SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2895-16T4

JANINE BALL,

Plaintiff-Appellant,

v.

CHARLES J. REESE and RITE AID CORPORATION,

Defendants,

and

FIDELITY & GUARANTY INSURANCE UNDERWRITERS, INC.,

Defendant/Intervenor-Respondent.

Argued April 23, 2018 – Decided May 15, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Docket No. L-0253-14.

John Burke argued the cause for appellant (Burke & Potenza, attorneys; John Burke, of counsel and on the briefs).

Michael A. Mourtzanakis argued the cause for respondent (Law Offices of William E. Staehle,

attorneys; Michael A. Mourtzanakis, on the brief).

PER CURIAM

The narrow question presented in this appeal is whether the trial court erred in applying a credit against an injured plaintiff's underinsured motorist ("UIM") coverage. The credit was for an amount that plaintiff received in settlement from a self-insured premises owner. The premises owner was named as a co-defendant in plaintiff's negligence case against an underinsured motorist who struck her while driving his car through the front of the premises.

We affirm the trial court's application of the credit, a result which is consistent with analogous case law and with the terms of plaintiff's state-approved UIM policy form.

I.

The underlying facts are uncomplicated and essentially undisputed.

On November 15, 2013, plaintiff Janine Ball was walking into a Rite Aid store in Hackettstown when a car operated by defendant Charles J. Reese struck her. Reese had fallen asleep while attempting to park his car in front of the store entrance. The car apparently ran over the curb, hit plaintiff, and crashed through the store's glass entrance doors. Plaintiff was knocked

onto the hood of the car until it came to a stop. Plaintiff sustained several injuries, including an amputation of a joint in her left fourth finger, which allegedly left her with a deformity and residual pain.

Plaintiff filed a personal injury action in the Law Division against Reese, based on his negligence in operating his vehicle, and against co-defendant Rite Aid Corporation, based on a theory of premises liability. Rite Aid is self-insured for such liability claims up to $2 million. Reese deposited the limits of his auto liability insurance policy, $50,000, with the Clerk of the Superior Court.

On December 22, 2015, plaintiff notified her automobile insurer, respondent Fidelity & Guaranty Insurance Underwriters, Inc. (also known as "Travelers") that she intended to pursue a UIM claim for the difference between Reese's liability limits and the $100,000 UIM limits in her policy. After a non-binding arbitration, plaintiff settled her claim with Reese for $50,000 and her claim with Rite Aid for a separate $50,000.

Plaintiff is a named insured on an automobile insurance policy with Travelers. The policy provides her with $100,000 per-person, and $300,000 per-accident, UIM coverage. The policy states in Coverage D1 (regarding Bodily Injury) and D2 (regarding Property Damage) that:

> We will pay damages that the "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" or "underinsured motor vehicle" because of:
>
> 1. "bodily injury" suffered by an "insured" and caused by an accident; and
>
> 2. "property damage" caused by an accident.

An underinsured motor vehicle for a named insured is defined in the policy as a "'highway vehicle,' motorcycle or 'trailer' of any type to which a bond or motor vehicle insurance policy applies at the time of the accident but its limit for liability is less than the limit of liability for this coverage under this policy." However, the UIM insurer "will subtract the amount of damages paid by or on behalf of anyone responsible for the 'insured's' 'bodily injury' or 'property damage' from the amount otherwise payable under this coverage. This includes any damages paid under the Liability section of this policy." (Emphasis added).

The trial court agreed with Travelers that both the $50,000 paid to plaintiff by Reese and the $50,000 paid to her by Rite Aid in settlement should be offset against the $100,000 UIM limit. As such, the combined settlements of $100,000 exhausted the UIM coverage limit. Among other things, the trial court noted in its written decision that, under Vassiliu v. Daimler Chrysler Corp., 178 N.J. 286 (2004), the Supreme Court had found that a UIM insurer was entitled a credit for the amount of a $215,000 settlement

received on a products liability claim against an automobile manufacturer. Thus, the trial court found here that a premises liability settlement would likewise entitle Travelers to a UIM credit in this case.

This appeal ensued.

II.

Plaintiff argues the trial court erred in applying a $50,000 setoff against her UIM coverage corresponding to her settlement with Rite Aid. She points out that the UIM statute, N.J.S.A. 17:28-1.1, does not contain language concerning a setoff for settlements made on behalf of "anyone responsible" for a bodily injury. Rather, N.J.S.A. 17:28-1.1(e)(1) states, in more restrictive language, that "[t]he limits of underinsured motorist coverage available to an injured person shall be reduced by the amount he has recovered under all bodily injury insurance or bonds. . . ." (Emphasis added).

Plaintiff concedes that the $50,000 settlement she received from defendant Reese, the underinsured motorist, is an appropriate setoff. She resists any setoff with respect to the other $50,000 settlement paid by Travelers, because there is no indication Travelers paid that sum out of "bodily injury insurance or bonds." Plaintiff further contends that Rite Aid's self-insured status

does not comport with the literal terms of N.J.S.A. 17:28-1.1(e)(1).

Despite plaintiff's arguments founded upon the literal terms of the UIM statute, we agree the setoff for the Rite Aid settlement was appropriately applied here for several reasons.

First, as a matter of contract law, we note the language of the Travelers policy is broader than the statute with respect to an eligible source of a UIM setoff. The insurance contract does not confine a setoff to payments made out of a bond or from an insurance policy. Instead, the contract authorizes a setoff for any payments made by a "responsible party," without reference to the payor's source of those settlement funds. This policy language was specifically approved by the Department of Banking and Insurance. See N.J.S.A. 17:28-1.1(d) ("Uninsured and underinsured motorist coverage shall be subject to the policy terms, conditions and exclusions approved by the Commissioner of Banking and Insurance, including, but not limited to, unauthorized settlements, non-duplication of coverage, subrogation and arbitration"). See also Craig & Pomeroy, New Jersey Auto Insurance Law, § 19:3 at 350-56 (2018) ("A relatively typical policy endorsement, approved by the Commissioner of Insurance pursuant to N.J.S.[A.] 17:28-1.1(d), has been used by most of the insurers licensed to transact business in New Jersey"). As such, it is

entitled to our deference. In re Adoption of N.J.A.C. 11:3-29 by State Dep't of Banking & Ins., 410 N.J. Super. 6, 24 (App. Div. 2009)

The offset applied in this case also is harmonious with the policy objectives of the UIM statute. Those objectives are to have UIM coverage function essentially as a "gapfiller." Selective Ins. Co. of Am. v. Thomas, 179 N.J. 616, 620 (2004) (quotation omitted). Here, the $50,000 plaintiff recovered in settlement from Rite Aid partially filled the gap in compensating her for her personal injury claim and the $100,000 UIM policy limit.

Further, this court's opinion in Vassiliu v. Daimler Chrysler Corp., 356 N.J. Super. 447 (App. Div. 2002), which was later affirmed in relevant part by the Supreme Court, 178 N.J. at 296, supports Travelers' position. In Vassiliu, the UIM carrier was granted a setoff for payments made by a co-defendant car manufacturer to the plaintiff. 178 N.J. at 296; 356 N.J. Super. at 458. We do not know from the reported Appellate Division and Supreme Court opinions whether in Vassiliu the manufacturer paid that settlement from an insurance policy, out of self-insured retention, or simply out of its own available funds. This court and the Supreme Court did not appear concerned about the payment source in treating the car maker's settlement as an appropriate UIM setoff.

We discern no reason to treat Rite Aid here, as a co-defendant sued under a premises liability theory, any differently than the car maker sued under a products liability theory in Vassiliu. In both instances, the defendant whose settlement was at issue was not an insured motorist, yet the settlement was applied as an offset to the plaintiff's UIM policy limits.

Travelers's offset argument also is consistent with the principles set forth in in Ryder/P.I.E. Nationwide, Inc. v. Harbor Bay Corp., 119 N.J. 402 (1990). In that case, the Supreme Court treated a trucking company's self-insurance of its motor vehicle fleet under N.J.S.A. 39:6-52 as the equivalent of motor vehicle insurance. Id. at 411-13. Travelers argues that, by logical extension, the same should pertain to Rite Aid's self-insurance policy.

We recognize there are special regulatory requirements for self-insurance of auto and workers' compensation, whereas there apparently are no comparable regulatory requirements for self-insurance of general commercial liability policies. Even so, we discern no logical basis to differentiate, at least for UIM offset purposes, between settlements paid out of self-insurance versus those paid out of a bond or insurance policy, given the broad language in the UIM policy to deduct sums paid to the injured plaintiff by "anyone responsible" for his or her bodily injury.

In sum, we are satisfied for these multiple reasons that the trial judge did not err in applying the $50,000 UIM setoff for the Rite Aid settlement, regardless of the source of the settlement funds.

Affirmed.