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

REPLY BRIEF OF APPELLLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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 4thday of February 2011, 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.

Robert B. Cetrulo, Esq.

STATEMENT OF THE CASE

Kentucky Courts have always followed the majority rule requiring direct vehicle to vehicle impact before allowing uninsured motorist coverage for an alleged phantom vehicle. The Commonwealth has always held that this policy is in conformity with public policy, rather than contrary to public policy. Appellee argues that State Farm is attempting to impose different definitions or standards in this case. However, it is Appellee who refers to Merriam Webster Dictionary for a definition of "strike". Appellant would prefer to rely on the definition established by the Kentucky Supreme Court in Masler v. State Farm Mutual Automobile Insurance Company, 894 S.W.2d 633 (1995). Our Courts have defined the "strike" as "**actual, direct, physical contact between the hit and run vehicle, itself, and the insured vehicle"** citing State Farm Mutual Automobile Insurance Company v. Mitchell, 553 S.W.2d 691 (1977). The Masler Court went on to deny coverage under nearly identical circumstances to Baldwin where there was not direct vehicle to vehicle impact.

Appellee contends that State Farm confuses the impact requirement of UM coverage with tort principals of proximate cause. In fact, Appellant agrees that these are two separate issues. Definition of an uninsured motor vehicle not only requires a strike, but also that the strike "cause bodily injury". Baldwin would have the burden of proof to show both elements in order to recover. He would have to show a strike (vehicle to vehicle impact), and that the impact caused his injury. His claim does not have either one of those elements of proof.

A majority of jurisdictions have denied uninsured motorist coverage where there was not direct vehicle to vehicle impact, or where there was indirect impact contact or

something thrown, or transferred between vehicles. Coverage was denied in the following circumstances: Nationwide Insurance Company v. Elchehimi, 249 S.W.3d 430 (Tx 2008); (an axial wheel assembly separated from a tractor trailer.) Yutkin v. U.S. Fidelity and Guarantee Company, 497 N.E. 2d 471 (1st Dist. Ill. 1986); (a piece of tire had been propelled into the air and struck the insured's windshield causing him to lose control and collide with a concrete embankment.) Illinois National Insurance Company v. Palmer, 453 N.E. 2d 707 (Ill. 1983); (a lug nut fell off an unidentified vehicle as it passed the insured vehicle.) Utica Mutual Insurance Company v. Spenningsby, 520 N.Y.S 2d 163 (2nd Dist. 1987); (a relief spring came loose from a passing unidentified truck and struck the windshield of an insured vehicle.) Matter of Insurance Company of North American 611 N.Y.S.2d 171 (1st Dept. 1994); (a metal gear box propelled from an unidentified vehicle.) Utica Mutual Insurance Company v. Tucker, 505 N Y.S. 2d 992 (Supreme Court 1986); (a rimless tire propelled from an overpass.) Davis v. Doe, 285 SC 538, 331 S.E. 2d 352 (1985); (a wheel bearing broke through a windshield of an insured automobile.) Page v. Insurance Company of North American 3 Cal. App. 3rd 121 83 Cal. Reporter 44 2nd District 1969; (thrown by an unidentified vehicle from the road through the Plaintiff's windshield.) Gardner v. Aetna Casualty Insurance Company, 114 Ariz. 123 559 P 2d 679 (Ariz. 1976); (a bale of wire fell from a truck and struck the insures automobile.) Murphy v. Georgia General Insurance Company, 208 GA App. 501 431 SE 2d 147 (1993); (an insured vehicle was struck by a pipe that had fallen from a cargo bed and struck the insured's windshield.) Williams v. Allstate Insurance Company 849 S.W. 2d 859 (Tx. App. 1993); (an insured's vehicle struck a piece of steel that had followed from the cargo area of a truck.) Texas Farmers Insurance Company v. Deville,

988 S.W. 2d 331 (Tx. App. 1999); (insured motorist was struck by a water pump that fell from the bed of an unidentified truck.) Barnes v. Nationwide Mutual Insurance Company, 186 Cal. App. 3rd 541, 230 Cal Reporter 800 (Cal. 1986); (insured's vehicle was struck by a box of dinette chairs that had fallen from an unknown vehicle.) Harrison v . Commercial Union Insurance Company, 471 SO 2d 922 (La. App. 1985); (insured's vehicle was struck by several bags of phosphate causing an accident.) Chapman v. State, 517 SO 2d 331 (La. App. 1987); (insured's vehicle was struck by a pile of sugar cane.) Barfield v. Insurance Company of North American, 59 Tenn. App. 631, 443 S.W.2d 482 (1968); (insured's vehicle struck by a ladder lying in the roadway.) Blenkenbaker v. Great Central Insurance Company, 151 Ind. App. 693, 281 N.E. 2d 496 (Ind. 1972); (insured's R.V. collided with a truck tire in the highway.) Pizani v. Progressive Insurance Company, 719 SO 2d 1086 (La. App. 5th Cir. 1998); (insured's vehicle struck a vehicle part fallen from a trailer.) Bauer v. Government Insurance Company, 61 F. Supp. 2d 514 (Ed. La. 1999); (accident debris left in the road.) GEICO v. Yarmoluk, 692 N.Y.S. 2d 433 (NY App. 1999); (automobile muffler in the road struck by the Plaintiff.) State Farm Mutual Automobile Insurance Company v. Normal, 191 WVA 498, 446 S.E.2d 720 (1994); (Insured's vehicle crashed after striking a truck tire in the road.) Jones v. State Farm Mutual Automobile Insurance Company, 850 SO 2d 1054 (La. App. 2d Cir. 2003); (insured's vehicle hit a tire tread in the roadway which caused loss of control.) Kreager v. State Farm Mutual Automobile Insurance Company, 197 Mich. App. 577, 496 N.W. 2d 346 (MI 1992); (a bottle thrown from an unidentified vehicle.) Aetna Casualty Assurity Company v. Head, 240 SO 2d 280 (Miss. 1970); (a soft drink bottle thrown from a driver's window.)

In the majority of jurisdictions uninsured motorist coverage is not triggered by physical contact with anything other than another motor vehicle. UM coverage is not triggered by physical contact with things lying in the roadway, thrown from a vehicle or unattached parts of an unknown vehicle. 46A, CJS Insurance §2274. See also 79 ALR 5th 289.

The impact rule requiring direct vehicle to vehicle contact provide an objective, verifiable basis to establish the presence of another vehicle, and protects insurance companies from fraudulent claims. There is no better, or more efficient rule to avoid out- right fraud upon the Courts.

In Baldwin's situation, there is absolutely no objective evidence of another vehicle being involved. There is no damage, no independent witnesses and simply no indication other than his own testimony that this incident even occurred.

Finally, Baldwin does nothing to counter the proximate cause argument in this matter. Even if we believe everything that he says, without any objective verification, he acknowledges in his own allegation that the plastic which settled on the front of his truck did not cause him any injury, or cause him to lose control of his vehicle. In order to make a prima facia case for UM benefits, the "strike" must "cause" injury to the insured.

There was no "strike"; the plastic did not "cause" an injury; and therefore Baldwin does not have an uninsured motorist claim.

Respectfully submitted,

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