



1988

# Recent Developments: Lee v. Wheeler: Recovery for Negligence of Phantom Driver under Uninsured Motorist Provisions

Glen P. Smith

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

### Recommended Citation

Smith, Glen P. (1988) "Recent Developments: Lee v. Wheeler: Recovery for Negligence of Phantom Driver under Uninsured Motorist Provisions," *University of Baltimore Law Forum*: Vol. 18 : No. 2 , Article 12.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol18/iss2/12>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

Justice Powell joined by Justice O'Connor (concurring) concluded that there were historical associations of creation-science with the religious belief in the creation of the universe by a divine God as described in the Bible. These associations, according to Justice Powell, were enough to override the fact that the statute did not explicitly refer to a religious purpose.

The Court did leave the door open for religious oriented information and creation-science to be used in public schools; but the purpose must not advance a particular religious belief.

*Edwards v. Aquillard* follows closely the trend of Supreme Court decisions dealing with state statutes addressing religion in public schools. The Establishment Clause is being relied upon in the Court's

involvement in state educational law, an area in which the state and local governments have a large interest. In recent years the Court has invalidated a school district's use of public school teachers in religious schools. *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and the hanging of a copy of the Ten Commandments on a public school wall. *Stone v. Gragam*, 449 U.S. 39 (1980). In these two cases the Court found no secular purpose. *Edwards* also illustrates that in determining the presence of secular purpose the Court will go beyond the definitions in the statute to find the motives of the legislature. This is one reason why Justice Scalia has called for a re-evaluation of the *Lemon* secular purpose test.

—David G. Banister

## *Lee v. Wheeler*: RECOVERY FOR NEGLIGENCE OF PHANTOM DRIVER UNDER UNINSURED MOTORIST PROVISIONS

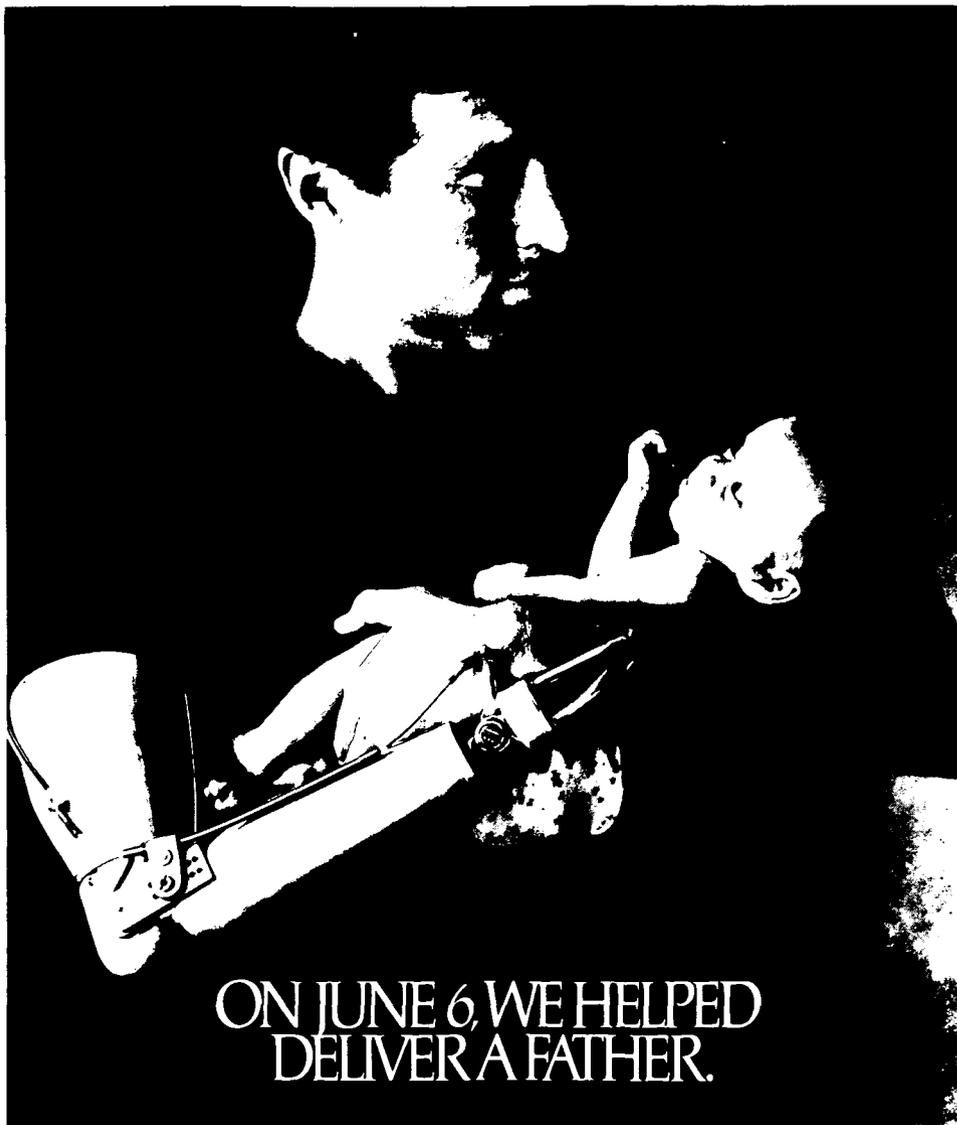
On a question certified by the United States Court of Appeals for the District of Columbia, the Court of Appeals of Maryland held in *Lee v. Wheeler*, 310 Md. 233, 528 A.2d 912 (1987) that under an automobile insurance policy covering Maryland insureds, an uninsured motorist provision limiting coverage to situations in which there is physical contact between the insureds' vehicle and the phantom vehicle is unenforceable as against public policy under Maryland law. This case expanded a similar ruling in *State Farm Mut. Auto. Ins. Co. v. Maryland Auto. Ins. Fund*, 227 Md. 602, 356 A.2d 560 (1976) by making such provisions unenforceable for accidents happening outside, as well as inside, the State of Maryland.

Ark and Olivia Lee were residents of Maryland whose automobile was titled and registered in Maryland. The original insurance policy and all renewals were addressed and mailed to the Lees' Maryland residence and all premiums were paid from the same residence. While the Lees were operating their vehicle in the District of Columbia, a vehicle operated by Marlene Wheeler swerved to avoid an unidentified (phantom) vehicle that suddenly entered her lane of traffic. In the process, Wheeler struck the Lees' vehicle head-on.

The Lees brought an action against Wheeler in the United States District Court for the District of Columbia invoking diversity jurisdiction under 28 U.S.C. § 1332 (1982). The Lees also joined their insurer, Pennsylvania General Insurance Company (Pennsylvania General), seeking coverage under the policy's uninsured motorist provisions for the damages sustained as a result of the phantom's negligence.

The Lees' claim against Pennsylvania General was dismissed because the district judge found that the Lees' insurance policy expressly required physical contact with the phantom vehicle in order for the uninsured motorist coverage provisions to apply and that provision was enforceable under District of Columbia law. The Lees appealed from the order granting the motion to dismiss.

The United States Court of Appeals for the District of Columbia Circuit found that Maryland law applied but found no pertinent Maryland cases to serve as a guide in making a decision. Under Md. Cts. & Jud. Proc. Code Ann. § 12-601 (1984), they certified the following ques-



The accident took seconds. The rehabilitation took months. But with the help of Easter Seals, and a burning spirit, what you see here is not a man with a disability, but a man called Dad. Give to Easter Seals. Give the power to overcome.



tion to the Court of Appeals of Maryland: "Under an automobile insurance policy covering Maryland insureds, is a provision in that policy requiring physical contact between the insureds' vehicle and the phantom vehicle lawful and enforceable under Maryland law where the accident occurs outside the State of Maryland?" *Lee v. Wheeler*, 810 F.2d 303, 304 (D.C. Cir. 1987).

In answering "no" to the question, Judge Adkins reviewed the principle in *State Farm* and expanded it to encompass accidents happening outside Maryland involving Maryland insureds.

In *State Farm*, the Maryland Automobile Insurance Fund (MAIF) sought a declaration that an insurance policy requiring, as a prerequisite to coverage, physical contact between an insured's vehicle and a phantom vehicle violated the uninsured motorist provision of Md. Ann. Code art. 48A, § 541(c) (1957, 1986 Repl. Vol.) which mandates that "[i]n no case shall the uninsured motorist coverage be less than the coverage afforded a qualified person under Md. Ann. Code art. 48A §§ 243H and 243-I." *Id.* at 237, 528 A.2d at 914.

Section 243H(a)(1) allows claims for the death of or personal injury to qualified persons "arising out of the ownership, maintenance or use of a motor vehicle in this State where the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained. . . ." Claims against MAIF are authorized without any distinction between impact and non-impact phantom drivers. *State Farm*, 227 Md. at 604, 356 A.2d at 562.

Pennsylvania General argued that, due to the "in this state" language, "§ 541(c) contains an implied territorial limitation when read in harmony with § 243H(a)(1)." 310 Md. at 238, 528 A.2d at 915.

The court explained that "[t]he primary purpose of the § 541(a) uninsured motorist coverage requirement is to assure financial compensation to the innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible uninsured motorists." 310 Md. at 238, 528 A.2d at 915 (quoting *Pennsylvania Nat'l Mut. v. Gartelman*, 288 Md. 151, 157, 416 A.2d 734, 737 (1980)).

Hesitant to imply exclusions or recognize exclusions beyond those expressly enumerated by the legislature, the court observed that no territorial exclusion or limitation is evident within the two express exclusions from mandatory minimum uninsured motorist coverage found in § 541(c)(2). Furthermore, the language on which Pennsylvania General relied deals with claims against MAIF rather than

with mandatory motor vehicle liability insurance. Due to the legislative history of the sections, there is

a functional continuity of purpose in the present MAIF provisions that militate against reading § 243H as in any way qualifying § 541(c)(2). . . . The provision for compulsory automobile insurance, plus the creation of MAIF as a liability insurer of last resort, demonstrate the dramatic change in state policy with respect to protection of the public from the economic harm produced by automobile accidents.

310 Md. at 240, 528 A.2d at 916.

Judge Adkins went on to say that "[t]o insert exclusions by implication or recognize exclusions not expressly prohibited by the statute has the dangerous potential of seriously frustrating the policies behind compulsory automobile liability insurance." *Id.* at 242, 528 A.2d at 917. To allow such exclusions "would fly in the face of the broadly-protective public policy" established through recent case law. *Id.* at 243, 528 A.2d at 917.

The court declined to express an opinion on whether Maryland law prohibits a physical contact requirement in uninsured motorist coverage in commercial policies as opposed to personal policies. 310 Md. at 235-36 n. 1, 528 A.2d at 913.

The Court of Appeals of Maryland expanded the principle of *State Farm* by finding an uninsured motorist provision, limiting coverage to situations in which there is physical contact between the insureds' vehicle and the phantom vehicle, unenforceable against public policy under Maryland law even when the collision occurs outside the State of Maryland. By upholding the primary purpose of the uninsured motorist coverage requirement, this ruling assures financial compensation to the innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible uninsured motorists.

—Glen P. Smith



## ***Ellison v. Maryland*: CONVICTED AND SENTENCED CRIMINAL DEFENDANT WHEN CALLED AS NON-PARTY WITNESS MAY INVOKE PRIVILEGE AGAINST SELF-INCRIMINATION**

In *Ellison v. Maryland*, 310 Md. 244, 528 A.2d 1271 (1987), the Court of Appeals of Maryland held that one who has been convicted and sentenced in a criminal proceeding may invoke the fifth amendment privilege against self-incrimination when called to testify as a non-party witness in a subsequent proceeding provided that the thirty-day time limit for taking an appeal or requesting a sentence review has not expired. The Court of Special Appeals of Maryland had similarly held the privilege applicable but had based their decision on a rationale which the court of appeals found to be unsupported by precedent.

Clinton Ellison and Tyrone Little, inmates at the Maryland Penitentiary, were charged in the Circuit Court for Baltimore City with the robbery and first degree murder of fellow inmate Charles Sneed. Additionally, Ellison and Little were charged with lesser included substantive offenses and the state filed notices of intent to seek the death penalty.

The defendants were tried separately, with the first case against Little. After closing arguments, but before a jury verdict was returned, the state and Little entered into a plea agreement. Little agreed to plead guilty to second degree murder in return for the state's promise to nol pros the first degree murder charge as well as the robbery and lesser charges. The state also agreed to recommend a twenty-five year jail sentence to be served concurrently with Little's prior sentence. The agreement was carried out as proposed and Little was sentenced on June 18, 1984. At that time the trial court advised Little that he had thirty days in which to request either an appeal of his conviction to the court of special appeals or a review of his sentence by a three judge panel of the circuit court.

Ellison's trial began on June 25, 1984, seven days after Little had been sentenced. During the course of the trial, and before Little's thirty-day period in which to request an appeal or sentence review had expired, Little was called by Ellison to testify as a witness for the defense. Little invoked the fifth amendment privilege against self-incrimination and refused to testify. The trial court upheld Little's invoking of the privilege and Ellison was subsequently found guilty of first degree murder and robbery. He was sentenced to life imprisonment for the murder and