IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICARDO SIERRA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N12C-07-1921 JAP
	)	
ALLSTATE PROPERTY and CASUALTY INSURANCE COMPANY,	)	
	)	
Defendant.	)	
	)	

Submitted: February 15, 2013
Decided: June 12, 2013

MEMORANDUM OPINION

Jonathan B. O'Neill, Esquire, Newark, Delaware, Attorney for the Plaintiff

Anthony N. Forcina, Jr., Esquire, Newark, Delaware, Attorney for the Defendant

Defendant's Motion to Dismiss calls upon the court to decide if an auto body shop worker is entitled to avail himself of the customer's no-fault automobile insurance benefits when the worker suffered an injury while repairing the customer's car. The court finds that under the circumstances alleged in the Complaint, he is not.

According to the Amended Complaint,[1] Plaintiff was performing body work on an automobile owned by Sabino Martinez (not a defendant) and insured by Defendant Allstate. Plaintiff alleges that he injured his lower back while touching the customer's vehicle and reaching with the other hand for a chain to attach the car to a pulling tower. Plaintiff claims that he is entitled to medical expenses and lost wages under the customer's no-fault PIP benefits. Although not alleged in the Complaint and not material to the issue presented here, the court notes that Plaintiff concedes he has received worker's compensation benefits for his injuries. Apparently those benefits have not fully compensated him for his lost wages or medical expenses, or both.

The issue here is controlled by 21 *Del. C.* sec. 2118. That section, which spans several pages in the Delaware Code, provides in pertinent part:

> c. 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.

[1] There were two oral arguments in connection with this motion. At the first argument the court suggested that the Complaint might be insufficient for reasons other than those discussed here. The court offered Plaintiff the opportunity to file an Amended Complaint, which he has done.

The parties seem to agree that the key language in the statute is that the coverage applies "to each injured person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle . . . ." Plaintiff focuses much of his argument on whether he was an occupant of the customer's vehicle at the time his injury occurred. The court believes, however, that the case is more easily resolved by first determining whether Plaintiff was injured by an "accident" as contemplated by section 2118.

Before addressing whether Plaintiff comes within the statutorily required coverage, the court must engage in a bit of statutory construction. The central phrase for present purposes is "injured in an accident involving such motor vehicle." Although Plaintiff does not make this argument, the court supposes the statute could be read so that that phrase modifies only "any other person injured" and does not apply to the phrase "person occupying such motor vehicle." Under this construction, it would be unnecessary to determine whether Plaintiff was injured by an "accident" as contemplated by the statute if he were an occupant of the insured vehicle at the time.

Having set up this straw man, the court will now knock him down. The court finds that the phrase "injured in an accident" was intended to modify both "any other person" and "person occupying such motor vehicle." The court need look no farther than subsection (d) to reach this conclusion. That subsection requires nationwide PIP coverage for "the named insureds and members of their households for accidents [sic.] which occur through being injured by an accident . . . ." It makes no sense to conclude that the General

Assembly intended less PIP coverage for the named insured, who presumably purchased the coverage, than that afforded to someone who happened to be occupying the car. The court therefore concludes that the phrase "injured in an accident" in subsection (c) was intended to modify both occupants and any other person other than an occupant of another motor vehicle. In short, Plaintiff must allege that he was injured in an "accident" as contemplated by section 2118.

Both sides to the Delaware Supreme Court's holdings in *Nationwide General Insurance Co. v. Royal*[2] and *Sanchez v. American Independent Insurance Co.*[3] stand for the proposition that the court must consider "(1) whether the vehicle was an 'active accessory' in causing the injury- *i.e.,* 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 use of the vehicle and the injuries inflicted; and (3) whether the vehicle was used for transportation purposes."[4] While *Nationwide* and *Royal* are instructive here, neither is controlling. Both of those cases involved interpretation of policy language extending coverage to injuries "arising out of ownership, maintenance or use" of the vehicle. While similar, if not identical, language appears in the statute, it does not apply to PIP coverage. Rather, that language appears only

[2] 700 A.2d 130 (Del. 1997).
[3] 2005 WL 2662960 (Del.).
[4] 700 A.2d at 132 (internal quotation marks omitted).

in the paragraph defining the requirements for indemnity coverage.[5] The significance of this is that it negates Plaintiff's argument that he is entitled to PIP coverage because he was performing maintenance on the car.

Turning to the question whether Plaintiff was injured in an "accident," *Nationwide* and *Royal* teach that section 2118 as a whole does not require coverage in instances in which a motor vehicle is the mere situs of an injury. Rather, the vehicle must play and "active role" in causing the injury. As this court put it, "[f]or an injury to arise out of use of an automobile there must be a causal relationship between the use of the vehicle for transportation purposes and the injury."[6] Here the customer's car was not moving and was not being used for transportation at the time of the accident. Indeed there is no particular significance to the fact that Plaintiff was touching a vehicle at the time he hurt his lower back reaching for a chain. His hand could have been touching anything and the injury would still have occurred. In *Sanchez*, the Supreme Court held that the plaintiff was not entitled to PIP coverage under the terms of the policy in question merely because he was sitting in a car at the time he was shot. The court reasoned:

> Under the first prong of Royal, the vehicle must be something more than the mere situs of the injury. Although Sanchez was shot while he was sitting in the car, his location was the only connection between the injury and the vehicle. As the Superior Court judge pointed out, Sanchez could just have easily been walking or riding a bike through the intersection when he was shot. No one intentionally shot at or targeted the vehicle. Nothing about Sanchez's presence

[5] The phrase is found in 21 *Del. C.* § 2118 (a)(1) which requires "[i]ndemnity from legal liability for bodily injury . . . arising out of ownership, maintenance or use of the vehicle."

[6] *Bryant v. Progressive Northern Insurance Co.,* 2008 WL 4140686, at *3 (Del. Super.).

> in the vehicle contributed to the fact that he was shot; unfortunately, he was merely in the wrong place at the wrong time.[7]

Although the Supreme Court was not interpreting the word "accident" in *Sanchez*, this court finds that the circumstances here, where Plaintiff was merely touching the fender of a stationary motor vehicle when he injured himself while reaching for a chain, do not constitute an "accident" involving a motor vehicle for purposes of section 2118.

Having concluded that section 2118 does not require coverage here, it is necessary to briefly examine the policy to determine if it provided PIP coverage in excess of that required by section 2118 which encompasses Plaintiff. It does not for at least two reasons: First, the policy provides for PIP payments for bodily injury "only when the bodily injury . . . is caused by an accident involving a motor vehicle." As discussed above, this is not an accident involving a motor vehicle. Second, aside from the named insured and his or her family, coverage is extended only to "any other person [injured] while in, on, getting into or out of, getting on or off, or through being struck by the insured motor vehicle." Merely touching a fender at the time the injury occurred does not satisfy this definition.

For the foregoing reasons the motion to dismiss is **GRANTED.**

John A. Parkins, Jr.
Superior Court Judge

[7] *Sanchez*, *supra* at *4.