IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JASON FRIEL,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
THE HARTFORD FIRE INSURANCE COMPANY, a Connecticut Corporation,	)	C.A. No. N13C-05-025 MMJ
	)	
	)	
Defendant.	)	

Submitted: March 10, 2014
Decided: May 6, 2014

Upon Defendant's Motion for Summary Judgment
GRANTED
Plaintiff's Cross Motion for Summary Judgment
DENIED

OPINION

Tiffany Quell Friedman, Esquire, Edward H. Wilson, III, Esquire (Argued), Roeberg, Moore & Friedman, P.A., Attorney for Plaintiff

Christina M. Gafford, Esquire (Argued), Tybout, Redfearn & Pell, Whitney N. Hutchinson, Esquire, Belgrade and O'Donnell, P.C., Attorneys for Defendant

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

On October 25, 2010, Plaintiff Jason Friel was employed as a delivery driver by Southern Wine & Spirits ("SWS"). Friel delivered products to various customers, including Costco. Defendant Hartford Fire Insurance Company ("Hartford") insured SWS.

Friel made a "pallet stop" at Costco on October 25, 2010. At a pallet stop, the product to be delivered is on multiple pallets inside the truck. In preparation for a pallet stop, drivers are responsible for getting a set of chains and a claw from a milk crate in the SWS warehouse. The chains and the claw are then used to connect the pallets to the forklift during the unloading process. Costco provided the forklift to complete the delivery.

On October 25, 2010, Friel obtained chains and a claw from the SWS warehouse and drove 12 or 13 pallets of product to Costco for the pallet stop. Friel arrived at Costco, parked the truck, applied the air brake, and turned off the truck. Friel exited the truck, opened the back of the truck, and removed the load bar, and awaited the arrival of the forklift.

Friel alleges he was injured during the unloading process. During the unloading process, Friel was standing in the back of the truck. While unloading approximately the tenth pallet of product, Friel bent down to hook up the chains and "felt a pop" in his back. Friel's injuries include lumbar strain and sprain,

lumbar disc derangement at L4-5, and lumbar facet pain. Friel filed a worker's compensation claim against his employer SWS as a result of his injury.

At the time of the injury, SWS had an automobile insurance policy with Hartford. The policy included Delaware Personal Injury Protection coverage ("PIP"), which stated in relevant part:

> We will pay, in accordance with Del. Code Ann. Tit. 21, Chapter 21, Subchapter 1, [PIP] benefits to or for the benefit of "the injured person" who sustains "bodily injury" caused by an "accident" arising out of the ownership, maintenance or use of a "motor vehicle" as a motor vehicle and incurred within two years from the date of the "accident."

Hartford denied Friel's claim for PIP coverage, reasoning that Friel's injury did not arise out of an "automobile accident." On May 5, 2013, Friel filed suit alleging breach of contract due to Hartford's failure to pay PIP benefits. Friel has incurred lost wages in the amount of $11,982.05. Friel is seeking an order requiring Hartford to provide PIP protection in the amount of Friel's lost wages resulting from his accident. The parties have filed Cross Motions for Summary Judgment. The parties agreed at oral argument to have the case heard on dispositive motions.[1]

[1] *See* Super. Ct. Civ. R. 56(h):

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

Where the parties have filed cross motions for summary judgment, and have not argued that there are genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[7] Neither party's motion will be granted unless

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[2] Super. Ct. Civ. R. 56(c).

[3] *Hammond v. Colt Indus. Operating Corp*., 565 A.2d 558, 560 (Del. Super. 1989).

[4] Super. Ct. Civ. R. 56(c).

[5] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[7] Super. Ct. Civ. R. 56(h).

no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[8]

ANALYSIS

Legal Standard of Eligibility for PIP Benefits

Delaware requires the owners of Delaware-registered motor vehicles to obtain certain insurance coverage.[9] The personal injury protection ("PIP") mandate requires insurance that provides for "[c]ompensation to injured persons for reasonable and necessary expenses . . . ."[10] PIP coverage is available to each person "occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle, other than an occupant of another motor vehicle."[11]

Delaware courts use a disjunctive two-prong test outlined in *National Union Fire Insurance Company v. Fisher*[12] to determine if a person qualifies as an occupant of the vehicle. A person is an "occupant" of the vehicle "if he or she is either: (a) within a reasonable geographic perimeter of the vehicle or (b) engaged

[8] *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997).
[9] 21 *Del. C.* § 2118(a)(2).
[10] 21 *Del. C.* § 2118(a)(2)(a).
[11] 21 *Del. C.* § 2118(a)(2)(c).
[12] 692 A.2d 892, 896 (Del. 1997).

in a task related to the *operation* of the vehicle."[13] The Delaware Supreme Court found that a claimant qualifies as an occupant when the claimant is "in, entering, exiting, touching, or within reach of the covered vehicle."[14]

In *Kelty v. State Farm Mutual Automobile Insurance Company*, the Delaware Supreme Court outlined a two-part test to determine whether the plaintiff was "injured in an accident involving [the insured] motor vehicle" as required by 21 *Del. C.* § 2118(a)(2)(c).[15] The Court must analyze: (1) whether the vehicle was an "active accessory" in causing the injury; and (2) "whether there was an act of independent significance that broke the causal link between use of the vehicle and the injuries inflicted."[16]

This Court also must consider the juxtaposition of PIP benefits and workers' compensation benefits. The Court finds that the availability of workers' compensation insurance is not dispositive in determining if PIP benefits are available to the claimant. As a matter of public policy, the existence of duplicative or overlapping coverage is not a reason for the Court to deny PIP coverage.

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[13] *Id*. at 896 (emphasis in original).

[14] *Id*. at 897.

[15] 73 A.3d 926, 932 (Del. 2013).

[16] *Id*. at 930 (citing *Cont'l W. Ins. Co. v. Klug*, 415 N.W.2d 876, 878 (Minn. 1987)).

Pursuant to 21 *Del. C.* § 2118(a)(2)(c), PIP coverage "shall be applicable to each person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle, other than an occupant of another motor vehicle." To determine Friel's eligibility for PIP coverage, the Court will analyze if Friel qualifies as an "occupant" of the vehicle and if the circumstances surrounding the injury qualify as "an accident involving such vehicle."

Friel Qualifies as an Occupant of the Vehicle under Fisher Test

The plaintiff must be an occupant of the vehicle to qualify for PIP coverage.[17] Delaware courts use the disjunctive two-part *Fisher* test to determine occupancy for the purpose of PIP coverage.[18]

In *Fisher*, police officer John Fisher and a fellow officer were dispatched to investigate a suspicious vehicle parked at an apartment complex.[19] The officers parked their patrol cars and left the motors running but locked the car doors.[20] The suspicious vehicle was a Mazda parked directly across from the officers' patrol cars.[21] After Officer Fisher tapped on the tinted driver's side window, the driver

[17] 21 *Del. C.* § 2118(a)(2)(c).

[18] *Nat'l Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d at 896; *see also South v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 5509623, at *2 (Del. Super.); *Gordon v. Nationwide Mut. Ins. Co.*, 2010 WL 546454, at *3 n.2 (Del. Com. Pl.).

[19] *Nat'l Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d at 894.

[20] *Id.*

[21] *Id.*

started the car and began backing out of the parking space.[22] Officer Fisher testified that he began to move toward his patrol car, but the Mazda moved toward him and forced him to walk backward.[23] Officer Fisher yelled for the driver to stop the car.[24] The Mazda ran over Officer Fisher, severely injuring him.[25] Officer Fisher was between 10 and 25 feet away from his patrol car when he was first struck by the Mazda. The Mazda was stolen and uninsured. [26]

The parties in *Fisher* agreed that Officer Fisher would have been covered if he had been "occupying" his patrol car.[27] The Court separately analyzed the two ways Officer Fisher could qualify as an occupant of the vehicle: (1) by being within a reasonable geographic perimeter of the vehicle; or (2) engaged in a task related to the operation of the vehicle.[28] The Court found that Officer Fisher failed the reasonable geographic perimeter prong of the test "because he was not in, entering, exiting, touching or within reach of the patrol car when he was injured."[29]

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[22] *Id*.

[23] *Id.* at 894-95.

[24] *Id*. at 895.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 896.

[28] *Id*. at 897.

[29] *Id*.

The Court further found that Officer Fisher was not engaged in a task related to the operation of his patrol car.[30] The Court noted that the patrol car was an "integral tool used during the performance of his duties," however, such use did not satisfy the test for occupancy.[31] The Court found that Officer Fisher did not qualify under either prong of the test as an "occupant" and therefore was not eligible for PIP benefits.[32]

In *Walker v. M & G Convoy, Inc.*,[33] the plaintiff was the driver of a car trailer and was seeking PIP benefits from his employer's insurance policy. After loading new cars onto the car trailer, the plaintiff was walking around the trailer making sure that the cars were loaded securely.[34] The ground was covered with ice and snow and the plaintiff slipped and fell on the ice.[35] The plaintiff sustained injuries to his arm and shoulder.[36] The court found that the plaintiff qualified as an "occupant."[37] The plaintiff was both within a reasonable geographic perimeter of

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[30] *Id*. at 898.

[31] *Id*.

[32] *Id*.

[33] 1989 WL 158511, at *1 (Del. Super.).

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*.

the trailer and engaged in a task related to the operation of the trailer.[38] The court reasoned that the plaintiff must have been within a reasonable geographic perimeter of the vehicle because his objective was to check the fasteners which held the cars to the trailer.[39]

The Court finds that Friel qualifies as an occupant of the vehicle under the first prong of the *Fisher* test. Friel was within a reasonable geographic perimeter because he was standing in the back part of the truck when his injury occurred. Because the two-part test is disjunctive, the Court does not need to address whether Friel was engaged in a task related to the operation of the vehicle.

Friel's Injury did not Occur in an Accident Involving a Motor Vehicle

For a claimant's injury to have occurred in an accident involving a motor vehicle: the insured vehicle must have been an "active accessory" in causing the injury; and the causal connection between the use of the vehicle and the claimant's injury must not have been broken by an independent act.[40]

In *Kelty*, Plaintiff Matthew Kelty was attempting to cut branches off a tree by sitting in the tree with a chainsaw.[41] To ensure that the branch would fall away from a nearby power line, Kelty and his companions tied one end of a rope to the

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[38] *Id.*

[39] *Id.*

[40] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d at 930.

[41] *Id.* at 928.

branch and the other end of the rope to the trailer hitch on a truck.[42] While Kelty was cutting the limb, his companion accelerated the truck rapidly and the rope snapped.[43] Kelty was knocked out of the tree and suffered injuries.[44] Kelty sued the driver of the truck, who also owned the truck, and settled the claim under the bodily injury liability coverage in the automobile insurance policy. The insurer denied Kelty's PIP claim.

The Delaware Supreme Court determined whether the Kelty was "injured in an accident involving [the insured] motor vehicle" by using a two-part test. The Court considered: (1) whether the insured vehicle was an "active accessory" in causing the injury; and (2) whether an act of independent significance "broke the causal link between use of the vehicle and the injuries inflicted."[45] The Court defined active accessory to require "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury."[46] The Court found that the vehicle was an active accessory because acceleration of the truck caused the rope to snap and the branch to recoil, knocking Kelty out of

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*. at 930 (citing *Cont'l W. Ins. Co. v. Klug*, 415 N.W.2d at 878).

[46] *Id*. at 931.

the tree.[47] The Court found that Kelty was eligible for PIP benefits under both prongs of the test.[48]

The issue in this case is whether the vehicle was an "active accessory" in causing the injury. The Delaware Supreme Court has defined active accessory to require "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury."[49]

Based on the narrow facts of this case, the Court finds that the vehicle was not an active accessory in causing Plaintiff's injury. Friel had turned off the truck's motor and exited the vehicle. A significant amount of time had passed while Friel waited for the forklift and unloaded approximately the first nine pallets. The chains and claw were not attached to the truck and were not a part of the truck. Friel picked up the chains and claw at the warehouse and transported them in the truck in anticipation of the pallet stop. The injury occurred after Friel bent down to hook the chains to a pallet.

The Court finds that the vehicle is the mere situs of the injury. The injury was in no way caused by use or operation of the motor vehicle, except as a

[47] *Id*. at 933.

[48] *Id*.

[49] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d at 931.

stationary platform from which product was being unloaded. The injury did not occur by virtue of the inherent nature of using a motor vehicle.[50]

Therefore, Friel is precluded from recovering PIP benefits. The Court does not need to address whether an independent act broke the causal link between the use of the vehicle and Friel's injury.

Occupancy Alone is Insufficient to Establish Eligibility for PIP Coverage

The Court reads the language in Section 2118(a)(2)(c) — "coverage . . . shall be applicable to each person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle . . . ." — to require that both occupants and non-occupants be "injured in an accident involving a motor vehicle." In other words, the correct analysis should be: first, use the disjunctive two-prong *Fisher* test to determine whether the plaintiff is an occupant; and second, use the two-prong *Kelty* test to determine whether the accident involved a motor vehicle. This interpretation is supported by Delaware case law.

In *Wagner v. State Farm Mutual Automobile Insurance Company*, the plaintiff qualified as an "occupant" under the second prong of the *Fisher* test because he was "engaged in a task related to the operation of the vehicle."[51] The

[50] *See id*. at 931 n.29.

[51] 2001 WL 34083818, at *2 (Del. Super.).

court then analyzed if the injuries arose out of the use of a vehicle, using a three-prong test derived from *Continental Western Insurance Company v. Klug*.[52]

In *South v. State Farm Mutual Automobile Insurance Company*, the plaintiff slipped and fell on a patch of ice while exiting the insured vehicle.[53] The plaintiff moved for partial summary judgment, arguing that he met the definition of "occupant" and was therefore eligible for PIP benefits as a matter of law.[54] The Court denied the motion, stating that "even if Plaintiff does qualify as an occupant . . . material facts remain in dispute on the issue[] of whether Plaintiff's injuries were proximately caused by the accident in question . . . ."[55] Occupancy alone is insufficient to end the analysis for PIP eligibility.

The Court also looks to the origin of the *Kelty* test, which is derived from the three-prong *Klug* test.[56] In *Klug*, the plaintiff was driving in his vehicle on the highway when the defendant drove up alongside the plaintiff and shot the plaintiff. The plaintiff in *Klug* was undoubtedly occupying his vehicle. The three-prong test was applied to determine if the accident arose out of the use or maintenance of a

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[52] *Id.*; *see Cont'l W. Ins. Co. v. Klug*, 415 N.W.2d at 878 (refined later by the Delaware Supreme Court to a two-prong test in *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d at 930).

[53] 2012 WL 5509623, at *1 (Del. Super.).

[54] *Id.*

[55] *Id.*

[56] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d at 930 (citing *Cont'l W. Ins. Co. v. Klug*, 415 N.W.2d at 878).

motor vehicle. Delaware Supreme Court refined the *Klug* test in *Kelty*; however, *Kelty* was decided as though the plaintiff was a non-occupant of the vehicle.[57]

CONCLUSION

The Court finds that Friel qualifies as an occupant of the vehicle, under the first prong of the *Fisher* test,[58] because Friel was within a reasonable geographic perimeter of the vehicle when the injury occurred. Nevertheless, the Court finds that, within the narrow facts of this case, the vehicle was not an "active accessory" in causing Friel's injury. Friel fails to satisfy the first prong of the *Kelty* test. Therefore, Friel is not eligible for PIP benefits because he was not involved in an accident involving a motor vehicle as required by the statute and defined by case law.

THEREFORE, the Hartford Insurance Company's Motion Summary Judgment is hereby **GRANTED.** Jason Friel's Cross Motion for Summary Judgment is hereby **DENIED.**

IT IS SO ORDERED.

/s/ *Mary M. Johnston*

The Honorable Mary M. Johnston

[57] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d at 928.

[58] *Nat'l Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d at 897.