

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

November 7, 2013

Richard A. DiLiberto, Jr.
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801

Danielle K. Yearick
Tybout, Redfearn & Pell
750 Shipyard Drive, Suite 400
P.O. Box 2092
Wilmington, DE 19899-2092

Dawn L. Becker
The Law Office of Dawn L. Becker
Citizens Bank Center
919 Market Street, Suite 550
Wilmington, DE 19801

RE: Kerry W. Hearn v. Elizabeth Garver, Carol Garver, and Geico Indemnity
Co.
C.A. No. N12C-12-028 WCC

Submitted: October 28, 2013
Decided: November 7, 2013

On Defendant Geico's Motion for Summary Judgment – **DENIED**

Dear Counsel:

The Court has before it a motion for summary judgment brought by Defendant
Geico Indemnity Company ("Geico"). Geico was brought into this case as the

uninsured motorist provider for Plaintiff. Plaintiff alleges that the underlying motor vehicle accident was, at least in part, caused by the actions of an unidentified bus driver, thereby triggering Plaintiff's uninsured motorist coverage. The Motion requires this Court to determine whether, taking the undisputed facts in a light most favorable to Plaintiff, the unidentified bus driver could be a proximate cause of Plaintiff's injuries. If so, Geico must remain in the case.

This case involves a motor vehicle accident that occurred on or about December 13, 2010. Defendant, Elizabeth Garver ("Garver"), was traveling eastbound on Old Baltimore Pike intending to turn left into a Royal Farms parking lot. In doing so, Garver needed to crossover at least two lanes of westbound traffic. When Garver was to make her turn, there was an unidentified bus driver stopped in the westbound lane in a red-light queue. In front of the unidentified bus driver, there was room for Garver to pass through and into the parking lot. The unidentified bus driver moved his hand in a waving gesture and Garver proceeded in front of the bus to make the turn. Garver claims she inched forward to pass the bus, at which time she collided with Plaintiff who was traveling next to the bus in the farthest westbound lane.

In support of its Motion, Geico directs this Court's attention to *Johnson v. Magee*¹ and *Evans v. Lattomus*.² However, the Court finds these cases factually distinguishable. In *Johnson v. Magee*, the defendant did not rely on the unidentified driver's wave as an indication that they could complete their turn. In *Johnson*, the

¹ 2007 WL 4248523 (Del. Super. Nov. 30, 2007).

² 2011 WL 664046 (Del. Super. Feb. 8, 2011).

defendant was trying to turn left onto a road whereon a bus was traveling. The bus driver stopped and indicated that it was turning onto the defendant's road and, despite having the right of way, waved for defendant to turn first, in front of the bus. The defendant stated that he understood the bus driver's wave to mean he could turn before and in front of the bus, because the bus could not complete its turn with defendant's car in the way. Defendant testified that he did not rely on the wave as the bus driver's acknowledgment that the road was otherwise clear such that the defendant could proceed through the intersection. Instead, the Defendant testified that he relied solely on his own judgment in completing the turn. Since the defendant did not rely on the wave to complete the turn and did not understand the wave to mean the turn was safe overall, the bus driver could not have been the proximate cause of the accident.³

The case in *Evans v. Lattomus*, while factually closer to the one at hand, is also materially distinguishable. In *Evans*, the driver was trying to make a left-hand turn requiring her to crossover two lanes of opposing traffic. An unidentified SUV driver, in a similar position to the bus here, waved the defendant to proceed. However, at her deposition, the defendant stated that she did not rely upon the wave in determining whether it was safe to make her turn. Rather, the defendant said she interpreted the wave to mean that she could pass in front of the SUV *and only the SUV*. The court in *Evans* noted that “[i]f [the defendant] had relied on the unidentified driver’s wave as

³ See *Johnson v. Magee*, 2007 WL 4248523.

an indication she could safely cross all lanes of traffic, the unidentified driver may have been the proximate cause of the accident”⁴

Here, Garver testified as follows:

Q. When you began to make your left turn, did you rely solely upon the wave out to make your left turn or did you look yourself to see if there was oncoming traffic?

A. Just from the wave I just like thought, you know, that was okay because I couldn't see -- the bus was too big. I couldn't see beyond the bus.

Q. So you relied solely upon the bus's wave out for making the determination that you could make a safe turn over three lanes of traffic according to your testimony, which would be the lane the unidentified vehicle was in, the lane the bus was in and the right turn lane?

A. Yes. But where the unidentified vehicle was, they stopped too so I guess -- you know.

Q. Okay. So is it fair to say then that you relied upon the bus driver's wave out that it was safe to pass in front of the bus and the right turn lane?

A. Yes.

Q. And you relied -- you didn't make any of your own judgment about that?

A. No. No. Since they waved, I thought, you know, I was good to go.

Q. Okay. Did you at any point look around the bus to see if there was traffic in the right turn lane --

A. Yeah.

Q. -- prior to completing your turn?

A. Well, yeah, because common sense because I knew that, you know, just to make sure you look both ways.⁵

Unlike the drivers in *Johnson* and *Evans*, Garver explicitly stated that she relied upon the bus driver's wave as an indication that she could complete her turn. She further stated that although she attempted to look both ways, she could not see past the bus.

⁴ *Evans v. Lattomus*, 2011 WL 664046 at *1.

⁵ Garver Dep. 58:24-60:7; 61:21-62:4.

This explicit reliance, coupled with Garver's movement around the bus notwithstanding her inability to see, makes this case factually distinguishable from both *Johnson* and *Evans*.

Whether or not Garver relied on the unidentified bus driver's wave as an indication that she could complete her turn is material to whether Geico, as the uninsured motorist provider, faces liability.⁶ Therefore, insofar as Geico disputes that Garver fully relied on the wave, despite her sworn testimony to the contrary, there exists a genuine issue of material fact precluding summary judgment.⁷ Therefore, the Court finds that the Motion for Summary Judgment must be DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

⁶ As explained above, if Garver did rely on the wave as an indication that she could complete her turn, the unidentified bus driver could be a proximate cause of the accident and Geico, in turn, could be financially liable therefore. Whether the unidentified bus driver was, in fact, negligent in waving and whether Garver's reliance on the wave was reasonable, are both issues of fact for a jury to determine. *Evans v. Lattomus*, 2011 WL 664046, at *1.

⁷ Summary judgment may be granted only when no material issues of fact exist. Super. Ct. Civ. R. 56(c).