STATE OF MICHIGAN
IN THE SUPREME COURT

JEREMY DROUILLARD,

Plaintiff/Appellant,

-vs-

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant/Appellee.

Supreme Court No: 157518
COA No: 334977
LC No: 15-002282-NI

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DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO THE COURT'S NOVEMBER 16, 2018 ORDER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case Law:

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WAS THE COURT OF APPEALS CORRECT IN FINDNG THAT THE TRIAL COURT ERRED IN DENYING SUMMARY DISPOSITION BASED ON THE DEFINITION OF "HIT AND RUN" VEHICLE WHICH REQUIRES THAT THE VEHICLE CAUSE AN OBJECT TO HIT THE INSURED VEHICLE?

Plaintiff-Appellant Answers:	NO
Defendant-Appellee Answers:	YES

STATEMENT OF FACTS

Introduction

At the time of the incident that is the subject of this action, Plaintiff was employed by Tri-Hospital EMS. He was riding as a passenger in a Tri-Hospital EMS ambulance.

At the intersection of Griswold and 13th Street the ambulance ran into a pile of construction materials. All witnesses have described the construction materials as a pile of drywall (as much as 2 feet high).[1] Plaintiff claims he sustained back injuries as a result of the impact. The damages sought are those in excess of first party no-fault benefits that would be available in a third-party automobile action. The complaint alleges that an unidentified vehicle dropped the load of construction materials onto Griswold prior to the accident.

AIIC issued an insurance policy to Tri-Hospital EMS which contains uninsured motorists coverage. If the coverage applies to this circumstance, Plaintiff would be a person that could receive benefits. However, in order for the coverage to apply, there must be an "uninsured motor vehicle" as defined in the insurance policy.

Underlying Accident

The incident took place on October 13, 2014 at approximately 8:00 pm.[2] The ambulance was on route to a residence on the 14th block of Griswold.[3] The ambulance

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[1]It would need to be a high (and consequently, highly visible) pile in order to cause a heavy truck (the ambulance) to become airborne and come down hard impacting the front end of the vehicle as Plaintiff alleges. One witness claims that there were also two by fours between sections of drywall. The impact with the pile of construction materials apparently caused the ambulance to temporarily go airborne and to come down stopping suddenly on the front end.

[2]Police Report, App 1b

[3]Angelica Schoenberg deposition, pp. 41-44, App 17b-20b

had turned westbound on Griswold from 10th Street and was traveling in the southern, westbound lane of travel.[4] The Tri-Hospital EMS ambulance was being driven by Angelica Schoenberg and had accelerated to 45 mph at the time of the impact.[5] She did not see the pile of drywall in the road prior to impact. She testified at her deposition:[6]

Question: When did you first observe whatever it was in the road?
Answer: After ***I hit it.***
Question: So you never saw it before hand?
Answer: No.
Question: After ***you hit it*** I presume you get out of the truck and you see what ***you hit***?
Answer: Yes.
Question: What did you observe as to what it was that ***you hit***?
Answer: Drywall.
Question: Can you describe it in any more detail to me. I know what drywall is but can you tell me dimensions can you tell me the pile, what it was like?
Answer: It was scattered all over Griswold.
Question: After ***you hit it?*** (Emphasis added).
Answer: Yes. There was dust in pieces and debris everywhere.

Schoenberg further testified:[7]

Question: You also agree with me, would you not, that whatever ***you hit*** in that road, it was a stationary object?
Answer: Yes.

* * * * *

Question: You don't take any issue with the statement I would make that ***you struck*** whatever was in the road there?
Answer: I do not take any issue with that.
Question: You agree with that?
Answer: ***Yes.*** (Emphasis added)

Ms. Schoenberg further testified:[8]

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[4]Angelica Schoenberg deposition, pp. 41-44, App 17b-20b

[5]Angelica Schoenberg deposition, p.26, App 16b

[6]Angelica Schoenberg deposition, pp. 45-46, App 21b-22b

[7]Angelica Schoenberg deposition, pp. 49-51, App 23b-25b

[8]Angelica Schoenberg deposition, p.26, App 16b

Question: Did you ever ask Jeremy did he see what was in the road?
Answer: No. We both said what did ***we just hit***.

* * * * *

Question: So he never indicated to you in any fashion that he saw anything in the road before ***you hit it*** or that he saw a truck?
Answer: No.

THE WITNESS: To be clear, I did not see the drywall prior to ***hitting it.*** (Emphasis added).

In response to Defendant's Request to Admit 4, Plaintiff has conceded that the drywall pile was stationary at the time of the impact:[9]

> Request to Admit 4: Please admit that the drywall or the object or objects was stationary in the roadway at the time of the impact.
>
> ANSWER: **Yes. I admit the drywall was stationary in the roadway at the time of the impact.**

The bystanders have given varying accounts of when this occurred and what direction the truck headed after dropping the load of drywall.

Bystander Testimony

Neighborhood witness, Christopher Thompson testified as follows:[10]

Question: What do you see next with regard to the ambulance that was driving down Griswold?
Answer: I saw the ambulance strike the pile.

Stephen Duckworth, another neighborhood witness, testified what he claims happened. Many of Mr. Duckworth's observations differ from Mr. Thompson's description in many respects, his characterization of what and who did the hitting was identical:[11]

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[9]Plaintiff's Answers to Requests for Admission, App 30b-31b

[10]Christopher Thompson deposition, p. 18., App 34b

[11]Stephen Duckworth deposition, p. 45.,App 36b

Answer: I don't remember if I told them about the pickup, I told them I seen the accident, I seen the drywall in the road and the ambulance hit the drywall and all that. I don't know for sure if I told them about the pickup truck. I believe I did.

Stephen Duckworth's girlfriend at the time, Calli Reniff, also claims to have witnessed the impact, stating:[12]

Answer: Yes, Like I said, I barely seen the back of the truck clear the other side of 13th and the ambulance was striking the drywall.

There is no dispute from any witness that the pile of drywall was completely stationary in the roadway at the time of impact.

The Insurance Policy

AAIC issued "Michigan Uninsured Motorists Coverage" to Tri-Hospital EMS.[13] It is not contested that, as an occupant of the covered vehicle, Plaintiff is "an insured" (provided coverage is available under the complete terms of the form). The insuring agreement reads in relevant part as follows:[14]

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle".
>
> [All words and phrases that are within quotations are defined in the coverage form.]
>
> "Uninsured motor vehicle" is defined under [F. Additional Definitions 3a-d][15]

Paragraph F. d of the coverage form reads, in relevant part, as follows:[16]

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[12]Calli Reniff deposition, pp. 23-24., App 38b

[13]AAIC's uninsured motorist provisions., App 39b-42b

[14]AAIC's uninsured motorist provisions.,App 42b

[15]Paragraphs a-c are inapplicable to this case as these provisions involve known vehicles and operators who either have no insurance or have an inadequate insurance.

[16]AAIC's uninsured motorist provisions., App 42b

> As used in this endorsement:
>
> 3. "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".

Procedural History

AAIC filed its Motion for Summary Disposition on the basis that it does not owe uninsured motorist benefits based on the uninsured motorist provisions of its policy.[17] A hearing on the motion was held on August 8, 2016, with the Court ultimately denying AIIC's Motion for Summary Disposition.[18] The Trial Court issued its Order on September 9, 2016, denying AAIC's Motion for Summary Disposition.[19] AAIC timely filed its Application for Leave to Appeal on September 27, 2016.[20]

On February 23, 2017, the Court of Appeals granted AAIC's Application for Leave to Appeal, limited to the issues raised in the Application and supporting Brief.[21] The parties filed briefs in accordance with the February 23, 2017 Order of the Court of Appeals. Oral argument was held in on February 6, 2018.[22] The Court issued its opinion and order on February 27, 2018 in which the Court of Appeals held:[23]

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[17]Trial Court Docket, App 45b

[18]August 8, 2016 Trial Court Hearing Transcript, App 49b - 63b

[19]September 9, 2016 Trial Court Order entered denying AAIC's Motion for Summary Disposition, App 64b-65b

[20]Court of Appeals Docket, App 66b

[21]February 23, 2017 Court of Appeals Order granting AAIC's Application for Leave to Appeal, App 70b

[22]Court of Appeals Docket, App 68b

[23]February 27, 2018 Court of Appeals Majority Opinion, App 75b

> It is evident from the plain language of the policy language that coverage is not limited to instances involving direct, physical contact with the hit-and-run vehicle.
>
> Instead, the policy states that "[t]he vehicle must hit, or cause an object to hit, an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying[.]'" Thus, coverage would be afforded in this case despite the absence of physical contact between the ambulance and pickup truck, as long as the pickup truck "cause[d] an object to hit" the ambulance. 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.
>
> * * * *
>
> Accordingly, we must conclude that the plain language of the contract provides uninsured motorist coverage to Drouillard only if the unidentified pickup truck caused an object to hit the insured ambulance, and not vice versa. Reviewing the pertinent section as a whole, the language cannot reasonably be understood in any other way. Importantly, Drouillard and Schoenberg both admitted that the building materials were stationary at the time of the accident, and Schoenberg agreed that, as the driver of the ambulance, she struck the materials in the roadway. Therefore, this is not a situation in which a hit-and-run vehicle caused an object to hit the insured ambulance, and Drouillard is not entitled to uninsured motorist benefits under the terms of the policy.

Drouillard v. Am. Alt. Ins. Corp. 323 Mich App 212, 221-222,223; 916 NW 2d 844(2018).

On April 10, 2018, Plaintiff-Appellant filed an Application for Leave to Appeal to this Court.[24] On November 16, 2018, this Court issued an Order which scheduled oral argument to consider the Application for Leave to Appeal.[25] This Court's Order also

[24]Court of Appeals Docket, App 68b

[25]November 16, 2108 Supreme Court Order, App 84b

directed the parties to submit supplemental briefs to address the question of whether there was no "uninsured motor vehicle" as defined in the insurance policy. This brief is submitted pursuant to this order.

ARGUMENT

As a basic legal tenet, this Court has required that when interpreting insurance policies under Michigan law, we are guided by a number of well-established principles of contract construction. Foremost among those is the maxim that an insurance **policy must be enforced in accordance with its terms.** *Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534; 676 NW 2d 616 (2004); *Wilkie v. Auto Owners Ins. Co.,* 469 Mich 41, 51; 664 NW2d 776 (2003); *Michigan Millers Mutual Ins Co v. Bronson Plating Co.*, 445 Mich 558,567; 519 NW 2d 864 (1994); *Upjohn Co v. New Hampshire Ins Co.*, 438 Mich 97,207; 476 NW 2d 392 (1991).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Shay v. Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010) (quotation marks and citation omitted). If the language of a contract is unambiguous, courts interpret the language according to its plain meaning. *Id.* This Court, has reiterated Michigan law that contracts, including insurance contracts, are to be enforced as written because an unambiguous contract reflects the parties' intent as a matter of law. *In re Smith Trust*, 480 Mich 19, 24; 745 NW 2d 754 (2008) relying on *Frankenmuth Mut. Ins. Co, v. Masters,* 460 Mich 105, 111, 595 NW 2d832 (1999); see also *Rory v Continental Insurance Company*, 473 Mich 457, 461; 703 NW2d 23(2005).

This Court has on many occasions held that the law with respect to insurance contracts is no different than the law with respect to other contracts. This Court has long recognized that "an insurance policy is an agreement between parties that a court interprets "much the same as **any other** contract ". *Auto Owners Ins Co v. Harrington*, 455 Mich 377, 381; 565 NW 2d 839 (1997) (emphasis added), quoting *Auto Owners Ins Co v. Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). "A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract." *Bowen v Prudential Ins Co of America*, 178 Mich 63, 69; 144 NW 543 (1913); *Upjohn Co v. New Hampshire Ins Co.*, 438 Mich 97,207; 476 NW 2d 392 (1991); *Michigan Millers Mutual Ins Co v. Bronson Plating Co.*, 445 Mich 558,567; 519 NW 2d 864 (1994); *Wilkie v. Auto Owners Ins. Co.,* 469 Mich 41, 51; 664 NW2d 776 (2003)*; Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534; 676 NW 2d 616 (2004). "[I]nsurance polices *are* subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Insurance Company*, 473 Mich 457,461;703 NW2d 23 (2005) (emphasis in original).

If an insurance contract's language is clear, its construction is a question of law for the court. *Henderson v. State Farm Fire & Cas. Co.*,460 Mich 348, 353-55; 596 NW2d 190 (1999). Where an insurance policy is unambiguous it is not open to construction and must be enforced as written. *Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534; 676 NW 2d 616 (2004)*; Auto Owners Ins Co. v. Churchman*, 445 Mich 560, 567; 489 NW2d 431 (1992). A court may not read ambiguities into a policy where none exist. *Auto Owners Ins Co v. Churchman*, 440 Mich 560,567; 489 NW2d 431 (1992).

In *Rory*, this Court specifically rejected the application of "special rules" for different classifications of contracts, stating that "the contract is to be enforced according to its plain language. *Rory*, *supra*.[26] We enforce an unambiguous contract "as written unless the provision would violate law or public policy", reading the policy as a whole, giving meaning to each term and giving each term its plain and ordinary meaning. *Rory*, *supra.* at 470.[27] We construe contractual terms in context. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW 2d 190 (1990). We must interpret a contract in a way that gives every word, phrase, and clause meaning, and must avoid interpretations that render parts of the contract surplusage. *Klapp v United Ins Group Agency Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

I. The Policy Must Be Interpreted According to Its Unambiguous Terms

Here, none of the parties is claiming that the policy is ambiguous. Accordingly, the question of the contract interpretation is a legal question for the court. Moreover, this Court has made clear that the insurance contract is to be enforced as written. The Court of Appeals properly analyzed the policy language and determined no uninsured motorist coverage is available in this circumstance.[28]

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[26]"Special rules" imposed by the judiciary and applied only to interpretation of insurance contracts do not apply to insurance policy interpretation. In *Rory*, in her dissent, Justice Weaver properly recognized the elimination of "specialized rules" of interpretation and enforcement of insurance contracts.

[27]In *Rory*, this Court concluded that the one-year limitation was not contrary to public policy, noting that "the Legislature has assigned the responsibility of evaluating the 'reasonableness' of an insurance contract to ... the Commissioner of Insurance" and that because the commissioner had approved the policy at issue in that case, which included a one-year limitation, the courts were not free to determine de novo whether the policy was reasonable. *Id.* at 475–476, 703 NW 2d 23. See also *McDonald v. Farm Bureau Ins. Co.*, 480 Mich 191, 198–99, 747 NW 2d 811, 816 (2008).

[28]February 27, 2018 Court of Appeals Majority Opinion, App 71b-76b

UM (Uninsured Motorist) "insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver." *Rory, supra.* at 465. Uninsured motorist coverage is not a statutorily mandated coverage. Consequently, the terms of the contract control the claimant's entitlement to benefits. *Manzella v. State Farm Mut. Auto. Ins. Co.*, 480 Mich 1115; 745 NW 2d 770 (2008); *DeFrain v State Farm*, 491 Mich 359;817 NW 2d 504 (2012). Consistent with *Rory*, *supra.* and the other decisions by this Court, the terms of the contract dictate available coverage, if any.

A. An "Uninsured Motor Vehicle" As Defined Is Required

There is no duty to perform a contract unless and until the conditions in the contract are met. *Knox v. Knox*, 337 Mich 109, 118;59 NW 2d 108 (1953). Where a condition precedent is not met, there is no obligation to perform the contract. *Wolverine Packing Co v Hawley*, 251 Mich 215, 219; 231 NW 617 (1930).

In order for coverage to be available, there first must be an "uninsured motor vehicle" as defined in the policy. The relevant policy language is:[29]

> 3. "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 a hit***, an "insured", a covered "auto" or a vehicle an "insured" is "occupying". (emphasis added)

[29]AAIC's uninsured motorist provisions., App 42b

B. A Hit And Run Vehicle Must Be Involved [30]

As a threshold for coverage, a "hit and run vehicle" must be involved. The uninsured motorist endorsement does not define "hit and run" vehicle. Accordingly, this Court has determined that common definitions be used, including a dictionary definition. The proper approach is to read the phrase as a whole, giving the phrase its commonly understood meaning. *Group Ins Co of Michigan v. Czopek* 440 Mich 590,596; 489 NW 2d 444 (1992). This requires a court to give contextual meaning to the phrase to determine what the phrase conveys to those familiar with our language and its contemporary usage. Thus, when the meaning of a colloquial phrase is in dispute, the court must not mechanistically parse the meaning of each word in the phrase; instead it must look to the contextual understanding and consider the phrase as a whole." *Henderson v. State Farm Fire and Casualty Co*, 460 Mich 348,356-357; 596 NW 2d 190 (1999).

The universal, common use of the term "hit and run" driver means a motor vehicle driver who does not stop after being involved in an accident.[31]

The Court of Appeals concurring opinion addressed a flaw in the *Dancey, supra.* opinion and Plaintiff's basic position by pointing out the temporal element required for a vehicle to be a "hit and run vehicle".[32]

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[30]The Court of Appeals majority opinion did not find it necessary to define or determine whether "hit and run vehicle" requires knowledge of the accident and like the trial court did not decide this issue. February 27, 2018 Court of Appeals Majority Opinion, p. 3, App 73b

[31]Definition of hit and run from Merriam-Webster on line dictionary., App 85b

See also definition from Cambridge English Dictionary., App 86b

[32]The concurring opinion noted:

Continuing one's driving under such circumstances, i.e., not stopping, is not flight or leaving the scene of an accident (as no accident has yet occurred) and thus does not fit the ordinary sense of running as used in the term "hit and run vehicle." By thereby putting the cart before the

The essential condition for coverage under paragraph 3.d. is that there actually be a hit and run vehicle. There is no basis to conclude that the driver of the alleged pick-up truck knew he/she was in an accident. Under the temporal element analysis in the concurring opinion, at best, the pick-up truck driver lost part of the load it was hauling, creating a condition, but the accident did not involve the pick-up truck.

The language of a contract is to be interpreted in accordance with the rules of grammar. *Pendill v Maas*, 97 Mich 215, 218; 56 NW 597 (1893). Thus, the language of a contract, like that of a statute, must be read and understood in its proper grammatical context. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). It is a general rule of grammar that a modifying clause is confined solely to the last antecedent, unless a contrary intent appears. *Id.*

Even if the Court assumes a “hit and run” vehicle, the vehicle must hit or cause an object to a hit, this circumstance did not occur in this case.

This Court has a already denied review of a Court of Appeals holding which addressed a similar analysis of an identical policy provision in a circumstance in which the insured vehicle struck a stationary object. *Seger v Hartford Insurance Company*, 482 Mich 880; 752 NW 2d 469 (2008).

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horse, *Dancey* converted the term "hit-and-run" into a new concept, "run-and-hit," because the later accident had the legal effect of turning the driving which preceded the accident into the running. *Dancey* simply labeled a truck which creates a dangerous condition short of an accident and which continues driving a "hit-and-run vehicle," where it is known with hindsight that an accident did actually occur. *Dancey* simply ignored or overlooked the fact that there must first be a "hit" and then a "run" in order for a vehicle to become a "hit-and-run" vehicle. By ignoring the "hit-and-run" requirement, *Dancey* violated the rule that "The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase," *Mich Battery Equip, Inc v Emcasco Ins Co*, 317 Mich App 282, 284; 892 NW2d 456 (2016), by essentially reading the "run" requirement of "hit-and-run" out of the policy. February 27, 2018 Court of Appeals Concurring Opinion, p. 3, App 79b

The Court of Appeals in the unpublished case of *Seger v Hartford Insurance Company* [33], examined the identical policy provision where a vehicle and driver that could not be identified allegedly caused the insured to swerve off the road causing the insured to hit a tree.

The Court's analysis examined the possibilities for coverage: (1) where there is vehicle to vehicle contact (direct physical contact); or (2) where a vehicle causes an object to hit the insured vehicle (no direct physical contact between the vehicles). *Seger*, *supra.* at *1.[34]

The *Seger* Court further considered the grammar employed in the policy provision and noted the grammatical distinction from a situation where the subject driver causes the insured to hit an object, also noting the grammar of direct and indirect objects reflects a commonsense understanding of causation. For plaintiff to have uninsured motorist coverage under her policy, an uninsured vehicle must cause an object to hit plaintiffs vehicle, and not vice versa. *Seger*, *supra.* at *2.[35] Consequently, the Court of Appeals determined that no uninsured motorist coverage was afforded under the policy.*Seger*, *supra.* at *2.[36]

Further, isolating a dictionary definition of "hit" does not comport with this Court's directives regarding contract interpretation. Using such an approach does not follow the

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[33]Slip Opinion, *Seger v Hartford Insurance Company,* Court of Appeals, February 26, 2008, Docket No. 274572., App 87b-89b

[34]Slip Opinion, *Seger v Hartford Insurance Company,* Court of Appeals, February 26, 2008, Docket No. 274572., App 87b

[35]Slip Opinion, *Seger v Hartford Insurance Company,* Court of Appeals, February 26, 2008, Docket No. 274572., App 88b

[36]Slip Opinion, *Seger v Hartford Insurance Company,* Court of Appeals, February 26, 2008, Docket No. 274572., App 88b

directive requiring that the contract be read and understood in its proper grammatical context.

Following any other interpretation of the contract language would rewrite the contract and ignore the grammatical context of the policy language. The policy only provides coverage where an object is propelled from or by the "hit and run" vehicle. An example is where a rock is thrown from the vehicle or the "hit and run" vehicle hits an object which then is propelled and strikes the insured vehicle. These are circumstances where an object that is in motion comes in contact with the insured vehicle.

This is consistent with the long-standing rules of contract construction that the language of a contract is to be interpreted in accordance with the rules of grammar as directed by this Court. *Pendill supra.* at 218.

Contrast this with circumstances in which the insured vehicle hits a tree or a light post or some other stationary object. Where the object which comes in contact with the insured vehicle is completely stationary (as in this case), the moving vehicle hits the stationary object, not vice versa.

Based on this analysis, the question then becomes did a hit and run vehicle cause an object to hit the covered vehicle? The terms of the policy require that a vehicle hit the insured vehicle or cause an object to hit the vehicle that the plaintiff is occupying. In this case, even assuming there is some relation between the unidentified vehicle and the drywall in the road, no vehicle hit or caused an object to hit the vehicle that the plaintiff was occupying. Rather, the vehicle that the Plaintiff was occupying hit or struck a stationary object (the pile of drywall). The drywall did not hit the covered auto, rather the covered auto hit the drywall.

All of the testimony describes the incident as the ambulance striking the drywall. The ambulance driver clearly describes the incident as the ambulance she was driving hit or struck the drywall. Each and every witness to this incident has described it the same way. No one has, could or would say that the pile of drywall struck or hit the ambulance. Because no object hit the ambulance, there is no coverage.

C. Physical Contact is Insufficient For Uninsured Motorist Coverage

Any argument that hit is the equivalent of direct physical contact which is what is required between the ambulance and the object ignores that contract language must be read and understood in its proper grammatical context. *Sun Valley, supra.* at 237.

"Perhaps the most fundamental rule of Michigan insurance jurisprudence is that an insurer can never be held liable for a risk it did not assume and for which it did not charge or receive any premium." *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 654; 177 NW 242(1920); *Twichel, supra*. This Court determined that "an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich 362, 375; 666 NW 2d 251 (2003). In *Quality Products*, *supra.,* this Court held that a party cannot unilaterally alter the terms of the original contract.

Accepting an argument that the policy language only requires physical contact between the insured vehicle and the object negates the plain contract language, impermissibly rewrites the contract, potentially “creates” coverage for a risk not assumed under the contract. Such an interpretation is inconsistent with this Court’s long-standing rules for contract interpretation.

The rights and duties of parties to a contract are derived from the terms of the contract and "respect for the freedom to contract entails that we enforce only those obligations actually assented to by the parties." *Evans v Norris*, 6 Mich 369, 372; (1859). *Rory, supra*, further dictates that courts should restrain themselves from adding terms to an unambiguous contract.

Consequently, the Court of Appeals, through its thorough analysis, including its assessment of the grammatical context of the word order and the ultimate determination that no uninsured motorist coverage is afforded in this circumstance where the insured vehicle struck a stationary object (the drywall), has followed the numerous holdings of this Court including *Rory, supra, Wilkie*, *supra*, and *Quality Products*, *supra*.

Plaintiff's argument that only physical contact is required to afford coverage is engrafting a provision into the coverage which is not supported by the policy language. This is similar to the cases decided using "substantial physical nexus" standard.

"[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of reasonableness as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory*, *supra*. at 461, 468. This Court properly refused to impose a judicial determination to find the contractual limitation was unreasonable in the face of unambiguous contract provisions. Regardless of whether a contract is adhesive, a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable." *Rory*, *supra*. at p. 489.

Regardless of whether the Courts determined that uninsured motorist coverage was available or not, any use of the requirement that there must be a substantial physical nexus is a judicially created requirement inserted into the policy language. However, cases applying the "substantial physical nexus" were decided before *Rory, supra, DeFrain, supra* and *Titan, supra.* There is no way to reconcile the "substantial physical nexus" analysis with the decisions from this Court which has made it very clear that the courts cannot engraft requirements or limitations into the contract which that do not appear in the contract language.

Even if this Court were to consider the "substantial physical nexus" requirement (it should not under the contract interpretation rules it has set forth), cases which extended uninsured motorist coverage under this standard all involve situations in which the Court noted that when an object is "cast off' by a vehicle, noting a "substantial physical nexus" between the unidentified vehicle and the object causing the injury to the insured has been found where the object in question was a piece of, or projected by, the unidentified vehicle, but not where the object originates from an occupant of an unidentified vehicle.

Moreover, many of the cases discussed by Plaintiff are distinguishable from this case based on several factors:

1) In *Herrara v. State Farm Mutual Automobile Insurance Company*, the policy language at issue is different than the AAIC policy provision.

2) Plaintiff improperly asks this Court to ignore the holding in *Kreager v. State Farm Mutual Automobile Insurance,* 197 Mich App 577; 496 NW 2d 349 (1993) which determined no uninsured motorist coverage available. Further, analysis involved policy language which was not the same as the AAIC policy and the Court used the "substantial

physical nexus" test which is a judicially engrafted requirement.[37]

3) The Court of Appeals ruling in *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 347; 556 NW 2d 207 (1996) addressed language which is different from the AAIC policy and again used the "substantial physical nexus" test which is inapplicable where the unambiguous policy language controls.

4) In *Hines v. Pioneer State Mutual Insurance Company*, Plaintiff again ignores the holding which determined no available uninsured motorist coverage.

5) Plaintiff fails to address that the Court of Appeals held that *Dancey v Travelers*, 288 Mich App 1; 792 NW 2d 372 (2010) did not address the issues raised by AAIC and, consequently, found that Dancey did not provide any guidance and did not provide support for a denial of summary disposition. Further, Plaintiff ignores the concurring opinion's detailed analysis of the question of "run and hit" v. "hit and run".

6) Plaintiff's reliance on *McJimpson v. Auto Club Gip. Ins. Co.*, 315 Mich App 353, 361, 889 NW 2d 724, 728 (2016) is misplaced because the policy language is not the same as the language in the AAIC policy. Further, McJimpson, supra. actually supports AAIC's position as the Court of Appeals enforced the policy as written rather than imposing additional requirements into the contract.[38]

7) Plaintiff's reliance on *Bahri v. IDS Property Casualty Ins, Co.*, 308 Mich App 420; 864 NW 2d 609(2014) misleads this Court. Plaintiff mis-characterizes the holding of the case which is based on the determination that the policyholder committed fraud. The

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[37]See AAIC's Response Brief in Opposition to Plaintiff's Application for Leave to Appeal regarding this detailed argument.

[38]The Court held that no uninsured motorist coverage was owed where the plaintiff was struck by a piece of metal that flew off a truck driving ahead of her on the highway.

discussion about the applicability of uninsured motorist coverage is dicta.

D. Public Policy Requires Upholding The Court of Appeals Result

Public policy must be clearly rooted in the law in such a way that it is not only "explicit," but also "well defined and dominant." *Terrien v. Zwit,* 467 Mich 56, 67-68; 648 NW2d 602 (2002). The determination of Michigan's public policy:

> "is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." In ascertaining the parameters of our public policy, we must look to "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law."

Rory,supra. at 470-471.(footnotes omitted).

This Court has made Michigan public policy very clear: 1) the availability of uninsured motorist is determined by the contract; 2) courts cannot engraft requirements or limitations into contract language; and 3) interpretation of contracts is done considering the grammatical context. Moreover, where there is any discrepancy between a Court of Appeals decision and a decision of this Court, this Court's rulings are supreme and any contrary rulings from the Court of Appeals must be rejected. *DeFrain*, *supra.* at 362,

The Court of Appeals ultimately held:

> [T]he policy states that "[t]he vehicle must hit, or cause an object to hit, an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying[.]'" Thus, coverage would be afforded in this case despite the absence of physical contact between the ambulance and pickup truck, as long as the pickup truck "cause[d] an object to hit" the ambulance. 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.

Drouillard, supra. at 221.

The Court's analysis was based on this Court's pronouncement of contract interpretation rules which include avoiding a "forced or constrained construction" and reading and understanding a contract provision in its proper grammatical context. *Drouillard, supra.* at 221-222.

Here, the Court of Appeals has followed this Court's directives with respect to contract interpretation, correctly analyzing and finding that the policy language does not afford uninsured motorist coverage to Plaintiff. This Court should reject Plaintiff's efforts to circumvent this Court's public policy statements regarding contract interpretation and uphold the Court of Appeals holding that uninsured motorist is not applicable.

RELIEF REQUESTED

For the reasons outlined in its Response in Opposition to Plaintiff-Appellant's Application for Leave to Appeal and the above reasons, Defendant-Appellee American Alternative Insurance Corporation respectfully requests that this Court DENY Plaintiff-Appellant's Application for Leave to Appeal, AFFIRM the Court of Appeals' February 27, 2018 decision, and remand for entry of Judgment in favor of AAIC.

Respectfully submitted,

kallas & henk pc

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Dated: January 30, 2019

PROOF OF SERVICE

I hereby certify that on January 30, 2019, I electronically filed **Defendant-Appellee's Supplemental Brief Submitted Pursuant to the Court's November 16, 2018 Order** with the Clerk of the Supreme Court using the ECF system which will send notification of such filing to all interested parties in this matter.

/s/Kelly Chirikas
KELLY CHIRIKAS