

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ILENE SIVAKOFF,	§	
	§	No. 781, 2010
Plaintiff Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
NATIONWIDE MUTUAL	§	C.A. No. 09C-02-248
INSURANCE COMPANY,	§	
	§	
Defendant Below-	§	
Appellee.	§	

Submitted: March 30, 2011  
Decided: May 16, 2011

Before **BERGER, JACOBS, and RIDGELY**, Justices.

***ORDER***

This 16<sup>th</sup> day of May 2011, it appears to the Court that:

(1) Plaintiff-Below/Appellant, Ilene Sivakoff, appeals from a Superior Court judgment, which granted the motion to dismiss of Defendant-Below/Appellee, Nationwide Mutual Insurance Co. (“Nationwide”), in this underinsured motorist (“UIM”) action. Sivakoff raises two arguments on appeal. First, Sivakoff contends that the Superior Court erred in concluding that the definition of an “underinsured motor vehicle” in the insurance policy at issue provides Sivakoff with the same coverage that Delaware’s UIM statute provides. Second, Sivakoff contends that the Superior Court erred in dismissing the action

because Nationwide failed to timely object to her proposed settlement with the tortfeasor. We find no merit to Sivakoff's appeal and affirm.

(2) It is alleged that Sivakoff was seriously injured when a vehicle operated by Jessica F. Talley struck the vehicle operated by Sivakoff. Talley's father owned, and Travelers Indemnity Company of America ("Travelers") insured, the vehicle that Talley operated. The Travelers policy provides a maximum of \$15,000 in coverage.

(3) Nationwide insured the vehicle that Sivakoff operated. The Nationwide policy includes UIM coverage. The Nationwide policy defines an underinsured motor vehicle as "a motor vehicle for which bodily injury liability coverage or other security or bonds are in effect; however, their total amount is less than the highest limit of uninsured motorists coverage under either (1) this policy . . . ; or (2) any other applicable policy."

(4) Travelers offered Sivakoff the \$15,000 policy limit to settle her claim. As that settlement offer was pending, Sivakoff's counsel sent a letter to Nationwide that relevantly provided:

The carrier for the responsible driver has offered its policy limits of \$15,000 to settle Ms. Sivakoff's personal injury claim. This is the extent of the insurance coverage. The claimant will be accepting that amount in full settlement of her claim against the tortfeasor. Thereafter, Ms. Sivakoff will be making a[] [UIM] claim under her Nationwide policy. We assume that Nationwide has no objection to Ms. Sivakoff accepting the tortfeasor's policy limits, unless we hear from you within 2 weeks.

(5) Nine days later, Sivakoff released Talley, Talley's father (Roy), Travelers, and "all other persons" from all claims (except UIM claims) in exchange for \$15,000. Sivakoff executed a document entitled, "Release in Full," which relevantly provided:

...I, Ilene Sivakoff, for the sole consideration of Fifteen Thousand dollars (\$15000.00) . . . release and forever discharge [Travelers] and Roy Talley/Jessica Talley and all other persons, firms, or corporations from all claims, demands, damages, actions, or causes of action, account of damage to property, bodily injuries or death, resulting, or to result, from the accident which occurred on September 16, 2006 at or near Marsh road, Wilmington De[laware] and for all claims or demands whatsoever in law or in equity, which we, our heirs, executors, administrators, or assigns can, shall or may have by reason of any matter, cause or thing whatsoever prior to the date hereof.

It is further understood and agreed that this release has no [e]ffect on any and all underinsurance claims which the releas[or] may have against any and all insurance companies. It is further understood and agreed that the releas[o]r is entering into this release based upon the understanding that Roy Talley has no other insurance coverage available to him covering this claim. If it is determined that Roy Talley has other available insurance coverage, then the terms of this release have no [e]ffect to the extent of any additional coverage.

It is Understood and Agreed that this is a full and final release of all claims of every nature and kind whatsoever, and releases claims that are known and unknown, suspected and unsuspected. . . .

(6) Eleven days after Sivakoff executed that release, Nationwide sent a letter to Sivakoff. That letter relevantly provided:

I am currently in the process of investigating whether Jessica F. Talley, the driver of the other vehicle involved in the accident,

had any additional liability coverage available to her other than the 15/30 BI limits carried by [Talley's father] with [] Travelers. It appears, based upon the police report, that Ms. Talley did not reside at Mr. Talley's address.

Thereafter, Sivakoff discovered that Progressive Casualty Insurance Co. ("Progressive") insured Talley's mother, and also Talley, because Talley resided at her mother's home. Sivakoff then filed a complaint against Talley in Superior Court. Talley moved to dismiss that complaint on the ground that the validly executed Release in Full barred any claim against Talley. The Superior Court granted Talley's motion to dismiss. That dismissal was not appealed.

(7) Sivakoff also filed a complaint against Nationwide. That complaint relevantly asserted: "Since the amount of Ms. Talley's liability insurance coverage is not sufficient to pay the damages sustained by the plaintiff, plaintiff is entitled to underinsurance motorist coverage pursuant to h[er] policy of insurance with the defendant." Nationwide moved to dismiss Sivakoff's complaint on the ground that Nationwide's obligation to make UIM benefit payments had not been triggered because Sivakoff had failed to exhaust all available insurance policies. The Superior Court granted Nationwide's motion to dismiss and explained:

The parties stipulated that [] Talley's [mother's] Progressive policy was available for purposes of Plaintiff's claims against Talley. Thus, it is indisputable that Plaintiff has not exhausted "all bodily injury bonds and insurance policies available" to her. Therefore, Nationwide's obligation to pay Plaintiff's UIM benefits has not been triggered. Furthermore, the terms of the Release will preclude Plaintiff from ever[] bringing a UIM

claim because Plaintiff will never be able to exhaust all of the insurance coverage that was available to her.

Despite the unambiguous language of 18 *Del. C.* § 3902(b)(3), Plaintiff contends that the Court should ignore the existence of the Progressive [] policy, and only consider the Traveler[]s [] policy for purposes of her UIM claim. According to Plaintiff, to trigger a UIM carrier’s obligation to make UIM benefit payments, only insurance that covers the “motor vehicle” involved in the accident must be exhausted. Plaintiff argues that because she has received the full policy limit of the Traveler[]s policy on the vehicle Talley was driving, she is entitled to receive UIM benefit payments from Nationwide. In support of this argument, Plaintiff points to the definition of an “underinsured motor vehicle” as set forth in the policy, which states: “a motor vehicle for which bodily injury liability coverage or other security or bonds are in effect; however, their total amount is less than the highest limit of uninsured motorist coverage under either (1) this policy . . . or (2) any other applicable policy.”

Plaintiff’s argument is flawed. The policy language quoted above tracks the language of § 3902(b)(2), which defines an underinsured motor vehicle. Therefore, the policy definition of an “underinsured motor vehicle” does not create any additional rights to the insured that already exist under the UIM statute. In *Dunlap v. State Farm Fire and Casualty Co.*, the Delaware Supreme Court noted that there are multiple statutory conditions precedent that must be satisfied in order to perfect a UIM claim. Among them, the tortfeasor’s vehicle must be considered “underinsured,” as that term is defined in the statute, and the insured must recover from all available insurance policies. In this case, Plaintiff argues that the definition of “underinsured motor vehicle” trumps the statutory exhaustion requirement. However, *Dunlap* clearly states otherwise. Both conditions must be satisfied in order to have a viable UIM claim. Thus, Plaintiff’s argument is without merit.<sup>1</sup>

This appeal followed.

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<sup>1</sup> *Sivakoff v. Nationwide Mut. Ins. Co.*, 2010 WL 5313230, at \*3 (Del. Super. Dec. 6, 2010).

(8) We review a decision to grant a motion to dismiss *de novo* to determine whether the Superior Court erred as a matter of law in formulating or applying legal precepts.<sup>2</sup> In doing so, “we view the complaint in the light most favorable to the nonmoving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations.”<sup>3</sup>

(9) Title 18, section 3902(b) of the Delaware Code relevantly provides:

Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of \$100,000 per person and \$300,000 per accident or \$300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.

(1) Acceptance of such additional coverage shall operate to amend the policy’s uninsured coverage to pay for bodily injury damage that the insured or his/her legal representative are legally entitled to recover from the driver of an underinsured motor vehicle.

(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.

(3) The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement or judgments. . . .

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<sup>2</sup> *Deuley v. DynCorp Int’l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

<sup>3</sup> *Id.* (quoting *Clinton*, 977 A.2d at 895).

We have explained that “[t]he overriding purpose of [section] 3902 is to ‘fully compensate innocent drivers.’”<sup>4</sup> But, we also have explained that we will not distort the General Assembly’s intent when unambiguous statutory language “clearly mandate[s] [a] result.”<sup>5</sup> For example, we have stated that the plain meaning of section 3902(b)(3) is that “UIM carriers are not obligated to pay their insureds until after the insureds exhaust all available liability insurance policies.”<sup>6</sup>

(10) The Nationwide policy provides that Nationwide “will pay damages . . . which are due by law to you . . . from the owner or driver of an uninsured motor vehicle because of bodily injury suffered by you . . . .” The Nationwide policy defines an underinsured motor vehicle as “a motor vehicle for which bodily injury liability coverage or other security or bonds are in effect; however, their total amount is less than the highest limit of uninsured motorists coverage under either (1) this policy . . . ; or (2) any other applicable policy.” Sivakoff argues that the Superior Court erred in concluding that the definition of an “underinsured motor vehicle” under the UIM provision of the Nationwide policy provides Sivakoff with greater coverage than Delaware’s UIM statute. She argues that “[a] comparison of the definition of an underinsured motor vehicle under [the] Nationwide[] policy, with that under the UIM statute shows that the subject policy

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<sup>4</sup> *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 439 (Del. 2005) (citing *Deptula v. Horace Mann Ins. Co.*, 842 A.2d 1235, 1237 (Del. 2004)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 439–40.

provides more liberal coverage than the coverage mandated by [section 3902(b)].”<sup>7</sup> Sivakoff argues that because she has received the full policy limit of the Travelers policy on the vehicle that Talley was operating, she is entitled to receive UIM benefit payments from Nationwide.

(11) The Nationwide policy is not broader than section 3902(b)(3). The Nationwide policy defines an underinsured motor vehicle as “a motor vehicle for which bodily injury liability coverage or other security or bonds are *in effect*.” Because Progressive insured Talley’s mother and covered Talley as a resident of her mother’s home, the Progressive policy coverage was “in effect” for the vehicle that Talley was operating. And, because Sivakoff did not pursue the coverage available under the Progressive policy, Sivakoff did not exhaust “all bodily injury bonds and insurance policies available” to her.<sup>8</sup> In these circumstances, there is no distinction between what the Nationwide policy describes as liability coverage that is “in effect” for a motor vehicle and what the statute defines as insurance policies “available” to the insured. Consequently, Nationwide is not “obligated to make

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<sup>7</sup> Compare The Nationwide policy (An underinsured motor vehicle is “*a motor vehicle for which bodily injury liability coverage or other security or bonds are in effect*; however, their total amount is less than the highest limit of uninsured motorists coverage under either (1) this policy . . . ; or (2) any other applicable policy.”), with 18 Del. C. § 3902(b)(3) (“The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under *all bodily injury bonds and insurance policies available to the insured* at the time of the accident have been exhausted by payment of settlement or judgments. . . .”) (emphases added).

<sup>8</sup> See 18 Del. C. § 3902(b)(3).



any payment” under section 3902(b).<sup>9</sup> The Superior Court did not err in interpreting the Nationwide policy.

(12) Sivakoff also argues that the Superior Court erred in dismissing the action because Nationwide failed to timely object to her proposed settlement with Talley. Because Sivakoff did not raise this claim in the Superior Court, our review is for plain error.<sup>10</sup> Even if we concluded that Nationwide was obligated to object to the proposed settlement, Sivakoff executed the Release in Full just nine days after sending her letter to Nationwide. That letter provided: “We assume that Nationwide has no objection to Ms. Sivakoff accepting the tort feisor’s policy limits, unless we hear from you within 2 weeks.” Sivakoff unilaterally set an arbitrary deadline for Nationwide to object and then did not allow that deadline to expire before executing the Release in Full. Accordingly, Sivakoff has not shown plain error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice

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<sup>9</sup> *See id.*

<sup>10</sup> *See* Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”); *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (“Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).