COMMONWEALTH OF KENTUCKY
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**

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

BRIEF OF APPELLEE – JAMES BALDWIN

Respectfully submitted:

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CERTIFICATE OF SERVICE: I hereby certify that a true and correct copy of the brief was mailed, postage prepaid and/or hand delivered for filing this January 24, 2011 to the following: HON. ROBERT B. CETRULO, CETRULO & MOWERY, PSC, 130 Dudley Road, Suite 200, Edgewood, Kentucky 41017, HON. ABIGAIL VOELKER, P.O. Box 70, Williamstown, Kentucky 41097, JUDGE STEPHEN L. BATES, 101 North Main St., Williamstown, Kentucky 41097, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, Clerk Grant Circuit Court, 101 North Main Street, Williamsburg, Kentucky 41097 and the original to the Kentucky Supreme Court, Room 235, State Capital, 700 Capital Avenue, Frankfort, Kentucky 40601.

CHARLES E. BULLARD

I. INTRODUCTION: The Appellant State Farm appeals from the decision of the Kentucky Court of Appeals finding that an insurance policy requirement for uninsured motorist coverage, which required that the unknown vehicle "strike" their insured's vehicle, was satisfied, when a part of the unknown vehicle, a large plastic tarp, came loose from the unknown vehicle and then struck and attached itself to the insured's vehicle. The State Farm insured is the Appellee, James Baldwin.

II. STATEMENT CONCERNING ORAL ARGUMENT: The Appellee, James Baldwin respectfully requests an oral argument. However, the Court of Appeals opinion clearly sets out the reasons for its decision.

III. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTER STATEMENT OF THE CASE:

This is a personal injury action involving Uninsured Motorist Insurance Coverage (hereinafter UM) against a hit-and-run unknown driver and the UM carrier (State Farm).

On January 24, 2006 the Appellee (hereinafter Baldwin) was driving a truck on Interstate 75 traveling south in Grant County, Kentucky. (ROA Deposition Baldwin page 28) An unknown driver was operating a tractor-trailer traveling south on Interstate 75 immediately in front of Baldwin. (ROA Deposition Baldwin page 20-30) The unknown driver had a large plastic tarp negligently and improperly hanging from the back of his trailer. The trailer was attached to the truck. (ROA Deposition Baldwin page 30) The tarp on the truck of the unknown driver broke off and lodged on the

Baldwin vehicle. The tarp wrapped itself on the left hand side of the vehicle from the front to the driver's side door and steps. The tarp was on the "breather, the mirror bracket, and.... steps" of the vehicle driven by Baldwin. (ROA Deposition 30-32) The tarp was six to seven feet long and eight feet wide. (ROA Baldwin Depo at 33-34). When Baldwin stopped his vehicle in order to remove the plastic tarp from his vehicle he slipped and fell *on the tarp* (emphasis added), which was on the steps of his vehicle and was seriously injured. (ROA Deposition Baldwin page 36).

The Trial Court granted Summary Judgment in favor of State Farm who argued that the plastic tarp coming from the unknown vehicle onto the vehicle of Baldwin was not a "strike' as required by Baldwin's policy of UM coverage. The Trial Court granted Summary Judgment based upon the case of *Masler v. State Farm Mutual Insurance,* 894 S.W.2d 633 (KY. 1995) (ROA PAGE 467). In *Masler,* a rock, which had been on the highway, was thrown up from the highway from the wheels of the unknown driver's car, was ruled not to be a physical contact (or a strike) between the two vehicles. (ROA page 467-469)

The Kentucky Court of Appeals reversed the trial court and found that the case of *Shelter Mut. Ins. Co. vs. Arnold,* 169 S.W.3d (Ky. 2005) was applicable to the fact situation of Baldwin and agreed with Baldwin that "any part of the vehicle, including objects coming off a vehicle, which then impacts the insured's vehicle, satisfies the "strike" requirement of the UM policy. The court recognized the distinction between the facts of *Masler,* wherein an object that was *not a part* of the vehicle struck another vehicle and the Baldwin facts wherein an object, which is part of the vehicle, came dislodged and struck another vehicle.

State Farm appealed the Court of Appeals ruling. This court has granted discretionary review.

ARGUMENT

Interpretation and construction of an insurance contract is a matter of law to be determined by the court. *Stone v. Kentucky Farm Bureau Mutual Ins. Co.*, 34 S.W.3d 809, 810 (Ky. App. 2000); *Kemper Nat'l Ins. Companies. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 871 (Ky. 2002). An appeal of a question of law subject to *de novo* review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App.2001)

ISSUE: Is the language of State Farm's UM insurance policy; which requires that the unknown vehicle to *"strike"* the insured's vehicle satisfied when a part of the unknown vehicle, i.e. the large plastic tarp, comes loose and strikes and attaches itself to the insured's vehicle?

Baldwin had a policy of insurance with State Farm which provided him with UM coverage against an "unknown vehicle". (ROA page 412) The policy provided in the index that that an "Uninsured Motorist Vehicle" ... "Was when the other car or driver is not insured." (ROA page 414)

Further policy provisions provided in Section III Uninsured Motor Vehicle – Coverage (ROA page 432) are as follows:

> ***Uninsured Motor Vehicle*** – Coverage U
>
> ***"You*** have this coverage if "U" appears in the "Coverages" space on the declarations page". (ROA page 432/ Declaration Page ROA page 412 has a "U" in the Coverage space)
>
> We will pay compensatory damages for ***bodily injury*** and ***insured*** is legally entitled to collect from the owner or driver of an ***uninsured motor vehicle.*** The ***bodily injury***

must be sustained by an ***insured*** and caused by accident arising out of the operation, maintenance or use of an ***uninsured motor vehicle.*** (ROA page 432)

Uninsured Motor Vehicle - means:

2. 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*** to the ***insured.***

(ROA pg 432) Note: The bold and italicized was not provided as emphasis by this writer but was provided in the policy of insurance.

State Farms uses the word *"impact, as defined by the policy"* in their brief at page 4, however, the policy term used is the word "strikes" as stated above.

It is without question that the insurance contract is a "contract of adhesion" between parties not equally situated with the purchaser having little bargaining power and clearly without input as to the policy language. State Farm unilaterally decided on the use of all of the words in the contract. They chose the word "strike". Any ambiguity in the terms of the contract should be held in favor of the insured, and construed against the contract drafter, i.e. State Farm.

Absent ambiguity, Kentucky courts are instructed to interpret contract terms in accordance with their plain meaning and common use. *Frear vs. PTA Industries, Inc.*, Ky 2003, 103 SW3d 99. "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). However, "[w]here a contract is

ambiguous or silent on a vital matter, a court may consider parole and extrinsic evidence involving . . . the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Cantrell* at 385.

Pursuant to the terms of the insurance contract, a hit-and-run vehicle is an "uninsured vehicle" *for which UM coverage is provided.* Under the stated terms of the contract, if the vehicle "strikes" the vehicle in which the insured is occupying and causes "bodily injury to the insured", UM is provided. There are numerous definitions for the word "strike" from the Merriam-Webster Dictionary Online Addition, ranging from "striking workers", to "delete something", to "lower a flag to surrender" but the most appropriate use of the word "strike" in the herein contract would be to "come in contact with".

In *State Farm Automobile Insurance Co. v. Mitchell*, 553 S.W.2d 691 (Ky. 1977), using the same policy language, the court held that the term "strike" in the State Farm contract required "actual physical contact". The definition of what was "actual physical contact" was modified by the Kentucky court to include indirect contact in the case of Shelter *Mutual Insurance Company v. Sallye J. Arnold*, 169 SW3d 855 (Ky 2005), wherein the court held that the "hit" requirement of Shelter's contract definition of a "hit-and-run motor vehicle" was satisfied when "a hit-and-run motorist hit an intermediate vehicle causing it to hit the insured vehicle." The Court therein expanding the "actual, direct and physical contact requirement" of the *Masler* court to include indirect contacts.

The clear implication of the terms the UM contract as provided to Baldwin is that if *any part* of the unknown vehicle came into contact with any part of the insured's vehicle, the insured would be provided with UM coverage under the policy.

The reasonable expectation of the person who purchased UM Insurance would be that he was insured for the damages caused. The language of the policy is such that a reasonable insured would believe that he was "struck" by the unknown vehicle, if even a part of the vehicle came off of the vehicle and struck his car. The reasonable insured would believe that he was insured for UM coverage if he was struck by a part of the vehicle put on the vehicle by the vehicle owner and not by the original manufacturer. For example, if a tire, windshield wiper, or door came off a vehicle, and struck another vehicle, one would reasonably believe that such contact would satisfy the "physical contact" requirement. In addition, the person covered by UM would have a reasonable expectation of UM coverage, given the terms of the contract, if any item added to the vehicle by the unknown motorist, such as antennas, cargo boxes, a sign, bicycle rack, luggage rack, luggage carrier, ski carrier, tarp, spoilers etc. etc., or the like which fell from the vehicle and struck the car of the vehicle covered by UM.

The Kentucky courts have held that exclusionary or limiting language in policies of automobile insurance must be clear and unequivocal, and further, that such policy language is to be strictly construed *against* the insurance company and in favor of the extension of coverage to the insured. *Louisville Gas & Electric v. American Ins. Co.*, 412 F.2d 908 (6th Cir. 1969); *Eyler; v. Nationwide Mutual Fire In. Co*, Ky., 824 S.W.2d 855 (1992)

State Farm now attempts to have this court modify its contract with Baldwin by adding additional requirements to the definition of a hit and run driver beyond what is stated in the policy. State Farm wishes to add language that would require that Baldwin have "objective verifiable evidence of another vehicle involved" and that the

"incident...[be] independently verifiable through property damage, witnesses, or otherwise. There is no policy language in the UM contract that requires any of the above and State Farm did not direct this court to any policy language to support their statements. The UM contract has no language of any nature whatsoever that requires the "strike" from the hit and run driver to cause property damage to their insured's vehicle or that there has to be "objective verifiable evidence that another vehicle was involved." This court cannot rewrite the UM contract for State Farm.

The Trial Court looked to the case of *Masler* for guidance but the case of *Masler* is significantly different from the facts of the herein case. *Masler* is distinguishable from the herein action as the case refers to objects that stuck the injured party which were not a part of the unknown drivers vehicle, but were items that were found on the roadway which attached themselves to the unknown drivers vehicle. In *Masler*, an unknown vehicle kicked up a rock from the road. In *Masler,* an object foreign to the vehicle, which came off the road and struck the insured vehicle, was not put on the vehicle by the owner or driver; was never a part of the vehicle and was never intended to be a part of the vehicle. The plastic tarp, on the other hand, was a part of the unknown driver's vehicle; placed on the vehicle by the driver, and a part of the vehicle in order to line the cargo bed of the trailer.

There is no question that a large plastic tarp was a part of the unknown driver's vehicle or that it came into contact with the vehicle driven by Baldwin. The tarp's contact with the Baldwin vehicle was a "strike" to the vehicle. The plastic tarp should be viewed no differently than had a muffler, tire, door or other part of the unknown vehicle fallen

off and hit the Baldwin vehicle. It is the same as if the actual trailer had come loose and struck the vehicle. The tarp and the trailer are all part of the vehicle.

State Farm confuses the "contact rule" with "proximate causation" in an attempt to limit UM availability, and to expand the situations in which UM coverage would not apply, despite Kentucky's public policy of mandating liability insurance and preferring coverage for its citizens. The "contact" provision for UM coverage and the proximate cause requirement of a tort claim, are separate issues. Proximate cause is required to prove your cause of action and the "contact" requirement is a contractual exception to limit UM coverage. One can have a valid cause of action, but no UM coverage if one does not have "contact"[1], either direct or indirect, with another vehicle. A driver could be witnessed running another driver off the road; thereby injuring the other driver and then leave the scene of the accident. Under current law, even with witnesses to substantiate the facts, the injured driver would not be covered by UM insurance if the insurance contract required "contact' between the two vehicles.

The "contact rule" for hit and run drivers was created to limit UM coverage against fraudulent claims. However, it has long since fallen short of that purpose and as a result it is now nothing more than an underwriting tool for insurance companies to deny benefits and sell illusory UM benefits to an unsophisticated consumer who not only does not read the policy (and couldn't change the policy if they did) but would also have to know the laws of this Commonwealth to understand the policy terms.

In the instant case the parties *did not* contract to require that the vehicle have

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[1] The term used in the policy was "strike"

"actual damage". It is clear by the contract terms that Sate Farm did not contract with Baldwin for the hit and run driver to have to cause any type of damage to the car before UM was to be available for his injuries.

If the facts establish even minimal "contact" between the motor vehicles, there is UM coverage in the policy Baldwin purchased. If "contact" is a contractual prerequisite to coverage, it is a factual question for the Jury. As said in *Perry vs. Motorist Mut. Ins. Co.*, Ky., 860 SW2d 762 (1993), while determining another contractual prerequisites to coverage (residency and intent), the court held that "residency and intent are questions of fact and not of law where the evidence supports more than one inference upon which reasonable minds may differ". Baldwin testified as to the "contact" by deposition, thereby creating an inference of contact.

State Farm seeks to expand the contact rule to cover only contact between vehicles that instantly cause damage to the other vehicles that can be verified after the accident. This is simply not required by the Baldwin UM insurance contract or by the law. Example: Three witnesses (a priest, a nun and a Kentucky Judge) witness a car accident. They see a driver rear-ended by another vehicle, lose control of the vehicle, run off a bridge, burst into flames, completely destroying the car and injuring the driver. The burning of the car destroys all evidence of contact between the two vehicles. The negligent driver leaves the scene. There is no evidence, other than witnesses' testimony, of any vehicle-to-vehicle contact. Under State Farm's theory, there is no UM coverage absent proof that the vehicle was "damaged". The Kentucky courts have rejected this argument. In *Shelter, Judge* Cooper, held that a literal "contact" or "touching" was *not*

required to prove contact, but an unbroken chain of events that leads to the injury is sufficient to met the definition of "contact" or "hit".

It is reasonably foreseeable that when a piece of plastic tarp, negligently attached to a vehicle, came off, and wrapped around Appellant's vehicle, caused him to receive an injury when he fell *on the plastic lodged on the steps of this vehicle* when he exited the vehicle to remove the plastic from his vehicle. The issue is whether or not it is "contact" between vehicles under the terms of the parties contract of UM coverage, when a part of the unknown driver's vehicle (the plastic tarp) came off the vehicle and struck (stuck to) the Baldwin vehicle. Under *Shelter vs. Arnold, Supra* it clearly does.

If the insurance carrier wanted to require more than mere "contact" to establish coverage under the UM policy, they could have drafted the policy to require vehicle to vehicle contact, with verifiable damage to the motor vehicle, with the injury to the injured party occurring instantaneous with the contact. They chose not to do that[2]. This court has consistently allowed coverage to apply where the "strike" or "contact" occurs, but the injury does not occur simultaneously but only after the vehicle strikes another object. If effect, the "contact rule" allows the contact to occur, setting in motion a chain of event in which the Plaintiff is ultimately injured. The plastic tarp coming off the unknown driver vehicle set in motion a foreseeable chain of event that injured Baldwin when he stepped on the tarp that clung to the steps of his vehicle.

A holding by this court that the loss of a "load", added parts, or accessories of a vehicle, which are part of a vehicle, that fall off a vehicle, are not sufficient "contact", or

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[2] The insurance policy only provides that for UM coverage that there be a "strike" which has been determined by the Kentucky court to be "contact".

are not part of the vehicle, will, effectively eliminate UM insurance on many claims, including bicycles falling off vehicles, towed vehicles, car tops, lumber, appliances being hauled, etc. etc., which come loose, fall off, and hit another vehicle. In many instances the drivers would not stop, as they would not know they had lost any of their load. State Farm would shift the risk to the driver injured by the falling load. Leaving him with an uninsurable injury.

This court should abolish the "contact rule" as its purpose conflicts with requiring insurance on wages, medical bills, no-fault coverage, property damage and liability. Even without abolishing the "contact rule" as to the instant claim, this court should find that the tarp coming loose and encasing the vehicle of the Appellant was in fact "contact", as required by the UM insurance policy that he purchased, as it was "... an unbroken chain of events that led to injury...". *Shelter, supra* at 857.

State Farm wants this court to expand the UM limitations beyond that Baldwin contracted for. State Farm is asking this court to not only require that there be "contact" as stated in the insurance policy, but also that there be an immediate injury to the appellant from the contact with no intervening time. If true, it would exclude all cases where there is contact between vehicles but damage to the driver occurs after he leaves the road and strikes an object. Also consider, a driver pierces a gas tank in a slight side swipe and leaves the scene of the incident not knowing that he has caused any damage to the other vehicle. The truck continues on down the road only to explode minutes later due to a gas leak. Another example would be where, a tarp comes off a vehicle thereby covering the entire front windshield of the vehicle following it. Clearly this would not cause any immediate damage to the vehicle itself, but since the driver is unable to see

through the tarp, it is only a matter of time that he runs off the road and is injured. Again, the time between the act of the tarp coming off and the actual injury to the driver is not immediate. Under State Farm's theory, the tortfeasor that leaves a scene after his load (or part thereof) causes an injury escapes liability, and the innocent injured party cannot buy insurance to protect against the tortfeasor's actions.

State Farm's reliance upon *Masler* is misplaced and distinguished from the facts of this action. The rock that struck the injured party in *Masler* was never a part of the alleged tortfeasor's vehicle, or part of the vehicle's load, or placed on the vehicle by the tortfeasor, but merely road debris. Rocks and insects are part of the assumed risk of driving moving vehicles. Although we have no duty to sweep the road before driving, we have a duty to secure our vehicle's load. In Baldwin's claim, the tarp was not road debris as it came directly from the other vehicle. The witness to this event was Baldwin and the jury has a right to believe him or not. If there was a factual question as to whether or not the accident occurred as stated Baldwin, it would be a jury question as to the creditability of the witness.

CONCLUSION

Baldwin, asks this Court to interpret the contract provision of the UM coverage policy to reasonably provide him with the insurance he purchased. Specifically, Baldwin asks this court to rule that when a part of the unknown driver's vehicle comes loose and strikes the insured's vehicle, such act meets the "strike" requirement of the UM language of the State Farm UM insurance policy. Baldwin ask this court to uphold the Court of Appeals well reasoned decision in the herein action.

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