IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LILIEN M. PARSONS,	)	
	)	C.A. No.: 09C-01-029 JTV
Plaintiff,	)	
	)	
v.	)	
	)	
STATE FARM MUTUAL AUTO-MOBILE INSURANCE COMPANY, a foreign corporation,	)	
	)	
	)	
Defendant.	)	

Submitted: August 12, 2011
Decided: December 30, 2011

Jeffrey J. Clark, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiff.

Sherry Ruggiero Fallon, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Plaintiff's
Motion For Summary Judgement
DENIED

Upon Consideration of Defendant's
Motion For Summary Judgement
GRANTED

VAUGHN, President Judge

OPINION

This is a claim for Personal Injury Protection ("PIP") benefits arising from a June 30, 2008 accident in which the plaintiff, Lilien M. Parsons, was injured while operating her motorcycle. She incurred medical expenses in excess of $5,000. Her insurance company, defendant State Farm Mutual Automobile Insurance Company, paid $5,000 but refused to pay more, contending that her coverage, which was $15,000, was subject to a $10,000 deductible. The issue is whether the policy contains a valid $10,000 deductible. Both parties have filed cross motions for summary judgment. For the reasons which follow, I deny plaintiff's motion for summary judgment and grant defendant's motion.

FACTS

The policy was created through the Delaware Assigned Risk, Automobile Insurance Plan on June 6, 2008. The producer of the policy was Insuraco, LLC. In the coverages section of the application, there are certain boxes checked and premiums stated. The PIP section is followed by a "Restricted Coverage (Motorcycles Only)" section with a box checked for a deductible of $10,000, with a premium of $128 written to the right of that. At oral argument on the motions, counsel for the defendant represented that the premium of $128 was the amount of premium for PIP coverage with a $10,000 deductible. The application was signed by the plaintiff's mother on her behalf. A Form A entitled "Delaware Motorists' Protection Act" was filled out at the same time as part of the application process. There are two different copies of Form A in the record. Both elect PIP limits of $15,000 per person and $30,000 per accident and check a box called "(Motorcycle

Risks Only) Restricted Coverage - Excludes off the highway accidents and accidents when no other motor vehicle is involved." To the right of that box is a section with boxes for preprinted deductibles of $100, $250, $500 and $1000. On one copy of Form A, nothing is entered in that deductible section. In the second copy of Form A, however, someone, at some point, hand wrote in 10,000 in that section below the just mentioned preprinted numbers. The circumstances under which the number 10,000 was written in are unclear. The plaintiff contends that an agent for State Farm wrote the 10,000 deductible on Form A after the paperwork reached State Farm. This contention appears to be supported by the following deposition testimony of a State Farm representative :

> Q: Okay. What was different about the [Form A] that you received?
>
> A: The number 10,000 was not written in that space.
>
> Q: Okay. Who wrote the 10,000 in that space?
>
> A: I don't know.
>
> Q: Okay. So, to be clear, in the Form A that you had that was filed – that was provided to you, there was no election of deductible on Form A?
>
> A: Correct.

The representative testified by deposition that he did not know who was responsible for writing the handwritten deductible figure on Form A. If the circumstances of the 10,000 being written on the form were material facts, summary judgment could not

be granted for the defendant. Under the analysis by which I decide the motions discussed hereinafter, however, I have concluded that the circumstances surrounding the handwritten figure of 10,000 on the Form A are not material.[1]

The application was assigned to State Farm, which subsequently issued a policy with PIP coverage of $15,000/$30,000 with a deductible of $10,000.

Ten months earlier, in August 2007, the plaintiff had obtained an Assigned Risk Plan policy from State Farm which also had a $10,000 PIP deductible. That policy was cancelled for non-payment of premiums.

PARTIES' CONTENTIONS

The plaintiff contends that in order for a policy to contain a valid PIP deductible, the requirements of 21 *Del. C.* § 2118(a)(2)(f) must be satisfied, and they were not satisfied in this case. Therefore, the plaintiff contends, the purported $10,000 deductible is invalid and she is entitled to the full $15,000 of coverage. State Farm contends that the plaintiff elected a $10,000 deductible in the application and that it is not responsible for alleged non-compliance with the requirements of 21 *Del C.* § 2118(a)(2)(f) in the context of an Assigned Risk Plan policy.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of

[1] The application and Form A were signed for the plaintiff by her mother. A dispute exists as to whether the mother was authorized to sign for the plaintiff. Based upon its view of this issue, State Farm contends that the policy is void for fraud. However, since I decide the motions on other grounds, I find it unnecessary to address this issue.

material fact and the moving party is entitled to judgment as a matter of law.[2] The moving party bears the burden of establishing the non-existence of material issues of fact.[3] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[4] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[5] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[6] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more throughly into the facts in order to clarify the application of law to the circumstances."[7]

DISCUSSION

21 *Del. C.* § 2118(a)(2)(f) states the manner by which a PIP deductible may be elected in a motor vehicle policy. It provides, in pertinent part, as follows:

> The owner of a vehicle may elect to have the coverage described in this paragraph written subject to certain deductibles . . . This election must be made in writing and

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[2] Super. Ct. Civ. R. 56(c).

[3] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[4] *Id.*

[5] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[6] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[7] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *4 (Del. Super. Jan. 31, 2007).

> signed by the owner of the vehicle; insurers issuing such policies may not require such reductions. For all policies having a deductible pursuant to this paragraph the insured shall receive in writing as a separate document a full explanation of all deductible options available, and the insured shall sign such written explanation acknowledging receipt of a copy of same. In addition the insured shall sign a separate statement acknowledging the specific deductible the insured is selecting and the related cost for the policies with such deductible.[8]

In the case of *Fernandez v. Government Employees,*[9] the plaintiff claimed PIP benefits for expenses related to an accident, but the claim was denied by the insurance company on the grounds that the policy was subject to a $10,000 deductible. The court found that section 2118(a)(2)(f) imposes three requirements: "(1) a document for the insured fully explaining the deductible options; (2) a copy of the document signed by the insured to acknowledge receipt of the explanatory material; and (3) a signed separate statement acknowledging the insured's specific deductible election and the policy cost associated with that deductible."[10] The court further concluded that the second and third requirements could be met by separate statements within the same document.

In this case, if State Farm is bound by the requirements of 21 *Del. C.* §

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[8] 21 *Del. C.* § 2118(a)(2)(f).

[9] 2010 WL 335011, at *2 (Del. Super. Jan. 12, 2010)

[10] *Id.* at *3.

2118(a)(2)(f), it cannot succeed on summary judgment on its claim that a valid $10,000 deductible exists. Section 2118(a)(2)(f) requires two signed statements. Form A would have to serve as one of those statements in this case, and, viewing the evidence in the light most favorable to the plaintiff, it did not even mention a $10,000 deductible when the insured's mother signed it on her behalf. A more in depth analysis of the application of the requirements of § 2118(a)(2)(f) to the specific documents involved here is not necessary to conclude that compliance with the statute cannot be established for summary judgment purposes.

This leads to State Farm's contention that it should not be held liable for the policy producer's alleged non-compliance with 21 *Del. C.* § 2118 because the policy involved here is an Assigned Risk Plan policy. It relies upon *Berg v. American Casualty Co.*[11] and *Johnson v. AIG Ins. Co.*[12] Both cases involved uninsured ("UM") and/or under insured ("UIM") coverage.

Berg was preceded by *State Farm Mut. Auto. Ins. Co. v. Arms.*[13] In *Arms*, the Supreme Court, citing *O'Hanlon v. Hartford Acc. & Indem. Co.*,[14] held that 18 *Del. C.* § 3902 imposed a duty on an insurer to offer its insured additional UM coverage, up to certain limits, whenever a new policy was issued or a policy was changed, other than a renewal, and failure to do so created a continuing offer to do so which could

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[11] 597 A.2d 4 (Del. 1991).

[12] 2004 WL 1732211 (Del. Super. July 26, 2004).

[13] 477 A.2d 1060 (Del. 1984).

[14] 522 F. Supp. 332, 334 (D. Del. 1981).

be accepted by the insured at any time, even after an accident occurred.

In *Berg* the insured applied for insurance under the Assigned Risk Plan. He requested UM/UIM coverage of $100,000 per person, $300,000 per accident, and single limit liability insurance in the amount of $300,000 per accident. He was not offered UM/UIM coverage in an amount equal to his liability coverage. After being injured in an accident and settling for the tortfeasor's policy limits of $100,000, Berg asserted a UIM claim against his insurer, contending that it had been obligated to offer him additional UM/UIM coverage to the extent of his liability coverage. The Supreme Court considered whether the rule it established in *Arms* applied where the policy was issued through the Assigned Risk Program. It stated, in pertinent part, as follows:

> Both *Arms* and *O'Hanlon* dealt with an insurer who issued a policy directly to the insured. However, Berg obtained his insurance through the Assigned Risk Plan. Under the Assigned Risk Plan, an applicant who is unable to procure auto insurance elsewhere files an application with the Insurance Commissioner. In the application, the applicant selects the types and amounts of coverage he desires. Coverage under the Assigned Risk Plan begins at the time the applicant completes the application. The insurance company, however, is unaware that it is the designated carrier until the Insurance Commissioner notifies the insurance company of the assignment. Once notified, the insurance company has fifteen days to issue a policy to the applicant. Thus, the question is whether to impose on an Assigned Risk Plan carrier the same duty to offer additional coverage as is imposed on the typical insurance carrier.

> To impose the same burden on Assigned Risk Plan insurers as we imposed on other insurers in *Arms* would not recognize the very different relationship which exists between the insured and insurer under an Assigned Risk Plan policy. An Assigned Risk Plan insurer has no contact with the insured before the policy goes into effect. Indeed, the insurer is not even aware of the insured's existence until the Insurance Commissioner notifies it of the assignment. That circumstance is vastly different from the insured-insurer relationship contemplated by *Arms*.
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> To apply the holding in *Arms* to an Assigned Risk Plan carrier would lead to the inequitable result that an insured who is involved in an accident after filing an application with the Insurance Commissioner, but before the policy is assigned, would have to be offered additional coverage *after* the accident occurred. Such a windfall for the insured certainly was not the intent of the legislature when enacting section 3902, nor of this Court when interpreting Section 3902.[15]

The Supreme Court concluded that an Assigned Risk Plan insurer is not obligated to offer UM/UIM coverage in an amount equal to the policy's liability coverage where the insured requests specific amounts of UM/UIM coverage on the application under the Assigned Risk Plan, and, by doing so, rejects additional coverage.

In *Johnson* the Superior Court relied, in part, upon the rationale of *Berg* in rejecting a contention that an Assigned Risk Plan insurer was obligated to make a "meaningful offer" of UM coverage.

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[15] *Berg*, 597 A.2d at 6.

The plaintiff correctly contends that *Berg* and *Johnson* are both distinguishable because they involved UM/UIM coverage and did not involve the statutory requirements of 21 *Del. C.* § 2118 pertaining to PIP deductibles. She further correctly contends that § 2118 contains no exception for Assigned Risk Plan policies. Nonetheless, I find the rationale of *Berg* persuasive in this case. In that case the Supreme Court found that a statutory duty which applied to a normal insured-insurer relationship was not imposed on an Assigned Risk Plan insurer because of the nature of the Assigned Risk Plan. I find that the requirements of § 2118(a)(2)(f) for documentation of the election of a deductible in the specific manner required by the statute are not imposed upon an Assigned Risk Plan insurer.

In this case the application requested PIP coverage with a $10,000 deductible. For purposes of this motion, I infer that the policy producer did not comply with 21 *Del. C.* § 2118(a)(2)(f). Despite that failure, based upon the rationale of *Berg*, I find that State Farm was entitled to issue a policy containing the deductible requested in the application and that the deductible requested by the insured is a valid part of the policy.

For these reasons, the plaintiff's Motion for Summary Judgment is ***denied*** and the defendant's Motion for Summary Judgment is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File