STATE OF MICHIGAN

COURT OF APPEALS

LISA WATERBURY,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

Before: Marilyn Kelly, P.J., and White and Breck,* JJ.

PER CURIAM.

In this action concerning uninsured motorist coverage, plaintiff appeals as of right a circuit court order denying her motion to vacate an arbitration ruling pursuant to MCR 3.602(J)(1)(c), and granting defendant's motion to confirm the ruling. We affirm.

On March 31, 1991, plaintiff Lisa Waterbury was injured in an automobile accident that occurred when she lost control of her car, leaving the road and landing in a roadside ditch. According to plaintiff, the loss of control occurred because an oncoming car swerved into her lane. There was no contact between the oncoming car and plaintiff's car. However, eyewitness Michael Day, who was travelling behind plaintiff's car at the time of the accident, was also forced to swerve from the road in order to avoid a collision, and apparently so testified by deposition.[1]

Pursuant to the insurance policy covering her vehicle, plaintiff filed a claim for arbitration seeking third-party benefits as a victim of an uninsured motorist. At the arbitration hearing, defendant moved for dismissal based on plaintiff's failure to meet the policy's requirement that such claims involve physical contact. Although defendant disputed plaintiff's version of the event, for the purpose of addressing the physical contact requirement, it stipulated to the involvement of a second vehicle, as verified by the eyewitness, and that there was no physical contact between the two cars. The policy provides:

> "UNINSURED MOTOR VEHICLE" shall mean:
>
> (1) any motor vehicle with respect to the ownership, maintenance or use of which there is . . . no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such motor vehicle; or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the Company writing the same is or becomes insolvent; or
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> 2) a hit-and-run motor vehicle as defined; shall not include [listed exclusions].
>
> "HIT-AND-RUN MOTOR VEHICLE" shall mean a motor vehicle which causes bodily injury to an insured arising out of physical contact of such motor vehicle with the insured or with a motor vehicle which the insured is in, upon, entering or alighting from at the time of the accident, provided:

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* Circuit judge, sitting on the Court of Appeals by assignment.

(1) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run motor vehicle" . . . .

Defendant relied on Said v Auto Club Ins Ass'n, 152 Mich App 240; 393 NW2d 598 (1986) and Auto Club Ins Ass'n v Methner, 127 Mich App 683; 339 NW2d 234 (1983), in which this Court upheld as enforceable a physical contact requirement. The arbitrators issued a 2 to 1 decision granting defendant's motion.

Plaintiff moved in circuit court to vacate the arbitrators' decision. The trial court denied plaintiff's motion, and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that although the result seemed inequitable, the cases relied on by defendant were on point, and the arbitrators had not clearly erred in their ruling.

Plaintiff appeals the court's decision on three grounds: (1) that the legislative intent behind the physical contact requirement does not preclude a finding that physical contact is not necessary where an eyewitness verifies the involvement of another vehicle, (2) that the policy's uninsured motorist provision applies regardless of the hit-and-run provisions, and (3) that the doctrine of equitable estoppel mandates recovery regardless of the literal terms of the hit-and-run provisions.

Because this case involves review of an arbitration ruling, our review is limited to the question whether the trial court properly found that the arbitrators did not exceed their authority; that is, that they did not act beyond the material terms of the contract from which they draw their authority, or in contravention of controlling principles of law. MCR 3.602(J)(1)(c); Gordon Sel-Way v Spence Bros, 438 Mich 488, 496; 475 NW2d 704 (1991); DAIIE v Gavin, 416 Mich 407, 434; 331 NW2d 418 (1982).

While this Court has construed physical contact requirements liberally, it has repeatedly upheld such requirements as enforceable, most recently in Kreager v State Farm, 197 Mich App 577, 582; 496 NW2d 346 (1992). In Methner, supra, this Court vacated an arbitration award that disregarded such a requirement, holding that the arbitrators had exceeded their power by acting beyond the material terms of the contract. Id. at 692. The Court observed that prior cases[2] had upheld contractual physical contract requirements, and that the Legislature had amended the Motor Vehicle Accident Claims Act (MVACA) to statutorily include such a requirement while that Act was still in force. Id. at 688-690.[3]

As plaintiff recognizes, the intent of a physical contact requirement is to eliminate the risk of "phantom-car frauds." Id at 691. The incorporation of such a requirement into a legislative act (the MVACA) signals that the requirement is not against public policy. Moreover, as noted above, while this Court has interpreted such requirements liberally, it has continued to hold such requirements enforceable, notwithstanding the MVACA's inapplicability to accidents occurring after January 2, 1976. MCL 257.1133; MSA 9.2833. The cases have permitted recovery where there has been physical contact between the claimant's vehicle and some part or object that had fallen from another vehicle, Adams v Zajac, 110 Mich App 522; 313 NW2d 347 (1981), but see Kersten v DAIIE, 82 Mich App 459; 267 NW2d 425 (1978), or had been propelled by another vehicle, Hill v Citizens Ins Co, 157 Mich App 383; 403 NW2d 147 (1987). The purpose of the physical contact requirement has been found to be adequately served by construing the term "physical contact" liberally, provided there is an adequate physical nexus between the unidentified vehicle and the injured claimant. Kreager, supra; Hill, supra. The cases, however, in expanding the meaning of physical contact, expressly reaffirm the requirement that there be some actual physical contact. Hill at 393-394; Adams at 528-529. In the instant case, the nexus between the unidentified car and the injury is present. The physical contact, however, is not. Notwithstanding plaintiff's argument that where an eyewitness corroborates a claimant's description of a "phantom vehicle," the risk of fraud is substantially reduced and public policy is satisfied, we are unable to conclude that this Court can properly rewrite the insurance contract to wholly eliminate the contractual requirement that there be some physical contact. Rohlman v Hawkeye Security Ins Co, 442 Mich 520, 525?; 502 NW2d 310 (1993).

We recognize that while at one time physical contact requirements were generally upheld as valid limits on insurer liability, R. Long, 4 The Law of Liability Insurance, §24.16[1], p 24-93 (1991); see also

thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, including owners or operators insured by any insolvent insurer, because of bodily injury, sickness or disease, including death, resulting therefrom, unless the named insured rejects such coverage in writing as provided herein.

This provision was repealed in 1973 with the advent of no-fault insurance.

[3] The Act was effectively repealed as of January 2, 1976. MCL 257.1133; MSA 9.2833. However, while it was still in force, as of July 1, 1968, MCL 257.11132 MSA 9.2812 included a physical contact requirement. As of 1970, that section read:

> Where the death or personal injury to any person is occasioned in this state by a motor vehicle but the identity of the motor vehicle and of the driver and owner thereof cannot be established, any person who would have a cause of action against the owner or driver in respect to the death or personal injury may bring an action against the secretary, either alone or as a codefendant with others alleged to be responsible for the death or personal injury. In any action commenced under this section, physical contact by the unidentified vehicle with the plaintiff or with a vehicle occupied by the plaintiff, is a condition precedent to such action. [Emphasis added.]

[4] Georgia's code provides:

> A motor vehicle shall be deemed to be uninsured if the owner or operator of the motor vehicle is unknown. In those cases . . . in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured. Such physical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant. [OCGA §33-7-11(b)2) (1993).]

Oregon provides for uninsured motorist coverage where the accident is caused by a phantom vehicle, defining "phantom vehicle" as:

> a vehicle which causes bodily injury to an insured arising out of a motor vehicle accident which is caused by an automobile which has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident, provided:
>
> (A) There cannot be ascertained the identity of either the operator or the owner of such phantom vehicle;
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> (B) The facts of such accident can be corroborated by competent evidence other than the testimony of the insured or any person having an uninsured motorist claim resulting from the accident; and
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> (C) [The accident is reported in accord with other requirements.] [ORS §742.504(2)(g).]

See also Washington's very similar statute, RCW 48.22.030 (1991), and Utah's rule that in a claim involving a no-contact accident

> the covered person must show the existence of the uninsured motor vehicle by clear and convincing evidence, consisting of more than the covered person's testimony". [Utah Code Ann 31A-22-305(5) (1993)].

[5] 436 Mich lxxxiv. The order was extended by Administrative Order No. 1991-11, 439 Mich cxliv, Administrative Order No. 1992-8, 441 Mich liii, and Administrative Order No. 1993-4, 442 Mich cxiii.

Annotation, 25 ALR 3d §§2, 4, and, like Michigan's MVACA, the uninsured motorist statutes of several states either explicitly impose the requirement, or sanction imposition by insurers, V. Disbrow, 2 No-Fault and Uninsured Motorist Automobile Insurance, §§ 26.20[1], 26.200[2] (1991), a growing number of states have rejected the requirement as conflicting with mandatory uninsured motorist coverage, or as unauthorized by the terms of the statute. R. Long, supra at pp 24-85, 24-86; V. Disbrow, supra §§26.10, 26.20; see also Streitweiser v Middlesex Mut Assur Co, 219 Conn 371, 381-382; 593 A2d 498, 503 (1991), and cases cited therein. A few states have adopted statutes that eliminate the physical contact requirement when there are independent corroborating witnesses.[4]

Unlike any of these states, however, Michigan currently has no statute addressing uninsured motorist insurance. Mandated instead is no-fault coverage, including personal protection benefits, which insurers pay to their insureds regardless of fault or negligence, and regardless of whether there is physical contact with a second vehicle. MCL 500.3101 et seq; MSA 24.13101 et seq. Belcher v Aetna Casualty, 409 Mich 231, 240; 293 NW2d 594 (1980). While such coverage does not address all problems created by uninsured motorists, Dixon v DAIIE, 121 Mich App 128, 132; 328 NW2d 396 (1982), and insurers continue to provide uninsured motorist protection upon request, there is no statutory requirement either that insurers offer such insurance coverage, or that vehicle owners or operators purchase it. Thus, even were we to disregard the evidence of legislative intent set forth in the MVACA, and our obligation to follow Kreager, supra, under Administrative Order No. 1990-6,[5] the rationale used by other courts to invalidate a policy's physical contact requirement is not available here.

In light of case law, the clear terms of the insurance contract, the absence of any current statute addressing uninsured motorist coverage, and the express intent of prior legislation, the arbitrators did not act beyond the material terms of the contract or contravene controlling principles of law in enforcing the physical contact provision. The trial court, thus, did not err in confirming the award. We, too, have no basis for resolving the issue in plaintiff's favor, and recommend instead that the issue be raised before the Legislature.

Addressing plaintiff's second and third claims of error, we note that these arguments were not advanced in the trial court and do not raise the kind of error that would justify overturning an arbitration ruling. Moreover, these arguments are unpersuasive.[6]

Affirmed.

/s/ Marilyn J. Kelly
/s/ Helene N. White
/s/ David F. Breck

[1] We rely on the representations of counsel here and below, as Day's testimony is not part of the record before us.

[2] Among the cases cited in Methner, supra, was Citizens Mutual Ins Co v Jenks, 37 Mich App 378; 194 NW2d 728 (1971) which involved an accident that occurred before the MVACA's amendment (see fn 3), and while MCL 500.3010; MSA 24.13010, which mandated the provision of uninsured motorist coverage unless specifically rejected by the insured, was still in effect. In Jenks, Citizens Mutual had sued for declaratory relief with regard to its physical contact requirement. This Court observed that the uninsured motorist endorsement, even as limited by the physical contact requirement, still provided more coverage than required by §3010, because it permitted recovery in hit-and-run situations involving unidentified drivers, which §3010 did not address. Id. 382-384.

Section 3010 provided in pertinent part:

> No automobile liability or motor vehicle liability policy . . . shall be delivered or issued . . . unless coverage is provided therein . . . for the protection of persons insured

[6] Plaintiff argues that coverage could have been found without resort to the hit-and-run clause, and that in any event, the definition of a hit-and-run vehicle does not explicitly exclude a "phantom vehicle." However, the policy clearly provides that an uninsured motor vehicle is either a verifiably uncovered vehicle or a hit-and-run vehicle, as defined. It appears that the former definition does not apply; thus, only the definition of a hit-and-run vehicle remains in issue. Moreover, defendant was not obliged to explicitly exclude phantom vehicles to limit coverage. The acknowledged purpose -- and effect -- of the hit-and-run provisions' physical contact requirement is to provide protection against "phantom-car frauds." Methner, supra, at 691.

As for plaintiff's equitable estoppel argument, plaintiff does not establish how defendant by representations, admissions, or silence, intentionally or negligently induced her to believe that its coverage extended to hit-and-run accidents regardless of the physical contact requirement. See Hoye v Westfield Ins Co, 194 Mich App 696, 705; 487 NW2d 838 (1992).