

STATE OF MICHIGAN
COURT OF APPEALS

MYCHELLE PROUGH,

Plaintiff-Appellee,

V

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED

July 12, 2002

No. 229490

Calhoun Circuit Court

LC No. 00-000635-CK

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

BANDSTRA, J. (*concurring*).

I concur in the majority's decision to affirm the order granting summary disposition to plaintiff but only because that result is required by *Berry v State Farm Mut Automobile Ins Co*, 219 Mich App 340, 350; 556 NW2d 207 (1996). My review of the precedents cited by the majority indicates that only *Berry* is binding on us under MCR 7.215(I)(1); there are no Supreme Court cases on point and *Kreager v State Farm Mut Automobile Ins Co*, 197 Mich App 577; 496 NW2d 346 (1992), the only other precedent issued on or after November 1, 1990, did not conclude that the "physical contact" provision could be construed to apply to the accident at issue.

However, I would further conclude that *Berry* was improperly decided and that this Court should consider convening a special panel to consider this issue. MCR 7.215(I)(3). Our Court noted already in *Kersten v DAIIE*, 82 Mich App 459, 469; 267 NW2d 425 (1978), that the term "physical contact has been stretched to include situations where no direct contact occurs." This is ludicrous; if there is "no direct contact" there is simply no "physical contact." In other words, the concept of "physical contact" has been "stretched" into meaninglessness.

In the present case, the facts are simple and straightforward. There was no physical contact between the hit and run vehicle and plaintiff's vehicle. Under the terms of the contract the parties entered into there is, thus, no coverage. The parties did not agree that coverage would apply if there was some "substantial nexus" or "causal connection" between the two vehicles. Except for *Berry*, the simple language of the parties' agreement would require summary disposition in favor of defendant, not plaintiff.

In lieu of any conflict panel being convened by our Court, I encourage the Supreme Court to correct this mistake either by granting leave in this case or any other that might become available.

/s/ Richard A. Bandstra