IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE D. SHORAGA,
Appellant,
vs.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A DULY REGISTERED ENTITY OF STATE FARM INSURANCE COMPANIES, AN ILLINOIS CORPORATION,
Respondent.

No. 39972

FILED

SEP 03 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing appellant's claims. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Jesse Shoraga appeals from a district court's order dismissing his claims against respondent State Farm Mutual Automobile Insurance Company. Shoraga argues first that application of NRS 690B.020(3)(f)(1) literally as it is written violates the spirit and intent of the act, and second, that the physical contact requirement of NRS 690B.020(3)(f)(1) violates the principles of equal protection. He therefore asks that the order of dismissal be reversed and that the matter be remanded. We decline and affirm the district court's order of dismissal.

Waiver of issues on appeal

State Farm argues that Shoraga failed to preserve his appellate issues by raising them first in the district court. Shoraga, however, did raise the issue of the meaning of NRS 690B.020(3)(f)(1) in the district court in his brief filed in opposition to State Farm's motion for rehearing of the district court's denial of State Farm's first motion to dismiss and Shoraga's concurrent counter-motion for declaratory

judgment. Accordingly, this issue is properly before this court.[1] Although Shoraga did not raise the equal protection argument in the district court proceedings, this court may address constitutional issues when raised for the first time on appeal.[2] We will therefore consider Shoraga's equal protection challenge to NRS 690B.020(3)(f)(1).

Plain meaning of NRS 690B.020(3)(f)(1)

Shoraga argues that this court's application of the literal language of NRS 690B.020(3)(f)(1) would render plaintiffs like him without a remedy whenever they are without fault in cases in which there was no physical contact with the offending vehicle. Shoraga contends that the statute's plain meaning violates the spirit of the act.

NRS 690B.020(1) requires that every motor vehicle liability policy provide uninsured motor vehicle coverage. NRS 690B.020(3) defines "uninsured motor vehicle" for purposes of the statute and subsection (3)(f)(1) specifically addresses incidents where the owner or operator of the vehicle at fault "is unknown or after reasonable diligence cannot be found . . . [and where] bodily injury or death has resulted from physical contact of the automobile with the named insured or the person claiming under him or with an automobile which the named insured or such a person is occupying." (Emphasis added.)

First, we note the well settled rule of statutory construction: when the language of a statute is clear and unambiguous, it is to be afforded its plain meaning and this court will not engage in an

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[1]See Nye County v. Washoe Medical Center, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992).

[2]Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 643-44, 600 P.2d 1189, 1190-91 (1979).

interpretation of the statute.[3] Second, we have previously examined the above language in Kern v. Nevada Insurance Guaranty and concluded that "the clear meaning of NRS 690B.020(3)(f)(1) contemplates actual physical contact between the named insured and the uninsured/hit-and-run vehicle."[4] We have previously recognized the meaning of ""physical contact"" as the ""direct application of force."""[5] Plainly, NRS 690B.020(3)(f)(1) requires that the claimant's vehicle come into direct contact with another vehicle. We also recognized in Kern that "the stated purpose of uninsured motorist coverage is to mitigate losses sustained by motorists and other insureds who, without fault, are involved in a collision with a driver who is inadequately insured or completely without insurance."[6] This policy is not served where the parties are unable to establish that a collision even occurred between the offending vehicle and the insured's vehicle.[7] We also note that the physical contact provision serves to prevent fraudulent claims.[8]

Shoraga attempts to distinguish Kern in that, in Kern, the parties could only attribute fault to a mysterious substance on the

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[3]City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

[4]109 Nev. 752, 757, 856 P.2d 1390, 1394 (1993).

[5]Id. at 756 n.2, 856 P.2d at 1393 n.2 (quoting Barnes v. Nationwide Mut. Ins. Co., 230 Cal. Rptr. 800, 801 (Ct. App. 1986) (quoting Orpustan v. State Farm Mutual Automobile Ins. Co., 500 P.2d 1119, 1122 (Cal. 1972))).

[6]Id. at 758, 856 P.2d at 1394.

[7]Id.

[8]See id. (discussing the majority view).

roadway. Shoraga argues that, because several witnesses and even the Nevada Highway Patrol attributed fault to an unidentified vehicle, the physical contact language frustrates the statute's purpose. Therefore, Shoraga argues that the physical contact requirement is invalid.[9]

Shoraga directs this court's attention to the 1966 California case of Inter-Insurance Exchange of Automobile Club of Southern California v. Lopez.[10] In Lopez, both the policy at issue and California's uninsured motor vehicle statute required physical contact in hit-and-run accidents as a precondition to recovery of benefits. Lopez held that "where an unknown vehicle has struck a second vehicle and caused it to strike the insured vehicle, there is physical contact between the unknown vehicle and the insured vehicle within the meaning of the uninsured motorist endorsement."[11] The Lopez court reasoned that, in this instance, there

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[9]Shoraga also cites to a number of cases in which he claims courts have found in favor of the insured in situations similar to his. However, in each of these cases, the controlling legislation did not contain a physical contact requirement, and therefore the insurance policies requiring physical contact contravened public policy. See Abramowicz v. State Farm Mut. Auto. Ins. Co., 369 A.2d 691, 694 (Del. Super. Ct. 1977); Simpson v. Farmers Ins. Co., Inc., 592 P.2d 445, 450 (Kan. 1979); Surrey v. Lumbermens Mut. Cas. Co., 424 N.E.2d 234, 238 (Mass. 1981); Clark v. Regent Ins. Co., 270 N.W.2d 26, 31 (S.D. 1978); Hartford Accident and Indemnity Co. v. Novak, 520 P.2d 1368, 1371 (Wash. 1974); see also Sands v. Prudential Property and Cas. Ins., 789 So. 2d 745, 747 (La. Ct. App. 2001) (noting that the Louisiana statute does not require physical contact, provided that there is corroboration of the accident); Smith v. General Cas. Ins. Co., 619 N.W.2d 882, 883 (Wis. 2000) (noting that, although the hit-and-run statutory language requires physical contact, the "requirement is satisfied in a chain reaction accident").

[10]47 Cal. Rptr. 834 (Ct. App. 1966).

[11]Id. at 837.

was no danger of fraud, which was what the legislature was trying to prevent by requiring physical contact.[12]

We note, however, that two more recently decided California decisions have since distinguished the facts of Lopez, choosing instead to strictly apply the physical contact provision. Moreover, these cases are factually close to the instant case. In Boyd v. Inter-Insurance Exchange, Etc.,[13] the insured driver swerved to avoid hitting an unidentified vehicle, lost control and struck a parked vehicle. There was no physical contact between the insured's vehicle and the unidentified vehicle. Several witnesses substantiated the absence of fault and fraud on the part of the insured. Unlike Lopez, a third party was not involved. Boyd held that, even though there were no indications of fraud, the physical contact provision precluded the insured from recovering uninsured motorist benefits.[14]

In Orpustan v. State Farm Mutual Automobile Insurance Co.,[15] the claimant was injured when his truck went off the highway. Although the claimant had no recollection of the accident, an eyewitness testified that the claimant had swerved to avoid hitting an unidentified vehicle that had left the scene. The California Supreme Court distinguished these facts from the three-car accident in Lopez, in which it found that physical contact occurred "through the medium of the

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[12]Id.

[13]186 Cal. Rptr. 443 (Ct. App. 1982).

[14]Id. at 445.

[15]500 P.2d 1119.

intervening vehicle."[16] The Orpustan court determined that the physical contact provision required nothing less than actual physical contact, stating that

> [t]he statute makes proof of 'physical contact' a condition precedent in every case for the recovery of damages caused by an unknown vehicle. There are no exceptions. If it is advisable that the statute be changed, the solution lies within the province of the Legislature. The court has no right to legislate the proviso from the statute or emasculate its application under the guise of judicial interpretation.[17]

While it is true that, in certain hit-and-run accidents, fraud is clearly not involved, the Nevada Legislature did not provide for any exceptions to its expressly stated physical contact requirement.[18] In Kern, we recognized that physical contact with the uninsured/hit-and-run vehicle is a condition precedent to recovery of uninsured motorist benefits.[19] Despite the unfortunate result that "meritorious claims will occasionally be denied,"[20] Shoraga's only remedy "lies within the province

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[16]Id. at 1122 (discussing Lopez).

[17]Id. at 1123.

[18]See Sands, 789 So. 2d at 747 (noting that, while the Louisiana statute requires physical contact, an exception is made where corroboration of the accident exists).

[19]109 Nev. at 757, 856 P.2d at 1394.

[20]Gobin v. Allstate Ins. Co., 773 P.2d 131, 133 (Wash. Ct. App. 1989).

of the Legislature."[21] If the Legislature had intended to make an exception to the physical contact requirement, it would have done so. Accordingly, we conclude that the plain meaning of NRS 690B.020(3)(f)(1) is in accord with the legislative intent to prevent fraud and, therefore, does not violate the spirit of the act.

Equal protection

"The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law."[22] Likewise, the Nevada Constitution, Article 4, Section 21 provides "all laws shall be general and of uniform operation throughout the State." Shoraga argues that the physical contact requirement, by mandating coverage for injuries only where there has been physical contact with an uninsured motor vehicle, establishes a discriminatory classification that conflicts with state and federal equal protection guarantees.

The equal protection question is one of law which we review de novo.[23] Because the challenged classification does not concern either a fundamental liberty interest or a suspect or a quasi-suspect classification, we review the classification under a rational basis test.[24] Under rational

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[21]Orpustan, 500 P.2d at 1123; see Williams v. State, 118 Nev. 536, 545, 50 P.3d 1116, 1122 (2002) ("Opponents of a valid statute must look to the Legislature rather than the judiciary to amend the law.").

[22]Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000).

[23]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

[24]See State, Dep't of Human Resources v. Fowler, 109 Nev. 782, 787, 858 P.2d 375, 378 (1993).

basis review, we will uphold the legislation where the classification is "rationally related to a legitimate government purpose."[25]

In determining whether the classification is rationally related to a legitimate government purpose, we turn first to the government interest involved. The State has an interest in assuring insurance coverage for persons involved in motor vehicle accidents with uninsured motorists. The State also has an interest in protecting the public at large from the effects of fraudulent insurance claims, which may increase the costs of insurance for the average consumer. We have previously recognized that most jurisdictions have determined that the rationale for the physical contact provision in uninsured motorist statutes is to prevent fraudulent or fictitious claims, ostensibly by providing corroboration of the phantom vehicle and its role in the accident.[26] Accordingly, the State has a legitimate interest in narrowing the scope of mandatory insurance coverage to prevent fraudulent claims.

Next, we turn to the question of whether NRS 690B.020(3)(f)(1) is rationally related to the State's legitimate interest. We observe first that the restriction in NRS 690B.020(3)(f)(1) is narrow and appears only to exempt from mandatory coverage those vehicles involved in accidents in which no physical contact with another vehicle has occurred. While this requirement will sometimes result in the denial

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[25]Id.

[26]Kern, 109 Nev. at 755, 856 P.2d at 1392; see also Orpustan, 500 P.2d at 1122; Moritz v. Farm Bureau Mut. Ins. Co., 434 N.W.2d 624, 627 (Iowa 1989); Gobin, 773 P.2d at 133.

of a claim,[27] it offers greater assurance that an accident with another vehicle actually occurred and that the claim is not fraudulent. Accordingly, we conclude that NRS 690B.020(3)(f)(1) is rationally related to a legitimate government interest and, therefore, does not violate equal protection principles.

CONCLUSION

We conclude that Shoraga's issues on appeal lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Jennifer Togliatti, District Judge
Minicozzi & Associates, Ltd.
James P. Sitter
Pearson, Patton, Shea, Foley & Kurtz, P.C.
Clark County Clerk

[27]Gobin, 773 P.2d at 133.