

STATE OF MICHIGAN
COURT OF APPEALS

REX ELLSWORTH,

Plaintiff-Appellee,

v

FARM BUREAU INSURANCE,

Defendant-Appellant.

UNPUBLISHED

September 20, 2002

No. 231759

Sanilac Circuit Court

LC No. 00-027138-CK

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals from the order granting summary disposition to plaintiff and ordering arbitration of this uninsured motorist benefit claim. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent was fatally injured in automobile accident. Before he died, decedent told police at the scene that a vehicle crossed over the centerline, forcing him to drive onto the shoulder and lose control of his car. He told police there was no physical contact between his car and the approaching vehicle. Police found no evidence of physical contact with the other vehicle, and the vehicle was never identified. Plaintiff filed a claim for uninsured motorist benefits. When defendant denied the claim, plaintiff sought arbitration.

Uninsured motorist benefits are not required by statute, and the contract of insurance determines under what circumstances benefits will be awarded. *Berry v State Farm Mutual Automobile Ins Co*, 219 Mich App 340, 346; 556 NW2d 207 (1996). The policy definitions control, and it is the court's duty to determine the parties' intent from the policy language. *Id.* The insured has the burden of establishing that the policy provided coverage. *Solomon v Royal Maccabees Life Ins Co*, 243 Mich App 375, 379; 622 NW2d 101 (2000).

The scope of an arbitrator's remedial authority is limited to the contractual agreement. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150-151; 393 NW2d 811 (1986). Arbitration agreements in uninsured motorist policies are fairly standard, and generally are either of two varieties, broad or narrow. *Linebaugh v Farm Bureau Mutual Ins Co*, 224 Mich App 494, 500; 569 NW2d 648 (1997). The policy at issue in *Linebaugh* was of the narrow variety, which did not subject a coverage question to arbitration. *Id.*, 502.

Here, the arbitration provision is similar to the one in *Linebaugh*. Thus, the question of coverage is properly decided by the court, rather than an arbitrator. *Id.*, 502-503. The trial court erred in ordering the issue of coverage to be determined in arbitration.

The policy at issue provided uninsured motorist coverage for a hit-and-run automobile only if bodily injury arose out of physical contact with the hit-and-run vehicle. The requirement in an uninsured motorist policy of physical contact between a hit-and-run vehicle and the insured's vehicle is enforceable in Michigan. *Berry, supra*, 347. The physical contact requirement is designed to reduce the possibility of fraudulent phantom vehicle claims. *Id.* In its supplemental brief, defendant presented evidence showing that there was no physical contact between the two vehicles. Plaintiff failed to present evidence in opposition, and defendant is entitled to summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Reversed. We lift the stay of proceedings previously granted by this Court.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly