

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CYNOTHIAS JOHNSON,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee,

and

MICHELLE PHAIR,

Defendant.

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UNPUBLISHED

April 19, 1996

No. 176190

LC No. 93-321457

Before: Murphy, P.J., and Markman and K.V. Fink, \* JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting summary disposition in favor of defendant. We affirm.

On November 29, 1991, at approximately 8:30 a.m., plaintiff was driving her automobile westbound on Harper Road in the City of Detroit. Plaintiff stopped her vehicle at a red light at the intersection of Cadieux Road and Harper. Defendant Phair (Phair) was driving her automobile northbound on Cadieux. The light at the intersection of Cadieux and Harper was green. As Phair travelled through the intersection, an unidentified third vehicle, which was travelling westbound on Harper, ran a red light and turned left into Phair's path. Phair swerved her vehicle to avoid hitting the unidentified vehicle and struck plaintiff's vehicle. The unidentified vehicle left the scene without stopping. The unidentified vehicle did not hit either plaintiff's or Phair's automobiles.

At the time of the accident, plaintiff was insured by defendant Auto Club Insurance Association (defendant) under an automobile insurance policy containing an uninsured motorist provision. Under the applicable portion of the policy, plaintiff was not entitled to uninsured motorist benefits unless there was "physical contact" between the unidentified vehicle and plaintiff's vehicle. Plaintiff made written demands to defendant for arbitration of her uninsured motorist claim, but defendant refused to arbitrate the claim. On July 29, 1993, plaintiff filed a complaint seeking a declaratory ruling compelling defendant to select an arbitrator and compelling arbitration of the parties' dispute concerning plaintiff's claim for uninsured motorist benefits.

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

On February 4, 1994, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (no genuine issue as to any material fact), arguing that the insurance policy only provided uninsured motorist benefits if there was physical contact and there was no physical contact between the unidentified vehicle and either plaintiff's or Phair's vehicles. Plaintiff argued that physical contact includes situations where no direct contact occurs and that there was a substantial nexus between the unidentified vehicle and Phair's vehicle hitting plaintiff's vehicle. The trial court granted defendant's motion and dismissed plaintiff's complaint for declaratory relief, ruling that plaintiff could not satisfy the physical contact requirement of the policy and that plaintiff therefore was not entitled to uninsured motorist benefits under the policy. Plaintiff appeals as of right, and we affirm.

In granting defendant's motion for summary disposition, the trial court did not state upon what basis summary disposition was appropriate. However, we conclude that summary disposition was appropriate under MCR 2.116(C)(10). On appeal, our review of a motion for summary disposition pursuant to MCR 2.116(C)(10) is de novo. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 650; 513 NW2d 441 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Smith v General Motors Corp*, 192 Mich App 652, 654; 481 NW2d 819 (1992). Then, giving the benefit of any reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.*

Plaintiff argues that she had a contractual right to arbitration of the issue whether the policy's "physical contact" requirement was satisfied and therefore whether plaintiff was entitled to uninsured motorist benefits. The question whether a dispute is arbitrable is for the court's determination. *Kentwood Public Schools v Kent Co Ed Ass'n*, 206 Mich App 161, 164; 520 NW2d 682 (1994). Absent an express contractual provision excluding a particular grievance from arbitration, or the most forceful evidence of a purpose to exclude the claim, the matter should go to arbitration. *Id.*, 164-165. In this case, there is an express policy provision excluding plaintiff's grievance from arbitration. Therefore, we reject plaintiff's argument that she was entitled to arbitration of her claim for uninsured motorist benefits.

The policy contains the following provision regarding uninsured motorist coverage:

#### **UNINSURED MOTORISTS COVERAGE**

Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay damages for **bodily injury** which: is caused by accident; and arises out of the ownership, operation, maintenance or use of an **uninsured motor vehicle**; and results in death, serious impairment of body function or permanent serious disfigurement; and an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**.

The policy defines an uninsured motor vehicle as a motor vehicle that is:

not insured by a **bodily injury** liability bond or policy that is applicable at the

time of the accident;

a hit-and-run motor vehicle of which the operator and owner are unknown and which makes physical contact with

you or a resident relative, or

a motor vehicle which an insured person is occupying;

insured by a bodily injury liability bond or policy at the time of the accident issued by a company that is or becomes insolvent.

The insurance policy also contains the following specific exemptions from arbitration:

Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, or whether or not a motor vehicle is an uninsured motor vehicle are not subject to arbitration . . . .

Plaintiff contends that the policy does not specifically exempt from arbitration the issue whether there was "physical contact" within the meaning of the policy. Plaintiff is correct; however, the insurance policy does specifically and unambiguously exempt from arbitration "disagreements concerning . . . whether or not a motor vehicle is an insured motor vehicle[.]" Whether the unidentified vehicle made "physical contact" with plaintiff's vehicle necessarily determines whether the unidentified vehicle was an uninsured motor vehicle under the policy because by definition, a motor vehicle is not an uninsured motor vehicle unless it made physical contact with the plaintiff's motor vehicle. In essence, then, plaintiff is arguing that the issue whether the unidentified vehicle was an uninsured motor vehicle is arbitrable when the policy specifically exempts from arbitration the issue whether a motor vehicle is an uninsured motor vehicle. Accordingly, we conclude that plaintiff was not entitled to arbitration under the policy.

Plaintiff also argues that the trial court erred in concluding that there was no physical contact between the unidentified third vehicle and plaintiff's vehicle and that plaintiff therefore was not entitled to uninsured motorist benefits under the insurance policy. We disagree.

As noted above, the applicable portion of the insurance policy allows for recovery of uninsured motorist benefits only if the unidentified vehicle made physical contact with plaintiff's vehicle. 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. *Kreager v State Farm Mutual Automobile Ins Co*, 197 Mich App 577, 582; 496 NW2d 346 (1992). "[T]he 'physical contact' provision in uninsured motor vehicle coverage may be satisfied even though there is no direct contact between the disappearing vehicle and claimant or claimant's vehicle." *Hill v Citizens Ins Co of America*, 157 Mich App 383, 394; 403 NW2d 147 (1987). In *Hill*, this Court noted:

Physical contact has been construed to include situations where no direct contact occurs. The most common circumstances in which recovery is permitted is when (1) the hit-and-run vehicle strikes a second or intervening vehicle which

in turn is propelled into plaintiff's vehicle, and (2) an object is propelled into the plaintiff's vehicle by another vehicle which does not stop. [*Id.*, 389, quoting *Adams v Zajac*, 110 Mich App 522, 526-527; 313 NW2d 347 (1981) (citations omitted).]

While the physical contact requirement may be satisfied even if there is not direct contact between the plaintiff or the plaintiff's vehicle, it is necessary that the proofs establish "a substantial physical nexus between the disappearing vehicle and the object cast off or struck." *Hill, supra*, 394.

The instant case does not involve the fact scenario described above in (2). While it is similar to the fact scenario described above in (1), there is an important difference in the present case in that here the unidentified vehicle did not make actual physical contact with Phair's vehicle (or plaintiff's vehicle). The only physical contact that occurred was between plaintiff's and Phair's vehicles. In *Lord v Auto-Owners Ins Co*, 22 Mich App 669; 177 NW2d 653 (1970), this Court held that the "physical contact" requirement of an uninsured motorist provision was satisfied when an unidentified vehicle struck a second vehicle causing the second vehicle to strike the plaintiff's vehicle. We decline to extend the holding in *Lord* to the present facts for two reasons. First, in plaintiff's complaint, plaintiff sought a declaratory ruling compelling arbitration, but did not, like the plaintiff in *Lord*, seek a declaratory ruling that "coverage did apply." *Id.*, 670. Second, the policy clearly requires the unidentified motor vehicle to make "physical contact with . . . a motor vehicle which an insured person is occupying" and here there was no physical contact between the third vehicle and either plaintiff's or Phair's vehicle. In light of the clear policy language and the absence of physical contact between the unidentified vehicle and either plaintiff's or Phair's vehicles, we do not believe that there is a substantial physical nexus between the unidentified vehicle and plaintiff's vehicle. Accordingly, we conclude that there is no genuine issue as to any material fact and defendant was entitled to judgment as a matter of law. The trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ William B. Murphy  
/s/ Stephen J. Markman  
/s/ Karl V. Fink