SUPREME COURT OF KENTUCKY
2010-SC-0665-D
(2008-CA-2258)

RONDA REYNOLDS — MOVANT

VS. APPEAL FROM BATH CIRCUIT COURT
HON. WILLIAM B. MAINS, JUDGE

SAFECO INSURANCE
COMPANY OF ILLINOIS — RESPONDENT

BRIEF FOR MOVANT

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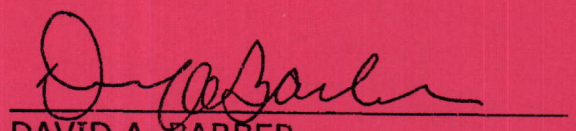
Certificate Of Service:

I hereby certify that a copy of the foregoing Brief for Movant has been mailed, postage prepaid, to Hon. William B. Mains 33 Terrapin Branch, Clearfield, Kentucky 40313; Hon. David Safe, 1700 Kentucky Home Life Building, 239 South Fifth Street, Louisville, Kentucky 40202. I hereby further certify that the record has been returned to the Supreme Court of Kentucky, 700 Capitol Avenue, Room 235, Frankfort, Kentucky 40601-3415.



DAVID A. BARBER

INTRODUCTION

This is an appeal of an opinion of the Court of Appeals affirming a summary judgment entered in favor of the Respondent Safeco Inc. Co. of Illinois (Safeco) dismissing the personal injury claim of the Movant Ronda Reynolds (Reynolds).

As issue is the Reynolds entitlement to uninsured coverage on her policy of insurance with Safeco when she was injured by ice which had become dislodged from the tractor-trailer of the Respondent unknown defendant (truck), smashed through her windshield and struck Reynolds in the face and body. Specifically, was that course of events a "hit" within provisions of Kentucky law so as to invoke the uninsured provisions of Reynolds policy of insurance with Safeco?

STATEMENT CONCERNING ORAL ARGUMENT

This Court's order granting discretionary review recites that an oral argument will be set. The Movant agrees that an oral argument would be beneficial.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts of this case are relatively undisputed. On February 20, 2007 Ronda Reynolds was a 21 year old college student from Pike County, Kentucky who was driving a vehicle on I-64 near Owingsville, Kentucky, when a 2 ½ foot piece of ice became dislodged from a truck and smashed through Reynolds' windshield striking her in the face and body. Reynolds' vehicle was insured by Safeco. It is also undisputed that the truck from which the ice became dislodged did not stop. Finally, it is undisputed that the contract of insurance between Reynolds and Safeco covered uninsured claims involving hit and run drivers.

What has been contested is what constitutes a "hit" within Kentucky Law so as to invoke Reynolds uninsured coverage thereby compensating her for damages she sustained in the wreck.

ARGUMENTS

1. THE STRIKING OF THE MOVANT BY DISLODGED ICE IS A "HIT" AS DEFINED BY KENTUCKY LAW.

What constitutes a "hit" for purposes of invoking uninsured insurance coverage has been litigated many times before this Court. That evolution of litigation has resulted in at least two cases that at first blush are in conflict, but upon close review are not in conflict at all.

Safeco argued before the trial court that the 1995 case of *Masler v. State Farm Mutual Automobile Insurance Company*, Ky., 894 S. W. 2d 633 (1995) was most like the fact situation in this case. In *Masler*, a rock was either thrown from a passing truck or thrown from the roadway by the wheels of the truck, striking Masler as he was operating his vehicle. The *Masler* Court held that "there was no contact between the truck itself and plaintiffs (Masler's) vehicle" and therefore there could be no "hit" for purposes of uninsured coverage.

If that were the final word on the issue, the Bath Circuit Court would have been correct in issuing a summary judgment in this case. However, ten years later this Court wrote *Shelter Mutual Insurance Company v. Arnold*, Ky., 169 S. W. 3d 855 (2005), which adopts a more realistic, and equitable standard to determine what constitutes a "hit" for purposes of determining uninsured insurance coverage in Kentucky.

Justice Cooper wrote:

> "There might have been no technical physical contact between the hit-and-run vehicle and the insured vehicle, BUT THAT 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." *Arnold* at 856. **Emphasis ours**

That language alone is sufficient to satisfy the "hit-and-run" requirement in this case, but Justice Cooper went on to include the following language, which for all purposes overrules *Masler* by implication;

> "Where force has been exerted from an unidentified vehicle through an intermediate object and where this fact may be verified in such a way to provide safeguards against fraud...the physical contact requirements of the policy has been satisfied."

AND FURTHER

> (It is clear that ever since the time of Sir Isaac Newton man has recognized and lived by certain physical laws of impact and motion.....We find as did Sir Isaac, that this acceptance of fundamental property of natural phenomena is the more sensible and consistent view as regards transfer of impact through intermediate objects'.) *Arnold* at 857.

Ronda Reynolds described the wreck as follows:

> "I was on my way to school and I was passing a semi. There was a truck in front of me. And I remember looking up and seeing something break off the truck. I couldn't tell what it was. I could just tell it was something large, but I didn't know what it was. And, the next thing I remember is just being across the interstate and that's really about all I recall. I remember – I felt like I was just bounding across the road and occasionally I could

look up and see, like, oncoming traffic coming toward me. "(Q 92 p.14 Ronda Reynolds depo)

The apparent conflict of authority resulting from *Masler* and *Arnold* is presently before this Court in this case and a companion case, State Farm Mutual Automobile Insurance Co. v. Baldwin, 2010-SC-0144-DG, where conflicting results were reached by different panels of the Court of Appeals in what are similar fact situations. Both panels of the Court of Appeals sought publication of their opinions.

The issue has been considered by many of our sister states' appellate courts. The trend of which is in line with Justice Cooper's opinion in *Arnold*, supra.

In *Fore v. Travelers Insurance Co.*, 528 So.2d 1091, dirt and debris from a truck traveling in front of Fore became dislodged as part of the trucks load and struck Fore's top and windshield causing him injury. The Louisiana appellate court found that was sufficient contact to invoke the uninsured provisions of Fore's policy. That court wrote:

> "However we see no reason for distinguishing between the uninsured vehicle causing a car to strike the Plaintiff's car and the uninsured vehicle causing dirt and debris to strike the Plaintiff's car so long as the causation is "complete, proximate, direct and timely"" 528 So. 2d at 1092

The Ohio Court of Appeals reached a similar conclusion in *Atwood v. State Farm Mutual Insurance Co.*, 587 N.E. 2d 936, a piece of limestone rock was propelled from a passing truck, traveling through Atwood's windshield,

striking him in the face. In finding that was sufficient contact to invoke uninsured coverage, the *Atwood* court wrote:

> "Nor is the 'physical contact' requirement unreasonable. The purpose of the requirement is obvious—to provide an objective standard of corroboration of the existence of [a] 'hit and run' vehicle to prevent the filing of fraudulent claims...
> The "physical contact" rule is designed, as was said in *Reddick*, to be "* * * an objective standard of corroboration * * *". There is no question of corroboration here; appellant has a smashed window and a fractured nose." 587 N.E. 2d at 937

In Illinois, a driver was injured when a lug nut came off a passing truck, came through his windshield and struck him. The Appellate Court of Illinois reversed a trial courts summary judgment finding no coverage and held"

> "It is well established in Illinois that an insured cannot recover under the hit-and-run provision of the uninsured motorist coverage unless there is "a physical contact of the unidentified motor vehicle with the insured or an automobile occupied by the insured...
> The purpose of the requirement of contact, either in a statute or policy, is to reduce the potential for fraud in that otherwise an insured might simply lose control of his automobile and blame it on a nonexistent driver...
> Where there is a direct causal connection between the hit-and-run vehicle and the Plaintiff's vehicle, which connection carries through to the Plaintiff's vehicle by a continuous and contemporaneously transmitted force from the hit-and-run vehicle, recovery is allowed." *Illinois National Insurance Company v. Palmer,* 542 N.E. 2d 707 at 708.

It is noteworthy that the *Palmer* court quoted the exact language from Sir Isaac Newton that Justice Cooper did in *Arnold* (supra).

Finally, there is an unjustified distinction drawn by the Court of Appeals in this case and the companion case, *State Farm Mutual Automobile Insurance Co. v. Baldwin,* 2010-SC-0144-DG. In *Baldwin*, a negligently secured tarp became dislodged from an unidentified truck, striking the passing driver and injuring him. While here, ice was negligently allowed to accumulate on an unidentified truck became dislodged striking the driver of a passing vehicle causing injury.

We assert that both acts are negligent, and would have been actionable against the respective trucks. (See *Alaska Freight Lines v. Harry*, 220 F. 2d 272, where a falling piece of ice from the top of a tractor trailer onto a passing vehicle was actionable negligence.)

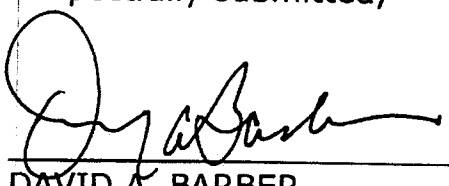
To allow differing results in similar circumstances undermines the public trust in our legal system and defies common sense.

CONCLUSION

Ronda Reynolds and her parents paid for insurance coverage to compensate them for damages caused by the acts of uninsured drivers. There was no possibility of fraud on Ronda's part as the hit and injury are verifiable and well documented. It is the natural progression of the law to accept Justice Cooper's logic and allow an injured person to prove their case to a jury. Defenses based upon hyper-technical interpretations of the law are simply unfair.

Therefore, the Movant urges the Court to firmly and finally establish the rule set out in *Arnold.*

Respectfully submitted,



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