IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PENNY KIMBALL and WADE KIMBALL,	)	
	)	C.A. No. 05C-06-052 JTV
Plaintiffs,	)	
v.	)	
PENN MUTUAL INSURANCE COMPANY and HARLEYSVILLE MUTUAL INSURANCE COMPANY, a successor in interest to Penn Mutual Insurance Company,	)	
Defendant and Third-Party Plaintiff,	)	
v.	)	
ENTERPRISE LEASING COMPANY OF NORFOLK-RICHMOND,	)	
Third-Party Defendant.	)	

Submitted: September 10, 2008
Decided: January 30, 2009

Thomas P. Leff, Esq., Casarino, Christman, Shalk, Ransom & Doss, Wilmington, Delaware. Attorney for Third-Party Plaintiff Harleysville.

Jennifer Hurvitz Burbine, Esq., White & Williams, Wilmington, Delaware. Attorney for Third-Party Defendant Enterprise Leasing Company.

Kimball v. Penn Mutual, et al.,
C.A. No. 05C-06-052 JTV
January 30, 2009

Upon Consideration of Third-Party Plaintiff's
Motion for Costs and Interest
***GRANTED* IN PART**

VAUGHN, President Judge

ORDER

Upon consideration of Harleysville's motion for costs and interest, Enterprise's opposition, and the record of the case, it appears that:

1. This case arises out of a 2002 automobile accident in Virginia. The original plaintiffs, Wade and Penny Kimball, were injured when their vehicle was struck by a vehicle rented from Enterprise Leasing Company of Norfolk-Richmond. The individual driving the Enterprise rental vehicle at the time of the accident was not an approved driver under the rental agreement with Enterprise. The person who rented the vehicle, who was named as the approved driver in the rental agreement, had asked his companion to drive, as he complained of a headache.

2. Enterprise denied liability coverage for the accident on the grounds that the driver was not an approved driver under the rental agreement. The Kimballs then made a claim for uninsured motorist benefits under their auto insurance policy with Harleysville. On August 4, 2006, Harleysville paid the Kimballs $60,260 in full settlement of their personal injury claims. Harleysville in turn sought contribution from Enterprise, alleging that Enterprise did, in fact, have liability for the accident under the Virginia "medical emergency exception."

3. A bench trial was held in the case, and the Court granted Harleysville's

request for a declaratory judgment, ordering Enterprise to contribute $25,000[1] toward Harleysville's settlement with the plaintiffs. Harleysville has now moved for costs and prejudgment interest.

4. Harleysville contends that its motion is governed by Delaware law. It relies upon Superior Court Civil Rule 54(d), which permits the award of costs to a prevailing party as a matter of right. As the prevailing party, Harleysville claims that it is entitled to $205 in filing and service fees.

5. Harleysville also contends that it is entitled to prejudgment interest, calculated from the date of its loss (August 4, 2006) to the date of the court's decision granting the declaratory judgment (August 29, 2008). Harleysville notes that its loss of $25,000 was a sum certain, and was specifically pleaded in its Third-Party Complaint. Under the relevant Delaware statute, prejudgment interest is to be calculated at the federal discount window rate on the date of the loss plus 5%.[2] The legal interest rate on August 4, 2006 was 11.25%.[3] Harleysville's calculation based on the time elapsed and the legal interest rate yields prejudgment interest in the amount of $5,816.25.

6. Enterprise contends that since the full amount of its liability is $25,000, Harleysville is not entitled to recover costs or prejudgment interest. As to interest,

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[1] $25,000 is the amount of Enterprise's liability under a Virginia statute discussed hereinafter.

[2] 6 *Del. C.* § 2301.

[3] Harleysville attaches as an exhibit the Federal Reserve Interest Rates for August 2006, showing the discount window primary credit rate of 6.25%.

Enterprise contends that any award of prejudgment interest must be considered under Virginia law. Enterprise notes that this Court ruled on January 31, 2007 that Virginia substantive law applies to this case.

7. Enterprise relies on a the case of *Dairyland Insurance Co. v. Douthat*[4] for the proposition that an insurer has no duty to pay prejudgment interest in excess of its policy limits absent a contractual provision to the contrary. In the alternative, Enterprise argues that the rate applied to any award of prejudgment interest granted by the Court should be the lower Virginia rate of 6%. Under that calculation, the prejudgment interest owing for the period between August 4, 2006 and August 29, 2008 would be $3,102. With respect to costs, Enterprise simply requests that the Court deny Harleysville's request for costs "as the coverage limits have already been paid to Harleysville."

8. Delaware courts routinely award costs as a matter of right. Superior Court Civil Rule 54(d) provides: "Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs."[5] "Judgment" is defined as "any order from which a writ of error or an appeal lies."[6]

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[4] 449 S.E.2d 799 (Va. 1994).

[5] Super. Ct. Civ. R. 54(d). *See also* 10 *Del. C.* § 5101 ("Generally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court.").

[6] Super. Ct. Civ. R. 54(a).

9. Determining when costs are appropriately awarded is a matter of judicial discretion.[7] A court should examine the reasonableness of the costs,[8] relying on counsel's representations as to the claimed amount.[9] Filing and service fees are routinely granted to the prevailing party.[10]

10. The costs sought by Harleysville are reasonable, and will be awarded as a matter of right under Superior Court Civil Rule 54 and the relevant case law.

11. Unlike court costs, Enterprise correctly argues that the recovery of prejudgment interest is a matter of substantive law under choice of law principles.[11]

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[7] *Graham v. Keene Corp.*, 616 A.2d 827, 829 (Del. 1992); *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976); *Foley v. Elkton Plaza Assocs., LLC*, 2007 WL 959521, at *1 (Del. Super. Mar. 30, 2007).

[8] *Khomenko v. Levitskiy*, 2007 WL 1651981, at *2 (Del. Super. June 6, 2007) (court was satisfied that $1,125 in prevailing party costs were reasonable and recoverable); *Burton v. Christiana Care Health Servs., Inc.*, 2004 WL 2154124, at *1 (Del. Super. Sept. 17, 2004) ("While costs are generally awarded to the prevailing party, the Court does have discretion to review the bills to ensure they are reasonable and appropriate.").

[9] *Gates v. Texaco, Inc.*, 2008 WL 1952164, at *1 (Del. Super. Mar. 20, 2008).

[10] *See, e.g.*, *Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Marketing Inc.*, 2004 WL 42611 (Del. Super. Jan. 8, 2004); *Habbart v. Liberty Mut. Fire Ins. Co.*, 2003 WL 367830 (Del. Super. Feb. 20, 2003).

[11] *Tisch Family Found., Inc. v. Tex. Nat'l Petroleum Co.*, 336 F. Supp. 441, 443 (D. Del. 1972) ("In Delaware, the recovery of moratory interest is a matter of substantive law, and since this suit involves the issue of performance of contractual obligations, the availability of moratory interest must be determined under the law of the place of performance."); *Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at *21 (Del. Ch. Dec. 21, 2007) ("The law of the forum is inapplicable, however, because the application of prejudgment interest is generally an issue of substantive law."); *Cooper. v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del. Super. 1986) ("The recovery of prejudgment interest in Delaware is a

Therefore, Virginia law applies to the Court's analysis of whether to award Harleysville any amount of the requested prejudgment interest.[12]

12. In *Dairyland Insurance Co,*[13] the issue was whether two automobile insurers were required to pay prejudgment interest in an amount exceeding their contractual limits of liability. A jury had awarded the injured party $95,000 in damages plus prejudgment interest from the date of the accident. Before the court entered final judgment in that case, *Dairyland*, the tortfeasor's insurer, paid the plaintiff its policy limits of $25,000. State Farm also paid the plaintiff $75,000, the maximum amount under the underinsured motorist provision of the policy which it had issued to the plaintiff. The plaintiff then brought suit against *Dairyland* and State Farm to recover for the unpaid amount of prejudgment interest awarded in the underlying action, which was over $27,000. The insurers argued that they were not obligated to pay any amounts in excess of their combined policy limits. Neither of the policies at issue provided specifically for prejudgment interest.

13. Construing the express terms of the policies, the court found nothing in

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matter of substantive law. Indeed, the majority view ... is that prejudgment interest, like the issue of damages, is substantive, and the state whose laws govern the substantive legal questions also govern the question of prejudgment interest.") (citations omitted); *see also Stentor Elec. Mfg. Co. v. Klaxon*, 125 F.2d 820 (3d Cir. 1942).

[12] This Court has previously held that Virginia law applies to the rights and duties of the parties under the "most significant relationship" test.

[13] 449 S.E.2d 799 (Va. 1994).

the language of either contract requiring the payment of prejudgment interest.[14] The court then considered whether any provision of law affected the enforcement of the contracts as written.[15] It examined Virginia's statute relating to the award of pre- and postjudgment interest. It noted that the statute distinguished between the discretionary award of prejudgment interest on the one hand, and the mandatory award of postjudgment interest on the other.[16] In contrast with postjudgment interest, an extra-contractual obligation, the court reasoned that there was no similar statutory requirement for the payment of prejudgment interest.[17] Thus, the court held that "an insurer has no duty to pay prejudgment interest in excess of its policy limits, absent a contractual provision to the contrary."[18] The court noted that its holding accorded with the view taken by the majority of courts.[19]

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[14] *Id*. at 801.

[15] *Id*.

[16] *Id*. ("Underlying this distinction is the principle that '[p]rejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered.' In contrast, postjudgment interest is not an element of damages, but is a statutory award for delay in the payment of money actually due.") (citations omitted).

[17] *Id*. at 802.

[18] *Id*.

[19] *Id*. *See Allstate Ins. Co. v. Starke*, 797 P.2d 14 (Colo. 1990); *Conway v. Country Cas. Ins. Co.*, 442 N.E.2d 245 (Ill. 1982); *Nunez v. Nationwide Mut. Ins. Co.*, 472 A.2d 1383 (Me. 1984); *Cochran v. N.C. Farm Bureau Mut. Ins. Co.*, 437 S.E.2d 910 (N.C. Ct. App. 1994); *Laplant v. Aetna Cas. & Sur. Co.*, 219 A.2d 283 (N.H. 1966); *Buckhannon-Upshur County Airport Auth. v. R & R Coal Contracting, Inc.*, 413 S.E.2d 404 (W.Va. 1991); Alexander C. Black, Annotation, *Liability of insurer for prejudgment interest in excess of policy limits for covered loss*, 23 A.L.R. 5th 75 (1994) ("Many courts have held that prejudgment interest is an

14. While Enterprise's analysis of *Dairyland* is accurate, *Dairyland* is distinguishable because Enterprise is a self-insurer whose liability is governed by a Virginia statute, not a contractual policy. The express holding in *Dairyland* is that "an insurer has no duty to pay prejudgment interest in excess of its *policy limits*, absent a contractual provision to the contrary."[20] The court was construing two automobile liability policies. The court looked only to the language of the policies and to the Virginia statute allowing the recovery of interest in civil cases. The statute governing Enterprise's liability, Section 46.2-472,[21] was not examined. That section, applicable to self-insurers through Section 46.2-368, provides that every covered policy shall:

> Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person, and injury to or destruction of property caused by accident and arising out of the ownership, use, or operation of such motor vehicle or motor vehicles within the Commonwealth, any other state in the United States, or Canada, *subject to a limit exclusive of interest and costs*, with respect to each motor vehicle, of

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element of damages, and have accordingly concluded that an insurer has no liability for prejudgment interest in excess of its policy damage limits.").

[20] *Dairyland*, 449 S.E.2d at 802 (emphasis added).

[21] Sections 46.2-108, 46.2-705, and 46.2-368 of the Virginia Code set forth the insurance requirements for businesses that rent automobiles. Section 46.2-368(B) provides for the issuance of self-insurance certificates to such entities if certain conditions are met, and states that "protection against the uninsured or underinsured motorist required under this section shall not exceed the financial requirements of § 46.2-472."

> $25,000 because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, to a limit of $50,000 because of bodily injury to or death of two or more persons in any one accident, and to a limit of $20,000 because of injury to or destruction of property of others in any one accident.[22]

15. The express language of the statute provides that the $25,000 limit for bodily injury does not include interest and costs. There do not appear to be any dispositive Virginia cases on the issue of whether prejudgment interest in excess of the relevant *statutory* limits may be awarded in favor of an insurer in a reimbursement case against a *self-insuring* entity.[23]

16. The plain language of Section 46.2-472 exposes Enterprise to interest in addition to the $25,000 for bodily coverage. Prejudgment interest may, therefore, be recovered in excess of the $25,000. The Court exercises its discretion to award

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[22] Va. Code § 46.2-472.

[23] Two other Virginia cases bear on some of the issues affecting rental car companies in their unique capacity as self-insurers; however, neither involves a claim for prejudgment interest. In *Kiernan v. Agency Rent A Car, Inc.*, 940 F.2d 917 (4th Cir. 1991), the Fourth Circuit held that a car rental company as a self-insurer was entitled to place contractual limits on its uninsured motorist coverage. Reasoning that the company's rental agreement was the relevant "policy," the court found that the provision in the agreement providing coverage up to the statutory minimum ($25,000) was both reasonable and enforceable against the lessee. While the court held that the $25,000 cap defeated diversity jurisdiction in the case, it did not address the interplay between the statutory coverage ceiling and a claimant's entitlement to interest and costs. In *USAA Casualty Insurance Co. v. Hertz Corp.*, 578 S.E.2d 775 (Va. 2003), the Virginia Supreme Court discussed the minimum statutory coverage obligations of self-insurers, and held that a rental company cannot avoid its duty to offer primary liability coverage by expanding the insurance coverage provided by a driver's own carrier. While *USAA* was a reimbursement action similar to the case at bar, the court did not address the elements of damage recoverable to USAA from Hertz.

prejudgment interest at the applicable Virginia rate of 6%.

17. Therefore, Harleyville's motion is ***granted in part.*** It is awarded the costs which it seeks plus prejudgment interest in the amount of $3,102.[24]

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[24] Va. Code §§ 6.1-330.53, 6.1-330.54. Based on the 6% rate, Enterprise calculated the interest accruing between August 4, 2006 and August 29, 2008 to be $3,102.00