

STATE OF MICHIGAN
COURT OF APPEALS

DEANNA MACINTOSH,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED

May 15, 2001

No. 222295

Macomb Circuit Court

LC No. 98-005252-CK

Before: McDonald, P.J., and Smolenski and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We decide this appeal without oral argument pursuant to MCR 7.214(E). We affirm.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5). The trial court must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff sought coverage under the uninsured motorist provision of defendant's policy. Defendant's policy provides coverage for bodily injury to an insured person that is caused by an accident and arises out of the ownership, operation, maintenance or use of an uninsured motor vehicle. The policy defines the term "uninsured motor vehicle" to include a "hit-and-run motor vehicle of which the operator and owner are unknown and which makes physical contact with" the insured or the vehicle occupied by the insured. Such physical contact provisions are "designed to prevent fraudulent claims. The purpose of the language is to reduce the possibility of phantom vehicle claims which result when a motorist who negligently loses control of his own vehicle is able to recover by alleging that an unknown vehicle caused him to lose control." *Adams v Zajac*, 110 Mich App 522, 526; 313 NW2d 347 (1981).

As a general rule where there is no physical contact between the insured's vehicle and the other vehicle, uninsured motorist benefits are not available. *Said v Auto Club Ins Ass'n*, 152 Mich App 240, 241-242; 393 NW2d 598 (1986); *Auto Club Ins Ass'n v Methner*, 127 Mich App 683, 685-687; 339 NW2d 234 (1983). However, indirect physical contact may be sufficient to satisfy the physical contact requirement if the insured's vehicle strikes an object left in the road by the unidentified vehicle or the unidentified vehicle propels an object or another vehicle into the insured's vehicle. *Wills v State Farm Ins Co*, 222 Mich App 110; 564 NW2d 488 (1997).

In this case, plaintiff swerved to avoid an oncoming car and struck a curb. There was no physical nexus between that car and the curb. While the other car caused plaintiff to swerve and hit the curb, that alone is not sufficient absent physical contact between the vehicles. While plaintiff contends that there is a question of fact whether the other car struck her vehicle, she has not presented any documentary evidence to support her contention. Neither plaintiff nor her sister knew if the unidentified vehicle struck plaintiff's car. Plaintiff has not offered any evidence, such as damage to the driver's side of her vehicle, to permit an inference that the other vehicle struck her car. The driver behind the unidentified vehicle stated unequivocally that it did not strike plaintiff's car. The police officer who investigated the accident saw no damage to plaintiff's car apart from that caused by the curb. Based on the record presented, reasonable minds could not differ in concluding that there was no contact between the two cars and thus the trial court properly granted summary disposition. *Maiden v Rozwood*, 461 Mich 109, 128; 597 NW2d 817 (1999).

Affirmed.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly