

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

<b>THOMAS E. DEPTULA,</b>	)	
	)	
Plaintiff,	)	
	)	
	)	C.A. No. 01C-04-166 JRS
v.	)	
	)	
<b>HORACE MANN INSURANCE</b>	)	
<b>COMPANY,</b>	)	
	)	
Defendant.	)	

*Upon Defendant's Motion for Summary Judgment.*  
**GRANTED.**

Date Submitted: March 1, 2002  
Date Decided: May 30, 2002

W. Christopher Componovo, Esquire. Law Office of Joseph J. Rhoades, 1225 King Street, Suite 1200, Wilmington, Delaware 19801. Attorney for Plaintiff.

Richard W. Pell, Esquire. Tybout Redfearn & Pell, Eleventh Floor, 300 Delaware Avenue, P.O. Box 2092, Wilmington, Delaware 19899. Attorney for Defendant.

**SLIGHTS, J.**

## **I. INTRODUCTION**

The issue presented in Defendant’s Motion for Summary Judgment is one of first impression: when determining whether a claimant is entitled to underinsured motorist coverage, does the claimant need to establish that the tortfeasor’s liability insurance coverage is less than the coverage available under *each* underinsured motorist policy that may be available, or is it sufficient that the claimant establish that the tortfeasor’s coverage is less than the coverage available under only *one* of the available underinsured motorist policies. For the reasons that follow, the Court holds that the claimant must establish that a tortfeasor is an underinsured motorist by comparing, on a policy-by-policy basis, each available underinsured motorist policy with the tortfeasor’s liability policy.

## **II. FACTS**

### **A. Plaintiff Recovers From Available Liability Coverage and The Primary Underinsured Motorist Coverage**

Plaintiff, Thomas Deptula (“Plaintiff”), was operating a vehicle owned by Keene Compressed Gas (“Keene”) and insured by Transamerican Insurance Group (“Transamerican”) when it was struck from the rear by a vehicle driven by the tortfeasor, Constance Carty. The resulting injuries were serious. Keene’s Transamerican policy provided \$300,000 in underinsured motorist (“UIM”) coverage;

the tortfeasor's policy provided \$100,000 in liability coverage and \$100,000 in UIM coverage. Plaintiff received the limits of available liability coverage from the tortfeasor's policy. By comparing Keene's Transamerican UIM coverage to the tortfeasor's liability coverage, it was determined that the tortfeasor was an underinsured motorist for purposes of the Transamerican policy.<sup>1</sup> Accordingly, Plaintiff recovered the \$300,000 UIM policy limits from Keene.

**B. Plaintiff Seeks Coverage From a Second Underinsured Motorist Policy**

Plaintiff now seeks additional UIM benefits from his own insurance carrier, Horace Mann ("Defendant"). The Horace Mann policy provides \$100,000 in UIM coverage--the same amount of liability coverage provided by the tortfeasor's policy. Both parties agree that if the comparison of the Horace Mann policy and the tortfeasor's policy is dispositive, Plaintiff would not be entitled to UIM benefits from Horace Mann because the UIM coverage does not exceed the liability coverage. Plaintiff argues, however, that it has already been determined that the tortfeasor is an underinsured motorist by comparing her policy limits (\$100,000) to the limits of the primary UIM policy (Transamerican's \$300,000). Because the tortfeasor is

---

<sup>1</sup>Delaware law defines an underinsured motor vehicle as "[o]ne for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage. These limits shall be stated in the declaration sheet of the policy." Del. Code Ann. tit. 18, §3902(b) (1999).

underinsured, Plaintiff argues that it is of no consequence that the secondary policy's UIM limit (Horace Mann's \$100,000) is the same as the limit of the tortfeasor's liability policy. Plaintiff contends that once a tortfeasor is found to be underinsured, he or she remains underinsured for all intents and purposes and the amount of coverage available is not governed by anti-stacking provisions.

In support of their Motion for Summary Judgment, Horace Mann contends that Plaintiff is precluded from triggering his personal UIM policy because both Plaintiff and the tortfeasor carry the same amount of coverage. Defendant argues that the determination of whether a tortfeasor is underinsured must be made on a policy-by-policy basis, so that in some instances a tortfeasor may be an underinsured motorist with respect to one UIM policy but not with respect to another.

### **III. DISCUSSION**

#### **A. Standard of Review**

When considering a motion for summary judgment, the Court is required to examine the record, all pleadings, affidavits and discovery.<sup>2</sup> The Court must view this evidence in the light most favorable to the non-moving party.<sup>3</sup> Summary

---

<sup>2</sup>*Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

<sup>3</sup>*See United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

judgment may be granted only when the Court's review of the record reveals that there are no genuine

issues of material fact and that the moving party is entitled to judgment as a matter of law.<sup>4</sup> The moving party bears the initial burden of illustrating the absence of a material factual dispute.<sup>5</sup> Then, the burden shifts to the non-moving party to demonstrate that there are material issue of fact that remain in dispute.<sup>6</sup>

The parties agree that no material facts are in dispute. The Court is called upon to interpret a statute and the outcome of this exercise will be dispositive of the motion.

**B. The Tortfeasor Is Not Underinsured With Respect To The Horace Mann UIM Policy**

---

The purpose of UIM coverage is to protect innocent persons from the negligence of “unknown or impecunious tortfeasors.”<sup>7</sup> As stated, Delaware law defines an underinsured motor vehicle as “one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage....[as] stated in the declaration

---

<sup>4</sup>*Dale v. Town of Elsmere*, 702 A.2d 1219, 1221 (Del. 1997).

<sup>5</sup>*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)(citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962)).

<sup>6</sup>*Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

<sup>7</sup>*Frank v. Horizon Assurance Co.*, 553 A.2d 1199, 1201 (Del. 1989).

sheet of the policy.”<sup>8</sup> “[I]n order to determine whether a tortfeasor is ‘underinsured’ the statute requires that a comparison be made between the total of all liability insurance policies available on behalf of the tortfeasor and the limits of each particular underinsured motorist policy that the policyholder is attempting to access.”<sup>9</sup>

Although it does not address the issue specifically, the Delaware Supreme Court’s decision in *Ayres* provides meaningful guidance here.<sup>10</sup> In *Ayres*, the Court held that Delaware law precludes the stacking of UIM coverage for purposes of the threshold inquiry into whether UIM coverage provided by any one UIM policy is triggered. In reaching that conclusion, the Court relied upon the specific language of 18 *Del. C.* §3902(b)(2) and stated:

The omission of the terms “all” and “total” in reference to UIM coverage, in conjunction with the use of the singular word “policy”, reflects a concerted decision by the legislature to have each underinsured motorist policy considered separately *vis-a-vis* all liability policies.<sup>11</sup>

Plaintiff contends that *Ayres* addresses only the threshold determination of

---

<sup>8</sup>Del. Code Ann. tit. 18, §3902(b)(2) (1999).

<sup>9</sup>*Colonial Ins. Co. v. Ayres*, 772 A.2d 177, 181 (Del. 2001).

<sup>10</sup>*Id.* Counsel was unable to locate decisions or other authority in Delaware or other jurisdictions that address the issue before the Court.

<sup>11</sup>*Id.*

whether a tortfeasor is underinsured. He notes that *Ayres* does not address the amount of recovery available once the threshold determination of underinsured status (without stacking) is made. Thus, according to Plaintiff, once a tortfeasor already has been found to be underinsured, *Ayres* does not prohibit a claimant from recovering additional UIM benefits, even if the UIM policy provides coverage less than or equal to liability coverage.

While the Court's holding in *Ayres* addresses only how to determine if a tortfeasor is underinsured as a threshold issue, its interpretation of the statutory language suggests that in each instance where a claimant seeks to access coverage from a UIM policy, the claimant must first establish that the tortfeasor's liability coverage is less than the UIM coverage from which the claimant seeks recovery. *Ayres'* examination of the statutory definition of an underinsured motor vehicle, specifically its examination of the use of the singular and plural with respect to UIM coverage and liability coverage, provides support for Horace Mann's position that a claimant must establish that the tortfeasor's liability insurance coverage is less than the coverage available under *each* underinsured motorist policy available.<sup>12</sup> With no authority to the contrary, this Court is persuaded that the Supreme Court's

---

<sup>12</sup>*Id.* (holding that the General Assembly intended that "each underinsured motorist policy [be] considered separately vis-a-vis all liability policies.")



interpretation of the statutory definition of “underinsured motorist” requires a policy-by-policy analysis to determine a claimant’s eligibility for coverage from any one UIM policy.

The public policy at the heart of UIM coverage is the protection of innocent persons from impecunious tortfeasors.<sup>13</sup> This protection, however, cannot be afforded at the expense of a tortured reading of the UIM statute and a result-oriented disregard for the controlling precedent interpreting the statute.<sup>14</sup> At times, the proper application of the UIM statute will result in the denial of coverage.<sup>15</sup>

## V. CONCLUSION

For the foregoing reasons, the Defendant's Motion for Summary Judgment must be **GRANTED**.

**IT IS SO ORDERED.**

---

Judge Joseph R. Slights, III

Original to Prothonotary

---

<sup>13</sup>*Frank*, 553 A.2d at 1201.

<sup>14</sup>*See e.g. E.I. duPont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 66 (Del. Ch. 1995) (“I cannot engage in a result-oriented analysis to eviscerate the exclusion by manipulating the clear and ambiguous language...to find uncertainty where none exists.”)

<sup>15</sup>*See e.g. Hubbs v. Liberty Mutual Ins. Co.* 1998 WL 960749 (Del. Super.) (denying coverage under UIM policy to claimants based upon interpretation of the statutory definition of underinsured motorist); Ayres, *supra*, (same).