IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALICIA WALLS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 09C-02-216 JRS
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and THE TRAVELERS INDEMNITY COMPANY,	)	
	)	
Defendants.	)	

Date Submitted: February 19, 2010
Date Decided: May 20, 2010

MEMORANDUM OPINION.
Upon Consideration of Defendants, State Farm Mutual Automobile Insurance Company and The Travelers Indemnity Company's Motions for Summary Judgment.
DENIED.

Jonathan B. O'Neill, Esquire, KIMMEL CARTER ROMAN & PELTZ, P.A., Newark, Delaware. Attorney for Plaintiff.

Louis J. Rizzo, Esquire, REGER, RIZZO & DARNALL, LLP, Wilmington, Delaware. Attorney for Defendant, The Travelers Indemnity Company.

Colin M. Shalk, Esquire, CASARINO CHRISTMAN SHALK RANSOM & DOSS, P.A., Wilmington, Delaware. Attorney for Defendant, State Farm Mutual Automobile Insurance Company.

SLIGHTS, J.

I.

This case arises from a motor vehicle accident that occurred on Elkton Road in Newark, Delaware, on March 19, 2005. Defendant, State Farm Mutual Automobile Insurance Co. ("State Farm"), has filed a Motion for Summary Judgment ("the Motion"), in which Defendant, Travelers Indemnity Company ("Travelers") (collectively "Defendants"), has joined. The issue raised in the Motion is whether Plaintiff, Alicia Walls ("Ms. Walls"), may pursue a claim for underinsured motorist ("UIM") benefits when she refuses to disclose the amount of her settlement with the tortfeasor's insurer (Nationwide Mutual Insurance Company).

Defendants argue that in the absence of information regarding the amount of the settlement of the underlying tort claim, it is impossible to determine whether Ms. Walls actually has a claim for UIM benefits as provided for in her State Farm and Travelers policies and 18 *Del. C.* § 3902(b)(3). Section 3902(b)(3) states: "The insurer shall not be obligated to make any payment under this coverage 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."[1] Defendants argue that because Ms. Walls refuses to disclose the amount received as a result of her settlement with the tortfeasor's insurer, their obligation to

[1] 18 *Del. C.* § 3902(b)(3).

pay UIM benefits has not yet been triggered. Defendants further argue that if Ms. Walls is allowed to proceed with her claim for UIM benefits, the amount she is eligible to receive should be offset by the total amount received from Nationwide, that is, the amount of the settlement, not just the amount of the policy limit.[2]

In response, Ms. Walls argues that she provided proof that the tortfeasor's policy limits were exhausted by the settlement. Based on the "clear and plain language expressed in 18 *Del. C.* § 3902(b)(3)," she argues that she has satisfied the conditions precedent to trigger Defendants' UIM coverage. According to Ms. Walls, this is where the inquiry should end. Ms. Walls further argues that any amount received in excess of the tortfeasor's policy limits was not compensation for personal injury and, therefore, should not be offset against the amount she is eligible to receive under the UIM policies.

The question *sub judice* is whether Ms. Walls must disclose the amount of the Nationwide settlement in order to qualify for UIM benefits. The issue is complicated by the fact that, according to Ms. Walls, she is prohibited from disclosing the amount of the Nationwide settlement by the settlement agreement's confidentiality clause. Ms. Walls contends that she should not be forced to breach this agreement by

[2] It appears that Ms. Walls received a settlement from Nationwide in an amount that exceeded the tortfeasor's coverage limits, although it is not clear in the record why an excess settlement was paid.

disclosing the settlement amount because she has provided Defendants with all that they need to know to determine her eligibility for UIM benefits under their policies, *i.e.*, proof that the tortfeasor's coverage limits have been exhausted.

II.

The Court's principle function when considering a motion for summary judgment is to determine whether genuine issues of material fact exist.[3] Summary judgment is appropriate if, after reviewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[4] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[5] The moving party bears the burden of demonstrating that the undisputed facts support his claims or defenses.[6] If the motion is properly supported, then the burden shifts to the nonmoving party to demonstrate that material issues of

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

[4] *Id.*

[5] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). *See also Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467).

[6] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

fact remain for resolution by the ultimate fact-finder.[7]

III.

Section 3902(b)(3) contains a statutory condition precedent that must be satisfied in order to perfect a claim for UIM benefits: "[T]he limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident [must] have been exhausted by payment of settlement or judgments."[8] As the language of the statute is clear and unambiguous, it is not subject to interpretation and the Court must apply the statute as written.[9] Therefore, in order to perfect her statutory entitlement to UIM benefits, Ms. Walls need only offer evidence that the "bodily injury bonds and insurance policies available to the insured" have been exhausted.[10] While she declined to provide settlement documents or disclose the amount of the settlement to Defendants, Ms. Walls averred in her complaint that the tortfeasor's policy limits had been exhausted and that her UIM limits exceeded the tortfeasor's liability limits.[11] She also provided a letter from Nationwide

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[7] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[8] 18 *Del. C.* § 3902(b)(3).

[9] *See Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10, 13 (Del. 1995).

[10] *See* 18 *Del. C.* § 3902(b)(3).

[11] Compl. ¶ 7.

indicating that the tortfeasor's policy limits were exhausted by her claim.[12] As this is all that the statute requires, she has met the statutory condition precedent for UIM coverage under Section 3902(b)(3).[13]

Next, the Court must examine whether the applicable UIM policies contradict or contravene Section 3902. As long as the policy requirements comply with the UIM statute, the Court will not refuse to enforce them.[14] Not surprisingly, Defendants argue that their policies comply with Section 3902, and Ms. Walls contends that they do not. After carefully reviewing the clear and unambiguous provisions of both policies, the Court is satisfied that neither policy contains language that is contrary to the statute. In fact, the UIM portions of both policies contain language identical or substantially similar to language that our Supreme Court has already deemed to be compliant with the UIM statute.[15] Therefore, the Court will not refuse to enforce

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[12] Pl.'s Resp. Opp'n Def.'s Mot. Summ. J. Ex. A.

[13] *Sutch v. State Farm Mut. Auto. Ins. Co.*, 672 A.2d 17, 19-20 (Del. 1995) (citing *Hurst*, 652 A.2d at 13-14).

[14] *See Hurst*, 652 A.2d at 12 ("This Court has also held that '[i]nsurance policy provisions designed to reduce or limit the coverage to less than that prescribed by the Delaware statute, 18 *Del.C.* § 3902, are void." (quoting *Frank v. Horizon Assur. Co.*, 553 A.2d 1199, 1201-02 (Del. 1989))). *See also Peebles*, 688 A.2d at 1377 (holding that the *Hurst* rationale applies equally in the UIM context).

[15] *See, e.g.*, *Peebles*, 688 A.2d at 1377 ("Section 3902(b) mandates that any reduction provided for by Section 3902(b)(3) must be deducted from the total amount of the insured claimant's bodily injuries . . . ."); *Hurst*, 652 A.2d at 13 ("Section 3902(b)(3) specifically permits a set-off or reduction by requiring the 'exhaustion' of other available insurance.").

Defendants' UIM policies on the grounds that they fail to comply with the statutory requirements for UIM coverage.

Finally, the Court must examine whether Ms. Walls has satisfied the contractual terms of her policies. If the policies actually do require her to disclose the amount she received in the settlement with Nationwide, then the fact that Ms. Walls agreed to a confidentiality provision in the settlement agreement will not excuse her from this obligation. The confidentiality restriction is a problem of her own making and will not be held against her UIM carriers. To the extent the policies do require disclosure, then the burden is on Ms. Walls to comply with this condition precedent to her entitlement to UIM benefits under the policies.

Defendants argue that Ms. Walls has failed to comply with the terms of her policies because the tortfeasor's policy limit is not the only amount at issue. According to Defendants, both UIM policies also speak to amounts paid by or on behalf of persons or organizations who may be legally responsible.[16] State Farm further argues that if Ms. Walls received only the policy limits in the settlement with

[16] The State Farm Policy, Section III – Uninsured Motor Vehicle – Coverage U, Limits of Liability 6(a)-(b) provides: "The most we pay will be the lesser of: a. the difference between the amount of the ***insured***'s damages for ***bodily injury***, and the amount paid to the ***insured*** by or for any ***person*** or organization who is or may be held legally liable for the ***bodily injury***; or b. the limits of liability of this coverage." The Travelers Policy, Uninsured Motorists Coverage – Delaware, Limit of Liability C(1) provides: "Any amounts otherwise payable for damages under this coverage shall be reduced by all sums: 1. Paid because of the 'bodily injury' or 'property damage' by or on behalf of persons or organizations who may be legally responsible."

Nationwide, there would be no need for the confidentiality clause on which she bases her refusal to disclose.

Ms. Walls contends that she is entitled to UIM benefits under the Defendants' policies because she has exhausted the tortfeasor's liability limits and yet she still has not been fully compensated for her accident-related injuries. She concedes that Defendants are entitled to a $15,000 offset (representing the tortfeasor's policy limits). She argues, however, that the setoff should be based solely on that amount, and should not take into account any amount that she may have received above and beyond the policy limits. She contends that any amount paid above the policy limits was not compensation for damages for her bodily injuries, but rather "compensation for a 'separate and distinct' claim that may have arisen after the initial motor vehicle accident."[17]

The Court agrees that Ms. Walls has satisfied the contractual conditions precedent for UIM coverage. She has exhausted available liability insurance limits and allegedly has not yet been fully compensated. Her eligibility for coverage, however, does not end the inquiry. The question remains as to how much UIM coverage is available to her. In this regard, neither Ms. Walls nor her attorney have

[17] Letter from Jonathan B. O'Neill, Attorney for Plaintiff, to The Honorable Joseph R. Slights, III 3 (Feb. 11, 2010).

provided any information regarding the nature or details of the "separate and distinct" claim she settled with the tortfeasor's carrier, and the Court cannot determine whether Defendants are entitled to a setoff in excess of the tortfeasor's policy limits without additional information about this settlement. Therefore, issues of material fact remain in dispute with respect to Ms. Walls' settlement with the tortfeasor, the amount and nature of any recovery above and beyond the tortfeasor's policy limits, and the extent to which that amount offsets Defendants' obligations to Ms. Walls under her UIM policies.

If Ms. Walls' counsel has accurately described the excess settlement as representing funds paid for claims not related to "bodily injury," then the Court agrees that Defendants have not pointed to, and the Court has been unable to locate, any language in either policy that would require the Court to reduce her UIM recovery by the amount of that settlement. The Court will note, however, that the cases interpreting and applying Section 3902(b)(3) make clear that the statute's purpose is to prevent double coverage (and double recoveries), and that the focus with respect to set-off is on the amount actually received from the tortfeasor as

compensation for "bodily injury," not the policy limits.[18]

While Ms. Walls has satisfied the trigger for UIM coverage contained in Section 3902(b)(3) and appears, thus far, to have complied with Defendants' UIM policy requirements, the question remains whether she can establish the *prima facie* elements of her claim, particularly the amount of her recoverable damages. If Ms. Walls fails to present evidence that will enable the Court to determine the appropriate set-off from any verdict she might receive, then the Court will be unable to determine the amount of her recoverable damages and she will, therefore, receive nothing.[19] In order for the Court to determine whether any amount must be reduced from the jury's verdict pursuant to the UIM policies, the Court must receive evidence regarding: (1) the total amount she received in settlement from the tortfeasor or his carrier; and (2)

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[18] *Nationwide Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d 1374, 1378 (Del.1997) ("[W]e hold that Section 3902(b) mandates that any reduction provided for by Section 3902(b)(3) must be deducted from the total amount of the insured claimant's bodily injuries and not from the limits of the insured claimant's underinsurance coverage."); *Hurst*, 652 A.2d at 14 ("[W]e hold the provision in the . . . Policy, that permitted a deduction for the amount paid 'by or for any liable parties' from the Policy limits, is void as an exclusion contrary to the express language of Section 3902(b)(1) and (3). Those sections in the statute only authorize a set-off or reduction (exhaustion) of other insurance coverage against the full amount of damages for bodily injury that could be legally recovered by the claimant from the tortfeasor.").

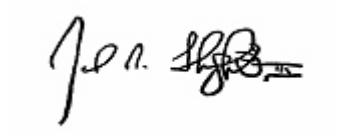
[19] *See Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 428-29 (Del. 2010) (holding that the determination of damages in a UIM action is governed by tort law, which requires proof of damages); *Hall v. Dorsey*, 1998 WL 960774, at *2 (Del. Super. Nov. 5, 1998) ("The tort of negligence contains the elements of: (1) duty, (2) breach, (3) causation, and (4) damages."). *See also Rapposelli*, 988 A.2d at 427 (noting that the trial court reduced the jury award by the amount already paid by the tortfeasor's insurer).

the exact nature of the claim(s) for which money was paid to Ms. Walls in settlement. Only after the Court receives information regarding the nature of the claim(s) can the Court determine whether a set-off is appropriate, i.e., whether the settlement represented "damages for bodily injury" as set forth in the Defendants' policies. Although this determination theoretically could be made after the jury's verdict, from a practical perspective, all parties (and the Court) would benefit from the disclosure of this information (perhaps with an appropriate protective order in place) prior to trial. The parties shall meet and confer and submit either a joint or separate proposal on how to resolve this remaining issue within fourteen (14) days.

IV.

Based on the foregoing, Defendants' Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

JRS, III/sb