COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-0531-FT

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

WARREN D. PATEK,

PLAINTIFF-APPELLANT,

V.

PEGGY A. STEARNS, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN INSURANCE COMPANY, JOHN DOE, A FICTITIOUS INDIVIDUAL, AND ABC INSURANCE COMPANY, A FICTITIOUS INSURANCE COMPANY,

DEFENDANTS,

BADGER MUTUAL INSURANCE COMPANY, A DOMESTIC INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

CONSTRUCTION WORKERS HEALTH FUND,

NOMINAL-DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Warren Patek was injured when his car struck a car driven by Peggy Stearns. Stearns claimed that, prior to her accident with Patek, she had been hit and forced off the road by another unidentified automobile. Based on the involvement of the unidentified automobile, Patek made a claim under the uninsured motorist provision of his insurance policy. Badger Mutual Insurance Company, Patek's insurer, denied Patek's claim. After Patek commenced the underlying lawsuit, Badger Mutual sought summary judgment on the question of coverage, arguing that because it was undisputed that the "hit-and-run" driver did not strike Patek's car, Patek was not entitled to uninsured motorist coverage. The circuit court agreed and granted Badger Mutual summary judgment. Patek appeals. By order dated March 11, 1997, this case was submitted to the court on the expedited appeals calendar. We agree with the circuit court that because it was undisputed that the "hit-and-run" driver did not strike Patek, Patek could not invoke the uninsured motorist provision of his policy. We therefore affirm the circuit court's judgment.

On July 11, 1992, Peggy Stearns was traveling south on I-94, when her car was "clipped" by an unidentified vehicle that cut in front of her. Stearns' automobile left the roadway and rolled up a grassy incline. The unidentified vehicle continued on, and was never identified. Stearns' vehicle rolled backward toward I-94, where it was struck by Patek's automobile.

At the time of the accident, Patek owned a Badger Mutual Insurance Company policy. The policy's uninsured motorist provision stated that it would pay:

> [D]amages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. The bodily injury must be caused by accident and arise out of the ownership, maintenance or use of the uninsured motor vehicle.

The policy defined an uninsured motor vehicle in the case of a "hit-and-run" accident as one in which the owner or operator of the uninsured vehicle is unknown and in which the uninsured vehicle strikes: the policy owner or a relative; a vehicle occupied by the policy owner or a relative; or the policy owner's insured car.

Badger Mutual argued that the language of the uninsured motorist provision in Patek's policy mandated summary judgment in its favor because the policy required that the "hit-and-run" driver "strike" the insured, the insured's vehicle, or a vehicle occupied by the insured. Badger Mutual contended that because it was undisputed that there had been no contact between the unidentified car and Patek, there could be no "hit-and-run" coverage under the policy.

Patek argued, however, that Badger Mutual's interpretation of the policy was contrary to § 632.32(4)(a)2b, STATS., which requires that uninsured motorist provisions include coverage for "an unidentified motor vehicle involved in a hit-and-run accident." He contended that because the unidentified vehicle that struck Stearns initiated a "chain reaction" that led to Stearns' accident with Patek, the hit-and-run provision in the Badger Mutual policy should apply. Patek further

argued that the cases on which Badger Mutual's argument relied were factually distinguishable.

The circuit court disagreed, reasoning that Wisconsin case law required summary judgment for Badger Mutual. The circuit court reasoned that for a hit-and-run insurance provision to apply, there must be actual contact between the unidentified vehicle and the vehicle in which the insured is traveling. The court noted that, under the language of Patek's Badger Mutual policy, the uninsured motorist provision was applicable only if the "hit-and-run" vehicle "strikes the insured, the insured's vehicle, or the vehicle in which the insured was traveling." The trial court concluded that the uninsured motorist provision in Patek's policy was inapplicable because there was no allegation that there was any contact between Patek's vehicle and the "hit-and-run" vehicle.

This court owes no deference to a circuit court's decision to grant summary judgment; rather, we independently apply the methodology set forth in § 802.08(2), STATS., to the record *de novo*. *See* ***Garcia v. Regent Ins. Co.,*** 167 Wis.2d 287, 294 481 N.W.2d 660, 663 (Ct. App. 1992). Summary judgment methodology has been stated often, and we therefore need not repeat it here. *See* ***Preloznik v. City of Madison***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). In general, however, summary judgment will be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Garcia***, 167 Wis.2d at 294, 481 N.W.2d at 663.

As we have already suggested, Badger Mutual and the circuit court believed that existing Wisconsin caselaw – specifically, ***Amidzich v. Charter Oak Fire Ins. Co***., 44 Wis.2d 45, 170 N.W.2d 813 (1969), ***Hayne v. Progressive Northern Ins. Co.***, 115 Wis.2d 68, 339 N.W.2d 588 (1983), and ***Wegner v.***

Heritage Mut. Ins. Co., 173 Wis.2d 118, 496 N.W.2d 140 (Ct. App. 1992) – controlled the issue presented here. Although Patek contends here, as he did in the circuit court, that this line of cases is factually distinguishable and therefore not dispositive, we disagree. Similarly, we disagree with Patek that simply because the purpose of uninsured motorist coverage is to compensate an insured who is a victim of an uninsured motorist's negligence, public policy requires that there be coverage under the circumstances of this case.

Patek contends first that this case is distinguishable from ***Amidzich***, ***Hayne***, and ***Wegner***, because in those cases there was no allegation of contact between any of the hit-and-run drivers and the other automobiles.[1] Patek suggests that because there was contact between the "hit-and-run" vehicle and Stearns, there should be coverage because that collision commenced the chain of events that led to the accident between Stearns and Patek.

We are unconvinced that the distinction upon which Patek rests his argument is one that dictates a different result from the ***Wegner*** line of cases. In ***Wegner***, the case most factually similar to Patek's, summary judgment was granted to the insurer on the uninsured motorist question as it related to the "initiating vehicle" that swerved in front of the van that caused the Wegner vehicle to leave the road. This court was untroubled by the circuit court's decision to grant summary judgment even though it was disputed as to whether the

[1] In ***Amidzich***, the plaintiff was forced off the road by an unidentified driver, but there was no contact between the vehicles. In ***Hayne***, the plaintiff, after swerving to avoid an oncoming vehicle, lost control of his vehicle and it overturned. In ***Wegner***, a car swerved into the path of a van, and the van, attempting to avoid the car, swerved into the path of the plaintiffs' car. The plaintiffs were forced off the highway, where they struck a railroad-crossing tower. Neither vehicle stopped to assist the plaintiffs. It was undisputed that the first car had not struck either the van or the plaintiffs, but it was disputed as to whether the van struck the plaintiffs.

unidentified vehicle caused the gray van to actually strike the plaintiffs. In affirming the trial court's decision to grant summary judgment, we restated the long-standing position in Wisconsin that "hit-and-run," as used in § 632.32(4)(a)2b, STATS., "is unambiguous and, according to its common and approved usage, requires an actual physical striking." ***Wegner***, 173 Wis.2d at 125, 496 N.W.2d at 143. Given the facts of ***Wegner***, this phrase can only be understood to mean that there must be an allegation of contact between the unidentified vehicle and the driver seeking to invoke the uninsured motorist provision of his or her policy. Under ***Wegner***, we must affirm the grant of summary judgment to Badger Mutual because there was no allegation that the unidentified car that struck Stearns also struck Patek.

In regard to Patek's claim that § 632.32(4)(a)2b, STATS., and public policy require coverage, we note that this court rejected a similar argument in ***Wegner***. We reasoned that, for an uninsured motorist provision to apply, there must have been physical contact between the hit-and-run vehicle and the insured's vehicle. ***Id***. at 127, 496 N.W.2d at 144. We noted that such a requirement was consistent with ***Amidzich*** and ***Hayne***, and preserved "the justification for the physical contact requirement, *i.e.*, the prevention of fraudulent claims." ***Id.*** As Badger Mutual points out, the requirement of physical contact between the unidentified vehicle and the insured or the insured's vehicle has long been a part of Wisconsin law. If the legislature had wanted to modify § 632.32(4)(a)2b and include in the definition of uninsured motor vehicles unidentified vehicles involved in accidents, but without physical contact, it has had many opportunities since ***Amidzich***, ***Hayne***, and ***Wegner*** were decided to do so.

Because the circuit court's decision to grant Badger Mutual summary judgment was in keeping with existing Wisconsin precedent, the circuit court's decision must be affirmed.

By the Court.—Judgment affirmed.

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