18 *Del. C.* § 3902, Horizon can avail itself of its statutory right to recover compensation from the UIM policy it purchased. The compensation sought is reimbursement for any payment made, by CIC to Henry, for damages that Appellants already paid. The Superior Court erred as a matter of law when it granted CIC's Motion for Summary Judgment because Appellants are entitled to this recovery.

Appellees contend that Delaware case law is "well-established" in their favor. This is perplexing, considering decades of case law and common practices in the workers' compensation industry that pre-dated the 2013 case of *Simendinger*.

Before *Simendinger*, employers' UIM rights were honored under the *Harris-Adams* line of cases, which recognized a lien when employers purchased the UIM policy.

Lastly, CIC's non-duplication clause does not dispose of this issue because contractual verbiage is fallible and cannot safely usurp a statutory right. Despite the non-duplication clause in the case *sub judice*, This Court has allowed Henry to proceed with a UIM Complaint against CIC that includes a prayer for duplicate compensation already paid by Appellants. Appellants seek the "sister" right to recover any duplicative compensation paid. Accordingly, Appellants respectfully request that This Honorable Court reverse the Superior Court's Memorandum Order dated May 2, 2022.

Respectfully submitted,

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