SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: James Pankowski, Jr., and Shea Pankowski v. State Farm Mutual Automobile Insurance Co.
C.A. No. N11C-11-203 RRC

Submitted: August 5, 2013
Decided: October 10, 2013

On Defendant's Motion for Summary Judgment.
DENIED.

Dear Counsel:

I. INTRODUCTION

Defendant automobile insurance company has moved for summary judgment against Plaintiff James Pankowski, Jr.'s uninsured motorist claim.[1] Plaintiff claims that the car in which he was riding rear-ended another vehicle while attempting to pass a third vehicle that has never been identified ("Unknown Phantom Vehicle").

[1] Plaintiff Shea Pankowski's action is for loss of consortium.

Plaintiff seeks to recover uninsured motorist damages relating to the Unknown Phantom Vehicle from Defendant on a policy after already recovering liability damages under a separate provision of the insurance policy.

The Court must now determine whether a non-duplication clause in the insurance policy limits recovery in the current claim because Defendant paid on the liability portion of the policy. Defendant contends summary judgment is appropriate because the non-duplication clause bars further recovery. Plaintiff in response contends summary judgment is inappropriate because he has asserted two separate recoverable claims. He argues that the non-duplication clause is "likely void" under Delaware law insofar as it purports to bar his uninsured motorist claim.

The Court concludes that the non-duplication clause does not bar Plaintiff's uninsured motorist claim. Defendant's Motion for Summary Judgment is therefore **DENIED**.

II. FACTUAL AND PROCEDURAL HISTORY

The parties agree that there are no genuine issues of material fact insofar as the interpretation of the insurance policy is concerned.

This motion stems from a motor vehicle accident on August 15, 2008 involving vehicles driven by Edward Doud ("Doud"), Michael Mariano ("Mariano"), and an alleged Unknown Phantom Vehicle. James Pankowski, Jr. ("Plaintiff") was a passenger in the car driven by Doud which was owned and insured by Plaintiff's wife, Shea Pankowski ("Ms. Pankowski"). Doud, who later pled guilty to driving under the influence stemming from the accident,[2] rear-ended Mariano in an accident that caused injuries to Plaintiff. Plaintiff asserts that he is personally unaware of the circumstances that caused the accident because he was leaning back in the passenger seat with his eyes closed.[3] Mariano stated that no other vehicles were in the vicinity of the accident.[4] Doud has asserted, however, that the accident was caused by his attempt to avoid colliding with an Unknown Phantom Vehicle.[5] Defendant argues that no competent evidence supports that factual assertion.

Plaintiff seeks to recover damages pursuant to the alleged involvement of the Unknown Phantom Vehicle from State Farm ("Defendant"), Ms. Pankowski's insurance company, after already recovering payment of the policy limits for a liability claim against Doud. The Policy contains a non-duplication clause that reads as follows:

[2] Ex. A to Def.'s Mot. for Summ. J.
[3] Ex. F to Def.'s Mot. for Summ. J.
[4] Ex. C to Def.'s Mot. for Summ. J.
[5] Ex. D to Def.'s Mot. for Summ. J.

> "***We*** [Defendant] will not pay under Uninsured Motor Vehicle Coverage any damages that have already been paid to or for the ***insured***:
>
> 1. for ***bodily injury*** **or** ***property damage*** involving a vehicle described in item 1., 2., or 4. of the definition of "***uninsured motor vehicle***", by or on behalf of any ***person*** or organization who is or may be held legally liable for the ***insured's bodily injury or property damage***;
> 2. for ***bodily injury*** or ***property damage*** under Liability Coverage or Non-Vehicular Property Damage Coverage or any policy issued by the ***State Farm Companies*** to ***you*** or any ***resident relative***…[6]

Plaintiff filed an initial claim against Defendant and Doud under the policy's liability provision. The basis of that claim was that Doud was responsible for the accident and Plaintiff's injuries. Defendant paid the liability limits of the policy on behalf of Doud in exchange for a release.[7]

Subsequently, Plaintiff filed the current uninsured motorist claim now alleging the partial liability of the Unknown Phantom Vehicle. Defendant filed a motion for summary judgment based on several issues, but the only remaining issue is the one at bar.

III. THE PARTIES' CONTENTIONS

A. Defendant's Contentions

Defendant contends that because Plaintiff already received payments under the liability portion of the policy he is precluded from recovering benefits under the uninsured motorist portion of the policy. Defendant argues that Plaintiff is simply trying to recover twice from the same accident. Defendant argues that this "double recovery" is the exact outcome the valid non-duplication clause seeks to avoid. Defendant contends the payment of policy limits to Plaintiff under the liability portion of the insurance contract should be Plaintiff's only recovery for this accident and that summary judgment should be granted on this basis.

Defendant contends the non-duplication clause is a valid and enforceable "escape clause." Defendant argues that since Plaintiff already received liability limits under the policy, Defendant can enforce the non-duplication provision. The damages, Defendant argues, are not different because he settled a claim for policy

[6] Ex. B to Def.'s Mot. for Summ. J.
[7] Ex. B to Def.'s Supplemental Br. to Def.'s Mot. for Summ. J.

limits and then signed a release. Defendant contends this recovery and release triggers the non-duplication provision and bars the current uninsured motorist claim.

In the alternative, Defendant argues that should the suit go forward, Doud will need to be added to a special verdict sheet so that the jury can apportion fault to all parties. Otherwise, Defendant contends, it will be unable to properly assess damages.

B. Plaintiff's Contentions

Plaintiff contends that there was an Unknown Phantom Vehicle that in part caused the accident and summary judgment is inappropriate in this case because the liability and uninsured motorist claims are two separate and valid claims under this single insurance policy. Plaintiff argues the non-duplication clause bars recovery of damages that have "already been paid" and since this second valid claim has not been paid yet, the clause is inapplicable.

Plaintiff also claims that the policy itself and legal authority do not limit the uninsured motorist claim and the non-duplication clause "is likely" void under Delaware law. Plaintiff interprets the contract as not explicitly precluding "double recovery" in the language of the policy. Defendant, Plaintiff argues, could easily have inserted language allowing only one claim per occurrence under the policy but it failed to do so.

Plaintiff relies on *Colbert v. Government Employees Insurance Co.*, in which an insurance policy provision seeking to reduce uninsured motorist recovery to zero by deducting the amount already recovered for bodily injury was found void under Delaware law.[8] Plaintiff contends that the voided language of the *Colbert* policy is arguably more restrictive than the contested language at bar. Plaintiff argues *Colbert* is not only analogous to the current case, but a string of cases detailed within that case[9] shows that each time an insurer tries to adopt language limiting subsequent uninsured motorist claims, such language has been found void under Delaware law. Plaintiff contends that, much like *Colbert*, Defendant is trying to limit coverage and the clause should likewise be found void.

IV. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[10] On

[8] "Any insurance policy provision that limits or reduces uninsured/underinsured motorist coverage to less than what the statute stipulates is void." 2010 WL 4226502, at *1 (Del. Super. Oct. 25, 2010).
[9] *Id.* at *1-2.
[10] Super. Ct. Civ. R. 56(e).

summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[11] Once a moving party establishes that no material facts are disputed, the non-moving party bears the burden to demonstrate a material fact issue by offering admissible evidence.[12] The non-moving party must do "more than simply show that there is some metaphysical doubt as to material facts."[13]

V. DISCUSSION

"A clause in an insurance policy that declares that an insurer is not liable if there is other valid insurance applicable to a claim or loss commonly is referred to as an 'escape clause.'"[14] Escape clauses, while "generally enforced in recognition that the insurer is entitled to write the policy so to limit its coverage," are nevertheless disfavored by the courts.[15] Courts in Pennsylvania, for example, have gone so far as to void escape clauses as a violation of public policy.[16] This Court does not find Defendant's contention persuasive that the non-duplication provision in the applicable insurance policy is a valid escape clause.

The Court finds this case strikingly similar to *Marchio v. Western National Mutual Insurance Co.*[17] In this Minnesota case, a female passenger was killed in a car accident that was both the fault of her driving husband and an unknown hit and run vehicle.[18] A potential wrongful death claim brought by her son against the husband was settled for the full policy limits for liability coverage and an executed release.[19] Summary judgment was granted in a later uninsured motorist claim focused on the unknown hit and run vehicle based on a "duplicate payments exclusion" in the policy.[20] However, the Court of Appeals of Minnesota reversed the trial court's grant of summary judgment, holding that the ruling violated Minnesota law because it "operates to eliminate UM coverage."[21] It applied the rationale of another Minnesota case[22] with facts very similar to *Colbert*, and held

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[11] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970).
[12] *See* Super. Ct. Civ. R. 56(e); *Phillips v. Del. Power & Light Co*., 216 A.2d 281, 285 (Del. 1966).
[13] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).
[14] 15 Lee R. Russ & Thomas F. Segalla, Couch on Insurance §219:36 (3d ed. Supp. 2012).
[15] *Id.* §219:37 (3d ed. 2005).
[16] *See Id.*
[17] 747 N.W.2d 376 (Minn. Ct. App. 2008).
[18] *Id.* at 378.
[19] *Id.*
[20] *Id.* at 379.
[21] *Id.* at 380.
[22] In *Mitsch v. American National Property and Casualty Company*, a woman injured in a motorcycle accident settled with her insurer and a third-party truck driver for policy limits. 736 N.W.2d 355, 357 (Minn. Ct. App. 2007). Her insurance company attempted to reduce, and ultimately eliminate, her underinsurance coverage by reducing her claim by what had already been paid in liability coverage. *Id.* Summary judgment for the insurance company was reversed. *Id.*

that "attempts by insurance carriers to contractually reduce or eliminate mandated UM coverage violate [that state's] no-fault statute and are invalid."[23]

Applying the same rationale as in *Marchio*, this Court finds the *Colbert* case controls here. As in *Colbert*, Defendant seeks completely to limit Plaintiff's recovery under the uninsured motorist portion of the policy. Defendant seeks to distinguish contrary authority in *Colbert* by emphasizing that the cases offered discuss an offset reduction of benefits and not a non-duplication bar as argued here. Although that case involved a technically different "reduction provision" and the case at bar involves a non-duplication provision, they both achieve the same result. Both provisions completely bar any sort of uninsured motorist recovery by the Plaintiff. The court's analysis in the *Colbert* line of cases applies equally here. Plaintiff is able to pursue a claim under the uninsured motorist provision of the policy and have the facts of his claim that an Unknown Phantom Vehicle was also a proximate cause of the accident determined by a jury.[24]

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary

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[23] *Marchio,* 747 N.W.2d at 381. "Although the insurance policy at issue in *Mitsch* did not involve the same policy language, this court's analysis applies equally here. The duplicate payments exclusion operates in the same manner as the reducing clause in *Mitsch*…." *Id.*

[24] The Court need not reach at this juncture the issue of whether the verdict sheet should require the jury to apportion liability between Doud, Mariano, and any Unknown Phantom Vehicle.