

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

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: May 11, 2006
Decided: August 29, 2006

Bernard A. Van Ogtrop, Esquire
Seitz Van Ogtrop & Green, P.A.
222 Delaware Avenue, Suite 1500
P.O. Box 68
Wilmington, DE 19899

William J. Cattie, III, Esquire
Rawle & Henderson
300 Delaware Avenue, Suite 1130
P.O. Box 588
Wilmington, DE 19899

Re: ***Daggett, et al. v. AAA Mid-Atlantic Insurance Company,
C.A. NO. 05C-10-040-FSS***

**Upon Defendant's Motion for Summary Judgment - - DENIED
and Plaintiff's Cross-Motion for Summary Judgment - - GRANTED**

Re: *Daggett, et al. v. AAA Mid-Atlantic
Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 2

Dear Counsel:

This is yet another case of first impression concerning Delaware's underinsured vehicle coverage law.¹ Plaintiffs' damages exceed the tortfeasor's coverage, and so, they want their underinsured motorist insurance to respond. The question presented, therefore, is whether the person who caused this tragic accident was underinsured. The case is one of first impression because the policies involve different split limits coverage.

The parties and the court agree that the court must compare the tortfeasor's personal liability policy's coverage limit against Plaintiffs' UIM coverage limit. If more insurance is available to Plaintiffs through their UIM policy, the tortfeasor was underinsured compared to them, and Plaintiffs' UIM policy must respond. The problem with comparing the policies here is, as mentioned, they offer different split limits coverage. In other words, each policy has one coverage limit "per person," and another limit "per accident" or "occurrence." So, how does the court compare them?

I.

The underlying accident was a parent's worst nightmare. On March 19, 2005, Matthew Daggett and Rose Eldridge were passengers in a car driven by Jonathan Fitzpatrick at a very high speed. Fitzpatrick hit a tree. He and Matthew died, while Rose was seriously injured. The Daggett family and Rose's guardian *ad litem* filed claims against Fitzpatrick.

Nationwide insured Fitzpatrick, through his parents' policy, for \$300,000 per person and \$300,000 per accident. AAA/Keystone insured

¹ 18 Del. C. § 3902.

Re: *Daggett, et al. v. AAA Mid-Atlantic
Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 3

Daggett, through his parents' policy, for \$250,000 per person and \$500,000 per accident. In other words, the per person limit on the tortfeasor's liability policy is higher than the per person limit on Plaintiffs' UIM policy, while the per accident coverage under the tortfeasor's policy is lower than the per accident coverage under Plaintiffs'.

Predictably, AAA/Keystone argues that the court must only compare the policies' per person limits and conclude, because the tortfeasor had greater per person coverage, he was not an "underinsured" motorist. Plaintiffs, of course, insist that the per accident or occurrence coverage comparison is determinative.

II.

AAA/Keystone initially relies on *Nationwide v. Williams*,² calling it controlling. In *Williams*, the tortfeasor's available coverage was \$100,000 per person and \$300,000 per accident. Williams and her husband had \$100,000 per person and \$300,000 per occurrence in UM/UIM insurance. Simply put, the UM/UIM coverage available to the Williamses was identical to the tortfeasor's coverage. Thus, the tortfeasor was not underinsured compared to the Williamses.

Williams was complicated because the tortfeasor injured more people than just the Williamses and they agreed to partition the tortfeasor's \$300,000 per accident coverage. As a result, the Williamses wound up with \$98,000 from the tortfeasor's insurance. They argued, therefore, that

² *Nationwide Mutual Ins. Co. v. Williams*, 695 A.2d 1124 (Del. Super. Ct. 1997).

Re: *Daggett, et al. v. AAA Mid-Atlantic Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 4

because their per person UIM coverage, \$100,000, was more than what was ultimately available to them from the tortfeasor's insurance, the tortfeasor was underinsured.

Williams held that the question whether the tortfeasor was underinsured turned

on the symmetry between the *limits* of the insured claimant's coverage and the *limits* of the tortfeasor's coverage, not the amount of the tortfeasor's coverage that remains *available* to pay the insured, after other claims are paid pursuant to the tortfeasor's liability policy.³

As presented, the coverage limits, both per person and per accident or occurrence, were symmetrical in *Williams*, which meant that the tortfeasor was not underinsured. Because the Fitzpatricks' policy limits and the Daggetts' UIM coverage are asymmetrical, and because the court here is not considering the remaining coverage available after all claims are settled, *Williams* is not controlling.

III.

If *Williams* is not controlling, that does not mean AAA/Keystone's overall position is wrong. As mentioned, the Fitzpatricks' policy's per person coverage is higher than the Daggetts', even if its per accident coverage is lower. AAA/Keystone's substantive argument is that in comparing the coverage here, because the Plaintiffs are making a per person claim, the court should only look at the per person coverage limits, \$300,000 vs. \$250,000,

³ *Id.* at 1127.

Re: *Daggett, et al. v. AAA Mid-Atlantic
Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 5

and ignore the per accident limits, \$250,000 vs. \$500,000.

For AAA/Keystone's benefit, the court assumes without deciding that the Daggetts' claims, wrongful death and survival, count as one. The assumption is debatable. *Emmons v. Hartford Insurance Underwriters Insurance Company*⁴ holds that the per accident limit applied to the wrongful death claim.⁵ On the other hand, the AAA/Keystone policy here appears to have been written by AAA/Keystone to trump *Emmons*. It remains to be seen, however, whether a Delaware insurance company can write its way around *Emmons*.⁶ Nevertheless, the court will assume that the Daggetts' wrongful

⁴ *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742 (Del. Super. Ct. 1997).

⁵ *Id.* at 747.

⁶ See *Wood v. Shepard*, 526 N.E. 2d 1089, 1094 (Ohio 1988)

Re: *Daggett, et al. v. AAA Mid-Atlantic
Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 6

death and survival claims are one. In that sense, therefore, the Daggetts are making a per person claim.

Giving AAA/Keystone the assumption's benefit not only makes it possible for AAA/Keystone to argue reasonably that the Daggetts are making a per person claim, the assumption makes it easier to conclude that the relative, per accident limits are not implicated, as AAA/Keystone contends. Because the Daggetts presumably have only one claim, arguably there is no reason to consider the Daggetts' policy's higher per accident coverage limit.

(holding that each insured under one policy has a separate claim, which "may not be made subject to the single person limit of liability in the underinsured motorist provision"); *see also Frank v. Horizon Assur. Co.*, 553 A.2d 1199, 1204 (Del. 1989) (holding "the enactment of Section 3902(c) bespeaks of legislative policy that uninsured[/underinsured] coverage shall not be undercut by restrictive policy provisions, unless such restrictions are specifically authorized by statute"), *quoted with emphasis in Hurst v. Nationwide Mut. Auto. Ins. Co.*, 652 A.2d 10, 14 (Del. 1995) and *approved in Deptula v. Horace Mann Ins. Co.*, 842 A.2d 1235, 1237 (Del. 2004).

The court also understands that the *Hurst*⁷ – *Peebles*⁸ – *Ayers*⁹ – *Deptula*¹⁰ line of cases, which largely concerns stacking, is not on point. But, those authorities’ approach is helpful because it addresses the way UM/UIM coverage is triggered. In the process, it also articulates the public policy behind Delaware’s UM/UIM vehicle coverage law.

IV.

Even with the helpful assumption that the Daggetts are pursuing one claim, AAA/Keystone’s approach undermines the now well-established legislative intent to compensate fully innocent motorists, and it is too narrow. The *Ayers* – *Deptula* rubric is only a means to an end. The ultimate question is whether or not the Daggetts’ UIM policy must respond. Under *Williams*, *Ayers* and *Deptula*, the analysis focuses on “the symmetry between the limits of” the policies. That, both literally and by implication, demands consideration of the policies’ coverage limits in their entirety, and not just selected parts.

Along the same line, quoting the UM/UIM vehicle coverage law and *Peebles*,¹¹ *Ayers* emphasizes that:

[a] motorist is underinsured if ‘the limits of bodily injury *liability*

⁷ *Hurst*, 652 A.2d at 10.

⁸ *Nationwide Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d 1374 (Del. 1997).

⁹ *Colonial Ins. Co. of Wisconsin v. Ayers*, 772 A.2d 177 (Del. 2001).

¹⁰ *Deptula*, 842 A.2d at 1235.

¹¹ *Peebles*, 688 A.2d at 1378 n.2.

Re: *Daggett, et al. v. AAA Mid-Atlantic
Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 8

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 sheet of the *policy*. (emphasis added in *Ayers*).¹²

It follows, again, that in comparing policies the court must consider all coverage limits in the applicable policies. Here, the tortfeasor's policy provides less per accident coverage and less total coverage to the Daggetts. Here, the Daggetts' stand to receive less, because the tortfeasor had less bodily injury liability coverage, itself.

The Daggetts are innocent. If they paid for less per person coverage than the Fitzpatricks, they paid for more per accident coverage. In that case, why deny UIM coverage? The Fitzpatricks' policy must respond to at least two distinct claims arising out of the accident, the Daggetts' combined claim and Rose Eldridge's. Had Rose not been in the car, AAA/Keystone's argument would be stronger, because neither policy's per accident coverage would be implicated. But Rose was in the car, and Fitzpatrick seriously injured her. Together, her claim and the Daggetts' claim exceed the Fitzpatricks' per person coverage limit, and their per person claims are capped by the Fitzpatricks' policy's lower per accident limit. The tortfeasor's carrier will never pay more than its policy's \$300,000 per accident limit. Because Rose and the Daggetts' must divide that sum, their potential claims' limits have been, or will be, reduced by the tortfeasor's per accident limit.

¹² *Ayers*, 772 A.2d at 180.

Re: *Daggett, et al. v. AAA Mid-Atlantic
Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 9

This reduced coverage provided by the Fitzpatrick's policy is not caused by the way the Daggetts and Rose will be paid, which is what happened to the injured parties in *Williams*. Instead, it is due to the Fitzpatrick's policy's lower per accident limit, and because that policy must respond to both their claims, the Daggetts and Rose start with less to divide.¹³ Thus, the amount left to respond to the Daggetts under the Fitzpatrick's *per person* coverage, in reality, is even lower than the Daggetts' UIM policy's *per person* coverage limit. Again, that means Fitzpatrick was underinsured. (The court reemphasizes the critical distinction between this case and *Williams*. This tortfeasor has less per accident coverage.)

Finally, there is another way to look at this situation. The underinsured vehicle coverage law requires that an insured's UM/UIM coverage must mirror the insured's liability coverage. An insured may not obtain better coverage for himself through his UM/UIM policy than he has available, through his liability coverage, to pay innocent people for damage caused by him. With that in mind, if Matthew had been the tortfeasor his policy would have provided as much as \$500,000 to the Fitzpatrick's and Rose, combined. That is more than the Daggetts and Rose can recover under Fitzpatrick's policy. In that important way, it can also be said the Daggetts had more insurance than Fitzpatrick.

V.

For the foregoing reasons, the tortfeasor was an "underinsured" motorist and Plaintiffs' UIM policy must respond. Defendant's motion for summary judgment is **DENIED**. Plaintiff's cross-motion for summary judgment is **GRANTED**.

¹³ Compare *Williams*, 695 A.2d at 1124.

Re: *Daggett, et al. v. AAA Mid-Atlantic
Insurance Company*
C.A. NO. 05C-10-040-FSS
August 29, 2006
Letter/Order
Page 10

IT IS SO ORDERED.

Very truly yours,

/s/ Judge Fred S. Silverman

FSS/lah
oc: Prothonotary (Civil Division)