STATE OF MICHIGAN

IN THE SUPREME COURT

JEREMY DROUILLARD,

Plaintiff-Appellant,

-vs-

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellee.

_____/

Supreme Court No. _____

Court of Appeals No. 334977

St. Clair County Circuit Court Case No. 1200263-NO

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellant
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48067
(248) 546-4649

FRASER & SOUWEIDANE

STUART A. FRASER IV (P29055)
Attorney for Plaintiff-Appellant
10 S. Main, Suite 302
P. O. Box 2304
Mt. Clemens, MI 48046
(586) 463-0100

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiff-Appellant, Jeremy Drouillard, seeks leave to appeal from the Michigan Court of Appeals decision dated February 27, 2018. A copy of that Opinion is Exhibit B to this application. That opinion reversed a circuit court decision denying the defendant's motion for summary disposition on Mr. Drouillard's claim for uninsured motorist benefits made under the terms of a policy issued by the defendant.

Plaintiff requests that this Court grant leave to appeal to consider an important legal question presented in this case. Alternatively, plaintiff requests that the Court summarily reverse the Court of Appeals' February 27, 2018, decision and remand this matter to the St. Clair County Circuit Court for further proceedings.

STATEMENT REGARDING QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER DEFENDANT WAS NOT ENTITLED TO SUMMARY DISPOSITION ON THE QUESTION OF WHETHER THIS CASE INVOLVES A "HIT-AND-RUN" VEHICLE FOR PURPOSES OF PLAINTIFF'S CLAIM FOR UNINSURED MOTORIST BENEFITS?

Plaintiff-Appellant says "Yes".

Defendant-Appellee says "No".

II. SHOULD THIS COURT SUMMARILY REVERSE THE COURT OF APPEALS FEBRUARY 27, 2018 DECISION WHICH CONCLUDED THAT DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION ON PLAINTIFF'S CLAIM FOR UNINSURED MOTORIST BENEFITS?

Plaintiff-Appellant says "Yes".

Defendant-Appellee says "No".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This cause of action arises out of injuries that Jeremy Drouillard sustained in a traffic accident that occurred in October 13, 2014. On that date, Mr. Drouillard was employed as an Emergency Medical Technician for a company, Tri-Hospital Emergency Medical Services Corp ("Tri-Hospital EMS").

On the evening of October 13, 2014, Mr. Drouillard was a passenger in an ambulance being driven by Angelica Schoenberg, responding to an emergency call in the City of Port Huron. Ms. Schoenberg was driving the ambulance west bound on Griswold Street, approaching the intersection of Griswold and 13th Street. At that intersection, Ms. Schoenberg encountered a stack of drywall that was laying in the middle of the road. Ms. Schoenberg could not avoid the drywall and Mr. Drouillard was injured in the crash that followed.

The sequence of events leading to this crash was witnessed by several residents of Griswold Street. Two of these witnesses, Steven Duckworth and Calli Reniff, were deposed in this case. Mr. Duckworth and Ms. Reniff were living together at the time at 1324 Griswold, within feet of the intersection of Griswold and 13th Street. Deposition of Steven Duckworth, at 8. As the accident in which Mr. Drouillard was injured unfolded, both Mr. Duckworth and Ms. Reniff were on the front porch of their home, smoking cigarettes. Duckworth Dep., at 10; Deposition of Calli Reniff, at 10.

While on their front porch, both Mr. Duckworth and Ms. Reniff saw a white pickup truck that was traveling northbound on 13th Street, approach that street's intersection with Griswold. The pickup truck was carrying approximately 30 sheets of 12 foot long drywall. Duckworth Dep., at 11-12; Reniff Dep., at 10-11.

There is a stop sign facing traffic on 13th Street at its intersection with Griswold. As the

white pickup truck approached that stop sign, Mr. Duckworth and Ms. Reniff could both see and hear the ambulance being driven by Ms. Schoenberg as it was traveling westbound on Griswold, approaching 13th Street. The ambulance had lights flashing and was also employing its sirens. Duckworth Dep., at 15.

Mr. Duckworth and Ms Reniff were watching as the driver of the white pickup truck, rather than waiting at the stop sign for the emergency vehicle to pass, decided to roll through the stop sign facing him, Reniff Dep., at 14, and he tried to cross the intersection before the ambulance got there. Duckworth Dep., at 30. To accomplish this, the driver of the white pickup had to accelerate dramatically to speed through the intersection and continue north-bound on 13th Street. *Id*., at 25; Reniff Dep., at 11.

But, as the driver of the white pickup accelerated to get across the intersection, the numerous sheets of drywall that were in the back of his pickup truck fell out of the bed of the truck and spilled onto Griswold. Duckworth Dep, at 11-12; Reniff Dep, at 21. Within seconds of the time that the drywall fell from the white pickup truck onto the street, the ambulance that Ms. Schoenberg was driving at a high rate of speed reached the intersection of Griswold and 13th Street. Duckworth Dep, at 16; Reniff Dep, at 23. As Ms. Reniff explained, the timing of this accident was such that the white pickup truck had barely cleared the intersection when the ambulance with Ms. Schoenberg and Mr. Drouillard in it reached 13th Street. *Id*., at 16-17.

Mr. Duckworth and Ms. Reniff watched as Ms. Schoenberg could not avoid the thick pile of drywall that had fallen onto the road. When the ambulance contacted the drywall, the ambulance was propelled airborne, two to three feet off the ground. Duckworth Dep., at 10-12. The front of the ambulance crashed violently into the road, doing substantial damage to the vehicle, *id* at 12, and

causing serious injury to Mr. Drouillard's back. Mr. Drouillard has since undergone three surgeries attempting to address the injuries he sustained in this accident.

The driver of the white pickup truck never stopped after accelerating through the intersection. Nor did he return to the scene after the ambulance crashed into the drywall that fell from his truck. Reniff Dep., at 21, 28. Mr. Duckworth and Ms. Reniff were only able to observe that the driver of the white pickup was a white male. Duckworth Dep., at 20; Reniff Dep., at 20-21. The identity of the driver of the white pickup has never been determined.

At the time of this accident, Mr. Drouillard's employer, Tri-Hospital EMS, had insurance through American Alternative Insurance Corporation ("AAIC"). A copy of the pertinent provisions of that policy is Exhibit A to this application. The insurance that Tri-Hospital EMS purchased from AAIC included a provision for uninsured motorist benefits. Under the terms of the uninsured motorist coverage in Tri-Hospital EMS's policy, AAIC agreed to pay "all sums the 'insured' is legally entitled to recover from the owner of an 'uninsured motor vehicle.'"

The term "uninsured motor vehicle" is defined in AAIC's policy in multiple ways, including the following:

> "Uninsured motor vehicle" means a land motor vehicle or "trailer":
>
> * * *
>
> d. That is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle an "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident".
>
> Policy (Exhibit A), at 4.

Mr. Drouillard brought this action against AAIC in the St. Clair County Circuit Court, seeking to recover uninsured motorist benefits available under the policy that AAIC and Tri-Hospital EMS entered into.

In July 2016, AAIC filed a motion for summary disposition. It argued in that motion that Mr. Drouillard was, as a matter of law, foreclosed from claiming uninsured motorist coverage under the terms of the policy it issued to Tri-Hospital EMS. In its motion for summary disposition, AAIC argued that this accident did not meet the policy's definition of a hit-and-run vehicle. That policy defined an uninsured motor vehicle as a hit-and-run vehicle whose driver and owner could not be identified which either hit or causes an object to hit a covered vehicle. AAIC contended that the drywall that the white truck deposited on Griswold did not hit the ambulance that Mr. Droulliard was riding in. Rather, according to AAIC, summary disposition was in order because the ambulance hit the drywall.

Plaintiff responded to AAIC's motion by noting that a panel of the Court of Appeals in *Dancey v Travelers Property Casualty Co of America*, 288 Mich App 1; 792 NW2d 372 (2010), construed precisely the same policy language in comparable circumstances and found that uninsured motorist benefits were appropriate. Plaintiff further argued in response to AAIC's motion that defendant was construing the word "hit" as used in its policy too narrowly. Plaintiff cited to a Merriam-Webster Dictionary definition of the word "hit" as including "coming into contact with." Thus, since the drywall came into contact with the ambulance in which Mr. Drouillard was riding, plaintiff argued that uninsured motorist coverage was available.

The circuit court held oral argument on AAIC's motion on August 8, 2016. At the conclusion on that hearing, the circuit court denied AAIC's motion for summary disposition. The

circuit court ruled that the case was controlled by the Court of Appeals decision in *Dancey*:

> THE COURT: Well when I first looked at this I had a lot of questions and uncertainty. After looking at it further I do think that the accident part of it, at least the striking of the drywall and how it got there and all of that and policy language is a situation that is controlled by *Dancey*. So, I am going to follow that reasoning in denying the Motion for Summary Disposition. I get myself in enough trouble with the Court of Appeals without trying to do it to adopt Mr. Kallas' position as something that goes against what I believe is my obligation as a Circuit Court Judge, which is to follow existing published case law that is on point in our situation. So that's what I intend to do.
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> Tr. 8/8/16, at 13.

A written order denying AAIC's summary disposition motion was signed by the circuit court on September 9, 2016. AAIC sought interlocutory review of that order, filing an application for leave to appeal in the Court of Appeals on September 27, 2016. On February 23, 2017, a two-person majority of this Court issued an order granting AAIC's application for leave to appeal.

Following briefing and oral argument, a panel of the Court of Appeals issued a published decision on February 27, 2018, reversing the circuit court's ruling. Exhibit B to this application is a copy of the Court of Appeals February 27, 2018 opinion. In its February 27, 2018 decision, a two person majority of the Court of Appeals ruled that for this accident to come within the definition of a hit-and-run vehicle the drywall had to hit the ambulance. Since the ambulance struck the drywall, the majority ruled that this case did not fit within the policy's definition of a hit-and-run vehicle:

> According to AAIC, this condition was not satisfied because the unrefuted testimony demonstrated that the pickup truck did not cause the building materials to hit the ambulance; rather, the ambulance hit the stationary building materials. We agree.
>
> The construction of the relevant policy language reflects a clear distinction between the direct object and indirect object. Coverage is available under the policy only if the subject of the sentence (the "vehicle," meaning the hit-and-run vehicle), caused the direct object ("an object") to hit the indirect object ("an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying' "). The order of the words in this sentence is

> grammatically distinct from the language that would be used to describe circumstances in which the hit-and-run vehicle caused the insured to hit an object. Interpreting the language at issue in a manner that would include those circumstances would require a "forced or constrained construction," which should be avoided.
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> Opinion (Exhibit B), at 5.

Judge Patrick M. Meter dissented from the majority's ruling. Relying on several prior decisions of the Court of Appeals construing comparable uninsured motorist hit-and-run provisions and the dictionary definition of the word "hit," Judge Meter came to the conclusion that because the ambulance made contact with the drywall that had fallen from the hit-and-run vehicle, Mr. Drouillard was entitled to claim uninsured motorist benefits under the policy's terms.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT AAIC WAS ENTITLED TO SUMMARY DISPOSITION ON MR. DROUILLARD'S CLAIM FOR UNINSURED MOTORIST COVERAGE ON THE GROUND THAT THE AMBULANCE HIT THE DRYWALL.

In its February 27, 2018 decision, a two person majority of the Court of Appeals came to the conclusion that, because Mr. Drouillard's vehicle hit the drywall and not vice versa, he had no claim to uninsured motorist benefits under AAIC's policy. In reaching this result, the Court of Appeals majority refused to follow a number of prior Court of Appeals decisions construing the same or comparable uninsured motorist coverage language.

One of the unique features of this case is that the author of the Court of Appeals majority opinion in this case, Chief Judge Michael J. Talbot, had to ignore a relatively recent published *per curiam* decision of a panel that he was on construing precisely the same policy language. In *Bahri v IDS Property Casualty Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014), the Court of Appeals was presented with a claim for uninsured motorist benefits in which the policy language allowed for such benefits where a hit-and-run vehicle "hits or causes an object to hit" another vehicle. Thus, the policy language at issue in *Bahri* was identical to that involved in this case.

In *Bahri*, a panel that included Chief Judge Talbot wrote that uninsured motorist benefits were unavailable under this policy language because the plaintiff "admitted that she made no direct or indirect *contact* with the third vehicle during her second accident. Thus, this section would not apply." *Id*., at 427 (emphasis added). Thus, in *Bahri*, what was central to the Court's construction of identical uninsured motorist coverage language was that there was no *contact* between plaintiff's

vehicle and either the hit-and-run vehicle itself or an object that was associated with that hit-and-run vehicle.

The holding in *Bahri* was entirely consistent with prior Michigan cases construing the same or comparable policy language that had held that the determining question for purpose of coverage is whether there was *contact* of any kind between plaintiff's vehicle and either the hit-and-run vehicle or an object emanating from that hit-and-run vehicle. *See Dancey*, 288 Mich App at 19 (describing identical policy language as requiring proof that "the unidentified vehicle causes an object to hit the unsecured's vehicle (*indirect physical contact*.") (emphasis added).[1]

Moreover, even without the more expansive language found in AAIC's policy that encompasses a hit-and-run vehicle "causing an object to hit" the plaintiff's vehicle, Michigan courts had recognized that uninsured motorist benefits were available where there was any direct *or indirect contact* between the two vehicles. This case law was summarized by the Court of Appeals in *Berry v State Farm Mutual Automobile Ins Co*, 219 Mich App 340; 556 NW2d 207 (1996). In *Berry*, the plaintiff lost control of her car when she struck a piece of metal that was resting on the road. The insurance policy at issue in *Berry* provided for uninsured motorist coverage where a hit-and-run vehicle "strikes" the insured or a vehicle the insured was occupying. The Court of Appeals in *Berry* found that the policy covered this accident:

> Thus, there must be some sort of actual physical contact between the hit-and-run vehicle and the insured or the insured's vehicle. See, e.g., *Said v. Auto Club Ins. Ass'n*, 152 Mich.App. 240, 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.*

[1]The facts of the *Dancey* case were, as the trial court noted, indistinguishable from this case. There, the plaintiff was injured after hitting a ladder that was resting on the freeway. Thus, using the terminology that the Court of Appeals majority used in this case, the plaintiff's vehicle in *Dancey* hit the ladder; the ladder did not hit plaintiff's vehicle.

> *Ass'n v. Methner*, 127 Mich.App. 683, 339 N.W.2d 234 (1983). However, 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*.
>
> *Id*., at 347 (emphasis added).

See also McJimpson v Auto Club Ins Co, 315 Mich App 353, 359-360; 889 NW2d 724 (2016) (reaffirming the holding in *Berry* that uninsured motorist benefits are available "as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs"). (Per J. Wilder).[2]

In addition, as even the majority opinion appeared to concede, the prior Michigan case law construing policy language requiring that an object associated with a hit-and-run vehicle "hit" or "strike" the plaintiff's vehicle is consistent with a dictionary definition of those terms. In responding to the defendant's motion for summary disposition, plaintiff cited to the Meriam-Webster Dictionary, and its definition of the word "hit," which includes "to come in contact with." In interpreting language that is undefined in a contract, courts may consult dictionary definitions. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010); *Coates v Bastian Bros, Inc.*, 276 Mich App 498, 504; 741 NW2d 539 (2007).

Applying this definition of the word "hit", the hit-and-run provision of AAIC's uninsured motorist provision should be read as requiring that the unidentified vehicle must either come into contact with the vehicle in which Mr. Drouillard was riding or that unidentified vehicle must cause

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[2]The Michigan Court of Appeals "contact" requirement as reflected in such cases as *Berry* and *Dancey* is also consistent with several decisions from outside this state construing comparable language. *Cincinatti Ins Co v Pritchett*, 3191 Ill Dec 744; 31 NE2d 420 (Ill App 2015); *State Farm Mut Auto Ins Co v Baldwin*, 373 SW3d 424 (Kent 2012).

an object to come into contact with Mr. Drouillard's vehicle. There is no question that the actions of the driver of the white pickup truck resulted in drywall coming into contact with the ambulance that Mr. Drouillard was a passenger in. For that reason, the circuit court correctly rejected AAIC's request for summary disposition on Mr. Drouillard's claim for uninsured motorist benefits.

There is one final reason why the Court of Appeals decision in this case has to be wrong. That decision cannot be squared with the language actually used in AAIC's policy. To repeat, the pertinent language from AAIC's policy provides the following definition of a hit-and-run vehicle:

> "Uninsured motor vehicle" means a land motor vehicle or "trailer":
>
> * * *
>
> d. That is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle an "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident".
>
> Policy (Exhibit A), at 4.

Confining itself exclusively to the second sentence of subparagraph (d) of the policy's definition of an "uninsured motor vehicle," the Court of Appeals majority rejected all of the prior Michigan case law that required only physical contact between the unidentified vehicle and plaintiff's vehicle. The majority concluded, instead, that because the ambulance hit the drywall and not vice versa, uninsured motorist coverage was not available.

In reaching this result, the Court of Appeals majority failed to account for the third sentence of subparagraph (d). That sentence specifies that "if there is *no direct physical contact* with the hit-and-run vehicle," the accident facts must be corroborated by competent evidence other than the

plaintiff's own testimony.

The structure of subparagraph (d) is clear. The second sentence of that subparagraph posits two scenarios in which a hit-and-run vehicle may give rise to uninsured motorist benefits - where that vehicle "hits" plaintiff's vehicle or where that vehicle "cause[s] an object to hit" plaintiff's vehicle. The third sentence of paragraph (d) provides an additional requirement that must be met where the second of the two scenarios expressed in the preceding sentence is in play. Where the hit-and-run vehicle does not "hit" the plaintiff's vehicle, to obtain uninsured motorist coverage under the policy, the plaintiff must also produce corroborating evidence of the facts underlying the accident.

But what is of overwhelming significance for purposes of the issue raised in this case is the language that the policy uses in the third sentence of subparagraph (d) to introduce this additional evidentiary requirement - "if there is no direct physical contact with the hit-and-run vehicle." This qualifying language is obviously a reference to the preceding sentence and the verb that was used twice in that previous sentence - "hit." Notably, the opening phrase of the third sentence of subparagraph (d), while obviously referring to the preceding sentence, did not use the same verb, "hit," that was used in the preceding sentence. Clearly, this third sentence of subparagraph (d) could have been written to mirror the verb that was used in the previous sentence. Thus, the introductory clause of this third sentence could have been written as follows: "If the hit-and-run vehicle does not hit a covered auto. . ."

But, that is not the way the policy is written. Instead, to convey the notion that additional corroborating evidence is required in those situations in which the hit-and-run vehicle does not itself *hit* plaintiff's vehicle, the policy describes this scenario as one in which "there is no direct physical

contact" between the two vehicles. What is unmistakable from a consideration of the second and third sentences of subparagraph (d) together is that the policy itself *equates* the word "hit," as contained in the second sentence of that subparagraph, with the term "direct physical contact" as provided in the following sentence. As used in the policy, the word "hit" has to mean the same thing as "direct physical contact." That is precisely what plaintiff argued in the circuit court when it introduced the Merriam-Webster definition of the word "hit."

That is, in essence, also the conclusion that the Court of Appeals came to in such cases as *Berry, Dancey* and *McJimpson*, in interpreting similar or identical policy language - the word "hit" as used in the policy is synonymous with "to make contact with." Reading the AAIC policy in its entirety, the Court of Appeals majority had no basis for ignoring the impact of these prior decisions.

The Court of Appeals published decision in this case is, therefore, not only inconsistent with the approach employed by the Court of Appeals in a number of prior cases, it is an approach that is at odds with the language of the policy.[3] This Court should review and reverse the majority's construction of the policy language.

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[3]The majority's holding also holds out the prospect that certain accidents that should unquestionably be covered by an uninsured motorist provision would not be covered merely because of the fortuities of a particular accident. Consider the circumstances of a driver covered by policy language identical to that involved herein who is approaching an intersection with a green light. Just prior to that driver reaching the intersection, a vehicle runs a red light and proceeds into the intersection just ahead of the covered driver. The covered driver hits the side of the car that went through the red light. The driver of the covered vehicle is injured in the collision and the driver of the car that went through the red light leaves the scene and is never identified. Under the Court of Appeals majority opinion, despite the obvious contact between the two vehicles, this accident would not trigger uninsured motorist benefits because the plaintiff's car "hit" the hit-and-run vehicle, not vice versa.

II. ALTERNATIVELY, THIS COURT SHOULD SUMMARILY REVERSE THE COURT OF APPEALS DETERMINATION THE AAIC WAS ENTITLED TO SUMMARY DISPOSITION ON MR. DROUILLARD'S CLAIM FOR UNINSURED MOTORIST BENEFITS.

For the reasons discussed previously in this brief and for the additional reasons outlined in Judge Meter's dissent, this Court, in lieu of granting leave to appeal, should summarily reverse the Court of Appeals February 27, 2018 opinion.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, Jeremy Drouillard, respectfully requests that this Court grant leave to appeal and give plenary consideration to the legal issue presented in this application. In the alternative, plaintiff requests that this Court summarily reverse the Court of Appeals February 27, 2018 decision, reinstate the circuit court's September 9, 2016 order denying defendant's motion for summary disposition and remand this matter to the St. Clair County Circuit Court for further proceedings.

MARK GRANZOTTO, P.C.
/s/ Mark Granzotto
MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellant
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

FRASER & SOUWEIDANE
/s/ Stuart A. Fraser IV
STUART A. FRASER IV (P29055)
Attorney for Plaintiff-Appellant
10 S. Main, Suite 302
P. O. Box 2304
Mt. Clemens, MI 48046
(586) 463-0100

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