IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER M. KRAUSS and LAURIE ANN LINEHAN,	)	
Plaintiffs,	)	
	)	C.A. No. 03C-08-252 RRC
v.	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	)	
Defendant.	)	

Submitted: March 9, 2004
Decided: April 23, 2004

MEMORANDUM OPINION

UPON DEFENDANT'S MOTION TO DISMISS COUNTS I, II AND IV OF THE COMPLAINT.
GRANTED.

Michael D. Carr, Esquire, The Law Offices of Michael D. Carr, Wilmington, Delaware, Attorney for Plaintiffs.

Daniel V. Folt, Esquire and Gary W. Lipkin, Esquire, Duane Morris L.L.P., Wilmington, Delaware, Attorneys for Defendant.

COOCH, J.

INTRODUCTION

This case stems from a June 26, 2000 automobile accident in which plaintiffs Christopher M. Krauss ("Krauss") and Laurie Ann Linehan ("Linehan") were injured. Krauss was driving Linehan's car and Linehan was a passenger. Krauss and Linehan, in their complaint, seek PIP benefits (Count I), damages from "Unfair Practices in Insurance" (Count II), underinsured motorists benefits ("UIM") (Count III), and punitive damages (Count IV). Before this Court is a motion to dismiss filed by the defendant State Farm Mutual Automobile Insurance Company ("State Farm"), Krauss' insurer, in which State Farm seeks dismissal of Counts I, II and IV of the complaint filed by Krauss and Linehan on the grounds that neither Krauss nor Linehan are eligible for insurance coverage under Krauss' two State Farm insurance policies.

With respect to State Farm's motion to dismiss Krauss' claims: Krauss is seeking insurance benefits under his two State Farm policies because these policies potentially provide him coverage if he was injured in a car accident involving a car other than his own. The issues for the Court to decide are (1) whether Linehan's judicial admission set forth in the complaint that she "qualif[ied] as [an] insured[] under the Krauss policies" (thereby in effect asserting that she was a "member of Krauss' household") requires dismissal of his PIP claim because he would thereby become disqualified from receiving PIP benefits under the "owned motor vehicle"

exception in his policies, (2) if Krauss' PIP claim is thus dismissed, whether he should be granted leave to amend his complaint to reassert his PIP claim by excluding Linehan's averments from any new amended complaint as to the PIP claim, and (3) whether Krauss has alleged sufficient facts to sustain either the "Unfair Practices in Insurance" claim or the punitive damages claim against his insurer, State Farm.

With respect to State Farm's motion to dismiss Linehan's claims: Linehan has recently withdrawn her claim for PIP benefits, implicitly conceding that she is not eligible to make a PIP claim under Krauss' policies.[1] The Court must also decide whether Linehan has alleged sufficient facts to sustain either the "Unfair Practices in Insurance" claim or the punitive damages claim against Krauss' insurer, State Farm.[2]

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[1] To be eligible for PIP benefits under the terms of Krauss' State Farm policies, Linehan needed to be a member of Krauss' household, and the car involved in the accident had to have belonged to someone other than her or Krauss. The complaint filed by Krauss and Linehan tacitly asserts that she was a member of his household and it is undisputed that the car involved was her car.

[2] State Farm now concedes that the UIM claims are ripe because the underlying claim has recently settled and all of the available insurance benefits have been tendered. Linehan's judicial admission has no affect on the UIM claim because the definition of "insured" under section III (UIM claims) does not include the "members of your household" language, but instead defines "insured," in part, as follows

> 1. the first ***person*** named in the declarations
> 4. any other ***person*** while ***occupying***
>
> b. a ***car*** not owned by ***you, your spouse*** or any ***relative***, or a trailer attached to such a car. It has to be driven by the first person named in the declarations or that ***person's spouse***

State Farm's motion to dismiss Krauss' PIP claim (Count I), both Plaintiffs' "Unfair Practices in Insurance" claims (Count II) and the punitive damages claims (Count IV) is **GRANTED**. This Court also holds that, under the particular circumstances of this case, Krauss should not be granted leave to amend his complaint to restate his PIP claim by withdrawing his prior joint assertion with Linehan that she "qualif[ied] as [an] insured" for purposes of her recovering PIP benefits.

FACTS

Plaintiffs were unmarried at the time of the accident and resided together in Millsboro, Delaware.[3] On June 26, 2000 Krauss and Linehan were involved in a two vehicle collision while traveling southbound on U.S. Route 13 near Townsend, New Castle County, Delaware. Krauss was driving Linehan's car, with her permission, at the time of the accident. Both Plaintiffs sustained serious injuries, which have required ongoing medical treatment.

Initially, Plaintiffs made claims under Linehan's policy with State Farm Fire and Casualty Company and each exhausted $50,000 in PIP coverage under that

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> and within the scope of the owner's consent. (emphasis in original).

Therefore, State Farm's motion to dismiss Count III of the complaint, in effect, has been withdrawn.

[3] Def's Mot. to Dismiss at Ex A at Pls' Compl. at ¶ 1 (hereinafter "Pls' Compl. at _").

policy. Plaintiffs then brought a tort action against Donna Whedbee,[4] the driver of the other car involved in the accident, who was (coincidentally) also insured by State Farm Mutual Automobile Insurance Company.[5] The underlying case was settled in February 2004.

While the underlying claim was still unresolved, Plaintiffs filed claims with State Farm for PIP benefits and UIM benefits under two policies held by Krauss, which claims were denied.[6] Under Krauss' State Farm policies, the PIP claims are governed by Section II, No-Fault Coverage. Section II (PIP claims) defines an "insured" as

> 1. any ***person*** while ***occupying*** or injured in an accident as a pedestrian by ***your car*** or a ***newly acquired*** car, if registered in Delaware; and
> 2. ***you*** or any ***member of your household*** while ***occupying*** or injured in an accident as a pedestrian by any other land motor vehicle designed for use on public highways and which IS NOT:
>
> b. OWNED BY OR FURNISHED FOR THE REGULAR USE OF ***YOU*** OR ANY ***MEMBER OF YOUR HOUSEHOLD***.[7] (emphasis in original)

[4] Donna Whedbee died sometime after the accident from an unrelated cause and the underlying action was subsequently defended by Robert Whedbee, the administrator for the estate of Donna Whedbee.

[5] Pls' Compl. at ¶¶ 10, 4 (*Krauss et. al. v. Whedbee,* Del. Super. Ct., 03C-03-240 RRC)

[6] *Id*. at ¶ 17.

[7] Def's Mot. to Dismiss at Exhibit B at 11.

not a co-owner of the car involved, nor was he included as a named insured on Linehan's insurance policy covering the car. Linehan was not a co-owner of either of Krauss' vehicles, nor was she included on his policies.

In August 2003, Plaintiffs filed the instant lawsuit in Superior Court against State Farm for PIP benefits, damages from "Unfair Practices in Insurance", UIM damages and punitive damages.[8] The joint complaint states that "[t]he Plaintiffs are Christopher M. Krauss and Laurie Ann Linehan"[9] and that "[b]oth Plaintiffs qualify as insureds under the Krauss policies and each have fulfilled any and all conditions precedent required for payments sought."[10]

At oral argument, Plaintiffs' counsel withdrew Linehan's PIP benefit claim, and the Court asked the parties to submit supplemental memoranda addressing the effect of Linehan's judicial admission that she "qualif[ied] as [an] insured" on Krauss' PIP claim and, assuming the complaint against Krauss were to be dismissed, whether the Court should allow Krauss an opportunity to amend the

[8] The "unfair practices in insurance" claim stems from the alleged conduct of State Farm in the instant case and in the underlying tort claim. Plaintiffs generally plead that State Farm is in violation of 18 *Del. C.* § 2301 and that "[i]n an effort to not expose the [UIM] . . . [policy limits], and in an effort not to pay PIP benefits, Defendant has intentionally denied the tender of the companion tortfeasor policy limits." Pls' Compl. at ¶¶ 22-23.

[9] Pls' Compl. at ¶1

[10] Ps' Compl. at ¶16.

complaint to restate his PIP claim by excluding Linehan's averments from any new amended complaint as to the PIP claim.[11]

STANDARD OF REVIEW

When deciding a motion to dismiss "all factual allegations of the complaint are accepted as true."[12] In deciding a motion to dismiss the Court must determine "whether the plaintiff may. . . recover under any plausible circumstances capable of proof under the complaint."[13] A motion to dismiss must "present[] a question of law and cannot be granted where the pleading raises any material issues of fact."[14]

DISCUSSION

The issues for the Court to decide are: (1) should Linehan's judicial admission set forth in the complaint that she "qualif[ied] as [an] insured[] under the Krauss policies" (thereby asserting that she was a "member of Krauss' household") require dismissal of co-plaintiff Krauss' PIP claim because (assuming that Linehan's averment was true) he then became disqualified under the "owned motor

[11] The Court in its letter of December 2, 2003 to counsel stated that it "wished to hear from the parties on an additional issue: assuming (without deciding) that the Court dismisses the Complaint against Krauss (all or in part), should the Court allow Krauss an opportunity to amend the Complaint?" Plaintiffs chose only to address the issue of Krauss amending his PIP claim.

[12] *Plant v. Catalytic Constr. Co.,* 287 A.2d 682, 686 (Del. Super. 1972), *aff'd* 297 A.2d 37 (Del. 1972)

[13] *Spence v. Funk,* 396 A.2d 967, 968 (Del. 1978).

[14] *Fagnani v. Integrity Fin. Corp.,* 167 A.2d 67, 68 (Del. 1960)

vehicle" exception in his policies, (2) if Krauss' PIP claim is thereby dismissed, should he be granted leave to amend his complaint to reassert his PIP claim by excluding Linehan's averments from the amended complaint as to the PIP claim, and (3) whether Krauss and Linehan have alleged sufficient facts to sustain either the "Unfair Practices in Insurance" claims or the punitive damages claims against his insurer, State Farm.

I. Krauss' Claim for PIP Benefits is Dismissed Because of Linehan's Judicial Admission in the Joint Complaint That She Was a Member of Krauss' Household, Which Disqualifies Him from Coverage Under the "Owned Motor Vehicle" Exception to His State Farm Policies.

1. State Farm's Argument to Dismiss Krauss' Claim for PIP Benefits.

State Farm argues that Krauss is disqualified from PIP coverage because of the "owned motor vehicle" exception in his policies.[15] State Farm contends that Krauss' policies insure him for PIP benefits only if he was a passenger in a car not owned by Krauss or by any member of his household. State Farm contends that by his jointly claiming with Linehan that Linehan would "qualify as [an] insured[] under the Krauss policies and . . . hav[ing] met all conditions precedent required,"

[15] The "owned motor vehicle" exclusion is an insurance policy provision excluding from coverage a person or member of his household injured while occupying a car owned by a member of the household but not named in the policy. *Webb v. State Farm Mut. Auto. Ins. Co*., 1993 Del. Super. LEXIS 88 at *6 (Del. Super. Ct.); *see* ROBERT K. BESTE JR., ESQUIRE & ROBERT K. BESTE, III, ESQUIRE, AUTOMOBILE INJURY AND INSURANCE CLAIMS, DELAWARE LAW AND PRACTICE, §4.06(d) (2003) (stating that "[t]he 'owned motor vehicle' exclusion excludes coverage for persons injured while occupying a vehicle or injured by a vehicle owned by the insured, but not insured under the policy.").

co-plaintiff Linehan has made a judicial admission that she was a member of Krauss' household. State Farm alleges that, as a member of Krauss' household, Linehan's ownership of the car involved in the accident disqualifies Krauss under Section II of his policy.[16]

State Farm argues that Krauss should be bound by Linehan's judicial admission because Plaintiffs, "having consulted with counsel. . . and intending to pursue potentially antagonistic theories of liability designed to promote recovery of insurance benefits for each plaintiff, knowingly, voluntarily and deliberately elected to jointly file a single complaint."[17]

2. Plaintiffs' Response.

Plaintiffs assert that Krauss should be potentially eligible for PIP benefits under his two policies and he should not be bound by Linehan's averments in the joint complaint. Plaintiffs assert that their complaint does not make joint averments but should be read as separate averments by each Plaintiff. Plaintiffs argue that paragraph 16 of their complaint "does not definitively plead" that each

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[16] ***Insured*** means

> 2. ***you*** or any ***member of your household*** while ***occupying*** or injured in an accident as a pedestrian by any other land motor vehicle designed for use on public highways and which IS NOT:
> b. OWNED BY OR FURNISHED FOR THE REGULAR USE OF ***YOU*** OR ANY ***MEMBER OF YOUR HOUSEHOLD***. (emphasis in original)

[17] Def's Supplemental Memo. at 1 (hereinafter "Def's Supp. Memo. at _").

Plaintiff has contended that "he or she qualify in their own right as an individual insured [or] whether the averment alleges that each contends that in addition to himself or herself, the other plaintiff qualifies as an insured."[18]

Plaintiffs additionally contend that any confusion as to who made which averments is due to "the policy language [being] ambiguous . . . [and] the ambiguity each faced when attempting to understand whether they qualified as insureds."[19] Plaintiffs contend that "[w]hile Paragraph 1 [of the policies] defines "insured" as "any person . . .occupying . . . your car" the language of Paragraph 2 is at best confusing and lends itself to any number of interpretations."[20] Plaintiffs then contend that "[r]eading the 'emphasized' language of the limitations suggested by Paragraph 2, one is confronted with the following: "**you** . . . **member of your household** . . . **occupying** . . . **YOU** . . . **MEMBER OF YOUR HOUSEHOLD**." (Emphasis in original). Paragraph 19 of Plaintiffs' complaint asserts that "State Farm knew or should have known that its policy language is ambiguous."

Plaintiffs argue that Linehan's stipulation to the dismissal of her claim for PIP benefits under Krauss' policies was "based upon her status as the owner of the

[18] Pls' Supplemental Response to Def's Supplemental Memo at 2 (hereinafter "Pls' Supp. Resp. at _").

[19] *Id.* at 3.

[20] Pls' Resp. at 2.

vehicle in which the parties were injured and the fact that she ***did not*** qualify as a member of Krauss' household because she was not economically dependent upon [him]."[21] (Emphasis added). Plaintiffs argue that State Farm has the burden of proving that Linehan is a member of Krauss' household in relation to Krauss' coverage and they argue that the judicial admission "does not constitute being a 'member of. . . Krauss' household as defined by the policy language."[22]

3. Discussion.

In a cause of action, pleadings are not mere ordinary admissions but are considered "judicial admissions."[23] A judicial admission is a formal statement by a party or his or her attorney, in the course of judicial proceedings, which removes an admitted fact from the field of controversy.[24] Judicial admissions are recognized in Delaware.[25] *Wigmore* states that "a party may at any and all times

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[21] Pls' Supp. Resp. at 2.

[22] *Id*.

[23] *Ervin v. Vesnaver and Murray Transportation Co.*, 2000 Del. Super. LEXIS 312 at 4 (Del. Super. Ct.) (citing *Wigmore, Evidence* § 1604 (Chadbourn rev. 1972).

[24] 29A Am Jur 2d, Evidence § 770 (1994).

[25] *Ervin*, 2000 Del. Super. LEXIS 312 at 4 (citing *Levinson v. Delaware Compensation Rating Bureau,* 616 A.2d 1182, 1186 (Del. 1992); *Blinder, Robinson & Co. v. Bruton,* 552 A.2d 466, 474 (Del. 1989); *Rudnick v. Shoenberg*, 122 A. 902, 903 (Del. 1922) (citing *Wigmore*); *Godwin v. State*, 74 A. 1101, 1103 (Del. 1910).

invoke the language of his opponent's pleading on that particular issue as rendering certain facts indisputable." *Wigmore* explains:

> judicial admissions . . . are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference [to the judicial admission is] an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.[26]

One authority states that "[t]he determination of whether a party's statement is sufficiently unequivocal to be a judicial admission is a question of law."[27] This authority also states "[a] judicial admission of fact may carry with it an admission of other facts necessarily implied from it."[28]

Krauss' argument does not fully appreciate the impact of Linehan's judicial admission. Regardless of what Linehan may have thought she was averring in her complaint, or the fact that she may have believed that her stipulation withdrawing her claim for PIP benefits effectively withdrew her claim to be a member of Krauss' household, there is no other way to categorize her original judicial admission as anything but a claim to have been a member of Krauss' household. Linehan had to plead as part of her PIP cause of action the fact that she was a

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[26] *Wigmore, Evidence* § 1604(2) (Chadbourn rev. 1972). *See also* 29A Am Jur. 2d, Evidence § 770 (1994) (A judicial admission is a formal statement by party or his or her attorney, in course of judicial proceedings, which removes an admitted fact from field of controversy.)

[27] 29A Am Jur 2d, Evidence § 770 (1994)

[28] *Id.*

member of Krauss' household in order to have any possible claim under the terms of Krauss' policies.

Plaintiffs, in their complaint, attempted to finesse the definition of "insured" so that both Plaintiffs could be potentially eligible for PIP benefits. Plaintiffs parsed the definition of "insured" in the PIP benefits section of the policy so that under the first part of the paragraph that defined "insured" Linehan would be considered a member of Krauss' household so that she could make a claim under his policy because only Krauss or a member of his household was potentially eligible for PIP benefits under his policies.[29] Also in the complaint, however, Plaintiffs sought effectively to disclaim Linehan as being a member of Krauss' household because 2(b) of the definition of "insured" states that he is not insured if he is injured while occupying or injured by "any . . . motor vehicle . . . which IS . . . OWNED BY . . . ***YOU*** OR ANY ***MEMBER OF YOUR HOUSEHOLD.***" (Emphasis in original). Thus under the "owned motor vehicle" exception to his policies, Krauss would not be insured because Linehan claimed to have been a member of Krauss' household and owned the car involved.

This Court finds that Krauss is not eligible for PIP benefits under his State Farm policies pursuant to the "owned vehicle" exception in his policies because he

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[29] An "insured" is defined under Section II (2) as "**you** (Krauss) or any ***member of your household*** (Linehan) while ***occupying*** or injured in an accident as a pedestrian by any other land motor vehicle designed for use on public highways."

is bound by Linehan's judicial admission that she was a member of his household, disqualifying him from coverage. Krauss and Linehan made a conscious decision, in consultation with counsel, to file the complaint jointly.[30] It follows that each is bound by the averments of the other because both Plaintiffs shared a joint interest (seeking insurance benefits under Krauss' State farm policies), they were both represented by the same counsel and they asserted the same rights.[31]

Not only did Plaintiffs file the complaint jointly, but the PIP benefits count of the complaint specifically states that "[b]oth Plaintiffs qualify as insureds." There is no indication in this count that Krauss was making specific allegations and claims and that Linehan was making separate allegations and claims based on a different theory of liability. Krauss did not plead in the alternative, and Krauss and Linehan did not bring separate Counts for PIP claims in the instant case, nor did they file separate complaints for PIP claims. Plaintiffs chose none of these options thereby binding each other.

Linehan's judicial admission relieves State Farm from otherwise having to prove that Linehan was a member of Krauss' household by showing she was

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[30] Counsel for Plaintiffs made this representation to the Court at oral argument.

[31] *See General Financial Services, Inc. v. Practice Place, Inc.*, 897 S.W.2d 516, 521 (Tex. App. 1995) (holding that judicial admissions "are equally binding on co-parties where there is privity or a joint interest between them, they are represented by the same counsel and assert the same rights and defenses.").

economically dependent upon him.[32] Her judicial admission that she is a member of Krauss' household, evidenced in her complaint when she averred that she qualified "as [an] insured[] under the Krauss policies," binds Krauss and requires the dismissal of his PIP claim (Count I) because he then becomes disqualified under the "owned motor vehicle" exception in his policy. This Court dismisses Krauss' claim in Count I for PIP benefits.

II. Krauss' Alternative Request to Amend the Complaint is Denied Because Granting the Request Would Allow Krauss to Plead a Contrary, and Not Additional or New, Set of Facts than Pled in the Original Complaint.

1. State Farm's Contention.

State Farm argues that, if this Court holds that Krauss is bound by Linehan's judicial admission, as this Court now does, that Krauss should not be allowed to amend the complaint to introduce "contradictory rather than supplementary facts."[33] State Farm acknowledges that Superior Court Civil Rule 15(a) envisions a liberal amendment policy unless there is "bad faith" on the part of the party

[32] *Friedmann et. al. v. United States*, 107 F.Supp.2d 502, 510-511 (N.J. Dist. Ct. 2000) (holding that "unequivocal averments of fact . . . [are] statements [that] constitute judicial admissions that are conclusively binding on the plaintiffs."); *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956) (holding that "[j]udicial admissions . . . are admissions in pleadings, stipulations etc. which do not have to be proven in the same litigation."); *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000) (holding that "[j]udical admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.").

[33] Def's Supp. Memo. at 6. Krauss, in his December 12, 2003 supplemental response, asked for leave to amend his complaint should the PIP claim be dismissed.

seeking to amend. State Farm alleges "bad faith" on the part of Plaintiffs because they pled one set of facts in order to "facilitate their joint and mutual interest in obtaining the largest insurance recovery possible" but that Krauss now wants to plead a "contradictory" set of facts when it became apparent that the facts originally alleged in the original pleading would deny Krauss PIP benefits.[34]

2. Krauss' Response.

Krauss argues that he should be allowed to amend Count I of his complaint by excluding Linehan's averments from the amended complaint as to the PIP claim because of the liberal nature of Rule 15(a). Krauss contends that in the complaint "the averment was made by mistake, inadvertence and improvidently based upon the belief that the language was ambiguous."[35] Krauss argues that a claimant should be able to amend his pleading, and the original pleading then becomes an evidentiary admission that may be refuted or explained by a party against whom it is used.[36]

3. Discussion.

Krauss will not be allowed to amend his complaint because, under the particular circumstances of this case, to do so would permit him to abuse the

[34] Def's Supp. Memo. at 7.

[35] Pls' Supp. Resp. at 3.

[36] Pls' Supp. Resp. at 3.

pleading process and to plead a set of contradictory facts. A party is bound by what it states in its pleadings.[37] Admissions in a pleading are generally binding on the parties and factual statements in the pleadings are considered conclusive unless they have been amended or withdrawn.[38] In addition, when a pleading is "admitted as an admission against interest [a party] is entitled, if he or she can, to overcome by evidence the apparent inconsistency."[39] The claimant may endeavor to "show that the statements were inadvertently made, were not authorized by him or her, or were made under a mistake of fact; [i]n addition, a party may have the right to introduce other paragraphs which tend to destroy the admission in the paragraph offered by the adversary."[40]

Plaintiffs rely on *Patrick v. Williams* for the proposition that if the Court finds Linehan made a judicial admission in the joint complaint that the Court should "conclude that the averment was made by mistake, inadvertence and

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[37] *Soo Line RR Co. v. St. Louis Southwestern Railway Co.*, 125 F.3d 481, 483 (7th Cir. 1997) (holding that "judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible"); *see also Keller v. United States*, 58 F.3d 1194, 1198 (7th Cir. 1995) (holding that "[j]udicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them"); *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995) (holding that a "plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts").

[38] 29A Am Jur 2d, Evidence § 775 (1994).

[39] *Id*. at § 775.

[40] 29A Am Jur 2d, Evidence § 775 (1994).

improvidently" and allow Krauss to amend the complaint by omitting Linehan's PIP claim.[41] However, in *Patrick*, the appeals court denied the defendant's appeal of the trial court's denial of leave by defendant's to amend their motion to amend.[42] The appeals court held that "defendants were bound by their solemn admissions" and "a party cannot create a genuine issue of material fact by offering evidence 'which contradicts prior judicial admissions.'"[43] This case seems more supportive of State Farm's position than that of Plaintiffs'.

Even though Rule 15(a) contemplates a liberal granting of a motion to amend, that permission is not automatic and the Court should factor in whether "justice so requires" the granting of leave to amend. In *Hess v. Carmine* this Court held that "leave to amend under Rule 15(a) should be freely given unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like."[44] When there is evidence that the plaintiff was aware of "facts and fail[ed] to included them in the complaint [this circumstance] might give rise to the inference that the plaintiff

[41] Pls' Resp. Mem. at 3.

[42] *Patrick v. Williams*, 402 S.E.2d 452 (N.C Ct. Apps. 1991)

[43] *Patrick,* 402 S.E.2d at 456.

[44] *Hess v. Carmine,* 396 A.2d 173, 177 (Del. Super. Ct. 1978) (citing *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227 (1962).

was engaging in tactical maneuvers to force the court to consider various theories seriatim."[45]

In *Ervin v. Vesnaver and Murray Transportation Co.*, upon which Plaintiffs also rely, leave was granted to amend a pleading where a defendant had filed an answer generally admitting negligence.[46] In *Ervin* a defendant was allowed to change an admission of generally being negligent to a denial when the Court found that he had not admitted to the specific allegations of negligence. *Ervin,* however, is distinguishable from the instant case. The *Ervin* Court gave great weight to the fact that three separate attorneys had represented the defendant.[47] Unlike the Plaintiffs in the instant case, the defendant in *Ervin* was not trying to plead completely contradictory facts, nor was he acting upon a specific litigation strategy formulated with his attorney.

There are apparently no cases in Delaware exactly on point with the instant case wherein the plaintiff seeks to amend the complaint to plead contradictory facts; however, there are cases in which defendants have tried to amend their answers to plead contradictory facts. In *Gould v. American-Hawaiian Steamship Co.,* the United States District Court for the District of Delaware held that

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[45] *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 599 (5th Cir. 1981).

[46] Pls' Supp. Resp. at 3. (citing *Ervin v. Vesnaver and Murray Transportation Co.*, 2000 LEXIS 312 (Del. Super. Ct.)

[47] *Ervin,* 2000 Del. Super. LEXIS 312 at 1.

> "while Rule 15(a) stress liberality to guarantee that litigants be afforded the opportunity to respond to new or unexpected developments, the rule cannot be utilized to sanction a defendant's taking diverse and, in fact, conflicting postures on the facts to facilitate multiple and contradictory defenses."[48]

The Court concluded that "the summary judgment motion would be a non-productive tool" if defendants were permitted to amend answers in such a manner.[49] Additionally, the Court of Chancery has allowed a defendant leave to amend its answer, holding that to oppose successfully the motion to amend the non-movant "must show undue or demonstrative prejudice or a bad faith motive by the [party seeking to amend]."[50] The Court of Chancery found that a showing by the plaintiff that the defendant "knew or should have known the answer was erroneous at the time it answered the complaint" would have been sufficient to defeat the motion to amend.[51] The Court held that when a party's request to amend its pleading is made "'disingenuously,' which amounts to saying it does so in bad faith," the result would "manipulate the course of litigation by adding defenses or

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[48] *Gould et.al. v. American-Hawaiian Steamship Co. et. al.,* 55 F.R.D. 475 (D. Del. 1972) (in which defendants'motion to amend its answer was denied because the Court held that "after being represented by experienced and qualified counsel for over two years . . . these defendants have obtained new counsel [and] [h]aving seen one legal theory rejected by this Court . . . are attempting to alter their factual stance to support an alternative legal theory).

[49] *Gould,* 55 F.R.D. at 477.

[50] *Gotham Partners v. Hallwood Realty*, 1999 Del. Ch. LEXIS 204 at *12 (Del. Ch.) (holding that a defendant would be allowed to amend its answer in an action seeking access to its books and records when that action had been settled but the plaintiff found that specific, earlier admission helpful to its case in another related action).

[51] *Gotham Partners*, 1999 Del. Ch. LEXIS at *1.

amending to the extent that the movant contradicted its legal position on the same facts."[52]

This Court does not find that "justice so requires" allowing Krauss to amend his complaint because the purported mistake in averments was in fact a calculated and tactical decision by Plaintiffs, in the words of State Farm, to "facilitate their joint and mutual interest in obtaining the largest insurance recovery possible."[53] Plaintiffs' counsel represented to this Court at oral argument that counsel had conferred at some length with Krauss and Linehan about the relative potential conflicts before filing the complaint. Furthermore, Plaintiffs cannot show that the original allegations were inadvertently made, were not authorized by him or her, or were made under a mistake of fact, nor have they sufficiently shown that there are paragraphs which tend to destroy the admission in the paragraph offered by the adversary.

Allowing Plaintiffs to amend their complaint to aver contradictory facts, as opposed to averring a newly discovered fact or an alternative theory of the case, would be an attempt to "manipulate the course of litigation."[54] Superior Court Civil Rule 8(e)(2) permits a party to set forth alternative theories of liability or defenses;

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[52] *Gotham Partners*, 1999 Del. Ch. LEXIS at *7, *10.

[53] Def's Supp. Memo. at 7.

[54] *Gotham Partners*, 1999 Del. Ch. LEXIS at *10.

however, pleading contradictory facts when the legal theory supported by the original facts is discounted on a motion to dismiss or motion for summary judgment would, to paraphrase the Court in *Gould*, undercut the finality of those motions.[55] This Court will not grant leave for Krauss to amend his complaint in light of the withdrawal of Linehan's PIP claim because Krauss and Linehan tactically chose to file a joint complaint and therefore each is bound by the other's averments.

III. Plaintiffs' Claims for "Unfair Practices in Insurance" and Punitive Damages are Dismissed Because There are No Plausible Circumstances capable of Proof Alleged That State Farm Withheld Insurance Benefits in a Manner That Was "Clearly Without Any Reasonable Justification."

1. State Farm's Contentions.

State Farm argues that both Plaintiffs' "Unfair Practices in Insurance" claims and punitive damages claims are "wholly contingent upon a finding that State Farm wrongly withheld PIP or UIM benefits."[56] State Farm contends that the bad faith claims in this lawsuit exist "in a vacuum" because Plaintiffs have alleged bad faith or unfair practices in the (now settled) underlying case rather than in the

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[55] *Cf. Dussouy*, 660 F.2d at 599 (holding that "where a movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate").

[56] Def's Mot. at n.1.

instant case.[57] State Farm argues that even if the claims of bad faith are properly alleged in the instant case, Plaintiffs must show that State Farm's denial of benefits was "clearly without any reasonable justification."[58] State Farm contends that there is an absence of facts in the complaint to support the claims of "Unfair Practices in Insurance" and punitive damages.

2. Plaintiffs' Response.

Plaintiffs contend that State Farm has engaged in "Unfair Practices in Insurance" and bad faith in the underlying case and the instant case by not tendering the policy limits of Whedbee's policy.[59] Plaintiffs claim that State Farm "has wrongly denied the Plaintiffs request for payment."[60] This claim is based on Plaintiffs' contention that State Farm's policy language was ambiguous and that State Farm "failed to properly interpret its own policy referencing only a portion of its policy, while ignoring other controlling and/or conflicting portions of the same policy."[61]

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[57] Def's Reply in Support of Its Rule 12(b) Motion to Dismiss at 2-4 (hereinafter "Def's Reply"). State Farm asserts that if it is shown that it has wrongly denied benefits to Plaintiffs in the underlying case, then Plaintiffs should have brought the claim in that case. This Court need not reach this issue.

[58] *Id.*

[59] Pls' Compl. at ¶¶ 20,26,28-29; Pls' Resp. at n.1.

[60] Pls' Compl. at ¶ 15; Pls' Letter of January 30, 2004.

[61] Pls' Compl. at ¶ 18. Plaintiffs have not explained how State Farm's policy language is ambiguous. In their complaint, Plaintiffs quoted only the emphasized words from the policies

3. Discussion.

The bad faith and "Unfair Practice in Insurance" claims are dismissed because even accepting all factual allegations of the complaint as true there is no evidence alleged that State Farm withheld insurance benefits in a manner that was "clearly without any reasonable justification." The Delaware Supreme Court explained in *Tackett v. State Farm* that a claim for bad faith must "show that the insurer's denial of benefits was 'clearly without any reasonable justification'."[62] The *Tackett* court held that "[t]he processing of a claim by an insurer encompasses the making of a judgment on at least two levels: (a) determining whether a claim is within the policy coverage; and (b) where damages are not liquidated, determining the amount of compensation."[63] A mere delay is not evidence of bad faith without a showing of "willful or malicious" conduct by the insurer.[64] A delay in payment

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in question as an example of how the language was ambiguous. In footnote 2 of Plaintiffs' response, Plaintiffs ask, "Does the language of paragraph 2 mean: a) that the vehicle IS NOT to be owned by YOU; b) IS NOT to be owned by any MEMBER OF YOUR HOUSEHOLD; c) IS NOT to be FURNISHED FOR THE REGULAR USE OF YOU; and/or d) IS NOT to be FURNISHED FOR THE REGULAR USE OF ANY MEMBER OF YOUR HOUSEHOLD?" (Emphasis in original). This Court finds that this reading of the paragraph, which Plaintiffs claim was unclear to them, is not ambiguous.

[62] *Tackett v. State Farm Mutual Fire and Casualty Insurance Company,* 653 A.2d 264 (Del. 1994) (holding that "[a] lack of good faith, or the presence of bad faith, is actionable where the insured can show that the insurer's denial of benefits was 'clearly without any reasonable justification'").

[63] *Tackett* 653 A.2d at 265-266.

[64] *Id.* at 266.

due to a "tough stance" policy alone is not sufficient to support claims for punitive damages.[65]

In the instant case, the PIP benefits were denied by State Farm on the basis that Krauss and Linehan were not eligible for PIP benefits because of the "owned motor vehicle" exception in Krauss' policies.[66] As the court in *Tackett* held, an insurer, in processing a claim, must make a determination of whether a claim is within the policy coverage and this judgment is not dispositive of bad faith unless it is shown that it was made "clearly without any reasonable justification." The UIM coverage was denied because at the time when Plaintiffs sought the coverage, the UIM claims were not ripe. The UIM claims only matured when the underlying case settled for policy limits in February 2004.

Plaintiffs' claims for "Unfair Practices in Insurance" and punitive damages claims are based on conclusory statements without any specific averments to support their claims. Plaintiffs generally aver that the language in State Farms insurance policy was ambiguous and that State Farm "failed to properly interpret its own policy."[67] In the complaint, Plaintiffs aver that State Farm's conduct is in violation of 18 *Del. C.* §2301, Unfair Practices in the Insurance Business, by

[65] *Id.* at 266. (quoting *Hayseeds, Inc. v. State Farm Fire and Cas.,* 352 S.E.2d 73, 80-81 (1986)).

[66] Def's Mot. to Dismiss at 3.

[67] Pls' Compl. at ¶18.

incorporating the statute into the complaint.[68] While Delaware is a notice pleading jurisdiction, the Supreme Court in *Tackett* held that a plaintiff must show that the insurance company withheld benefits "clearly without any reasonable justification." This showing is lacking in the instant complaint.

In paragraph 26 of the complaint, Plaintiffs attempt to shift the burden of proof onto State Farm to show that it had "any reasonable basis for its failure to tender the policy limits of the tortfeasors's [Donna Whedbee] policy" in the underlying claim; however, it is Plaintiffs who must show that State Farm did not have a reasonable basis for withholding benefits. Plaintiffs did attempt to submit to the Court the deposition of Robert Whedbee to support their argument;[69] however, this submission was made after the close of the briefing schedule on the motion to dismiss. Further, Plaintiffs apparently expected the Court to read through the deposition and itself determine the facts supposedly supportive of Plaintiffs' claims in Counts II and IV of the complaint; the sixty-eight page deposition was submitted *in toto* to the Court without reference by Plaintiffs to any specific passages. For these two reasons, this Court declines to include the deposition as part of the record for the purpose of this motion to dismiss.

[68] Pls' Compl. at ¶22.

[69] Pls' Letter of January 30, 2004 to the Court with attachment.

There are "no plausible circumstances capable of proof under the complaint" in which it is shown that State Farm withheld benefits "clearly without any reasonable justification;" therefore, this Court grants State Farms motion to dismiss Counts II and IV, the "Unfair Practices in Insurance" claims and the punitive damages claims.

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss Counts I, II and IV is **GRANTED.**

IT IS SO ORDERED.

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oc: Prothonotary