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

RONDA REYNOLDS — APPELLANT

V.

BATH CIRCUIT COURT
2007-CI-90274

SAFECO INSURANCE COMPANY OF ILLINOIS — APPELLEE

BRIEF FOR APPELLEE,
SAFECO INSURANCE COMPANY OF ILLINOIS

CERTIFICATE OF SERVICE

It is hereby certified that the original and nine (9) copies of the foregoing were served via Federal Express this 24 day of March, 2011, upon the Clerk of the Supreme Court of Kentucky, 700 Capitol Avenue, Room 235, Frankfort, Kentucky, 40601-3415; and that a true and correct copy of the Brief for Respondent has been mailed, postage prepaid, to David A. Barber, Counsel for Appellant, 86 West Main Street, P.O. Box 1169, Owingsville, Kentucky, 40360; and Hon. William B. Mains, Bath Circuit Court Judge, P.O. Box 855, Morehead, Kentucky, 40351. The undersigned further certifies that the record on appeal was not withdrawn from the Supreme Court of Kentucky.

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STATEMENT CONCERNING ORAL ARGUMENT

This Court has previously issued an Order advising the parties that this case will be set for oral argument on the same date as the State Farm Mut. Auto. Ins. Co. v. Baldwin, 2010-SC-000144, case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On February 20, 2007, along Interstate 64 in Bath County, Kentucky, the Appellant, Ronda Reynolds, while traveling to school from home, contends that a piece of ice broke free from the cab of a tractor trailer she was passing striking her vehicle. (See PLAINTIFF'S COMPLAINT at Paragraph 4, as well as Deposition of Ronda Reynolds at p. 13, ll. 16-18; p. 14, ll. 9-18; p. 15, ll. 2-14; p. 17, ll. 10-11; and p. 18, ll. 11-15). Ms. Reynolds described that when the ice broke off the cab, it looked like a piece of poster board flying in the air. (Reynolds Depo., p. 22, ll. 10-13). Ms. Reynolds cannot identify the tractor trailer company or the driver of the tractor trailer from which the piece of ice allegedly broke free. (Reynolds Depo., p. 23, l. 16 – p. 24, l. 10). Ms. Reynolds does not contend that the tractor trailer was hauling ice at the time of this accident. (Reynolds Depo., p. 25, ll. 1-3). Ms. Reynolds does not think that there was any particular purpose for the ice to be on the tractor trailer other than as a natural accumulation. (Reynolds Depo., p. 42, ll. 2-4). Ms. Reynolds' car was never struck by the tractor trailer or any other vehicle, nor did her car strike any other vehicle. (Reynolds Depo., p. 30, l. 18 – p. 31, l. 5).

Ms. Reynolds filed suit in this matter against this Appellee, Safeco Insurance Company of Illinois, seeking uninsured motorist benefits. Attached hereto as Appendix Tab 1 is a copy of Safeco's policy covering Ms. Reynolds' vehicle at the time of the incident which is the subject of this case. The uninsured motorist (hereinafter "UM") portion of the Safeco policy begins on Page 12 under **PART C**. Subsection **C.** defines "**Uninsured motor vehicle**" as including a motor vehicle:

3. Which is a hit-and-run **vehicle** whose operator or owner cannot be identified and which **hits**:

   a. **you** or any family member;

   b. **a vehicle** which you or any family member are occupying;

   c. **your covered auto**; or

   d. **another vehicle which**, in turn, **hits**:

      (1) **you** or any family member;

      (2) **a vehicle** which you or any family member **are occupying**; or

      (3) your covered auto.

(Emphasis added).

After deposing Ms. Reynolds, Appellee, Safeco, moved the trial court for Summary Judgment as a matter of law arguing that its policy does not provide uninsured motorist coverage for the Plaintiff based upon the undisputed material facts of this case. The parties had an opportunity to brief the issues for the trial court. On October 22, 2007, the trial court entered Summary Judgment in favor of Safeco. Ms. Reynolds appealed the grant of Summary Judgment to the Kentucky Court of Appeals. On September 17, 2010, the Court of Appeals issued its OPINION AFFIRMING in favor of Safeco. This Court has now accepted discretionary review.

ARGUMENT

The issue before this Supreme Court is whether the Trial Court properly entered Summary Judgment in favor of Safeco holding that Ms. Reynolds is not entitled to coverage under the uninsured motorist portion of Safeco's policy. The legal question

presented is whether a piece of naturally-occurring ice which breaks off a tractor trailer driving down the road thereby making contact with the Appellant's passing vehicle constitutes a "hit" by a "hit-and-run vehicle" under the Safeco policy.

A. SUMMARY JUDGMENT STANDARD

The controlling standard for summary judgment in Kentucky was originally set forth in Paintsville Hospital Company v. Rose, 683 S.W.2d 255 (Ky. App. 1985). That standard was subsequently clarified in Steelvest, Inc. v. Scansteel Service Center, 807 S.W.2d 476 (Ky. 1991). In the Steelvest Inc., infra, case, this Kentucky Supreme Court held that while summary judgment is not designed to be a substitute for trial, where the adverse party cannot prevail under any circumstances, the granting of summary judgment is proper. The task of the trial judge is to examine the evidence of record to discover if a real issue exists and not to decide any issues of fact. Steelvest, 807 S.W.2d at 480. It is the role of the trial judge to determine all questions of law. In the present matter, even if all allegations and facts as testified to by the Appellant, Rhonda Reynolds, are assumed to be true, it is clear that Safeco is entitled to judgment as a matter of law. In short, Ms. Reynolds cannot prevail as a matter of law under any circumstances in this case.

B. THE TRACTOR TRAILER DID NOT "HIT" MS. REYNOLDS' VEHICLE AS REQUIRED BY THE CLEAR LANGUAGE OF THE SAFECO POLICY.

Kentucky's Appellate Courts have long enforced the "physical contact" requirement for uninsured motorist benefits to be available in any particular case. See, for example, Jett v. Doe, 551 S.W.2d 221 (Ky. 1977). This Kentucky Supreme Court routinely recognizes that the uninsured motorist statute allows insurance companies to

contractually restrict uninsured motorist coverage to those situations where there is actual physical contact between the insured and the alleged uninsured vehicle. Id.; see also KRS 304.20-020. Further, the unambiguous terms of insurance policies, like other contracts, are to be given their natural meaning. See, for example, Bituminous Cas. Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633 (Ky. 2007).

Kentucky's Appellate Courts have defined two situations in which the physical contact requirement of an uninsured motorist policy can be satisfied. Safeco's UM policy language contemplates both scenarios. First, there can be a direct hit between the insured and the alleged uninsured motorist. See, by way of explanation, Burton v. Farm Bureau Ins. Co., 116 S.W.3d 475 (Ky. 2003). There are no allegations of direct contact between the tractor trailer and Ms. Reynolds' vehicle in this case. (Reynolds Depo., p. 30, l. 18 – p. 31, l. 5).

Second, the physical contact requirement of an uninsured motorist policy can be satisfied by an indirect hit in a chain-reaction accident. Shelter Mut. Ins. Co. v. Arnold, 169 S.W.3d 855 (Ky. 2005). The case of Shelter Mut. Ins. Co. v. Arnold, supra, concerned a three vehicle chain reaction. Vehicle No. 3 struck Vehicle No. 2, thereby pushing Vehicle No. 2 into Vehicle No. 1. Vehicle No. 3 then fled the scene. Id. at 856. The driver of Vehicle No. 1, Sallye Arnold, sought uninsured motorist benefits from her own automobile insurer, Shelter Mutual Insurance Company. This Supreme Court held that Ms. Arnold was entitled to uninsured motorist benefits in that indirect hit situation since it was the hit-and-run Vehicle No. 3 which initiated the force against Vehicle No. 2 that ultimately struck Ms. Arnold's vehicle. Id. at 857.

Safeco's policy specifically incorporates the holding of Shelter Mut. Ins. Co. v. Arnold, supra, in its UM coverage language by defining an uninsured vehicle as including:

> 3. . . . a hit-and-run vehicle . . . which hits:
>
> d. another vehicle which, in turn, hits:
>
> (1) you . . .
>
> (2) a vehicle which you . . . are occupying; or
>
> (3) your covered auto.

(Appendix Tab 1, p. 12). Safeco's policy requires both a "hit" and physical contact between "vehicle(s)". The unambiguous policy language clearly does not provide UM coverage for the insured's contact with naturally occurring snow and ice. By no reasonable interpretation could naturally occurring ice be considered a "vehicle" or an integral part of a "vehicle" as used in the Safeco policy.

Ms. Reynolds cannot point this Court to any "hit" as required by the Safeco policy. The Appellant continues to ignore the fact that she has made no allegations whatsoever in this matter that the tractor trailer from which the ice broke free actually hit anything, let alone another vehicle as required by the clear language in Safeco's policy. The Appellant does not even contend that the tractor trailer "hit" the piece of ice propelling it through the air. Instead, the Appellant testified that a natural accumulation of ice simply broke free from the tractor trailer.

C. THE TRACTOR TRAILER DID NOT "HIT" THE NATURALLY OCCURRING ICE AS CONTEMPLATED BY THE CONTROLLING CASE LAW.

Even if this Court should disregard the clear language of the Safeco policy which requires that a "hit" occur between "vehicle(s)", the Appellant still cannot prevail. The holding in the Shelter Mut. Ins. Co. v. Arnold case requires an actual "hit" of an "intermediate object". Id. at 857. Ms. Reynolds never alleged or presented evidence in the trial court that the tractor trailer initiated any force on the piece of ice causing it to strike Ms. Reynolds' vehicle as required by Shelter Mut. Ins. Co. v. Arnold, 169 S.W.3d 855. In the present case, the Appellant simply alleged and testified that the ice broke free from the tractor trailer.

This Court's ruling in Shelter Mut. Ins. Co. v. Arnold, 169 S.W.3d 885, did not directly or indirectly overrule the holding in Masler v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 633 (Ky. 1995). The two cases involved substantially dissimilar fact patterns. In Shelter Mut. Ins. Co. v. Arnold, 169 S.W3d 855, this Court was confronted with a third vehicle striking an intermediate vehicle thereby propelling it into the first vehicle. Again, there are no allegations in the present case that the tractor trailer actually struck the piece of ice propelling it into Ms. Reynolds' vehicle.

By contrast, in Masler v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 633, this Court considered a situation where a passing tractor trailer propelled a rock from the roadway into the windshield of the Plaintiff's following vehicle. The Court's ruling that the Plaintiff was not entitled to uninsured motorist benefits under a "hit-and-run" definition virtually identical to the Safeco definition at issue in this case was based on the fact that there was no physical contact between the passing truck and the Plaintiff's

vehicle. Id. at 635. Safeco suggests that the holding in Masler v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 633, applies to the facts of the current situation. If anything, the facts in Masler v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 633, are more compelling than the facts in the present case. Arguably, the Massler tractor trailer struck the rock with its tires propelling it through the windshield of the Plaintiff's vehicle. In the present situation, Ms. Reynolds admitted in her deposition that the ice simply broke free from the tractor trailer. The tractor trailer did not "hit" or propel the ice towards the Appellant's vehicle.

D. THE TWO JURISDICTIONS WHICH HAVE ADDRESSED ICE CASES HELD THAT UM COVERAGE WAS NOT AFFORDED TO THE INSURED.

An extensive search for cases in other jurisdictions involving snow or ice breaking off of a passing vehicle uncovered only two cases. Dehnel v. State Farm Mut. Auto. Ins. Co., 604 N.W.2d 575 (Wis. App. 1999), and Smith v. Great American Ins. Co., 272 N.E.2d 528 (N.Y. App. 1971).[1] (See Appendices 2 and 3, respectively). Both the Wisconsin and New York cases involved snow and/or ice breaking free from an unidentified truck thereby breaking the insured's windshield. Dehnel v. State Farm Mut. Auto. Ins. Co. at 575-576 and Smith v. Great American Ins. Co. at 528-529. In both cases, the Appellate Courts denied the insured's claim to UM benefits. Dehnel v. State Farm Mut. Auto. Ins. Co. at 579 and Smith v. Great American Ins. Co. at 531.

[1] New York, like Kentucky, accepts intervening vehicle contact as meeting the physical contact requirements for UM purposes. MVIAC v. Eisenberg, 218 N.E.2d 524 (N.Y. 1966). New York also has held that a portion of a truck's load (i.e. sand) which falls out of a passing truck satisfies the physical contact requirements for UM purposes. Bajrami v. General Acc. Ins. Co., 593 N.Y.S.2d 405 (N.Y. Sup. 1993).

In Dehnel v. State Farm Mut. Auto. Ins. Co., supra, the Plaintiff, Ryan Dehnel, claimed he was injured when a piece of ice came off of a passing tractor trailer, breaking the windshield of his vehicle. Mr. Dehnel could not identify the tractor trailer owner or driver. Id. at 575-576. Mr. Dehnel was insured by State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") at the time of the incident. Mr. Dehnel's State Farm policy included uninsured motorist coverage which simply stated:

> 2. In this paragraph "uninsured motor vehicle" also includes: . . .
>
> b. An unidentified motor vehicle involved in a hit-and-run accident.

Id. at 576. The Wisconsin Court of Appeals first held that the Wisconsin uninsured motorist statute required actual physical contact in hit-and-run cases. Id. at 577. The Wisconsin Court of Appeals then struck down Mr. Dehnel's second argument noting:

> . . . the physical contact that occurred here was not between any part of the semi and Dehnel's vehicle. Rather, it was an indirect touching, in that the ice was not even an integral part of the unidentified vehicle, such as a tire that had become unattached.

Id. at 578.

The Smith v. Great American Ins. Co., supra, case also involved a set of facts where the insured's windshield was broken by snow and ice dislodged from a tractor trailer. Id. at 528-529. In the majority Opinion, the New York Court of Appeals, in defining "physical contact" as used in the New York UM statute, distinguished between "[u]nfocused forces" and "collision[s] through inert or inactive intermediate solid objects". Id. at 531. The New York Court of Appeals noted as follows:

> Unfocused forces, whether produced by centrifugal force or ricochet, set off by a moving vehicle do not provide the kind of physical nexus contemplated by the statute nor understood in common parlance to constitute physical contact with the vehicle itself. On the other hand,

> common understanding does embrace within physical contact the limited indirect contact by collision through inert or inactive intermediate solid objects, as discussed in the Eisenberg case. The point also is that, as a matter of statutory construction, physical contact requires a narrower category of cause than would be understood in tort law as proximate cause, or again the statutory limitation would have no meaning.

Id. In short, the New York Court of Appeals, when faced with a factual situation exactly as presented to this Court, drew the distinction between an actual "hit" and a mere "break off" of naturally occurring ice and snow.

As noted above, this Supreme Court has previously held that in a situation where a passing tractor trailer propelled a rock from the roadway into the windshield of a Plaintiff's following vehicle did not satisfy the physical contact requirements of a UM policy. Masler v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 633. There were no allegations in the Masler v. State Farm, supra, case that the tractor trailer striking the rock was actually hauling rock at the time. Id. As noted by the Wisconsin Court of Appeals in the Dehnel v. State Farm, supra, case, the ice which the Appellant, Ms. Reynolds, contends broke free from a tractor trailer she was passing was a mere natural occurrence. She acknowledged that there is no evidence that the tractor trailer was hauling ice. In fact, she noted that the ice broke free from the tractor rather than falling out of the trailer. In her Complaint and some argument before the Trial Court, Ms. Reynolds tried to argue that the ice constituted an "integral" part of the tractor trailer. Of course, this is a ridiculous argument in light of her testimony that the ice was naturally occurring and was not being hauled by the tractor trailer. Further, similar to the New York Court of Appeals case of Smith v. Great American Ins. Co., supra, Ms. Reynolds did not testify or

otherwise present evidence that the tractor trailer "hit" or collided with the ice, but admitted that the naturally occurring ice merely broke free from the tractor.

The Safeco policy at issue here clearly requires a "hit" between "vehicles". These requirements are consistent with the Kentucky uninsured motorist statute. KRS 304.20-020. The Safeco physical contact requirements are also consistent with the Kentucky case law on this subject. Shelter Mut. Ins. Co. v. Arnold, 169 S.W.3d 855.

CONCLUSION

The Bath Circuit Court, Division 1, properly entered Summary Judgment in favor of the Appellee, Safeco Insurance Company of Illinois, and against the claims asserted against it by the Appellant, Ronda Reynolds. Safeco's uninsured motorist provision reasonably defines an uninsured vehicle as one which actually "hits" Ms. Reynolds, her vehicle or an intermediate vehicle. Even assuming arguendo the facts as alleged and testified to by Ms. Reynolds are true, the tractor trailer Ms. Reynolds was passing never hit her vehicle or any other vehicle. According to Ms. Reynolds, a piece of ice simply broke free from the tractor trailer. The ice was a naturally-occurring phenomenon. The ice striking Ms. Reynolds' vehicle does not constitute a "hit" between "vehicles" under the unambiguous language in the UM portion of Safeco's policy. In addition, Ms. Reynolds admitted that the tractor trailer did not "hit" or collide with the ice. Therefore, the Summary Judgment entered by the Bath Circuit Court should be affirmed.

Respectfully Submitted,

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