COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP319 **Cir. Ct. No. 2008CV485**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PROGRESSIVE NORTHERN INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

KATHY A. SCHROEDER P/K/A KATHY A. WEIGMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Kathy Schroeder appeals from a summary judgment decision that declared her insurance policy from Progressive Northern Insurance did not provide her coverage for an automobile accident. We affirm for the reasons discussed below.

BACKGROUND

¶2 According to the summary judgment materials, Schroeder sustained injuries when she lost control of her vehicle, veered into an embankment, traveled back across the highway and finally struck a guardrail.

¶3 Sheriff's Deputy Chad Heidenreich responded to the accident and noted in his report that a "slippery substance was found on the roadway and believed to be [the] primary cause of [the] crash." Heidenreich subsequently provided an affidavit stating that the liquid substance covered an entire lane of the highway, requiring the highway to be shut down for a period of time, and appeared to have been spilled by some other vehicle that had traveled the roadway before Schroeder's vehicle. The deputy also noted in his affidavit that there was frequent dump truck traffic in the area where the accident had occurred.

¶4 The deputy stated in a deposition that he never identified what the slippery substance was or where it had come from, and didn't know "if it was fuel or what." He said it looked "like … a vehicle was leaking as it was going up the hill" and noted that sometimes semis would leak fuel like that on the road. He thought the wetness of the slick spot "resembled" such leaks, although he could not recall whether there was any sort of fuel smell and admitted he could not "conclusively" say that the substance was fuel. He explained that the suggestion in his affidavit that the substance came from another vehicle was based on a combination of an assumption that a vehicle would be the only logical source of a substance in the middle of a highway lane and his "experience on seeing stuff leak fluid on that roadway … over the years." The deputy acknowledged, however, that he never learned what, if any, vehicle the substance came from, or whether the substance may have been part of a load that was being carried as opposed to fuel.

¶5 Following the accident, Schroeder sought uninsured motorist coverage from her insurer for a hit-and-run accident. The insurer filed a declaratory judgment action seeking to deny coverage on the grounds that there had been no physical contact with any other vehicle. The trial court granted summary judgment in favor of the insurer and Schroeder appeals.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

DISCUSSION

¶7 Wisconsin law defines an "uninsured motorist" to include an unidentified motor vehicle involved in a hit-and-run accident. WIS. STAT. § 632.32(4)(a)2.b. (2007-08).[1] The term "hit-and-run" includes the element of physical contact. ***DeHart v. Wisconsin Mut. Ins. Co.***, 2007 WI 91, ¶15, 302 Wis. 2d 564, 734 N.W.2d 394. Physical contact, in turn, requires an actual hit

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

from the unidentified motor vehicle or a part thereof, and a hit to the insured's vehicle or a part thereof. ***Id.***, ¶40. The purpose of the physical contact requirement is "to prevent a fraudulent claim about a phantom motor vehicle when the insured's loss of control causes the accident." ***Theis v. Midwest Sec. Ins. Co.***, 2000 WI 15, ¶30, 232 Wis. 2d 749, 606 N.W.2d 162.

¶8 There have been several Wisconsin cases that considered whether an object flying off of a vehicle could be considered part of that vehicle for purposes of hit-and-run coverage. For instance, in ***Dehnel v. State Farm Mut. Auto. Ins. Co.***, 231 Wis. 2d 14, 604 N.W.2d 575 (Ct. App. 1999), we held that a chunk of ice which flew off a passing semi-truck was not "part" of that truck. We noted that the chunk of ice was not an integral part of the vehicle, and that expanding the definition "to cover extraneous objects that may be carried by vehicles would have no reasonable ending point for coverage." ***Id.*** at 22. In contrast, in ***Theis***, 232 Wis. 2d 749, the supreme court held that a leaf spring which detached from a vehicle was part of that vehicle. Similarly, in ***Tomson v. American Family Mut. Ins. Co.***, 2009 WI App 150, ___ Wis. 2d ___, 775 N.W.2d 541, we treated a dual-wheel assembly that had come off a semi-trailer as part of an unidentified vehicle.

¶9 Schroeder argues that her driving over a slippery substance on the highway should qualify as physical contact with another vehicle because the substance "came from" a previously passing vehicle, according to the deputy's initial report. Assuming it's true that the substance came from a vehicle, Schroeder's argument still fails to address the critical question whether the substance was somehow an integral part of that vehicle as opposed to something in a load the vehicle was carrying. In short, without any positive identification of what the substance was, Schroeder cannot establish the physical contact element

of a hit-and-run analysis. We therefore conclude that the trial court properly granted summary judgment in the insurer's favor.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.