IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTHEW KELTY, Appellant/ Plaintiff Below v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee/ Defendant Below	:	C.A. No. 121, 2012 Appeal from Superior Court C.A. No. N10C-08-246 WCC

ANSWERING BRIEF OF APPELLEE STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

TYBOUT, REDFEARN & PELL

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NATURE OF PROCEEDINGS

The Appellant/Plaintiff Below, Matthew Kelty ("Plaintiff"), filed this breach of contract action seeking Personal Injury Protection ("PIP") benefits from Appellee/Defendant Below, State Farm Mutual Automobile Insurance Company ("State Farm"), on August 26, 2010. State Farm filed a motion for summary judgment on September 21, 2011, and the motion was heard by the Superior Court on December 14, 2011. The Superior Court issued a written decision on February 21, 2012, granting State Farm's motion for summary judgment. The Plaintiff subsequently filed the present appeal. This is State Farm's Answering Brief in Opposition.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court correctly determined that Plaintiff's injuries did not arise from the ownership, maintenance, or use of Lovegrove's vehicle.

II. Denied. The Plaintiff is not eligible for PIP as a pedestrian under 21 Del. C. § 2118.

III. Denied. Liability settlement was not properly raised or fairly presented at the Superior Court; further, the decision of an insurer to settle a third-party liability claim has no binding effect on a first-party suit for PIP benefits.

STATEMENT OF FACTS

Plaintiff in this breach of contract action is seeking Personal Injury Protection ("PIP") benefits under a policy of insurance issued by State Farm Mutual Automobile Insurance Company ("State Farm"). (B1-3). Shirley Lovegrove, Plaintiff's mother-in-law, and John Lovegrove, her husband are the named insureds under the policy of insurance from State Farm at issue in this case. (A77; A208). Plaintiff, at no time relevant hereto, resided with the Lovegroves. (A77-78).

On August 3, 2008, the Plaintiff was injured in a landscaping accident while "topping" a tree at the house of Shirley Lovegrove and her husband, John Lovegrove. (A85). Topping involves removing branches from the top of a tree. (A85). Plaintiff was to be paid $400 for his services assisting with the tree grooming. (A88-90).

In order to perform the tree topping, Plaintiff climbed a ladder ten to twelve feet high, and positioned himself in a "Y" formation of branches approximately six to eight feet above the ladder with a chainsaw. (A106). At the same time, a rope was tied from the branch being cut, to the hitch of a Ford pick-up truck. (A97-98). John Lovegrove would apply pressure with the truck to pull the rope taut to hold the branch away from nearby power lines while Plaintiff cut the branch. (A28; A98-99). The rope was made of nylon, approximately two-inches in diameter, and looked old and faded. (A106; A120). Once the branches had fallen to the ground, Shirley Lovegrove would tell John Lovegrove to stop the tension on the rope and she physically transported the branch away from the ground. (A174).

When cutting the branch in issue, Plaintiff was approximately sixteen feet off the ground, and the rope was tied approximately twenty feet off the ground. (A107-108). Plaintiff did not have fall protection equipment such as a harness on at the time. (A120-121). Plaintiff believed, from his vantage point, that John Lovegrove was in an argument with Shirley Lovegrove. (A92). John Lovegrove did not recall being upset at that time. (A39) Shirley Lovegrove only recalled having told John Lovegrove to be careful around the rope, before branch cutting began. (A173).

After cutting several branches, John Lovegrove applied pressure on the rope to a particular branch near the wires with the vehicle, "not [like] a crazy man". (A38-41; A198). When the Plaintiff was approximately eighty percent through cutting the branch that was two-feet in diameter, the rope snapped, causing the branch to "boomerang" back toward Plaintiff. (A103). The recoiling branch broke the rest of the way through and struck the power lines, knocking Plaintiff out of the tree in the process. (A103). When the rope broke, John Lovegrove felt the slack of tension behind and stopped the vehicle. (A40-41). Plaintiff contends that John Lovegrove applied too much pressure, and the rope was old. (A119). There was approximately thirty feet of rope on the broken end attached to the truck. (A41).

Following the fall, the Plaintiff initiated suit against John Lovegrove.[1] The Lovegroves' liability policy, evidently, elected to settle the Plaintiff's claim for unknown reasons.[2] Plaintiff, separately, made a claim for PIP benefits under the Lovegrove's

[1] Kelty v. Lovegrove, N10C-02-024 RRC.
[2] Tr. Oral Arg. at 13 (Plaintiff's Opening Br., Exh. B)

automobile policy that was denied on August 17, 2010. (B1-3). In its denial of the present PIP claim, State Farm specifically stated:

> Any action taken by State Farm Mutual Automobile Insurance Company or any of its authorized representatives to investigate, evaluate, pay, defend, or otherwise adjust any claim presented, shall not waive any terms or conditions of the policy mentioned above, nor shall any such actions waive any of our other rights.

(B8).

ARGUMENT I

THE SUPERIOR COURT CORRECTLY FOUND THAT THE PLAINTIFF COULD NOT SATISFY THE ELEMENTS OF THE KLUG TEST

A. QUESTION PRESENTED

Did the Plaintiff satisfy all three required elements of the Klug test to show that his injuries arose from the ownership, maintenance, or use of a vehicle? (Exh. A to Appellant's Brief at 4)

B. SCOPE OF REVIEW

When reviewing a grant of summary judgment by a trial court, the issue on appeal presents a matter of law to be reviewed *de novo*. Newtowne Village Serv. Co. v. Newtowne Road Dev. Co., 772 A.2d 172, 175 (Del. 2001). "Questions of statutory interpretation are questions of law reviewed *de novo*." Delaware Bay Surgical Services, P.C. v. Swier, 900 A.2d 646, 652 (Del. 2006).

Summary judgment is appropriate and should be granted where the evidence of record fails to raise a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Burkhart v. Davies, 602 A.2d 56 (Del. 1991). The moving party has the burden of showing that no issue of material fact exists and that it is entitled to judgment as a matter of law. Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets this burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. Id. at 681. If the non-moving party is unable to designate specific facts showing a genuine issue for trial, the movant is entitled to summary judgment as a matter of law. Id.

C. MERITS OF ARGUMENT

The Superior Court correctly determined that the Plaintiff was not injured through the ownership, maintenance, or use of a motor vehicle as contemplated by the PIP statute, 21 Del. C. § 2118. The scope of required PIP coverage is defined in 21 Del. C. § 2118(a)(1): benefits are payable for bodily injury "arising out of ownership, maintenance or use of the vehicle."[3] To that end, this Court has adopted the three-part test enunciated in Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987) for defining when an injury arises out of the ownership, maintenance, or use of a motor vehicle. Nationwide General Ins. Co. v. Royal, 700 A.2d 130, 132 (Del. 1997).

> The Klug test considers:
>
> 1) Whether the vehicle was an 'active accessory' in causing the injury, which is something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury;
>
> 2) whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted; and
>
> 3) whether the vehicle was used for transportation purposes.

Campbell v. State Farm Mut. Auto. Ins. Co., 12 A.3d 1137, 1139 (Del. 2011)(citing Royal, *supra*.). Plaintiff cannot satisfy the elements of

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[3] The policy at issue provides that: "We will pay in accordance with Subchapter 1, Chapter 21, Title 21 of the Delaware Code for ***bodily injury*** to an **insured** caused by accident resulting from the maintenance or use of a motor vehicle." Thus, the interpretation of the phrase "ownership, maintenance, or use of a motor vehicle" under 21 Del. C. § 2118 defines the scope of coverage under both the statute and the policy.

the Klug test to demonstrate that his injuries arose from the ownership, maintenance, or use of a motor vehicle.

The Superior Court correctly found that the vehicle here was not being used for transportation purposes in this case. Few Delaware cases have considered the third prong with any depth of analysis, but other jurisdictions can be instructive as to the test. Royal, 700 A.2d at 133. The Superior Court correctly analogized the facts in this case to Cesefski v. State Farm Mut. Auto. Ins. Co., 2002 WL 1482790 (Mich. Ct. App. July 9, 2002). In Cesefski, the plaintiff was injured in nearly identical circumstances when falling out of a tree, and the vehicle involved was used in an identical manner to maintain tension on the branch being cut. Id. at *1. For analytical purposes, the Michigan court was interpreting the phrase "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" under the no-fault statute. The Cesefski court found that the language "as a motor vehicle" also meant "for transportational purposes." Id. at *2.

After analyzing whether the same tree-trimming activity presented here was using the vehicle for transportational purposes, the Michigan court found that the plaintiff's injuries were not related to the use of the vehicle as a transportation device, but rather as a tool. Similarly here, the Plaintiff's injuries were suffered while engaging in tree topping when he fell from the tree. The only involvement of the vehicle was through the application of tension to hold the branch being cut away from adjacent wires. As used in this scenario, the

vehicle involved was more like a tension providing tool such as a ground based winch.

The courts of Minnesota, where Klug was first enunciated, have interpreted the transportation prong several times, shedding light on the meaning of when a vehicle is used "for transportation purposes." In two similar cases of carbon monoxide asphyxiation deaths, the Minnesota courts reached different results due to the interpretation of the transportation prong.

In Norwest Bank Minnesota, N.A. v. State Farm Mut. Auto. Ins. Co., 588 N.W.2d 743 (Minn. 1999), an action for no-fault benefits was initiated after the insureds died from carbon monoxide poisoning in bed from their vehicle inadvertently being left idling in the garage after they returned home from a restaurant. 588 N.W.2d at 745. The Minnesota Supreme Court found that the vehicle had been used for transportation purposes, despite the difference in time between the use of the vehicle and the injury. The Norwest court reasoned that the vehicle's use met the requirement because the vehicle had been used to travel between the insureds' home and the restaurant, two different locations. Id. at 747.

The Minnesota Court of Appeals later decided a similar asphyxiation case in Alexis v. State Farm Mut. Auto. Ins. Co., 696 N.W.2d 109 (Minn. Ct. App. 2005). In Alexis, the decedent went into his garage with his cousin, lying in the back of the vehicle while allowing it to run. 696 N.W.2d at 111. The Court of Appeals found that the vehicle was not being used for transportation purposes because the "facts suggest[ed] that travel was not imminent," as the decedent was

not intending to move with the vehicle to another location. 696 N.W.2d at 114. It was not enough that a plaintiff "merely [demonstrate] that the injured party's use was reasonably consistent with the inherent nature of a vehicle. Id. at 113. The key distinction in these two divergent results is that a vehicle is used for transportation purposes where it is being placed in action for the purpose of moving from one location to a different location (i.e., from a restaurant to a home).

Plaintiff proposes an interpretation that a vehicle is being used for transportation purposes "where there is a causal between the use of the truck and injury suffered."[4] Respectfully, this proposed definition would eliminate all meaning of the third prong, essentially repeating the meaning of the second prong regarding an unbroken chain of causation.

Plaintiff cites Bryant v. Progressive Northern Ins. Co., 2008 WL 4140686 (Del. Super. Apr. 4, 2008) as an instance where the Superior Court applied the third prong of the Klug test. In Bryant, the plaintiff's decedent was attacked by a carjacker and injured when her leg was caught in the door and she was dragged as the carjacker drove away in the vehicle. Id. at *1.[5] There was no dispute that the carjacker was, in fact, using the vehicle to move from the location where he stole the vehicle to another location, away from there.

Similarly, in Carroll v. Nationwide Mut. Fire Ins. Co., 2008 WL 2583012, *1 (Del. Super. June 20, 2008), the plaintiff was attacked by

[4] Plaintiff's Opening Br. at 15.
[5] The Bryant court offered only the brief quotation that "[b]ecause the car was being driven by the carjacker at the time of the injury, the vehicle was being used for transportation purposes." Bryant at *2.

a driver during the information exchange following an accident. The Carroll court found that the vehicle was used for transportation purposes because the attacker had used the vehicle to transport himself to the location where the attack occurred. Again, the vehicle was, in fact, being used to move from one location to another. Plaintiff's interpretation of the Bryant and Carroll decisions expands the meaning of the third prong to equate the transportation purposes with the causation second prong. (Plaintiff's Opening Br. at 15).

As the Minnesota decisions would apply to the facts in this case, the Plaintiff's injuries are not arising out of the use of the vehicle for transportation purposes. The vehicle was the equivalent of a tool maintaining tension on the branch. There was no intention or goal to move from one location to another and the purposes would have been equally served if the vehicle had remained stationary and provided adequate tension.

Contrary to Plaintiff's insistence, the purpose was not to "transport" the branches from up in the tree to the ground, as that would have been equally satisfied by gravity absent any use of the rope or vehicle. The record demonstrates that the clear purpose was to maintain tension on the branch away from the wires. Additionally, once the branches were on the ground, they were not transported away by the vehicle, but by Shirley Lovegrove. There is no evidence demonstrating that the vehicle was being used to transport anything from one location to another; therefore, the vehicle was not being used for transportation purposes.

Plaintiff attempts to analogize the incident to Motzko v. State Farm Mut. Auto. Ins. Co., 2001 WL 1182356 (Minn. Ct. App. Oct. 9, 2001). In Motzko, the plaintiff's decedent was injured when competing trucks were linked together by a chain in order to see which vehicle was powerful enough to drag the other vehicle. The Motzko court reasoned that the vehicle was used for transportation purposes because the goal was to "carriage or conveyance of both trucks and their drivers from one position on the road to another through motorized operation." Id. at *4. The common thread of moving someone or thing from one location to another is the key factor in transportation purposes. In this case, the holding of a branch away from wires by tension from the rope does not demonstrate a similar purpose. The key purpose of the vehicle was the tension purpose, as the branch would move from treetop to ground on its own.

Plaintiff's citation of the Texas and New Mexico cases essentially proposes a ruling that would eliminate the entire third prong of the Klug test. Those courts did not adopt or utilize the factors considered in Klug. The Klug test adopted by this Court necessarily requires the consideration of the transportation use of the vehicle. The proposed analysis based on the Texas and New Mexico cases is akin to the "active accessory" analysis already incorporated into the Klug test because the key inquiry is whether the vehicle was being used at the time of the injury or was the mere situs of the injury. The Klug test incorporates this analysis and appropriately continues with the remaining two factors to determine whether, under Delaware law, an injury occurred through the ownership, maintenance,

or use of a motor vehicle. The Superior Court's findings pursuant to the Klug test in this case were correct, and do not constitute legal error.

Even if the Superior Court was incorrect regarding transportation purposes, the ultimate ruling in favor of State Farm was not legal error.[6] In Campbell, *supra.*, the plaintiff was injured by a closing garage door that was set in motion from a remote control inside a vehicle. 12 A.3d at 1138. The Court in Campbell found that the vehicle was not an active accessory in the accident because the garage door could have just as easily have been set in motion from another remote in a different location (i.e., the vehicle was the mere situs of the remote). Id. at 1139.

In Sanchez v. American Independent Ins. Co., 2005 WL 2662960, *1 (Del. Super. Oct. 17, 2005), the plaintiff was shot while riding as a passenger in a vehicle from an individual standing on a street corner. The court in Sanchez held that the plaintiff's injuries were not arising out of the ownership, maintenance, or use of a motor vehicle under Klug because the gunshot could have occurred just as easily if the plaintiff had been walking or riding a bike; therefore the vehicle was not an active accessory. Id. at *2.

In this case, the Plaintiff was injured when he was knocked from a position approximately sixteen feet up in tree. The fall was instigated when the branch he was approximately eighty percent through cutting recoiled and pushed him out of the tree. The branch was set

[6] It is acknowledged that the Superior Court did not find in State Farm's favor on factors (1) and (2) of the Klug test; however, as this is question reviewed de novo, it reaffirms its position as stated previously that none of the elements are present under the Klug test.

in motion by the breaking of the rope that was fastened to it for tension. The other end of the rope was attached to the rear of the Lovegrove truck. With the branch being eighty percent cut at that point, the branch could have just as easily been set in such motion to eject the Plaintiff by an individual holding the other end of the rope and letting go. The amount of tension was not particularly unique to an automobile as a ground based winch would provide just as much tension. The vehicle used was merely the situs of the other end of the offending rope that was attached to the branch, and therefore the vehicle was not an active accessory under Klug.

Further, the Plaintiff's injuries were caused by several acts of independent significance that intervened breaking the causal link between the vehicle and the Plaintiff's injuries. In Carroll v. Nationwide Mut. Fire Ins. Co., *supra*. at *1, the plaintiff was injured by an act of road rage initiated by another driver who assaulted him while they exchanged information following a motor vehicle accident. The plaintiff's injuries were held to be the result of an act of independent significance because the assault broke the causal link between the motor vehicle use and the injuries. Id. at *3. The Carroll court noted that the "[c]ausal connection between the injury and the ownership maintenance, or use of the automobile must be more than incidental or fortuitous and must be reasonably identifiable with the normal ownership, maintenance or use of the vehicle." Id. at n.22 (citing Dick v. Koutafaris, 1990 WL 106182 at *2 (Del. Super. July 19, 1990)).

In this case, the nylon rope being used to maintain tension on the branch created an intervening act of independent significance that broke the causal link between the Lovegrove vehicle and the Plaintiff's injuries. The vehicle itself did not knock the Plaintiff from the tree; the recoiling branch was the impetus for Plaintiff's injuries, set in motion by the breaking of the rope. The branch was already cut approximately eighty percent, allowing it to break the rest of the way through on the recoil. The breaking of the rope and the branch are not events that are reasonably identifiable with the normal ownership, maintenance, or use of a motor vehicle, and render the Lovegrove vehicle more remote to the Plaintiff's injuries, thereby breaking the causal link.

Because this Court has adopted the Klug test for determining whether an injury has occurred through the ownership, maintenance, or use of a motor vehicle, the Plaintiff must satisfy the burden of proving that the three elements of the test are satisfied. The Plaintiff cannot satisfy the elements of the Klug test, including that the vehicle was being used for transportation purposes. Therefore, the Plaintiff is not entitled to PIP benefits under the policy.

ARGUMENT II

THE PLAINTIFF IS NOT ENTITLED TO PIP BENEFITS AS A PEDESTRIAN

A. QUESTION PRESENTED

Did the Superior Court correctly find that the Plaintiff is not entitled to PIP benefits regardless of whether he was a pedestrian or not? (Exh. A to Appellant's Brief at 9).

B. SCOPE OF REVIEW

See Argument I, Section B for the standard of review.

C. MERITS OF ARGUMENT

The Plaintiff is not a pedestrian to benefits under the PIP statute, and is not entitled to benefits under 21 Del. C. § 2118(a)(2)(c). The Plaintiff asks this Court to overrule the Klug test for ownership, maintenance, or use of a motor vehicle in the context of pedestrians in favor of a much broader test never endorsed or adopted by this Court. The Plaintiff is correct that there are two categories of individuals, occupants of vehicles and pedestrians. However, the threshold question of whether the injuries were suffered through the ownership, maintenance, or use of a motor vehicle must still be satisfied for both occupants and pedestrians seeking PIP coverage. The inquiry throughout this case has been premised on the Plaintiff being a pedestrian, as he clearly was not an occupant of a vehicle, the fact remains that as a matter of law the Plaintiff is not eligible for PIP as the injuries did not arise out of the ownership, maintenance, or use of a motor vehicle.

21 Del. C. § 2118(a)(2)(c) states: "[t]he coverage required by this paragraph 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." The Plaintiff argues that this language creates a separate basis for coverage under the statute that is broader than 21 Del. C. § 2118(a)(1), injuries suffered in an accident merely "involving [a] motor vehicle."[7] This ignores the preceding clause, "the coverage required by this paragraph." The preceding language clearly relates back to 21 Del. C. § 2118(a)(1)'s standard for the scope of defined coverage, arising from the ownership, maintenance, or use of a motor vehicle. Therefore, the Plaintiff would still be required to satisfy the elements of the Klug test in order to be entitled to benefits as a pedestrian.

The plaintiff in Campbell, *supra*. made the same argument for entitlement of PIP benefits following her injuries caused by contact with a garage door. 12 A.3d at 1140. The Court in Campbell found this argument unavailing, as she "must be a pedestrian injured by an accident with any motor vehicle to qualify for PIP coverage under the statute." Id. The Court emphasized that the record reflected that the plaintiff's injuries were "caused by contact with a garage door, not with or by any vehicle." Id. Similarly here, Plaintiff's injuries were caused by contact with a tree branch and his subsequent fall to the ground, not by a vehicle. Nevertheless, the Plaintiff would still have to satisfy the Klug test in order to be eligible for PIP benefits under any portion of 21 Del. C. § 2118(a).

[7] Plaintiff's Opening Br. at 24.

All PIP analysis, pedestrian or occupant, must pass through the threshold of whether the injuries arose through the ownership, maintenance, or use of a motor vehicle. The Court in Gray v. Allstate Ins. Co., 668 A.2d 778 (Del. 1995) described the statutory provisions establishing pedestrian PIP coverage, and specifically quoted 21 Del. C. § 2118(a)(1) *and* 21 Del. C. § 2118(a)(2)(c). The plaintiff in Gray was a bicyclist injured when a non-contact vehicle pushed him off the road. It is evident from this fact pattern that the necessary inquiry under § 2118(a)(1) was satisfied by the facts at hand with a motor vehicle being operated on the roads for transportation purposes and forcing the plaintiff off the vehicle. As such, the inquiry in Gray focused on the latter question of whether the injuries were sufficiently caused by the non-contact vehicle to be eligible for PIP coverage under § 2118(a)(2)(c).

In Wisnewski v. State Farm Mut. Auto. Ins. Co., 2005 WL 697945 (Del. Super. Feb. 14, 2005), cited by the Plaintiff, the Superior Court found that a plaintiff could recover PIP benefits as a pedestrian when a non-contact vehicle that crashed into her living room wall. The question of whether the injuries arose out of the ownership, maintenance, or use of the motor vehicle in issue was not discussed under the Klug factors, though the "use" of the motor vehicle is evident within the facts. The vehicle was being used for transportation purposes when it ran off the road and into the plaintiff's house. Thus, the court moved on to the second inquiry of whether the pedestrian's injuries involved the motor vehicle in issue, a causation question. Id. at *2. The Wisnewski case should not be

interpreted to create a separate unique inquiry that eliminates the meaning of 21 Del. C. § 2118(a)(1) entirely. Because the Plaintiff cannot satisfy the Klug factors, he remains ineligible for PIP regardless of his status as a pedestrian or not.

ARGUMENT III

SETTLEMENT WITH THE LIABILITY INSURANCE CARRIER HAS NO CONTROLLING EFFECT IN THE DECISION OF A PIP CASE

A. QUESTION PRESENTED

Does a liability carrier's settlement relieve the Plaintiff of the burden of proof to demonstrate eligibility for PIP benefits?

B. SCOPE OF REVIEW

"Under Supreme Court Rule 8 and general appellate practice, this Court may not consider questions on appeal unless they were first fairly presented to the trial court for consideration."[8] Russell v. State, 5 A.3d 622, 627 (Del. 2010), as corrected (Sept. 29, 2010). "This prohibition applies to both specific objections as well as the arguments that support those objections." Id.

"A very narrow exception to Rule 8, embedded in its own text, permits this Court to consider a question for the first time on appeal when the interests of justice so require. This exception is extremely limited and invokes the plain error standard of review." Id.

C. MERITS OF ARGUMENT

This issue was not properly raised at the Superior Court, nor fairly presented to the trial court for review. Therefore, this Court should not consider this question on appeal pursuant to Supr. Ct. Rule 8. The Superior Court did not decide this question below, and this issue does not constitute plain error warranting review or reversal.

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[8] "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Delaware Supreme Court Rule 8.

The Plaintiff cites to a portion of the oral argument below where this issue was alleged to have been presented to the trial court; however, the transcript does not exhibit a fair presentation of the issue to the Superior Court. State Farm objected to the issue being raised at that time, as it was not briefed and there was no record to consider on the point. (Exhibit B to Plaintiff's Opening Br. at 13). The documents at A229-336 are from a different, liability case against John Lovegrove, which were not submitted to the Superior Court or part of the record in this case. Notably absent from Plaintiff's record is the Release that would have accompanied any settlement of a bodily injury claim, further demonstrating that the record was not developed to fairly present this issue. Plaintiff's raising the issue at oral argument does not constitute the creation of an adequate record below, nor does it permit this Court to review an issue that must be fairly presented.

Further, Plaintiff did not plead a cause of action for bad faith in this matter, and no discovery was conducted on such a claim. (B1-3). Plaintiff's broad allegations of bad faith in his Opening Brief represent an attempt to *post hoc* insert such a claim on appeal. Such argument cannot constitute an amendment to add a cause of action at this late time, and should not be considered on appeal. This Court should decline to consider such argument on the merits as it was not properly raised at the trial court.

Nevertheless, Plaintiff fails to cite any legal authority for the proposition that a liability settlement in a separate case precludes an argument under a separate policy, in this case, PIP. Plaintiff's

argument is fundamentally flawed from the outset, as in the liability case, the defendant was John Lovegrove, not State Farm. The PIP carrier in this case, State Farm, was not a party to the liability suit, and any decisions regarding settlement in the liability case do not represent a statement or decision made by the PIP carrier in this case. All actions of Robert Pierce asserted by Plaintiff in his argument are, in fact, actions on behalf of John Lovegrove, not the PIP carrier, State Farm. Further, State Farm's denial letter under the PIP policy clearly disclaims that any actions to "investigate, evaluate, pay, defend, or otherwise adjust any claim presented, shall not waive any terms or conditions of the policy. . . nor shall any such action s waive any of [its] other rights." (B8). Given the foregoing reservation, Plaintiff clearly was on notice that any outside actions were not binding on the legal analysis applicable to the PIP policy at issue.

Plaintiff's argument is further flawed because identifying a policy's applicability in the Form 30 Interrogatories is in no way an acknowledgment that coverage is appropriate or applicable under the policy, rather only that the policy named is at issue in the case. In this matter, despite there being a dispute to coverage, State Farm identified the automobile policy in issue. (B4-7). In doing so, State Farm is not precluded from contesting coverage under the policy because Plaintiff's injuries did not arise from the ownership, maintenance, or use of the motor vehicle.

The actions of a liability carrier have no bearing on the decisions of a PIP carrier. Liability and PIP claims are prohibited

from being litigated within the same action; therefore, the separate claims are treated as claims under separate policies. See 21 Del. C. § 2118(g)(4).[9] This Court has held that the PIP statute "demonstrate[s] an unambiguous legislative intention to completely separate all litigation regarding the *statutory* right to PIP benefits from any independent cause of action at common law against a tortfeasor for personal injury." Harper v. State Farm Mut. Auto. Ins. Co., 703 A.2d 136, 139 (Del. 1997). As such, PIP claims are precluded from being litigated together with any third-party litigation. See Crumpton v. State Farm Mut. Auto. Ins. Co., 2004 WL 249584 (Del. Super. Jan. 28, 2004)(precluding joinder of PIP claims and UIM claims because the UIM carrier stands in the shoes of the tortfeasor). Therefore, the actions of any tortfeasor in settling or resolving a claim have no effect on the Plaintiff's eligibility for benefits under a PIP policy. The matter of whether Plaintiff's injuries arose from the operation, maintenance or use of a motor vehicle is still a question of law for the Court to determine. Carroll, *supra*. at *2.

"[I]n order to establish 'bad faith' the plaintiff must show that the insurer's refusal to honor [the claim] was clearly without any reasonable justification." Albanese v. Allstate Ins. Co., 1998 WL 437370, *2 (Del. Super. July 7, 1998)(citing Casson v. Nationwide Ins. Co., 455 A.2d 361 (Del. Super. 1982)). The proper inquiry is "whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a *bona fide*

[9] "No insurer or self-insurer shall join or be joined in an action by an injured party against a tortfeasor for the recovery of damages by the injured party and/or the recovery of benefits paid by the insurer or self-insurer." 21 Del. C. § 2118(g)(4).

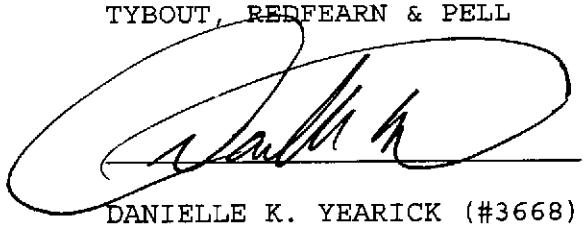
dispute and therefore a meritorious defense to the insurer's liability." Albanese, 1998 WL 437370 at *2. Given the findings of the Superior Court and the entire preceding analysis, it plainly evident that a *bona fide* dispute exists as to whether the Plaintiff's injuries arose out of the ownership, maintenance, or use of the motor vehicle, and Plaintiff cannot raise this question at this time.

Because this issue was not properly raised below, and the question presented is clearly not ripe for decision, this Court should decline to consider this question. Even if the issue is considered, there is no sound legal basis for Plaintiff's argument, and the issue does not constitute plain error.

CONCLUSION

For the reasons stated herein, Appellee, State Farm Mutual Automobile Insurance Company, requests this Court to affirm the decision of the Superior Court granting summary judgment in favor of State Farm Mutual Automobile Insurance Company.

TYBOUT, REDFEARN & PELL



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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Alexander ALBANESE
v.
ALLSTATE INSURANCE COMPANY

No. 97C-08-191-WTQ. | July 7, 1998.

Letter Opinion and Order on Defendant's Motion for Partial Summary Judgment-Motion Granted.

Attorneys and Law Firms

James A. Erisman, Esquire, Daley Erisman & vanOgtrop, Wilmington.

Arthur D. Kuhl, Esquire, Dennis D. Ferri, P.A., Wilmington.

Opinion

QUILLEN, J.

*1 Gentlemen:

This is the Court's opinion on Defendant Allstate Insurance Company's Motion for Partial Summary Judgment. The Motion requests dismissal of Count II of Plaintiff Alexander Albanese's Complaint. Count II alleges bad faith on the part of the Defendant in its denial of personal injury protection ("PIP") benefits under Delaware's no-fault law. For the following reasons, Defendant's Motion for Partial Summary Judgment is GRANTED.

FACTS

This action arises out of a November 25, 1995 motor vehicle accident ("the accident") during which Plaintiff sustained injuries. At the time of the accident, Plaintiff was insured under an automobile insurance policy issued by the Defendant that provided for reasonable and necessary medical expenses incurred by the Plaintiff as a result of the accident. Plaintiff alleged that he sustained bilateral carpal tunnel syndrome as a result of the accident. He obtained surgery for carpal tunnel syndrome and submitted his medical bills to the Defendant for payment on December 5, 1996 and January 27, 1997. Because Plaintiff's surgery had already been performed, Dr. Daniel Gross conducted a review of Plaintiff's medical records on behalf of the Defendant. Dr. Gross did not see or talk to the Plaintiff. Dr. Gross agreed that Plaintiff had carpal tunnel syndrome, but opined on April 17, 1997 that the carpal tunnel syndrome was not related to the accident. As a result, Defendant denied payment of Plaintiff's surgery expenses. Plaintiff filed suit on August 20, 1997 seeking PIP benefits for his medical expenses and alleged "bad faith" by Defendant for failure to reimburse him for the cost of his surgery. Defendant moved for partial summary judgment on February 27, 1998 seeking a dismissal of the bad faith allegations in Count II of Plaintiff's Complaint.

STANDARD ON SUMMARY JUDGMENT

When considering a Motion for Summary Judgment under Superior Court Civil Rule 56, the Court's function is to examine the record to determine whether genuine issues of material fact exist. *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, Del.Super., 312 A.2d 322, 325 (1973). If after reviewing the record in a light most favorable to the non-moving party the Court finds there are no genuine issues of material fact, summary judgment is appropriate. *Id.* The Court's decision must be based only on the record presented, including all pleadings, affidavits, depositions, admissions, and answers to interrogatories, and not on what evidence is "potentially possible." *Rochester v. Katalan,* Del.Supr., 320 A.2d 704 (1974). All reasonable inferences must be drawn in favor of the non-moving party. *Sweetman v. Strescon Indust.,* Del.Super., 389 A.2d 1319 (1978). Summary Judgment will not be granted if the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances. *Ebersole v. Lowengrub,* Del.Supr., 180 A.2d 467 (1962).

DISCUSSION

*2 The issue before the Court is whether Defendant's

denial of PIP benefits to Plaintiff for carpal tunnel syndrome surgery could constitute bad faith. "[I]n order to establish 'bad faith' the plaintiff must show that the insurer's refusal to honor [the claim] was clearly without any reasonable justification." *Casson v. Nationwide Ins. Co.*, Del.Super., 455 A.2d 361, 369 (1982); *Tackett v. State Farm Fire & Cas. Ins.*, Del.Supr., 653 A.2d 254, 264 (1996). The question to be asked is "whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a *bona fide* dispute and therefore a meritorious defense to the insurer's liability." *Casson*, 455 A.2d at 369. "[T]he question of bad faith refusal to pay should be submitted to the jury unless it appears that the insurer did not have reasonable grounds for relying upon its defense to liability." *Id.*

In the case at bar, Defendant says Plaintiff was not examined by Defendant's doctor because his surgery for carpal tunnel syndrome had already occurred. Instead, Defendant submitted Plaintiff's medical records to Dr. Gross for a peer review. Dr. Gross examined some of Plaintiff's 1985 through 1995 medical records to determine if the carpal tunnel syndrome surgery was related to the accident. The medical records reviewed were specifically listed in Dr. Gross' report of April 17, 1997. His review of the records presented to the Defendant failed to find any documented evidence of complaints or treatment compatible with carpal tunnel syndrome until at least five months following the accident. Further, Dr. Gross determined that this time interval between the injury and treatment is not usual and customary for the diagnosis of carpal tunnel syndrome. *See* Dkt. No. 14, Ex. A.

At oral argument, counsel for Plaintiff made an argument not emphasized in his brief. Plaintiff alleged that Dr. Gross' conclusion regarding the causation of Plaintiff's carpal tunnel injury to the accident was totally inconsistent with the records relied upon in Dr. Gross' peer review.1 Plaintiff in his supplement to the record argues that Plaintiff's medical record document complaints concerning his hands, indicating that he suffered symptoms of carpal tunnel syndrome immediately after the accident. Plaintiff submitted the medical report of Dr. Wesley Young dated December 18, 1995. In this report, Dr. Young indicates that Plaintiff's "wrists hurt-had carp[a]l tunnel in past but not as bad as now." While this record shows that there was documentation of complaints by Plaintiff involving his hands a month after the accident, this particular report was not included in the records relied upon by Dr. Gross in his peer review. *See* Dkt. No. 19, Ex. C. Moreover, there is no allegation by Plaintiff that the record was submitted to Defendant.

Plaintiff also relies on medical records listed as 5 and 8 of Dr. Gross' peer review to bolster his argument that there existed documented complaints concerning his hands shortly after the accident. Record 5, as listed in Dr. Gross' peer review, states" "Admission, Medical Center of Delaware, October 1996, for release of right carpal tunnel with symptoms of one year (Dr. Sowa)." Record 8 of Dr. Gross' peer review states: "Records of Dr. Sowa of May 1996 and June 1996, indicate a six month history of symptoms of carpal tunnel syndrome with a positive bilateral EMG and positive Tinel's signs." Dkt. No. 14, Ex. A. These records at best suggest that in May, June, and October of 1996, Dr. Sowa opined that Plaintiff had experienced symptoms of carpal tunnel syndrome from the time of the accident. Dr. Sowa first treated Plaintiff three months after the accident, on February 20, 1996, and there was no documented record of any hand injuries. It is not until May 1996, five months after the accident, that Dr. Sowa made his determination that Plaintiff suffered from carpal tunnel syndrome. According to Dr. Gross, five months is too long an interval from the time of the accident to causally connect Dr. Sowa's diagnosis of Plaintiff's carpal tunnel syndrome to the accident. Obviously, the opinions of Dr. Sowa and Dr. Gross might have been better coordinated, but it certainly cannot be said that the insurer "was clearly without any reasonable justification."

***3** The other reports relied on by Plaintiff merely list the opinions of various experts, none of which Dr. Gross examined in his peer review, stating that Plaintiff developed carpal tunnel syndrome from the accident.2 While diametrically opposed to the findings of Plaintiff's experts, Dr. Gross' conclusion presented a *bona fide* dispute as to whether Plaintiff's need for carpal tunnel surgery was related to the accident. The record presented in this matter does not support Plaintiff's allegation that Defendant had no reasonable justification in denying payment of PIP benefits in 1997 and thus there was no basis for a bad faith claim against Defendant. Plaintiff's claim of bad faith should not go to a jury. *See Casson*, 455 A.2d at 369. The underlying issue of Defendant's obligation to pay for Plaintiff's carpal tunnel surgery expenses remains to be resolved. It seems to the Court that it would certainly be appropriate for the Defendant to review the current record to determine whether the treatment is compensable.

Accordingly, Defendant's Motion for Partial Summary Judgment is GRANTED. IT IS SO ORDERED.

Footnotes

1 Since this argument was raised for the first time at oral presentation of the Motion, the Court allowed Plaintiff to supplement the record. The Court wanted to make certain that the conclusion reached by Dr. Gross was within the bounds of reason in light of the medical records upon which he relied. The Court is concerned with the possibility of insurance companies having medical doctors on retainer to issue reports favoring the insurance company without medical examinations.

2 The medical records of Dr. Wesley Young dated August 23, 1996 state in pertinent part: "main complaints revolve around [Plaintiff's] wrists-They hurt from the accident and now has been diagnosed as carp[a]l tunnel. Needs to get them fixed." *See* Dkt. No. 22, Ex. D. The narrative report of Dr. David T. Sowa dated August 7, 1997 states in pertinent part: "it is my opinion, within reasonable medical probability, that the patient developed bilateral carpal tunnel symptoms after his November 25, 1995 motor vehicle accident. He reports having gripped the steering wheel at the time of impact." *Id.* at Ex. E. The narrative report of Dr. David T. Sowa dated November 12, 1997 states in pertinent part: "The next hand written note I have from Dr. Young, dated 11/29/95, indicated that Mr. Albanese was involved in a motor vehicle accident on 11/25/96. As a result of that accident he developed bilateral hand pain. When Dr. Young next saw Mr. Albanese on 12/18/95 the patient, again, complained that his wrists hurt.... Based on the history obtained from the patient and based on the medical records I have in my possession, I do not believe that Mr. Albanese would have come to surgery but for the 11/25/95 motor vehicle accident." *Id.* at Ex. F.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.

Gloria A. BRYANT, Personal Representative of the Estate of Felicia C. Alston, Plaintiff,
v.
PROGRESSIVE NORTHERN INSURANCE COMPANY, et al., Defendants.

C.A. No. 05C-05-042 MMJ. | Submitted: April 4, 2008. | Decided: July 28, 2008.

Synopsis

Background: Motorist who was injured by a motor vehicle during carjacking filed suit against insurer that provided uninsured motorist coverage on vehicle, seeking coverage for her injuries after insurer denied coverage. Insurer filed motion for summary judgment.

Holdings: The Superior Court, Castle County, Mary M. Johnston, J., in a matter of first impression, held that
[1] vehicle operated by carjacker was an "uninsured motor vehicle";
[2] bodily injuries to motorist arose out of ownership, maintenance or use of an uninsured motor vehicle; and
[3] motorist was an "insured person" under policy.

Motion denied.

West Headnotes (4)

[1] **Insurance**
Uninsured Motorists or Vehicles

Vehicle operated by carjacker was an "uninsured motor vehicle" for purposes of determining whether uninsured motorist policy on vehicle provided liability coverage for carjacker's conduct, which consisted of throwing motorist out of driver's side of car, entering car, putting it in reverse, and dragging motorist, whose leg was caught between door of vehicle and floor panel, causing injuries to motorist; insurer denied liability coverage, and carjacker was operating vehicle without permission. 18 Del.C. § 3902(a, b).

1 Cases that cite this headnote

[2] **Insurance**
Uninsured or Underinsured Motorist Coverage

Bodily injuries to motorist, which occurred when carjacker threw motorist out of driver's side of car, entered car, put it in reverse, and dragged motorist, whose leg was caught between door of vehicle and floor panel, arose out of ownership, maintenance or use of an uninsured motor vehicle, for purposes of determining whether uninsured motorist policy on vehicle provided liability coverage for carjacker's conduct; vehicle was an active accessory to injuries sustained, because vehicle was being driven by carjacker at time of injury, it was being used for transportation purposes, and, while carjacking was act of independent significance, it did not break causal link between use of vehicle and injuries.

2 Cases that cite this headnote

[3] **Insurance**
Uninsured or Underinsured Motorist Coverage

Motorist was an "insured person" under uninsured motorist policy on vehicle involved in carjacking, for purposes of determining whether policy provided liability coverage for carjacker's conduct, which consisted of throwing motorist out of driver's side of car, entering car, putting it in reverse, and dragging motorist, whose leg was caught between door of vehicle and floor panel, causing injuries to motorist; policy defined "insured person" as "any person occupying a covered vehicle," and motorist met definition of

"occupant," in that her foot was still inside vehicle when injuries occurred.

[4] **Insurance**
⇐Uninsured or Underinsured Motorist Coverage

Purpose of statute governing uninsured and underinsured vehicle insurance coverage is to protect innocent persons from the negligence of unknown or impecunious tortfeasors. 18 Del.C. § 3902.

Upon Defendant's Motion for Summary Judgment. **DENIED.**

Attorneys and Law Firms

Joseph J. Rhoades, Esquire, A. Dale Bowers, Esquire, Wilmington, DE, Attorneys for Plaintiff.

Michael I. Silverman, Esquire, Silverman, McDonald & Friedman, Wilmington, DE, Attorney for Defendant.

Opinion

OPINION

JOHNSTON, J.

*1 On May 14, 2003, Felicia C. Alston was injured by a motor vehicle during a carjacking. Alston, who did not own the vehicle, sought coverage under Progressive Northern Insurance Company's uninsured motorist plan. Progressive denied coverage. On May 4, 2005, Alston filed suit. This is the decision on Progressive's Motion for Summary Judgment. The insurance policy interpretation issues are of first impression in Delaware.

STATEMENT OF FACTS

On May 14, 2003, Alston was operating a motor vehicle with passenger Robin Garvin. Robin Garvin's mother, Joanne Garvin, owned the motor vehicle. The vehicle was insured by Progressive and had uninsured motorist coverage.

Garvin exited the vehicle. As Alston was collecting her belongings, an unknown man came up behind her and threw her to the ground. The assailant got into the vehicle and put it in reverse. Alston's leg was caught in between the door of the vehicle and the floor panel. Alston was dragged and sustained injuries.

Alston now is deceased. Her death is unrelated to the carjacking. Gloria A. Bryant is the personal representative of Alston's estate.

SUMMARY JUDGMENT STANDARD

This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the nonexistence of material issues of fact.1 Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.2 Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.3 If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.4
A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.5 The court must evaluate the facts in the light most favorable to the non-moving party.6 Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.7

ANALYSIS

Progressive denied uninsured motorist coverage to Alston, claiming that the uninsured driver was operating a vehicle owned by the policyholder. Progressive contends that the uninsured motorist coverage was not intended to cover persons injured by an insured vehicle.

Progressive also argues that Alston is not eligible for uninsured motorist coverage, as defined under the policy, because: (a) Alston is a relative of the owner; (b) Alston's injury did not arise out of the ownership, maintenance or use of the vehicle; and (c) Alston was not occupying the car at the time of injury.

*2 Although Alston referred to Joanne Garvin as her aunt, the parties agreed at oral argument that Alston and Garvin are not actually related. Therefore, argument (a) is moot.

"Uninsured Motor Vehicle"

[1] The policy defines "uninsured motor vehicle" as a motor vehicle "to which no bodily injury liability bond or policy applies at the time of the accident." The carjacker was operating the Garvin vehicle without permission. Progressive denied liability coverage for the carjacker's conduct, which resulted in Alston's injury. Because Progressive denied liability coverage, the Court finds that the Garvin vehicle was an "uninsured motor vehicle" as defined in the policy. Additionally, the car is an uninsured vehicle pursuant to 18 *Del. C.* § 3902(a) and (b).

"Arising out of the ... use of an insured motor vehicle"

[2] The policy provides uninsured coverage for bodily injuries "arising out of the ownership, maintenance, or use of an uninsured motor vehicle."
In *Nationwide General Ins. Co. v. Royal,* the Court outlined a three-part test to determine whether an injury arises "out of the operation, use or maintenance of a motor vehicle:"[8]

> (1) whether the vehicle was an "active accessory" in causing the injury-*i.e.*, "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury;"
>
> (2) whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted; and
> (3) whether the vehicle was used for transportation purposes.[9]

The purpose of the three-prong test is to provide a flexible framework that takes into the account the circumstances of the injury and promotes the protection of innocent persons from the negligence of unknown impecunious tortfeasors.[10]

In this case, the use of the vehicle by the carjacker directly caused Alston's injuries. The assailant was driving the vehicle when Alston was injured. In other words, the vehicle was an "active accessory" to the injury sustained.

Because the car was being driven by the carjacker at the time of injury, the vehicle was being used for transportation purposes.

The Court further finds that the carjacking was an act of independent significance. Thus, the question arises-whether the carjacking broke the causal link between the use of the car and the injury. In *State Farm Mutual Insurance Co. v. Buckingham,* the Delaware Supreme Court found no causal link when a motorist left his car to assault another driver.[11] The Court noted that

> acts of leaving the vehicle and inflicting a battery were viewed as events of independent significance which broke the causal link between the "use" of the vehicle and the injuries inflicted. And this was so in spite of the fact that in each instance the subject auto was used to transport the tortfeasor(s) to the scene of the accident[12]

*3 For an injury to arise out of the use of an automobile there must be a causal relationship between use of the vehicle for transportation purposes and the injury.[13] The Court finds the carjacking, although an act of independent significance, did not break the causal link between the injury and the vehicle. The injury arose out of the carjacker's act of driving the vehicle.

Occupying a Covered Vehicle

[3] For purposes of uninsured motorist coverage, the policy defines an "insured person" as "any person occupying a covered vehicle." Alston contends that she was occupying the vehicle at the time of the injury and is therefore an insured person.
It is a settled principle that insurance contracts are liberally construed in favor of finding uninsured/underinsured coverage.[14] Delaware Courts consistently have liberally interpreted the term "occupant."[15] The policy defines "occupying" as "in, on entering, or exiting the vehicle." Under a liberal interpretation, persons are occupants if: (1) they are "within a reasonable geographic perimeter of the vehicle;" or (2) "engaged in a task related to the *operation* of the vehicle."[16]

Alston clearly meets the definition of occupant. Her foot was still inside the vehicle when the injury occurred. Therefore, Alston is an "insured person" under the

uninsured motorist policy.

Section 3902 and Public Policy

[4] Public policy considerations outlined in 18 *Del. C.* § 3902 compel uninsured motorist coverage in this case. The purpose of section 3902 is to protect innocent persons "from the negligence of unknown or impecunious tortfeasors."17 The Delaware Supreme Court has rejected efforts by insurance companies to contract "around" coverage, because doing so "weakens the statutory objective of encouraging full protection against uninsured and financially irresponsible motorists."18

Progressive's desired interpretation of its policy would permit it to declare the Garvin vehicle "uninsured" and deny coverage, based on the carjacker's unauthorized and unlawful use of the vehicle. Simultaneously, Progressive urges the Court to find the vehicle "insured" in order to deny Alston uninsured motorist coverage. Such a result is unfair, against public policy and contrary to the clear intention underlying section 3902.

CONCLUSION

The Court finds that the vehicle was uninsured, plaintiff's injuries arose out of the use of the uninsured vehicle, plaintiff was occupying the uninsured vehicle at the time of injury, and the carjacker's criminal conduct did not break the causal link between the use of the vehicle and injury.

THEREFORE, Progressive's Motion for Summary Judgment is hereby **DENIED.**

IT IS SO ORDERED.

Footnotes

1 *Moore v. Sizemore,* 405 A.2d 679, 680 (Del.1979).

2 *Id.* at 681.

3 Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

4 *Burkhart v. Davies,* 602 A.2d 56, 59 (Del.1991), *cert. denied,* 504 U.S. 912, 112 S.Ct. 1946, 118 L.Ed.2d 551 (1992); *Celotex Corp.,* 477 U.S. 322-23.

5 *Merrill v. Crothall-American, Inc.,* 606 A.2d 96, 99 (Del.1992).

6 *Id.*

7 *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del.1962).

8 700 A.2d 130, 132 (Del.Super.1997).

9 *Id.* (citing *Continental Ins. Co. v. Klug,* 415 N.W.2d 876, 878 (Minn.1987)).

10 *Nationwide,* 700 A.2d at 132.

11 919 A.2d 1111, 1112 (Del.2007).

12 *Id.* at 1116.

13 *Meric v. Mid-Century Ins. Co.,* 343 N.W.2d 688, 690 (Minn.App.1984.).

14 *See Frank v. Horizon,* 553 A.2d 1199, 1202 (Del.1989); 18 *Del. C.* § 3902.

15 *National Union Fire Ins. Co. of Pittsburgh v. Fisher,* 692 A.2d 892, 896 (Del.1997).

16 *Id.* (emphasis in original); *Selective Ins. Co. v. Lyons and Allstate Ins. Co.,* 681 A.2d 1021, 1025 (Del.1996).

17 *Frank v. Horizon,* 553 A.2d 1199, 1202 (Del.1989); 18 *Del. C.* § 3902.

18 *Id.*

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.

Timothy CARROLL, Plaintiff,
v.
NATIONWIDE MUTUAL FIRE INSURANCE CO., Defendants.

C.A. No. 07C-12-184 PLA. | Submitted: June 5, 2008. | Decided: June 20, 2008.

On Defendant's Motion to Dismiss. **GRANTED.**

Attorneys and Law Firms

R. Stokes Nolte, Esquire, Reilly Janiczek & McDevitt, Wilmington, DE, for Plaintiff.

Robert J. Leoni, Esquire, Shelsby & Leoni, Wilmington, DE, for Defendant.

Opinion

ABLEMAN, Judge.

Introduction

*1 Before the Court is the Motion to Dismiss filed by Defendant Nationwide Mutual Fire Insurance Co. ("Nationwide"). Because Timothy Carroll's ("Carroll") injuries did not arise out of the operation, use or maintenance of his vehicle, Nationwide properly denied the claim for Personal Injury Protection ("PIP") and Uninsured Motorist ("UM") benefits under his policy. For reasons set forth more fully hereafter, Defendant's Motion to Dismiss is granted.

Facts

On January 10, 2006 Timothy Carroll was rear-ended by the driver of a tractor trailer truck while he was operating his vehicle in New Castle, Delaware.[1] Carroll then pulled his car to the side of the road and got out to assess the damage and exchange information with the truck driver, Bernard Cherry ("Cherry"). At that point, Cherry approached Carroll and began striking him in the head with a large pipe that he carried from his vehicle. At all relevant times, Carroll was standing next to his car. Carroll sustained injuries as a result of the attack.[2]

Carroll then submitted a claim to Nationwide to recover PIP and uninsured motorist benefits. Nationwide's policy with Carroll required benefits to be paid for injuries that are caused by accidents arising out of the operation, maintenance or use of the insured motor vehicle.[3] Nationwide acknowledged the claim but denied benefits. As a result of Nationwide's refusal to pay benefits, Carroll filed a Complaint against Nationwide to recover PIP and UM benefits.

Parties' Contentions

Nationwide has now filed the instant motion to dismiss, wherein it argues that Carroll cannot recover PIP or UM benefits under the policy because his injuries did not arise out of the operation, maintenance or use of his car. Nationwide relies on several Delaware cases, including *Nationwide General Insurance Co. v. Royal,*[4] *State Farm Auto Insurance Co. v. Buckingham,*[5] and *Dick v. Koutafaris*[6] to support its position that dismissal of the Complaint is appropriate because Carroll cannot recover benefits under any set of circumstances.

Carroll recognizes the case law cited by Nationwide but argues that the Court cannot, as a matter of law, determine that his injuries did not arise out of the operation, maintenance or use of his insured vehicle. He contends that whether the injuries resulting from Cherry's assault, which may have been motivated by "road rage" or some other event, are covered by Nationwide's policy is a factual dispute that should be submitted to a jury. Carroll also cites *Smaul v. Irvington General Hospital,*[7] a New Jersey Supreme Court decision, in arguing that an assault by another driver does not automatically preclude benefits. Because Carroll was injured as a result of leaving his vehicle to exchange insurance information with the other driver, as required by 21 *Del. C.* § 4201, he contends that his injuries arose out of the operation, maintenance or use of his vehicle.

Standard of Review

*2 Superior Court Civil Rule 12(b)(6) states, in pertinent part: "[T]he following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted...."[8] When judging a motion to dismiss a complaint for failure to state a claim, the Court must accept all well-pleaded allegations as true.[9] The Court must determine "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[10] Where a plaintiff may recover, the Court must deny the motion to dismiss.[11]

Discussion

As an initial matter, the Court notes that the determination of whether Carroll is entitled to benefits is a legal, rather than a factual, question for the Court.[12] Although Carroll submits that a jury should evaluate Cherry's motive for the assault, the motivation behind Cherry's assault of Carroll is not relevant to the issue of whether Nationwide is required to pay PIP and UM benefits pursuant to Carroll's policy. The Court must only determine whether Carroll's injuries arose out of the operation, use or maintenance of his policy with Nationwide.[13] This is a matter of contractual interpretation, which is a question of law for the Court.[14]

In order to determine whether an insured's injury arose out of the operation, maintenance or use of his vehicle, the Delaware Supreme Court in *Nationwide General Insurance Co. v. Royal*[15] adopted the three-part test set forth by the Minnesota Supreme Court in *Continental Western Insurance Co. v. Klug.*[16] Under the *Klug* test, the court must determine: (1) whether the vehicle was an "active accessory" in causing the injury or was merely fortuitous; (2) whether an act of independent significance broke the causal link between the use of the vehicle and the injuries caused; and (3) whether the vehicle was used for transportation purposes.[17] If the *Klug* factors are met, the injuries arose out of the operation, maintenance or use of the vehicle, entitling the insured to coverage under his policy.[18] This test has been applied in cases involving PIP claims.[19]

The Court applied the *Klug* test more recently in *State Farm Mutual Auto Insurance Co. v. Buckingham,*[20] a case that is factually similar to the case at bar. In that case, while Buckingham was stopped at a traffic light, an unidentified man pulled his truck next to his vehicle. In an apparent fit of road rage allegedly related to Buckingham's vehicle kicking up rocks at the truck, the driver got out of his truck, opened Buckingham's car door, and began striking him with a metal object. Since Buckingham sustained physical injuries, he sought UM benefits for injuries arising out of the operation, maintenance or use of the vehicle.

The Supreme Court concluded that the injuries did not arise out of the operation of Buckingham's vehicle and that the insurer correctly denied him benefits. The Court first held that whether an accident arose out of the operation, use or maintenance of the insured vehicle is a question of law.[21] The Court then applied the *Klug* test to determine whether the insurance company wrongfully denied benefits. Under the first *Klug* factor, the Court determined that Buckingham's car was an "active accessory" in the injuries because the incident was caused by rocks from Buckingham's car that hit the assailant's truck and was not simply the situs of the attack. Under the third factor, the Court concluded that there was a causal connection between the use of the truck and the assault because the truck transported the truck driver to the scene.

*3 Under the second *Klug* factor, however, the Court noted that the assault was a criminal and independent act that broke the causal connection between the use of the vehicle and the injuries:

> We find that the facts in this case do not satisfy the second *Klug* factor. The assailant here ... got out of his car and assaulted Buckingham-an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted. The assailant intentionally and criminally caused the injury, independent of the use or operation of his truck. Therefore, we conclude that the injuries inflicted by the assault did not arise "out of the ownership, maintenance or use" of the uninsured motor vehicle.[22]

In applying the holding in *Buckingham* to the facts here, the Court concludes that the first and third *Klug* factors are met. Carroll's vehicle was an "active accessory" in causing his injuries because the vehicle's presence was not merely fortuitous. Just as in *Buckingham,* the collision between Carroll and Cherry "provoked" the incident because it caused Carroll and Cherry to pull over to the side of the road and arguably motivated Cherry to commit the assault.[23] Similarly, Carroll's injuries satisfy the third factor of the *Klug* test because Cherry's truck transported him to the scene of the injury, thereby establishing a causal connection between the use of the vehicle and the assault.[24]

Significantly, as in *Buckingham,* the second *Klug* factor is not met in this case because an act of independent significance occurred to break the causal link between the use of the vehicle and the insured's injuries.[25] Cherry, the assailant, left his truck and intentionally and criminally assaulted Carroll with a pipe, independent of his use or

operation of his truck. While it is true that Carroll and Cherry left their vehicles to exchange insurance information after the collision, as required by 21 *Del. C.* § 4201,26 Cherry's decision to attack Carroll with a pipe was an independent act that occurred outside the use of his vehicle. The assault was thus independent of both drivers' use and operation of their vehicles.

Further supporting the Court's conclusion that the assault broke the causal connection is the fact that both drivers were outside their vehicles. The Delaware Supreme Court has noted that an assault outside of a stationary car does not arise out of the operation, maintenance or use of a vehicle:

> The facts in this case are distinguishable from those cases in which the vehicle has come to rest and, thus, was not an active accessory to the infliction of the injury. An example of [this] ... is the scenario of a disagreement between two motorists that results in the actors exiting their cars and committing an assault. In such cases the vehicles merely transport the actors to the location and add nothing more to the danger of the situation.27

***4** As noted in *Buckingham,* the vehicles were not related to any injuries suffered in the assault because Cherry left his vehicle and attacked Carroll outside his car. In other words, even though the vehicles transported the two men to the scene of the assault, and even if Cherry's motivation to assault Carroll was related to the original collision, the vehicle was not essential to causing Carroll's injuries.28

Carroll relies on the New Jersey Supreme Court case of *Smaul v. Irvington General Hospital*29 to argue that his injuries arose from the operation, maintenance or use of his vehicle. In *Smaul,* the plaintiff-driver stopped his car to ask for directions. Two men approached him and pulled him out of the car to rob him. The men then tried to steal his car. When Smaul tried to resist, the men attacked and injured him. Smaul sought PIP benefits under a New Jersey statute which permitted recovery where the driver "sustain[ed] bodily injury as a result of an accident involving an automobile."30

The *Smaul* Court concluded that there was a "substantial nexus" between the injuries and the accident and found that Smaul was entitled to PIP benefits under his policy. Noting that Smaul's injuries were reasonably foreseeable, the Court next found that Smaul's vehicle was directly involved in the accident:

> [P]laintiff sought directions so that he could drive his car to his destination, he was sitting in his car when the assault occurred, and a purpose of the assailants-not emphasized by either court below but acknowledged in Allstate's Statement of Facts-was to steal the car after yanking plaintiff out of the driver's seat. The effort to take the automobile removes, for us, any doubt about this case falling within the statutory requirement of an "accident involving an automobile." Surely the automobile was not merely coincidental to the critical events or a mere "attending circumstance": its role was central to the incident.31

The Delaware Supreme Court distinguished *Smaul* in the case of *Sanchez v. American Independent Insurance Co.*32 In *Sanchez,* plaintiff was accidentally shot in the head while riding as a passenger in his mother's car. The Supreme Court applied the *Klug* test and found that the car was not an active accessory:

> Although Sanchez was shot while he was sitting in the car, his location was the only connection between the injury and the vehicle. As the Superior Court judge pointed out, Sanchez could just have easily been walking or riding a bike through the intersection when he was shot. No one intentionally shot at or targeted the vehicle. Nothing about Sanchez's presence in the vehicle contributed to the fact that he was shot; unfortunately, he was merely in the wrong place at the wrong time.33

The Court noted that Sanchez's injuries were completely unrelated to his presence in the vehicle:

> Although Sanchez cites several cases that he argues support his position, all of them can be distinguished on their facts. For example, in *Smaul v. Irvington Gen. Hosp.,* 108 N.J. 474, 530 A.2d 1251 (N.J.1987), the New Jersey Supreme Court awarded PIP benefits to a plaintiff who stopped the car to ask directions, and was assaulted by assailants who apparently wanted to steal the car. The plaintiff's injuries were connected to the vehicle in that case, because the assault stemmed from the assailant's desire to steal the car.... Unlike those cases, the assault on Sanchez had nothing to do with his presence in the motor vehicle.34

***5** The *Smaul* case is also distinguishable from the case at bar. Unlike the New Jersey statutory language in *Smaul,* which allowed recovery for an injury that resulted from an accident involving a car, the policy language at issue

here is narrower as it only permits recover for injuries arising out of the operation, maintenance or use of the vehicle. Secondly, the *Smaul* Court did not apply the *Klug* factors that have expressly been adopted by the Delaware Supreme Court to determine whether an insured's injuries arose out of the operation, maintenance or use of his vehicle. As already explained, Carroll's injuries were the result of an independent assault that was unrelated to his operation, maintenance or use of his vehicle under the second *Klug* factor.

Most importantly, the Delaware Supreme Court has held that an assault occurring after a driver leaves his vehicle does not arise out of the operation, maintenance or use of the insured's vehicle. In *Buckingham,* the Delaware Supreme Court relied on the Minnesota Supreme Court case of *Holm v. Mutual Service Casualty Insurance Co.*[35] in holding that an intentional or criminal act breaks the causal chain:

> For example, in *Holm v. Mutual Service Cas. Ins. Co.,* the Minnesota Supreme Court found an act of independent significance had occurred where a police officer, after pursuing a motorcycle, left his vehicle to make an arrest and committed a battery upon the motorcyclist. After analyzing cases from other jurisdictions, the court arrived at the following conclusion: ... acts of leaving the vehicle and inflicting a battery were viewed as events of independent significance which broke the causal link between the 'use' of the vehicle and the injuries inflicted. And this was so in spite of the fact that in each instance the subject auto was used to transport the tortfeasor(s) to the scene of the accident.[36]

As in *Holm,* Cherry left his vehicle and assaulted Carroll, who had also left his vehicle. While *Smaul* permitted coverage where the driver was assaulted in his car, the assailant in this case was outside his car after the collision. Unlike *Smaul,* Cherry was not attempting to steal Carroll's car. Although cars were used to transport both Cherry and Carroll to the scene of the accident, Cherry's act of leaving his vehicle to commit an intentional assault upon Carroll constitutes an act of independent significance that breaks the causal chain. Stated differently, although Cherry's motivation is unknown, the assault on Carroll "had nothing to do with his presence in the motor vehicle."[37]

Conclusion

Because Carroll's injuries did not arise out of the operation, maintenance or use of his vehicle, Nationwide correctly denied Carroll's claim for PIP and UM benefits. Carroll cannot therefore recover under any set of conceivable circumstances. Accordingly, Nationwide's Motion to Dismiss is hereby **GRANTED.**

IT IS SO ORDERED.

Footnotes

1 The Court accepts the well-pleaded facts in Carroll's Complaint as true. *See Spence v. Funk,* 396 A.2d 967, 968 (Del.1978) ("For the purpose of judging a motion to dismiss a complaint for failure to state a claim, made pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded allegations must be accepted as true.").

2 *See* Docket 6, Ex. A (Complaint). Carroll admits that his injuries resulted solely from the attack. *See* Docket 7, ¶ 6.

3 Docket 6, ¶ 2. Nationwide asserts that "[i]t is undisputed that the Nationwide policy covers only injuries caused by accidents arising out of the operation, maintenance or use of the insured motor vehicle." *Id.* Although neither party included a copy of the policy, Carroll agrees that his policy only covers injuries that arise out of the operation, maintenance or use of his insured vehicle. *See* Docket 7, ¶ 2 ("Therefore, such actions are clearly within the scope of the operation, maintenance and use of the vehicle...."). As a result, the Court finds no dispute over the policy's coverage.

4 700 A.2d 130 (Del.1997).

5 919 A.2d 1111 (Del.2007).

6 1990 WL 106182 (Del.Super.Ct. Jul. 19, 1990).

7 530 A.2d 1251 (N.J.1987).

8 Super. Ct. Civ. R. 12(b)(6).

9 *Spence,* 396 A.2d at 968.

10 *Id.*

11 *Id.*

12 *Buckingham,* 919 A.2d at 1113.

13 *Id.*

14 *Id.* (noting that the determination of whether an insured's injuries arise out of the operation, maintenance or use of his vehicle is a matter of contractual interpretation that is a question of law); *see also Twin City Fire Ins. Co. v. Delaware Racing Ass'n,* 840 A.2d 624, 626 (Del.2003).

15 *Royal,* 700 A.2d at 132.

16 415 N.W.2d 876 (Minn.1987).

17 *Id.* (citing *Klug,* 415 N.W.2d at 878).

18 *Id.*

19 *See Sanchez v. American Independent Ins. Co.,* 886 A.2d 1278, 2005 WL 2662960, at *2 (Del. Oct. 17, 2005) (Table).

20 919 A.2d 1111 (Del.2007).

21 *Buckingham,* 919 A.2d at 1113.

22 *Id.* at 1116 (citations omitted). *See also Dick v. Koutafaris,* 1990 WL 106182, at *2 (Del.Super.Ct. Jul. 19, 1990) (noting that the "causal connection between the injury and the ownership, maintenance or use of the automobile must be more than incidental or fortuitous" and must be "reasonably identifiable with the normal ownership, maintenance or use of the vehicle") (citations omitted).

23 *Buckingham,* 919 A.2d at 1114.

24 *Id.*

25 *Id.* (citing *Klug,* 415 N.W.2d at 878).

26 21 *Del. C.* § 4201 requires a driver involved in an accident to stop his car and give his name, address, registration, license, and other documentation related to his driving privileges. *Id.* § 4201(a), (b).

27 *Id.* (citing *Royal,* 700 A.2d at 135 (Walsh, J., dissenting)).

28 *Royal,* 700 A.2d at 132-33. The Court recognizes that but for the rear-end collision and both drivers stopping on the side of the road, neither driver would have been present at the scene of the assault. To that extent, the cars were active accessories in the injuries. Nonetheless, Carroll's injuries resulted from an external assault outside of his car by a driver who also left his car. Thus, the vehicles were not essential to Carroll's injuries. *See, e.g., Klug,* 415 N.W.2d at 876 (citing *Holm v. Mut. Serv. Cas. Ins. Co.,* 261 N.W.2d 598, 603 (Minn.1977) (finding a battery on a motorcyclist by an officer who left his vehicle to be an independent act because "the battery could as easily have occurred had [the officer] come upon the stationary motorcycle while on foot"). The *Buckingham* Court accepted the rationale of *Holm. See Buckingham,* 919 A.2d 1115-16 (discussing *Holm*).

29 530 A.2d 1251 (N.J.1987).

30 *Smaul,* 530 A.2d at 1252.

31 *Id.* at 1253.

32 886 A.2d 1278, 2005 WL 2662960 (Del. Oct. 17, 2005) (Table).

33 *Sanchez,* 2005 WL 2662960 at *2.

34 *Id.* at *3 n. 16.

35 261 N.W.2d 598 (Minn.1977).

36 *Buckingham,* 919 A.2d at 1115 (citing *Holm,* 261 N.W.2d at 603).

37 *Sanchez,* 2005 WL 2662960 at *3 n. 16.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Tim CESEFSKI, Plaintiff-Appellant,
v.
STATE FARM INSURANCE COMPANY and CITIZENS INSURANCE COMPANY, Defendants-Appellees.

No. 231013. | July 9, 2002.

Before: HOOD, P.J., and SAAD and E.M. THOMAS,* JJ.

Opinion

UNPUBLISHED

PER CURIAM.

*1 Plaintiff appeals as of right the trial court's order granting defendants summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff became paralyzed after falling from a ladder while cutting down a tree. He stood on a ladder about twelve to sixteen feet above the ground, cutting the upper portion of the tree with a chain saw. One end of a rope was tied to the upper portion of the tree, and the other end of the rope was tied to the trailer hitch of plaintiff's pickup truck. Keith Wayburn drove plaintiff's pickup truck. Wayburn drove the pickup truck away from the tree to maintain resistance on the rope and keep it taut. They intended that the upper portion of the tree would be safely pulled from the lower trunk and onto the ground. To maintain a taut rope, Wayburn drove out onto a public road and had to back out of the road several times to allow traffic to pass. When the upper portion of the tree finally came loose, Wayburn drove away from the tree. However, the upper portion hit the lower trunk. This caused plaintiff to fall from his ladder. He suffered injuries to his back, resulting in paralysis.

Wayburn's vehicle is insured by defendant State Farm Insurance Company (State Farm), and plaintiff's vehicle is insured by Citizens Insurance Company (Citizens). Plaintiff brought an action against Wayburn. Defendants entered into a settlement in that case.

Plaintiff then filed this action against defendants, alleging that they refused to provide personal injury protection benefits as required under the No-Fault Act, M.C.L. § 500.3101 *et seq.*, and seeking a declaratory judgment regarding defendants' liability. The trial court granted defendants summary disposition, finding that plaintiff's injuries were not covered by the no-fault act.

Plaintiff argues that the trial court erred in concluding that his injuries are not covered by the no-fault act. We disagree.

The trial court granted defendants' motion pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). A decision on a motion for summary disposition is reviewed de novo. *Hazle v. Ford Motor Co,* 464 Mich. 456, 461; 628 NW2d 515 (2001). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id.* To rule on the motion, the trial court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G). The court must view the evidence and all reasonable inferences drawn from the evidence in favor of the nonmoving party, giving the nonmoving party the benefit of any reasonable doubt. *Morales v. Auto-Owners Ins Co,* 458 Mich. 288, 294; 582 NW2d 776 (1998). If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, the court may grant summary disposition pursuant to MCR 2.116(C)(10). *Hazle, supra.*

MCL 500.3105(1) provides: "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter."

*2 In *McKenzie v. Auto Club Ins Ass'n,* 458 Mich. 214; 580 NW2d 424 (1998), our Supreme Court explained how to determine whether an injury arose out of the use of a motor vehicle as a motor vehicle. The Court explained:
As a matter of English syntax, the phrase "use of a motor vehicle 'as a motor vehicle' " would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle ." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a

vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes. [*Id.* at 218-219.]

Thus, the Court concluded that the Legislature's intent was that the no-fault act provides coverage for injuries that result "from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *Id.* at 220. It further stated: "[W]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles." *Id.* at 225-226.

The evidence here establishes that Wayburn drove the truck to maintain tension on the rope. Wayburn used the pickup truck to assist in the tree cutting process. Although Wayburn drove out onto a public street, plaintiff's injury was not closely connected to the function of the pickup as a transportation device; it was related to the use of the pickup truck as a tool. The trial court correctly concluded that plaintiff's injury does not fall within the no-fault act.

Plaintiff also argues that defendants should be equitably or judicially estopped from taking a position contrary to that asserted in his action against Wayburn, in which defendants entered into a settlement. Plaintiff asserts that because defendants paid plaintiff under the policies in the case against Wayburn, "they are now equitably or judicially estopped from claiming that this incident does not arise out of the operation of a motor vehicle as a motor vehicle."

*3 Equitable estoppel is a doctrine under which a party may be precluded from asserting or denying the existence of a particular fact. *Conagra, Inc v. Farmers State Bank,* 237 Mich.App 109, 140-141; 602 NW2d 390 (1999). It may arise where "(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Id.* at 141.

Plaintiff does not explain how application of the doctrine of equitable estoppel may arise from defendants' settlement in the prior action. Thus, he has not established that the doctrine of equitable estoppel should apply.

Judicial estoppel is applied to bar a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a later proceeding. *Hall v. McRea Corp,* 238 Mich.App 361, 366; 605 NW2d 354 (1999), remanded on other grounds 465 Mich. 919 (2001). Plaintiff has not shown that defendants "successfully and unequivocally asserted a position" in the Wayburn case that is inconsistent with their position in this case. Defendants simply settled that case.

Affirmed.

Footnotes

* Circuit judge, sitting on the Court of Appeals by assignment.

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2004 WL 249584
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Starline P. CRUMPTON, Plaintiff,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and American National Fire Insurance Company, Defendants.

No. 02C-04-315 CLS. | Submitted Oct. 24, 2003. | Decided Jan. 28, 2004.

On Defendant American National Fire Insurance Company's Motion to Sever PIP and UIM Claims. Granted.

Attorneys and Law Firms

L. Vincent Ramunno, David R. Scerba, Ramunno Ramunno & Scerba, P.A., Wilmington, Delaware, for Plaintiff.

Donald M. Ransom, Casarino, Christman & Shalk, P.A., Wilmington, Delaware, for Defendant State Farm.

Steven F, Mones, McCullough & McKenty, P.A., Wilmington, Delaware, for Defendant American National.

Opinion

MEMORANDUM OPINION

SCOTT, J.

I. INTRODUCTION

*1 Defendant American National Fire Insurance Company ("American National") has filed a Motion to Sever PIP and UIM Claims. Upon consideration of the evidence presented at oral argument and a review of American National's motion, plaintiff's response, and further correspondence from counsel addressing this issue, this court concludes American National's motion should be GRANTED.

II. BACKGROUND

Plaintiff Starline P. Crumpton ("Crumpton") claims to have suffered injuries when the bus in which she was riding was struck by a car operated by a third party. Crumpton initially sued only her own insurance carrier, State Farm Mutual Automobile Insurance Company ("State Farm") for PIP1 and UIM2 benefits. Crumpton later amended her complaint to add claims against American National, the carrier for the bus in which she was riding. On October 1, 2003, American National filed a Motion to Sever PIP and UIM Claims. On October 3, 2003, Crumpton filed her response. Oral argument on the motion was held October 21, 2003. Counsel for both American National and Crumpton supplemented their arguments in letters received by the court October 24, 2003.

III. DISCUSSION

In *Layton v. The Hartford Fire Insurance Co.*, the court found 21 Del. C. § 2118(g)(4) precluded the plaintiff from amending his complaint to include both PIP and uninsured motorist claims.3 The court in *Layton* recognized "[t]he Delaware Supreme Court has emphasized that there is a clear legislative intent to separate litigation surrounding 'the statutory right to PIP benefits from any independent cause of action at common law against a tortfeasor for personal injury." '4

Crumpton argues that notwithstanding the decision in Layton, the court should consider all the subsections of 21 Del. C. § 2118(g) (" § 2118(g)") as whole and come to the conclusion that § 2118(g)(4) does *not* preclude joinder of PIP and UIM claims in a single lawsuit. The court finds Crumpton's arguments unavailing. Even if § 2118(g) did not preclude joinder of the PIP and UIM claims, § 2118(h) precludes introduction into evidence of PIP amounts in an action against the tortfeasor.5 The court finds that this would be impossible if the PIP and UIM claims were to proceed as a single action. The court finds the UIM carrier stands in the shoes of an uninsured tortfeasor.6

IV. CONCLUSION

For the above reasons, the court finds 21 Del. C. § 2118(h) precludes joinder of PIP and UIM claims in the same lawsuit. Therefore, American National's Motion to Sever PIP and UIM Claims is GRANTED.

Plaintiffs shall tender to the Prothonotary the $175.00 filing fee, a copy of the complaint, and a new Case Information sheet citing the original case and case number within 10 days. The Prothonotary shall assign the no-fault (PIP) claim a new case number and assign the case to Judge Scott.

Footnotes

1 Personal Injury Protection-sometime referred to as "no fault" insurance.

2 Un-/Under-Insured Motorist.

3 2003 WL 22016865 (Del.Super.).

4 *Id.* (internal citation omitted).

5 21 Del. C. § 2118(h) states in relevant part: "Any person eligible for benefits described in paragraph (2) or (3) of subsection (a) of this section [the PIP provisions], ... is precluded from ... introducing into evidence in an action for damages against a tortfeasor those damages for which compensation is available under paragraph (2) or (3) of subsection (a) ..."

6 *Layton*, 2003 WL 22016865.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware, New Castle County.

Deborah M. DICK, Plaintiff,
v.
John KOUTOUFARIS, Marlene Koutoufaris and Roger M. Keith, Defendants.

C.A. No. 88C-NO-114. | Plaintiff's Motion Submitted: July 13, 1990. | Defendant's Motion Submitted: July 10, 1990. | Decided: July 19, 1990.

Decision on motions *in limine*. Plaintiff's motion Denied. Defendants' motion Denied.

Attorneys and Law Firms

Randall E. Robbins, and Barbara H. Stratton, of Ashby, McKelvie & Geddes, Wilmington, for plaintiff.

Stephen B. Potter, and James R. Leonard, of Potter, Crosse & Leonard, Wilmington, for defendants.

Opinion

MEMORANDUM OPINION

GEBELEIN, Judge.

*1 In this personal injury action both parties have filed motions *in limine*. The factual basis of this case can be found in the Court's decision on defendant's motion for summary judgment. *Dick v. Koutoufaris,* Del.Super., 88C-NO-114, Gebelein, J., (July 11, 1990). The Court will address the motions *in seriatim*.

I.

The plaintiff seeks to preclude evidence suggesting that two of the defendants, John and Marlene Koutoufaris, relinquished control of the property. She states that in this Court's opinion of July 11, 1990 the Court held that the lease with the Blue Coat Inn was insufficient to convey the duty to provide security to the Blue Coat Inn.

From this legal conclusion, the plaintiff concludes that if the lease did not expressly convey control, then it must follow that John and Marlene did have control and that, therefore, they should be precluded from arguing the issue of control.

While the opinion did conclude that the lease was insufficient to convey the duty for security to the Blue Coat Inn, it does not determine who had control. The opinion states that control means the "authority to manage, direct, restrict or regulate." In looking at the facts in a light most favorable to the plaintiff, the Court determined that "a reasonable jury could conclude that the Koutoufarises exercised actual control...." *Id.* at p. 6.

Control remains an issue of fact as to these two defendants because it has not been determined whether both John and Marlene Koutoufaris had control or whether John alone or Marlene alone had control. On account of the factual issues as to ownership, it is conceivable that regarding decision-making, etc., both or only one of the Koutouf arises made managerial decisions, etc. Likewise, the extent of control exercised by Mr. Keith is a factual issue as well.

The plaintiff also states that the defendants have listed the lease as an exhibit in the pre-trial stipulation and that because the lease is only relevant to the issue of control, that any argument by the defendants that the lease conveyed control is contrary to the law of the case and will confuse and mislead the jury.

The Court did determine that the lease, as a matter of law, did not effectively convey control. Because the lease is no longer relevant, the defendants should be precluded from introducing it at trial, unless they can demonstrate some other reason than control for the basis of introduction. Decision on this issue must await development of the factual context in which the lease is offered.

The plaintiff also seeks to have the Court determine that she was at the time of the incident a business invitee. Again, this is a factual issue that must be developed at trial. The Court is without sufficient basis to determine this issue at this time.

At this time the Court DENIES plaintiff's motion *in limine*.

II.

A brief description of the facts of this case is necessary to address defendant's motion *in limine.* The plaintiff, Deborah Dick, was raped, robbed and beaten by an unknown assailant after being abducted from the parking lot of the premises owned by the defendants. The assailant entered the car while plaintiff was parked in the parking lot, by reaching into the partially opened window, unlocking the door and forcing his way into the car. When plaintiff attempted to leave the car through the passenger's door, he grabbed her by the hair to keep her inside. The assailant drove off in the vehicle while plaintiff's legs were still outside the car, causing her injury. He then drove her to a remote cornfield where he parked the car and raped her. He took her money and left her tied up in the rear of the car.

*2 The plaintiff sued the defendants for failing to warn her that the parking lot was dangerous, failing to adequately light the premises, and failing to provide adequate security when the defendants knew or should have known that a dangerous condition existed on the premises.

The defendants move for an Order *in limine* to exclude admission of any and all medical bills, evidence of lost wages or other reimbursable expenses of plaintiff. They claim that the vehicle, which belonged to the plaintiff's mother, was insured and that the policy provided personal injury protection coverage. They argue that the plaintiff was covered by this policy and, therefore, she is precluded from pleading or introducing into evidence damages for medical expenses and lost wages that would be covered by the policy. 21 *Del.C.* § 2118(g).

One question the Court must address is whether the plaintiff is within the class of persons to be protected by the insurance policy. *See, Thornton v. Carroll,* D.Del., 490 F.Supp. 455 (1980) (plaintiff not within class of persons to be protected where vehicle was not registered in Delaware); *see, Burke v. Elliott,* 3rd Cir., 606 F.2d 375 (1979) (policy written under laws of another state not affected by Delaware statute excluding admission of such evidence because the collateral source rule prohibits the tortfeasor from benefiting from payment the injured party received from a source unconnected with the defendant).

The no-fault statute establishes that benefits may be available to indemnify for bodily injury *arising out of ownership, maintenance, or use of the vehicle.* 21 *Del.C.* § 2118(a)(1). Persons eligible for no-fault benefits are precluded from pleading or introducing into evidence in an action for damages against a tortfeasor those damages for which compensation is available under the no-fault statute. 21 *Del.C.* § 2118(g).

In determining whether there is no-fault coverage for an injury, the majority of courts state that the causal connection between the injury and the ownership, maintenance or use of the automobile must be more than incidental or fortuitous. The injury must be reasonably identifiable with the normal ownership, maintenance or use of the vehicle. *See,* Annotation, *Injury or Death Caused by Assault as Within Coverage of No-Fault Motor Vehicle Insurance,* 44 A.L.R. 4th 1010 (1986); Annotation, *Automobile Liability Insurance What are Accidents or Injuries "Arising out of Ownership, Maintenance, or Use" of Insured Vehicle,* 15 A.L.R. 4th 10 (1982). It is not enough for the vehicle to be the physical site of the injury or that the injury occurred coincidental to its use. *Selected Risks Ins. Co. v. Pennsylvania Manufacturers' Ass'n. Ins. Co.,* Del.Super., C.A. No. 83C-JN-57, Walsh, J. (June 20, 1986).

In *Selected Risks,* a mentally and physically handicapped boy was transported to school in a bus owned and operated by the school district. He was unknowingly left in the bus until the end of the day. PMA provided liability coverage for the school for claims caused by accidents resulting from the ownership, maintenance or use of motor vehicles.

*3 The Court stated that while the injury need not be proximately caused by the vehicle, there must be a sufficient causal nexus between the injury and the use of the vehicle for liability to exist. The Court found that the injury was caused by the failure of the bus driver and monitor to ensure that the child disembarked when he arrived at school. The Court concluded that the child was not injured by any of the foreseeable risks that the vehicular policy insured. Thus, the vehicle was merely the situs of the injury, and there was no causal link between the vehicle and the injury.

Similarly, other Courts have concluded that the type of conduct must be reasonably identifiable with the use of a vehicle. 44 A.L.R. 4th 1010, §§ 3, 4, 5, 6, 7. In those cases, which deal with assaults, the Courts concluded that where the injury neither arose from the intrinsic nature of the vehicle, as such, nor did the vehicle itself produce the injury, the injury or death caused by the assault was not within the coverage of no-fault insurance. The Courts held that assaults by an assailant were not the type of conduct foreseeably identified with the normal use of the vehicle. *Id.; see also, Aetna Cas. & Sur. Co. v. U.S. Fidelity & Guar. Co.,* 1st Cir., 806 F.2d 302 (1986).

In *Aetna,* the Court held that damages resulting from the

rape of a child by a bus driver who was transporting her were not within the coverage of the insurance policy. It held that the limitation on liability to damages "resulting from the ownership, maintenance, use" of a covered vehicle insures that the risk spread is the risk of automobile accidents, and not all accidents or incidents to which a vehicle may be tied.

Aetna claimed that the vehicle provided the driver with the opportunity to rape the girl, thus, the rape resulted from the *use* of the bus. The Court stated that while vehicles are an indispensable part of many crimes, such as bank robberies, that it would be farfetched to say that these crimes result from the *use* of the automobile.

Here, the plaintiff was attacked on the defendant's premises. When she attempted to exit her car she was grabbed by her hair and held in the car. The assailant then drove her to a remote location, parked the car and raped her. Her complaint against the defendants alleged the existence of a dangerous condition on the premises because previous criminal acts had occurred on the premises, such as purse snatchings, car break-ins, etc. She asserted that the defendants had not warned her of the dangerous condition or provided safe premises or adequate security when they knew or should have known of the condition.

To invoke coverage under the no-fault statute, it is necessary that the allegedly negligent acts arose from the ownership, maintenance or use of the insured vehicle. This Court cannot conclude that her injury arose out of the ownership, maintenance or use of a vehicle. Under the reasonable expectations test, this Court cannot say that at the time of the inception of the contract the parties contemplated or intended that using the vehicle as the situs of a criminal act would constitute a use of the vehicle within the meaning of the statute. *See also, Dairyland Ins. Co. v. Esterling,* Nebr.Supr., 290 N.W.2d 209 (1980) (cited in *Selected Risks, supra*) (where complaint alleged existence of dangerous condition on the premises, the fact that injury was received inside a vehicle did not constitute "use" of the vehicle); 15 A.L.R. 4th 10 § 18(b).

***4** The defendants here cite two Delaware Supreme Court cases for the proposition that no-fault benefits would be available to the plaintiff. *Hudson v. State Farm Mutual Ins. Co.,* Del.Supr., 569 A.2d 1168 (1990); *Bass v. Horizon Assurance Co.,* Del.Supr., 562 A.2d 1194 (1989).

In *Hudson,* the plaintiff was injured when her husband intentionally or recklessly caused a collision by driving off the road in an attempt to injure or kill her. In *Bass,* the plaintiff was injured in an automobile accident while he was driving his wife's vehicle while under the influence of alcohol. In both cases the Court determined that PIP benefits were available to the plaintiffs.

While these cases are legally and factually different, they still support the legal principle in *Selected Risks* that requires a sufficient causal nexus between the injury and the use of the vehicle.

First, in *Hudson,* the Court was interpreting the phrase "caused by accident." The insurer argued that injuries were not "caused by accident" because the husband intentionally or recklessly drove off the road. The Court held that it would not imply an exclusion for reckless or intentional misconduct while operating a vehicle because the purpose of the Delaware financial responsibility law is to protect and compensate persons injured in "automobile accidents." *Id.* at 1171. Second, the facts clearly substantiate that the operation of the vehicle was the cause of the injury. Third, the injuries were sustained because the driver ran off the road and hit a telephone pole. The risk that a driver would fail to control a vehicle and collide with an object causing injuries is certainly a foreseeable risk that would be contemplated in making the contract.

Hudson holds that foreseeable risks that cause injury are risks to be covered, whether the act was negligent or intentional, and that insurers cannot avoid liability by attempting to impose fault into a no-fault statute.

This is made clear in the *Bass* decision where the insurer included in the policy an exclusion of PIP coverage where the insured was convicted of operating a motor vehicle while under the influence of alcohol. The Court held that such exclusions were impermissible under the Delaware statute because it attempted to affix fault and to fix a penalty for anti-social conduct which was a governmental responsibility through legislative response. *Id.* at 1196.

Again, it must be noted that in *Bass,* the Court was not interpreting the same provisions as this Court is being asked to interpret. However, the facts demonstrate that the operation or use of the vehicle was the causal nexus of the injuries. Furthermore, driving under the influence was certainly within the contemplation of the parties because the contract specifically addressed that issue. Finally, the insurer paid PIP benefits to the injured passenger, but attempted to avoid payment to the injured driver who was, in fact, intoxicated. Clearly, the Supreme Court concluded that the injuries were a foreseeable risk that the policy covered.

***5** Here, the vehicle was merely the situs of the injury. There was no causal link between the vehicle and the

injury. The plaintiff's injuries were inflicted by the intentional acts of her assailant that could have just as easily occurred anywhere. The fact that she was in an insured vehicle was merely fortuitous.

There is no causal connection or nexus between the use of the vehicle and the injuries sustained by the plaintiff; the injuries were not caused by or inflicted by the vehicle; thus, this Court cannot conclude that no-fault benefits would be available to her. Therefore, she is not precluded from introducing her medical expenses in an action against the defendants for failure to provide safe premises.

The Court DENIES the defendants' motion *in limine*.

IT IS SO ORDERED.

End of Document

2001 WL 1182356
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Mary E. MOTZKO, trustee for the heirs and next-of-kin of Arnold Francis MOTZKO, deceased, Respondent,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant,
Bobby Gene OLSON, Respondent.

No. C4-01-131. | Oct. 9, 2001.

Attorneys and Law Firms

Paul D. Johnson, McLarnan, Hannaher & Skatvold, P.L.L.P., Moorhead, MN, for respondent Mary E. Motzko.

Erik J. Askegaard, Askegaard, Robinson & Schweich, P.A., Brainerd, MN, for appellant.

Richard D. Varriano, Moorhead, MN, for respondent Bobby Gene Olson.

Considered and decided by CRIPPEN, Presiding J., SCHUMACHER and SHUMAKER, JJ.

Opinion

UNPUBLISHED OPINION

SHUMAKER, Judge.

*1 In a dispute as to the applicability of uninsured motorist (UM) coverage to a truck-pulling contest in which a vehicle driver was killed, appellant State Farm Mutual Automobile Insurance Company alleges that the district court erred in its rulings on assumption of risk and the use of the vehicles for "transportation purposes," and in its jury instruction on the concept of "accident." Because we find no error in the district court's rulings or instruction, we affirm.

FACTS

In a bar on the evening of October 30, 1998, Arnold Motzko, Bobby Gene Olson, Leen Iten, and Tammy Heng had a friendly debate as to whether Ford or Chevrolet pickup trucks were stronger. Motzko and Olson owned Chevrolets and Iten owned a Ford.

The group decided to settle the debate by having a truck-pulling contest on a country road. It was planned that Iten would pit his Ford against Motzko's Chevrolet and that Olson would pull against the winner. The group departed for the contest site.

Motzko and Olson arrived and waited for Iten. When Iten did not appear, they decided to go ahead with the contest. They attached a ten-foot chain to the trailer hitches on their trucks. Then each drove forward in an effort to pull the other backward.

After Olson had pulled Motzko's pickup about 615 feet, the chain broke or came loose. This caused Motzko's truck to leave the road and to roll over. During the rollover, Motzko was ejected from the truck. When the truck eventually came to rest it landed on top of Motzko and killed him.

Olson was uninsured. Motzko carried uninsured motorist coverage (UM) with State Farm. Motzko's trustee sued State Farm to recover UM proceeds. State Farm moved for summary judgment, contending that coverage is not available for intentional acts and that Motzko assumed the risk of his death. The district court denied the motion and the parties tried the case to a jury.

At the conclusion of all the evidence, the court denied State Farm's motion for a directed verdict. The court also denied State Farm's request for jury instructions on primary assumption of risk, on whether Motzko's death resulted from an accident, and on whether Motzko was using his truck for transportation purposes. The court previously had ruled as a matter of law that Motzko was using his pickup for transportation purposes at the time of his death.

In its special verdict, the jury found that (1) Olson did not intend to cause Motzko's truck to roll over; (2) both Olson and Motzko were negligent and that the negligence of each was a direct cause of the rollover; (3) Olson was 65% and Motzko 35% at fault; and (4) damages amounted

to $300,000. The district court ordered judgment on this verdict, denying cross-motions by the trustee and State Farm for judgment notwithstanding the verdict, or, in the alternative, a new trial. State Farm appealed.

DECISION

On appeal from denial of a motion for a new trial, "the verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict." *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn.App.1992) (citation omitted), *review denied* (Minn. Apr. 29, 1992). Because the district court has the discretion to grant a new trial, a reviewing court will not disturb the district court's decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. BaumannFurrie & Co.*, 454 N.W.2d 905, 9-10 (Minn.1990). Judgment notwithstanding the verdict (JNOV) is proper when a jury verdict has no reasonable support in fact or is contrary to the law. *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn.1990). We review denial of a motion for JNOV de novo. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn.1998). Unless a reviewing court is "able to determine that the evidence is practically conclusive against the verdict, or that reasonable minds could reach but one conclusion against the verdict," the district court's order denying a motion for JNOV will stand. *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975) (citation omitted). The interpretation of an insurance contract is a question of law, which this court reviews de novo. *Am. Nat'l Prop. & Cas. Co. v. Loren*, 597 N.W.2d 291, 292 (Minn.1999).

I.

***2** The insurance policy Motzko purchased from State Farm provided coverage for accidental bodily injury caused by an uninsured vehicle:

> We will pay for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle.* The *bodily injury* must be caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle.*

The first issue is whether Motzko's death was "caused by accident." State Farm argues that Olson acted intentionally, and even though he might not have intended to harm Motzko personally he did intend to cause property damage to Motzko's truck. The intent to cause some harm, even to the insured vehicle, is sufficient, argues State Farm, to preclude this incident from coverage as an accident.

The State Farm policy does not define "accident." In their arguments, the parties have cited several insurance cases that attempt to define the term. During the pendency of this appeal, the Minnesota Supreme Court decided *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn.2001), a case involving a personal injury claim against a homeowner's insurance policy. Three high school boys were "just goofing around" in a gymnasium. One boy hung by his hands from the rim of a basketball hoop while the other two pulled on his ankles. When the boy lost his grip and began to fall, the boys holding his ankles let go. As a result, he injured his hand. The injured boy made a claim against the homeowner's policy covering the family of one of the other boys.

The homeowner's insurer brought a declaratory judgment action seeking a determination that the incident resulting in the injury was not an "occurrence." The policy provided liability coverage only for occurrences. The policy defined occurrence as "an accident." But the policy did not define "accident."

The supreme court concluded that the applicable definition of "accident" is that stated in *Hauenstein v. St. Paul-Mercury Indem. Co.*, 242 Minn. 354, 65 N.W.2d 122 (1954). Thus, an accident is "an unexpected, unforeseen, or undesigned happening or consequence * * *." *Walser*, 628 N.W.2d at 611 (quotation omitted). The court elaborated, saying that, in applying this definition, conduct is intentional when there is a specific intent to cause injury and is accidental where there is no intent to injure, even though the conduct that resulted in the injury was intentional. *Id.* at 612.

As stated in a previous case discussed in *Walser*, for an act to be considered intentional, "the requisite intent demands that the [actor] intended the harm itself, not merely that the [actor] generally intended to act." *R.W. v. T.F.*, 528 N.W.2d 869, 872 (Minn.1995) (citation omitted). Intent may be established "either by proving [the actor's] actual intent to injure or by inferring such intent as a matter of law." *Id.* "[I]n analyzing whether there was an accident for purposes of coverage, lack of specific intent to injure will be determinative * * *." *Walser*, 628 N.W .2d at 612.

***3** There is nothing in the record that shows that either Olson or Motzko intended to cause an injury. Although

they intentionally engaged in a reckless activity, there was no specific intent to injure. Nor do the facts support an inference of such intent as a matter of law. An inference of intent can be drawn only when the nature and circumstances of a person's act are such that the harm was substantially certain to occur. *R.W. v. T.F.*, 528 N.W.2d at 872.

We also reject State Farm's argument that an intention to cause property damage is sufficient to preclude this incident from being categorized as an accident. The coverage provision the trustee has invoked is that referring to bodily injury. Even if, arguably, Olson and Motzko contemplated the possibility of damage to their trucks, that is not bodily injury and is not a sufficient basis for classifying Motzko's death as being the result of intentionally caused bodily harm.

The jury had before it evidence upon which it could reasonably find that Olson's conduct was not intentional. That finding was not reversible error.

II.

State Farm assigns as error the district court's refusal to give a requested jury instruction and special-verdict question on the law of accident in the state of Minnesota.

District courts have broad latitude in selecting the language of jury instructions, provided that the entire charge fairly and adequately states the applicable law. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn.1986). District courts also have broad discretion in framing special-verdict questions. *Dang v. St. Paul Ramsey Med. Ctr.*, 490 N.W.2d 653, 658 (Minn.App.1992), *review denied* (Minn. Dec. 15, 1992). Where jury instructions fairly and correctly state the applicable law, this court will not reverse the denial of a new trial. *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn.App.1990), *review denied* (Minn. May 11, 1990).

The district court instructed the jury:

> In this case you will first need to determine whether or not Arnold Motzko's death was caused by accident. To do so, you must determine whether the defendant, Bobby Olson, intended to cause the rollover.
>
> Intent or intentionally means that a person wants to cause the consequences of his or her acts, or knows that his or her acts are substantially certain to cause those consequences.
>
> If you determined that the defendant, Bobby Olson, intended to cause the rollover of Mr. Motzko's pickup truck, the only other issue for you to determine will be the issue of damages, if any, the plaintiffs are entitled to.
>
> If you determine that the rollover of Mr. Motzko's pickup was not intended, but was an accident, there will be additional issues for you to decide.

State Farm argues that the court erred in refusing to instruct the jury that the term "accident" should be afforded its plain, ordinary, or popular meaning. State Farm also contends the district court erred in denying State Farm's request to include a separate question on whether Motzko's death was caused by accident, specifically, "[w]as the death of Arnold Francis Motzko, bodily injury caused by accident, from the perspective of Bobby Gene Olson?" and instead asking the question, "Did defendant, Bobby Olson, intend to cause the rollover of the vehicle driven by Arnold Motzko?"

*4 Although the district court did not define "accident" and did not use that term in the special verdict, the concept was fairly presented by contrast. The court instructed the jury that it had to determine whether the incident was an accident or was intentional. From the instruction it was clear that these were mutually exclusive terms. The court adequately defined "intent." If the jury found that the facts fit the definition of intent, that finding necessarily excluded accident. Conversely, if the jury found that the facts did not fit the definition of intent, the act necessarily was an accident, because that was the only other possibility presented to the jury. This approach did not distort the concept of "accident," and the district court did not err in denying State Farm's requests for a definition of accident and a special verdict question about accident.

III.

State Farm alleges that the district court erred in finding as a matter of law that at the time of Motzko's death, Olson's vehicle was being used for transportation purposes. State Farm argues that this issue should have been submitted to the jury.

On established facts, the question of whether an injury arose out of the use of a motor vehicle is a question of law, and the appellate court need not defer to the district court. *Med. Lake Bus Co. v. Smith*, 554 N.W.2d 623, 624 (Minn.App.1996); *Kern v. Auto Owners Ins. Co.*, 526 N.W.2d 409, 4-10 (Minn.App.1995).

State Farm's policy provides coverage for bodily injury caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle. An accident arises out of the use or maintenance of a motor vehicle when (1) there is adequate causation between the motor vehicle and the injury; (2) no act of independent significance breaks the causal link between the use and the injury; and (3) the vehicle is used for a transportation purpose. *Cont'l W. Ins. Co. v. Klug,* 415 N.W.2d 876, 878 (Minn.1987); *Midwest Family Mut. Ins. Co. v. Karpe,* 430 N.W.2d 856, 859 (Minn.App.1988), *review denied* (Minn. Dec. 21, 1988). State Farm contests only the third prong of the Klug test, arguing that at the time of the incident Olson was not using his vehicle as a motor vehicle but rather as "an instrumentality in a dangerous and illegal contest." State Farm essentially argues that Olson was using his vehicle as a weapon, not as a mode of transportation.

The use of a motor vehicle in a dangerous and illegal manner does not necessarily preclude its contemporaneous use for transportation purposes. Driving a car at an excessive speed and weaving in and out of traffic are dangerous and illegal uses of a motor vehicle. But the car is still being used to transport the driver. Using an ordinary passenger vehicle to tow or to push a disabled vehicle, although perhaps not illegal, are arguably dangerous activities and yet are still within the constellation of motoring activities known as transportation. The common meaning of "transport" is "[t]o carry from one place to another; convey." *The American Heritage Dictionary of the English Language* 1903 (3d ed.1992). The truck-pulling contest involved the carriage or conveyance of both trucks and their drivers from one position on the road to another through the motorized operation of the Olson truck. As the court in Klug points out, for insurance coverage purposes, there must be a distinction drawn between risks associated with motoring and those incident to the use of a vehicle as merely the situs of a risky activity. *Klug,* 415 N.W.2d at 878-79. Motoring uses are within the contemplation of the insurance policy. Non-motoring uses likely would fall into a category of some other type of insurance coverage. The truck-pulling contest was a motoring or transportation use and not a mere situs of injury. The district court did not err in ruling as a matter of law that the Olson truck was being used for transportation purposes at the time of Motzko's death.

IV.

*5 Finally, State Farm argues that the district court erred by not ruling as a matter of law that Motzko assumed the risk of his death and by refusing to instruct the jury on the law of assumption of risk.

When the facts are undisputed and reasonable people can draw only one conclusion, assumption of the risk is a question of law for the court. *Schroeder v. Jesco, Inc.,* 296 Minn. 447, 451, 209 N.W.2d 414, 417 (1973). It is within the district court's discretion to decide whether or not to instruct the jury on assumption of risk. *Kantorowicz v. VFW Post,* No. 230, 349 N.W.2d 597, 599 (Minn.App .1984).

Minnesota law recognizes two types of assumption of the risk. *Swagger v. City of Crystal,* 379 N.W.2d 183, 184 (Minn.App.1985), *review denied* (Minn. Feb. 19, 1986). Primary assumption of the risk is shown if a person has knowledge of the risk, appreciates the risk, and has a choice to avoid the risk but voluntarily chooses to chance the risk. *Andren v. White Rodgers Co .,* 465 N.W.2d 102, 104-05 (Minn.App.1991), *review denied* (Minn. Mar. 27, 1991). Application of the primary assumption of risk doctrine is uncommon. *Swagger,* 379 N.W.2d at 185. By contrast, secondary assumption of the risk is a form of contributory negligence. *Andren,* 465 N.W.2d at 104.

Primary assumption of the risk applies only when a person is aware of a specific danger. *Olson v. Hansen,* 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974). The record contains no evidence regarding Motzko's knowledge or appreciation of the risk involved in engaging in a truck-pulling contest. Thus, there was no factual basis on which the court could apply the doctrine of primary assumption of risk as a mater of law.

Motzko's conduct was, at most, a secondary assumption of risk. In finding Motzko 35% negligent, the jury recognized that Motzko was negligent in his conduct and assumed some risk. The record supports that determination. It was properly within the district court's discretion to rule as it did on the issue of primary assumption of risk.

Affirmed.

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Unpublished Disposition
886 A.2d 1278 (Table)
(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')
Supreme Court of Delaware.

Miguel SANCHEZ, Plaintiff Below, Appellant,
v.
AMERICAN INDEPENDENT INSURANCE COMPANY, Defendant Below, Appellee.

No. 186,2005. | Submitted Sept. 7, 2005. | Decided Oct. 17, 2005.

Synopsis

Background: Passenger, who was accidentally shot in the head while riding as a passenger in his mother's vehicle, sought personal injury protection benefits through his mother's automobile insurance policy. The Superior Court, New Castle County, entered summary judgment in favor of insurance company. Passenger appealed.

Holding: The Supreme Court held that passenger's injuries did not arise out of the use of a motor vehicle, and thus passenger was not entitled to personal injury protection benefits under mother's automobile insurance policy.

Affirmed.

West Headnotes (1)

1 **Insurance**
⇐No-Fault Coverage

Passenger's injuries, which occurred when he was accidentally shot in the head while traveling in his mother's vehicle, did not arise out of the use of a motor vehicle, and thus passenger was not entitled to personal injury protection benefits under mother's automobile insurance policy; the vehicle was not an active accessory in causing the injury since passenger was not intentionally shot at and the vehicle was not targeted. 21 Del.C. § 2118(a)(2)(b).

5 Cases that cite this headnote

Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 03C-09-153.

Before STEELE, Chief Justice, BERGER, and JACOBS, Justices.

Opinion

ORDER

***1** This 17th day of October, 2005, upon consideration of the briefs of the parties, it appears to the Court as follows:

(1) The plaintiff-below appellant, Miguel Sanchez, appeals from a Superior Court order entering summary judgment in favor of the defendant-below, American Independent Insurance Company. Sanchez was accidentally shot in the head while riding as a passenger in his mother's vehicle. Sanchez argues that the Superior Court erred in holding that he was not entitled to recover personal injury protection benefits through his mother's automobile insurance policy, issued by American Independent. Because Sanchez's injury did not arise out of the use of an automobile, the Superior Court correctly held that the carrier could legally deny Sanchez's claim. We therefore affirm.

(2) On May 2, 2001, Sanchez was riding in the front passenger seat of a vehicle owned by his mother, Elaine DeJesus-Davila. Unbeknownst to Sanchez or his mother, two pedestrians, at a nearby intersection, were involved in an argument. As DeJesus-Davila drove through the intersection, one of the pedestrians fired a gun at the other. The bullet missed its intended target, and passed through the rear window of the vehicle, striking Sanchez in the head.

(3) The American Independent policy insuring DeJesus-Davila's vehicle included a provision for a maximum of $15,000 in no-fault PIP benefits. In September 2003, Sanchez filed an action in Superior Court, seeking PIP benefits from American Independent. American Independent denied coverage, contending that the policy did not apply to Sanchez's injuries because

they did not arise out of the use of the motor vehicle. The parties filed cross-motions for summary judgment, and the Superior Court granted American Independent's motion and denied Sanchez's motion. Sanchez appeals from that order.

(4) On appeal, Sanchez contends that the Superior Court erroneously concluded that Sanchez was not entitled to PIP benefits under the insurance policy. This Court reviews *de novo* a decision granting summary judgment, to determine whether the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.1 Here, the only issue on this appeal is whether American Independent properly denied Sanchez PIP benefits under the policy. This Court reviews the interpretation of language in contracts, including insurance contracts, *de novo.*2

(5) Under Delaware's no fault insurance statute, 21 Del. C. § 2118(a)(2), the owner of a motor vehicle is required to have insurance that covers medical expenses and lost earnings for persons injured in an automobile accident.3 That coverage, referred to as "PIP" benefits, must be at least $15,000.4 The policy at issue in this case provided:

> [American Independent] will pay ... personal injury protection benefits to or for an "insured" who sustains "bodily injury." The bodily injury must:
>
> *2 1. Be caused by an accident; and
> 2. Arise out of the ownership, maintenance or use of a "motor vehicle" as a "motor vehicle."5

(6) American Independent contends that Sanchez is not entitled to coverage under that provision because his injuries did not "arise out of the ownership, maintenance or use" of a motor vehicle. The Superior Court agreed with American Independent after applying the test articulated by this Court in *Nationwide General Insurance Co. v. Royal.*6

(7) In *Royal,* this Court adopted a three-part test to determine whether an injury has arisen out of the operation, use, or maintenance of a motor vehicle. That test, which was initially articulated by the Minnesota Supreme Court, considers:

> (a) whether the vehicle was an "active accessory" in causing the injury-i.e. "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury;"
>
> (b) whether there was an act of independent significance that broke the causal link between use of the vehicle and the injuries inflicted; and
> (c) whether the vehicle was used for transportation purposes.7

(8) Sanchez argues that *Royal* is not applicable here, because this case involves an application for PIP benefits, rather than for the uninsured motorist benefits that the plaintiff in *Royal* was seeking. That is a distinction without a difference. The *Royal* test was developed "as a standard by which the courts of this State should determine whether an injury has arisen out of the operation, use, or maintenance of a vehicle."8 Both the no-fault insurance statute and the UIM statute provide coverage for injuries "arising out of" automobile accidents. Both the policy in this case, and the policy in Royal limited coverage to injuries "aris[ing] out of ... the use" of the vehicle.9 The General Assembly has never suggested and this Court has never held that one statute should be construed more broadly than the other, and for purposes of determining whether an injury arose from the "operation, maintenance, or use" of a vehicle, there is no principled reason to read one statute differently from the other.

(9) Under the Royal test, Sanchez's injuries did not arise out of the "use" of a motor vehicle because the vehicle was not an "active accessory" in causing the injury. Under the first prong of Royal, the vehicle must be something more than the mere situs of the injury. Although Sanchez was shot while he was sitting in the car, his location was the only connection between the injury and the vehicle. As the Superior Court judge pointed out, Sanchez could just have easily been walking or riding a bike through the intersection when he was shot. No one intentionally shot at or targeted the vehicle. Nothing about Sanchez's presence in the vehicle contributed to the fact that he was shot; unfortunately, he was merely in the wrong place at the wrong time.

*3 (10) Under factual circumstances very similar to this case, this Court in *Royal* held that the victim of a drive-by shooting was not entitled to collect UIM benefits. Although the owner of the car used in the shooting was underinsured, this Court held that the plaintiff was not entitled to collect UIM benefits from her insurer, because the vehicle was not a significant element in the events that led to the plaintiff's injuries.10 As the *Royal Court* stated, "[the shooter] did not use the vehicle in order to catch up with or better position himself to shoot at Royal. He could have injured her just as easily without a vehicle by shooting at the trailer from the street or by walking up to or even into the trailer."11

(11) Because the issue of whether a vehicle was an "active accessory" is highly fact specific, the *Royal* Court noted that it is helpful to consider how other jurisdictions have resolved similar fact patterns.12 In similar factual circumstances, other courts have found that the injuries did not arise out of the use of the motor vehicle. For

example, in *Collier v. Employers Nat'l Insurance Co.*,13 the Texas Court of Appeals held that the plaintiff was not entitled to UIM coverage when an unidentified assailant drove by and shot the plaintiff. The Court reasoned that the assault was not related to the ownership, maintenance or use of the assailant's vehicle, because the same injury could have been suffered in the same way if the parties had been on foot or on bicycles. The Court declined to extend coverage to any circumstance where an automobile was merely the site of a criminal assault, without more. Similarly, in *Kreager v. State Farm Mutual Automobile Insurance Co.*,14 the Michigan Court of Appeals held that the plaintiff was not entitled to PIP benefits when the plaintiff was standing in a parking lot and an assailant shot him while driving an automobile. The Court held that the injury did not arise from the "use of a motor vehicle as a motor vehicle," because the involvement of the car in the injury was not related to the car's character as a motor vehicle, but was merely incidental or fortuitous.15 The Court reasoned that the shots could just as easily have been fired from a building or by a pedestrian.16

(12) Lastly, a finding of coverage is not warranted under the facts of this case, because there was no causal connection between Sanchez's use of the vehicle and his injuries.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

Parallel Citations

2005 WL 2662960 (Del.Supr.)

Footnotes

1 *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del.1999).

2 *Twin City Fire Ins. Co. v. Del. Racing Assn.*, 840 A.2d 624, 626 (Del.2003).

3 *Bass v. Horizon Assurance Co.*, 562 A.2d 1194, 1195 (Del.1989).

4 *21 Del. C. § 2118(a)(2)(b)*. Under the statute, the mandated coverage may be subject to conditions and exclusions customary to the field of liability, casualty and property insurance. *Id.* at Section 2118(f).

5 Although Sanchez raises in his opening brief the issue of whether he was an "occupant" of the vehicle (and therefore an insured) and whether the shooting was an "accident," American Independent does not appear to dispute those issues. Rather, American Independent argues that, regardless of whether Sanchez was an "insured" injured in an "accident," he was not entitled to coverage because the injuries had no causal connection to the use of the vehicle, as required by the terms of the policy.

6 700 A.2d 130 (Del.1997).

7 *Id.* at 132.

8 *Id.*

9 *Id.* at 131.

10 *Id.* at 132.

11 *Id.* at 133.

12 *Id.*

13 861 S.W.2d 286 (Tex.App.1993).

14 197 Mich.App. 577, 496 N.W.2d 346 (Mich.App.1992).

15 *Id.* at 347.

16 *Id.* at 348. Although Sanchez cites several cases that he argues support his position, all of them can be distinguished on their facts. For example, in *Smaul v. Irvington Gen. Hosp.*, 108 N.J. 474, 530 A.2d 1251 (N.J.1987), the New Jersey Supreme Court awarded PIP benefits to a plaintiff who stopped the car to ask directions, and was assaulted by assailants who apparently wanted to steal the car. The plaintiff's injuries were connected to the vehicle in that case, because the assault stemmed from the assailant's desire to steal the car. *Id.* at 1253. Similarly, in *Pena v. Allstate Ins. Co.*, 463 So.2d 1256 (Fla.1985) the Florida Supreme Court awarded PIP

benefits to a taxicab driver who was assaulted and robbed of his fare money. The facts of that case are distinguishable because the assault was directly related to the taxi driver's use of the motor vehicle; he was assaulted because the assailant believed that the driver would be carrying money from his fares. Unlike those cases, the assault on Sanchez had nothing to do with his presence in the motor vehicle.

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2005 WL 697945
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Barbara WISNEWSKI, Plaintiff-Below/Appellant,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
DefendantBelow/Appellee.

No. 03C-06-177 MMJ. | Submitted Jan. 31, 2005. | Decided Feb. 14, 2005.

Upon Defendant-Below/Appellee's Rule 56 Motion for Summary Judgment. Denied.

Attorneys and Law Firms

Matthew M. Bartkowski, Kimmel, Carter, Roman & Peltz, Bear, Delaware, for Plaintff-Below, Appellant.

Sherry Ruggerio Fallon, Tybout, Redfearn & Pell, Wilmington, Delaware, for Defendant-Below, Appellee.

Opinion

MEMORANDUM OPINION

JOHNSTON, J.

Factual and Procedural Context

*1 On August 9, 2001, a driver allegedly lost control of her vehicle. The vehicle ran off the road and crashed into the living room wall of the home of Barbara Wisnewski, Plaintiff-Below/Appellant ("Plaintiff"). At the time the vehicle struck Plaintiff's house, Plaintiff was standing in her living room. The vehicle did not physically strike Plaintiff. Plaintiff claims to have suffered psychological injuries resulting from the severe noise and shaking caused by the accident.

The driver was insured by State Farm Mutual Automobile Insurance Company, Defendant-Below/Appellee ("State Farm"). State Farm denied that Plaintiff's injuries were covered by the driver's no-fault insurance policy issued by State Farm. By Decision dated May 30, 2003, the Department of Insurance Arbitration Panel ruled in favor of State Farm, finding: "Claimant not defined as pedestrian. No PIP coverage." On June 23, 2003, Plaintiff filed in this Court a Complaint on Appeal from the Department of Insurance Arbitration Panel.

Defendant's Motion for Summary Judgment

State Farm has moved for summary judgment. Summary judgment is appropriate when there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law.1 State Farm asserts that because "Plaintiff was not occupying a motor vehicle at the time of the accident, she is not entitled to no-fault benefits unless she can demonstrate that she is a 'pedestrian'." State Farm relies upon 21 *Del. C.* § 2118(a)(2)(e), which provides:

The coverage required in this paragraph shall apply to pedestrians only if they are injured by an accident with any motor vehicle within the State....

State Farm also argues that coverage should be denied to Plaintiff because Plaintiff is not an insured person as defined by the policy. Section II-No-Fault-Coverage defines "Insured" as "any person while occupying or injured in an accident as a pedestrian by your car...." Neither section 2118 nor the policy define "pedestrian."

The Court does not find State Farm's argument persuasive. The question of whether or not Plaintiff is a "pedestrian" need not be resolved. The minimum amount of no-fault insurance coverage required by Delaware law is established by section 2118. Section 2118(2)(c) provides:

The coverage required by this paragraph 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. (Emphasis added).

To constitute an "accident involving such motor vehicle," a causal connection is required between the use of the vehicle and the injury. The injury must originate from, be incidental to, or have some connection with the use of a motor vehicle.2 This Court has held that there is no burden on a plaintiff to prove that the injury was proximately caused by the use of the automobile. The plaintiff need only demonstrate a causal connection between the use of the vehicle and the injury. The injury must have occurred by virtue of the inherent nature of

using the motor vehicle.3

*2 The issue of causation must be interpreted from the viewpoint of the injured person.4 The primary objective of section 2118 is to protect and compensate all persons injured in automobile accidents, regardless of fault.5 Section 2118 also furthers the public policy of assuring health care providers that they will be compensated for care, regardless of the cause of the accident.6 By extending coverage to "any other person injured in an accident involving such motor vehicle," the General Assembly expressed its clear intention to favor injured persons over the no-fault vehicle insurer.7

The inherent nature of a motor vehicle is to carry passengers from one place to another. Whether or not the collision occurred on an established roadway is not determinative. In this case, it is undisputed that the vehicle was traveling on a roadway, and as part of a continuous course of events, ran off the roadway and into a structure. Therefore, the Court finds that the accident, allegedly causing injury to Plaintiff, involved a motor vehicle, occurred by virtue of the inherent nature of the use of the vehicle, and was causally connected to the use of the vehicle. This is not a situation in which a vehicle was the mere situs of an injury or where an accident occurred in the vicinity of a vehicle.8

The only remaining issue is whether the more restrictive language in the State Farm insurance policy may circumscribe the minimum coverage required by section 2118, and, more specifically, the inclusive language in section 2118(2)(c). Section 2118(2)(f) permits vehicle owners to elect coverage subject to certain deductibles, waiting periods, sublimits, percentage reductions, excess provisions and similar reductions offered by insurers.

The Delaware Supreme Court has established a two-pronged test to determine if the exclusion from coverage is valid. First, the exclusion must be one that is customary in the field of Delaware Insurance. Second, the exclusion must be consistent with the purpose of section 2118.9 There has been no evidence presented as to whether or not the State Farm policy limitation of coverage to occupants and "pedestrians" is customary. The Court, however, need not decide that issue. The Court finds that exclusion of coverage to persons injured in an accident involving a motor vehicle, but who are neither occupants nor "pedestrians," is inconsistent with the purpose of Delaware's no-fault statute-"to protect and compensate all persons injured in automobile accidents."10

CONCLUSION

THEREFORE, Plaintiff-Below/Appellant, Barbara Wisnewski, is entitled to no-fault coverage under the policy issued to the driver of the motor vehicle, Jennifer C. Jackman, by Defendant-Below/Appellee, State Farm Mutual Automobile Insurance Company. Coverage is consistent with 21 *Del C.* § 2118(2)(c). The restrictive language in the insurance policy, purporting to limit coverage to occupants and "pedestrians," does not supercede the plain statutory language and public policy concerns clearly addressed by the General Assembly.

*3 IT IS SO ORDERED.

Footnotes

1 *Burkhart v. Davies,* 602 A.2d 56, 59 (Del.1991).

2 *Gray v. Allstate Insurance Co.,* 668 A.2d 778, 780 (Del.Super.1995) (Cyclist's injury was found to be caused by his own negligence when he lost control of his bicycle while swerving to avoid a motor vehicle, however, he was found to be entitled to compensation under section 2118.).

3 *Id.; Dickerson v. Continental Casualty Co.,* Del.Super., C.A. No. 82C-MR-8, Poppiti, J. (Sept. 1, 1983).

4 *Hudson v. State Farm Mut. Ins. Co.,* 569 A.2d 1168, 1171 (Del.1990).

5 *Id.*

6 *Marvin v. State Farm Mut. Ins. Co.,* 2002 WL 31151655, at *4 (Del.Super.)

7 *See Gray,* 668 A.2d at 781 n. 3.

8 *See, e.g., Nationwide General Ins. Co. v. Royal,* 700 A.2d 130, 133-34 (Del.1997) (plaintiff struck by a bullet in a drive-by shooting while asleep inside her trailer home, was not entitled to underinsured motorist benefits); *Oggenfuss v. Big Valley Associates,* 1996 WL 453319, at *1 (Del.Super.) (plaintiff who slipped and fell between the curb and a parked vehicle not covered by PIP); *Carter v. Nationwide Ins. Co.,* 1992 WL 240479, at *1-3 (Del.Super.) (plaintiff not covered for injury sustained while walking to a convenience store after fueling his vehicle); *Dick v. Koutoufaris,* 1990 WL 106182, at *5 (Del.Super.) (plaintiff who was raped in her vehicle was not entitled to no-fault benefits); *Selected Risks Ins. Co. v. Pennsylvania Manufacturers Assoc. Ins. Co.,* 1986 WL 13107, at *2 (Del.Super.) (handicapped child left in a school bus not covered by PIP insurance).

9 *State Farm Mut. Automobile Ins. Co. v. Wagamon*, 541 A.2d 557, 560-61 (Del.1988).

10 *Hudson*, 569 A.2d at 1171.

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