

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2005-SC-000571-D

FILED

AUG 02 2006

SUPREME COURT CLERK

ERIC MITCHELL and
CANDACE SLADE

APPELLANTS

APPEAL FROM HARRISON CIRCUIT COURT

v. NO. 02-CI-00067

COURT OF APPEALS OF KENTUCKY
NO. 2004-CA-001277-MR

ALLSTATE INSURANCE COMPANY

APPELLEE

REPLY BRIEF FOR APPELLANTS

Submitted by:

DAN E. SIEBERT
SIEBERT & JOHNSON, PLLC
500 West Jefferson St., Suite 2250
Louisville, Kentucky 40202
(502) 589-2246

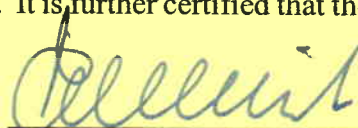
KEVIN C. BURKE
125 South Seventh Street
Louisville, Kentucky 40202
(502) 584-1403

COUNSEL FOR APPELLANTS
ERIC MITCHELL AND
CANDACE SLADE

CO-COUNSEL FOR
APPELLANTS
ERIC MITCHELL AND
CANDACE SLADE

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was sent via U.S. Mail this 1 day of August, 2006 to: Hon. A. Campbell Ewen, Hon. William P. Carrell II, Ewen Kinney & Rosing, 1090 Starks Building, 455 South Fourth Avenue, Louisville, Kentucky 40202; Hon. Robert McGinnis, Judge, Harrison Circuit Court, 5 Justice Center, 115 Court Street, Cynthiana, Kentucky 41031; and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. It is further certified that the record on appeal was not withdrawn by the Appellants.



COUNSEL FOR APPELLANTS

I. ALLSTATE FAILS TO PORTRAY THE FACTS IN A LIGHT MOST FAVORABLE TO MITCHELL AND SLADE

Allstate urges this Court to accept its own version of the facts as true, even though the Kentucky standard for summary judgment requires that the deposition testimony and affidavits submitted to the trial court be examined in a light most favorable to Appellants. Clearly, the summary judgment standard requires that the facts, inferences, and conclusions derived from the facts must be considered in a light most favorable to Mitchell and Slade. *See, e.g., Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991); *Com v. Thomas Heavy Hauling, Inc.*, 889 S.W.2d 807, 808 (Ky. 1994). Allstate simply ignores this well-settled principle.

Allstate claims that the relationship between Rita Taylor, Virginia Warner, and Allan Warner is “undisputed,” and that the restrictions on the use of a Toyota Camry – a vehicle titled to Rodney Taylor, given to Virginia Warner by Rodney Taylor’s wife, Rita Taylor (without any intention on the Taylors’ part to ask for the vehicle back), and then operated by Virginia Warner’s son, Allan, with Ms. Warner’s permission on the date of the wreck – “clearly” demonstrates a “lack of permission” on Allan’s part.

Allstate continues to ignore the inconsistent testimony of Rita Taylor, who first stated that Allan could not drive the vehicle because Allan had “lied” to Ms. Taylor on a previous occasion, but then admitted that the restriction only applied to “regular” use of the vehicle as Ms. Taylor trusted Ms. Warner (as Allan’s mother) to “make a case by case decision about whether to let [Allan] use the car occasionally” (*Compare Taylor Depo.*, p. 16, lines 19-25, p. 17, lines 4-6 *with Taylor depo.*, p. 20, lines 21-24, p. 21, lines 11-19). Allstate also conveniently ignores the fact that Rita Taylor’s alleged “restriction” on Allan’s use of the vehicle is inconsistent with the Taylors giving the vehicle to Ms. Warner to do as she pleased

(including allowing her son to drive the vehicle) with no intention of asking for its return. (Taylor depo., p. 18, lines 17-21).

Similarly, while Allstate concedes that Allan's mother gave Allan permission to drive the vehicle on the day of the wreck, Appellee refuses to acknowledge the factual dispute as to the scope of Ms. Warner's permission. Ms. Warner claims that she had a "standing house rule" that Allan was to drive the Camry to and from work and that Allan was not to have passengers. However, affidavits from Eric Mitchell, Candace Slade, and Gary Claypool, tendered in opposition to Allstate's Motion for Summary Judgment reveal otherwise. In contrast to Ms. Warner's testimony, the affidavits reveal that Ms. Warner regularly allowed Allan use of the vehicle for shopping and errands and that Ms. Warner allowed Allan to drive the Camry with passengers. (Affidavit of Eric Mitchell, p. 1, ¶¶ 3-4; Affidavit of Candace Slade, p. 1, ¶ 4; Affidavit of Gary Claypool, p. 1, ¶ 2).

Existing case law already reveals that "permission" under such circumstances is *a factual issue to be determined by the jury*, and circumstantial evidence may be considered. *See, e.g., Maryland Cas. Co. v. Hassell*, 426 S.W.2d 133, 134 (Ky. 1967). Accordingly, reversal is required based on the disputed facts and Kentucky's summary judgment standard.

II. ONLY THE "INITIAL PERMISSION" RULE IS CONSISTENT WITH THE GOALS AND PURPOSES OF THE MVRA

Perhaps more disturbing than Allstate's recitation of the facts in its own favor, is Allstate's flawed legal analysis regarding the "initial permission" rule and the policy and purposes underlying the Kentucky Motor Vehicle Reparations Act.

Neither Allstate's insurance policy nor the MVRA defines the word "permission." Nevertheless, case law makes clear the MVRA is to be construed in the broadest possible

terms “...in order to protect the *victims* of motor vehicle accidents and to insure that one who suffers a loss as the result of an automobile accident would have a source and means of recovery.” National Insurance Association v. Peach, 926 S.W.2d 859, 861 (Ky.App. 1996)(Emphasis in original). “The primary purpose of the MVRA is to benefit motor vehicle accident victims *by reforming, and in some cases broadening*, their ability to make and collect claims.” Crenshaw v. Weinberg, 805 S.W.2d 129, 131 (Ky. 1991)(Emphasis added).

Moreover, the Kentucky MVRA differs from other states’ model financial responsibility acts in that mandatory liability coverage under the MVRA can never be diluted. Bishop v. Allstate Ins. Co., 623 S.W.2d 865, 866 (Ky. 1981). As such, this Court has repeatedly recognized that Kentucky’s MVRA is unique among model acts because of the broad coverage it affords accident victims like Mitchell and Slade. Id.; McGrew v. Stone, 998 S.W.2d 5 (Ky. 1999).

Despite the above, Allstate maintains in its brief that the “majority of other states reject the ‘initial permission’ rule.” (Appellee’s brief, p. 13). Allstate then cites cases from other jurisdictions for support, but fails to inform this court that the cases cited by Allstate were decided under a common law rule or under a model financial responsibility act substantially different from Kentucky’s MVRA. See St. Paul Fire & Marine v. West American Ins., 437 A.2d 165 (De. 1981) (not considered in context of financial responsibility or no-fault law); Kobetitsch v. American Manufacturer’s Mut. Ins. Co., 390 So.2d 76 (Fla. App. 1980)(not considered in context of financial responsibility or no-fault law); AIG Hawaii Ins. Co. v. Vincente, 891 P.2d 1041 (Haw. 1995) (Hawaii does not interpret its financial responsibility law as broadly as Kentucky); Cimarron Ins. Co. v.

Loftus, 612 P.2d 1245 (Kan. App. 1980)(not considered in context of financial responsibility or no-fault law); Nationwide Mut. Ins. Co. v. Continental Ins. Co., 589 A.2d 556 (Md.App. 1991)(not considered in context of financial responsibility or no-fault law); Grinnell Mut. Reinsurance Co. v. Farm & City Ins., 616 N.W.2d 353 (N.Dak. 2000) (North Dakota does not interpret its financial responsibility law as broadly as Kentucky); Ryan v. Western Pac. Ins. Co., 408 P.2d 84 (Or. 1965) (not considered in context of financial responsibility or no-fault law); State Farm Mut. Auto Ins. v. Ragatz, 571 N.W.2d 155 (S. Dak. 1997)(South Dakota does not interpret its financial responsibility law as broadly as Kentucky); Old Am. County Mut. Fire Ins. Co. v. Renfrow, 130 S.W.3d 70 (Tex. 2004) (not considered in context of financial responsibility or no-fault law).

In contrast to the above, a good example of a state with a motor vehicle reparations act providing broad liability coverage for innocent accident victims like Kentucky is Minnesota. In adopting the initial permission rule, the Minnesota Supreme Court held as follows:

This trend of our cases to interpret the [Minnesota] Safety Responsibility Act and omnibus clauses in liability insurance policies so as to effect public policy affording protection to victims of automobile accidents is consistent with the jurisprudential trend in other jurisdictions. Today, the initial permission rule is said to be supported by the 'weight of authority' [citations omitted]....Primary justification for the 'initial permission' rule is that it alone guarantees fulfillment of the state's policy of compensating innocent accident victims from financial disaster. Courts also have recognized that application will discourage collusion between bailor and bailee in order to escape liability; and courts have noted that the 'initial permission' rule will greatly reduce a most costly and wasteful type of litigation.

Milbank Mut. Ins. Co. v. U.S. Fidelity and Guar. Co., 332 N.W.2d 160, 166 (Minn. 1983).

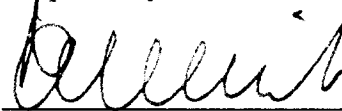
It is respectfully submitted that Kentucky's MVRA provides no less coverage than Minnesota's Safety Responsibility Act and other states with financial responsibility laws as broad as the compulsory insurance laws of Minnesota and Kentucky. The cases cited by Allstate adopting the minor deviation rule are simply "apples" to the MVRA's "oranges."

Because the "initial permission" rule is consistent with the goals and purposes of the MVRA, it should be adopted by this Court in affording mandatory liability coverage to innocent accident victims like Mitchell and Slade.

CONCLUSION

WHEREFORE, Appellants Eric Mitchell and Candace Slade respectfully request that this Court reverse the Opinion of the Kentucky Court of Appeals and remand this matter to the Trial Court for further proceedings.

Respectfully submitted,



DAN E. SIEBERT
SIEBERT & JOHNSON, PLLC
500 W. Jefferson Street, Suite 2250
Louisville, Kentucky 40202
(502) 589-2246

AND

KEVIN C. BURKE
125 South Seventh Street
Louisville, Kentucky 40202
(502) 584-1403

COUNSEL FOR APPELLANTS
ERIC MITCHELL AND
CANDACE SLADE