

IN THE COURT OF COMMON PLEAS IN THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

Eldred Gordon)	
)	C.A. No. CPU5-09-001241
Plaintiff,)	
)	
v.)	
)	
Nationwide Mutual Insurance Company)	
)	
Defendant.)	

February 2, 2010

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**DECISION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff has filed this Motion for Summary Judgment, contending that the language of her husband's personal injury protection ("PIP") insurance policy from the Nationwide Mutual Insurance Company ("Nationwide") permits her to stack benefits for injuries suffered in an automobile accident with a vehicle not otherwise covered by Nationwide. Plaintiff received PIP benefits for her injuries from the insurance company covering that vehicle. The Court does not accept Plaintiff's interpretation of the Nationwide insurance policy language and finds that the Nationwide policy does not allow for the "stacking" of PIP benefits. Therefore, Plaintiff's Motion for Summary Judgment is denied.

Nationwide has requested that the Court find that Plaintiff is not entitled to stack PIP benefits and dismiss this action. The Court will treat Nationwide's request as a cross Motion for Summary Judgment and grant Nationwide's request. As such, Plaintiff's action is dismissed with prejudice.

BACKGROUND

Eldred Gordon ("Plaintiff") is an insured person for personal injury protection ("PIP") coverage under the automobile insurance policy her husband, Sam Gordon, has with the Nationwide Mutual Insurance Company ("Nationwide"). On October 8, 2007, Plaintiff was injured while exiting a vehicle owned by Waynenicka Johnson ("Ms. Johnson") and insured by the Progressive Insurance Company ("Progressive"). Ms. Johnson's Progressive policy had a \$15,000 limit in Personal Injury Protection ("PIP") benefits, which were paid to medical providers in connection with Plaintiff's injuries. This \$15,000 did not cover all of Plaintiff's medical expenses, however.

Plaintiff requested that Nationwide pay her additional medical expenses out of the \$15,000 PIP coverage included in her husband's Nationwide policy. On February 19, 2009, Nationwide sent Plaintiff's counsel a Denial of Coverage letter denying the claim based on the following terms and conditions of the No-Fault section of the policy at page N3:

The following provisions apply to circumstances in which Personal Injury Protection benefits are available from more than one policy or company:

1. If other insurance available under the Delaware Motorists Protection Act applies to a loss, we will be liable only for our proportional share of the loss. That share will be determined by our proportion of the total coverage limits provided under this and the other available coverage.

On March 9, 2009, Nationwide sent another Denial of Coverage letter to Plaintiff, indicating that coverage was not available based on the following policy language, found at page N2 of the No-Fault section of the policy:

You and household members are covered for bodily injury:

1. while occupying a motor vehicle; or
2. as a pedestrian if injury involves a motor vehicle.

However, if injured while occupying or by involvement with any motor vehicle other than your auto, this coverage will apply only if the other motor vehicle is not insured under the Delaware Motorists Protection Act. (Emphasis added.)

Both Denial of Coverage letters included the following explanation for the denial of the claim:

Our investigation indicates that Eldred Gordon was injured exiting a motor vehicle and the vehicle was insured in the state of Delaware. I have confirmed with your office that Progressive insurance has issued its policy limits of \$15,000, there is no excess coverage available under Sam Gordon (sic) auto policy. Accordingly, there is no Personal Injury Protection coverage available to you for this claim.

On May 28, 2009, Plaintiff filed a Complaint, alleging that Nationwide improperly denied Plaintiff the additional PIP coverage. Nationwide filed an Answer to the Complaint on August 21, 2009. Plaintiff filed this Motion for Summary Judgment on September 30, 2009, arguing that the plain language of the Nationwide policy clearly provides coverage. In its response filed on October 15, 2009, Nationwide asked that the Court deny Plaintiff's motion, and enter judgment that the policy language precludes the "stacking" of Nationwide's PIP benefits with the PIP benefits already received from the Progressive policy.¹ Plaintiff filed a reply on November 11, 2009, maintaining that the policy provisions found at pages N2 and N3 of the policy are conflicting, and, therefore, ambiguous, and should be construed against the insurer. The parties subsequently filed a Stipulation of Facts for this matter pursuant to a request by the Court.

STANDARD OF REVIEW

In essence, both parties have requested summary judgment for this matter. In such a case, "neither party will be granted summary judgment unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law." *Gallagher v. USAA Cas. Ins. Co.*, 2005 WL 3062014, at *1 (Del. Super.). The parties have filed a Stipulation of Facts. Thus, the sole issue before the Court concerns the legal

¹ The Court will treat Nationwide's request that the Court enter judgment that the Plaintiff is not entitled to stack PIP benefits as a Motion for Summary Judgment.

interpretation of a contract for insurance. “The proper construction of any contract, including an insurance contract, is purely a question of law.” *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992). Because only questions of law remain, summary judgment is appropriate. *Robinson v. Allstate Ins. Co.*, 1992 WL 207272, at *2 (Del. Super.).

DISCUSSION

In matters involving insurance contract disputes, the Court must first determine whether the policy language is ambiguous. *Ruggiero v. Montgomery Mut. Ins. Co.*, 2004 WL 1543234, at *2 (Del. Super.). “All provisions of a policy are to be read together and construed according to the plain meaning of the words involved, as to avoid ambiguity while at the same time giving effect to all provisions.” *Keystone Ins. Co. v. Walls*, 2006 WL 1149143, at *4 (Del. Super.) (quoting *Hercules v. OneBeacon Am. Ins. Co.*, 852 A.2d 33, 35 (Del. Super. 2004)). “Clear and unambiguous language in insurance contracts will be given its plain and ordinary meaning.” *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1195. If the language is reasonably susceptible to at least two different interpretations, it will be deemed ambiguous. *Id.* at 1196. Ambiguous language in an insurance contract is typically construed against the insurer. *Fisher v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 1997 WL 817893, at *2 (Del. Super.).

The disputed provisions in the No-Fault section of the Nationwide insurance policy, when read together in the order in which they appear in the policy, are clear and unambiguous. The policy provides, as follows:

YOU AND A HOUSEHOLD MEMBER

You and household members are covered for bodily injury:

1. while occupying a motor vehicle; or
2. as a pedestrian if injury involves a motor vehicle.

However, if injured while occupying or by involvement with any motor vehicle other than your auto, this coverage will apply only if the other motor vehicle is not insured under the Delaware Motorists Protection Act.

Nationwide Policy at N2.

OTHER INSURANCE – PERSONAL INJURY PROTECTION

The following provisions apply to circumstances in which Personal Injury Protection benefits are available from more than one policy or company:

1. If other insurance available under the Delaware Motorists Protection Act applies to a loss, we will be liable only for our proportional share of the loss. That share will be determined by our proportion of the total coverage limits provided under this and the other available coverage.

Nationwide Policy at N3.

The language that appears first in the No-Fault section of the policy provides that if the insured is injured while occupying any vehicle other than the insured's vehicle, PIP coverage will be paid only if the other vehicle is not insured under the Delaware Motorists Protection Act. In this case, Plaintiff was an occupant of Ms. Johnson's vehicle.² Ms. Johnson's vehicle was insured under the Delaware Motorists Protection Act and Plaintiff received the full amount of PIP benefits available under that policy. Therefore, by reading this provision, a reasonable person would assume that PIP benefits are not available to Plaintiff under the Nationwide policy.

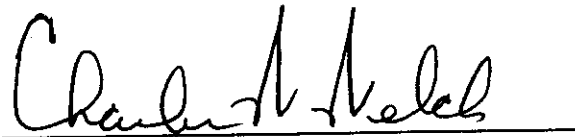
The Court now turns to the language of the second disputed provision. The introduction sentence of that provision, when read after the earlier provision, makes it clear that this second provision does not apply to Plaintiff. "*The following provisions apply to circumstances in which Personal Injury Protection benefits are available from more than one policy or company.*"³ The earlier provision precludes Plaintiff from receiving PIP benefits from Nationwide, making this circumstance one in which PIP benefits were only available from one policy: the Progressive policy. As a result, the remainder of the second provision must be disregarded. Given the plain language of the Nationwide policy, Plaintiff's Motion for Summary Judgment is denied, and

² The Delaware Supreme Court has defined an "occupant" of an insured vehicle to be a person who is "(a) within a reasonable geographic perimeter of the vehicle or (b) engaged in a task related to the operation of the vehicle." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892, 896 (Del. 1997) (defining "a reasonable geographic perimeter" to be within touching distance of the vehicle). Although Plaintiff does not contend that she was a pedestrian at the time of the injury, the Court believes that for the sake of clarity, the determination of Plaintiff's status as an occupant of Ms. Johnson's vehicle at the time of the injury must be included in this Opinion.

³ It has long been held in Delaware that an injured pedestrian may stack PIP benefits. *DiJiacomo v. Progressive Ins. Co.*, 2008 WL 4817085, at *2 (Del. Super.). Had Plaintiff been a pedestrian, and not an occupant of Ms. Johnson's vehicle, she would be able to stack the Nationwide and Progressive PIP benefits.

Nationwide's Motion for Summary Judgment is granted. Therefore, Plaintiff's action is dismissed with prejudice.

IT IS SO ORDERED THIS 2nd DAY OF FEBRUARY, 2010.



CHARLES W. WELCH
JUDGE