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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001000-MR

JOSHUA JACKSON — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 12-CI-00147

STATE FARM FIRE AND
CASUALTY COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Joshua Jackson appeals from an order granting summary judgment to State Farm Fire and Casualty Company (State Farm) and dismissing his complaint on the basis that he did not qualify for underinsured motorist (UIM) coverage because he was not an "occupant" of a vehicle.

Jackson testified by deposition about the events leading to the accident in which he was injured. On April 21, 2010, Jackson was in the parking lot of an apartment complex after having completed a visit with friends. He was preparing to walk home when he stopped to say hello to Delores Jones (insured by GEICO) who was sitting in her vehicle in a parking space.

Jackson was talking to Jones when Dennis Doyle (driver) and Latasha Hayes (passenger and Jackson's cousin) pulled up in Doyle's vehicle (insured by State Farm) behind Jones's vehicle. Hayes called to Jackson from her open passenger window which was facing the rear bumper of Jones's vehicle.

Jackson walked to that window and talked with Doyle and Hayes for about two minutes. They arranged to give him a ride to the other side of town. Hayes told Jackson she had to run up to her apartment and then they could go.

Immediately before the accident, Jackson was leaning his head into the passenger window of Doyle's vehicle with his arms on the door. At the time of the accident, Jackson raised his head out of the window and had his hands on the passenger door when he was struck by Jones's vehicle, which pushed him against Doyle's vehicle.

Jackson testified Jones's vehicle hit him twice. Each time, Jones's vehicle's rear bumper struck Jackson above and below the knees, pinning him against Doyle's vehicle. When he was hit the first time, his head smacked on the top of Doyle's vehicle, he blacked out for a few seconds, came to and felt himself being hit again. He injured his head, nose and lips on the roof of Doyle's vehicle

when he hit it. When Jones's vehicle pulled away, he fell to the ground. Afterward, he observed dents in Doyle's passenger door where his body hit, which was documented by a photo taken at the scene admitted as an exhibit during his deposition. He also testified his head dented the roof of Doyle's vehicle. Jackson testified that although he is able to work, he has ongoing intense leg pain and attributes an increase in the frequency of his migraine headaches to the accident.

Jackson applied for basic reparation benefits (BRB) from GEICO as a pedestrian and received those benefits. He also applied for and received liability benefits from GEICO in the amount of $25,000 which was the maximum available under its liability policy. Jackson then filed suit against State Farm for UIM coverage claiming he was an "occupant" of Doyle's vehicle under its policy. The State Farm policy defines "insured" as including "any other person while occupying a car that: (a) is owned by you [Doyle]." The policy states: "Occupying means in, on, entering, or exiting."

State Farm filed a motion for summary judgment arguing that because Jackson elected to apply for and received BRB benefits from GEICO as a pedestrian, he could not also be "occupying" Doyle's vehicle, especially where he made no physical movement to get inside it. State Farm argued because Jackson was not occupying Doyle's vehicle, he was not entitled to UIM coverage.

The trial court granted summary judgment. After applying the *Kentucky Farm Bureau v. McKinney*, 831 S.W.2d 164 (Ky. 1992), four-factor test for determining whether an individual is an occupant, the trial court concluded

Jackson was not an occupant because he did not meet the third and fourth factors of the test in that he was neither "vehicle oriented" or using the automobile as a conveyance. Jackson appealed.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

"As a general rule, interpretation of an insurance contract is a matter of law for the court." *Stone v. Kentucky Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809, 810 (Ky.App. 2000). In *McKinney*, the Kentucky Supreme Court found that when interpreting contractual language, "two cardinal principles apply: (1) the contract should be liberally construed and all doubts resolved in favor of the insureds; and, (2) exceptions and exclusions should be strictly construed to make insurance effective." *McKinney*, 831 S.W.2d at 166 (internal quotation marks omitted). Ambiguous contracts must be given a reasonable interpretation which provides the insured with all reasonably expected coverage. *Deerfield Ins. Co. v. Warren Cty. Fiscal Court ex rel. City Cty. Planning Comm'n*, 88 S.W.3d 867, 873 (Ky.App.

2002). "Finally, the terms should be interpreted in light of the usage and understanding of the average person." *Stone*, 34 S.W.3d at 811.

In *McKinney*, Diana McKinney and her unborn child were hit and killed by a motorcycle after Diana exited the disabled truck she was riding in and was engaged in flagging on-coming traffic around the scene over 100 feet away from the truck. The issue was whether McKinney qualified for uninsured motorist (UM) coverage based upon "occupying" the truck under a policy that defined "occupying" as meaning "in or upon or entering into or alighting from, with permission of the owner." *Id.* at 165. In making its determination, the Kentucky Supreme Court favorably discussed Professor Alan I. Widiss's opinion from *Uninsured and Underinsured Motorist Insurance*, Second Edition, Volume One that "courts generally employ expansive interpretations of insurance policy coverage terms to provide indemnification for persons engaged in a task related to the use, operation or maintenance of an insured vehicle even though they were not upon, entering into or alighting from an insured vehicle." *McKinney*, 831 S.W.2d at 167. The Court then adopted a four-part method of analysis other jurisdictions have used to interpret the term "occupying" in UM policies:

> (1) There must be a causal relation or connection between the injury and the use of the insured vehicle;
>
> (2) The person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;

> (3) The person must be vehicle oriented rather than highway or sidewalk oriented at the time; and,
>
> (4) The person must also be engaged in a transaction essential to the use of the vehicle at the time[.]

Id. at 168 (quoting *Rau v. Liberty Mut. Ins. Co.*, 21 Wash.App. 326, 334, 585 P.2d 157, 162 (1978) (abrogating by *Butzberger v. Foster*, 151 Wash.2d 396, 408, 89 P.3d 689, 696 (2004), as to the vehicle orientation factor)). The Court then determined McKinney was "occupying" the truck and qualified for UM coverage. *Id*.

The *McKinney* factors are not limited to only UM cases; they have also been applied to determine whether UIM coverage is available. *MGA Ins. Co., Inc. v. Glass*, 131 S.W.3d 775, 778 (Ky.App. 2004). However, no Kentucky case has expressly determined whether the four-factor test applies to situations in which a person is in the process of entering into or in physical contact with an insured vehicle. In resolving this issue, decisions from other jurisdictions applying the four-part test to factual scenarios similar to Jackson's are persuasive.

In *Roden v. General Cas. Co. of Wisconsin*, 671 N.W.2d 622 (S.D. 2003), UIM coverage was found to exist for an employee standing outside and talking to his supervisor through the open window of the insured vehicle when he was hit by a second vehicle. The insurance policy defined "occupying" to mean "in, on, upon, getting in, on, out, or off." *Id*. at 625. Rather than construing the terms of the policy to determine whether Roden was "on" or "upon" the insured vehicle, the Court adopted the four-part test and generally determined that Roden was

"occupying" the vehicle because his actions satisfied all four factors of the test as follows: (1) there was a causal relationship between Roden's injury and use of the insured vehicle because Roden approached his supervisor's pickup truck to talk to about company business, in essence using the vehicle as an office; (2) Roden was in close physical proximity to the vehicle because he was leaning against the vehicle's door and had his arms, hands and face in the window; (3) Roden was vehicle oriented because he had his head in the window and was talking business; and (4) Roden was engaged in a transaction essential to use of the vehicle because he was not a stranger engaged in idle conversation with the vehicle's driver. *Id.* at 628-29.

In *Fisher v. Harleysville Ins. Co*., 423 Pa.Super. 362, 364, 621 A.2d 158, 159 (1993), Fisher, who was hunting all day, had made arrangements to meet his uncle for a ride home. While preparing to enter his uncle's truck, Fisher was injured when hit by another vehicle and subsequently sought UIM coverage from his uncle's insurance policy on the truck. In applying the four-part test, the Court noted the uncle instructed Fisher to unload his gun before entering the truck and turned on his headlights so that Fisher could see what he was doing (under Pennsylvania law it was unlawful to have a loaded firearm in a vehicle) and Fisher was in the process of unloading his gun under the glare of the truck's headlights when he was struck by the underinsured vehicle. *Id.* The Court concluded under these circumstances, the four-part test was satisfied:

> At the time of the accident, Fisher was in close proximity to the truck. He was also truck oriented because he was making preparation to enter the same lawfully and carefully. Under the circumstances, moreover, there was a causal connection between the injuries which he sustained and the use of the truck.

Id. at 365-66, 621 A.2d at 160.

Considering the facts most favorably to Jackson under an expansive interpretation of the State Farm policy, we conclude the trial court erred by determining as a matter of law that Jackson was not "occupying" Doyle's vehicle: (1) there was a causal relationship or connection between where Jackson was located when he received his injury and the use of the insured vehicle; Hayes's action of calling to Jackson, Doyle's action of stopping his vehicle behind Jones's vehicle, and Jackson conversing with Hayes through the open passenger window with his back to Jones's vehicle put him in a vulnerable position behind her vehicle and the impact of the two vehicles resulted in his injuries from being pinned between them and hitting his head on Doyle's vehicle; (2) Jackson was in reasonably close geographic proximity to Doyle's vehicle because he was in actual physical contact with it when he was hit by Jones's vehicle; (3) Jackson was vehicle oriented because he had his hands on the vehicle and was talking to Hayes through the window; and (4) Jackson was arranging a ride which was an essential transaction to enable him to use the vehicle as a passenger and, although paused,

the vehicle was still being driven which is also an essential use of the vehicle.[1] Therefore, the trial court erred in granting summary judgment to State Farm.

Additionally, UIM coverage could also be available to Jackson based on the definition of "occupying" in the State Farm policy. We do not believe that *McKinney* preempts or limits policy language which may provide coverage for individuals who do not satisfy all of the four factors because the intent in *McKinney* was to expand the term "occupying" to serve the remedial purposes of auto insurance rather than limit insurance liability. Jackson could qualify as "occupying" because the policy language defines "occupying" as including being "on" or "entering" the insured vehicle. *See Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky.App. 1991) (holding driver of an insured vehicle who exited it, removed its battery to help start a second vehicle and who was replacing that battery back in the insured vehicle when hit by the second vehicle qualified as "occupying" the insured vehicle because he was "'upon' the vehicle as contemplated by the policy's own language."); *Fields v. BellSouth Telecommunications, Inc*., 91 S.W.3d 571, 573 (Ky. 2002) (holding "the process of 'entering into' a vehicle [thus "using" within the meaning of the Motor Vehicles

[1] We note that at least one Court has opined that "a driver's gesture and call to invite and assist a passenger to enter a vehicle is *part of* the inherent use of a vehicle." *Garcia by Ladd v. Regent Ins. Co*., 167 Wis.2d 287, 300, 481 N.W.2d 660, 666 (Wis.App. 1992). Additionally, in *Illinois Farmers Ins. Co. v. Marvin*, 707 N.W.2d 747, 753 (Minn.App. 2006), the Court noted that a victim who was loading the back of an Explorer when hit by another vehicle and pinned between their bumpers had established her use of the Explorer entitling her to UIM coverage, because such use resulted in "injuries [which] were sustained, at least in part, when she came in contact with the bumper of the Explorer and thus the vehicle use was actively 'connected' with the injury." Being caught between two vehicles caused injuries distinct from merely those caused by the other vehicle hitting her. *Id*. at 755-56.

Reparation Act] can begin no sooner than when a person, or that person's agent, makes contact with the vehicle with the intention of entering the vehicle.") However, we need not decide if Jackson could also qualify as "occupying" Doyle's vehicle under the State Farm policy language defining that term because we have already determined he qualifies as "occupying" under *McKinney*.

We are not persuaded that Jackson's decision to seek BRB from GEICO should affect our analysis. Whether Jackson was entitled to recovery BRB from GEICO is not properly before this Court because GEICO did not challenge his entitlement to BRB and is not a party to this suit. We note that as explained in *Saxe v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 188, 191 (Ky.App. 1997) (footnote omitted), Jackson is to be fully compensated but never receive a double recovery. If he had received BRB from State Farm, State Farm would have been entitled to recover this amount from GEICO:

> The entire MVRA statutory scheme reflects a zero-sum approach where the injured person's losses are fully compensated by a combination of reparation benefits, liability insurance and, if necessary, underinsured motorist coverage. The reparation obligor then recovers its payments (BRB's or ARB's) from the insurer for the responsible secured party. Under this system, the injured party is fully compensated or "made whole" (if appropriate coverages are in place) but never realizes a net gain from his injuries.

Id. Therefore, there is no practical effect from Jackson recovering BRB from GEICO initially because in either event, GEICO would have ultimately been responsible for paying it. Jackson is not seeking BRB from State Farm, nor would

he be entitled to any additional BRB where he has already received it from GEICO.

Jackson identifying himself as a pedestrian to GEICO was not a waiver of his right to be fully compensated from all responsible insurers. In *Illinois Farmers Ins. Co. v. Marvin*, 707 N.W.2d 747 (Minn.App. 2006), the Court determined summary judgment was properly granted in favor of an accident victim claiming she was "occupying" the insured vehicle and, thus, entitled to UIM coverage where her testimony indicated she was in the process of sliding off the insured vehicle's floor after loading it and intended to be a passenger when she was hit by a second vehicle. The Court was not persuaded that the victim self-identifying as a pedestrian and hospital records doing the same raised a material issue of fact as to whether she was "occupying" insured vehicle as the insurer claimed. *Id.* at 751-52.

Accordingly, we reverse and remand the Graves Circuit Court's grant of summary judgment to State Farm and dismissal of Jackson's case.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
David V. Oakes Paducah, Kentucky	Dennis J. Courtney Murray, Kentucky