

Trend to Allow More Than Eyewitness Testimony in Hit-and-Run Uninsured-Motorist Cases

Paul F. Bell¹

Proving that hit-and-runs occurred is difficult in uninsured-motorist (UM) cases where the driver drives off the road or into an object in a successful evasion of a hit-and-run driver. In these "miss-and-runs" even a van-full of nuns who saw the accident cannot testify if they have an interest in the case, such as, claims for injury. The UM statute, R.S. 22:1406(D)(1)(f),² requires witnesses in miss-and-runs be disinterested, independent, and in one Louisiana circuit, an eyewitness.³

In *Jackson v State Farm*⁴, the 2nd Circuit Court of Appeal held that only independent and disinterested *eyewitnesses of a miss-and run* may prove that the accident was caused by a phantom driver. In the suit, Jackson testified that she careened into a ditch to avoid an oncoming car and suffered injuries as a result. She managed to drive home and called friends telling them of her accident. When Jackson tried to have her friends testify, the court refused explaining that her friends were neither independent or witnesses. They were not independent because they derived all their information of the accident from Ms. Jackson and they were not witnesses because they did not observe the accident.

¹ Article written for the Caluda Law Firm. Soon to be published in the *Louisiana Advocate*, a publication of the Louisiana Trial Lawyers Association.

² R.S. 22:1406(D)(1)(f) [now R.S. 22:680(1)(f)]: "Uninsured motorist-coverage shall include coverage for bodily injury arising out of a motor vehicle accident caused by an automobile which has no physical contact with the injured party or with a vehicle which the injured party is occupying at the time of the accident, provided that the injured party bears the burden of proving, by an independent and disinterested witness, that the injury was the result of the actions of the driver of another vehicle whose identity is unknown or who is uninsured or underinsured."

³ *Jackson v State Farm Mut. Auto Ins. Co.*, 665 So. 2d 661 (La. App. 2nd Cir. 1995).

⁴ *Id.*

The federal court in *Mesa-Toney v Mazda*⁵ disagreed with the *Jackson*'s court definition of witness. They instead used that from Black's Law Dictionary, "one who testifies to what he has seen, heard, or otherwise observed." The *Mesa-Toney* court wrote,

"[i]f less than eyewitness testimony is allowed as the basis of a criminal conviction, it makes little sense to heighten the standard in a civil case when the determination is whether a plaintiff can establish that she was injured in an accident as a result of the negligence of an unknown or uninsured or underinsured driver."

In *Mesa-Toney*, Ms. Mesa-Toney drove her car into a curb to avoid a phantom truck that had driven into her lane, the car air-bag exploded, and she was injured. The court held that the independent and disinterested police officer and paramedic that arrived on the scene soon after the accident were witnesses that could testify as to what they saw, heard or otherwise observed.

In *Caboni v General Motors Corp.*⁶, another miss-and-run suit from the E.D. La. and subject to R.S. 22:1406(D)(1)(f), the court found the *Mesa-Toney* holding persuasive and held that a good Samaritan and a deputy that arrived at the scene after the accident were independent and disinterested witnesses who could testify as to what they saw, heard, or observed.

The federal court decisions in *Mesa-Toney* and *Caboni* have had zero to some effect on decisions from Louisiana state courts. Zero from the 5th Circuit Court of Appeals where in *Schollnick v Doe*⁷, decided two years after *Mesa-Toney*, the court interpreted the UM statute as requiring eyewitness testimony of the accident in miss-

⁵ *Mesa-Toney v Mazda Motor Am., Inc.*, Not reported in F. Supp. 2d. 1998 WL 812391 (E.D. La. 1998).

⁶ *Caboni v General Motors Corp.*, Not reported in F. Supp. 2d. 2000 WL 1449883 (E.D. La. 2000).

⁷ *Schollnick v Doe*, 802 So. 2d 659 (La. App. 5th Cir. 2000).

and-runs: “[f]or an insured to recover . . . the statute requires that a witness, . . . who was an eyewitness to the accident, testify that an unknown vehicle caused the accident in question.”

The 1st Circuit Court of Appeals has held twice that circumstantial evidence from independent and disinterested witnesses may be used in miss-and runs. In *Pinkney*, a motorcyclist driving on an elevated interstate highway hit a wooden pole in the road, became airborne, crashed, and suffered injuries.⁸ Although no one witnessed the pole falling from a vehicle and hitting the motorcycle, another driver saw a stake truck filled with trash driving a few hundred yards in front of the motorcycle. Cars following the truck took evasive action around some object while cars preceding the truck did not. A police officer testified that the highway was some distance from any pedestrian walkway and too far for a pedestrian to have carried the pole to the accident site. The court concluded that the stake truck was the phantom vehicle.

In *Wheat v Wheat*⁹, the lower court found no independent and disinterested eyewitnesses to a miss-and-run because there were no eyewitnesses to the accident. The defendant was granted a summary judgment. On appeal, the 1st Circuit Court of Appeals reversed stating that “there is nothing in the language of La R.S. 22:1406(D)(1)(f) requiring that the witness actually see the accident occur.” The court held that the state trooper who arrived soon after the accident occurred was an independent and disinterested witness. The trooper testified that Wheat’s car had collided with a vehicle transmission that was not Wheat’s and that the transmission was

⁸ *Pinkney v Progressive Specialty Ins. Co.*, 597 So. 2d 1168 (La. App. 1st Cir. 1992).

⁹ *Wheat v Wheat*, 868 So. 2d 83 (La. App. 1st Cir. 2003).

too heavy to have been carried to the highway by a pedestrian.

The 1st circuit in *Snowden v Voyager*¹⁰ left open the possibility that expert witnesses—persons with no personal knowledge of the accident—could testify provided the expert was independent and disinterested (a difficult task since plaintiff's hiring the expert creates an interested witness). Furthermore, evidence such as videotapes would also be allowed to prove the phantom vehicle caused the accident.

The 2nd Circuit Court of Appeals, that earlier decided in *Jackson* that only eyewitnesses were witnesses, rejected but did not overrule this holding in *Jones v State Farm*¹¹. In *Jones*, the court discussed the 1st Circuit decision in *Pinkney* involving the motorcyclist and agreed that witnesses who did not see the accident can testify to prove a link between the phantom vehicle and the insured's vehicle. The *Jones* court emphasized the importance of the witness linking the stake truck to the accident and did not write of the other more indirect, circumstantial evidence used in *Pinkney*. The *Jones* decision is consistent with *Mesa-Toney* in allowing non-eyewitnesses. Neither *Jackson* or *Mesa-Toney*, however, was cited by the *Jones* court.

Jones effectively overrules *Jackson* but courts could muddy the waters. The miss-and-runs in the *Jones* and the *Pinkney* decisions are of a type that the 4th Circuit includes with other hit-and-runs.¹² There is physical contact between the phantom vehicle and insured's car in these miss-and-runs, albeit one where the collision is only from an object fallen from the phantom vehicle. A court could find that the *Jones* miss-and-run is really a hit-and-run and, therefore, there is no requirement for eyewitnesses,

¹⁰ *Snowden v Voyager Indem. Ins. Co.*, 825 So. 2d 1223 (La. App. 1st Cir. 2002).

¹¹ *Jones v State Farm Mut. Auto. Ins. Co.*, 850 So. 2d 1054 (La. App. 2nd Cir. 2003).

¹² *Brooks v State Farm Mut. Auto. Ins. Co.*, 855 So.2d 419 (La. App. 4th Cir. 2003).

independence or disinterest. The miss-and-runs that remain would be subject to the eyewitness requirement outlined in *Jackson*. Voila! A holding reconciling the 1st Circuit's *Jones* and *Jackson*.

There is conflict among the Louisiana circuit courts on whether only eyewitnesses to miss-and-run accidents may prove the existence of at-fault phantom vehicles in UM suits. The 1st and 2nd Circuits have held that eyewitnesses to the accident are not required while the 5th Circuit has held that they are. The more recent opinions from the state and federal courts indicate a trend toward relaxing the evidentiary burden by no longer requiring witnesses be eyewitnesses. Post-accident observers such as police, medics, and unpaid experts who are independent and disinterested would be able to testify.