IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal of a Superior Court decision dated February 21, 2012, in the case of *Matthew Kelty v. State Farm Automobile Insurance Company*, C.A. No. 10C-08-246 WCC.[1] The Plaintiff Below-Appellant is Matthew Kelty (hereinafter, "Kelty"). The Defendant Below-Appellee is State Farm Automobile Insurance Company (hereinafter, "State Farm"). The decision below followed a hearing concerning State Farm's Motion for Summary Judgment. Plaintiff filed suit alleging State Farm breached its contract with Plaintiff by failing to pay personal injury protection ("PIP") benefits. State Farm filed for Summary Judgment alleging that because the accident in question did not arise out of the "maintenance or use of a motor vehicle" State Farm was not responsible for providing PIP benefits. Kelty responded that the accident did in fact occur as a result of the use of motor vehicle, and therefore State Farm breached its contractual obligation by not providing PIP benefits.

On December 14, 2011, the Superior Court heard oral argument on the motion. At the close of the argument, the Court reserved decision. By written decision dated February 21, 2012, the Court granted State Farm's Motion for Summary Judgment, holding that Kelty did not satisfy the third prong of the *Klug* test because the motor vehicle was not being used for transportation purposes at the

[1] A copy of the decision is attached as hereto as Exhibit A.

time of the accident. Kelty filed a timely Notice of Appeal with this Court on March 8, 2012. This is Kelty's Opening Brief on Appeal, seeking reversal of the Superior Court's decision.

SUMMARY OF ARGUMENT

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

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

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

STATEMENT OF FACTS

On August 3, 2008, Kelty suffered injury while in the process of "topping" two large trees located on the premises of Kelty's mother-in-law, and her husband John Lovegrove ("Lovegrove"). (A85). Topping is where the top of a tree is removed, along with many of the tree's branches. (A85). Lovegrove directed Kelty as to how to top the trees. (A91-92). Lovegrove also assisted Kelty in topping the trees. (A91).

Kelty climbed one of the trees and attached a 150 foot rope to one of the branches. (A92). The other end of the rope was tied to the hitch of Lovegrove's truck. (A98). Lovegrove then planned to drive the truck forward in an attempt to transport the tree branch from its location in the tree to a location on the ground without coming into contact with nearby power lines. (A92). Kelty would use his chainsaw in the tree, while Lovegrove operated the truck in order to transport the branch out of the tree and clear of the power lines. (A28, 34-35). Kelty and Lovegrove used the truck to transport other tree limbs from their location in the trees to a location on the ground prior to the accident in question. (A36-37).

Before the accident in question, yet while still in the process of topping the trees, Lovegrove was involved in an argument with his wife. (A92). Subsequent to the argument, while the truck was attached via the rope to the next tree branch to

be cut and transported, Lovegrove got into the truck, slammed the door and, "stomped on the gas like a wild man." (A93). Because Lovegrove depressed the gas pedal with too much force, the rear tires of the truck spun out, while moving the truck forward at approximately 3 to 4 miles per hour. (A101). While Lovegrove was pulling the branch away from the power lines, Kelty began cutting the branch with a chainsaw. (A102-103). As Lovegrove was transporting the branch away from its location in the tree to a location on the ground, the rope snapped as a result of Lovegrove's applying too much pressure to the gas pedal of the truck.(A102-103) The increased force on the rope from the pulling force of the truck caused the branch that was attached to the rope to snap back and knock Kelty out of the tree. (A103). Kelty fell approximately 16 feet to the ground below, suffering injury to his right foot and ankle. (A124-125).

As a result of the injuries, Kelty filed a lawsuit against Lovegrove and in response to that filing, Lovegrove's insurer, State Farm on April 26, 2010, supplied answers to Form 30 interrogatories identifying both a homeowners and automobile liability policy that applied to the loss. (A229). On March 31, 2011, State Farm amended their Form 30 interrogatories to identify only the State Farm automobile liability policy as applicable to the loss. (A233). By way of letter dated April 1, 2011, counsel for State Farm indicated that the liability policy still applied to this incident, ostensibly, because it arose out of the ownership, maintenance or use of a

motor vehicle. (A235). Despite State Farm's open acknowledgement that Mr. Kelty's injuries arose out of the ownership, maintenance or use of a motor vehicle for purposes of the applicability of the automobile liability policy, State Farm filed a Motion for Summary Judgment on September 21, 2011 contending that Kelty was not entitled to PIP benefits pursuant to State Farm's policy because his injuries did not arise out of the ownership, maintenance or use of a motor vehicle. (A10)

ARGUMENT

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

A. Question Presented

Whether, Kelty's injuries arose from the ownership, maintenance or use of Lovegrove's vehicle. This issue was raised in the Plaintiff's Response to the Defendant's Motion for Summary Judgment and at oral argument on the Motion for Summary Judgment. (Ex. B at 8)

B. Scope of Review.

This is Kelty's appeal from the decision of the Court below on State Farm's motion for summary judgment. On an appeal from a summary judgment decision, this Court's scope and standard of review is one of *de novo* consideration.[2] "The entire record is reviewed, including the trial court's opinion."[3] If this Court determines that the court below's findings are wrong, the Court will draw their own conclusions as to the facts.[4]

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[2] *Wilson v. Joma, Inc.*, 537 A.2d 187, 188 (Del. 1988) (citing *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982)).
[3] *Id.*
[4] *Id.*

In this litigation, summary judgment may only be granted if State Farm demonstrates, on undisputed facts, that it is entitled to judgment as a matter of law.[5] In deciding State Farm's motion for summary judgment, the court below must not weigh evidence and accept that evidence which appears to have the greater weight.[6] "If it appears from the evidence there is any reasonable hypothesis upon which Kelty, as the non-moving party, may recover, the motion for summary judgment must be denied."[7]

C. Merits of Argument

In response to the Defendant State Farm's Motion for Summary Judgment, the Plaintiff, Matthew Kelty contended that the injuries he sustained arose out of the ownership, maintenance or use of a vehicle as delineated at 21 Del. C. §2118(a)(1). This position was predicated on the factual circumstances of the loss and their comportment with the standard annunciated by this Court for making such a determination.[8] First, the Plaintiff argued that the vehicle in question was an active accessory in causing the injury. Plaintiff's position was supported by the undisputed fact that vehicle in question was actively used to pull branches from the tree to a location on the ground in order to keep them from coming into contact

[5] *Id.* (citing *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718, 720 (Del. 1970)).
[6] *Id.* (citing *Continental Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969).
[7] *Id.*(citing *Vanaman*, 272 A.2d at 720).
[8] *Nationwide General Ins. Co. v. Royal*, 700 A.2d 130 (Del. 1997).

with electrical wires. Second, the Plaintiff posited that there was an unbroken causal link between the use of the vehicle and the injury. To that end the Plaintiff argued that the rope used was not an active independent significance, it was both physically and metaphorically the causal link between the use of the car and the injury inflicted. Third, the Plaintiff argued that the vehicle in question was being used for transportation purposes.

In its Opinion dated February 21, 2012, the Superior Court held that the Plaintiff's first and second arguments regarding active accessory and independent significance were correct.[9] However, the Court held that the Plaintiff had failed to prove that the vehicle was used for transportation purposes. In order to make its determination, the Superior Court applied the *Klug*[10] Test.

By way of background, the analysis commences with an examination of 21 Del. C. §2118(a)(1) which provides:

> Indemnity from legal liability for bodily injury, death or property damages arising out of the ownership, maintenance or use of the vehicle to the limit, exclusive of interest and costs, of at least the limits prescribed by the Financial Responsibility Law of this State.

When determining whether an injury has arisen out of the ownership, use or maintenance of a motor vehicle, this Court and the Courts of this State apply the

[9] In light of the fact that there was no cross appeal, the focus of this section of the Plaintiff's argument is limited to the third prong of the *Klug* test.
[10] *Continental Western Ins. Co. v. Klug*, 415 N.W. 2d 876 (Minn. 1987).

standard articulated in *Klug*.[11] The purpose of the *Klug* test is to provide a **flexible** framework that takes into the [sic] account the circumstances of the injury and promotes the protection of innocent persons.[12] The three *Klug* factors are: (1) whether the vehicle was an "active accessory" in causing the injury or was merely fortuitous; (2) whether an act of independent significance broke the causal link between the use of the vehicle and the injuries caused; and (3) whether the vehicle was used for transportation purposes.[13] The Court below held as a matter of law that the undisputed facts before it did not satisfy *Klug* in full. (Exhibit A at 9). The only prong of *Klug* not satisfied was the third prong regarding whether the vehicle was used for transportation purposes.

As an initial matter, the tendency of courts interpreting individual motor vehicle insurance policy clauses, under compulsory insurance statutes, has been toward liberal construction in order to achieve the public policy objective of universal coverage.[14] Further, the fundamental purpose of Delaware's financial responsibility laws is to protect and compensate all persons injured in automobile accidents.[15] Section 2118 is entitled to liberal construction in order to achieve its

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[11] *Nationwide General Ins. Co. v. Royal*, 700 A.2d 130 (Del. 1997).
[12] *Bryant v. Progressive Northern Ins. Co.*, 2008 WL 4140686 (Del Super. Jul. 28, 2008). (emphasis added)
[13] *Carroll v. Nationwide Mutual Fire Ins. Co.*, 2008 WL 2583012 (Del. Super. Ct. Jun. 20, 2008) (citing *Royal*, 700 A.2d at 132).
[14] *Gray v. Allstate Ins. Co*, 668 A.2d 778 (Del. Super. 1995) (Citations omitted)
[15] *Id*.

purpose.[16] Finally, in the absence of statutory language permitting a contract policy exclusion of a non-contact injury from PIP coverage, such an exclusion in the case of a pedestrian is invalid in Delaware.[17] In light of the foregoing, it is Kelty's contention that the Court below has construed the third prong of the *Klug* test too narrowly, thereby undermining the overarching public policy purpose of compulsory insurance statutes.

To be sure, the issue and applicability of *Klug* has come before this Court before and the courts of many other jurisdictions, however, the *Klug* test and its progeny are overwhelmingly the product of the unfortunate rise of the crime of carjacking in the 1980s and 1990s and the implication of this crime on insurance coverage actions. The majority of cases regarding the *Klug* test turn on the second prong, with respect to criminal acts, usually involving guns. In light of this jurisprudence, in reaching its conclusions, the Court below relied on a Michigan Court of Appeals case with a strikingly similar fact pattern to the instant matter.[18] In relying on this Michigan case, the Court below stated:

> The [Michigan Court of Appeals] reasoned that the truck was used to maintain tension on the rope, and therefore, the 'plaintiff's injury was not closely connected to the function of the pickup as a transportation device.' The *Cesefski* court instead likened the use of the truck to the use of a tool. (Exhibit A at 8)

[16] *Id.*
[17] *Id.*
[18] *Cesefski v. State Farm Ins. Co.*, 2002 WL 1482790 (Mich. Ct. App. 2002).

Kelty respectfully submits that the Court below's reliance on *Cesefski* is misplaced for three important reasons: First, the *Cesefski* court was not analyzing the applicability Michigan's no-fault statute pursuant to the dictates of the *Klug* test. Kelty concedes that the Court below acknowledged the same, and that the *Cesefski* court does make mention of the truck being used for transportation purposes, however, the analysis is not being conducted under the rubric of *Klug*. Rather, the analysis is being conducted pursuant to the language of the Michigan no-fault statute. Further, there is no consideration or discussion of whether the *Cesefski* court is under the same or similar public policy considerations to achieve universal coverage as in Delaware. In fact, the *Cesefski* court discusses the intent of the legislature and concludes that the legislative intent in the Michigan no-fault statute was to restrict coverage:

> It is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g. as a housing facility of sorts, as an advertising display, as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum…It seems then that when we are applying the statute, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes.[19]

[19] *Id.*

Second, the *Cesefski* court's definition of "transport" is impossibly narrow. Black's Law Dictionary defines transport as, "To carry or convey from one place to another."[20] It appears manifest and undisputed under the facts of the instant matter or *Cesefski*, that the ultimate intent of the operator of the motor vehicle was not to maintain tension on a rope, but to transport a tree branch from a tree to the ground. In its Opinion of February 21, 2012 the Court below writes:

> Lovegrove's plan was to press the gas only as much as necessary to keep the rope taut. It did not matter to Lovegrove if the truck moved from Point A to Point B or remained at Point A in this process, so long as there was tension on the rope. (Ex. A at 7)

Respectfully, this conclusion is simply incorrect and under the facts of the instant matter, a taut rope was a mean, not an end. Lovegrove's plan was to remove or transport falling tree branches from a tree to a location on the ground without those branches coming into contact with power lines. (A28) To this end, Lovegrove employed and operated his motor vehicle. Were it not Lovegrove's intention to use his vehicle to transport the falling branches from their location in the trees, to a location on the ground, Kelty or any arborist could have simply cut the branches out of the tree without Lovegrove's assistance. Lovegrove used his truck to transport tree branches. As such, the vehicle was being used to transport goods

[20] Black's Law Dictionary 1344 (5th ed. 1979).

from one place to another, specifically, tree branches. Third and perhaps most importantly, the Michigan no-fault statute analyzed in *Cesefski* reads as follows:

> Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle **as a motor vehicle,** subject to the provisions of this chapter.[21]

The *Cesefski* court's analysis is predicated on the phrase, "use of a motor vehicle **as a motor vehicle**." Where a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether [the party's] construction is based on a permissible construction of the statute.[22] This Court construes statutes, "to give a sensible and practical meaning to a statute as a whole in order that it may be applied in future cases without difficulty.[23] Further, words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language.[24] The Delaware no-fault statute does not contain a limiting phrase like, "as a motor vehicle." Therefore, and in light of the foregoing the *Cesefski* court's analysis is fundamentally distinguishable and not persuasive.

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[21] *Cesefski v. State Farm Ins. Co.*, 2002 WL 1482790 (Mich. Ct. App. 2002). (emphasis added).
[22] *Brown v. State Board of Dental Examiners*, 1994 WL 315304 (Del. Super. Ct. May 23, 1994).
[23] *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 998 A.2d 425 (Del. 2010).
[24] 1 Del. C. §303.

As stated *supra*, there has been precious little analysis of the third prong of *Klug* particularly under facts where there is no underlying criminal act. To that end, the Delaware Superior Court, conducting an analysis pursuant to *Klug* wrote, "Because the car was being driven by the carjacker at the time of the injury, the vehicle was being used for transportation purposes."[25] While the facts before the Superior Court were clearly different, the point remains the same, because a car is being driven, it is being used for transportation purposes. This is a logical and reasonable conclusion and in the present matter, there is not a dispute that the car was being driven, ergo, the car was being used for transportation purposes and the third prong of *Klug* is satisfied. *Bryant* however, is not the only such case to address the third prong of *Klug*. In *Carroll*[26] the Court stated:

> Similarly, [the Plaintiff's] injuries satisfy the third factor of the *Klug* test because Cherry's truck transported him to the scene of the injury, thereby establishing a causal connection between the use of the vehicle and the assault.

A plausible interpretation of the Court's reasoning regarding the third prong of the *Klug* test in *Carroll* could read, "The third prong of the *Klug* test is satisfied where there is a causal connection between the use of the truck and injury suffered." In the instant matter, it is not disputed that there is a causal connection between the use of the truck and the injury suffered. Despite State Farm's protestations to the

[25] *Bryant*, 2008 WL 4140686 at *2.
[26] *Carroll*, 2008 WL 2583012 at *3.

contrary at oral argument, the truck was not merely a fungible placeholder that could have been replaced by a person. It was the force of the acceleration of the truck that set the chain of events in motion leading to Kelty's injuries. Thereby satisfying the third prong of the *Klug* test.

Unsurprisingly, the proliferation of carjacking and other crimes associated with the use of a car has not been limited to Delaware. In addressing the issues of insurance coverage presented by this troubling trend, many other states besides Delaware have adopted Minnesota's standard elucidated in *Klug*. However, one case in particular bears special attention as it is a case heard by the Minnesota Court of Appeals after *Klug* and addresses the third prong at length. As opposed to relying on the *Cesefski* court, Kelty respectfully suggests that this Court consider the Minnesota Court of Appeal's decision in *Motzko ex rel. Motzko v. State Farm Mutual Automobile, Ins. Co.*[27] The facts of *Motzko* are not too dissimilar to the instant matter with respect to the use of the trucks.[28]

After an argument about which trucks were stronger, Ford or Chevrolet, a group of individuals decided to test their hypothesis. In order to do so, they linked the rear of one truck to the rear of another truck via a ten foot chain and both trucks

[27] 2001 WL 1182356 (Minn. Ct. App. 2001).

[28] Kelty concedes the policy at issue in *Motzko* is a UIM policy, but for the purpose of this analysis the PIP and UIM policies have identical language regarding the ownership maintenance or use of a motor vehicle. Further, for the purposes of this entire matter, it is Kelty's contention that PIP and UIM policies are indistinguishable for purposes of third prong *Klug* analyses.

drove in opposite directions to determine which truck was stronger. During the contest, the chain broke and caused an accident that resulted in the death of one of the drivers of the trucks. One of the issues before the Minnesota trial court was whether the trucks were being used for transportation purposes pursuant to *Klug*. In determining that the truck was being used for transportation purposes and that the third prong of *Klug* was satisfied, the Minnesota Court of appeals wrote:

> State Farm contests only the third prong of the *Klug* test, arguing that at the time of the incident [the driver] was not using his vehicle as a motor vehicle but rather as 'an instrumentality in a dangerous and illegal contest.' State Farm essentially argues that [the driver] was using his vehicle as a weapon, not as a mode of transportation.
>
> The use of a motor vehicle in a dangerous and illegal manner does not necessarily preclude its contemporaneous use for transportation purposes. Driving a car at an excessive speed and weaving in and out of traffic are dangerous and illegal uses of a motor vehicle. But the car is still being used to transport the driver. Using an ordinary passenger car to tow or push a disabled vehicle, although perhaps not illegal, are arguably dangerous activities and yet are still within the constellation of motoring activities known as transportation. The common meaning of 'transport' is to carry from one place to another; convey. The truck pulling contest involved the carriage or conveyance of both trucks and their drivers from one position on the road to another through the motorized operation of [the driver's] truck…Motoring uses are within the contemplation of the insurance policy…The truck pulling contest was a motoring or transportation use and not a mere situs of injury.[29]

[29] *Motzko*, 2001 WL 1182356 at *4 (internal citations omitted).

What the *Motzko* Court makes apparent is that the motorized operation of a vehicle, to move an item from one position to another, whether it be a person, a truck or a tree branch, makes that use for transportation purposes. In the matter *sub* judice, the Court below erroneously considered Lovegrove's intent, "It did not matter to Lovegrove if the truck moved from Point A to Point B or remained at Point A in this process, so long as there was tension on the rope." (Ex. A at 7). Nowhere in any analysis of the *Klug* test's third prong is intent a prerequisite. Further, as a practical matter, what mattered to Lovegrove, the entire impetus for his actions, was that the branches of the tree in question were transported from their location in the tree, to a location on the ground, without striking the overhead wires, and Lovegrove chose to use his vehicle to effectuate that transportation, perhaps unwisely, but as noted in *Motzko*, the sagacity of the decision is immaterial to the determination of whether the third prong of *Klug* is satisfied. In the instant matter, the Court below makes a strikingly similar statement, that Lovegrove's use of the truck was more akin to the use of a tool. (Ex. A at 8). Kelty respectfully submits that the use of the truck as a tool does not preclude its use for transportation purposes, in fact, a truck is rather specifically designed to be both a tool and a means of transportation.

Other jurisdictions have similarly reached conclusions that are inapposite to the holding of the Court below when considering the third prong of the *Klug* test.

Most courts look at the "use" provision contained in insurance contracts or statutory provisions broadly. Texas courts define use broadly; the phrase 'arising from use' is treated as being a general catchall designed and construed to include all proper uses of the vehicle not falling within other terms of definition.[30] The consideration most regularly examined to determine use is whether, "the vehicle at issue is only the locational setting for an injury, the injury does not arise out of any use of the vehicle."[31]

The Supreme Court of New Mexico has reached the same conclusion as the United States Court of Appeal for the 5th Circuit.

> Finally, the court must consider whether the 'use' to which the vehicle was put was a normal use of that vehicle. For example, transportation would be a normal use, whereas use of a parked car for a gun rest would not be.[32]

As implicated by reference *supra*, it does not take a great stretch of intellect to conclude that transporting tree branches is precisely the type of use that is contemplated in the design and manufacture of a pick-up truck. Towing, hauling, removing and pulling items are essential design elements of a pick-up truck. One need only watch a Sunday afternoon NFL football game and nearly every

[30] *Lincoln General Ins. Co. v. Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006).
[31] *Id.*
[32] *Britt v. Phoenix Indemnity Ins. Co.*, 120 N.M. 813 (N.M. Supr. Ct. 1995).

commercial break will feature an advertisement extolling the virtues of these design elements and normal uses of a pick-up truck. Frankly, at this point, it has become classic Americana. As such, under the Supreme Court of New Mexico's standard, Lovegrove's use of the truck to transport tree branches from the tree, to the ground is a normal use.

In a refinement of the *Klug* test, the Minnesota Court of appeals stated that where a tortfeasor maneuvered his car into a position to cause injury, then that was a use for transportation purposes in satisfaction of the third prong of the *Klug* test.

> In *Klug*, the tortfeasor chased and rammed the victim's car, ultimately wounding the victim by firing a shotgun from his moving car. The supreme court concluded the victim's injuries arose from the use of the car for motoring purposes. The court reasoned the tortfeasor used his car to drive beside the victim and maneuver into a position to shoot. Similarly, [the tortfeasor in the instant matter] used the Cadillac as a means to maneuver into a position to injure his wife.[33]

In the matter *sub judice* Lovegrove had to maneuver his truck into a position to fasten the rope to the truck and the branch in order to injure Kelty. While the Minnesota case *Wilson* deals with an intentional maneuver, *Klug* does not as the tortfeasor in *Klug* was ultimately determined to be mentally ill. Therefore, whether Lovegrove had any intention of injuring Kelty is immaterial, what matters is that

[33] *Wilson v. State Farm Mut. Auto. Inc. Co.*, 451 N.W. 2d 216 (Minn. Ct. App. 1990).

he maneuvered his car to a position to facilitate, albeit unintentionally, the injuries sustained by Kelty.

In light of the foregoing, Kelty respectfully submits that it is manifest that Lovegrove was using his truck for transportation purposes within the auspices of the third prong of the *Klug* test.

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

A. Question Presented

Whether the Superior Court committed reversible error by failing to acknowledge as a matter of law, the Plaintiff's status as a pedestrian. This issue was raised at oral argument on the Defendant State Farm's Motion for Summary Judgment. (Ex. B at 5).

B. Scope of Review

This is Kelty's appeal from the decision of the Court below on State Farm's motion for summary judgment. On an appeal from a summary judgment decision, this Court's scope and standard of review is one of *de novo* consideration.[34] "The entire record is reviewed, including the trial court's opinion."[35] If this Court determines that the court below's findings are wrong, the Court will draw their own conclusions as to the facts.[36]

In this litigation, summary judgment may only be granted if State Farm demonstrates, on undisputed facts, that it is entitled to judgment as a matter of

[34] *Wilson v. Joma, Inc.*, 537 A.2d 187, 188 (Del. 1988) (citing *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982)).
[35] *Id*.
[36] *Id.*

law.[37] In deciding State Farm's motion for summary judgment, the court below must not weigh evidence and accept that evidence which appears to have the greater weight.[38] "If it appears from the evidence there is any reasonable hypothesis upon which Kelty, as the non-moving party, may recover, the motion for summary judgment must be denied."[39]

C. Merits of Argument

In granting Defendant State Farm's Motion for Summary Judgment the Court held, "As a result, the Court find[s] [*sic*] that Kelty's injuries did not arise from the ownership, maintenance, or use of Lovegrove's vehicle, and State Farm's Motion for Summary Judgment is hereby granted. This holding renders moot the remaining issues addressed by the parties." (Ex. A at 9).

21 Del. C. §2118(a)(2)(c) states:

> 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)

[37] *Id.* (citing *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718, 720 (Del. 1970)).
[38] *Id.* (citing *Continental Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969).
[39] *Id.*(citing *Vanaman*, 272 A.2d at 720).

The plain language of the statute emphasized above creates a separate inquiry that is not subsumed by the Court's determination pursuant to 21 Del. C. §2118(a)(1).[40] The clauses pertaining to the motor vehicle in §2118(a)(1) and §2118(a)(2)(c) are distinct and Plaintiff Kelty respectfully submits that they should have differing interpretations.[41] Whereas §2118(a)(1) references injuries arising out of ownership, maintenance or use of the vehicle, §2118(a)(2)(c) only requires a determination that injuries were sustained in an accident **involving** [a] motor vehicle. The foregoing distinction is more than semantic because §2118(a)(2)(c) covers injuries sustained by a pedestrian in light of Delaware's public policy towards universal coverage.[42] Whereas the language of §2118(a)(2)(c) has been interpreted by Courts to require a showing that the injury occurred by virtue of the inherent nature of using a motor vehicle, this is a different and distinct determination from the inquiry pursuant to §2118(a)(1) discussed *supra*.

The language of the policy in issue is also telling. The pertinent language in the PIP policy reads:

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[40] See Generally, *Gray*, 668 A.2d at 779.

[41] Plaintiff Kelty concedes that Courts have previously held the language of §2118(a)(2)(c) to mean, "While a causal connection between use of the vehicle and the injury is required, there is no requirement to show that the injury was proximately caused by the use of the automobile. Rather, the showing must be that the injury occurred by virtue of the inherent nature of using the motor vehicle. *Gray*, 668 A.2d at 780 (citing *Dickerson v. Continental Casualty Co.*, C.A. No. 82C-MR-9, Poppiti, J. (Sept. 1, 1983).

[42] *Gray*, 668 A.2d at 779.

> We will pay in accordance with Subchapter 1, Chapter 21, Title 21, of the Delaware Code for bodily injury to an insured caused by accident resulting from the maintenance or use of a motor vehicle. (A214).

The language of the policy vaguely mirrors the language of §2118(a)(1) but is wholly different from the language in §2118(a)(2)(c) inasmuch as in the former the injuries must arise out of use or maintenance, but the policy does not follow the latter which only requires that a pedestrian be injured in an accident involving a motor vehicle. As such, the language of the statute should control.

On several occasions the Courts of this state have discussed the causal nexus between an injury and an automobile accident which is required to trigger coverage under §2118(a)(2)(c).[43] As in *Gray*, the Court below in the instant matter was faced with a threshold determination of whether plaintiff was injured in an accident involving [a] motor vehicle pursuant to §2118(a)(2)(c). However, unlike in *Gray*, the Court below failed to make the determination pursuant to §2118(a)(2)(c) and stopped its inquiry once it determined that Plaintiff Kelty was not eligible for PIP benefits pursuant to §2118(a)(1).

Because State Farm contests Kelty's status as a pedestrian, the proper analysis is under §2118(a)(2)(c).[44] Further, assuming *arguendo* that this Court accepts Defendant State Farm's position that Kelty is neither a pedestrian nor an

[43] *Gray*, 668 A.2d at 780.
[44] *Gray v. Allstate Ins.*, 941 A.2d 1018 (Del. 2007).

occupant then only one result is plausible. When faced with this same conundrum, of trying to determine what a party was if they are neither a pedestrian nor an occupant of a vehicle the Delaware Superior Court held that, "[Any] exclusion of coverage to persons injured in an in an accident involving a motor vehicle, but who are neither occupants nor pedestrians is inconsistent with the purpose of Delaware's no-fault statute – "'to protect and compensate all persons injured in automobile accidents.'"[45]

In light of the foregoing, irrespective of the Court below's determination regarding the applicability of §2118(a)(1), a determination should have been made to determine whether, as a pedestrian (or not) pursuant to §2118(a)(2)(c) as such determination is also issue dispositive.

[45] *Wisnewski v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 697945 (Del. Super. Ct. Feb. 14, 2005).

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

A. Question Presented

Whether State Farm is precluded from denying Personal Injury Protection benefits to Kelty when, pursuant to the same policy of insurance and same accident, State Farm made a liability payment to Kelty. This issue was raised at oral argument on State Farm's Motion for Summary Judgment. (Ex. B at 13).

B. Scope of Review

This is Kelty's appeal from the decision of the Court below on State Farm's motion for summary judgment. On an appeal from a summary judgment decision, this Court's scope and standard of review is one of *de novo* consideration.[46] "The entire record is reviewed, including the trial court's opinion."[47] If this Court determines that the court below's findings are wrong, the Court will draw their own conclusions as to the facts.[48]

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[46] *Wilson v. Joma, Inc.*, 537 A.2d 187, 188 (Del. 1988) (citing *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982)).
[47] *Id*.
[48] *Id.*

In this litigation, summary judgment may only be granted if State Farm demonstrates, on undisputed facts, that it is entitled to judgment as a matter of law.[49] In deciding State Farm's motion for summary judgment, the court below must not weigh evidence and accept that evidence which appears to have the greater weight.[50] "If it appears from the evidence there is any reasonable hypothesis upon which Kelty, as the non-moving party, may recover, the motion for summary judgment must be denied."[51]

C. Merits of Argument

State Farm accepted liability in regard to the third party case against Mr. Lovegrove and paid the policy limits pursuant to the automobile liability insurance policy on the truck Mr. Lovegrove was using to transport tree branches at the time to the accident. (Ex. B at 13). The language of the State Farm's liability insurance policy is identical to the language of State Farm's PIP policy in that both policies will only pay benefits for an incident arising out of the ownership, maintenance or use of a motor vehicle. By tendering it's liability policy limits, State Farm functionally admitted that the incident in question arose out of the ownership,

[49] *Id.* (citing *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718, 720 (Del. 1970)).
[50] *Id.* (citing *Continental Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969).
[51] *Id.*(citing *Vanaman*, 272 A.2d at 720).

maintenance or use of the truck, yet State Farm now takes the opposite position with regard to the PIP case. In doing so, State Farm has breached its duty to act in good faith and should be precluded from now asserting the polar opposite position with respect to PIP benefits that are derived pursuant to the exact same contract of insurance as the liability benefits were paid from.

As a factual matter, State Farm was aware of the potential for liability exposure under both the homeowner's policy and automobile liability policies they issued to Mr. Lovegrove. State Farm's knowledge is evidence in their Answers to Form 30 Interrogatories response number 6, wherein State Farm lists both policies as being applicable to this loss. (A230) Nearly a year later, ostensibly after State Farm had ample opportunity to investigate the facts of the loss, they chose to amend their Form 30 interrogatory responses to list only the automobile liability policy. (A233). Additionally, counsel for State Farm wrote a letter indicating that the automobile liability policy still applied to this loss. (A235). It is indisputable that in order for the automobile liability policy to apply, there must be an injury, "caused by accident resulting from the ownership, maintenance or use of your car." (A212). Because State Farm conceded that the liability policy was applicable, they are also conceding that this loss was caused by an accident resulting from the ownership, maintenance or use of a car.

State Farm is required to act in good faith when determining whether to pay Kelty PIP benefits arising out of the August 3, 2008 accident.[52] The implied covenant of good faith attaches to every contract, including contracts of insurance.[53] The obligation of good faith "is the obligation to preserve the spirit of the bargain rather than the letter, the adherence to substance rather than form."[54] The implied covenant of good faith and fair dealing requires that the insurer act in a way that honors the insured's reasonable expectations.[55] For an insured who reads their contract and notes that payments under both Section 1 and Section 2 are predicated upon injury resulting from ownership maintenance or use for Section 1 and maintenance or use for Section 2, it would be a reasonable expectation that the same insurance company would not assert that a car was used pursuant to Section 1 but not pursuant to Section 2. (Compare A214 & A212). The implied covenant of good faith requires the insurer to "refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[56] State Farm's contradictory approach in the liability and PIP cases is an arbitrary and unreasonable position. With the exact same facts and

[52] *Dunlap v. State Farm Fire & Cas. Co*., 878 A.2d 434, 441-442 (Del. 2005)
[53] *Id*.
[54] *Pierce v. Int'l Ins. Co. of Illinois*, 671 A.2d 1361, 1366 (Del. 1996) citing 3A *Corbin on Contracts* § 654A (1994).
[55] *Id.* at 44.
[56] *Id*. citing *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del.Ch.1985).

nearly identical policy language in both cases, State Farm's current position can be defined as nothing other than an attempt to prevent Kelty from receiving the PIP benefits that it has essentially already admitted he is entitled to receive. To allow State Farm to take the position that the incident did not occur out of the ownership, maintenance or use of the motor vehicle in the instant cases would allow State Farm to breach the implied covenant of fair dealing.

Accordingly, and in light of the foregoing, Kelty respectfully requests that State Farm be precluded from denying PIP benefits on the grounds that to do so would constitute a breach of the implied covenant of good faith and fair dealing.

CONCLUSION

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

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