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

YOLANDA GARNETT,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 03C-10-006 MJB
v.	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE, PROGRESSIVE CASUALTY INSURANCE COMPANY,	)	
	)	
Defendants.	)	

Submitted: June 1, 2006
Decided: August 23, 2006

Upon Motion for Summary Judgment of
Progressive Casualty Insurance Company. **DENIED**.

OPINION AND ORDER

Brian E. Lutness, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware, Attorney for Defendant.

Gary S. Nitsche, Esquire, W. Christopher Componovo, Esquire, Weik, Nitsche, Dougherty & Componovo, Wilmington, Delaware, Attorneys for Plaintiff.

BRADY, J.

Facts and Procedural History

This is a claim for underinsurance motorist coverage arising from injuries Yolanda Garnett ("Ms. Garnett") allegedly sustained in a motor vehicle collision on January 25, 2002. As compensation for injuries she alleged she sustained in that collision, Ms. Garnett recovered the full $15,000 policy limit of the tortfeasor, Nneka Taylor. At the time of the collision, Ms. Garnett carried underinsured ("UIM") insurance through her own personal automobile policy with Liberty Mutual Fire Insurance, ("Liberty") with a limit of $25,000 per person and $50,000 per accident, and was driving her uncle's vehicle, which had UIM coverage provided by Progressive Casualty Insurance Company ("Progressive") in the amount of $15,000 per person and $30,000 per accident limit. The interplay between the coverage of these policies frames the analysis of this Motion for Summary Judgment. The Court heard oral argument on June 1, 2006. This is the Court's decision on the matter.

Standard of Review

The standard for granting summary judgment is high.[1] Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

[1] *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).

as a matter of law.[2] "In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party."[3] When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.[4]

Contentions of the Parties

Progressive has requested Summary Judgment on two grounds. First, Progressive argues the vehicle coverage policy is the sole subject of inquiry to determine eligibility of UIM coverage. Because the UIM coverage in the Progressive policy has the same policy limit as the tortfeasor's liability coverage, Progressive argues that, by definition, the tortfeasor was not underinsured and Ms. Garnett cannot recover UIM coverage from the Progressive policy.

Ms. Garnett responds that *Deptula v. Horace Mann Ins. Co.*[5] broadly construed the Delaware underinsurance statute to allow any policy to be used when determining whether the tortfeasor was underinsured, not just the vehicle policy.

---

[2] Super.Ct.Civ.R. 56(c).
[3] *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).
[4] *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).
[5] 842 A.2d 1235 (Del. 2004).

The second basis upon which Progressive seeks summary relief is based on the language of its policy. Progressive contends that the definition of an underinsured motor vehicle in the vehicle policy precludes access to the policy's UIM coverage in a situation such as the case at bar. Ms. Garnett does not address this issue in her briefing.

Applicable Law

Delaware Construction of DEL CODE ANN. tit. 18, § 3902(b)(2)

The determination of whether a driver is underinsured is governed by DEL. CODE ANN. tit. 18, § 3902(b)(2):

> An underinsured motor vehicle is 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. These limits shall be stated in the declaration sheet of the policy.

A good synopsis of how 3902(b)(2) is construed to determine coverage appears in *Colonial Ins. Co. of Wisconsin v. Ayers*:[6]

> Section 3902(b)(2) authorizes the stacking of total liability coverage "under all bonds and insurance policies." The amount of that combined liability coverage is then compared to the amount of UIM coverage "stated in the declaration sheet of the policy." Thus, in 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

[6] 772 A.2d 177 (Del. 2001).

underinsured motorist policy that the policyholder is attempting to access.[7] (Emphasis omitted.)

Under Delaware law, the UIM coverage on the vehicle is primary and the injured party's personal UIM coverage is secondary.[8] "To qualify as an underinsured motor vehicle, the limits of bodily injury coverage available to the tortfeasor must be less than the limits provided by the claimant's underinsured motorist (UIM) coverage."[9] An injured party may not "stack" the coverage provided by multiple policies in order to trigger, or establish in the first instance, that a tortfeasor's vehicle is underinsured.[10] However, "…stacking is permitted once the statutory threshold for UIM coverage has been satisfied by **any one** policy."[11] (Emphasis added.)

The ruling in *Deptula v. Horace Mann Ins. Co.* governs this dispute. In *Deptula*, the plaintiff was traveling in his employer's vehicle when he was involved in a motor vehicle collision.[12] The plaintiff accepted the $100,000 policy limits of the tortfeasor's bodily injury liability insurance coverage.[13] The vehicle the plaintiff was traveling in had UIM coverage in the amount of $300,000.[14] The plaintiff sought and received this amount. The plaintiff

[7] *Id* at 180-181.
[8] *Masten v. Nationwide Mutual Insurance Co*., 1993 WL 19651 at *3 (Del.Super.).
[9] *Deptula v. Horace Mann Ins. Co*., 842 A.2d at 1235.
[10] *Colonial Ins. Co. v. Ayers*, 772 A.2d 177 (Del. 2001).
[11] *Deptula* v. *Horace Mann Ins. Co*., 842 A.2d at 1236.
[12] *Id*.
[13] *Id*.
[14] *Id*.

then attempted to recover $100,000 in UIM coverage from his personal policy.[15] The Delaware Supreme Court held the plaintiff was permitted to access the $100,000 in UIM coverage in his personal policy because stacking of coverage provided by multiple automobile insurance policies is permitted once the statutory threshold for UIM coverage has been satisfied by any one policy.[16]

In *Deptula*, that was the vehicle policy. Progressive relies on that single fact to distinguish the holding in *Deptula* from the case at bar. Progressive argues Ms. Garnett is not underinsured pursuant to the holding in *Deptula* because the UIM policy limits of the vehicle in which Ms. Garnett was traveling at the time of the collision are the same as the liability limits of the tortfeasor. Such an argument disregards both the express language in *Deptula* that "any one policy" may qualify an injured party as underinsured, and the legislative intent in enacting the uninsured/underinsured motorist provision, to protect "…people injured by tortfeasors carrying little or no insurance."[17]

This Court holds, consistent with *Deptula*, an injured party is not limited to looking to the vehicle policy when determining the threshold question of whether they qualify for UIM coverage. The injured party may

[15] *Id.*
[16] *Id.*
[17] *Id.*

look to "any one" policy to determine the threshold question of whether they qualify for UIM coverage, including their personal policy. If any policy qualifies the injured party for UIM coverage, that person may "stack" other UIM coverage amounts onto the policy that qualified them for UIM coverage to be more fully compensated for their injuries.

The UIM limits of Ms. Garnett's personal policy were in the amount of $25,000 per person and $50,000 per accident. These amounts are greater than the $15,000 per person and $30,000 per accident liability coverage amounts of the tortfeasor. Therefore, UIM coverage for Ms. Garnett is triggered. Once the threshold determination is made that Ms. Garnett qualifies for UIM coverage by looking to "any one" policy, she may "stack" the vehicle policy onto the amounts of her personal policy and access the coverage amounts in both policies.[18]

Progressive Policy Language

Progressive next argues that language contained within the vehicle policy itself precludes Ms. Garnett's access to the coverage amounts in a case such as this, regardless of Delaware case law. Progressive again seeks to distinguish this case from *Deptula*, because in that case there was no definition of "underinsured," in the applicable policy, as there is in the

[18] *Id* at 1238.

Progressive policy in the instant case. The pertinent language in the policy defines an underinsured motor vehicle as:

> A land motor vehicle of any type to which a bodily injury or policy applies at the time of the accident, but the sum of all applicable limits of liability for bodily injury is less than the coverage limit for Underinsured Motorist Coverage shown on the Declaration Page.

Progressive argues, based on the above language, it is not obligated to pay Ms. Garnett the underinsurance coverage amounts in the vehicle policy because it provided underinsured policy limits equal to that of bodily injury limits of the other vehicle in the collision.

Insurance policy provisions designed to reduce or limit the coverage to less than that prescribed by Delaware law are void.[19] The holding in *Deptula* is Delaware law and any insurance policy language inconsistent with the holding therein is void as against public policy. The Court finds the Progressive policy language in contravention of Delaware public policy.

Conclusion

Delaware recognizes "…the legislative purpose in mandating the availability of uninsured motorist coverage is to protect innocent persons from impecunious tortfeasors."[20] Delaware law allows stacking of

[19] *Frank v. Horizon Assurance Co*., 553 A.2d 1199, 1201-1202 (Del. 1989), *citing State Farm Mut. Auto. Ins. Co. v. Abramowicz*, 386 A.2d 670, 673 (Del. 1978).
[20] *Hurst v. Nationwide Mut. Ins. Co*., 652 A.2d 10, 12 (Del. 1995); *Frank v. Horizon Assurance Co*., 553 A.2d at 1201.

underinsured policy limits to determine whether an injured party is entitled to underinsurance coverage. In this case, Ms. Garnett may look to her personal policy, which has limits higher than those of the tortfeasor, to qualify for UIM coverage, and then "stack" those amounts onto the policy Progressive issued for the vehicle.[21] The policy language in the Progressive policy is in contravention of the rule of law outlined in *Deptula*, and the legislative intent reflected in DEL. CODE ANN. tit. 18, § 3902(b)(2), and is, therefore, void as against public policy.

For the foregoing reasons the Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[21] The Court is unconvinced by the argument proffered by Progressive at the hearing in this matter that the Court should not rule in this way because it would require Progressive to re-write the language of it's existing policies. To the extent such policies are inconsistent with the public policy of Delaware; they will be so construed.