2-23-1977

Suzanne Jett v. John Doe and Kentucky Farm Bureau Mutual Insurance Co.

Other 1973-SC-1068

OTHER

551 SW2d 221

SUPREME COURT OF KENTUCKY

73-1068

FILED

FEB 23 1977

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

SUZANNE JETT — APPELLANT

VS.

JOHN DOE and KENTUCKY FARM BUREAU MUTUAL INSURANCE CO. — APPELLEES

APPELLANT'S LIST OF RECENT CITATIONS

* * * *

Appellant, Suzanne Jett, by Counsel, submits a list of case citations decided since her appeal was briefed, pursuant to request of the Court at the oral agrument of this matter on February 17, 1977:

1. Montoya vs. Dairyland Insurance Company, New Mexico District Court, 394 F.Supp. 1337 (1975).

2. Webb vs. United States Services Automobile Association, Pa., 323 A.2d 737 (1974).

3. Farmers Insurance Exchange vs. McDermott, Colo., 527 P.2d 918 (1974).

4. State Farm Fire & Casualty Company vs. Lambert, Ala., 285 So.2d 917 (1973).

5. DeMello vs. First Insurance Company of Hawaii, Hawaii, 523 P.2d 304 (1974).

6. Hartford Accident and Indemnity Company vs. Novak, Wash., 520 P.2d 1368 (1974).

Respectfully submitted,

Bernard S. Ritchie, Jr.

BERNARD S. RITCHIE, JR.
Attorney for Appellant
440 South Seventh Street
Louisville, Kentucky 40203
587-0789

SCHAEFFER & AIRHART
ATTORNEYS AT LAW
440 SOUTH SEVENTH STREET
LOUISVILLE, KENTUCKY 40203

This is to certify that a copy of the foregoing Appellant's List of Recent Citations was hereby mailed to Thomas E. Harris, Attorney for Appellees, Suite 4A Citizens Bank Square, Lexington, Kentucky 40507 this 22 day of February, 1977.

Bernard S. Ritchie Jr.

BERNARD S. RITCHIE, JR.

SCHAEFFER & AIRHART
ATTORNEYS AT LAW
440 SOUTH SEVENTH STREET
LOUISVILLE, KENTUCKY 40203

tiff, an Illinois resident, and in- l him to join in the preparation of ctbook." The defendant "was in nual contact with [the plaintiff] ail and telephone," . . . "the was accepted in Illinois," and "de- ant's assignment of ten percent of oyalties was forwarded by him to hton-Mifflin Co., in Illinois, was ted by it in Illinois, and was honor- defendant from December 6, 1961 October 22, 1963."

e balance of the cases cited by the tiff which involve the Illinois arm statute generally deal with tions where contact with the forum initiated by the defendant and sub- nt contacts were far more exten-

e court, therefore, concludes that tiff has failed to establish the mini- contacts necessary to sustain *in nam* jurisdiction over the defend- pursuant to the Illinois long-arm te.

cordingly, the motion of the de- nt to dismiss the complaint for of jurisdiction over the person of efendant will be allowed.

a MONTOYA, Individually and as ext friend of David Montoya, a minor, Plaintiffs,

v.

LAND INSURANCE COMPANY, a corporation, Defendant.

Civ. No. 74-476.

United States District Court, D. New Mexico.

June 2, 1975.

sured, individually and as a next of a minor, brought action her automobile liability insurer ing coverage and rights under an uninsured motorist endorsement to the automobile liability policy issued by her insurer. The District Court, Payne, Chief Judge, held that the provision of the uninsured motorist endorsement to the policy which required that there be "physical contact" between insured and the "hit-and-run" vehicle was in derogation of the statute which required uninsured motorist coverage and was therefor invalid; and that the uninsured motorist provision of the policy provided coverage for accident in which the insured struck a stone wall when she was forced to leave the road in order to avoid a head on collision with an oncoming vehicle even though there was no physical contact with the oncoming vehicle.

Judgment in accordance with opinion.

1. Insurance ⇐467.51

The uninsured or unknown motorist statutes are designed to protect the injured party from the uninsured or unknown motorist and are not designed to protect the insurance company from the injured party. 1953 Comp.N.M. §§ 64-24-105, 64-24-107.

2. Insurance ⇐467.51

Uninsured motorist provision of automobile liability policy allowing coverage when the insured is involved in an accident with a "hit-and-run" vehicle, provided there is in fact physical contact between the insured and the "hit-and-run" vehicle, was in derogation of New Mexico statute which required automobile liability policies to provide uninsured motorist coverage and was invalid. 1953 Comp.N.M. § 64-24-105.

3. Insurance ⇐467.51

Insured, who struck stone wall with her automobile when she was forced to leave the road in order to avoid a head on collision with an oncoming automobile which drove on without stopping was entitled to recover under the uninsured motorist provision of her automobile liability policy even though there

was no physical contact between the insured and the other vehicle. 1953 Comp. N.M. § 64-24-105.

Bachicha, Corlett & Casey, P. A., Santa Fe, N. M., for plaintiffs.

LeRoi Farlow, Albuquerque, N. M., for defendant.

MEMORANDUM OPINION

PAYNE, Chief Judge.

This case involves a complaint for declaratory judgment filed by the plaintiff, Concha Montoya, individually and as next friend of David Montoya, a minor, against the defendant, Dairyland Insurance Company concerning the coverage and rights of the plaintiff under an uninsured motorist endorsement to plaintiff's automobile insurance policy issued by the defendant.[1]

The one fact giving rise to this lawsuit which is not in dispute is that plaintiff's car, at the time being driven by plaintiff who was accompanied by her son, David Montoya, collided with a stone wall. Further, it is agreed there was no physical contact between the plaintiff's vehicle and any other vehicle prior to the collision with the wall.

Plaintiff further states that while she was properly driving her vehicle, plaintiff suddenly noticed the headlights o an oncoming vehicle approaching aroun a curve on plaintiff's lane of traffic short distance from plaintiff. Plaintif states that to avoid an imminent head-o collision, plaintiff swerved her vehicle t the right and collided with a stone wa off the right shoulder of the roa There was never any physical contact b the plaintiff's vehicle and the other un known vehicle, the operator of which plaintiff states, drove on without stop ping and has never been identified.

Plaintiff and her husband had i force at the time of the collision an au tomobile liability insurance policy wit the defendant insurer which provide certain coverage when an uninsured mo torist was involved. That coverage in cluded provisions allowing coverag when the insured is involved in an acc dent with a "hit-and-run" vehicle *pro vided* there is in fact *physical conta* between the insured and the "hit-an run" vehicle.

The particular question before thi Court is whether an insurance compan can contractually restrict its uninsure or unknown motorist coverage to situa tions in which there is *physical conta* between the insured and a "hit-an run" [2] vehicle without violating the le islative policy of § 64-24-105 New Mex co Statutes Annotated, 1953 Comp.[3]

1. The complaint was originally filed in the District Court of Santa Fe County, State of New Mexico and was subsequently removed to this Court upon the petition of the defendant.

2. As the Supreme Court of Washington has adequately explained, a non-physical contact accident can in fact involve a "hit"-and-run vehicle. Hartford Accident And Indemnity Company v. Novak, 83 Wash.2d 576, 520 P. 2d 1368, 1373 (1974).

3. Section 64-24-105 New Mexico Statutes Annotated, 1953 Comp. provides as follows: "Insurance against uninsured and unknown motorists—Rejection of coverage by the insured.—On and after January 1, 1968, no motor vehicle or automobile liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person, and for injury to or destruction of property of others arising out of the ownershi maintenance or use of a motor vehic shall be delivered or issued for delivery this state with respect to any motor vel cle registered or principally garaged this state, unless coverage is provid therein or supplemental thereto in limi for bodily injury or death, and for inju to or destruction of property as set for in section 64-24-79 New Mexico Statut Annotated, 1953 Compilation, according rules and regulations promulgated by, a under provisions filed with and approv by the superintendent of insurance, f the protection of persons insured thereu der who are legally entitled to recov damages from owners or operators of u insured motor vehicles because of bod injury, sickness or disease, including dea and for injury to or destruction of prop ty resulting therefrom. The uninsur

Because the courts of New Mexico ve not addressed the aforementioned rticular question and because the ate law is unsettled, it is the function the Federal Courts in this diversity it to determine what the New Mexico upreme Court would likely decide if resented with the identical issue.

The issue of the validity of the physial contact requirement of insurance polies has been entertained by courts of everal states for some time. 25 ALR rd 1299.[4] In those states, as in New Mexico, there is generally a statute requiring insurance companies to offer unnsured or unknown motorist coverage. There is, however, usually no statutory requirement to include coverage for "hit-and-run" drivers nor a requirement that physical contact must have occurred before one can recover for injury due to a "hit-and-run" vehicle.[5] The courts of those same states have, on the other hand been almost unaminous in holding that the operator of a "hit-and-run" vehicle is an uninsured or an unknown motorist. *See* 26 ALR 3rd 883, 913. The split of the various states has arisen over the physical contact issue.

This Court has considered numerous decisions which conclude that it is reasonable to require physical contact between a "hit-and-run" vehicle and the insured before coverage is allowed under the uninsured or unknown motorist provisions. Phelps v. Twin City Fire Insurance Co., 476 S.W.2d 419 (Tex.Civ.App. 1972); Buckeye Union Insurance Co. v. Cooperman, 33 Ohio App.2d 152, 293 N.E.2d 293 (1972); Ely v. State Farm Mutual Automobile Insurance Co., 148 Ind.App. 586, 268 N.E.2d 316 (1971); Collins v. New Orleans Public Service, Inc., 234 So.2d 270 (La.App.1970), writ refused, 256 La. 375, 236 So.2d 503 (1970); Hendricks v. U. S. Fidelity and Guaranty Co., 5 N.C.App. 181, 167 S.E. 2d 876 (1969); Prosk v. Allstate Insurance Co., 82 Ill.App.2d 457, 226 N.E.2d 498 (1967).

The reasoning is generally based on the premise that requiring physical contact precludes any fraud upon the insurer and prevents recovery of damages in cases where the insured's injuries are the result of his own negligence, without the intervention of any other vehicle, but it is alleged by the insured that the accident was caused by an unidentified vehicle which subsequently left the scene of the accident. *See gen.* 25 ALR 3rd 1299.

This Court has similarly considered numerous cases holding that, generally, the physical contact requirement is an impermissible limitation on the uninsured or unknown motorist statute, is contrary to public and legislative policy, and is, therefore, invalid. Farmers Insurance Exchange v. McDermott, 527 P. 2d 918 (Colo.App.1974); Balestrieri v. Hartford Accident & Indemnity Insurance Co., 22 Ariz.App. 255, 526 P.2d 779 (1974); DeMello v. First Insurance Co. of Hawaii, Ltd., 523 P.2d 304 (Hawaii 1974); Hartford Accident & Indemnity Co. v. Novak, 83 Wash.2d 576, 520 P.2d 1368 (1974); Webb v. United Services

motorist coverage shall provide an exclusion of not more than the first two hundred fifty dollars ($250.00) of loss resulting from injury to or destruction of property of the insured in any one accident; Provided that the named insured shall have the right to reject such coverage; and Provided further that, unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer."

4. This ALR annotation and the 1974 supplement do not contain a listing of the more recent cases hereafter cited in this opinion.

5. However, "[i]n a few states requiring insurance companies to offer uninsured motorists insurance, *the statutes have specifically provided* that where recovery is sought for injury caused by a 'hit-and-run' or other unidentified vehicle, the claimant must show that there was physical contact with the unidentified vehicle." 25 ALR 1299, 1303. (emphasis added).

Automobile Association, 227 Pa.Super. 508, 323 A.2d 737 (1974); State Farm Fire and Casualty Co. v. Lambert, 291 Ala. 645, 285 So.2d 917 (1973); Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla.1971).

Whereas there is generally one reason espoused by the proponents of the physical contact requirement, *i. e.*, fraud on the insurer, those Courts who have ruled against the physical contact requirement cite many and varied reasons for its invalidity.

These latter cases correctly reveal that uninsured or unknown motorist statutes were adopted, and the clear and unambiguous legislative intent was, to expand insurance protection to the public who use the streets, highways and walkways. The public was to be protected from damage or injury caused by other motorists who were not insured and could not make the injured party whole. The public was no longer to be faced with the possible financial distress or all too often certain financial calamity caused by negligent and insolvent drivers.

[1] In short, the uninsured or unknown motorist statutes are designed to protect the injured party from the uninsured or unknown motorist. The statutes are not designed to protect the insurance company from the injured party.

There is, of course, the possibility of fraud by one claiming injury due to an unidentified "hit-and-run" driver when there was no such driver and it was in fact the negligence of the injured party himself who caused the injury. However, "[t]he argument that the policy requirement of physical contact is reasonable is fallacious. The only reason for such a requirement is to prove that the accident actually did occur as a claimant may say it did. This is a question of fact to be determined by the jury, or the judge if demand for jury trial is not made. If the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover, regardless of the actuality of physical contact. If twenty witnesses will swear they saw the accident happen, their testimony should not be deemed worthless, as it would be under the decision here for review." Hartford Accident And Indemnity Company v. Novak, *supra* at 1372.[6]

Also, the following criticism of the physical contact requirement as an anti-fraud measure has been expressed:

> "It seems unreasonable to establish a rule under which recovery is possible if there is a minute scratch on the insured's car, but no impartial witnesses —and to deny all rights where there was no contact, even though there are many witnesses and there is no reason to suspect collusion or fraud. Some standard assuring adequate evidence in support of a claim that the injuries (for which indemnification is sought) are the result of an evasive action executed to avoid a collision with an unidentified negligent driver is certainly warranted. It is suggested that the claimant should bear the burden of persuasion, leaving to the judge, jury or arbitrator the determination of whether the claimant has sustained the requisite burden of proof, and providing an opportunity for the insurance company to raise fraud or collusion as a defense to such a claim." A. Widiss, A Guide To Uninsured Motorist Coverage (1969).

The Supreme Court of Hawaii indicated, as would common sense, that the physical contact requirement may in fact *not* be a complete barrier to fraudulent claims.

> "We also note the clear possibility of instances in which the contractually imposed requirement [of physical contact] will not fulfill its justifiable

6. Furthermore, very often the parties must first submit the facts to the scrutiny of an arbitration panel before they proceed *de novo* in the Courts. *See* § 64-24-107 N.M. S.A., 1953 Comp.

jective of eliminating fraudulent
ims. A claimant with a fraudulent
im can bolster the same, if neces-
ry, by damaging his own car to
ve apparent proof of the requisite
ysical contact' with a non-existent
nidentified vehicle.' The contractual
ysical impact' requirement thus not
ly sweeps too broadly but also not
oadly enough, to accomplish its only
stifiable and statutorily permissible
rpose, the prevention of frauds."
Mello v. First Insurance Company
Hawaii, Ltd., 523 P.2d 304, 310
974).

would serve no purpose to further
ss in detail the other important
s cited, *supra*, which are antagonistic
he physical contact requirement.
it suffice to say that, generally, the
s hold that the insurer's contractual
irement of physical contact unjusti-
y impedes effectuation of the legis-
e intent and statutory policy of pro-
on for insured's against injury from
negligence and insolvency of unin-
d or unknown motorists.

aving reviewed the reasoning of the
divergent lines of authorities which
on the issue at hand, this Federal
t, as aforementioned, must decide
the Supreme Court of New Mexico
d likely decide if presented with the
tical issue.

is Court considered several opinions
h concern the New Mexico unin-
d or unknown motorist statute.
ez v. State Farm Mutual Automo-
Insurance Co., 87 N.M. 327, 533 P.
00 (1975);[7] Willey v. Farmers In-
nce Group, 86 N.M. 325, 523 P.2d
(1974); Sloan v. Dairyland Insur-
Co., 86 N.M. 65, 519 P.2d 301
4); American Mutual Insurance Co.
omero, 428 F.2d 870 (10th Cir.
).

e very recent *Chavez* decision is of
most import to the instant case.

That case held invalid, as against public policy, an exclusionary provision contained in the uninsured motorist coverage of an automobile insurance policy. The facts of the case are of no moment, however, in invalidating the particular exclusionary provision, the New Mexico Supreme Court stated as follows:

> "The object of compulsory uninsured motorist insurance is: . . . 'to protect persons injured in automobile accidents from losses which, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated'. . . . In other words, the legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor has possessed liability insurance.
>
> . . . . . .
>
> The adoption by almost all of the states of uninsured motorist statutes occurred as a result of the failure of the financial responsibility laws to protect innocent victims against uninsured tortfeasors. . . . The promise, extracted by the statute from the insurer, to protect each insured as if the negligent uninsured motorist has liability insurance is clearly spelled out in New Mexico's statute, providing, in part:
>
> '* * * for the protection of *persons* insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, and for injury to or destruction of property resulting therefrom. * * *' (Emphasis added by the New Mexico Supreme Court) § 64-24-105, N.M.S.A.'
>
> . . . . . .

he *Chavez* decision was rendered in
rch, 1975. It contains the New Mexico
reme Court docket number of 10011.
entire decision can be found in The State Bar Of New Mexico Bulletin And Advance Opinions, Vol. 14, No. 3, published March 27, 1975.

So construed, the only limitations on protection are those specifically set out in the statute itself, i. e., that the insured be legally entitled to recover damages and that the negligent driver be uninsured."

The Supreme Court ended its opinion with the following comment:

"The remedial purpose of the statute weighted against State Farm's arguments leads us to conclude the Legislature did not intend to allow the creation of a gap in coverage which is contrary to the purpose of the statute."

[2, 3] In view of the *Chavez* decision, it is apparent that the New Mexico Supreme Court would determine the "physical contact" requirement is, because of the remedial purpose of the statute and because the New Mexico State Legislature did not intend to allow the creation of a gap in coverage, in derogation of § 64-24-105, N.M.S.A., 1953 Comp., and therefore, invalid. This Court so holds. Accordingly judgment will be entered for the plaintiff-insured.

MOBAY CHEMICAL CORPORATION, CHEMAGRO AGRICULTURAL DIVISION, Plaintiff,

v.

Russell E. TRAIN, Administrator of the United States Environmental Protection Agency, Defendant.

No. 75 CV 238 W-4.

United States District Court, W. D. Missouri, W. D.

May 23, 1975.

Action was filed by plaintiff to secure declaratory and injunctive relief against Administrator of Environmental Protection Agency for allegedly violating certain provisions of Federal Environmental Pesticide Control Act. On motion of plaintiff for preliminary injunction, the District Court, Elmo B. Hunter, J., held that preliminary injunctive relief was issued against Interim Policy Statement of Administrator of Environmental Protection Agency to extent that procedures outlined therein permitted Administrator to consider data which, though submitted in support of a present application for pesticide registration, was previously submitted by plaintiff in support of a prior application, where present applicant had failed to secure permission of plaintiff to rely upon such data and had not made a specific offer to plaintiff of reasonable compensation for use of such data.

Motion granted.

1. Courts ⇐284(3)

Action wherein plaintiff sought declaratory and injunctive relief against Administrator of Environmental Protection Agency for allegedly violating certain provisions of Federal Insecticide, Fungicide, and Rodenticide Act, as amended by Federal Environmental Pesticide Control Act, was within subject matter jurisdiction of district court. Federal Insecticide, Fungicide, and Rodenticide Act, § 2 et seq. as amended 7 U.S.C.A. § 135 et seq.; Federal Environmental Pesticide Control Act of 1972, §§ 2 et seq., 3, 7 U.S.C.A. §§ 136 et seq., 136a.

2. Courts ⇐268(3)

Venue of action wherein plaintiff sought declaratory and injunctive relief against Administrator of Environmental Protection Agency for allegedly violating certain provisions of Federal Insecticide, Fungicide, and Rodenticide Act, as amended by Federal Environmental Pesticide Control Act, was properly laid in Western District of Missouri, where plaintiff resided in district, and no real property was involved. Federal Insecticide, Fungicide, and Rodenticide Act, § 2 et seq. as amended 7 U.S.C.A. § 135 et

227 Pa.Super. 508

In the Matter of the Arbitration Between Evans W. WEBB and Elizabeth Webb and UNITED SERVICES AUTOMOBILE ASSOCIATION, Appellant.

Superior Court of Pennsylvania.

April 11, 1974.

Petition for Allowance of Appeal Denied Sept. 3, 1974.

Action by insureds against insurer under uninsured motorist clause of automobile liability policy for injuries allegedly sustained when unknown motorist swerved automobile in front of insureds, causing their automobile to hit a third. Following ruling by arbitration panel that policy provided no coverage, the Court of Common Pleas, Trial Division, Law, Philadelphia County, No. 746 January Term, 1973, Hirsh, J., granted insureds' petition to vacate award of arbitrators and to return matter to arbitration on questions of fault and damages alone, and insurer appealed. The Superior Court, No. 1191 October Term, 1973, Spaeth, J., held that trial court had jurisdiction where insureds attacked validity of "physical contact" requirement in automobile liability policy as being repugnant to Uninsured Motorist Coverage Act and that the "physical contact" requirement in insureds' automobile liability policy uninsured motorist clause was void and unenforceable as contrary to the Uninsured Motorist Coverage Act.

Affirmed.

Spaulding, J., absent.

1. Appearance ⇐24(5)

Where insurer appeared and defended action on the merits, it waived any defect in service of process. Pa.R.C.P. No. 1032, 12 P.S. Appendix.

2. Insurance ⇐567

Where application or construction of uninsured motorist clause is at issue, the dispute is within exclusive jurisdiction of the arbitrators, even if both parties waive arbitration. 40 P.S. § 2000.

3. Insurance ⇐567

Courts will take jurisdiction over dispute involving uninsured motorist clause, subject to arbitration, only where claimant attacks a particular provision of the clause itself as being contrary to a constitutional, legislative, or administrative mandate, or against public policy, or unconscionable. 40 P.S. § 2000.

4. Insurance ⇐574(7)

Where insureds attacked the "physical contact" requirement contained in uninsured motorist clause of insureds' automobile liability policy as being repugnant to Uninsured Motorist Coverage Act, trial court properly exercised jurisdiction over insureds' petition to vacate award of arbitrators. 40 P.S. § 2000.

5. Insurance ⇐467.51

Uninsured Motorist Coverage Act was designed to insure compensation to one who was injured through the fault of another driver from whom the injured party cannot recover damages. 40 P.S. § 2000.

6. Insurance ⇐467.52

Possibility of fraudulent claims under uninsured motorist clause in cases involving no physical contact between automobiles and in which negligent motorist avoided liability by getting away can be mitigated by placing burden of proof upon the claimant. 40 P.S. § 2000.

7. Insurance ⇐572

In deciding whether plaintiff has proved his case for a claim under uninsured motorist clause of policy in cases in which there is no physical contact between automobiles, arbitrators should take into account the possibility of fraud according to the particular facts of the case.

8. Insurance ⇐467.51

The "physical contact" requirement contained in uninsured motorist clause of insureds' automobile liability policy, which was raised in defense by insurer against

action by insureds for injuries allegedly incurred when unknown motorist swerved his automobile in front of insureds' causing them to hit a third automobile, was void and unenforceable as contrary to Uninsured Motorist Coverage Act. 40 P.S. § 2000.

Robert C. Steiger, Philadelphia, for appellant.

Allen Weinberg, Philadelphia, for appellees.

Before WRIGHT, President Judge, and WATKINS, JACOBS, HOFFMAN, CERCONE and SPAETH, JJ.

SPAETH, Judge:

Appellees sustained personal injuries as a result of an automobile accident that they allege occurred when an unknown motorist swerved his car in front of theirs, causing them to hit a third car. The unknown motorist drove on and disappeared. The third car was insured, but appellees brought an action against appellant as their carrier under the policy's uninsured motorist clause on the theory that the unknown motorist's car was a "hit-and-run" car.[1] The case went to arbitration pursuant to a standard clause in the policy. The arbitration panel's decision was that appellees are bound by a provision of their insurance policy defining a "hit-and-run" car as one causing injury "arising out of physical contact;" since there was no allegation any contact between appellees' car and the car appellees swerved to avoid, there was no coverage.

[1] Appellees then filed a petition and rule to vacate the award of the arbitrators and return the matter to arbitration on the questions of fault and damages alone. Argument was heard on the motion,[2] and appellees' petition was granted.

On this appeal from that order appellant challenges both the jurisdiction of the court below and the merits of its decision. We hold that the court had jurisdiction and that its decision was correct, and therefore affirm.

I.

The opinion of the court below makes no reference to whether it had jurisdiction, although that issue is extremely difficult. Pennsylvania courts have said repeatedly that all questions under an uninsured motorist clause with an aribtration provision are within the exclusive jurisdiction of the arbitrators. Allstate Insurance Co. v. McMonagle, 449 Pa. 362, 296 A.2d 738 (1972); Nationwide Mutual Ins. Co. v. Barbera, 443 Pa. 93, 277 A.2d 821 (1971); Preferred Risk Mut. Ins. Co. v. Martin, 436 Pa. 374, 260 A.2d 804 (1970); Great American Ins. Co. v. American Arbitration Association, 436 Pa. 370, 260 A.2d 769 (1969); Pennsylvania General Ins. Co. v. Barr, 435 Pa. 456, 257 A.2d 550 (1969); Allstate Insurance Co. v. Taylor, 434 Pa. 21, 252 A.2d 618 (1969); Merchants Mut. Ins. Co. v. Am. Arb. Assoc., 433 Pa. 250, 248 A.2d 842 (1969); Harleysville Mut. Ins. Co. v. Medycki, 431 Pa. 67, 244 A.2d 655 (1968); National Grange Mut. Ins. Co. v. Kuhn, 428 Pa. 179, 236 A.2d 758 (1968); Hartford Ins. Grp. v. Kassler, Pa. Super., 324 A.2d 521 (1974); Allstate Ins. Co. v. Blackwell, 223 Pa.Super. 401, 301 A.2d 890 (1973).

There have been instances, however, when an appellate court has taken jurisdiction over cases dealing with such clauses. *See* Harleysville Mut. Ins. Co. v. Blumling, 429 Pa. 389, 241 A.2d 112 (1968); Nationwide Mut. Ins. Co. v. Ealy, 221 Pa.Super. 138, 289 A.2d 113 (1972); Bankes v. State

1. The clause is reproduced at note 9, *infra*.

2. Appellant claims that service below was defective. Because it appeared and defended on the merits, any defect of this sort was waived. Pa.R.Civ.P. 1032, 12 P.S. *Appendix*.

Farm Mut. Auto. Ins. Co., 216 Pa.Super. 162, 264 A.2d 197 (1970); Ellison v. Safeguard Mut. Ins. Co., 209 Pa.Super. 492, 229 A.2d 482 (1967).

It is therefore necessary to examine the cases to sort out the seemingly contradictory statements about jurisdiction. When this is done, certain consistent general principles emerge.

There have been several cases in which the insurance company has sought an injunction against arbitration. It has been consistently held that because the parties to the policy have chosen arbitration as the forum, one party cannot seek to enjoin arbitration, and all matters arising under a standard uninsured motorist clause must go to arbitration rather than to court. Allstate Ins. Co. v. McMonagle, 449 Pa. 362, 296 A.2d 738 (1972) (policy claimed to have expired six days prior to accident); Preferred Risk Mt. Ins. Co. v. Martin, 436 Pa. 374, 260 A.2d 804 (1970) (claim that foster child was not covered by policy); Pennsylvania General Ins. Co. v. Barr, 435 Pa. 456, 257 A.2d 550 (1969) (failure to put dollar limit on uninsured motorist coverage alleged to be mutual mistake); Allstate Ins. Co. v. Taylor, 434 Pa. 21, 252 A.2d 618 (1969) (claimant alleged not to be member of policyholder's household); Harleysville Mut. Ins. Co. v. Medycki, 431 Pa. 67, 244 A.2d 655 (1968) (alleged that claimant had not cooperated with company in seeking litigation); National Grange Mut. Ins. Co. v. Kuhn, 428 Pa. 179, 236 A.2d 758 (1968) (alleged that third party was not an "uninsured motorist" under the terms of the policy).

For the same reason the company will not be allowed to avoid arbitration by seeking a declaratory judgment. Allstate Ins. Co. v. Taylor, *supra*; Hartford Insurance Group v. Kassler, Pa.Super., 324 A.2d 521 (1974) (alleged that the automobile in question was not "uninsured" as defined in the policy).

It is also settled that the proper procedure to obtain review of an arbitrator's award is not by equitable action but by petition to the Court of Common Pleas to vacate the award. Nationwide Mut. Ins. Co. v. Barbera, 443 Pa. 93, 277 A.2d 821 (1971); Great American Ins. Co. v. Am. Arb. Assoc., 436 Pa. 370, 260 A.2d 769 (1969). Such a petition will not succeed, however, unless it can be shown by clear, precise, and indubitable evidence that a party was denied a hearing, or that there was fraud, misconduct, or other irregularity that has caused the rendition of an unjust, inequitable, or unconscionable award. Allstate Ins. Co. v. Fioravanti, 451 Pa. 108, 299 A.2d 585 (1973); Press v. Maryland Cas. Co., Pa.Super., 324 A.2d 403 (1974). This is a difficult burden. In *Fioravanti* the arbitrators decided that the carrier should be estopped to deny that the claimant was covered by the policy and refused to allow the carrier to submit a memorandum of law on the issue. This was held not to be such an irregularity as to deny the carrier a full and fair hearing, and the award was upheld. Similarly, a claimant was held not to have been denied a full and fair hearing where the arbitrators refused to hear her case because she had identified the name on the side of the truck that hit her and could presumably trace it through the fleet owner. Smith v. Employer's Liability Assurance Grp., Ltd., 217 Pa.Super. 31, 268 A.2d 200 (1970).

In the preceding cases both of the parties affirmed the language of the policy but disagreed in their interpretations of it. The principles stated apply to that situation consistently. They do not, however, necessarily apply to such a case as this one, in which the claimant alleges that one of the policy's terms offends a mandate of the state legislature.[3] Whether in such a

3. The only case our research revealed in which the carrier sought judicial relief based on an irregularity on the face of the policy is Pennsylvania General Ins. Co. v. Barr, 435 Pa. 456, 257 A.2d 550 (1969). The carrier alleged that its failure to include a dollar limit on the uninsured motorist recovery was a mutual mistake of fact and sought to enjoin arbitration.

case a different set of principles applies is a question yet to be squarely decided by our courts.

Despite the frequent references in the cases to the exclusive jurisdiction of the arbitrators, there are a number of cases in which the Supreme Court or this court has taken jurisdiction.

In Ellison v. Safeguard Mutual Ins. Co., 209 Pa.Super. 492, 229 A.2d 482 (1967), the claimant filed for arbitration even though there was neither an uninsured motorist clause nor an arbitration clause in his policy. The arbitrators agreed with the claimant's position that the Uninsured Motorist Coverage Act, Act of Aug. 14, 1963, P.L. 909, § 1, as amended Dec. 19, 1968, P.L. 1254, No. 397, § 1, 40 P.S. § 2000,[4] required that such a clause be on the policy and that under a regulation promulgated by the Insurance Department an arbitration clause should also be included. The panel therefore awarded cliamant damages, and a judgment was entered by the court. This court decided that to hold that the arbitration provisions were part of the contract because of the regulation would be to attribute to the legislature an unlawful delegation of power.[5] Judge HOFFMAN, joined by Judge SPAULDING, concurred in the result, but only because the lack of an arbitration clause created a jurisdictional defect which negated the award, adding, "Furthermore, I wish to express no view on the critical question of whether a *court* could read the omitted coverage into this policy. I do not believe that the insured is foreclosed by our action today from pressing his claim in a proper forum." *Id.* at 498, 229 A.2d at 485. Since the policy itself lacked an arbitration clause, court action was not precluded by any agreement. The power of the court to hear the issue before it (*i. e.*, whether the arbitration panel had jurisdiction) was not a question.

The Supreme Court has held, in Harleysville Mutual Cas. Co. v. Blumling, 429 Pa. 389, 241 A.2d 112 (1968), that a standard "other insurance" clause was invalid because against the spirit of the Uninsured Motorist Coverage Act. The plaintiff in that case brought an action for a declaratory judgment against his carrier. Whether this was proper procedure is not discussed in the court's opinion, although by allowing the appeal and affirming a decision for the plaintiff on the merits it would seem that the court implicitly approved the procedure.[6]

In Bankes v. State Farm Mutual Ins. Co., 216 Pa.Super. 162, 264 A.2d 197 (1970), it was held that a clause excluding motorcycle accidents from uninsured motorist coverage was unenforceable as contrary to the purpose of the Uninsured Motorist Coverage Act. Although the policy in dispute had an arbitration clause, this court accepted jurisdiction because neither party objected. However, in Allstate Ins. Co. v. Taylor, 434 Pa. 21, 252 A.2d 618 (1969), not cited in *Bankes*, the parties specifically stipulated that arbitration be stayed pending a declaratory judgment ac-

It was sent to arbitration on the policy as printed, the court holding that no mutual mistake of fact had been proved. Thus the case does not deal with the type of allegation we are discussing here, since both parties were willing to affirm the underlying clause. In any event, since virtually all insurance policies are on printed forms prepared by the insurer, it is difficult to see how the alleged defect could have been "mutual."

4. The Act is quoted at note 10, *infra*.

5. It was also stated in *dictum* that the wording of the clause itself limited the arbitrable issues to negligence and damages. This reading was specifically rejected in National Grange Ins. Co. v. Kuhn, 428 Pa. 179, 183, 236 A.2d 758, 759–760 (1968).

6. In Harleysville Mut. Ins. Co. v. Medycki, 431 Pa. 67, 244 A.2d 655 (1968), it is stated that the reason the procedural issue was not reached in *Blumling* was because it was not raised by either party. This explanation may be technically correct, but it does not square with repeated *dicta* that "all matters" arising under uninsured motorist coverage go to arbitration in order to spare the courts an unnecessary burden. *Cf.* Allstate Ins. Co. v. Taylor, discussed *infra*, where the court refused jurisdiction even though arbitration had been explicitly waived.

tion on whether the party injured in the accident was a member of the insured's household. There the court said: "Despite the stipulation of the parties, the court below should not have entertained a declaratory judgment action. The dispute between the parties having arisen under the uninsured motorist provision of the policy [, it] should have been settled by arbitration." *Id.* at 23, 252 A.2d at 619.

Finally there is Nationwide Mutual Ins. Co. v. Ealy, 221 Pa.Super. 138, 289 A.2d 113 (1972), in which the claimant succeeded in getting from the lower court a declaratory judgment that insurance companies operating in Pennsylvania may not contractually divide their uninsured motorist coverage into noncumulative policies attaching separately to the insured's individual automobiles. This court, per Judge JACOBS, distinguished *Bankes* and *Blumling* and reversed on the merits without discussing jurisdiction.

[2, 3] Although not clearly apparent, there is a thread that runs through this maze. *Ellison, Blumling, Bankes* and *Ealy* may seem to be exceptions to the rule that all disputes arising under an uninsured motorist clause must go to arbitration (even if arbitration is waived), but in fact they are members of a very narrow separate class of cases that is not subject to the rule at all. What was in dispute in these four cases was the validity of some part of the uninsured motorist clause. What was in dispute in the other cases that have been cited (including *Taylor*) was the application of the clause and the construction of certain words and phrases in it. Thus the rule, to which all of the cases conform, is that where the application or construction of the uninsured motorist clause is at issue the dispute is within the exclusive jurisdiction of the arbitrators;[7] the courts will take jurisdiction only where the claimant attacks a particular provision of the clause itself as being contrary to a constitutional, legislative, or administrative mandate, or against public policy, or unconscionable.[8]

[4] In the present case appellees have attacked the "physical contact" requirement in appellant's policy as being repugnant to the Uninsured Motorist Coverage Act. The court below thus properly exercised jurisdiction.

II.

Appellees contend that the requirement of "physical contact" in the clause defining "hit-and-run automobile" for purposes of "uninsured motorist" coverage[9] is more restrictive than is allowed under the Unin-

7. This is so even if both parties waive arbitration. Allstate Ins. Co. v. Taylor, *supra*.

8. The normal procedure to raise such an issue is by petition for declaratory judgment; this is the procedure implicitly approved in *Blumling* and *Ealy*. The issue may also be raised on appeal from the arbitrators' decision, as in this case. An action in equity to stay arbitration is improper, Allstate Ins. Co. v. McMonagle, *supra*, as is such an action following arbitration, Nationwide Mut. Ins. Co. v. Barbera, *supra*. Since the type of action in which a court will take jurisdiction is necessarily an attack on the policy itself, and since today the carrier always writes the policy, the carrier may never seek direct judicial determination, for to do so would be to attack the very policy it had written. The carrier could only seek a direct judicial determination where it wishes to contest a regulation or statute requiring a certain clause. In such a case it would be attacking the requirement, not its own policy.

9. The relevant parts of the policy are as follows: "[The Company] Agrees with the insured . . . To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile . . . . '[U]ninsured automobile' includes a trailer of any type and means: . . . (B) a hit-and-run automobile . . . . '[H]it-and-run automobile' means an automobile which causes bodily injury to an insured arising out of *physical contact* of such automobile with the insured or with an automobile 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 'hit-and-run automobile' . . . . Emphasis supplied.

sured Motorist Coverage Act.[10] For the reasons that follow we have concluded that there is merit to this contention.

[5] Faced with an identical factual situation and statute, the Supreme Court of Alabama recently struck down this clause: "The design of the statute is to protect injured persons who can prove that the accident did in fact occur and that he [*sic*] was injured as a proximate result of the negligence of such other motorist who cannot respond in damages for such injuries." State Farm Fire and Casualty Co. v. Lambert, Ala., 285 So.2d 917, 919 (1973). *Accord*, Brown v. Progressive Mutual Ins. Co., 249 So.2d 429 (Fla.1971). This reasoning is persuasive. The Act speaks of "the protection of persons . . . who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . ." It thus is designed to insure compensation to one who is injured through the fault of another driver from whom he cannot recover damages. "The purpose of the uninsured motorist law is to provide protection to innocent victims of irresponsible drivers." Harleysville Mut. Cas. Co. v. Blumling, 429 Pa. 389, 395, 241 A.2d 112, 115 (1968). To insist on contact is not necessary so long as the claimant can prove to the satisfaction of the arbitration panel that there was indeed another car involved. While this task is certainly easier when there was contact, it should not be made impossible simply because there was not.

We are aware that most of the jurisdictions that have dealt with this issue have decided that a physical contact clause is valid. Some of these cases have been decided within easily distinguishable statutory contexts. Certain states (in contrast to Pennsylvania) explicitly require physical contact so that a claim such as presented here could not arise. These states include California,[11] Esparza v. State Farm Mut. Auto. Ins. Co., 257 Cal.App.2d 496, 65 Cal. Rptr. 245 (1967), New York, Motor Vehicle Accident Indemnification Corp. v. Eisenberg, 18 N.Y.2d 1, 271 N.Y.S.2d 641, 218 N.E.2d 524 (1966), and South Carolina, Coker v. Nationwide Ins. Co., 251 S.C. 175, 161 S.E.2d 175 (1968). Other cases come down hard on the words "hit-and-run" in the statute, a provision not found in the more general Pennsylvania statute.[12] *See* Hendricks v. U. S. Fidelity & Guaranty Co., 5 N.C.App. 181, 167 S.E.2d 876 (1969); Prosk v. Allstate Ins. Co., 82 Ill. App.2d 457, 226 N.E.2d 498 (1967). Still other cases have defined legislative purpose mainly in terms of the possibility of fraud, deciding that this possibility is so great that the legislature could not have intended to rule out a physical contact requirement. Phelps v. Twin City Fire Ins. Co., 476 S.W.2d 419 (Tex.Civ.App.1972); Ely v. State Farm Mut. Auto. Ins. Co.,

10. Act of August 14, 1963, P.L. 909, § 1, as amended Dec. 19, 1968, P.L. 1254, No. 397, § 1, 40 P.S. § 2000. The pertinent part of the Act reads as follows:

> (a) No motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State, unless coverage is provided therein or supplemental thereto in limits for bodily injury or death as are fixed from time to time by the General Assembly in section 1421 of article XIV of "The Vehicle Code," act of April 29, 1959 (P.L. 58), under provisions approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom, ...

11. It should be noted, however, that before California added this requirement to its statute the physical contact clause in a standard policy had been held to be invalid. Costa v. St. Paul Fire and Marine Ins. Co., 228 Cal.App.2d 651, 39 Cal.Rptr. 774 (1964).

12. The statute is substantially uniform in 35 states. *See* Widiss, A Guide to Uninsured Motorist Coverage, § 3.2 n. 7 (1969).

Ind.App., 268 N.E.2d 316 (1971). Lawrence v. Beneficial Fire and Cas. Ins. Co., 8 Ariz.App. 155, 444 P.2d 446 (1968).

[6] While it would certainly eliminate the possibility of fraud to hold the physical contact clause valid, it would also eliminate any hope of recovery in cases clearly involving another negligent motorist who has avoided liability by getting away. This latter situation is surely within the contemplation of the Uninsured Motorist Coverage Act, and the possibility of fraud can be mitigated by the burden of proof placed on the claimant. Two examples of unfortunate results from other states should demonstrate this point. In Collins v. New Orleans Public Service Inc., 234 So.2d 270 (La.App.1970), the plaintiff was a passenger on one of the defendant's buses. She was injured when the bus suddenly stopped to avoid hitting a car that had swerved in front of it. Many passengers on the bus corroborated her story, thus eliminating the possibility of fraud; but since there was no physical contact, her complaint was dismissed. In Amidzich v. Twin City Fire Ins. Co., 44 Wis.2d 45, 170 N.W.2d 813 (1969), plaintiff found two disinterested witnesses to testify that an unidentified truck had run his car off the road. Even though the truck driver was clearly negligent, since he could not be found and since there had been no contact, the plaintiff was barred from recovery.

[7] These cases demonstrate what can happen when a rule is adopted that is too broad for its purpose. The Pennsylvania statute is broad enough to allow recovery in situations such as those presented in *Collins* and *Amidzich*. To provide the maximum coverage consistent with avoidance of fraudulent claims, it is only necessary to require that the plaintiff prove his case. In deciding whether the plaintiff has proved his case, the arbitrators should take into account the possibility of fraud according to the particular facts of the case.

In the present case, for instance, the other driver involved in the collision might well have seen the unknown motorist's car and so have satisfied the arbitrators that it was not a phantom—a clear showing that would be precluded were we to reverse the order below. As the Florida Supreme Court noted when it held a physical contact clause contrary to a statute similar to ours:

> The only reason for such a requirement is to prove that the accident actually did occur as a claimant may say it did. This is a question of fact to be determined by the [trier of fact].[13] If the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover, regardless of the actuality of physical contact. If twenty witnesses will swear they saw the accident happen, their testimony should not be deemed worthless . . . . Brown v. Progressive Mutual Ins. Co., 249 So.2d 429, 430 (Fla.1971).

If the legislature intended to "provide protection to innocent victims of irresponsible drivers," Harleysville Mut. Cas. Co. v. Blumling, *supra*, it could not also intend that the motorist faced with the decision whether to collide with another vehicle or to avoid it should choose to collide or else lose his protection.[14]

13. In Florida and some of the other states cited these cases go to court rather than to arbitration.

14. The situation in some states that require contact or enforce contact clauses has inspired the following highly dubious counsel: "It is indeed unfortunate that an otherwise deserving insured who was injured in an effort to avoid a more serious accident may be denied recovery under the physical contact clause; but until some better clause can be devised, it appears preferable for the insured to collide rather than avoid where he himself may be injured by avoiding." Pretzel, Uninsured Motorists, § 24.3A at 57–58 (1972). *Cf.* Notman, Uninsured Motorist Coverage: A Current Analysis, 55 Ill.B.J. 142, 147 (1966): "An alert, athletic pedestrian who barely manages to avoid contact with such a car by leaping through a plate glass display window receives the unkindest

[8] We therefore hold the physical contact requirement void and unenforcible as contrary to the Uninsured Motorist Coverage Act.

The order of the court below remanding the matter to the arbitration panel on the issues of fault and damages only is affirmed.

226 Pa.Super. 574

Angela WISNIEWSKI

v.

The GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation, Appellant.

Superior Court of Pennsylvania.

April 3, 1974.

Buyer of loaf of bread sued bakery because of flare-up of gastritis which occurred when she consumed bread from loaf which contained crumpled brown paper and red string. The Court of Common Pleas, Civil Division, Allegheny County, No. 2955 October Term 1969, Weir, J., entered judgment for the plaintiff and denied the bakery's motion for judgment n. o. v. and for new trial. The bakery appealed. The Superior Court, No. 274 April Term, 1973, Jacobs, J., held that personal injury proximately caused by breach of warranty of merchantability with respect to food is compensable, that the defective condition of the bread could have constituted a substantial factor in bringing about or exacerbating the plaintiff's gastritis, and that a buyer of bread could recover under the Uniform Commercial Code for reasonable and necessary medical expenses incident to a physical injury resulting from fear of having ingested poisonous substance in a defective food product.

Affirmed.

Cercone, J., concurred in the result.

Spaulding, J., did not participate.

1. Judgment ⇐199(3.2)

On motion for judgment n. o. v., the evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor.

2. Trial ⇐139.1(17)

A case may be withdrawn from a jury only in clear cases in which as a matter of law jury would not be legally justified in arriving at a verdict in favor of the party against whom the withdrawal is made.

3. Sales ⇐427

Personal injury proximately caused by a breach of warranty of merchantability with respect to food is compensable. 12A P.S. § 2-314, 2-714(1-3), 2-715(2)(b).

4. Negligence ⇐56(1.7, 1.12)

A "proximate cause" is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.

See publication Words and Phrases for other judicial constructions and definitions.

5. Negligence ⇐56(1.9)

Where conduct acts as a substantial factor to bring about a certain harm, and

cuts of all for his efforts, but cannot qualify. Snubbed, too, is the driver who miraculously manages to steer his car off the highway and thus avoid a collision with an oncoming vehicle traveling in the wrong lane, but in so doing effects a rather abrupt stop against an unyielding bridge abutment. Seemingly, then, this requirement once again illustrates vividly the bitter truth of that time-worn pronouncement that 'close ones only count in horseshoes.'"

[10] Where, as here, an employee of a realty firm makes an offer to purchase property which is the subject of that firm's listing with the seller, the realty firm must establish the following facts in order to recover any commission:

(1) That a full disclosure was made to the seller regarding the employment relationship; and

(2) that, following this disclosure, the seller consented to sell to the employee. *See* Hall v. Gehrke, 117 Colo. 223, 185 P. 2d 1016; H. Fusilier, *supra*, ¶5.4.

[11] Plaintiff in effect concedes that the foregoing is a correct statement of the law but contends that the burden is upon sellers here to establish that they did not consent to sell to their agent. By virtue of the fact that Horton's offer was not accepted, the trial court could properly infer that sellers were unwilling to consent to an offer from their agent, and it was unnecessary for the trial court to require evidence from sellers on this issue.

Judgment affirmed.

SILVERSTEIN, C. J., and ENOCH, J., concur.

FARMERS INSURANCE EXCHANGE, an inter-insurance exchange, Plaintiff-Appellee,
v.
Paul F. McDERMOTT, Defendant-Appellant.
No. 73-431.

Colorado Court of Appeals,
Div. II.
Aug. 20, 1974.

Rehearing Denied Sept. 10, 1974.

Certiorari Denied Nov. 11, 1974.

Selected for Official Publication.

Insurer brought action seeking declaratory judgment to determine whether insured's loss from "hit-and-run" accident fell within uninsured motorist coverage. The District Court of Arapahoe County, Mark O. Shivers, J., entered judgment for insurer, and insured appealed. The Court of Appeals, Pierce, J., held that the uninsured motorist statute requires coverage for hit-and-run drivers and that policy provision requiring physical contact between insured vehicle and hit-and-run vehicle was invalid as an impermissible restriction on the coverage required by the statute.

Reversed.

1. Insurance ⇐467.51

Automobile insurance policy providing uninsured motorist coverage of injury caused by hit-and-run vehicle only when hit-and-run vehicle made physical contact with insured vehicle was an impermissible restriction on the coverage required by the uninsured motorist statute. 1965 Perm. Supp., C.R.S., 72-12-19, 72-12-20.

2. Insurance ⇐467.51

Applicability of uninsured motorist statute is not limited to those situations in which the identity of the negligent party is known; the statute requires coverage for hit-and-run drivers. 1965 Perm.Supp., C. R.S., 72-12-19, 72-12-20.

3. Insurance ⇐467.51

Prime concern of legislature in enacting uninsured motorist statute was to compensate innocent driver for injuries received at the hands of one from whom damages cannot be recovered, whether that person is known or unknown. 1965 Perm. Supp., C.R.S., 72-12-19, 72-12-20.

Dosh, DeMoulin, Anderson & Campbell, Laird Campbell, Denver, for plaintiff-appellee.

Frickey, Cairns & Wylder, P.C., Earl S. Wylder, Denver, for defendant-appellant.

PIERCE, Judge.

Plaintiff insurance company brought this action seeking a declaratory judgment to determine whether defendant's loss from a "hit-and-run" accident falls within the cov-

rage of an insurance policy issued by laintiff. The case, involving a personal njury, was submitted to the trial court ıpon stipulated facts and a declaratory udgment was entered in favor of the in-ıurance company. We reverse.

The parties stipulated that the defendant ınd an independent eyewitness would, if :alled as witnesses, testify that the acci-lent in which defendant was involved re-sulted when an unidentified automobile pulled into defendant's lane of traffic and caused him to swerve. Defendant's car then struck a guard rail and bounced into another lane of traffic, striking a third vehicle. It was also stipulated that the witnesses would testify that there was no physical contact between defendant's vehicle and the vehicle of the unidentified driver, and that plaintiff would not call witnesses to controvert such testimony from defendant and the eyewitness.

The only issue presented is whether defendant is entitled to coverage under the policy of insurance issued by plaintiff to defendant. That policy contained a standard "uninsured motorist" provision. The definition of an uninsured motor vehicle under this provision includes a "hit-and-run" vehicle which is further defined as follows:

> "Hit-and-Run Motor Vehicle means a motor vehicle which causes bodily injury *arising out of physical contact* of such motor vehicle with the insured or with an automobile 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 'hit-and-run motor vehicle' . . . ." (emphasis added)

[1] Defendant argues that this provision of the policy, insofar as it requires a physical contact between the insured vehicle and the "hit-and-run" vehicle, is invalid as an impermissible restriction upon the coverage which is required by the Colorado uninsured motorist statute, 1965 Perm. Supp., C.R.S. 1963, 72–12–19. We agree. The statute provides as follows:

> "No automobile liability or motor vehicle liability policy . . . shall be delivered or issued for delivery in this state . . . unless coverage is provided . . . for bodily injury or death . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom . . . ."

The following section, 1965 Perm.Supp., C.R.S. 1963, 72–12–20, is a declaration of public policy by the legislature stating the following:

> "[I]t is the policy of this state to induce and encourage all motorists to provide for their financial responsibility for the protection of others, *and to assure the widespread availability to the insuring public of insurance protection against financial loss caused by negligent financially irresponsible motorists.*" (emphasis added)

This declaration of policy is made with specific reference to the preceding section. *See also* Morgan v. Farmers Insurance Exchange, Colo., 511 P.2d 902.

Two divergent lines of authority appear to exist on the issue before us. One view is that the physical contact restriction is not in conflict with the uninsured motorist statute. *See, e. g.*, Prosk v. Allstate Insurance Co., 82 Ill.App.2d 457, 226 N.E.2d 498, 25 A.L.R.3d 1294. However, other courts have held under statutes very similar to ours, that the physical contact rule is inconsistent with the public policy of the state. State Farm Fire & Casualty Co. v. Lambert, 291 Ala. 645, 285 So.2d 917; Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla.). *See also* Costa v. St. Paul Fire & Marine Insurance Co., 228 Cal.App.2d 651, 39 Cal.Rptr. 774; Doe v. Brown, 203 Va. 508, 125 S.E.2d 159.

The cases which uphold the physical contact rule are based on the premise that

the statute was intended to apply only when the negligent party actually has no insurance coverage. They reason that there is no presumption of a lack of insurance where the negligent party remains unidentified and that therefore, those drivers should not be included within the definition of uninsured motorists under the statute. In their view, the hit-and-run coverage provided by most insurance companies is coverage which actually goes beyond the coverage required by the statute and the physical contact requirement cannot constitute an undue restriction upon the required coverage.

[2, 3] We find this reasoning unpersuasive. Instead, we conclude that the key to the application of the uninsured motorist statute is the inability of the innocent injured party to recover for a loss caused by another's negligence, whether that person is known or unknown. There can be no doubt as to the liability of the errant driver here, had his identity been known. While the language of the statute focuses on the problems of an uninsured motor vehicle, its applicability is not limited to those situations in which the identity of the *negligent party is known*. Furthermore, the declaration of public policy expresses the legislature's prime concern as the need to compensate the innocent driver for injuries received at the hands of one from whom damages cannot be recovered. Morgan v. Farmers Insurance Exchange, *supra*. Thus, we conclude that the statute does require coverage for hit-and-run drivers. State Farm Fire & Casualty Co. v. Lambert, *supra*; Brown v. Progessive Mutual Insurance Co., *supra*.

Since we have concluded that the term "uninsured motor vehicle" found in the statute and the contract includes motor vehicles whose drivers cannot be identified, we must now decide whether the physical contact restriction in the policy constitutes a reasonable restriction upon the coverage required by the statute. This restriction does not appear in the Colorado uninsured motorist statute. On the contrary, 1965 Perm.Supp., C.R.S. 1963, 72-12-19 and 72-12-20 evince the legislature's intent to require comprehensive coverage for this type of accident. Hence, the physical contact restriction in the policy is an impermissible restriction upon the broad coverage required under the uninsured motorist statute.

Judgment reversed.

SILVERSTEIN, C. J., and SMITH, J., concur.

Brigita CRABTREE, Petitioner-Appellee,

v.

Cecil I. CRABTREE, Respondent-Appellant.

No. 73-374.

Colorado Court of Appeals,
Div. III.

Aug. 27, 1974.

Rehearing Denied Sept. 17, 1974.

Certiorari Denied Nov. 18, 1974.

Not Selected for Official Publication.

Dissolution of marriage. The District Court, City and County of Denver, Gilbert A. Alexander, J., denied husband's motion to set aside verbal stipulation made in open court, and he appealed. The Court of Appeals, Sternberg, J., held that verbal stipulation made in open court governing division of property, custody, support, waiver of maintenance and attorneys' fees was valid in absence of evidence to sustain husband's assertion of undue pressure to settle exerted upon him by former attorney; that change of attorneys by husband was not a proper basis for invalidating the stipulation; and that failure of wife's attorney to perform the ministerial act of putting stipulation into writing did not defeat stated intention of the parties.

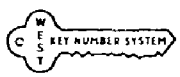
Affirmed.

erly joined nor argued in bulk since they involved different legal principles, even different decrees. Even so, the lack of any argument going to the matter sought to be asserted in assignment of error No. 2 precludes our review thereof.

It is our conclusion that the decree here appealed from is due to be affirmed, and it is so ordered.

Affirmed.

HEFLIN, C. J., and MERRILL, MADDOX, and FAULKNER, JJ., concur.



STATE FARM FIRE AND CASUALTY COMPANY and Southern Guaranty Insurance Company et al.

v.

Ronnie LAMBERT.

S.C. 346.

Supreme Court of Alabama.

Nov. 15, 1973.

Insured instituted declaratory judgment proceeding to determine validity of "physical contact" requirement of "hit-and-run" clause of uninsured motorist provision of policy. The Circuit Court, Baldwin County, Telfair J. Mashburn, J., rendered judgment in favor of the plaintiff and the defendants appealed. The Supreme Court, Jones, J., held that "physical contact" requirement of the policy was in derogation of uninsured motorist statute and was void.

Affirmed.

Coleman, J., concurred in result.

1. Insurance ⇐467.51

Hit-and-run driver was included within term "uninsured motorist" of uninsured motorist statute; thus, "physical contact" requirement in hit-and-run clause of uninsured motorist provision of automobile liability policy was in derogation of the statute and was void. Code of Ala., Tit. 36, §§ 74(42)–74(83), 74(62a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance ⇐467.51

Policy provisions more restrictive than uninsured motorist statute are invalid. Code of Ala., Tit. 36, §§ 74(42)–74(83), 74(62a).

Pillans, Reams, Tappan, Wood, Roberts & Vollmer and Geary A. Gaston, Mobile, for appellant, State Farm Fire & Casualty Co.

Collins, Galloway & Murphy and Robert H. Smith, Mobile, for appellant, Southern Guaranty Ins. Co.

James R. Owen, Bay Minette, for appellee.

JONES, Justice.

[1] Is the "physical contact" requirement in a "hit-and-run" clause in the uninsured motorist provision of an automobile liability insurance policy in derogation of the Alabama Uninsured Motorist Statute?

While the posture of the proceedings below is not entirely clear, all parties in interest concede that our answer to the foregoing question is dispositive of this appeal. We answer, as did the court below, in the affirmative; and, accordingly, we affirm.[1]

1. We recognize that the extent of liability of each of the appellants is not adjudicated by this affirmance since this issue is yet to be determined.

This is a case of first impression in Alabama. The pertinent provisions of each policy are as follows:

"COVERAGE U—UNINSURED AUTOMOBILE COVERAGE—DAMAGES FOR BODILY INJURY CAUSED BY UNINSURED AUTOMOBILES. To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; * * * *

"DEFINITIONS—PART 1.

"UNINSURED AUTOMOBILE—Under Coverage U Means: * * *

"(2) a hit-and-run automobile as defined: * * *

"HIT-AND-RUN AUTOMOBILE—Under Coverage U means a land motor vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with an automobile which the insured is occupying at the time of the accident, provided:

(1) there cannot be ascertained the identity of either the operator or owner of such 'hit-and-run automobile' * * *"

The Alabama Uninsured Motorist Statute (Title 36, § 74(62a), Code of Alabama 1940 (Recomp.1958), as amended) became effective January 1, 1966, and reads as follows:

"No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in sub-section (c) of section 74(46) of this title, under provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, that the named insured shall have the right to reject such coverage; and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer."

Appellee concedes that the physical contact requirement is valid unless the Uninsured Motorist Statute includes within its scope and purview hit-and-run drivers. Appellants conceded that if the statute does include hit-and-run drivers, the "physical contact" provision is void as being more restrictive than the statute.

The threshold question, then, is whether the legislature by passage of the uninsured motorist statute intended to cover within the term "uninsured motorist" a hit-and-run driver.

This question cannot be answered apart from the historical context within which the statute was passed. Automobile liability insurance has long been recognized as the only practical means for the general motoring public to provide financial responsibility concomitant with the increasing number of injured persons—fatal and non-fatal—resulting from the use of our highways. Out of the increase in the number of vehicles, their greater power and speed, and the resultant social problem of the uncompensated injured and deceased evolved the debate as to the public policy best suited to fill this need.

Primarily, two alternatives were considered. One was the Uniform Motor Vehi-

cle Safety-Responsibility Act and the second was compulsory liability insurance.[2] Alabama, along with some 42 other states, chose the former. This public policy, as expressed in §§ 74(42)–74(83), Title 36, Code of Alabama 1940 (Recomp.1958), as amended, was adopted by the Alabama Legislature, effective January 1, 1952, and provided in substance that those who were answerable for injuries and damages resulting from their fault in the use and maintenance of an automobile who did not have automobile liability insurance, or who were otherwise unable to financially respond to such damages, would be subject to the loss of their driving privileges.[3] While this policy tended to develop an ever increasing consciousness on the part of the motoring public for the need of financial responsibility to third parties, the practical effect was nonetheless to leave a substantial number of the motorists uninsured and financially irresponsible.

A progressive and an imaginative insurance industry moved into this gap and provided, as optional coverage, uninsured motorist protection. The responsible motorist was now able for a nominally increased premium to cover not only his liability to others, but to protect himself from loss due to personal injury incurred through the fault of the financially irresponsible. These irresponsible motorists fall basically into two categories—the known driver and the unknown driver (hit-and-run).

While the gap was narrowed, it was not fully bridged. Two deficiencies yet remained: (1) the uninsured motorist coverage was purely contractual and thus wholly optional, and (2) by the terms of the policy the insured's protection against hit-and-run drivers was conditioned on physical contact of the vehicles involved.

In light of this historical perspective, and working within the traditional fault concept, the legislature passed the Uninsured Motorist Statute. By requiring each policy to include such coverage—absent an express disavowal on the part of the insured—the gap represented by the first deficiency was further narrowed. It is equally clear that the statute in providing "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles" speaks directly to the second deficiency—the unknown or hit-and-run as well as the known financially irresponsible driver.

To hold that the legislative intent had the restrictive effect of speaking only to the first of the two above-referred to deficiencies is to dispute that the purpose of the statute is to protect persons who are injured through the fault of other motorists who in turn are not insured and cannot make whole the injured party. The design of the statute is to protect injured persons who can prove that the accident did in fact occur and that he was injured as a proximate result of the negligence of such other motorist who cannot respond in damages for such injuries. Moreover, the statute permits the enforcement of the policy provisions by the insured directly against the insurer without first obtaining a judgment against the uninsured.[4]

We agree with the Florida Supreme Court which addressed itself to the identical issue in Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (1971), thusly:

> "The effect of [appellant's contention] is to place on the injured person in every case the burden of proving that the offending party was without insurance re-

2. For a more detailed historical account of legislation leading to the adoption of Uninsured Motorist Statutes, see Widiss, A Guide to Uninsured Motorist Coverage, Chapter 1.

3. See Mooradian v. Canal Insurance Co., 272 Ala. 373, 130 So.2d 915 (1961); and American Southern Insurance Co. v. Dime Taxi Service, Inc., 275 Ala. 51, 151 So.2d 783, 4 A.L.R.3d 611 (1963).

4. Widiss, A Guide to Uninsured Motorist Coverage, § 1.9.

gardless of the circumstances, the equities or the difficulties. Failure on the part of the injured party to make such proof results in nonrecovery, and the certainty that in some cases at least, injured persons then become the burden of society or of the state, despite their attempt to protect themselves by purchase of insurance intended to shield them against damages inflicted by a party from whom recovery cannot be made in person or through his insurance.

". . . the question to be answered is whether the offending motorist has insurance available for the protection of the injured party, for whose benefit the statute was written; the test should not be simply whether or not the injured party can prove the offending party was uninsured, which is, in many instances, impossible in hit-and-run cases. Any other construction of the statute is unfair and unduly restricts the application intended by the Legislature.

"The argument that the policy requirement of physical contact is reasonable is fallacious. The only reason for such a requirement is to prove that the accident actually did occur as a claimant may say it did. This is a question of fact to be determined by the jury, or the judge if demand for jury trial is not made. If the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover, regardless of the actuality of physical contact."

[2] We have consistently held that policy provisions more restrictive than the statute will not meet the test of validity. Higgins v. Nationwide Mutual Insurance Company, 291 Ala. 462, 282 So.2d 301 (1973); Hogan v. Allstate Insurance Company, 287 Ala. 696, 255 So.2d 35, (1971); Preferred Risk Mutual Insurance Co. v. Holmes, 287 Ala. 251, 251 So.2d 213 (1971).

We hold, therefore, that the "physical contact" requirement in the "hit-and-run" provision of the automobile liability insurance policies here under consideration is in derogation of the Alabama Uninsured Motorist Statute and is void as against public policy.

Affirmed.

HEFLIN, C. J., and BLOODWORTH and McCALL, JJ., concur.

COLEMAN, J., concurs in result.

STUART CONSTRUCTION CO., INC., a corp.

v.

VULCAN LIFE INSURANCE CO., a corp., et al.

S.C. 387.

Supreme Court of Alabama.

Nov. 15, 1973.

Rehearing Denied Dec. 13, 1973.

Action by unsuccessful bidder for general contract for construction of building for life insurance company against the life insurance company, the architects and the successful bidder for damages for civil conspiracy. The Circuit Court, Baldwin County, Telfair J. Mashburn, J., sustained demurrers to the complaint and the unsuccessful bidder took a nonsuit and appealed. The Supreme Court, Faulkner, J., held that the unsuccessful bidder's complaint failed to state cause of action for civil conspiracy and that where no actionable wrong was committed against the unsuccessful bidder, action for civil conspiracy, standing alone, would not lie.

Affirmed.

Howard J. DeMELLO, Plaintiff,

v.

FIRST INSURANCE COMPANY OF HAWAII, LTD., Defendant.

No. 5437.

Supreme Court of Hawaii.

June 12, 1974.

Original proceeding which presented question of insured's right to recover from insurer under hit-and-run driver clause in uninsured motorist provision of automobile policy, was submitted on an agreed statement of facts. The Supreme Court, Ogata, J., held that physical contact requirement in the hit-and-run driver clause in the uninsured motorist provision of the automobile policy was in contravention to the protective purpose of statute requiring insurers to offer uninsured motorist coverage and was invalid.

Judgment for plaintiff.

Kobayashi, J., and Vitousek, Circuit Judge, dissented and filed an opinion.

1. Insurance ⇐467.52

A "physical contact" requirement in the hit-and-run driver clause in an uninsured motorist provision of an automobile policy is a contractual provision that imposes upon insured, as one of the prerequisites of recovery, under the uninsured motorist provision of his policy, the need to prove physical contact between the insured's vehicle and a second vehicle.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance ⇐467.51

Physical contact requirement in hit-and-run driver clause in uninsured motorist's provision of automobile policy is contrary to protective purpose of statute requiring insurers to offer uninsured motorist coverage and is invalid. HRS § 431–448.

3. Insurance ⇐138(3)

In determining whether provision in contract or policy should be held null and void as in contravention of statutory policy, court must examine the arguably valid objective of the provision and its compatibility with the statute, and determine whether the objective is served by the provision and whether there are countervailing objections to the provision that will nonetheless invalidate it.

Syllabus by the Court

[1] 1. A "physical contact" requirement in the "hit-and-run" driver clause in an uninsured motorists provision of an automobile insurance policy is a contractual provision that imposes upon insured, as one of the prerequisites of recovery (under the uninsured motorists provision of his policy) the need to prove physical contact between the insured's vehicle and a second vehicle.

2. In order to effectuate the protective purpose of HRS § 431–448, any "physical contact" requirement in the "hit-and-run" driver clause in the uninsured motorists provision of an automobile liability policy must be deemed invalid.

Christopher P. McKenzie, Honolulu (Gould & McKenzie, Honolulu, of counsel), for plaintiff.

Walter Davis, Honolulu, for defendant.

Before RICHARDSON, C. J., LEVINSON, KOBAYASHI and OGATA, JJ., and VITOUSEK, Circuit Judge, Assigned Temporarily by reason of vacancy.

OGATA, Justice.

Howard J. DeMello (hereinafter plaintiff or plaintiff-insured) and First Insurance Company of Hawaii (hereinafter defendant or defendant-insurer) submitted this case for our decision under the provisions of the former ch. 631 of H.R.S., which provided that this Court could hear and determine a claim for relief presented

on an Agreed Statement of Facts.[1] From the submitted Agreed Statement of Facts we extract the following sequence of legally significant events.

Late on the evening of August 18, 1971, plaintiff was operating his pickup truck in Honolulu, on Kalanianaole Highway about one-half mile ewa (west) of the intersection of Kalanianaole Highway and Ehukai Street. At this particular location, Kalanianaole Highway is a two-lane road; plaintiff was in his ewa-bound lane. The other lane was for traffic proceeding in the opposite direction (Makapuu or east bound). Suddenly, plaintiff noticed the headlights of an on-coming, Makapuu-bound vehicle approaching his pickup truck. According to the stipulated facts, the on-coming Makapuu-bound vehicle was in the ewa-bound lane of travel. To avoid an apparently imminent head-on collision, plaintiff swerved his vehicle to the right and collided with the mountainside off the right shoulder of the highway. The operator of the approaching vehicle that had been driven in the improper lane drove on without stopping and has never been identified.

It is further stipulated and agreed that: (1) plaintiff suffered severe injuries as a result of his collision with the mountainside; (2) this collision and its resultant injuries were proximately caused by the negligence of the still unknown operator of the on-coming vehicle; (3) there was no physical contact between plaintiff's vehicle and the unidentified on-coming vehicle. It is also agreed that plaintiff had in force at the time of the accident a valid automobile liability insurance policy with defendant-insurer that provided that defendant-insurer would pay damages caused by an uninsured motorist. The particular provision under which plaintiff-insured claims coverage is the "hit-and-run" paragraph, which paragraph specifically includes coverage for any "bodily injury to an insured arising out of physical contact" of insured's motor vehicle and any motor vehicle operated by a negligent "hit-and-run" driver, so long as the identity of the "hit-and-run" driver cannot be ascertained.[2] Plaintiff and defendant agree that all the prerequisites for recovery under the policy provisions have been complied with, save and except for the fact that there was no physical contact between plaintiff-insured's vehicle and the vehicle operated by the still unidentified other driver.

1. Ch. 631 of H.R.S. has been repealed in its entirety, SLH 1972, Act 89, § 7; effective July 1, 1973, SLH 1972, Act 89, § 11. This case was submitted to us for decision March 2, 1973. We have jurisdiction and power to entertain and dispose of this cause under HRS § 602-5(3) as amended by SLH 1972, Act 88, § 2, effective July 1, 1973, and under our Rule 21.

2. The relevant policy provisions are:

PROTECTION AGAINST UNINSURED MOTORIST'S COVERAGE:

the company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; . . . .

"'Uninsured highway vehicle'" means: . . . .

(b) A hit-and-run vehicle:

"'*Hit-and-run vehicle*'" means a highway vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with an automobile 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 vehicle; (b) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer of the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts and support thereof; and (c) at the company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.

Before turning to the narrow legal issue involved herein, *infra*, the issue raised by the dissenting opinion merits brief discussion. We cannot agree with the view, expressed by the dissent, that we have invalidly assumed the applicability herein of HRS § 431–448 by invalidly assuming that accidents involving unidentified motor vehicle operators and insured drivers are intended by HRS § 431–448 to be covered in all automobile liability insurance policies issued in this state. Nor can we agree with the view expressed in the dissent that the terms of HRS § 431–448 are clear and unambiguous as applied in this case.[3]

The dissenting opinion proceeds on the logically unsound basis that an *unidentified* driver is not, and cannot be, an *uninsured* driver, and hence the statute does not apply. However, it seems clear to us that unidentified drivers can either be (a) insured or (b) uninsured. Unless we make some completely unsupportable and unwarranted factual assumption about whether or not the unidentified driver is or is not insured, we cannot know from the bare terms of the uninsured motorists statute whether or not an automobile accident involving an *unidentified* driver is or is not intended to be covered by that statute. We have no factual basis on which to make such determination, and factual determinations are inappropriate activities for an appellate court, in any event. Whereas the dissenting opinion, perhaps unconsciously, makes a factual assumption that the unknown driver, by virtue of being unknown, cannot also be uninsured, we prefer to have recourse to the legislative history of HRS § 431–448 for assistance in determining how the term "uninsured" in the statute is to be read in cases such as that here at bar. The legislative history of this statute, set out in pertinent part, *infra*, fn. 4, is not only clearly indicative of a legislative intention to assure, via HRS § 431–448, proper compensation for those tragically injured in automobile accidents, but in fact, *expressly*, *clearly*, and *without ambiguity*, states a legislative intention to assure that insurance companies provide coverage for persons injured in accidents and who have, as here, a valid claim that is uncollectible because of the fact that the tortfeasor operating the second vehicle involved in the accident *cannot be identified*. In sum, whereas the dissenting opinion apparently takes the illogical and unfounded view that because "unidentified" and "uninsured" are different adjectives (albeit not mutually exclusive conceptually), there is a presumption in favor of the unknown tortfeasor's insurance coverage, we think that only the opposite presumption can be reconciled with the clear and unambiguous statement of the legislative intent to provide to insureds adequate protection in instances such as that now before us.

The more narrow and complex legal issue presented for our decision is whether plaintiff-insured can recover under his particular insurance policy with defendant-insurer when, as here, the "physical contact requirement" in the policy language is not complied with. Plaintiff-insured urges that the precondition of physical contact is null and void under HRS § 431–448.

[2] We have recently decided a somewhat similar issue. In Walton v. State Farm Mutual Automobile Insurance Company, 55 Haw. 326, 518 P.2d 1399 (1974), we held that in order to accomplish the

3. HRS § 431–448 provides in pertinent part as follows:

> § 431–448 Automobile liability; coverage for damage by uninsured motor vehicle. No automobile liability or motor vehicle liability policy . . . shall be delivered, issued for delivery, or renewed in this State . . . unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 287–7, under provisions filed with and approved by the insurance commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage in writing.

protective purpose of HRS § 431—448,[4] an "other insurance" clause in the uninsured motorists provisions of an insured's automobile liability policy is invalid if its effect is to limit recovery by the insured under the particular policy to an amount that is less than the statutory minimum set up by HRS § 287–7, if that limit also results in insured's total recovery from all sources equalling less than the insured's actual damage. Similarly, we here hold invalid—as contrary to the protective purpose of HRS § 431—448—the "physical contact" requirement in the uninsured motorists coverage of insured's automobile policy.

As in *Walton*, we are confronted at the outset with a split in authority.[5] However, a detailed study of the case authority in this field is only minimally helpful, because we are here required to construe a Hawaii *statute*, as to which the law in other jurisdictions can be advisory only.

[3] In considering whether the contractually imposed policy requirement of physical impact should be null and void as in contravention of the statutory policy

4. Standing Committee Report 194 on H.B. 26 (which became HRS § 431–448). 1965 House Journal, page 582, states in part:

> The purpose of this bill is to *promote protection*, through voluntary insurance, for persons who are injured by uninsured motorists who cannot pay for personal injuries caused by motor vehicle accidents. . . .
>
> An insurance company offering uninsured motorist protection engages to pay to the insured, . . . sums not to exceed the stated limits, for any uncollectible valid claims or unsatisfied judgment for damages resulting from bodily injury or death, resulting from the . . . use of an automobile. *The claim becomes payable when the innocent victim shows that his claim is valid*, that is, that there is legal liability on the person alleged to be responsible *and that the claim cannot be collected* because of the financial irresponsibility of that person or *because of the inability to identify the person or persons responsible.*
>
> In testimony on this bill, instances have been cited where persons have suffered extensive personal injuries and property damages and found that the guilty motorist was financially irresponsible and without any liability insurance. *Your Committee believes that if the general public knows about the availability of such insurance, and if the insurance companies are compelled to offer it, many of these tragic circumstances can be avoided.* (Emphasis supplied.)

5. In interpreting the Florida uninsured motorist statute, it was held that no contractual physical contact requirement could be permitted to stand so as to defeat recovery in a factual situation similar to that here involved. Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla.1971). The special legislative purpose of the uninsured motorist statute required this result. Fla.Stat. § 627.0851, F.S.A. Compare, Brown v. Progressive Mutual Insurance Company, *supra*, with Gilliam v. Stewart, 291 So.2d 593 (Fla.Sup.Ct., 1974), in which the Florida court retained the rule that an essential element in a valid claim for negligently caused emotional stress was proof of actual physical impact. There was no relevant statute in *Gilliam* similar to the uninsured motorist statute in *Brown*.

Prior to the amendment of Cal.Ins.Code § 11580.2 by legislative addition of a "physical contact" requirement, Stats.1961, ch. 1189, the California statute, like the Hawaii statute, was silent as to the necessity for physical impact. Regardless of physical contact, it was decided that insurer had a duty to pay the claim where an otherwise valid claim for recovery could be made under such pre-amendment statute. Costa v. St. Paul Fire and Marine Insurance Company, 228 Cal.App.2d 651, 39 Cal.Rptr. 774 (1964) (by implication).

Although Virginia procedures are different from ours as to the methods for assertion of claims for damage from "uninsured motorists," the law in Virginia is that the physical impact requirement is null and void under the Virginia Uninsured Motorists Law. Doe v. Brown, 203 Va. 508, 516, 125 S.E.2d 159, 165 (1962).

On the other hand, there are cases that have upheld a contractually imposed physical impact requirement in an insurance policy definition of "hit-and-run" driver, as consistent with the state statute on uninsured motorist protection. Buckeye Union Ins. Co. v. Cooperman, 33 Ohio App.2d 152, 293 N.E.2d 293 (1972). For other cases in accord with Buckeye, *see generally*, "Annotation: Uninsured Motorist Indorsement: Validity and Construction of Requirement that there be 'Physical Contact' with Unidentified or Hit-and-Run Vehicle," 25 A.L.R.3d 1299, 1306–07.

requirement evident in HRS § 431–448, we may analyze the problem by endeavoring to discover (1) what arguably valid objective this arbitrary physical impact requirement is designed to serve, (2) whether this objective is compatible with the statute, and (3) if so, whether (a) the objective is actually served by the requirement, and, (b) whether there are countervailing objections to the requirement that will nonetheless invalidate it as inconsistent with the statutory purpose.

The first two steps in the analysis are relatively easy. The physical impact requirement can only be designed to reduce the number of claims that may be filed by insureds with insurers, by elimination of some claims which are fraudulent. Brown v. Progressive Mutual Insurance Company, 249 So.2d 429, 430 (Fla.1971); Inter-Insurance Exchange of Auto. Club of Southern California v. Lopez, 238 Cal.App.2d 441, 446, 47 Cal.Rptr. 834, 837 (1965). "The object is to eliminate fictitious claims of a driver who, through his own negligence, causes injury to himself without the involvement of another vehicle, and then seeks recovery on the ground that it was due to a fictitious hit-and-run driver." State Farm Mutual Automobile Insurance Company v. Spinola, 374 F.2d 873, 875 (5th Cir. 1967). The elimination of fraudulent claims is obviously not repugnant to the statutory terms of HRS § 431–448 or to the policies reflected in the provision's legislative history.

Conceding that the physical impact requirement is designed to eliminate fraudulent claims and that such elimination is not contrary to the statute, we are next faced with the third analytical step of evaluating whether this proper and even laudable objective is actually served by the physical impact requirement, especially in light of any countervailing objections to the requirement. Since, in the case at bar, and according to the Agreed Statement of Facts, the claim of plaintiff-insured is a *valid and non-fraudulent claim*, it is evident that it would be contrary to the statutory policy and legislative intent of HRS § 431–448[6] to permit the physical impact requirement to bar *this* plaintiff-insured's valid claim against this defendant-insurer. Although this case might be easily decided on these grounds, defendant-insurer seeks a broader ruling from this court.

This court has held that the fear of a flood of fraudulent claims cannot justify the judicial deprivation of a plaintiff's right to bring an independent action in tort, because the genuineness of the claim can be adequately tested by the mechanisms of our adversary process. Rodrigues v. State, 52 Haw. 156, 169–176, 472 P.2d 509, 518–522 (1970). In the case at bar, as in *Rodrigues*, it is not to be forgotten that *plaintiff carries the burden of proof*. We have only very recently held that the weight of plaintiff's burden of proof provides fully adequate protection against any "flood" of fraudulent claims for the negligent infliction of emotional distress, and that the judicial imposition of a physical impact requirement cannot be permitted and should be eliminated in this state as an arbitrary, irrelevant, and often unjust barrier to the recovery by plaintiff of damages for actual mental distress negligently inflicted by others. Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974). Similarly we here hold that the physical impact requirement cannot be used by defendant-insurer to defeat an insured's otherwise valid claim. For us to enforce insurer's physical impact contractual prerequisite would, in effect, amount to our propping up of an arbitrary barricade erected to eliminate all claims for damages resulting from one car accidents. Since it is clear that one car accidents can be caused by the negligent operation of a second "uninsured" vehicle (as here) any contractual prerequisite of physical contact between automobiles undermines the statutory purposes of HRS § 431–448.[7]

6. See the legislative history set out in fn. 4 especially paragraph two thereof.

7. Note italicized portions of the legislative history set out in fn. 4.

It has been repeatedly, if tacitly, recognized by many courts that the physical impact requirement can, if strictly enforced, defeat valid claims. To prevent this result, and yet "uphold" the impact requirement, courts have been compelled to engage in what may euphemistically be termed unbelievably creative thinking. For example, in Johnson v. State Farm Mut. Auto. Ins., 70 Wash.2d 587, 424 P.2d 648 (1967), the court held that, under language in pertinent part substantively identical to that here involved,[8] there was "physical contact" when an unknown vehicle struck a second vehicle, which in turn struck insured's vehicle; the court held that this strained interpretation of "physical contact" was consistent with the uninsured motorist statute.[9] Other courts have gone yet *further*. In *Barfield* v. Insurance Company of North America, 59 Tenn.App. 631, 443 S.W.2d 482 (1968), the court held that a "physical contact" requirement was satisfied when the rear wheels of an unidentified vehicle propelled a rock through a claimant's windshield causing him severe injury.[10] In American Insurance Company v. *Gernand*, 262 Cal.App. 2d 300, 68 Cal.Rptr. 810 (1968), the court found an arbitrable issue as to whether defendant-insured Alice Gernand could collect under her uninsured motorists indorsement requiring physical contact when Mrs. Gernand and another were injured in an accident caused by an unidentified driver's negligent operation of a vehicle, which operation resulted in a third vehicle's swerving to avoid collision with the unidentified party's automobile. This third vehicle's swerve caused defendant-insured, as operator of her vehicle, to swerve to avoid collision. None of the vehicles touched any of the other vehicles, yet this factor could not alone defeat insured's claim, the "physical contact" requirement notwithstanding.[11]

The preceding cases indicate a trend toward the erosion of the validity of a contractually imposed impact requirement. This factor should be considered in connection with the obvious correlative truth that this arbitrary requirement will defeat some clearly valid claims unless stretched conceptually to points of incredulity far beyond that done in the preceding cases.[12]

8. The insured's policy provided the following as a definition of a "hit-and-run" automobile (for purposes of uninsured motorists protection):

> [A]n automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident . . . .

70 Wash.2d at 589, 424 P.2d at 649. Compare with the policy language involved in the case at bar, fn. 2, following the words "'Hit-and-run vehicle'" means . . . .

9. *Accord*, Latham v. Mountain States Mutual Casualty, 482 S.W.2d 655 (Tex.Civ.App. 1972); State Farm Mutual Automobile Insurance Co. v. Spinola, 374 F.2d 873 (5th Cir. 1967); Lord v. Auto-Owners Insurance Company, 22 Mich.App. 669, 177 N.W.2d 653 (1970); Inter-Insurance Exchange of Automobile Club of Southern California v. Lopez, 238 Cal.App.2d 441, 47 Cal.Rptr. 834 (1965). As in Johnson v. State Farm Mut. Auto. Ins., *supra*, relevant policy language in all these cases was substantively identical with the policy language in the case at bar.

10. *Cf.*, Gavin v. M. V. A. I. C., 57 Misc.2d 335, 292 N.Y.S.2d 745 (1968) (a similar interpretation given to phrase "physical contact" in New York Insurance Law § 617, a statutory provision.)

11. We acknowledge that in other cases a contractually imposed physical impact requirement has been strictly construed, e. *g.*, Cruger v. Allstate Ins. Co., 162 So.2d 690 (Fla.App.1964); Ely v. State Farm Mutual Auto. Ins. Co., 148 Ind.App. 586, 268 N.E.2d 316 (1971); Blankenbaker v. Great Cent. Ins. Co., Ind.App., 281 N.E.2d 496 (1972); Aetna Casualty & Surety Co. v. Head, 240 So.2d 280 (Miss.1970); Collins v. New Orleans Public Service, Inc., 234 So.2d 270 (La. App.1970), writ refused, 256 La. 375, 236 So.2d 503 (1970).

12. For example, one California arbitrator decided that a "physical contact" requirement was satisfied when *only* oncoming headlight beams "struck" insured's vehicle prior to an accident! A. I. Widiss, A Guide to Uninsured Motorist Coverage, § 2.41, pp. 84–5, fn. 194 (1969).

In light of these considerations we do not think we should adopt a rule validating the impact requirement if to do so will either defeat valid claims initially (by strict construction), or compel many claimants to take on the expense of litigating the meaning of "physical contact" (if a liberal approach prevails). Since we feel that, at a minimum, a liberal approach to the definition of physical contact requirement would be required by the statute, and since the presence of physical contact will often be a collateral or irrelevant issue to the establishment of a valid claim based on the negligence of the unidentified driver, and, finally, since considerable sophistry must, perforce, be used by courts to decide what amounts to "physical contact" in any one case in order to sustain a valid claim (given a liberal definition of the provision) we think it is required to hold the physical impact prerequisite provision void under the statute. To hold otherwise would dilute the protection intended to be offered by HRS § 431–448 to insureds, by making it unnecessarily difficult and expensive for an injured insured to prove his claim's validity.

We also note the clear possibility of instances in which the contractually imposed requirement will not fulfill its justifiable objective of eliminating fraudulent claims. A claimant with a fraudulent claim can bolster the same, if necessary, by damaging his own car to leave apparent proof of the requisite "physical contact" with a non-existent "unidentified vehicle." The contractual "physical impact" requirement thus not only sweeps too broadly, but also not broadly enough, to accomplish its only justifiable and statutorily permissible purpose, the prevention of frauds.

Because insurer's contractual requirement of physical impact unjustifiably impedes effectuation of the statutory policy of protection for insureds against damage from the negligence of unidentified drivers, as elaborated in our analysis, *supra*,[13] it cannot stand. Accordingly, judgment will be entered for plaintiff-insured.

KOBAYASHI, Justice, and VITOUSEK, Circuit Judge (dissenting).

We dissent.

The basic fallacy of the opinion of the majority is that it goes on the assumption that unidentified, "hit and run" owners or operators of motor vehicles fall within the provisions of HRS § 431–448.

In addition, the opinion of the majority violates a fundamental rule of statutory construction. Though the language of the statute is plain, clear, and unambiguous, the majority concludes ambiguity exists and for support of its conclusion utilizes a legislative committee report for "clarification" as to legislative intent.

Then the majority of the court plunges into a justification of why a "physical contact" is not necessary in a "hit and run" situation.

The opinion of the majority would be plausible if the opinion had addressed itself initially to the threshold questions, resolved same, and then dealt with the dispensation of "physical contact" in a "hit and run" case. However, we are of the opinion that if the majority had dealt with the basic threshold questions involved herein, the majority would have concluded that the defendant insurance company was not compelled to issue a coverage for "hit and run" or unidentified owners or operators of motor vehicles under the terms of HRS § 431–448, and that said coverage was strictly a voluntary agreement between plaintiff-insured and defendant insurance company. And in that context this court would then resolve the issue of whether the defendant insurance company could or could not impose the requirement of "physical contact" in a "hit and run" coverage.

In our opinion the terms of HRS § 431–448 are clear and unambiguous and need

13. For other criticism of the impact requirement, *see e. g.*, *Widiss*, *supra*, § 2.41, p. 86; Chadwick and Poche, California's Uninsured Motorist Statute: Scope and Problems, 13 Hast.L.J. 194, 197–98 (1961).

no construction as to their meaning. The provisions therein state clearly "to recover damages from owners or operators of *uninsured* motor vehicles . . . ." (Emphasis added.) Twentieth Century Furniture, Inc. v. Labor and Industrial Relations Appeal Board, 52 Haw. 577, 482 P.2d 151 (1971); Helvering v. City Bank Company, 296 U.S. 85, 89, 56 S.Ct. 70, 80 L.Ed. 62 (1935). The law does not require the defendant insurance company to provide "hit and run" or unidentified vehicle insurance coverage, and where the public policy does not forbid the imposition of a requirement of "physical contact" in a "hit and run" insurance coverage, both the plaintiff-insured and the defendant insurance company are bound by their voluntarily entered into agreement.[1] Accordingly, we would enter judgment in favor of defendant insurance company.

Application of Mary P. HORNER, widow of Roy Horner, Deceased.

No. 5461.

Supreme Court of Hawaii.

June 10, 1974.

Rehearings Denied July 19, 1974.

Widow of deceased victim of automobile accident applied to the Criminal Injuries Compensation Commission for compensation and the Commission denied the claim. The widow appealed. The Supreme Court, Richardson, C. J., held that the victim was killed by an act falling within the statutory definition of manslaughter and that the Criminal Injuries Compensation Commission abused its discretion by denying the widow's claim on the ground that death resulting from an automobile accident was not one of the crimes enumerated in the statute which provided for compensation for victims of certain crimes.

Reversed and remanded.

1. States ⇐183

Judicial review of a decision of the Criminal Injuries Compensation Commission is limited to a determination of whether the Commission observed the requirements of the law and whether its factual findings were supported by substantial evidence.

2. States ⇐183

Where action of Criminal Injuries Compensation Commission clearly involves construction of statute under which it functions, a question of law is presented for court's determination on appeal.

3. States ⇐111

The offenses enumerated by the statute under which Criminal Injuries Compensation Commission operates are not limited to intentional acts or omissions and injuries inflicted by the operation of automobiles are not specifically excluded. HRS § 351-32.

4. States ⇐111

Where deceased was killed apparently when struck by automobile driven by person whose blood alcohol content was .20 or .21 per cent and who, driving in a 35 mph zone, left 136 feet of skidmarks before colliding with automobile by which deceased was standing, deceased was killed by an act falling within the statutory definition of manslaughter and the Criminal Injuries Compensation Commission abused its discretion in denying compensation to the widow of the victim on the ground that death resulting from an automobile accident was not one of the crimes enumerated in the statute from which it derived its authority. HRS §§ 291-5, 351-31, 351-32, 748-6.

5. States ⇐111

Where act which results in death falls within the statutory definition of man-

1. *Accord*, Amidzich v. Charter Oak Fire Insurance Co., 44 Wis.2d 45, 170 N.W.2d 813 (1969).

83 Wash.2d 576

HARTFORD ACCIDENT AND INDEMNITY COMPANY, Respondent,

v.

Stanley NOVAK and Jane Doe Novak, husband and wife, Appellants.

No. 43028.

Supreme Court of Washington, En Banc.

April 4, 1974.

Action by insurer for declaratory judgment concerning coverage and rights of insureds under "uninsured motorist" portion of policy. The Superior Court, Pierce County, James Ramsdell, J., granted summary judgment for insurer and insureds appealed. The Supreme Court, Hunter, J., held that provision in policy defining a "hit-and-run automobile" as automobile causing injury to an insured arising out of "physical contact" of such automobile with the insured was contrary to public policy, and insureds who were involved in accident with a second vehicle which had swerved to avoid colliding with third vehicle which failed to make any "physical contact" with either second vehicle or insured's vehicle but fled scene without leaving any means of identification were covered for injuries and damage.

Reversed and remanded with direction.

1. Insurance ⇐467.51

Statute requiring policy to provide coverage in automobile policy for injury or death for protection of persons entitled to recover damages from owners or operators of uninsured vehicles and hit-and-run motor vehicles is intended to afford protection to an insured for injuries or damage proximately caused by a hit-and-run vehicle, irrespective of its actual physical contact with the vehicle of the insured. RCWA 48.22.030.

2. Insurance ⇐467.51

Language in automobile policy requiring physical contact by hit-and-run vehicle to afford uninsured motorist coverage was void as contrary to statute not requiring physical contact. RCWA 48.22.030.

3. Insurance ⇐467.51

Insureds injured when their automobile was struck by second automobile which had swerved to avoid a third automobile which failed to make any physical contact with either the second vehicle or insured's vehicle but fled scene without leaving any means of identification were covered for injuries and damage under uninsured motorist clause. RCWA 48.22.030.

4. Insurance ⇐467.51

The phrase "hit-and-run" in statute requiring policy to provide coverage for insureds legally entitled to recover damages from uninsured motor vehicles and hit-and-run motor vehicles does not require a hitting or physical contact in order for uninsured motorist protection to be afforded an insured. RCWA 48.22.030.

See publication Words and Phrases for other judicial constructions and definitions.

5. Insurance ⇐574(5.2)

Question of coverage under uninsured motorist clause is not an issue for arbitration.

6. Insurance ⇐574(5.2)

Issue of liability under uninsured motorist clause, injuries and damage sustained, are properly matters for arbitration where the policy so provides.

McGavick & Felker, Robert S. Felker, Tacoma, for appellants.

F. Ross Burgess, Tacoma, Lycette, Diamdon & Sylvester, Edwin J. Snook, Seattle, for respondent.

HUNTER, Associate Justice.

This case involves a complaint for declaratory judgment filed by the plaintiff (respondent), Hartford Accident and Indemnity Company, against the defendants (appellants), Stanley and Jane Doe Novak, concerning the coverage and rights of the

defendants under an "uninsured motorist" portion of an insurance policy with the plaintiff. The defendants appeal from an order by the trial court granting the plaintiff's motion for summary judgment.

On December 11, 1970, the defendants were involved in an automobile accident with a second vehicle, which struck the defendants' vehicle as the second vehicle swerved to avoid colliding with another third vehicle, which had unexpectedly pulled out into the lane of traffic. At the time of the accident the third vehicle failed to make any "physical contact" with either the second vehicle or the defendants' vehicle, but rather fled the scene without leaving any means of identification available to anyone involved.

The accident was immediately investigated by the Washington State Patrol. The drivers and witnesses in both the defendants' vehicle and the second vehicle maintained without question that the accident was the unavoidable result of the actions of an unknown and unidentifiable vehicle which had fled the scene without a scratch. No accident report was ever filed by the fleeing driver, and neither the plaintiff, which insures the defendants, nor the insurer for the second vehicle, had received any correspondence from any insurance company regarding the role of the third vehicle in this accident.

As a result of the accident, the defendants allegedly received certain injuries asserted to have been proximately caused by the operation of the hit-and-run vehicle, and filed a demand with the American Arbitration Association on August 16, 1972, for the matter to be arbitrated. The section of the insurance policy upon which the defendants relied in asserting a right to arbitrate provides as follows:

> 6. Arbitration: If any person making claim hereunder and the company *do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Section,* then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound to be bound by any award made by the arbitrators pursuant to this Section.

(Italics ours.)

Subsequent to the filing of the defendants' demand for arbitration, the plaintiff filed a complaint for declaratory judgment in the Superior Court for Pierce County, seeking a judgment declaring that no coverage was available under the "uninsured motorist" provisions of their policy for the defendants and that the plaintiff should not have to arbitrate the matter. Section 3, subdivision 2 of the insurance contract, defines "uninsured automobile" as follows:

> (a) an automobile or trailer with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law of the state in which the insured automobile is principally garaged, 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 automobile, 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 denies coverage thereunder or
>
> (b) a hit-and-run automobile;
>
> . . . . . .

The insurance policy further defines a "hit-and-run automobile" as follows:

> . . . an automobile which causes bodily injury to an insured *arising out of physical contact of such automobile with the insured* or with an automobile which

the insured is occupying at the time of the accident . . .

(Italics ours.)

After considering the language of the sections of the insurance policy referring to arbitration and uninsured motorist coverage, the trial judge, upon motion by the plaintiff, entered an order staying the arbitration proceedings. Subsequently, on February 20, 1973, the trial judge entered an order granting the plaintiff's motion for summary judgment, holding: (1) that the plaintiff had no coverage under the insurance policy for the defendants as a result of the accident; and (2) that the plaintiff need not arbitrate the matter in question with the defendants through the American Arbitration Association. Thereafter, the defendants took this appeal.

The primary issue in this case is whether the defendants would be covered under the uninsured motorist provision of their insurance policy, should it be determined that the injuries or damages sustained by the defendants were proximately caused by a hit-and-run vehicle, which failed to make physical contact with the vehicle of the insured.

This issue was first considered by this court under a different factual situation in Johnson v. State Farm Mut. Auto. Ins. Co., 70 Wash.2d 587, 424 P.2d 648 (1967). In that case the same limiting language was in the policy requiring physical contact by the hit-and-run vehicle with the vehicle of the insured to afford coverage. Under the facts, however, the hit-and-run vehicle did not collide with the car of the insured, but struck a second car that was propelled into the vehicle of the insured.

We considered the diverse views on the issue of whether physical contact was required under decisions in the states of New York and California, and stated on page 589, 424 P.2d on page 649:

> Where an unknown vehicle has struck a second vehicle and caused it to strike the insured vehicle, there is "physical contact" between the unknown vehicle and the insured vehicle within the meaning of the clause quoted above.

On pages 590–591, 424 P.2d on page 650, we then stated the purpose of the uninsured motorist clause, the basis for the physical contact requirement, and the extent to which it should be applied:

> Such provisions are intended to protect the insured against losses occasioned under circumstances where recovery cannot be had against the party causing the injury. Those circumstances are:
>
> (1) where the offending party is uninsured; and
>
> (2) where the identity of the offending party cannot be ascertained.
>
> Loss occurs, and for the same reasons, whether the contact between the hit-and-run automobile and the insured's vehicle be "physical" or "actual."
>
> In Inter-Insurance Exchange of the Auto. Club of Southern Cal. v. Lopez, 238 Cal.App.2d 441, 47 Cal.Rptr. 834 (1965), the court, in interpreting the pertinent provisions of the California Insurance Code, noted at 446, 47 Cal.Rptr. 834 at p. 837:
>
> > The requirements of physical contact . . . are intended to prevent frauds, not to lessen the coverage extended to innocent motorists. *We believe the physical contact requirement, designed to prevent false claims, should not be extended to defeat recovery in cases where fraud clearly does not exist.*
>
> (Italics ours.)

Subsequent to the above decision, in the following year our legislature, apparently having in mind our enunciations in *Johnson*, enacted the uninsured motorist act. RCW 48.22.030 provides as follows:

> On and after January 1, 1968, no new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or

issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in RCW 46.29.490, for the *protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles* because of bodily injury, sickness or disease, including death, resulting therefrom, except that the named insured may be given the right to reject such coverage, and except that, unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

(Italics ours.)

It is significant in the above statute that the legislature omitted the limitation of "physical contact" by hit-and-run motor vehicles.

In Touchette v. Northwestern Mut. Ins. Co., 80 Wash.2d 327, 332, 494 P.2d 479, 482 (1972), we stated in clear and concise language the purpose of the above enactment:

> The statute (RCW 48.22.030) requiring that uninsured motorist coverage shall be provided . . . is but one of many regulatory measures designed to protect the public from the ravages of the negligent and reckless driver. It was enacted to expand insurance protection for the public in using the public streets, highways and walkways and at the same time cut down the incidence and consequences of risk from the careless and insolvent drivers. The statute is both a public safety and a financial security measure. Recognizing the inevitable drain upon the public treasury through accidents caused by insolvent motor vehicle drivers who will not or cannot provide financial recompense for those whom they have negligently injured, and contemplating the correlated financial distress following in the wake of automobile accidents and the financial loss suffered personally by the people of this state, the legislature for many sound reasons and in the exercise of the police power took this action to increase and broaden generally the public's protection against automobile accidents.

We there further stated on pages 332–333, 494 P.2d on page 483:

> There is no longer any judicial doubt that the state may regulate insurance, so closely is that industry affected with the public interest (43 Am.Jur.2d *Insurance* § 60 (1969)), and regulatory statutes become a part of the policy of insurance.
>
> . . .
>
> Thus, a valid statute becomes a part of and should be read into the insurance policy. . . . Read into the insurance contract as a public policy designed to expand uninsured motorist coverage to a significantly greater proportion of the population, the statute should receive from the courts a construction that will effectuate its manifest purpose. This principle, variously stated in other jurisdictions, was so declared in First Nat'l Ins. Co. of America v. Devine, 211 So.2d 587, 589 (Fla.App.1968):

(Citations omitted.)

We cited therefrom the following key and controlling language:

> The position taken by courts of this State, and by courts of other States, makes it clear that *restriction* upon the coverage provided by uninsured motorists provisions of automobile insurance policies is against public policy and is void.

(Italics ours.)

[1–3] We believe it is apparent that the legislature, by its enactment of RCW 48.22.030, intended to afford protection to an insured for injuries or damages proximately caused by a hit-and-run vehicle, irrespective of its actual physical contact with the vehicle of the insured. The plaintiff

insurance company in this case was bound to follow the mandate of our statute, and the limiting language in the policy to the contrary, requiring physical contact by the hit-and-run vehicle to afford the defendants coverage, is void and contrary to the public policy of this state. We therefore hold that the defendants, under their insurance policy with the plaintiff, were covered for injuries and damages which may have resulted from the operation of the hit-and-run vehicle.

The plaintiff has cited various cases in support of its contention that "physical contact" is required to afford uninsured motorist coverage in the case of injuries or damages sustained from a hit-and-run vehicle. We find in those cases so holding that in most instances the statute of that state, requiring uninsured motorist coverage, also contains the "physical contact" limitation in the case of injuries or damages caused by a hit-and-run vehicle. As to other cases cited, holding contrary to our views expressed herein, we are not inclined to follow. We believe the Florida court in Brown v. Progressive Mut. Ins. Co., 249 So.2d 429 (Fla.1971), contains the better reasoning and the more enlightened view consistent with the philosophy of our previous decisions, which we adopt. In that case the insured sustained injuries and damages from a hit-and-run vehicle which was not known to have made "physical contact" with the vehicle of the insured as required for coverage by the policy. The statute in the state of Florida, directing uninsured motorist coverage, was similar to our statute and contained no "physical contact" provision in order to afford recovery for injuries caused by an unidentified vehicle. That court stated on page 430:

> The purpose of the uninsured motorist statute is to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party. The statute is designed for the protection of injured persons, not for the benefit of insurance companies or motoriests who cause damage to others. The effect of the District Court of Appeal decision here for review is to place on the injured person in every case the burden of proving that the offending party was without insurance regardless of the circumstances, the equities or the difficulties. Failure on the part of the injured party to make such proof results in nonrecovery, and the certainty that in some cases at least, injured persons then become the burden of society or of the state, despite their attempt to protect themselves by purchase of insurance intended to shield them against damages inflicted by a party from whom recovery cannot be made in person or through his insurance.
>
> In deciding whether a person is entitled to the protection of Fla.Stat. § 627.-0851, F.S.A., the question to be answered is whether the offending motorist has insurance available for the protection of the injured party, for whose benefit the statute was written; the test should not be simply whether or not the injured party can prove the offending party was uninsured, which is, in many instances, impossible in hit-and-run cases. Any other construction of the statute is unfair and unduly restricts the application intended by the Legislature.
>
> *The argument that the policy requirement of physical contact is reasonable is fallacious. The only reason for such a requirement is to prove that the accident actually did occur as a claimant may say it did. This is a question of fact to be determined by the jury, or the judge if demand for jury trial is not made. If the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover, regardless of the actuality of physical contact. If twenty witnesses will swear they saw the accident happen, their testimony should not be deemed worthless, as it would be under the decision here for review.*
>
> (Italics ours.)

We also agree with the reasoning of the Arizona Court of Appeals in Mazon v. Farmers Ins. Exch., 13 Ariz.App. 298, 475 P.2d 957 (1971). (Arizona also has an uninsured motorist statute similar to our state statute, which does not require physical contact for injuries caused by an unidentified vehicle, to come within the uninsured motorist coverage.) That court stated on pages 300–301, 475 P.2d on page 959:

> In the instant case, plaintiff has challenged the "physical contact" requirement as it was enumerated in *Lawrence, supra* [Lawrence v. Beneficial Fire and Cas. Ins. Co., 8 Ariz.App. 155, 444 P.2d 446 (1968)], as being violative of the statutory provision which makes no mention of "physical contact." [Arizona uninsured motorist statute]
>
> The "physical contact" requirement found in policies today is primarily designed to prevent fraudulent claims. In that regard, it is similar to tort rules on damages for mental anguish which require, in addition, some physical injury. In both cases, the physical contact goes to assuring the reliability of the claim. *See*, Annot., 25 A.L.R.3d 1299.
>
> However, the difficulty with using a secondary standard as a means to screen out unreliable claims is that the second test can become a requirement by itself without regard to its original intent. Thus, as in the instant area, in cases even where there was clear evidence of hit and run injuries, insurance companies persuaded some courts to require an actual physical contact also. In some cases this has developed into a rigid rule, unjustifiable in terms of its original intent. A. Widiss, A Guide to Uninsured Motorist Coverage (1969). In reaction to these cases, a California court has adopted a less strict interpretation of the policy requirement, looking to see if the actual proximate cause of the injury is a hit and run vehicle. Inter-Insurance Exchange of Automobile Club of Southern California v. Lopez, 238 Cal.App.2d 441, 47 Cal.Rptr. 834 (1965). Several other jurisdictions have followed. Motor Vehicle Accident Indemnification Corporation v. Eisenberg, 18 N.Y.2d 1, 271 N.Y.S.2d 641, 218 N.E.2d 524 (1966); Johnson v. State Farm Mutual Automobile Insurance Company, 70 Wash.2d 587, 424 P.2d 648 (1967).
>
> We believe that this broader reading of the policy language fits best within the coverage sought under the Arizona statute. However, that is not to detract from the plaintiff's being obligated to prove that a valid injury arose due to the operation of a "hit and run" vehicle. The company has an opportunity to show fraud.[1]

[4] The plaintiff further argues that the literal meaning of the term "hit-and-run" in RCW 48.22.030 requires a hitting or physical contact of some sort in order for uninsured motorist protection to be afforded an insured, and cites cases to support this contention. Ely v. State Farm Mut. Auto. Ins. Co., 268 N.E.2d 316 (Ind. App.1971), and Prosk v. Allstate Ins. Co., 82 Ill.App.2d 457, 226 N.E.2d 498 (1967). We disagree with this contention and the reasoning of those cases. The phrase "hit-and-run" cannot be considered in isolation; it must be considered in context with the totality and purpose of the enactment. To give the term "hit-and-run vehicle" its literal meaning as suggested by the plaintiff would be inconsistent with the broad public policy grounds and purpose set forth in *Touchette*, of affording protection to the public from the inability to recover compensation for injuries and damages caused by the users of the high-

1. This case was later vacated by the Arizona Supreme Court, Mazon v. Farmers Ins. Exch., 107 Ariz. 601, 491 P.2d 455 (1972), specifically on grounds other than the failure of physical contact by the offending vehicle, which does not affect the impact of the above reasoning.

way. Injuries sustained as a result of the actions of an unidentified driver who flees from the scene of an accident without a scratch are just as real and severe as those caused by an unidentified driver of a car who runs from the accident where physical contact is involved. Moreover, the use of the term "hit-and-run" in this state, as well as in most other jurisdictions, is synonymous with a car involved in an accident causing damages where the driver flees from the scene. The requirement of physical contact is not to provide meaning to the term "hit-and-run," but rather is for the purpose of preventing the possible filing of fraudulent claims, as heretofore discussed in this opinion. If the literal meaning is given to the term "hit-and-run," then the requirement for physical contact provisions would be superfluous.

[5, 6] The defendants have raised the issue as to whether this entire case should be submitted to arbitration as indicated in the policy. The answer to this question is contained in a lengthy annotation in 29 A. L.R.2d 328, § 7, at 346 (1970). The authorities are uniform that the question of coverage is not an issue for arbitration, and we so hold. However, the authorities are equally clear that the issue of liability and injuries and damages sustained are properly matters for arbitration where the policy so provides.

In summary, the judgment of the trial court is reversed. The defendants are covered under the uninsured motorist provision of their policy. The case is remanded to the trial court with direction that the parties be afforded arbitration under the terms of the policy on the issue of liability, and for injuries and damages sustained by the defendants by reason of the asserted negligent operation of the hit-and-run vehicle. It is so ordered.

HALE, C. J., and FINLEY, ROSELLINI, HAMILTON, STAFFORD, WRIGHT, UTTER and BRACHTENBACH, JJ., concur.

83 Wash.2d 566

P. B. LUTZ, Appellant,

v.

The CITY OF LONGVIEW and the Planning Commission of the City of Longview, Respondents.

No. 42890.

Supreme Court of Washington, En Banc.

April 4, 1974.

Petitioner brought a writ of review challenging acts of city and its planning commission in approving a planned unit development. The Superior Court, Cowlitz County, Frank L. Price, J., entered judgment dismissing writ, and petitioner appealed. The Supreme Court, Brachtenbach, J., held that imposition of a planned unit development or floating zone upon a specific parcel of land constituted an "act of rezoning" which could not be delegated to planning commission but could only be accomplished by city council, and approval given development by planning commission merely constituted a recommendation to council which had to be acted upon by council, though administrative functions of tailoring specifics of concept to particular site, when rezoned, could be carried out by commission.

Amended.

1. Municipal Corporations ⇐57

A municipal corporation, being solely a creature of and subordinate to the state, possesses only those powers given to it by state and must exercise those powers in the manner prescribed.

2. Zoning ⇐152

Imposition of a planned unit development or floating zone upon a specific parcel of land constituted an "act of rezoning" which could not be delegated to planning commission but could only be accomplished by city council, and approval given development by planning commission merely constituted a recommendation to council