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

FREDERICK J. BOLING,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 05C-02-065 CLS
v.	)	
	)	
ALL STATE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

Submitted: July 10, 2006
Decided: October 30, 2006

Upon Consideration of Defendant's Motion for Summary Judgment
DENIED.

Richard F. Rago, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Michael A. Pedicone, Esquire, Wilmington, Delaware, Attorney for Defendant.

SCOTT, J.

INTRODUCTION

Plaintiff, Frederick J. Boling (Boling) has sued Allstate Insurance Company (Allstate) to recover no-fault Personal Injury Protection (PIP) benefits. This claim for personal injury damages arises out of a car accident where Plaintiff was driving a vehicle owned by Paul Whitely. Even though Paul Whitely has insurance on this vehicle with Progressive Insurance Company (Progressive), Plaintiff claims that his personal insurance with Defendant Allstate should also cover his injuries.

On Motion for Summary Judgment, Defendant Allstate argues that Plaintiff should not recover PIP benefits because its policy specifically excludes recovery for bodily injury that occurs to the occupants of other vehicles. Defendant's exclusion is clear on its face. However, the exclusion does not apply to the case at hand because Plaintiff does not ask for additional benefits, but merely for a difference in benefits from his policy with Defendant Allstate and the lesser policy with Progressive. As such, the Court finds that Defendant is not entitled to judgment as a matter of law and thereby finds that Defendant's Motion for Summary Judgment is **DENIED.**

BACKGROUND

Plaintiff Boling is a resident of Wilmington, Delaware. Plaintiff purchased an automobile insurance policy with Defendant Allstate, a foreign

corporation registered with the Insurance Commissioner of Delaware to sell insurance in the State of Delaware.

On February 11, 2003, Plaintiff was in a car accident that occurred at the intersection of Delaware Route 4, Chestnut Hill Road and Marrow Road in New Castle County, Delaware. Plaintiff alleges that he sustained severe personal injuries. Because of these injuries, Plaintiff contends that he has incurred medical expenses and lost wages. Defendant neither admits nor denies these allegations.

The car driven by Plaintiff in this accident was owned by Paul Whitely. Both parties concede that Whitely had insurance for this car with Progressive at the time of the accident. Because Whitely's insurance policy includes up to $25,000 of PIP, Plaintiff received $25,000 from Progressive for his injuries.

Plaintiff now seeks PIP No-fault benefits coverage from his automobile insurance policy with Defendant Allstate. Under this policy, Plaintiff contracted for $50,000 of PIP with Defendant. Therefore, Plaintiff seeks to collect the $25,000 difference between the amount of PIP he contracted for through Defendant Allstate and the amount of PIP he received from Progressive.

Plaintiff claims that he is entitled to No-fault PIP benefits from Defendant that include lost wages and medical expenses, relating to the accident pursuant to 21 *Del. C.* §2118(a)(2)(c). According to Plaintiff, Defendant has, "failed and improperly refused to pay the aforesaid medical expenses and lost wages despite medical confirmation that they are reasonable, necessary and casually related to the aforesaid accident."

Defendant admits that Plaintiff does in fact have PIP insurance with its company policy, but denies that this policy covers Plaintiff for no-fault benefits. According to Defendant, Plaintiff's insurance policy includes PIP with standard exclusions, "including those permitted by 21 *Del. C.* §2118(a)(2)(c)." The policy, as provided by Defendant, states that PIP coverage does not apply to, "(7) bodily injury to any person while in, on, getting into or out of, getting on or off a motor vehicle owner by you or a resident relative which is not an insured motor vehicle."

Plaintiff denies that his insurance policy contained the exclusion permitted under this statute because he is "unable to locate a copy of his Allstate Insurance policy." In addition, Plaintiff claims that Defendant provided him with a generic copy of the alleged policy after the start of litigation, but this copy "is not specific to him or in anyway indicates that this was in fact Plaintiff's policy with Allstate." Defendant maintains that

this copy is identical to the policy in effect at the time of the February 11, 2003 collision.

STANDARD OF REVIEW

The Court may grant summary judgment if it concludes that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law."[1] The moving party bears the initial burden of showing that no material issues of fact are present.[2] Once such a showing is made, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact in dispute.[3] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the nonmoving party.[4] The Court's decision must be based solely on the record presented and not on all evidence "potentially possible."[5]

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[1] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[2] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[3] *Id*. at 681.
[4] *Burkhart*, 602 A.2d at 59.
[5] *Rochester v. Katalan*, 320 A.2d 704, 708 (Del. 1974) (citing *United States v. Article Consisting of 36 Boxes*, 284 F.Supp. 107 (D. Del. 1968), *aff'd*, 415 F.2d 369 (3d Cir. 1969)).

APPLICABLE LAW

Delaware law requires that all owners of motor vehicles purchase an insurance policy for their vehicle.[6] Pursuant to 21 *Del. C*. §2118, the policy must provide minimum insurance coverage for "Compensation to injured persons for reasonable and necessary expenses incurred within 2 years from the date of (an) accident."[7] These expenses include medical expenses and loss of earnings.[8]

The section at issue here places a limitation on the extent of the insurance policy. Pursuant to Rule 2118(a)(2)(c),

> The coverage required by this paragraph shall be applicable to each person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle, other than an occupant of another motor vehicle.[9]

DISCUSSION

I. No Genuine Issue of Material Fact Exists as to Whether Plaintiff's Insurance Policy Contained an "Occupant of Another Vehicle" Exclusion

In response to Defendant's Motion for Summary Judgment, Plaintiff generally denies that his policy contained the "occupant of another vehicle"

[6] 21 *Del. C.* §2118
[7] 21 *Del. C.* §2118(a)(2)(a)
[8] *Id.*
[9] 21 *Del. C.* §2118(a)(2)(c)

exclusion.[10] Plaintiff claims that he cannot locate a copy of his Allstate policy.[11] Even though Allstate provided him with a copy of the policy after the start of litigation, Plaintiff alleges that it is a generic copy "not specific to him or in anyway (indicative) that this was in fact Plaintiff's policy."[12] Plaintiff, therefore, asserts that an issue of material fact exists as to whether his insurance policy with Defendant contained the "occupant of another vehicle" exclusion.

Defendant Allstate claims that Plaintiff's response "merely rest(s) on denial and does not set forth any material fact."[13] Because Plaintiff has not set forth specific facts, he has not shown a genuine issue for trial.[14] The Court agrees with Defendant.

This Court finds that Plaintiff's contention generally amounts to a "lost policy" argument that does not raise an issue of material fact for trial. In *Monsanto Co. v. Aetna Casualty & Surety Co.*, the Court held that the non-movant in a motion for summary judgment must meet its burden of proving the existence of "missing policies".[15] Plaintiff, the non-movant,

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[10] Pl. Reply Br. at 1.
[11] *Id*. at 2.
[12] *Id*.
[13] Def. Reply Br. at 2.
[14] *Id*.
[15] *Monsanto Co. v. Aetna Casualty & Surety Co*., 1993 Del. Super. LEXIS 461, at *3.

"cannot create a genuine issue for trial through bare assertions or conclusory allegations."[16]

The *Monsanto* Court ruled that when lost policies are at issue, a non-movant must prove its case by clear and convincing evidence.[17] If a plaintiff cannot "meet this heightened showing, the trial's outcome is affected."[18] In *Monsanto*, the defendant insurance company filed a motion for partial summary judgment because plaintiff did not produce some of the policies on which it based claims for coverage.[19] The plaintiff in *Monsanto* only produced "(l)etters, cover notes, facsimiles and memos", as well as witnesses who verified the existence of policy jackets containing terms and conditions of the purchased policy.[20] When considering this evidence, the Court found that Plaintiff gave "enough evidence, when taken as a whole, to demonstrate that genuine issues of material fact exist as to the existence and terms of the policies."[21] It, therefore, denied defendant's motion for summary judgment.[22]

Both *Monsanto* and the case at hand involve a motion for summary judgment and the issue of a "missing" insurance policy. However, unlike

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[16] *Id*. at *5.
[17] *Monsanto*, 1993 Del. Super. LEXIS 461, at *11.
[18] *Id*. at *13.
[19] *Id* at *3-4.
[20] *Id*. at *14-15.
[21] *Id*. at *16.
[22] *Id*.

the plaintiff in *Monsanto*, Plaintiff Boling has not met the clear and convincing standard of evidence. Here, Plaintiff states that he lost the original policy, and the policy provided by Defendant Allstate is in no way indicative of the original. For these reasons, Plaintiff argues that an issue of genuine fact exists as to whether his policy contained the "occupant of another vehicle" exclusion. This line of reasoning relies on pure conjecture. Plaintiff simply attacks the credibility of the policy provided by Defendant without offering any evidence as to why the Court should not rely on it; He simply states that it is not indicative. The Court, thereby, finds that Plaintiff has not proven that a genuine issue of material fact exists here. As such, the Court must rely on the copy of the insurance policy provided by Defendant which includes the "occupant of another vehicle" exclusion.

II. Defendant Allstate's "Occupant of Another Vehicle" Exclusion is a Standard Exclusion, Valid Under Delaware Law

In general, the Court finds that Defendant Allstate's "occupant of another vehicle" exclusion is a standard exclusion permitted by 21 *Del. C.* §2118(a)(2)(c). The policy, as provided by Defendant, states that PIP coverage does not apply to, "(7) bodily injury to any person while in, on,

getting into or out of, getting on or off a motor vehicle owner by you or a resident relative which is not an insured motor vehicle."[23]

The Court finds that Defendant may, in fact, classify this exclusion as a standard exclusion under Delaware law. The Delaware Supreme Court has identified three types of exclusions in automobile liability insurance policies, as follows:

> First are those exclusions which would negate the minimum mandatory statutory liability and no-fault coverages. They are, to that extent at least, unenforceable *per se*. The second category of exclusions are those which are *not both* customary as well as consistent with the statute. They are unenforceable to any extent.[24] The third type of exclusions are *both* customary and consistent with the statutory requirements. They are enforceable beyond the minimum coverage mandated by statute.[25]

Defendant's "occupant of another vehicle" exclusion falls into the third category identified here. The exclusion is a standard or "customary" one because it "is found in almost all, if not all, insurance policies." [26]

The Court in *Selective v. Lyons* held that the insured cannot avoid an exclusion derived from the specific language of 21 *Del. C.* 2118(a)(2).[27] In

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[23] Def. Mot. Summ. J. at Ex. D.

[24] *Nationwide General Ins. Co. v. Seeman*, 702 A.2d 915, 922 (Del. 1997) (citing *Hudson v. State Farm Mutual Ins. Co*. 569 A.2d 1168 (Del. 1990); *Bass v. Horizon Assurance Co.*, 562 A.2d 1194 (Del. 1989); *State Farm Mutual Auto. Ins. Co. v. Wagamon*, 541 A.2d 557 (Del. 1988)).

[25] *Id*. (citing *Harris v. Prudential Property and Casualty Ins. Co*., 632 A.2d 1380,1381 (Del. 1993); *Universal Underwriters Ins. Co. v. The Travelers Ins. Co*., 669 A.2d 45, 48 (Del. 1995)).

[26] *Selective Ins. Co. v. Lyons*, 681 A.2d 1021,1026 (Del. 1995).

Selective, a vehicle hit the plaintiff while he pumped gas into his car.[28] The plaintiff sought PIP benefits under his policy with Allstate and the defendant Selective, the insurance carrier of the car that struck him.[29] In determining whether to apply the "occupant of another vehicle" exclusion found in defendant's policy, the *Selective* Court compared the language of the defendant's exclusion with the wording of 21 *Del. C.* 2118(a)(2)(c).[30] Selective's policy afforded coverage "for any person injured by an accident with the insured vehicle, provided that the injured person is not an occupant of another vehicle."[31] The Court reasoned that as such, the defendant insurance company's policy "track(ed)" the wording of this statute.[32] Therefore, the Court strictly applied the exclusion to the case at hand and denied plaintiff PIP benefits under the tort-feasor's policy.[33]

Like the defendant in *Selective*, Defendant Allstate seeks to defend itself on the basis of an "occupant of another vehicle" exclusion in its insurance policy. Here, the Court finds that the language of Defendant's exclusion also closely "tracks" the wording of 21 *Del. C.* 2118(a)(2)(c). This statute states that coverage required by law does not apply to

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[27] *Selective*, 681 A.2d at 1026.
[28] *Id.* at 1023.
[29] *Id.*
[30] *Id*. at 1026.
[31] *Id.*
[32] *Id.*
[33] *Id.*

"occupant(s) of another motor vehicle".[34] Similarly, Defendant's policy clearly states that coverage does not apply to bodily injury that occurs in a vehicle "which is not an insured motor vehicle".[35] The Court takes "another motor vehicle" to mean one that is not insured under the policy. Both the Delaware statute and the Defendant's insurance policy, therefore, explicitly exclude injury that arises from a motor vehicle, other than the vehicle insured under the policy. As such, the Court finds that the "occupant of another motor vehicle" exclusion provided by Defendant is valid under Delaware law.

III. Even though Defendant's "Occupant of Another Vehicle" Exclusion is Valid, It Does Not Warrant the Granting of Summary Judgment

While Defendant's "occupant of another vehicle" exclusion is valid under Delaware law, the Court finds that it does not warrant the granting of summary judgment in favor of Defendant. Under Delaware law, the "occupant of another vehicle" exclusion seeks to "prevent double coverage when other PIP benefits are available, a result entirely consistent with the no-fault statute."[36] The statutory exclusion, therefore, seeks to prevent a

[34] 21 *Del. C.* 2118(a)(2)(c)
[35] Def. Mot. Summ. J. at Ex. D.
[36] *Gonzales v. State Farm Mutual Automobile Ins. Co*., 1996 WL 526014 at*2 (Del.).

plaintiff from unnecessarily seeking double recovery under two different insurance policies.

In *Gonzales*, the Delaware Supreme Court did not allow double recovery of PIP benefits.[37] The minor child in *Gonzales* collected $15,000 in PIP benefits from the insurer of the vehicle that hit him while riding a bicycle.[38] However, the child's mother sought to collect an additional $15,000 from her own insurance carrier, the defendant State Farm.[39] The mother's insurance policy with State Farm covered up to $15,000 in PIP benefits and specifically contained a double recovery exclusion.[40] As the *Gonzales* Court found that the tort-feasor's vehicle had the "required insurance" of $15,000, it granted summary judgment in favor of the defendant State Farm.[41] Hence, the Court denied double recovery here because plaintiff had already recovered the full $15,000 that would have been afforded by her policy.

Several years after the Supreme Court made its decision in *Gonzales*, the Superior Court in *Jones v. State Farm* also denied the recovery of additional PIP benefits.[42] The plaintiff in *Jones* sustained injuries from an

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[37] *Gonzales v. State Farm Mutual Automobile Ins. Co*., 1996 WL 526014 at*2 (Del.).
[38] *Id.* at *1.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Jones v. State Farm*, 1998 WL 473041 (Del. Super.).

accident while a passenger in the car of a vehicle owned by Percy Marshall.[43] The insurance carrier of Mr. Marshall covered plaintiff for $15,000 in PIP benefits.[44] However, plaintiff sought to recover additional benefits from his mother's policy that afforded up to $25,000 in PIP benefits.[45] While the *Jones* Court denied plaintiff from recovering the entire $25,000, it did allow him to recover $10,000 from his mother's policy.[46] The Court, therefore, allowed plaintiff to "cover the difference between (his) policy and that of an individual with lesser PIP coverage."[47] As such, the *Jones* Court differentiated between the exclusion of additional benefits and the right to receive a difference in benefits.

Like the plaintiff in *Jones*, Plaintiff Boling may also have the right to receive a difference in benefits. Here, Plaintiff argues that he should receive "the difference between the PIP he was personally insured for less the amount of PIP he received".[48] Plaintiff only recovered $25,000 of PIP benefits from the car owner's insurance policy with Progressive. However, Plaintiff is, in fact, insured up to $50,000 in PIP coverage through his insurance policy with Defendant Allstate. Plaintiff simply asks the Court to

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[43] *Id.* at *1.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at *2.
[48] Pl. Reply Br. at 1.

award him $25,000, the difference between his policy with Defendant and the lesser insured policy with Progressive. Unlike the plaintiff in *Gonzales*, Plaintiff Boling, therefore, does not seek multiple insurance payments, but the difference in policy payments.

The Court, thereby, finds that Defendant's "occupant of another vehicle" exclusion does not warrant the granting of summary judgment here. Material issues of fact exist as to whether Plaintiff may recover the difference between his policy payment with Defendant Allstate and the lesser policy payment afforded to him with Progressive.

CONCLUSION

For the foregoing reasons, this Court determines as a matter of law that Allstate cannot avail itself of the "occupant of another vehicle" exclusion here. The court further holds that, viewing the evidence in the light most favorable to the non-movant, material issues of fact exist as to whether Plaintiff may seek the difference in benefits from his policy with Defendant Allstate. Accordingly, Allstate's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.