IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DONALD R. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N17C-03-206 ALR
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation,	)	
	)	
Defendant.	)	

Submitted: September 11, 2017
Decided: October 16, 2017

Upon Defendant's Motion for Summary Judgment
GRANTED

MEMORANDUM OPINION

Gary S. Nitsche, Esquire, Joel H. Fredericks, Esquire, Weik, Nitsche & Dougherty, Attorneys for Plaintiff

Beth H. Christman, Esquire, Brian V. Dermott, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Attorneys for Defendant

Rocanelli, J.

This is an insurance dispute arising out of a motor vehicle accident that occurred on October 22, 2014. Plaintiff Donald Johnson ("Plaintiff") was a pedestrian when he was struck by a motor vehicle operated by Fredia Brinkley ("Brinkley"). At the time of the accident, Brinkley was insured under a policy ("Brinkley's Policy") with Defendant State Farm Mutual Automobile Insurance Company ("State Farm"). Brinkley's Policy provided Brinkley with liability, uninsured motorist ("UM"), and underinsured motorist ("UIM") coverage. Following the accident, State Farm tendered the liability coverage policy limits on Brinkley's Policy to Plaintiff. Plaintiff then sought to recover UIM benefits from State Farm as an insured under Brinkley's Policy, which State Farm denied.

Procedural Background

Plaintiff filed a complaint on March 20, 2017, alleging that he is entitled to UIM benefits as an insured under Brinkley's Policy with State Farm. State Farm moves for summary judgement, contending that Plaintiff does not qualify as an insured under Brinkley's Policy and that Brinkley's vehicle does not meet the required definition of uninsured vehicle. Plaintiff opposes State Farm's motion.

Standard of Review

The Court may grant summary judgment only where the moving party can "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] The moving party bears the initial burden of proof and, once that is met, the burden shifts to the non-moving party to show that a material issue of fact exists.[2] At the motion for summary judgment phase, the Court must view the facts "in the light most favorable to the non-moving party."[3]

Discussion

Brinkley's Policy provides UIM coverage for injuries that "an *insured* is legally entitled to recover from the owner or driver of an *uninsured motor vehicle*."[4] The policy defines "insured" to include the named insured, resident relatives, and "any other person while occupying [the named insured's] car."[5] It further defines "occupying" to mean "in, on, entering, or exiting."[6] In addition, Brinkley's Policy defines "uninsured motor vehicle" to exclude any vehicle "whose ownership, maintenance, or use is provided Liability Coverage by this policy."[7]

The parties do not dispute the material facts in this case. However, State Farm contends, as a matter of law, that Plaintiff is not entitled to UIM benefits based on two terms in the policy language. First, State Farm contends that Brinkley's vehicle

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[1] Super. Ct. Civ. R. 56.
[2] *Moore v. Sizemore*, 405 A.2d 679, 680–81 (Del. 1979).
[3] Brzoska v. Olson, 668 A.2d 1355, 1364 (Del. 1995).
[4] Defendant's Mot. Summ. J., Ex. C, 13 (emphasis in original).
[5] *Id.* at 12.
[6] *Id.* at 4.
[7] *Id.* at 13.

had liability coverage, thereby excluding it from the definition of uninsured vehicle in the UIM insuring agreement. Second, State Farm argues that Plaintiff cannot meet the definition of insured to recover UIM benefits under Brinkley's Policy. The Court rejects State Farm's argument that Brinkley's vehicle was not an uninsured vehicle, but agrees that Plaintiff cannot qualify as an insured on Brinkley's Policy.

I. State Farm's definition of "uninsured motor vehicle" is inconsistent with Delaware statutory and decisional law.

Delaware courts have consistently held that insurers may not reduce or limit UIM coverage on the grounds that they also provided liability coverage on the same policy.[8] For example, in *Tillison*, this Court considered an insurance policy that similarly defined "uninsured motor vehicle" to exclude vehicles having liability coverage under the same insurance policy.[9] The Court found that the definition of "underinsured motor vehicle" in Delaware's UIM statute "makes no distinction based upon the number of vehicles or insurance policies involved in a collision."[10] Therefore, the Court concluded that defining "uninsured motor vehicle" to exclude

[8] *See, e.g., Tillison v. GEICO Secure Ins. Co.*, 2017 WL 2209895 (Del. Super. May 15, 2017); *Baunchalk v. State Farm Mut. Auto. Insur. Co.*, 2015 WL 12979117 (Del. Super. Oct. 26, 2016); *Pankowski v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 5800858 (Del. Super. Oct. 10, 2013); *Colbert v. Gov't Employees Ins. Co.*, 2010 WL 4226502 (Del. Super. Oct. 25, 2010).
[9] *Tillison*, 2017 WL 2209895, at *1.
[10] *Id*. at *3 (citing 18 *Del. C.* §3902).

vehicles with liability coverage was inconsistent with Delaware's UIM statute and the underlying public policy.[11]

In this case, State Farm is relying on a similar definition of "uninsured motor vehicle" to exclude UIM coverage on the basis that it already paid liability benefits under the same policy. However, as illustrated by *Tillison*, this restrictive definition of "uninsured motor vehicle" is inconsistent with Delaware statutory and decisional law. Therefore, Brinkley's vehicle is not excluded from the definition of "uninsured motor vehicle" merely because it also had liability coverage.

II. Plaintiff does not qualify as an insured under Brinkley's Policy.

Even though Brinkley's vehicle qualifies as an "uninsured motor vehicle" under the policy, Plaintiff is still not entitled to UIM benefits because Plaintiff cannot qualify as an insured under Brinkley's Policy. As discussed, Brinkley's Policy defines "insured" to include "any other person while occupying [the named insured's] car,"[12] and defines "occupying" to mean "in, on, entering, or exiting."[13] In addition, the Delaware Supreme Court held that a person is an "occupant" for UIM purposes when he or she is "within a reasonable geographic perimeter of an insured vehicle or engaged in a task related to the operation of a vehicle at the time

[11] *Id.* at *2-*3.
[12] Defendant's Mot. Summ. J., Ex. C, 12.
[13] *Id.* at 4.

injuries are sustained."[14] Here, it may be true that Plaintiff was in a close geographic perimeter to the vehicle when it struck him. However, Plaintiff is unable to cite to any cases where an injured pedestrian qualified as an insured under a policy insuring the vehicle that struck him or her.

In *Fisher*, a police officer was struck by a vehicle he was investigating while he was standing approximately 10 to 25 feet away from his own patrol car.[15] The officer applied for UIM benefits under an insurance policy covering his patrol car. The insurer denied coverage on the ground that the officer was not an insured because he was not occupying the patrol car at the time of the accident.[16] The Court adopted a "liberal definition" of the term "occupant" in UIM policies, which includes any person who is "within a reasonable geographic perimeter of the vehicle" or "engaged in a task related to the operation of the vehicle."[17] However, the Court concluded that even under that liberal definition, the officer was not occupying his patrol car at the time of the accident. Significantly, the officer in *Fisher* was not attempting to qualify as an insured under a policy insuring the vehicle that struck him, and the Court did not consider whether he could have qualified as an insured under any such policy.

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[14] *National Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892, 894 (Del. 1997).
[15] *Id.* at 895.
[16] *Id.*
[17] *Id.*

This Court applied the *Fisher* test to another scenario involving a pedestrian in *Buckley v. State Farm Mutual Automobile Insurance Company*.[18] In *Buckley*, a student was struck by a vehicle while crossing the street to board her school bus.[19] The student sought Personal Injury Protection ("PIP") benefits under an insurance policy insuring the school bus.[20] The Court concluded that the student was an occupant of the school bus under both prongs of the *Fisher* test, and was thereby entitled to PIP coverage. However, *Buckley* is inapplicable to the present case for two important reasons. First, like the officer in *Fisher*, the student in *Buckley* did not seek payments under an insurance policy covering the vehicle that struck her. Second, *Buckley* involved PIP benefits, not UIM benefits. Therefore, Plaintiff's reliance on *Buckley* is misplaced.

Under Delaware law, UIM coverage is personal to the insured.[21] Brinkley purchased UIM coverage to protect herself, her resident relatives, and others who occupied her vehicle from the negligence of unknown tortfeasors.[22] Brinkley's UIM coverage was not meant to protect pedestrians injured by her own negligence. For that, Brinkley purchased liability coverage, and Plaintiff received the full policy

[18] 139 A.3d 845 (Del. Super. 2015).
[19] *Id.* at 846-47.
[20] *Id.* at 847.
[21] *See Frank v. Horizon Assur. Co.*, 553 A.2d 1199, 1202 (Del. 1989).
[22] *See id.* at 1201 (stating that the public policy underlying Delaware's UIM statute is to protect innocent people from the negligence of unknown tortfeasors).

limits of Brinkley's liability coverage. For that reason, the Court finds as a matter of law that Plaintiff cannot recover UIM benefits as an insured under Brinkley's Policy.

Conclusion

Although Brinkley's vehicle can qualify as an "uninsured motor vehicle," the Court finds as a matter of law that Plaintiff cannot qualify as an insured for UIM purposes under the policy insuring the vehicle that struck him. As a result, State Farm is entitled to judgment as a matter of law.

NOW, THEREFORE, this 16th day of October, 2017, Defendant State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli