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STATE OF MICHIGAN

IN THE SUPREME COURT

JEREMY DROUILLARD,

Plaintiff-Appellant,

-vs-

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellee.

____/

Supreme Court No. 157518

Court of Appeals No. 334977

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

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF FILED PURSUANT TO THE COURT'S NOVEMBER 16, 2018 ORDER

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

RECEIVED by MSC 1/10/2019 3:06:29 PM

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii

STATEMENT REGARDING QUESTIONS PRESENTED vi

STATEMENT FACTS 1

ARGUMENT 7

I. THE COURT OF APPEALS MAJORITY ERRED IN CONCLUDING THAT AAIC WAS ENTITLED TO SUMMARY DISPOSITION ON MR. DROUILLARD'S CLAIM FOR UNINSURED MOTORIST COVERAGE SINCE THE FACTS OF THIS CASE MET THE POLICY'S DEFINITION OF A HIT AND RUN VEHICLE 7

A. The Dictionary Definition Of "Hit" 8

B. The History Of Uninsured Motorist "Hit And Run" Policy Language In Michigan Law 9

C. Construing The Hit And Run Provision In The Policy As A Whole, The Court Must Conclude That Only Physical Contact Between the Ambulance And The Drywall Is Necessary 19

RELIEF REQUESTED 25

RECEIVED by MSC 1/10/2019 3:06:29 PM

INDEX OF AUTHORITIES

Cases **Page**

Adams v Mr. Zajac, LCL, 110 Mich App 522; 313 NW2d 347 (1981) 10

American Motorists Ins Co v Llanes, 64 Mich App 105; 235 NW2d 77 (1975) 11

Auto Club Ins Ass'n v DeLaGarza, 433 Mich 208; 444 NW2d 803 (1989). 11

Auto Club Ins Ass'n v Methner, 127 Mich App 683; 339 NW2d 234 (1983) 11

Bahri v IDS Property Casualty Ins Co, 308 Mich App 420; 864 NW2d 609 (2014). 16

Basilla v Aetna Ins Corp, 38 Mich App 260; 195 NW2d 893 (1972) 10

Berry v State Farm Mut Automobile Ins Co, 219 Mich App 340; 556 NW2d 207 (1996). 13

Cincinnati Ins Co v Pritchett, 391 Ill Dec 744; 31 NE3d 420 (2015) 22

Citizens Mut Ins Co v Jenks, 37 Mich App 378; 194 NW2d 728 (1972). 11

Clements v United States Fidelity and Guaranty Co, 243 Kan 124; 753 P2d 1274 (1988) 11

Dancey v Travelers Property Casualty Co of America,
288 Mich App 1; 792 NW2d 372 (2010) 5

Detroit Public Schools v Conn, 308 Mich App 234; 863 NW2d 373 (2014). 22

Dixie Ins Co v Mello, 75 Wash App 328; 877 P2d 740 (1994) 11

Drouillard v American Alternative Ins Co, 323 Mich App 212; 916 NW2d 844 (2018). 5

Fremont Ins Co v Izenbaard, 493 Mich 859; 820 NW2d 902 (2012) 8

Groshans v Dairyland Ins Co, 311 Ill App3d 876; 726 NE2d 138 (2000). 22

Hill v Citizens Ins Co of America, 157 Mich App 383; 403 NW2d 147 (1987). 11

Kersten v Detroit Automobile Inter-Insurance Exchange, 82 Mich App 459;
267 NW2d 425 (1978) 11

Kreager v State Farm Mutual Automobile Ins Co, 197 Mich App 577; 496 NW2d 346 (1993)
. . . . 12

RECEIVED by MSC 1/10/2019 3:06:29 PM

Lord v Auto-Owners Ins Co, 22 Mich App 669; 177 NW2d 653 (1970) 11

Maryland Casualty Co v McGee, 32 Mich App 539; 189 NW2d 44 (1971) 11

McJimpson v Auto Club Group Ins Co, 315 Mich App 353; 889 NW2d 724 (2016) 10

Medlock v Safeway Ins Co of Alabama, 15 So3d 501 (Ala 2009) 11

Michigan Millers Mut Ins Co v Bronson Plating Co, 445 Mich 558; 519 NW2d 864 (1994). . . . 8

Reed v Breton, 475 Mich 531; 718 NW2d 770 (2006). 7

Rohlman v Hawkeye-Security Ins Co, 442 Mich 520; 502 NW2d 310 (1993). 7

Rory v Continental Ins Co, 473 Mich 457; 703 NW2d 23 (2005) 7

Said v Auto Club Ins Ass'n, 152 Mich App 240; 393 NW2d 598 (1986). 11

State Automobile Mut Ins Co v Ropp, 7 Mich App 698; 153 NW2d 172 (1967). 11

Stagray v Detroit Automobile Inter-Insurance Exchange, 1 Mich App 34; 136 NW2d 51 (1965) 10

The Western Casualty & Surety Co v Strange, 3 Mich App 733; 143 NW2d 572 (1966) 11

Wilkie v Auto-Owners Ins Co, 469 Mich 41; 664 NW2d 776 (2003). 22

Wills v State Farm Ins Co, 222 Mich App 110; 556 NW2d 207 (1996) 17

Statutes

MCL 257.1101, *et seq*. 10

MCL 257.1112 10

MCL 257.625a 7

MCL 600.2955a(1) 7

MCL 600.2955a(2)(b). 7

Other Authorities

State Farm Mutual Automobile Insurance Co v Azihar: Protecting the New Victims of "hit and Run" in Underinsured Motorist Coverage," 54 La L Rev 1743 (1994) 10

RECEIVED by MSC 1/10/2019 3:06:29 PM

RECEIVED by MSC 1/10/2019 3:06:29 PM

STATEMENT REGARDING QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT DEFENDANT WAS 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".

RECEIVED by MSC 1/10/2019 3:06:29 PM

STATEMENT 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 the 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; she hit the drywall and Mr. Drouillard sustained injuries 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 during the discovery phase of 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; App 16a. As the accident unfolded, both Mr. Duckworth and Ms. Reniff were on the front porch of their home, smoking cigarettes. Duckworth Dep., at 10; App 17a; Deposition of Calli Reniff, at 10; App 33a.

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; App 17a; Reniff Dep., at 10-11, App 33a.

RECEIVED by MSC 1/10/2019 3:06:29 PM

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 emergency lights flashing and was also employing its sirens. Duckworth Dep., at 15; App 18a.

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; App 34a, and he tried to cross the intersection before the ambulance got there. Duckworth Dep., at 30; App 22a. 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; App 21a; Reniff Dep., at 11; App 33a.

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; App 17a; Reniff Dep, at 21, App 36a. 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; App 18a; Reniff Dep, at 23; App 36a. As Ms. Reniff explained, the timing of this accident was such that the white pickup truck had barely cleared the intersection when the ambulance reached 13th Street. *Id.*, at 16-17; App 34a-35a.

Mr. Duckworth and Ms. Reniff watched as Ms. Schoenberg could not avoid the thick pile of drywall that had just 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; App

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17a. The front of the ambulance crashed violently into the road, doing substantial damage to the vehicle, *id* at 12; App 17a, 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; App 36a, 37a. 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; App 19a; Reniff Dep., at 20-21; App 35a-36a. 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"). The insurance that Tri-Hospital EMS purchased from AAIC included a provision for uninsured motorist benefits. A copy of the policy provisions relating to uninsured motorist coverage can be found in plaintiff's appendix, App 11a - App 14a. 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 or driver of an 'uninsured motor vehicle.'" Policy, §(A)(1), App 11a:

Under §(F)(3) of the policy, the term "uninsured motor vehicle" is defined in multiple ways, including what the policy describes as 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, §(F)(3)(d); App 14a.

In September 2015, 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 had 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 must either "hit, or cause an object to hit" a covered vehicle. AAIC contended in its summary disposition motion 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 hit and run vehicle language in comparable circumstances and found that uninsured motorist benefits were available. 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 in response to AAIC's summary disposition motion a Merriam-Webster Dictionary definition of the verb "hit" as including "coming into contact with." Thus, since the drywall came into contact

RECEIVED by MSC 1/10/2019 3:06:29 PM

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.

Tr. 8/8/16, at 13; App 54a.

A written order denying AAIC's summary disposition motion was signed by the circuit court on September 9, 2016. App 57a-58a. 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 the Court of Appeals issued an order granting AAIC's application for leave to appeal. App 59a.

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. *Drouillard v American Alternative Ins Co*, 323 Mich App 212; 916 NW2d 844 (2018). App 60a-65a. In its February 27, 2018 decision, a two person majority of the Court ruled that for this accident to come within the policy's definition of a hit and run vehicle, the drywall had to physically strike the ambulance. Since the ambulance struck the drywall while it was lying on the street, the majority ruled that this

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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 [*sic*]construction," which should be avoided.
>
> 323 Mich App at 221-222; App 64a.

Judge Patrick M. Meter dissented from the majority's ruling. App 70a-72a. 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 all that was necessary for coverage was that the ambulance in which Mr. Drouillard was riding made contact with the drywall. 323 Mich App at 230-232; App 71a-72a.

Mr. Drouillard filed an application for leave to appeal in this Court. On November 16, 2018, the Court issued an order instructing the Clerk to schedule oral argument on Mr. Drouillard's application for leave to appeal. App. 73a. The Court's November 16, 2018 order further indicated that the parties were to submit supplemental briefs addressing the question of whether AAIC was entitled to summary disposition "on the ground that there was no 'uninsured motor vehicle' as defined in the insurance policy." *Id*.

RECEIVED by MSC 1/10/2019 3:06:29 PM

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ARGUMENT

I. THE COURT OF APPEALS MAJORITY ERRED IN CONCLUDING THAT AAIC WAS ENTITLED TO SUMMARY DISPOSITION ON MR. DROUILLARD'S CLAIM FOR UNINSURED MOTORIST COVERAGE SINCE THE FACTS OF THIS CASE MET THE POLICY'S DEFINITION OF A HIT AND RUN VEHICLE.

The issue presented in this case concerns the appropriate interpretation of the uninsured motorist provision of AAIC's policy and its definition of a hit and run vehicle. Because uninsured motorist benefits are not required by statute, it is AAIC's policy language that must control the resolution of this issue. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993); *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005).

It is, therefore, important to return to the policy language that controls this question. 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 §(F)(2)(d); App 14a.

To come within the definition of a hit and run vehicle for purposes of AAIC's policy, the vehicle must "hit, or cause an object to hit," the insured vehicle. Since there was no question that the white pickup truck did not itself strike the ambulance in which Mr. Drouillard was driving, the

question presented in this case is whether the white pickup "caused an object to hit" the ambulance.

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 struck the drywall as it lay on the road service, it could not be said that the drywall "hit" the ambulance that Mr. Drouillard was in. On that basis, the majority ruled that he had no claim to uninsured motorist benefits under AAIC's policy.

There are three distinct reasons why the Court of Appeals majority's interpretation of this policy language should be rejected.

A. The Dictionary Definition Of "Hit"

The Court of Appeals was called upon in this case to give meaning to the word "hit" as used in the uninsured motorist provision of AAIC's policy. This Court has recognized that a court may use a dictionary in determining the meaning of otherwise undefined provisions in an insurance policy. *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 568; 519 NW2d 864 (1994); *Fremont Ins Co v Izenbaard*, 493 Mich 859; 820 NW2d 902 (2012).

In response to AAIC's summary disposition motion, Mr. Drouillard cited to the Meriam-Webster Dictionary, and its definition of the word "hit," which includes "to come in contact with." In his dissent in the Court of Appeals, Judge Meter also relied on a dictionary definition of the word "hit" from another dictionary, the Random House Webster's College Dictionary. 323 Mich App at 232; App 72a. That dictionary defines "hit" to mean "to come against with an impact."

All that these dictionary definitions require in the circumstances of this case is that the ambulance in which Mr. Drouillard was riding came into contact with the drywall that had fallen from the white pickup. Based on these definitions of the word "hit," the Court of Appeals majority erred in reversing the circuit court's denial of AAIC's motion for summary disposition.

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The Court of Appeals in its unpublished decision in *Herrera v State Farm Mutual Automobile Ins Co*, Court of Appeals No. 329507, App. 84a-95a, used a comparable dictionary definition in similar circumstances. In *Herrera*, the panel was construing the hit and run provision of an uninsured motorist policy that allowed the recovery of benefits where the unidentified vehicle "strikes" the insured or the insured's vehicle. The panel in *Herrera* concluded that, based on the dictionary definition of the word "strikes," the policy at issue required only some form of physical contact between the unidentified vehicle and the plaintiff. The panel held in *Herrera*:

> Under the terms of the insurance policy and binding Michigan caselaw, the evidence presented below establishes a genuine issue of material fact as to whether the accident "involve[d] the operation, maintenance, or use of an insured motor vehicle as a motor vehicle," and whether the unidentified hit-and-run vehicle "str[uck]: a. the insured; or b. the vehicle the insured is occupying ...." *As denoted by the term "strikes," the policy requires physical contact between a hit-and-run vehicle and the insured or the vehicle that the insured is occupying. See Merriam-Webster's Collegiate Dictionary (11th ed.) (defining "strike," in relevant part, as "to come into contact forcefully," "to bring into forceful contact," and "to come into contact or collision with"*).
>
> *Herrera*, *8; App. 91a (emphasis added).

Applying these definitions to the policy language in question, this Court should conclude that the hit and run provision of AAIC's uninsured motorist policy applies where the unidentified vehicle causes an object to come into contact with insured or the insured's vehicle. Since there is no question that the drywall came into contact with Mr. Drouillard's vehicle, the Court of Appeals majority erred in concluding that Mr. Drouillard had no claim for uninsured motorist benefits.

B. The History Of Uninsured Motorist "Hit And Run" Policy Language In Michigan Law

Dictionary definitions of the verb "hit" support the conclusion that Mr. Drouillard is entitled to uninsured motorist benefits because the drywall that fell from the white pickup *made contact* with

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the ambulance in which he was riding. Precisely the same conclusion must be reached on the basis of the historical treatment of hit and run policy language in Michigan case law. As the Court of Appeals observed in *McJimpson v Auto Club Group Ins Co*, 315 Mich App 353; 889 NW2d 724 (2016), since the advent of uninsured motorist policies, Michigan courts "have considered various linguistic formulations of uninsured motorist coverage" pertaining to hit and run vehicles. *Id*., at 359.

The very earliest Michigan cases in this area[1] contained precisely the same language for the triggering of uninsured motorist benefits based on a hit and run vehicle; there had to be some form of "physical contact" between that unidentified vehicle and the plaintiff's vehicle.[2] From 1966, when the first case construing the hit and run provision of an uninsured motorist policy reached the Michigan appellate courts, until 1993, *every* Michigan appellate case on this subject involved policy

[1]Uninsured motorist insurance policies were not developed until the 1950's. *See* Rivera, *State Farm Mutual Automobile Insurance Co v Azihar*: Protecting the New Victims of "Hit and Run" in Underinsured Motorist Coverage," 54 La L Rev 1743, 1747 (1994). The first Michigan appellate case to ever mention the existence of such insurance coverage was the Court of Appeals decision in *Stagray v Detroit Automobile Inter-Insurance Exchange*, 1 Mich App 34; 136 NW2d 51 (1965).

[2]For a period of time, the "physical contact" requirement found in various insurers' policy language was not confined to uninsured motorist policies; it was also contained in a "hit and run" statute that was part of the Motor Vehicle Accident Claims Act, MCL 257.1101, *et seq*. A provision of that act allowed for suits against the Secretary of State where an injury resulted from the conduct of a driver, "but the identity of a motor vehicle and of the driver cannot be established." MCL 257.1112. In 1968, MCL 257.1112 was amended to establish as a condition precedent to such an action that there be "physical contact by the unidentified vehicle with the plaintiff or with a vehicle occupied by the plaintiff." *Basilla v Aetna Ins Corp,* 38 Mich App 260; 195 NW2d 893 (1972). In interpreting this statutory "physical contact" requirement, the Court of Appeals employed the same analysis that it used in construing the identical policy language that was then in vogue. *See e.g. Adams v Mr. Zajac, LCL*, 110 Mich App 522, 526-528; 313 NW2d 347 (1981).

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language requiring "physical contact" between the two vehicles.[3] During this 27 year period, Michigan courts determined that where the hit and run vehicle struck another car causing that car to strike an insured vehicle, the "physical contact" requirement was met. *See e.g. Lord v Auto-Owners Ins Corp*, 22 Mich App 669; 177 NW2d 653 (1970). Michigan courts further held during this time period that, where an object was propelled by an unidentified vehicle and that object struck the insured vehicle, the "physical contact" requirement of the uninsured motorist policy was also met. *See e.g. Hill v Citizens Ins Co of America*, 157 Mich App 383; 403 NW2d 147 (1987). But, consistent with the policy language requiring "physical contact" with the unidentified vehicle, Michigan courts recognized that where a hit and run vehicle did not make any contact with the insured vehicle, uninsured motorist benefits were unavailable even where the unidentified vehicle caused the accident. *See* e.g. *Citizens Ins Co v Jenks*, 37 Mich App 378; 194 NW2d 728 (1971). *Said v Auto Club Ins Ass'n*, 152 Mich App 240, 242; 393 NW2d 598 (1986); *Auto Club Ins Ass'n v Methner*, 127 Mich App 683, 687-689; 339 NW2d 234 (1983)[4]

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[3] *The Western Casualty & Surety Co v Strange*, 3 Mich App 733; 143 NW2d 572 (1966); *State Automobile Mut Ins Co v Ropp*, 7 Mich App 698; 153 NW2d 172 (1967); *Lord v Auto-Owners Ins Co*, 22 Mich App 669; 177 NW2d 653 (1970); *Citizens Mut Ins Co v Jenks,* 37 Mich App 378; 194 NW2d 728 (1972); *Maryland Casualty Co v McGee*, 32 Mich App 539; 189 NW2d 44 (1971); *Basilla v Aetna Ins Corp*, 38 Mich App 260; 195 NW2d 893 (1972); *American Motorists Ins Co v Llanes*, 64 Mich App 105; 235 NW2d 77 (1975); *Kersten v Detroit Automobile Inter-Insurance Exchange*, 82 Mich App 459; 267 NW2d 425 (1978); *Auto Club Ins Ass'n v Methner*, 127 Mich App 683; 339 NW2d 234 (1983); *Said v Auto Club Ins Ass'n*, 152 Mich App 240; 393 NW2d 598 (1986); *Hill v Citizens Ins Co of America*, 157 Mich App 383; 403 NW2d 147 (1987); *Auto Club Ins Ass'n v DeLaGarza*, 433 Mich 208; 444 NW2d 803 (1989).

[4] It is perhaps worth noting that, in a number of other states, uninsured motorist policies that were the subject of appellate decisions called for such benefits where the hit and run vehicle either hit the insured's vehicle *or caused an accident. See e.g. Medlock v Safeway Ins Co of Alabama*, 15 So3d 501 (Ala 2009); *Clements v United States Fidelity and Guaranty Co*, 243 Kan 124; 753 P2d 1274 (1988); *Dixie Ins Co v Mello*, 75 Wash App 328; 877 P2d 740 (1994). Under

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The first hit and run uninsured motorist case to reach the Michigan appellate courts that did not contain the "physical contact" language that had been construed in prior cases was *Kreager v State Farm Mutual Automobile Ins Co*, 197 Mich App 577; 496 NW2d 346 (1993). In *Kreager*, the plaintiff was driving his car when he was shot by a person in an unidentified vehicle. The plaintiff had a policy with the defendant allowing for the recovery of uninsured motorist benefits where plaintiff's injuries were caused by a hit and run vehicle, which was defined as one "whose owner or driver remains unknown and which *strikes* . . . the insured . . . and caused bodily injury to the insured." 197 Mich App at 581-582 (emphasis added). Thus, *Kraeger* was the first case in which a Michigan appellate court had to construe an uninsured motorist provision which required the hit and run vehicle to "strike" or "hit" the plaintiff or his vehicle.

What is notable about the Court of Appeals decision in *Kreager* is that the Court found the word "strike" in the parties' policy to be synonymous with the "physical contact" requirement that had been addressed in all prior Michigan cases. After citing the hit and run language contained in the policy, the *Kreager* Court ruled that the policy language before it required some "physical contact" or "physical nexus" between the hit and run vehicle and that of the plaintiff:

> The requirement in an uninsured motorist policy of "physical contact" between the allegedly uninsured vehicle that caused the accident and the plaintiff or the plaintiff's vehicle is enforceable in Michigan. *See Auto Club Ins. Ass'n v. Methner*, 127

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this particular policy language, actual physical contact between the vehicles was not necessary as long as the hit and run vehicle did something to contribute to the accident. These policies did, however, contain an additional qualification necessary where there was no contact between the vehicles - there had to some evidence substantiating the circumstances of the accident beyond that provided by the injured party. As expressed in the policy at issue in *Medlock*, benefits were recoverable in the absence of contact between the vehicles only if "the accident [is] corroborated by competent evidence other than the testimony of any person making a claim under this . . . insurance." 15 So3d at 504. According to plaintiff's research, no such policy language has ever been construed by a Michigan appellate court.

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> Mich.App. 683, 687, 339 N.W.2d 234 (1983). Plaintiff relies on the criticism of *Methner* in *Hill v. Citizens Ins. Co. of America*, 157 Mich.App. 383, 403 N.W.2d 147 (1987), but that case is distinguishable. In *Hill*, the plaintiff's husband was killed by a "large rock" projected through the windshield by the wheels of a passing truck. The Court applied a broad construction of the "physical contact" requirement, see *id*. at 391, 403 N.W.2d 147, but nonetheless concluded that "[i]t is still necessary that the proofs establish a substantial physical nexus between the disappearing vehicle and the object cast off or struck." Id. at 394, 403 N.W.2d 147.

Id., at 582.

The Court of Appeals was to conclude in *Kreager* that plaintiff's claim for uninsured motorist benefits failed because there was not a sufficient "physical nexus" between the unidentified vehicle and the injuries that plaintiff sustained:

> *Plaintiff's injuries lack a sufficient "physical nexus" with the unidentified vehicle*. Unlike the plaintiff in Hill, supra, plaintiff was not injured by an object accidentally projected by the uninsured vehicle. Rather, the "projectile" involved was a bullet fired from the handgun used by the assailant. There was no projection resulting from the vehicle itself. The same may be said of the bottle thrown from the other car. Under the facts of the case, the bottle itself did not cause plaintiff's injury and therefore is irrelevant to our inquiry.
>
> *Because the lack of physical contact disposes of this question*, we do not reach whether plaintiff's injury was caused "by accident" and, if so, whether it arose out of the "ownership, maintenance or use of an uninsured motor vehicle."

Id., at 583 (emphasis added).

The precise holding announced by the Court in *Kreager* is of no importance in this case. What is significant, however, is that the Court of Appeals in *Kreager* found that contractual language requiring that the hit and run vehicle "strike" the plaintiff or his vehicle represented no change from the policy language that had been considered in all prior Court of Appeals decision - requiring "physical contact" between the unidentified vehicle and the insured vehicle.

This point was reinforced in the Court of Appeals decision three years later in *Berry v State*

Farm Mut Automobile Ins Co, 219 Mich App 340; 556 NW2d 207 (1996). In *Berry*, the plaintiff was involved in an accident after the car she was driving struck a piece of scrap metal resting in the road. Like *Kreager*, the uninsured motorist provision of the parties' policy in *Berry* allowed for recovery of benefits where the driver of an unidentified vehicle *strikes* the insured or the insured's vehicle. Like *Kreager*, the Court in *Berry* found this contractual language to be synonymous with the "physical contact" requirement that had been the subject of numerous prior Michigan appellate decisions. Thus, the *Berry* Court noted:

> Defendant acknowledges, and we agree, that *the policy's requirement that a hit-and-run vehicle must strike the insured's vehicle constitutes a requirement of physical contact between the hit-and-run vehicle and the insured's vehicle.* Defendant's arguments all concern whether physical contact between a hit-and-run vehicle and plaintiff's vehicle occurred in this case.

219 Mich App at 346 (emphasis added).

In the course of its decision, the *Berry* Court stressed repeatedly that, to satisfy the hit and run provision of the parties' policy, the plaintiff had to establish "physical contact" with the unidentified vehicle:

> The requirement in an uninsured motorist policy of "*physical contact*" between a hit-and-run vehicle and the insured or the insured's vehicle is enforceable in Michigan. The *physical contact* requirement is designed to reduce the possibility of fraudulent phantom vehicle claims. Thus, there must be some sort of actual physical contact between the hit-and-run vehicle and the insured or the insured's vehicle. 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).

Having found the policy language at issue in that case - that the hit and run vehicle *struck* the plaintiff's vehicle - required only physical contact with the plaintiff's vehicle, the Court of Appeals

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in *Berry* was not compelled to determine whether the piece of scrap metal that plaintiff ran over "struck" the plaintiff's car or whether plaintiff's car "struck" the scrap metal. Construing the policy as requiring only some direct or indirect "physical contact" between plaintiff's vehicle and the piece of metal which had been deposited on the road by an unidentified vehicle, the panel ruled in *Berry* that plaintiff satisfied the physical contact requirement to recover uninsured motorist benefits.

Both the holding and the analysis in *Berry* are of importance here. Finding that the word "strikes" in the policy at issue was synonymous with "physical contact," the Court in *Berry* concluded that uninsured motorist benefits were recoverable where the plaintiff's vehicle made physical contact with the scrap metal, despite the fact that it might be said that the scrap metal did not "strike" plaintiff's vehicle.

In 2004, in its unpublished decision in *Hines v Pioneer State Mutual Ins Co*, Court of Appeals No. 247093, App 74a-83a, the Court of Appeals considered for the first time a slightly different variation of the hit and run vehicle definition in an uninsured motorist provision. The policy at issue in *Hines* defined a hit and run vehicle as one whose driver could not be identified and "which hits or causes an object to hit" the insured or the insured's vehicle. Thus, *Hines* was the first case to reach the Michigan appellate courts with the same language as that contained in AAIC's policy in this case.

What is of significance in the Court of Appeals decision in *Hines* is that the panel once again equated the operative verb used in the policy - "hit" - with some form of physical contact between the unidentified vehicle and plaintiff's vehicle. Thus, the Court in *Hines* ruled: "The insurance policy at issue here essentially indicated that such benefits would be paid if *physical contact* between the plaintiff and the insured vehicle caused the plaintiff's injury." *Hines*, *6; App. 79a (emphasis

added).

The Court of Appeals considered the same policy language in two later published cases. The first of these was *Dancey v Travelers Property Casualty Co of America*, 288 Mich App 1; 792 NW2d 372 (2010), the case that the circuit court followed in denying AAIC's motion for summary disposition. In *Dancey*, the plaintiff was injured when she ran into a ladder that was lying in her lane of traffic on a Detroit area freeway. The plaintiff in *Dancey* hit the ladder, not vice versa. Despite that fact, the Court of Appeals held in *Dancey* that the plaintiff could recover uninsured motorist benefits under policy language that defined a hit and run vehicle as one that "hits, or causes an object to hit" a covered vehicle.

In analyzing this language, the Court in *Dancey* held, just as the panel did in *Hines*, that the policy required some form of physical contact between the two vehicles, either direct or indirect:

> Defendant's policy is somewhat different from those at issue in *Kersten* and *Hill* and from the statute at issue in *Adams,* because rather than requiring direct physical contact between an unidentified vehicle and the insured's vehicle, *it provides that coverage is available in two situations: (1) where there is vehicle-to-vehicle contact (direct physical contact); and (2) where the unidentified vehicle causes an object to hit the insured's vehicle (indirect physical contact).*

288 Mich App at 18 (emphasis added).

The second published Court of Appeals decision construing "hit and run"language identical to that presented in this case was *Bahri v IDS Property Casualty Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014). In *Bahri*, the Court of Appeals once again equated the policy language requiring that the hit and run vehicle *hit* the plaintiff or plaintiff's vehicle as synonymous with "physical contact" between the two. Thus, in *Bahri*, the panel expressly held that to satisfy the definition of a hit and run vehicle as one requiring that the unidentified vehicle "hits or causes an object to hit"

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plaintiff, “the definition requires *some sort of physical contact* with the insured.” *Id.*, at 427 (emphasis added).

What this brief history of the hit and run language in Michigan uninsured motorist policies demonstrates is that the first generation of such provisions uniformally required some type of *physical contact*, either direct or indirect, between the unidentified vehicle and the plaintiff or the plaintiff’s vehicle. *See* fn. 3, *supra.* Over time, different formulations of the relevant policy language were introduced requiring that the unidentified vehicle “strike”, *Kraeger; Berry; Wills v State Farm Ins Co*, 222 Mich App 110, 112-115; 556 NW2d 207 (1996), or “hit” the plaintiff. *Hines; Dancey, Bahri*. Yet, in every case decided by the Court of Appeals prior to this one, the courts held that this alternative policy language was not meant to alter the “physical contact” requirement that had been contained in prior uninsured motorist policies.

This point was perhaps most clearly expressed in the Court of Appeals unpublished decision in *Tucker v Doe*, Court of Appeals No. 330199, App. 98a-102a. The policy language at issue in that case required that the covered party’s injuries result from the unidentified vehicle “striking” him or his vehicle. The Court of Appeals in *Tucker,* once again using a dictionary definition of the operative word used in the policy - “striking,” held that uninsured motorist benefits were available as long as there was some form of physical contact between the hit and run vehicle and the plaintiff’s vehicle:

> Turning to the present case, uninsured motorist insurance coverage exists under the policy in the event of a hit-and-run accident when a hit-and-run motor vehicle "causes bodily injury to a person covered under this section as the result of striking that person or a motor vehicle which that person is occupying at the time of the accident" (italics added). *As commonly understood, among other definitions, the term "strike" means "to come into contact forcefully," "to strike at: HIT;" "to bring into forceful contact;" and "to come into contact or collision with."* Merriam-Webster's

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> Collegiate Dictionary (2014). In other words, as ordinarily understood, in the context of a car accident, the *use of the term "striking" clearly denotes a physical contact requirement*. Indeed, this Court has previously treated policies using the word "strike" as imposing a "physical contact" requirement. *See, e.g., Wills*, 222 Mich. App. at 112; *Berry,* 219 Mich. App. at 342
>
> *Tucker,* *3-4; App. 100a-101a.

The views expressed in each of these cases as to the continuing viability of the "physical contact" requirement found in the earlier versions of uninsured motorist policies issued in Michigan is fully supported by the work of the Insurance Services Office, Inc. ("ISO"), a company that develops and publishes standard policy language that many insurance companies use. Among the standard policies that the ISO promulgates is a Personal Auto Policy (PAP) form that includes a provision for uninsured motorist coverage which contains a provision for coverage arising out of a hit and run vehicle.

As reflected in the Michigan case law discussed above, the ISO PAP form in its earlier formulation called for uninsured motorist benefits where the hit and run vehicle made "physical contact" with the insured's vehicle. ISO later changed its form policy to require that the unidentified vehicle "hits" the insured or the insured's vehicle. But, as noted in Magarik, 2 Casualty Insurance Claims (4th ed), this change in the language of the ISO PAP form was *not* intended to change the meaning of the policy:

> The ISO PAP form includes in its definition of "uninsured motor vehicle" 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'; b. A vehicle which you or any 'family member' are 'occupying', or c. 'Your covered auto.'"
>
> The keyword in this clause is "hits." *This replaces former wording that used the phrase "physical contact." The meaning was intended to be the same.*

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Id., §24:10 (emphasis added).

As this commentary demonstrates, earlier versions of uninsured motorist policies required some type of "physical contact" between the hit and run vehicle and the plaintiff's vehicle. While the formulations of the policy language may have evolved over time, the intent of the newer policy language was not meant to alter the requirements of some physical contact.

Until the majority issued its decision in this case, Michigan courts had universally recognized that physical contact with the unidentified vehicle, either direct or indirect, represented the essential component of a hit and run uninsured motorist claim regardless of whether the policy language called for "physical contact" between the vehicles, or it required that the unidentified vehicle "hit" or "strike" the insured's vehicle. Here, there is no question that the vehicle in which Mr. Drouillard was riding made physical contact with the material that had fallen out the back of the white pickup. Since the Michigan cases have properly recognized that the "hit" requirement in the parties' policy is synonymous with "physical contact," the Court of Appeals majority erred in concluding that AAIC was entitled to summary disposition on Mr. Drouillard's claim.

C. Construing The Hit And Run Provision In The Policy As A Whole, The Court Must Conclude That Only Physical Contact Between the Ambulance And The Drywall Is Necessary.

Even if the Court were to reject the two foregoing arguments as to the interpretation of uninsured motorist provisions of the parties' policy, the Court would still be compelled to reverse the Court of Appeals majority on the basis of the language of the policy itself. The Court of Appeals majority rejected Mr. Drouillard's argument that only physical contact was required between the ambulance and the drywall that had been dumped onto the road. The Court of Appeals majority held, instead, that to give rise to uninsured motorist coverage, the drywall had to "hit" Mr.

Drouillard's vehicle. Since, in the majority's view, it was the ambulance that "hit" the drywall, uninsured motorist coverage was unavailable.

In arriving at this conclusion, the Court of Appeals majority confined itself to the second sentence of the policy's definition of a hit and run vehicle. That second sentence states that, "the vehicle must hit, or cause an object to hit and 'uninsured,' a covered 'auto', or a vehicle an'insured' is occupying. Policy, §(F)(3)(d); App. 14a.

In reaching this result, the Court of Appeals majority completely failed to account for the sentence in the policy that follows immediately thereafter. That third sentence of §(F)(3)(d) specifies that "[i]f 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 plaintiff's own testimony. *Id.* (emphasis added).

The structure of §(F)(3)(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 unidentified vehicle "hits" plaintiff's vehicle or where that vehicle "cause[s] an object to hit" plaintiff's vehicle. The third sentence of subparagraph (d) provides an additional requirement that must be met where the second of the two scenarios expressed in the second sentence is in play. Where the hit-and-run vehicle does not itself "hit" the plaintiff's vehicle, but causes an object to hit plaintiff's vehicle, to obtain uninsured motorist coverage under the policy, the plaintiff must also produce corroborating evidence of the facts underlying the accident.[5]

But what is of overwhelming significance for purposes of the issue raised in this case is the

[5]Based on the testimony provided by at least two disinterested eyewitnesses, Ms. Reniff and Mr. Duckworth, there has never been any suggestion that this third sentence of subparagraph (d) has not been satisfied.

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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 that 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. . .," additional corroborating evidence would be necessary.

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, but only causes an object to hit that 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 Mr. Drouillard argued in the circuit court when he introduced the Merriam-Webster definition of the word "hit" to argue that the policy only required physical contact between the drywall and the ambulance. That is 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 to be read as synonymous with "to make contact with." In

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ignoring the impact of the third sentence of §(F)(3)(d), the Court of Appeals majority overlooked the fact that the text of the policy itself equated the word "hit" with "physical contact."

It is axiomatic that an insurance policy is to be "read . . . as a whole, giving harmonious effect, if possible, to each word and phrase." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50, n. 11; 664 NW2d 776 (2003); *Detroit Public Schools v Conn*, 308 Mich App 234, 251-252; 863 NW2d 373 (2014). Here, construing the policy as a whole, by its very terms, it equates the word "hit" with "physical contact."[6]

The Court of Appeals published decision in this case is, therefore, not only inconsistent with the dictionary definition relied on by Mr. Drouillard and the approach employed by the Court of

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[6]There is one other way to construe the language of the third sentence of subparagraph (d) of the policy. That alternative interpretation is reflected in the decision of the Illinois Court of Appeals in *Cincinnati Ins Co v Pritchett*, 391 Ill Dec 744; 31 NE3d 420 (2015). *Pritchett* involved an uninsured motorist policy with a hit and run provision that is virtually identical to that involved in this case. That policy contained a sentence that specified that the unidentified vehicle "must hit, or cause an object to hit" the insured or his vehicle. That sentence in the policy was followed immediately by the same qualifying language as involved here: "If there is no physical contact with the hit and run vehicle," additional evidentiary support for the claim is required. The parties in *Pritchett* disagreed as to the meaning of this latter sentence. The insurance company plaintiff argued that this language pertaining to situations involving no physical contact was a reference to those circumstances in which "the alleged 'contact' is with an 'object' rather than with the hit and run vehicle itself." 31 NE3d at 425. Thus, the insurer in *Pritchett* contended (just as Mr. Drouillard has here) that this sentence was a reference to the "causes an object to hit" language in the policy's preceding sentence. The injured party in *Pritchett* offered another reading of this sentence requiring additional corroboration. According to the injured party, this language meant that no physical contact of any kind between the vehicles was required to give rise to uninsured motorist coverage. The injured party, therefore, argued that this sentence requiring corroboration where there was no physical contact rendered the uninsured motorist provision of the policy ambiguous and had to be construed in his favor. The Illinois Court of Appeals in *Pritchett* found both of these conflicting interpretations to be reasonable and, construing the policy language in favor of the insured, it ruled that uninsured motorist coverage was available even in the absence of any physical contact, direct or indirect, between the vehicles. *Id*., at 425-426; *see also Groshans v Dairyland Ins Co*, 311 Ill App3d 876; 726 NE2d 138 (2000).

Appeals in a number of prior cases, it is also an approach that is at odds with the language of the policy itself. For each of these reasons, the Court should reverse the Court of Appeals determination.

Finally, the Court should consider the practical ramifications of the Court of Appeals majority's holding. That holding will assure that certain accidents which should unquestionably come within the uninsured motorist provision of a policy will not be covered merely because of the fortuities of a particular accident. Consider the circumstances of a driver (the plaintiff) covered by an insurance policy containing language identical to that involved in this case who is driving through an intersection on a green light when his vehicle collides with another car who has run a red light. The driver of the car that ran the red light immediately drives away and can never be identified. Assume further that the accident is witnessed by multiple disinterested persons who would supply corroborating evidence as to the circumstances of the accident.

There are two possible ways in which such a collision could take place and, according to the Court of Appeals majority, it would make all the difference as to how that collision occurred. If the plaintiff driver reached the center of intersection first such that the never-identified driver struck the side of the plaintiff's vehicle, even the Court of Appeals majority would presumably conclude that the hit-and-run driver "hit" the plaintiff's vehicle and uninsured motorist coverage would be triggered.

But, according to the Court of Appeals majority, that result would not hold true if the driver running the red light beat the plaintiff to the intersection such that plaintiff's vehicle struck the side of the unidentified car. Under the majority's logic, it would have to be said that plaintiff's vehicle "hit" the hit-and-run vehicle not vice versa. Despite the fact that there was no doubt that the two vehicles made contact with each other, according to the rationale of the majority opinion, the policy

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language would not extend to this latter situation.

This distinction between a covered and uncovered event makes no sense. Both of these potential accidents should give rise to uninsured motorist benefits. To avoid this senseless result, this Court should hold for all of the reasons discussed in this brief that the policy in question gives rise to uninsured motorist coverage provided that there was physical contact between the drywall dumped onto the road and the ambulance in which Mr. Drouillard was riding.

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RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, Jeremy Drouillard, requests that this Court reverse the Court of Appeals February 27, 2018 decision, reinstate the circuit court's September 9, 2016 order denying AAIC'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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