IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GOVERNMENT EMPLOYEES INSURANCE COMPANY, as subrogee of STEPHEN DIMINO and STEPHEN DIMINO, INDIVIDUALLY,	)	
Plaintiffs,	)	
v.	)	C.A. No. CPU4-09-007572
ROBERT DURNAN and STATE OF DELAWARE	)	
Defendants.	)	

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Submitted: August 4, 2011
Decided: August 22, 2011

MEMORANDUM OPINION

This is a subrogation case brought by Stephen Dimino, individually and Plaintiff Government Employees Insurance Company as subrogee of Stephen Dimino against Defendants Robert Durnan and the State of Delaware. Trial in the above captioned matter took place on August 4, 2011 in the Court of Common Pleas, New Castle County, State of Delaware.

Following the receipt of documentary evidence[1] and sworn testimony, the Court reserved decision. This is the Court's Final Decision and Order.

The Court heard from several fact witnesses from the parties at trial. Plaintiff Stephen Dimino seeks payment of his $100.00 deductible. Subrogee Government Employees Insurance Company seeks $1,077.34 paid for property damage to Plaintiff Stephen Dimino's motor vehicle for a total of $1,177.34.

I. Procedural Posture

(i) The Complaint

The matter is a subrogation action brought by Plaintiffs Government Employees Insurance Company as subrogee of Stephen Dimino (hereinafter "Plaintiff GEICO" or "GEICO") and Stephen Dimino individually (hereinafter "Plaintiff Dimino" or "Dimino") against Defendants Robert Durnan (hereinafter "Defendant Durnan" or "Durnan") and the State of Delaware (hereinafter "Defendant State of Delaware" or "State of Delaware") in connection with an automobile collision.

The Complaint alleges that GEICO is an insurance company licensed to do business in the State of Delaware. At the time of the collision that is at issue in the instant lawsuit, GEICO was the insurance carrier for Stephen Dimino and pursuant to 21 *Del. C.* § 2118 and its' contract of insurance with the insured, GEICO is subrogated to the rights of its' insured, and entitled to recover from the Defendants amounts paid to or on behalf of its' insured.

Plaintiffs allege that on February 17, 2009, the Defendant, Robert Durnan, was operating a motor vehicle in a careless and negligent manner thereby colliding with Plaintiff Stephen

[1] The Court received into evidence the following items: Plaintiffs' Exhibit # 1 (Six (6) Photographs depicting the scene where the collision occurred); Plaintiffs' Exhibit # 2 (Six (6) Photographs depicting damage to Plaintiff Stephen Dimino's vehicle); Plaintiffs' Exhibit # 4 (Rental Invoice from Automated Rental Management System indicating the rental period of 2-18-09 to 2-23-09 for Renter Stephen Dimino billed to Plaintiff GEICO in the total amount due of $150.00).

Dimino's vehicle. Further, the vehicle that Defendant Durnan operated was owned by Defendant State of Delaware. Defendant Durnan was operating State of Delaware's vehicle in the course and scope of his agency and employment with Defendant State of Delaware.

Plaintiffs allege a cause of action against Defendant Durnan for negligence and carelessness in that he: (a) failed to keep a proper lookout, in violation of 21 *Del. C.* § 4176; (b) failed to give full time and attention to the operation of the vehicle he was operating, in violation of 21 *Del. C.* § 4176; (c) failed to maintain appropriate control of the vehicle he was operating, in violation of 21 *Del. C.* § 4176; (d) operated the vehicle in a careless and inattentive manner in violation of 21 *Del. C.* § 4176; and (e) operated the vehicle in a willful and wanton disregard for the safety of persons or property, in violation of 21 *Del. C.* § 4175.

As a direct and proximate result of Defendant Durnan's negligence, Plaintiff Dimino's vehicle suffered extensive property damage, which resulted in expenses to Plaintiffs Dimino and GEICO.

Plaintiff GEICO had a policy of insurance on the vehicle that Defendant Durnan struck, pursuant to which it was obligated to and did pay collision benefits totaling $927.24, rental expenses totaling $150.00, in addition to Plaintiff Dimino's $100.00 deductible, for a total amount of $1,177.34.

Plaintiffs further allege a cause of action against the State of Delaware. Specifically, Plaintiffs allege that Defendant State of Delaware, as principal, is vicariously liable for the damages sustained by the Plaintiffs as a result of the negligence of Defendant Durnan, the State's agent. Defendant State of Delaware, in addition, negligently entrusted their vehicle to Defendant Durnan, knowing that Durnan could act carelessly and negligently in a manner that would cause injury and damages to another person or vehicle.

As a direct and proximate result of Defendant State of Delaware's negligence, Plaintiff Dimino's vehicle suffered property damage, which resulted in expenses to Plaintiff's Dimino and GEICO.

Plaintiff GEICO had a policy of insurance on the vehicle that Defendant Durnan struck, pursuant to which it was obligated to and did pay collision benefits totaling $927.24, rental expenses of $150.00, in addition to Plaintiff Dimino's $100.00 deductible, for a total amount of $1,177.34.

Plaintiffs seek judgment against Defendants, jointly and severally, in the amount of Plaintiff Dimino's $100.00 deductible as well as in the amount of $1,077.34 for Plaintiff GEICO for a total amount of $1,177.34 plus costs and interests.

(i) Defendants' Answer

Defendants filed an Answer to Plaintiffs' Complaint. In the Answer, Defendant Durnan denies that he was careless or negligent in any manner. Defendants admit that the vehicle operated by Defendant Durnan was a vehicle owned by the State of Delaware and that Defendant Durnan was operating Defendant State of Delaware's vehicle in the course and scope of his employment with the State of Delaware.

Defendant Durnan denies that he was negligent and careless as to the following as alleged by Plaintiffs: (1) that he failed to keep a proper lookout, in violation of 21 *Del. C.* § 4176; (2) that he failed to give full time and attention to the operation of the vehicle that he was operating, in violation of 21 *Del. C.* § 4176; (3) that he failed to maintain appropriate control of the vehicle that he was operating, in violation of 21 *Del. C.* § 4176; (4) that he operated the vehicle in a careless and inattentive manner in violation of 21 *Del. C.* § 4176; and (5) that he operated the

vehicle in a willful and wanton disregard for the safety of persons or property, in violation of 21 *Del. C.* § 4175.

Defendant Durnan further denies that he was negligent in any manner.

Defendant State of Delaware denies that their vehicle was negligently entrusted to Defendant Durnan, knowing that Defendant Durnan could act carelessly and negligently in a manner that would cause injury and damages to another person or vehicle. Further, Defendants deny that Defendant State of Delaware was negligent in any manner.

(ii) Defenses Raised by Defendants

Defendants set forth the following defenses in the Answer: (1) Plaintiffs' claims against the State of Delaware are barred in whole or in part by sovereign immunity pursuant to the Delaware Constitution, Art. I, § 9 or otherwise limited by 10 *Del. C.* § 4001 et seq.;[2]
(2) Plaintiffs' Complaint should be dismissed since service of process was improper or insufficient and/or the Court lacks personal jurisdiction; (3) Plaintiffs fail to state a legal claim upon which relief can be granted; (4) Plaintiffs' claims are time barred under the appropriate statute of limitations or repose; (5) Plaintiffs' damages, if any, must be reduced by the operation of 21 *Del. C.* § 2118; (6) to the extent that Defendants are found to be liable to Plaintiffs, the damages, if any, must be reduced to reflect Plaintiff GEICO's subrogee Plaintiff Dimino's own negligent conduct under 10 *Del. C.* § 8132 where the liability is 50% or less.

[2] The State raises the affirmative defense of sovereign immunity in Paragraph 17 of the Defendants' Answer; however, the State did not pursue this defense at trial though it was raised in their initial responsive pleading. Moreover, the State, had they raised such defense at trial would have been unsuccessful in such. *See, e.g.*, *Government Employees Insurance Company v. Kirkpatrick and State of Delaware – Fleet Services*, 2011 WL 2570394, *1,*4 (Del. Com. Pl. June 17, 2011)(The Delaware Tort Claims Act, specifically, 10 *Del. C.* § 4012 permits tort suits against the State where the action arises from the ownership, maintenance or use of vehicles. Further, the State is not exempt from a suit in subrogation. "There can be no public policy basis to allow the State to avoid subrogation as a self-insured entity when it is acting in the community as a private citizen would act, i.e., operating a motor vehicle.").

Further, Defendants allege that Plaintiff Dimino's negligent conduct consists of the following: (a) his failure to observe the existing traffic conditions; (b) caused his vehicle to turn left into an intersection without yielding the right-of-way to a vehicle approaching from the opposite direction at a distance close enough to constitute a hazard in violation of 21 *Del. C.* § 4132; (c) failed to yield the right-of-way to a vehicle approaching on the roadway that was sought to be crossed and entered in violation of 21 *Del. C.* § 4133; (d) caused a vehicle to turn into an intersection prior to ascertaining whether such movement could be made with safety and without interfering with other traffic, in violation of 21 *Del. C.* § 4155(a); and (e) his failure to give full time and attention to the operation of his motor vehicle all in violation 21 *Del. C.* §§ 4107, 4131, 4164, 4176 and 4176A.

Defendants Durnan and the State of Delaware seek that the Complaint be dismissed and judgment entered on behalf of the Defendants together with an award of costs and all other relief which the Court may deem proper and just; or in the alternative, that any judgment entered against Defendants be apportioned according to the fault of Plaintiff GEICO's subrogee Stephen Dimino.

(ii) The Facts

On February 17, 2009, Plaintiff Stephen Dimino was exiting a private parking garage, commonly and informally known as the JP Morgan Chase garage, onto Walnut Street in Wilmington, Delaware. Dimino works near the area of the parking garage in downtown Wilmington and parks his vehicle in that garage every day. He also exits the parking garage onto Walnut Street every day.

According to Dimino, Walnut Street is a one-way street with four (4) lanes of travel. The lanes of travel split on the street where the two (2) most left lanes allow for a left turn to be made while the right lane allows for a vehicle to proceed straight on Walnut Street.

The parking garage has a slight decline upon approaching the exit. Dimino indicated that he usually, after exiting the gate of the parking garage, stops his vehicle prior to entering the roadway in order to check the roadway for oncoming traffic. Dimino indicated that he stops his vehicle prior to entering the roadway because that stretch of Walnut Street is on a bend in the roadway.

On that day, Dimino stopped at the exit of the parking garage and looked to his right to observe oncoming traffic. He indicated that he did not observe Durnan exiting from Third Street. He observed that the two (2) lanes closest to his exit – the two (2) most left lanes - were unoccupied. Dimino then pulled into the left most lane of travel on Walnut Street intending to make a turn onto Fourth Street from Walnut Street. He estimated that from his exit of the parking garage to the intersection of Fourth Street and Walnut Street is approximately a few yards or one-half of a block. Dimino indicated that there is a traffic light at the intersection of Fourth Street and Walnut Street.

Dimino, after exiting the parking garage, observed Durnan's vehicle proceeding across four (4) lanes of travel and approaching into Dimino's lane of travel. At that point, Dimino applied the brakes and honked the horn. However, the resulting collision between Dimino's vehicle and Durnan's vehicle had occurred. According to Dimino, it was a matter of seconds between the time that he applied the brakes and honked the horn in an effort to avoid the collision and the resulting collision. Dimino surmised that his vehicle could have been in Durnan's blind spot.

Dimino indicated that he first observed Durnan's vehicle coming across the lanes of travel as Dimino was entering the lane of travel. Specifically, Dimino observed Durnan proceed across the second, third and fourth lanes of travel. Dimino did not observe Durnan's vehicle until Dimino had proceeded into the lane of travel. Dimino stated that he assumed the Durnan had exited from Third Street which intersects with Walnut Street; however, he did not observe Durnan exit from Third Street. Further, Dimino did not know if Durnan stopped his vehicle at the stop sign at the intersection of Third Street and Walnut Street.

Dimino stated that he did not observe Durnan's vehicle prior to making the turn onto Walnut Street from the parking garage and that his concern in making said turn is traffic approaching from the right. On that day, he was looking toward the right to observe oncoming traffic. Dimino stated that prior to his entering the roadway, his focus is upon oncoming traffic approaching from the right. Dimino conceded that he was not looking straight across Walnut Street to Third Street for traffic. Dimino further conceded that the intersection of Third Street and Walnut Street is a lawful intersection.

After the collision, Dimino and Durnan exited their respective vehicles and inquired as to whether the other was injured. After ascertaining that neither party was injured, Durnan suggested that they move the vehicles from the roadway to which they did. Durnan contacted the police and the parties waited for the arrival of the police. While the parties waited for the police to arrive, they talked informally and Dimino learned that Durnan is employed by the State of Delaware and utilizes the vehicle to transport prisoners.

Dimino was driving a 2005 Honda Accord at the time of the collision and indicated that Durnan was driving a large Ford vehicle.

Dimino at the relevant time in question was leasing the vehicle that he was operating but now owns the vehicle. The point of impact on Dimino's vehicle was the right side (passenger side) bumper which interfered with the opening of one of the vehicle's doors. Dimino stated that his fender was damaged and one of the vehicle's doors could not be opened as a result.[3] Dimino stated that he did not observe any scratches on Durnan's vehicle.

Dimino stated that at the time of the collision he leased the vehicle that he was driving. Further, Dimino indicated that he kept the vehicle in good repair. Dimino reported the incident to his insurer, Plaintiff GEICO. The repairs to Dimino's vehicle were covered under his insurance policy. Dimino paid a deductible in the amount of $100.00.

Mark Anthony (hereinafter "Anthony") testified for the Plaintiffs. Anthony is an auto management supervisor. In his employment duties, Anthony oversees employees who prepare estimates for vehicle repairs and reviews such estimates. According to Anthony, an auto damage adjuster views the vehicle which has been damaged and prepares an estimate for repair.

In this particular matter, Dimino brought the vehicle into the shop for inspection. Anthony stated that the auto damage adjusters utilize a standard form in generating an estimate for repair. The auto damage adjuster then submits the estimate for payment. The estimate provided for repair of Dimino's vehicle was $1,027.34 of which Plaintiff GEICO paid the amount of $927.34 for repair of Dimino's vehicle. According to Anthony, the amount of the estimate is the amount that is paid in repair. Plaintiff GEICO partners with Porter Automotive Group which is a guaranteed repair shop for Plaintiff GEICO. Porter Automotive Group's repair shop accepts the amount of the estimate as payment for repair. Anthony stated that in his experience, Dimino's vehicle was involved in a minor accident.

[3] *See* Plaintiffs' Exhibit # 2 (Photographs depicting Plaintiff Dimino's vehicle and damage thereto).

Further, according to Anthony, Plaintiff GEICO will cover rental expenses in relation to vehicle repair if the customer has additional coverage for a rental vehicle. Anthony stated that he had no prior knowledge whether Plaintiff Dimino had rental coverage but rather he only became aware that Plaintiff Dimino did in fact have rental coverage from what he heard in the courtroom at trial. Anthony stated that Plaintiff Dimino was provided a rental vehicle for a duration of six (6) days in which the amount due for such was $150.00.[4] According to Anthony, the total amount of the rental vehicle amounted to $299.58 but an amount of $149.58 had previously been received. Thus, the remaining balance of $150.00 was billed to Plaintiff GEICO and paid by such.

Defendant Robert Durnan testified to a different version of the events giving rise to the automobile collision. Durnan is currently a detective with the State of Delaware having been employed with the Delaware Department of Justice for the past thirteen (13) years.

Previously, Durnan was a Delaware State Trooper for twenty (20) years, retiring as a sergeant. In the course of his employment, Durnan extradites and transports fugitives.

On the day in question in the present matter, Durnan was at Justice of the Peace Court # 20 in downtown Wilmington. He had parked his vehicle on Third Street. Upon departure, Durnan intended to make a left turn onto Walnut Street and then a left turn onto Fourth Street. Durnan had driven this route many times. Durnan approached the stop sign on Third Street at the intersection of Third Street and Walnut Street. He looked to the left for oncoming traffic. Durnan did not check to see if vehicles were exiting the parking garage at that time since it is "not his responsibility" to do so. Oncoming traffic at that time had a red light. Upon seeing no northbound traffic approaching, Durnan began to cross the five (5) lanes of travel on Walnut Street.

[4] *See* Plaintiffs' Exhibit # 4 (Billing from Enterprise Rental Car).

According to Durnan, Walnut Street has five (5) lanes of travel with the furthest two (2) left lanes allowing for vehicles to turn onto Fourth Street. Durnan proceeded across all lanes of travel at an angle. His intention was to enter the furthest left lane in order to turn onto Fourth Street. As he was turning into the farthest left lane, his side mirror hit Dimino's vehicle. According to Durnan, he was already in the roadway when Dimino began to exit the parking garage. Further, Durnan stated that vehicles exiting the parking garage have the responsibility to yield to traffic currently in the roadway. It was Durnan's testimony that Dimino's vehicle was not in a lane of travel when Durnan began moving his vehicle to traverse the intersection. Durnan confirmed that the parties moved their respective vehicles from the roadway after the collision and awaited the arrival of the police.

(iii) Parties' Contentions

(i) Plaintiffs' Contentions

Plaintiffs argue that Plaintiff Dimino's vehicle was completely in the roadway, in the furthest left lane of travel at the time of the collision and that Defendant Durnan proceeded across all lanes of travel without yielding to traffic currently in the roadway. As such, Plaintiffs argue that Defendants were negligent and Plaintiffs are entitled to judgment in their favor and an award of damages in the total amount of $1,177.34 which includes Plaintiff Dimino's deductible in the amount of $100.00; $927.34 paid by Plaintiff GEICO for repair to Dimino's vehicle; and $150.00 paid by Plaintiff GEICO for Dimino's rental expenses.

(ii) Defendants' Contentions

Defendants argue that pursuant to 21 *Del. C.* § 4133, Plaintiff Dimino had an obligation to yield to vehicles in the roadway and Plaintiff Dimino failed to do so as Dimino testified that he

did not observe Durnan's vehicle until Durnan was crossing the lanes of travel, thus violating 21 *Del. C.* § 4133.

(iv) <u>The Law</u>

In a civil action, the burden of proof is on the Plaintiff to prove his claim by a preponderance of the evidence.[5]

The plaintiff in a civil suit is required to prove all the elements of his or her claim by a preponderance of the evidence.[6] "Preponderance of the evidence" is defined as "the weight of evidence under all the facts and circumstances proved before you."[7] Or, put somewhat differently, "[t]he side on which the preponderance of the evidence exists is the side on which the greater weight of the evidence is found."[8]

This Court in *Turner v. Jones*[9] has previously addressed a matter of subrogation. Speaking to such, the Court stated:

> "Subrogation is 'a substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to a debt or claim, and its rights or remedies.' The subrogee stands in the shoes of the subrogor and can assert only such rights as the subrogor. Accordingly, the subrogee can assert no greater rights against a third person than its subrogor. Consequently, a subrogee not only gains all the rights of the subrogor, but also is subjected to all subrogor's liabilities. 'An insurer, as subrogee or assignee of the claims of its insured, stands in the insured's shoes and is subject to any and all defenses which are available against the insured had he brought suit in his own name.' Thus, any claim of negligence against the subrogor is a bar to recovery by insurer as subrogee."[10]

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[5] *Williams v. Vertical Blind Factory*, 2009 WL 5604428,*1,*3 (Del. Com. Pl. Nov. 17, 2009) (citing *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. Ct. 2005)).
[6] *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426,*1,*3 (Del. Com. Pl. May 19, 2009) (citing *Neilson Business Equipment Center, Inc. v. Monteleone*, 524 A.2d 1172 (Del. Super. Ct. 1987)).
[7] *Id*. (citing *Warwick v. Addicks*, 157 A. 205, 206 (Del. Super. Ct. 1931)).
[8] *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426,*1,*3 (Del. Com. Pl. May 19, 2009) (citing *Reynolds v. Reynolds*, 237 A.2d 708 (Del. Super. Ct. 1967)).
[9] *Turner v. Jones*, 1997 WL 1737123 (Del. Com. Pl. Oct. 13, 1997).
[10] *Id*. at *1.

Additionally, to prevail in a negligence action, ". . . a plaintiff must show, by a preponderance of the evidence, that a defendant's negligent act or omission breached a duty of care owed to plaintiff in a way that proximately caused the plaintiff's injury."[11]

The violation of a Delaware statute enacted for the safety of others is evidence of negligence *per se*.[12] Further, a finding of negligence by the defendant, standing alone, will not sustain an action for damages unless it is also shown to be the proximate cause of plaintiff's injury.[13] "In Delaware, proximate cause is one which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."[14]

21 *Del. C.* § 4175. Reckless driving provides:

(a) No person shall drive any vehicle in willful or wanton disregard for the safety of persons or property, and this offense shall be known as reckless driving.[15]

21 *Del. C.* § 4176. Careless or inattentive driving provides:

(a) Whoever operates a vehicle in a careless and imprudent manner, or without due regard for road, weather and traffic conditions then existing, shall be guilty of careless driving.

(b) Whoever operates a vehicle and who fails to give full time and attention to the operation of the vehicle, or whoever fails to maintain a proper lookout while operating the vehicle, shall be guilty of inattentive driving.[16]

21 *Del. C.* § 4133. Vehicle entering roadway provides:

The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed.[17]

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[11] *Duphill v. Delaware Electric Cooperative, Inc.*, 662 A.2d 821, 828 (Del. 1995) (quoting *Culver v. Bennett*, 588 A.2d 1094, 1096-97 (Del. 1991)).

[12] *Government Employees Insurance Company v. Antoinette*, 2009 WL 5667695, *1, *2 (Del. Com. Pl. Nov. 24, 2009) (citing *Duphill v. Delaware Electric Cooperative, Inc.*, 662 A.2d at 828)).

[13] *Id*.

[14] *Government Employees Insurance Company v. Antoinette*, 2009 WL 5667695 at *2 (citing *Duphill v. Delaware Electric Cooperative, Inc.*, 662 A.2d at 829)).

[15] 21 *Del. C.* § 4175.

[16] 21 *Del. C.* § 4176.

[17] 21 *Del. C.* § 4133.

21 *Del. C.* § 4131. Vehicle approaching or entering intersection provides:

(a) The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway.

(b) When 2 vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

(c) The right-of-way rules declared in subsections (a) and (b) of this section are modified at through highways and otherwise as stated in this chapter.[18]

21 *Del. C.* § 4132. Vehicle turning left provides:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard.[19]

21 *Del. C.* § 4155. Turning movements and required signals provides in relevant portion:

(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in § 4152 of this title, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway or turn so as to proceed in an opposite direction unless and until such movement can be made with safety without interfering with other traffic.[20]

21 *Del. C.* § 4164. Stop signs and yield signs provides in relevant part:

(a) Except when directed to proceed by police officers or traffic-control devices, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop at a marked stop line, but if none, before entering the crosswalk on the near side of the intersection or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersection roadway before entering the intersection.

(b) The operator of any vehicle who has come to a full stop as provided in subsection (a) of this section shall yield the right-of-way to any vehicle or pedestrian in the intersection or to any vehicle approaching on another roadway so closely as to constitute an immediate hazard and shall not enter into, upon or across such roadway or highway until such movement can be made in safety.

(c) Whenever a yield sign notifying drivers to yield the right-of-way has been erected, it shall be unlawful for a driver of any vehicle on the highway whose traffic is regulated by such a sign to fail to yield the right-of-way to any vehicle approaching on or from another highway or merging roadway or to a pedestrian legally crossing a roadway. If required for safety to stop, the stop shall be made at a marked stop line, but if none, before entering the crosswalk on the near side of the intersection or if none, then at the point nearest the

[18] 21 *Del. C.* § 4131.
[19] 21 *Del. C.* § 4132.
[20] 21 *Del. C.* § 4155.

intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. Any such driver having so yielded to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard or to a pedestrian legally crossing a roadway shall not enter into, upon or across such roadway or highway until such movement can be made in safety.[21]

21 *Del. C.* § 4107. Obedience to and required traffic-control devices provides in relevant part:

(a) The driver of any vehicle shall obey the instructions of any traffic-control device applicable thereto placed in accordance with this title, unless otherwise directed as authorized in § 4103 of this title, subject to the exceptions granted the driver of an authorized emergency vehicle in this title.
(b) No provision of this chapter for which traffic-control devices are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official traffic-control device is not in proper position and sufficiently legible to be seen by an ordinarily observant person. This subsection shall not operate to relieve a driver of the duty to operate a vehicle with due regard to the safety of all persons using the highway.
(c) Whenever a particular section does not state that traffic-control devices are required, such section shall be effective even though no traffic-control devices are erected or in place.
(d) In the event that a traffic-control device is erected and maintained at a place other than an intersection, this title shall be applicable except as to those provisions which by their nature can have no application.[22]

(v) Discussion

Defendant Durnan is alleged by Plaintiffs to have committed negligence in violating 21 *Del. C.* §§ 4175, 4176 for failing to keep a proper lookout, failing to give full time and attention to the operation of the vehicle he was operating, failing to maintain appropriate control of the vehicle he was operating, operating the vehicle in a careless and inattentive manner and operating the vehicle in a willful and wanton disregard for the safety of persons or property. Further, Defendant State of Delaware is alleged by Plaintiffs to be vicariously liable, as the principal, for the damages sustained by the Plaintiffs as a result of the negligence of Defendant Durnan, their agent as well as to have negligently entrusted their vehicle to Defendant Durnan, knowing that

[21] 21 *Del. C.* § 4164.
[22] 21 *Del. C.* § 4107.

that Durnan could act carelessly and negligently in a manner that would cause injury and damages to another person or vehicle. The Court does not find by a preponderance of the evidence that Defendant Durnan breached his duty of care owed as a reasonable driver under the circumstances and that his breach of said duty legally and proximately caused the collision with Dimino's vehicle.

The Court finds based upon the trial record that plaintiffs failed to prove the specific allegations of the Motor Vehicle Code as alleged in the Complaint. The Court is not convinced, by a preponderance of the evidence that Plaintiffs proved their case through the evidence presented to the Court. Therefore, the Court is not convinced that Defendants Durnan and the State of Delaware breached any duty owed to Plaintiffs. The Court does not find that Defendant Durnan committed the statutory violations alleged by Plaintiffs in the Complaint.

This Court has a duty to decide whether by a preponderance of the evidence Defendant Durnan violated these motor vehicle provisions of the Delaware Code.

The Court's obligation is to determine whether this alleged negligence was the proximate cause of the damage and claims and deductibles paid by the Plaintiffs.

Each side has set forth opposed testimony as to how the collision occurred on the day in question. The Court finds after reviewing carefully the testimony of all fact witnesses and the documentary evidence offered into evidence by the parties that Plaintiffs have failed to prove by a preponderance of the evidence that as a direct and proximate result of Defendant Durnan's negligence, Mr. Dimino's vehicle was damaged. The evidence at trial indicated that Plaintiff Dimino failed to ensure that nothing obstructed his path before he began driving onto Walnut Street.

The evidence also shows that Defendant Durnan was proceeding across the lanes of travel on Walnut Street after exiting from Third Street when Dimino's vehicle entered the left most lane of travel causing the vehicles to collide. Rather, Plaintiff Dimino committed several violations of the Motor Vehicle Code in regard to the collision. Dimino's candid testimony indicated that never looked toward Third Street for vehicles exiting in that direction. He simply only looked to the right for oncoming traffic and as such observed Defendant Durnan's vehicle approaching as he was turning into the lane of travel. Hence, why Plaintiff Dimino, at that point, applied his brakes and honked his horn.

Thus, Plaintiff Dimino violated 21 *Del. C.* § 4133 when, exiting the private parking garage, he failed to yield to approaching traffic on the roadway, namely Defendant Durnan's vehicle. Even assuming *arguendo* that Plaintiff Dimino and Defendant Durnan entered onto Walnut Street at approximately the same time, Plaintiff Dimino, pursuant to 21 Del. C. § 4131, had the responsibility as the driver on the left to yield the right-of-way to Defendant Durnan, the vehicle on the right.

Plaintiff GEICO's subrogee, Plaintiff Dimino breached the obligations as a driver under the Motor Vehicle Code, specifically the allegations set forth in Defendants' Answer which include: (1) failing to observe the existing traffic conditions; (2) causing his vehicle to turn left into an intersection without yielding the right-of-way to a vehicle approaching from the opposite direction at a distance close enough to constitute a hazard in violation of 21 *Del. C.* § 4132; (3) failing to yield the right-of-way to a vehicle approaching on the roadway that was sought to be crossed and entered in violation of 21 *Del. C.* § 4133; (4) causing a vehicle to turn into an intersection prior to ascertaining whether such movement could be made with safety and without interfering with other traffic, in violation of 21 *Del. C.* § 4155 (a); and (5) failing to give full

time and attention to the operation of his motor vehicle in violation of 21 *Del. C.* §§ 4107, 4131, 4164, 4176 and 4176 (a).[23] Plaintiffs GEICO and Dimino did not provide adequate evidence to support a finding by a preponderance of the evidence that Defendant Durnan was, in fact, operating his motor vehicle in a negligent or careless manner. Quite frankly, the evidence indicates that Dimino had a duty to avoid the collision with Durnan, and failed to uphold that duty. The Court is not convinced that both Defendants in this matter breached the specific allegations brought by Plaintiffs in the Complaint.

As a further matter, Plaintiffs presented only oral testimony as to damages at trial. Though Plaintiffs presented documentation regarding damages, Plaintiffs never moved for the admission of the exhibit regarding damages into evidence, thus the Court could not find a sufficient basis upon which to conclude damages if applicable.

This matter is a subrogation action brought by the insurance carrier who paid Plaintiff Dimino his property damage claim. The Court cannot find in the record by a preponderance of the evidence that the allegations of negligence as alleged in paragraphs 9(a) through (e) of the Complaint were proven. In sum, under the totality of the circumstances, the Court is not convinced that Plaintiffs proved their case by a preponderance of the evidence.

(vi) Final Order and Opinion

The Court therefore enters judgment in favor of Defendants Robert Durnan and the State of Delaware. Each party shall bear their own costs.

IT IS SO ORDERED this 22nd day of August, 2011.

/s/ John K. Welch
John K. Welch
Judge

/jb
cc: Ms. Tamu White, Civil Division Supervisor

[23] *See* Defendants' Answer, Paragraph # 22.