STATE OF MICHIGAN

COURT OF APPEALS

ROBERT A. DANHOF,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
March 15, 2016

No. 324991
Eaton Circuit Court
LC No. 14-000157-CK

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

Plaintiff filed suit after the providers who insured his motorcycle and motor vehicles denied his claims for uninsured motorist (UIM) benefits. Plaintiff was injured when his motorcycle struck a large piece of lumber lying in the roadway. Plaintiff contended that the lumber fell off a flatbed truck that left the scene of the accident, entitling him to UIM benefits. The circuit court discerned no factual question regarding the necessary physical nexus between the lumber and a disappearing vehicle. Accordingly, the circuit court granted summary disposition in the insurers' favor. We vacate that decision and remand for further proceedings.

I. BACKGROUND

On the afternoon of May 17, 2013, Robert Danhof was driving his motorcycle northbound on M-66 in Woodland Township. When Danhof stopped at the intersection of M-50, he observed a commercial "Lowboy" truck pull out from a Speedway gas station. Witnesses described the truck as a flatbed with an open back. The truck carried a Hitachi excavator. As Danhof proceeded through the intersection, a Chevrolet Aveo separated him from the commercial truck. Suddenly, the Chevrolet swerved to avoid a four-by-six or four-by-eight piece of wood that took up the entire lane of traffic. Danhof did not see the wood in time to follow suit and struck it head on. His motorcycle flipped and Danhof landed on his back in the roadway, injuring his spine. Neither the driver of the Lowboy or the Chevrolet stopped. Coincidentally, a Progressive claims adjuster, James Scoville, was travelling southbound and witnessed the accident. He stopped to assist Danhof and pulled the wood off the road.

Danhof posited that the wood fell from the Lowboy. First, Danhof noted, many commercial vehicles brace the wheels of equipment being hauled with such pieces of lumber.

Second, the truck did not swerve to avoid the wood, suggesting that it fell from that vehicle. Third, the piece of wood was too large and heavy to have naturally fallen there.

At the time of the accident, Danhof had insured his motorcycle through Progressive Michigan Insurance Company and secured UIM coverage in the amount of $100,000. Danhof maintained no-fault insurance policies for his other motor vehicles through State Farm Mutual Automobile Insurance Company, also with $100,000 in UIM coverage. The relevant Progressive policy provision states:

> **"Uninsured motor vehicle"** means a land motor vehicle or trailer of any type:
>
> * * *
>
> d. that is a hit-and-run vehicle whose owner or operator cannot be identified and which strikes
>
> (i) **you** or a **relative**;
>
> (ii) a vehicle that **you** or a **relative** are **occupying**; or
>
> (iii) a **covered motorcycle** . . . .

The State Farm policy similarly provides:

> A "hit-and-run" land motor vehicle or motorcycle the owner and driver of which remain unknown and which strikes
>
> a. the **insured**; or
>
> b. the vehicle the **insured** is **occupying** and causes **bodily injur**y to the **insured**.

Danhof filed a claim for UIM coverage from Progressive. Based on Scoville's report to his employer that he did not see the wood fall from the Lowboy, Progressive rejected that a "hit-and-run vehicle" was involved in the accident and denied Danhof's claim. Danhof also filed a claim with State Farm. State Farm denied coverage based on the existence of the Progressive policy.[1] It also contended that no evidence connected the wood with a truck that left the scene of the accident.

Danhof then filed suit against both insurers, seeking a court declaration of coverage. Both insurers filed motions for summary disposition. State Farm contended, in part, that its contract required physical contact between the insured's vehicle and the hit-and-run driver to merit coverage. Progressive raised a similar argument. The insurers asserted that no evidence supported that the wood fell from the Lowboy. At the motion hearing, Progressive's counsel

[1] The circuit court did not decide this issue below and State Farm is free to raise the issue again on remand.

even suggested that the lumber could have come from a nearby railroad line. The evidence, the insurance companies contended, was simply too speculative to determine how the wood came to rest in the roadway. Therefore, the truck did not make contact with the motorcycle and UIM coverage did not exist.

In granting the insurers' summary disposition motions, the circuit court concluded that no evidence connected the wood with another motor vehicle. "The piece of wood could have been placed there in any number of . . . ways." Even accepting that the commercial truck did not swerve, the court discerned no ground to believe that the truck would have swerved had the wood been in its path. "Quite frankly," the court held, "that's simply too speculative," and no "connection or nexus" could be found.

Danhof has appealed this ruling.

II. STANDARD OF REVIEW

> We review a trial court's decision on a motion for summary disposition de novo. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). . . .
>
> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).]

We also review de novo issues of contract interpretation. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). We must review the contract's language and examine and apply its plain and ordinary meaning. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

III. ANALYSIS

This Court has repeatedly interpreted "hit-and-run" provisions in UIM contracts to include coverage even in cases of "indirect physical contact," such as where an object falls off or is cast off by another vehicle that leaves the scene. All that is required to support coverage is "a substantial physical nexus between the disappearing vehicle and the object cast off or struck. . . ." *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 347; 556 NW2d 207

(1996). See also *Kreager v State Farm Mut Auto Ins Co*, 197 Mich App 577, 582; 496 NW2d 346 (1992); *Hill v Citizens Ins Co of America*, 157 Mich App 383, 394; 403 NW2d 147 (1987).

In this case, Danhof presented circumstantial evidence to support the necessary physical nexus between the wood and the disappearing Lowboy. By granting summary disposition, the circuit court discredited Danhof's version of events, and the reasonable inferences flowing from it, in favor of the insurers. This is not permitted at the summary disposition phase. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Only when a court finds no grounds for a difference of opinion concerning the facts or the reasonable inferences flowing therefrom is summary disposition appropriate. See *West*, 469 Mich at 183.

Danhof testified at his deposition that an individual named "Missy" who owned a flea market near the accident site "saw the whole thing." Danhof reported that Missy saw the truck "use[] his exhaust brakes to slow and hit the railroad tracks," causing "the board [to get] jarred loose." Missy saw the board "fall off and flip." Danhof was unable to locate "Missy" in time to conduct a deposition before the summary disposition hearing. Danhof also stated that Scoville told him that he saw the board come off the truck. Moreover, Danhof testified that he saw the board just before he hit it. "It was still moving but it was laying in the road." Danhof asserted at his deposition that the officers investigating the accident could have located the driver of the Lowboy by reviewing security footage from the Speedway gas station and the driver of the Chevrolet by following a lead that he was wearing a prison guard uniform, but implied the police had not conducted due diligence in this regard.

It is true that Scoville contradicted Danhof's version of events at his deposition. Scoville denied that he witnessed the wood fall from a truck. Scoville spoke to a woman at the scene named "Dixie or Misty" but could not recall whether she indicated that she observed the wood fall from a truck. Scoville also testified that the wood was stationary at the time of the accident.

However, even Scoville's deposition testimony suggested that the wood likely fell off the Lowboy or at least been dragged there by the truck from the railroad tracks. Scoville indicated that the wood was lying in the northbound lanes just north of the railroad tracks. He noted that traffic in the northbound lane was "more steady." Yet, Scoville never claimed to have seen any other vehicle swerve as he headed southbound toward the location of the accident. It could be inferred from this fact that the wood had not been in the lane more than a few seconds. And Scoville described the wood as "a four-by-four post" that was more than three feet long, but offered no other mechanism by which such a large object could have suddenly appeared in the roadway.

This case is factually similar to *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1; 792 NW2d 372 (2010), in which this Court discerned a factual question to overcome summary disposition.[2] In *Dancey*, as in this case, no evidence showed with certainty that the

[2] The UIM provision in *Dancey* included language adopting Michigan's treatment of collisions with objects cast off by passing vehicles. Such language was not required to find coverage, however, given the state of the law.

object in the roadway had fallen from a particular vehicle. Specifically, as the plaintiff drove along the I-696/I-75 interchange in Royal Oak, she encountered a steel construction ladder blocking the entire lane of traffic. *Id.* at 6. Just as in this case, the plaintiff's view of the object was blocked by the vehicle in front of her, leaving her to make "a split second . . . decision" whether to swerve or drive over the object. *Id.* The plaintiff in *Dancey* could point to no truck or construction vehicle that may have been carrying the ladder, nor was there a construction site nearby. The plaintiff remembered witnesses at the scene mentioning "a truck" but she did not know if anyone saw the ladder fall from it. *Id.* at 18.

The *Dancey* Court found sufficient evidence for a jury to conclude that the ladder must have come from a disappearing vehicle. The interchange was a bridge that rose above the other sections of the freeway, so the ladder could not have fallen from an overpass. *Id.* at 19-20. The accident site was inaccessible to pedestrian traffic and the circuit court found no reason to believe that a person would have walked down the expressway carrying a ladder, just to drop it in the roadway. *Id.* at 20. The court also noted no reason to believe the ladder fell from an airplane. *Id.* Therefore, "under these circumstances and in the absence of any other reasonable explanation for the ladder's presence," this Court held that a jury could find the necessary " 'substantial physical nexus' between a hit-and-run vehicle and the ladder struck by plaintiff." *Id.* at 21. "Although some degree of speculation is necessary to determine exactly how this ladder arrived at its location," this Court acknowledged, "we conclude that, under the unique set of facts in this case, such speculation is permissible." *Id.* at 21-22.

Admittedly, pedestrians were more likely to stroll along M-66 than along the I-696/I-75 interchange. However, there is absolutely no evidence that anyone saw a person physically move this large, cumbersome "post" into the roadway. Given the "steady" traffic flow in the northbound lane that afternoon, such activity certainly would not have gone unnoticed. And like in *Dancey*, there was no reasonable explanation for the wood to be in the roadway, unless a vehicle was involved. The two theories posited are that the wood fell from the Lowboy or was pulled by a vehicle from the railroad crossing. If the wood was pulled by a vehicle's tire from the railroad crossing, this case would be akin to those in which a rock or other object was thrown up from the roadbed by a passing vehicle. See, e.g., *Hill*, 157 Mich App 383, 383-385 (in which a large "camper-truck" caused a rock to become airborne and crash through the plaintiff's windshield). If the wood fell from the Lowboy, this case would be akin to cases in which the object is deemed to have fallen off a disappearing vehicle. See, e.g., *Berry*, 219 Mich App 340 (in which a single-vehicle accident was caused by debris in the roadway and an open truck hauling scrap metal was spotted nearby).

In either case it is reasonable to infer that the large piece of wood fell from the commercial truck pulling a trailer occupied by an excavator, or fell from another motor vehicle.[3] This inference is far more sensible than any other explanation offered for the wood's sudden presence on the road. Ultimately, it will be for the jury to decide whether the evidence and any

[3] Counsel for Progressive Michigan conceded at oral argument that if the piece of wood came from *any* motor vehicle the necessary physical nexus would exist.

reasonable inferences drawn from it mandate coverage. The jury may well reject Danhof's position. However, neither this Court nor the circuit court may dismiss this case before its time.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens