STATE OF MICHIGAN

COURT OF APPEALS

CHRISTAL J. SEGER,

Plaintiff-Appellee,

v

HARTFORD INSURANCE COMPANY OF THE MIDWEST,

Defendant-Appellant.

UNPUBLISHED
February 26, 2008

No. 274572
Saginaw Circuit Court
LC No. 06-058909-NI

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

BECKERING, P.J. (*dissenting*).

I would affirm the trial court's denial of defendant's motion for summary disposition because the policy language regarding when coverage exists if there is no direct physical contact is ambiguous, as manifested by the trial court's interpretation of the policy and ruling.

Because uninsured motorist coverage is not required by statute, *Citizens Ins Co of America v Buck*, 216 Mich App 217, 224; 548 NW2d 680 (1996), the language of the contract of insurance determines the circumstances under which insurance benefits will be awarded. *Rohlman v Hawkeye-Security Ins Co* 442 Mich 520, 525; 502 NW2d 310 (1993).

In hit-and-run accidents, where the alleged at-fault vehicle cannot be identified, the requirement of physical contact in a policy of insurance is designed to reduce the possibility of fraudulent phantom vehicle claims. *Hill v Citizens Ins Co of America*, 157 Mich App 383, 394; 403 NW2d 147 (1987). Thus, if the language of the policy requires physical contact between the hit-and-run vehicle and the insured or the insured's vehicle, such a policy is enforceable. *Kreager v State Farm Mutual Automobile Ins Co*, 197 Mich App 577, 582; 496 NW2d 346 (1992). In uninsured motorist policies requiring physical contact, "this Court has construed the physical contact requirement 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." *Berry v State Farm Mutual Automobile Ins Co*, 219 Mich App 340, 347; 556 NW2d 207 (1996), citing *Kreager, supra*, and *Hill, supra*.

Uninsured motorist claims involving hit-and-run incidents often deal with an analysis of what constitutes physical contact and how far the "substantial physical nexus" extends, such as

when objects have been cast off are later struck by the insured driver. In the instant case, the majority opinion addresses whether there is coverage under the physical contact language in the policy, which provides coverage when a hit-and-run vehicle "hits or causes an object to hit" the insured or the vehicle occupied by the insured. It is reasonable to conclude that under circumstances where an insured hits a tree on the side of the road, there is not a substantial physical nexus to qualify as indirect physical contact with the disappearing vehicle. I disagree with the majority opinion, however, to the extent that it draws an overly literal distinction between hitting or being hit by an object, as it misses the point of the substantial physical nexus analysis set forth in *Berry, supra*, wherein the relevant question is the connection between the object struck and the disappearing vehicle.

To ascertain whether insurance coverage exists in any given circumstance, one must look to and interpret all of the language in the applicable policy. In addition to physical contact language, the policy at issue also contains language regarding coverage when there is "**no direct physical contact.**" The Hartford Personal Auto Insurance Policy states in pertinent part:

C. 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 or causes an object to hit:
   a. You or any family member;
   b. A vehicle which you or any family member are occupying; or;
   c. Your covered auto.

   If there is no direct physical contact with the hit-and-run vehicle, the facts of the accident must be proved. We will only accept competent evidence other than the testimony of a person making a claim under this or any similar coverage (emphasis added).

After identifying what constitutes physical contact, Hartford's policy language goes on to address instances where there is "no direct physical contact." This policy language could reasonably be interpreted to further limit coverage in instances where there is **in**direct physical contact (e.g. a rock hitting the windshield) by requiring independent proof of the accident to trigger coverage. It could also reasonably be interpreted, however, to cover those claims where there is ***no*** direct physical contact between the hit-and-run vehicle and the insured, but competent evidence exists (other than the testimony of the person making the claim) to establish that the hit-and-run incident actually occurred. Both interpretations accomplish the intended goal of reducing the possibility of fraudulent phantom vehicle claims.

Whether the language in an insurance contract is ambiguous is a question of law. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348; 596 NW2d 190 (1999). Where there is no ambiguity, the terms of an insurance contract must be enforced as written. *Id.* Provisions that are clearly, plainly and definitely expressed should be enforced in accordance with their terms. *Whitaker v Citizens Ins Co of America*, 190 Mich App 436; 476 NW 2d 161 (1991). A contract is ambiguous if its provisions are capable of conflicting interpretations. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). Thus, an insurance policy is ambiguous when, after reading the entire document, its language can be

reasonably understood in different ways. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134; 610 NW2d 272 (2000).

Upon review of the record, and as the trial court found, there is admissible evidence other than the testimony of plaintiff to prove the facts of the accident in this matter. Eyewitness Brian Baber was the driver of a vehicle traveling in the same direction and approximately 150 yards behind plaintiff's vehicle at the time of the accident. Mr. Baber testified at his deposition to having observed a "big white Dodge four-wheel drive" truck appear at the crest of a hill traveling in the opposite direction of plaintiff on a narrow, snow covered road with no marked centerline. When the plaintiff's vehicle and the truck encountered each other at the crest of the hill, they swerved to avoid a collision. As Baber crested the hill, he observed that following this evasive maneuver, plaintiff had lost control of her car and struck a tree. The white Dodge never stopped (perhaps because plaintiff spun out at the top of the hill where her car was not likely visible to the truck after it descended the hillcrest). Having witnessed the event contemporaneously with its occurrence, Baber pulled over and approached the plaintiff's vehicle, where he found plaintiff unresponsive and bleeding from the ears.

Given the fact that the policy language could very reasonably be interpreted to provide coverage in instances where there is no direct physical contact but there exists competent evidence regarding the existence of an actual hit-and-run accident other than through the testimony of the insured, I would affirm the trial court's decision to deny defendant's motion for summary disposition, and would hold that plaintiff is entitled to have a jury decide the meaning and appropriate application of the insurance contract language under the circumstances of this case.

/s/ Jane M. Beckering