IN THE SUPREME COURT OF TEXAS

NO. 06-0106

NATIONWIDE INSURANCE COMPANY, PETITIONER,

v.

MOHAMAD ELCHEHIMI, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF KHALED ELCHEHIMI AND LUKMAN ELCHEHIMI, MINORS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

JUSTICE O'NEILL, joined by JUSTICE MEDINA, dissenting.

An axle-and-wheel assembly detached from an unidentified tractor-trailer and, propelled by the vehicle's momentum, flew across the highway median, striking Mohamad Elchehimi's car and injuring its occupants. The Court concludes there was no actual physical contact between the two vehicles as the uninsured-motorist statute requires, and thus Elchehimi was not covered under his standard automobile insurance policy. The Court purports to rely upon the statute's plain language, but nothing in that language compels the Court's holding and the statute's remedial purpose clearly belies it. In my view, when an integral part of an unidentified vehicle is propelled by the vehicle's momentum and, in a continuous and unbroken sequence of events, collides with an insured's vehicle, "actual physical contact" with a "motor vehicle" has occurred and coverage is afforded under the statute. Because the Court holds otherwise, I respectfully dissent.

I. The Statute

The uninsured-motorist (UM) statute was enacted to protect conscientious motorists from "financial loss caused by negligent financially irresponsible motorists." Act of Oct. 1, 1967, 60th Leg., R.S., ch 202, § 3, 1967 Tex. Gen. Laws 448, 449; *see Stracener v. United Servs. Auto. Ass'n*, 777 S.W.2d 378, 382 (Tex. 1989). The statute protects motorists by requiring that all Texas automobile insurance policies provide coverage to the insured when the insured is hit by a motorist who is uninsured, underinsured, or unidentified.[1] TEX. INS. CODE §§ 1952.101–1952.104. The statute is designed to reward responsible motorists who purchase insurance by providing them with coverage when the at-fault party's insurer is unable to provide compensation for their injuries because the party is uninsured, underinsured, or unidentified. We have repeatedly and consistently held that because the UM statute is remedial, it should be construed liberally to give full effect to the Legislature's purpose in enacting it — to provide coverage to insured motorists. *Old Am. County Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 115 (Tex. 2004) ("Th[e] Court has recognized that, because of their remedial purposes, [sections of the UM statute] should be liberally interpreted to give effect to the public policy that led to their enactment."); *Tex. Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123, 128 (Tex. 2004); *Stracener*, 777 S.W.2d at 382.

Under the UM statute, when the owner or operator of a vehicle who would otherwise be liable to the insured is unknown, "actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured." TEX. INS. CODE § 1952.104(3). The Legislature understandably included this requirement to prevent

[1] Elchehimi's vehicle was covered by Nationwide's standard Texas automobile insurance policy. That policy included UM coverage, as defined by the Texas Insurance Code. Both parties agree that interpretation of the UM statute governs the scope of coverage under the policy.

fraud; insureds without collision coverage who are involved in one-car accidents might be tempted to claim a "phantom car" was at fault in order to obtain coverage if they did not have to prove there was "actual physical contact" with the unknown "motor vehicle." *Smith v. Nationwide Mut. Ins. Co.*, No. 04-02-00646-CV, 2003 Tex. App. LEXIS 5056, at *4–*5 (Tex. App.—San Antonio June 18, 2003, pet. denied).

Whether the requirements of section 1952.104(3) are met when something less than the entire unknown vehicle collides with an insured vehicle is an issue of first impression for our Court, but our courts of appeals have decided a number of cases establishing some guiding principles. In *Latham v. Mountain States Mutual Casualty Co.*, for example, the court held that when an unknown vehicle strikes another vehicle, which in turn strikes the insured, the requirements of the section are met and coverage is afforded. 482 S.W.2d 655, 657 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).[2] However, collisions with cargo that has fallen from an unidentified vehicle or with debris in the roadway have been held not to constitute "actual physical contact" with a "motor vehicle." *Deville*, 988 S.W.2d at 333; *Williams*, 849 S.W.2d at 861; *Smith*, 2003 Tex. App. LEXIS 5056, at *7 (holding that a collision with the loading ramp of a trailer was not "actual physical contact" with a "motor vehicle").

[2] Both Nationwide and the Court insinuate that *Latham* is not good law or is inapplicable because the policy language at issue in *Latham* did not include the word "actual" and no court has extended the principle in *Latham* to other fact scenarios. However, our courts of appeals have repeatedly held that *Latham* applies to the current statute, even though the statute includes the word "actual," and have affirmed that it is still valid law. *E.g.*, *Smith*, 2003 Tex. App. LEXIS 5056, at *5; *Tex. Farmers Ins. Co. v. Deville*, 988 S.W.2d 331, 334 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Williams v. Allstate Ins. Co.*, 849 S.W.2d 859, 860–61 (Tex. App.—Beaumont 1993, no writ). When the Legislature first codified coverage of collisions with unknown motor vehicles in 1977, it included the "actual physical contact" requirement. Act of May 6, 1977, 65th Leg., R.S., ch. 182, § 1, art. 5.06-1(2)(d), 1977 Tex. Gen. Laws 370, 371. Prior to 1977, the UM statute did not mention unknown motor vehicles whatsoever. *See* Act of May 16, 1967, 60th Leg., R.S., ch. 203, § 1, art. 5.06-1, 1967 Tex. Gen. Laws 448, 448–49.

Thus, our courts of appeals have reasonably concluded that contact with something other than a vehicle or a part of a vehicle, such as road debris or cargo, does not constitute contact with a "motor vehicle" for purposes of the UM statute. *Deville*, 988 S.W.2d at 333; *Williams*, 849 S.W.2d at 861. In *Smith*, the court of appeals took the analysis one step further, concluding that contact with a vehicle part does not trigger coverage. 2003 Tex. App. LEXIS 5056, at *7. Although the court in *Smith* recognized that its holding was at odds with the UM statute's remedial purpose, it failed to consider that remedial statutes are to be construed liberally in order to further that purpose. *Id.* at *1; *see Stracener*, 777 S.W.2d at 382.

In this case, the court of appeals considered and adopted the integral-parts test. 183 S.W.3d 833, 838–39. Under that test, there is "actual physical contact" with a "motor vehicle" for purposes of the UM statute when the insured is struck by an integral part of another vehicle and there is a temporal continuity between the part's detachment from the unknown vehicle and collision with the insured. *Id.* The temporal-continuity requirement exists in order to preserve the anti-fraud purpose of the "physical contact" element by requiring the insured to show that another motor vehicle was in fact the cause of the collision. *See Allstate Ins. Co. v. Killakey*, 580 N.E.2d 399, 401 (N.Y. 1991). I believe the integral-parts test comports with the statutory language and best serves its remedial purpose. *See Sanchez*, 149 S.W.3d at 115; *Sturrock*, 146 S.W.3d at 128; *Stracener*, 777 S.W.2d at 382.

Under the Court's analysis, though, only a collision with an entire motor vehicle is covered under the UM statute. That rigid construction undermines the Legislature's object in mandating UM coverage and does nothing to further the purpose advanced by section 1952.104(3)'s "actual physical

contact" requirement. It is true that the integral-parts test is not expressed as such in the statute's text, but neither does the statute specify that actual physical contact with a motor vehicle *as a whole* is required. Both the integral-parts test and the Court's interpretation require construing a statute intended to be remedial in effect. Nothing in the statute itself compels the Court's conclusion that only a collision with the motor vehicle as a whole will satisfy the statute, and the Court's restrictive interpretation of section 1952.104(3) places that provision in tension with the UM statute's fundamental purpose. *See Smith*, 2003 Tex. App. LEXIS 5056, at *1. The integral-parts test, on the other hand, comports with the statutory language and furthers its underlying purpose. *See Stracener*, 777 S.W.2d at 382.

Moreover, the Court's construction does nothing to further the anti-fraud purpose behind the requirement of "physical contact" with a "motor vehicle." *See Deville*, 988 S.W.2d at 335 (Cohen, J., concurring). Under both the integral-parts test and the Court's interpretation, the insured must show that "actual physical contact" occurred and that the contact was with an unknown motor vehicle. Whether that contact was with an integral vehicle part propelled into the insured's vehicle by a continuous and unbroken sequence of events, or was with an unknown vehicle as a whole, makes little difference in light of the statutory purpose to protect responsible motorists and at the same time prevent fraudulent claims.

In this case, no one questions that there was "actual physical contact" between the axle-and-wheel assembly and Elchehimi's vehicle, or that there was a temporal nexus between the assembly's detachment from the truck and the collision. Nor is there any question of fraud, or doubt that the collision was the unidentified truck's fault. Yet under the Court's analysis the Elchehimis, who

responsibly purchased UM insurance, are denied coverage for their injuries. Nothing in the statutory language or purpose compels that result.

In reaching its holding today, the Court relies not on any definitions in the UM statute but on the Texas Transportation Code's definition of "motor vehicle": a "self-propelled vehicle designed for use on a highway, a trailer or semi-trailer designed for use with a self-propelled vehicle, or a vehicle propelled by electric power from overhead wires and not operated on rails." TEX. TRANSP. CODE § 601.002(5). Texas Insurance Code section 1952.101(a), a part of the UM statute, references chapter 601 of the Transportation Code as the chapter that governs the minimum liability limits for automobile insurance and specifies who must carry such insurance for what kinds of vehicles. *See, e.g.*, *id.* § 601.051. Thus, this definition of "motor vehicle" governs what types of vehicles must be insured and logically only includes intact motor vehicles. In the case of vehicle collisions, however, the distinction between motor vehicles that as a whole cause damage and motor vehicles whose integral parts directly and immediately cause damage is illogical and undermines the purpose behind the UM statute. *See Killakey*, 580 N.E.2d at 401. Furthermore, the definition of "motor vehicle" in section 601.002(5) of the Transportation Code is expressly applicable only to chapter 601 of the Transportation Code, TEX. TRANSP. CODE § 601.002 (specifying definitions for use "[i]n this chapter"); there is no indication that it is designed to be applied in other contexts. I would decline to apply that definition here, where doing so is contrary to the purpose of the UM statute.

II. Other Jurisdictions

The substantial majority of states with UM statutes that require hit-and-run coverage have considered language identical or similar to our UM statute and determined that coverage exists in

situations far more attenuated than that presented here. In these circumstances, we should strive for uniformity as much as possible. *See Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc*., 907 S.W.2d 517, 522 (Tex. 1995). Eleven such states have statutes similar to ours in that they require "physical contact" or "actual physical contact" with a "motor vehicle," "vehicle," or "automobile" to trigger coverage.[3] *See* CAL. INS. CODE § 11580.2(b)(1) (Deering 2007); FLA. STAT. ANN. § 627.736(4)(e)(1) (West 2008);[4] GA. CODE ANN. § 33-7-11(b)(2) (2007); 215 ILL. COMP. STAT. ANN. 5/143a(2)(i) (West 2007); MICH. COMP. LAWS SERV. § 257.1112 (LexisNexis 2008); MISS. CODE ANN. § 83-11-103(c)(v) (2008); NEV. REV. STAT. ANN. § 690B.020(3)(f)(7) (LexisNexis 2007); N.C. GEN. STAT. § 20-279.21(b)(3)(b) (2007);[5] N.Y. INS. LAW § 5217 (Consol. 2008); W. VA. CODE ANN. § 33-6-31(e)(iii) (LexisNexis 2007); WIS. STAT. ANN. §§ 632.32(2)(a), (4)(a)(2)(b) (West 2007);[6] *see generally* David J. Marchitelli, Annotation, *Uninsured Motorist Indorsement: Construction and Application of Requirement That There Be "Physical Contact" with Unidentified or Hit-and-Run Vehicle; "Hit-and-Run" Cases*, 79 A.L.R.5th 289 (2000). Another five states require either physical contact with the unidentified motor vehicle or, if there was no physical contact, that the insured meet additional evidentiary burdens, such as producing a disinterested

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[3] Some states require coverage absent any physical contact requirement whatsoever. *E.g.*, CONN. GEN. STAT. ANN. § 38a-336 (West 2008); OKLA. STAT. ANN. tit. 36, § 3636 (West 2007).

[4] Although the Florida statute requires "physical contact," the Florida Supreme Court has held that the requirements of the statute are met if the insured can show that his or her injuries were "caused by" the identified vehicle even if there was no physical contact. *Lumbermens Mut. Cas. Co. v. Castagna*, 368 So. 2d 348, 350 (Fla. 1979).

[5] The North Carolina statute uses the term "collision" instead of "physical contact," but the Supreme Court of North Carolina has interpreted the statute to require "physical contact." *Andersen v. Baccus*, 439 S.E.2d 136, 137–38 (N.C. 1994).

[6] The Wisconsin statute does not use the term "physical contact," but the Wisconsin Supreme Court has interpreted the "hit" in "hit-and-run" to require physical contact. *Theis v. Midwest Sec. Ins. Co.*, 606 N.W.2d 162, 165–66 (Wis. 2000).

eyewitness or proving by clear and convincing evidence that the accident was caused by another vehicle. *See* ARIZ. REV. STAT. § 20-259.01(M) (2007); LA. REV. STAT. ANN. § 22:680(1)(d)(i) (2008); S.C. CODE ANN. § 38-77-170(2) (2007); TENN. CODE ANN. § 56-7-1201(e)(1)(B) (2008); WASH. REV. CODE ANN. § 48.22.030(2), (8) (West 2008).

Of these sixteen jurisdictions, many have not had occasion to consider the integral-parts test because their courts have interpreted the requirement of "physical contact" with a "motor vehicle" more liberally than our courts have done. For example, some states require coverage when the insured's injuries are the result of contact with cargo, *e.g.*, *Pham v. Allstate Ins. Co.*, 254 Cal. Rptr. 152, 155 (Cal. Ct. App. 1988), debris propelled by another vehicle, *e.g.*, *So. Farm Bureau Cas. Ins. Co. v Brewer*, 507 So. 2d 369, 372 (Miss. 1987); *Progressive Classic Ins. Co. v. Blaud*, 132 P.3d 298, 300–01 (Ariz. Ct. App. 2006); *Barfield v. Ins. Co. of N. Am.*, 443 S.W.2d 482, 486 (Tenn. Ct. App. 1968), or even when there is no contact at all, *e.g.*, *Lumbermens Mut.*, 368 So. 2d at 350 (Florida). These courts have generally reasoned that since the "physical contact" with a "motor vehicle" language can be interpreted in a number of ways and the UM statute is remedial, a liberal interpretation favoring coverage should be applied. *See, e.g.*, *So. Farm Bureau*, 507 So. 2d at 371–72; *Progressive Classic*, 132 P.3d at 300; *Pham*, 254 Cal. Rptr. at 155; *Barfield*, 443 S.W.2d at 486. Several of these courts have also noted that requiring contact with an entire vehicle does nothing to further the anti-fraud purpose of the physical contact requirement. *See, e.g.*, *So. Farm Bureau*, 507 So. 2d at 372; *Progressive Classic*, 132 P.3d at 300.

Seven of the sixteen states with statutes similar to Texas's have considered whether the requirements of the statute are met when a vehicle part becomes detached from an unidentified vehicle and makes contact with the insured's vehicle. Two of those states have found "physical

contact" with a "motor vehicle" when any vehicle part becomes detached and strikes the insured. *Theis*, 606 N.W.2d at 163 (Wisconsin);[7] *Brooks v. State Farm Mut. Auto. Ins. Co.*, 855 So. 2d 419, 425 (La. Ct. App. 2003). Four have adopted the more restrictive integral-parts test. *Killakey*, 580 N.E.2d at 401 (New York); *State Farm Fire & Cas. Co. v. Guest*, 417 S.E.2d 419, 422 (Ga. Ct. App. 1992); *Ill. Nat'l Ins. Co. v. Palmer*, 452 N.E.2d 707, 707, 709 (Ill. App. Ct. 1983);[8] *Adams v. Mr. Zajac, L.C.L. Transit Co.*, 313 N.W.2d 347, 349 (Mich. Ct. App. 1981). Only one has expressly rejected it. *Davis v. Doe*, 331 S.E.2d 352, 353 (S.C. 1985).

Those courts that have either adopted the integral-parts test or determined that physical contact with any vehicle part is sufficient to require coverage have emphasized that the requirement that there be "physical contact" with a "motor vehicle" is designed to prevent fraud by ensuring that another vehicle was involved in the accident. *See Theis*, 606 N.W.2d at 168; *Killakey*, 580 N.E.2d at 400; *Palmer*, 452 N.E.2d at 707; *Adams*, 313 N.W.2d at 348. However, requiring that a motor vehicle as a whole strike the insured's vehicle to trigger coverage does nothing to further the purpose of preventing fraud and frustrates the overarching remedial purpose of the UM statute, which is designed to compensate responsible motorists for injuries caused by negligent and irresponsible drivers. *See Theis*, 606 N.W.2d at 168; *Guest*, 417 S.E.2d at 421; *Adams*, 313 N.W.2d at 349. As the highest court of New York aptly stated:

> The remedy for distinguishing between valid and fraudulent hit-and-run claims should rest on the proof that there was, indeed, an unidentified vehicle and that

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[7] In *Theis*, it was unclear whether the tractor-trailer part that struck the insured was debris that was propelled by another unidentified vehicle or whether the part detached from and was propelled by the same vehicle. 606 N.W.2d at 163. However, the Supreme Court of Wisconsin did not consider that distinction important. *Id.* The holding appears to be limited to vehicle parts and inapplicable to other types of road debris that might be propelled into traffic. *Id.* at 167.

[8] The Supreme Court of Illinois has followed and approved of the reasoning in *Palmer*. *Hartford Accident & Indem. Co. v. LeJeune*, 499 N.E.2d 464, 466 (Ill. 1986).

> physical contact with the vehicle caused an accident, not on artificial distinctions between accidents involving a vehicle and those which may involve parts which undeniably come from it.

Killakey, 580 N.E.2d at 401.

All but one of the states to have considered the issue have determined that physical contact with a part or an integral part of a motor vehicle is sufficient to invoke coverage. Although these decisions are not binding on this Court, the weight of their authority is at least instructive. The Court rejects the integral-parts test on the premise that it would be practically unmanageable; however, the fact that so many other jurisdictions have applied the test for decades indicates otherwise.

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Because we are to interpret the UM statute liberally, and because the integral-parts test best furthers the statute's language and remedial purpose while preserving the anti-fraud objectives of the "actual physical contact" with a "motor vehicle" requirement, I would adopt that test and affirm the court of appeals' judgment. Because the Court does not, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: March 28, 2008