IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MICHAEL MAHAFFEY, individually and as Administrator of the Estate of Deloris L. Mahaffey,	)	C.A. No. 00C-08-006
Plaintiff,	)	
and	)	
CHRISTINE MAHAFFEY,	)	C.A. No. 00C-08-048
Plaintiff,	)	
5.	)	
ESTATE OF TINA MARIE BAILY, JOHN BAILY, Administrator,	)	
Defendant.	)	

Submitted: May 7,2001
Decided: July 26, 2001

Upon Consideration of Defendant's Motion for Summary Judgment - Estate's Survival Action. Granted.

Upon Consideration of Defendant's Motion for Declaratory Judgment. Granted.

Constantine F. Malmberg, Esq., Dover, Delaware. Attorney for Plaintiff.

Robert B. Young, Esq., Dover, Delaware. Attorney for Defendant.

WITHAM, J.

Mahaffey v. Estate of Tina Marie Bailey
C.A. Nos. 00C-08-006 and 00C-08-048
July 26, 2001

ORDER

Upon consideration of the Defendant's Motion for Summary Judgment and second Motion for Declaratory Judgment, it appears that:

(1) This is a personal injury case involving a car accident that occurred on December 5, 1999. In that crash, both drivers died -- Tina Marie Bailey ("Defendant") and Deloris L. Mahaffey. Allegedly, the accident occurred because of Bailey's negligence. At the time of her death, Deloris Mahaffey was single and had no issue. Subsequent to her death, Michael and Christine Mahaffey, the parents of Deloris L. Mahaffey, filed separate actions under Delaware's Wrongful Death Statute, 10 *Del. C.* §3721, *et. seq.* Michael Mahaffey also alleged a Survival Action on behalf of his daughter ("the Estate"), pursuant to 10 *Del. C.* § 3701.

(2) The Defendant, Tina Marie Bailey, had liability coverage with State Farm. Through their attorney, State Farm filed identical motions against all of the parties in this case. Essentially, Defendant brings two motions: first, a motion for summary judgment against the Survival Action brought by Michael Mahaffey on behalf of his daughter's estate; and second, a motion for declaratory judgment that the insurance policy's "each person" limit of $100,000 and not the "each accident" limit of $300,000 applies to the Estate's Survival Action and the separate Wrongful Death actions filed by the parents.

I. Defendant's Motion for Summary Judgment.

(3) *Superior Court Civil Rule 56(c)* states that summary judgment should be granted "if 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] Summary judgment cannot be granted unless after viewing the record in light most favorable to the non-moving party, there are no material issues of fact.[2] The moving party bears the burden of showing that there are no material issues of fact; however, if the moving party "supports" the motion under the Rule, the burden shifts to the non-moving party to show that material issues of fact do exist.[3] In *Merrill v. Crothall-American, Inc.*, the court stated that the "role of a trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is

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[1] ***Sup. Ct. Civ. Rule 56(c).***

[2] ***Moore v. Sizemoore*, Del. Supr., 405 A.2d 679, 680 (1979).**

[3] ***Id.***

necessary to decide the case, but not to decide such issues."[4]

[4] *Merrill v. Crothall-American, Inc.*, **Del. Supr., 606 A.2d 96, 99 (1992).**

(4) State Farm brings the motion for summary judgment against the Survival Action of the Estate of Deloris Bailey claiming there is no material issue in dispute. Pursuant to the Survival Action statute, 10 *Del. C.* § 3701, *et. seq.*, the estate of an individual may maintain a personal injury action for its decedent. To do so, the Estate must prove that conscious pain and suffering existed after the incident and before the death.[5] In *Magee v. Rose*, the Court found that "proof of such pain and suffering as are substantially contemporaneous with death, or mere incidents to it, or as to a short period of insensibility intervening between fatal injuries and death, is not sufficient."[6] Therefore, to properly bring a survival action the Estate must prove that Deloris Mahaffey had conscious pain and suffering in the time between the accident and her death.

(5) The Estate claims that a dispute exists as to this material fact of conscious pain and suffering. In an investigative report performed by the insurer, Violet Tripp, a passenger in Deloris Mahaffey's vehicle, claimed that she heard Deloris Mahaffey moaning and that Deloris Mahaffey responded when Ms. Tripp called out her name. This was Ms. Tripp's recollection for approximately four months, until her deposition. At the deposition, Ms. Tripp stated that she could not be sure whether Mahaffey responded to her when she called out. When asked why

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[5] ***Coulson v. Shirks Motor Express Corp.*, Del. Super., 107 A.2d 922 (1954).**

[6] ***Magee v. Rose*, Del. Supr., 405 A.2d 143, 146 (1979).**

she was uncertain, she recalled how she also thought she heard Larry Heverin, another passenger in Deloris Mahaffey's car, respond to her, but he was actually unconscious. According to Ms. Tripp, she is not certain whether she actually heard a response or whether it was merely wishful thinking that she heard her friends responding to her.

(6) Ms. Tripp's equivocal testimony does not create a genuine dispute concerning a material issue of fact. The Estate has no proof of survival beyond the accident other than Ms. Tripp's earlier statements which have been recanted, to some extent. On the other hand, Defendant points out that Deloris was declared dead at the scene of the accident by Dr. Esterwitz of Kent General Hospital through the emergency personnel. Therefore, Defendant's motion for summary judgment is GRANTED as the Court finds that Plaintiff is unable to prove "by a preponderance of the evidence that the decedent did not die instantaneously upon impact and that there was some appreciable interval of conscious pain and suffering after the injury."[7]

II. Declaratory Judgment interpreting the Insurance Policy's "each person" limit.

(7) State Farm also argues that both parents Wrongful Death claims and the

[7] ***Magee* at 146.**

Estate's Survival Action are subject to the $100,000 limit for "each person" under Bailey's insurance policy. Christine Mahaffey concedes that the $100,000 policy limit for "Each Person" should apply to her and Michael Mahaffey's Wrongful Death Claims. In opposition, Michael Mahaffey, on behalf of himself and the Estate, argues that the $300,000 "Each Accident" provision should apply to the Estate's Survival Action and both parents Wrongful Death Actions. Based upon the Court's earlier ruling on the summary judgment motion, only the Wrongful Death actions brought by each of the parents remains. Therefore, the Court does not have to decide whether the $100,000 "each person" limit applies to all three causes of action. The Court must only decide if the two wrongful death actions should be considered together as one claim under the "Each Person" policy provision. The State Farm policy in question states the following:

> The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability – Coverage A – Bodily Injury, Each Person, Each Accident." Under "Each Person" is the amount of coverage for all damages due to bodily injury to one person. "Bodily injury to one person" includes all injury and damages to others resulting from this bodily injury. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person," for all damages due to bodily injury to two or more persons in the same accident.

(8) Michael Mahaffey argues that the insurance policy is vague and ambiguous and should therefore be interpreted against the insurer. Policy provisions such as the one in question have been interpreted by many Courts. Courts consistently

find that these provisions are not vague or ambiguous.[8] In *Emmons v. Hartford Underwriters Ins. Co.*, the Supreme Court was dealing with the UM/UIM section of an insurance policy, but the same interpretation principles would apply to the facts in this case. The Court in *Emmons* interpreted the policy provision by stating that the reason the "per accident" policy limit would apply is because the "policy does not contain language that restricts the right of recovery to the "per person" limit when only one person has suffered actual bodily injury." The Supreme Court contrasted the lack of limiting language in the policy they were interpreting with other cases where the policy language was similar to that in the case *sub judice*. In their comparison, the Supreme Court noted that the difference between the results in the *Gill* and *Ortiz* cases and their case, *Emmons*, was the actual limiting language within the policy. Therefore, implicitly, the Supreme Court upheld the decisions which interpreted provisions similar to the one in question here. (9) A brief synopsis of the *Gill* and *Ortiz* decisions referenced by the Supreme Court will further clarify the issue. Under Delaware law, only one cause of action lies with respect to the death of a person. In *Gill v. Nationwide Mutual Ins. Co.*, this Court stated that "multiple parties can only recover damages resulting from one wrongful death claim, . . . the statute does not create multiple causes of action from the death of a single individual. Therefore, wrongful death claims are subject to the 'per person' limits of insurance

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[8] ***Essick v. Barksdale*, D. Del., 882 F. Supp. 365, 371 (1995); *Gill v. Nationwide Mutual Ins.* Co., Del. Super., C. A. No. 90C-FE-11, Ridgely, P.J. (Feb. 22, 1994), Mem. Op. at 4; *Ortiz v. White*, Del. Super., C. A. No. 90C-10-233-1-CV (Consolidated), Babiarz, J. (May 6, 1993), Mem. Op. at 4-5.**

policies (citations omitted)."[9] Much of the language of this opinion was taken from the *Ortiz* case deciding a similar issue. Shortly thereafter, a District Court decision found that under Delaware law "only one cause of action lies with respect to the death of a person, regardless of the number of those claiming damages. 10 *Del. C.* § 3724(e). As further indication of the derivative nature of the single claim, the statute also speaks in terms of 'injury' resulting from the wrongful death, rather than 'injuries.'"[10] The Court was referring to 10 *Del. C.* § 3724 (c), (d) and (e) which state in part that:

> (c) In an action under this subchapter, damages may be awarded to the beneficiaries proportioned to the injury resulting from the wrongful death. The amount recovered shall be divided among the beneficiaries in shares directed by the verdict.
> (d) In fixing the amount of damages awarded under this subchapter, the court or jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death.
> (e) Only 1 action under the subchapter lies in respect to the death of a person.

Therefore, based on the Wrongful Death Act, the State Farm Insurance Policy

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[9] ***Gill v. Nationwide Mutual Ins. Co.*, Del. Super., C.A. No. 90C-FEW-11, Ridgely, P.J. (Feb. 22, 1994), Mem. Op. at 4.**

[10] ***Essick* at 371.**

language and the common law, the two wrongful death claims, brought by Christine and Michael Mahaffey individually, will be treated as one person/claim and subject to the $100,000 limit for "Each Person."

Defendant's Motion for Summary Judgment as to the Estate's Survival Action is **GRANTED**. Defendant's Motion for Declaratory Judgment as to determining whether the $100,000 "Each Person" policy limit should apply to the parent's individual Wrongful Death claims is **GRANTED.**

IT IS SO ORDERED.

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Judge

oc: Prothonotary
xc: Order Distribution