IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICHARD D. BUCKINGHAM, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 03C-07-174 (CHT)**
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and NATIONWIDE ASSURANCE COMPANY, (f/k/a "Colonial Insurance Company of Wisconsin"),	)	
	)	
Defendants.	)	

Opinion and Order

On the Motions by State Farm and Nationwide for Summary Judgment and Buckingham's Cross-Motions for Summary Judgment

Submitted: July 15, 2005
Decided: May 17, 2006

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TOLIVER, JUDGE

Before the Court are motions for summary judgment filed by the Defendants, State Farm Mutual Automobile Insurance Company and Nationwide Assurance Company, against the Plaintiff, Richard D. Buckingham, III. Mr. Buckingham has filed motions for summary judgment in response against both Defendants. Given the fact that they address the same issues and portions of the record, the motions have been consolidated for purposes of disposition.

STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

There is very little dispute between the parties concerning the relevant facts of February 27, 1999. At approximately 9:00 p.m., Mr. Buckingham was driving a 1996 Pontiac Firebird west on Delaware Route 72 in route to his mother's home. The car was owned by Theresa Dorrell, who

occupied the front passenger seat during the trip. They were stopped at a traffic light at the intersection of Delaware Routes 72 and 4, when a pickup truck approached and stopped a few feet from the rear of their vehicle without making contact with it.

While Mr. Buckingham conversed with Ms. Dorrell, the unidentified operator of the pickup truck exited that vehicle and approached the driver's side of the Buckingham vehicle. He then, without giving any prior warning, opened the car door and began directing profane comments at Mr. Buckingham. Based upon his comments, it appears the assailant believed that the Buckingham vehicle had earlier traversed the roadway in front of his vehicle in such a manner that it caused rocks and other road debris to strike that vehicle. In any event, the verbal assault turned physical when the assailant struck Mr.

Buckingham about his head with what appeared to be a tire iron, causing serious injury to his right eye.

As the assault unfolded, Ms. Dorrell got out of her car. When the assailant threatened her with the tire iron, Ms. Dorrell reentered the car and the assailant sped off in his vehicle. Neither Mr. Buckingham nor Ms. Dorrell were able to observe the license plate number of the that vehicle. The incident was reported to the police, but without any additional information as to the identity of the assailant or his vehicle, the investigation was soon terminated.

The blow to Mr. Buckingham's right eye caused internal hemorrhaging, a detached retina and fractures to his skull and cheekbone. Treatment of the eye injury required retinal reattachment surgery and placement of a sclera buckle around the eyeball itself. Removal of the buckle required a second

surgery. He continues to suffer from persistent pain and sensitivity to light.

Mr. Buckingham filed a claim against State Farm, Ms. Dorrell's carrier, which was settled for the $25,000 of coverage provided by her policy for personal injury protection benefits. Mr. Buckingham also filed claims against State Farm and Colonial Insurance Company of Wisconsin, his own automobile insurance company, seeking future medical expenses, lost wages, and pain and suffering up to the limits of the uninsured motorist (UM) coverage of those policies. Colonial was acquired by Nationwide at some point in time subsequent to the assault on Mr. Buckingham and Nationwide assumed responsibility for the policy insuring Mr. Buckingham's personal vehicle.

Both policies were in effect at all times relevant to

this matter and provided in standard industry language:

> We will pay damages for bodily injury and property damage an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury or property damage must be caused by accident *arising out of the operation, maintenance or use of an uninsured motor vehicle*.[1] (Emphasis added.)

The State Farm policy provided $25,000 in UM coverage and the Nationwide policy provided $15,0000 of similar protection. Both insurers determined that Mr. Buckingham's injuries did not arise "operation, maintenance, or use" of the assailant's vehicle and denied coverage on that basis.

Mr. Buckingham then initiated this action to determine whether he is entitled to UM coverage under the above referenced State Farm and Nationwide policies. State Farm filed its summary judgment motion on February 14, 2005. Nationwide's motion followed on April 28, 2005. Mr.

[1] *See* State Farm Policy 9809.5 at 13-14 and Nationwide Policy 177127978 at 5.

Buckingham similarly moved for the entry of summary judgment in his favor against both Defendants on April 15 and May 6, 2005. All responses having now been filed and oral argument presented, that which follows is the Court's resolution of the issues so identified.

DISCUSSION

Standard of Review

Summary judgment may be granted only where, considering the facts in a light most favorable to the nonmoving party, there are no material issues of fact.[2] Disposing of litigation via summary judgment is encouraged, when possible, to expeditiously and economically resolve lawsuits.[3] Whereas

[2] *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334 (Del. Super. Ct. 1973); and *Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. Ct. 1976).

[3] *Davis v. University of Del.*, 240 A.2d 583 (Del. 1968).

in this case, cross motions for summary judgment are involved, the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions.[4]

Analysis

The sole issue to resolve is whether the State Farm and Nationwide UM policies afford coverage for the assault upon Mr. Buckingham. Both insurers contend that the question should be answered in the negative because the assault upon Mr. Buckingham clearly did not involve the operation, maintenance, or use of the assailant's vehicle. If there is no coverage, there are no remaining issues of fact and summary judgment must be entered on behalf of State Farm and

[4] *Browning-Ferris, Inc. v. Rockford Enters., Inc.*, 642 A.2d 820 (Del. Super. Ct. 1993).

Nationwide as a matter of law.

Determining the extent of UM coverage under these novel facts calls for applying the three-part test adopted in *Nationwide General Insurance Co. v. Royal.*[5] That test requires the Court to determine:

> (a) 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;"
>
> (b) Whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted; and
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> (c) Whether the vehicle was used for transportation purposes.[6]

It is apparent, and the parties agree, that *Royal* governs this coverage dispute. It is equally clear that the application of the second and third factors listed above is

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[5] 700 A.2d 130 (Del. 1997).

[6] *Id.* at 132.

generally straightforward, and has not been the subject of significant discussion in the relevant case law. Determining whether the use of a vehicle constitutes an "active accessory", however, presents a more complex situation.

The connection between the use of the vehicle and the injury suffered must be more than incidental.[7] There must be a sufficient causal nexus between the two.[8] While proximate cause is not required, the fact that a vehicle is the situs of an injury, or that the injury occurred coincidental to the use of the vehicle, is not sufficient.

The injury must be forseeably identifiable with the normal use of the vehicle. The Courts have addressed that issue by asking whether it is the kind of risk that the

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[7] *See Id.* (quoting *Auto Owners insurance Co. v. Rucker*, 469 N.W.2d 1, 1-2 (Mich. Ct. App. 1991); and *Dick v. Koutoufaris*, 1990 Del. Super. LEXIS 285, at *7.

[8] *Royal*, 700 A.2d at 132.

parties contemplated would be covered when they entered into the contract of insurance.[9] In addition, they have asked whether the injury arose out of the use of a motor vehicle consistent with its character in that regard.[10]

State Farm and Nationwide cite *Royal* and *Koutoufaris* in support of their position that the vehicles involved in the instant matter were not essential to the assault on Mr. Buckingham. In *Royal*, a case involving a drive-by shooting, the car from which the gunshots originated was deemed nonessential because the shooting could have been achieved no matter the mode of transportation.[11] In *Koutoufaris*, a woman was raped in a parked vehicle whose sole nexus to the crime was as the situs of the offense.[12] The Court held that there

[9] *Koutoufaris*, 1990 Del. Super. LEXIS 285, at *9.

[10] *Id.*

[11] *Royal*, 700 A.2d at 132-33.

[12] *Koutoufaris*, 1990 Del. Super. LEXIS 285, at *12.

was no coverage under the insurance policy covering the vehicle where the assault occurred. It reasoned that the parties to the contract of insurance did not contemplate that the situs of an assault would constitute an insurable use of the vehicle under the policy or governing statute.[13]

According to the Defendants, a similar finding should be made here. Both vehicles had come to a stop and were never in direct contact before the assault occurred. The injuries were caused by blows from what was purportedly a tire iron wielded by the assailant. Lastly, the Dorrell vehicle was nothing more than the situs of the crime and the role the assailant's vehicle was limited to transportation only. The incident is therefore akin to *Royal* and *Koutoufaris.* Stated differently, the involvement of the vehicles was fortuitous and the assault

[13] *Id.* at *9.

did not arise out of any use contemplated by the UM coverage in question.

Mr. Buckingham argues that when the circumstances surrounding the assault are viewed from the beginning to end, the sequence of events are of a "traffic nature" which was contemplated by the instant UM coverages. The incident was precipitated by and arose out of the use of both vehicles. The situation is distinguishable as a result from *Royal* and *Koutoufaris*.

As noted above, it appears that the problem began when debris from the roadway was thrown by the Buckingham vehicle at or on the assailant's vehicle. Unknown to Mr. Buckingham, the assailant followed and ultimately stopped behind Mr. Buckingham and Ms. Dorrell at a stop light some unknown distance away from the initial encounter. The assault then

occurred inside the Buckingham vehicle as described without significant pause. At no point was there any vehicle to vehicle contact. It is in this context that the factors set forth in *Royal* must be applied and the existence or nonexistence of insurance coverage must be resolved.

Given the facts and circumstances involved in this situation, the Court must conclude that the assailant's vehicle was an active accessory in the assault on Mr. Buckingham. First, it is apparent that the causal connection was greater or more than incidental. The assault was spawned by the interaction of the two motor vehicles and the resulting indirect contact. Second, the assailant's vehicle provided the transportation to the site, was part of the site where the assault occurred and the specific location from which it was launched. It is also apparent that the assailant's vehicle

was employed to transport the weapon used in the assault. Third, the injuries arose out of the use of the motor vehicle consistent with its intended purpose. That purpose was transportation and the risk is that which one would anticipate, i.e., damage, real or imagined, to another vehicle along with any consequential actions leading to the injuries in question.[14] The initial *Royal* inquiry must therefore be answered in the affirmative.

It is also apparent that the incident constitutes one unbroken sequence of events and that there was no break in that sequence, either in terms of timing or the character of the events occurring. To the extent the Defendants argue that when the assailant stopped and vacated his vehicle, there was

[14] An awareness of present day social reality mandates acknowledgment that behavior such as road rage, which obviously arises out of the use of a motor vehicle, carries with it the risk of injury. It would be reasonable to assume as a result that it was a risk the parties to a contract of insurance would contemplate covering.

both a temporal and substantive break in that chain, they are incorrect. At best, any interruption was brief, and the stream of events continued in the manner in which they began. Accordingly, the second and third inquiries of the *Royal* test must also be answered in the affirmative.

While this matter does involve an assault much like the *Royal* and *Koutoufaris* cases, the parallels end there. This matter includes a traffic related component which culminated in the later assault. Had there not been the initial contact, however slight, there would not have been the apparent fit of rage. Nor would the assailant's vehicle have been used to pursue and assault Mr. Buckingham. In sum, the continuous stream of events involved the assailant's vehicle at every stage. Without that involvement, the conflict would and could not have occurred.

No matter how the situation is viewed, the causal link between the use of the motor vehicle in question and the injuries sustained has been established. That vehicle was used as intended and that usage was inextricably intertwined with the assault. At no point in this unbroken sequence of events can the use of the assailant's motor vehicle be deemed coincidental or that the assault would have occurred in any event independent of its involvement. The Court must therefore conclude that the assault related injuries are within the uninsured motorist coverage provisions of the State Farm and Nationwide policies at the center of this controversy.[15]

[15] Given this result, it is not necessary to reach the argument concerning whether State Farm is estopped from denying coverage because of its payment of PIP benefits. For the same reason, the Court need not address whether the "tire iron" allegedly used to assault Mr. Buckingham should be considered a part of the assailant's vehicle as well as the consequences of so nominating that item.

CONCLUSION

Based upon the foregoing discussion, the Court concludes as a matter of law that Mr. Buckingham is entitled to uninsured motorist benefits coverage under the State Farm and Nationwide policies of insurance referenced above for the injuries and related loses he suffered on February 27, 1999. The maximum amount of such coverage available to Mr. Buckingham is $40,000, $25,000 from State Farm and $15,000 from Nationwide. Accordingly, the motions for summary judgment filed on behalf of State Farm and Nationwide are **denied**, and the cross-motions filed by Mr. Buckingham in that regard are **granted**.

IT IS SO ORDERED.

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TOLIVER, JUDGE