IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE STEPHANIE BUCKLEY'S ANSWERING BRIEF

BARROS, MCNAMARA, MALKIEWICZ
& TAYLOR, P.A.

MICHAEL J. MALKIEWICZ, ESQUIRE
BAR ID No. 2093
2 W. Loockerman Street
P.O. Box 1298
Dover, DE 19903
Telephone: (302) 734-8400
Fax: (302) 734-8969
Attorney for Plaintiff Below-Appellee Stephanie Buckley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law **Page**

TABLE OF AUTHORITIES - CONTINUED

Case Law **Page**

Statutes

Delaware Regulations:

Other Authorities

TABLE OF AUTHORITIES - CONTINUED

Other Authorities - Continued

NATURE AND STAGE OF THE PROCEEDINGS

On March 25, 2014, Plaintiff Stephanie Buckley ("Plaintiff") filed a Complaint against Defendant State Farm Mutual Automobile Insurance Company ("Defendant") in the Superior Court of Kent County ("Superior Court") after Defendant denied payment of Plaintiff's claim for PIP benefits (See Appendix to Defendant's Supreme Court Opening Brief, A9-A13)("Defendant App. A___").

On July 27, 2015, the Superior Court issued it's Opinion denying Defendant's Motion for Summary Judgment (Defendant's Opening Brief, Exhibit A). On August 4, 2015, the Superior Court issued an Order entering Summary Judgment in favor of Plaintiff, as the parties agreed there was no dispute about the amount of medical expenses, nor the necessity or reasonableness of the medical treatment received by Plaintiff, and that there were no further issues of fact or law to be presented to the Court or a jury (Defendant's Opening Brief, Exhibit B).

On September 21, 2015, Defendant filed a Notice of Appeal with this Court. On November 5, 2015, Defendant filed an Opening Brief in support of its Appeal. On November 10, 2015, Defendant filed a corrected Opening Brief.

This is Plaintiff's Answering Brief in support of her request that this Court affirm the decision of the Superior Court.

SUMMARY OF ARGUMENT

1. Plaintiff denies Paragraph 1 of Defendant's Summary of Argument. Although Plaintiff only has to satisfy one prong, Plaintiff satisfied both prongs of Delaware's *Fisher* test. First, Plaintiff was an "occupant" of the insured school bus. Secondly, Plaintiff was within a reasonable geographic perimeter of the school bus at the time she was injured, and was also engaged in an activity related to the operation of the insured school bus in issue. *Nat. Union Fire Ins. Co. Of Pittsburgh v. Fisher,* 692 A.2d 892, 896 (Del. 1997). Therefore, Plaintiff is eligible for Personal Injury Protection ("PIP") benefits under the insurance policy issued by the Defendant to the owner of the school bus, Bumble Bee Transportation ("Bumble Bee").

In Plaintiff's case, no PIP eligibility test other than the *Fisher* test is needed. The Plaintiff's actions of leaving the safety of the shoulder of the road and walking across the road toward the school bus after being told to do so by the school bus driver, amounts to "entering" the school bus, or "occupying" the school bus. "Entering" the school bus is conduct that was insured under the Defendant's insurance policy covering the school bus. It is clear under 21 Del. C. §2118(a)(2)c. that if a PIP claimant, such as Plaintiff, is "occupying" an insured school bus at the time of injury, that the PIP claimant, or Plaintiff, is eligible to receive PIP benefits under the policy that insures the school bus. No other test or inquiry is required under

21 Del. C. §2118(a)(2)c., including the test created by the Court in *Kelty v. State Farm Mutual Automobile Insurance Company,* 73 A.3d 926, 932 (Del. 2013).

2. Plaintiff denies Paragraph 2 of Defendant's Summary of Argument. If this Court determines that the *Kelty* test must be used in this case, the Plaintiff also satisfied both prongs of the *Kelty* test. First, Plaintiff was injured in an accident involving a school bus insured by the Defendant. Secondly, there was no act of independent significance that broke the causal link between use of the insured school bus and the injuries to the Plaintiff. *Kelty, supra,* at 932.

3. Defendant did not have a Paragraph 3 in its Summary of Argument, so no denial is needed. Paragraph 3 of Plaintiff's Summary of Argument is an argument made by Plaintiff. There are laws, State regulations and the Delaware's Commercial Drivers License Manual already in place, and they address the issues involved in Plaintiff's case, which is a case of first impression. Plaintiff respectfully requests that this Court join the majority of other state courts, and adopt a specific test or analysis to determine PIP eligibility in cases involving students who are injured while entering and exiting school buses in Delaware.

> ...The process by which a child crosses an open highway to board a school bus is charged with danger. Accordingly, the legislature has enacted the most stringent provisions feasible to safeguard the entire operation. The child, the bus and the bus driver are constituents of this process, bound together legally and practically in a special, exigent

relationship, from the moment the bus stops and signals until the child is safely aboard. Because parties entering contracts of insurance on school buses should be and probably are aware of all these matters, it reasonably may be inferred that they intend "entering into" a school bus to include the entire typical process by which a child transverses a roadway to a safe place within the bus. (Emphasis Added). *Westerfield v. LaFleur*, 493 So.2d 600 (1986); 59 A.L.R. 4th 139, 34 Ed.Law Rep. 1270 (The Court rejected State Farm's argument that a child was not "occupying" or "entering" a school bus at the time the child was killed by a motorist 15 feet from the bus). For examples of Courts acknowledging the dangerous process surrounding students "exiting" school buses and extending underinsured coverage see *Kantola v. State Farm Insurance*, 405 N.E. 2nd 744, 746 (Ohio Misc. 1979), *Etter v. Travelers Insurance Cos.*, 657 N.E.2d 298, 3020303 (Ohio Ct. App. 1995), *Olsen v. Farm Bureau Insurance Company*, 609 N.W. 2d 644, 670-71 (Neb. 2000), *State Farm Mutual Insurance Company v. Holmes*, 333 S.E.2d 917, 918 (Ga. Ct. App. 1985), *Nelson v. Iowa Mutual Insurance Company*, 515 P.2d 362, 364 (Mont. 1973). For further analysis see attached legal article on the creation of safety zones around buses and extending insurance coverage: Court Finds That a Minor Hit By A Drunk Driver Is An Occupant Of His School Bus For Underinsured Motorist Coverage Purposes, New Hampshire Bar Journal, Fall 2013/Winter 2014 (Plaintiff Appendix B1-B5)("Plaintiff's App. ___").

STATEMENT OF FACTS

On March 27, 2012, Defendant insured a school bus owned by Bumble Bee (See copy of policy at Defendant App. A453-A485). The school bus was operated on said date by a Bumble Bee employee, Gloria R. Mogle ("Ms. Mogle" or "school bus driver"). On said date, Ms. Mogle had a valid Delaware Commercial Driver's License ("CDL")(Plaintiff's Deposition of Ms. Mogle, Defendant App. A382-384). As the school bus driver, Ms. Mogle was in complete charge of the school bus and student passengers, had the authority of a classroom teacher, and was responsible for the health, safety, and welfare of each student passenger. (Delaware Department of Education and Division of Motor Vehicles Approved School Bus Drivers'/Aides' Handbook, Document No. 95-01/10/10/02, at p. 9)("DOE Handbook) (Plaintiff App. A6-A94).

On March 27, 2012, at approximately 7:27 a.m., Plaintiff, a 16-year old Junior at Caesar Rodney High School located in Camden, Delaware, stood on the shoulder of the road at the end of the driveway to her home at 10685 Westville Road, Wyoming, Delaware, waiting to enter the school bus (Defendant's Deposition of Plaintiff, Defendant App. A345; Defendant App. A423). Westville Road is a two lane road running east-west with improved shoulders on both sides of the road, with solid white lines marking the edge of each shoulder of the road (Plaintiff's Deposition

of Officer Ciglinsky, Defendant App. A232-A235). Each of the two travel lanes are 12 feet wide and divided by a double yellow line (Id. at 222). Plaintiff's home is located on the south/westbound side of Westville Road, approximately 1 mile west of Wyoming, Delaware.

On March 27, 2012, Ms. Mogle operated a school bus eastbound along Westville Road, and stopped the school bus in front of Plaintiff's home partially in the eastbound travel lane and partially on the eastbound shoulder of the road. Ms. Mogle did her normal routine of activating the school bus blinking amber and red lights and extending the safety guard from the front bumper (Defendant App. A398-A402). After stopping the school bus, Ms. Mogle observed a vehicle coming westbound in the opposite direction of the school bus on Westville Road. Ms. Mogel thought that because of the distance the westbound vehicle was from the school bus that Plaintiff could safely enter the school bus, and she also thought that the westbound vehicle was going to stop before it would strike Plaintiff (Defendant App. A402-A405, A411-412). Before beginning to enter the bus by walking across the westbound lane of Westville Road, Plaintiff looked to her left, or east, in the direction of the approaching westbound vehicle. Plaintiff saw the westbound vehicle, but thought that it would be safe for her to start entering the bus by crossing over the westbound lane of Westville Road. However, before Plaintiff moved from the

shoulder of the road, she waited, as she did every school day, for Ms. Mogle's verbal instructions over the school bus intercom to enter the school bus (Defendant App. A346-A349, A351). While waiting at the bus stop, Plaintiff had ear buds in her ears, and was listening to music as she usually did each school day. But, as the bus arrived Plaintiff turned the volume of the music down, just as she did each school day, so she could hear Ms. Mogle's instructions. (Defendant App. A129, p. 256 and A350).

Using the outside school bus intercom system, Ms. Mogle verbally instructed Plaintiff to enter the school bus. After hearing Ms. Mogle's instructions, Plaintiff looked to her left again and observed the vehicle continuing to travel westbound toward her (Defendant App. A-128, A355-356). However, Plaintiff still thought that she could safely leave the shoulder of the road to enter the school bus, so she started to enter the school bus by walking across the westbound lane of Westville Road (Defendant App. A128-129). As Plaintiff started to enter the bus by walking across Westville Road, she entered into what the State of Delaware Commercial Driver's License Manual, Section 10, School Buses ("CDL Manual") refers to as the DANGER ZONE ("DANGER ZONE")(Defendant App. A-128, pp. 22 and 24; A353, A-355 pp. 23 and 25., CDL Manual Section 10.1.1 and Figure 10.1, Defendant App. A-107). The CDL Manual states that the area to the left side of a school bus (the side Plaintiff was on at the time she was injured) is always considered dangerous because

of the passing lane next to the school bus (CDL Manual, Section 10.1.1).

After Plaintiff was between halfway across Westville Road and almost to the double yellow line that divides the east and west bound lanes of Westville Road, Ms. Mogle realized the westbound vehicle was not stopping, and she used the school bus intercom again and ordered the Plaintiff to "stop" (Defendant App. A405, A410-411, A428-435). At about the same time, and without anytime for Plaintiff to react to the instruction to "stop", the westbound motor vehicle, operated by Norman C. Anderson ("Mr. Anderson"), struck Plaintiff causing her severe injuries and damages resulting in significant medical treatment and medical expenses (Defendant App. A-433). Mr. Anderson committed suicide one week later, so his version of the facts was never obtained other than a brief statement to the investigating officer. Mr. Anderson told the officer that the sun blinded him, but the truth of that statement is in doubt because he was traveling westbound with the sun coming up behind him in the east.

Ms. Mogle admitted the following: It was her job to make sure that it was safe for Plaintiff to enter the school bus by coming across the road; that the purpose of the school bus being on Westville Road was to pick up and transport Plaintiff to school; that Plaintiff was instructed by her to enter the DANGER ZONE and cross the westbound lane of Westville Road; that Plaintiff did not start to cross the road until after she received her instruction to do so; that Plaintiff was not to enter the

DANGER ZONE and begin crossing the road to enter the school bus until Ms. Mogle instructed Plaintiff to do so; that Plaintiff was walking toward the school bus at the time she was injured; that Plaintiff could not have taken any action to avoid being struck by the motor vehicle; and that the accident would not have occurred unless the school bus was there to pick up Plaintiff (Defendant App. A400, A403, A413-415, A433-434).

After exhausting all other applicable PIP benefits, Plaintiff filed a PIP claim with Bumble Bee and the Defendant to have her remaining medical expenses paid by the Defendant's motor vehicle insurance policy that extended coverage to the school bus in issue. Plaintiff's unpaid medical expenses are currently $75,790.62 (Plaintiff App. A-95). The parties have stipulated to the reasonableness and necessity of the medical treatment received by Plaintiff and the amount the treatment cost.

Defendant denied Plaintiff's claim indicating that Plaintiff was not "occupying" the insured school bus at the time Plaintiff was injured, and also that the injuries were caused by the significant intervening action of being struck by an automobile driven by Mr. Anderson. Plaintiff filed a Complaint against Defendant in the Superior Court of Kent County seeking payment of PIP benefits (Defendant App. A9-A13). Defendant filed a Motion for Summary Judgment in the Superior Court. The motion was briefed by the parties (See Defendant's Opening Brief at Def. App. A19-A47;

Plaintiff's Answering Brief, Def. App. A48-80; and Defendant's Reply Brief, Def. App. A81-A100). Defendant did not include Plaintiff's Exhibits to the Answering Brief, but all the exhibits are referred to herein and included in Plaintiff's Appendix to this Answering Brief.

Defendant's Motion for Summary Judgment was denied by the Superior Court in its 16 page Opinion dated July 27, 2015 (Defendant Opening Brief, Exhibit A). On August 4, 2015, the Superior Court entered an Order granting Summary Judgment in favor of the Plaintiff (Defendant's Opening Brief, Exhibit B). Defendant appealed the Superior Court's decision to the Delaware Supreme Court.

ARGUMENT I

I. PLAINTIFF QUALIFIES FOR PIP BENEFITS FROM THE DEFENDANT'S INSURANCE POLICY INSURING THE SCHOOL BUS BECAUSE PLAINTIFF WAS ENTERING AND OCCUPYING THE SCHOOL BUS AT THE TIME PLAINTIFF WAS INJURED.

A. QUESTIONS PRESENTED

1. Was Plaintiff occupying the school bus at the time she was injured in accordance with the criteria set forth in *Nat. Union Fire Ins. Co. Of Pittsburgh v. Fisher*, 692 A.2d 892, 869 (Del. 1997)?

   a. Was Plaintiff either within a reasonable geographic perimeter of the insured school bus at the time of injury? or,

   b. Was Plaintiff engaged in a task related to the operation of the insured school bus at the time of injury?

2. Was Plaintiff "entering" the school bus at the time she was injured, thereby satisfying the definition of "occupying" found in the Defendant's applicable insurance policy?

3. Was Plaintiff "occupying" the insured school bus at the time of the injury, thereby satisfying the PIP eligibility requirements of 21 Del. C. §2118(a)(2)c.?

B. SCOPE OF REVIEW

Plaintiff agrees with, and adopts, the Scope of Review set forth in Defendant's Opening Brief at pp. 9-10.

C. MERITS OF THE ARGUMENT

1. PLAINTIFF WAS AN OCCUPANT OF THE SCHOOL BUS UNDER BOTH PRONGS OF THE *FISHER* TEST, UNDER THE DEFINITION OF "OCCUPYING" IN DEFENDANT'S INSURANCE POLICY, AND UNDER THE LANGUAGE OF 21 DEL. C. §2118(a)(2)c.

In the *Fisher* test, a person is an "occupant" of an insured motor vehicle if the person is either (a) within a reasonable geographic perimeter of the motor vehicle at the time of injury, or (b) engaged in a task related to the operation of the vehicle. *Friel v. Hartford Fire Ins. Co.,* 2014 Del. Super., Lexis 234 *13-14 (Del. Super., May 6, 2014). *Nat. Union Fire Ins. Co. Of Pittsburgh v. Fisher*, 692 A.2d 892, 896 (Del. 1997) aff'd by 2015 LEXIS 49 (Del., Jan. 28, 2015). In *Fisher*, the Delaware Supreme Court determined that a PIP claimant qualifies as an occupant whenever the claimant is "in, entering, exiting, touching, or within reach of the covered vehicle." *Fisher, supra*, at 897.

Plaintiff satisfied the first prong ("reasonable geographic perimeter") of the *Fisher* test. Therefore, Defendant's argument that Plaintiff did not satisfy this prong because she was not an occupant of the school bus must be rejected. This is a school

bus case, not an automobile case. Plaintiff clearly was within the reasonable geographic perimeter of the school bus. The school bus was present for the purpose of picking up the Plaintiff. There are authorities that describe what a reasonable geographic perimeter is for purposes of boarding (entering) and exiting a school bus in Delaware, and where injuries typically occur in school bus cases. Plaintiff was in close proximity to the school bus at the time of injury, and clearly inside the "DANGER ZONE" that was established and described at length in the Delaware CDL Manual, Section 10.1.1 and depicted in Figure 10.1 of said Manual (Defendant App. A107). The DANGER ZONE is also explained in the DOE Handbook (The School Bus Danger Zone) (Plaintiff App. A24-A25). Therefore, these authorities must also be used in the analysis of this school bus case, together with any judicially created tests. While "entering" the school bus, Plaintiff was struck by the Anderson motor vehicle after she walked more than halfway across the 12-foot wide westbound lane of Westville Road and was near the double yellow line that divided the eastbound and westbound lanes of Westville Road. According to Ms. Mogel, the Plaintiff was injured near the double yellow line dividing the east and westbound lanes (Defendant App. A435). Therefore, Plaintiff was clearly in the State designated DANGER ZONE and near the school bus that was stopped partially in the eastbound lane and partially on the shoulder of the road (Defendant App A410-411). The Delaware CDL

Manual clearly states that, "the area to the left of the school bus is always considered dangerous because of passing cars". Figure 10.1 in the Delaware CDL Manual illustrates the location of the DANGER ZONE (Defendant App A107). Plaintiff was "entering" the school bus at the instruction of the school bus driver, and was within a reasonable geographic perimeter of the insured school bus at the time she was injured. *Friel, supra,* at 13-14. Plaintiff contends that any student injured inside the State designated DANGER ZONE, after the school bus driver instructed Plaintiff to enter the DANGER ZONE, is within a reasonable geographic perimeter of the school bus for PIP eligibility purposes. Unlike an automobile case where a reasonable geographic perimeter is subject to subjective designation, in cases involving school buses in Delaware, we have a clearly identified area around stopped school buses known as a DANGER ZONE. In the DANGER ZONE, safety is necessary, there is great potential for injury or death occurring in this area, and students would not be in the DANGER ZONE but for the school bus stopping to either pick them up or drop them off. Furthermore, a student's conduct when entering the DANGER ZONE to enter the bus is directed, initiated and stopped at the direction of the person operating the insured school bus for the sole purpose of getting the students to pass through the DANGER ZONE safely when entering or exiting the school bus. Basically, the DANGER ZONE should be treated as if it is an area inside the school bus.

The Plaintiff independently satisfied 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 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 the Anderson 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 systems 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. (Superior Court Opinion, *Buckley v. State Farm Mutual Automobile Insurance Company*, C. A. No. K14C-03-028 (July 27, 2015)(Defendant's Opening Brief, Exhibit A, pp. 8-9).

In support of its argument, the Defendant cites a number of cases [as it did in Defendant's Opening Brief], 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 as within reach of the vehicle, and did not address whether the claimant was entering or exiting the vehicle. (Superior Court Opinion, *Buckley v. State Farm Mutual Automobile Insurance Company*, C. A. No. K14C-03-028 (July 27, 2015)(Defendant's Opening Brief, Exhibit A, pp. 9-10).

In support of its argument, Defendant cited *Oggenfuss v. Big Valley Associates L.P.*, 1996 WL 453319, at *1 (Del. Super. May 3, 1996), but *Oggenfuss*, which was decided before the reasonable geographic perimeter prong had been created, was implicitly rejected in *Fisher*. *Fisher, supra* at 897-898. (Superior Court Opinion, *Buckley v. State Farm Mutual Automobile Insurance Company*, C. A. No. K14C-03-028 (July 27, 2015)(Defendant's Opening Brief, Exhibit A, p. 10).

Defendant's argument about the scope of what is considered "to enter" is incorrect in the context of this school bus case. The reasonable geographic perimeter criteria include a claimant that is either (1) in, (2) entering, (3) exiting, (4) traveling, or (5) within reach of the covered vehicle. (Superior Court Opinion, *Buckley v. State Farm Mutual Automobile Insurance Company*, C. A. No. K14C-03-028 (July 27, 2015)(Defendant's Opening Brief, Exhibit A, p. 10).

> Accordingly, being "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 the 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 (Emphasis Added). (Superior Court Opinion, *Buckley v. State Farm Mutual Automobile Insurance Company*, C. A. No. K14C-03-028 (July 27, 2015)(Defendant's Opening Brief, Exhibit A, pp. 10-11).

The loading and unloading procedures are addressed in the State of Delaware regulations related to school bus operations, and are useful in understanding the inter-relationship between the Plaintiff boarding and exiting a school bus and the school bus. 14 Del. Adm. Code, §1105, Rule 8.0, entitled "Pupil Conduct on School Buses", and Rule 9.0 entitled "Procedure for Operating Buses" (Regulations 8.1.11 and 9.8)(Plaintiff's App. B104-B106). The Superior Court determined that these regulations were instructive, and that the regulations set out provisions that covered the exact factual situation that Plaintiff found herself in when she was entering/boarding the school bus, and that they supported Plaintiff's argument that she was "entering" the school bus at the time she was injured. (Superior Court Opinion, *Buckley v. State Farm Mutual Automobile Insurance Company*, C. A. No. K14C-03-028 (July 27, 2015)(Defendant's Opening Brief, Exhibit A, pp. 11-12).

The Superior Court found that:

> 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 (Emphasis Added). (Superior Court Opinion, *Buckley v. State Farm Mutual Automobile Insurance Company*, C. A. No. K14C-03-028 (July 27, 2015)(Defendant's Opening Brief, Exhibit A, pp. 11-12).

Although only one prong of the *Fisher* test must be satisfied, under the circumstances of this case involving a school bus and a student, Plaintiff also satisfied

the second prong of the *Fisher* test. Plaintiff was clearly engaged in a task related to the operation of the school bus by being in the process of "entering" the school bus by walking in a State designated DANGER ZONE, and at the instruction of the school bus driver. The Plaintiff "entering" the school bus was a task "inextricably related to the operation" of the school bus. *Fisher, supra* at 897-898. The only purpose of the school bus being present at the time of Plaintiff's injury, was to transport the Plaintiff to school. Therefore, under *Fisher*, Plaintiff was an occupant of the insured school bus at the time she was injured. As such, Plaintiff is eligible for PIP benefits.

2. PLAINTIFF WAS IN THE PROCESS OF ENTERING THE BUS WHILE WALKING THROUGH THE DANGER ZONE AT THE INSTRUCTION OF THE SCHOOL BUS DRIVER AND THEREBY SATISFIED THE DEFINITION OF BEING AN OCCUPANT OF THE SCHOOL BUS AS SET FORTH IN DEFENDANT'S APPLICABLE INSURANCE POLICY.

Plaintiff was "entering" the school bus when she was injured. The term "entering", as it appears in the Defendant's insurance policy definition of "occupying", would be rendered meaningless if the policy required the person to be "in" the vehicle, because the term "in" also appears in the policy definition for "occupying" (Defendant App. A-460). Therefore, Defendant, an experienced insurance carrier, must have considered that it would be extending coverage to those

individuals who were in the process of "entering" the school bus and who were not yet actually "in" the school bus. The Defendant's argument that "entering" is synonymous only with being "in" the bus must be rejected because the term "exiting" is also used in the insurance policy definition of "occupying" (Defendant App. A-460). The process of entering a school bus has been interpreted by the majority of courts to be synonymous with "occupying" the school bus. *Westfield, supra,* at 605-606.

3. PLAINTIFF WAS "OCCUPYING" THE SCHOOL BUS, AND HAS SATISFIED THE INSURANCE ELIGIBILITY REQUIREMENT OF 21 DEL. C. §2118(a)(2)c., AND THEREFORE THE TWO PRONG *KELTY* TEST DOES NOT NEED TO BE APPLIED IN THIS CASE.

The Defendant wants this Court to apply the *Kelty* test to determine Plaintiff's PIP eligibility. The *Kelty* test was extended to PIP cases in *Sanchez v. Am. Indep. Ins. Co.*, 886 A.2d 1278, 2005 WL 2662960, at *2 (Del., October 17, 2005)(ORDER). However, there is no statutory requirement that a Court use the *Kelty* test, nor should that test be used in a school bus case that is easily distinguishable from the facts in *Kelty* and *Sanchez*.

Furthermore, when the Court in *Kelty* announced the PIP "mandate" that it was relying on in 21 Del. C. §2118(a), the Court only quoted and relied upon only a part of the PIP mandate statute that determines eligibility for PIP benefits and did not

address the language of 21 Del. C. §2118(a)(2)c. that this Plaintiff is relying on to say that she is eligible for PIP benefits. In *Kelty*, the Court did not mention in its analysis the language in the initial part of 21 Del. C. §2118(a)(2)c., which provides PIP eligibility to claimants who are "occupying" an insured vehicle.

The *Kelty* Court in referring to only part of the relevant statute stated as follows:

> Section 2118(a)(2) [Section 2118(a)(2)c.] contains the PIP mandate, which requires insurance providing for [c]ompensation to injured persons for reasonable and necessary expenses" and provides, in relevant part, that "[t]he coverage required by this paragraph shall be applicable ...*to any other person injured in an accident involving [the insured] motor vehicle,* other than an occupant of another motor vehicle." *Kelty, supra,* p. 930.

Later in its opinion, the Court again quoted and relied on only part of the relevant statute:

> Section 2118(a)(2)(c) [Section 2118(a)(2)c.] determines the scope of PIP coverage. That statute provides that "[t]he coverage required by this paragraph shall be applicable to...any other person injured in an accident involving such motor vehicle, other than an occupant of another vehicle. *Kelty, supra,* pp. 930, 931.

However, the complete language of 21 Del. C. §2118(a)(2)c. that identifies all the available circumstances for PIP eligibility provides as follows:

> The coverage required by this paragraph shall be applicable **to each person occupying such motor vehicle and** to any other person injured in an accident involving such motor vehicle, other than an occupant of another motor vehicle. (Emphasis Added - the language in bold is what the Court in *Kelty* did not mention or use in its analysis).

The phrase not used by the *Kelty* Court, "each person occupying such motor vehicle...." (Emphasis Added) is part of Delaware's PIP mandate law and allows an individual such as Plaintiff, who is "occupying" an insured motor vehicle (the school bus) to qualify for PIP benefits. The Superior Court indicated that this argument by Plaintiff, "is not wholly without merit" (Defendant's Opening Brief, Exhibit A, p. 7).

Plaintiff contends that 21 Del. C. §2118(a)(2)c. requires her to only show that she was "occupying" the insured school bus in order to be eligible for PIP benefits. Therefore, the two prong *Kelty* test for PIP eligibility that the Defendant wants the Court to apply to the facts in this case is unnecessary, unless there is a reason to not give a plain reading and interpretation to the language of 21 Del. C. §2118(a)(2)c. To date, the Defendant has not provided any such reason. Therefore, Plaintiff asks this Court to rely upon the initial phrase found in 21 Del. C. §2118(a)(2)c., that the *Kelty* Court never used or mentioned ("...coverage...shall be applicable to each person occupying such motor vehicle..." (Emphasis Added), along with Plaintiff's other arguments made herein, and affirm the Superior Court's decision granting Summary Judgment against Defendant. For all the reasons stated herein, Plaintiff was clearly occupying the insured school bus at the time she was injured, and as such under 21 Del. C. §2118(a)(2)c. mandates that Plaintiff is eligible for PIP benefits.

ARGUMENT II

II. IF THIS COURT DECIDES TO APPLY THE TWO PRONG *KELTY* TEST TO THE PLAINTIFF'S CASE, PLAINTIFF HAS SATISFIED BOTH PRONGS OF THE TEST AND IS ELIGIBLE FOR PIP BENEFITS.

A. QUESTIONS PRESENTED

1. Was the insured school bus an active accessory in causing Plaintiff's injury?

2. Did an act of independent significance occur that broke the causal link between using the insured school bus and the injuries to the Plaintiff?

B. SCOPE OF REVIEW

Plaintiff agrees with and adopts the Scope of Review set forth in Defendant's Opening Brief at pp. 23-24.

C. MERITS OF THE ARGUMENT

1. The insured school bus was an active accessory in causing Plaintiff's injuries.

If the Court decides to apply the *Kelty* two prong test, Plaintiff contends that she has satisfied both prongs of the test.

In addition to a person being eligible for PIP benefits by satisfying the "occupying" test of 21 Del. C. §2118(a)(2)c., the same statute also provides that PIP benefits are to be paid to "any other person injured in an accident involving such

[insured] motor vehicle..." (Emphasis Added). In Plaintiff's case, clearly the insured school bus was "involved" in the accident that caused Plaintiff's injuries. But for the school bus being present, there would not have been an accident.

As for the first prong of *Kelty*, the insured school bus was an active accessory in causing Plaintiff's injury. When examining the active accessory prong, courts require less than proximate cause in the tort sense, and something more than the vehicle being the mere situs of injury. *Kelty, supra*, at 932 (quoting *Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997). The active accessory prong is intended to prevent situations found in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 12 A. 3d, 1137, 1139 (Del. 2011). In *Campbell*, an individual was shot while sitting in a vehicle. Thus, the insured vehicle was the location of the injury, but the insured vehicle had a negligible impact on the events that caused that Plaintiff's injuries. *Kelty, supra,* at 399.

In Plaintiff's case, the school bus was an active accessory and clearly had an impact on events that caused Plaintiff's injuries. If the school bus had not been present, Plaintiff would not have been present in the DANGER ZONE when she was injured, and the accident would not have occurred. Plaintiff was present in the DANGER ZONE at the time she was injured because she had been directed by the school bus driver to enter the bus, who was sitting inside the insured school bus, and

according to the DOE Handbook, had the authority of a teacher in a classroom (Plaintiff App. A15). Plaintiff, the school bus, and the school bus driver were "...bound together legally and practically in a special, exigent relationship from the moment the bus stops and signals until the child is safely aboard". *Westerfield, supra,* at 600.

The insured school bus, by way of the school bus driver and the State designated DANGER ZONE, was an active accessory to Plaintiff's injuries and was "involved" in the following ways: (1) Plaintiff was safely on the shoulder of the roadway until the school bus driver instructed her to leave the safe area; (2) the school bus driver stopped the school bus on a roadway and shoulder of the roadway in front of Plaintiff's home for the sole purpose of having the Plaintiff enter the bus; (3) the State designated DANGER ZONE perimeter was within a reasonable geographic perimeter of the school bus; (4) the amber and red colored blinking warning lights were activated on the school bus by the school bus driver; (5) the safety guard near the front bumper of the school bus was extended by the school bus driver causing Plaintiff to take a certain path to the school bus that was determined by the location of the safety guard and the school bus; (6) the school bus door was opened by the school bus driver to allow Plaintiff to enter the school bus; and (7) the school bus intercom was used by the school bus driver to give oral instructions to

Plaintiff to leave the safety of the shoulder of the road and begin the process of entering the school bus through the DANGER ZONE. The school bus driver agreed that this accident would not have occurred but for the school bus being present (Defendant App. A-415).

For all of the reasons stated hereinabove, and in Plaintiff's Argument III hereinafter, the school bus in this case was an active accessory in causing Plaintiff's injuries.

2. An act of independent significance did not occur so as to break the causal link between using the insured school bus and the injuries to Plaintiff.

The second prong of the *Kelty* test involves determining if an act of independent significance occurred that broke the causal link between using the insured vehicle and the injuries to the PIP claimant. *Kelty*, *supra*, at 935. Plaintiff was "entering" the school bus, which made her an "occupant" of the school bus (Plaintiff incorporates herein all previous arguments, and Argument III hereinafter, regarding "entering" the school bus, and being an "occupant" of the school bus). Therefore, for PIP eligibility purposes, Plaintiff is an occupant of the school bus throughout the entire "entering" process, including moving from the safe shoulder of the road after receiving instructions to do so from the school bus driver, and while walking through the DANGER ZONE while entering the school bus. It is reasonable

to assume that the Defendant contemplated extending insurance coverage to students such as the Plaintiff for injuries occurring in the DANGER ZONE. as this area is within a reasonable geographic perimeter of the school bus. The DANGER ZONE is an area extremely important to the Delaware Department of Education, as well as the Delaware Department of Transportation. Both State agencies either issued or approved Regulations, a Handbook, and a CDL Manual that included instructions and requirements related to school bus drivers and students entering/boarding and exiting school buses in Delaware. It is reasonable to believe that the Defendant insurance company, knew or should have known about the State designated DANGER ZONE and related requirements for school bus drivers. Additionally, the Defendant, who drafted the relevant insurance policy, included in the policy the term "entering" as part of the definition of the word "occupying". (Defendant App. A-460). If Defendant did not want to provide coverage for students outside of a school bus when they are in the process of entering a school bus, it should have clearly stated such an exclusion in it's insurance policy. In this case, the Defendant did not do so. Any ambiguity in the meaning of the language in the insurance contract should be decided against the Defendant and in favor of the Plaintiff, who had no part in drafting the relevant insurance contract. Plaintiff and Plaintiff's parents had a reasonable expectation that Plaintiff would be insured if she was entering the school bus.

(Defendant App. A453-485). *Ruggerio v. Montgomery Mut. Ins. Co.*, 2004 WL 1543234 (Del. Super); *Bermel v. Liberty Mut. Fire Insur. Co.*, 56 A.3d 1062 (Del. 2012).

Defendant has argued that the negligence of both the driver who struck Plaintiff, and the Plaintiff herself, are acts of independent significance which break the causal link between the insured school bus and the Plaintiff. But, these are allegations of foreseeable negligence, and are not criminal or intentional acts, that can clearly break the causal link. *Kelty, supra* at 933. The superceding nature of an accident in intentional and criminal conduct is based on the lack of forseeability of the conduct. As the Superior Court determined,

> "If the Court were to adopt a standard that excluded PIP coverage where there was a negligent tortfeasor, it would eviscerate PIP coverage in many instances."(Defendant's Opening Brief, Exhibit A, pp. 15-16).

And,

> "Defendant's proffered standard would provide for no PIP coverage in any circumstances where there was a negligent third-party tortfeasor." (Defendant's Opening Brief, Exhibit A, p. 16).

A motorist crashing into a student outside of a school bus is a foreseeable and an obvious risk for the Defendant when selling insurance coverage to school bus companies. By selling insurance policies to school bus companies, the Defendant has the responsibility of knowing about the State designated DANGER ZONE as it

relates to students entering/boarding and exiting school buses. Therefore, the Defendant's argument that the motorist who struck the Plaintiff broke the casual link between the school bus and Plaintiff's injuries must be rejected. The Court in *Westerfield* and the majority of court's deciding cases involving school bus and student injury cases have decided that the causal link includes the entire process involving the dangerous situation of entering a school bus, and the relationship between the injured student, the school bus, and the school bus driver. *Westerfield, supra,* at 605-606. The motorist striking the Plaintiff was a foreseeable event, and not some superceding unanticipated cause of injury, as can be found in an intentional tort or in criminal activity.

Plaintiff contends that in school bus "entering" and "exiting" cases, a reasonable application of the second prong of the *Kelty* test does not require that the school bus physically cause Plaintiff's injuries or come into contact with Plaintiff. Plaintiff contends that in addition to mandating PIP benefits for persons "occupying" an insured vehicle, 21 Del. C. §2118(a)(2)c. also establishes PIP eligibility to persons injured in an accident "involving" the insured vehicle. The term "involving" does not require actual physical contact before a person is eligible for PIP benefits. The purpose of the school bus being present to pick Plaintiff up, its location, and the fact that Plaintiff was "occupying" the school bus while "entering" it throughout the entire

DANGER ZONE perimeter involves the school bus in the accident, and these facts do not allow the causal link between the school bus and Plaintiff's injuries to be broken by the motorist striking the Plaintiff within the DANGER ZONE. Furthermore, Plaintiff asks the Court to adopt the type of analysis used in "entering" and "exiting" school bus cases used by the *Westfield* court, and the majority of other courts, as will be explained in more detail in Plaintiff's Argument III.

Plaintiff has satisfied both prongs of the *Kelty* test, and the Opinion of the Superior Court to enter Summary Judgment against the Defendant should be affirmed.

ARGUMENT III

III. THE RELATIONSHIP OF THE PLAINTIFF, SCHOOL BUS AND SCHOOL BUS DRIVER AS PART OF A PROCESS THAT PROTECTS STUDENTS ENTERING AND EXITING SCHOOL BUSES IN DELAWARE, AND STATE REGULATIONS, HANDBOOKS AND THE CDL MANUAL, MUST BE CONSIDERED WHEN PIP ELIGIBILITY IS QUESTIONED BASED ON OCCUPANCY OF A VEHICLE IN CASES RELATED TO INJURED STUDENTS ENTERING AND EXITING SCHOOL BUSES.

A. QUESTIONS PRESENTED

1. When deciding whether a student is entering and occupying a school bus for PIP eligibility purposes, should courts take into consideration the special relationship between the student, the school bus driver and the school bus, the relevant State CDL Manual, Handbook, and State regulations related to school bus drivers and boarding students?

B. SCOPE OF REVIEW

Plaintiff adopts the Scope of Review set forth in Defendant's Opening Brief at pp. 23-24.

C. MERITS OF ARGUMENT

1. **The relationship of the Plaintiff, school bus and school bus driver as part of a process that protects students entering and exiting school buses in Delaware, and State Regulations, Handbooks and the CDL Manual, must be considered when**

PIP eligibility is questioned based on occupancy of a vehicle in cases related to injured students entering and exiting school buses.

This is an important case and is one of first impression in Delaware that will determine the PIP benefits eligibility threshold for school children in Delaware who, after being instructed by a school bus driver to enter the DANGER ZONE, are injured inside the DANGER ZONE while entering and exiting a school bus.

Entering and exiting school buses are dangerous situations for students of all ages. The process of entering or exiting a school bus is physically unlike the process that takes place in the operation of an automobile, and there are regulations, a DOE Handbook and the CDL Manual that cover school bus situations, so case law involving just automobiles may have limited relevancy.

Delaware has applicable regulations and standards related to school bus drivers, students, and the rules to be followed when having the students enter school buses. Therefore, Plaintiffs asks this Court to adopt a specific analysis in cases involving school buses and injured students when determining who is occupying a school bus, and who is or is not eligible for PIP benefits. The Court is not being asked to create a new public policy. The statutes, regulations, a DOE Handbook and the State's CDL Manual are already in place, and these sources can be used by the Court to outline a process to determine whether a student is occupying a school bus

for PIP eligibility purposes, when they are injured while passing through the State designated DANGER ZONE at a school bus driver's instruction.

The process of having school children of all ages throughout Delaware entering and exiting school buses safely, which is repeated thousands of times each school day, is the subject of many laws, regulations, a DOE Handbook and the State CDL Manual, with one goal in mind - to provide for the safety of school children in Delaware. There are also other statutes specifying the location, colors and sequencing of flashing warning lights on school buses as students enter and exit (See 21 Del. C. §4166(b)(1)-(4)), and statutes requiring school bus drivers to report violations, and statutes requiring offenders to face substantial fines, loss of license and jail terms (See 21 Del. C. §4166 (f)-(i)):

> Hence, a child who crosses a typical two lane roadway while entering into an immobile signalized school bus is guarded from harm by a legal cordon during the entire time she is traversing the roadway. She and her parents are entitled to rely for her safe passage upon the motorist's observance of the safety zone and the bus driver's performance of his duty to activate highly visible signals, await the child's safe boarding and report any motorist violation of the legally protected entryway....
>
> ...The process by which a child crosses an open highway to board a school bus is charged with danger. Accordingly, the legislature has enacted the most stringent provisions feasible to safeguard the entire operation. The child, the bus and the bus driver are constituents of this process, bound together legally and practically in a special, exigent relationship, from the moment the bus stops and signals until the child is safely aboard. Because parties entering contracts of insurance on school buses should be and probably are aware of all these matters, it

reasonably may be inferred that they intend "entering into" a school bus to include the entire typical process by which a child transverses a roadway to a safe place within the bus. (Emphasis Added). *Westerfield v. LaFleur*, 493 So.2d 600 (1986); 59 A.L.R. 4th 139, 34 Ed.Law Rep. 1270 (The Court rejected State Farm's argument that a child was not "occupying" or "entering" a school bus at the time the child was killed by a motorist 15 feet from the bus). For examples of Courts acknowledging the dangerous process surrounding students "exiting" school buses and extending underinsured coverage see *Kantola v. State Farm Insurance*, 405 N.E. 2nd 744, 746 (Ohio Misc. 1979), *Etter v. Travelers Insurance Cos.*, 657 N.E.2d 298, 3020303 (Ohio Ct. App. 1995), *Olsen v. Farm Bureau Insurance Company*, 609 N.W. 2d 644, 670-71 (Neb. 2000), *State Farm Mutual Insurance Company v. Holmes*, 333 S.E.2d 917, 918 (Ga. Ct. App. 1985), *Nelson v. Iowa Mutual Insurance Company*, 515 P.2d 362, 364 (Mont. 1973). For further analysis see attached article on the creation of safety zones around buses and extending insurance coverage: Court Finds That a Minor Hit By A Drunk Driver Is An Occupant Of His School Bus For Underinsured Motorist Coverage Purposes, New Hampshire Bar Journal, Fall 2013/Winter 2014 (Plaintiff's App. B1-B5).

Therefore, in Delaware, as in other states, there is a comprehensive regulated process at work that is aimed at providing for the safety of children entering and exiting school buses. Risk of injury in the school bus context is not limited to "inside" the school bus. There is more risk of injury in areas outside the school bus, and when accidents occur outside the school bus, they frequently result in death or serious injury, as fast moving steel collides with fragile unsuspecting children, who were following the instructions of the school bus driver. According to the Delaware Department of Education, more than half of the children killed each year in school

bus related accidents are killed in the DANGER ZONE (Plaintiff App. A24). The Defendant is one of the largest insurance companies in the world and surely knew or should have known about these risks. It is reasonable to believe that in this case, the Defendant intended to insure risks happening while a student enters or exists a school bus and while in the DANGER ZONE, and not just inside the school bus. Otherwise, Defendant would have specifically excluded injuries occurring outside the bus from coverage, or specifically state in its policy that is was only covering students injured "inside" the school bus. The No Fault coverage language in the Defendant's insurance policy defines who is "occupying" the school bus, and that definition includes students "in", "on", "entering" or "exiting" [a school bus]. (Defendant App. A460). Fortunately for many children and their parents in other states, the majority of courts have found coverage in cases where "entering" a school bus is in issue. For example:

> "...reasoning that state statutes mandate the protection measures of a bus and thus, a student injured while using those protective measures is clearly still in the process of getting on or getting off of the bus" (*Westerfield, supra,* at 605-606).

For all the reasons stated herein, the decision of the Superior Court should be affirmed.

CONCLUSION

The Defendant is asking this Court to narrow the scope of its financial exposure toward Plaintiff, and thus all students in Delaware who are transported by school buses, by arguing that Plaintiff was not "occupying" the school bus, that she was not "entering" the school bus, and that while Plaintiff was in the State designated DANGER ZONE, she was not within a "reasonable geographical perimeter" of the insured school bus. These arguments must be rejected by the Court for all the reasons stated herein, and the decision of the Superior Court should be affirmed.

Respectfully submitted,

BARROS, MCNAMARA, MALKIEWICZ
& TAYLOR, P.A.

BY: /s/ Michael J. Malkiewicz

MICHAEL J. MALKIEWICZ, ESQUIRE
BAR ID No. 2093
2 W. Loockerman Street
P.O. Box 1298
Dover, DE 19903
Telephone: (302) 734-8400
Fax: (302) 734-8969
Attorney for Plaintiff Below-Appellee

DATED: December 7, 2015