

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4536-04T2

JOSEPH BERGAMO and
KAREN BERGAMO, his wife,

Plaintiffs-Respondents,

v.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY,

Defendant-Respondent,

and

ENCOMPASS INSURANCE COMPANY,

Defendant-Appellant.

Argued May 10, 2006 - Decided September 14, 2006

Before Judges Wecker, Fuentes and Graves.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, L-8346-03.

Jeffrey J. Czuba argued the cause for appellant
Encompass Insurance Company (Hoagland, Longo,
Moran, Dunst & Doukas, attorneys; Mr. Czuba,
of counsel and on the brief).

Patricia M. McDonagh argued the cause for
respondent Universal Underwriters Insurance
Company (Marshall, Dennehey, Warner, Coleman &
Goggin, attorneys; Michael R. Speer, of counsel;
Ms. McDonagh, on the brief).



R-RECALL-14

printed 9/7/06

Respondent Bergamo did not file a brief.

PER CURIAM

The issue in this case is whether Encompass Insurance Company (Encompass) is obligated to provide underinsured motorist benefits to plaintiff Joseph Bergamo,¹ who was injured in an accident on November 18, 2001, in Middletown, New Jersey. Encompass appeals from orders entered on September 24, 2004, granting a motion by Universal Underwriters Insurance Company (Universal) for partial summary judgment and denying Encompass's cross-motion for summary judgment. After reviewing the record and applicable law in light of the contentions advanced on appeal, we reverse the orders under review.

The facts that give rise to this matter are not in dispute. Plaintiff was occupying a motorcycle, which he owned, at the time of the accident on November 18, 2001. Plaintiff's motorcycle was insured under a policy issued by Universal. Plaintiff also owned a 2000 Lincoln Navigator that was insured by Encompass. Plaintiff's motorcycle was not insured under his policy with Encompass. Plaintiff was a named insured on both policies and both policies provided uninsured/underinsured motorist coverage in the amount of \$250,000 per person and

¹ Because the claims of Karen Bergamo, the wife of Joseph Bergamo, are entirely derivative, we refer to Joseph Bergamo as "plaintiff" in this opinion.

\$500,000 per accident. The policies were standard policies.
See N.J.S.A. 39:6A-2(n).

Plaintiff initially instituted suit against the driver of the other vehicle involved in the accident, Shirley Zicari, who was insured for \$100,000. After that matter settled for \$95,000, plaintiff filed the present action against both Universal and Encompass for underinsured motorist benefits.

When Universal filed its motion for partial summary judgment, it conceded that its policy provided plaintiff with underinsured motorist coverage in connection with the accident involving Zicari on November 18, 2001. But it argued that the Encompass policy "applies on a pro-rata basis with the Universal Underwriters Insurance policy to extend UIM [underinsured motorist] benefits to the plaintiff." In its cross-motion for summary judgment, Encompass sought a declaration that plaintiff was not entitled to underinsured motorist coverage under the Encompass policy. Encompass argued that plaintiff did not qualify for coverage under the Encompass policy because he did not fall within the definition of a "covered person."

Encompass contends that the following provisions of its policy clearly demonstrate that plaintiff was not a covered person under the policy at the time of the accident:

**UNINSURED MOTORISTS COVERAGE-NEW JERSEY
(SPLIT LIMITS BASIS)**

In consideration of an additional premium, if the Coverage Summary shows an amount of "Uninsured Motorists" coverage, we will provide the coverage described by the provisions of this endorsement.

DEFINITIONS

The following words and phrases are defined for this "UNINSURED MOTORISTS COVERAGE" endorsement. Only in regard to the coverage provided by this endorsement, the following definitions replace any corresponding definitions in the "MOTOR VEHICLE" Segment.

1. Covered Person means:
 - a. You for the ownership, maintenance or use of any vehicle, except while occupying, or when struck by a vehicle owned by you which is not insured for this coverage under this policy;

INSURING AGREEMENT

We will pay compensatory damages which any covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of:

1. Bodily injury sustained by any covered person, and caused by an accident;
2. Property damage caused by an accident except under paragraph b. of definition 4. Uninsured Motor Vehicle.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle or underinsured motor vehicle.

According to Encompass, plaintiff does not fall within the definition of a "covered person" because (1) he was occupying a motorcycle he owned at the time of the accident, and (2) the motorcycle was not insured under the Encompass policy.

Following oral argument on September 24, 2004, the trial court granted Universal's motion for partial summary judgment and it denied Encompass's cross-motion for summary judgment. Thereafter, plaintiff and Universal settled plaintiff's claim against Universal. Universal agreed to pay plaintiff the sum of \$50,000, and it further agreed that if Encompass is successful in its efforts to reverse the trial court's ruling, then it will pay an additional \$50,000 to plaintiff after "all available Appellate rights are exhausted." Plaintiff also settled his claim against Encompass. Encompass agreed to pay plaintiff the sum of \$10,000. If Encompass is successful on appeal, however, then the \$10,000 will be returned to Encompass, and plaintiff will pursue his rights under his agreement with Universal.

In reviewing a matter on summary judgment, we apply the same standards that govern trial courts. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether, giving the non-moving party the benefit of all reasonable inferences, there is a genuine issue as to a material fact. If not, we then decide whether the motion judge's

application of the law was correct. In a case such as this, where the facts are not in dispute, the trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The law governing uninsured motorist (UM) coverage and underinsured motorist (UIM) coverage are both codified in N.J.S.A. 17:28-1.1. But there are important distinctions between UM and UIM coverage. Every standard motor vehicle liability policy "must include minimum UM coverage." Pinto v. N.J. Mfrs. Ins. Co., 365 N.J. Super. 378, 387 (App. Div. 2004) (citing N.J.S.A. 17:28-1.1a), aff'd, 183 N.J. 405 (2005). But, "the statute does not require any motor vehicle liability policy to include UIM coverage." Ibid. (citing N.J.S.A. 17:28-1.1b). As the Court has explained, the "availability of uninsured motorist benefits affects all ratepayers of insurance (all auto insurance companies pay a portion of their premiums into the Uninsured Motorist Fund), whereas the availability of UIM benefits affects only the parties insured under the contract." French v. N.J. Sch. Bd. Ass'n Ins. Group, 149 N.J. 478, 491-92 (1997).

"[T]he uninsured motorist statute was designed to provide maximum remedial protection to the innocent victims of

financially irresponsible motorists and to reduce the drain on the financially-troubled Unsatisfied Claim and Judgment Fund." Riccio v. Prudential Prop. & Cas. Ins. Co., 108 N.J. 493, 503-04 (1987). Accordingly, in UM cases our courts have routinely rejected any attempt by an insurer to restrict the liability on a UM endorsement as "repugnant to both the intent and meaning of the statute." Beek v. Ohio Cas. Ins. Co., 135 N.J. Super. 1, 5 (App. Div. 1975), aff'd, 73 N.J. 185 (1977); see also Rider Ins. Co. v. First Trenton Cos., 354 N.J. Super. 491, 497 (App. Div. 2002) (noting that policy exclusions that aim to limit the members of the UM statutory class violate the purposes of the uninsured motorist statute); Campbell v. Lion Ins. Co., 311 N.J. Super. 498, 507 (App. Div. 1998) (noting that in UM cases "our courts have frequently struck policy provisions which were more restrictive than those mandated by statute").

Because UIM coverage is optional, these same considerations do not apply to UIM coverage. In the context of a UIM policy, the Supreme Court in French, supra, quoted the following passage with approval:

In appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning[.] The parties to an insurance contract may contract for any lawful coverage, and the

insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.

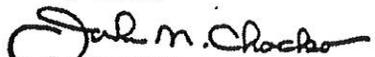
[149 N.J. at 492 (quoting Leader Nat'l Ins. Co. v. American Hardware Ins. Group, 545 N.W.2d 451, 455 (Neb. 1996) (citations omitted in original)).]

"The purpose of New Jersey's [UIM] statute is to protect the insured up to the UIM limits purchased and not to make an injured person whole again." Bauter v. Hanover Ins. Co., 247 N.J. Super. 94, 96 (App. Div.), certif. denied, 126 N.J. 335 (1991) (citing Nikiper v. Motor Club of Am. Cos., 232 N.J. Super. 393, 399 (App. Div.), certif. denied, 117 N.J. 139 (1989)). In our view, plaintiff is not entitled to UIM coverage under the Encompass policy because plaintiff's motorcycle was not insured under the Encompass policy, and the limiting language in the Encompass policy does not violate either the intent or purpose of the UM/UIM statute. See Kamf v. Franklin Life Ins. Co., 33 N.J. 36, 43-44 (1960) ("When the terms of an insurance contract are clear, it is the function of a court to enforce it as written and not make a better contract for either of the parties."). We are, however, somewhat concerned with the format of the policy, which sets forth provisions concerning UIM coverage under the large-font heading "UNINSURED MOTORISTS COVERAGE--NEW JERSEY." Under other circumstances, this format

might be deemed an ambiguity, which would be construed in favor of the policyholder.

The orders under review are reversed, and the matter is remanded to the trial court for entry of judgment in accordance with this opinion.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION