IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANTHONY CALVARESE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No. 00C-11-243 RRC
STATE FARM MUTUAL	)	
INSURANCE COMPANY,	)	
	)	
Defendant.	)	

Submitted: January 30, 2003
Decided: April 7, 2003

Upon Defendant's "Motion in Limine [to Preclude the Plaintiff's Claim for Lost Wages]." DENIED.

ORDER

This 7th day of April, 2003, upon consideration of the submissions of the parties, it appears to this Court that:

1. This is a breach of contract action brought by plaintiff Anthony Calvarese ("Plaintiff") against his automobile insurer, defendant State Farm Mutual Insurance Company ("State Farm").[1] Plaintiff was involved in an automobile accident in February 1999 with a third-party tortfeasor, as a result of which Plaintiff alleged he "sustained physical injuries…caused by

[1] State Farm informs the Court that its proper name is "State Farm Mutual Automobile Insurance Company." Def.'s Mot. at 1 n.1.

the negligence of [that] underinsured motorist."[2] Plaintiff further alleged that State Farm "breached…[its] policy of [underinsured motorist] insurance [with Plaintiff] by failing to reimburse…his damages and economic losses [in connection with that accident]."[3] State Farm denied liability but "admitted that at the relevant time the [P]laintiff was insured by a policy of insurance issued by State Farm…and…provid[ing] underinsured motorist coverage…."[4]

Prior to filing his Complaint, Plaintiff settled with the alleged tortfeasor by accepting the tendered limits of the tortfeasor's "no-fault" insurance coverage in exchange for a release of all claims against him and his insurer.[5] Additionally, Plaintiff was fully compensated for his lost wages by his employer through a non-contributory wage continuation plan.[6]

Currently before the Court is a defense motion in limine, the resolution of which requires the Court to determine whether a damages-preclusion statute that is part of Delaware's compulsory "no-fault" insurance

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[2] Compl. ¶ 3.

[3] Id. ¶ 5.

[4] Answer ¶ 4.

[5] Ex. "B" to Def.'s Mot.

[6] Letter from Ann C. Hines (Benefits Administrator to the New Journal) to Kenneth M. Roseman of 3/12/99 (Ex. "C" to Def.'s Mot.).

law applies equally to Plaintiff's elective "uninsured/underinsured motorist" coverage. Because the Court finds that the preclusion statute does not apply and that the lost wages Plaintiff now seeks to recover from his underinsured motorist insurance carrier would come from an independent "fund" created by Plaintiff himself, State Farm's Motion in Limine is **DENIED**.

2. State Farm moves this Court to enter an order precluding Plaintiff's lost wage claim from trial because "the collateral source rule[[7]] is inapplicable to this case and any double recovery of the lost wages would [therefore] be impermissible[ ][,]"[8] and because "even if the…rule applied…Plaintiff's eligibility for no-fault benefits precludes [his] recovery of the lost wages…."[9] With regard to its assertion of the non-applicability of the "collateral source" rule, State Farm contends that that doctrine applies "only where payments received from the collateral source are supported 'by

[7] Under the "collateral source" rule, "a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source." Yarrington v. Thornburg, 205 A.2d 1, 2 (Del. 1964) (stating that the "collateral source" rule is "firmly embedded" in the law of the State of Delaware). Black's similarly defines the rule: "if an injured party receives compensation for its injuries from a source independent of [a] tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay." BLACK'S LAW DICTIONARY 256 (7th ed. 1999).

[8] Def.'s Mot. ¶ 4.

[9] Id. ¶ 5.

actual consideration or detriment' paid by [a] plaintiff."[10] With regard to its assertion of the preclusive effect of Delaware's "no-fault" statute to the present case,[11] State Farm argues that "Plaintiff was 'eligible' to receive lost wage benefits under his no-fault policy[,]" and that "[w]hether he simply elected not to make a claim under his…['no-fault'] coverage, or whether the benefits could not be paid because he had already received his lost wages through his salary continuation plan, is immaterial…."[12] State Farm further contends that "the applicability of the collateral source rule to the case at bar must pass through the filter of the ['']no-fault['] statute."[13]

In response, Plaintiff argues that section 2118(h) does not apply to his claim for lost wages because he "was not eligible to receive no-fault benefits which duplicated his disability benefit[s][.]"[14] "Since…[section] 2118(h) does not preclude the introduction of…[P]laintiff's wages[,]" Plaintiff argues that he "may recover those special damages…under the collateral

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[10] Id. ¶ 4 (citation omitted).

[11] Delaware's "no-fault" statute provides "[a]ny person eligible for benefits described in…[the statute, including lost wages]…is precluded from pleading or introducing into evidence in an action for damages against a tortfeasor those damages for which compensation is available under…[the statute]…whether or not such benefits are actually recoverable." DEL. CODE ANN. tit. 21, § 2118(h) (1995).

[12] Def.'s Mot. ¶ 7.

[13] Letter from David G. Culley to the Court of 11/20/02, at 1 (Dkt. #31).

[14] Resp. ¶ 2.

source rule."[15] Plaintiff additionally contends that Duphily v. Delaware Electric Cooperative, Inc.[16] supports his argument of the admissibility of his lost wages because that case "recognized" a plaintiff's right to recover from a tortfeasor even when that plaintiff is "eligible" to recover from an insurer. In response, however, State Farm argues that "Duphily does not address the issue before the Court[ ][,]" because that case "deal[t] with the interplay of a workers compensation carrier's rights and the ["no-fault"] preclusion statute, which is not involved at the case at bar…."[17]

3. The "collateral source" rule was recognized as being "firmly embedded" in the law of Delaware by the Delaware Supreme Court in Yarrington v. Thornburg.[18] In that case, the Court explained that the doctrine "permit[s] the tortfeasor to obtain the advantage of payments made by himself or from a fund created by him[ ][,]" because under those circumstances, "the payments come…from the defendant himself [and not

[15] Id. ¶ 3.

[16] 662 A.2d 821 (Del. 1995) (en banc) (holding that in an action against an alleged tortfeasor, a workers' compensation insurance carrier which has already compensated an injured worker is permitted to introduce evidence of the injured worker's medical expenses to protect the carrier's right of subrogation).

[17] Letter from David G. Culley to the Court of 1/28/03, at 2 (Dkt. #27).

[18] 205 A.2d 1 (Del. 1964) (affirming the Superior Court's crediting of $5,000 to the defendant-tortfeasor after a verdict in the plaintiff's favor because that amount (previously paid to the plaintiff pretrial) resulted directly from defendant's own insurance and thus was the product of a "fund" created by him).

from a 'collateral source']."[19] The Yarrington Court did not clearly delineate whether the insurance at issue there was of the "no-fault" or "uninsured/underinsured" motorist variety.

In State Farm Mutual Automobile Insurance Company v. Nalbone,[20] however, the Delaware Supreme Court indicated that, insofar as "no-fault" insurance benefits are concerned, "[t]he no-fault statute…limits the collateral source rule by precluding an insured from suing a tortfeasor for damages for which compensation is available under the ["no-fault"] statute[ ][,]" and that such preclusion results "whether or not…[the "no-fault"] benefits are actually recoverable."[21] Because the injured plaintiff in Nalbone had already been compensated by her employer through a non-contibutory wage continuation plan, though, her insurer was held entitled to a declaratory judgment that it did not owe the plaintiff (its insured) any "no-fault" benefits.

The Nalbone Court went on to hold that "the extent to which the collateral source rule should be applied to permit double recovery should

[19] Yarrington, 205 A.2d at 2.

[20] 569 A.2d 71 (Del. 1989) (en banc) (holding that an insured is not entitled to be compensated for net wages lost while the insured is unable to work if the insured has received or is receiving compensation pursuant to a non-contributory wage continuation plan).

[21] Nalbone, 569 A.2d at 73 (quotations omitted).

depend upon the contractual expectations that underlie the collateral source payment."[22] After stating that a double recovery should be permitted in certain circumstances, the Nalbone Court held that "the conditions under which double recovery should be allowed [will] best be determined by examining the consideration that has been paid[ ]";[23] in that Court's view, "any consideration will support recovery," so long as that consideration is "not based on speculation."[24] However, the Court stated, "[i]f the collateral payments are received *gratis*, then their receipt should bar recovery…."[25] The Nalbone Court did not, however, address the applicability of the "collateral source" rule to the uninsured/underinsured motorist coverage context.

However, in what was termed a "case of first impression under the laws of Delaware," the United States Court of Appeals for the Third Circuit predicted in Lomax v. Nationwide Insurance Company,[26] that "the Delaware Supreme Court would apply the collateral source rule to the [uninsured

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[22] Id.

[23] Id.

[24] Id. at 76.

[25] Nalbone, 569 A.2d at 75.

[26] 964 F.2d 1343 (3d. Cir. 1992).

motorist context[ ][,]"[27] *i.e.*, a risk-adverse insured who had paid a premium for uninsured motorist coverage (which is supplemental coverage under Delaware law,[28] in contrast to compulsory "no-fault" coverage) would be entitled to a "double recovery." The Lomax Court's reasoning was predicated in large part upon what it determined were the separate policies behind the two types of coverage: 1) the fact that "no-fault benefits are designed to assure prompt payment to an injured person irrespective of fault[ ]" while uninsured/underinsured motorist benefits are "designed to compensate innocent persons injured by an automobile who are unable to obtain recompense from unknown or [impoverished] negligent tortfeasors…";[29] 2) the fact that uninsured/underinsured motorist benefits are "based on fault[ ]";[30] and 3) the fact that uninsured/underinsured coverage is "not compulsory[ ]" while "no-fault coverage…is mandatory…."[31]

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[27] Lomax, 964 F.2d at 1348.

[28] Title 18, section 3902 of the Delaware Code (Delaware's uninsured/underinsured motorist insurance statute) provides that uninsured coverage can be "rejected in writing, on a form furnished by the insurer…by an insured named therein…." DEL. CODE ANN. tit. 18, § 3902(a)(1) (1999).

[29] Lomax, 964 F.2d at 1346.

[30] Id.

[31] Id.

The Lomax Court ultimately concluded "[i]f an insurer is allowed to reduce the judgment against it by the amount of collateral benefits paid," then "insureds will suffer a net loss because they will derive no benefit from the [uninsured/underinsured motorist] insurance for which they paid premiums."[32]

4. Here, Plaintiff has predicated his Complaint solely on the ground that State Farm owes him underinsured motorist benefits. Thus, strictly speaking, Nalbone has no direct application to the merits of the motion currently under consideration. That case was limited to a "no-fault" situation, as indicated by its assertion that application of the "collateral source" rule to a "no-fault" lawsuit (such as existed there) would "sanction[ ] a windfall for insureds by introducing a fault-based doctrine into a no-fault system of insurance."[33] Nalbone does apply to this case, however, insofar as the Court therein held that any "double recovery" depends "upon the contractual expectations that underlie the collateral source payment."[34]

Although Plaintiff has already been compensated for his wage loss through his non-contributory wage continuation plan, he also maintained

[32] Id. at 1347.

[33] Nalbone, 569 A.2d at 76.

[34] Id. at 73.

underinsured motorist coverage on his vehicle for which he paid consideration; that such consideration was paid, *i.e.*, in the form of an insurance premium, is evident by State Farm's agreement that "at the relevant time the [P]laintiff was insured by a policy of insurance issued by State Farm…and…provid[ing] underinsured motorist coverage…."[35] And as Nalbone indicates, insofar as double recovery is concerned, "any consideration will support recovery…."[36]

The Court is not persuaded that, as State Farm maintains, "the applicability of the collateral source rule to the case at bar must pass through the filter of the [']no-fault['] statute."[37] The Court initially notes that section 2118(h) is part of Delaware's "no-fault" statute, and not the "uninsured/underinsured" coverage described at title 18, section 3902. Given the entirely separate policies and statutory frameworks behind the two types of coverage, this Court declines to find that a portion of the "no-fault" statute applies equally to the uninsured motorist statute context.

[35] Answer ¶ 4.

[36] Nalbone, 569 A.2d at 75.

[37] Letter from David G. Culley to the Court of 11/20/02, at 1.

Moreover, the case law relative to section 2118(h) makes it clear that such an extension in unwarranted. In Mullins v. Klase,[38] (a case in which this Court held that the preclusive effect of section 2118(h) applied to a situation wherein a "no-fault" insurer had become insolvent because the statute specifically states it operates "whether or not such benefits are actually recoverable"), this Court expressly stated:

> Thus, Yarrington and Nalbone do not address [']boarding[']
> damages, especially…["no-fault"] claims. At the most, they may control
> whether [a] [p]laintiff can recover from [its]…["no-fault"] carrier on top
> of the health insurance benefits [it] already has received. If it comes to
> that, the [C]ourt assumes without deciding, that [a] [p]laintiff might
> recover from [its]…["no-fault"] carrier if [it] proves that [it], and not [its]
> employer, paid for the health insurance coverage that [it] received.[39]

Under that reasoning, Mullins is in agreement with Yarrington and Nalbone that a party should enjoy the benefits of a source of recovery supported by consideration and created by that party itself, *i.e.*, the underinsured motorist policy Plaintiff had here. To hold otherwise would permit Plaintiff to "derive no benefit from the [underinsured motorist] insurance for which he paid premiums."[40]

This Court's finding that Plaintiff should be permitted to recover his lost wages at trial under his "uninsured/underinsured motorist" coverage is

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[38] C.A. No. 99C-04-182, 2001 WL 1198946 (Del. Super. Sept. 28, 2001).

[39] Mullins, 2001 WL 1198946, at *2.

[40] Lomax, 964 F.2d at 1347.

consistent with the Lomax Court's holding. This Court finds the Lomax Court's prediction that Delaware would permit such a recovery to be persuasive, as that prediction is supported by the above-cited Delaware case law, *i.e.*, a risk-averse insured may contract for additional recovery by purchasing supplemental "uninsured/underinsured motorist" coverage. This finding is also in accord with Plaintiff's assertion that the Lomax decision "recognizes that the applicability of the collateral source rule can be limited in no[-]fault cases[41] for reasons that are not appropriately considered in tort actions."[42] The Court therefore adopts the Lomax Court's reasoning, despite State Farm's contention that the holding of the Third Circuit Court of Appeals "is at best incidental to the question before this Court and at wors[t] simply ignores the applicability of…[title 21, section 2118(h) and the cases interpreting it]."[43]

Accordingly, State Farm's motion is denied insofar as State Farm seeks an order precluding Plaintiff from recovering his lost wages under his underinsured motorist coverage at trial. Because Plaintiff separately paid consideration for that coverage, he should be able to recover those wages,

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[41] Presumably Plaintiff is referring to the effect of section 2118(h), although the Lomax decision does not explicitly reference that statute.

[42] Letter from Kenneth M. Roseman to the Court of 11/4/02, at 1 (Dkt. #22).

[43] Letter from David G. Culley to the Court of 11/20/02, at 2.

subject to proof at trial, even though his employer already compensated Plaintiff.[44]

5. Based on the above,[45] State Farm's Motion in Limine is **DENIED**.

IT IS SO ORDERED.

_____/s/_____
Richard R. Cooch, J.

oc: Prothonotary
xc: Kenneth M. Roseman, Esquire, Attorney for Plaintiff
David G. Culley, Esquire, Attorney for Defendant

[44] This result can be compared to that of a similar defense motion in limine to exclude a lost wage claim filed in Ameer-Bey v. Liberty Mutual Fire Insurance Company, C.A. No. 00C-11-031 RRC. By Order entered in that case simultaneously herewith, the Court has denied the defendant's motion in that case because the plaintiff there had established an independent "fund" from which to recover lost wages by virtue of maintaining supplementary "uninsured/underinsured motorist" coverage on her vehicle, despite plaintiff's being unable to recover under her "no-fault" coverage by virtue of a wage continuation plan to which she contributed nothing. Ameer-Bey v. Liberty Mut. Fire Ins. Co., Del. Super., C.A. No. 00C-11-031, Cooch, J. (Apr. 7, 2003) (ORDER).

[45] Given the above analysis, the Court need not consider Plaintiff's secondary argument that Duphily applies to the facts of this case because that case "recognized" a plaintiff's right to recover from a tortfeasor even when that plaintiff is "eligible" to recover from an insurer.