

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

MIGUEL SANCHEZ,

Plaintiff,

v.

**AMERICAN INDEPENDENT INSURANCE
COMPANY,**

Defendant.

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C.A. No. 03C-09-153 SCD

Submitted: March 16, 2005
Decided: April 27, 2005

Upon Consideration of Plaintiff's Motion for Summary Judgment – **DENIED.**

Upon Consideration of Defendant's Cross-Motion for Summary Judgment – **GRANTED.**

OPINION

Arthur M Krawitz, Esquire and Matthew R. Fogg, Esquire, Doroshow Pasquale Krawitz Siegel and Bhaya, Wilmington, Delaware, Attorneys for Plaintiffs.

Nicholas E. Skiles, Esquire, Swartz Campbell LLC, Wilmington, Delaware, Attorney for Defendant.

Del Pesco, J.

Plaintiff seeks Personal Injury Protection ("PIP") benefits from defendant, the insurer of his mother's vehicle. Defendant denies coverage on the grounds that plaintiff's injuries did not arise out of the use of the insured motor vehicle. Plaintiff, a passenger in his mother's vehicle, was accidentally struck by a bullet from a gun fired in an unrelated altercation between two near-by pedestrians. Applying the *Klug* test, coverage is denied as the vehicle occupied by plaintiff was not an "active accessory" to the assault that caused plaintiff's injuries, and the discharge of the gun was an act of independent significance which broke the link between use of the car and the injuries; thus, the injuries did not arise out of the use of the motor vehicle.

Stipulated Facts

On May 2, 2001, Miguel Sanchez ("plaintiff") was a front-seat passenger in a vehicle owned and operated by his mother traveling through the City of Wilmington. Two pedestrians were involved in an altercation on a city sidewalk. Plaintiff's mother was unaware of any altercation when she drove her vehicle through the intersection where the altercation was occurring. During the altercation, one of the pedestrians discharged a firearm with the intent to strike the other pedestrian. A bullet from the firearm passed through the rear window of the vehicle and struck plaintiff in the head. Plaintiff's medical bills resulting from the accident exceed \$15,000.

At all times relevant, plaintiff's mother's vehicle was insured under a policy from American Independent Insurance Company ("defendant"). This policy included no-fault benefits in the amount of \$15,000. Plaintiff is an insured under the terms of this policy. Coverage applicable to the incident is disputed by defendant.

Policy Provisions

The policy contains a provision for Personal Injury Protection (“PIP”) that appears in two places in the policy.¹ The wording in both places is identical and states in relevant part:

We will pay, in accordance with Delaware Code, personal injury protection benefits to or for an “insured” who sustains “bodily injury”. The “bodily injury” must:

1. Be caused by an accident; and
2. Arise out of the ownership, maintenance or use of a “motor vehicle” as a “motor vehicle”.²

Legal Standard

A motion for summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.³ In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the non-moving party.⁴ When parties file cross-motions for summary judgment, they “implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective positions.”⁵

Discussion

The determination of whether an injury arises out of the use of an automobile turns on the existence of a causal nexus between the injury and the operation of the motor vehicle. The analysis is highly fact dependent. The requirement of a causal connection does not mean that the

¹ Policy is provided as Ex. A to plaintiff’s motion for summary judgment, Docket # 11. PIP provisions appear on pp. 33-34 and 42-43. Pages of the policy hereinafter will be “P. at ___”.

² P. at 33 and 43.

³ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992).

⁴ *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

⁵ *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.*, 642 A.2d 820, 823 (Del. Super. 1993) (internal citation omitted).

vehicle needs to be the instrumentality that causes the injury.⁶ The causal connection between the injury and the use of the vehicle must be more than incidental or fortuitous.⁷

In the factual context of a victim of a drive-by shooting seeking UMI benefits,⁸ the Delaware Supreme Court adopted the *Klug* test⁹ which requires the Court to analyze: (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.¹⁰

Applying the first prong of the *Klug* test to the facts of this case is dispositive. The vehicle was not an "active accessory" in causing the plaintiff's injuries. Its presence at the scene was purely fortuitous. The plaintiff was in the vehicle, but he could as well have been standing, walking or riding a bicycle. The vehicle was merely the situs of the injury because it passed by at exactly the wrong time. The second prong finds no application either. The act of independent significance which broke the causal link because the use of the vehicle and the injuries inflicted on plaintiff was the firing of the gun by a pedestrian.

This ruling is consistent with similar cases which deny PIP benefits under circumstances where, unlike here, the shot into the vehicle was deliberate, yet coverage was denied.¹¹

⁶ *Selected Risk Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 1986 WL 13107 (Del. Super.).

⁷ *Dick v. Koutoufaris*, 1990 WL 106182 (Del. Super.).

⁸ *Nationwide General Ins. Co. v. Royal*, 700 A.2d 130 (Del. 1997).

⁹ Named after the seminal case, *Continental Western Insurance Co. v Klug*, 415 N.W.2d 876 (Minn. 1987).

¹⁰ *Royal*, 700 A.2d at 132 (citing *Klug*, 415 N.W.2d at 878).

¹¹ See e.g. *Marzonie v. Auto Club Ins. Ass'n*, 495 N.W.2d 788 (Mich. 1992) (injuries did not arise out of use of a motor vehicle for purposes of PIP benefits when shots fired at vehicle hit

Conclusion

The facts of this case fail to comport with the *Klug* test, and thus fail to meet the policy requirement that the injury arise out of the use of the insured motor vehicle. Plaintiffs' Motion for Summary Judgment is DENIED. Defendant's Cross-Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Judge Susan C. Del Pesco

driver who was not intended target); *Detroit Auto Inter-Ins. Exchange v. Higginbotham*, 290 N.W.2d 414 (Mich. App. 1980) (injuries did not arise out of use of a motor vehicle for purposes of PIP benefits where woman was shot in her car by estranged husband who had forced her car off the road and then shot her).