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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000205-MR

HAROLD LAWSON — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 98-CI-00537

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: DYCHE, HUDDLESTON AND KNOX, JUDGES.

KNOX, JUDGE: Harold Lawson (Lawson) appeals an order of the Campbell Circuit Court granting appellee, State Farm Mutual Automobile Insurance Company (State Farm), summary judgment on a claim for uninsured motorist benefits brought by Lawson. Having reviewed the record and applicable law, we reverse.

This matter arises from an automobile accident involving several vehicles. The record discloses that on October 10, 1996, in the state of Ohio, a blue pick-up truck struck the vehicle driven by Matthew Hackworth. The collision caused Mr. Hackworth to lose control of his vehicle and collide with the vehicle Lawson was driving. A chain reaction was set into motion

wherein two (2) additional vehicles were involved in the accident. The driver of the blue pick-up never paused and left the scene of the accident without his or her identity ever being discovered.

Lawson, a Kentucky resident who had procured his contract of automobile insurance in Kentucky through his insurer, State Farm, made a claim for uninsured motorist benefits under his policy in the Campbell Circuit Court. State Farm denied coverage due to a lack of any physical contact between Lawson's vehicle and the alleged "phantom" driver's truck. Thereafter, State Farm filed a complaint for declaratory judgment, requesting that the court determine the rights and obligations afforded to Lawson, respecting uninsured motorist coverage, under the policy.[1] In December 1998, the court granted summary judgment in favor of State Farm. The appeal ensued.

Summary judgment is germane where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The circuit court is precluded from rendering summary judgment where a material fact exists requiring a trial. The function of summary judgment is to dispose of litigation where it is impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor. James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins.

[1] Originally, Lawson filed a lawsuit in Hamilton County, Ohio, against Matthew Hackworth. An arbitration panel of the Court of Common Pleas determined that Hackworth was not liable under the circumstances. Without proceeding further in Hamilton County, Lawson, through his attorney, submitted an uninsured motorist claim to State Farm.

Co., Ky., 814 S.W.2d 273, 276 (1991). However, summary judgment is to be cautiously applied and not to be used as a substitute for trial, or to sever litigants from their right to trial should they present viable issues, for the sake of efficiency and expediency. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). Yet, where the issue presented to the court is a question of law, such issue should be determined by the court. Cornette v. Commonwealth, Ky. App., 899 S.W.2d 502, 505 (1995).

In the present case, the dispositive issue is whether, as a matter of law, Lawson is contractually entitled to recover uninsured motorist benefits from State Farm, under the terms of the policy and legal precedent of this jurisdiction. We believe coverage is called for.

The circuit court observed that the language contained in Lawson's policy of insurance was the same as that discussed at length in the case of Masler v. State Farm Mut. Auto. Ins. Co., Ky., 894 S.W.2d 633 (1995), wherein a divided Supreme Court chose "not to expand the actual, direct, physical contact requirement to indirect physical contact[,]" with regard to "hit-and-run" vehicles provided for under the terms of uninsured motor vehicles coverage. Id. at 635. However, we believe the circumstances underlying the Masler decision are readily distinguishable from those before us. It is our opinion that the holding of State Farm Mut. Auto. Ins. Co. v. Mitchell, Ky., 553 S.W.2d 691 (1977)(per curiam), can be reconciled with Masler so as to

demonstrate that coverage, under conditions such as those sub judice, is available.

As a primary matter, we discern the language variation in Lawson's uninsured motorist policy and that contained in the policy at issue in Mitchell to be a distinction without a difference. The uninsured motorist provisions of the policy discussed in Mitchell contained a definition of hit-and-run vehicle as follows:

> []Hit-and-run automobile means a land motor vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (1) there cannot be ascertained the identity of either the operator or owner of such []hit-and-run automobile[.]

Mitchell, 553 S.W.2d at 692.

The insurance policy, as relating to uninsured motorist coverage, in Masler provided, in pertinent part, the identical language as that contained in Lawson's. Lawson's policy contained the following provision:

> We will pay damages for ***bodily injury*** an ***insured*** is legally entitled to collect from the owner or driver of an ***uninsured motor vehicle***. The ***bodily injury*** must be caused by an accident arising out of the operation, maintenance or use of an ***uninsured motor vehicle***.
>
> ***Uninsured Motor Vehicle —*** means:
>
> 2. a "hit-and-run" land motor vehicle whose owner or driver remains unknown and which strikes:
>
> a. the ***insured*** or

> b. the vehicle the ***insured*** is ***occupying*** and causes ***bodily injury*** to the ***insured***.

See also Masler, 894 S.W.2d at 635.

Plainly, both policies required: (1) bodily injury to the insured; (2) arising from physical contact/striking of the unknown vehicle with the insured's own vehicle or the vehicle which the insured is occupying at the time of the accident; and, (3) the land motor vehicle's owner and/or operator's identity remain unknown. The trial court viewed the Masler decision more persuasive in that the policy discussed therein contained the verb "strike" as opposed to "contact." We see no such distinction. Rather, we believe the two verbs to be entirely interchangeable. For example, "contact" has been defined as "[a] coming together or touching as of objects or surfaces." The American Heritage Dictionary 406 (3d ed. 1996). "Strike" has been defined as "[t]o cause to come into violent or forceful contact[,]" or "[t]o damage or destroy, as by forceful contact[.]" Id. at 1779. Since the verb "strike" merely implies a form of "contact," we observe no meaningful difference with respect to the application and scope of the provision of uninsured motorist insurance addressed in Mitchell versus that discussed in Masler. Therefore, contrary to the trial court's opinion, we do not necessarily view Masler as controlling in this matter.

As a secondary matter, we note the underlying policy reasons behind the physical contact/striking requirement.

Insurance companies inject such a requirement as a means of protecting an insurer from fraudulent claims arising in instances where the insured's injuries are the result of his own negligence. Jett v. Doe, Ky., 551 S.W.2d 221, 222 (1977). "Without such a requirement, insureds could damage their own car and recover, claiming fault with some third party." Belcher v. Travelers Indem. Co., Ky., 740 S.W.2d 952, 953 (1987). Such is a means by which the insurer shields itself from the fraudulent phantom driver scenario.

Masler addressed a fact pattern wherein the plaintiff sought uninsured motorist benefits following an automobile accident. Apparently, plaintiff was driving his automobile northbound when an unidentified truck, equipped with duel tandem wheels, approached traveling southbound. As the truck passed, a rock entered the windshield of plaintiff's vehicle, striking plaintiff and causing him injury. The truck neither slowed nor stopped, the identity of its driver never being ascertained. At no time was there ever any physical contact between the actual truck, itself, and the vehicle of the plaintiff.

The Masler Court denied coverage in that it gleaned the absence of any direct physical contact or "striking" between the phantom vehicle and plaintiff foreclosed coverage. The Court observed:

> The accepted and recognized rationale for the "striking" requirement of a policy when the identity of a hit and run motorist is unknown is to foreclose fraudulent and collusive claims.
>
> . . . .

> In any event, it is clear, whether we agree or not, that the State Farm policy clearly and unambiguously provides that a hit and run vehicle must strike the insured or the vehicle occupied by the insured in order for uninsured motorist coverage to arise.

Masler, 894 S.W.2d at 635. (Citing, inter alia, State Farm Mut. Auto. Ins. Co. v. Mitchell, Ky., 553 S.W.2d 691 (1977)).

We concede Mitchell incorporates a "physical contact" requirement for the receipt of uninsured motorist benefits in a hit-and-run scenario. However, it is our opinion this holding envisioned a fact pattern such as that before us and opined benefits to be available. Specifically, the court stated:

> The majority rule in this respect holds that where an unknown hit-and-run motorist strikes a third vehicle, which in turn strikes the insured vehicle, there is "actual physical contact" within the meaning of the contractual requirements contained in an uninsured motorist policy.

Mitchell, 553 S.W.2d at 692. (Citations omitted)(emphasis added).

The Mitchell case involved a motorist, Timothy Moran, who alleged that having been forced off the road by a utility truck, he swerved across the grass median of Highway I-65 and struck an automobile driven by Lucy Mitchell. Moran admitted there was no physical contact between his vehicle and the truck, nor were there any witnesses to the event either prior- or post-collision. As such, the Court concluded:

> This court is of the opinion, nevertheless, that where there has been no actual physical contact between the hit-and-run vehicle itself and either the insured vehicle or the intermediate vehicle, the "physical contact" requirement of the hit-and-run clause of the uninsured motorist

> policy under consideration in this case has not been met.

Mitchell, 553 S.W.2d at 692. (Emphasis added).

We believe, as did a dissenting opinion in Masler, this language reflects the Court's recognition "that there is a possibility of coverage where the unknown hit-and-run vehicle strikes another vehicle, which in turn strikes the insured vehicle." Masler v. State Farm Mut. Auto. Ins. Co., Ky., 894 S.W.2d 633, 638 (1995) (4-3 decision) (Stumbo, J., dissenting). Further, Masler is distinguishable from the case sub judice in that the intermediary object of forceful contact was a flying rock as oppose to a vehicle involved in the collision.[2]

Here, the first vehicle (the unidentified blue truck), supplied the propulsive force that made the intermediary vehicle (Hackworth) an agency of harm to the third vehicle (Lawson). The underlying policy reasons behind the insurance contract requiring physical contact with an unidentified car are simply not applicable. The record reflects the actual existence and errant action of the hit-and-run driver was never brought into question. Similarly, as State Farm points out in its brief, a non-binding arbitration panel in Hamilton County, Ohio, found Hackworth not

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[2] We note that the oft-cited case of Jett v. Doe, Ky., 551 S.W.2d 221 (1977), as well as Mitchell involved the denial of coverage due to the absence of any actual contact with the unidentified vehicle. In both these cases the driver swerved away from the errant vehicle, which reflexive action resulted in loss of control and, ultimately, collision with another vehicle. Although we align with the reasoning set forth by Justice Leibson's dissent in Belcher v. Travelers Indem. Co., Ky., 740 S.W.2d 952, 954 (1987), as equally as we do Justices Leibson's and Stumbo's dissenting opinions in Mitchell, such broad issues are not before this Court and, as such, we limit our discussion herein to the facts at bar.

liable for the accident. We believe Justice Leibson succinctly stated the rationale for providing uninsured motorist benefits under circumstances such as those contained in the facts of this case, to wit:

> Since uninsured motorist coverage was first enacted in 1970, the legislature has further demonstrated a policy of providing accident victims statutory coverage by the Motor Vehicle Reparations Act (MVRA), which adds no-fault and underinsured motorist coverage. This should give us pause to reevaluate our thinking in Jett v. Doe, Ky., 551 S.W.2d 221 (1977), which was never really sound in the first place.
>
> The underlying reasoning upholding the physical contact requirement expressed in Jett was that an insurance company had a right to protect against fraud or collusion. The reason is simply meaningless in cases where there is independent corroboration to prove that an unknown motorist caused the accident.

Belcher, 740 S.W.2d at 954. (Leibson, J., dissenting).

In sum, we believe that as a matter of law the Court's opinion in State Farm Mut. Auto. Ins. Co. v. Mitchell, Ky., 553 S.W.2d 691 (1977), controls in this matter and Lawson should be permitted to pursue his cause of action against State Farm for uninsured motorist benefits. Further, in light of the decision of the Hamilton County, Ohio, arbitration panel, it appears there is some physical evidence or other form of corroborating testimony that will support Lawson's theory of the case. Should State Farm choose to challenge Lawson's theory, a question of fact will be raised for a jury to determine.

In concert with the forgoing opinion, the order of the Campbell Circuit Court granting summary judgment in favor of

State Farm is reversed and the matter remanded for further proceedings.

DYCHE AND HUDDLESTON, JUDGES, CONCUR IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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