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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002258-MR

RONDA REYNOLDS — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 07-CI-90274

SAFECO INS. CO. OF ILLINOIS
AND UNKNOWN DRIVER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Ronda Reynolds appeals from an order of the Bath Circuit Court granting summary judgment to her auto insurance provider, Safeco Insurance Company. For the reasons stated, we affirm.

While Reynolds was driving on Interstate 64 in Bath County, a piece of ice dislodged from a tractor-trailer and struck Reynolds's vehicle, causing her injury and damaging the vehicle.[1] It is undisputed that the truck did not strike Reynolds's vehicle or any other object and that the identity of the truck's driver or owner is unknown. Reynolds attempted to secure compensation for her injuries and damage to the vehicle through the uninsured motorist (UM) clause in her insurance policy. Safeco denied her claim asserting that Reynolds's accident was not covered by the UM policy.

The trial court granted Safeco's motion for summary judgment, finding that even when it viewed the facts in a light most favorable to Reynolds, she was not entitled to coverage based upon the holding of *Masler v. State Farm Mutual Automobile Insurance Company*, 894 S.W.2d 633 (Ky. 1995). The trial court found that the facts were so similar to the facts of *Masler*, it was compelled to grant Safeco's motion. On appeal, Reynolds argues that *Masler* was impliedly overruled by *Shelter Mutual Insurance Company v. Arnold*, 169 S.W.3d 855 (Ky. 2005).

Our review of a summary judgment is *de novo. Blevins v. Moran*, 12 S.W.3d 698, 699 (Ky.App. 2000). Summary judgment is authorized when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56.03. While summary judgment should be

[1] For reasons unknown, Reynolds's attorney refers to this piece of ice as an "ice log," though Reynolds herself said it more closely resembled a sheet of poster board. The term "ice log" implies a size and shape of the ice that is not supported by the record so we do not adopt that term.

granted only cautiously, it is warranted when it would be impossible for the non-moving party to prevail at trial. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482-83 (Ky. 1991). With this standard as our guide, we discuss the merits of Reynolds's appeal.

Reynolds's automobile insurance policy provided coverage for accidents involving uninsured motorists. The relevant portion of the policy's definition of an uninsured vehicle is as follows:

> C. "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
> . . .
> 3. Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits:
> . . .
> c. your covered auto; or
> d. another vehicle which, in turn, hits:
> . . .
> (3) your covered auto.

The issue is whether the ice striking Reynolds's vehicle was a "hit" as contemplated by the portion of the policy covering an insured against hit-and-run accidents.

In *Masler*, the Supreme Court considered the application of an uninsured motorist provision in the context of a hit-and-run accident. The insurance policy in that case covered the insured for hit-and-run accidents in which his car was struck by a vehicle whose driver or owner was unknown. *Masler*, 894 S.W.2d at 635. However, the Court determined the insured was not entitled to coverage when a rock was thrown from the tires of an unidentified truck and struck

the insured's vehicle. The Court emphasized that the policy required "actual, direct, physical contact between the hit and run vehicle, itself, and the insured's vehicle," and declined "to expand the actual, direct, physical contact requirement to indirect physical contact." *Id.* (citing *State Farm Mutual Automobile Insurance Co. v. Mitchell*, 553 S.W.2d 691 (Ky. 1977)). Because the truck itself did not strike the insured vehicle, the resulting damage was not covered by the policy.

The trial court correctly noted the similarities between *Masler* and Reynolds's accident. In both cases, an object that was not a part of nor affixed to the unknown vehicle struck the insured vehicle and the unknown vehicle did not have contact with the insured vehicle. Safeco argues the holding in *Masler* is controlling given the similarity of circumstances.

In contrast, Reynolds argues the reasoning in *Shelter Insurance* controls. In *Shelter Insurance*, the Supreme Court concluded that physical contact was present in a "chain-reaction accident" for purposes of the insured's UM policy.[2] The insured in that case was involved in an accident in which an unknown hit-and-run driver struck a vehicle which then struck the insured vehicle. There was no direct physical contact between the hit-and-run vehicle and the insured vehicle; however, the court found the requirements of the policy were met because "the hit-and-run vehicle initiated the force that ultimately struck the insured vehicle." 169 S.W.3d at 857.

[2] The policy in *Shelter Insurance* did not include an express provision regarding chain-reaction accidents, though Reynolds's policy does.

Reynolds claims, because the truck initiated the force (*i.e.*, the forward motion) which caused the ice to hit her car, under *Shelter Insurance* she is entitled to UM coverage. We believe Reynolds's interpretation of *Shelter Insurance* is too broad. The Supreme Court stated: "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.'" *Id*. (emphasis added). The holding is limited to chain-reaction accidents and does not alter the rule stated in *Masler*.

In the instant case, as in *Masler*, the offending vehicle did not strike another vehicle, including Reynolds's vehicle. The language of the policy does not create coverage unless the hit-and-run vehicle directly and physically hits either the insured's vehicle or a vehicle which then comes into contact with the insured vehicle. This is consistent with the language of the policy and with *Shelter Insurance*.

Finally, we are aware that another panel of this Court, in *Baldwin v. Doe*, 2010 WL 392343 (Ky.App. Feb. 05, 2010) (No. 2009-CA-000721-MR), as modified (Feb. 26, 2010), *disc. rev. pending*, *State Farm Mut. Ins. Co. v. Baldwin*, (No. 2010-SC-000144) reached a contrary result under similar, though not identical, facts. We believe the case before us is distinguishable from *Baldwin*.

In *Baldwin*, a tarpaulin that was affixed to the vehicle dislodged causing it to strike the plaintiff's vehicle. A separate panel of this Court relied on *Shelter Insurance*, and its holding that an indirect hit satisfies the "hit" requirement

in a motor vehicle insurance policy. Specifically, this Court held that a strike by a part of the vehicle, including an object affixed but dislodged, was sufficient to trigger the UM coverage under the policy. The reasoning in *Baldwin* is a natural extension of the holding in *Shelter Insurance*.

The present case presents an entirely different scenario. The object that hit the vehicle was not intentionally affixed to the vehicle. It was ice. There is nothing to suggest that the ice accumulated other than by an act of God nor was there any evidence to suggest the ice was intentionally affixed to the hit-and-run vehicle by its operator.

For the reasons stated, we affirm the order of the Bath Circuit Court granting summary judgment.

CAPERTON, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur with the majority but write separately because I believe *Baldwin*, like Reynolds, reads *Shelter Insurance* too broadly. *Shelter Insurance* does not abandon the purpose of

> the "physical contact" condition . . . . [The purpose remains] to protect the insurer from having to defend against potentially fraudulent claims "arising in cases where the insured's injuries are the result of his own negligence, without the intervention of any other vehicle, although it is alleged that the accident was caused by an unidentified vehicle which immediately fled the scene."

Shelter Insurance at 856-57 (quoting *Jett v. Doe*, 551 S.W.2d 221, 222 (Ky. 1977) and citing *Belcher v. Travelers Indem. Co*., 740 S.W.2d 952 (Ky. 1987)). I believe *Baldwin v. Doe* strays too far from this purpose for the "physical contact" condition.

While I recognize there is a distinction between naturally occurring ice and the placement of a tarp on a vehicle, I do not believe such a distinction bears on the legal question: what constitutes a "strike" or "hit" for purposes of UM coverage? In fact, it reintroduces an element of fault where none is required. Nor does one circumstance (improperly secured tarp) satisfy the purpose for the "physical contact" condition as quoted above from *Shelter Insurance*, while the other circumstance (naturally occurring ice) fails to do so.

Therefore, while I agree with the result reached by the majority, I write separately to satisfy my obligation to engage in constructive criticism of what appears to me to be precedent. *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986)("Court of Appeals is compelled to follow precedent . . . . [But t]hat is not to say, however, that disagreement is prohibited or constructive criticism banned.").

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
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