In the
Missouri Court of Appeals
Western District

ROBERT MORRIS,

Appellant,

v.

GEICO CASUALTY COMPANY, ET AL.,

Respondents.

WD83788

OPINION FILED:

MARCH 9, 2021

Appeal from the Circuit Court of Clay County, Missouri
The Honorable David Chamberlain, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, Gary D. Witt, Judge, Anthony Rex Gabbert, Judge

Robert Morris appeals the circuit court's grant of summary judgment in favor of GEICO Casualty Company ("GEICO") on Morris's Second Amended Petition for Damages against Bradley Christopher and GEICO. Morris contends that the circuit court erred in granting summary judgment to GEICO on Morris's claim for vexatious refusal to pay, 1) when it found that the Ford Taurus that hit Morris's vehicle was neither an "uninsured motor vehicle" nor a "hit-and-run vehicle" as defined by the GEICO Policy, and 2) when it found that Morris's claims were barred by the doctrine of election of remedies. We affirm.

Factual and Procedural Background

The factual issues underlying this appeal appear undisputed. On November 22, 2014, Morris was stopped in traffic when his 1997 GMC Sierra was rear-ended by a 1998 Ford Taurus with license plate number PM8C9E. The accident occurred at or near the intersection of Missouri Highway 291 and Ruth Ewing Road in Liberty, Clay County, Missouri. Colton Massie was an eyewitness to the collision and followed the Ford Taurus, obtaining a vehicle license number which he provided to police. At the time of the rear-end collision, Missouri license plate number PM8C9E was registered to a 1998 Ford Taurus owned by Michael Christopher. Michael Christopher and Bradley Christopher, father and son respectively, were listed as named insureds on a policy of liability insurance issued by State Farm Insurance Company ("State Farm") on the Ford Taurus. The State Farm Policy provided liability coverage for damages for which Michael and/or Bradley Christopher were deemed legally liable because of bodily injury to others caused by an accident involving the 1998 Ford Taurus, subject to the terms and conditions of the State Farm Policy.

At the time of the collision, Morris was a named insured on a Missouri Family Automobile Insurance Policy issued by GEICO. The GEICO Policy provided coverage for Morris's 1997 GMC Sierra. The Policy provided Uninsured Motorist Coverage with limits of $100,000 per person and $300,000 per accident. The Policy provided that GEICO would pay damages under the Uninsured Motorists Coverage "for bodily injury caused by accident which the insured is legally entitled to recovery from the owner or operator of an uninsured motor vehicle or hit-and-run vehicle arising out of the ownership maintenance or use of that auto." On June 14, 2016, a year and a half after the accident, Morris sent a demand to GEICO for his uninsured motorist

coverage policy limit of $100,000. On June 17, 2016, GEICO rejected Morris's demand for the reason that the accident was being covered by State Farm.[1]

On October 4, 2016, Morris filed a Petition for Damages against both Michael Christopher and Bradley Christopher as a result of the rear-end collision of November 22, 2014. In the Petition, Morris alleged in alternative counts that Michael Christopher and Bradley Christopher were the operators of the Ford Taurus that collided with Morris's vehicle. With regard to Bradley Christopher specifically, the petition alleged that on November 22, 2014, he was "operating his father's teal 1998 Ford Taurus" and "failed to operate the motor vehicle he was driving with the highest degree of care" and "as a direct and proximate result of the collision" caused Morris to sustain damages.

On January 6, 2017, depositions were taken of Michael Christopher and Bradley Christopher. Michael Christopher testified that he was the title owner of a Ford Taurus with license plate number PM8C9E, and that he bought the Ford Taurus for his son, Bradley Christopher, in August 2014. He testified that Bradley was the individual who used the Ford Taurus, and had the set of keys for the Ford Taurus, from the time Michael Christopher bought the car in August of 2014 and up and until 2015. Bradley Christopher testified that he was the individual who used and possessed the Ford Taurus on November 22, 2014. He denied, however, that the Ford Taurus

[1] The summary judgment record reflects that GEICO's stated reason for denying uninsured motorist coverage to Morris was because State Farm, the insurance company which insured Michael Christopher's vehicle, had agreed to provide liability coverage for the accident. It is undisputed that the Ford Taurus was insured by State Farm with liability limits in compliance with Missouri's Financial Responsibility Law. Question #6 in Morris's Statement of Additional Material Facts in Opposition to GEICO's Motion for Summary Judgment states: "Three days later, on June 17, 2016, Geico Casualty Company rejected Plaintiff's demand by way of letter because State Farm Insurance Company had stated they had coverage for the accident." In Response, GEICO admitted that it sent a letter to Plaintiff's counsel wherein it rejected Morris's demand, stated that the letter spoke for itself, and further stated that, "Defendant admits that prior to rejecting the demand, it confirmed that the Ford Taurus which collided with the Plaintiff's vehicle was insured by State Farm, and that State Farm had agreed to afford the liability coverage for the subject accident."

was involved in a collision on that date, and denied that he was the operator of a vehicle that collided with Morris.

On January 30, 2017, Morris filed a First Amended Petition for Damages. The amended petition removed Michael Christopher as a defendant, retained Bradley Christopher as a defendant in Count I, and added GEICO as a defendant. The negligence allegations against Bradley Christopher were substantially similar to those made in the initial petition. The allegations against GEICO in Count II titled "Uninsured Motorist Coverage" contended that, "an unknown person was operating the hit-and-run automobile … when the hit-and-run automobile negligently collided with the rear of Plaintiff's stopped vehicle, causing Plaintiff to sustain serious injuries." It further alleged that, "the unknown operator failed to operate the motor vehicle he was driving with the highest degree of care as required by law …." Count II additionally alleged that, "there was no policy of bodily injury liability insurance applicable to the unknown operator's automobile. Further, that the "hit-and-run automobile left the scene of the accident, and the identity of the operator is unknown." Also, that Morris was covered by a policy of liability insurance, issued by GEICO, that contained uninsured motor vehicle coverage applicable to Morris in the amounts of $100,000 per person and $300,000 per accident. Count II requested a judgment against GEICO for the damages Morris sustained in the accident, along with prejudgment interest as appropriate, and costs.

On November 8, 2017, Colton Massie, the eyewitness to the accident who gave the Ford Taurus's license number to the police, testified in a deposition regarding his observations of the accident. During his testimony, he was shown a photograph of Bradley Christopher by Morris's counsel. Massie identified Bradley Christopher as the operator of the Ford Taurus at the time it rear-ended the GMC Sierra on November 22, 2014.

On March 8, 2019, Morris filed a Second Amended Petition for Damages against Bradley Christopher and GEICO. The Second Amended Petition was similar to the First Amended Petition, with additional allegations in Count II that GEICO's denial of uninsured motorist coverage was against the terms and provisions of Morris's insurance policy, that GEICO's refusal to pay Morris's loss was without reasonable care or excuse, and that GEICO's denial of payment was vexatious.

On April 29, 2019, Morris received a policy limit settlement offer of $100,000 from State Farm on behalf of Bradley Christopher, Michael Christopher, and all other insureds pursuant to State Farm Policy No. 274-1146-F03-25B. On May 1, 2019, Morris sent a letter to GEICO informing GEICO of State Farm's settlement offer, and advised GEICO that Morris would not agree to any settlement releasing his claims without first providing GEICO the opportunity to pay the $100,000 in uninsured motorist coverage to Morris, with GEICO then having the right to pursue claims against Michael or Bradley Christopher "or others arising out of the accident pursuant to Defendant's policy provisions."

On May 10, 2019, GEICO sent Morris a letter advising that GEICO had no objection to Morris accepting the policy limit offer from State Farm, and had no objection to Morris releasing his claims against Bradley Christopher, Michael Christopher, and all other insureds. GEICO advised, however, that it was rejecting Morris's demand for the $100,000 uninsured motorist coverage policy limit.

On June 10, 2019, Morris reached a settlement agreement on his claims asserted against Bradley Christopher. In exchange for $100,000, Morris agreed to release all claims against Bradley Christopher and Michael Christopher for any damages "which have resulted or may in the future develop from an alleged accident occurring on or about November 22, 2014 at or near the intersection of Missouri Highway 291 and Ruth Ewing Road, Liberty, Clay County, Missouri."

Morris executed a Release memorializing the terms and conditions of the settlement agreement. The settlement amount of $100,000 was paid to Morris by State Farm on behalf of its insureds, Bradley Christopher and Michael Christopher. After receiving payment of the settlement amount from State Farm, Morris dismissed his claims against Bradley Christopher with prejudice.

On October 2, 2019, Morris filed a Motion for Partial Summary Judgment with supporting documents seeking "a determination as to whether Defendant Geico Casualty Company should have provided uninsured motorist coverage to Plaintiff at the time of Plaintiff's demand" and asking the court to proceed to trial on the amount due Morris under the uninsured motorist coverage and his claims of vexatious refusal to pay. GEICO filed a response opposing Morris's motion and arguing that Morris was not entitled to partial summary judgment because the undisputed material facts showed that the accident was not caused by an "uninsured motor vehicle" or a "hit-and-run vehicle" as defined in the GEICO Policy.

On December 6, 2019, GEICO filed its own Motion for Summary Judgment on Morris's claims for Uninsured Motorist Coverage and Vexatious Refusal to Pay. GEICO also filed a Memorandum in Support and a Statement of Uncontroverted Material Facts with supporting exhibits. Morris filed a Response in Opposition to GEICO's Motion for Summary Judgment and additional supporting materials on January 3, 2020. GEICO filed a Reply Brief and a Response to Plaintiff's Statement of Additional Material Facts on January 20, 2020. The circuit court heard argument on May 11, 2020. On May 13, 2020, the court entered an Order and Judgment denying Morris's Motion for Partial Summary Judgment and granting GEICO's Motion for Summary Judgment. The court held:

> The Court finds that the Ford Taurus which caused the subject motor vehicle accident was neither an 'uninsured motor vehicle' nor a 'hit-and-run vehicle' as such is defined by the GEICO policy, such that Plaintiff's claim for uninsured

> motorist coverage fails as a matter of law. The Court further finds that Plaintiff's claims are barred by the doctrine of election of remedies.

This appeal follows.

Standard of Review

The standard of review for an appeal challenging the grant of a motion for summary judgment is *de novo*. *State ex rel. Heart of America Council v. McKenzie,* 484 S.W.3d 320, 324 (Mo. banc 2016). Accordingly, we do not defer to the trial court's decision, but instead use the same criteria that the trial court should have employed in initially deciding whether to grant GEICO's motion. *Barekman v. City of Republic*, 232 S.W.3d 675, 677 (Mo. App. 2007) (internal citations omitted). We review the record in the light most favorable to the party against whom judgment was entered and accord that party the benefit of all inferences which may reasonably be drawn from the record. *Id.* Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452-53 (Mo. banc 2011). Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. *Id.*

> A 'defending party' may establish a right to summary judgment by showing: (1) facts negating any one of the claimant's elements; (2) that the party opposing the motion has presented insufficient evidence to allow the finding of the existence of any one of the claimant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support a properly pleaded affirmative defense.

Ameristar Jet Charter, Inc. v. Dodson Intern. Parts, Inc., 155 S.W.3d 50, 58-59 (Mo. banc 2005).

"The interpretation of an insurance contract is a question of law and is given *de novo* review." *Doe Run Res. Corp. v. Am. Guarantee & Liab. Ins.*, 531 S.W.3d 508, 511 (Mo. banc 2017). "In construing the terms of an insurance policy, this Court applies the meaning which

would be attached by an ordinary person of average understanding if purchasing insurance." *Griffitts v. Old Republic Ins. Co.*, 550 S.W.3d 474, 478 (Mo. banc 2018) (internal quotation marks and citation omitted). "Absent an ambiguity, an insurance policy must be enforced according to its terms." *Id.*

Point I – "Hit-and-Run Vehicle" and "Uninsured Motor Vehicle"

In Morris's first point on appeal, he contends the circuit court erred in granting summary judgment in favor of GEICO on Morris's claim for vexatious refusal to pay after finding that the Ford Taurus was neither an "uninsured motor vehicle" nor a "hit-and-run vehicle" as defined by the GEICO Policy. Morris argues that the undisputed material facts establish that the Ford Taurus qualified as a "hit-and-run vehicle" under the GEICO Policy at the time Morris made the claim for uninsured motorist coverage. He contends that, although he eventually accepted a settlement offer from Bradley and Michael Christopher's insurer, the identity of the operator of the vehicle that collided with Morris had not been identified at the time Morris demanded payment from GEICO under Morris's uninsured motorist coverage; consequently, "at the time of the demand for coverage, the vehicle that collided with Plaintiff Morris qualified as a 'hit-and-run vehicle' and Plaintiff has a valid claim for vexatious refusal to pay."

The Uninsured Motorist Coverage provisions of the GEICO Policy provide, in relevant part (all emphases original):

SECTION IV
UNINSURED MOTORISTS COVERAGE

* * *

DEFINITIONS

The definitions of terms for Section I apply to Section IV, except for the following special definitions:

1. ***Hit-and-run vehicle*** means: a motor vehicle causing ***bodily injury*** to an ***insured*** with or without physical contact with him or with a vehicle he is ***occupying*** at the time of the accident and whose operator or owner cannot be identified;

* * *

6. ***Uninsured motor vehicle*** is a vehicle, including a ***trailer*** of any type, which has no bodily injury liability bond or insurance policy applicable with liability limits complying with the Financial Responsibility Law of the ***state*** in which the ***insured auto*** is principally garaged at the time of the accident, or a ***hit-and-run*** vehicle. This term also includes a vehicle for which there is a bodily injury liability insurance policy applicable at the time of the accident but the Company writing the policy is or becomes insolvent or denies coverage.

* * *

LOSSES WE PAY

Under the Uninsured Motorists Coverage we will pay damages for ***bodily injury*** caused by accident which the ***insured*** is legally entitled to recovery from the owner or operator of an ***uninsured motor vehicle*** or ***hit-and-run vehicle*** arising out of the ownership maintenance or use of that auto.

* * *

GEICO proposes that the Policy's definition of a "hit-and-run vehicle" requires that either the operator of a motor vehicle causing bodily injury to an insured cannot be identified, or the owner of a motor vehicle causing bodily injury to an insured cannot be identified; i.e., the vehicle *is not* a "hit-and-run vehicle" if the owner or operator *can* be identified. Morris proposes that the language must be interpreted to mean that a "hit-and-run" vehicle encompasses situations where an owner has been identified, but an operator has not, and vice versa. He contends that Section 379.203, RSMo 2016, which mandates uninsured motor vehicle coverage in Missouri, requires this interpretation.

We find that we need not definitively interpret this language because, even if we were to accept Morris's explication, it does not assist him on the facts of this case. As discussed in more detail below, at the time of Morris's demand for uninsured motorist coverage, Morris was alleging

operator negligence and proceeding against the vehicle owner and his insureds, Michael and Bradley Christopher, as if they were the negligent operators. The Christophers' insurance company agreed to provide coverage for the alleged operator negligence. Because the State Farm Policy only provided liability coverage for damages for which Michael Christopher and/or Bradley Christopher were deemed legally liable, and Morris was alleging operator liability, it would have been reasonable to assume that an operator had been, or certainly could be, identified.[2] Consequently, even under Morris's explanation of the contract language, the Ford Taurus was not a "hit-and-run vehicle" under the terms of the GEICO Policy at the time Morris demanded uninsured motorist payment from GEICO. Further, because the Ford Taurus that collided with Morris was insured, and the company providing that liability insurance was not denying coverage for the accident, the Ford Taurus was also not an "Uninsured motor vehicle" under the language of the GEICO Policy at the time of the demand.

Morris contends that *Stotts v. Progressive Classic Ins. Co.*, 118 S.W.3d 655 (Mo. App. 2003), interpreted Section 379.203 to require insurance providers to pay uninsured motorist benefits if either the offending vehicle's owner or the offending vehicle's operator has no insurance coverage. Morris argues that *Stotts* held that the issue of whether a vehicle is considered uninsured turns on the underlying tort liability alleged and whether there is coverage for that particular tort. *Stotts*, 118 S.W.3d at 664-65. Morris reasons that, even though the *owner* of the vehicle that hit him had liability coverage for the accident through State Farm, Morris was entitled to uninsured

[2] Morris acknowledges that to support a claim for vexatious refusal to pay, the insured must show that the insurer's refusal to pay the loss was willful and without reasonable cause, as the facts would appear to a reasonable and prudent person at the time the insurer was called upon to pay. *Boatmen's First Nat. Bank of Kansas City*, 861 S.W.2d 600, 603 (Mo. App. 1993).

motorist coverage from GEICO because the *operator* of the vehicle had not been conclusively identified at the time of the demand, and Morris's claims involved the tortious actions of the *operator*, not the owner. We find that *Stotts* does not assist Morris.

In *Stotts*, this court reversed a circuit court's grant of summary judgment to plaintiffs Linda Stotts and Rhonda Knouse on their petition against Progressive Classic Insurance Company ("Progressive") which alleged breach of contract and vexatious refusal to pay uninsured motorist benefits. *Id.* at 658. On the facts of that case, Linda Stotts was operating her vehicle when it was struck by a vehicle owned by Matthew James; James carried no insurance on the vehicle. *Id.* at 658-659. The operator of the uninsured vehicle, Christopher Schlosser, carried a liability policy covering his negligent operation of the vehicle. *Id.* at 659. Stott's mother was a passenger in Stotts's car at the time of the accident, and the mother died as a result of injuries sustained. *Id.* Schlosser was sued for negligent operation of James's vehicle, and Schlosser's insurance carrier settled the suit. *Id.* Because the offending vehicle was owned by James and had no liability coverage, Stotts and her sister, Rhonda Knouse, filed a claim with Stotts's insurance company for uninsured motorist benefits. *Id.* This claim was denied. *Id.* The daughters then sued Progressive for breach of contract and vexatious refusal to pay, and the circuit court entered summary judgment in the Stotts's and Knouse's favor. *Id.*

Progressive appealed the circuit court's ruling to this court, arguing that the daughters failed to make a *prima facie* case for summary judgment because they had not alleged uncontroverted facts demonstrating that the motor vehicle was an "uninsured motor vehicle" under the Progressive Policy and Section 379.203. *Id.* at 661. Progressive contended that, under the policy language, the uninsured vehicle was not an "uninsured motor vehicle" because it was undisputed that the operator had an operator's liability policy that provided coverage for his

operation of the vehicle at the time of the accident. *Id.*[3] We agreed with Progressive that, under the unambiguous terms of Stotts's policy, if *any liability policy* provided coverage for that vehicle at the time of the accident, it was not uninsured for purposes of the uninsured motorist coverage provision. *Id.* at 663. Consequently, because it was undisputed that the operator of the uninsured vehicle had a liability policy that covered his negligent operation of the vehicle at the time of the accident, the vehicle was not an "uninsured motor vehicle." *Id.* The policy language, however, did not end the issue.

The daughters argued that, despite there being no uninsured motorist coverage under the express terms of the policy, Section 379.203 mandates coverage as a matter of public policy under two scenarios:

> (1) where either the operator or owner of the vehicle does not carry a liability policy on the subject vehicle, regardless of whose negligence caused the accident; or (2) where, regardless of the fact that the operator carries a liability policy on the subject vehicle, the owner does not, and it can be shown that the owner negligently entrusted the vehicle to the driver.

Id. Upon review of Section 379.203, we disagreed that the statute mandates coverage under the first scenario proposed by the daughters, but agreed that coverage is required under the second.[4]

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[3] Whether the vehicle was a "hit-and-run vehicle" under Progressive's Policy was not an issue in that case. "Uninsured motor vehicle" was defined in the Progressive Policy in a manner substantially similar to how the term is defined in the GEICO Policy in this case.

[4] Section 379.203 states, in relevant part (emphasis added):

> 1. No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, or in the case of any commercial motor vehicle, as defined in section 301.010, RSMo, any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, RSMo, for the protection of persons insured thereunder **who are legally entitled to recover damages from owners or operators of uninsured motor vehicles** because of bodily injury, sickness or disease, including death, resulting therefrom.

Id. at 664-65. We interpreted Section 379.203 "as mandating uninsured motorist coverage if: (1) the insured is legally entitled to recover damages in tort from the owner *or* operator of the vehicle for causing bodily injury, sickness or disease, including death; *and* (2) the vehicle, at the time of the accident, was uninsured by a liability policy of insurance." *Id.* at 664 (emphasis added).[5] We made clear that the issue of whether a vehicle is uninsured for purposes of Section 379.203 "does not turn solely on whether there was an owner's or operator's policy in effect at the time of the accident. Rather it turns on the underlying tort liability alleged and whether there is coverage for that particular tort." *Id.* at 664-65. Consequently, because the underlying tort alleged by the daughters when demanding uninsured motorist coverage in *Stotts* was negligent entrustment of the vehicle by the owner, the question then became whether there was an insurance policy covering the owner's negligent entrustment. *Id.* at 665. We concluded that, "although an operator's policy was in effect at the time of the accident covering the operator's negligence in operating the subject vehicle, there was not an owner's policy covering the owner's negligent entrustment of the vehicle to the operator, which was alleged to have caused or contributed to cause the damages sought." *Id*. We stated that, "if the tortfeasor is an operator, then the vehicle is uninsured if there is not a liability policy covering the tortfeasor's negligent operation of the vehicle; or if the tortfeasor is an owner, the vehicle is uninsured if there is not a liability policy covering the owner's negligent acts in causing the accident." *Id.* at 666-667. Consequently, the daughters were entitled to uninsured motorist coverage benefits.

[5] Significantly, we discussed that the "owner or operator" language in the statute referenced the "tort proof element," not the "contract proof element," which meant that "the mere fact that either the 'owner or operator' of the subject vehicle *did not have a policy of insurance* covering the vehicle at the time of the accident is not dispositive of the issue whether the vehicle is considered uninsured for purposes of § 379.203." *Id.* at 664 (emphasis original). *Stotts* exemplified that interpretation of Section 379.203 and the legislative meaning and intent therein required analysis separate from interpretation of the insurance contract, and the two cannot be conflated.

Upon examination of the summary judgment record and the uncontroverted material facts in this case, we find that *Stotts* is distinguishable. Unlike in *Stotts* where separate claims for negligence were brought against the operator and owner, there is nothing in the summary judgment record here to suggest that Morris ever made any claims of owner liability separate from operator liability. Morris's claims were always operator negligence; it was, therefore, operator negligence that State Farm had already agreed to cover when Morris demanded uninsured motorist coverage from GEICO.

Morris contended in his Plaintiff's Statement of Uncontroverted Facts, Fact #16, that he performed all conditions to qualify under the GEICO Policy's definition of a hit-and-run vehicle by reporting the accident and giving a recorded statement on November 24, 2014, which set forth "his claim that he has a cause of action for damages against an unidentified person." At the time of Morris's recorded statement, made two days after the accident, neither the owner nor the operator of the Ford Taurus had been positively identified, although a license plate number to the Ford Taurus had been provided to police by an eyewitness. Yet, more than a year and a half elapsed between the recorded statement and Morris's demand for uninsured motorist coverage payment, during which time the owner of the vehicle was identified and the owner's insurance company agreed to insure the accident. According to the record, this information was acquired, at least in part, through GEICO's investigation into the matter.[6]

[6] Morris agrees that an insurer receiving a demand for uninsured motorist coverage is allowed a reasonable amount of time to investigate the claim. A vexatious refusal to pay claim can be predicated on an insurer's unreasonable delay in investigating, or refusal to investigate, a claim. *See D.R. Sherry Const., Ltd. V. American Family Mut. Ins. Co.*, 316 S.W.3d 899, 907 (Mo. banc 2010). No such contention was made in this case, and the record reflects that GEICO investigated the matter before refusing Morris's demand for payment.

Plaintiff's Exhibit D[7], referenced in support of Morris's Fact #16, shows numerous interactions, as recorded by GEICO, that purportedly occurred between Morris and GEICO prior to Morris ever making his demand. In one conversation, Morris advises that he would prefer not to make any claims against his own insurance company if the offending party is determined to have insurance. Exhibit D shows GEICO following up on leads regarding license numbers provided by Morris to determine the owner of the vehicle that hit Morris. The exhibit shows that an accurate license number was finally provided GEICO on December 7, 2014, which resulted in GEICO obtaining Michael Christopher's name. On December 10, 2014, GEICO sent Michael Christopher a letter described as a "UM_10_Day_Letter." On December 16, 2014, GEICO received a police report of the accident which confirmed the license number Morris had provided GEICO.

On December 26, 2014, GEICO discovered that State Farm Policy #274114625 was in effect on the Ford Taurus on the date of the accident. GEICO's notes indicate that on that same date, a call was made by GEICO to Morris "to advise No UM because Clmt was Insured w/State Farm." On December 29, 2014, a message was left by GEICO for Morris asking about his "filing decision" under his "medpay claim."[8] The note states: "ob call to Robert morris for filing decision…adv appears we have found cvg under clmt policy… would he like to close medpay

[7] We are cognizant that, while Plaintiff's Exhibit D was part of the summary judgment record, only portions of the Exhibit were cited by Plaintiff in support of Plaintiff's Statement of Uncontroverted Facts. The content of this Exhibit is not necessary to our decision. It is only referenced herein to show that the Exhibit Morris submitted to prove that the Ford Taurus qualified as a "hit-and-run" vehicle at the time Morris demanded uninsured motorist coverage does not show Morris ever made a claim to GEICO for coverage of owner liability separate from operator liability.

[8] GEICO's notes indicate that Morris had been advised by GEICO on November 25, 2014, that Morris had $5,000 coverage in his GEICO Policy labeled "medpay" and that he could receive this even if the adverse carrier policy covered the accident.

claim under his policy at this time?...adv he had prev adv he did not want to file under his policy unless he had to…adv him to give me a callback to let me know how to proceed w/medpay claim…" A January 5, 2015, notation states: "closing letter b/c filing with a/c[9] emailed to Dean Morris."

Plaintiff's Exhibit D shows that Morris's attorney then called GEICO on January 7, 2015, and documents were emailed by GEICO to the attorney on that same date. An internal GEICO communication on January 17, 2015, states: FOLLOW UP WITH ATTNY ON FILE – DOES INSD WISH TO USE HIS COLL COVG ON THIS POLICY?" On January 21, 2015, GEICO called Morris's attorney and GEICO's notation on that date states: "Asked filing Dec Attny Sttd that he will ask PH[10] and Call me back." An internal GEICO communication on January 23, 2015 states, "does ubi need to be reopened for insd? Has a/c state farm determine if there is covg or have they disclaimed/denied coverage?" On this same date, documents were faxed by GEICO to State Farm and GEICO updated its records to reflect that, "Adverse Carrier/State Farm was updated for IP[11] Christopher Michael." GEICO also telephoned State Farm on this date and was given State Farm Policy # 274114625. A notation was entered by GEICO that, "UBI does not need to be open at this point."

On January 30, 2015, GEICO contacted State Farm inquiring as to whether "they have coverage / accepted liab and handling damages to our insd Robert Dean Morris." A message was also left by GEICO with Morris's attorney inquiring as to whether "insd is using coll on policy?

[9] "A/c" is referenced elsewhere in the notations as signifying "Adverse Carrier."

[10] "PH" is referenced elsewhere in the notations as signifying "Policy Holder."

[11] "IP" is referenced elsewhere in the notations as signifying "Interested Party."

Did state farm accept liab and handle injs?" On February 10, 2015, GEICO called State Farm who advised that "Clmt has an Active Policy – Good Covg." but that liability was tentative because State Farm had not yet spoken to their insured. State Farm advised it would make a liability decision on February 24, 2015, regardless of whether they spoke to their insured. GEICO also placed a call to Morris's attorney on February 10, 2015. According to GEICO's notes, the attorney advised that they would speak to State Farm on the 24th "and attempt to file with them for the PD." GEICO then advised the attorney that it was "closing the Coll Claim" and that if Morris "needs to file W/GEICO to call me back."

Four months later, on June 18, 2015, an inbound call was received by GEICO from Morris's attorney stating that Morris would like to file a "medpay claim." He was advised by GEICO that the claim was closed but that it could be reopened and reviewed. On June 23, 2015, a demand for $5000 was received from GEICO by Morris's attorney for MedPay under the GEICO Policy. The MedPay claim was reopened and it appears a $5,000 payment was sent to Morris by GEICO on June 24, 2015. The claim was then closed on June 24, 2015, for the reason that the policy limits had been exhausted.

The next notation by GEICO in Plaintiff's Exhibit D occurs one year later, on June 13, 2016; Morris's attorney called GEICO advising that a "demand was on the way for UBI."[12] On this same date, GEICO called State Farm "to confirm if there is was good coverage for this accident…she sttd they do have good cov and BI cov is 100/300…did rule out UMBI using this…confirmed no UMBI or UMBI applicable for this accident." A note by GEICO on June 17, 2016, indicates that a telephone call was made to Morris's attorney and the attorney's office was

[12] "UBI" is referenced elsewhere in the notations as signifying "Uninsured Bodily Injury."

advised "that UMBI will not apply and he does not carry UIMBI…", and that Morris's attorney would be receiving a fax to that effect.[13]

Approximately three weeks after GEICO denied Morris's demand (on the undisputed grounds that State Farm, who insured both Michael and Bradley Christopher, had agreed to provide coverage for the accident) Morris sued Michael and Bradley Christopher alleging in alternate counts that they were each negligent *operators* of the Ford Taurus when it hit Morris; there was no claim of negligent vehicle *ownership*. After conducting discovery, Morris removed Michael Christopher as a defendant and retained Bradley Christopher, continuing to allege that Bradley Christopher was negligently operating the Ford Taurus when it struck Morris. Although GEICO was added at that time as a defendant in Morris's new claim for uninsured motorist coverage alleging an *unidentified operator*, there was never an assertion (before the demand, after the demand, in any of Morris's filings, or on appeal) that Morris's claims against Michael and Bradley Christopher involved anything other than *operator* negligence. Consequently, despite that the operator had not been confirmed at the time of Morris's demand, Morris was not entitled to uninsured motorist coverage because the owner of the vehicle *had been* identified, and the owner's policy was agreeing to provide coverage for the alleged tort of *operator* negligence.[14]

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[13] The next notation in the GEICO file is recorded eight months later, on February 14, 2017, noting "company has been served. No vex count. Staff can handle complaint. Complaint sees [sic] to allege def Bradley is at fault and that a phantom was at fault."

[14] In Morris's Statement of Additional Material Facts in Opposition to Defendant Geico's Motion for Summary Judgment, Morris's Fact #15 states that, "On January 6, 2017, Bradley Christopher testified that he was the one who used and possessed the Ford Taurus on November 22, 2014." Although Bradley Christopher also denied being involved in a motor vehicle collision on November 22, 2014, and denied operating a "hit-and-run motor vehicle that collided with Plaintiff on November 22, 2014," this does not negate Bradley Christopher's admission to being "the one who used and possessed the Ford Taurus" on the date of the collision. He was later identified by Colton Massie as the offending driver. Moreover, although Bradley Christopher declined to admit to committing a hit-and-run felony under oath, nothing in the summary judgment record supports that someone other than Bradley Christopher had access to and/or drove his car that day. The Christophers never claimed that the car was stolen or driven by someone else.

The test for requiring uninsured motorist coverage under Section 379.203, as discussed above, is the underlying tort liability *alleged* and whether there was coverage for *that particular tort*. *Stotts*, 118 S.W.3d at 665. If there is not, uninsured motorist coverage applies. The underlying tort liability Morris alleged was always operator negligence. The fact that State Farm was agreeing to cover the alleged negligent operation of the vehicle at the time of Morris's demand is, therefore, dispositive of Morris's claim for uninsured motorist coverage for negligent operation of the vehicle; there was a policy in effect covering the vehicle for the alleged tort of operator negligence, and the company supplying coverage was not refusing coverage. Regardless of Bradley Christopher's denial that he operated the Ford Taurus at the time of the accident, at the time of Morris's demand, State Farm was agreeing to cover the vehicle as if Michael and Bradley Christopher were the negligent operators. It was reasonable to assume, therefore, that when State Farm confirmed that it was providing coverage for the alleged operator negligence associated with the Ford Taurus's collision with Morris on November 22, 2014, the operator had been identified or certainly *could* be identified. The policy language requires that the operator "cannot" be identified, not that the operator "has not" been identified. GEICO was, therefore, not required to extend uninsured motorist coverage to Morris under Section 379.203 or the GEICO Policy.[15]

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[15] *Compare Berry v. American Family Mut. Ins. Co.*, 995 S.W.2d 16 (Mo. App. 1999). In *Berry*, a cyclist was injured by a Pizza Hut delivery driver whose liability insurance had lapsed. *Id.* at 17. A Pizza Hut insurance policy through Kemper, however, insured the vehicle. *Id.* The plaintiff cyclist carried uninsured motorist coverage through American Family. Kemper communicated with American Family, advising that the Kemper policy would provide coverage for the accident. *Id.* American Family denied the plaintiff's claim for uninsured motorist coverage because "uninsured motor vehicle" in the American Family policy was defined as a vehicle "not insured by a bodily injury liability bond or policy at the time of an accident." *Id.* at 19. After the plaintiff received a settlement from Kemper for the driver's and Pizza Hut's alleged negligence, he sued American Family for recovery of uninsured motorist benefits and vexatious refusal to settle. *Id.* at 18. American Family's motion for summary judgment, arguing that uninsured motorist coverage did not apply because the operator's vehicle was insured by Kemper, was denied. *Id.* After the plaintiff prevailed against American Family at trial, American Family appealed. *Id.* We reversed, finding that "the insured cannot settle a liability claim premised on coverage by the tortfeasor's insurer and then recover against the uninsured motorist carrier on the premise that there was no applicable liability insurance." *Id.* at 18.

Morris argues in his reply brief that this application leads to the absurd result of a stolen vehicle causing a collision and then fleeing the scene not being deemed a "hit-and-run vehicle" under the GEICO Policy if the vehicle and its owner are later identified but the thief/operator is not. Yet, Section 379.203 merely ensures insurance coverage for the alleged tort. If there is no other coverage for that alleged tort, uninsured motorist coverage applies.

We conclude that the circuit court did not err in granting summary judgment to GEICO on Morris's claim for vexatious refusal to pay when it found that the Ford Taurus that hit Morris's vehicle was neither an "uninsured motor vehicle" nor a "hit-and-run vehicle" as defined by the GEICO Policy. Reviewing GEICO's policy provisions as advocated by Morris and consistent with the requirements of Section 379.203, the vehicle was not a "hit-and-run vehicle" under GEICO's policy because the owner of the vehicle had been identified and, irrespective of whether the operator had been conclusively identified at the time of the demand, Morris was alleging operator negligence by the owner and the owner's policy was providing coverage for operator negligence.[16]

Point I is denied.

Point II – Election of Remedies

In his second point on appeal, Morris contends that the circuit court erred in finding that Morris's claim for vexatious refusal to pay was barred by the doctrine of election of remedies. Morris argues that his vexatious refusal claim is consistent with his settlement of the claim against Bradley Christopher, does not involve a duplicate recovery, and GEICO was not entitled to

[16] Morris argues that this is an unfair result because he had to "litigate" for three years to determine the identity of the tortfeasor to his detriment. It is not apparent from this record why Morris needed to litigate the identity of the tortfeasor when the uncontroverted facts reveal that Morris's claims were for operator negligence and, prior to Morris ever filing suit, State Farm had agreed that the Christophers' policy would cover alleged operator negligence associated with the Ford Taurus involved in the accident.

judgment as a matter of law because the vehicle that collided with him qualified as a "hit-and-run vehicle" at the time Morris demanded coverage. Further, Morris argues that GEICO's refusal was vexatious, Bradley Christopher continued to deny operating the vehicle that hit Morris, and the settlement regarding the claim against Bradley Christopher did not involve the damages Morris suffered as a result of GEICO's vexatious refusal to pay.

We note that Morris moved for summary judgment against GEICO, asking for payment of the uninsured motorist benefits (along with damages for vexatious refusal to pay), *after* Morris settled his claim of operator negligence against Bradley Christopher. It was Morris's request for the uninsured motorist benefits that the circuit court found barred by the election of remedies doctrine.[17] Morris has apparently abandoned his claim that he was entitled to both the settlement proceeds *and* uninsured motorist benefits, stating in his appeal brief that, "While Plaintiff Morris cannot now recover uninsured motorist coverage, Defendant GEICO is still liable for the damages resulting from its vexatious refusal to pay."[18] Morris argues that those damages would not constitute double recovery because they represent a different wrong.

Because we determined in our review of Morris's first point on appeal that the vehicle that collided with Morris did not qualify as an "uninsured motor vehicle" or "hit-and-run vehicle" under the GEICO Policy, and Section 379.203 cannot be interpreted to require uninsured motorist

[17] This ruling is consistent with Section 379.203. We made clear in *Stotts* that, "In ruling that the determination of whether the subject vehicle is uninsured, for purposes of § 379.203, is contingent on whether the underlying tortfeasor is the owner or operator of the vehicle, we are mindful of the fact that it is not the purpose of the statute to require dual coverage. In other words, § 379.203 cannot be invoked to allow recovery for damages otherwise covered by a liability policy." *Id.* at 667 n.3 (internal quotation marks and citation omitted). There was no "dual coverage" in *Stotts* because there were two alleged underlying tortfeasors – a negligent operator *and* a negligent owner. The alleged negligent operator had liability coverage for his alleged tort; the alleged negligent owner did not. Consequently, the plaintiffs in *Stotts* were allowed to proceed with their claim for uninsured motorist coverage.

[18] Morris's counsel reiterated this position in oral argument.

coverage to Morris on the facts of Morris's case, Morris has no claim against GEICO for vexatious refusal to pay his demand for uninsured motorist benefits. Where there is no claim for vexatious refusal, there can be no damages associated with that claim.

Point II is denied.

Conclusion

The circuit court's judgment is affirmed.



Anthony Rex Gabbert, Judge

All concur.