STATE OF MICHIGAN

COURT OF APPEALS

MARTA HILL,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

JUL 22 1988

No. 102682

Before: Beasley, P.J., and Sawyer and Weaver, JJ.

PER CURIAM

Defendant appeals as of right an order of the Delta County Circuit Court granting summary disposition, pursuant to MCR 2.116(c)(10), in favor of plaintiff in a suit brought to recover no-fault survivor benefits.

The facts are not in dispute. Plaintiff and her husband were driving on M-183 in Delta County when a large rock came through the windshield of the vehicle plaintiff and her husband occupied. As a result, plaintiff's husband was killed. The rock came through the windshield just as another vehicle, a camper, passed plaintiff's vehicle, traveling in the opposite direction. In the complaint, plaintiff alleges that the camper propelled the rock, while defendant contends that it has no evidence of what caused the rock to become airborne.

Motions for summary disposition were filed by both parties on the interpretation of the "physical contact" requirement under the definition of "hit-and-run automobile" pursuant to the insurance policy. The lower court agreed with defendant that actual physical contact was required, hence the rock being propelled through the windshield did not constitute physical contact. On appeal, this Court reversed, holding that only a substantial nexus between the disappearing vehicle and the object cast off, or struck, need be shown. Hill v Citizens Ins Co of America, 157 Mich App 383, 394; 403 NW2d 147 (1987).

Plaintiff again filed a motion for summary disposition, based on MCR 2.116(C)(10). Plaintiff's argument was that, except as to damages, there was no genuine issue of material fact because plaintiff had established "physical contact" and plaintiff is not required to prove negligence or fault under the terms of the policy. The trial court agreed with plaintiff's position that negligence need not be shown, as long as notice requirements, along with other requirements under § 4 of the policy, were complied with.

In construing the contract language at issue, it must first be determined if there is an ambiguity. The case of Raska v Farm Bureau Mutual Ins Co of Michigan, 412 Mich 355, 361-362; 314 NW2d 440 (1982), defined the test for ambiguity as follows:

> Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy.
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> * * *
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> If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and other fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.
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> Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear.

In reviewing the policy at issue, it appears there is indeed an ambiguity between what is required under an uninsured motorist claim and what is required under a hit-and-run driver claim. While a hit-and-run vehicle is defined, for insurance purposes, as an uninsured motorist, certain requirements must be met before an accident can be labeled as "hit-and-run." According to defendant's policy, this includes: (a) that the driver cannot be identified; (b) that the accident is reported to the proper authorities within twenty-four hours and also that the insured file a statement under oath, within thirty days, setting forth that he has a cause or causes of action arising out of the

accident, and stating the facts which support each such claim; and (c) make the vehicle involved available for inspection by the insurer. Defendant argued that the part of the hit-and-run driver definition which requires the insured to state his cause of action implies that negligence on the part of the driver must be established as part of that cause of action in personal injury cases. We note that this certainly is not a "clear" term, especially to a lay person, who is the typical purchaser of such policies, since proof of negligence is an implied term.

The Michigan Supreme Court recently restated a set of six rules derived from case law to assist in construing ambiguous provisions in insurance policies in Powers v Detroit Automobile Inter Ins Exchange, 427 Mich 602, 623-624; 398 NW2d 411 (1986):

> 1) "[E]xceptions in an insurance policy to the general liability provided for are to be strictly construed against the insurer." Pietrantonio [v Travelers Ins Co, 282 Mich 111; 275 NW 786 (1937)] at 116.
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> 2) An insurer may not "escape liability by taking advantage of an ambiguity . . . ." Hooper [v State Mutual Life Assurance Co, 318 Mich 384; 28 NW2d 331 (1947)] at 393. "'[W]herever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted.'" DeLand [v Fidelity Health & Accident Mutual Ins Co, 325 Mich 9; 37 NW2d 693 (1949)] at 18.
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> 3) An insurer must "so . . . draft the policy as to make clear the extent of nonliability under the exclusion clause." Francis [v Scheper, 326 Mich 441; 40 NW2d 214 (1949)] at 448.
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> 4) An insurer may not "escape liability by taking advantage of . . . a forced construction of the language in a policy . . . ." Hooper, supra. "[T]echnical constructions of policies of insurance are not favored . . . ." Pietrantonio, supra.
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> 5) "The courts have no patience with attempts by a paid insurer to escape liability by taking advantage of an ambiguity, a hidden meaning, or a forced construction of the language in a policy, when all question might have been avoided by a more generous or plainer use of words." Hooper, supra.
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> 6) "[N]ot only ambiguous but deceptive." "[T]he policyholder must be protected against confusing statements in policies . . . ." DeLand, supra at 17-18.

In reviewing the policy language employed in conjunction

with the six rules delineated above, it is the opinion of this Court that the contract language must be construed in favor of the insured, not only to the ambiguities present, but based upon public policy reasons.

Because the other driver in a hit-and-run accident leaves the scene immediately, there are very real and substantial proof problems for an insured in attempting to prove the negligence of the other driver. If this Court were to adopt defendant's argument, that fault or negligence must be shown, the coverage for hit-and-run drivers becomes practically, if not actually, an illusory term in the contract. Coverage in the contract become illusory since the insurer would never have to pay unless the insured proved negligence, which is practically impossible if the other driver and vehicle are not known.

A reasonable construction of setting forth the insured's cause or causes of action should be limited to the insured's freedom from negligence, along with facts indicating the other driver and vehicle could not be identified. This construction would include knowledge and information within the grasp of the insured, while still upholding this type of language in the policy.

While the trial court presumably based its decision to grant plaintiff's motion on the principles of no-fault insurance, it is our opinion that nonetheless the trial court reached the right result, even if for the wrong reason, People v Beckley, 161 Mich App 120, 131; 490 NW2d 759 (1987); hence, reversal is not required.

The trial court properly granted plaintiff's motion for summary disposition, because plaintiff, under the terms of the insurance policy, is not required to prove negligence of a hit-and-run driver in order to receive benefits.

Affirmed.

/s/ William R. Beasley
/s/ David H. Sawyer
/s/ Elizabeth A. Weaver