Third Party Claims & The Interplay With Workers' Compensation

Group 10

19 *DEL. C.* § 2363

§ 2363 Third person liable for injury; right of employee to sue and seek compensation; right of employer and insurer to enforce liability; notice of action; settlement and release of claim and effect thereof; amount of recovery; reimbursement of employer or insurer; expenses of recovery; apportionment; compensation benefits.

(a) Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or the employee's dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with this section. If the injured employee or the employee's dependents or personal representative does not commence such action within 260 days after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of actions prescribed by statute, enforce the liability of such other person in the name of that person. Not less than 30 days before the commencement of suit by any party under this section, such party shall notify, by certified mail at their last known address, the Industrial Accident Board, the injured employee or, in the event of the employee's death, the employee's known dependents or personal representative or the employee's known next of kin, the employee's employer and the workers' compensation insurance carrier. Any party in interest shall have a right to join in said suit.

(b) Prior to the entry of judgment, either the employer or the employer's insurance carrier or the employee or the employee's personal representative may settle their claims as their interest shall appear and may execute releases therefor.

(c) Such settlement and release by the employee shall not be a bar to action by the employer or its compensation insurance carrier to proceed against said third party for any interest or claim it might have, and such settlement and release by the employer or its compensation insurance carrier shall not be a bar to action by the employee to proceed against said third party for any interest or claim the employee may have.

(d) In the event the injured employee or the employee's dependents or personal representative shall settle their claim for injury or death, or commence proceedings thereon

against the third party before the payment of workers' compensation, such recovery or commencement of proceedings shall not act as an election of remedies and any moneys so recovered shall be applied as provided in this section.

(e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, reimbursement shall be had only from the third-party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved.

(f) Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting such recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of said recovery.

PERSONAL INJURY PROTECTION BENEFITS

v.

WORKERS' COMPENSATION BENEFITS

1999 WL 1568331
Only the Westlaw citation is currently available.

Superior Court of Delaware.

COMMUNITY SYSTEMS, INC., Employer-Appellant,
v.
Ernest ALLEN, Employee-Appellee.

No. 99A-01-002.
|
Nov. 4, 1999.

Upon Appeal from a Decision of the Industrial Accident Board-Affirmed in Part Reversed in Part, Remanded.

Attorneys and Law Firms

Raymond W. Cobb, of Wilmington, Delaware, for Employer-Appellant.

Jessica L. Welch, Doroshow, Pasquale, Krawitz, Seigel & Bhaya, of Wilmington, Delaware, for Claimant-Appellee.

MEMORANDUM OPINION

GEBELEIN, J.

*1 This is the Court's decision on Appellant Community Systems, Inc. ("Employer")'s appeal of the Industrial Accident Board ("Board")'s decision of August 19, 1998, concluding that Appellee Ernest Allen ("Claimant") was entitled to total disability benefits from September 16, 1997 through December 6, 1997 based on Claimant's part-time employment with Community Systems, Inc. For the following reasons, the decision of the Board is AFFIRMED.

I.

Claimant was employed full-time by the Delaware Psychiatric Center as a psychiatric attendant and part-time by Community Systems, Inc. ("CSI") as a residential counselor. On September 15, 1996, while working for CSI Claimant sustained injuries to his neck, lower back, shoulder and right knee when the van in which he was a passenger was rear-ended by another vehicle also driven by an employee of CSI. Claimant sought workers' compensation benefits for his wage loss at CSI. Claimant had already received lost wage benefits for his full-time job at Delaware Psychiatric Center from the personal injury protection ("PIP") carrier.

On October 18, 1996, a Petition for Compensation Due was filed with the Board seeking total temporary disability for a closed period of September 19, 1996 to January 21, 1997, and medical expenses. On August 19, 1998, the Board issued a written decision that granted Claimant total disability from September 16, 1996 to December 6, 1996 for Claimant's part-time employment with CSI and awarded a portion of the medical expenses.

Employer appealed the Board's decision, contending that Claimant should have proceeded under PIP to obtain wage loss benefits from his part-time employer as PIP benefits are primary over workers' compensation benefits. Employer argues that allowing Claimant to collect the workers' compensation award of total disability benefits for part-time employment is manifestly unfair where Claimant had already received PIP benefits for his full-time employment. Employer also argues that the Board erred as a matter of law when it awarded Claimant total disability benefits for part-time employment based on a 40-hour work week. [1]

Claimant contends that the Board's decision to allow Claimant to receive workers' compensation benefits enables Claimant to maximize his recovery which is the underlying premise of both the workers' compensation and PIP statutes. Claimant argues that PIP benefits from the job of injury would not be the optimal distribution.

II.

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. [2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support

a conclusion.[3] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings .[4] It merely determines if the evidence is legally adequate to support the agency's factual findings.[5] If such evidence exists and the agency has made no error of law, its decision must be affirmed.[6]

III.

*2 The problem involved in this case is the overlap of coverages between the Workmen's Compensation Act[7] and the Delaware No-Fault Insurance Act.[8] Both statutes are entitled to liberal construction in order to achieve their remedial purposes.[9] Claimant was injured within the course and scope of employment and therefore is entitled to coverage under the Workmen's Compensation Act. Additionally, Claimant is entitled to PIP benefits because he was injured as a result of an automobile accident. Therefore, with regard to Claimant's loss of earnings for the part-time job with CSI, both workers' compensation and PIP benefits are available. With regard to Claimant's loss of earnings for the full-time job with Delaware Psychiatric Center ("DPC"), workers' compensation benefits are not available because Claimant was not injured within the course and scope of that employment. However, unlike workers' compensation benefits, payments issued pursuant to the no-fault statute are not limited to accidents occurring in the course and scope of employment and Claimant therefore is entitled, and in fact received, PIP benefits for his loss of earnings at DPC. The issue here is whether Claimant must accept PIP benefits for the part-time job at CSI because PIP benefits are primary, or whether Claimant is entitled to choose workers' compensation benefits because they offer the maximum coverage for Claimant.

It is well settled law in Delaware that to the extent that the benefits provided by no-fault coverage and workers' compensation overlap, no-fault provides greater benefits and therefore no-fault should control.[10] Not only is PIP coverage primary, but its "interaction with the coverage provided under the worker's compensation act must be managed in such a fashion that the injured employee receives the maximum benefits available under both. The object is to provide and protect the interests of such individuals."[11]

Both parties agree that the primary obligation to provide compensation for injuries received as a result of an automobile accident occurring in the course and scope of employment lies with PIP coverage.[12] Employer argues, however, that because PIP benefits are primary, Claimant must obtain PIP benefits rather than workers' compensation coverage for the part-time employment with CSI. Claimant argues that the purpose behind holding PIP benefits primary to workers' compensation is to maximize the employee's benefits, and in the case at bar, the workers' compensation benefits provide the optimal distribution.

In most cases involving workers' compensation and no-fault coverage overlap, the employee usually is seeking the PIP coverage over the workers' compensation benefits because the no-fault coverage is greater. For example, in *Cicchini,* the employees wanted to recover under PIP rather than workers' compensation but the employer argued that the employees would benefit more by taking the workers' compensation. While the court agreed that the employees would be "benefitted" under the workers' compensation scheme, and did not dispute the proposition that Delaware law does not require the PIP insurer to pay first in all instances even where PIP coverage is termed "primary" or "superior,"[13] the Court found that the employer was unable to contradict the argument that by declaring the workers' compensation benefits primary, the employees would actually recover less because the resultant liens would be satisfied directly from any recovery received by the employees from the tortfeasors.[14]

*3 Here, Claimant argues that the maximum benefit arises under the workers' compensation scheme. It is true that with regard to the wage loss and medical bills, the amount of PIP benefits are limited and PIP benefits are the only source of wage loss coverage available to Claimant for his position at DPC. If Claimant were to exhaust the PIP coverage, he would be prevented from receiving compensation for any future wage loss with DPC.

In *Cicchini* the Court was concerned that resultant liens would reduce the employees recovery under the workers' compensation scheme. This is no longer an issue now that the amendment to 19 *Del. C.* § 2363(e) was enacted which prevents the workers' compensation carrier from asserting

a claim against plaintiff's recovery if the expenses paid were eligible for PIP coverage.

This Court concludes that the purpose behind holding PIP coverage primary is to maximize the benefits to the employee.[15] In this case that goal would be advanced under the workers' compensation scheme. The no-fault statute does not indicate that the PIP coverage is exclusive, therefore, there is no reason to conclude that because Claimant has a PIP claim for his full-time employment, that he would be forced to accept PIP coverage for his employment with CSI.

IV.

Employer also argues that the Board erred in concluding that Claimant worked an average of 40 hours per week for CSI. Claimant testified that he worked 30 hours per week every other week, and 42 hours per week on the alternate weeks, yet the Board concluded in its written decision issued August 19, 1998, that Claimant "worked an average of forty hours a week at CSI."[16]

The statutory basis for wage calculation is found in 19 *Del. C.* § 2302(b). The statute, in pertinent part, states: "If the rate of wages is fixed by the day or hour, the employee's weekly wages shall be taken to be that rate times the number of days or hours in an average work week of the employee's employer at the time of the injury." The Board's calculation of average work week does not appear to be supported by the only evidence on this issue. If the limited evidence were assumed to be true an award could be no greater than a 36 hour work week average.

V.

In light of the foregoing, the decision of the Board is hereby REVERSED and the case is REMANDED with direction to the Board for such further proceedings as are consistent with this opinion as to the issue of average work week, as to all other issues the decision is AFFIRMED.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1999 WL 1568331

Footnotes

1 It is the employer's contention that the Board erroneously concluded in its decision that Claimant worked an average of 40-hours per week at CSI and the Board's factual premise for the award is not substantiated in the record. The only testimony presented before the Board with regard to the number of hours that Claimant worked at CSI was Claimant's testimony that he would work 30 hours per week every other week and 42 hours per week on alternate weeks.

2 *General Motors v. Freeman,* Del.Supr., 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corporation,* Del.Supr., 213 A.2d 64, 66-67 (1965).

3 *Oceanport Ind. v. Wilmington Stevedores,* Del.Supr., 636 A.2d 892, 899 (1994); *Battisa v. Chrysler Corp.,* Del.Super., 517 A.2d 295, 297 (1986), *app. dism.,* Del.Supr., 515 A.2d 397 (1986).

4 *Johnson v. Chrysler,* 213 A.2d at 66.

5 29 *Del. C.* § 10142(d).

6 *Mooney v. Benson Mgt. Co.,* Del.Super., 451 A.2d 839 (1982).

7 19 *Del. C.* § 2301, et. seq.

8 21 *Del. C.* § 2118.

9 *Morgan v. State Farm Mutual Auto Insurance Co.,* Del.Super., 402 A.2d 1211 (1979); *Hill v. Moskin Stores, Inc.,* Del.Supr., 165 A.2d 447 (1960).

10 *Cicchini v. State,* Del.Super., 640 A.2d 650 (July 12, 1993), *aff'd,* Del.Supr., 642 A.2d 837 (1994); *Pennsylvania Manufacturers Assoc. Co. v. Oliphant,* Del.Super., C.A. No. 83C-AP-3, Bush, J. (September 10, 1986)(relying on the fact that the no-fault statute was more recently enacted and more specific, applying to all PIP insured, whether employees or not, who are injured in an automobile accident).

11 *Cicchini,* 640 A.2d at 653.

12 *Cicchini,* 640 A.2d 650.

13 *Oliphant,* at 4.

14 *Cicchini*

15 *Cicchini,* at 654; *Hone Ins. Co. v. Walls,* Del.Super., C.A. No. 77C-0C-90, Taylor, J. (October 19, 1979); *Johnson v. Fireman's Fund Ins. Co.,* Del.Super., C.A. No. 82C-0C-63, Poppiti, J. (November 21, 1983).

16 *Allen v. Community Systems, Inc.,* IAB Hearing No. 1089766 (August 7, 1998).

End of Document

19 *DEL. C.* § 2363(e)

and

PERSONAL INJURY PROTECTION BENEFITS

19 Del. C. § 2363(e)

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, **except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, reimbursement shall be had only from the third-party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved.**

COLLATERAL ESTOPPEL

655 A.2d 1209
Supreme Court of Delaware.

Donald W. MESSICK and Penny Messick, Plaintiffs Below, Appellants,
v.
STAR ENTERPRISE, a general partnership, Texaco Refining and Marketing (East) Inc., a Delaware corporation, as owner/partner of Star Enterprise, and Saudi Refining, Inc., a Delaware corporation, as owner/partner of Star Enterprise, Defendants Below, Appellees.

No. 183, 1994.
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Submitted: Feb. 14, 1995.
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Decided: March 22, 1995.

Synopsis

Employee, who suffered heart attack allegedly as result of being overcome by gases when working on pipeline, and whose petition with Industrial Accident Board (IAB) for workers' compensation benefits had been dismissed by stipulation, brought action for damages against owner of pipeline. The Superior Court, New Castle County, granted pipeline owner's motion for summary judgment, holding that employee was collaterally estopped by dismissal of IAB proceeding from arguing that heart attack was caused by gas exposure. Employee appealed. The Supreme Court, Veasey, C.J., held that statutory preclusion of election of remedies dictated that collateral estoppel not bar relitigation of issue of whether heart attack was caused by gas exposure.

Reversed and remanded.

West Headnotes (9)

[1] Judgment
Essentials of Adjudication

Under doctrine of collateral estoppel, if court has decided issue of fact necessary to its judgment, that decision precludes relitigation of issue in suit on different cause of action involving party to first case.

35 Cases that cite this headnote

[2] Administrative Law and Procedure
Res judicata

Collateral estoppel extends not only to issues decided by courts, but also to issues decided by administrative agencies acting in judicial capacity where parties had opportunity to litigate.

5 Cases that cite this headnote

[3] Workers' Compensation
Matters concluded

Issues developed by employee before Industrial Accident Board (IAB) were substantially similar to issues in employee's action against owner of gas pipeline, for purposes of determining whether employee was collaterally estopped from arguing that his heart attack was caused by exposure to gases; issue developed before IAB was whether heart attack was causally connected to emission of gases, and, in action against owner, employee claimed damages stemming from heart attack suffered as result of exposure to gases.

2 Cases that cite this headnote

[4] Judgment
Mutuality of estoppel

Judgment
Mutuality of estoppel in general

Mutuality is not prerequisite to assertion of collateral estoppel.

Cases that cite this headnote

[5] Workers' Compensation
Conclusiveness and Effect

Issue decided by Industrial Accident Board (IAB) was "litigated," for purposes

of determining whether employee was collaterally estopped from arguing issue.

2 Cases that cite this headnote

[6] **Workers' Compensation**
Finality
Workers' Compensation
Matters concluded

Issue of whether employee's heart attack was causally related to his exposure to gases was determined, and valid and final judgment was rendered, in employee's proceeding before Industrial Accident Board (IAB), for purposes of determining whether employee was collaterally estopped from arguing issue; IAB held that employee did not meet his burden of proof, and, although employee originally appealed decision, his appeal was withdrawn with prejudice.

2 Cases that cite this headnote

[7] **Workers' Compensation**
Election of Remedies

Statutory preclusion of election of remedies dictated that collateral estoppel not bar relitigation in third-party civil action of factual issue decided in proceedings before Industrial Accident Board (IAB); desire to end litigation and avoid conflicting decisions underlying collateral estoppel doctrine was overshadowed by statutory public policy, since, in absence of mutuality requirement for collateral estoppel, employee would have to choose between obtaining immediate aid by bringing proceeding before IAB and bringing potentially more remunerative third-party suit, and spouses would be prevented from bringing loss of consortium suit if injured employee lost before IAB. 19 Del.C. § 2363(a).

19 Cases that cite this headnote

[8] **Appeal and Error**
Construction, Interpretation, or Application of Law
Appeal and Error
De novo review

Supreme Court will review de novo the trial court's grant of summary judgment, and will affirm trial court's legal conclusions unless they represent error in applying legal precepts.

Cases that cite this headnote

[9] **Workers' Compensation**
Purpose of legislation

Workers' compensation law was enacted to serve injured worker's need for expeditious relief without having to subject worker to hazards and delay of lawsuit. 19 Del.C. § 2101 et seq.

Cases that cite this headnote

***1210** Upon appeal from the Superior Court. **REVERSED AND REMANDED.**

Attorneys and Law Firms

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Harvey B. Rubenstein (argued), Christopher J. Curtin and William W. Erhart, Delaware Trial Lawyers Ass'n, Wilmington, amici curiae.

Before VEASEY, C.J., WALSH, HOLLAND and BERGER, JJ., and DUFFY, J., Retired,* constituting the Court en Banc.

Opinion

VEASEY, Chief Justice.

In this appeal, we consider whether the application of collateral estoppel to decisions of the Industrial Accident Board ("IAB") forces an election of remedies prohibited under Delaware Workers' Compensation law. The Superior Court found that collateral estoppel applies to IAB decisions, thus barring plaintiff below-appellant Donald W. Messick ("Messick") from rearguing in a third-party civil suit a factual contention rejected by

the IAB—namely, that his heart attack was caused by gas exposure. Therefore, it granted summary judgment for defendant below-appellee Star Enterprise ("Star"). It also denied, for the same reason, Messick's Motion for Reargument with regard to claims for additional injuries. We hold that collateral estoppel, as applied to issues decided in IAB hearings and then relitigated in third-party civil actions, forces an election of remedies in violation of 19 *Del.C.* § 2363(a) ("Section 2363(a)"). Accordingly, we **REVERSE** the judgment of the Superior Court granting summary judgment to Star, and **REMAND** the case for proceedings consistent with this opinion. [1]

*1211 I. FACTS

On March 14, 1991, Messick, an employee of U.E. & C. Catalytic, Inc. ("Catalytic"), was injured while working on a pipeline at the Star Enterprise Delaware City Plant (the "Plant"). [2] While removing a nozzle on the pipeline, Messick was overcome by gases and became ill. He received oxygen at the Plant's medical unit, returned to work, and continued to work until March 31, 1991. On April 6, 1991, Messick suffered a heart attack.

On June 13, 1991, Messick filed a petition against Catalytic with the IAB seeking to recover workers' compensation benefits. At an IAB hearing on April 29, 1992, Messick testified and presented expert witness testimony in support of his claim. The IAB found that, while Messick had been exposed to a gas, he failed to prove that the gas caused his subsequent heart attack.

Messick filed a Notice of Appeal from this ruling with the Superior Court. That appeal was dismissed with prejudice by stipulation between Messick and his employer, Catalytic, on October 20, 1992. Messick then commenced this action against Star on February 19, 1993. Messick alleged that, as a result of concentrated exposure to sulfur dioxide and hydrogen sulfide gases at the Plant, he suffered a "massive heart attack." Star moved for summary judgment, claiming that Messick should be collaterally estopped from arguing that his heart attack was caused by the gas exposure, since that issue had already been resolved in the IAB proceeding involving Catalytic.

The Superior Court granted Star's Motion for Summary Judgment on November 4, 1993. Messick then filed a Motion for Reargument pursuant to Superior Court Civil Rule 59(e), based on the issue of Messick's damages in addition to his heart attack. The Superior Court denied the motion, finding that such other damages were the same symptoms as those giving rise to a heart attack. Messick appeals the Superior Court's grant of summary judgment to Star.

II. COLLATERAL ESTOPPEL AS APPLIED TO IAB DECISIONS

[1] **[2]** Under the doctrine of collateral estoppel, if a court has decided an issue of fact necessary to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). Collateral estoppel extends not only to issues decided by courts, but also to issues decided by administrative agencies acting in a judicial capacity where the parties had an opportunity to litigate. *Foltz v. Pullman, Inc.,* Del.Super., 319 A.2d 38, 42 (1974); *Phillips v. A.P. Green Refractories Co.,* 428 Pa.Super. 167, 630 A.2d 874, 879 (1993), *appeal granted in part sub nom. Phillips v. A–Best Prod.,* Pa.Supr., 645 A.2d 1317 (1994) (citing *Grant v. GAF Corp.,* 415 Pa.Super. 137, 608 A.2d 1047 (1992), *order aff'd sub nom. Gasperin v. GAF Corp.,* 536 Pa. 429, 639 A.2d 1170 (1994) (hereinafter referred to as "*Grant* ")). "The test for applying collateral estoppel requires that (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment." *Taylor v. State,* Del.Supr., 402 A.2d 373, 375 (1979) (citing *Tyndall v. Tyndall,* Del.Supr., 238 A.2d 343, 346 (1968)). Based on *Foltz,* 319 A.2d 38, the Superior Court found that all four of these criteria are met in the controversy at bar.

[3] **[4]** First, the issue developed before the IAB was whether Messick's heart attack was causally connected to the emission of gases at the Plant. In this suit, Messick claims damages stemming from a heart attack suffered as a result of exposure to gases at the Plant. The issue in this suit is substantially similar to the issue Messick raised in the IAB hearing. Although Star was not a party to the prior adjudication, mutuality is not a prerequisite to the assertion of collateral estoppel. *Columbia Casualty Co. v. Playtex FP, Inc.,* Del.Supr., 584 A.2d 1214, 1217 (1991); *Foltz,* 319 A.2d at 41.

*1212 **[5]** Second, the issue was litigated. "The differences between litigating an issue before the [Industrial Accident] Board and litigating it before this

Court are not ... so fundamental as to preclude the application of collateral estoppel." *Foltz,* 319 A.2d at 42; *see Phillips,* 630 A.2d at 879 ("The doctrine of collateral estoppel is not unavailable simply because administrative procedures are involved") (quoting *Grant,* 608 A.2d at 1056).

[6] Finally, the issue was determined and a valid and final judgment was rendered. The IAB held that Messick failed to meet his burden of proof in that he did not show that his heart attack was causally related to his inhalation of gases at the Plant. Additionally, although Messick originally appealed the decision, his appeal was withdrawn with prejudice.

[7] Messick complains that, despite the clarity of existing law collaterally estopping him from pursuing an action against Star, which was not a party to the original IAB action, the imposition of collateral estoppel forces an election of remedies which is prohibited under Section 2363(a). That section, which deals with the acceptance of and the taking of proceedings to enforce worker's compensation benefits, provides that such actions "shall not act as an election of remedies, but such injured employee or his dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with this section."

Messick claims that, if election of remedies were required, he would be forced to choose between trying to secure immediate compensation for medical bills and lost wages in an IAB hearing, and instituting a lengthier, though possibly more remunerative, third-party civil action. Messick thus argues that *Foltz* should no longer be followed, collateral estoppel in the absence of mutuality should be abandoned in the IAB context, and the Superior Court's grant of summary judgment should be vacated.

[8] This Court will review *de novo* the trial court's grant of summary judgment, and will affirm the trial court's legal conclusions unless they represent an error in applying legal precepts. *Arnold v. Society for Savings Bancorp, Inc.,* Del.Supr., 650 A.2d 1270, 1278 (1994).

[9] After reviewing the facts of this case, we hold that mutuality must be retained in instances, as here, where the desire to end litigation and avoid conflicting decisions is overshadowed by statutory public policy and by principles of fairness and justice. *See Continental Can Co. v. Hudson Foam Latex Prod.,* 129 N.J.Super. 426, 324 A.2d 60, 61–62 (1974) (holding that the application of collateral estoppel depends on many factors, all of which must be considered "because they contribute to the greatest good for the greatest number so long as fairness is not sacrificed on that altar"). Although the workers' compensation law was enacted by the legislature to serve the injured worker's need for expeditious relief "without [having to] subject himself to the hazards and delay of a law suit," *Frank C. Sparks Co. v. Huber Baking Co.,* 48 Del. 9, 96 A.2d 456, 461 (1953), absence of mutuality subjects the injured worker appearing before the IAB to the possibility of collateral estoppel and thus precludes the possibility of a third-party civil action.

In *Foltz,* the Superior Court noted the existence of this dilemma. Despite holding that the application of collateral estoppel to IAB decisions did not effect an election of remedies, the Court in *Foltz* stated that "plaintiff did run the risk that a final, adverse decision could be rendered by the [IAB] prior to a final judgment in the action against the defendant for damages and that one or more of the issues decided by the [IAB] would be crucial issues in the third-party action." *Foltz,* 319 A.2d at 42. But it is precisely because "plaintiff did run [that] risk" that he was forced to an election of remedies in contravention of the statute. *See also* 2A Arthur Larson, *The Law of Workmen's Compensation,* §§ 73.10, 73.21 (1993) (noting existence of election of remedies in IAB context in Delaware and its inequitable results).

If *Foltz* were to be followed, the only way to avoid this result would be to litigate the third-party claim first and await the result before going to the IAB. This defeats the ***1213** purpose of the workers' compensation law, as the worker is left in the position of having to forego immediate aid and assistance before the IAB in the hope that he wins his third-party suit. On the other hand, the third party has two chances to avoid risk—the first if the worker loses before the IAB (he then will be collaterally estopped from asserting the claim in a third-party suit), and the second if the worker wins before the IAB and files a third-party action. In a third-party action, the successful claimant could not use the doctrine of collateral estoppel as a sword against the defendant, but the defendant could nonetheless use collateral estoppel as a shield against the claimant. *See Restatement (Second) of Judgments* § 29, at 291 (1982) (collateral estoppel should not apply to issues

relitigated in third-party civil actions where "treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved").

Further, the differences between a workers' compensation proceeding and civil litigation are appreciable. Litigation in the Superior Court permits litigants to undertake full discovery of witnesses and parties, including document production, interrogatories and depositions. SUPER.CT.CIV.RS. 26–34.. ACTIONS BEFORE THE IAB, ON THE OTHER HAND, ALLOW ONLY LIMITED DISCOVERY IN THE NATURE OF DOCUMENT PRODUCTION, PURSUANT TO IAB RULE 11. DIFFERENCES ALSO EXIST IN THE EVIDENTIARY RULES, THE AWARD OF DAMAGES, AND THE TIMEEEEEEE ALLOWED TO PRESENT THE CASE. *COMPARE GENERALLY* SUPER.CT.CIV.RS. WITH IAB sRules. ALTHOUGH BOTH FORA PRESENT THE CLAIMANT OPPORTUNITY TO LITIGATE, THE TOOLS AVAILABLE TO PROSECUTE A CLAIM IN THE TWO FORA ARE NOT EQUAL. *SEE RESTATEMENT (SECOND) OF JUDGMENTS* § 29(2), COMMENT D, AT 291–294 (1982) (COLLATERAL ESTOPPEL SHOULD NOT APPLY WHERE "[T]HE FORUM IN THE SECOND ACTION AFFORDS THE PARTY AGAINST WHOM PRECLUSION IS ASSERTED PROCEDURAL OPPORTUNITIES IN THE PRESENTATION AND DETERMINATION OF THE ISSUE THAT WERE NOT AVAILABLE IN THE FIRST ACTION AND COULD LIKELY RESULT IN THE ISSUE BEING DIFFERENTLY DETERMINED").

The absence of mutuality also has a chilling effect on spousal suits for loss of consortium. If the injured worker loses a cause of action before the IAB, this effectively precludes his or her spouse from bringing a loss of consortium action before the courts. This is the result even though the spouse did not have the opportunity to bring the claim before the IAB.

Star claims that collateral estoppel in this case does not force an election of remedies. Star relies on *Grant,* 608 A.2d at 1059, a Pennsylvania case, for the proposition that, while Section 2363 allows an injured employee to pursue an action against third parties, it does not exempt the employee from statutes and common law doctrine in a civil action once the IAB has made a final determination. Star's reliance on *Grant* is misplaced. The Pennsylvania workers' compensation statute that *Grant* interprets does not explicitly state, as does Delaware's, that the statute is not to serve as an election of remedies. *Compare* 19 *Del.C.* § 2363(a) *with Pa.Stat.Ann.* tit. 77, §§ 1–1603. Therefore, the problematic issues concerning collateral estoppel in this State are different from the issues which may or may not arise in Pennsylvania.

III. CONCLUSION

Here the statutory preclusion of election of remedies dictates that collateral estoppel not bar the relitigation in third-party civil actions of factual issues decided in IAB hearings. This holding is strictly limited to this narrow set of circumstances where a statute mandates that there be no election of remedies and the application of collateral estoppel would result in such an election.[3] Accordingly, we disapprove the holding in *Foltz,* **REVERSE** the Superior Court's grant of summary judgment, and **REMAND** for proceedings consistent with this opinion.

All Citations

655 A.2d 1209

Footnotes

* Sitting by designation pursuant to Supreme Court Rule 2 and Del. Const, art. IV, §§ 12 and 38.

1 Due to our holding, we find it unnecessary to address Messick's remaining assignments of error.

2 The Plant is owned by Star, a general partnership owned by Texaco Refining and Marketing (East) Inc. and Saudi Refining, Inc.

3 Nothing contained herein is intended to be applied as precedent in connection with the application of principles of collateral estoppel in other proceedings where, for example, administrative proceedings and legal remedies coexist, in the absence of a statute such as 19 *Del.C.* § 2363(a) precluding an election of remedies.

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2006 WL 3095949
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.

Re: Dwight D. CLARK, Sr.
v.
ST. PAUL FIRE & MARINE INS. CO.

C.A. No. 04C-07-265 RRC.
|
Submitted: Sept. 19, 2006.
|
Decided: Oct. 30, 2006.

On Defendant's Motion for Summary Judgment. **GRANTED.**
On Plaintiff's Motion in Limine **DENIED AS MOOT.**

Attorneys and Law Firms

Kenneth F. Carmine, Esquire, Potter Carmine & Aaronson, P.A., Wilmington, DE, Attorney for Plaintiff.

Elizabeth A. Saurman, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, DE, Attorney for Defendant.

Opinion

RICHARD R. COOCH, Resident Judge.

*1 Dear Counsel:

Before the Court is Defendant's motion for summary judgment. Plaintiff's claim against Defendant seeks personal injury protection ("PIP") benefits for medical expenses and lost wages arising from a work-related accident. The issue presented is whether the doctrine of collateral estoppel prohibits an injured employee, whose previous petition for workers' compensation benefits was denied by the Industrial Accident Board ("Board"), from bringing a new action, on identical facts, against the third party administrator of his employer's PIP program for PIP benefits. Because the Court finds that all the elements of collateral estoppel are met in this case, Defendant's motion for summary judgment is **GRANTED.**

Also before the Court is Plaintiff's motion in limine to exclude certain photographic evidence from being introduced at trial. Because Defendant's motion for summary judgment is granted, Plaintiff's motion in limine is **DENIED AS MOOT.**

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was involved in an accident on February 12, 2004 while he was driving a DART bus during the course and scope of his employment. He subsequently filed a petition for workers' compensation benefits against DART for medical expenses and lost wages allegedly arising from that accident.

At his hearing before the Board, Plaintiff had the burden of proving that his medical expenses and lost wages were reasonable, necessary, and related to the accident. Plaintiff presented testimony of his wife and his expert, Dr. Bruce Katz. He also testified himself. In its September 28, 2004 decision, the Board found that Plaintiff was "not credible" and his expert's opinion was "unpersuasive." [1] Thus, the Board held that Plaintiff did not meet his burden of proof and denied his petition. [2]

Plaintiff appealed the decision of the Board, claiming that it had erred by admitting and considering a digital image video of the interior of the DART bus at the time of the accident. This Court affirmed the Board's decision on August 31, 2005. [3] Plaintiff then appealed to the Supreme Court, which also affirmed the decision on February 24, 2006. [4]

Plaintiff has now filed the present claim in this Court against Defendant, the third-party administrator of his employer's self-insured PIP program, for medical expenses and lost wages pursuant to 21 *Del. C.* § 2118.

II. PARTIES' CONTENTIONS

Defendant contends that the doctrine of collateral estoppel bars Plaintiff from relitigating the issues decided in the workers' compensation case before the Board. In particular, Defendant asserts that the issues in this case are identical to the issues that Plaintiff unsuccessfully litigated before the Board, that the Board's decision was final and on the merits, that Defendant is in privity with DART, and that Plaintiff had a full and fair opportunity to be heard before the Board. Therefore, Defendant argues that

all of the elements of collateral estoppel are satisfied, thus barring Plaintiff's claim.

*2 In response, Plaintiff contends that collateral estoppel does not apply in this case because the parties to this claim for PIP benefits are different than the parties to the workers' compensation action before the Board. Furthermore, Plaintiff claims that collateral estoppel should not apply because Plaintiff should have the opportunity to have his case heard before a jury.

III. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [5] Although the moving party has the burden of demonstrating that no material issues of fact are in dispute and it is entitled to judgment as a matter of law, the facts must be viewed "in the light most favorable to the nonmoving party." [6]

IV. DISCUSSION

"[W]here a court or administrative agency has decided an issue of fact necessary to its decision, the doctrine of collateral estoppel precludes relitigation of that issue in a subsequent suit or hearing concerning a different claim or cause of action involving a party to the first case." [7] In order for collateral estoppel to apply, the following factors must be present:

> (1) the issue previously decided is identical to the issue at bar; (2) the prior issue was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. [8]

However, collateral estoppel should not be applied if there is a difference in the extensiveness or quality of procedures available in the two tribunals that warrants relitigation. [9]

It is undisputed that the issue decided by the Board, whether Plaintiff's medical expenses and lost wages were reasonable, necessary, and related to the accident, is the identical issue in this case. Additionally, both parties agree that the Board's decision was final and on the merits, and that Plaintiff had a full and fair opportunity to litigate the issue in the prior action before the Board. Therefore, the only issues in dispute are whether Defendant in this case is the same party or in privity with a party to the workers' compensation case and whether Plaintiff should be allowed to relitigate the issue due to the procedural differences between proceedings in this Court and those before the Board. [10]

If Defendant was a party in the previous action or is in privity with a party to the previous action before the Board collateral estoppel will bar Plaintiff's claim against Defendant for PIP benefits. The term privity, in the context of collateral estoppel, signifies that "the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit." [11]

*3 Plaintiff's workers' compensation petition was filed against DART. The insurer in that action was PMA, a third-party administrator of the self-insured workers' compensation program covering DART employees. The current claim is filed against Defendant, a third-party administrator of DART's self-insured PIP program. If DART had been found liable to Plaintiff for workers' compensation before the Board, Defendant would have been obligated to pay Plaintiff's PIP benefits. [12] Moreover, any PIP benefits that Defendant paid would have been reimbursed by DART. [13] Therefore, Defendant is in privity with DART.

Plaintiff also claims he should be allowed to proceed with his PIP claim because his workers' compensation claim was not heard before a jury. However, the application of collateral estoppel is not limited to where an issue has previously been decided by a jury. The doctrine applies to administrative agency hearings as well and court proceedings. [14] Courts have sometimes recognized an exception to collateral estoppel if relitigation is "warranted by differences in the quality or extensiveness of the procedures followed in the two courts," [15] for example, if a party was limited in its ability to undertake full discovery of witnesses and parties, including document production, interrogatories

and depositions.[16] No such circumstances are alleged here. Plaintiff merely claims that he "should have the right to present the issue of his credibility to a jury of his peers." Plaintiff has already had a full and fair opportunity to litigate this issue before the Board. Therefore, he does not have the right to relitigate it before a jury.

Because all the elements of collateral estoppel are present in this case, Plaintiff's claim against Defendant for PIP benefits is barred.

V. CONCLUSION

For the reasons stated above, Defendant's motion for summary judgment is **GRANTED.** Accordingly, Plaintiff's motion in limine is **DENIED AS MOOT.**

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2006 WL 3095949

Footnotes

1 *Clark v. State,* IAB Hearing No. 1247102 (Sept. 2, 2004).
2 *Id.*
3 *Clark v. State,* 2005 WL 2143709 (Del.Super.).
4 *Clark v. State,* 2006 WL 454508 (Del.Supr.).
5 Super. Ct. Civ. R. 56(c).
6 *Mason v. United Servs. Auto. Ass'n,* 697 A.2d 388, 392 (Del.1997).
7 *Betts v. Townsends, Inc.,* 765 A.2d 531, 534 (Del.2000).
8 *City of Newark v. Unemployment Ins. Appeal Bd.,* 802 A.2d 318, 324 (Del.Super.Ct.2002).
9 *Id. See also Messick v. Star Enterprise,* 655 A.2d 1209, 1213 (Del.1995).
10 The Delaware Supreme Court has held that collateral estoppel should not be used in a third-party civil action to bar the relitigation of factual issues previously decided by the Board where such an application would improperly force an election of remedies under workers' compensation law. *Messick,* 655 A.2d at 1213. However, Plaintiff here does not contend that an application of collateral estoppel in this case would result in an improper election of remedies.
11 *Higgins v. Walls,* 901 A.2d 122, 138 (Del.Super.Ct.2005) (quoting 18 James WM. Moore et. al, Moore's Federal Practice § 132.01[1][b] (3d ed.2004)). *See also Coca-Cola Co. v. Pepsi-Cola Co.,* 172 A. 260 (Del.Super.Ct.1934) ("If the defendant's responsibility is necessarily dependent upon the culpability of another ... who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel....").
12 *See State v. National Auto. Ins. Co.,* 290 A.2d 675, 677 (Del. Ch.1972) (stating that even though the insurer was not a party to an action against insured for injures sustained in a car accident, the insurer was in privity with the insured and therefore the determination of the insured's liability was final and binding on the insurer). *See also Johnson v. Fireman's Fund,* 1983 Del. LEXIS 762, at *3 (Del.Super.) (holding that it was the "good faith obligation" of the PIP insurer to pay additional PIP benefits "where after the PIP benefits have been paid to their maximum amount it is determined post hoc that workmen compensation would have paid all the claimed medical expenses, thus freeing up monies for additional benefits which could have been applied to the claimant's net lost earnings").
13 Burcham Aff. ¶ 2.
14 *Messick,* 655 A.2d at 1211.
15 *City of Newark,* 802 A.2d at 324.
16 *Messick,* 655 A.2d at 1213.

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KEELER CALCULATION

KEELER CALCULATION

SETTLEMENT AMOUNT=A;
TOTAL FEES AND COSTS= B;

1. TAKE THE AMOUNT OF THE COMP LIEN AND DIVIDE IT BY THE SETTLEMENT AMOUNT (A) (GIVING US "C");

2. TAKE OUR FEES AND COSTS ("B") AND MULTIPLY BY "C", THUS GIVING US "D". THIS IS THE COMP LIEN REDUCTION;

3. TAKE THE TOTAL LIEN AMOUNT AND SUBTRACT "D"-THE COMP LIEN REDUCTION- FROM THIS TO GIVE YOU THE NEW LIEN (E);

3. SUBTRACT THE AMOUNT OF THE SETTLEMENT (A) BY THE TOTAL OF OUR FEES AND COSTS (B), THEN SUBTRACT FROM THIS AMOUNT THE NEW LIEN ("E"). THIS IS WHAT THE CLIENT WOULD GET.

EXAMPLE:

SETTLEMENT $10,000.00
COMP LIEN- $5,000.00
FEES AND COSTS- $5,000.00

1. $5,000 DIVIDED BY $10,000= .50 (THIS IS "C");

2. $5,000.00 X .5= $2,500.00 (THIS IS "D");

3. $5,000.00(TOTAL COMP LIEN) - $2,500.00 (D-REDUCTION)= $2,500.00(E)

4. $10,000.00 - $5,000.00 = $5,000.00 - $2,500.00= $2,500.00(E)

THE CLIENT IN THIS EXAMPLE WOULD GET $2,500.00 FROM THIS SETTLEMENT.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Hobson v. Mid-Century Ins. Co., Ariz.App. Div. 2, February 27, 2001

672 A.2d 1012
Supreme Court of Delaware.

Bayard P. KEELER, Plaintiff Below, Appellant,
v.
HARFORD MUTUAL INSURANCE COMPANY, Defendant Below, Appellee.

No. 207, 1995.
|
Submitted: Jan. 25, 1996.
|
Decided: Feb. 29, 1996.
|
As Amended March 11, 1996.
|
Rehearing Denied March 20, 1996.

Synopsis
Workers' compensation claimant sought a declaratory judgment regarding his obligation to reimburse workers' compensation carrier for its lien in full after claimant obtained recovery from third party. The Superior Court, New Castle County, held that carrier did not have to pay a portion of recovery costs, including attorney fees. Claimant appealed. The Supreme Court, Walsh, J., held that carrier must pay its share of costs of litigation proportionate to amount of its recovery; overruling *Cannon v. Container Corp. of America*, 282 A.2d 614.

Reversed and remanded.

West Headnotes (6)

[1] **Workers' Compensation**
Expenses of investigation and litigation; attorney fees

Workers' Compensation
Rights of Employer or Insurer

Under statute governing insurer's right to enforce third person liability for workers' compensation claimant's injury, carrier is required to pay a share of costs of litigation of third-party claim proportionate to amount of its recovery; not requiring carriers to bear part of cost of third-party tort litigation where recovery results in reimbursement of benefits is inequitable and contrary to language of statute; overruling *Cannon v. Container Corp. of America*, 282 A.2d 614. 19 Del.C. § 2363.

8 Cases that cite this headnote

[2] **Statutes**
Prior construction

Legislative reenactment is a tool used to determine legislative intent and guides statutory construction where it provides an insight into probable intent, e.g., where General Assembly has actually recognized problem that the Supreme Court has addressed in the past and reenacted statute without change.

1 Cases that cite this headnote

[3] **Workers' Compensation**
Subrogation or assignment in general

Legislative silence when legislature reenacted statute governing right of employer and workers' compensation insurer to enforce liability against third persons for injuries to workers' compensation claimants, after Supreme Court decision that a carrier could be reimbursed for amounts paid to a claimant without sharing in costs of litigation which made reimbursement possible, did not imply that General Assembly intended to adopt Supreme Court's construction of statute absent any indication that General Assembly ever considered that precise issue. 19 Del.C. § 2363(e).

4 Cases that cite this headnote

[4] **Statutes**
Superfluousness

In determining legislative intent, it is important to give effect to whole statute and leave no part superfluous.

10 Cases that cite this headnote

[5] **Courts**
Construction and operation of statutes

Abandonment of established precedent, particularly in area of statutory construction, should be exercised with caution.

Cases that cite this headnote

[6] **Courts**
In general;retroactive or prospective operation

New ruling that workers' compensation carrier is required to share in costs of third-party litigation which made possible reimbursement for amounts it paid to injured worker would apply to case before the Supreme Court, any case now pending on appeal to Supreme Court, any case now pending in superior court which had not yet been appealed but which might be eligible for appeal to Supreme Court, and any claim for reimbursement asserted by workers' compensation carrier after date of current decision. 19 Del.C. § 2363.

7 Cases that cite this headnote

***1013** Appeal from Superior Court. Reversed and Remanded.
Court Below: Superior Court of the State of Delaware in and for New Castle County; C.A. No. 95C–02–108.

Attorneys and Law Firms

Sidney Balick (argued), and Adam Balick, Sidney Balick & Associates, Wilmington, for appellant.

William J. Cattie, III, Heckler & Cattie, Wilmington, for appellee.

Before VEASEY, C.J., WALSH, HOLLAND, HARTNETT, and BERGER, JJ., constituting the Court en banc.

Opinion

WALSH, Justice:

This appeal from the Superior Court presents the issue of whether a workers' compensation carrier is entitled to be reimbursed for amounts it paid to an injured worker without sharing in the costs of the litigation which made reimbursement possible. Despite our decision to the contrary in *Cannon v. Container Corp. of Am.*, Del.Supr., 282 A.2d 614 (1971), we now hold that the language of 19 *Del.C.* § 2363 requires that the insurance carrier pay a share of the costs of litigation proportionate to the amount of its recovery. The decision of the Superior Court is therefore reversed.

I.

The facts underlying the carrier's reimbursement claim are not in dispute. On November 6, 1989, the appellant, Bayard P. Keeler ("Keeler"), was injured while working for Steel Suppliers, Inc. The appellee, Harford Mutual Insurance Co. ("Harford"), was the workers' compensation carrier for Steel Suppliers and ultimately paid $83,543.74 to or on the behalf of Keeler in workers' compensation benefits for medical expenses and lost wages. Thereafter Keeler filed an action in tort against Whiting–Turner Contracting Company ("Whiting–Turner") alleging that his injuries were attributable to the negligence ***1014** of Whiting–Turner. As provided by 19 *Del.C.* § 2363, Harford became entitled to reimbursement for its payments to Keeler in the event of a settlement or recovery against Whiting–Turner. In January 1995, Keeler recovered a judgment against Whiting–Turner in the amount of $570,000. The award was later reduced to $450,000 pursuant to a mid-trial high-low settlement agreement between Keeler and Whiting–Turner. That sum was paid in full and final satisfaction of the judgment. From the award, Keeler expended $4,285 for medical treatment, $9,097 in litigation costs, and $150,000 in attorney's fees. A dispute arose, however, concerning whether Harford should receive the full amount of its lien or whether that amount should be net of counsel fees.

II.

Keeler sought a declaratory judgment in the Superior Court regarding his obligation to reimburse Harford for its lien in full. The parties' disagreement turned on their respective interpretations of 19 *Del.C.* § 2363, which provides in part:

> (e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries ..., after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits....
>
> (f) Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting such recovery.... The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear the time of said recovery.

The Superior Court held that the matter was controlled by *Cannon v. Container Corp. of Am.*, Del.Supr., 282 A.2d 614 (1971), and ruled that the insurance carrier need not pay a portion of the recovery costs, including attorney's fees. In *Cannon* this Court held that, under § 2363, distributions from a tort award against a third party were to be made in the following sequence:

> (1) deduction of the expenses of the recovery, including attorneys' fees;
>
> (2) reimbursement to the carrier of any past benefits paid to the employee as of the date of the recovery; and
>
> (3) distribution of any balance to the employee, to be credited against any future benefits to which the employee may be entitled as the result of the accident involved.

Cannon, 282 A.2d at 616. Although it questioned the continued vitality of the *Cannon* holding, the Superior Court was of the view that any reconsideration of the reasoning in *Cannon* was properly a matter for this Court.

On appeal, Keeler argues that the language of the statute and considerations of fairness require the reversal of *Cannon.* To the contrary, Harford contends that our previous decision is correct and controls the result here. Furthermore, Harford asserts that we may not reconsider our interpretation of the statute since that interpretation was implicitly approved by the General Assembly when it amended § 2363 without further amending the statute to negate *Cannon's* declaration of legislative intent.

III.

[1] We conclude that not requiring workers' compensation carriers to bear part of the cost of third party tort litigation where recovery results in reimbursement of benefits is inequitable and contrary to the language of the statute. While the Court in *Cannon* was undoubtedly influenced by the somewhat unusual facts of that case, the general application of the rule promulgated therein cannot be supported. Therefore, the holding in ***1015** *Cannon* that insurers are to be reimbursed in full without bearing a proportional part of the litigation costs is hereby overruled.

A.

In *Cannon,* this Court decided that an insurer was to be paid its workers' compensation lien in full before subtracting costs. 282 A.2d at 616. Unlike this case, the insurer had brought suit and participation by the employee was minimal. *Id.* at 615–16. In that scenario, the *Cannon* Court was apparently influenced by the belief that the employee was unjustifiably benefitting from the effort of, and at the expense of, the insurer. Ultimately, the Court held that the language of § 2363 required that the employee bear all of the costs of litigation.

The *Cannon* Court relied on Larson's *Workmen's Compensation* treatise as authority for its interpretation of the statute. At that time, Larson stated that "[i]f the sum recovered by the employee is more than enough to pay the attorney's fees and reimburse the carrier, the carrier is reimbursed in full, and ... is not required to share the legal expenses involved in obtaining recovery." *Cannon,*

282 A.2d at 617 (citing 2 Arthur Larson, *The Law of Workmen's Compensation* § 74.32, at 226.118). The treatise upon which the Court relied has been revised to reflect the fact that the majority of jurisdictions now recognize the rule that requires both parties to share in the costs of litigation.[1] The treatise revision seriously undermines the continuing force of the reasoning in *Cannon.*

B.

Harford contends that the General Assembly's amendment of § 2363 without altering the result reached in *Cannon* demonstrates that *Cannon* is consistent with legislative intent. Harford correctly notes that this Court has previously viewed legislative reenactment as agreement on the part of the General Assembly with this Court's prior interpretation of that legislation. *See Allen v. Prime Computer, Inc.,* Del.Supr., 540 A.2d 417, 420 (1988).

[2] Legislative reenactment is a tool used to determine legislative intent. It guides statutory construction where it provides an insight into probable intent, *e.g.,* where the General Assembly has actually recognized the problem that this Court has addressed in the past and reenacted the statute without change.[2] Scholars have noted, however, that for every canon of statutory construction there is another which may yield the opposite outcome. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,* 3 Vand.L.Rev. 395 (1950). In the final analysis, rules of construction are aids in the quest to ascertain the legislative intent, but application of a single standard may not necessarily resolve uncertainty. Legislative reenactment may be a valuable ***1016** rule in some circumstances, but does not always yield the correct result.[3]

[3] In this case, we are unpersuaded that the post-*Cannon* amendment to § 2363(e) implies that the General Assembly intended to adopt our previous construction of § 2363 in *Cannon.* There is no indication that the General Assembly ever considered this precise issue. According to the synopsis to the 1993 amendment, 69 *Del.Laws,* ch. 116, § 1, was "intended to clarify subrogation rights of insurers where both worker's compensation and no-fault benefits are payable to an injured person."[4] Section 2 of 69 *Del.Laws,* ch. 116 provided penalties for no-fault insurance carriers who delay payment of valid claims. Nothing in the amendment spoke to the apportionment of attorney's fees in suits against third-party tortfeasors in the workers' compensation context. To construe legislative silence as an affirmative endorsement of a prior holding of this Court is an interpretive step which cannot be justified in light of what is known of the background and the language of the 1993 amendment.[5] The U.S. Supreme Court, confronted with a similar contention, opined that

> since the legislative consideration of th[is] statute[ ] was addressed principally to matters other than that at issue here, it is our view that the failure of [the legislature] to overturn the [previous] interpretation falls far short of providing a basis to support a construction of [the statute] so clearly at odds with its plain meaning....
> *Aaron v. SEC,* 446 U.S. 680, 694 n. 11, 100 S.Ct. 1945, 1955 n. 11, 64 L.Ed.2d 611 (1980)

While evidence of legislative attention to an issue followed by inaction may imply an endorsement of the *status quo,* "[i]t would require very persuasive circumstances enveloping [legislative] silence to debar this Court from re-examining its own doctrines." *Helvering v. Hallock,* 309 U.S. 106, 119–20, 60 S.Ct. 444, 451–52, 84 L.Ed. 604 (1940). In this case, the prior interpretation in *Cannon* appears at variance with the full text of the statute.

In particular, our previous interpretation of § 2363 in *Cannon* does not appear to give effect to the last sentence of § 2363(f): "The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of said recovery." *See Keys v. State,* Del.Supr., 337 A.2d 18, 22 (1975) (when interpreting statute, it is necessary to "ascertain and give effect to the intention of the Legislature as expressed in the Statute itself"). This specific requirement of apportionment is a legislative direction which must be accorded significance in any reading of the entire statute.

[4] In determining legislative intent in this case, we find it important to give effect to the whole statute, and leave no part superfluous. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06 (1995). Section 2363(f) clearly provides that the expenses of the recovery "shall be apportioned by the court between the parties." While the sequential language of § 2363(e) may seem to imply that a three-step procedure is followed, *see Cannon,* 282

A.2d at 616, reading the two subsections in conjunction clearly indicates that the insurer is to be reimbursed "after deducting expenses of recovery," 19 *Del.C.* § 2363(e).

Finally, although the clear meaning of the statute must prevail, we note that pro rata apportionment of attorneys' fees is consistent with equity jurisprudence. *Cf. Wilmington Trust Co. v. Copeland,* Del.Supr., 33 Del. Ch. 399, 94 A.2d 703, 708 (1953) (dividing estate ***1017** tax burden pro rata among beneficiaries). It is irrelevant that the right of subrogation here is statutory and "not one which is directly dependent upon historical principles of equity." *Baio v. Commercial Union Ins. Co.,* Del.Supr., 410 A.2d 502, 506 (1979) (applying 19 *Del.C.* § 2363). "[N]o matter what the form, subrogation is an equitable remedy." *Id.*

The direction of the statute that expenses are to be "apportioned ... between the parties as their interests appear," 19 *Del.C.* § 2363(f), imparts an equitable concept that neither party achieve an advantage not attributable to that party's effort in bringing about the result. Requiring Keeler to shoulder the full cost of recovery in this case yields an unfair result. He initiated and successfully completed the litigation which produced full recovery for Harford as well as himself. For Harford to step in after recovery and demand satisfaction of its lien without contributing to the effort or cost of recovery is patently unfair and at clear variance with the statutory mandate of apportionment.

IV.

In sum, because the *Cannon* decision failed to give any significance to the language in § 2363(e) and (f) which requires apportionment of costs between insurer and employee, it must be overruled. Despite Harford's arguments to the contrary, legislative reenactment does not constrain us to follow *Cannon,* especially since that decision was contrary to the clear language of the statute.

[5] It is with some reluctance that we overrule *Cannon* because of our regard for the principle of *stare decisis* which imparts continuity and predictability to our law. The abandonment of established precedent, particularly in the area of statutory construction, should be exercised with caution. *LeCompte v. State,* 516 A.2d 898, 905 (1986) (Walsh, J., dissenting). But precedents, over time, may lose their acceptability and a case wrongly decided at the inception should not preclude reconsideration simply because it is a quarter of a century old. [6]

[6] In view of the effect of this decision on established case law, it is necessary to define the scope of abrogation. *Duvall v. Charles Connell Roofing,* Del.Supr., 564 A.2d 1132, 1137 (1989). The ruling announced here will apply to: (1) this case; (2) any case now pending on appeal to this Court; (3) any case now pending in the Superior Court which has not yet been appealed but which may be eligible for appeal to this Court; (4) any claim for reimbursement asserted by a worker's compensation carrier pursuant to 19 *Del.C.* § 2363, after this date.

The judgment of the Superior Court is REVERSED and this case is REMANDED for proceedings consistent with this decision.

All Citations

672 A.2d 1012

Footnotes

1 That treatise now provides:

> In a substantial majority of states, when a third party suit is brought or recovery effected by the employee, the employer or carrier is now obliged to pay a portion of the attorney's fees out of his share. The emergence of this majority rule is the result of both a number of legislative amendments, not least in the major compensation jurisdictions, and of a similar trend in decisional law.

2A Arthur Larson, *The Law of Workmen's Compensation* § 74.32(a), at 14–535 (1995).

2 The United States Supreme Court has declined to interpret legislative reenactment as assent to a previous interpretation where there is no indication that Congress examined or was aware of the issue. *See, e.g., Rowan Cos. v. United States,* 452 U.S. 247, 260–62 & n. 15, 101 S.Ct. 2288, 2295–96 & n. 15, 68 L.Ed.2d 814 (1981) (holding that reenactment of statute without change does not give prior interpretation "effect of law" where, *inter alia,* there is no evidence of Congressional consideration of prior interpretation during reenactment); *Toussie v. United States,* 397 U.S. 112, 119–

20, 90 S.Ct. 858, 862–63, 25 L.Ed.2d 156 (1970) (Congressional silence during reenactment of statute does not indicate adoption of prior judicial interpretation); *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426, 431, 75 S.Ct. 473, 476, 99 L.Ed. 483 (1955) ("Re-enactment—particularly without the slightest affirmative indication that Congress ever had the [previous] decision before it—is an unreliable indicium at best."); *cf. United States v. Bd. of Comm'rs,* 435 U.S. 110, 135, 98 S.Ct. 965, 980, 55 L.Ed.2d 148 (1978) (finding Congressional ratification through inaction when legislative history showed Congress agreed with previous interpretation).

3 This canon of construction has faced critical scholarly scrutiny. *See, e.g.,* William N. Eskridge, Jr., *Interpreting Legislative Inaction,* 87 Mich.L.Rev. 67 (1988); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom,* 50 U.Chi.L.Rev. 800, 813–14 (1983).

4 The synopsis went on to note that "prior interpretations of the Statutes (19 *Del.C.* § 2363(e) and 21 *Del.C.* § 2118(f)(1)) have produced inconsistent and confusing results."

5 It is highly unlikely that those who were disadvantaged as a class by the *Cannon* holding, *i.e.,* injured employees, organized themselves effectively to force legislative consideration of the issue. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction,* 87 Mich.L.Rev. 67, 107–08 (1988).

6 Mr. Justice Holmes' comment on the slavish adherence to precedent bears repeating:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Oliver Wendell Holmes, *The Path of the Law, in Collected Legal Papers* 187 (1952).

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UNDERINSURED MOTORIST BENEFITS

DOES A LIEN ATTACH?

74 A.3d 609
Supreme Court of Delaware.

Kingsley A. SIMENDINGER, Individually and as Administratrix of the Estate of Christopher Sturmfels, and Kingsley A. Simendinger, as Next Friend of Beck Sturmfels, a minor child, Plaintiff Below–Appellant,
v.
NATIONAL UNION FIRE INSURANCE COMPANY, Intervenor Below–Appellee,
and
Philadelphia Indemnity Insurance Company, Defendant Below.

No. 553, 2011.
|
Submitted: Jan. 10, 2013.
|
Decided: March 19, 2013.

Synopsis

Background: Estate of deceased employee brought personal injury action against defendant driver. Employer intervened seeking to enforce a lien upon underinsured motorist (UIM) benefits paid to estate in the amount of the workers' compensation benefits paid by workers' compensation insurer. Workers' compensation insurer was substituted as the real party in interest and moved for summary judgment. The Superior Court, New Castle County, granted insurer summary judgment. Estate appealed.

[Holding:] The Supreme Court, Ridgely, J., held that workers' compensation insurer was not permitted to assert a priority lien against UIM benefits received by deceased employee's estate pursuant to employer's UIM policy.

Reversed and remanded.

West Headnotes (3)

[1] Appeal and Error

De novo review

Appeal and Error

Summary Judgment

Supreme Court reviews the superior court's grant of summary judgment de novo 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 as a matter of law.

Cases that cite this headnote

[2] Insurance

Workers' compensation

Workers' Compensation

Lien of employer or insurer

Employer's workers' compensation carrier was not entitled to assert a priority lien in the amount of workers' compensation benefits paid against underinsured motorist (UIM) benefits received by deceased employee's estate pursuant to employer's UIM policy following fatal automobile accident in the course of employee's employment; policy expressly prohibited underinsured motorist coverage from applying to claim by workers' compensation carrier. 19 West's Del.C. § 2363(e).

1 Cases that cite this headnote

[3] Workers' Compensation

Lien of employer or insurer

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. 19 West's Del.C. § 2363(e).

1 Cases that cite this headnote

Attorneys and Law Firms

*609 Gary S. Nitsche, Esquire, of Weik, Nitsche & Dougherty, Wilmington, Delaware for Appellant.

Daniel L. McKenty, Esquire (argued), and Katherine L. Hemming, Esquire, of Heckler & Frabizzio, Wilmington, Delaware for Appellee.

Before STEELE, Chief Justice, and HOLLAND, BERGER, JACOBS, and RIDGELY, Justices, constituting the court en Banc.

Opinion

*610 RIDGELY, Justice.

Two employees of Connections CSP, Inc. ("Connections") were killed in an automobile collision during the course and scope of their employment. Connections owned the vehicle and had purchased underinsured motorist insurance ("UIM") for the vehicle and also worker's compensation insurance which covered the employees.

The UIM insurer paid its policy limit of $1,000,000. The worker's compensation insurer also paid benefits to the representatives of the decedents. The worker's compensation insurer then sought to enforce a lien upon the UIM payment equal to the worker's compensation benefits it paid. But the UIM policy specifically excludes the direct or indirect benefit of any insurer or self-insurer under a worker's compensation claim. Notwithstanding this exclusion, the Superior Court enforced the lien based upon its interpretation of 19 *Del. C.* § 2363(e), which allows reimbursement of a worker's compensation carrier "from the third party liability insurer." We hold that he General Assembly has eliminated the ability of a worker's compensation insurer to assert a lien against the UIM payments made pursuant to the employer's UIM policy. Because the Superior Court erred as a matter of law in enforcing a lien, we REVERSE and REMAND this matter for further proceedings.

Facts and Procedural History

This matter arises from a two-vehicle collision on Route 13. Decedents Christopher Sturmfels and Michael Kriner ("Decedents") suffered fatal injuries during the course and scope of their employment for Connections when its vehicle was struck by a car driven by Mark Bednash. Connections provided workers' compensation insurance coverage to its employees through a policy with National Union Insurance Company ("National"). National approved and paid benefits to the Decedents' personal representatives in the amount of $38,711 for Sturmfel and $31,754 for Kriner.

Connections also has purchased a UIM policy for the vehicle through Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity"), with coverage limits of $1,000,000. The UIM Policy expressly provides that it does not apply to benefits obtained through worker's compensation insurance.

Kingsley A. Simendinger, acting as administrator of the estate of Christopher Sturmfels and Next Friend of Beck Sturmfels, a minor child, filed a personal injury action on behalf of Decedents against Bednash, *et al.* Philadelphia Indemnity tendered and interpled the policy limits of $1,000,000. Connections intervened in the litigation, seeking to enforce a lien in the amount of the workers' compensation benefits paid by National. National was substituted for Connections as the real party in interest. National then moved for summary judgment in its favor.

The Superior Court granted National's motion, concluding that the exclusion in the UIM Policy was unenforceable as a matter of law. The court found the exclusion to conflict with 19 *Del. C.* § 2363(e) and held that "an employer-payor has a statutory right to recover worker's compensation benefits from any recovery to which its employee is entitled," including UIM benefits. The court explained that, as a matter of public policy, it saw "no reason why an employer should be penalized for their efforts to protect their employees." Philadelphia Indemnity's motion for reargument was denied. This appeal followed.

Discussion

[1] We review the Superior Court's grant of summary judgment *de novo* "to *611 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 as a matter of law." [1]

[2] "Delaware courts have consistently applied principles of contract to a subrogation claim in the context of a workmen's compensation proceeding, when that claim originated with the act of a third party tortfeasor." [2] The UIM Policy contains the following policy exclusion:

> This insurance does not apply to any of the following: ... (2) the direct or indirect benefit of any insurer or self-insurer under any worker's compensation, disability benefits, or similar law.

National contends—as it did below—that this provision is unenforceable because it contravenes Section 2363(e), which provides:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. *Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, reimbursement shall be had only from the third party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved.* [3]

This section of the Workers' Compensation Act was amended to the present version in 1993. [4] We find no merit to National's argument.

[3] In *Hurst v. Nationwide Mut. Ins. Co,* [5] we considered Section 2363 after the 1993 amendments. We noted in *dicta* "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." [6] We adopt this same interpretation of Section 2363 in this case. Since the *Hurst* decision, the General Assembly has amended other provisions of the Workers Compensation Act, but not § 2363(e).

In *Adams v. Delmarva Power & Light Co.,* we construed a pre–1993 version of Section 2363 and held that an employer's worker's compensation carrier was not entitled to a set off against UIM benefits ***612** purchased by an employee. [7] The UIM coverage in that case contained a provision similar to the one here, that "preclude[ed] its applicability to claims made by workmen's compensation carriers." [8] Nothing in the current version of § 2363(e) distinguishes that circumstance from one where an employer either pays for or reimburses an employee for the very same coverage. Moreover, Section 2363(e) expressly limits reimbursement by providing that "reimbursement shall be had *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." [9]

National relies upon *Harris v. New Castle County* [10] and other opinions issued by this Court prior to the 1993 amendments to support its position. These cases stood for the proposition that the then-statutory scheme conferred a right of reimbursement from the UIM benefits received by an employee under a policy paid for by the employer. [11] All of these cases are distinguishable today because of the 1993 amendments.

Conclusion

The judgment of the Superior Court is REVERSED, and this matter is REMANDED for further proceedings consistent with this opinion.

All Citations

74 A.3d 609

Footnotes

1 *State Farm Mut. Auto. Ins. Co. v. Patterson,* 7 A.3d 454, 456 (Del.2010) (*quoting Brown v. United Water Delaware, Inc.,* 3 A.3d 272, 275 (Del.2010)).

2 *Adams v. Delmarva Power & Light Co.,* 575 A.2d 1103, 1106 (Del.1990) (citations omitted).

3 19 *Del. C.* § 2363(e) (emphasis added).

4 1993 Delaware Laws Ch. 116 (S.B.26) (emphasis added to indicate changed language).

5 *Hurst v. Nationwide Mut. Ins. Co.,* 652 A.2d 10 (Del.1995).

6 *Id.* at n. 2.

7 *Adams,* 575 A.2d at 1107.

8 *Id.*

9 19 *Del. C.* § 2363(e) (emphasis added).

10 *Harris v. New Castle County,* 513 A.2d 1307, 1308–09 (Del.1986).

11 *See Guy J. Johnson Transportation Co. v. Dunkle,* 541 A.2d 551, 552 (Del.1988); *Travelers v. E.I. DuPont De Nemours & Co.,* 9 A.2d 88, 90–91 (Del.1939); *State v. Donahue,* 472 A.2d 824, 827–28 (Del.Super.1983)

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19 *DEL. C.* § 2304

§ 2304 Compensation as exclusive remedy. (Current Law)

Except as expressly excluded in this chapter and except as to uninsured motorist benefits, underinsured motorist benefits, and personal injury protection benefits, every employer and employee, adult and minor, 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.

Section 1. Amend § 2304, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2304 Compensation as exclusive remedy.

~~Every employer and employee, adult and minor, except~~ Except as expressly excluded in this chapter and except as to uninsured motorist benefits, underinsured motorist benefits, and personal injury protection benefits, every employer and employee, adult and minor, 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.

Section 2. This Act shall take effect upon its enactment into law.

Approved September 06, 2016

2016 WL 425010
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Carletta E. Simpson, Plaintiff,
v.
State of Delaware and Government Employees Insurance Company, Defendants.

C.A. No. N15C–02–138 WCC
|
Submitted: September 11, 2015
|
Decided: January 28, 2016

Defendant State of Delaware's Motion for Summary Judgment—GRANTED

Attorneys and Law Firms

Timothy E. Lengkeek, Esquire, Young Conaway Stargatt & Taylor, LLP, 1000 N. King Street, Wilmington, DE 19801. Attorney for Plaintiff.

Lynn A. Kelly, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorney for Defendant State of Delaware.

Erin K. Radulski, Esquire, Law Office of Dawn L. Becker, Citizens Bank Center 919 Market Street, Suite 550, Wilmington, DE 19801. Attorney for Defendant GEICO.

MEMORANDUM OPINION

CARPENTER, J.

***1** In the present case, Carletta E. Simpson ("Plaintiff") seeks underinsured motorist coverage from her employer, the State of Delaware ("Defendant" or "State"), and her personal insurance carrier, Government Employees Insurance Company ("GEICO"), for injuries sustained in the course of her employment in a motor vehicle accident with a third party tortfeasor. Plaintiff operated a vehicle owned and insured by the State at the time of the accident and she recovered workers' compensation benefits for her injuries. The State moved for summary judgment on the grounds that Plaintiff accepted workers' compensation to the exclusion of other remedies.[1] For the foregoing reasons, the Motion is GRANTED.

FACTUAL & PROCEDURAL BACKGROUND

On September 16, 2010, Plaintiff was injured in an automobile collision caused by Lashonmonique Dajanee Ricks. Ms. Ricks was driving a vehicle owned by Tiffany J. Cleveland and insured by United Services Automobile Association ("USAA") with a policy limit of $15,000 per person. Plaintiff was operating a State-owned vehicle as authorized by virtue of her employment in Delaware's Health and Social Services Department. All State-owned vehicles are insured under the State's self-administered automobile liability policy,[2] which includes uninsured/underinsured motorist ("UM/UIM") coverage with limits of $25,000 per accident.[3] Plaintiff had also purchased UIM coverage through her GEICO policy.[4]

Plaintiff suffered injuries to her cervical spine and lower back as a result of the accident.[5] In connection with those injuries, she received workers' compensation benefits from the State pursuant to 19 *Del. C.* § 2304 for an 11–day period following the accident.[6] In July 2013, USAA paid Plaintiff the $15,000 policy limits to settle all claims on behalf of Ms. Cleveland and Ms. Ricks.[7] Given Ms. Ricks's status as underinsured motorist,[8] Plaintiff requested UIM benefits under the State's policy in October 2013 but was denied coverage in May 2014.[9]

***2** On February 16, 2015, Plaintiff commenced the instant litigation seeking UIM benefits from both the State and GEICO. In the Complaint, Plaintiff asserts she has suffered "serious, painful and limiting injuries, both physical and mental in nature" some of which "have continued since the accident and are permanent in nature"[10] requiring her to undergo further treatment and incur additional costs.[11] Plaintiff additionally maintains she continues to experience "considerable pain, suffering, and discomfort, both mental and physical in nature"[12] and "has incurred lost wages and/or diminished earning capacity."[13] According to Plaintiff, she has

been prevented from accessing her UIM benefits through GEICO until she is able to exhaust the State's coverage as the primary policy on the vehicle involved in the accident. [14] In response, the State filed this Motion for Summary Judgment pursuant to Superior Court Civil Rule 56, contending Plaintiff's exclusive remedy against it as her employer were the benefits she received under Delaware's Workers' Compensation Act ("WCA") and as a result, she is not "legally entitled to recover" UIM benefits under the State's insurance policy.

STANDARD OF REVIEW

In deciding a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether there are any genuine issues of material fact. [15] It is the burden of the moving party to prove that no such issues exist and the movant is entitled to judgment as a matter of law. [16] In reviewing a summary judgment motion, the Court must view all factual inferences in a light most favorable to the non-moving party. [17] Where it appears material facts remain disputed or that further inquiry into the factual circumstances is warranted, the Court will not grant summary judgment. [18]

DISCUSSION

The Court is asked to decide whether Plaintiff may pursue a UIM claim against her self-insured employer, the State of Delaware, for essentially the same injuries she received workers' compensation in light of the WCA's exclusivity clause. For the foregoing reasons, the Court finds Plaintiff is barred from recovering UIM benefits under the State's policy.

Pursuant to 18 *Del. C.* § 3902, an insurer is required (1) to "include the minimum uninsured motorist coverage in the policy, unless explicitly rejected by the insured" and (2) to "alert the insured that he [or she] may purchase supplemental underinsured motorist coverage." [19] UIM benefits in particular are governed under subsection (b), which requires insurers to offer the insured "the *option* to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy" and specifies that "such additional insurance shall include underinsured bodily injury liability coverage." [20] "Acceptance of such additional coverage shall operate to amend the policy's uninsured coverage to pay for bodily injury damage that the insured ... [is] legally entitled to recover from the driver of an underinsured motor vehicle." [21] An insurer is not obligated to pay UIM benefits "until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement or judgments." [22]

***3** Under 2304 of the WCA, "[e]very employee ... shall be bound ... to accept compensation for personal injury ... 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." [23] Thus, in terms of sums recoverable from an employer, the injured employee is limited to amounts available under the WCA. In cases involving third party tortfeasors, however, § 2363 of the Act allows the employee to "recover against the tortfeasor when the third party is 'other than a natural person in the same employ.' " [24] Furthermore, Delaware law "does not prohibit 'a risk-averse insured from contracting for additional recovery.' " [25] In other words, Courts have allowed employees to collect both workers' compensation and UIM benefits in cases where the employee purchased his or her own personal UIM policy. [26] In those cases, the Delaware Supreme Court has reasoned that "[r]estricting a double recovery in underinsured motorist cases would frustrate the reasonable expectations of the insured (created by the payment of insurance premiums) to recover under the policy, and thereby would defeat the General Assembly's purpose in enacting Section 3902." [27] However, the issue presently before the Court, whether § 2304 precludes an employee's recovery of UIM benefits from a self-insured employer *in addition* to workers' compensation paid by the employer, appears to be one of first impression. Put differently, the Court is confronted with a scenario in which the workers' compensation insurer and the UM/UIM insurer are the same entity, the State of Delaware.

The State's UM/UIM policy tracks the language of the statute and provides that it will "pay all sums the insured is *legally entitled* to recover as compensatory damages

from the owner or driver of (a) an uninsured ... [or] underinsured motor vehicle because of bodily injury sustained by the insured...." [28] With regard to Plaintiff, there is no question she (1) was operating an automobile covered by the policy, (2) exhausted the benefits available under tortfeasor's policy, and, (3) for purposes of this Motion, sustained damages in excess of those benefits. Nevertheless, the State asserts Plaintiff is precluded from recovering UIM benefits under its policy because she accepted benefits under the WCA "to the exclusion of all other rights and remedies." [29]

While the crux of the State's argument is that Plaintiff is precluded by the WCA from recovering UIM benefits under its policy, it would appear to the Court that initial consideration is warranted as to whether Plaintiff's injury was even covered by the State's policy in the first place. After all, "[o]nce an insured has purchased the statutory minimum, the insured is free as a matter of contract to procure as much or little optional insurance as it wants, and to allocate it among drivers as it chooses." [30]

***4** The named insured on the policy at issue here is the State and it appears to have paid the premiums associated with its UIM coverage. Moreover, the policy expressly lists as an exclusion "bodily injury to any employee of the insured arising out of and in the course of his or her employment by the insured," but not to "bodily injury to domestic employees *not entitled to workers' compensation benefits*." [31] In response to the Court's inquiry as to why the State would provide self-insurance coverage for UM/UIM in the first place if such benefits were precluded by the WCA, the State submitted the affidavit of Debra Lawhead, Administrator of the State of Delaware Insurance Coverage Office. [32] Ms. Lawhead provided examples of UM/UIM coverage matters handled by her office where the WCA does not apply, including: independent contractors operating State vehicles, students on school busses, arrestees transported by police, prisoners transported by the Department of Corrections, etc. [33] In these cases, workers' compensation is not available and access to UM/UIM coverage would seem appropriate. Additionally, the Delaware Supreme Court has recognized that "[t]here is nothing improper under Delaware's insurance statutes about an employer providing higher optional levels of insurance to certain of its [employees] than to others." [34]

The basic tenant of the UM/UIM coverage, required to be offered in policies, is to insure that individuals have the ability to be compensated for their injuries beyond what may be available from a negligent tortfeasor's policy. [35] For those who have access to workers compensation, that is what is occurring by the benefits they receive. As long as the employee's injuries remain, workers compensation will pay to compensate for the injury. So, in essence, workers compensation is playing the same role that the UIM benefits would provide for an individual who has access to them.

In this context, the exclusivity provision makes sense. If not there, the injured party would in effect be compensated twice for the same injury: first by workers compensation and second by the employer's UM/UIM insurance policy. While the legislature clearly intended to protect injured parties from underinsured tortfeasors, it did not intend it as a windfall beyond what would be the reasonable and appropriate cost for the disability caused by the accident. [36] While the Court would suggest that the State legislatively introduce clarifying language to support their positions and the language of the insurance policy be reviewed beyond the form document provided by their carrier, it finds that the phrase "exclusion of all rights and remedies" in 19 *Del. C.* § 2304 prohibits the Plaintiff from gaining access to the State's UM/UIM policy. As such, the summary judgment motion of the State is granted.

CONCLUSION

As indicated above, the Court believes this issue requires clarification from the legislature. When that review is undertaken, the Court would suggest that a more thorough study of what injuries are covered by the WCA versus those covered under personal injury policies be done. It appears to the Court that recovery under both is not fully aligned, meaning the exclusivity provision could operate to unfairly deprive an employee of much-needed benefits. As noted by Plaintiff here, pain and suffering as well as wages beyond the WCA maximum compensation rate are not recoverable under the WCA but may be under a personal injury policy. To the extent there is an inconsistency in coverage, there should at least be a clear legislative mandate to reflect that was intended.

*5 It is shocking to the Court that this precise issue has never been decided before in this jurisdiction. That also probably suggests that the parties to such litigation have believed for some time the exclusivity language of the Workers Compensation Act would prohibit such action. While the Court believes both parties have advanced strong arguments in support of their positions, in the end it finds the State's position is correct.

All Citations

Not Reported in A.3d, 2016 WL 425010

Footnotes

1 Counsel for Defendant GEICO informed the Court that GEICO takes no position on the State's Motion for Summary Judgment. Letter from Erin K. Radulski, Esquire, to the Court, D.I. 11 (April 17, 2015).

2 Def. Mot. for Summ. J., Ex. D.

3 *See id.* at 8.

4 Pl. Compl., ¶ 19.

5 Def. Mot. for Summ. J., Ex. A.

6 *Id.* The documents supplied by the State are confusing at best. One document provided to the Court indicates Plaintiff received total disability benefits of $426.37 bi-weekly for the period of 09/17/10–09/28/10 "in accordance with the provisions of the Workers' Compensation Law of the State of Delaware." However, the second document included in the exhibit states "[n]o actual payment has been made as such benefits have already been paid by PIP/auto no-fault directly to the claimant." Both documents are dated September 30, 2011. The Court will assume for purposes of this motion that, as a result of the accident, Plaintiff received workers' compensation benefits pursuant to 19 *Del. C.* § 2304.

7 Pl. Compl., ¶¶ 11–12.

8 The statute defines an "underinsured motor vehicle" as "one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident are less than the damages sustained by the insured" and requires those limits "be stated in the declaration sheet of the policy." 18 *Del. C.* § 3902(b)(2).

9 Pl. Compl., ¶¶ 14–16.

10 *Id.* ¶ 6.

11 *Id.* ¶ 7

12 *Id.* ¶ 8.

13 *Id.* ¶ 9.

14 Hearing Tr., 7:18–22 (May 11, 2015).

15 Super. Ct. Civ. R. 56(c). *See also Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del.1996).

16 *See Moore v. Sizemore,* 405 A.2d 679 (Del.1979).

17 *See Alabi v. DHL Airways, Inc.,* 583 A.2d 1358, 1361 (Del.1990).

18 *See Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del.Super.1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del.1965).

19 *See Banaszak v. Progressive Direct Ins. Co.,* 3 A.3d 1089, 1094 (Del.2010), as corrected (Sept. 3, 2010).

20 *See* 18 *Del. C.* § 3902(b) (emphasis added).

21 *Id.* § 3902(b)(1). Moreover, "[a]n insured who executes a release of a single tortfeasor ... in exchange for payment of the entire limits of liability insurance afforded by the tortfeasor's liability insurer shall continue to be legally entitled to recover against that tortfeasor for the purposes of recovery against the insured's underinsurance carrier." *Id.* § 3902(b)(4).

22 *Id.* § 3902(b)(3).

23 19 *Del. C.* § 2304.

24 *See Littlejohn v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2029058, *2 (Del.Super. May 21, 2010) (quoting *Grabowski v. Mangler*, 956 A.2d 1217, 1220 (Del.2008)). *See also* 19 *Del. C.* § 2363. The State's reliance on *Littlejohn v. State Farm* in support of this argument is thus misplaced. In *Littlejohn,* the Court held that an employee could not recover worker's compensation and UIM benefits from her employer for injuries sustained as a result of a coworker's negligent conduct because the co-worker was acting within the course and scope of his employment. Plaintiff, on the other hand, was not injured by the negligence of a co-worker but by that of a third party, Ms. Ricks. Thus, *Littlejohn* cannot be read to preclude an employee like Plaintiff from recovering from a third party tortfeasor.

25 *See Kelley v. Perdue Farms,* 123 A.3d 150, 154 (Del.Super.2015) (quoting *Adams v. Delmarva Power & Light Co.*, 575 A.2d 1103, 1106 (Del.1990)).

26 *See Miller v. State Farm Mut. Auto. Ins. Co.,* 993 A.2d 1049, 1053 (Del.2010) ("The State Farm insurance policy was purchased and paid for by the Millers, whereas Miller's workers' compensation insurance was paid for by his employer. Because State Farm contributed nothing to the fund that created the collateral source and had no interest in that fund, State Farm should not have been allowed to benefit from it.").

27 *See id.* at 1056.

28 Def. Mot. for Summ. J., Ex. D at 21 (emphasis added).

29 *See* 19 *Del. C.* § 2304.

30 *See Stoms v. Federated Serv. Ins. Co.,* 125 A.3d 1102, 1106 (Del.2015). Like the policy in *Stoms,* the State provides for $25,000 in PIP coverage, which exceeds the $15,000 minimum PIP coverage required in Delaware. *See id.* at 1106 n. 15 (citing 21 *Del. C.* § 2118(a)); Def. Mot. for Summ. J., Ex. D at 12 (added personal injury protection endorsement).

31 Def. Mot. for Summ. J., Ex. D at 4 (emphasis added).

32 Lawhead Aff., D.I. 14, ¶¶ 2–4.

33 *Id.* ¶¶ 7–10.

34 *See Stoms,* 125 A.3d at 1106. *See also State Farm Mut. Auto. Ins. Co. v. Kelty*, 126 A.3d 631, 639 (Del.2015) ("If insurance companies are forced to provide benefits beyond what policyholders contracted for and what is expressly required under the statute, they will undoubtedly raise the cost of such coverage, and thereby reduce the number of Delaware drivers who opt to pay for anything more than the statutory minimum.").

35 *See, e.g.*, *Lomax v. Nationwide Mut. Ins. Co.,* 964 F.2d 1343 (3d Cir.1992) ("Under Delaware law, uninsured motorist coverage is designed to compensate innocent persons injured by automobile who are unable to obtain recompense from unknown or impecunious negligent tortfeasors for general damages, such as pain and suffering, as well as economic losses.").

36 *See Harmon v. F & H Everett & Associates,* 83 A.3d 737 (Del.2013) (discussing exclusivity clause in context of workers' compensation and unemployment benefits) ("Although the Workers' Compensation Act contemplates full compensation, it is not intended to permit more than one recovery for a single loss.").

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WHAT DOES A JURY HEAR?

22. DAMAGES

- Worker's Compensation Benefits ..... ' 22.21

WORKER'S COMPENSATION

You have heard testimony about the worker's compensation benefits that [***plaintiff's name***] has received. You should not consider the fact that some of the medical expenses and lost wages that [***he/she***] claims in this lawsuit have been paid through worker's compensation because [***plaintiff's name***] has a legal obligation to repay this compensation from any money that you might award in this case. On the other hand, if [***he/she***] does not recover in this case, there is no obligation for [***plaintiff's name***] to reimburse.

{**Comment**: *The collateral source rule does not apply to worker's compensation payments relevant to a claim for damages arising from medical negligence. See 18* Del. C. *' 6862.*}

Source:

19 *Del. C.* ' 2363(e); *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 834-35 (1995); *State v. Calhoun*, Del. Supr., 634 A.2d 335, 337-38 (1993); *Cannon v. Container Corp. of Am.*, Del. Supr., 282 A.2d 614, 616 (1971); *but see Baio v. Commercial Union Ins. Co.*, Del. Supr., 410 A.2d 502, 507-08 (1979)(in case where employer, or employee's carrier, has a conflict of interest with injured worker pursuing a right of subrogation, principles of equity apply and carrier's right of subrogation may be waived).

930 A.2d 881
Supreme Court of Delaware.

Valeria SPENCER, Plaintiff Below, Appellant,
v.
WAL–MART STORES EAST, LP, a Delaware Limited Partnership, Defendant Below, Appellee.

No. 305, 2006.
|
Submitted: May 2, 2007.
|
Decided: June 18, 2007.
|
Reargument Denied July 26, 2007.

Synopsis

Background: Plaintiff, an employee of a business located on corporate landowner's property, brought action against landowner to recover for injuries sustained in slip and fall accident in parking lot. The Superior Court, New Castle County, entered judgment on jury verdict in favor of landowner. Plaintiff appealed.

Holdings: The Supreme Court, Jacobs, J., held that:

[1] question of plaintiff's secondary assumption of risk was for the jury;

[2] jury instruction regarding workers' compensation benefits received by plaintiff was not improper;

[3] witness was not qualified as an expert on snow and ice removal; and

[4] plaintiff was not entitled to admission of expert report.

Affirmed.

West Headnotes (16)

[1] Appeal and Error
Instructions

Jury instruction challenged on appeal is subject to de novo review.

Cases that cite this headnote

[2] Appeal and Error
Instructions

Appellate court reviews a jury instruction challenged on appeal to determine whether the instruction correctly stated the law and enabled the jury to perform its duty.

Cases that cite this headnote

[3] Negligence
Existence as Defense

Negligence
Effect of comparative negligence

Negligence
Secondary assumption of risk

Assumption of the risk, to a level greater than a defendant's primary negligence, may constitute proximate cause sufficient to bar recovery; but ordinarily, secondary assumption of risk is a basis for apportionment of fault under the comparative negligence scheme.

3 Cases that cite this headnote

[4] Negligence
Effect of others' fault;comparative negligence

Negligence
Assumption of risk

Because secondary assumption of risk is generally a question of fact to be determined by the jury, its degree remains a jury question.

3 Cases that cite this headnote

[5] Trial
Construction and Effect of Charge as a Whole

Jury instructions may not be viewed in isolated portions, but must be read in their

entirety to determine whether they accurately state the substance of the law.

1 Cases that cite this headnote

[6] **Damages**
Mitigation or reduction of damages

Jury instruction in action arising out of slip and fall accident that occurred on landowner's property properly informed jury that if it found for plaintiff, it should award the full amount of lost wages and medical expenses, without deducting any amount paid by workers' compensation; instruction properly advised jury how to determine damages and dispelled any jury concerns about possible double recovery.

1 Cases that cite this headnote

[7] **Appeal and Error**
Admission or exclusion of evidence in general

Trial judge's decision to admit or exclude evidence is reviewed for abuse of discretion.

4 Cases that cite this headnote

[8] **Courts**
Abuse of discretion in general

Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.

2 Cases that cite this headnote

[9] **Appeal and Error**
Abuse of discretion

To find an abuse of discretion, there must be a showing that the trial court acted in an arbitrary and capricious manner.

2 Cases that cite this headnote

[10] **Damages**
Matter of mitigation;collateral source rule in general

Tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source.

Cases that cite this headnote

[11] **Appeal and Error**
Expert Evidence and Witnesses

Trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion.

5 Cases that cite this headnote

[12] **Evidence**
Necessity and sufficiency

Trial judges perform an important gatekeeping function and, thus, must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.

Cases that cite this headnote

[13] **Appeal and Error**
Substitution of reviewing court's discretion or judgment

When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.

1 Cases that cite this headnote

[14] **Evidence**
Matters involving scientific or other special knowledge in general

Evidence
Necessity of qualification

Evidence

Necessity and sufficiency

To determine whether expert testimony is admissible, the trial court must find (1) the witness to be a qualified expert; (2) the testimony to be relevant and reliable; (3) the testimony to be based upon information reasonably relied upon by experts; (4) the testimony will assist the trier of fact; and (5) the testimony will not create unfair prejudice or confuse or mislead the jury. Rules of Evid., Rule 702.

4 Cases that cite this headnote

[15] **Evidence**

Physical facts

Witness trained as an architect was not qualified to testify as an expert on proper parking lot maintenance in plaintiff's action to recover for injuries sustained in slip and fall accident in snow-covered parking lot; although witness had taken two-day course addressing snow and ice abatement procedures, witness's formal education and professional seminars included no training related to snow and ice removal, witness did not have relevant professional work experience and was not a member of any professional organizations in the field of snow and ice removal, and witness's experience in relation to snow removal was limited to his distant experience of helping his father who had operated a snow plowing company. Rules of Evid., Rule 702.

4 Cases that cite this headnote

[16] **Evidence**

Due care and proper conduct

Report submitted by purported expert witness regarding witness's opinion as to negligent parking lot maintenance was not admissible in plaintiff's action to recover for injuries sustained in slip and fall accident in snow-covered parking lot; report was a collection of potentially favorable fragments of various snow plowing and safety publications, and report did not demonstrate that witness reached his opinion through observation and application of theory, training and experience. Rules of Evid., Rule 702.

1 Cases that cite this headnote

***882** Court Below: Superior Court of the State of Delaware, in and for New Castle County, C.A. No. 04C–08–144.

Upon appeal from the Superior Court. **AFFIRMED.**

Attorneys and Law Firms

David R. Scerba, Esquire, of Ramunno, Ramunno & Scerba, P.A., Wilmington, Delaware, for Appellant.

Margaret F. England, Esquire, of Eckert Seamans Cherin & Mellot, LLC, Wilmington, Delaware, for Appellee.

***883** Before HOLLAND, BERGER and JACOBS, Justices.

Opinion

JACOBS, Justice.

Valeria Spencer ("Spencer"), the plaintiff-below, appeals from a judgment based upon an underlying Superior Court verdict for the defendant, Wal–Mart Stores East, L.P. ("Wal–Mart"), in a slip and fall personal injury case. Spencer claims that the Superior Court erred in three separate respects. We find that Spencer's claims lack merit and affirm.

FACTS

On January 5, 2003, a snowfall blanketed the area where a Wal–Mart store was located. Four days later, on January 9, 2003, Spencer entered the Wal–Mart parking lot to go to her place of work, which was located inside of the Wal–Mart building.

As a result of the melting snow, a stream of water had developed in the parking lot. Spencer claimed that she slipped on ice that had formed under the stream of water. Michelle Carter, a Wal–Mart assistant manager, responded to Spencer's request for assistance. After investigating, Carter prepared an incident report and took

photographs of the area where Spencer fell. There was also a rooftop videotape of the incident, which Wal–Mart preserved.

After her fall, Spencer went to the hospital where she was told to follow up with her primary care physician. By the time of her trial, Spencer's medical expenses had totaled $121,085.04, and her lost wages were claimed to have totaled $20,435.

Spencer filed an action against Wal–Mart, seeking damages for her injuries sustained as a result of her slip and fall at Wal–Mart's parking lot. Spencer claimed that the parking lot had not been properly maintained, and that she was injured as a result of Wal–Mart's negligent maintenance of the parking lot. Spencer also filed a workers' compensation claim against her employer, which was not Wal–Mart but was located inside the Wal–Mart building. At the time of trial, Spencer had received workers' compensation benefits totaling $121,205.62, for which the workers' compensation carrier had a lien.

There were two pretrial conferences. During the first conference, Spencer sought the admission into evidence of the workers' compensation benefits she had received. In response to Wal–Mart's objection, Spencer conceded that she could prove the compensability of her special damages through medical testimony, without having to refer in any way to the workers' compensation lien. The trial judge concluded that the workers' compensation lien should be admitted, nonetheless. At the second conference, there was further discussion about the admissibility of the workers' compensation lien. The trial court reaffirmed its ruling that the jury should be informed of Spencer's workers' compensation benefits. [1]

***884** At the trial, Spencer called Julius Pereira ("Pereira") as an expert witness on the issue of Wal–Mart's negligence in removing snow from the parking lot. The Superior Court held a *Daubert* hearing before trial on the admissibility of Pereira's proposed testimony. After hearing Pereira's proposed testimony and reviewing his expert report, the trial judge ruled that Pereira was not qualified to testify as an expert under the Delaware Rules of Evidence. [2]

At trial, the Superior Court judge instructed the jury on landowner liability, as follows:

> A landowner has a duty to provide a business invitee with safe ingress and egress to its property. Ingress means the entrance or way onto the premises. Egress means the exit or way off the premises. Ordinarily, a landowner does not have a duty to warn an invitee of a danger located off the premises. But if the actual location of the hazard is immediately adjacent to the place of ingress or egress from the premises, the landowner has a duty to warn of the danger or protect against the danger in order to provide its invitees with a safe way onto and off the premises. *If the danger, however, is so apparent that a business invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning and the landowner has no further duty to warn or protect the invitee.* [3]

The trial judge also gave the following jury instruction regarding calculation of damages:

> You have heard testimony about worker's compensation benefits that Ms. Spencer has received. You should not consider the fact that some of the medical expenses and lost wages she claims in this lawsuit have been paid through workers' compensation because Ms. Spencer has a legal obligation to repay those compensations from any money that you might award in this case. On the other hand, if she does not recover in this case, there is no obligation for her to reimburse. In this case workers' compensation has paid a total of $121,205.65 in benefits to the plaintiff. [4]

At the conclusion of the trial, the jury returned a verdict for Wal–Mart on the issue of liability. Spencer filed this appeal. ***885** Three questions are presented, namely,

whether the Superior Court erred by: (1) instructing the jury improperly as to Spencer's knowledge of the hazardous condition; (2) informing the jury of Spencer's receipt of workers' compensation; and (3) precluding testimony from Spencer's expert witness. We address these issues in that order.

ANALYSIS

I. *The "Knowledge of Dangerous Condition" Jury Instruction Claim*

Spencer first contends that the final italicized sentence of the jury instruction regarding her knowledge of the dangerous condition in the parking lot (see p. 884, supra) was erroneous, because it would effectively absolve a landowner of any duty to its business invitees. Relying on *Koutoufaris v. Dick,* [5] Spencer claims that the instruction is incorrect because it conflicts with Delaware's comparative negligence statute.

[1] **[2]** A jury instruction challenged on appeal is subject to *de novo* review. [6] Specifically, we review "a jury instruction challenged on appeal to determine 'whether the instruction correctly stated the law and enabled the jury to perform its duty.' " [7]

Koutoufaris does not support Spencer's position. That case involved a claim that landowners were liable for the rape and abduction of their employee, a waitress. This Court concluded that assumption of risk was not a defense to a claim by the employee, who had knowingly walked into a dangerous parking area after she had completed her work. In *Koutoufaris,* this Court divided assumption of risk into two categories: "primary assumption of risk" (referring to cases where the plaintiff expressly relieves the defendant from all legal duty) and "secondary implied assumption of risk" (a plaintiff's deliberate and unreasonable choice to encounter a risk created by another's breach of duty). [8] In *Koutoufaris,* we concluded that "adoption of a comparative negligence standard ... manifests a legislative intention ... to retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct on a case-by-case basis." [9] That is, in Delaware the doctrine of secondary implied assumption of risk was subsumed within a comparative fault analysis. Therefore, the plaintiff was not barred from recovery for knowingly walking into the dangerous parking lot.

[3] In *Koutoufaris* we noted, however, that where "the assumption of risk is of the primary type, *i.e.,* a bargained-for, agreed-upon shifting of the risk of harm, a plaintiff's conduct might well constitute a complete bar to recovery, as a matter of law, even in a comparative negligence jurisdiction." [10] This Court further observed that although Delaware has adopted a modified comparative negligence standard, ***886** "[a]ssumption of the risk, to a level greater than a defendant's primary negligence, may constitute proximate cause sufficient to bar recovery." [11] But ordinarily, "[s]econdary assumption of risk is a basis for apportionment of fault under the comparative negligence scheme." [12]

[4] In this case, Spencer did not expressly relieve Wal–Mart or any other party to the law suit of all legal duty. That is, there was no primary assumption of risk. The issue is whether Spencer secondarily assumed the risk. Spencer had worked at the Wal–Mart location for several years, and was familiar with the parking lot. On the day of her accident, she chose not to walk on the sidewalk and instead walked through a stream of water that had developed as a result of the melting snow. Thus, Spencer assumed the risk of proceeding through the water, which constituted a "secondary assumption of risk" category. Because secondary assumption of risk is generally a question of fact to be determined by the jury, [13] "its degree remains a jury question." [14]

[5] In Delaware, "[j]jury instructions may not be viewed in isolated portions, but must be read in their entirety to determine whether they accurately state the substance of the law." [15] Here, the challenged jury instruction was not inconsistent with our system of comparative negligence. [16] Although the instruction allowed for the landowner's duty to be satisfied if a warning is given, the jury must still consider the degree of Spencer's secondary assumption of risk in determining her comparative fault. Therefore, the jury instruction was consistent with the comparative negligence statute and it properly explained the principles that were crucial to the jury's deliberations.

II. *The Workers' Compensation Benefits Disclosure Claim*

[6] Spencer next claims that the Superior Court reversibly erred by informing the jury that she had received workers'

compensation benefits. Spencer argues that because the collateral source rule would have prohibited the admission of evidence of her receipt of workers' compensation benefits, the Superior Court abused its discretion in informing the jury that a workers' compensation lien existed and disclosing the amount of the lien.

[7] **[8]** **[9]** A trial judge's decision to admit or exclude evidence is reviewed for abuse of discretion.[17] Judicial discretion "is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored ***887** recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."[18] To find an abuse of discretion, there must be a showing that the trial court acted in an arbitrary and capricious manner.[19]

[10] In *Yarrington v. Thornburg,*[20] this Court articulated the collateral source rule thusly: "a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source."[21] The collateral source rule "is predicated upon the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant."[22]

The collateral source rule is inapplicable here. In *Bounds v. Delmarva Power & Light Co.,*[23] we upheld the same jury instruction as was given in this case:

> You have heard testimony about the workers' compensation benefits that Craig Bounds has received. You should not consider the fact that some of the medical expenses and lost wages that he claims in this lawsuit have been paid through workers' compensation because Craig Bounds has a legal obligation to repay this compensation from any money that you might award in this case. On the other hand, if he does not recover in this case, there is no obligation for Craig Bounds to reimburse.

The workers' compensation instruction given here is a pattern civil instruction that, together with the instruction on damages, is designed to inform the jury that if it finds for the plaintiff, it should award the full amount of lost wages and medical expenses that it finds to exist by a preponderance of the evidence, without deducting any amount paid by workers' compensation. The instruction is also intended to dispel any jury concerns about possible double recovery by the plaintiff of medical bills or lost wages.

In this case, there was a significant risk that evidence that Spencer had received workers compensation could mislead the jury to conclude that Spencer was seeking a double recovery. To prevent any such misconception, the trial court properly exercised its discretion in advising the jury how to determine the damages.[24]

Nor was Spencer prejudiced by that instruction, which was given for the jury to consider in determining the amount of damages. The jury never reached the damages issue, because the jury found no liability on the part of Wal–Mart. Because no prejudice resulted to Spencer from the instruction, there is no basis to find that the Superior Court abused its discretion.

III. *The Daubert Claim*

Finally, Spencer contends that the trial court abused its discretion by excluding the testimony of her proposed expert witness, Pereira.[25] Spencer argues that Pereira ***888** was qualified to testify about whether Wal–Mart had properly maintained its parking lot, that Pereira's opinions were based upon reliable principles and methods, and that his testimony would have assisted the jury in understanding the evidence or determining a fact.

[11] **[12]** **[13]** A trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion.[26] "This deferential standard of review merely recognizes that trial judges perform an important gatekeeping function and, thus, 'must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.' "[27] Further, "[w]hen an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness."[28]

[14] The admissibility of expert testimony is governed by Delaware Rule of Evidence 702.[29] In *Goodridge v. Hyster Co.,*[30] this Court articulated a five-step test to determine

whether expert testimony is admissible under that Rule. Specifically, the trial judge must find:

> (1) the witness to be a qualified expert; (2) the testimony to be relevant and reliable; (3) the testimony to be based upon information reasonably relied upon by experts; (4) the testimony will assist the trier of fact; and (5) the testimony will not create unfair prejudice or confuse or mislead the jury. [31]

[15] Spencer first argues that Pereira had sufficient education, experience and training to opine on snow and ice control. Pereira's curriculum vitae, however, reveals that Pereira did not possess the experience necessary to qualify him as expert in that field. Pereira was trained as an architect. Except for a two-day course addressing snow and ice abatement procedures, Pereira's other formal education and professional seminars included no training related to snow and ice removal. Pereira was then currently employed as a forensic architect for the consulting firms Robson Forensic and Fornier Ross and Associates. Before that time, Pereira was employed as an architect or consultant for various architectural firms and real estate developers. Pereira was not a member of ***889** any professional organizations in the field of snow and ice removal, and his experience in relation to snow removal was limited to helping his father, who operated a snow plowing company, when he was a teenager. Consequently, the trial court did not err in finding Pereira not qualified as an expert on ice and snow removal.

[16] Second, Spencer contends that Pereira's report should have been admitted because his opinions were based upon reliable principles and methods. As noted above, "trial courts have a gatekeeping obligation to ensure that all expert testimony is reliable and relevant." [32] In *Daubert v. Merrell Dow Pharmaceuticals,* [33] the United States Supreme Court established the following non-exclusive list of factors in assessing expert testimony under Federal Rule of Evidence 702:(1) whether a scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) whether the technique is generally accepted. [34]

In *Goodridge v. Hyster Co.,* [35] this Court held that taking phrases from various trade journals and piecing them together to develop an opinion is not a satisfactory basis or technique to be used to form an expert opinion in the Delaware courts. [36] After reviewing Pereira's report, the Superior Court found that the majority of Pereira's opinion was "based simply on his culling potentially favorable snippets from various snow plowing and safety publications, instead of an opinion based on the application of facts to a scientific theory, or adequate experience and special training." [37] That finding is solidly grounded in the record. Pereira failed to perform a sound analysis of the facts and theories, and to show how he reached his conclusions from his observations. The Superior Court did not abuse its discretion by excluding the testimony of Spencer's expert witness.

Lastly, Spencer contends that Pereira's testimony would have helped educate the jury that Wal–Mart's efforts to clear snow and ice from the parking lot fell below the standard of care owed to the invitee in light of relevant industry standards. We find that argument unpersuasive, because Pereira's proffered opinion did not provide any additional understanding of the issues of fact confronting the jury. Rather, most of Pereira's opinions consisted of quotations pulled from building codes. These quotations essentially provided a code based duty of care for landowners, [38] which was embodied in the jury instructions given by the Superior Court. It is for the jury, not the expert witness, to determine ***890** whether Wal–Mart met the appropriate standard of care in maintaining its parking lot. In the form as proffered, Pereira's opinion would have usurped the trial court's function to instruct the jury on the law. Pereira's expert opinions were more common sense than formulated opinions. As the Superior Court pointed out, "expert testimony is [not] required to argue to a jury that a pile of snow in a parking lot is going to melt." [39] The trial judge properly exercised her discretion in excluding Pereira's testimony.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court is affirmed.

All Citations

930 A.2d 881

Footnotes

1 [The Court:] Just so that I make the record clear again, I was led to believe that I was also misconstruing who it was who wanted to have the lien into evidence with respect to the workers' compensation lien. Mr. Scerba I thought was trying to get it into evidence because I got a defense motion asking that it be precluded and I looked at the pretrial stipulation again it also had lien there as one of your Exhibits. When I talked on the phone you acted like I was crazy that you did not want it in, but just so I let you know that is where I was coming from it does not change my ruling, though.
[Spencer's counsel:] I am comfortable.
[The Court:] If you look at the pretrial stipulation you proposed it as one of your Exhibits.
[Spencer's counsel:] Very well, Your Honor.
[The Court:] This is what then generated this response motion on the part of the defendants and that was what generated my assumption that you are the one who wanted it in, when you told me on the phone no, no, I did not want it in, I thought I was missing something.
[Spencer's counsel:] Can I explain myself just briefly? Initially you are correct, I indicated that on the pretrial conference there was a discussion in general terms, as I recall, as to how that should be handled whether or not it should come in whether it shouldn't. Subsequent to that I did some research. I brought it to Your Honor's attention based on the research that I had done that it had done that it should not come in.
[The Court:] Your research was wrong.
[Spencer's counsel:] I am simply—
[The Court:] The record at the call was no different from what it was—there was nothing in the record in writing that led me to believe other than you wanted to put that in as your Exhibit. That is where the record stands right now. The call of the calendar is not the place to give the Court legal authority for anything.

2 *Spencer v. Wal–Mart Stores E., LP,* 2006 WL 1520203, 2006 Del.Super. LEXIS 230, (Del.Super. Ct. June 5, 2006) (holding that Spencer "has failed to demonstrate (1) that [her expert witness] Mr. Pereira has specialized knowledge that would qualify him to testify as an expert; (2) that his opinions are the product of reliable scientific methods and principles; and (3) that his testimony will assist the trier of fact.")

3 (Emphasis added). This jury instruction is Delaware Pattern Jury Instruction for Civil Practice 15.2A (2000).

4 This jury instruction is Delaware Pattern Jury Instruction for Civil Practice 22.21 (2000).

5 604 A.2d 390, 398 (Del.1992) (holding that "if the plaintiff was aware of the danger, no liability arises on the part of the landowner even though on a comparative basis the plaintiff's error in judgment in not appreciating the risk might be far less blameworthy than defendant's conduct in creating the risk or failing to eliminate it. Such a result is clearly at variance with the legislative intent that, where negligence is reflected in the conduct of both parties, liability, and consequent recovery, be determined proportionately.").

6 *Chrysler Corp. v. Chaplake Holdings, Ltd.,* 822 A.2d 1024, 1034 (Del.2003).

7 *Id. citing Russell v. K–Mart Corp.,* 761 A.2d 1, 4 (Del.2000).

8 *Koutoufaris,* 604 A.2d at 397, *citing Bib v. Merlonghi,* 252 A.2d 548, 550 (Del.1969).

9 *Koutoufaris,* 604 A.2d at 398.

10 *Id. citing Swagger v. City of Crystal,* 379 N.W.2d 183 (Minn.Ct.App.1985).

11 *Koutoufaris,* 604 A.2d at 398 n. 6. This Court has held that "[i]f the plaintiff knows of the existence of risk, appreciates the danger of it and nevertheless does not avoid it, he will be held to have assumed the risk and may not recover for his injuries." *Yankanwich v. Wharton,* 460 A.2d 1326, 1330 (Del.1983), *quoting Robinson v. Meding,* 163 A.2d 272, 276 (Del.1960).

12 *Halpern v. Wheeldon,* 890 P.2d 562, 565 (Wyo.1995), *citing Brittain v. Booth,* 601 P.2d 532, 534 (Wyo.1979).

13 *Curties v. Hill Top Developers, Inc.,* 14 Cal.App.4th 1651, 1656, 18 Cal.Rptr.2d 445 (Cal.Ct.App.1993).

14 *Patton v. Simone,* 626 A.2d 844, 853 (Del.Super.Ct.1992).

15 *Shum v. Minor,* 1993 WL 385108, at *2, 1993 Del. LEXIS 366, at *4 (Del. Sept. 22, 1993), *citing Chavin v. Cope,* 243 A.2d 694, 698 (Del.1968).

16 *Compare, Culver v. Bennett,* 588 A.2d 1094, 1099 (Del.1991).

17 *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 237–38 (Del.2001).
18 *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del.1988).
19 *Chavin v. Cope*, 243 A.2d 694, 695 (Del.1968).
20 205 A.2d 1 (Del.1964).
21 *Id.* at 2.
22 *Id.*
23 2004 WL 343982, 2004 Del.Super. LEXIS 39 (Del.Super.Ct. Jan. 29, 2004), *aff'd* 2004 WL 2850090, 2004 Del. LEXIS 555 (Del. Dec. 2, 2004).
24 At the pretrial conference, the trial judge stated: "[The jury] may have to be told in order to understand where the money is, where it is to where it came from. One thing they shouldn't be misled either way, this is not a game, win at all costs. Get them the truth so they can decide what is fair."
25 The Superior Court, after a pretrial hearing, held that Pereira's testimony should be excluded because (1) his qualifications as an architect did not qualify him to testify in the areas of maintenance and snow removal; (2) his expert "opinion" was formed by pulling phrases and sentences from various snow plowing and safety publications; and (3) the jury would not be assisted by Pereira's testimony as it consisted primarily of a restatement of the legal standard of care. *See Spencer v. Wal–Mart Stores E., LP*, 2006 WL 1520203, at *2, 2006 Del.Super. LEXIS 230, at *5–7 (Del.Super. Ct. June 5, 2006).
26 *Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del.2004).
27 *Bowen v. E.I. duPont de Nemours & Co., Inc.*, 906 A.2d 787, 795 (Del.2006), *quoting Garden v. State*, 815 A.2d 327, 338 (Del.2003).
28 *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del.2006), *quoting Chavin v. Cope*, 243 A.2d 694, 695 (Del.1968).
29 Delaware Rule of Evidence 702 provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." D.R.E. 702 (2001).
30 845 A.2d 498 (Del.2004).
31 *Id.* at 503.
32 *White v. United States*, 422 F.Supp.2d 1089, 1093 (D.Ariz., 2006).
33 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
34 *Id.* at 593–94, 113 S.Ct. 2786.
35 2002 WL 32007200 (Del.Super.Ct. Oct. 4, 2002).
36 *Id.* at * 1.
37 *Spencer*, 2006 WL 1520203 at *2, 2006 Del.Super. LEXIS 230 at *6.
38 For example, Pereira cites the International Property Maintenance Code, which states that "[a]ll sidewalks, walkways ... and similar paved areas shall be kept in a proper state of repair ... and maintained free of hazardous conditions." In addition, Pereira cited three snow removal and ice control industry references such as *The Snowplowing Handbook, Managing Snow & Ice and Snow Business, A Contractor's Guide to Profitable Snow Removal* solely to "identify proper operational procedures."
39 *Spencer*, 2006 WL 1520203 at *2, 2006 Del.Super. LEXIS 230 at *7.

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993 A.2d 1049
Supreme Court of Delaware.

Todd MILLER and Victoria Miller,
Plaintiffs Below, Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant Below, Appellee.

No. 570, 2009.
|
Submitted: March 3, 2010.
|
Decided: April 21, 2010.

Synopsis

Background: Insured motorist brought action to recover underinsured motorists benefits from his automobile insurer for damages he allegedly sustained in accident with third-party tortfeasor while driving a car owned by his employer. Insurer conceded liability, and case was tried before jury on issue of damages. The Superior Court, New Castle County, entered judgment on jury verdict, awarding insured $0 in damages. Insured appealed.

Holdings: The Supreme Court, Jacobs, J., held that:

[1] as an issue of first impression, the collateral source rule applied to require exclusion of evidence of insured's workers' compensation settlement, and

[2] error in admitting such evidence was not harmless.

Reversed and remanded.

West Headnotes (8)

[1] Appeal and Error
Admission or exclusion of evidence in general

The Supreme Court reviews a trial judge's decision to admit or exclude evidence for abuse of discretion.

1 Cases that cite this headnote

[2] Appeal and Error
Admission or exclusion of evidence in general

The Supreme Court reviews de novo the Superior Court's decision to admit or exclude evidence premised upon a determination, as a matter of law, that the collateral source rule is inapplicable.

6 Cases that cite this headnote

[3] Damages
Matter of mitigation;collateral source rule in general

The "collateral source rule" provides that a person deemed legally responsible to another cannot mitigate damages by claiming the benefit of the ability of the injured party to recover from a third party expenses related to the injury.

3 Cases that cite this headnote

[4] Damages
Aggravation, mitigation, and reduction of loss

The "collateral source rule" prohibits the admission of evidence of an injured party receiving compensation or payment for tort-related injuries from a source other than the tortfeasor; the tortfeasor has no interest in monies received by the injured person from sources unconnected with the defendant, and prejudice may result to an injured party in the minds of the jury from knowledge of any double recovery.

6 Cases that cite this headnote

[5] Damages
Aggravation, mitigation, and reduction of loss

An exception to the inadmissibility of collateral source evidence exists where the injured party raises the issue during his or her own direct examination.

1 Cases that cite this headnote

[6] **Insurance**
Workers' compensation
Insurance
Admissibility

Collateral source rule applied to require the trial court to exclude evidence of insured's workers' compensation settlement in action against his automobile insurer for underinsured motorist benefits; the workers' compensation carrier had no connection to the automobile insurer, and restricting double recovery would have frustrated the reasonable expectations of the insured, created by his payment of insurance premiums, to recover under the policy, and, thereby, would have frustrated public policy to encourage motorists to purchase underinsured motorist coverage. 18 West's Del.C. § 3902.

5 Cases that cite this headnote

[7] **Insurance**
Uninsured or Underinsured Motorist Coverage

The public policy underlying the uninsured and underinsured motorist statute is to permit an insured as a rational and informed consumer to contract for supplemental insurance protecting him from an irresponsible driver who causes death or injury. 18 West's Del.C. § 3902.

1 Cases that cite this headnote

[8] **Appeal and Error**
Damages and amount of recovery

Error in admitting collateral source evidence of payment of insured's medical bills by workers' compensation carrier in action to recover underinsured motorists (UIM) benefits was not harmless, even though trial court instructed jury to determine whether insured's expenses were reasonable and necessary, because instruction did not explicitly inform the jury that insured was legitimately entitled to seek a double recovery, where liability was conceded, and only issue to be determined by jury was amount of insured's damages. 18 West's Del.C. § 3902.

1 Cases that cite this headnote

***1050** Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 07C–03–041.

Upon Appeal from Superior Court. **REVERSED and REMANDED.**

Attorneys and Law Firms

Robert K. Beste, III, Esquire, of Smith, Katzenstein & Furlow, LLP, Wilmington, DE, for Appellants.

Donald M. Ransom and Joshua H. Meyeroff, Esquires, of Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, DE, for Appellee.

Before HOLLAND, BERGER and JACOBS, Justices.

Opinion

JACOBS, Justice:

Todd Miller ("Miller") and his wife—Victoria Miller, the plaintiffs, appeal from two Superior Court orders denying their motions to exclude evidence in a personal injury action in which State Farm Mutual Automobile Insurance Company ("State Farm"), Millers' underinsured motorist carrier, was a codefendant. On appeal, the Millers claim that the Superior Court erred by admitting evidence, in violation of the collateral source rule, that Miller had received workers' compensation benefits and had entered into a settlement with his employer's workers' compensation carrier (the "WC Carrier"). We reverse the judgment of the Superior Court and remand for a new trial.

FACTS

On March 11, 2005, Miller, while driving a car owned by his employer, was struck by a car operated by Jennifer King ("King"). Because Miller was working when the accident occurred, the WC Carrier paid most of his medical expenses.

The Millers filed a Superior Court action against two defendants: King for personal injuries and loss of consortium, and State Farm for underinsured motorist coverage under the Millers' State Farm automobile ***1051** insurance policy.[1] Under 19 *Del. C.* § 2363(e), the WC Carrier was entitled to be reimbursed from any amounts recovered by the Millers in their action against King.[2]

Before trial, King's insurance carrier paid Miller the bodily injury liability coverage limit under King's policy ($50,000) in settlement of Miller's claims against King.[3] Contemporaneously, Miller entered into a settlement with the WC Carrier, in which: (1) the WC Carrier accepted $24,000 of the $50,000 settlement proceeds in satisfaction of its reimbursement right; and (2) Miller released the WC Carrier from all claims arising out of the accident. That left only the Millers' action against State Farm for underinsured motorist coverage, which went to trial.

On November 24, 2008, the Millers filed a motion *in limine* to exclude from evidence any reference to Miller having received workers' compensation benefits, including the fact that Miller was working at the time of the accident. Miller argued that admission of that evidence was precluded by the collateral source rule.[4] The Superior Court denied the motion by order dated January 27, 2009, which stated that "[t]he Court shall advise the jury of the workers comp. benefits and plaintiff's legal obligation to repay them from any verdict, consistent with *Spencer v. Wal–Mart Stores East, LP.*"[5]

On February 2, 2009, the Millers moved for reargument. On April 1, 2009, the Superior Court ruled that "[a]fter considering the authorities submitted by the parties, including *State Farm Mutual Automobile Insurance Company v. Nalbone*[6] ... the Court will instruct the jury that the plaintiff received workers compensation benefits, the carrier asserted a lien, and that lien was satisfied for approximately $24,000." Accordingly, during the trial, State Farm mentioned Miller's settlement ***1052** with the WC Carrier repeatedly before the jury.

During the trial, State Farm did not contest King's underlying liability.[7] State Farm disputed only the damages (if any) that Miller should be entitled to recover.[8] Specifically, State Farm contended that the medical treatments Miller had received (most of which his WC Carrier paid for), were not "reasonable and necessary." The Superior Court instructed the jury as follows:

> Medical bills have been submitted in evidence totaling $73,707.35. Mr. Miller's workers' compensation carrier paid $71,893.07, a difference of $1,814.28. Mr. Miller paid the workers' compensation carrier the sum of $24,000. State Farm does not agree that the bills in evidence were for reasonably necessary medical treatment. You may award Todd Miller the amount of the medical bills if you find those bills reflecting the medical treatment of Mr. Miller were reasonable and necessary.
>
> The jury awarded no ($0) damages to the Millers. This appeal followed.[9]

ANALYSIS

On appeal, the Millers claim that the Superior Court erred by admitting into evidence the fact that Miller had received workers' compensation benefits. The Millers claim that that evidentiary ruling violated the collateral source rule, under which "a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source."[10] The Millers argue that State Farm, which was "standing in the shoes" of the tortfeasor (King), should not be permitted to benefit from the jury being told that, because of his settlement with the WC Carrier, Miller had no further obligation to repay the WC Carrier and would retain any damages that the jury awarded.

State Farm responds that under *State Farm v. Nalbone,*[11] Miller was not entitled to a double recovery. Put differently, State Farm contends that the collateral source rule does not apply to claims to recover under the underinsured motorist provision of an automobile insurance policy. State Farm also argues that it should not be treated as if it were the tortfeasor (here, King) for

purposes of applying the collateral source rule. Finally, State Farm urges that any error in admitting collateral source evidence was harmless, because the Superior Court's jury instructions, which were consistent with *Spencer v. Wal–Mart Stores East, LP,* [12] eliminated any potential jury confusion over double recovery.

I. Standard of Review

[1] **[2]** This Court reviews a trial judge's decision to admit or exclude evidence for ***1053** abuse of discretion. [13] The applicability of the collateral source rule, however, is a question of law that we review *de novo.* [14] Accordingly, we review *de novo* the Superior Court's decision to admit or exclude evidence premised upon a determination, as a matter of law, that the collateral source rule is inapplicable. [15]

II. The Collateral Source Rule

[3] **[4]** **[5]** The collateral source rule is "firmly embedded" in Delaware law. [16] It provides that "a person deemed legally responsible to another cannot claim the benefit of the ability of the injured party to recover [ ] from a third party expenses related to [the] injury." [17] Therefore, the rule "prohibits the admission of evidence of an injured party receiving compensation or payment for tort-related injuries from a source other than the tortfeasor." [18] The rule has two underlying rationales. The first is that "a tortfeasor has no interest in ... monies received by the injured person from sources unconnected with the defendant." [19] The second, which is particularly relevant here, is "a concern for prejudice that may result to an injured party in the minds of the jury from knowledge of any 'double recovery.' " [20]

[6] The issue before us—whether the collateral source rule applies in the underinsured motorist context—is of first impression. We conclude that that issue must be answered in the affirmative. The collateral source—here, Miller's WC Carrier—had no connection to the defendant, State Farm. The State Farm insurance policy was purchased and paid for by the Millers, whereas Miller's workers' compensation insurance was paid for by his employer. Because State Farm contributed nothing to the fund that created the collateral source and had no interest in that fund, State Farm should not have been allowed to benefit from it. That Miller's action is based upon a contract (the State Farm insurance policy), or that State Farm was not the actual tortfeasor, do not alter that conclusion. Under the underinsured motorist provision of the insurance contract between the Millers and State Farm, State Farm was required to pay Miller whatever damages that Miller was "legally entitled to recover" from King. That is, State Farm's contractual obligation to pay the Millers derived from King's liability in tort. [21] Under the collateral source rule (which clearly applied to Miller's separate claim against King), Miller's entitlement to recover from King ***1054** would not have been diminished by payments he received from a collateral source. Consequently, State Farm's derivative contractual obligation to Miller should likewise have been unaffected by the collateral source payments. [22]

Because the Superior Court, in concluding otherwise, relied on *Nalbone v. State Farm,* [23] we must address the impact of *Nalbone* on actions to recover underinsured motorist proceeds. In *Nalbone,* this Court interpreted the Delaware No–Fault Statute [24] as precluding an insured from recovering Personal Injury Protection (PIP) benefits as compensation for wage losses to the extent those losses had already been satisfied by a collateral source —*unless* the collateral source payments were supported by actual consideration or by some detriment to the insured. [25] That is, under *Nalbone* "the collateral source rule applies in the no-fault insurance context only to the extent that the plaintiff has paid consideration or sustained some detriment for the payments from the collateral source; collateral payments received *gratis* bar a double recovery." [26] Because Nalbone's wage losses were recovered under her employer's non-contributory wage continuation plan, we held that Nalbone could not recover those losses (again) from State Farm, in the form of PIP benefits.

State Farm (and the Superior Court) read *Nalbone* as applying to all contract actions where the plaintiff seeks a double recovery of damages, including underinsured motorist cases. That reading is overbroad. [27] Our ruling in *Nalbone* was limited to the no-fault insurance context. [28] ***1055** *Nalbone* does not reach fault-based scenarios,

including actions to recover underinsured motorist benefits.

[7] In *Nalbone* we accepted certification of a legal question that required us to interpret the statutory term "net amount of lost earnings."[29] The applicable statute carved out a limited exception to the collateral source rule in no-fault insurance claims (*i.e.*, claims based on 21 *Del. C.* § 2118), because "the policy goals of no-fault insurance can best be served by application of principles of contract rather than tort law."[30] Here, however, the determination of the insured's damages in an underinsured motorist claim is governed not by contract principles, but by tort law—which includes the "firmly embedded" collateral source rule.[31] 18 *Del. C.* § 3902—the statute that governs underinsured motorist coverage, has no legislative provision that eliminates or modifies the collateral source rule.[32] Nor do the policy considerations underlying the Delaware underinsured motorist coverage regime support State Farm's argued-for limitation of the collateral source rule.[33] In cases involving underinsured motorist benefits, public policy supports applying the rule, because that will encourage motorists to purchase underinsured motorist coverage.[34] Unlike no-fault insurance, underinsured motorist coverage is not compulsory,[35] but supplemental in nature.[36] The public policy underlying 18 *Del. C.* § 3902 is to *permit* an insured as a "rational and informed consumer"—to contract for supplemental insurance protecting him from an irresponsible driver who causes death ***1056** or injury.[37] In that sense, the underinsured motorist carrier—not the WC Carrier—*was the collateral source* for which the insured paid independent consideration.[38] Restricting a double recovery in underinsured motorist cases would frustrate the reasonable expectations of the insured (created by the payment of insurance premiums) to recover under the policy,[39] and thereby would defeat the General Assembly's purpose in enacting Section 3902. That result also would contravene *Nalbone's* explicit holding that "the extent to which the collateral source rule should be applied to permit double recovery *should depend upon the contractual expectations*" of the insured to recover from a source for which he has paid.[40]

We therefore conclude that the Superior Court erred as a matter of law by failing to apply the collateral source rule, which required excluding all evidence of Miller's workers' compensation benefits.[41] That brings us to the final question, which is whether or not that error was harmless.[42]

III. Prejudice

[8] Although State Farm was allowed to introduce collateral source evidence at trial, before the jury began its deliberations, the Superior Court instructed the jury that they "may award Todd Miller the amount of the medical bills if [they] find those bills reflecting the medical treatment of Mr. Miller were reasonable and necessary." That instruction, State Farm claims, rendered harmless any error by the Superior Court, because it informed the jury that Miller was entitled to a double recovery. State Farm argues that the jury's zero ($0) damages verdict was based solely on the jury's determination that Miller's medical expenses were not "reasonable and necessary." That is possible. But, it is equally possible that the verdict flowed from the jury's reluctance to award Miller a double recovery. That is so, because the instruction did not *explicitly* inform the jury that Miller was *legitimately entitled* to seek a double recovery.

The Superior Court opined that its jury instruction was consistent with *Spencer v.* ***1057** *Wal–Mart.*[43] In *Spencer* this Court upheld a jury instruction "designed to inform the jury that if it finds for the plaintiff, it should award the full amount of [damages] that it finds to exist by a preponderance of evidence, without deducting any amount paid by workers' compensation."[44] We upheld the instruction in *Spencer* because "there was a significant risk that evidence that Spencer had received workers compensation could mislead the jury to conclude that Spencer was seeking double recovery," to which she was not entitled.[45] But here, Miller was entitled to a double recovery. Moreover, the *Spencer* instruction explicitly required the jury *not to consider* the fact that some of the plaintiff's losses had been paid by her workers' compensation carrier. Here, the jury was not told what it should not consider. Rather, the jury was instructed only to determine whether Miller's expenses were "reasonable and necessary." Finally, the Superior Court's reliance on *Spencer* was misplaced, because in *Spencer* we ultimately determined that no prejudice resulted to the plaintiff because the jury found no liability on the part of

defendant; therefore, the *Spencer* jury never reached the damages issue.[46] Here, however, liability was conceded, and the only issue to be determined by the jury was the amount of Miller's damages. Therefore, the Superior Court's erroneous admission of the collateral source evidence materially prejudiced the Millers and was not harmless.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the Superior Court and remand this case for a new trial.

All Citations

993 A.2d 1049

Footnotes

1 King's insurance bodily injury liability limit was $50,000. The Millers' auto insurance policy, written by State Farm, provided for $100,000 in underinsured motorist coverage. King's car was an "underinsured motor vehicle," as defined in 18 *Del. C.* § 3902(b)(2).

2 19 *Del. C.* § 2363(e) ("Any recovery against the third party for damages resulting from personal injuries ... shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid ... under the Workers' Compensation Act to date of recovery."); *see also Adams v. Delmarva Power & Light Co.*, 575 A.2d 1103, 1107 (Del.1990) (holding that underinsured motorist insurance may preclude its applicability to claims made by workmen's compensation carriers). The Millers' insurance policy excludes underinsured motorist coverage "to the extent it benefits ... any workers compensation ... insurance company."

3 King was subsequently dismissed from the action.

4 The collateral source rule provides that a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source. *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del.1964).

5 In *Spencer v. Wal–Mart Stores East, LP*, 930 A.2d 881, 887 (Del.2007) this Court upheld an instruction informing the jury that plaintiff had received workers' compensation benefits and that her workers' compensation carrier asserted a lien on any amount recovered.

6 In *State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71 (Del.1989), this Court held that an insured may not recover "net wages lost" pursuant to 21 *Del. C.* § 2118 as personal injury protection (PIP) benefits, if the insured has received reimbursement for such losses under a wage continuation plan (a collateral source), except where the collateral source was supported by consideration or a detriment to the insured. Two Justices dissented, arguing that the statutory obligation of the PIP insurer to compensate the insured for lost wages is independent of the insured's right to collect from a collateral source. *Id.* at 78.

7 A condition precedent to an insured's eligibility for underinsured motorist benefits is that the insured be "legally entitled to recover" damages from the underinsured tortfeasor. 18 *Del. C.* § 3902(b)(1); *Nationwide Mut. Ins. Co. v. Nacchia*, 628 A.2d 48 (Del.1993).

8 The parties agreed that the jury "would simply determine a damage amount" and the Superior Court "would apply the policy as a matter of law."

9 On September 1, 2009 the Superior Court denied the Millers' motion for a new trial.

10 *Yarrington*, 205 A.2d at 2.

11 *Nalbone*, 569 A.2d 71. *See supra* note 6.

12 *Spencer*, 930 A.2d at 887. *See supra* note 5.

13 *Id.* at 886.

14 *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 552 (Del.2006) ("This Court reviews questions of law, including the application of the collateral source rule, *de novo*.").

15 *Id.*; *Secrest v. State*, 679 A.2d 58, 61 (Del.1996) (holding that although motions *in limine* are reviewed for abuse of discretion, the Superior Court's application of an interpretation of the statute to undisputed facts when deciding a motion *in limine*, is subject to *de novo* review).

16 *Yarrington*, 205 A.2d at 2.

17 *Guy J. Johnson Transp. Co. v. Dunkle*, 541 A.2d 551, 553 (Del.1988).

18 *James v. Glazer,* 570 A.2d 1150, 1155 (Del.1990). An exception to the inadmissibility of collateral source evidence exists where the injured party raises the issue during his or her own direct examination. *Id.* Here, however, the Millers attempted to exclude the collateral source evidence well in advance of the trial.

19 *Yarrington,* 205 A.2d at 2.

20 *James,* 570 A.2d at 1155.

21 18 *Del. C.* § 3902. *See also Rapposelli v. State Farm Mut. Auto. Ins. Co.,* 988 A.2d 425 (Del.2010).

22 In *Rapposelli,* 988 A.2d at 429, we held that the determination of damages in an underinsured motorist action is based on the insured's entitlement to recover from the wrongdoer, and, therefore, is governed by tort law. The body of tort law includes the "firmly embedded" collateral source rule, which holds that the tort principle that a wrongdoer is liable for all damages that proximately result from his wrong, takes precedence over the principle that a victim of a wrong is entitled to compensation sufficient to make him whole, but no more. *See Mitchell v. Haldar,* 883 A.2d 32, 38 (Del.2005). State Farm argues that because as an underinsured motorist coverage carrier its liability "sounds in contract" rather than in tort, precedence should be given to the latter principle, which disfavors a double recovery by the victim. That argument is oxymoronic: if we were to treat Miller's underinsured motorist claim as completely contractual, State Farm would not be able to argue that Miller's expenses were not "reasonable and necessary" *results* of the accident. *See Rapposelli,* 988 A.2d at 429 ("State Farm conceded the underinsured's negligence, the tortfeasor's tender of her bodily injury limits, and Rapposelli's entitlement to underinsured motorist coverage. State Farm only contested compensatory damages arising from the accident—a contention only a proceeding in tort could solve.").

23 The Superior Court's Order dated April 1, 2009 states that "[a]fter considering the authorities submitted by the parties, including *State Farm Mutual Automobile Insurance Company v. Nalbone,* 569 A.2d 71, 72 (Del.1989), the Court will instruct the jury that the plaintiff received workers compensation benefits, the carrier asserted a lien, and that lien was satisfied for approximately $24,000."

24 21 *Del. C.* § 2118 (titled: "Requirement of insurance for all motor vehicles required to be registered in this State; penalty.").

25 *Nalbone,* 569 A.2d at 76.

26 *Lomax v. Nationwide Mut. Ins. Co.,* 964 F.2d 1343, 1345 (3d. Cir.1992) (applying Delaware law).

27 As explained above, State Farm incorrectly classifies underinsured motorist claims as "purely" contractual. *See* note 22 *supra.*

28 *Nalbone,* 569 A.2d at 72 ("The question before us is essentially one of statutory interpretation [of § 2118].... We ... approach the question from the standpoint of the primary policy considerations underlying the Delaware No–Fault Statute...."); *Id.* at 75 ("The acknowledged no-fault goal of full and speedy recovery of special damages ... is not advanced by permitting double recovery...."). *See also Ameer–Bey v. Liberty Mut. Fire Ins.,* 2003 WL 1847291, at *4 (Del.Super.Ct. Apr.7, 2003) (holding that *Nalbone* is "confined by the facts of that case to a 'no-fault' context."); *Calvarese v. State Farm Mut. Ins. Co.,* 2003 WL 1847355, at *3 (Del.Super.Ct. Apr.7, 2003) (holding that *Nalbone* has no direct application in the underinsured motorist context and is limited to the no-fault situation). *See also Schulze v. Sate Farm Mut. Auto. Ins. Co.,* 2009 WL 1638609 (Del.Super.Ct. Apr.2, 2009) (declining to extend *Nalbone* within the no-fault context, and rejecting State Farm's general "lost nothing—get nothing" argument).

29 21 *Del. C.* § 2118(a)(2) requires that an owner of a motor vehicle have insurance covering, *inter alia,* an injured person's "net amount of lost earnings."

30 *Nalbone,* 569 A.2d at 75.

31 *Rapposelli,* 988 A.2d at 428–29 ("contract law governs *only* those aspects of the underinsured motorist claim that are not controlled by the resolution of facts arising from the accident.") (emphasis added).

32 *Estate of Farrell ex rel. Bennett v. Gordon,* 770 A.2d 517, 520 (Del.2001) (holding that absent specific legislative direction we "are not free to impose limits on recovery, or dilute the force of the collateral source rule."); *Nalbone,* 569 A.2d at 73 (noting that several states have directly modified the collateral source rule by enacting statutes that limit the extent of double recovery or windfall results).

33 *Nalbone,* 569 A.2d at 72 (stating that because "recourse to the statute itself provides little insight into the legislative purpose concerning the certified question ... [w]e thus approach the question from the standpoint of primary policy considerations underlying the Delaware No–Fault Statute").

34 *Lomax,* 964 F.2d at 1347. In *Lomax,* the Third Circuit addressed the same issue raised here—whether under Delaware law the collateral source rule applies to uninsured motorist claims. The Third Circuit correctly predicted that this Court would answer that question in the affirmative. *Id.* at 1348.

35 18 *Del. C.* § 3902(b) ("Every insurer shall offer the insured the option to purchase" underinsured motorist coverage.)

36 *Adams,* 575 A.2d at 1107.

37 *Id.*

38 Here, the WC Carrier resembles the no-fault insurance carrier because workers' compensation is the exclusive remedy for personal injury 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." 19 *Del. C.* § 2304. Where the employee personally pays for underinsured motorist coverage, he creates—by contract—an additional fund to protect himself and his family. *See Adams,* 575 A.2d at 1107 (holding that "[t]he language of Adams' underinsured motorist coverage, precluding its applicability to claims made by workmen's compensation carriers, promotes that public policy *by preventing a diminution in the additional fund* which Adams sought, by contract, to provide as protection for himself and his family.") (emphasis added).

39 *Ameer–Bey,* 2003 WL 1847291, at *5; *Nalbone,* 569 A.2d at 75 ("There is no reason why a risk-averse insured should not be permitted to contract for a double recovery ... if an injury occurs he should be permitted, as a matter of contract law, to receive a double recovery since that is what he had paid for.").

40 *Nalbone,* 569 A.2d at 75.

41 Because the *Nalbone* holding did not apply here (or alternatively, because under the circumstances the consideration supporting the collateral source was Miller's payment of the insurance premium to State Farm), we need not address Miller's argument that he had incurred a detriment by entering the settlement with the WC Carrier. We note, however, that under *Nalbone,* "the detriment of loss of future availability" of the collateral source is sufficient to permit a double recovery. *Id.* at 75.

42 *Mitchell,* 883 A.2d at 40.

43 930 A.2d at 887.

44 *Id.* The instruction read as follows:

> You have heard testimony about the workers' compensation benefits that [the plaintiff] has received. You should not consider the fact that some of the medical expenses and lost wages that he claims in this lawsuit have been paid through workers' compensation because [the plaintiff] has a legal obligation to repay this compensation from any money that you might award in this case. On the other hand, if he does not recover in this case, there is no obligation for [the plaintiff] to reimburse.

45 *Id.* Indeed, in *Spencer* we held that the collateral source rule was inapplicable because Spencer had not settled with her workers' compensation carrier and had a legal obligation to repay any award to that carrier.

46 *Id.*

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