SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
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May 21, 2010

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Re: Sylvia Littlejohn and Darryl Littlejohn v. State Farm Mutual Automobile Insurance Company
C.A. No. 09C-05-023 JAP

Dear Counsel:

In this personal injury case, Plaintiff Sylvia Littlejohn ("Plaintiff") is seeking uninsured motorist coverage from Defendant State Farm Mutual Automobile Insurance Company ("Defendant"), her insurance carrier, for injuries sustained while travelling as a passenger with a co-employee from Dover to Wilmington for work. Plaintiff has previously sought and accepted

worker's compensation benefits in connection with this same accident. Defendant has moved for summary judgment alleging that Plaintiff's exclusive remedy under the circumstances is worker's compensation. For the reasons stated below, Defendant's motion is **GRANTED**.

Facts

On January 29, 2007, Plaintiff, an employee of RGIS, and Thermon Spence, her supervisor, were working at an offsite store in Dover, Delaware. After work, as part of his job responsibilities, Mr. Spence drove Plaintiff from the Dover store to the RGIS facility in Wilmington. While driving from Dover to Wilmington that day, Mr. Spence was involved in a motor vehicle accident, in which Plaintiff was injured.

Mr. Spence's insurer, Safe Auto Insurance Company, filed an action against Mr. Spence and Plaintiff in Pennsylvania seeking a declaratory judgment that Mr. Spence was not entitled to coverage due to an applicable policy exclusion for operating the vehicle during the course of any business or employment. The Philadelphia Court of Common Pleas entered summary judgment in favor of Safe Auto on March 23, 2009.

Plaintiff sought and received worker's compensation benefits for her injuries sustained during the accident. She then filed a complaint in this Court seeking to recover uninsured motorist benefits from her insurance

company. Defendant has moved for summary judgment on the ground that worker's compensation is Plaintiff's exclusive remedy in this case.

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."[1] When considering a motion for summary judgment, the facts must be viewed "in the light most favorable to the nonmoving party."[2] Furthermore, "[f]rom those accepted facts the court will draw all rational inferences which favor the non-moving party."[3]

Analysis

Pursuant to 18 *Del. C.* §3902(a), uninsured motorist ("UM") coverage provides insurance benefits for those "who are legally entitled to recover damages from owners or operators of uninsured or hit-and-run vehicles for bodily injury . . . or personal property damage resulting from the ownership, maintenance or use of such uninsured or hit-and-run motor vehicle."[4] Plaintiff's insurance policy tracks the language of the statute and states that

[1] Super. Ct. Civ. R. 56(c)
[2] *Mason v. USAA*, 697 A.2d 388, 392 (Del. 1997).
[3] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).
[4] 18 *Del. C.* § 3902(a).

Defendant "will pay damages for bodily injury and property damage an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle."[5] Therefore, in order to qualify for UM benefits under §3902 and her policy, Plaintiff must be "legally entitled to recover" damages from Mr. Spence.

Delaware's Worker's Compensation Act "provides the exclusive remedy against the employer for employees who are injured on the job from acts 'arising out of and in the course and scope of employment.'"[6] Under §2363 of the Act, an injured employee may recover against a third party tortfeasor when the third party is "other than a natural person in the same employ."[7] In general, co-employees are excluded as third parties who may be sued by an injured employee, and therefore common law negligence suits against co-employees are barred under the Act.[8] However, the Delaware Supreme Court has interpreted §2363 to provide immunity to co-employees only when the co-employee is acting in the course of employment.[9]

It is undisputed that Plaintiff sought and received worker's compensation benefits for the injuries sustained in the January 28 accident. It is also undisputed that Mr. Spence was acting in the course of his

[5] Pl. Opp. to Def. Mot. for Summ. J., Ex. A, at 13.
[6] *Grabowski v. Mangler*, 956 A.2d 1217, 1220 (Del. 2008); 19 *Del. C.* § 2304.
[7] *Grabowski*, 956 A.2d at 1220.
[8] *Id*.
[9] *Id*.

employment at the time of the accident. Therefore, §2363 is inapplicable to this case and Plaintiff is barred by the exclusivity provision of the Worker's Compensation Act from bringing any negligence claims against Mr. Spence.

Plaintiff claims that summary judgment should not be granted because there is a factual dispute as to whether she was acting in the course and scope of her employment at the time of the injury. However, under §2304 the worker's compensation benefits she is receiving are her remedy for "an accident arising out of and in the course of employment." Indeed, when applying for those benefits, she submitted an affidavit stating that she "was involved in an industrial accident on January 29, 2007."[10]

Plaintiff contends that under *Grabowski* Plaintiff's decision to accept worker's compensation benefits does not bar her from arguing that the injury occurred outside the scope of her employment. In *Grabowski*, the plaintiff was injured when his co-employees bound him with duct tape. The Supreme Court held that the plaintiff's receipt of worker's compensation benefits did not preclude him from bringing a third party negligence suit against the co-employees under §2363 because their conduct was outside the scope of their employment. Neither *Grabowski* nor §2363 support Plaintiff's assertion that she may accept worker's compensation and claim that she was acting outside

[10] Def. Mot. for Summ. J., Ex. 7, at ¶ 1.

the scope of her own employment. Both parties agree that Mr. Spence was acting within the scope of his employment at the time of the accident, and therefore, the exception in §2363 as interpreted by *Grabowski* is inapplicable to this case.

Plaintiff cites to a Pennsylvania district court decision, *Nationwide Insurance Company v. Chiao,*[11] for the proposition that a plaintiff can recover UM benefits while simultaneously receiving worker's compensation benefits after being injured as a passenger in a co-worker's car. Despite Plaintiff's lengthy analysis of this case, however, she fails to recognize that the district court opinion in *Chiao* was reversed by the Third Circuit Court of Appeals in 2006.[12] The Third Circuit held that the plaintiff was not "legally entitled to recover" from the negligent co-employee under Pennsylvania's UM statue and worker's compensation act (which contain language very similar to Delaware's) and therefore, that the plaintiff was not eligible to recover under her UM policy.[13]

Plaintiff also relies on *Southern Farm Bureau Casualty Insurance Company v. Pettite,*[14] where an Arkansas court held that the exclusive remedy provisions of worker's compensation law did not bar the plaintiff

[11] 374 F. Supp. 2d 432 (M.D. Pa. 2005).
[12] *Nationwide Mut. Ins. Co. v. Chiao,* 186 F. App'x 181, 2006 WL 1785367 (3d Cir. June 29, 2006).
[13] *Id*. at 185.
[14] 924 S.W.2d 828 (Ark. Ct. App.).

from bringing an underinsured motorist claim against his insurance company. Specifically the court stated that "Arkansas case law interpreting our uninsured and UIM statutes has expressed a public policy that requires coverage in the instant case."[15] However, this Court is not bound by Arkansas case law or its public policy. Moreover, the majority of states that have considered this issue have come to the opposite conclusion of *Petitte*.[16]

The Delaware Supreme Court has held that the phrase "legally entitled to recover" is unambiguous and should be interpreted literally.[17] Under the plain language of the UM statute, Plaintiff is not "legally entitled to recover" from Mr. Spence because of the exclusive nature of the worker's compensation benefits she is receiving. Therefore, under her policy with Defendant, she is not entitled to UM benefits.

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[15] *Id*. at 832.

[16] *Ex parte Carlton*, 867 So.2d 332 (Ala. 2003); *Allstate Ins. Co. v. Boynton*, 486 So.2d 552 (Fla. 1986); *Williams v. Thomas*, 370 S.E.2d 773 (Ga. Ct. App. 1988); *State Farm Mut. Auto. Ins. Co. v. Royston*, 817 P.2d 118 (Haw. 1991); *Williams v. Country Mut. Ins. Co.*, 328 N.E.2d 117 (Ill. App. Ct. 1975); *O'Dell v. State Farm Mut. Auto. Ins. Co.*, 362 N.E.2d 862 (Ind. Ct. App. 1977); *Lee v. Allstate Ins. Co.*, 467 So.2d 44 (La. Ct. App. 1985); *Hopkins v. Auto-Owners Ins. Co.*, 200 N.W.2d 784 (Mich. Ct. App. 1972); *Peterson v. Kludt*, 317 N.W.2d 43 (Minn 1982); *Wachtler v. State Farm Mut. Auto. Ins. Co.*, 835 So.2d 23 (Miss. 2003); *Kough v. New Jersey Auto. Full Ins. Underwriting Assn.*, 568 A.2d 127 (N.J. Super. Ct. App. Div. 1990); *Cormier v. National Farmers Union Prop. & Cas. Co.*, 445 N.W.2d 644 (N.D. 1989); *Peterson v. Utah Farm Bureau Ins. Co.*, 927 P.2d 192 (Utah 1997); *Aetna Cas. & Sur. Co. v. Dodson*, 367 S.E.2d 505 (Va. 1988). *See generally* John B. Ludington, Annotation, *Automobile uninsured motorist coverage: "legally entitled to recover" clause as barring claim compensable under workers' compensation statute*, 82 A.L.R.4th 1096 (1990).

[17] *Nationwide Mut. Ins. Co. v. Nacchia*, 628 A.2d 48, 52 (Del. 1993).

Conclusion

For the reasons stated above, Defendant's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

oc: Prothonotary