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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant Below, Appellant, v. STEPHANIE BUCKLEY, Plaintiff Below, Appellee.	:	Delaware Supreme Court Case No. 516, 2015 Court Below: Superior Court of the State of Delaware, Kent County, C.A. No. K14C-03-028 (JJC)

APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

This case stems from Appellee Plaintiff-Below Stephanie Buckley's ("Plaintiff") claim for Personal Injury Protection Benefits ("PIP") related to the Bumble Bee Transportation Bus ("the bus") for an accident which occurred on March 27, 2012. (A9-A13). Plaintiff was a pedestrian crossing the road when she was struck by a separate vehicle operated by Norman C. Anderson ("Anderson"). (A120 at ¶3). The bus was insured by Appellant Defendant-Below State Farm Mutual Automobile Insurance Company ("State Farm"). (A453-A485).

On March 25, 2014 Plaintiff filed a complaint against State Farm, alleging that she was "in the act of using" the bus[1] and that the bus was "an active accessory in causing Plaintiff 's personal injuries, in that the driver of the school bus signaled for Plaintiff to cross the roadway for the purpose of getting onto the school bus the driver was operating." (A10 at ¶ 5). The complaint alleged that no act of independent significance broke the casual link between Plaintiff's use of the school bus and "the injuries inflicted to Plaintiff by Anderson" because the school bus driver directed Plaintiff to cross the road. *Id.* at ¶ 10.

[1] In Plaintiff's response to interrogatories for the present proceeding, Plaintiff stated that she was a pedestrian. (A161 at n. 26).

On June 13, 2014 State Farm filed an answer to the complaint, denying that Plaintiff was an insured for PIP benefits from the bus. State Farm stated the following affirmative defense:

> The plaintiff was not an occupant of the school bus in that she was not within a reasonable geographic perimeter and the school bus was not an active accessory in causing the plaintiff's injuries. Further, an independent act occurred which broke the causal link between the alleged conduct of the school bus operator in that the tortfeasor Norman Anderson was negligent in a manner proximately causing the motor vehicle accident and the plaintiff was herself comparatively negligent by crossing the roadway without looking and by wearing headphones which made her unable to hear the approaching vehicle. There are such other and further acts of negligence by the plaintiff or Norman Anderson which will be more fully developed during the course of litigation.

(A15-A16).

Discovery in the case was completed as of March 25, 2015. On April 6, 2015, a stipulation to set a briefing schedule for the dispositive motions was approved.

On April 15, 2015 State Farm moved for summary judgment of Plaintiff's claims on the grounds that she was not entitled to the bus' PIP coverage as she was not an occupant of the bus, nor was she was a person injured in an accident involving the bus. (A19-A147). On May 25, 2015 Plaintiff filed a response brief asserting that she was an occupant of the bus and she a person injured in an accident involving the bus. (A48-A100). On June 10, 2015 State Farm filed a reply brief. (A101-A118).

On July 27, 2015, the Honorable Judge Jeffrey J. Clark issued an opinion granting Plaintiff's Motion for Summary Judgment and denying State Farm's Motion for Summary Judgment. Ex. A. On August 4, 2015, Judge Clark issued a final order. Ex. B. On August 26, 2015 State Farm filed an appeal. [2] This is State Farm's Opening Brief in support of its appeal.

[2] Through a clerical error the original appeal was inadvertently filed with the Superior Court. This was corrected through a motion to transfer, filed on September 21, 2015. The Superior Court granted the motion to transfer on September 21, 2015. On September 21, 2015, the Appeal was transferred to the Supreme Court.

SUMMARY OF ARGUMENT

1. Plaintiff was not an occupant of the school bus as she satisfies neither prong of the *Fisher* test. *Friel v. Hartford Fire Ins. Co.*, 2014 Del. Super. LEXIS 234, at *13-14 (Del. Super. May 6, 2014) (citing *National Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892, 896 (Del. 1997)), *aff' d* by 2015 Del. LEXIS 49 (Del. Jan. 28, 2015). In order for Plaintiff to establish that she was an occupant of the bus, Plaintiff is required to demonstrate that she was either 1) within a reasonable geographic perimeter of the bus; or 2) engaged in the operation of the bus. *Fisher,* supra 896. Plaintiff, fails the first prong of the *Fisher* test as Plaintiff was a pedestrian crossing the road to get to the bus, and there is no evidence in the record indicating that she had completed her approach to the bus. The act of approaching the bus does not constitute entering it. She was not in, entering, exiting, touching or within reach of the bus. Plaintiff was several feet away from the bus when she was injured, which was itself sitting stationary in an entirely different lane of travel. (A298:5-9, A299:4-5). Further, Plaintiff fails the second prong of the *Fisher* test, as she was not engaged in the operation of the bus. The bus's job related function is to transport students, however, job related functions are *not* functions which are engaged in the operation of a vehicle. *Fisher, supra* at 898. Plaintiff's actions were not related to the mechanism which allow the bus to move. *Fisher, supra* at 898. Plaintiff was neither

in a reasonable geographic perimeter to the bus, nor engaged in the operation of the bus, and thus she was not an occupant of the bus. As occupancy of the bus is a requirement in order for Plaintiff to be entitled to the bus' PIP benefits, Plaintiff is not entitled to the PIP benefits of the bus.

2. Plaintiff is further not eligible for PIP benefits of the bus as she was not a person injured in an accident involving the bus, as defined by the two criteria of the *Kelty* test. *Kelty v. State Farm Mutual Automobile Insurance Company*,73 A.3d 926, 932 (Del. 2013). Plaintiff is required to prove both that the bus was (1) an active accessory in causing her injury; and (2) there was no act of independent significance breaking the casual link between the bus and Plaintiff's injuries. *Id.* Plaintiff fails to meet the first prong, as the accident did not occur "by virtue of the inherent nature of using" the bus, which was merely the situs to Plaintiff's injuries, which were caused by Anderson. The bus was a stationary vehicle, which Plaintiff was approaching from a distance. Further, Plaintiff fails the second prong, as two acts of independent significance broke any potential causal link: (1) Anderson's negligence in failing to yield to a pedestrian and stop when approaching a bus with its safety lamps activated; and (2) Plaintiff's act of failing to look both ways when she crossed the street. The bus itself was in no way related to the injury, and its presence bore no relation to Anderson's negligent acts of ignoring the bus' stop signal and striking a pedestrian.

STATEMENT OF FACTS

On March 27, 2012, 16 year old Plaintiff Stephanie Buckley was struck as a pedestrian on Westville Road by a motor vehicle operated by Norman C. Anderson. (A248-A261). *See also* (A334 at 5); Plaintiff's Complaint in *Buckley v. Anderson.* (A120-121 at ¶ 3-5). At the time Plaintiff was struck by Anderson's vehicle, she was a pedestrian crossing the street with the intent to board a fully stopped Bumble Bee Transportation Bus ("the bus"). (A248-A261). *See also* (A120-121 at ¶ 3-5).

There are two lanes of traffic on Westville Road. Each lane of traffic is approximately 12 feet wide, and the width of both lanes is approximately 24 feet. (A234:4-8 and A248-261). Plaintiff's home is located on the westbound side of Westville Road. The bus was traveling down the eastbound lane, and came to a complete stop across from the Plaintiff's driveway. (A286-A288 and A258). The amber lights went on as the bus driver slowed to a stop, then the red stop lights came on, and the stop sign came out. (A351:18-24, A352:1-2). The entrance to the bus was facing the sidewalk of the eastbound side, away from Plaintiff. Plaintiff exited her home, and began walking down the driveway toward the road. (A287:19-22, A288:1-22, A289:1-10). The bus driver used the intercom to tell Plaintiff to board the bus. (A345: 23-24). (A398:15-21). Witness Angela Wilson, stated that she saw the bus driver wave for the student to hurry up coming down her driveway, as Plaintiff

was coming down the driveway slowly. (A290:5-22, A-291:1-6). [3] Plaintiff did not appear to react to this waving and continued down the driveway at a slow pace. (A291:7-19, A929:1-22).

Eventually, Plaintiff began walking across the Westbound lane. *Id.* Plaintiff reported to the police that she did not look both ways before crossing and had her headphones on with music playing at low volume. (A248-A261). The Plaintiff did not glance, step back, move left or move right prior to the impact. (A299:16-19 and A295 5-8 and A229:6-14). As soon as Plaintiff stepped out from the shoulder into the westbound lane, "right in front of her driveway" she was struck by Anderson's vehicle. (A278:18-22, A279:1-10, A298:5-9, A299:4-5 and A248-A261). There was no contact between Plaintiff and the bus. (A101). Anderson stated that the reason he struck Plaintiff was because he could not see her due to the sun glare. *Id.*[4]

Anderson's insurer paid the limits of his PIP policy, $15,000, as Plaintiff was a pedestrian struck by his vehicle. (A1567 at no. 23 and no. 27(f)). Plaintiff brought

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[3] At her deposition on August 22, 2013 Plaintiff did not recall that the bus driver waved to her . Q: "Did the bus driver make any arm motion to you?" A: "I don't remember".... Q: "And did she normally wave you across with her hand, or did it vary?" A: "I don't remember". (A128 at 22:8-15). At Plaintiff's deposition on July 23, 2014, Plaintiff stated the bus driver waved her across the street. (A343 at 2-8).

[4] Anderson died several days following the accident, and has not been deposed.

a suit for personal injuries against Anderson. (A119-A122). Plaintiff alleged that she was a pedestrian for the purposes of the suit against Anderson. *Id.* at ¶¶3-5. [5]

Bumble Bee Transportation Bus has a PIP policy with State Farm with $100,000 limits. The No-Fault Coverage section of the State Farm policy reads:

> Insured means: 1. any ***person*** while ***occupying*** or injured in an accident as a pedestrian by ***your car*** or ***a newly acquired car***, if registered in Delaware; and 2. ***you*** or ***any member of you household*** while ***occupying*** or injured in an accident as a pedestrian by any other land motor vehicle designed for use on public highways which is NOT: a. OPERATED ON RAILS OR TRACKS; OR b. ***OWNED BY*** OR FURNISHED FOR THE REGULAR USE OF YOU OR ANY ***MEMBER OF YOUR HOUSEHOLD***.

See State Farm Policy (A466). The "definitions" section of the policy defines "occupying" as meaning "in, on, entering or exiting". (A460).

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[5] Plaintiff's complaint read: "**Plaintiff S. Buckley was a pedestrian** standing in her driveway.... waiting to board a school bus... On that same date and time, a school bus had traveled eastbound on Westville road and came to a stop in front of Plaintiff S. Buckley's residence. After the bus had stopped, the bus driver activated the stop lights and flashers, and then Plaintiff S. Buckley walked out of the driveway of her residence onto the westbound lane of Westville Road, and Decedent Anderson failed to observe the school bus and Plaintiff S. Buckley, and failed to stop the motor vehicle, and the motor vehicle Decedent Anderson was operating struck pedestrian Plaintiff S. Buckley at or near the center of the westbound lane of Westville Road... Anderson breached his statutory duty by failing to exercise care to avoid colliding with a **pedestrian**....." (A119-A122 at ¶ 3-5).

ARGUMENT I

I. PLAINTIFF DOES NOT QUALIFY FOR PIP BENEFITS FROM THE BUS BECAUSE PLAINTIFF WAS NOT AN OCCUPANT OF THE BUS

A. Questions Presented

1. Was Plaintiff an occupant of the bus, as is defined by the criteria set forth in *National Union Fire Ins. Co. Of Pittsburgh v. Fisher*, 692 A.2d 892, 896 (Del. 1997)? (A29).

a. Was Plaintiff within a reasonable geographic perimeter of the bus? (A29).

b. Was Plaintiff engaged in a task related to the operation of the bus? (A29).

B. Standard and Scope of Review

This Court reviews a trial judge's grant of summary judgment *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007). It will affirm a trial judge's grant of summary judgment when, viewing the facts and inferences in the light most favorable to the nonmoving party, if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Id.* Furthermore, this Court, reviewing questions of law, reviews those questions under a *de novo* standard of review. *Id.*

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. *Moore v. Sizemore*, 405

A.2d 679, 680 (Del. 1970). Once the moving party establishes that there are no material factual issues in dispute, the non-moving party bears the burden of demonstrating a material factual issue by offering admissible evidence. *See* Super. Ct. Civ. R. 56(e); *Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del 1966).

C. Merits of the Argument

1. Plaintiff must satisfy either prong of the Fisher Test, and both requirements of the Kelty Test in order to qualify for PIP benefits.

The analysis and argument below do not deal with whether or not Plaintiff is entitled to PIP benefits generally, from her own coverage, or from the tortfeasor who struck her, but rather, whether Plaintiff is also entitled to PIP benefits from the bus which was parked on the side of the road. In order for Plaintiff to qualify for PIP coverage from the bus, she must establish that she was an occupant of the bus at the time she was injured and that the accident involves the bus. Del. Code Ann. tit. 21, § 2118(a)(2)(c). The relevant portion of the PIP statute reads:

> 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. [6]

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[6] The Court in *Kelty* has held that § 2118(a) is not applicable to the analysis of who is eligible to receive PIP benefits, and that the § 2118(a)(2)(c) controls. *Kelty v. State Farm* 73 A.3d 926, 930 (Del. 2013).

This Court in *Kelty*, analyzed the above language of the PIP statute and held that the term "such vehicle" in the statute refers to the insured vehicle, and thus,"the coverage required by this paragraph shall be applicable...to any other person injured in an accident involving [*the insured*] motor vehicle, other than the occupant of another motor vehicle." 73 A.3d 926, 930 (Del. 2013).

The correct analysis for the determination of whether an individual qualifies for PIP benefits from a particular vehicle, is the following: first, use the disjunctive two-prong *Fisher* test to determine whether the plaintiff was an occupant of the insured vehicle; and second, use the two requirements of the *Kelty* test to determine whether the accident involved the insured motor vehicle. *Friel v. Hartford Fire Ins. Co.*, 2014 Del. Super. LEXIS 234, at *13-14 (Del. Super. May 6, 2014)(citing *National Union Fire Ins. Co. Of Pittsburgh v. Fisher*, 692 A.2d 892, (Del. 1997); and *Kelty v. State Farm Mutual Automobile Insurance Company*, 73 A.3d 926, 932 (Del. 2013)), *aff'd*, 2015 Del. LEXIS 49 (Del. Jan. 28, 2015). Plaintiff must only qualify under one prong of the *Fisher* test, but must satisfy both requirements of the *Kelty* test in order to establish entitlement to PIP benefits from the bus.

2. Plaintiff was not an occupant of the bus

Webster's Dictionary defines "pedestrian" as "a person going on foot." *State Farm Mut. Auto. Ins. Co. v. Kelty*, 2015 Del. LEXIS 550 at n. 42 (Del. Oct. 20, 2015).

Likewise, it defines "occupant" as "one who acquires title by occupancy" or "one who occupies a particular place." *Id.* To occupy means "to take up (a place or extent in space)." *Id.* Plaintiff, who was on foot walking across the road, has identified herself multiple times, both in this litigation, and in other litigation related to this incident, as a pedestrian. (A119-A122 at ¶¶3-5). *See also* (A161 at no. 23). She now submits that she was an occupant of the bus.

Delaware courts have historically liberally interpreted the term "occupant." *Thomas v. Nationwide Mut. Ins. Co.* 1984 Del. Super. LEXIS 700 (Del. Super. 1984). However, even a liberal construction of the term occupant has its limits. *Fisher,* 692 A.2d 892, 896. Delaware has established a disjunctive two-part *Fisher* test to define the limits of occupancy, and this test is the first step in the analysis of whether an individual is entitled PIP coverage. A person is considered an occupant of the covered vehicle if she is either: (1) within a reasonable geographic perimeter of that vehicle; or (2) engaged in a task related to the operation of that vehicle. *Fisher*, supra at 896. The claimant needs to satisfy only one prong to qualify as an occupant. *Id.*

a. Plaintiff was not within a Reasonable Geographic Perimeter of the Bus

Plaintiff was not within in a reasonable geographic perimeter of the bus.

"To qualify for occupancy status under the reasonable geographic perimeter prong of the test, the claimant must be in, entering, exiting, touching or within reach of" the bus when she was injured. *Fisher,* supra at 897. Plaintiff was approaching the bus on foot as a pedestrian, and more than twelve feet away when she was struck by Anderson's vehicle. (A63). Plaintiff was neither in, entering, exiting, touching or within reach of the bus when she was struck. Based on the case law precedent surrounding the reasonable geographic perimeter test Plaintiff was not within a reasonable geographic perimeter of the bus.

The courts of Delaware have defined the limits of "occupancy" in a variety of fact situations, and the courts have ruled as matter of law in many cases that those particular facts do not meet the legal standard for occupancy. *Id.* at 896. In *Wagner*, utilizing the reasonable geographic perimeter test, the court determined a distance of ten to fifteen feet away to be too far to qualify for occupancy. *Wagner v. State Farm Mut. Auto. Ins. Co.*, 2001 Del. Super. LEXIS 519 at * 12 (Del. Super. 2001)(holding that the plaintiff was not within the reasonable geographic perimeter of the box truck since he stood ten to fifteen feet away).

In *Fisher*, the Court utilized distance to determine that ten to twenty-five feet away from the insured vehicle was too distant to qualify as entering, or within reach of the covered police vehicle. *Fisher,* supra at 894-898 (holding plaintiff police

officer who was between ten and twenty-five feet away from his patrol car was too far at the time he sustained his injuries, and this he was not "in, entering, exiting, touching or within reach of the [vehicle]" at the time of injury).

While distance is a consideration in the reasonable geographic perimeter test, it is not necessarily the distance itself which defines whether or not plaintiff was within a reasonable geographic perimeter, but whether Plaintiff was "in, entering, exiting, touching or within reach" of the insured vehicle. *Fisher,* supra at 897. Even when the plaintiff's precise distance from the insured vehicle is unknown, the court has been able to determine that if a plaintiff is not touching or within reach of the insured vehicle, the plaintiff is not within a reasonable geographic perimeter to qualify as an occupant. *Waite v. Continental National Indemnity*, 2002 Del. Super. LEXIS 362, at *1-2 (Del. Super. Apr. 26, 2002) (holding where a plaintiff was not able to determine exactly how far from the truck he was at the time he fell, but had clearly walked a distance sufficient to prevent him from touching the truck or being within in reach of the vehicle to stabilize himself during the fall, he was too far away to pass the reasonable geographic perimeter test. Even though he was still touching the hose attached to the truck, this was not the "touching" contemplated by the Supreme Court).

Plaintiff does not contend that she was "in", "exiting", "within reach of" or "touching" the bus, but that she was "entering" the bus. She argues that "entering" a vehicle must be equated with the act of approaching that vehicle, even from a distance. (A64). The court below agreed with Plaintiff and found that being "in the bus" was the only criteria which would require the Plaintiff to finish crossing the street. Ex. A at 11.

In the present case, the critical analysis is whether or not Plaintiff was "entering" the bus, as that is what Plaintiff asserts is the criteria which qualifies her as an occupant. (A64). In particular, as it applies to the term "enter", a person approaching the insured vehicle with the intent to enter is not "entering" that vehicle. *Oggenfuss v. Big Valley Assocs. L.P.*, 1996 Del. Super. LEXIS 234, *3-5 (Del. Super. 1996)(holding that a plaintiff who was returning to her car and slipped on ice in the two-foot space between the curb and her vehicle was not an occupant, and although she was very close to her car, *she had not yet begun to enter it.*)

The Superior Court in the case below disregarded *Oggenfuss v. Big Valley Assocs., L.P.*, 1996 Del. Super. LEXIS 234 (Del. Super. May 3, 1996) stating that the case was implicitly rejected by the Court in *Fisher*. While it is true that *Fisher* expanded the criteria of occupancy to include "touching" and "within reach of", which was not considered by the court in *Oggenfuss,* the case was not cited by State

Farm in the context of establishing the entire test for occupancy. State Farm discussed at length in its briefing the two prong test set forth in *Fisher*, and further specifically stated that *Fisher* had expanded the definition of occupancy beyond "entering" to include "within in reach of" the covered vehicle. (A91-A92)[7]. Under the expanded definition, the plaintiff in *Oggenfuss* may have qualified as being "within reach of the vehicle", as the Superior Court above mentions. *Id.* However, Plaintiff in the present case does not argue that she was "touching" or "within reach of the bus", but rather, Plaintiff argues the act of approaching a vehicle with the intent to enter constitutes "entering". (A64-A65). This was the same argument analyzed in *Oggenfuss*. Therefore, on the issue of whether the act of approaching a vehicle constitutes "entering it" *Oggenfuss* is instructive and should not be disregarded. The *Oggenfuss* Court concluded that even being in close proximity of a vehicle, the act of

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[7] In relation to the expanded definition of occupancy, State Farm stated in its briefing:

> Defendant, however, recognizes that Plaintiff need not be 'entering' the bus in order qualify as an occupant under the reasonable geographic perimeter prong of the *Fishe*r test. Plaintiff may also be "within reach" of the vehicle. Both parties agree that Plaintiff was only half-way across the first lane of traffic, ("Plaintiff was struck halfway across a 12 foot wide Westbound lane of Westville Road..."). . . .
> There was still approximately another 6 feet in the Westbound lane for Plaintiff to cross, and at least half of the Eastbound lane for Plaintiff to cross, before completing her approach or coming within reach of the bus. . .There is no indication from any of the facts in the record that the Plaintiff was within reach of the bus. Plaintiff, therefore, was not within a reasonable geographic perimeter to the bus. (A-101).

approaching with the intent to enter does not constitute entering the vehicle for the purposes of the PIP statute. *Id.* at *3-5.

Similarly, the court in *Adamkiewicz v. Milford Diner, Inc.*, found that occupancy under the PIP statute could not rationally be extended to encompass pedestrians crossing the road with the intent to reach their vehicle. 1991 Del. Super. LEXIS 64 at *3-4 (Del. Super. Feb. 13, 1991).

> While, as a matter of "social policy" it may be desirable to provide PIP coverage in as broad a context as conceivable to assure prompt payment of expenses without regard to fault, there must be a rational basis for drawing the parameter of the reach of the coverage. Here the line can clearly be drawn. How could anyone rationally conclude walking toward one's car with an intent to enter it constitutes "occupying the vehicle"? If the General Assembly wishes to draw a radius of occupancy for individuals at or near their car in order to qualify for PIP coverage, they may do so. I cannot create such a speculative zone of occupancy for prospective claimants who are merely waking toward their vehicle when they are injured.

Id. at * 4.[8]

Further, whether or not an individual was in the process of crossing the street to reach the insured vehicle, *or had completed crossing* the street when struck, is critical to the determination of whether they were within a reasonable geographic

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[8] State Farm recognizes that this case predates *Fisher*, which expanded the definition of occupancy to include "within reach of" the vehicle. However, an "in reach of" analysis is not at issue in the present case, and the legal precedent is instructive on the issue of whether a Plaintiff crossing the road with the ultimate intention of eventually entering her vehicle constitutes "entering".

perimeter. *Thomas*, 1984 Del. Super. LEXIS 700 at *2-6 (holding plaintiff could qualify as an occupant "if the jury were convinced that claimant had completed her approach to the car, that is, *had reached it and was actually engaged in the process of getting into the vehicle insofar as she was able under the circumstances*", and declining summary judgment to either party).

In addition to the legal precedent, which has analyzed whether "approaching" and "entering" have the same legal meaning, the definition of the words themselves show that entering and approaching are different acts. The words "in", "entering" and "approaching" do not have the same meaning. "In" describes a physical location, "used to indicate location or position within something". Webster's II New College Dictionary, 2001. "Entering" is defined as "1. to come or go into (something) 2. To penetrate: pierce". *Id.* The synonyms for "entering" are "set foot in, cross the threshold of, gain access to, infiltrate, access". *Id.* "Approaching" is defined as to "move close or closer to". *Id.* The synonyms for approaching are "to move toward, come/go toward, advance toward, inch toward, go/come/draw/move nearer, go/come/draw/move closer, near". *Id.* The three terms have distinct and separate meanings. For example, approaching a building from 10 feet away, does not mean you are inside, or in the act of entering the building.

The court below found that as "entering" and "in" are separately listed, entering must require something lesser than "in". State Farm agrees. Plaintiff did not need to be "in" the bus in order to "enter" it. That, however, does not mean that simply approaching from a distance qualifies as entering the bus. While it is possible to be "touching" a vehicle without being "in" the vehicle, the same cannot be said of the reverse. One cannot be "in" the vehicle without "touching" it or "within reach of" it. Similarly, while it may be possible to be "within reach of" a vehicle without "entering" it, it is not possible to "enter" a vehicle "without being in reach" of it.

There is no evidence that Plaintiff had reached the bus and was "actually engaged in the process of getting into the vehicle". *Thomas* 1984 Del. Super. LEXIS 700 at *6; *Oggenfuss*, 1996 Del. Super. LEXIS 234 at *3-5. There are no facts in the record demonstrating that Plaintiff was physically entering or exiting the bus at the time she was struck. *Fisher* at 894-898. Plaintiff was *approaching* the bus. The door for Plaintiff's entrance to the bus was on the other side of the street, and she would have had to complete crossing the street to begin entering. (A260). Further, the facts of the record demonstrate that Plaintiff was in a different lane than the bus when she was struck by the tortfeasor's vehicle, having just stepped off the shoulder of the road. (A298:5-9, A299:4-5 and A262). The courts have not stretched the term "occupy" to those who are merely approaching a vehicle, even if the end intent is to

enter that vehicle. Plaintiff therefore fails the geographic perimeter test, and the Court must look to see if Plaintiff can satisfy the second prong.

b. Plaintiff was not engaged in a Task Related to the Operation of the Insured Vehicle

The second prong of the *Fisher* test requires Plaintiff to demonstrate that she was engaged in a task related to the operation of a motor vehicle. *Fisher*, at 896. The term "operating" in relation to the PIP statute is limited to those tasks *clearly connected to the movement or driving of a vehicle. Waite*, 2002 Del. Super. LEXIS 362 at *4-5 (emphasis added). Tasks related to the operation of a vehicle include "pumping gas, checking the fasteners on a loaded trailer, changing a tire or jump-starting an engine." *Id.* at *7 (holding a plaintiff who fell while pulling an oil pumping hose from his vehicle did not constitute as a task related to the operation of the vehicle). Functions beyond this limitation are simply job related tasks, in which one's vehicle may be an integral part, but do not constitute "operating". *Id.* Plaintiff in this case was not engaging in a task related to the operation of the bus. Plaintiff was crossing the street and this conduct was in no way connected to the mechanisms which allow the bus to move.

The distinction between job related tasks, and tasks which allow the vehicle to move, was something the Court in *Fisher* was careful to distinguish. The Court in

Fisher held that job related tasks are ones for which one's vehicle is an integral tool, however, they do not satisfy the second prong of Fisher. Tasks engaged in the operation of the vehicles are tasks that directly relate to the mechanisms which allow the vehicle to move. *Id.*

The Superior Court below found that a student crossing the street in order to get to the bus was performing a task "inextricably related to the operation of school bus" Ex. A at pg. 13. The bus itself, however, operates independently of a student crossing the street in order to reach it. The job related task of the school bus is to transport and pick up students, however, the students do not relate to the actual mechanisms which allow the vehicle to operate and move (such as jump starting an engine, or changing a tire). Plaintiff crossing the street was not engaged in the operation of the bus.

Therefore, as Plaintiff was neither engaging in a task related to the operation of the bus, nor within a reasonable geographic perimeter, she is not an occupant of the vehicle for the purposes of PIP coverage pursuant to § 2118(a)(2)(c). Analysis under the two criteria established in the *Kelty* test is unnecessary, as Plaintiff does not meet the definition of occupancy. The Superior Court's grant of Summary judgment to the Plaintiff was improper, and should be reversed.

<u>ARGUMENT II</u>

II. PLAINTIFF DOES NOT QUALIFY FOR PIP BENEFITS FROM THE BUS BECAUSE PLAINTIFF WAS NOT INJURED IN AN ACCIDENT INVOLVING THE BUS

A. Questions Presented

1. If Plaintiff satisfied the *Fisher occupancy* test, did Plaintiff also demonstrate that she was injured in an accident involving the bus, as defined by the two criteria of the test set forth in *Kelty v. State Farm Mutual Automobile Insurance Company*, 73 A.3d 926, 932 (Del. 2013)? (A29).

(a) Has Plaintiff demonstrated that bus was an active accessory in causing her injury?(A29).

(b) Has Plaintiff demonstrated that there were no acts of independent significance breaking the casual link between the bus and her injury?(A29).

B. Standard and Scope of Review

This Court reviews a trial judge's grant of summary judgment *de novo*. *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007). It will affirm a trial judge's grant of summary judgment when, viewing the facts and inferences in the light most favorable to the nonmoving party, if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Id.* Furthermore, this Court

reviewing questions of law, reviews those questions under a *de novo* standard of review. *Id.*

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970). Once the moving party establishes that there are no material factual issues in dispute, the non-moving party bears the burden of demonstrating a material factual issue by offering admissible evidence. *See* Super. Ct. Civ. R. 56(e); *Phillips v. Del. Power & Light Co.,* 216 A.2d 281, 285 (Del 1966).

C. Merits of the Argument

1. Plaintiff was not injured in an accident involving the bus

Occupancy alone is insufficient to end the analysis for PIP eligibility. *Friel,* supra at *13. The plaintiff must also be injured in an accident involving an insured motor vehicle as required by Del. Code Ann. tit. 21, § 2118(a)(2)(c). *Id. at 6* (citing *Kelty* ,73 A.3d 926, 932).[9] To constitute an "accident involving such motor vehicle," a causal connection is required between the use of the vehicle and the injury. *Gray v. Allstate Ins. Co.*, 2007 Del. Super. LEXIS 124 at *6 (Del. Super. May 2, 2007). An

[9] The "Kelty test" is a variation of the formerly used *Klug* Test. Although all three prongs of the Klug test are still applicable to Underinsured Motorist Coverage, this Court refined the test to two prongs, as it relates to PIP benefits in *Kelty v. State Farm* 73 A.3d 926, 930 (Del. 2013). This test is now know as the "Kelty Test". *Friel v. Hartford Fire Ins. Co.*, 2014 Del. Super. LEXIS 234, at *13 (Del. Super. May 6, 2014).

accident simply occurring in the vicinity of the vehicle will not be deemed to satisfy the requisite causal connection. *Id.*

The injury must originate from or have some connection with the use of a motor vehicle. *Id.* Further, "Superior Court case law interpreting Section 2118(a)(2) requires a plaintiff to show 'that the injury occurred by virtue of the inherent nature of using the motor vehicle'". *Kelty,* at footnote 29, citing *Gray v. Allstate Ins. Co.*, 668 A.2d 778, 780 (Del. Super. 1995) (citations omitted). Read in context, this language addresses the necessary causal relationship between the injury and the insured vehicle, an inquiry encompassed within the Klug test's "active accessory" prong." *Kelty*, supra at 932.

This Court outlined a two-part test in order to make this determination. *Friel*, supra at *6. The Court must analyze: (1) whether the vehicle was an "active accessory" in causing the plaintiff's injury; and (2) "whether there was an act of independent significance that broke the causal link between use of the vehicle and the injuries inflicted." *Id.* If the insured vehicle was not an active accessory in causing the injury, or if there was an act of independent significance breaking the casual link, the plaintiff is not entitled to PIP benefits from that vehicle.

a. The bus was not an active accessory in causing the Plaintiff's injury

In order to determine whether a vehicle was an active accessory

in causing the injury, the court considers the relationship between the insured vehicle's presence and the injury. *Kelty, supra* at 932. Active accessory requires "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury." *Kelty,* supra at 931(citing *Nationwide v. Royal*, 700 A.2d 130, 132 (Del. 1997), *rev'd on other grounds*). The connection must be more than incidental or fortuitous. It is insufficient to show that, but for the automobile, the incident would not have occurred. *Royal,* at 132. The active accessory criteria cannot be satisfied if the insured vehicle is completely uninvolved in the accident[10]. *Minner v. State Farm*, 2010 Del. Super. LEXIS 190, at *8 (Del. Super. Feb. 3, 2010). It is the vehicles' effect on the mechanism causing injury which determines its status as an active accessory. *Campbell v. State Farm Mut. Auto Ins. Co.*, 12 A.3d 1137, 1139 (Del. 2011).

A vehicle was not an active accessory in a plaintiff's injury when the plaintiff had exited his truck, opened the back of the truck, and was injured during the unloading process. *Friel*, supra at *15-16. Even though the truck was the site where he was performing the unloading, which ultimately resulted in his injury, the truck itself was not related to the cause of his injury. *Id.* In another instance where a

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[10] Although the third prong of the Klug test was overruled by *Kelty,* the first prong was affirmed, and utilized in the two step analysis defined by this Court.

woman who pressed a garage door opener from inside her vehicle, then walked outside of her vehicle and was hit by the garage door, the vehicle's presence had no relationship with the injury because a wall mounted garage door opener could have caused the same injury. *Campbell*, 12 A.3d 1137, 1139. Although she was utilizing the garage because of her vehicle, the vehicle happened to be present when the garage injured her, and it was not actively related to her injury. *Id.*

The school bus was not an active accessory in Plaintiff's injury in this case, and the bus was the mere situs of the injury. Plaintiff's injuries were in no way caused by the use or operation of the bus. Plaintiff's allegation that the bus driver physically waving to her caused her to enter the road does not have any effect on whether the bus itself was an active accessory in Plaintiff's injury. Such an allegation simply provides one more act of independent significance breaking any potential casual link between the bus and the Plaintiff. [11]

The Plaintiff below requested, and the Superior Court below adopted a new test, a test that only requires that the vehicle's presence was related to the presence of the pedestrian who was struck, *i.e.* the person would not have been at the location, at that time, but for the being transported by the vehicle at issue. The Superior Court below found that the bus was an active accessory in Plaintiff's injuries as "but for the

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[11] A290:5-22, A291:1-6

presence of ths bus, this injury would not have happened." Ex. A at 15. The Superior court precisely articulated what does not qualify as an active accessory. The mere presence of the vehicle is not enough to make it an active accessory in the injury, but rather, what makes it in the situs of the injury. *Campbell*, 12 A.3d 1137, 1139.

If all that is required is that a pedestrian would not have been at a particular location, at that time, "but for" the anticipation of being transported by a vehicle or intending to be transported by a vehicle, the new test would essentially provide PIP benefits in every scenario where a person had either been transported to a location by a vehicle, or was walking in anticipation of heading to a location where a vehicle was present, as in each such occasion the individual would not be there but for the fact that a vehicle had, or was going to, transport him somewhere. If it is the General Assembly's intent to provide all encompassing coverage under every scenario where an individual would not be at a location, but for a vehicle, the statute would provide for that. The courts should not create a new broad area of coverage for prospective plaintiffs who are merely present at a location at a particular time because of a vehicle.

It was not Plaintiff's proximity to the bus which played the role of active accessory in her injury, but the tortfeasor's negligent act. The bus was a stationary object which Plaintiff was approaching. Unless acted upon by other forces for which

the presence of the bus was not responsible, *i.e.*, the actions of the pedestrian, or the conduct of a negligent driver of another vehicle, the presence of the bus is harmless. In those circumstances it is not the bus which is an active accessory in producing the harm suffered by the injured pedestrian, but the negligent conduct of the driver who struck her. It is clear that the bus had no effect on the tortfeasor whatsoever. The bus had its stop lights fully activated, and the tortfeasor ignored them. Had the tortfeasor adhered to the caution lights and stop signs, Plaintiff would not have been struck.

Further, the injury did not occur by virtue of the inherent nature of using the bus as a vehicle. Being struck by another vehicle while crossing the road to get to a bus is not an "inherent, permanent, essential, or characteristic attribute of the operation of" a school bus. There are no facts to support any failure on the part of the bus, or to support that the operation of the bus itself created a casual link to Plaintiff's injuries. Therefore, the bus was not an active accessory in causing Plaintiff's injuries, and Plaintiff does not qualify PIP benefits from the bus.

b. There were acts of independent significance that broke any potential casual link between the use of the bus and the injuries inflicted on the Plaintiff

If Plaintiff is able to establish the requisite degree of causation between the bus and the injury to the plaintiff, the Court must next determine whether an act of

independent significance occurred, breaking the causal link between the 'use' of the bus and the injuries inflicted. *Friel*, supra at * 13-14.

An accident cannot be said to "involve" a vehicle where an independent act breaks the casual link between the vehicle and the injuries inflicted. *Kelty*, supra at 921. There is limited case law in Delaware addressing this topic. When a person commits an intentional or criminal act, such as road rage, there is an act of independent significance that breaks the casual like between the use of the vehicle and the injuries inflicted. *State Farm Insurance Co., v. Buckingham,* 919 A.2d 1111, 1114-115 (Del. 2007). *See also, Carroll v. Nationwide Mut. Fire Ins. Co.*, 2008 Del. Super. LEXIS 217 at *10 (Del. Super. 2008)(holding a driver leaving his vehicle to commit a criminal assault was an act that broke the casual link between the use of the vehicle and the injuries inflicted).

Although it is clear that the bus was not an active accessory in Plaintiff's injuries, there were several acts of independent significance that broke any potential casual link. The tortfeasor proceeded, without regard to the bus. The independent actions that drove the tortfeasor's negligent conduct were not related to any action of the bus. The bus was completely stationary, and completed all acts prior, and with no relation to the tortfeasor's negligent conduct.

Anderson's conduct was in violation of law. He failed to exercise due care to avoid colliding with a pedestrian, in violation of 21 Delaware Code § 4144, and failed to stop or remain stopped when approaching a school bus from the front, until such school bus begins to move or no longer has the red stop lamps activated, in violation of 21 Delaware Code § 4166(d)(1). In that instance his negligent inattentiveness was an act of independent significance, breaking any potential causal link between the bus and the Plaintiff's injuries.

Further, Plaintiff, who was 16 years old at the time of the occurrence, made the decision to not look before crossing the road. This was an act of independent significance. Plaintiff was struck almost immediately upon stepping into the road, and did not notice Anderson's vehicle approaching. (A353:23-24, A354:1 and A281:18-22, A282:1-10, A298: 5-9, A299:4-5). Plaintiff chose to leave a place of safety and walk into the path of a vehicle which was so close as to constitute an immediate hazard in violation of 21 Delaware Code § 4142(b). Had Plaintiff looked for oncoming traffic, she would not have stepped out in front of his vehicle. This act of independent significance breaks any casual link.

As the bus was not an active accessory, and there were multiple acts of independent significance which caused Plaintiff's injuries, Plaintiff did not establish both necessary criteria of the *Kelty* test, and she is not qualified as "any other person

injured in an accident involving such motor vehicle" pursuant to Del. Code Ann. tit. 21, § 2118(a)(2)(c).

CONCLUSION

In order for Plaintiff to have established that she was entitled to PIP benefits from the bus, under 21 *Del. C.* § 2118(a)(2)(c) she was required to demonstrate that she qualified as an occupant under one of the two prongs of the *Fisher* Test, and further demonstrate that she satisfied both criteria in the *Kelty* Test.

Plaintiff was not an occupant of the school bus pursuant to either prong of the *Fisher* test. *Friel v. Hartford Fire Ins. Co.*, 2014 Del. Super. LEXIS 234, at *13-14 (Del. Super. May 6, 2014) (citing *National Union Fire Ins. Co. Of Pittsburgh v. Fisher*, 692 A.2d 892, 896 (Del. 1997)), *aff' d* by 2015 Del. LEXIS 49 (Del. Jan. 28, 2015). Plaintiff was neither within a reasonable geographic perimeter of the bus nor engaged in the operation of the bus. *Fisher,* supra 896. Plaintiff, had just stepped into a twelve foot lane of travel which was a separate lane of travel from the bus. Approaching a vehicle with the intent to ultimately enter that vehicle, is not the same thing as entering that vehicle. Plaintiff had not completed crossing the road to begin to enter the bus, and was not "in, entering, exiting, touching or within reach of" the bus. Plaintiff, therefore, was not within a reasonable geographic perimeter to the bus. *Id.* at 895 and 897. Further, Plaintiff was not engaged in the operation of the bus. Her actions were in no way related to the mechanism which allowed the bus to move. *Id.* at 898. As Plaintiff was neither in a reasonable geographic perimeter to the bus,

nor engaged in the operation of the bus, she was not an occupant of the bus. Therefore, Plaintiff does not qualify for PIP benefits from the bus.

Further, Plaintiff does not satisfy both criteria of the *Kelty* test. Plaintiff was not a person "injured in an accident involving such motor vehicle", in relation to the Bumble Bee Bus. *Friel,* 2014 Del. Super. LEXIS 234, at *13-14, *aff' d*, 2015 Del. LEXIS 49 (Del. Jan. 28, 2015). The bus was not an active accessory in her injury, and its presence was incidental to the injury. The fact that Plaintiff would not have been at that location at that time, but for the presence of the bus, is insufficient to make the bus an active accessory in her injury. The bus' presence bore no relation to the fact that the tortfeasor was not paying attention and hit the Plaintiff. No mechanism of the bus contributed to the accident, and no failure in the bus' operation played a role in the tortfeasor's conduct. The accident did not occur "by virtue of the inherent nature of using a motor vehicle" as it relates to the bus. The bus was merely the situs to the plaintiff's injuries. Plaintiff therefore fails the first criteria of the *Kelty* test.

In relation to the second criteria of the *Kelty* test, Plaintiff fails as there was an act of independent significance. Anderson's negligent actions constitute acts of independent significance breaking any potential casual link. It was Anderson's negligent inattentiveness which caused him to ignore the bus' safety lights, stop

signals and Plaintiff walking into the road. Those acts of negligence were the act of the independent significance breaking any potential casual link. Further, Plaintiff's own failure to look as she entered the roadway, was an additional act of independent significance breaking an casual link. Plaintiff satisfies neither prong of the *Fisher* test, and fails to satisfy both criteria of the *Kelty* test, she therefore, is not entitled to the PIP benefits of the Bumble Bee Bus.

As such, the Superior Court decision below should be reversed and summary judgment should be found for Appellant State Farm.

Respectfully Submitted,

CASARINO CHRISTMAN SHALK
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/s/

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Dated: November 5, 2015

Exhibit A

EFiled: Jul 27 2015 11:02AM EDT
Transaction ID 57609192
Case No. K14C-03-028 JJC

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STEPHANIE BUCKLEY,	:	
	:	C. A. No. K14C-03-028 JJC
Plaintiff,	:	
	:	
v.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
	:	
Defendant.	:	

Submitted: July 8, 2015
Decided: July 27, 2015

OPINION

Upon Defendant State Farm Mutual Insurance Company's Motion for Summary Judgment

Michael J. Malkiewicz, Esquire of Barros McNamara Malkiewicz & Taylor, Dover Delaware; attorneys for the Plaintiff.

Colin M. Shalk, Esquire of Casarino Christman Shalk Ransom & Doss, Wilmington, Delaware, attorneys for the Defendant.

CLARK, J.

I. INTRODUCTION

Before the Court is a suit for Personal Injury Protection ("PIP") benefits for medical expenses incurred by a minor struck by a car while crossing the road to

board a school bus. Plaintiff Stephanie Buckley ("Plaintiff") seeks PIP benefits from the school bus's PIP policy even though Plaintiff was not physically within the bus at the time of the accident. In a case of first impression, the Court finds that based upon the uncontroverted facts in this case, a student in the process of crossing the road to board a school bus, at the direction of the driver via intercom while the bus's red stop lamps and stop arm are activated, is entitled to PIP benefits from the automobile policy insuring the school bus. Accordingly, Defendant State Farm Mutual Automobile Company's (Defendant's) Motion for Summary Judgment is **DENIED**.

II. FACTS AND PROCEDURAL HISTORY

The operative facts are not in dispute. On March 27, 2012, 16 year old Plaintiff Stephanie Buckley ("Plaintiff") was struck on Westville Road by a motor vehicle operated by Norman Anderson ("Anderson"). At the time Plaintiff was struck by Anderson's vehicle, she was crossing the street to board a Bumble Bee Transportation bus insured by the Defendant, State Farm Mutual Automobile Insurance Company ("Defendant").

Just before the incident, the bus approached the Plaintiff's driveway, traveling in the eastbound lane. As the bus approached, the driver activated the amber lights and slowed to a stop. At that point, the bus's red stop lamps activated and the stop

sign arm extended. The entrance to the bus faced the sidewalk of the eastbound side of the roadway, on the opposite side of the Plaintiff's driveway. Plaintiff then exited her home, and began walking down the driveway toward the road. Prior to the Plaintiff's entering the roadway, the bus driver, via the bus's intercom, directed the Plaintiff to cross the westbound lane and board the bus. At that point, the Plaintiff began walking across the westbound lane. Just before reaching the halfway point near the double yellow center divide, a westbound motor vehicle operated by Anderson struck the Plaintiff causing her injury.

At the time of the aforementioned incident, State Farm Mutual Automobile Insurance Company insured the bus. Its policy included $100,000 in PIP limits. The No-Fault Coverage section of the State Farm policy reads in relevant part: "**Insured** means: 1. Any person while occupying ... your car ..." Pursuant to the policy, "**Occupying** means in, on, entering, or exiting."

Plaintiff claimed PIP medical benefits from State Farm in the amount of $75,423.60 for treatment of her injuries. State Farm denied payment of these claimed benefits. Thereafter, Plaintiff filed a PIP suit. Before the Court is Defendant's Motion for Summary Judgment, which contends that Plaintiff is not entitled to the aforementioned PIP coverage because she was not an occupant of the bus at the time she was struck by a motorist, nor was she a person injured in an accident involving

such motor vehicle.

III. STANDARD OF REVIEW

Summary judgment is appropriate if, when viewing the facts in the light most favorable to the non-moving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] In doing so, the Court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[2] When the facts of record "permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law."[3]

IV. DISCUSSION

A. 21 *Del. C.* § 2118(a)(2)c's Analytical Framework

The Delaware General Assembly enacted provisions requiring owners of Delaware registered motor vehicles to obtain minimum insurance coverage.[4] One of

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[1] Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[2] *Sztybel v. Walgreen Co.*, 2011 WL 2623930, at *2 (Del. Super. June 29, 2011).

[3] *Friel v. Hartford Fire Ins. Co.*, 2014 WL 1813293, at *2 (Del. Super. May 6, 2014) *aff'd Friel v. Hartford Fire Ins. Co.*, 108 A.3d 1225 (Del. 2015) (citing *Wootten v. Kiger*, 226 A.2d 238, 239 (Del.1967)).

[4] 21 *Del. C.* § 2118.

these coverages includes Personal Injury Protection ("PIP") coverage.[5] The legislative intent of Delaware's PIP statute is "to impose on the no-fault carrier ... not only primary but ultimate liability for the [injured party's] covered medical bills to the extent of [the carrier's] unexpended PIP benefits.[6] Pursuant to the operative statute, PIP

> coverage ... shall be applicable to each person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle, other than an occupant of another motor vehicle.[7]

Under section 2118(a)(2)c of Title 21, Delaware Code, whether a claimant is eligible for PIP benefits is a question of statutory interpretation.[8] Furthermore, the Superior Court's interpretation of an insurance policy is a matter of law.[9] When interpreting a statute, the Court must attempt to determine and give effect to the General Assembly's intent.[10]

In delineating the scope of PIP coverage, the Delaware Supreme Court has

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[5] 21 *Del. C.* § 2118(a)(2).

[6] *International Underwriters, Inc. v. Blue Cross & Blue Shield of Del. Inc.*, 449 A.2d 197, 200 (Del. 1982).

[7] 21 *Del. C.* § 2118(a)(2)c.

[8] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 929 (Del. 2013).

[9] *Id.*

[10] *National Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892, 895-96 (Del. 1997).

adopted a liberal construction of the term "occupant."[11] Two Delaware Supreme Court cases, *Fisher and Kelty*, combine to establish the criteria necessary to evaluate the compensability of a PIP claim for injuries suffered by the claimant in this matter.

In *Friel v. Hartford Fire Ins. Co.*– which was recently affirmed by the Delaware Supreme Court[12]– this Court interpreted "the language in Section 2118(a)(2)c... to require that both occupants and non-occupants be 'injured in an accident involving a motor vehicle.'"[13] As held in *Friel*, the separate standards outlined in *Fisher* and *Kelty* must be met in the aggregate in order to support a claim for PIP benefits. Accordingly, to determine whether a claimant is eligible for PIP benefits, "the correct analysis should be: first, use the disjunctive two-prong *Fisher* test to determine whether the plaintiff is an occupant; **and second**, use the two-prong *Kelty* test to determine whether the accident involved a motor vehicle."[14]

In its Answering Brief in opposition to this motion, the Plaintiff argued that finding occupancy alone pursuant to a *Fisher* generated analysis is sufficient, in

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[11] *Id.* at 896.

[12] *Friel*, 108 A.3d 1225 (Del. 2015).

[13] *Friel*, 2014 WL 1813293, at *5.

[14] *Id.* (emphasis added). (The Superior Court supported its interpretation with a number of cases where a claimant was ineligible for PIP coverage despite clearly qualifying as an "occupant." *See e.g.,Wagner v. State Farm Mut. Auto. Ins. Co., 2001 WL 34083818*, at *2 (Del. Super. Oct. 25, 2001); *South v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 5509623, at *2 (Del. Super. Sept. 28, 2012)).

itself, to trigger PIP eligibility under section 2118(a)(2)c. Plaintiff relies on a plain reading of the statute that Plaintiff asserts requires all occupants of a motor vehicle to be covered by PIP, regardless of whether the person was injured in an accident **involving the motor vehicle.** Plaintiff's argument is not wholly without merit. A reasonable reading of 21 *Del. C.*§2118 (a)(2)c could mandate an either-or analysis (*i.e.* requiring either (1) "occupancy"; or separately (2) that "any other person" be injured in an accident "involving such motor vehicle.") In response, Defendant correctly asserts that this issue was squarely before this Court in *Friel v. Hartford Fire Ins. Co.* There, this Court determined that occupancy alone was not enough. The *Friel* decision required the finding of a use related nexus to the vehicle's operation before mandating PIP coverage under such vehicle's policy. On appeal, the Delaware Supreme Court affirmed the *Friel* decision in a one page Order "on the basis of and for the reasons assigned by the Superior Court."[15] As such, this Court is constrained by the analytical framework outlined in *Friel* and will apply it below.

B. Occupancy Requirement Pursuant to *Fisher*

The occupancy test at issue was outlined by the Delaware Supreme Court in *Nat'l Union Fire Ins. Co. of Pittsburgh v. Fisher*.[16] Under this test, this Court must

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[15] *Friel v. Hartford Fire Ins. Co.*, 108 A.3d 1225 (Del. 2015).

[16] 692 A.2d at 897-98.

utilize a disjunctive two prong test whereby a claimant will be considered an occupant of a vehicle "if he or she is either: (a) within a reasonable geographic perimeter of the vehicle, or (b) engaged in a task related to the operation of the vehicle."[17] In assessing a reasonable geographic perimeter, "the claimant must be in, entering, exiting, touching or within reach of the covered vehicle."[18] Under the task related to the operation of the vehicle, courts must "carefully distinguish between job-related tasks for which one's vehicle is an integral tool and tasks directly related to the operation of one's vehicle."[19] Only tasks that are directly related to the operation of the vehicle will suffice under the second prong of the *Fisher* analysis.[20]

Turning to this case, the Plaintiff independently satisfies both prongs of the *Fisher* test, though satisfying only one aspect is necessary. The parties agree that just prior to the accident, the Plaintiff was on her property, located on the westbound side of Westville Road, waiting for the bus. The parties also agree, that when the bus arrived, both the entrance to it and the bus itself were on the eastbound side of

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[17] *Id.* at 896 (emphasis added).

[18] *Id.* at 897 (holding that the "geographic perimeter test should be a clear, bright-line test (absent further legislative or contractual exposition) and should not involve a nexus component.")(emphasis added).

[19] *Id.* at 897-98.

[20] *See e.g., Id.* at 898.

Westville Road. Under the circumstances, the only logical way for the Plaintiff to enter the bus would be for her to cross Westville Road. Indeed, that is precisely what the Plaintiff was doing– crossing Westville Road, entering the bus– when she was struck by Anderson's vehicle.

This criteria for occupancy references a reasonable geographic perimeter. Evaluation of what is reasonable must contemplate, to a certain extent, the nature of the vehicle and the activity at issue. Here, the evaluation as to what is a reasonable geographic perimeter of a school bus hinges on several operative facts. Where a student is crossing a two-lane road, at the express direction of a bus driver speaking from an intercom system from within the bus, with stop lamps activated, and a stop paddle extended, that student is in the process of "entering" the bus. Because "entering" contemplates a reasonable geographical perimeter pursuant to the *Fisher* test, the Court finds that the Plaintiff was an "occupant" within the meaning of section 2118(a)(2)c.

The Defendant argues that the Plaintiff was not "entering" the bus because she was not actually engaged in the process of getting into the vehicle. According to the Defendant, the "entrance to the bus was on the other side of the street, and [the Plaintiff] would have to complete crossing the street to begin entering." In support, the defendant cites a number of cases, all of which are distinguishable from the

present case in either law or fact. Some of the case were decided prior to *Fisher* and the articulation of its test, and others deal with whether the claimant was within reach of the vehicle, and did not address whether the claimant was entering or exiting the vehicle.

For instance, the defendant cites *Oggenfuss v. Big Valley Associates*, where this Court held that an injured plaintiff was not an occupant when she slipped and fell within two feet of her car while returning from an automatic teller machine because there was an insufficient nexus between the vehicle and the plaintiff's activity.[21] However, *Oggenfuss* was one of the cases referenced and implicitly rejected in *Fisher*.[22] Under the reasonable geographic perimeter prong– which did not yet exist– the outcome in *Oggenfuss* would have been different because the plaintiff was clearly within reach of her vehicle when she slipped and injured herself.

Additionally, the Defendant's position regarding the scope of what is considered "to enter" is incorrect in this context. As mentioned above, the reasonable geographical perimeter criteria include a claimant that is either (1) in, (2) entering, (3) exiting, (4) touching, or (5) within reach of the covered vehicle. Accordingly, being

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[21] 1996 WL 453319, at *1 (Del. Super. May 3, 1996).

[22] *See Fisher*, 692 A.2d at 897-898 (providing that "[w]e realize that application of this holding to prior Superior Court cases could have caused different results to have been obtained in one or more of those cases... To the extent the analysis in any of those cases is inconsistent with the holding announced herein, we decline to approve such case or cases."

"in" the bus would have been the only criteria which would require the Plaintiff to "complete crossing the street." "Entering" is an individually listed criteria. While it is impossible, for instance, to be "in" a vehicle without "touching" it, it is possible to be considered "entering" a vehicle prior to coming "within reach of", or "touching" it. By necessity, entering a vehicle for purposes of this definition of occupancy contemplates a person being outside that vehicle. How far outside that vehicle the act of entering extends to is controlled in this case by the specific facts of a school bus's loading and unloading procedures.

Regulatory authority, effective at the time of the incident at issue, and cited by Plaintiff is also instructive as to the relationship between a student boarding a school bus and the vehicle itself. Namely, *14 Del. Admin. Code.* §1105, Rule 8.0, deals with the relationship of students to their school buses. Namely, Regulation 8.0 is entitled "Pupil Conduct on School Buses".[23] Within that regulation, are various provisions related to the "boarding" of students. Those same regulations prohibit students from crossing the road until "being told to begin crossing by the driver..."[24] The regulations further provide that a student shall, only at such direction, cross the roadway in the same manner as Plaintiff was instructed to cross in the case at hand. Including the

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[23] *14 Del. Admin. Code* §1105, Reg. 8.0 (Ex. "A' to Plaintiff's Answering Brief) (emphasis added).

[24] Reg. 8.1.13.

street-crossing process within the definition of boarding a bus is supportive of a finding that Plaintiff was entering a bus at the time of the injury. Furthermore, regulation 9.0 includes "Procedures for **Operating** Buses."[25] Withing these procedures, Rule 9.8 provides in relevant part

> [p]upils who must cross the road **to board the bus** ... shall cross at a distance in front of the bus beyond the crossing control arms so as be clearly seen by the driver and only upon an audible clearance by the driver. The driver shall signal pupils to cross by instructions through the external speaker of the public address system.

Boarding a school bus is synonymous with a student's entering such a vehicle. Accordingly, in evaluating what is a "reasonable" geographic perimeter, in the circumstances of this case, the student was within such a perimeter.

Only one of the *Fisher* criteria are necessary for a person to be considered an "occupant" for purposes of PIP coverage. Nevertheless, independently, the second *Fisher* criteria is also satisfied in this case. Under the unique circumstances involved in a student boarding a school bus at the direction of a driver sitting inside the bus, the boarding function is also a "task related to the operation of the vehicle."

The Supreme Court in *Fisher* was careful to "distinguish between job related tasks for which one's vehicle is an integral tool and tasks directly related to the

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[25] *14 Del. Admin. Code* §1105, Reg.9.0 (emphasis added).

operation of one's vehicle."[26] The analysis of such matters is highly reliant upon the individual facts of a given case. Clearly, the student injured in the accident at issue was not engaged in a job-related task. Rather, she was in the process of being transported to school. A school bus's sole task is to transport its pupils to and from school. A student, actively engaged in this process, is performing a task "inextricably related to the operation" of the school bus.[27] Accordingly, under either *Fisher* criteria, the student qualifies as an occupant for purposes of PIP coverage.

C. Requirement That the Claimant Be Injured in an Accident Involving a Motor Vehicle

Next, to assess PIP coverage for this incident, the Court must also analyze the claim pursuant to the criteria set forth in *Kelty v. State Farm Mut. Auto. Ins. Co.* to determine if the claimant was injured in an accident involving a motor vehicle.[28] To do so, "[t]he Court must analyze: (1) whether the vehicle was an 'active accessory' in causing the injury; and (2) whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted."[29] The

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[26] *Fisher*, 692 A.2d at 897-898.

[27] *See Id.* at 897 (quoting *Messick v. Reliance Ins. Co.*, 1995 WL 1946624, at *3 (Del. Super, Aug. 17, 1995), 995 WL 465 181, (Del. Super. July 26, 1995) (where the Supreme Court cited approvingly the Superior Court's use of this standard, while declining to revisit that case and other cases' results).

[28] 73 A.3d 926 (Del. 2013).

[29] *Friel*, 2014 WL 1813293, at * 2 (internal quotations omitted).

Court defined "active accessory" as "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury."[30]

The active accessory prong is intended to exclude situations such as those at issue in *Campbell v. State Farm Mut. Auto. Ins. Co.*[31] In that case, an individual sat in a vehicle while another individual accidentally shot him.[32] In that case, the vehicle happened to be the physical location of the plaintiff at the time he was injured and "had a negligible impact on the events that caused the respective plaintiff's injuries."[33]

In the present case however, the bus clearly had an impact on the events that caused the Plaintiff's injuries. The Plaintiff was safely on her property before being injured. As the bus approached the Plaintiff's driveway, the driver activated the amber lights and slowed to a stop at which point the red lights activated and the stop sign extended. The purpose of the lights and stop sign was to halt all traffic and facilitate safe passage across the street for the Plaintiff. Additionally, the driver used the bus's loudspeaker to give instructions to the plaintiff to cross the street at the time she crossed. Without the bus's presence or the instruction by the driver sitting inside the

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[30] *Kelty*,73 A.3d at 932 (quoting *Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997)).

[31] 12 A.3d 1137, 1139 (Del. 2011).

[32] *Id.*

[33] *Kelty*,73 A.3d at 933.

bus, the plaintiff would not have entered onto Westville Road at the time of the accident. Furthermore, the precise manner of Plaintiff's boarding, the directive by a driver seated inside the bus for the student to cross, and the aforementioned regulations including the detailed process for boarding, supports this nexus. Certainly, the bus's impact on the circumstances of injury meet a but-for threshold. But-for the presence of the bus, this injury would not have happened. Candidly, the bus's impact on the matter meets the standard (in a tort sense) for proximate cause, which exceeds the necessary nexus for coverage. Consequently, the bus was an active accessory to the Plaintiff's injuries.

Finally, there was no act of independent significance that broke the causal link between use of the vehicle and the injuries inflicted. Defendant argues that (1) the alleged negligence of the other driver, and (2) the alleged comparative negligence of the Plaintiff, are superceding acts which break the causal link. Both, however, are allegations regarding the negligence of another.

As noted in *Kelty*, intentional or criminal acts can break the causal link.[34] The superceding nature of the conduct in such situations hinges on the lack of forseeability of that conduct. A motorist striking a child exiting or boarding a bus, however, is a foreseeable risk of such activity. If the Court were to adopt a standard that excluded

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[34] *Id.*

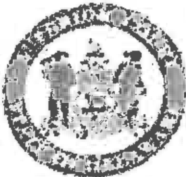
PIP coverage where there was a **negligent** tortfeasor, it would eviscerate PIP coverage in many instances. On the other hand, if a child in the process of boarding a bus were injured by an intentional criminal act of a third party, such an intentional criminal act would be of a superceding nature sufficient to break the causal link between the vehicle and the injuries inflicted. Defendant's proferred standard, however, would provide for no PIP coverage in any circumstances where there was a negligent third-party tortfeasor. That is clearly contrary to the purpose of Delaware's mandated PIP coverage. Here, these two alleged cases of negligent conduct, intervening **though not superceding** under the circumstances of this case, do not rise to a level that result in a denial of PIP coverage.

V. CONCLUSION

Here, the Plaintiff was an "occupant" of the bus within the meaning of 21 *Del. C.* § 2118(a)(2)c. In addition, the circumstances surrounding her injury qualify as "an accident involving such vehicle." Accordingly, the Defendant's Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.

/s/ Jeffrey J Clark
Judge



So Ordered
/s/ Clark, Jeff Aug 04, 2015

EFiled: Aug 04 2015 02:07PM EDT
Transaction ID 57651349
Case No. K14C-03-028 JJC

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STEPHANIE BUCKLEY, Plaintiff,	:	C.A. No. K14C-03-028 (WLW)
v.	:	TRIAL BY JURY OF TWELVE DEMANDED
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	:	

ORDER

AND NOW, TO-WIT, this ______ day of ___________, 2015, this Court having entered an Order on July 27, 2015, denying the Defendant's Motion for Summary Judgment, and the parties representing to the Court on July 30, 2015, that there is no dispute about the necessity and reasonableness of the medical treatment and costs for that treatment received by the Plaintiff;

IT IS HEREBY ORDERED that there are no issues of fact or law to be presented by the parties to the Court or a jury and, therefore, the Court enters Summary Judgment in favor of the Plaintiff.

FORM OF ORDER APPROVED BY:

/s/ Michael J. Malkiewicz, Esquire
Attorney for Plaintiff

/s/ Colin M. Shalk, Esquire
Attorney for Defendant

JUDGE

Exhibit B

So Ordered
/s/ Clark, Jeff Aug 04, 2015

EFiled: Aug 04 2015 02:07PM EDT
Transaction ID 57651349
Case No. K14C-03-028 JJC

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STEPHANIE BUCKLEY, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	:	C.A. No. K14C-03-028 (WLW) TRIAL BY JURY OF TWELVE DEMANDED

ORDER

AND NOW, TO-WIT, this ______ day of ____________, 2015, this Court having entered an Order on July 27, 2015, denying the Defendant's Motion for Summary Judgment, and the parties representing to the Court on July 30, 2015, that there is no dispute about the necessity and reasonableness of the medical treatment and costs for that treatment received by the Plaintiff;

IT IS HEREBY ORDERED that there are no issues of fact or law to be presented by the parties to the Court or a jury and, therefore, the Court enters Summary Judgment in favor of the Plaintiff.

FORM OF ORDER APPROVED BY:

/s/ Michael J. Malkiewicz, Esquire
Attorney for Plaintiff

/s/ Colin M. Shalk, Esquire
Attorney for Defendant

____
JUDGE