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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1902-13T1

MARIE ST. SURIN,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Respondent.

Submitted January 28, 2015 – Decided February 27, 2015

Before Judges Fuentes and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4743-12.

Escandon, Fernicola, Anderson & Covelli, attorneys for appellant (Victor M. Covelli, of counsel; Scott M. McPherson, on the brief).

Kenneth N. Lipstein, attorney for respondent.

PER CURIAM

Plaintiff Marie St. Surin appeals from the order of the Law Division dismissing her declaratory judgment action against defendant Allstate Insurance Company (Allstate). Plaintiff sought a judicial declaration that she was entitled to uninsured motorist (UM) coverage under her automobile policy. It is

undisputed plaintiff was injured when the car she was driving struck an automobile tire and rim that was lying in the northbound lane of Highway 35 in the Borough of Belmar. Plaintiff did not see the tire and rim dislodge or disconnect from any vehicle at any time before the accident.

Judge Jamie S. Perri granted Allstate's summary judgment motion. After reviewing the evidence presented by the parties and applying the well-settled standards established by the Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) and codified in Rule 4:46-2(c), Judge Perri found plaintiff did not establish "a causal nexus between the operation, maintenance or use of a motor vehicle and the happening of the accident." Judge Perri rejected plaintiff's "proposition that the mere fact that a piece of a motor vehicle is found in the roadway necessitates a finding that it came to be there because it fell off of a vehicle." We agree with Judge Perri and affirm substantially for the reasons she expressed in her oral opinion delivered from the bench on November 8, 2013.

We review the grant or denial of a motion for summary judgment de novo. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We must determine whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540.

Mindful of these standards, we will recite the relevant facts in the light most favorable to plaintiff's position, including giving her all favorable inferences that can be rationally drawn from the available evidence.

I

At approximately 6:03 a.m. on January 11, 2007, plaintiff was driving her 1998 Toyota Camry northbound on Highway 35 in Belmar. She was on her way home to Asbury Park after completing her regular 10:00 p.m. to 6:00 a.m. shift as a certified nursing assistant in an assisted living residence facility in Wall Township. We will describe the event that gave rise to this litigation by quoting plaintiff's deposition testimony verbatim:

> Q. Tell me in your own words how the accident happened?
>
> A. As I'm driving going home, I feel something impacted my car, and something is rolling under it, and I'm applying my brake

to stop, and I couldn't stop it, and I lose control of the car, and I scream, "Help," and my vehicle enter [sic] a driveway, rest [sic] in front of a tree, and flipped over.

Q. How many times did it roll over?

A. Just once.

Q. Did you see anything before feeling the impact under your car?

A. No, I don't recall seeing anything.

Q. Was it something in the roadway that you hit?

A. Yes, it has to be that, but after the accident officer tell [sic] me it was an extra tire that he see [sic] under my car. They did not know where it came from.

Q. From what you felt, can you tell where in the roadway this object was?

A. I cannot tell. It's when it's impacted, I feel [sic] it.

Q. Did you ever see the tire yourself - -

A. No.

Q. - - at any time?

A. No.

Q. Even after the accident?

A. No.

Q. As you were driving were you looking generally at the roadway?

A. Yes, I was looking ahead of me.

> Q. If the tire was in the roadway would your headlights have illuminated it so you could see it? [1]
>
> A. Yes, I would have seen it, and I would have tried to avoid it. I wouldn't lose control of my car.
>
> Q. Could you tell me why you didn't see it?
>
> A. Because I just did not see it. I don't know where it came from.
>
> Q. Well, that's actually my next question. Do you have any idea where that tire came from?
>
> A. No, I don't know.

Plaintiff was thirty-five years old at the time of the accident. The police officers and other first-aid personnel who reported to the scene of the accident did not find any evidence indicating plaintiff was impaired in any manner by any intoxicants. Moreover, plaintiff was not issued any summons for violations of the motor vehicle code. The investigation of the accident conducted by the Belmar Police Department did not reveal where the tire and rim that caused the accident came from, or how it came to be on the northbound lane of Highway 35 on the date and time it came into contact with plaintiff's car. Plaintiff has not presented any evidence to show this tire and

[1] Earlier in the deposition plaintiff testified she was driving with her car's headlights on because it was "full dark" at the time.

rim came to be at this location because it came from or was part of a motor vehicle.

II

N.J.S.A. 17:28-1.1(e)(1) defines "underinsured motorist coverage" as "insurance for damages because of bodily injury and property damage resulting from an accident arising out of the ownership, maintenance, operation or use of an underinsured motor vehicle." (Emphasis added). N.J.S.A. 17:28-1.1(e)(2) defines, in relevant part, the term "uninsured motor vehicle" as:

> (a) a motor vehicle with respect to the ownership, operation, maintenance, or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident;
>
> (b) a motor vehicle with respect to the ownership, operation, maintenance, or use of which there is bodily injury liability insurance in existence but the liability insurer denies coverage or is unable to make payment with respect to the legal liability of its insured because the insurer has become insolvent or bankrupt, or the Commissioner of Banking and Insurance has undertaken control of the insurer for the purpose of liquidation; [or]
>
> (c) a hit and run motor vehicle as described in . . . [N.J.S.A.] 39:6-78[.]

This statutory scheme obligates those seeking to receive compensation based on the UM coverage provisions in their automobile policy to establish a "substantial nexus" that the

claim is based on an accident with an uninsured motor vehicle. Livsey v. Mercury Ins. Grp., 197 N.J. 522, 533 (2009). The insured must provide reasonably prompt notice of the accident to permit the carrier to investigate the claim and verify the availability of UM coverage within the terms of the policy. As we held in Scheckel v. State Farm Mut. Auto. Ins. Co., 316 N.J. Super. 326 (App. Div. 1998):

> an insured claiming coverage under a UM endorsement may be deemed to have breached the policy if he or she fails to demonstrate that reasonable efforts were undertaken to ascertain the identity of the uninsured vehicle. "[W]hether actions taken to ascertain identification constitute reasonable efforts depends on the circumstances of the individual case." On this issue, the insured bears the burden of proof. However, "[u]ninsured motorist provisions are generally interpreted broadly to afford the injured claimant recovery."
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> [Id. at 332 (internal citations omitted).]

In Livsey, supra, our Supreme Court distilled the question before us to a straightforward two-pronged test: "first, the insured must demonstrate that his or her injuries were caused by an "accident;" and, second, the insured must prove that the accident arose from the ownership, maintenance, operation or use of an uninsured vehicle." 197 N.J. at 531 (emphasis added). Here, there is no evidential support that plaintiff's "accident arose from the ownership, maintenance, operation or use of an

uninsured vehicle." Indeed, plaintiff cannot even rely on what has been characterized as the "phantom car" approach to UM coverage. See Cockerline v. Menendez, 411 N.J. Super. 596, 614 (App. Div.), certif. denied, 201 N.J. 499 (2010).

The following colloquy between plaintiff's counsel and Judge Perri during oral argument in Allstate's summary judgment motion illustrates the point:

> THE COURT: Okay. In your brief, you suggested that you're going to argue, that the plaintiff would be able to argue to the jury that the tire and rim were negligently attached to an unknown vehicle from which it fell and was left in the roadway by the driver of the unknown vehicle.
>
> Are there any facts anywhere in the motion record that could possibly support a finding that the tire was negligently attached to a vehicle? You don't have an expert, who says I inspected the tire and it had marks on it which show that the lugs were improperly torqued or this was the - - Or you don't have anyone who could say that this is the type of tire that's generally carried as an external spare or anything like that, right?
>
> PLAINTIFF'S COUNSEL: No, Your Honor. My point simply is that it's for the jury to decide whether it came from a motor vehicle and arose out of the ownership, maintenance, or operation or use of an uninsured motor vehicle.
>
> THE COURT: Based on what?
>
> PLAINTIFF'S COUNSEL: Based upon just the jury's, you know, natural reasoning and deduction in hearing that - - There's no dispute that the plaintiff alleges that she

> hit the tire and ran off the road and crashed. You know, there's no dispute as to that. And there's no dispute that she did strike a tire. I don't believe that there's a dispute as to that. So based upon that testimony, I think a jury could reasonably, you know, use their own reasoning and deduction to find that the tire came from a motor vehicle.

At the conclusion of oral argument, Judge Perri gave a detailed, well-reasoned opinion finding plaintiff had not presented competent evidence from which a jury could rationally infer that the tire and rim were connected with or came from a motor vehicle sometime before her car came into contact with them. We agree. Acceptance of plaintiff's argument would permit the jury to base its verdict on nothing more than rank speculation.

Affirmed.