IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MATTHEW KELTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 10C-08-246 WCC
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

Submitted: December 14, 2011
Decided: February 21, 2012

Upon Defendant's Motion for Summary Judgment: **GRANTED**

OPINION

Gary S. Nitsche, Esquire. Weik, Nitsche & Dougherty, 305 N. Union Street, Second Floor, P.O. Box 2324, Wilmington, DE 19899. Attorney for Plaintiff.

Sherry Ruggiero Fallon, Esquire. Tybout, Redfearn & Pell, 750 Shipyard Drive, Suite 400, P.O. Box 2092, Wilmington, DE 19899. Attorney for Defendant.

CARPENTER, J.

Before the Court is the Motion for Summary Judgment filed by State Farm Mutual Automobile Insurance Company requesting the Court to dismiss the litigation, asserting the injuries sustained by the plaintiff did not arise out of ownership, maintenance, or use of a vehicle which would entitle him to personal injury protection benefits. Upon review of the record and the parties' submissions, the Court finds that the vehicle was not being used for transportation purposes, and the Motion for Summary Judgment is therefore GRANTED.

FACTS

On August 3, 2008, John Lovegrove and Matthew Kelty set about trimming a tree on property belonging to Lovegrove's wife. In order to prevent a particularly large branch from falling onto nearby power lines, Lovegrove attached one end of a rope to his truck and directed Kelty to attach the other end to the branch. Kelty was to cut the branch while Lovegrove used his truck to keep the rope taut so that the branch would not hit the power lines. With this procedure in mind, Kelty climbed the tree, tied the rope around the branch, and began cutting. When he was almost done cutting through the branch, Lovegrove—aggravated by comments made by his wife—accelerated his truck, causing the rope to break. As a result, the branch whipped onto the power lines and then back towards Kelty, pushing him out of the tree. Kelty sustained injuries from his fall.

Kelty sought personal injury protection (PIP) benefits from Lovegrove's automobile insurer, State Farm Mutual Automobile Insurance Company. State Farm denied Kelty's claim and Kelty subsequently filed a complaint against them in this Court. Kelty alleges that State Farm is obligated to provide PIP benefits pursuant to Lovegrove's insurance policy and 21 *Del. C.* § 2118, which provides for mandatory insurance coverage for injuries "arising out of ownership, maintenance or use" of a vehicle. Kelty argues that his injuries arose out of the use of Lovegrove's vehicle to trim the tree.

STANDARD OF REVIEW

A party is entitled to summary judgment where there are no genuine issues of material fact.[1] The moving party bears the burden of showing that there are no genuine issues of material fact so that it is entitled to judgment as a matter of law.[2] The Court must view all factual inferences in the light most favorable to the non-moving party.[3] Summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.[4]

[1] Super. Ct. Civ. R. 56(c).
[2] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[3] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), rev'd in part on proc. grounds and aff'd in part, 208 A.2d 495 (1965).

DISCUSSION

The only issue presented by the Summary Judgment Motion is whether Kelty's injuries arose out of the ownership, maintenance, or use of Lovegrove's vehicle. If they did, Kelty is entitled to benefits. If not, State Farm properly denied benefits. The determination of this issue is a legal question for the Court to resolve.[5] The Delaware Supreme Court has adopted the three-part test first recognized by the Minnesota Supreme Court in *Continental Western Insurance Co. v. Klug*.[6] The *Klug* test considers: (1) whether the vehicle was an "active accessory" in causing the injury, which is something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury; (2) whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted; and (3) whether the vehicle was used for transportation purposes.[7] If any of the *Klug* prongs is not satisfied by the facts before the Court, State Farm's Motion for Summary Judgment will be granted.

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[5] *See Carroll v. Nationwide Mut. Fire Ins. Co.*, 2008 WL 2583012, at *2 (Del. Super., June 20, 2008) ("The Court must only determine whether Carroll's injuries arose out of the operation, use or maintenance of his policy with Nationwide. This is a matter of contractual interpretation, which is a question of law for the Court.").

[6] *See Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997) (adopting the three-part test set forth by the Minnesota Supreme Court in *Continental Western Insurance Co. v. Klug*, 415 N.W.2d. 876 (Minn. 1987)).

[7] *Id.*

1. Active Accessory

To satisfy the first prong of *Klug*, Lovegrove's vehicle must have been an active accessory, and not a mere situs, in causing Kelty's injuries. State Farm argues that Lovegrove's truck was not an active accessory in causing Kelty's injuries because the rope could have snapped just as easily if an individual held it taut or if Lovegrove had tied the rope to a stationary object. In support of this argument State Farm cites *Campbell v. State Farm Mutual Automobile Insurance Co.*[8] and *Sanchez v. American Independent Insurance Co.*.[9] In *Campbell*, the Supreme Court of Delaware determined that the first prong of *Klug* was not met when the garage door that struck the plaintiff could have been shut by a button pressed inside the garage as easily as by a button located inside a vehicle.[10] In *Sanchez*, the Supreme Court held that the plaintiff, who was shot in crossfire while inside a vehicle, could have just as easily been shot if he had been outside the vehicle.[11]

The Court is not persuaded by State Farm's logic. Here, the use of the vehicle affected the sequence of events immediately preceding Kelty's injuries. It is highly unlikely, if not impossible, that a person could have pulled the rope taut

[8] 12 A.3d 1137 (Del. 2011).
[9] 2005 WL 2662960 (Del. Oct. 17, 2005).
[10] *Campbell*, 12 A.3d at 1139.
[11] *Sanchez*, 2005 WL 2662960, at *2.

with as much sudden force as an accelerating vehicle. And, had the rope been tied to a stationary object, there would have been no pulling force at all. The force that precipitated Kelty's injuries was unique to vehicular acceleration, and therefore Lovegrove's vehicle was an active accessory in the causation of Kelty's injuries.

2. Independent Significance

The second prong of *Klug* asks whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted. The record reflects that the vehicle accelerated and the rope snapped, but it is unclear whether the rope would have snapped without the force of the accelerating vehicle. There is some conflicting testimony about the condition of the rope, but since this is a summary judgment motion, the Court will view the facts in the light most favorable to the plaintiff. As such, the Court finds the condition of the rope was not a factor of independent significance that broke the causal link between the use of the vehicle and the injuries. Therefore, the second prong of *Klug* has been met.

3. Transportation Purposes

The third prong requires that the vehicle was used for transportation purposes. Kelty argues to the Court that this prong is satisfied as long as the vehicle was being operated and cites *Bryant v. Progressive Northern Insurance*

Co. in support of his position[12] However, the Court finds Kelty reads *Bryant* too broadly because the factual context of *Bryant* made the transportation requirement a non-issue. There is no question that the carjacker in *Bryant* was using the vehicle to transport himself and perhaps his victim from the crime scene.

"For an injury to arise out of the use of an automobile there must be a causal relationship between the use of the vehicle *for transportation purposes* and the injury" (emphasis added).[13] If the *Klug* court intended the mere operation of a vehicle to be sufficient to establish the third prong it would have clearly stated so. To give meaning to the term "transportation purposes" there must be some evidence that the vehicle was being used to move goods or people from one place to another. Here, Kelty and Lovegrove were not using Lovegrove's truck in this manner. 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.

The Court's conclusion that Lovegrove did not use his truck for transportation purposes finds support in other jurisdictions. The Supreme Court of

[12] 2008 WL 4140686, at *2 (Del. Super. Jul. 28, 2008) ("Because the car was being driven by the carjacker at the time of injury, the vehicle was being used for transportation purposes.").
[13] *Id* at *3.

Delaware advises that, when engaging in the fact-specific analysis required by *Klug*, it is helpful to consider how other jurisdictions resolve similar fact patterns.[14] The Court of Appeals of Michigan reviewed a case with a nearly identical fact pattern in *Cesefski v. State Farm Insurance Co.*[15] and denied no-fault benefits to the plaintiff. The court 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."[16] The *Cesefski* court instead likened the use of the truck to the use of a tool.[17] While the court did not use the three-prong *Klug* test, its analysis required a determination as to whether the vehicle was being used for transportation.[18] The Court finds the *Cesefski* opinion persuasive and supportive of its conclusion that Lovegrove did not use his vehicle for transportation purposes.

CONCLUSION

The three-prong *Klug* test guides the Court's decision as to whether an injury arose out of the ownership, maintenance, or use of a vehicle such that the injured party is entitled to PIP benefits, and for the plaintiff to prevail, all three

[14] *See Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997) ("It is instructive that, in other jurisdictions, coverage is routinely denied in fact patterns like ours.").
[15] 2002 WL 1482790 (Mich. Ct. App. 2002).
[16] *Id.* at *2.
[17] *Id.*
[18] *Id.*

prongs must be met. The undisputed facts before the Court do not satisfy *Klug* in full. As a result, the Court find 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.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.