Order

Michigan Supreme Court
Lansing, Michigan

July 9, 2019

157518

JEREMY DROUILLARD,
Plaintiff-Appellant,

v

SC: 157518
COA: 334977
St. Clair CC: 2015-002282-NI

AMERICAN ALTERNATIVE INSURANCE CORPORATION,
Defendant-Appellee.

_____/

On May 7, 2019, the Court heard oral argument on the application for leave to appeal the February 27, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, which held that summary disposition for the defendant was proper because the plaintiff was not entitled to coverage under the insurance policy's uninsured motor vehicle provision as a matter of law. See MCR 2.116(C)(10). We REMAND this case to the St. Clair Circuit Court for further proceedings not inconsistent with this order.

Uninsured motorist coverage is not statutorily mandated and, therefore, the terms of the contract control whether a claimant is entitled to benefits. *DeFrain v State Farm*, 491 Mich 359, 367 (2012). We review de novo the interpretation of an insurance contract. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533 (2004). "An insurance policy is enforced in accordance with its terms. Where a term is not defined in the policy, it is accorded its commonly understood meaning." *Id*. at 534. "In determining what a typical layperson would understand a particular term to mean, it is customary to turn to dictionary definitions." *Mich Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 568 (1994), rev'd on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003). Only "[w]here ambiguity is found" will a court "construe the term in the manner most favorable to the insured." *Id*. at 567.

The defendant's policy insuring Tri-Hospital Emergency Medical Services Corporation for the period of September 1, 2014 to September 1, 2015 includes the following in its definition of an "uninsured motor vehicle" in Paragraph (3), Subparagraph (d), of Section F, "Additional definitions":

> "[A] land motor vehicle or 'trailer'
>
> * * *

> d. [t]hat is a hit-and-run vehicle and neither the driver nor [the] 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".

The Court of Appeals erred by concluding that the unidentified truck in this case did not "cause[] an object to hit the insured ambulance" when the ambulance hit the drywall left in the road by the truck. *Drouillard v American Alternative Ins Corp*, 323 Mich App 212, 222-223 (2018). According to the Court of Appeals, the ambulance hit the object, and not vice versa, because the drywall in this case lay "stationary [in the road] at the time of the accident . . . ." *Id*. at 223. Neither party disputes that the drywall left the bed of the truck; that the drywall came to rest in the road; and that, shortly thereafter, the ambulance collided with the drywall as the drywall lay stationary in the road. Using the commonly understood meaning of the provision's terms, see *Twichel*, 469 Mich at 534, one way of triggering coverage under the provision is for an unidentified vehicle to cause an object to come in contact with a covered auto. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "hit" as "to come in contact with <the ball [hit] the window>"). See also *Merriam-Webster's Dictionary and Thesaurus* (2007) (defining "hit" as "to make or bring into contact: collide"). That is exactly what happened when the unidentified vehicle in this case lost its load in the path of the oncoming ambulance. By depositing the drywall directly in the path of an oncoming vehicle, the unidentified vehicle caused the drywall to come in contact with the oncoming vehicle. Thus, whether the drywall was moving or was stationary at the time of the contact is not dispositive.

We disagree with the defendant and the dissenting statement that coverage is precluded because the drywall was stationary when the collision occurred. The dissenting statement wants to reframe the issue as a theoretical semantic one, asking whether a stationary object can be said to "hit" a moving one. But in doing so, the dissenting statement fails to apply the ordinary meaning of the term "hit" or to interpret it in the context in which it appears in the policy provision at issue.[1] As discussed above,

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[1] The dissenting statement's reference to hammers and nails, fists and noses, and golf clubs and balls does not add clarity because the word "hit" has a different meaning in those contexts than it does in the context of the policy provision in this case. As it pertains to hammers and nails (or fists and noses), the word "hit" is defined as "to deal a blow or stroke to: *Hit the nail with the hammer*." Dictionary.com, <https://www.dictionary.com/browse/hit#> (accessed July 3, 2019) [https://perma.cc/CUC7-QDKV]. See also *Merriam-Webster's Collegiate Dictionary*

we believe the pertinent inquiry under the policy is whether a vehicle that has lost its load in a roadway, thereby placing a stationary object in the path of a moving vehicle, can be said to have caused the stationary object to come in contact with the moving vehicle. When the question is properly framed, the answer is straightforward: depositing drywall directly in the path of an oncoming vehicle is sufficient to cause it to come in contact with that vehicle. Accordingly, the phrase "cause an object to hit" does not preclude coverage under the uninsured motor vehicle provision in this case merely because the drywall was stationary at the time of the accident.

Our conclusion is further supported by the presence of the word "hit" in both scenarios in which a hit-and-run accident may give rise to uninsured motorist benefits as prescribed in the second sentence of Subparagraph (d)—when an unidentified vehicle has "hit" a covered auto and when an unidentified vehicle has "cause[d] an object to hit" a covered auto.[2] The defendant concedes that, when the term "hit" appears for the first time in the second sentence, its meaning does not depend on whether the unidentified vehicle "hits" the insured vehicle, or vice versa, so long as the vehicles come into contact with each other. The defendant nevertheless argues that, when the term appears for the second time in the same sentence, coverage is available only if the object "hits" the insured vehicle, but not if the insured vehicle "hits" the object.[3] Because Subparagraph (d) does not distinguish between "hit" in circumstances involving a collision between vehicles and "hit" in circumstances involving a collision between an object and a vehicle, the defendant's argument is belied by the principle recognized in our Court that "[i]dentical language should certainly receive identical construction when found in the same act."[4] *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 426 n 16 (1997) (quotation marks and citation omitted).

(11th ed) (defining "hit" in this context as "to deliver (as a blow) by action"). As it pertains to golf clubs and balls, the word "hit" means "to strike (as a ball) with an object (as a bat, club, or racket) . . . ." *Id.* We choose the contextually appropriate ordinary meaning. See *In re Erwin*, 503 Mich 1, 33 n 15 (2018) (VIVIANO, J., dissenting).

[2] The dissenting statement's disapproval of this method of construction is misguided. The sole issue before us was and is construction of Subparagraph (d), and we must therefore consider the meaning of the same word used elsewhere in the same sentence of the policy, regardless of whether a party has raised or disputed that specific construction argument.

[3] See Michigan Supreme Court, Oral Arguments in *Drouillard v American Alternative Ins Corp* <https://www.youtube.com/watch?v=OGXiXCaoEaY> at 20:19-22:33 (accessed July 3, 2019).

[4] We believe this principle applies equally to contract interpretation and probably with even more force here, where the same word is used not just in the same policy or provision of the policy, but in the same sentence. See *Twichel*, 469 Mich at 534.

MARKMAN, J. (*dissenting*).

The issue here is remarkably straightforward: whether certain drywall lying stationary on a road can properly be said to have "hit" a moving insured motor vehicle, thereby entitling plaintiff to uninsured motorist coverage. The Court of Appeals majority concluded that, while the moving vehicle "hit" the stationary drywall, the stationary drywall did not "hit" the moving vehicle and therefore plaintiff is not entitled to coverage. This conclusion makes sense, as it would be highly unorthodox in common parlance for a speaker of the American-English language to observe that a stationary object had "hit" a moving object. To take just one example, one would not ordinarily declare during a game of pick-up baseball that a window in a nearby home had "hit" a stray baseball. Rather, one would declare that the ball had "hit" the window. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "hit" as "to come in contact with <*the ball* [*hit*] *the window*>") (emphasis added). The majority reverses the Court of Appeals and effectively holds that, as a matter of law, a stationary object can be fairly described as having hit a moving object. Because I do not believe that any reasonable speaker of our language would concur with this analysis and contend that the stationary drywall here "hit" the moving vehicle, I respectfully dissent from this Court's order reversing the decision of the Court of Appeals.

The insurance policy at issue provides coverage for an injury caused by an "uninsured motor vehicle" and further provides that an "uninsured motor vehicle" encompasses a vehicle

> 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".

Thus, the first sentence provides for coverage only if: (a) an accident is caused by a "hit-and-run vehicle," and (b) "neither the driver nor owner can be identified." The second sentence adds that the insured is only entitled to coverage if *either*: (a) the hit-and-run vehicle "hits" the insured vehicle, *or* (b) the hit-and-run vehicle "causes an object to hit" the insured vehicle. Finally, the third sentence provides a heightened evidentiary burden for claims as to which "there is no direct physical contact with the hit-and-run vehicle . . . ." For such claims, "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'." To summarize, the first and

second sentences provide the prerequisites for coverage under the contractual provision, while the third sentence establishes a heightened evidentiary burden for a particular class of claims under the provision.

Plaintiff does not allege that the unidentified vehicle itself "hit" the insured vehicle. Thus, the question is simply whether the unidentified vehicle "cause[d] an object to hit" the insured vehicle where the drywall fell out of the unidentified vehicle onto the road and the insured vehicle struck it moments later, when the drywall was lying stationary on the road.[5] In other words, the question is whether the stationary drywall "hit" the moving vehicle. As this Court has long recognized, terms in a contract "must be interpreted by common sense and common usage, unless some special reason exists to the contrary in a given case." *Burkam v Trowbridge*, 9 Mich 209, 210-211 (1861). Any speaker of English would recognize that it is principally the moving object that "hits" the stationary one; stationary objects can be hit *by* something else, but they do not themselves do the hitting. Once again, the window does not *hit* the ball, just as the nail does not *hit* the hammer, the golf ball does not *hit* the golf club, the nose does not *hit* the fist, and the fire hydrant does not *hit* the vehicle careening into it. As the Court of Appeals majority aptly noted:

> [T]he relevant policy language reflects a clear distinction between the direct object and the 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. [*Drouillard*, 323 Mich App at 221-222.]

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[5] Judge TUKEL's concurrence in the Court of Appeals raises a substantial argument that a "hit-and-run vehicle" is one in which a driver of a vehicle hits another vehicle, recognizes that he has hit that other vehicle, and then runs immediately thereafter in order to flee the scene of the accident. See *Drouillard v American Alternative Ins Corp*, 323 Mich App 212, 223-229 (2018) (TUKEL, J., concurring). However, the proper interpretation of a "hit-and-run vehicle" need not be addressed in this case, as I agree with the unanimous conclusion of the Court of Appeals (including Judge TUKEL himself) that even if this interpretation of a "hit-and-run vehicle" is correct, there remains a question of fact as to whether the driver of the unidentified vehicle was cognizant of the accident prior to leaving the scene. Accordingly, plaintiff is not, as a matter of law, precluded from coverage on this basis.

This commonsense understanding of the term "hit" is supported by empirical data from the Corpus of Contemporary American English (COCA). While this data is not without its limitations, this Court has recognized it as a tool to "analyze[] ordinary meaning through a method that is quantifiable and verifiable." *People v Harris*, 499 Mich 332, 347 (2016) (quotation marks and citation omitted). COCA enables users to search more than 560 million words spread evenly across 1990–2017 to discover linguistic patterns and exercises of common usage. Its remarkably comprehensive database includes transcripts of live television broadcasts, newspapers, magazines, academic journals, and fiction. Davies, Corpus of Contemporary American English <https://www.english-corpora.org/coca/> (accessed June 25, 2019) [https://perma.cc/Y7KA-SHK3]. Of the 1,895 relevant excerpts in COCA in which the word "hit" (employed as a verb) is collocated within four words of objects that are generally stationary (a wall, a fence, a guardrail, a nail, a curb, a post, a mailbox, a floor, the ground),[6] there are only thirteen excerpts at the most-- approximately .68% of all relevant excerpts-- that could even arguably be interpreted as communicating that a stationary object can "hit" something else.[7] The remaining 1,882 excerpts-- approximately 99.3% of all relevant excerpts-- describe the stationary object as being

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[6] The number of excerpts in COCA in which the verb "hit" appears within four words to the right or the left of the relevant search term (used as a noun) for each term, in order from the most to the fewest number of excerpts, is: ground (1,174), wall (637), floor (549), nail (207), fence (48), post (44), curb (25), guardrail (12), and mailbox (10). Because of the high volume of results for the search involving the words "hit" and "ground," I analyzed only an entirely randomly selected 500-excerpt sample for this opinion. For the other search terms, I analyzed every excerpt in the database. Of the 2,032 excerpts I analyzed, 137 of them, for various reasons, did not support either party's position. For example, in the search for the words "hit" and "post," there were excerpts in which the word "hit" was within four words of "The Washington Post." Because the word "hit" was used in conjunction with a proper noun rather than a stationary object, these excerpts did not assist in determining whether the stationary object does or does not "hit" the moving object in ordinary usage. Additionally, there were some excerpts in which "hit" and the search term appeared in different sentences and therefore there was no relationship between "hit" and the search term to analyze.

[7] Of the thirteen excerpts that could arguably support the majority's conclusion, four of these compare something moving as hitting something else "like a wall," for example, "the howling rush of air hit like a wall." While the fact that something moving is described as "hitting" something "like a wall" arguably suggests that a stationary wall can "hit" something, this is dubious support for the conclusion that a stationary wall "hits" something else. Rather, this phrase appears to be an essentially literary or metaphorical device whereby emphasis is given to the proposition that something being hit by a moving object with sufficient force has *effectively* hit the moving object.

"hit" by something else, not as doing the "hitting." These data reinforce what I believe is already a commonly understood proposition: in common American-English parlance, the moving object "hits" the stationary object; the stationary object does not "hit" the moving object.

The majority rejects this reasoning, concluding that because the word "hit" can be defined as "come in contact with," and the drywall "c[a]me in contact with" the insured vehicle, the drywall thus "hit" the insured vehicle and plaintiff is entitled to coverage. *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "hit" as "to come in contact with <the ball [*hit*] the window>"). However, this understanding of "hit" is hardly contrary to the common understanding explained above. The majority seems to presume that the phrase "come in contact with" itself does not require movement or the terminus of a process, but simply identifies an occurrence, i.e., that to "come in contact with" signifies one item contacting another, regardless of which item had been "moving" when the contact occurred. But definitions of the word "come" and "in" indicate that only a moving object actually "hits" another. The first two definitions of the word "come" in the same dictionary employed by the majority require motion. *Id.* ("to move toward something: approach <[*come*] here>"; "to move or journey to a vicinity with a specified purpose <[*come*] see us> <[*come*] and see what's going on>"). Moreover, "in" can be defined as the equivalent of the first definition of "into," which is "a function word to indicate entry, introduction, insertion, superposition, or inclusion <came [*into*] the house>." *Id*. These definitions strongly suggest that an object only "come[s] in contact with" another if the contact is the product of that object *moving* to contact the other.[8]

Admittedly, some of the dictionary definitions of "in" and "come" in *Merriam-Webster's Collegiate Dictionary* could be pasted together in a manner that sustains the majority's position, i.e., that a stationary object can "hit" a moving object. However, other definitions (as well as a reasonable understanding of actual use of the English language) are compatible with defendant's conclusion, i.e., that only a moving object "hits" another object. Additionally, the sentence provided with the dictionary definition cited by the majority-- "the ball hit the window"-- supports defendant's understanding. It appears clear that in this example the object doing the hitting-- the ball-- is in motion while the object being hit-- the window-- is stationary. The stationary window is not

[8] The majority also cites *Merriam-Webster's Dictionary and Thesaurus* (2007), which defines "hit" as "to make or bring into contact: COLLIDE." However, this definition is also not necessarily inconsistent with common understandings, given that the word "collide" is defined as "to come together with solid impact" and "come" is defined, in part, as "to move toward something: APPROACH." *Id*. Thus, this definition also contributes little to the majority's argument, as it also requires the hitting object to be in motion at the time the physical contact occurs.

hitting the moving ball, the moving ball is hitting the stationary window. Thus, the majority's dictionary definitions, far from contradicting defendant's position, affirmatively support that position.

Moreover, as this Court has recognized, "the dictionary should be seen as a tool to facilitate [legal] judgments, not conclusively resolve linguistic questions. . . . The dictionary is but one data point; it guides our analysis, but it does not by itself settle it." *In re Estate of Erwin*, 503 Mich 1, 19-20, 21 (2018). Reference to dictionary definitions is valuable precisely because it provides *evidence* as to a term's common usage. *People v Morey*, 461 Mich 325, 330 (1999) ("[W]e may turn to dictionary definitions to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings.") In other words, a dictionary can help this Court *determine* a term's common usage, but a dictionary cannot *supplant* or *nullify* a term's common usage. See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 356 (1999) (holding that when interpreting a contractual provision, this Court must "determine what the phrase conveys to those familiar with our language and its contemporary usage," which may not be completely reflected in dictionary definitions). At the very least, when dictionary definitions might conceivably support either of the two proffered interpretations (and even this is a highly favorable conclusion to the majority in the present circumstance), this Court is bound to apply the interpretation that is *most* consistent with common usage.

The majority fails entirely to explain why its preferred definition of "hit" is more consistent with common usage than the understanding that only a moving object can "hit" another object. The majority's only support for this holding is grounded in defendant's concession as to an issue that is entirely extraneous to the issue in this case.[9] Specifically, the majority argues that because defendant concedes that when an accident involves two moving vehicles it does not matter which vehicle does the "hitting," and the

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[9] The majority rightly declines to endorse plaintiff's argument that the phrase "direct physical contact" in the third sentence of the relevant provision compels the conclusion that "hit" as used in this policy is synonymous with "direct physical contact." As discussed above, the third sentence merely heightens a claimant's *evidentiary* burden for a particular class of claims under the provision; it does not define the threshold circumstances under which a party is entitled to coverage under the policy. In other words, the third sentence defines what quantum of evidence must be provided to demonstrate the occurrence of a situation entitling a claimant to coverage under the policy but does not define the circumstances under which that claimant is entitled to coverage. Accordingly, the third sentence cannot reasonably be understood to define the term "hit" as used in the preceding sentence. While parties to a contract are certainly free to define a contractual term in whatever esoteric manner they desire, the instant provision here does not do so, and therefore we must define the term "hit" consistently with common usage.

term "hit" should be interpreted consistently throughout different parts of the insurance policy, it stands to reason that it is irrelevant whether the object "hit" the vehicle or vice versa. I agree with the majority that as a general proposition identical terms in an insurance contract should be interpreted consistently. However, the issue here is the distinct one of whether the stationary drywall "hit" the moving vehicle, and defendant did not concede that a stationary vehicle can "hit" a moving vehicle, but only that it was irrelevant *which* of two moving vehicles did the "hitting." Thus, I fail to see how this concession supports the majority's conclusion that a stationary object can hit a moving object.

Moreover, even if this Court could somehow conclude that defendant had conceded that a stationary vehicle can "hit" a moving vehicle, how and why should this concession affect the interpretation of the relevant contractual term? Neither party contends that two vehicles here contacted each other, and therefore neither briefed the appropriate definition of the word "hit" in relation to collisions between multiple vehicles.[10] However, defendant clearly argues that the drywall did not "hit" the insured vehicle because the drywall was lying stationary on the road. Assuming that defendant wrongly presumes that the term "hit" has a different meaning when applied to physical contact between multiple vehicles than it does when applied to physical contact between a vehicle and a stationary object, that does not mean as a result that defendant is incorrect in arguing that a "hitting" object must be in motion. In other words, even if defendant wrongly argued that the common usage of "hit" applies only in the context of one provision, when it should for the sake of consistency apply in the other context as well, defendant remains correct in its reasoning as it applies to *this* case. I would decline to employ the majority's attenuated reasoning, especially when the result of this reasoning is plainly to misinterpret the unambiguous contractual provision at issue.

In conclusion, the proper disposition of this case turns on one specific issue: whether the stationary drywall can properly be said to have "hit" the moving insured motor vehicle. It is reasonably clear to most speakers of American English that a stationary object does not "hit" a moving object, i.e., that the window does not "hit" the ball. This understanding is fully consistent with the dictionaries utilized by the majority in support of its contrary conclusion, as these indicate that only a moving object can "hit" another object. Because the parties concede that the drywall was altogether stationary when the accident occurred, the unidentified vehicle did not cause an object to "hit" the insured vehicle and therefore plaintiff is not entitled to coverage under the policy. Plaintiff argues that it is "senseless" to base coverage under the policy on whether

[10] This issue appears to have been raised for the first time in an amicus brief filed by the Michigan Association for Justice five days before oral argument.

an object was stationary or in motion when it contacted the insured vehicle. However "senseless" one might find this distinction, it is this Court's responsibility to enforce contractual provisions, not to rewrite them in a manner that is consistent with the Court's own sense of fairness and to further erode what should be a disciplined and faithful process by which this Court gives meaning to disputed contracts.

ZAHRA, J., joins the statement of MARKMAN, J.

STATE OF MICHIGAN

COURT OF APPEALS

JEREMY DROUILLARD,

Plaintiff-Appellee,

v

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellant.

FOR PUBLICATION
February 27, 2018
9:00 a.m.

No. 334977
St. Clair Circuit Court
LC No. 2015-002282-NI

Before: TALBOT, C.J., and METER and TUKEL, JJ.

TALBOT, C.J.

Defendant, American Alternative Insurance Corporation (AAIC), appeals by leave granted[1] an order denying its motion for summary disposition in this dispute over uninsured motorist coverage. We reverse and remand for entry of an order granting summary disposition in favor of AAIC.

On the evening of October 13, 2014, Jeremy Drouillard, an emergency medical technician, was involved in a single-vehicle accident while riding as a passenger in an ambulance driven by his partner, Angelica Schoenberg. Schoenberg and Drouillard were traveling westbound on Griswold in "lights and sirens mode," on their way to a service call near the intersection of Griswold and 14th Street. Schoenberg opined that she was driving less than 45 miles per hour when the ambulance suddenly struck something in the intersection of Griswold and 13th Street. She did not know what she struck until she exited the ambulance and saw drywall dust and debris scattered in the roadway. As a result of the accident, Drouillard suffered injuries to his lumbar spine and was eventually disabled from work.

The events surrounding the accident were witnessed by three bystanders, who resided in homes fronting Griswold, near the intersection with 13th Street. According to these bystanders, a white pickup truck driving on 13th Street darted across Griswold in front of the ambulance. The rapid acceleration of the truck caused a large quantity of building materials to fall from the

[1] *Drouillard v American Alternative Ins Corp*, unpublished order of the Court of Appeals, entered February 23, 2017 (Docket No. 334977).

truck's bed or trailer into the roadway, blocking both traveling lanes on Griswold. Shortly thereafter, the ambulance came upon the intersection and struck the building materials.

Drouillard's employer maintained insurance for the ambulance through a policy issued by AAIC, which included an endorsement for Michigan uninsured motorist coverage. The endorsement stated that AAIC would pay all amounts an insured individual was entitled to recover from the owner or driver of an "uninsured motor vehicle." Pertinent to this matter, the policy defined "uninsured motor vehicle" as follows:

> "Uninsured motor vehicle" means a land motor vehicle or "trailer":
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> * * *
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> 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".

Drouillard filed suit against AAIC on September 21, 2015, seeking uninsured motorist benefits pursuant to the above policy terms. AAIC admitted that Drouillard was an "insured" who would qualify for uninsured motorist benefits if all other terms and conditions were satisfied, but maintained that benefits were not available to Drouillard because there was no "uninsured motor vehicle" involved in the accident. AAIC moved for summary disposition on this basis, arguing that the pickup truck did not qualify as a hit-and-run vehicle and that the pickup truck did not cause an object to hit the insured ambulance. The trial court rejected both arguments, and this appeal followed.

This Court reviews rulings on summary disposition motions de novo.[2] AAIC did not identify the subrule under which it brought its motion for summary disposition. However, because AAIC challenged the factual sufficiency of Drouillard's claim and relied on evidence beyond the pleadings, we review the court's ruling under the standards applicable to MCR 2.116(C)(10).[3] The trial court may grant a motion for summary disposition under MCR 2.116(C)(10) only if "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."[4] "A genuine issue of material fact exists when the

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[2] *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010).

[3] See *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010).

[4] *Dancey*, 288 Mich App at 7, quoting *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (quotation marks omitted).

record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."[5]

"An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to 'determine what the agreement was and effectuate the intent of the parties.' "[6] The Court ascertains the intent of the parties by looking to the language employed in the contract.[7] The words and phrases used should be construed in context, and this Court may consult a dictionary in order to ascertain the plain and ordinary meaning of undefined language.[8] "Every word, phrase, and clause in a contract must be given effect, and [an] interpretation that would render any part of the contract surplusage or nugatory must be avoided."[9] "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law."[10] "A contract is ambiguous when, after considering the entire contract, its words may reasonably be understood in different ways."[11]

AAIC argues on appeal that it was entitled to summary disposition because there was no evidence that an "uninsured motor vehicle" was involved in the accident in light of the contractual definition of an uninsured motor vehicle as a vehicle that is a "hit-and-run vehicle." Specifically, AAIC argues that the common usage of the phrase hit-and-run denotes a knowledge element on the part of the driver and points to various statutes proscribing criminal penalties for a "driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident" but fails to stop at the scene.[12] Drouillard, on the other hand, contends that the phrase hit-and-run does not involve a knowledge component and suggests that a hit-and-run vehicle is involved in the accident whenever neither the driver nor owner of the vehicle can be identified.

We find it unnecessary to determine whether the phrase "hit-and-run vehicle" requires knowledge of the accident on the part of the driver because assuming, without deciding, that knowledge *is* required, the trial court correctly concluded that questions of fact remained as to that issue. On appeal, AAIC argues that the only evidence of the truck driver's knowledge

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[5] *Dancey*, 288 Mich App at 8, quoting *West*, 469 Mich at 183 (quotation marks omitted).

[6] *Hunt v Drielick*, 496 Mich 366, 372; 852 NW2d 562 (2014), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

[7] *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012).

[8] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004); *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015).

[9] *McCoig Materials, LLC*, 295 Mich App at 694.

[10] *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009).

[11] *Auto-Owners Ins Co*, 310 Mich App at 146.

[12] See MCL 257.617 through MCL 257.619.

consisted of eyewitness speculation.[13] Although it is true that "[s]peculation and conjecture are insufficient to create an issue of material fact,"[14] a fact-finder could infer from evidence other than eyewitness speculation that the driver was aware that the building materials he was hauling had fallen into the road. Although the eyewitnesses differed as to whether the building materials included lumber or consisted solely of drywall, they agreed that there was such a large amount of materials deposited in the road that the pile measured approximately two feet high. They also agreed that the accident occurred quickly after the materials landed in the roadway: one witness described the lapse of time as approximately three to five seconds; another witness estimated that it was "[m]aybe half a minute, if that"; and a third witness observed that the pickup truck had "barely cleared the intersection" before the ambulance arrived. Given the quantity of materials lost and the immediacy of the ambulance's collision, reasonable minds could differ as to whether the driver would be alerted to the loss of the building materials based on the sudden absence of weight from his vehicle and, in turn, come to realize that the lost materials had caused an accident. The trial court did not err in reaching the same conclusion.

Next, AAIC argues that the plain language of the insurance policy only provides coverage in these circumstances if the pickup truck caused an object to hit the insured ambulance. Thus, according to AAIC, it was entitled to summary disposition because the unrefuted evidence demonstrated that the ambulance struck the stationary pile of building materials—the building materials did not strike the ambulance.

As it relates to this issue, the trial court found that it was required by this Court's holding in *Dancey v Travelers Prop Cas Co* to deny AAIC's motion for summary disposition. In that case, this Court was called upon to interpret identical policy language to determine whether the plaintiff was entitled to uninsured motorist benefits after she struck a ladder in the roadway, when there was no direct evidence that the ladder had fallen from an unidentified vehicle.[15] The Court examined a line of cases involving accidents in which a vehicle came into contact with some object cast off from another vehicle.[16] It found the circumstances before it distinguishable from similar cases because there was no "objective and convincing evidence of another unidentified vehicle that could have been the source of the object that made contact with the insured vehicle."[17] Nonetheless, it affirmed the trial court's denial of summary disposition because the accident occurred on a raised overpass that was only accessible to vehicular traffic.[18] The Court reasoned that even without evidence of an identified vehicle from which the ladder

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[13] Presumably, AAIC is referring to eyewitness testimony opining that the driver "had to feel the shift of weight," that the driver did not return because "he knew he was going to be in trouble," and that "if you lost that much weight, you could tell . . . ."

[14] *Ghaffari v Turner Const Co*, 268 Mich App 460, 464; 708 NW2d 448 (2006).

[15] *Dancey*, 288 Mich App at 11-12.

[16] *Id*. at 13-18.

[17] *Id*. at 17.

[18] *Id*. at 20-22.

may have fallen, the unique location of the accident created a question of fact "with regard to whether a substantial physical nexus exists between the ladder and unidentified hit-and-run vehicle."[19]

Importantly, the issue before the Court in *Dancey*, and the reason for its conclusion, focused on whether the plaintiff could establish a substantial physical nexus between the ladder she hit and a hit-and-run vehicle. By contrast, as it did in the trial court, AAIC asks this Court to assume for purposes of its appeal that a substantial nexus existed between the pickup truck, the building materials, and the ambulance's impact with the materials. As such, we agree with AAIC's contention that the trial court erred by concluding that it was bound to follow the outcome in *Dancey*. Although *Dancey* involved the same policy language and substantially similar facts, it did not turn on the same issue—i.e., how to give effect to the language requiring that the hit-and-run vehicle "cause an object to hit" the insured, an insured vehicle, or a vehicle occupied by an insured. Therefore, *Dancey* was not dispositive of the issue raised by AAIC.

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[.]' "[20] 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.[21]

Drouillard relies on a dictionary definition of the verb "to hit" to refute this reading of the policy language. Specifically, Drouillard points to *Merriam-Webster*'s definition of "hit" which includes, in pertinent part, the meaning "to come in contact with."[22] However, it is worth noting

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[19] *Id*. at 21.

[20] Emphasis added.

[21] *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 222; 600 NW2d 427 (1999) (quotation marks and citation omitted).

[22] *Merriam-Webster's Collegiate Dictionary* (11th ed).

that the quoted definition is followed by an illustration of the term and definition: "to come in contact with <the ball ~ the window>[.]"[23] When such an illustration is included, the swung dash replaces the word being illustrated.[24] Thus, the definition proffered by Drouillard is best illustrated by the following usage: "the ball hit the window." Even this definition suggests a distinction between the object doing the hitting—the ball—and the object being hit—the window. In that example, it is certainly true that the ball and window came in contact with each other, but, absent extraordinary circumstances, it is improbable that a window hit a stationary ball.

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.

Reversed and remanded for entry of an order granting summary disposition in favor of AAIC. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jonathan Tukel

[23] *Id*.

[24] *Id*. at p 19a.

STATE OF MICHIGAN

COURT OF APPEALS

JEREMY DROUILLARD,

Plaintiff-Appellee,

v

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellant.

FOR PUBLICATION
February 27, 2018

No. 334977
St. Claire Circuit Court
LC No. 2015-002282-NI

Before: TALBOT, C.J., and METER and TUKEL, JJ.

TUKEL, J. (*concurring*).

I agree that summary disposition must be granted to defendant, and I join the majority opinion. There are two principal legal points at issue: (1) Did the pickup truck hit, or cause an object to hit the ambulance, as required by the policy language; and (2) was the pickup truck a "hit and run vehicle" as required by the policy language in order for there to be coverage. The majority answers the first question in the negative, a conclusion with which I agree, and which is sufficient to mandate summary disposition in favor of defendant. The dissent answers the first question in the affirmative by relying on previous decisions of this Court which have ignored the second question and which merely assumed that the vehicles at issue in those cases were hit-and-run vehicles. I write separately to point out the assumptions which have been and are being built into our jurisprudence for future cases, which I believe merit review at some point by our Supreme Court, even if this case does not present the issue clearly enough to warrant such review.

I. POLICY LANGUAGE

The policy at issue here required that the pickup truck carrying the drywall "*hit, or cause an object to hit*, an 'insured,' a covered 'auto' or a vehicle an 'insured' is 'occupying.'" (Emphasis added.) Rather than focusing on the critical "hit, or cause an object to hit" language, as does the majority, the dissent focuses on this Court's opinion in *Dancey v Travelers Prop Cas Co*, 288 Mich App 1; 792 NW2d 372 (2010):

> The majority states that the *Dancey* Court was focusing on the possibility of a "substantial physical nexus" between the ladder and another vehicle and not on the "cause an object to hit" phrasing from the policy. But implicit in the *Dancey*

> Court's holding was that the situation in *Dancey* satisfied the conditions of the policy. Therefore, *Dancey* provides supportive caselaw for plaintiff's position in the present case.

I respectfully disagree. "A point of law merely assumed in an opinion, not discussed, is not authoritative." *United States v Oleson*, 44 F3d 381, 387 (CA 6, 1995) (NELSON, J., concurring), overruled on other grounds by *United States v Reed*, 77 F3d 139 (CA 6, 1996); see also *Webster v Fall*, 266 US 507, 511; 45 S Ct 148; 69 L Ed 411 (1925); *Othi v Holder*, 734 F3d 259, 265 (CA 4, 2013); *Nelson v Monroe Regional Med Ctr*, 925 F2d 1555, 1576 (CA 7, 1991).[1] Consequently, the dissent's reliance on *Dancey's* "implicit" holding of a point not raised or ruled on, but merely assumed, is misplaced. As the majority opinion properly holds, *Dancey* did not decide, and thus provides no support for, the issue of whether the facts of the present case satisfy the requirement in the policy that "[t]he vehicle must hit, or cause an object to hit" the insured. The majority correctly construes those words, which plainly do not cover the situation here, where the ambulance hit stationary objects that had been dropped by the pickup truck, rather than the objects hitting the ambulance.

II. WHAT CONSTITUTES A "HIT AND RUN VEHICLE"?

The analysis in *Dancey* has another flaw—it fails to fully consider what is necessary for a vehicle to constitute a "hit-and-run" vehicle, the threshold for coverage in the first instance. Defendant argues that there is no evidence that the driver of the pickup truck knew of an accident and then left the scene, the statutory definition of some hit-and-run offenses. Both the majority and the dissent agree that defendant's reliance on statutory definitions is misplaced; because the term itself is undefined in the policy, statutory definitions have no applicability, and the term must be given its ordinary meaning. See *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 83; 730 NW2d 682 (2007). The majority and dissent also agree that if the term "hit-and-run vehicle" encompasses some requirement that the driver had to have known of the accident, there was sufficient evidence of knowledge here to deny summary disposition on that point. That is so in this case because one fair reading of the record is that the drywall fell off the truck just seconds before the ambulance hit it, as the majority opinion recognizes. Under those circumstances, it is a fair inference that the driver would have felt the shift in weight of the truck, and would have looked up at the rearview mirror and seen the accident or its immediate aftermath. The driver likely would have heard the crash as well. Therefore, there was sufficient evidence in this case to conclude that the truck was a hit and run vehicle, and so coverage was at least possible, which is sufficient to preclude summary disposition as to that issue.

[1] The opinions of lower federal courts are not binding on this Court, but such opinions may be considered for their persuasive value. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

A. HIT AND RUN V. RUN AND HIT

Dancey and *Berry v State Farm Mut Auto Ins Co*, 219 Mich App. 340; 556 NW2d 207 (1996), the cases relied upon by the dissent and by plaintiff, however, contain a flaw in the form of an assumption, which is related to the knowledge issue. The requirement of a "hit-and-run vehicle" requires something basic—that a vehicle "hits" another vehicle and then "runs." Regardless of whether the phrase "hit-and-run" imposes some requirement of knowledge on the part of the driver, its very phrasing imposes a temporal requirement—the "hit" must precede the "run." *Dancey* discussed only what constitutes the "hit" portion of the analysis; after finding that satisfied, it did not discuss the "run" component at all. Thus, under *Dancey*, a vehicle which in some sense starts a chain of events which later causes an accident (thus, according to *Dancey*, satisfying the "hit, or cause an object to hit" language of the policy), is assumed to constitute a "hit-and-run" vehicle. But that cannot be correct, as the facts of *Dancey* demonstrate.

In *Dancey*, a ladder fell or dropped off a truck some time before the plaintiff's vehicle struck the ladder on the highway. At least one vehicle in front of the plaintiff's, which had blocked her view, managed to avoid the ladder. *Dancey*, 288 Mich App at 18. Witnesses at the scene talked about a truck which may have dropped the ladder, but the plaintiff did not know if anyone had seen a truck. *Id*.

Thus, even assuming that the "hit" portion of the "hit and run" requirement was met in *Dancey*, there was no evidence that the driver fled or "ran" from an accident, even if the driver knew that the ladder had fallen off. Unlike in the present case, there was no immediate accident which followed the ladder coming to a stop on the roadway, and when the ladder fell it was not necessarily the case that an accident would ensue. One vehicle seemed to have avoided the ladder, and the plaintiff almost did as well. But in any event, all that the evidence showed was that after losing the ladder, the truck continued driving *before* an accident took place. Even if it could be proven that the driver of whatever vehicle lost the ladder knew that it had fallen off, at most it could be said that the driver had created a high likelihood of an accident by creating a very dangerous situation. 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 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.

Berry, a case also cited by the dissent, demonstrates this point even more clearly. In *Berry*, a truck was hauling a load of scrap metal. At some point it stopped, and the driver got out and inspected the load. Between five and fifteen minutes later, at a spot about a half-mile from

where the driver had stopped to inspect the truck, a fallen piece of metal caused an accident. *Berry*, 219 Mich App at 350. By that time, the truck had long since driven away. The *Berry* Court examined the facts and determined that "a substantial physical nexus between the hit-and-run vehicle and the object struck by plaintiff was established." *Id*. The *Berry* Court did not discuss at all whether or how the truck had "run" from what it determined was the "hit." Thus, even setting aside whether there was a basis for determining "a substantial physical nexus" between the truck and the plaintiff's vehicle, simply labeling the truck "the hit-and-run" vehicle where it continues driving and is gone from the scene of what later becomes an accident ignores the temporal requirement of a hit followed by a run. It is not hard to imagine a scenario such as in *Berry* in which a sharp piece of metal could lie on a rural road for days undiscovered and then cause an accident. Under those circumstances, labeling someone a "hit-and-run" driver for having driven days before, even if the driver had known about a part falling off, simply strains the term "hit-and-run" beyond a reasonable reading. See *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000) (stating that courts should avoid strained construction of insurance policies).[2]

B. APPLICATION TO CURRENT CASE

In the present case, the policy language, properly construed, solves the problem. Its requirement that a vehicle "hit, or cause an object to hit" an insured vehicle (as opposed to the insured vehicle hitting a stationary object, as in this case) necessarily requires that an accident occur prior to whatever driving by the unidentified vehicle is labeled as running. However, if this Court continues to adopt the *Dancey* and *Berry* assumptions of what constitutes "hit and run" then our Supreme Court will have to address the issue in an appropriate case.

/s/ Jonathan Tukel

[2] The temporal requirement of "hit and run" suggests that when this Court does consider whether in order to be labeled a hit-and-run, the driver of a vehicle needed to have been aware of an accident, the answer will be yes. As this analysis has shown, absent a preceding accident there can be no hit and run. For the same reasons, absent knowledge of the accident, driving is simply driving, and only becomes "running" if the driver is running from something, i.e., an accident.

STATE OF MICHIGAN

COURT OF APPEALS

JEREMY DROUILLARD,

Plaintiff-Appellee,

v

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellant.

FOR PUBLICATION
February 27, 2018

No. 334977
St. Clair Circuit Court
LC No. 2015-002282-NI

Before: TALBOT, C.J., and METER and TUKEL, JJ.

METER, J. (*dissenting*).

I respectfully dissent because I believe the trial court correctly denied defendant's motion for summary disposition. I would affirm.

As noted by the majority, plaintiff's insurance policy defined "uninsured motor vehicle" as follows:

> "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".

In *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 2-3, 11-12; 792 NW2d 372 (2010), this Court considered a situation analogous to that in the instant case; the insured's vehicle hit a ladder in a roadway, and the policy language at issue was identical to that at issue here. The Court stated:

> Defendant claims that in order for the hit-and-run vehicle to "cause an object to hit" plaintiff's vehicle, there must be a physical nexus between the hit-and-run vehicle and the object. Defendant argues that because no one could

> affirmatively state that the ladder fell off another vehicle, only speculation would permit a jury to conclude that there was any nexus between the ladder and the hit-and-run vehicle, and speculation is insufficient to establish a genuine issue of fact. Plaintiff argues that there was no other logical explanation for how the ladder came to be in the roadway, given that the area was not under construction, was not open to pedestrian traffic, and was not beneath an overpass from which a ladder could have fallen. [*Id*. at 12.]

This Court ultimately affirmed the denial of summary disposition to the insurer, concluding that sufficient evidence had been presented to establish a substantial physical nexus between the ladder and another vehicle. *Id*. at 21-22. The majority indicates that the *Dancey* Court was focusing on the possibility of a "substantial physical nexus" between the ladder and another vehicle and not on the "cause an object to hit" phrasing from the policy. Implicit in the *Dancey* Court's holding, however, was that the situation in *Dancey* satisfied the pertinent language of the policy. Therefore, *Dancey* provides supportive caselaw for plaintiff's position in the present case.

In *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 342-343; 556 NW2d 207 (1996), the insured's vehicle struck an object in a roadway and she sought uninsured motorist benefits. The insurance policy in question defined an "uninsured motor vehicle," in part, as a hit-and-run vehicle that "strikes . . . the vehicle the insured is occupying." *Id*. at 342. This Court stated:

> [D]efendant takes issue with the [trial] court's legal conclusion that plaintiff was covered under the uninsured motorist provision of the insurance policy. 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.
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> * * *
>
> [T]his 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. In this case, defendant argues that an insufficient nexus existed between a hit-and-run vehicle and the metal piece lying in the road. [*Id*. at 346-347 (citations omitted.]

The *Berry* Court ruled that "the legal requirement of a substantial physical nexus between the hit-and-run vehicle and the object struck by plaintiff was established." *Id*. at 350. The Court indicated that adequate evidence of contact between the insured and another vehicle had been presented because "the metal piece lying in the road that [the insured's] vehicle struck was deposited by the hit-and-run vehicle itself, i.e., the truck hauling a trailer of scrap metal." *Id*. at 352.

The relevant policy language in *Berry* was "a . . . motor vehicle . . . which strikes . . . the vehicle the insured is occupying," and the Court found adequate evidence of coverage. *Id*. at 342, 352. The relevant language in the present case is "a . . . vehicle [that] . . . cause[s] an object to hit . . . a vehicle an 'insured' is 'occupying'." The policy language in the present case is broader than that at issue in *Berry*.

Both *Dancey* and *Berry* suggest the existence of coverage in the present case.[1] In addition, the plain language of the insurance policy supports the existence of coverage. Evidence demonstrated that the building materials in the road "hit" the ambulance when the ambulance proceeded over them. *Random House Webster's Dictionary* (1997) defines "hit," in part, as "to come against with an impact[.]" The building materials "c[a]me against" the ambulance "with an impact[.]" Accordingly, the white pickup truck "cause[d] an object to hit" the ambulance.

In light of the policy language and existing caselaw, I would affirm the denial of summary disposition to defendant.[2]

/s/ Patrick M. Meter

[1] Contrary to the suggestion made in the concurring opinion, I do not find that *Dancey* and *Berry* are strictly binding in the present case. I find them *suggestive* of coverage, and reading them in conjunction with the plain language of the policy leads me to conclude that the trial court did not err in denying summary disposition to defendant.

[2] I agree with the majority that defendant was not entitled to summary disposition based on the argument relating to the common definition of a "hit-and-run vehicle" because, contrary to defendant's argument, the trial court correctly concluded that there were genuine issues of fact regarding knowledge on the part of the driver. Whether this knowledge must ultimately be proven in order for plaintiff to recover is not a question currently before us because we are reviewing, simply, whether the trial court correctly denied defendant's motion for summary disposition.