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Case Number 431,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK GINSBERG, Individually, and as Executor of the ESTATE OF LISA DAVIS, and RON ZOLADKIEWICZ, as Ad Litem Guardian of BRANDON ZOLADKIEWICZ, a Minor Child,	)	No. 431, 2023
Plaintiffs-Below, Appellants,	)	
v.	)	On Appeal from the Superior Court No. N22C-08-165 VLM
HARLEYSVILLE WORCESTER INSURANCE COMPANY, n/k/a NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY,	)	
Defendant-Below, Appellee.	)	

PLAINTIFFS-BELOW APPELLANTS' REPLY BRIEF ON APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASE **PAGE**

STATUTES

ARGUMENT I

THE TRIAL COURT ERROENOUSLY DETERMINED THAT 18 DEL. C. § 3902(c) PROHIBITS STACKING, NOTWITHSTANDING THE CONTRARY LANGUAGE OF AN INSURANCE POLICY AND THE RULES OF CONSTRUCTION FOR INSURANCE CONTRACTS.

Plaintiffs begin by noting that Defendant Nationwide erroneously ordered the arguments in its Answering Brief, such that Defendant's Argument I responds to Plaintiffs' Argument II, and Defendant's Argument II responds to Plaintiffs' Argument I. Plaintiffs' Reply Brief maintains the same ordering of arguments as the Opening Brief. The Court should take notice of Defendant's erroneous ordering for purposes of cross-referencing the parties' briefs.

Defendant fails to respond to virtually all of the contentions raised in Argument I of Plaintiffs' Opening Brief. Defendant does not address the substance of the "Other Insurance" clause found in Endorsement A2677. See A40; Op. Br. at 8-10. Defendant does not address the "primary" and "excess" coverage distinctions in the Other Insurance clause. A40; Op. Br. at 8-10. Defendant does not address the contradiction between the Other Insurance and "Two or More Auto Policies" clauses in Endorsement A2677. A40; Op. Br. at 10-11.

Defendant does not address the trial court's finding that "there is some ambiguity" between the aforementioned clauses. Ginsberg v. Harleysville Worcester Ins. Co., 2023 Del. Super. LEXIS 854, at *16 (Del. Super. Ct. Oct. 31, 2023); Op.

Br. at 10-11. Defendant does not address the case authority from other jurisdictions holding that analogous policy provisions are ambiguous. See Op. Br. at 11-13. Defendant does not address whether parties may contract around 18 Del. C. § 3902(c), such that an insurer may provide stackable UM/UIM coverage under multiple policies issued by the same insurer. Op. Br. at 13-14. Defendant does not address the principle of *contra proferentem* or the trial court's failure to resolve ambiguities in an insurance contract in favor of the insured. Op. Br. at 14-15.[1]

Instead of responding to Plaintiffs' arguments, Defendant simply contends that Plaintiffs cannot stack UM coverage because there are a handful of anti-stacking provisions sprinkled throughout the fifty-page-long Ginsberg Policy. Defendant then asks this Court to read the anti-stacking provisions in isolation, and essentially ignore the substance of the Other Insurance clause.

Under Delaware law, however, "[a] court's interpretation of an insurance contract must rely on a reading of all of the pertinent provisions of the policy as a whole, and not on any single passage in isolation." Stoms v. Federated Serv. Ins. Co., 125 A.3d 1102, 1107 n.23 (Del. 2015) (emphasis added) (citation omitted). To

[1] Plaintiffs would also reiterate that Defendant chose to include an anti-stacking provision for "excess" **liability** coverage, but chose to omit the same, anti-stacking language for "excess" **UM/UIM** coverage. See Op. Br. at 16 and n.7. Compare A43 (Endorsement A2669, applicable to liability coverage) with A40 (Endorsement A2677, applicable to UM/UIM coverage). Of course, Defendant does not address this argument, either.

that end, the Other Insurance and Two or More Auto Policies clauses must be considered collectively. Defendant's approach, which overlooks the Other Insurance clause, is flawed.

The Ginsberg Policy can be construed in one of two ways relative to UM stacking. On one hand, the policy permits stacking by distinguishing between primary and excess UM coverage in the Other Insurance clause (A40), and designating excess UM coverage as stackable. Alternatively, the policy is ambiguous because the Other Insurance clause provides "a right to excess [UM] coverage without any carveouts or exceptions," while the Two or More Auto Policies clause "take[s] away that right on the same page with its anti-stacking [language]." Ginsberg, 2023 Del. Super. LEXIS 854, at *18. Under the first interpretation, stacking is permitted, and under the second interpretation, the ambiguity must be construed against Defendant, and in favor of stacking. Accordingly, Plaintiffs may stack UM benefits under the Ginsberg Policy.

ARGUMENT II

PUBLIC POLICY CONSIDERATIONS JUSTIFY THE STACKING OF UM COVERAGE WHERE DEFENDANT (1) FAILED TO NOTIFY PLAINTIFFS THAT THEY COULD NOT STACK UM BENEFITS, (2) CONTRACTED TO PROVIDE ILLUSORY EXCESS UM COVERAGE, AND (3) CHARGED PREMIUMS FOR NON-EXISTENT UM COVERAGE.[2]

Defendant fails to respond to the majority of arguments raised in Argument II of Plaintiffs' Opening Brief. Defendant does not address the proposition that Plaintiff Ginsberg was deprived of the opportunity to purchase excess UM/UIM coverage, in violation of 18 Del. C. § 3902(b). Op. Br. at 20-21. Defendant does not address the grave public policy concerns associated with misleading consumers about whether they may stack UM/UIM coverages, especially when one of the coverages is deemed excess. Op. Br. at 21-23. Defendant does not address the unconscionability and unconstitutionality of anti-stacking provisions and section 3902(c). Op. Br. at 23-27.

Instead, Defendant relies primarily on the Supreme Court's decision in Bromstad-Deturk v. State Farm, 2009 Del. LEXIS 274 (Del. 2009) to argue that the issues raised in the instant case have already been decided in Defendant's favor. Bromstad, however, is distinguishable.

[2] Plaintiffs remind readers that Plaintiffs' Argument II corresponds to Defendant's erroneously-ordered Argument I.

In Bromstad, the plaintiff and her husband purchased three, separate insurance policies from their insurer, defendant State Farm, to cover their three vehicles. Id., 2009 Del. Lexis 274, at *1. Each policy provided UIM coverage with limits of $100,000.00. Id. Plaintiff was injured in an automobile accident, and after settling with the tortfeasor, filed a declaratory action seeking to stack her three UIM policies for a total recovery of $300,000.00. Id., at *2. Defendant State Farm moved to dismiss plaintiff's complaint on the basis of anti-stacking provisions in the policies, which limited State Farm's exposure to the highest limit of liability under any one policy. Id.

The Supreme Court affirmed the trial court's decision granting State Farm's motion to dismiss, reasoning that 18 Del. C. § 3902(c) "clearly and unambiguously allows the type of anti-stacking provision found in [plaintiff's] policies. We will not encroach upon the General Assembly's apparent intent to allow … anti-stacking provisions that preclude stacking multiple policies issued by the same insurer." Bromstad, 2009 Del. Lexis 274, at *4.

In the present case, Lisa Davis and Mark Ginsberg purchased separate policies because they both had children from prior marriages who were insured under their respective policies. See Op. Br. at 3 n.2. This distinction is critical. Lisa Davis and her son, Bryce Zoladkiewicz, were the named insureds/drivers under Lisa Davis's policy. See Ans. Br., Appx. at B10. Mark Ginsberg and his son, Joshua Ginsberg,

were the named insureds/drivers under Mark Ginsberg's policy. See Ans. Br., Appx. at B91.

Unlike in Bromstad, the Plaintiffs in this case were not named drivers/insureds on each other's policies. They did not purchase their policies together, nor did they share insurance coverage or ownership of each other's vehicles. Rather, Lisa Davis and Mark Ginsberg purchased separate policies, covering separate individuals, including their separate biological children, for their separate vehicles. It just so happens that they purchased automobile insurance from affiliated companies.

By disputing coverage under the Ginsberg Policy, Defendant is attempting to rob Plaintiff Ginsberg of coverage, for which he paid separate and valuable consideration, on the basis of a coincidence. The facts would be no different in the case of individuals who live together as roommates and whose vehicles happen to be insured with the same auto insurance carrier, or a parent who moves into the home of their adult child, and brings a vehicle that happens to be insured with the same auto insurance carrier used by the adult child. Such a coincidence cannot serve as a legitimate basis to deny contractual insurance benefits that are purchased with separate premiums.

Moreover, unlike in Bromstad, the insurance policies here contain anti-stacking provisions *as well as* contradictory Other Insurance provisions that allow stacking. See Argument I supra. The public policy concerns overlap but are different.

Defendant next contends that a finding in favor of Plaintiffs would violate 18 Del. C. §§ 3902(b) and (c).

According to Defendant, additional payouts under the Ginsberg Policy would violate section 3902(b) because "Lisa Davis had a $100,000 bodily injury limit," and therefore, "[a]n uninsured policy of $100,000 is the only amount allowable under Delaware law." Ans. Br. at 9. Defendant's assertion is incorrect because it fails to recognize that the Ginsberg Policy is a separate policy.

Lisa Davis carried a policy with limits of 100/300 for bodily injury liability and UM/UIM. Defendant has already paid $200,000.00 under Lisa Davis's UM policy, broken down as follows: $100,000.00 for the wrongful death/survivorship UM claim, and $100,000.00 for Brandon Zoladkiewicz's bodily injury UM claim. Plaintiffs now seek to recover under Mark Ginsberg's separate, 100/300 policy, in the amount of $200,000.00, broken down the same as before: $100,000.00 for the wrongful death/survivorship UM claim, and $100,000.00 for Brandon Zoladkiewicz's bodily injury UM claim. There would be no problem with this recovery if the policies were purchased from unaffiliated insurance carriers, so the fact of such an affiliation has no bearing on section 3902(b).

Defendant's argument concerning section 3902(c) is equally unpersuasive. As discussed in Plaintiffs' Opening Brief, section 3902(c) does not indicate that stacking of UM/UIM coverage between policies issues by the same carrier is legally

prohibited. See Op. Br. at 13-14. Rather, the Supreme Court has interpreted section 3902(c) as reflecting "the General Assembly's apparent intent to **allow** … anti-stacking provisions that preclude stacking multiple policies issued by the same insurer." Bromstad, 2009 Del. Lexis 274, at *4 (emphasis added). It would be unreasonable and illogical to conclude that the General Assembly intended to prohibit insurance carriers from selling coverage that is more comprehensive than the coverage contemplated in Delaware's motor vehicle financial responsibility laws.

ARGUMENT III

THE RELEASES EXECUTED BY PLAINTIFFS IN SETTLEMENT OF THEIR UM CLAIM UNDER THE DAVIS POLICY DO NOT PROHIBIT PLAINTIFFS FROM RECOVERING ADDITIONAL UM BENEFITS UNDER THE SEPARATE GINSBERG POLICY.

At the outset, Plaintiffs would highlight that the trial court declined to decide Defendant's argument concerning the scope of the settlement releases. See Ginsberg, 2023 Del. Super. LEXIS 854, at *4 n.21 ("The Court need not address the issues regarding the validity of the release."). In the event this Court determines that the releases present a case-dispositive issue, Plaintiffs submit that the issue must first be decided by the trial court. See, e.g., Clariant Corp. v. Harford Mut. Ins. Co., 11 A.3d 220, 222 (Del. 2011) ("On appeal, this Court decided that a potentially dispositive issue had not been addressed by the Superior Court …. Accordingly, … we remanded this matter to the Superior Court.").

Notwithstanding the absence of a decision from the lower court, the Defendant's position concerning the settlement releases is unpersuasive.

The settlement releases utilize restrictive language that limits their scope to the particular claims filed under Lisa Davis's policy. The heading of the releases reference "Claim # S1 396913-005," which is the claim number assigned to the claim under Lisa Davis's policy. Ans. Br., Appx. at B68, B78. The body of the releases

reference "Policy No. S1 396913-005," again corresponding to Lisa Davis's claim. Ans. Br., Appx. at B68, B78. Moreover, the releases explicitly state:

> The parties further understand that this Release is made as a compromise to avoid expense and **to terminate the controversy as set forth in the** lawsuit or **claim referred to above**.

Ans. Br., Appx. at B69, B79 (emphasis added).

Based on the language of the releases, the scope is limited to the claims made under Lisa Davis's policy. Under Delaware law, "an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as the language will permit." Steigler v. Ins. Co. of N. Am., 384 A.2d 398, 401 (Del. 1978). Here, Plaintiffs had no expectation of releasing any claims under Mark Ginsberg's separate policy, for which Plaintiff Ginsberg paid separate consideration, to a then-distinctly-named insurance company.

If the scope of the releases is uncertain, then the releases must be deemed ambiguous, and construed against the drafter. See Steigler, 384 A.2d at 400 ("where ambiguous, the language of an insurance contract is always construed most strongly against the insurance company which has drafted it."). Construing the release against Defendant Nationwide, the terms are limited to releasing claims under Lisa Davis's policy only, and not Mark Ginsberg's policy.

Two final points warrant consideration. First, the terms of the releases state that "the receipt of [the settlement money] is hereby acknowledged." Ans. Br., Appx.

at B68, B78. Critically, Plaintiff Ginsberg signed the release on November 1, 2021. See B70. When Plaintiffs were litigating this particular issue before the Superior Court in March 2023, more than one year and three months later, Defendant Nationwide still had not paid once cent to Plaintiff Ginsberg. On this basis, Plaintiff argued before the lower court: "Not only is Nationwide in material breach of the agreement, but the release is void for lack of consideration. Accordingly, the release is unenforceable and does not preclude a recovery by Plaintiff Ginsberg [under his separate policy]." See Plaintiffs' Motion for Summary Judgment, at 11-12. (DI 14). It was not until late June 2023, more than one-and-a-half years after signing the agreement, that Defendant Nationwide actually paid the settlement funds due. Defendant should not be permitted to utilize procedural developments (such as the trial court's decision that did not address Plaintiffs' argument), and substantial delays of time, over which Plaintiff Ginsberg had no control, to gain a legal advantage.

Second, the release signed by Plaintiff Zoladkiewicz (executed after he became an adult) includes an additional sentence which further evidences the parties' intent to limit the release to the claims made under Lisa Davis's policy. Specifically, the agreement provides: "This release applies to consideration paid under policy no. S1 396913-005 only." See Ans. Br., Appx. at B78.

In sum, the scope of the releases is limited to the claims made under Lisa Davis's policy, otherwise, the releases are ambiguous and must be construed in favor of Plaintiffs. The releases are also void on account of Defendant's then-material breach for non-payment.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully requests that the Court reverse the decision of the trial court, and remand the case with instructions to enter judgment in favor of Plaintiffs.

Respectfully submitted:

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