

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

TIMOTHY CARROLL,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 07C-12-184 PLA
v.	)	
	)	
NATIONWIDE MUTUAL FIRE	)	
INSURANCE CO.,	)	
	)	
Defendants.	)	

**ON DEFENDANT’S MOTION TO DISMISS  
GRANTED**

Submitted: June 5, 2008  
Decided: June 20, 2008

R. Stokes Nolte, Esquire, REILLY JANICZEK & MCDEVITT,  
Wilmington, Delaware, Attorney for Plaintiff.

Robert J. Leoni, Esquire, SHELSBY & LEONI, Wilmington, Delaware,  
Attorney for Defendant.

**ABLEMAN, JUDGE**

## **Introduction**

Before the Court is the Motion to Dismiss filed by Defendant Nationwide Mutual Fire Insurance Co. (“Nationwide”). Because Timothy Carroll’s (“Carroll”) injuries did not arise out of the operation, use or maintenance of his vehicle, Nationwide properly denied the claim for Personal Injury Protection (“PIP”) and Uninsured Motorist (“UM”) benefits under his policy. For reasons set forth more fully hereafter, Defendant’s Motion to Dismiss is granted.

## **Facts**

On January 10, 2006 Timothy Carroll was rear-ended by the driver of a tractor trailer truck while he was operating his vehicle in New Castle, Delaware.<sup>1</sup> Carroll then pulled his car to the side of the road and got out to assess the damage and exchange information with the truck driver, Bernard Cherry (“Cherry”). At that point, Cherry approached Carroll and began striking him in the head with a large pipe that he carried from his vehicle.

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<sup>1</sup> The Court accepts the well-pleaded facts in Carroll’s Complaint as true. *See Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978) (“For the purpose of judging a motion to dismiss a complaint for failure to state a claim, made pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded allegations must be accepted as true.”).

At all relevant times, Carroll was standing next to his car. Carroll sustained injuries as a result of the attack.<sup>2</sup>

Carroll then submitted a claim to Nationwide to recover PIP and uninsured motorist benefits. Nationwide's policy with Carroll required benefits to be paid for injuries that are caused by accidents arising out of the operation, maintenance or use of the insured motor vehicle.<sup>3</sup> Nationwide acknowledged the claim but denied benefits. As a result of Nationwide's refusal to pay benefits, Carroll filed a Complaint against Nationwide to recover PIP and UM benefits.

### **Parties' Contentions**

Nationwide has now filed the instant motion to dismiss, wherein it argues that Carroll cannot recover PIP or UM benefits under the policy because his injuries did not arise out of the operation, maintenance or use of his car. Nationwide relies on several Delaware cases, including *Nationwide*

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<sup>2</sup> See Docket 6, Ex. A (Complaint). Carroll admits that his injuries resulted solely from the attack. See Docket 7, ¶ 6.

<sup>3</sup> Docket 6, ¶ 2. Nationwide asserts that "[i]t is undisputed that the Nationwide policy covers only injuries caused by accidents arising out of the operation, maintenance or use of the insured motor vehicle." *Id.* Although neither party included a copy of the policy, Carroll agrees that his policy only covers injuries that arise out of the operation, maintenance or use of his insured vehicle. See Docket 7, ¶ 2 ("Therefore, such actions are clearly within the scope of the operation, maintenance and use of the vehicle . . ."). As a result, the Court finds no dispute over the policy's coverage.

*General Insurance Co. v. Royal*,<sup>4</sup> *State Farm Auto Insurance Co. v. Buckingham*,<sup>5</sup> and *Dick v. Koutafaris*<sup>6</sup> to support its position that dismissal of the Complaint is appropriate because Carroll cannot recover benefits under any set of circumstances.

Carroll recognizes the case law cited by Nationwide but argues that the Court cannot, as a matter of law, determine that his injuries did not arise out of the operation, maintenance or use of his insured vehicle. He contends that whether the injuries resulting from Cherry's assault, which may have been motivated by "road rage" or some other event, are covered by Nationwide's policy is a factual dispute that should be submitted to a jury. Carroll also cites *Smaul v. Irvington General Hospital*,<sup>7</sup> a New Jersey Supreme Court decision, in arguing that an assault by another driver does not automatically preclude benefits. Because Carroll was injured as a result of leaving his vehicle to exchange insurance information with the other driver, as required by 21 *Del. C.* § 4201, he contends that his injuries arose out of the operation, maintenance or use of his vehicle.

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<sup>4</sup> 700 A.2d 130 (Del. 1997).

<sup>5</sup> 919 A.2d 1111 (Del. 2007).

<sup>6</sup> 1990 WL 106182 (Del. Super. Ct. Jul. 19, 1990).

<sup>7</sup> 530 A.2d 1251 (N.J. 1987).

### **Standard of Review**

Superior Court Civil Rule 12(b)(6) states, in pertinent part: “[T]he following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted. . . .”<sup>8</sup> When judging a motion to dismiss a complaint for failure to state a claim, the Court must accept all well-pleaded allegations as true.<sup>9</sup> The Court must determine “whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”<sup>10</sup> Where a plaintiff may recover, the Court must deny the motion to dismiss.<sup>11</sup>

### **Discussion**

As an initial matter, the Court notes that the determination of whether Carroll is entitled to benefits is a legal, rather than a factual, question for the Court.<sup>12</sup> Although Carroll submits that a jury should evaluate Cherry’s motive for the assault, the motivation behind Cherry’s assault of Carroll is not relevant to the issue of whether Nationwide is required to pay PIP and UM benefits pursuant to Carroll’s policy. The Court must only determine

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<sup>8</sup> Super. Ct. Civ. R. 12(b)(6).

<sup>9</sup> *Spence*, 396 A.2d at 968.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Buckingham*, 919 A.2d at 1113.

whether Carroll’s injuries arose out of the operation, use or maintenance of his policy with Nationwide.<sup>13</sup> This is a matter of contractual interpretation, which is a question of law for the Court.<sup>14</sup>

In order to determine whether an insured’s injury arose out of the operation, maintenance or use of his vehicle, the Delaware Supreme Court in *Nationwide General Insurance Co. v. Royal*<sup>15</sup> adopted the three-part test set forth by the Minnesota Supreme Court in *Continental Western Insurance Co. v. Klug*.<sup>16</sup> Under the *Klug* test, the court must determine: (1) whether the vehicle was an “active accessory” in causing the injury or was merely fortuitous; (2) whether an act of independent significance broke the causal link between the use of the vehicle and the injuries caused; and (3) whether the vehicle was used for transportation purposes.<sup>17</sup> If the *Klug* factors are met, the injuries arose out of the operation, maintenance or use of the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (noting that the determination of whether an insured’s injuries arise out of the operation, maintenance or use of his vehicle is a matter of contractual interpretation that is a question of law); *see also Twin City Fire Ins. Co. v. Delaware Racing Ass’n*, 840 A.2d 624, 626 (Del. 2003).

<sup>15</sup> *Royal*, 700 A.2d at 132.

<sup>16</sup> 415 N.W.2d 876 (Minn. 1987).

<sup>17</sup> *Id.* (citing *Klug*, 415 N.W.2d at 878).

vehicle, entitling the insured to coverage under his policy.<sup>18</sup> This test has been applied in cases involving PIP claims.<sup>19</sup>

The Court applied the *Klug* test more recently in *State Farm Mutual Auto Insurance Co. v. Buckingham*,<sup>20</sup> a case that is factually similar to the case at bar. In that case, while Buckingham was stopped at a traffic light, an unidentified man pulled his truck next to his vehicle. In an apparent fit of road rage allegedly related to Buckingham's vehicle kicking up rocks at the truck, the driver got out of his truck, opened Buckingham's car door, and began striking him with a metal object. Since Buckingham sustained physical injuries, he sought UM benefits for injuries arising out of the operation, maintenance or use of the vehicle.

The Supreme Court concluded that the injuries did not arise out of the operation of Buckingham's vehicle and that the insurer correctly denied him benefits. The Court first held that whether an accident arose out of the operation, use or maintenance of the insured vehicle is a question of law.<sup>21</sup> The Court then applied the *Klug* test to determine whether the insurance

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<sup>18</sup> *Id.*

<sup>19</sup> See *Sanchez v. American Independent Ins. Co.*, 886 A.2d 1278, 2005 WL 2662960, at \*2 (Del. Oct. 17, 2005) (Table).

<sup>20</sup> 919 A.2d 1111 (Del. 2007).

<sup>21</sup> *Buckingham*, 919 A.2d at 1113.

company wrongfully denied benefits. Under the first *Klug* factor, the Court determined that Buckingham's car was an "active accessory" in the injuries because the incident was caused by rocks from Buckingham's car that hit the assailant's truck and was not simply the situs of the attack. Under the third factor, the Court concluded that there was a causal connection between the use of the truck and the assault because the truck transported the truck driver to the scene.

Under the second *Klug* factor, however, the Court noted that the assault was a criminal and independent act that broke the causal connection between the use of the vehicle and the injuries:

We find that the facts in this case do not satisfy the second *Klug* factor. The assailant here . . . got out of his car and assaulted Buckingham—an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted. The assailant intentionally and criminally caused the injury, independent of the use or operation of his truck. Therefore, we conclude that the injuries inflicted by the assault did not arise "out of the ownership, maintenance or use" of the uninsured motor vehicle.<sup>22</sup>

In applying the holding in *Buckingham* to the facts here, the Court concludes that the first and third *Klug* factors are met. Carroll's vehicle was an "active accessory" in causing his injuries because the vehicle's presence

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<sup>22</sup> *Id.* at 1116 (citations omitted). See also *Dick v. Koutafaris*, 1990 WL 106182, at \*2 (Del. Super. Ct. Jul. 19, 1990) (noting that the "causal connection between the injury and the ownership, maintenance or use of the automobile must be more than incidental or fortuitous" and must be "reasonably identifiable with the normal ownership, maintenance or use of the vehicle") (citations omitted).

was not merely fortuitous. Just as in *Buckingham*, the collision between Carroll and Cherry “provoked” the incident because it caused Carroll and Cherry to pull over to the side of the road and arguably motivated Cherry to commit the assault.<sup>23</sup> Similarly, Carroll’s injuries satisfy the third factor of the *Klug* test because Cherry’s truck transported him to the scene of the injury, thereby establishing a causal connection between the use of the vehicle and the assault.<sup>24</sup>

Significantly, as in *Buckingham*, the second *Klug* factor is not met in this case because an act of independent significance occurred to break the causal link between the use of the vehicle and the insured’s injuries.<sup>25</sup> Cherry, the assailant, left his truck and intentionally and criminally assaulted Carroll with a pipe, independent of his use or operation of his truck. While it is true that Carroll and Cherry left their vehicles to exchange insurance information after the collision, as required by 21 *Del. C.* § 4201,<sup>26</sup> Cherry’s decision to attack Carroll with a pipe was an independent act that occurred

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<sup>23</sup> *Buckingham*, 919 A.2d at 1114.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (citing *Klug*, 415 N.W.2d at 878).

<sup>26</sup> 21 *Del. C.* § 4201 requires a driver involved in an accident to stop his car and give his name, address, registration, license, and other documentation related to his driving privileges. *Id.* § 4201(a), (b).

outside the use of his vehicle. The assault was thus independent of both drivers' use and operation of their vehicles.

Further supporting the Court's conclusion that the assault broke the causal connection is the fact that both drivers were outside their vehicles. The Delaware Supreme Court has noted that an assault outside of a stationary car does not arise out of the operation, maintenance or use of a vehicle:

The facts in this case are distinguishable from those cases in which the vehicle has come to rest and, thus, was not an active accessory to the infliction of the injury. An example of [this] . . . is the scenario of a disagreement between two motorists that results in the actors exiting their cars and committing an assault. In such cases the vehicles merely transport the actors to the location and add nothing more to the danger of the situation.<sup>27</sup>

As noted in *Buckingham*, the vehicles were not related to any injuries suffered in the assault because Cherry left his vehicle and attacked Carroll outside his car. In other words, even though the vehicles transported the two men to the scene of the assault, and even if Cherry's motivation to assault Carroll was related to the original collision, the vehicle was not essential to causing Carroll's injuries.<sup>28</sup>

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<sup>27</sup> *Id.* (citing *Royal*, 700 A.2d at 135 (Walsh, J., dissenting)).

<sup>28</sup> *Royal*, 700 A.2d at 132-33. The Court recognizes that but for the rear-end collision and both drivers stopping on the side of the road, neither driver would have been present at the scene of the assault. To that extent, the cars were active accessories in the injuries. Nonetheless, Carroll's injuries resulted from an external assault outside of his car by a

Carroll relies on the New Jersey Supreme Court case of *Smaul v. Irvington General Hospital*<sup>29</sup> to argue that his injuries arose from the operation, maintenance or use of his vehicle. In *Smaul*, the plaintiff-driver stopped his car to ask for directions. Two men approached him and pulled him out of the car to rob him. The men then tried to steal his car. When Smaul tried to resist, the men attacked and injured him. Smaul sought PIP benefits under a New Jersey statute which permitted recovery where the driver “sustain[ed] bodily injury as a result of an accident involving an automobile.”<sup>30</sup>

The *Smaul* Court concluded that there was a “substantial nexus” between the injuries and the accident and found that Smaul was entitled to PIP benefits under his policy. Noting that Smaul’s injuries were reasonably foreseeable, the Court next found that Smaul’s vehicle was directly involved in the accident:

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driver who also left his car. Thus, the vehicles were not essential to Carroll’s injuries. See, e.g., *Klug*, 415 N.W.2d at 876 (citing *Holm v. Mut. Serv. Cas. Ins. Co.*, 261 N.W.2d 598, 603 (Minn. 1977) (finding a battery on a motorcyclist by an officer who left his vehicle to be an independent act because “the battery could as easily have occurred had [the officer] come upon the stationary motorcycle while on foot”). The *Buckingham* Court accepted the rationale of *Holm*. See *Buckingham*, 919 A.2d 1115-16 (discussing *Holm*).

<sup>29</sup> 530 A.2d 1251 (N.J. 1987).

<sup>30</sup> *Smaul*, 530 A.2d at 1252.

[P]laintiff sought directions so that he could drive his car to his destination, he was sitting in his car when the assault occurred, and a purpose of the assailants – not emphasized by either court below but acknowledged in Allstate’s Statement of Facts – was to steal the car after yanking plaintiff out of the driver’s seat. The effort to take the automobile removes, for us, any doubt about this case falling within the statutory requirement of an “accident involving an automobile.” Surely the automobile was not merely coincidental to the critical events or a mere “attending circumstance”: its role was central to the incident.<sup>31</sup>

The Delaware Supreme Court distinguished *Smaul* in the case of *Sanchez v. American Independent Insurance Co.*<sup>32</sup> In *Sanchez*, plaintiff was accidentally shot in the head while riding as a passenger in his mother’s car. The Supreme Court applied the *Klug* test and found that the car was not an active accessory:

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 in the vehicle contributed to the fact that he was shot; unfortunately, he was merely in the wrong place at the wrong time.<sup>33</sup>

The Court noted that Sanchez’s injuries were completely unrelated to his presence in the vehicle:

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<sup>31</sup> *Id.* at 1253.

<sup>32</sup> 886 A.2d 1278, 2005 WL 2662960 (Del. Oct. 17, 2005) (Table).

<sup>33</sup> *Sanchez*, 2005 WL 2662960 at \*2.

Although Sanchez cites several cases that he argues support his position, all of them can be distinguished on their facts. For example, in *Smaul v. Irvington Gen. Hosp.*, 108 N.J. 474, 530 A.2d 1251 (N.J.1987), the New Jersey Supreme Court awarded PIP benefits to a plaintiff who stopped the car to ask directions, and was assaulted by assailants who apparently wanted to steal the car. The plaintiff's injuries were connected to the vehicle in that case, because the assault stemmed from the assailant's desire to steal the car. . . . Unlike those cases, the assault on Sanchez had nothing to do with his presence in the motor vehicle.<sup>34</sup>

The *Smaul* case is also distinguishable from the case at bar. Unlike the New Jersey statutory language in *Smaul*, which allowed recovery for an injury that resulted from an accident involving a car, the policy language at issue here is narrower as it only permits recover for injuries arising out of the operation, maintenance or use of the vehicle. Secondly, the *Smaul* Court did not apply the *Klug* factors that have expressly been adopted by the Delaware Supreme Court to determine whether an insured's injuries arose out of the operation, maintenance or use of his vehicle. As already explained, Carroll's injuries were the result of an independent assault that was unrelated to his operation, maintenance or use of his vehicle under the second *Klug* factor.

Most importantly, the Delaware Supreme Court has held that an assault occurring after a driver leaves his vehicle does not arise out of the

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<sup>34</sup> *Id.* at \*3 n.16.

operation, maintenance or use of the insured's vehicle. In *Buckingham*, the Delaware Supreme Court relied on the Minnesota Supreme Court case of *Holm v. Mutual Service Casualty Insurance Co.*<sup>35</sup> in holding that an intentional or criminal act breaks the causal chain:

For example, in *Holm v. Mutual Service Cas. Ins. Co.*, the Minnesota Supreme Court found an act of independent significance had occurred where a police officer, after pursuing a motorcycle, left his vehicle to make an arrest and committed a battery upon the motorcyclist. After analyzing cases from other jurisdictions, the court arrived at the following conclusion: . . . acts of leaving the vehicle and inflicting a battery were viewed as events of independent significance which broke the causal link between the 'use' of the vehicle and the injuries inflicted. And this was so in spite of the fact that in each instance the subject auto was used to transport the tortfeasor(s) to the scene of the accident.<sup>36</sup>

As in *Holm*, Cherry left his vehicle and assaulted Carroll, who had also left his vehicle. While *Smaul* permitted coverage where the driver was assaulted in his car, the assailant in this case was outside his car after the collision. Unlike *Smaul*, Cherry was not attempting to steal Carroll's car. Although cars were used to transport both Cherry and Carroll to the scene of the accident, Cherry's act of leaving his vehicle to commit an intentional assault upon Carroll constitutes an act of independent significance that breaks the causal chain. Stated differently, although Cherry's motivation is

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<sup>35</sup> 261 N.W.2d 598 (Minn. 1977).

<sup>36</sup> *Buckingham*, 919 A.2d at 1115 (citing *Holm*, 261 N.W.2d at 603).

unknown, the assault on Carroll “had nothing to do with his presence in the motor vehicle.”<sup>37</sup>

### **Conclusion**

Because Carroll’s injuries did not arise out of the operation, maintenance or use of his vehicle, Nationwide correctly denied Carroll’s claim for PIP and UM benefits. Carroll cannot therefore recover under any set of conceivable circumstances. Accordingly, Nationwide’s Motion to Dismiss is hereby **GRANTED**.

**IT IS SO ORDERED.**

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**Peggy L. Ableman, Judge**

Original to Prothonotary

cc: R. Stokes Nolte, Esq.  
Robert J. Leoni, Esq.

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<sup>37</sup> *Sanchez*, 2005 WL 2662960 at \*3 n.16.