STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Richard E. Lemaster,
Plaintiff Below, Petitioner

vs) No. 11-0883 (Berkeley County 09-C-926)

GEICO General Insurance Company,
Defendant Below, Respondent

FILED
May 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner Richard E. Lemaster, by counsel Laura V. Faircloth, appeals the order of the circuit court of Berkeley County entered May 5, 2011, which granted summary judgment in favor of respondent GEICO General Insurance Company ("GEICO"). GEICO, by counsel Michael Lorensen, has filed a response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioner appeals the circuit court's order of summary judgment in favor of his insurer, respondent GEICO, in the underlying declaratory judgment action regarding the denial of uninsured motorist coverage by GEICO for the petitioner's personal injury and property damage claims caused when a pumpkin hit his vehicle. It is the petitioner's theory that persons unknown drove a vehicle onto an overpass bridge and threw the pumpkin off, causing it to hit his vehicle as he drove by. The incident occurred on Halloween night on Interstate 81 in Berkeley County, when petitioner was passing under an overpass bridge. When something hit his vehicle, he pulled over, looked back but saw no one on the bridge, checked his vehicle and found that a part of it was covered with pumpkin. Further, he noted that there was a dent just above the windshield. The police officer who investigated also noted that the damage was to "the top portion of his windshield and the guard for the windshield." Plaintiff indicated that he was never able to find out who did it and the police report reflected "no suspects at this time."

The petitioner's GEICO policy has uninsured motorist coverage which provides $25,000 for bodily injury and $25,000 for property damage. Because GEICO denied uninsured motorist coverage for the incident, petitioner filed a declaratory judgment complaint against GEICO seeking such

coverage. Although the incident occurred in West Virginia, the relevant insurance policy was issued in Virginia and Virginia law controls regarding coverage issues. One of the central issues below was the construction of the term "use" of a vehicle. Paragraph A of the Uninsured Motorists Coverage of the GEICO policy states:

> "We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of "bodily injury":
>
> 1. Sustained by an "insured"; and
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured vehicle."

GEICO initially filed a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, but the circuit court denied this motion and discovery was conducted. GEICO filed a motion for summary judgment arguing, inter alia, that in order to determine if an injury arises from the "use" of a vehicle for uninsured motorist purposes under Virginia law, there must be a causal relationship between the injury sustained and the employment of the motor vehicle as a vehicle. Using a vehicle as a platform from which to throw pumpkins does not constitute such "use" per GEICO.

The circuit court granted summary judgment for GEICO, concluding, inter alia, that there was no evidence that another vehicle was involved in the incident. The circuit court found that the plaintiff told the investigating officer that he had not seen anyone on the bridge as he approached it. The circuit court found that "[p]laintiff expressly acknowledged that [p]laintiff does not have any facts or observations to state that there was another vehicle involved in the occurrence that caused [p]laintiff's injuries. Plaintiff could only speculate that a vehicle was used to transport the pumpkin to the scene." The circuit court also concluded that even if the petitioner had established proof that a vehicle had been involved, the plaintiff's theory of the case did not establish that such a vehicle had been "used" within the meaning of the policy language. The circuit court cited Virginia case law which indicates that where a vehicle is employed in a manner foreign to its designed purpose, there is no coverage under the uninsured motorist provisions "because the resulting injury does not arise out of the 'use' of the uninsured vehicle as a vehicle, but instead arises from its employment in a manner contemplated neither by its designers, its manufacturer, nor the parties to the insurance contract." *Fireman's Fund Ins. Co. v. Sleigh*, 267 Va. 768, 772, 594 S.E.2d 604, 606 (2004).

The standard of review for entry of a summary judgment and a declaratory judgment is de novo. Syl. Pts.1 & 2, *Mountain Lodge Ass'n v. Crum & Forster Indem. Co.*, 210 W.Va. 536, 558 S.E.2d 336 (2001). "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

The petitioner argues that the circuit court erred in concluding that there was no basis for the petitioner's uninsured motorist claim because the petitioner could not prove that a vehicle was involved in the act of dropping the pumpkin. GEICO argues that the presence of an uninsured motor vehicle had to be established in order for petitioner to have a valid claim for uninsured motorist coverage. Further, GEICO argues that petitioner can only speculate that a vehicle was involved in the underlying incident. The Court has considered the appendix record and the arguments of the parties and concludes that there was no error by the circuit court in its conclusion that the petitioner failed to establish any evidence that another vehicle was involved in the incident.

The petitioner also argues that the circuit court erred by concluding that the use of a motor vehicle to throw a pumpkin would not amount to the "use" of a motor vehicle under the policy for the purposes of uninsured motorist coverage. The Court notes initially that there was no evidence that another vehicle was used in the incident. Even if there were proof of involvement by a vehicle, the Court is persuaded that the circuit court properly applied Virginia law in finding that such activity as theorized by the petitioner in the present case would not constitute a "use" of a motor vehicle.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh