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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTHEW KELTY, Plaintiff Below, Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant Below, Appellee.	)	No. 121, 2012 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. NO. N10C-08-246 WCC

APPELLANT'S REPLY BRIEF

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NATURE OF PROCEEDINGS

This is the Reply Brief of Plaintiff Matthew Kelty on an appeal taken of a Superior Court decision dated February 21, 2012, in the case of *Matthew Kelty v. State Farm Automobile Insurance Company*, C.A. No. 10C-08-246WCC. In the Plaintiff's Opening Brief, Plaintiff advanced three primary arguments; (1) The car involved in the accident in question was being used for transportation purposes; (2) that Kelty was a pedestrian entitled to personal injury protection benefits pursuant to 21 Del. C. §2118(a)(2)(c); and (3) that State Farm breached the implied covenant of good faith by denying PIP benefits under section 2 of an insurance policy on the theory that the accident did not occur as a result of the ownership, maintenance or use of a vehicle when, under section 1 of the same policy, with respect to the same incident, State Farm paid the liability limits based on the same ownership, maintenance or use standard.

In response to the Plaintiff's arguments, State Farm has alleged that despite paying its liability limits, the motor vehicle in this instance was not being used for transportation purposes and was more akin to a "ground based winch." Next, State Farm argues that irrespective of the status of the Plaintiff as either a pedestrian or an occupant, the Plaintiff is not entitled to personal injury protection benefits unless the vehicle in question was being used for transportation purposes. Finally, State Farm argues that the Plaintiff is precluded from raising its third argument because it was not fairly presented to the Court below.

ARGUMENT

I. THE COURT BELOW COMMITTED REVERSIBLE ERROR WHEN IT DETERMINED AS A MATTER OF LAW THAT KELTY'S INJURIES DID NOT ARISE FROM THE OWNERSHIP, MAINTENANCE OR USE OF LOVEGROVE'S VEHICLE

As an initial matter, Appellee, State Farm Mutual Automobile Insurance Company's ("State Farm") Answering Brief states, "The common thread of moving someone or thing from one location to another is the key factor in 'transportation purposes.'"[1] There is no citation attributed to this statement and as such, it reads as an assertion of State Farm itself, not State Farm relaying on caselaw, treatise or any other stated source. Plaintiff Kelty is in complete agreement with State Farm's independent assertion and further, under the facts of the instant matter, the record indisputably demonstrates, that Lovegrove's truck was being used to move a thing from one location to another.

> I put a little pressure on it so that the tree falls where Matt wants it to fall. He clips it off, and as he clips it off and the pressure comes off the tree, **I just speed up a little bit and pull the tree limb on out.** (A28 emphasis added)

The undisputed testimony of Lovegrove completely vitiates State Farm's argument that Lovegrove's truck was tantamount to "a ground based winch."[2] Lovegrove's testimony makes it clear that the truck was being used to transport the branches, from their location in the tree, to a location on the ground while avoiding having the branches contact the power lines. While it's true that gravity would have moved the branch from the tree to the ground on its own, the Plaintiff and Lovegrove desired that the branch travel via a different route than the route the

[1] Defendant's Answering Br. at 12.

[2] *Id*. at 9.

branch would have travelled via gravity alone. If the branches were simply cut, and not actively pulled by Lovegrove's truck, they would have come into contact with the power lines, therefore, the truck was used to transport the branches via a different route than the branches would have followed had they been allowed to fall only as a result of gravity's influence. Furthermore and importantly, Lovegrove states that he, "pull[ed] the tree limb on out." (A28). Lovegrove is referring to pulling a tree limb with his truck by applying pressure to the gas pedal. Common sense, without the need for examining the holdings of Michigan or Minnesota Courts, tells us that this is using a truck for transportation purposes, i.e. transporting a tree limb out of a tree to the ground, clear of power lines. For the reasons stated, the decision of the Court below must be reversed.

State Farm contends that the Superior Court correctly relied on the *Cesefski*[3] Court's reasoning in reaching its conclusions. This position cannot withstand scrutiny. In addition to the reasons stated in the Plaintiff's Opening Brief, *Cesefski* is inapplicable because despite State Farm's arguments to the contrary, in the instant matter, the truck was not being used solely as a tensioning tool. First the truck was used to apply tension, next the truck was used to pull the tree limbs out of the tree, to the ground, via a route that would ensure the limbs did not make contact with the power lines. Assuming *arguendo* that this Court found the *Cesefski* fact pattern analogous to the instant matter, it cannot be ignored that the Michigan Court was not analyzing *Cesefski* pursuant to *Klug.*[4] Moreover, the stated purpose of the statute the Michigan Court was analyzing *Cesefski* under was to restrict coverage under Michigan's no-fault statute, the polar opposite of the legislative intent of Delaware's no-fault statute.[5]

[3] *Cesefski v. State Farm Ins. Co*., 2002 WL 14827790 (Mich. Ct. App. 2002).
[4] *Continental Western Ins. Co. v. Klug*, 415 N.W. 2d 876 (Minn. 1987).
[5] Op. Br. at 12.

State Farm next analyzes two Minnesota cases involving death by asphyxiation from carbon monoxide poisoning.[6] The inapplicability of these cases is self-evident. The examination of the transportation use of the car in either *Norwest* or *Alexis* turns on the intent of the actors. Since there was no intent to travel in *Alexis*, there was no transportation use. This cannot be said of the Lovegrove's intent, he intended for his truck to move from point A to point B[7] for the purpose of transporting the tree branch. This conclusion is supported in the record by every party at the scene of the Plaintiff's accident.

> When [Kelty] started to cut the trees, Tiffany was off to the side, and she would say, "Speed it up. Go." (A28).

Lovegrove's above referenced testimony eviscerates State Farm's "ground based winch" theory. Lovegrove was being instructed to, "speed it up" and "go" meaning, apply pressure to the accelerator and make the truck travel, thereby making the branches travel, from the tree to the ground avoiding the wires. Therefore, the truck was not being used as a stationary tool, but it was being used to transport the branches. Accordingly, State Farm's assertion that, "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"[8] cannot withstand the scrutiny of the logical implication of the instruction, "Speed it up. Go."

Conversely, in *Norwest*, the Minnesota court found that where a truck *had* been used for transportation purposes, to transport the decedent home, that that transportation use was sufficient to satisfy the third prong of *Klug* despite the apparent divergence between the

[6] *Norwest Bank Minnesota, N.A. v. State Farm Mut. Auto. Ins. Co.*, 588 N.W.2d 743 (Minn. 1999) and *Alexis v. State Farm Mut. Auto. Ins. Co.*, 696 N.W.2d 109 (Minn Ct. App. 2005).
[7] Admittedly a very short distance from Point A, but nonetheless, a distinct and different location.
[8] Ans. Br. at 11.

transportation use and the injury. There is no such divergence in the instant matter, therefore, the *Norwest* case is neither persuasive nor instructive.

State Farm's inquiry into the events that lead to the Plaintiff's injuries is too shallow to be functional. State Farm writes, "the record demonstrates that the clear purpose was to maintain tension on the branch away from the wires."[9] Despite the error in syntax,[10] as has been demonstrated *supra*, the record not only elucidates that the purpose was to maintain tension on the branches, but further, to keep the branches from contacting the wires during their transit from the treetop to the ground. The assertion that, "There is no evidence demonstrating that the vehicle was being used to transport anything from one location to another;"[11] ignores the testimony of both Lovegrove and the Plaintiff who both characterize the role of the truck as "pulling" the branches out of the tree top, away from the power lines, and then to the ground.

> This was his plan, to get in the truck, apply pressure with the gas pedal and then hold the brakes, the branch would be cut and with the pressure of the rope on the branch it would pull the branch as it is being cut away from the power lines. That was his plan. (A99).

The plainly stated intention of both Lovegrove and the Plaintiff that the truck would pull the branch is the reason that the Minnesota Court of Appeal decision in *Motzko*[12] is analogous to the instant matter. In *Motzko*, the trucks were pulling at each other out of sheer competition, not a desire to transport goods, had the trucks been of equal strength, ostensibly, they would not have moved at all, but the fact is they did move and that movement was sufficient to satisfy the transportation use requirement of *Klug*. Just as in the instant matter, the fact is that because

[9] Ans. Br. at 11.
[10] As written, State Farm alleges that the record establishes that the clear purpose was to apply tension to a branch that was located away from the wires.
[11] Ans. Br. at 11.
[12] *Motzko v. State Farm Mut. Auto Ins. Co.*, 2001 WL 1182356 (Minn. Ct. App. Oct. 9, 2001).

Lovegrove's applied too much pressure to the gas pedal, the truck did move and the truck's movement set a chain of events in motion that culminated with the Plaintiff's injuries.

State Farm is simply wide of the mark when they state, "the key purpose of the vehicle was the tension purpose, as the branch would move from treetop to ground on its own."[13] This averment ignores the plain language of Lovegrove and the Plaintiff's deposition testimony. The key purpose of the vehicle was to move the branches in such a manner that they did not strike the power lines. If the power lines were not an issue here, the Plaintiff could have simply climbed the tree and cut the limbs and allowed them to fall to the ground solely under the force of gravity. However, the power lines were an issue, therefore Lovegrove and the Plaintiff had to devise a means by which the limbs would not fall directly to earth, but would take a different route, the limbs had to be transported from what would have been their "natural path" to the earth and taken along a different route such that their trip to the ground did not involve any interaction with the power lines.

Next, State Farm notes that the Plaintiff's citation to the Texas and New Mexico cases essentially proposes a ruling that would eliminate the entire third prong of the *Klug* test.[14] On September 18, 2012, *Klug* will have been the standard applied by this Court for 15 years to determine whether an automobile has been used for transportation purposes. As noted by both parties to this appeal, the Courts of this State have undertaken precious little analysis of the third prong of *Klug*. Plaintiff respectfully suggests that perhaps it is time for this Court to take a more nuanced approach to the analysis of whether an automobile is being used for transportation purposes and abandon the *Klug* approach. As stated in *Nationwide General Ins. Co. v. Royal*,[15] the *Klug* approach provides a flexible framework that takes into the [*sic*] account the

[13] Ans. Br. at 12
[14] *Id*.
[15] *Nationwide General Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997).

circumstances of the injury and promotes the legislative purpose of Delaware's underinsured motorist statute- the "protection of innocent persons from the negligence of unknown or impecunious tortfeasors." As the fundamental purpose of Delaware's Financial Responsibility Law is to protect and compensate all persons injured in automobile accidents State Farm's present actions are contrary to the imposition of the *Klug* factors as addressed in *Royal* and are akin to the Michigan Court's actions in *Cesefski,* to limit coverage.[16] As such, the time may be right to dispose of the third *Klug* factor in this Court's analysis or use some of the flexibility of the *Klug* standard to reach a result that is compatible with the intent of Delaware's Financial Responsibility Law.

[16] *Gray v. Allstate Ins. Co.*, 668 A.2d 778 (Del. Super. 1995)

II. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY FAILING TO ACKNOWLEDGE AS A MATTER OF LAW KELTY'S STATUS AS A PEDESTRIAN ELIGIBLE FOR PIP BENEFITS PURSUANT TO 21 DEL. C. §2118(a)(2)(c)

As its opening gambit in response to the Plaintiff's second argument State Farm avers, "…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."[17] Again, State Farm cites no case law, treatise or other source in support of this conclusion. Frankly, State Farm's argument is a polemic against the stated positions of this Court. The Chief Justice of this Court has, as recently as 2007, stated:

> On appeal, [the Plaintiff's] counsel, in counsel's brief and during oral argument, argued that [the Plaintiff] is a "pedestrian" under the statute. [The defendant insurer] does not contest [the Plaintiff's] status as a "pedestrian." Thus, we analyze this case under section 2118(a)(2)(e). That section requires that insurers pay PIP benefits "to pedestrians only if they are injured by an accident *with* any motor vehicle within the State…"[18]

The preceding language is positive indicia that State Farm's stated position is incorrect. There is no required threshold determination that an injury was sustained though the ownership, maintenance or use of a motor vehicle. As the Court has plainly stated and chose to emphasize, a threshold determination is contained at 21 Del. C. §2118(a)(2)(e). The Plaintiff concedes and is aware of the factual difference between *Gray* and the instant matter, inasmuch as in the instant matter State Farm does not concede that the Plaintiff is either a pedestrian or an occupant. However, this difference is immaterial to refute State Farm's position. State Farm argues that

[17] Ans. Br. at 16. Plaintiff is aware that at page 18 of its Answering Brief State Farm does attempt to attribute this sentiment to the first *Gray* Court, but this ignores the second *Gray* Court's distinction as noted *infra*.
[18] *Gray v. Allstate Ins*., 941 A.2d 1018, 2007 WL 4374409 at *1 (Del. Dec. 17, 2007) (TABLE) (emphasis in original).

the determination of pedestrian or occupant must be made according to the language of 21 Del. C. §2118(a)(1) and therefore coverage must be determined based on whether the injuries arise from the ownership, maintenance or use of a motor vehicle, however, the second *Gray* Court, chose to emphasize that 21 Del. C. §2118(a)(2)(e), "requires that insurers pay PIP benefits to pedestrians only if they are injured by an accident *with* any motor vehicle within the State."[19] In this instance it is equally important to note what the Chief Justice did not conclude. Chief Justice Steele did not write that an analysis under §2118(a)(2)(e) must first be construed through the more restrictive prism of §2118(a)(1). Therefore, an analysis under §2118(a)(2)(c) need not be considered first through the restrictive language of §2118(a)(1) either. Moreover, the language of §2118(a)(1) is disjunctive, therefore as Lovegrove was the owner of his truck, the injury to the Plaintiff arose out of the ownership of the vehicle pursuant to §2118(a)(1) and the "use" issue is rendered moot. In fact, to reach the conclusions desired by State Farm would be to narrow and restrict the available coverage and would be directly against the avowed public policy of Delaware's Financial Responsibility Law.[20] As such, as the second *Gray* Court held that the standard was, "an accident *with* a motor vehicle," so to should the standard here be, "an accident *involving* such motor vehicle."[21]

Next, perhaps in an attempt to rile physicists everywhere because of their recent triumphs, State Farm attempts to ignore the concept of causation. State Farm proclaims, "Plaintiff's injuries were caused by contact with a tree branch and his subsequent fall to the ground, not by a vehicle."[22] This proclamation ignores the fact that the tree branch in question was tied to Lovegrove's truck via a nylon rope and it was that truck's acceleration that caused

[19] *Gray*, 2007 WL 4374409 at *1.
[20] *Gray*, 668 A.2d at 779.
[21] *Compare*, 21 Del. C. §2118(a)(2)(e) and 21 Del. C. §2118(a)(2)(c).
[22] Ans. Br. at 17.

the rope to snap, thereby causing the branch to swing back and knock the Plaintiff out of the tree. State Farm's position is equivalent to holding a seatbelt liable for causing a cervical sprain and strain in a rear-end motor vehicle accident and ignoring the liability of the striking car. The tree branch was not and is not capable of independent movement and it was set in motion by the truck that was tied to it. Further, the Delaware Superior Court has addressed the appropriate causation standard to apply pursuant to §2118, and has determined that the normal "proximate cause" standard applies.[23] The Superior Court has stated that it did, "not find anything in the statute which, under the circumstances prevailing here, justifies departure from the normal proximate cause tort standard as it relates to damages covered under §2118(a)(1) and (2).[24] Moreover, the Superior Court's determination in this instance found that the vehicle was an active accessory and there was not an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted.[25] In short, irrespective of the *Klug* analysis for purposes of benefits pursuant to 21 Del. C. §2118, the Plaintiff's injuries were as a matter of fact, proximately caused by the Lovegrove truck.

Finally, State Farm attempts to keep the Court from being persuaded by the Superior Court's attempt to effectuate the legislative intent of 21 Del. C. §2118 by implying that *Wisnewski* is inapplicable.[26] State Farm argues that under the facts of *Wisnewski* the "use" of the motor vehicle, "is evident within the facts."[27] Respectfully, this distinction is unsupported and it uses the wrong standard. First, the standard elucidated by the *Wisnewski* Court was "an accident involving a motor vehicle" not an accident arising out of the "use" of a motor vehicle.[28] Second,

[23] *State Farm Mut. Ins. Co. v. Olanowski*, 1995 WL 945543 (Del. Super. May 30, 1995).
[24] *Id.*
[25] Op. Br. Ex. A at 5-6.
[26] *Wisnewski v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 697945 (Del. Super. Feb, 14, 2005).
[27] Ans. Br. at 18.
[28] *Compare*, Ans. Br. at 18 and *Wisnewski*, 2005 WL 697945 at *2.

that the incident that gave rise to the injuries in the instant matter arose out of an accident *involving a motor vehicle* is apparent and importantly, State Farm paid under their auto liability policy in this very same incident.[29] Simply stated, State Farm's position is fatally flawed and their position cannot avoid the inescapable conclusion that the decision of the Superior Court must be reversed.

[29] Op. Br. Ex. B at 13.

III. THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO HOLD AS A MATTER OF LAW THAT STATE FARM'S PAYMENT OF BENEFITS UNDER AN AUTOMOBILE LIABILITY POLICY PRECLUDED IT FROM DENYING PIP BENEFITS IN REGARD TO THE SAME ACCIDENT

State Farm contends that Argument III was not properly raised at the Superior Court; this argument is flawed and is not supported by the record.[30] As a practical matter, State Farm is incorrect in asserting that because the Superior Court did not decide the issue below, the Plaintiff is precluded from raising the issue before this Court.[31] This Court has determined that an issue has been fairly presented where a Vice-Chancellor noted in passing that he was not persuaded by [a] plaintiff's argument as to standing.[32] In the instant matter, there are seven pages of oral argument transcript on the issue of State Farm's waiver of their right to deny PIP benefits once they had accepted liability and paid benefits pursuant to their liability policy.[33] Pursuant to *Sergeson*, the waiver issue was fairly presented to the trial Court. Further, the Court explicitly acknowledged the presentation of the issue and stated:

> Well, it's too much to just off the top of my head say one way or the other, so I'll take it under advisement.
>
> It's an interesting issue, and although the Court has some concern about, waiver is maybe a wrong word to use, but it seems like there's some inconsistency here by a company acknowledging on one hand that there is liability under an auto policy then on the second hand saying there isn't any.
>
> The inconsistency is concerning but I'll leave that for another day when the issue is ripe, and maybe Mr. Nitsche will figure out it's ripe now and we'll do something about that, but it seems to me an issue that at some point in time someone's going to have to decide.[34]

[30] Ans. Br. at 20.
[31] *Id*.
[32] *Sergeson v. Delaware Trust Co.*, 413 A.2d 880 (Del. 1980).
[33] Op. Br. at Ex. B 12-18.
[34] *Id*. at 17-18.

Respectfully, in light of the foregoing statements of the trial Judge, it is readily apparent that this issue was properly raised before the Court below, within the standard prescribed in *Sergeson*. Further, perhaps presaging his decision and this very appeal and this very argument, the trial Judge stated, "maybe Mr. Nitsche will figure out it's ripe now…"

It is axiomatic that State Farm's argument would be that this issue isn't properly raised, since on its face, State Farm's position doesn't pass "the smell test." In support of the stated position of the Plaintiff, the trial Court stated:

> I don't mean to add to the dilemma here, but it would seem to me that there's at least, a valid argument that State Farm has waived their right to argue that PIP benefits don't apply if they have, in fact, agreed that a liability policy, in fact, covers the incident.
>
> I know they are two different contracts, liability and tort, and I understand the difference, but having made that one decision, do they not then waive their right to object to the tort, to the PIP piece of it?[35]

The trial Court's inquiry is a reasonable one and further, it's one rooted in the implied covenant of good faith that attaches to every contract, including contracts of insurance.[36] Further and in response to State Farm's allegation that the Plaintiff failed to plead bad faith, the Plaintiff's position is that State Farm has breached the implied covenant of good faith. This Court has held that absent an explicit pleading of bad faith, a claim for breach of the implied covenant of good faith may still be maintained so long as the complaint alleges facts that suggest a breach of the implied covenant of good faith.[37]

In an attempt to value form over substance, State Farm has drawn this Court's attention to the distinction between the named Defendants in the liability and PIP actions and various other matters of form. The plain fact, without getting bogged down with minutiae, is the very same

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[35] *Id*. at 15.
[36] *Pierce v. Int'l Ins. Co. of Illinois*, 671 A.2d 1361, 1366 (Del. 1996) citing 3A *Corbin on Contracts* §654A (1994).
[37] *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 437 (Del. 2005).

company has said on the one hand this accident arose out of the ownership, maintenance or use of a vehicle and the company believed that to be the case to the extent that they paid $100,000.00 to the Plaintiff. Now, under the exact same circumstances, that very same company has said, on the other hand, the accident did not arise out of the ownership, maintenance or use of a vehicle. If this is the landscape in which the Delaware automobile insurance consumer must operate, then it is high time to call in the landscaping team and cut back the overgrowth so that some common sense can bloom. The question then presents itself, why would State Farm engage in conduct that is so contrary to logic? As the Court is keenly aware, Delaware is an add-on no-fault state. Generally, a personal injury protection carrier such as State Farm would have a right of subrogation against a liability carrier for any benefits paid out in connection with a loss pursuant to 21 Del. C. §2118(g). As State Farm is the liability carrier in this instance as well as the personal injury protection carrier, there is no opportunity for State Farm to recoup any personal injury protection benefits they are otherwise obligated to pay and so they have asserted, despite their clear admission to the contrary in the liability suit, that for the purposes of the personal injury protection benefits, this accident did not occur out of the ownership, maintenance or use of a motor vehicle. As a matter of fairness and public policy, this result simply cannot stand and the decision of the trial Court must be reversed.

As noted *supra*, the trial Court had the same concerns, the desired result advanced by State Farm is simply not consistent with the concept of the implied covenant of good faith. Plaintiff understands and concedes that State Farm's position that there are other reasons to engage in settlement has merit, but under that facts of the instant matter, State Farm's actions are troubling. Paying policy limits under a liability policy does not connote a compromise settlement or a settlement where there is some question or doubt about the validity of the claim

in any respect. In order to make an offer of settlement under the liability policy State Farm had to conduct an investigation. The very first step of that investigation would be to determine if there is coverage, in other words, given the facts of the loss, does the insurance policy apply. No insurance company, that intends to be a going concern for long, pays out policy limits without first making a determination that the loss is covered under the policy of insurance. That investigation requires making a few critical determinations. First, was the policy in force at the time of the loss? Second, is the loss of a type covered by the policy? Third, do any policy exclusions apply to the loss in light of the specific facts of the loss? A liability adjuster at State Farm conducted this investigation and advised his counsel that the most prudent course of action was to offer a policy limits settlement because the liability adjuster concluded that this matter occurred as a result of the maintenance or use of Lovegrove's truck. For State Farm to now take a position that this loss is not covered because it didn't occur out of the use of Lovegrove's truck is simply beyond the pale. Since State Farm's argument is fatally flawed, the decision of the Court below must be reversed.

CONCLUSION

For the reasons set forth in the attached Brief, Appellant respectfully requests that the Order Granting the Appellee's Motion for Summary Judgment be REVERSED.

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