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

JERRY D PAUL, Plaintiff-Appellant, and JOANNE PAUL, Plaintiff,	UNPUBLISHED June 19, 2018
v FARM BUREAU INSURANCE COMPANY OF MICHIGAN, Defendant-Appellee.	No. 339075 Isabella Circuit Court LC No. 2106-013174-CZ

Before: MURRAY, C.J., and SERVITTO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant and dismissing his claim for uninsured motorist benefits under his insurance policy with defendant insurer. We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On February 14, 2015, as plaintiff and his wife Joann Paul[1] were driving through Indiana on their way to Florida, they became involved in a multi-vehicle pileup caused by a whiteout. As visibility improved, plaintiff exited his vehicle; his wife remained inside. Another vehicle then struck plaintiff's vehicle propelling it into plaintiff causing him to sustain serious injuries. The other vehicle left the scene and it is unknown whether that vehicle was insured.

At the time of the accident, plaintiff was insured by defendant under an automobile insurance policy (the policy) that included uninsured motorist benefits. Plaintiff made a claim

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[1] Plaintiffs agreed to the dismissal of Joanne Paul's loss of consortium claim, and she is not a party to this appeal. We therefore use the term "plaintiff" to refer to Jerry D. Paul only.

for uninsured motorist benefits under the policy's "hit-and-run auto" provision, because the driver of the vehicle that had hit his vehicle was unknown. Defendant denied the claim. Plaintiff therefore initiated the instant lawsuit against defendant for breach of the parties' insurance contract.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff was not entitled to uninsured motorist coverage under the policy because there was no "actual physical contact" between the unidentified vehicle and plaintiff or a vehicle that plaintiff was occupying, as was required under the language of the policy. Defendant alternately argued that plaintiff was not legally entitled to recover the requested benefits from defendant due to applicability of the "sudden emergency" doctrine. Plaintiff responded that because the unidentified vehicle had hit his vehicle, and had propelled it into him, the "actual physical contact" language of the policy was satisfied. Plaintiff further responded that there were at least questions of fact regarding the weather and visibility at the time of impact, that no facts had been presented concerning what, if any, actions the unidentified driver had taken in response to the weather and visibility, and that it was therefore impossible to prove a sudden emergency defense. The trial court granted summary disposition in defendant's favor, holding that the hit-and-run auto provision of the policy unambiguously required "actual physical contact" between the unidentified vehicle and the insured or a vehicle occupied by the insured. The trial court determined that because plaintiff was standing outside of his vehicle when the impact occurred and the unidentified vehicle did not have actual physical contact with plaintiff, plaintiff's injury was not covered by the policy. The trial court therefore granted summary disposition in favor of defendant and dismissed plaintiff's claim for uninsured motorist benefits.[2] This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision regarding a motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition made under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. The Court considers all affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion and if the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. See *Bernardoni v City of Saginaw*, 499 Mich 470, 472-473; 886 NW2d 109 (2016).

"The construction and interpretation of the language of an insurance contract presents an issue of law that is reviewed de novo." *Hellebuyck v Farm Bureau Gen Ins Co of Michigan*, 262 Mich App 250, 254; 685 NW2d 684 (2004). Ambiguous language in a policy exclusion or exception must be narrowly construed against the insurer and in favor of coverage. See *Fire Ins Exch v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996).

[2] The trial court did not address defendant's argument concerning the "sudden emergency" doctrine.

III. ANALYSIS

Plaintiff argues that the fact that the hit-and-run vehicle hit plaintiff's vehicle and propelled it into him satisfies the "actual physical contact" requirement in the policy's definition of "hit and run auto," and that the trial court erred by holding otherwise as a matter of law. We agree.

As we stated in *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010):

> The rules of contract interpretation apply to the interpretation of insurance contracts. The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase. When the policy language is clear, a court must enforce the specific language of the contract. . . . An insurance contract is ambiguous if its provisions are subject to more than one meaning. An insurance contract is not ambiguous merely because a term is not defined in the contract. Any terms not defined in the contract should be given their plain and ordinary meaning, which may be determined by consulting dictionaries. (Internal citations omitted)

It is undisputed that the driver of the vehicle that struck plaintiff's vehicle is unknown. The parties therefore agree that the coverage sought falls under the "uninsured motorist coverage" provision in the policy, specifically that of a "hit-and-run auto." "Hit-and-run auto" is defined in the policy to mean an auto:

> a. that causes bodily injury by actual physical contact with the injured person or the auto the injured person is occupying;
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> b. whose owner or operator is unknown;
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> c. involved in an accident that has been reported to the police within 24 hours of when the hit-and-run accident occurs. . . .; and
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> d. involved in an accident that has been reported to us . . .

The trial court noted that some Michigan cases have interpreted insurance policy language requiring physical contact to be satisfied by physical contact that is either direct or indirect. The trial court, however, also noted that plaintiff's policy in this case did not simply require "physical contact," but instead required "actual physical contact" between the unidentified vehicle and either plaintiff or a vehicle occupied by plaintiff. The trial court found that there was no actual physical contact between the unknown vehicle and plaintiff, and that he was not occupying his vehicle at the time of the accident, such that the requirement of the policy language was not satisfied and plaintiff's injury was thus not covered by the policy.

An insurer is permitted to require physical contact between a hit-and-run vehicle and the insured or insured's vehicle in order to provide coverage. *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 347; 556 NW2d 207 (1996) (citation omitted). This requirement is designed to reduce the possibility of "fraudulent phantom vehicle claims." *Id*. In other words, an insurer

is permitted to limit its risk by declining to provide coverage when, for example, an insurer asserts that an unknown vehicle caused them to swerve into an obstacle. See *Said v Auto Club Ins Ass'n*, 152 Mich App 240, 242; 393 N.W.2d 598 (1986) (swerving to avoid a hit-and-run vehicle does not satisfy the physical contact requirement); see also *Auto Club Ins Ass'n v Methner*, 127 Mich App 683, 688; 339 NW2d 234 (1983).

Michigan courts have often held that the physical contact requirement of an insurance policy may be met not only through "direct" contact, but also through "indirect" contact between the unidentified vehicle and the injured person or the vehicle the injured person was occupying. "The most common circumstances in which recovery is permitted is when (1) the hit-and-run vehicle strikes a second or intervening vehicle which in turn is propelled into plaintiff's vehicle, and (2) an object is propelled into the plaintiff's vehicle by another vehicle which does not stop." *Adams v Zajac*, 110 Mich App 522, 527; 313 NW2d 347 (1981) (citations omitted). For example, in *Lord v Auto-Owners Ins Co*, 22 Mich App 669; 177 NW2d 653 (1970), the plaintiff's vehicle was hit by another vehicle, the driver of which asserted that his vehicle had itself been hit by an unidentified vehicle that then propelled it into plaintiff's vehicle. *Id*. at 670. The plaintiff sought insurance benefits from his insurer under the uninsured motorist provision in the policy at issue, and his insurer denied coverage on the ground that there was no physical contact between the unidentified vehicle and plaintiff's vehicle as required under the policy. *Id*. The insurance policy defined an uninsured motor vehicle as including a "hit-and-run" vehicle and, in turn, defined a "hit-and-run" vehicle as "an automobile which causes bodily injury to an assured arising out of physical contact of such automobile with the assured or with an automobile which the assured is in, upon, entering or alighting from at the time of the accident * * *." *Id*. at 671. This Court held that "an insured party is covered where the impact of the hit-and-run car was transmitted to his car through an intermediate car" because "this acceptance of a fundamental property of natural phenomena is the more sensible and consistent view as regards transfer of impact through intermediate objects." *Id*. at 672.

In *Hill v Citizens Ins Co of Am*, 157 Mich App 383; 403 NW2d 147 (1987), the driver of a vehicle was killed when a large rock, believed to have been propelled by a passing camper, came through his windshield. *Id*. at 384-385. The decedent's estate sought uninsured motorist benefits under the "hit-and-run" provision in the insurance policy issued on the decedent's vehicle. That provision defined a "hit-and-run" automobile as "an automobile which causes bodily injury to an Assured arising out of physical contact of such automobile with the Assured or with an automobile which the Assured is occupying at the time of the accident . . . ." The insurer denied the payment of benefits because there was no physical contact with the uninsured vehicle and the decedent's vehicle. On appeal, this Court noted that the purpose of the physical contact requirement was to reduce the possibility of fraud and that where "indirect contact occurs, the possibility of fraud is substantially diminished by the tangible physical evidence of the intermediate object." *Id*. at 394. The Court further stated that where the allegation of an object cast off from an unidentified vehicle is claimed to have caused an injury, it is necessary "that the proofs establish a substantial physical nexus between the disappearing vehicle and the object cast off or struck." *Id*. at 394.

Finally, in *Berry*, 219 Mich App at 342, the plaintiff drove over an object in the roadway, causing her to lose control. The plaintiff sought uninsured motorist benefits from her insurer under the "hit-and-run" driver provision of the policy at issue. The policy defined a hit-and-run

vehicle as a "land motor vehicle whose owner or driver remains unknown and which strikes: a. the insured or b. the vehicle the insured is occupying and causes bodily injury to the insured." *Id*. Recognizing that "this Court has construed the physical contact requirement broadly to include indirect physical contact . . . as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs," the Court held that there was a substantial physical nexus. *Id*. at 347, 250.

Notwithstanding the above cases, the trial court in this case held that our recent holding in *McJimpson v Auto Club Group Ins Co*, 315 Mich App 353; 889 NW2d 724 (2016), required the dismissal of plaintiff's claim under the specific language of the policy. We conclude that the trial court has read *McJimpson* too broadly. In *McJimpson*, the plaintiff was injured when a piece of metal flew off a semi-truck and hit her vehicle, shattering her windshield and then bouncing of her hood and roof before finally falling to the road. *Id*. at 354-355. The plaintiff made a claim for uninsured motorist benefits under the insurance policy she held with the defendant, specifically under the "hit-and-run" provision. *Id*. at 355. That provision provided for benefits when "a hit-and-run motor vehicle of which the operator and owner are unknown and which makes *direct* physical contact with: (1) you or a resident relative, or (2) a motor vehicle which an insured person is occupying." *Id*. (emphasis added). This Court held that the plaintiff was not entitled to benefits under that provision despite other Michigan cases having found that either direct or indirect contact is sufficient to trigger coverage and that contact with a propelled object also constitutes indirect contact provided that there is a "substantial physical nexus" between the propelled object and the unidentified vehicle. *Id*. at 359. The *McJimpson* Court noted that:

> [T]he policy language in this case is different from the language considered in those cases. Defendant's uninsured-motorist provision is written more narrowly, providing for coverage only when the unidentified vehicle makes "direct physical contact" with the insured or her vehicle. It does not refer to propelled objects as in Wills nor does it use the unmodified term "physical contact," thereby implicating the "substantial physical nexus" test. By instead requiring "direct physical contact" with the unidentified vehicle, the policy limits uninsured-motorist coverage to cases in which the unidentified vehicle itself strikes an insured person or vehicle. That requirement is not met here. [*Id*. at 361]

The result in *McJimpson* was based on the language of the insurance policy in that case, which contained the modifier "direct" before the term "physical contact." Under those circumstances, reading the policy as permitting "indirect" physical contact, as our previous cases have defined it, see *Berry*, 219 Mich at 347; *Hill*, 157 Mich App at 394, would have failed to give effect to that modifier and been contrary to the plain language of the policy. *McGrath*, 290 Mich App at 439. The *McJimpson* panel was clear that its holding was based on the specific language of the policy at issue. *McJimpson*, 315 Mich App at 359. ("Over the years, we have considered various linguistic formulations of uninsured-motorist coverage. Some policies are written broadly . . . . Other policies we have examined have been written more narrowly.")

The policy at issue before this Court, like *McJimpson*, contains a modifier before the term "physical contact." But it is a different modifier. In order to trigger application of "hit-and-run" coverage, the unidentified vehicle must cause "bodily injury by *actual* physical contact with the

injured person or the auto the injured person is occupying." The unidentified vehicle must therefore have caused plaintiff's bodily injury by *actual* physical contact with plaintiff for the coverage to apply.[3]

The word "actual" is not defined in the insurance policy. Therefore, this Court may consult a dictionary for the common definition. *McNeel v Farm Bureau General Ins Co of Mich*, 289 Mich App 76, 91; 795 NW2d 205 (2010). "Actual" is defined in *Merriam-Webster's Collegiate Dictionary* (11th ed.) as "active;" "existing in act and not merely potentially;" and "existing or occurring at the time." In other words, the physical contact must not have been merely "potential," as when a hit-and-run vehicle causes a plaintiff to swerve, see *Said*, 152 Mich App at 242. This Court in *Berry* similarly used the phrase "actual physical contact" to distinguish situations in which a hit-and-run vehicle has made an impact from situations in which the hit-and-run vehicle did not make contact with *anything*. See *Berry*, 219 Mich App at 347 (stating that "there must be some sort of actual physical contact between the hit-and-run vehicle and the insured or the insured's vehicle" and holding that indirect physical contact can satisfy this requirement).[4]

No party argues that this is a case where only "potential" physical contact by the hit-and-run vehicle occurred. We conclude that the phrase "actual physical contact" as used in the policy is not synonymous with the phrase "direct physical contact" in *McJimpson*. Although *McJimpson*, 315 Mich App at 355, 361-362, noted that a modifier to the phrase "physical contact" can limit its definition, we do not find that the modifier "actual" here should be read as limiting the policy language in the same way as the word "direct;" the words are not synonymous and should not be interpreted as essentially identical. At the very least, the policy language is ambiguous regarding whether direct or indirect (but actual and not potential) physical contact satisfies the coverage condition in the policy; we therefore construe the policy in favor of coverage. See *Diehl*, 450 Mich at 687.

Accordingly, we reverse the trial court's grant of summary disposition in favor of defendant and remand for further proceedings.[5] Although defendant urges us to affirm on the alternate ground that the "sudden emergency" doctrine precludes plaintiff's claim, we decline to do so on this record in light of the potentially fact-intensive nature of the inquiry and the fact that

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[3] It is undisputed that plaintiff had exited his vehicle, had closed the door, and was standing outside of the vehicle when he incurred bodily injury. He was thus not occupying his motor vehicle when the unidentified vehicle hit it, and that aspect of the policy language is therefore not implicated.

[4] By using the modifier "actual" in its policy in the instant case, defendant therefore incorporated this aspect of the holding in *Berry*.

[5] We note that our holding that the policy language does not as a matter of law bar coverage does not resolve the issue of whether a "substantial physical nexus" existed between the hit-and-run vehicle's contact and the contact with plaintiff's vehicle. *Berry*, 219 Mich at 347, *Said*, 152 Mich App at 242; *Methner*, 127 Mich App at 688.

the trial court did not rule on this issue. See *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (stating that "although an appellee need not file a cross-appeal to urge alternate reasons to support a judgment, to properly preserve a claim for appeal, the reasons must have been presented to the trial court" (citations omitted)); *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010) (noting that this Court may disregard issue preservation requirements if failure to do so would result in "manifest injustice" or "the issue involves a question of law and the facts necessary for its resolution have been presented").

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Mark T. Boonstra