EFiled: Sep 11 2014 04:55PM EDT
Filing ID 56021141
Case Number 315,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	No. 315, 2014
Defendant Below, Appellant,	)	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
v.	)	C.A. NO. N10C-08-246 WCC
MATTHEW KELTY,	)	
Plaintiff Below, Appellee.	)	

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal of a Superior Court Memorandum Opinion on Remand dated May 28, 2014, in the case of *Matthew Kelty v. State Farm Automobile Insurance Company*, C.A. No. 10C-08-246 WCC. The Plaintiff Below, Appellee is Matthew Kelty ("Kelty"). The Defendant Below, Appellant is State Farm Mutual Automobile Insurance Company ("State Farm"). The decision below followed briefing on the narrow issue of whether Kelty was entitled to $15,000.00 or $100,000.00 of PIP benefits pursuant to a policy issued by State Farm. Kelty initially filed suit alleging State Farm breached its contract with Kelty by failing to pay personal injury protection ("PIP") benefits. State Farm filed for summary judgment alleging that because the accident in question did not arise out of the "maintenance or use of a motor vehicle" State Farm was not responsible for providing PIP benefits. Kelty responded that the accident did in fact occur as a result of the use of motor vehicle, and therefore State Farm breached its contractual obligation by not providing PIP benefits.

On December 14, 2011, the Superior Court heard oral argument on the motion. At the close of the argument, the Court reserved decision. By written decision dated February 21, 2012, the Court granted State Farm's Motion for Summary Judgment, holding that Kelty did not satisfy the third prong of the *Klug* test because the motor vehicle was not being used for transportation purposes at the

time of the accident. Kelty filed a timely Notice of Appeal with this Court on March 8, 2012. On July 26, 2013, via an *en banc* decision, this Court reversed and remanded the Superior Court rejecting the judicial gloss *Klug's* transportation purposes prong placed on Delaware's PIP statute. In response to this Court's opinion, prior counsel for State Farm tendered $15,000.00 to Kelty. The Superior Court requested informal briefing on the issue of whether Kelty was entitled to the $85,000.00 that remained available pursuant to the insurance policy. On May 28, 2014, the Superior Court determined Kelty was entitled to the full policy amount of $100,000.00 on public policy grounds. As a result of that decision, State Farm filed the instant appeal with this Court. This is Kelty's Answering Brief in support of the affirmance of the Trial Court's decision.

SUMMARY OF ARGUMENT

I. DENIED. THE SUPERIOR COURT CORRECTLY HELD THAT THE POLICY PROVISION CONTAINED IN THE STATE FARM PIP POLICY WAS VOID AS AGAINST PUBLIC POLICY.

II. ASSUMING *ARGUENDO* THAT THE COURT FINDS THAT THE POLICY PROVISION AT ISSUE DOES NOT VIOLATE PUBLIC POLICY THEN KELTY'S STATUS WITH RESPECT TO THE LOSS IS THAT OF AN OCCUPANT.

STATEMENT OF FACTS

On August 3, 2008, Kelty suffered injury while in the process of "topping" two large trees located on the premises of Kelty's mother-in-law, and her husband John Lovegrove ("Lovegrove"). (B85). Topping is where the top of a tree is removed, along with many of the tree's branches. (B85). Lovegrove directed Kelty as to how to top the trees. (B91-92). Lovegrove also assisted Kelty in topping the trees. (B91).

Kelty climbed one of the trees and attached a 150 foot rope to one of the branches. (B92). The other end of the rope was tied to the hitch of Lovegrove's truck. (B98). Lovegrove then planned to drive the truck forward in an attempt to transport the tree branch from its location in the tree to a location on the ground without coming into contact with nearby power lines. (B92). Kelty would use his chainsaw in the tree, while Lovegrove operated the truck in order to transport the branch out of the tree and clear of the power lines. (B28, 34-35). Kelty and Lovegrove used the truck to transport other tree limbs from their location in the trees to a location on the ground prior to the accident in question. (B36-37).

Before the accident in question, yet while still in the process of topping the trees, Lovegrove was involved in an argument with his wife. (B92). Subsequent to the argument, while the truck was attached via the rope to the next tree branch to be cut and transported, Lovegrove got into the truck, slammed the door and,

"stomped on the gas like a wild man." (B93). Because Lovegrove depressed the gas pedal with too much force, the rear tires of the truck spun out, while moving the truck forward at approximately 3 to 4 miles per hour. (B101). While Lovegrove was pulling the branch away from the power lines, Kelty began cutting the branch with a chainsaw. (B102-103). As Lovegrove was transporting the branch away from its location in the tree to a location on the ground, the rope snapped as a result of Lovegrove's applying too much pressure to the gas pedal of the truck.(B102-103) The increased force on the rope from the pulling force of the truck caused the branch that was attached to the rope to snap back and knock Kelty out of the tree. (B103). Kelty fell approximately 16 feet to the ground below, suffering injury to his right foot and ankle. (B124-125).

As a result of the injuries, Kelty filed a lawsuit against Lovegrove and in response to that filing, Lovegrove's insurer, State Farm on April 26, 2010, supplied answers to Form 30 interrogatories identifying both a homeowners and automobile liability policy that applied to the loss. (B229). On March 31, 2011, State Farm amended their Form 30 interrogatories to identify only the State Farm automobile liability policy as applicable to the loss. (B233). By way of letter dated April 1, 2011, counsel for State Farm indicated that the liability policy still applied to this incident, ostensibly, because it arose out of the ownership, maintenance or use of a motor vehicle. (B235). Despite State Farm's open acknowledgement that Mr.

Kelty's injuries arose out of the ownership, maintenance or use of a motor vehicle for purposes of the applicability of the automobile liability policy, State Farm filed a Motion for Summary Judgment on September 21, 2011 contending that Kelty was not entitled to PIP benefits pursuant to State Farm's policy because his injuries did not arise out of the ownership, maintenance or use of a motor vehicle. (B10). That issue was appealed to this Court and by an *en banc* Opinion dated July 26, 2013, this Court held that Kelty had satisfied the PIP statute's requirement that he be injured in an accident involving a vehicle (B237).

After this Court's decision, the Superior Court requested informal briefing on the issue of whether Kelty was entitled to the statutorily mandated minimum policy limit of $15,000.00 or the policy limit of $100,000.00. (B252). After briefing was submitted on January 6, 2014, the Superior Court issued a Memorandum Opinion on May 28, 2014 which held that the State Farm Policy Provision at issue in the instant litigation was void as against public policy. (B263). State Farm appealed the decision of the Court below.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE POLICY PROVISION CONTAINED IN THE STATE FARM PIP POLICY WAS VOID AS AGAINST PUBLIC POLICY

A. QUESTION PRESENTED

Whether the policy provision contained in State Farm's PIP policy is void as against public policy? This question was preserved in the Trial Court via Kelty's informal briefing. (B252).

B. SCOPE OF REVIEW.

This is State Farm's appeal from the decision of the Court below finding the policy provision at issue to be void as against public policy. A trial court's interpretation of an insurance policy is also a determination of law.[1] Consequently, the appropriate standard of appellate review requires this Court to determine whether the Superior Court "erred in formulating or applying legal precepts."[2]

C. MERITS OF ARGUMENT

As an initial matter, the tendency of courts interpreting individual motor vehicle insurance policy clauses, under compulsory insurance statutes, has been toward liberal construction in order to achieve the public policy objective of universal coverage.[3] Further, the fundamental purpose of Delaware's financial responsibility laws is to protect and compensate all persons injured in automobile

[1] *State Farm Mut. Auto Ins. Co. v. Clarendon Nat. Ins. Co.*, 604 A.2d 384 (Del. 1992) citing *Hudson v. State Farm Mut. Ins. Co*., 569 A.2d 1168, 1170 (Del. 1990).
[2] *Id*.
[3] *Gray v. Allstate Ins. Co.*, 668 A.2d 778 (Del. Super. Ct. 1995) (Citations omitted).

accidents.[4] Section 2118 is entitled to liberal construction in order to achieve its purpose.[5] Finally, in the absence of statutory language permitting a contract policy exclusion of a non-contact injury from PIP coverage, such an exclusion in the case of a pedestrian is invalid in Delaware.[6]

State Farm's non-relative pedestrian policy provision at issue states:

> THERE IS NO COVERAGE
>
> 2. FOR **BODILY INJURY**
>
> f. IN EXCESS OF THE MINIMUM LIMITS REQUIRED BY LAW FOR ANY PEDESTRIAN. This does not apply to ***you, your spouse*** or any ***relative.***

(B215). The Superior Court, having found that this policy provision violated public policy, found it unnecessary to opine on any other issues regarding the provision raised by Kelty. As noted by the Superior Court, "litigation around Delaware's PIP statute and the companion Delaware Financial Responsibility Law has been unfortunately all too frequent and, frankly, decisions related thereto have made it difficult to always find clear and unequivocal guidance for insurers and insurance companies."[7]

Initially, State Farms claims that its policy is consistent with Delaware Law. However, a review of Delaware Law on the issue leads to the inescapable

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[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 3057887 (Del. Super.) (internal citations omitted).

conclusion that this bald assertion has no basis in fact nor law. As noted by the Superior Court, "This decision is intended to develop a bright line so that insurance companies providing coverage in this State will appreciate the limits they have on including exclusions in their policies."[8] "The Delaware Supreme Court in *State Farm Mutual Automobile Insurance Company v. Wagamon*[9] came close to developing the aforementioned bright line regarding coverage when it ruled that *any* attempt to restrict coverage based on the relationship of the injured to the policyholder was invalid as against public policy."[10] The *Wagamon* decision is of critical importance as this holding sets the foundation for the principle that limitations to the availability of coverage based on the plaintiff's relationship to the insured are void as against public policy.[11] However, and perhaps tellingly, State Farm's sole reference to this opinion is not focused on this aspect of the holding, but a different aspect of the holding that has since been refined by this Court. More specifically, State Farm claims that *Wagamon* stands for the proposition that only basic insurance coverage for all personal injury claims arising out of an automobile accident regardless of the plaintiff's relationship to the insured. (Op. Br. at 14). In *Wagamon*, State Farm claimed that the household exclusion contained in the policy was invalid only to the extent it abrogates the minimum

[8] *Id.*
[9] 541 A.2d 557 (Del. 1988).
[10] *Kelty*, 2014 WL 3057887 at *3 (emphasis added).
[11] 541 A.2d at 558.

policy limits required by the Financial Responsibility Law, but that it is valid respecting limits in excess of those amounts.[12] This is precisely the same claim that State Farm is advancing in the instant litigation. Importantly, this Court wrote:

> Finally, State Farm contends that if the household exclusion is found involved, the extent of that company's liability for 'household' claims should not exceed the minimum limits provided in 21 *Del*. *C*. § 2902 (1985). We reject that argument for two reasons. First, we have found the State Farm provision to be violative of public policy. Accordingly there is no basis for us to reform this exclusion without the full agreement of the parties. Second, when finding a contract provision violative of public policy, we follow the well-established rule of construction that if the offending provision is separable, it should be stricken, while the remaining contract provisions should be enforced. Here, the household exclusion is entirely separable, and can be severed from the policy without rendering the remaining provision unenforceable. Under the circumstances, the invalid exclusion should not be partially revived at State Farm's behest.[13]

The extension of the holding of *Wagamon* to the instant facts seems a natural consequence of the jurisprudence on the issue of policy provisions that limit coverage based on the relationship of the plaintiff to the insured. Moreover, the "basic coverage" language contained in the *Wagamon* decision has evolved. More recent case law on the issue of the public policy goal of Delaware automobile insurance statute is to promote, "*full compensation* to all victims of automobile

[12] *Id.* at 559.
[13] *Id*. at 561-562.

accidents."[14] There is a distinct and tangible difference between the concepts of basic coverage and full compensation.[15] Kelty respectfully submits that full compensation is a higher standard than basic coverage and that full compensation references all proceeds available under the policy, including those proceeds in excess of statutorily mandated minimums. Additionally, State Farm incorrectly asserts that the stated public policy goal is compensating persons injured in motor vehicle accident. (Op. Br. at 14). As noted both *supra* and *infra*, the public policy favors full compensation. Where this issue has been specifically addressed by the Court this Court has held, "the public policy underlying the statute favors *full* compensation to all victims of automobile accidents and encourages the Delaware driving public to purchase *more* than the statutory minimum amount of coverage."[16] Accordingly, State Farm's assertion that full compensation means statutorily mandated minimum coverage in the face of paid for available coverage in excess of that amount is baseless in light of this Court's directives on the issue.

State Farm next asserts that "policy provisions that do not violate [sic] statute have been upheld by Delaware Courts when the coverage is restricted to the statutory minimum." (Op. Br. at 10). This argument misses the more nuanced position of Kelty's present argument and the holding of the Court below. The

[14] *Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492 (Del. 2012) (emphasis added).
[15] In addition to this dichotomy, the goal of universal coverage as discussed by the Superior Court is discussed *infra*.
[16] *Mohr*, 47 A.3d at 500 citing *Nationwide Gen. Ins. Co. v. Seeman*, 702 A.2d 915 (Del. 1997).

issue isn't whether *some* policy provisions limiting coverage to statutory minimums *can* be upheld as valid; the issue is whether a policy provision limiting recovery to the statutory minimum coverage based on the injured party's relationship to the insured is void as against public policy. The Delaware Superior Court has determined that it is based on its interpretation of the previous holdings of this Court. The argument asserted by State Farm in its Opening Brief cannot withstand scrutiny and frankly this Court has held so previously under similar circumstances.[17]

In *Mohr* this court was required to decide whether Delaware's automobile insurance statute – in particular, subparagraph (e) of 21 *Del. C.* § 2118(a)(2) – requires an insurer to provide PIP coverage under a Delaware policy for an insured who is injured, as a pedestrian, in Delaware by a Delaware-insured car.[18] The incremental difference in coverage in *Mohr* is identical to the incremental coverage differential in the instant matter, $85,000.00. *Mohr* is also a critical case. In *Mohr*, the Progressive policy insured Mohr's mother and members of her household (including Mohr) as pedestrians, but *only* where the insured pedestrian is struck by a car that is *not* insured in Delaware.[19] When summarizing the position of the insurer, the Superior Court in the *Mohr* case stated, "should a pedestrian have the

[17] *See generally*, *Wagamon*, 541 A.2d at 561 and *Mohr*, 47 A.3d 492.
[18] *Mohr*, 47 A.3d at 495.
[19] *Id*.

misfortune of being struck by one of these ill-fated, lesser-insured Delaware vehicles, she must resign herself to that vehicle's limited coverage."[20] That crapshoot cannot be what the legislature intended for Delaware residents.[21] What State Farm proposes is anathema to the holding of this Court in *Mohr*. Additionally, and importantly, is the issue of the premium paid by the policy holder to State Farm for the applicable coverage. Why should State Farm enjoy the windfall of only having to pay 15% of the coverage paid for by Kelty's family based purely on a seemingly arbitrary provision in its policy? In *Mohr*, the insurer's argument was the recovery of benefits would depend on whether the striking car is insured in Delaware, regardless of the amount of PIP coverage for which a premium was paid.[22] This Court did not agree with that argument in *Mohr*. Here State Farm's argument is that the recovery of benefits should be limited based on Kelty's "status" as a pedestrian and his "relationship" to the insured regardless of the amount of PIP coverage for which a premium was paid. This is precisely the same sort of coverage crapshoot rejected by the Court in *Mohr*. The effect of State Farm's policy provision is to create a class of persons who are automatically afforded less protection than is available to them solely because of their status as a pedestrian. Why should State Farm be entitled to

[20] *Id*.
[21] *Id*.
[22] *Id*.

collect a premium for policy limits of $100,000.00 yet be able to then limit their exposure and the coverage available to "pedestrians" to $15,000.00, the mandatory minimum?

1. *Should State Farm's policy provision be held valid, it would create a scenario where passengers injured while riding in automobiles are entitled to greater coverage protections than pedestrians struck by automobiles.*

State Farm's Opening Brief implies that Kelty was a stranger to the State Farm policyholder he was assisting John E. Lovergrove, III. (Op. Br. at 4). As a matter of fact, Kelty was a relative of the Lovegrove, more specifically, he was his *son-in-law*.[23] 21 *Del. C.* § 2118(a)(2) provides:

> 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.
>
> d. The coverage require by this paragraph shall also be applicable to the named insureds and members of their households for accident which occur though being injured by an accident with any motor vehicle other than a Delaware insured motor vehicle while a pedestrian or while occupying any registered motor vehicle other than a Delaware registered insured motor vehicle, in any state of the United States, its territories or possessions or Canada.

The relationship standard established by subsection (a)(2)(c) is one based on location. Stated differently, subsection (a)(2)(c) does not contemplate the

[23] Kelty concedes that the term "relative" is defined pursuant to the policy at issue and that Kelty falls outside of the definition of the term "relative" as it is defined in the insurance policy at issue.

relationship between the occupants of the insured motor vehicle, it only matters that they were occupying the insured motor vehicle at the time of the incident that gives rise to insurance coverage. Similarly, it should only matter that a vehicle was an active accessory in causing a pedestrian's injuries, the relationship between the parties should be immaterial. Hypothetically, had Kelty and Lovegrove completed their task of cutting branches and were then riding together in the truck when a collision occurred, then Kelty would be entitled to the full benefits of the PIP policy and not subject to the policy provision.

Applying State Farm's logic and a separate hypothetical, if Lovegrove had negligently reversed his truck and struck Kelty, while Kelty was a pedestrian, Kelty would be entitled to less coverage than as an occupant in the hypothetical scenario envisioned *supra* and that argument has been rejected. This dichotomy of coverage availability is opposed to the stated purpose of Delaware's Financial Responsibility Law to achieve universal coverage.[24] It is also telling to note that Merriam-Webster defines the word universal thusly:

> Including or covering all or a whole collectively or distributively *without limit or exception*; *especially*: available equitably to all members of a society.[25]

And Black's Law Dictionary defines universal thusly:

[24] *Gray v. Allstate Ins. Co*, 668 A.2d 778 (Del. Super. Ct. 1995)
[25] http://www.merriam-webster.com/dictionary/universal?show=0&t=1410121646 (last visited September 7, 2014)

> Having relation to the whole or an entirety; pertaining to all without exception, a term more extensive than "general," which latter may admit of exceptions.[26]

As noted *supra*, State Farm is attempting to create an exception to the universal coverage mandate required by this Court when interpreting Delaware's Financial Responsibility Law. This attempted separation cannot be endorsed. Whether the insured is an occupant stranger or pedestrian relative, the available coverage should be the same under the policy to meet the goal of universal coverage. The Delaware Superior Court has stated, "[Any] exclusion of coverage to persons injured in an in an accident involving a motor vehicle, but who are neither occupants nor pedestrians is inconsistent with the purpose of Delaware's no-fault statute – 'to protect and compensate all persons injured in automobile accidents.'"[27]

Other jurisdictions have similarly reached conclusions that are inapposite to the position of State Farm when considering the validity of policy provision excluding coverage based on the injured party's status as a pedestrian within the state of the policy issuance or their relationship to the insured in policies when applied to compulsory insurance provisions. When examining such policy provisions the Supreme Court of South Dakota noted the following:

> In contrast, a minority of jurisdictions hold that where the

[26] *Black's Law Dictionary* 1376 (5th Ed. 1979).
[27] *Wisnewski v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 697945 (Del. Super.).

> [policy provision] is held invalid as violative of public policy, the limits of the insurer's liability are those provided by the policy, rather than the lesser limits required by statute.[28]

Additionally, of the cases in other jurisdictions which have addressed the validity of the policy provisions that are based on the injured party's relationship to the insured subsequent to enactment of mandatory automobile liability insurance a clear majority have invalidated similar policy language.[29]

2. *State Farm has failed to demonstrate that the proposed exclusion is customary to the field of liability, casualty and property insurance and not inconsistent with the requirements of 21 Del. C. § 2118.*

State Farm concedes in its brief that, 21 *Del. C.* § 2118(f) allows for exclusions that are customary and not inconsistent with the requirement of the statute. (Op. Br. at 8). However, State Farm goes on to state, "pursuant to this statute, only $15,000 is required to be available to [Kelty] as a pedestrian involved in an accident with a Delaware registered vehicle in the State of Delaware." *Id.* This is a misstatement of the state of Delaware law, specifically, this Court's statement that, section 2118 was meant to protect persons injured in an automobile

[28] *Cimarron Ins. Co. v. Croyle*, 479 N.W.2d 881, 885 (S.D. 1992). Citing *Meyer v. State Farm Mut. Auto. Ins. Co.*, 689 P.2d 585 (Colo. 1984); *Wagamon*, 541 A.2d 557 (Del. 1988); *Kish v. Motor Club of Am. Ins. Co.*, 261 A.2d 662 (N.J. Super. Ct. App. Div. 1970).

[29] *See, e.g.*, *DeWitt v. Young*, 625 P.2d 478 (Kan. 1981); *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865 (Ky. 1981); *State Farm Mut. Auto. Ins. Co. v. Sivey*, 272 N.W.2d 555 (Mich. 1978); *Transamerica Ins. Co. v. Royle*, 656 P.2d 820 (Mont. 1983); *Estate of Neal v. Farmers Ins. Exch.*, 566 P.2d 81 (Nev. 1977); *Kish*, 261 A.2d 662, *cert. denied* 264 A.2d 68 (N.J. 1970); *Hughes v. State Farm Mut. Auto. Ins. Co.*, 236 N.W.2d 870 (N.D. 1975); *Jordan v. Aetna Cas. & Sur. Co.*, 214 S.E.2d 818 (S.C. 1975); *Allstate Ins. Co. v. Wyoming Ins. Dept.*, 672 P.2d 810 (Wyo. 1983).

accident, regardless of their affiliation with the insured.[30] Any attempt to restrict this class of protected persons is invalid.[31] It is axiomatic that, via its policy provision, State Farm is attempting to limit the available protection based both on the affiliation of Kelty to the insured and his status as a pedestrian in direct contravention of this Court's stated purpose of universal coverage and full compensation.

It is important to contrast the policy provision at issue here with other provisions that have been upheld and validated as not against public policy. In *Harris v. Prudential Property & Casualty Insurance Company*[32] this Court found that a cooperation clause does not rise to the same level of public policy concerns as cases like *Wagamon*.[33] *Harris* involves a policy provision that requires the insureds cooperation. Because the insured party in *Harris* did not cooperate with the insurer. The provision in *Harris* does not involve the relationship of the injured party to the insured or the status of the injured party as an occupant or pedestrian. However, the *Harris* Court does note, "the insurer's liability is absolute to the extent of the statutory minimum regardless of whether the insured has violated any conditions or requirement contained within the policy.[34]

[30] *Wagamon*, 541 A.2d at 560.
[31] *Id*.
[32] 632 A.2d 1380 (Del. 1993).
[33] *Kelty*, 2014 WL 3057887 at *3.
[34] *Harris*, 632 A.2d at 1381.

The purpose of 21 *Del. C.* § 2118 is to impose on the no-fault insurance carrier the ultimate liability for the payment of an injured party's medical bills, to the extent of the carrier's unexpended personal injury protection benefits.[35] It also serves a further social purpose of assuring health care providers regardless of the cause of the accident that they will be compensated for care which they provide to those who are injured in an automobile accident.[36] The theory advanced by State Farm runs contrary to the previously stated public policy purpose of section 2118. More exactingly, State Farm would have the health care providers of this State know, that should they be treating a pedestrian with catastrophic injuries received in an accident with a car, the maximum proceeds available for that patients medical care will be the statutorily mandated minimum coverage, regardless of the actual coverage available under the policy and irrespective of the premiums State Farm has collected from its insureds. Just as in *Wagamon*, the State Farm policy provision here can be severed from the policy without rendering the remaining provisions unenforceable.[37]

The notion that this matter should be remanded for discovery on whether the policy provision at issue here is customary is perplexing. Kelty struggles to determine what interrogatory response, response to request for production,

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[35] *Bass v. Horizon Assur. Co.*, 562 A.2d 1194 (Del. 1989) citing *Int'l Underwiriters, Inc. v. Blue Cross and Blue Shield of Del. Inc.*, 449 A.2d 197 (Del. 1982).
[36] *Id.*
[37] *Bass*, 562 A.2d at 1197.

response to request for admissions or deposition answer he could offer that would aid in the determination of whether this policy provision is customary. It would seem that a large, complex and diverse insurer such as State Farm, with lawyers available at their beck would have and could have submitted such information to either the Trial Court or this Court once they were made aware that the provision in their policy was voided as against public policy. It is manifest that no such showing has been made. In fact, this is not the manner in which this determination would be made. The existence of household exclusions clauses in policies issued elsewhere by other companies, and the determination by courts of other states that such a clause is customary, do not convince us that the exclusion is customary in Delaware and consistent with the public policy expressed in sections 2118 and 2902.[38]

As it appears to Kelty, the critical issue is that State Farm may not[39] seemingly arbitrarily limit the recovery for alleged pedestrians injured in automobile accidents within the State of Delaware with an applicable Delaware issued PIP policy to the statutorily mandated limits while continuing to collect premiums based on greater coverage amounts. As noted *surpa*, State Farm suggests creating a system where pedestrians are limited to the statutory minimum benefits no matter what benefits are actually available. In other words, occupants

[38] *Wagamon*, 541 A.2d at 561.
[39] Certainly may not without offering proof that it is customary.

of vehicles are provided with greater amounts of protection than pedestrians injured by the same vehicle. Respectfully, Kelty asks that this Court consider another hypothetical. Consider If Kelty and Lovegrove were in a single vehicle crash where Lovegrove's truck struck a tree and then careened into a pedestrian injuring both the Kelty and the pedestrian. State Farm would argue that it is reasonable and equitable to suggest that Kelty would be entitled to $100,000.00 in available PIP, while the pedestrian is limited to only $15,000.00 in PIP solely because of the pedestrian's status as a pedestrian and the fact that the pedestrian is not related to the insured. This is an absurd result. The pedestrian did not have the advantage of being protected by a car surrounding their person when they were involved in this motor vehicle accident while the passenger did have such protections. Why then should the pedestrian, who would ostensibly be in a much worse position than the passenger, be entitled to less coverage? The passenger has no relation to the driver, and to take the hypothetical one step further, imagine if the driver had, just before the crash, picked up the passenger as a stranger just to be a good Samaritan and give the passenger a lift. It is axiomatic that this result is inequitable, unsustainable and contrary to the public policy of this State.

II. ASSUMING *ARGUENDO* THAT THE COURT FINDS THAT THE POLICY PROVISION AT ISSUE DOES NOT VIOLATE PUBLIC POLICY THEN KELTY'S STATUS WITH RESPECT TO THE LOSS IS THAT OF AN OCCUPANT

A. QUESTION PRESENTED

If the policy provision contained in State Farm's PIP policy is not void as against public policy, then Kelty's status with respect to the loss is that of an occupant? This question was preserved in State Farm's Motion for Summary Judgment. (B10).

B. SCOPE OF REVIEW.

This is State Farm's appeal from the decision of the Court below finding the policy provision at issue to be void as against public policy. A trial court's interpretation of an insurance policy is also a determination of law.[40] Consequently, the appropriate standard of appellate review requires this Court to determine whether the Superior Court "erred in formulating or applying legal precepts."[41]

C. MERITS OF ARGUMENT

In the underlying action to this appeal, State Farm contested Kelty's status as a pedestrian.[42] Kelty respectfully submits that he wasn't a pedestrian, then he was an occupant. Further, assuming *arguendo* that this Court accepts State Farm's

[40] *State Farm v. Clarendon*, 604 A.2d 384 citing *Hudson v. State Farm*, 569 A.2d at 1170.
[41] *Id.*
[42] State Farm chose not to define pedestrian in the insurance policy at issue.

position asserted in the underlying action that Kelty is neither a pedestrian nor an occupant then only one result is plausible. When faced with this same conundrum, of trying to determine what a party was if they are neither a pedestrian nor an occupant of a vehicle the Delaware Superior Court held that, "[Any] exclusion of coverage to persons injured in an in an accident involving a motor vehicle, but who are neither occupants nor pedestrians is inconsistent with the purpose of Delaware's no-fault statute – 'to protect and compensate all persons injured in automobile accidents.'"[43]

Delaware Courts have consistently applied the liberal definition of occupant when interpreting insurance policies and [they] hold to this interpretation.[44] This Court has held that a person is an occupant of a vehicle if he or she is either within a reasonable geographic perimeter of the vehicle or engaged in a task related to the operation of the vehicle.[45] The rationale to be applied to the term occupy involve[s] an understanding that each component (reasonable geographic perimeter or task related to the operation of the vehicle) is discrete and must be analyzed separately. Applying the second prong of the test annunciated in *Lyons*, this Court has previously held that Kelty was injured in an accident involving a vehicle.[46] Kelty respectfully submits that this, given the facts of this matter, is the functional

[43] *Wisnewski*, 2005 WL 697945.
[44] *Selective Ins. Co. v. Lyons*, 681 A.2d 1021 (Del. 1996).
[45] *Id*.
[46] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926 (Del. 2013).

equivalent of being engaged in a task related to the operation of the vehicle. It is undisputed and a matter of *stare decisis* that Kelty was injured in an accident involving a vehicle.[47] It is also undisputed and a matter of *stare decisis* that the vehicle that was involved in Kelty's injuries was an active accessory in causing the injury, because the force it exerted on the rope and branch led to Kelty's injuries.[48] Accordingly, it logically follows that Kelty was engaged in a task related to the operation of the vehicle. The tying of a rope to a branch that is attached to the vehicle is a task that very similar to checking the fasteners on a loaded trailer, which falls within the definition of tasks related to the operation of a vehicle.[49] To find otherwise would be to create a legal fiction with no relation to reality.[50] Stated in the language of but-for causation, Kelty would not have been dislodged from the tree but-for the operation of his father-in-law's truck and its actual physical connection to the branch upon which Kelty was standing. As such, Kelty would be deemed an "occupant" of the vehicle for purposes of determining the application of the PIP statute and would be entitled to the full limits available under the policy.[51]

21 *Del. C.* § 2118(a)(2)(c) states:

> The coverage required by this paragraph shall be applicable to each person occupying such motor vehicle

[47] *Id*.
[48] *Id*.
[49] *National Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892 (Del. 1997).
[50] *Messick v. Reliance Ins. Co.*, 1995 WL 1946624 (Del. Super.).
[51] It is also a meaningful consideration that Kelty cannot assert a claim against his own policy.

> and to any other person injured in an accident involving such motor vehicle, other than an occupant of another motor vehicle.

It is undisputed that Kelty was not an occupant of another vehicle. There does not appear to be a judicial determination as to Kelty's status save for this Court's analysis of the *Klug* test was conducted pursuant to 2118(a)(2) in the prior appeal. Whereas section 2118(a)(1) references injuries arising out of ownership, maintenance or use of the vehicle, section 2118(a)(2)(c) only requires a determination that injuries were sustained in an accident **involving** [a] motor vehicle. The foregoing distinction is more than semantic because section 2118(a)(2)(c) covers injuries sustained by an occupant or pedestrian in light of Delaware's public policy towards universal coverage.[52] Whereas the language of section 2118(a)(1) has been interpreted by Courts to require a showing that the injury occurred by virtue of the inherent nature of using a motor vehicle, this is a different and distinct determination from the inquiry pursuant to section 2118(a)(2)(c) discussed *supra*. Moreover, *stare decisis* dictates that Kelty has satisfied the PIP statute's requirement that he be injured in an accident involving a vehicle.

The language of the policy in issue is also telling. The pertinent language in the PIP policy reads:

[52] *Gray*, 668 A.2d at 779.

> We will pay in accordance with Subchapter 1, Chapter 21, Title 21, of the Delaware Code for bodily injury to an insured caused by accident resulting from the maintenance or use of a motor vehicle. (B214).

The language of the policy vaguely mirrors the language of section 2118(a)(1) but is wholly different from the language in section 2118(a)(2)(c) inasmuch as in the former the injuries must arise out of use or maintenance, but the policy does not follow the latter which only requires that a pedestrian be injured in an accident involving a motor vehicle.

Although Kelty was certainly outside the passenger compartment of the vehicle that was an active accessory in bringing about his injury, pursuant to Delaware jurisprudence on the issue he should still be considered an occupant of the vehicle for purposes of obtaining the benefit of the full coverage available to him under the applicable insurance policy.

CONCLUSION

The language of the case law on this issue is not ambiguous and its leads to the inescapable conclusion that, 21 *Del. C.* § 2118 was meant to protect persons injured in an automobile accident, regardless of their affiliation with the insured. The policy provision at issue here not only conditions the receipt of benefits on the injured party's relationship to the insured, but also on their status as a pedestrian in violation of the stated public policy of universal, full coverage of persons injured in an incident with a motor vehicle. This provision creates uncertainty for medical providers and results in a disparity between the availability of resources for those injured as occupants of a vehicle and pedestrians injured by vehicles. For the reasons set forth in the attached Brief, Appellee respectfully requests that the Opinion of the Court below be AFFIRMED.

WEIK, NITSCHE, DOUGHERTY & GALBRAITH

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Dated: September 11, 2014