IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LESLIE K. HATCHER, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	)	C.A. No. N15C-12-011 CLS

Date Submitted: September 20, 2016
Date Decided: November 29, 2016

On Defendant State Farm Mutual Automobile Insurance Company's Motion for Summary Judgment. **GRANTED**.

ORDER

Renee J. Leverette, Esquire, Weik, Nitsche & Dougherty, Wilmington, Delaware, Attorney for Plaintiff.

Reneta L. Green-Streett, Esquire, Young & McNelis, Dover, Delaware, Attorney for Defendant State Farm Mutual Automobile Insurance Company.

SCOTT, J.

Background

Plaintiff, Leslie K. Hatcher ("Plaintiff") allegedly sustained injuries from stepping into a pothole while exiting her vehicle in the Wells Fargo Bank parking lot in Bear, Delaware on August 27, 2015. Plaintiff applied for Personal Injury Protection ("PIP") benefits with her insurance carrier Defendant, State Farm Automobile Insurance Company ("Defendant") claiming that her injuries fall within the scope of Delaware's PIP statute 21 *Del. C.* § 2118. Plaintiff's claim is based on the theory that her vehicle was an accessory in causing her injury.[1] Plaintiff claims she fell in a pothole after exiting her vehicle, and subsequently she caught herself with her elbows on her car and another car. Defendant claims that Plaintiff's vehicle was not an accessory in causing her injury, but rather a mere situs to the injury.

Standard

The Court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law."[2] The moving party bears the initial burden of showing that no material issues of fact are present.[3]

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[1] *See Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926 (Del. 2013).
[2] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[3] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact in dispute.[4] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.[5] The Court will not grant summary judgment if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law.[6]

Discussion

Under Delaware law, whether an individual is "eligible for PIP benefits is a question of statutory interpretation."[7] Section 2118 of Title 21 of the Delaware Code requires motor vehicle operators to carry minimum PIP coverage of $15,000 for any one person and $30,000 for all persons injured in any one accident.[8] PIP benefits apply "to each person occupying such motor vehicle and to any other person injured in any accident involving such motor vehicle, other than the occupant of another motor vehicle."[9]

In order to determine if a claimant is eligible for PIP benefits under section 2118 this Court must analyze two tests. First, under the *Fisher* test, the Court must

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[4] *Id.* at 681.
[5] *Burkhart*, 602 A.2d at 59.
[6] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at *1 (Del. Super. Ct. Apr. 26, 2006).
[7] *Buckley v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 4515699, at *2 (Del. Super. Ct. July 27, 2015), *aff'd*, 140 A.3d 431 (Del. 2016); *see also Kelty*, 73 A.3d at 929.
[8] *See* 21 *Del. C.* § 2118.
[9] 21 *Del. C.* § 2118 (a)(2)(c).

"determine whether the plaintiff is an occupant"[10] of the vehicle, and then "determine whether the accident involved a motor vehicle"[11] under the test proffered in *Kelty*. Defendant concedes that Plaintiff is an "occupant" pursuant to the *Fisher* test. Thus, this Court must determine whether Plaintiff's accident involved a motor vehicle under the *Kelty* test.

The *Kelty* test requires the Court "analyze whether (1) the vehicle was an active accessory in causing the injury" *and* whether "(2) there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted."[12] The first prong of the test requires "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury."[13] Delaware courts found that a vehicle was a not an active accessory in causing a plaintiff's injury in *Sanchez, Campbell*, and *Jones*. In *Sanchez*, the plaintiff was a passenger in his mother's vehicle when he was shot in the head by a stray bullet as his mother drove through an intersection.[14] Plaintiff filed an action seeking PIP benefits from his mother's motor vehicle insurance

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[10] *Buckley*, 2015 WL 4515699, at *2; *see also Nat'l Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892 (Del. 1997).
[11] *Buckley*, 2015 WL 4515699, at *2.
[12] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 932 (Del. 2013).
[13] *Id.*
[14] *Sanchez v. Am. Indep. Ins. Co.*, 2005 WL 2662960 (Del. 2005) *abrogated by Kelty*, 73 A.3d 926 (Although the Supreme Court in *Kelty* found that the third prong of the test was no longer required, the first two prongs of the test were reaffirmed).

provider.[15] The Supreme Court agreed with the Superior Court's decision and denied the plaintiff's claim.[16] The court found that the vehicle was not an active accessory to the plaintiff's injury, noting that no one "intentionally shot or targeted the vehicle. Nothing about [plaintiff's] presence in the vehicle contributed to the fact that he was shot; unfortunately, he was merely in the wrong place at the wrong time."[17] Likewise, in *Campbell*, the court held that a vehicle was not an active accessory to an injury when a garage door closed on the plaintiff.[18] The court reasoned that merely because the "device inside a vehicle was used to close the garage door, which had been opened by a button on a wall, does not transform the incident into an 'automobile accident'."[19]

More recently in *Jones*, this Court issued an opinion affirming the Court of Common Pleas holding that a vehicle was not an accessory to an injury where the plaintiff was injured while using a vacuum cleaner attached to a DART bus.[20] The plaintiff in *Jones* injured himself while he was cleaning a DART bus using a vacuum attached to the bus.[21] The plaintiff argued that the bus was an active accessory in causing the injury because without the bus in the "factual scenario,

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[15] *Id.*
[16] *Id.*
[17] *See Sanchez*, 2005 WL 2662960 at *2-3.
[18] *Campbell v. State Farm Mut. Auto. Ins. Co.*, 12 A.3d 1137, 1139 (Del. 2011).
[19] *Id.*
[20] *See Robert P. Jones v. Delaware Transit Corp.*, 2016 WL 5946494 (Del. Super. Ct. Oct. 16, 2016).
[21] *Id.*

there is no way the injury could have occurred."[22] This Court held that based on prior Delaware case law, even assuming the vacuum did not operate without the bus, it was not "enough under these circumstances to conclude that the bus is more than the mere situs of the injury."[23]

In contrast, in *Buckingham* and *Buckley*, the court found that the plaintiff's vehicle was an active accessory in causing the plaintiff's injury. In *Buckingham* another driver attacked the plaintiff in his vehicle.[24] The court noted that the plaintiff "allegedly provoked the assailant by operating his car in a manner that kicked up rocks that hit the assailant's truck. The assailant, in an apparent fit of road rage, followed [plaintiff] to the stop light in his truck" where he struck the plaintiff with a tire iron.[25] Thus, the vehicle was an "active accessory" to the "incident provoking the attack that caused [plaintiff's] injuries."[26]

In *Buckley*, a motor vehicle struck the plaintiff while she crossed the street to board her school bus, and she subsequently sought PIP benefits from the bus insurance policy.[27] The Supreme Court affirmed this Court's decision "for a straightforward reason . . . school buses are different than other vehicles."[28] The court reasoned that the "relationship between the school bus's proper operation in

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[22] *Id.* at *2.
[23] *Id.* at *4.
[24] *See State Farm Mut. Auto. Ins. Co. v. Buckingham*, 919 A.2d 1111 (Del. 2007).
[25] *Id.* at 1114.
[26] *Id.*
[27] *Buckley*, 2015 WL 4515699, at *1.
[28] *State Farm Mut. Auto. Ins. Co. v. Buckley*, 140 A.3d 431, 432 (Del. 2016).

safely picking up and discharging its student passengers was clearly involved in the accident."[29] The Supreme Court distinguished that the driver of the bus "by law, controlled the process by which [the plaintiff] entered and exited the bus, and the accident occurred after the bus driver signaled her to proceed and she followed that instruction."[30] Thus, "by regulatory mandate, a student's entry and egress from a bus is controlled by the bus driver, and that the bus driver's instruction therefore involved the bus in the accident."[31]

Based on the facts of this case and prior Delaware case law, Plaintiff's vehicle was not an active accessory in causing her injuries. Plaintiff contends her case is similar to *Buckley*. Plaintiff argues that she would not have been injured if she wasn't using her vehicle. However, Plaintiff was not using her vehicle at all. Plaintiff had already parked her vehicle, exited her vehicle, and began to walk towards her destination. Although Plaintiff may not have fallen in that pothole if she chose to park elsewhere, her claim does not meet the threshold to qualify for PIP benefits under § 2118 because her vehicle is not more than a mere situs to her injury. Furthermore, Plaintiff's case is distinguishable from *Buckley*. The Supreme Court made a key distinction that school buses are different than other vehicles. Unlike the plaintiff in *Buckley* who was signaled by the bus driver to cross the

[29] *Id.* at 433.
[30] *Id.* at 432.
[31] *Id.* at 433.

street to enter the school bus, pursuant to Delaware law, Plaintiff willfully exited her vehicle in the Wells Fargo Bank parking lot. She fell after she exited and as she was walking towards her destination. Delaware's PIP statute is intended to "impose on the no-fault carrier . . . not only primary liability but ultimate liability for the [insured party's] covered medical bills to the extent of [the carrier's] unexpended PIP benefits."[32] To extend the holding of *Buckley* to scenarios similar to Plaintiff's would open the door to numerous law suits and require no-fault carriers to pay for injuries that did not truly involve the insured vehicle. Furthermore, the most recent decision by this Court in *Jones* shows that Plaintiff's injury is not an active accessory merely because she touched the vehicle as she fell. The primary reason Plaintiff fell is because of a pothole in the parking lot. Summary Judgment is therefore appropriate because Plaintiff's vehicle was not more than mere situs of her injury.

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.

[32] *Buckley*, 2015 WL 4515699, at *2.