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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, | : | Delaware Supreme Court Case No. 516, 2015 |
| Defendant Below, Appellant, | : | Court Below: Superior Court of the State of Delaware, Kent County, |
| v. | : | C.A. No. K14C-03-028 (JJC) |
| STEPHANIE BUCKLEY, | : | |
| Plaintiff Below, Appellee. | : | |

**APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S REPLY BRIEF**

CASARINO CHRISTMAN SHALK
RANSOM & DOSS, P.A.

COLIN M. SHALK, ESQ.
Del. Bar ID No. 99
CATHERINE M. CRAMER ESQ.
Del. Bar ID No. 6000
405 North King Street, Suite 300
P.O. Box 1276
Wilmington , DE 19899-1276
Telephone: (302)594-4500
Fax: (302)594-4509
Attorneys for Appellant-Defendant Below
State Farm Mutual Automobile

## ARGUMENT I

## I. PLAINTIFF DOES NOT QUALIFY FOR PIP BENEFITS FROM THE BUS BECAUSE PLAINTIFF WAS NOT AN OCCUPANT OF THE BUS

### A. Merits of the Argument

#### 1. Plaintiff was not an occupant of the bus, as she was neither within a reasonable geographic perimeter of the bus, nor was she engaged in a task related to the operation of the bus.

##### *a. Plaintiff was not within a reasonable geographic perimeter of the bus at the time of the accident.*

Plaintiff was not an occupant of the bus at the time of the accident, but a pedestrian. In order for Plaintiff to qualify for occupancy by being within a reasonable geographic perimeter of the bus at the time of the accident, she had to be "in, entering, exiting, touching, or within reach of" the bus. *National Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892, 897 (Del. 1997)). In the present case, the critical analysis is whether or not Plaintiff was "entering" the bus, as that is the criteria which Plaintiff asserts places her within a reasonable geographic perimeter of the bus. Pl. Ans. Br. at p.13.

Plaintiff asserts two arguments to attempt to establish that "approaching" a vehicle is equivalent "entering" that vehicle. Plaintiff argues that as Bumblee Bee's insurance policy does not require one to be "inside" the vehicle, in order to "enter" the vehicle, State Farm must have contemplated that the act of approaching a vehicle

would equate the act of entering that vehicle for PIP purposes. Pl. Ans. Br. at p. 18. Plaintiff asserts that the definition of "entering" in the policy would be rendered meaningless if it required an individual to be in a vehicle. *Id.*

State Farm makes no argument that an individual must be "in" the vehicle in order to occupy it. Although a common lay person's understanding of occupancy may be that an individual be "in" a vehicle, State Farm recognizes one can be outside the covered vehicle, and be an occupant, in any of the ways defined by the Court in *Fisher*. Plaintiff however, ignores the meanings of the words used to define occupancy, and the distinction between "entering" and "approaching". The policy, following the language of the statute, requires that a person be "occupying" the covered vehicle, or alternatively a pedestrian injured by the covered vehicle in order to obtain PIP benefits[1].(A-466). The "definitions" section of the policy defines "occupying" to mean "in, on, entering or exiting". (A-460). Like the clear criteria established in *Fisher*, Bumblee Bus's insurance policy provides occupancy in the event a claimant is "entering" a covered vehicle in addition to when a claimant is "in" a covered vehicle.

As discussed in great detail in State Farm's opening brief, "in", "entering" and "approaching" all have separate and distinct meanings which are not interchangeable.

[1]There are additional ways an individual can qualify for PIP benefits under the policy, such as the pedestrian resident relative. These methods of qualification are not at issue in this case.

Def. Op. Br. at 18. Had the policy utilized the terms "approaching the covered vehicle" or "traveling to or from the covered vehicle", in order to define occupancy, then Plaintiff's argument regarding policy language would be accurate. The policy, however, utilized "entering", mirroring the language of the Delaware courts, who have held that merely approaching a vehicle, cannot logically be equated with entering the vehicle.[2] Plaintiff was a pedestrian approaching a vehicle which she later intended to enter. Her status as a pedestrian never changed prior to being struck by the tortfeasor.

In response to the legal precedent holding that approaching a vehicle does not constitute entering it, Plaintiff submits that the Court should not apply the precedent in this particular case, because the definition of "enter" should differ in school bus cases as opposed to cases involving every other type of vehicle. Pl. Ans. Br. at p. 16. Plaintiff requests that this Court treat this case differently than "an automobile case"[3], and apply a different and expanded set of criteria for occupancy based upon the type

[2]"Here the line can clearly be drawn. How could anyone rationally conclude walking toward one's car with an intent to enter it constitutes 'occupying the vehicle'? If the General Assembly wishes to draw a radius of occupancy for individuals at or near their car in order to qualify for PIP coverage, they may do so. I cannot create such a speculative zone of occupancy for prospective claimants who are merely waking toward their vehicle when they are injured."*Adamkiewicz v. Milford Diner, Inc.*, 1991 Del. Super. LEXIS 64 at *3-4 (Del. Super. Feb. 13, 1991). See also *Oggenfuss v. Big Valley Assocs. L.P.*, 1996 Del. Super. LEXIS 234, *3-5 (Del. Super. 1996)(holding the act of approaching with the intent to enter does not constitute entering the vehicle for the purposes of the PIP statute); *Thomas v. Nationwide Mut. Ins. Co.* 1984 Del. Super. LEXIS 700 (Del. Super. 984).

[3] "This is a school bus case, not an automobile case." Pl. Ans. Brief at p. 12.

of vehicle involved. This argument must be rejected as having no basis in either statute or legal precedent, as neither make a distinction between the occupancy requirements for a school bus and other vehicles for the purposes of defining eligibility.

Plaintiff provides this Court with the new expanded test accepted by the Superior Court in it's decision in *Buckley v. State Farm*. Def. Op. Br. Ex. A. Plaintiff states the new criteria established by the Superior Court in *Buckley* permits the following actions to qualify for occupancy of a vehicle: "(1) in, (2) entering, (3) exiting, (4) **traveling** or (5) within reach of the covered vehicle". Pl. Ans. Br. at p.16 citing Def. Op. Br. Ex. A, *Buckley v. State Farm* at p.10. Although the Superior Court, itself, did not utilize the word "traveling" as one of the criteria qualifying an individual for occupancy, Plaintiff's addition of the word "traveling" as one of the criteria provides an accurate articulation of the *effect* of the Superior Court's decision in *Buckley v. State Farm.* The decision, in effect, expands the previous criteria to encompass "traveling to" or "traveling from" a vehicle as method of occupying it. Plaintiff seeks to have this Court affirm that holding which expands the *Fisher* criteria for students who are "traveling to or from a bus" with the *intent to eventually enter it*, and deem that conduct as "entering" the bus for the purposes of the PIP occupancy requirements.

Plaintiff relies on the Delaware Department of Education's School Bus Driver's Handbook ("Bus Driver Handbook") and the section of the Delaware CDL manual which provides training for school bus drivers as support for the expanded criteria for occupancy of school buses. The Bus Driver's Handbook and CDL manual identify certain areas surrounding a bus as more dangerous, and call those areas the "danger zone". Plaintiff submits that based on the manuals' identification of certain areas as dangerous, a student within one of these areas "must be treated as if it is an area inside the school bus" for insurance purposes. Pl. Ans. Br. at p. 14. Plaintiff asks the Court to apply the concept of the "danger zone" to the PIP statute and use these training manuals as authority for governing insurance coverage.

The Superior Court below adopted Plaintiff's argument, and found that whether an individual was "entering" a school bus could be determined by examining the loading and unloading procedures in a Bus driver manual, as there is a special relationship between a student boarding a school bus and the bus itself. Def. Op. Br. Ex. A at p.12. The Superior Court found that the procedures in this manual controlled occupancy for the purposes of the PIP statute. *Id*. at p.12.

The issue of whether an accident occurs in area that is, or is not, more dangerous has never been utilized as a criteria by the courts, or factored into whether an individual is an occupant of a vehicle. Just as distinguishing occupancy based on

the type of vehicle involved has no basis in statute, the concept of the "danger zone" likewise has no basis in the statutory language. In order for the "danger zone" premise to be adopted, and a special set of requirements to be applied to school bus cases, these concepts would have to be introduced and adopted by the General Assembly with that particular purpose in mind. *Kelty v. State Farm Mutual Automobile Insurance Company*, 73 A.3d 926, 933 (Del. 2013).

Without statutory authority providing for special consideration for particular vehicles, or greater areas of danger, the courts would have to chose what vehicles or areas of danger are worthy of special consideration. The application of this analysis for defining occupancy may have no limit, for each new area that an individual argues may have increased danger, would become a potential new area of coverage. For example, crossing a highway is inherently dangerous, and arguably more dangerous when there is not a bus with an outstretched stop sign and flashing lights warning oncoming traffic to stop. Under the current legal precedent, this enhanced danger does not make the individual crossing a highway an automatic occupant of the vehicle at the other end of the highway. It is whether the individual was in, entering, exiting, touching, or within reach of that covered vehicle. *Fisher*, supra at 897. If the Court adopts Plaintiff's argument, the courts would now have to weigh additional factors in order to determine if that individual is qualified for coverage based on their type of

vehicle, and the danger involved. Such criteria could produce two different results for two individuals crossing the road in the same circumstance approaching different types of vehicles.

Plaintiff provides the Court with public policy arguments, and an article demonstrating a court from another jurisdiction has adopted this new area of coverage. Plaintiff urges the court to follow suit and"adopt a specific analysis in cases involving school buses and injured students..." Pl. Ans. Br. at 31. Plaintiff's attempt to broaden the definition of occupancy, with argument that there is a public policy goal to protect individuals with PIP coverage, ignores that the Delaware PIP statute **does provide** protection for pedestrians who are non-occupants and provides them with opportunities to qualify for PIP coverage in multiple ways. Plaintiff ignores the fact that *she did* qualify for, and utilize, the PIP benefits from the vehicle (Anderson's vehicle) *which was involved in the accident*, when she claimed entitlement to those benefits as a pedestrian. Public policy does not require that the no fault statute be broadened to provide every individual injured in every possible circumstance every type of coverage.

While creating an expanded definition of coverage for students approaching school buses may be a desirable social policy, just as it might be a desirable social policy to provide PIP coverage in as broad a context as conceivable for all individuals,

the General Assembly has provided limits. *Adamkiewicz v. Milford Diner, Inc.*, 1991 Del. Super. LEXIS 64 at *3-4 (Del. Super. Feb. 13, 1991). One of those limits is "occupancy" of the covered vehicle. If Delaware wishes to establish a separate occasion for PIP eligibility, and a separate set of criteria in relation to school buses, the place to do so is within the legislature. Regardless of the social merit of Plaintiff's position, it is not the law of Delaware as it currently stands, and the courts must apply the law as it stands.

> If the General Assembly wishes to draw a radius of occupancy for individuals at or near their car in order to qualify for PIP coverage, they may do so. I [the Court] cannot create such a speculative zone of occupancy for prospective claimants who are merely waking toward their vehicle when they are injured.

*Adamkiewicz v. Milford Diner, Inc.*, 1991 Del. Super. LEXIS 64 at *3-4 (Del. Super. Feb. 13, 1991).

At the time of the accident Plaintiff was not entering, exiting, in reach of, or within the bus, and therefore was not occupying the bus. *Fisher*, supra at 897. Plaintiff was a pedestrian walking and approaching the bus, who collected PIP benefits as a pedestrian from the striking vehicle.

***b. Plaintiff was not engaged in a task related to the operation of the bus***.

Plaintiff asserts that even if she was not within a reasonable geographic perimeter of the bus, she was "clearly engaged in a task related to the operation of the

school bus" as she was "entering" the bus, and "entering" a bus is inherent to the use of the bus. See Pl. Resp. Br. at p. 12. She argues that as the bus's purpose was to pick up the Plaintiff, and that her act of crossing the street "was a task 'inextricably related to the operation' of the school bus". Pl. Ans. Br. at p.18. With this argument Plaintiff confuses what qualifies an individual as being within a reasonable geographic perimeter, and what makes an individual engaged in the operation of the vehicle.

"Operating" in relation to the PIP statute is limited to those tasks clearly connected to the movement or driving of a vehicle. *Waite*, 2002 Del. Super. LEXIS 362 at *4. Job related tasks where one's vehicle may be an integral part, such as picking up students to take to school, do not constitute "operating" within the meaning held by Delaware courts. *Id.* at *4-5.

Plaintiff was in no way related to the movement or driving of the vehicle. Plaintiff's act of approaching a bus from a distance, and/or walking towards the bus, as Plaintiff was doing, does not equate to engaging in the bus' operation. As Plaintiff's actions were in no way related to the mechanisms which allowed the bus to move, she was not engaged in an activity related to the operation of the bus within the meaning of the *Fisher* test, such as changing a tire, jump starting the car, or checking the engine. Plaintiff satisfies neither prong of the *Fisher* test. Therefore, further analysis

is unnecessary, as Plaintiff must satisfy one of the two prongs in order to qualify for PIP benefits from the bus.

## ARGUMENT II

### II. PLAINTIFF DOES NOT QUALIFY FOR PIP BENEFITS FROM THE BUS BECAUSE PLAINTIFF WAS NOT INJURED IN AN ACCIDENT INVOLVING THE BUS

### A. Merits of the Argument

#### 1. In order to qualify for PIP benefits from the bus, Plaintiff must meet one of the two prongs for the *Fisher* Test, and both criteria of the *Kelty* Test.

Plaintiff argues in her answering brief that she need only prove occupancy under the *Fisher* Test, and that she does not need to comply with the additional requirements of *Ketly* in order to establish she is entitled to the bus' PIP coverage. Pl. Ans. Br. at p. 19. Defendant notes that Plaintiff did not take a cross appeal on this issue, and thus it has been waived. Further, this issue was already fully briefed in another case submitted to, and decided by, this Court earlier this year in *Friel v. Hartford Fire Ins. Co.*, 108 A.3d 1225 (Del. 2015).

The statutory language states, in relevant part:

> The coverage 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.

21 *Del. C.* § 2118(a)(2)(c).

The meaning of the statutory language was discussed at length in the briefing in the *Friel* case. *See* Friel Op. Br. (AR-1-AR32); Hartford Ans. Br. (AR-33-AR-61); Friel Rep. Br. (AR-61-AR-&&); Hartford Sur-reply Br. (AR-78-AR-85). This Court, by affirming the Superior Court's decision, held that in order to obtain PIP benefits, a Plaintiff must establish she meets either one of the disjunctive prongs under the *Fisher* Occupancy Test, and also demonstrate that she qualifies under both portions of the *Kelty* Test. *Friel*, supra at *5-6. Plaintiff here makes the same argument as plaintiff in *Friel* made regarding the statutory language: that the phrase "injured in an accident involving such motor vehicle" in the statue applied only to "any other person injured" and did not apply to the phrase a "person occupying such motor vehicle." (AR-14). As was discussed by the briefing in *Friel*, looking to the statute as a whole, the phrase "injured in an accident" was intended to apply to both occupants and non-occupants of the insured motor vehicle. (AR-41-AR-42) Plaintiff's analysis fails to account for the requirements established by Friel, and therefore Plaintiff's argument that the *Kelty* test should not be applied fails.

As it would be impossible to fully brief this issue in the space allotted for a reply brief when no cross appeal was taken by Plaintiff, and this particular issue was recently decided by the Supreme Court, Defendant relies on the arguments submitted in the *Friel* briefing, and the opinions of the Superior Court in *Friel v. Hartford Fire*

*Ins. Co.*, 2014 Del. Super. LEXIS 234 (Del. Super. May 6, 2014), and this Court in *Friel v. Hartford Fire Ins. Co.*, 108 A.3d 1225 (Del. 2015).

Plaintiff must satisfy either of two disjunctive prongs in the *Fisher* test, and also must satisfy both criteria of the *Kelty* test in order to be eligible for PIP benefits in relation to the school bus.

**2. Plaintiff was not injured in an accident involving the bus.**

***a. The bus was not an active accessory in causing Plaintiff's injuries***.

The first requirement of the *Kelty* test is that the vehicle from which Plaintiff seeks benefits must be an active accessory in causing her injuries. *Kelty v. State Farm* 73 A.3d 926, 932 (Del. 2013). This requires a plaintiff to show 'that the injury occurred by virtue of the inherent nature of using the [insured] motor vehicle'". *Kelty*, at n. 29 There was nothing about the use of the bus that caused or contributed to the injuries to Plaintiff. The bus was a stationary object which Plaintiff was approaching. Unless acted upon by other forces for which the presence of the bus was not responsible, *i.e.*, the conduct of a negligent driver of another vehicle, the presence of the bus is harmless. In that circumstance it is not the bus which is an active accessory in producing the harm suffered by the injured pedestrian, but the negligent conduct of the driver who struck her. The bus was the mere situs of Plaintiff's injuries.

This is not to say there is never a circumstance where the bus could play an active role, but in this particular case where it merely sat at a stop on the side of the road, and had no contact with the other vehicle, and contact with the injured plaintiff, it cannot be said to be an *active* accessory in causing her injuries. Put simply, the vehicle which struck the plaintiff, and caused her injury, worked wholly independently of the bus. It was in no way connected to the bus. No mechanism of the bus created or contributed to the tortfeasor's negligence. The bus' lights did not fail, and the bus' stop sign did not fail, causing the tortfeasor to strike Plaintiff. The tortfeasor simply ignored the bus entirely, and ignored the Plaintiff in the road.

Plaintiff argues that the bus had an impact on plaintiff's injuries because "[i]f the school bus had not been present, Plaintiff would not have been present in the DANGER ZONE when she was injured, and the accident would not have occurred." Pl. Ans. Br. at 23. The Superior Court's decision in the case below adopted this argument, finding "but for the presence of ths bus, this injury would not have happened." The Superior Court and Plaintiff precisely articulated what does not qualify as an active accessory. The mere presence of the vehicle is not enough to make it an active accessory in the injury, but rather, is precisely what makes it in the situs of the injury. *Campbell*, 12 A.3d 1137, 1139. A test that only requires that the vehicle's presence be related to the presence of the pedestrian who was struck would

be so broad as to encompass all pedestrians injured who arrived at any location via a vehicle, or are headed to a location in order to be transported by a vehicle.

If it is the General Assembly's intent to provide all encompassing coverage under every scenario where an individual would not be at a location, but for a vehicle, the statute would provide for that. The courts should not create a new broad area of coverage for prospective plaintiffs who are merely present at a location at a particular time because of a vehicle.

Whether one utilizes a garage door because of a vehicle, unloads a truck because of a vehicle, or crosses the street because of a vehicle, it is not *the vehicle* which was an active accessory in causing the harm. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 12 A.3d 1137 (Del. 2011); *Friel*, 2014 Del. Super. LEXIS 234 at * 10-12. It was the garage door falling, it was the person picking up more than he could carry, and it was the driver of a wholly separate vehicle not paying attention. *Id*. The bus was not an active accessory in causing Plaintiff's injuries, and as such, Plaintiff was not injured in an accident involving the bus.

***b. An act of independent significance occurred breaking any potential causal link between the bus and the injuries to the Plaintiff.***

Only after a plaintiff has established that a vehicle was an active accessory with a causal link in causing her injuries does the Court reach the second step of the *Kelty*

analysis. If the Court determines the bus was not an active accessory in causing Plaintiff's injuries, the Court does not need to address whether an independent act broke the causal link between the use of the bus and the injury. *Friel*, supra at *13.

An accident cannot be said to "involve" a vehicle where an independent act breaks the casual link between the vehicle and the injuries inflicted. *Kelty*, supra at 921. In this case Anderson ignored the presence of the bus entirely, and proceeded independently of the bus. When Plaintiff was struck by Anderson's vehicle, which as a Delaware registered vehicle carried PIP coverage for pedestrians it struck, she became a pedestrian for the purposes of the PIP statute. This event was an act of independent significance breaking any link between Plaintiff and the bus. The pedestrian portion of the PIP statute holds.

> The coverage required in this paragraph shall apply to pedestrians only if they are injured by an accident with any motor vehicle within the State except as to named insureds or members of their households to the extent they must be covered pursuant to subparagraph d. of this paragraph.

21 *Del. C.* § 2118(a)(2)(e).

Webster's Dictionary defines "pedestrian" as "a person going on foot." Webster's Ninth Collegiate Dictionary 867 (1988). Likewise, it defines "occupant" as "one who acquires title by occupancy" or "one who occupies a particular place." Id.

at 817. To occupy means "to take up (a place or extent in space)." *State Farm Mut. Auto. Ins. Co. v. Kelty*, 2015 Del. LEXIS 550 at n. 42 (Del. Oct. 20, 2015).

At the instant Plaintiff was struck, Plaintiff was like anyone else walking to a vehicle. Plaintiff was injured before she reached the point where she had lost her status as pedestrian and became an occupant of a vehicle. Plaintiff has agreed that she is a pedestrian, and stated this as a fact in the litigation preceding this case related to obtaining benefits from Anderson's vehicle, and in this litigation. (A119-A122)(A161 at n. 26). Plaintiff becoming a pedestrian under the PIP statute, injured in an accident involving a wholly separate motor vehicle, and accepting that status, is an act of independent significance breaking any potential causal link between the bus and plaintiff's injuries.

Plaintiff was involved in accident involving the negligent tortfeasor's vehicle. As the bus was not an active accessory in bringing about Plaintiff's injury, and the intervening cause was Plaintiff being struck by a tortfeasor and becoming a pedestrian for the purposes of the PIP statute, Plaintiff was not injured in an accident involving the bus.

## CONCLUSION

Plaintiff asks the Court to ignore Delaware precedent and the statutory language in the Delaware PIP statute, in order "to create or adopt" a special test only applicable to students and school buses. *See* Pl Br. at pg. 18 and 31. Plaintiff argues that the Court should create a special exception providing coverage to a student on a school bus in additional instances that are not available to anyone else, based on a Bus Driver's training booklet. Under Plaintiff's argument, if an adult chaperone, and a student were standing on a street across from a school bus, both with the intent to eventually board the school bus, began walking side by side, and were struck by a vehicle, the Court would apply one analysis to the student and a wholly separate analysis to the adult. The statute is not designed to provide two people, in the same situation, different levels of coverage based upon the vehicle they are approaching, or whether the injured party is a student as compared to an adult. The statute makes no such distinction, and the case law prior to the Superior Court's holding in the case below recognized no such distinction.

Plaintiff seeks to have this Court adopt the role of the legislature to determine when Personal Injury Protection Benefits should apply, ignoring the fact that the legislature has already done specifically that. If a new law should be created mandating that buses provide PIP coverage for students who are crossing streets in all circumstances, then it is the General Assembly that should introduce the law, weigh

the pros and cons of such a law, and come to decision as to its enactment. It is the role of the Court to examine the legal meaning of the statute within the context of the precedent established by the courts of this jurisdiction and apply the law.

Applying the meaning of the statute, and the legal precedent of Delaware, Plaintiff fails to meet the legal standard for occupancy in relation to the school bus and established by the *Fisher* test, as she was neither in a reasonable geographic perimeter, nor engaged in a task related to the operation of the bus.

Plaintiff was not in, entering, exiting, or within reach of the bus. There is a distinction between approaching and entering, and it is not a distinction without a difference. To broaden the scope of occupancy to include all people approaching or departing from the covered vehicle on foot would create a greatly expanded area of PIP coverage, not contemplated by the statute. Further, plaintiff was in no way related to any mechanism which allowed the bus to move, and was not engaged in a task related to the operation of the bus. Plaintiff fails to satisfy the *Fisher* test.

Additionally, Plaintiff failed to satisfy the requirements established by *Kelty*. As was affirmed by this Court in the recent *Friel* case Plaintiff must first show that she was an occupant, and the demonstrate that the vehicle from which she seeks coverage was involved in causing her injury. *Friel v. Hartford Fire Ins. Co.*, 2014 Del. Super. LEXIS 234 (Del. Super. May 6, 2014), aff'd 108 A.3d 1225 (Del. 2015).

Plaintiff fails to demonstrate that the bus was an active accessory in causing her injuries, and that no independent acts of significance broke that alleged causal link. The bus was the mere situs of Plaintiff's injuries, and played no part in the accident. The tortfeasor completely ignored the bus, and did not injure plaintiff as a result of any act or failure on the part of the bus. When Plaintiff was struck by the tortfeasor's Delaware registered she became a pedestrian for the purposes of the PIP statute. This was an act of independent significance, breaking any causal link between the bus and Plaintiff. As such, Plaintiff was not injured in an accident involving the bus, but injured in an accident involving the tortfeasor's vehicle. She is not eligible for PIP benefits from the school bus, and the Superior Court's ruling in the case below granting Plaintiff summary judgment should be reversed.

Respectfully Submitted,

CASARINO CHRISTMAN SHALK
RANSOM & DOSS, P.A.

*/s/ Colin M. Shalk*
COLIN M. SHALK, ESQ.
Del. Bar ID No. 99
CATHERINE M. CRAMER ESQ.
Del. Bar ID No. 6000
Attorneys for Appellant-Defendant Below
State Farm Mutual Automobile
Insurance Company

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