COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO.: 2010-SC-000144

ON DISCRETIONARY REVIEW FROM

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO.: 2009-CA-000721

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — **APPELLANT**

vs.

JAMES BALDWIN
AND
JOHN DOE, AN UNKNOWN DRIVER — **APPELLEE**

BRIEF OF APPELLLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, Robert B. Cetrulo, hereby certify that a true and correct copy of the foregoing was mailed this 22 day of November 2010, via U.S. regular mail, postage pre-paid to the following: **Kentucky Supreme Court,** Supreme Court of Kentucky, Room 235, State Capitol, 700 Capitol Ave., Frankfort, KY 40601; **Clerk, Kentucky Court of Appeals**, 360 Democrat Drive, Frankfort, KY 40601; **Grant County Circuit Clerk**, Grant County Courthouse, 101 North Main Street, Williamstown, KY 41097; **Judge Stephen L. Bates**, Grant County Courthouse, 101 North Main Street, Williamstown, KY 41097; **Charles E. Bullard, Esq.**, Bullard & Hayes, P.O. Box 17188, Ft. Mitchell, KY 41017; **Abigail Voelker, Esq.**, P.O. Box 70, Williamstown, KY 41097; **Kenneth Sizemore, Esq.**, 105 South Broad Street, P.O. Box 1808, London, KY 40741.

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I. INTRODUCTION

Appellee, James Baldwin claimed that a piece of plastic tarp became dislodged from an unidentified truck and stuck to the front of his truck. When Baldwin stopped to remove the plastic, he claims that he slipped and fell, and injured his back. He filed suit against State Farm Mutual Automobile Insurance Company for uninsured motorist coverage. The trial court granted State Farm's Motion for Summary Judgment. The Court of Appeals reversed the summary judgment. This court has granted discretionary review.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellant would request oral argument on this matter to fully address the issues in this matter. The Court of Appeals opinion disregards, or misinterprets the impact rule which has been the law of this Commonwealth for over 30 years.

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STATEMENT OF THE CASE

This cases arises out of a "slip and fall" by the plaintiff which occurred on January 24, 2006. Strangely, however, suit was filed by Appellee against State Farm Mutual Automobile Insurance Company for uninsured motorist benefits, under an auto policy.

Plaintiff's deposition was taken November 26, 2008. Thereafter, State Farm made a Motion for Summary Judgment, which was granted by the trial court by its opinion entered March 19, 2009. Baldwin appealed to the Kentucky Court of Appeals which reversed this summary judgment, by their opinion of February 5, 2010. State Farm was granted discretionary review by this Honorable Court.

There are no witnesses to any of the incidents that give rise to this action, nor is there any independent evidence (property damage) to verify plaintiff's version of events. We have only plaintiff's allegations as to what occurred.

The plaintiff contends that on January 24, 2006, he was operating a truck on I-75 in Grant County, Kentucky. He states that a plastic tarp on a truck in front of him flew off of that vehicle, and lodged on the front of Baldwin's truck. (Baldwin depo, pg. 30). Baldwin was not injured in this incident. Baldwin continued to drive his truck on I-75, and at some point down the road, he pulled off at an exit and pulled into a truck stop. He says that he intended to remove the plastic tarp from the front of his vehicle. (Baldwin depo, pg. 35-36). Baldwin contends that as he was dismounting his truck, he slipped and fell to the ground, injuring his back. (Baldwin depo, pg. 36). Baldwin contends that the John Doe defendant, the unknown driver, did not stop but left the scene of the incident.

Plaintiff brought suit against John Doe, the unknown driver, as well as State Farm Mutual Automobile Insurance Company, his personal auto carrier for uninsured motorist coverage.

ARGUMENT I

APPELLEE'S CLAIM DOES NOT SATISFY THE IMPACT REQUIREMENT OF UNINSURED MOTORIST COVERAGE.

Uninsured motorist coverage is provided by statute at KRS 304.20-020. The contract of insurance between State Farm and the plaintiff, James Baldwin defines 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.

There are two elements to that definition of hit and run driver. The first element is that there must be a direct vehicle to vehicle impact between the uninsured vehicle and the vehicle the claimant is occupying. The second element required in the definition is that the vehicle to vehicle impact directly causes bodily injury to the claimant. Neither of these elements have been met by Mr. Baldwin's situation.

Kentucky courts have repeatedly upheld the impact requirement of uninsured motorist coverage, as being consistent with the uninsured motorist statute, KRS 304.20-020, Jett v. Doe, 551 S.W. 2d 221 (KY, 1977).

Kentucky courts have always held that physical contact between the vehicles is a valid requirement of uninsured motorist coverage. Belcher v. Travelers Indemnity Company, 740 S.W. 2d 952 (KY, 1987); State Farm Mutual Automobile Insurance

Company v. Mitchell, 553 S.W. 2d 691 (KY, 1977); Huelsman v. National Emblem Insurance Company, 551 S.W. 2d 579 (KY App., 1977).

The reasoning and purpose of the impact rule is to protect the insurance company from having to defend from potentially fraudulent claims which are caused by the insured's own negligence, while claiming that it was caused by a phantom vehicle.

> We have consistently held that the physical contact condition is a valid requirement. Its purpose is 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 Mutual Insurance Co. v. Arnold, 169 S.W. 3d 855 (KY, 2005)

Obviously, the requirement of direct vehicle to vehicle impact creates an objective standard to verify the presence of another vehicle.

Baldwin has contended, and the Court of Appeals found that the plastic tarp which allegedly flew from one vehicle onto Baldwin's vehicle, was an "indirect contact", and therefore satisfied the impact requirement. However, the fallacy with this argument is twofold. One, the plastic tarp which flew from one truck onto another does not provide any objective verifiable evidence of another vehicle being involved. As acknowledged by Baldwin, the tarp caused no injury to himself nor any property damage to his truck. The second reason that the tarp would not satisfy the impact rule is that the tarp was not the proximate cause of Baldwin's injuries. He acknowledges that neither he nor his truck were damaged or injured as a result of the plastic touching his truck. (Baldwin depo, pg. 34-35). The very definition of a hit and run vehicle requires that the vehicle to vehicle impact "causes bodily injury to the insured". The

Court of Appeals decision specifically did not address this fatal aspect of Respondent's claim.

The Respondent and the Court of Appeals relied on the case of Shelter Mutual Insurance Company v. Arnold, 169 S.W. 3d 855 (KY, 2005). The facts of that case are that a hit and run driver hit a third party vehicle which was propelled directly into plaintiff's vehicle, causing her injuries. The unidentified vehicle fled the scene. The Supreme Court held that where there is direct impact between an intermediate vehicle and the plaintiff's vehicle causing injury, the physical contact requirement had been satisfied. The Court relied heavily on the fact that the impact between the vehicles was such that it could be verified in a way to provide safeguards against fraud. Under those limited circumstances, the physical contact requirement of the policy had been satisfied by "indirect" contact.

Again, those facts are completely distinguishable from the facts presented by Baldwin. Baldwin's situation is that there was no vehicle to vehicle impact anywhere. There can be no verification of the plastic movement from one vehicle to the other, because there was no damage to the vehicle, and there was no witnesses other than the plaintiff himself.

Even if we were to assume, against all the weight of authority that a piece of plastic coming against the front of plaintiff's vehicle was an "impact", as defined by the policy, Baldwin's claim would still fail, simply based upon causation principles. Clearly, the plastic coming in contact with the front of Baldwin's vehicle was not the direct proximate cause of any of his claimed injuries. In the Arnold, supra, case this Honorable Court cited a number of cases from other jurisdictions on this point. In

Springer v. Government Employees Insurance Company, 311 S.O. 2d 36 (LA Ct. App., 1975) it was noted "the impact must be the result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continued sequence".

In Spalding v. State Farm Mutual Insurance Company, 202 S.E. 2d 653 (1974), it was noted that physical contact means "causal physical contact". Clearly, the case law requires multiple elements that are missing from Baldwin's claim. In every situation in which uninsured motorist coverage has been allowed, there was a "impact causing injury scenario". All of those situations require vehicle to vehicle contact, not indirect contact such as a stone, or piece of plastic. All of the cases in which uninsured motorist coverage has been allowed by the Kentucky courts, have been cases in which the impact of the vehicle directly caused an injury to the plaintiff. The Court of Appeals decision ignores all of the precedent of this Honorable Court and expands coverage to a situation never envisioned or permitted by this Court's prior rulings.

It is well settled that a remote cause will not create liability, but that events must be such that the negligence is the proximate cause of the accident. In Suter's Adm'r v. Kentucky Power and Light, 76 S.W. 2d 29 (KY, 1934), and pointing out the difference between a remote cause and a proximate cause it was said:

> It is that cause which naturally leads to and which might have been expected to have produced the result. The connection of cause and affect must be established. And if a cause is remote and only furnish the condition or occasion of the injury, it is not the proximate cause thereof. Logan v. Cincinnati N.O. & T.P.R. Co., 129 S.W. 575 (KY, 1910). The proximate cause is a cause which would probably, according to the experience of mankind, lead to the event which happened, and a remote cause is a cause which would not, according to such experience, lead to such an event. It is superfluous to say there can be no recovery on account of negligence of another which was not the proximate cause of the

injury complained of. Evans Adm'r v. Cumberland Telephone and Telegraph Co., 121 S.W. 959 (KY, 1909).

It is not enough that the harm would not have occurred had the actor not been negligent, but the negligence must be a substantial factor in bringing about the harm. Higginbotham v. Keeneland Association, _____ S.W. 3d _____, 2010 WL 323287 (KY App.); Pathways Inc. v. Hammons, 113 S.W. 3d 85 (KY, 2003). At best, the plastic drifting from one truck to the other would be described as a remote cause, creating only the setting for the accident, rather than causing the accident itself. Obviously, the plastic on the front of Baldwin's vehicle was not the direct, proximate cause of his injuries. His injuries did not occur until much more remote time and place, when he slipped and fell getting out of his truck.

In contrast, the trial court decision relied on the much more similar fact pattern which was addressed by this Court in Masler v. State Farm Mutual Automobile Insurance Company, 894 S.W. 2d 633 (KY, 1995). In that case, it was alleged that an unidentified truck passed the plaintiff's vehicle, and kicked up a rock which went through the plaintiff's windshield, and struck and injured the driver. There was no direct vehicle to vehicle impact between the truck and the plaintiff's vehicle. The claimant contended that the rock was propelled by the uninsured vehicle, directly causing his injury, and that this satisfied the impact rule. **This Honorable Court held that the impact rule requires actual, direct, physical contact between the hit and run vehicle itself and the insured's vehicle**. Id. citing State Farm Mutual Automobile Insurance Company v. Mitchell, KY., 553 S.W. 691 (1977). The Court of Appeals' decision in the case at bench is in direct contravention to this Court's decision in Masler.

The fact scenario in Masler is actually even stronger than in Baldwin's situation. At least in Masler, the rock thrown by the uninsured vehicle was the actual, direct, proximate case of the injuries to the claimant. In Baldwin's situation, a piece of plastic is alleged to have drifted from one vehicle to another, causing no damage to Baldwin's vehicle, or to himself. Taking Baldwin's claims as true, the vehicle proceeded on down the road, and Baldwin pulled off at a later time and parked at a truck stop. It was at this point that he allegedly slipped and fell from his truck, claiming an injury. Baldwin offers no independent proof, or witnesses to this slip and fall. There is absolutely no objective verification of any of the events which Baldwin later claims were a result of the phantom uninsured vehicle. This case presents the exact potential or risk of fraud that Kentucky courts have always held that insurers may reasonably protect against in requiring both physical contact and causation of bodily injury.

The Court of Appeals decision completely disregards and contravenes the policy provisions that exist in virtually every insurance policy in the State. Those provisions and requirements for uninsured motorist coverage have been upheld by Kentucky courts for over 30 years.

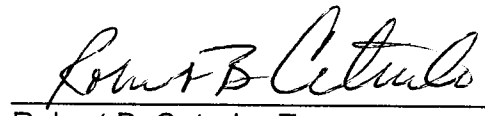
CONCLUSION

In short, Baldwin's claims lack all of the required elements for coverage. There is no vehicle to vehicle impact at any point in this situation. The plastic which he claims lodged on the front of his vehicle, did not cause him injury. Baldwin's claims are not otherwise verifiable since there was no damage to his vehicle, nor is there any independent evidence of any of these events. Since the incident is not independently

verifiable through property damage, witnesses, or otherwise, there is no safeguard against fraud which is the basis of the impact rule itself.

For all the foregoing reasons, Appellant respectfully request that this Court reverse the Court of Appeals decision in this matter.

Respectfully submitted,



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