

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

KYLIE A. SHUBA and	:	
MICHAEL D. SHUBA,	:	C.A. No. 09C-03-015 WLW
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
UNITED SERVICES	:	
AUTOMOBILE ASSOCIATION,	:	
a foreign corporation,	:	
	:	
Defendant.	:	

Submitted: February 26, 2010

Decided: May 14, 2010

ORDER

Upon Plaintiffs' Motion for Summary Judgment. *Denied.*
Upon Defendant's Motion for Summary Judgment. *Granted.*

I. Barry Guerke, Esquire of Parkowski Guerke & Swayze, P.A., Dover, Delaware; attorneys for the Plaintiffs.

Stephen P. Casarino, Esquire and Joshua H. Meyeroff, Esquire of Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware; attorneys for the Defendant.

WITHAM, R.J.

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Defendant United Services Automobile Association (“USAA”) filed a Motion for Summary Judgment on November 20, 2009. On December 18, 2009, Plaintiffs Kylie A. Shuba (“Kylie”) and Michael D. Shuba (“Michael”) (collectively, the “Shubas”) responded by filing a Consolidated Motion for Summary Judgment. Both motions were subsequently re-noticed for February 26, 2010. USAA filed a response to the Shubas’ consolidated motion on January 27, 2010. Based upon the reasons set forth below, The Shubas’ Motion for Summary Judgment must be denied, and USAA’s Motion for Summary Judgment must be granted.

STIPULATED FACTS

The parties have stipulated to the facts for the purpose of these cross motions for summary judgment. On or about July 6, 2002, Linda Ann Banning (the “Decedent”) was killed in an automobile accident in Kent County, Delaware. The Decedent was killed when a 1999 Mazda Protege, driven by Daniel V. Gatto (“Gatto”), struck the 1995 Mercury Sable (“Decent’s vehicle”) she was a passenger in. Gatto failed to negotiate a curve. The Decedent’s husband, Lester E. Banning, III (“Lester”) was driving the Decedent’s vehicle at the time of the accident. He was also killed. Michael, the Decedent’s biological son, was in the rear seat of the Decedent’s vehicle and sustained injuries as a result of the accident. The Decedent’s biological daughter, Kylie, was not in the Decedent’s vehicle.

On January 11, 2005, binding arbitration was held in the wrongful death action of *R. Duane Shuba et al. v. Gatto*, C.A. No. 04C-07-003 JTV. USAA did not participate in the binding arbitration. The arbitrator awarded \$791,000 to Michael for

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the wrongful death of his mother, the Decedent, and \$7,000 for his personal injuries. The arbitrator also awarded Kylie \$648,000 for the wrongful death of her mother, the Decedent. In addition, Michael and Kylie were awarded \$100,000 each for the wrongful death of their step-father, Lester.

As a result of the binding arbitration award, Gatto's automobile insurance carrier, New Jersey Manufacturers Insurance Company, paid its combined single bodily injury coverage policy limits of \$100,000 to all claimants, exhausting that coverage. A release was executed thereafter expressly preserving any underinsured motorist claims.

Nationwide General Insurance Company, the automobile insurance carrier covering the Decedent's vehicle, paid its UIM coverage policy limits of \$300,000 to all claimants, exhausting that coverage. A release was executed thereafter expressly preserving any further UIM claims.

At the time of the accident, Michael and Kylie's step-mother, Gloria Shuba ("Gloria"), maintained an automobile insurance policy through USAA (the "Policy"). The Policy is at the heart of the present cross motions for summary judgment. The Policy provides UIM coverage in the amount of \$300,000 per person / \$500,000 per accident. The Policy further provides that UIM coverage exists for "BI [bodily injury] sustained by a covered person and caused by an auto accident."

The Decedent was not a resident of Gloria's household at the time of the accident. The Decedent and her ex-husband, R. Duane Shuba, Gloria's current husband, shared joint custody of Michael and Kylie. Consequently, for purposes of

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the present motions, USAA concedes that Michael and Kylie were residents of Gloria's household.

Standard of Review

When there are cross motions for summary judgment, the Court is to consider Superior Court Civil Rule 56(h). According to Rule 56(h):

Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.¹

Summary judgment should be rendered only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.³ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁴

¹ Super. Ct. Civ. R. 56(h).

² Super. Ct. Civ. R. 56(c).

³ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

⁴ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

DISCUSSION

There are essentially three questions presently before this Court: (1) may Michael and Kylie recover under Gloria's policy for the wrongful death of their mother, the Decedent; (2) is the language of the Policy consistent with 18 *Del. C.* § 3902(b); and (3) is there a compensable injury under the Policy? All three questions, however, appear to have been previously addressed by the courts in *Adams-Baez v. General Accident Company*,⁵ and *Temple v. Travelers Indemnity Company*.⁶

Nevertheless, the Shubas ask this Court to disregard *Adams-Baez* and *Temple*. In fact, the Shubas concede that, if this Court agrees with *Adams-Baez*, that decision will be dispositive in the case *sub judice*. The Court has reviewed the record, along with the parties' arguments, and agrees with the *Adams-Baez* and *Temple* decisions.

Recovery Under the Policy for Wrongful Death

The *Adams-Baez* court noted that a wrongful death plaintiff "stands in the shoes of the [d]ecedent."⁷ In other words, where coverage is not available to the decedent, it is not available to the wrongful death plaintiff.⁸ Here, the Decedent was

⁵ 2005 WL 2436220 (Del. Super.).

⁶ 2000 WL 33113814 (Del. Super.), *aff'd* by, *Temple v. Travellers [sic] Indemnity Co.*, 2001 WL 760864 (Del. Supr.).

⁷ 2005 WL 2436220, at *3.

⁸ *Id.*; *see also*, *Temple*, 2000 WL 33113814, at *6 ("The Court finds that a fair reading of 18 *Del. C.* § 3902(b) limits recovery to bodily injuries suffered by the policy's insured or if those injuries had led to the death of the insured, those benefits may flow to his/her legal representative. It does not allow coverage for injuries sustained by non-insured individuals, regardless of their

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not covered by the Policy. It was never contemplated by any party that the *Decedent* would be covered by *Gloria's* policy. Consequently, neither Michael nor Kylie may recover under Gloria's policy for the wrongful death of their mother, the Decedent.

Language of the Policy

The Shubas contend that *Adams-Baez* and *Temple* both incorrectly allowed the language of the insurance policy to be more restrictive than 18 *Del. C.* § 3902 ("Section 3902") permits. The Shubas assert that Section 3902 does not require a named insured to sustain bodily injuries to recover under a policy. The *Temple* court, however, rejected a similar argument that "the policy inappropriately limits coverage or is . . . void as against public policy," and found that "the language found in [the insurance company's] policy [was] consistent with 18 *Del. C.* § 3902(b)."⁹ And as noted above, the Delaware Supreme Court affirmed the *Temple* court's decision.¹⁰

Nevertheless, this Court has independently examined the parties arguments and the language of Section 3902. This Court agrees with the *Adams-Baez* and *Temple* courts and concludes that, here, "a fair reading of 18 *Del. C.* § 3902(b) limits recovery to bodily injuries suffered by the policy's insured, or, if those injuries had led to the

relationship to the policyholder").

⁹ 2000 WL 33113814, at *6.

¹⁰ *Temple v. Traveller's [sic] Indemnity Co.*, 2001 WL 760864, at *1 (Del. Supr.) (providing that, "it appears to the Court that the judgment of the Superior Court should be affirmed on the basis of and for the reasons set forth in its decision dated November 30, 2000.").

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death of the insured, those benefits may flow to his/her legal representative.”¹¹ As the *Adams-Baez* court noted, “an insurance company has the right to place reasonable limits on the policy, including restricting coverage to the named insured.”¹²

Compensable Injury

Given that the Shubas cannot recover under the Policy for the wrongful death of the Decedent, and that the Policy appropriately limited recovery to “bodily injury,” the Shubas may only recover under the Policy if they suffered bodily injuries as a result of the accident. The Shubas assert that “bodily injury” includes psychological or emotional responses, such as sleeplessness, anxiety, and depression. Under this definition, the Shubas contend, both Michael and Kylie, as covered individuals, sustained “bodily injuries” sufficient to recover under the Policy.

This issue, however, was also specifically addressed by the *Adams-Baez* court. The *Adams-Baez* court concluded that, “it is important for this Court to respect the clear and unambiguous language within the insurance policy and to interpret the insurance policy with common sense, unless ambiguity exists.”¹³ The *Adams-Baez* court further noted that, “[t]he policy precisely defines ‘bodily injury’ and there is nothing . . . to suggest that the Plaintiff has suffered any injuries specifically covered

¹¹ *Temple*, 2000 WL 33113814, at *6.

¹² 2005 WL 243620, at *2.

¹³ *Id.*

within that definition.”¹⁴

The Policy here clearly defined “bodily injury.”¹⁵ And similar to *Adams-Baez*, the Court has seen nothing to suggest that the psychological or emotional damages sought by Michael and Kylie are specifically covered within that definition.

Michael’s Damages

The only remaining issue concerns Michael’s claim for UIM benefits for his alleged bodily injuries sustained in the accident. Michael was a passenger in the Decedent’s vehicle during the accident. The arbitrator awarded him \$7,000 for the personal injuries he sustained as a result of the accident. The parties concede that Michael resided with Gloria at the time of the accident.

USAA maintains that it is not bound by the arbitration award of \$7,000 because it had no notice, no meaningful opportunity to participate, and no opportunity to appeal. The Shubas, however, do not contend that USAA is bound by the results of the binding arbitration. Consequently, the amount of personal injury damages allegedly sustained by Michael as a result of the automobile accident remains at issue.

¹⁴ *Id.*

¹⁵ The Policy defined “bodily injury” as “bodily harm, sickness, disease or death.”

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CONCLUSION

For the foregoing reasons, Michael and Kylie Shuba's Consolidated Motion for Summary Judgment must be **DENIED**. USAA's Motion for Summary Judgment is **GRANTED**, such that all claims for wrongful death benefits against USAA are dismissed with prejudice.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Order Distribution