S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ALVERETTA KERR, Plaintiff-Appellee,	UNPUBLISHED January 22, 2008
v	No. 273319 Jackson Circuit Court
CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellant.	LC No. 2005-006261-NI

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant appeals by leave granted the denial of its motion for summary dismissal of plaintiff's uninsured motorist claim on the ground that plaintiff cannot meet the insurance contract's "actual physical contact" requirement. We reverse.

Plaintiff was traveling on I-94 when she saw a bale of hay in the traffic lanes. She swerved to avoid it, made some contact with it, and then lost control, striking a guard rail and causing damage to her car and injuries to herself. She sought uninsured motorist benefits under a policy from defendant that states,

> "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
>
> * * *
>
> 3. Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits:
>
> a. You or any "family member"; or
>
> b. A vehicle which you or any "family member" are "occupying"; or
>
> c. "Your covered auto" . . . .

Defendant denied plaintiff's claim for benefits and this lawsuit followed.

Defendant moved for summary disposition, pursuant to MCR 2.116(C)(10), on the ground that Michigan case law generally requires physical contact between the hit-and-run vehicle and the insured. Defendant acknowledged that the phrase "actual physical contact" has been construed at times to include indirect physical contact, as long as a substantial physical nexus can be established between the disappearing vehicle and the object. In this case, plaintiff testified that she neither knew how the bale of hay got on the highway nor for how long it was there. In fact, plaintiff could produce no witness who could testify as to how exactly the bale of hay got on the highway.

Plaintiff conceded that she could not produce a witness who could say that the bale fell off a particular vehicle. However, she argued that she could prove her case by circumstantial evidence because I-94 is not designed for anything other than vehicle traffic and a bale of hay is not typically found in the middle of I-94. She also presented testimony of the investigating officer, Trooper Steve Rando, who testified that when bales of hay have been found on the highway in other instances, he could sometimes trace it to a particular vehicle and sometimes not. Another trooper, Gordon Vangelder who had worked with Rando investigating the accident, was asked if he knew where the bale came from. He said there were numerous ways it could have gotten on the highway and he noted that it was during hunting season and so, it could have come from a hunter, or it could have come from a farmer. He was then asked, "But all of them involve for one reason or another falling off a vehicle?" He replied, "Correct."

At oral argument on the motion, the trial court observed that there was farm land in the area where the incident occurred and further opined that there may even be hay bales on land proximate to I-94. But the court noted that I-94 is a limited access highway by statute, and that being the case, there were barriers, like wire fences, between the fields and I-94. Therefore, the court concluded that it would be difficult for teenagers playing a prank to get the bale onto the highway. The court also noted the troopers' testimony that hay bales get onto the highway from vehicles, though those vehicles cannot always be identified. The court ruled that there was circumstantial evidence that the bale got on the highway by being on some type of vehicle and that, considering the evidence in the light most favorable to plaintiff, there was "at least a question of fact" as to whether there was the requisite "substantial physical nexus." This appeal followed.

Defendant argues that the trial court erroneously denied its motion for summary disposition because plaintiff failed to present evidence of a substantial physical nexus between a hit-and-run vehicle and the bale of hay. After de novo review of the trial court's decision, considering the facts in the light most favorable to plaintiff, we agree. See MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

The uninsured motorist insurance contract dictates under what circumstances the benefits will be awarded. *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 346; 556 NW2d 207 (1996). The contract at issue here requires physical contact—as denoted by the term "hits"—between a hit-and-run vehicle and plaintiff or her vehicle. It is uncontested that the physical contact requirement has been construed

> broadly to include indirect physical contact, such as where a rock is thrown or an object is cast off by the hit-and-run vehicle, as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs. [*Id*. at 347.]

Case law on the issue of whether a "substantial physical nexus" exists is plentiful and generally requires that the object causing the injury be either a piece of, or projected by, the unidentified vehicle itself and not an occupant of that vehicle. See *Wills v State Farm Ins Co*, 222 Mich App 110, 115; 564 NW2d 488 (1997), citing *Berry, supra* at 350; *Kreager v State Farm Mut Auto Ins Co*, 197 Mich App 577, 579; 496 NW2d 346 (1992); *Adams v Zajac*, 110 Mich App 522, 526-527; 313 NW2d 347 (1981).

For example, the physical contact requirement was met: (1) in *Hill v Citizens Ins Co of America*, 157 Mich App 383, 384-385, 394; 403 NW2d 147 (1987), when a large rock was propelled through the insured's windshield by a camper-truck's tire as it was passing in the opposite direction; (2) in *Berry*, *supra* at 343-344, 351, when the insured collided with scrap metal in the roadway about fifteen minutes after a pickup truck hauling an uncovered trailer full of scrap metal was seen in the same area; (3) in *Adams*, *supra* at 525-526, when the insured either struck or swerved to avoid striking a truck tire and rim assembly in the roadway at the same time that a flatbed tractor-trailer was seen, first, parked on the side of the road where the tire was located, and second, leaving the scene after the incident. In all of these cases, although the hit-and-run vehicles were not identified, there was significant evidence that particular vehicles were physically involved in causing the insured's injuries.

In an early case, *Kersten v DAIIE*, 82 Mich App 459; 267 NW2d 425 (1978), the physical contact requirement was not met. In that case, the plaintiff's vehicle struck a truck tire and rim assembly that was on its side and spinning on the road in which the plaintiff was driving. *Id*. at 464. The evidence included that about ten or eleven hours earlier, a truck carrying a load of scrap tires spilled a number of tires in the area of the plaintiff's accident. *Id*. This Court held that "[r]ecovery is permitted where the evidence discloses a direct causal connection between the hit-and-run vehicle and plaintiff's vehicle and which connection carries through to the plaintiff's vehicle by a continuous and contemporaneously transmitted force from the hit-and-run vehicle." *Id*. at 471. Noting that no one saw the truck or trailer drop the tire that was involved in the plaintiff's accident, the Court rejected the plaintiff's claim as too attenuated and too inferentially established to satisfy the physical contact requirement. *Id*. at 472, 475. The "continuous and contemporaneously transmitted force" *requirement* has since been rejected, *Adams*, *supra* at 528, yet it is still considered a "significant, but not dispositive, factor to be considered in indirect contact cases in determining whether the requisite substantial physical nexus has been established." *Berry*, *supra* at 351; see, also, *Hill*, *supra* at 389.

In this case, however, plaintiff is not merely asking that the bale of hay be inferred as projecting from an unidentified vehicle—that is, from a vehicle that was seen in the area of the incident but could not be identified. Instead, plaintiff is requesting that we infer that an unidentifiable vehicle in fact dropped the bale of hay—that is, no vehicle was seen in the area. Although "inferential evidence rather than objective evidence is enough to establish a link between a disappearing vehicle and plaintiff's vehicle," *Adams*, *supra* at 529, in this case there is no disappearing vehicle.

Plaintiff argues that she should be able to establish her case with circumstantial evidence. But, plaintiff has not offered any facts from which a reasonable inference could be drawn as to how or when the bale of hay got into the roadway; she merely offers the fact that it was, indeed, in the roadway. Plaintiff has failed to offer evidence that "establishes a continuous sequence of events with a clearly definable beginning and ending, resulting in plaintiff's coming into contact with the [bale of hay].” *Berry*, *supra* at 351-352, citing *Kersten*, *supra* at 473. Thus, if this case was presented to a jury, we would be asking the jury to find facts based on nothing more than conjecture and speculation. There are a number of explanations for the bale of hay’s presence on the roadway and not all of them involve a hit-and-run vehicle. Because plaintiff failed to establish a genuine issue of material fact with regard to this critical issue, we reverse the trial court’s denial of defendant’s motion for summary disposition and remand for an entry of an order granting the same.

Reversed and remanded for entry of an order granting defendant’s motion for summary disposition as to plaintiff’s uninsured motorist claim. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O’Connell