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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000721-MR

JAMES BALDWIN — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 08-CI-00035

JOHN DOE AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

CAPERTON, JUDGE: James Baldwin appeals the Grant Circuit Court's order of March 19, 2009, granting the motion for summary judgment by State Farm Mutual Automobile Insurance Company. On appeal, Baldwin argues that the trial court

[1] Senior Judge William Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

erroneously granted the motion for summary judgment. We agree and, accordingly, reverse the order of March 19, 2009, and remand for further proceedings.

The facts that give rise to this appeal are not in dispute. On January 24, 2006, Baldwin was driving his truck on the interstate in Grant County. Baldwin alleges that an unknown driver in a flatbed truck was traveling immediately in front of him when a large tarp flew from the flatbed truck onto Baldwin's vehicle. Baldwin continued traveling to the next truck stop in order to remove the tarp from his vehicle. As he was dismounting from his truck, Baldwin alleges that he slipped and fell, thereby injuring his back. Baldwin then sought uninsured motorist insurance coverage (UM) through State Farm, alleging his injuries were the result of a hit-and-run from an unknown driver. State Farm denied coverage and Baldwin initiated suit.

State Farm moved the court for summary judgment arguing that the tarp coming from an unknown vehicle onto Baldwin's vehicle was not a "strike," *i.e.*, physical contact, as required by State Farm's policy of UM coverage.[2] The trial court granted the motion for summary judgment in its order of March 19, 2009. In granting summary judgment, the court relied upon *Masler v. State Farm Mut. Auto. Ins. Co.,* 894 S.W.2d 633, 635 (Ky. 1995), in which the Kentucky Supreme Court held that the "striking" requirement "means actual, direct, physical

[2] State Farm's policy defined uninsured motor vehicle as 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.
(Internal emphasis omitted).

contact between the hit-and-run vehicle, itself, and the insured's vehicle." The trial court further noted that while *Masler* involved a rock thrown up by an unknown vehicle and the facts *sub judice* involve a tarp that came directly from an unidentified vehicle, the reasoning in *Masler* dictated the grant of summary judgment. It is from this order that Baldwin appeals.

On appeal, Baldwin presents one argument: that the trial court erroneously granted summary judgment as the contact between Baldwin and the unidentified vehicle was sufficient physical contact (*i.e.*, satisfied the striking requirement) to provide UM coverage. State Farm argues that the trial court properly granted summary judgment as the facts in the case *sub judice* do not meet either requirement of UM coverage under the policy, namely, that there must be direct vehicle-to-vehicle impact and that this impact causes bodily injury to the insured.

At the outset, we note the applicable standard of review on appeal of a grant of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the

record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Thus, summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

In a determining whether uninsured motorist coverage exists, the courts turn to the contract provision between the parties and to our Kentucky statutes. KRS 304.20-020 recognizes "that individual insurers may, by contractual definitions, provide coverages and terms and conditions in addition to those required by the statute." *Burton v. Farm Bureau Ins. Co.,* 116 S.W.3d 475, 478 (Ky. 2003). As the determination of UM coverage involves only the construction of Kentucky statutes and a written insurance contract, our review is *de novo* and

we have no obligation of deference to the lower courts. *Dowell v. Safe Auto Ins. Co.,* 208 S.W.3d 872 (Ky. 2006).

As noted by State Farm, Kentucky courts have consistently held that contact in the hit-and-run context means direct physical contact in order to prevent fraud. As held in *Masler, supra:*

> 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. *Jett v. Doe*, Ky., 551 S.W.2d 221 (1977), recognizes the purpose of the standard form provision which is contained in State Farm's policy of insurance. The requirement means actual, direct, physical contact between the hit and run vehicle, itself, and the insured's vehicle. *See State Farm Mutual Automobile Insurance Co. v. Mitchell,* Ky., 553 S.W.2d 691 (1977). This Court has chosen not to expand the actual, direct, physical contact requirement to indirect physical contact.

Masler at 635.

Indeed, uninsured motorist insurance is "neither an all-risk insurance designed to provide coverage for all injuries incurred, nor is it a no-fault motor vehicle insurance that provides coverage without regard to whether a plaintiff is legally entitled to recover damages from an uninsured or unidentified motorist." *Id.*

However, subsequent to *Masler*, the Kentucky Supreme Court in *Shelter Mut. Ins. Co. v. Arnold*, 169 S.W.3d 855 (Ky. 2005), held that an indirect "hit" which was the result of a casual chain of connection was sufficient to provide UM coverage. In so holding the Court stated:

> The issue now before us is whether the "hit" requirement in Shelter's definition of a "hit-and-run motor vehicle" is satisfied when a hit-and-run motorist hits an intermediate vehicle causing it to hit the insured vehicle. We hold that it is. The fact situation here is conceptually the same as if the hit-and-run motorist had first struck a stationary object, such as a road sign, driving the sign forward into Arnold's vehicle, and causing the sign to interpose itself between her vehicle and that of the tortfeasor, preventing the sort of intimate and literal "physical contact" urged by Shelter. Such a scenario has been held to constitute "physical contact." *Progressive Cas. Ins. Co. v. Mastin*, 4 Ohio App.3d 86, 446 N.E.2d 817, 819 (1982). In both that scenario and the situation that occurred in this case, there might have been no technical physical contact between the hit-and-run vehicle and the insured vehicle, but the hit-and-run vehicle initiated the force that ultimately struck the insured vehicle. We hold that an indirect "hit" resulting from a chain-reaction accident initiated by a "hit-and-run" motorist satisfies the "hit" requirement of Shelter's definition of a "hit-and-run motor vehicle."

Arnold at 857.

State Farm argues that *Arnold* is not applicable as it involved vehicle-to-vehicle impact under limited circumstances[3] and that *Masler* with its requirement of direct physical contact is controlling. Baldwin relies upon *Arnold, supra,* to make the argument that if part of a vehicle or something it was transporting comes off the vehicle and strikes the insured's car, then UM coverage

[3] State Farm also makes the argument that assuming, *arguendo,* that the tarp did "impact" the front of Baldwin's vehicle, his claim must still fail based upon a lack of causation. State Farm argues that the tarp coming into contact with Baldwin's vehicle was not the direct proximate cause of any of his claimed injuries. We decline to address this argument as we are unclear if this argument was presented to the trial court. *See Jewell v. City of Bardstown*, 260 S.W.3d 348, 350-351 (Ky.App. 2008)("the circuit court did not address any of these issues in reaching its decision. We only review decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible.").

should apply, as this would satisfy the physical contact requirement given the causal connection. Baldwin distinguishes *Masler* because that case involved an object of unknown origin propelled by an unknown driver; whereas, in the case *sub judice*, an object transported by an unidentified vehicle struck Baldwin's vehicle. Baldwin further argues that the clear implication of the UM policy (*i.e.*, the construction of the contract) provides for coverage if any part of an unknown vehicle comes into contact with any part of the insured's vehicle. After a review of the parties' arguments, the policy in question contained within the record, and the applicable jurisprudence, we agree with Baldwin that any part of the vehicle, including an object coming off a vehicle, which then impacts the insured's vehicle, satisfies the "strike" requirement of the UM policy.

Unlike the situation presented in *Masler,* where an object of unknown origin was propelled by the unidentified vehicle, the facts *sub judice* involve an object that was attached (albeit insufficiently) to a vehicle that subsequently became dislodged from the unidentified vehicle and impacted Baldwin's vehicle. It defies logic to think that a vehicle could literally disintegrate into pieces while traveling our highways and neither the owner nor operator thereof would bear liability, but if all the pieces remained together as a whole then liability would attach. We believe that the impact set forth by the facts *sub judice* was sufficient to satisfy the physical contact required by the "strike" provision in the UM policy. Thus, the trial court erred in its grant of summary judgment.

Accordingly, we reverse and remand this matter back to the trial court for further proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Charles E. Bullard
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEES:

Robert B. Cetrulo
Edgewood, Kentucky