STATE OF MICHIGAN

COURT OF APPEALS

PATRICE M. MASON and SHARL MASON, Plaintiffs-Appellees, v AUTO CLUB INSURANCE ASSOCIATION, a/k/a ACIA a/k/a AAA MICHIGAN, Defendant-Appellant.	UNPUBLISHED August 3, 2010 No. 289719 Wayne Circuit Court LC No. 07-710258-NF

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from an order dismissing plaintiffs' complaint for uninsured motorist (UIM) benefits under an automobile insurance policy issued by defendant. The order directed that plaintiffs' claims be submitted to arbitration, subject to defendant's right to appeal an earlier order denying its motion for summary disposition. Defendant now challenges the summary-disposition decision. We reverse the denial of summary disposition and remand this case for entry of judgment in favor of defendant.

This action arises from an automobile accident that occurred in June 2006. According to plaintiffs' complaint, plaintiffs were "run off the road by two racing vehicles" that apparently did not stop and cannot be identified. Plaintiff Patrice Mason is the daughter of plaintiff Sharl Mason. Patrice was driving her minivan, and Sharl was the front seat passenger.

Patrice testified that the incident occurred as she was driving on a two-lane road through Chandler Park in Wayne County. At least three cars were approaching her from the opposite direction and were "snake driving," i.e., veering from one side of the road to the other and back. One of those cars lost control and spun off onto the west side of the road, "kicking up debris and boulders and rocks." Patrice swerved to avoid the vehicle, ran off the road, and "went up on the rocks and hit the fence and the curb." When she struck a fence post, some of the car windows were broken and the airbag deployed.

When asked whether anything from the unidentified vehicle struck her car, Patrice stated, "As I was going up on the curve, he was turning back on the west side and the rocks and the debris hit the car." When asked whether any part of the unidentified car or any substance it pushed hit Patrice's car, Sharl stated, "Well when he ran her off-the-road [sic], he kind of hit the fence that lifted up and hit the car." When asked whether anything else moved from the

unidentified car to Patrice's car, Sharl stated, "Rocks, dirt because it was a big old boulder there, fence, the pole that the fence is made to, not the fence is made of, how the fence is made and then there is a pole that sits in the ground. Do you understand, the that [sic] hit the car."

Patrice had insurance under a policy issued by defendant and the policy included UIM benefits. A policy amendment stated:

> [W]e will pay damages for **bodily injury** to an **insured person** which:
>
> a. is caused by accident; and
>
> b. arises out of the ownership, operation, maintenance or use of an **uninsured motor vehicle** or **underinsured motor vehicle**; and
>
> c. that **insured person** suffers death, serious impairment of body function or permanent serious disfigurement; and
>
> d. that **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** or **underinsured motor vehicle**. [Emphasis in original.]

An "uninsured motor vehicle" was defined to include "a hit-and-run motor vehicle of which the operator or owner are unknown and which makes direct physical contact with: (1) you or a resident relative [i.e., the insured], or (2) a motor vehicle which an insured person is occupying."

After plaintiffs sued for UIM benefits, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10). It asserted that plaintiffs had failed to state a claim for relief because, while they alleged that they were run off the road by other cars, they did not allege that there was any physical contact between those cars and their own car. Defendant additionally stated that the evidence failed "to establish that there was direct physical contact with a second unidentifiable hit-and-run vehicle."

Plaintiffs argued that when a policy refers to physical contact between two vehicles, indirect physical contact is sufficient. Plaintiffs claimed that there was at least a question of fact regarding whether an unidentified vehicle caused something to strike plaintiffs' vehicle. Defendant responded that the case law cited by plaintiffs was distinguishable because the policy at issue specifically required "direct physical contact."

The trial court denied defendant's motion, ruling, in part:

> In all deference to the higher court, I do not see how the insertion of the word direct in the clause changes anything with regard to being provisions [sic] relative to physical contact with the uninsured vehicle.
>
> Where we have the second type of clause, physical contact with an uninsured vehicle, we have a number of cases that allows [sic] for recovery when there isn't physical contact with the uninsured vehicle and including the word direct physical contact does the [sic] not in any way change the analysis as far as I'm concerned. . . .

Defendant contends that the trial court should have granted its motion for summary disposition. We agree. We review de novo a trial court's ruling concerning a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).[1] When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law that are also reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Because UIM benefits "are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded." *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993). "An insurance policy is much the same as any other contract." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). "It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties." *Id*. An insurance contract is to be read as a whole, with meaning given to all terms. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). A clear and unambiguous contractual provision is to be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). "Clear and unambiguous language may not be rewritten under the guise of interpretation," *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997), and "[c]ourts must be careful not to read an ambiguity into a policy where none exists," *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). "[I]f a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear." *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).

As noted, defendant's policy provides UIM coverage to an "insured person" for an accident arising out of the ownership, operation, maintenance, or use of an "uninsured motor vehicle." For purposes of UIM coverage, the policy identifies an insured person as "you," and any other person occupying the car. An uninsured motor vehicle is defined to include the following:

> [A] hit-and-run **motor vehicle** of which the operator and owner are unknown and which makes direct physical contact with:

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[1] From context, it is apparent that the trial court analyzed defendant's motion under MCR 2.116(C)(10).

(1) **you** or a **resident relative**, or

(2) a **motor vehicle** which an **insured person** is **occupying**. [Emphasis in original.]

The policy does not define the word "direct." Where words are not defined in a policy, they are to be given their commonly used meanings, and it is appropriate to consult a dictionary to determine the common meaning of a word. *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 515; 773 NW2d 758 (2009). In the pertinent context, the term "direct" means "without intermediary agents, conditions, etc.; immediate: *direct contact*." *Random House Webster's College Dictionary* (1997) (emphasis in original). The policy therefore makes clear that indirect contact, such as the contact that occurred in the present case, is insufficient to trigger UIM benefits. See, e.g., *Dancey v Travelers Property Casualty Co of America*, ___ Mich App ___; ___ NW2d ___; 2010 WL 1328952 (2010) (indicating that "direct physical contact" means "vehicle-to-vehicle contact").

This conclusion is apparent from a reading of *Hill v Citizens Ins Co of America*, 157 Mich App 383; 403 NW2d 147 (1987). In *Hill*, the Court held that an object propelled by an unidentified vehicle into an insured's vehicle is sufficient to satisfy a "physical contact" requirement as long as there is "a substantial physical nexus between the disappearing vehicle and the object cast off or struck." *Id*. at 394. The Court stated:

> the overwhelming majority of jurisdictions hold that the "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. [*Id*. (emphasis added).]

Here, in contrast to *Hill*, the policy specifically *requires* "direct physical contact" – not merely "physical contact" – in order for UIM coverage to apply. There was insufficient evidence of direct contact in the present case, and therefore the trial court should have granted defendant's motion for summary disposition.

Plaintiffs contend that enforcing the contract as written would constitute an unlawful contravention of public policy. We disagree. Plaintiffs have provided no persuasive authority supporting this argument. In *Auto Club Ins Ass'n v Methner*, 127 Mich App 683, 685; 339 NW2d 234 (1983), the defendant "was forced off the road by an unidentified car which swerved into his lane," and "[t]here was no contact" between the two vehicles. The policy at issue allowed for UIM benefits only if "physical contact" occurred. *Id*. The Court held that the requirement of physical contact did not contravene public policy. *Id*. at 687-692. We similarly find that a requirement of "direct physical contact" does not contravene public policy. The parties in this case freely contracted, and we must enforce their contract as written.

The order denying defendant summary disposition is reversed, and we remand this case for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering