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IN THE
COURT OF APPEALS OF INDIANA

SALLY G. LEONARD,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 71A03-0909-CV-444
	)	
MARK A. SOROCCO,	)	
JOHN DOE, and	)	
UNITED FARM FAMILY	)	
MUTUAL INSURANCE CO.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable David C. Chapleau, Judge
Cause No. 71D06-0902-CT-22

July 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Sally G. Leonard appeals the grant of summary judgment in favor of United Farm Family Mutual Insurance Co. ("Farm Bureau") on her complaint for damages and declaratory relief based on an automobile accident.[1] We affirm.

Issue

Leonard raises two issues, which we consolidate and rephrase as follows: Whether the trial court erred in finding that, as a matter of law, the automobile accident was not covered by the uninsured motorist provision in her automobile insurance policy with Farm Bureau.[2]

Facts and Procedural History

The facts most favorable to Leonard as the nonmoving party show that on February 5, 2007, Leonard, Mark Sorocco, and an unidentified driver ("John Doe") were operating vehicles in the eastbound lanes of U.S. Highway 31 in St. Joseph County. John Doe skidded on the ice and swerved toward Sorocco. Sorocco took evasive action and avoided a collision with John Doe's vehicle, but in so doing, Sorocco collided with Leonard's vehicle. John Doe drove on without stopping.

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[1] Defendants Mark A. Sorocco and John Doe are not seeking relief on appeal and have not filed briefs. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

[2] In her statement of the issues in her appellant's brief, Leonard states that she is presenting the issue of "[w]hether uninsured motorist insurance policy coverage exclusions of miss and run collisions violate public policy." Appellant's Br. at 1. Leonard fails to present an argument on this issue and has therefore waived it. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]"); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that argument was waived for failure to cite authority or provide cogent argument), *trans. denied*.

Leonard was insured under an automobile policy provided by Farm Bureau, which contained the following relevant provisions regarding uninsured motorist coverage:

> **Uninsured motor vehicle** – means a land motor vehicle licensed for highway use:
>
> 1. the ownership, maintenance or use of which is:
>
> a. not insured or bonded for bodily injury liability at the time of the **accident**;
>
> b. is insured by a company which denies coverage or is or becomes insolvent; or
>
> 2. as to **bodily injury** only, a **hit-and-run vehicle**.
>
> ….
>
> **Hit and run vehicle** – means a land motor vehicle whose owner or driver cannot be identified and which strikes the **insured**, or the vehicle occupied by the **insured**, and causes bodily injury to the **insured**.
>
> ….
>
> **We** will pay **damages** for **bodily injury** an **insured** is legally entitled to collect from the owner or driver of an **uninsured** or **underinsured motor vehicle**. The **bodily injury** must be caused by an **accident** arising out of the ownership, maintenance or use of an **uninsured** or **underinsured motor vehicle**.

Appellant's App. at 19, 27-28.

On February 4, 2009, Leonard filed her complaint for damages and declaratory relief against Sorocco, John Doe, and Farm Bureau, alleging negligence against Sorocco and John Doe and seeking a declaration that, to the extent that the accident was caused by John Doe, she was entitled to uninsured motorist coverage under her insurance policy with Farm Bureau. On May 13, 2009, Farm Bureau filed a motion for summary judgment, arguing that Leonard was not entitled to coverage under the hit-and-run provision of her insurance policy because there was no direct or indirect physical contact between John Doe's vehicle and

Leonard's vehicle. On August 5, 2009, the trial court entered an order granting Farm Bureau's summary judgment motion, which provides in relevant part as follows:

> Plaintiff Leonard is asking this trial court to go beyond current Indiana law and find that a near miss is sufficient for indirect contact sufficient to comply with the terms of the policy at issue. …. The policy language has not been met as there has been no striking of the third vehicle with either the plaintiff's vehicle or the vehicle driven by Mr. Sorocco and therefore there has been no direct or indirect striking.
>
> This court declares that there is no coverage under the policy as an uninsured motorist claim.

Appellant's Br. at 14-15. Leonard appeals.

Discussion and Decision

This is a challenge to the trial court's grant of a summary judgment motion.

> Our standard of review is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. Review of a summary judgment motion is limited to those materials designated to the trial court. We must carefully review a decision on a summary judgment motion to ensure that a party was not improperly denied its day in court.

Mangold ex rel. Mangold v. Ind. Dep't of Natural Resources, 756 N.E.2d 970, 973-74 (Ind. 2001) (some citations omitted).

Leonard asserts that the trial court erred in finding that the automobile accident was not covered by the uninsured motorist provision in her automobile insurance policy with Farm Bureau. The focus of Leonard's appeal goes to the meaning of the word "strikes" as used to define a hit-and-run vehicle in Leonard's auto insurance policy.

> Although some special rules of construction of insurance contracts have been developed due to the disparity in bargaining power between insurers and

> the insured, if an insurance contract is clear and unambiguous, the language therein must be given its plain and ordinary meaning. Stated otherwise, we may not extend coverage beyond that provided in the contract, nor may we rewrite the clear and unambiguous language of that document. Rather, we only construe ambiguous insurance policies, those that contain language about which reasonably intelligent policyholders honestly may differ. An ambiguity does not exist merely because the parties proffer differing interpretations of the policy language.

Von Hor v. Doe, 867 N.E.2d 276, 278 (Ind. Ct. App. 2007) (citations and quotation marks omitted), *trans. denied*.

In the context of construing "physical contact" in a hit-and-run vehicle definition similar to the one in issue here, another panel of this Court reasoned as follows:

> We are of the opinion that there need not be a direct physical touching between the hit-and-run automobile and the insured automobile in all instances before the 'physical contact' condition is satisfied. If a substantial physical nexus between the hit-and-run vehicle and the intermediate object is shown and if the transmitted force is continuous and contemporaneous, as when one object hits a second impelling it to strike a third, we believe that 'physical contact', within the policy's meaning, exists.
>
> …. [W]e do not believe that the term 'physical contact' is so plain and clear that its meaning may not be enlarged or contracted in appropriate occasions to prevent unjust and absurd results. That the term 'physical contact' as employed in insurance policies is subject to only one interpretation is clearly an unreasonable contention considering the divergent conclusions which have been reached by the courts. ….
>
> We hold that 'physical contact' within the meaning of the hit-and-run provision of uninsured motorist coverage occurs when an unidentified vehicle strikes an object impelling it to strike the insured automobile and a substantial physical nexus between the unidentified vehicle and the intermediate object is established. Hypothetical situations in which indirect physical contact could possibly satisfy the condition are when: the unidentified automobile strikes another automobile propelling it into the insured's automobile; the unidentified automobile strikes a telephone pole causing it to strike the insured's automobile.

Allied Fidelity Ins. Co. v. Lamb, 361 N.E.2d 174, 178-79 (Ind. Ct. App. 1977).

Farm Bureau concedes that "strikes" as used in its policy with Leonard likely encompasses both direct and indirect physical contact. Appellant's App. at 51, n.1. However, the parties agree that there was no direct physical contact between John Doe's vehicle and Leonard's. Further, they agree that John Doe's vehicle did not have physical contact with Sorocco's, and thus even the indirect physical contact described in *Lamb* is not satisfied. Nevertheless, Leonard asserts that there "is nothing within the holding of [*Lamb*] or the principles of general application which it sets forth that expressly prohibits uninsured motorist hit and run coverage when there is no direct physical contact between the hit and run vehicle and the intermediate vehicle." Appellant's Br. at 8. We disagree. Leonard overlooks the *Lamb* court's discussion expressly limiting its holding:

> Our holding should not be interpreted as allowing all types of indirect physical contact to satisfy the policy condition. …. Neither is our holding to be interpreted as a derogation of the requirement of some type of physical contact. *Recovery should not be granted under an uninsured motorist provision requiring physical contact in hit-and-run accidents where the claimant is unable to show the existence of any type of physical contact.* If we were to completely discard the requirement of physical contact, the doors to fraud and collusion would be opened wide.

Lamb, 361 N.E.2d at 179 (emphasis added).[3]

In determining whether indirect physical contact had occurred in auto insurance cases, this Court has declined to dispense with the requirement that the unidentified vehicle undergo some kind of physical contact with some object involved in the accident. In *Rice v. Meridian*

[3] For the same reason, we reject Leonard's argument that subsequent Indiana cases have misapplied the holding in *Lamb*.

Ins. Co., 751 N.E.2d 685 (Ind. Ct. App. 2001), *trans. denied*, the insurance policy at issue defined an uninsured motor vehicle as one which "hits" the insured. There, Diana Rice was driving up a hill and saw two vehicles approaching her, one of which was in her lane. Diana swerved to avoid a head-on collision, lost control of her vehicle, and struck a concrete culvert, which caused her vehicle to fly 150 feet in the air before finally landing in a ditch. The Rices argued that what happened should be construed as indirect physical contact, but we rejected their argument citing the language in *Lamb* specifically limiting its holding. *Id.* at 689 (citing *Lamb*, 361 N.E.2d at 179).

In addition, the Rices urged us to adopt the corroborative evidence test. "The corroborative evidence test places liability on an insurer for miss-and-run accidents only if an independent third party corroborates the insured's story that the negligence of an unidentified vehicle was a proximate cause of the accident." *Id.* at 690 (citations and quotation marks omitted). Noting that we had previously held that interpreting hit-and-run provisions in auto insurance policies to not provide coverage for miss-and run accidents did not violate the Uninsured Motorist Act, Indiana Code Section 27-7-5-2, we declined to adopt the corroborative evidence test. *Id.* at 689-90 (citing *Ind. Ins. Co. v. Allis*, 628 N.E.2d 1251, 1252 (Ind. Ct. App. 1994), *trans. denied*).

Later in *Von Hor*, 867 N.E.2d 276, this Court addressed "whether the 'strike,' or physical contact requirement within an uninsured motorist clause may be disregarded when independent evidence exists that an unidentified miss-and run-driver was the proximate cause of an accident." *Id.* at 277. Thus, *Von Hor* dealt with an uninsured motorist provision that

contained the same term, "strike," in issue here. There, Von Hor was operating a motorcycle in the right-hand lane of the westbound portion of the Lloyd Expressway in Evansville. A Ford Explorer was going west in the center lane and without warning, the Explorer changed lanes by crossing over into Von Hor's lane of traffic. Von Hor swerved his motorcycle and avoided being hit by the Explorer, but struck the curb and lost control of his motorcycle. He suffered numerous injuries. Relying on *Rice*, and noting that we are not authorized to redraft legislation, we again declined to adopt the corroborative evidence test. *Id*. at 278-79.

Based on our holdings in *Rice* and *Von Hor*, we conclude that the trial court did not err in finding that Leonard was not entitled to coverage under the uninsured motorist provision of her auto insurance policy with Farm Bureau.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.