STATE OF WISCONSIN

SUPREME COURT

JAMES ZARDER, GLORY ZARDER, and
ZACHARY ZARDER, by Robert C. Menard,
Guardian Ad Litem,

Plaintiffs-Respondents,

v.

HUMANA INSURANCE COMPANY,

Defendant,

ACUITY, A MUTUAL INSURANCE COMPANY,

Defendant-Appellant-Petitioner.

District 2
Appeal No. 2008AP919

Case No. 07 CV 1146

Review of the February 18, 2009 Decision of the Wisconsin Court of Appeals, District II, Affirming an Order of the Circuit Court for Waukesha County, the Honorable Kathryn W. Foster Presiding, Denying the Motion for Declaratory Judgment of the Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER, ACUITY, A MUTUAL INSURANCE COMPANY

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ISSUES PRESENTED FOR REVIEW

I. DOES THE ACUITY POLICY OF INSURANCE MANDATE UNINSURED MOTORIST COVERAGE FOR AN ALLEGED "HIT-AND-RUN" ACCIDENT INVOLVING AN UNIDENTIFIED MOTOR VEHICLE AND AN INSURED WHERE THERE IS NO "RUN," AS THAT TERM IS UNDERSTOOD IN THE CONTEXT OF § 632.32(4)?

Answered by the Circuit Court in the affirmative.

This question was not answered by the Court of Appeals. Rather, the Court of Appeals abandoned the public policy analysis undertaken by the Circuit Court, addressing, instead, the issue set forth immediately below.

II. WHEN AN INSURANCE POLICY COVERS "HIT-AND-RUN" AS PART OF AN UNINSURED MOTORIST PROVISION AND THE POLICY DOES NOT DEFINE THE TERM, DOES "RUN" MEAN TO FLEE WITHOUT STOPPING?

This question was not answered directly by the Circuit Court. The Circuit Court affirmatively held there was no "run" in the instant case, instead ruling coverage was available to the Plaintiffs based on public policy grounds.

Answered by the Court of Appeals in the negative. The Court of Appeals concluded the term "run," as used in "hit-and-run," means to leave a scene without providing identifying information.

PROCEDURAL POSTURE

This is a review of a decision of the Court of Appeals, District II, affirming an Order of the Circuit

Court of Waukesha County, denying a Motion for Declaratory Judgment filed by ACUITY.

In filing its Motion for Declaratory Judgment, ACUITY sought a declaration from the Circuit Court regarding the rights of the parties under an ACUITY policy of insurance. The Circuit Court concluded ACUITY's policy provided coverage to the Zarders because the facts and circumstances concerned injury to a minor and damage to the minor's bicycle. A non-final order memorializing the Circuit Court's decision was entered on April 1, 2008.

Subsequently, ACUITY petitioned the Court of Appeals, District II, for leave to appeal from the Circuit Court's non-final order. The Court of Appeals granted ACUITY's petition on or about May 15, 2008.

In a February 18, 2009 Decision, the Court of Appeals, District II, affirmed the Circuit Court's ruling. Abandoning the rationale underlying the Circuit Court's decision, the Court of Appeals concluded that where an insurance policy covers "hit-and-run" as part of an uninsured motorist provision and the policy does not define the term, "run" means leaving the scene without providing identifying information even if the unidentified driver stopped to see if there was an injury.

STATEMENT OF THE CASE

1. The December 9, 2005 Accident.

The Plaintiffs, James and Glory Zarder, reside at 14285 West Park Avenue, New Berlin. *See* Complaint at ¶ 1. (R. 1 at 3; P-Ap. 51) Their son, Zachary Zarder ("Zarder"), resides at the same address. *Id.* at ¶ 2.

Regarding the alleged accident, the Complaint states that:

> That on the 9th day of December, 2005, the plaintiff, Zachary Zarder, was operating his bicycle in a safe and lawful manner in the City of New Berlin, County of Waukesha, State of Wisconsin and that at the same time and place, an unidentified vehicle was being operated in a negligent manner causing the motor vehicle that he/she was operating to strike the plaintiff, Zachary Zarder's bicycle, causing the plaintiff, Zachary Zarder, to be severely injured as more fully described herein.

Id. at ¶ 6. (R. 1 at 4; P-Ap. 104)

At the time of the alleged incident, Edward Miller and his wife, Sandra, were walking outside of their residence, which is located in the 2000 block of South East Lane in New Berlin. *See* Affidavit of Edward Miller at ¶¶ 1-3 (R. 17 at 77; P-Ap. 112) and Affidavit of Sandra Miller at ¶¶ 1-2, 4, 7. (R. 16 at 71-72; P-Ap. 106-107) While walking with her husband, Sandra Miller heard a young male voice state that "a car is coming." *See* Aff. of S. Miller at ¶ 4. (R. 16 at 71; P-Ap. 106) After hearing the statement, Sandra

Miller observed a vehicle driving east/northeast on South East Lane and, thereafter, heard a crash of metal. *Id.* at ¶ 5. The vehicle did not appear to be traveling fast or recklessly. *Id.* at ¶ 6.

Within seconds after hearing the crash, Sandra Miller and her husband arrived at the area where the sound occurred. *Id.* at ¶ 7. There, the Millers observed Zarder sitting on a snow bank near the mailbox at the end of the driveway at 2000 South East Lane. *Id.* at ¶ 7. *See also* Aff. of E. Miller at ¶ 6. (R. 17 at 78; P-Ap. 113)

As the Millers reached the spot where Zarder was seated, they observed a vehicle (the "unidentified vehicle") stop approximately one hundred feet north/northeast of the driveway. *Id.* at ¶ 8. *See also* Aff. of E. Miller at ¶ 7. (R. 17 at 78; P-Ap. 113) The occupants of the unidentified vehicle exited the vehicle, walked towards Zarder and questioned Zarder concerning his well-being. *Id.* at ¶ 9. The occupants of the unidentified vehicle asked Zarder if he was okay, to which Zarder responded "yes." *Id.* at ¶ 10. *See also* Aff. of E. Miller at ¶ 11. (R. 17 at 78; P-Ap. 113)

After Zarder assured the occupants of the unidentified vehicle that he was okay, the occupants returned to the vehicle and drove away. *Id.* at ¶ 12. *See also* Aff. of E.

Miller at ¶ 12. (R. 17 at 78; P-Ap. 113) The unidentified vehicle did not flee the scene. *Id.*

Like the occupants of the unidentified vehicle, Sandra Miller, too, asked Zarder if he was hurt. Zarder responded in the negative, assuring Miller that he was uninjured. *Id.* at ¶ 13.

Sandra Miller also inquired whether the unidentified vehicle hit Zarder. *Id.* at ¶ 14. Zarder informed Miller that the unidentified vehicle did not hit him and, rather, hit his bike. According to Zarder, he jumped off of his bicycle before the unidentified vehicle hit the bike. *Id.* After Zarder again assured Miller that he was uninjured, Miller and her husband continued to their neighbors' home. *Id.* at ¶ 15, 18. See *also* Aff. of E. Miller at ¶ 14. (R. 17 at 79; P-Ap. 114)

Accident report materials authored by the New Berlin Police Department note, in the Accident Report's "Narrative" section, that:

> UNKNOWN DRIVER OF VEH. # 1 CHECKED ON BICYCLIST WHO ADVISED THAT HE WAS NOT INJURED.

Affidavit of Jeffrey Kuehl, Exh. A. (R. 21 at 165-183; P-Ap. 87-105) Additional information detailed in the same report reveals that Zachary Zarder confirmed the occupants of the vehicle "immediately checked on his wellbeing[,]"

and Zarder "told the occupants of the vehicle that he was not injured and that they could leave." *Id.* For these reasons, the New Berlin Police Department did not investigate the December 9, 2005, accident as a hit-and-run accident. *Id.* at ¶5.

2. The ACUITY Policy.

ACUITY issued a policy of insurance to the Zarders with a policy term of August 15, 2005 to August 15, 2006 (the "ACUITY Policy"). *See* Affidavit of Daniel K. Miller, Exh. A. (R. 19 at 101-144; P-Ap. 119-163) The ACUITY Policy contains requirements relating to the provision of uninsured motorists coverage. Specifically, the ACUITY Policy provides that:

> **SECTION III – UNINSURED MOTORISTS AND UNDERINSURED MOTORISTS**
>
> **PART H – UNINSURED MOTORISTS**
>
> **We** will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle. Bodily injury** must be sustained by an **insured person** and must be caused by accident and result from the ownership, maintenance or use of the **uninsured motor vehicle . . .**

Id., Exh. B at Page 19 of 24 (emphasis in original). (R. 19 at 124; P-Ap. 143).

Under its Uninsured Motorists coverage part, the ACUITY Policy contains a detailed definition of "uninsured

motor vehicle." "Uninsured motor vehicle" includes various categories of vehicle, including "hit-and-run" vehicles. In this regard, the ACUITY Policy states that:

> As used in this Section:
>
> * * *
>
> **2. "Uninsured motor vehicle"** means a land motor vehicle or trailer which is:
>
> * * *
>
> c. A hit-and-run vehicle whose operator or owner is unknown and which strikes:
>
> (1) **You** or a **relative;**
> (2) A vehicle which **you** or a **relative** are **occupying;**
> (3) **Your insured car;** or
> (4) Another vehicle which, in turn, hits:
>
> (a) **You** or any **relative;**
> (b) A vehicle which **you** or any **relative** are **"occupying";** or
> (c) **Your insured car . . . .**

Id., Exh. B at Page 19 of 24 and 20 of 24 (emphasis in original). (R. 19 at 124-125; P-Ap. 143-144)

3. Procedural Background.

The Zarders commenced the underlying circuit court action against ACUITY to obtain uninsured motorist benefits. *See* Complaint. (R. 1; P-Ap 49-57). The Zarders alleged two principal claims against ACUITY, an uninsured motorist claim and a bad faith claim. *Id.*

On January 11, 2008, ACUITY filed its Motion for Declaratory Judgment in the Circuit Court. *See* Notice of

Motion and Motion for Declaratory Judgment. (R. 14; P-Ap 65-66) In its motion, ACUITY sought a no coverage declaration in connection with the Zarders' claims. *See* Brief in Support of Motion for Declaratory Judgment. (R. 15; P-Ap 67-86) As grounds for its request, ACUITY argued the facts and circumstances giving rise to the action did not evidence a "hit-and-run" accident, as that phrase is understood under Wisconsin law and, by proxy, the ACUITY Policy. *Id.*

The Zarders opposed ACUITY's motion. *See* Plaintiffs' Memo. of Law in Oppos'n. (R. 23; P-Ap 184-195) Contrary to ACUITY's position, the Zarders argued the December 9, 2005 accident was a "hit-and-run" accident. *Id.* As support, the Zarders relied on case law construing the policy underpinning Wisconsin Statute § 632.32, extrajurisdictional case law purportedly analyzing similar "run" issues and Wisconsin Statute § 346.67. *Id.*[1]

On February 29, 2008, ACUITY filed a Reply Brief, wherein ACUITY argued the December 9, 2005 incident was not a "hit-and-run" accident because no "run" occurred, extrajurisdictional authority relied on by the Zarders did not support the Zarders' position and, finally, § 346.67

[1] The Zarders did not dispute the facts detailed by ACUITY in its Motion for Declaratory Judgment, nor did the Zarders dispute that declaratory judgment was an appropriate vehicle for use by the Circuit Court in addressing the issues before it.

had no application to the present action. *See* Reply Brief (R. 26; P-Ap 218-228)

On March 17, 2008, the Circuit Court heard arguments on ACUITY's Motion for Declaratory Judgment. *See* Transcript of Proceedings. (R. 28; P-Ap 23-48) After considering the parties' arguments, the trial court denied ACUITY's Motion for Declaratory Judgment. *Id.* at 23. (R. 28 at 254; P-Ap 45)

In making its ruling, the Circuit Court interpreted the ACUITY policy of insurance only insofar as it incorporates language detailed in the Wisconsin Omnibus statute, specifically, § 632.32(4). *Id.* at 15 (R. 28 at 246; P-Ap 37) The Circuit Court concluded the dispute did not involve an issue as to whether there was a "hit." *Id.* at 16. (R. 28 at 247; P-Ap 38) Moreover, the trial court unequivocally ruled that "**clearly there was no run under any definition of ambiguous, unambiguous.**" *Id.* at 19. (R. 28 at 250; P-Ap 41) (emphasis added).

The Circuit Court described the case as one of "first impression," notwithstanding this Court's decision in *Hayne v. Progressive Northern Insurance Company*, 115 Wis. 2d 68, 339 N.W.2d 588 (1983). *Id.* at 21. (R. 28 at 252; P-Ap 43) After deciding there was no "run," the Circuit Court stated that "[i]n terms of public policy, I think what I am

struggling with, if you will, is the fact that I believe there has to be coverage in the case." *Id.* at 20. (R. 28 at 251; P-Ap 42) The Circuit Court concluded coverage was necessary "not because there was a claim but because we are dealing with a child and because of the nature of the accident, if you will, the damage to the bike." *Id.*

Confining its decision to the limited facts of the present dispute, the Circuit Court stated that:

> The fact that here is the Massachusetts or the Mendonca case that I think is favorable to the Plaintiff and in my assessment of the facts of this case the reason we have this kind of statute, not only keeping in mind a prohibition of fraud to insurance companies but the purpose of that statute is to protection of persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. The question – the argument that the reason this court is in effect finding that this unidentified vehicle is synonymous with uninsured is partially or totally the fault of the plaintiff here, the thirteen year old, but that's a hard label to stick on someone who is thirteen and who has just suffered a substantial injury, two bones in any body or two parts of the body and I don't think that that is equitable with protecting people in the case and so I believe for purposes of 632.32 does trump anything else, if you will, as a need for specific facts in the case and for all those reasons the Court will deny the motion of the defense . . .

Id. at 22-23. (R. 28 at 253-254; P-Ap 44-45)

ACUITY petitioned the Court of Appeals, District II, for leave to appeal from the Circuit Court's April 1, 2008

non-final Order. The Court of Appeals granted ACUITY's petition on or about May 15, 2008.

In a February 18, 2009 decision, the Court of Appeals, District II, affirmed the ruling of the Circuit Court. The Court of Appeals framed the issue before it in the following manner:

> What does *run* mean when an insurance policy covers "hit-and-run" as part of an uninsured motorist provision and the policy does not define the term? Does *run* mean to flee without stopping, or does it mean leaving the scene without providing identifying information even if the driver stopped to see if there was an injury? We hold that the latter definition controls and affirm the circuit court.

Zarder v. Humana Ins. Co., 2009 WI App. 34, ¶ 1, 316 Wis. 2d 573, 765 N.W.2d 839. Whereas the Circuit Court relied solely on public policy grounds in support of its ruling, the Court of Appeals ignored the Circuit Court's analysis and affirming the Circuit Court ruling, based upon contractual and statutory construction methodology.

ARGUMENT

II. STANDARD OF REVIEW.

"Statutory interpretation and the interpretation of an insurance policy present questions of law that we review de novo." *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 9, 293 Wis. 2d 123, 717 N.W.2d 258 (2006).

III. WISCONSIN SHOULD ADHERE TO THE DEFINTION OF "HIT-AND-RUN" IN *HAYNE V. PROGRESSIVE NORTHERN INSURANCE COMPANY*, 115 WIS. 2D 68, 339 N.W.2D 588 (1983) AND CONCLUDE THAT WHEN AN INSURANCE POLICY COVERS "HIT-AND-RUN" AS PART OF AN UNINSURED MOTORIST PROVISION AND THE POLICY DOES NOT DEFINE THE TERM, "RUN" MEANS TO FLEE WITHOUT STOPPING.

A. *Hayne v. Progressive Northern Insurance Company* Expressly Defines The "Run" Component Of The Term "Hit-and-Run" As "Fleeing From The Scene Of An Accident."

In *Hayne v. Progressive Northern Insurance Company*, 115 Wis. 2d 68, 339 N.W.2d 588 (1983), this Court defined the term "hit-and-run," including both components "hit" and "run," for purposes of Wisconsin's Omnibus statute and policies of insurance incorporating the same. ACUITY submits *Hayne*'s definition of the term compels a finding in ACUITY's favor relative to the insurance coverage issue before the Court.

The statutory language at issue in *Hayne* was "the term 'hit-and-run' as used in sec. 632.32(4)(a)2.b., Stats." *Hayne*, 115 Wis. 2d at 73. The question for the *Hayne* court was "whether the term 'hit-and-run' includes 'miss-and-run' or whether it requires an actual physical striking." *Id.*

Out of the gate, the *Hayne* court concluded that the statutory language of Wis. Stat. § 632.32(4)(a)2.b. – including the term "hit-and-run" – "is **unambiguous**." *Id.* at

74 (emphasis added).[2] *See also DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶ 13, 302 Wis. 2d 564, 734 N.W.2d 394 (stating that "[w]e have interpreted Wis. Stat. § 632.32(4)(a)2.b. in prior cases and recently reaffirmed our 20-plus years of precedent establishing that the phrase 'hit-and-run accident' is unambiguous and includes a physical contact element"). Having reached this conclusion, the *Hayne* court assessed the "legislature's intent by according the language its common and accepted meaning." *Id.* (citing *State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d at 97 (1977)). In doing so, the *Hayne* court concluded specifically that "the common and accepted meaning of the term 'hit-and-run' includes an element of physical contact." *Id.*

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[2] Wis. Stat. § 632.32(4)(a)2.b. provides that:

> (4) REQUIRED UNINSURED MOTORIST AND MEDICAL PAYMENTS COVERAGES.
>
> Every policy of insurance subject to the section that insures with respect to any motor vehicle registered or principally garaged in this state 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 contain therein or supplemental thereto the following provisions:
>
> (a) Uninsured motorist.
>
> * * *
>
> 2. In this paragraph "uninsured motor vehicle" also includes:
>
> * * *
>
> b. An unidentified motor vehicle involved in a hit-and-run accident.

To accord the statutory language with the common and approved usage of words and phrases therein, the *Hayne* court employed a series of dictionary definitions that the Court reasoned "clearly indicate that the plain meaning of 'hit-and-run' consists of two elements: a 'hit' or striking, and a 'run', or fleeing from the scene of an accident." *Id.* at 73-74. The *Hayne* court placed specific reliance on the following definitions:

> Webster's Third New International Dictionary 1074 (1961) defines "hit-and-run" as "2a(1) of the driver of a vehicle: guilty of leaving the scene of an accident without stopping to render assistance or to comply with legal requirements (2): caused by, resulting from, or involving a hit-and-run driver . . . ." Webster's then refers to a "hit-and-run driver" in the definition of "hit-and-runner": "one that hits and runs away; esp: a "hit-and-run driver." *Id.* "Hit" is defined as "to reach or get at by *striking* with or as if with a sudden blow." (Emphasis added.) *Id.* The American Heritage Dictionary 625 (1979) defines "hit-and-run" as "designating or involving the driver of a motor vehicle who drives on after *striking* a pedestrian or another vehicle." (Emphasis added.) Fund and Wagnall's Standard College Dictionary 636 (1968) provides the following definition of "hit-and-run": "designating, characteristic of, or caused by the driver of a vehicle who illegally continues on his way after *hitting* a pedestrian or another vehicle." (Emphasis added.) "Hit" is defined as "to give a blow to; *strike* forcibly." (Emphasis added.) *Id* at 636.

Id. Together, the definitions "uniformly indicate that 'hit-and-run' includes two elements: a 'hit' or striking,

and a 'run', or fleeing from the accident scene." *Id.* at 75.

ACUITY submits the *Hayne* court undertook to define "hit-and-run" in a global fashion and it is this definition that is pertinent to the construction of both the ACUITY Policy and the Omnibus statute. The *Hayne* court affirmatively concluded that "632.32(4)(a)2.b., Stats., is unambiguous," remarking further that the statutory subsection is "clear on its face." *Id.* at 76. Twenty-plus years of legal precedent in Wisconsin is aligned with the *Hayne* court's conclusion in this respect, and it is well-settled that the term "hit-and-run" is unambiguous. *See DeHart*, 2007 WI 91 at ¶ 13 (citations omitted).

Whether construing a statute or a contract, the test for determining whether ambiguity exists is the same. *Wilke v. First Federal Sav. & Loan Asso.*, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982) (citing *Security Savings & Loan Association v. Wauwatosa Colony, Inc.*, 71 Wis. 2d 174, 179, 237 N.W.2d 729 (1976)). "Ambiguity exists when a statute or contract 'is capable of being understood by reasonably well-informed persons in either of two or more senses.'" *Id.*

Because this Court has ruled the term "hit-and-run" is unambiguous, that finding controls, irrespective of whether

the discussion concerns the ACUITY Policy or, alternatively, the Omnibus statute. *Hayne* ascribed meaning to "hit-and-run," and it is the plain meaning of that term and its component parts that, when viewed in connection with the historical facts of this case, compels a finding of no insurance coverage to the Zarders.

It is undisputed that the operator of the unidentified vehicle did not "flee" from the scene.[3] *Hayne* equates "run" with "flee," and because there was no "flee," there can be no "run." Without a "run," there can be no "hit-and-run." Accordingly, the unambiguous definition of "hit-and-run," as detailed in *Hayne*, is controlling and acts to preclude insurance coverage to the Zarders.

B. The Conclusion Reached By The *Hayne* Court Regarding The Meaning Of "Run" Is Not Dictum.

A fair reading of *Hayne* reveals the definition ascribed to "run" is anything but dicta. Wisconsin "does not always recognize intentionally answered questions of law in judicial decisions as nonbinding dicta." *State v. Picotte*, 2003 WI 42, ¶ 61, 261 Wis. 2d 249,661 N.W.2d 381. "[W]hen a court of last resort intentionally takes up,

[3] This is a position maintained by ACUITY with which the trial court expressed agreement. In this regard, the trial court astutely observed that "clearly there was no run under any definition of ambiguous, unambiguous." *See* Transcript of Proceedings. (R. 28 at 250; P-Ap 41). Nevertheless, the trial court, relying on public policy grounds, denied ACUITY's Motion for Declaratory Judgment.

discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *Chase v. American Cartage Co.*, 176 Wis. 235, 238, 186 N.W. 598 (1922) (emphasis in original). "While the statement in [a prior case] was not decisive to the primary issue presented, it was plainly germane to that issue and is therefore not *dictum*." *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981) (emphasis in original).

The *Hayne* court purposefully ascribed meaning to both the "hit" and "run" components of the term "hit-and-run," clearly indicating that deciding the meaning of "run" was at the least, germane to the issue before it. After all, if the *Hayne* court's definition of the "run" component of "hit-and-run" was an "off-the-cuff" statement, as suggested by the Court of Appeals,[4] why take the affirmative step of

[4] In addition to portraying the definition attributed by the *Hayne* court to "run" as "off-the-cuff," the Court of Appeals similarly stated that:

- Passages in the *Hayne* decision cited by ACUITY "were not germane to the outcome of *Hayne*."
- Statements relied on by ACUITY "were ... made without any careful thought or analysis, another indication of dicta."
- Though the *Hayne* court equated "run" with "flee," it did not define or discuss the circumstances that determine when a 'flee' has occurred."

applying meaning to "run" in the first place? The *Hayne* court could just as easily have concluded the term "hit-and-run" requires two elements: a "hit," or striking, and a "run." Instead, the *Hayne* court chose to bestow meaning upon "run," signifying its germaneness to the principal issue in *Hayne*: the construction of the term "hit-and-run," as set out in Wisconsin's Omnibus statute.

As for the suggestion the dictionary definitions cited by the *Hayne* court in support of its analysis of "hit-and-run" were uniform only as to the "hit" component, ACUITY submits that a fair reading of *Hayne* prompts a contrary finding. The definitions of "hit-and-run" cited in *Hayne* are:

> 1. '2a(1) of the driver of a vehicle: guilty of leaving the scene of an accident **without stopping to render assistance** or to comply with legal requirements (2): caused by, resulting from, or involving a hit-and-run driver [.]'
>
> 2. 'one that hits and **runs away**[.]'
>
> 3. 'designating or involving the driver of a motor vehicle **who drives on** after striking a pedestrian or another vehicle.'

- The definitions cited by the *Hayne* court in its analysis of "hit-and-run" were not uniform as to the "run" component of the phrase.

Zarder v. Humana Ins. Co., 2009 WI App. 34, ¶¶ 12-13, 316 Wis. 2d 573, 765 N.W.2d 839. With the foregoing points as a foundation, the Court of Appeals concluded "*Hayne*'s mention of 'run' is uninformative dicta and not controlling." *Id.* at ¶ 14.

> 4. 'designating, characteristic of, or caused by the driver of a vehicle who **illegally continues on his way** after hitting a pedestrian or another vehicle.'

115 Wis. 2d at 73-74 (emphasis added).

The definitions do not mirror one another, nor are they identical in their descriptive language. Nevertheless, they are in harmony as to the meaning of "run" insofar as they lead the *Hayne* court to conclude that, together, they indicate "run" accords with "flee" in the term "hit-and-run." The *Hayne* court stated simply that the definitions, together, "clearly indicate" the "plain meaning" of "hit-and-run" consists of two elements, including a "run," or "fleeing from the scene of an accident." *Id*. at 74. Besides, the fact the *Hayne* court settled on a definition of the "run" component of "hit-and-run" when considering less-than-identical definitions, lends credence to ACUITY's position that the *Hayne* court affirmatively sought to ascribe meaning to "run." Neither "flee" nor "fleeing" appear in any of the foregoing definitions. The *Hayne* court, then, expressly chose to accord the term "flee" with "run," clearly evidencing the Court's consideration of an issue germane to its holding.[5] In the end, the *Hayne* court

[5] Like the *Hayne* court, courts outside Wisconsin have aligned "flee" with "run," as that word is used in the term "hit-and-run." *See e.g. Surrey v. Lumbermens Mut. Cas. Co.*, 384 Mass. 171, 176-177, 424 N.E.2d 234 (Mass. 1981) (commenting that "[i]n all other lexical and

was satisfied the definitions were sufficiently uniform to take the position that, globally, they required that "flee" be part of the "run" component of a "hit-and-run."

Though the meaning attributed to "run" may not have been decisive of the principal issue in *Hayne*, it was no less than germane to that issue and, therefore, is not dictum. *See State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981). Thus, applying the meaning of "run," as detailed in *Hayne*, to the undisputed facts in this matter requires a finding of no insurance coverage to the Zarders.[6]

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decisional construction, 'hit-and-run' is uniformly 'synonymous with a car involved in an accident causing damages where the driver flees from the scene'") (citation omitted); *State Farm Mut. Auto. Ins. Co. v. Abramowicz*, 386 A.2d 670, 673, 1978 Del. LEXIS 614 (Del. 1978) (citing to New Hampshire law in remarking that "[t]he phrase hit-and-run is the commonly accepted description of an incident involving a car accident where the driver flees the scene") (citing *Soule v. Stuyvesant Ins. Co.*, N.H. Supr., 116 N.H. 595, 364 A.2d 883 (1976)); *Progressive Specialty Ins. Co. v. Maas*, 2005 U.S. Dist. LEXIS 28012, *5 (D. Minn. November 7, 2005) (remarking that "[i]n the context of motor vehicles, the term 'hit-and-run' is 'synonymous with a vehicle involved an accident causing damages where the driver flees from the scene, regardless of whether or not physical contact between that vehicle and the insured's automobile occurs.'") (citation omitted); and, *Royal Ins. Co. of Amer. v. Austin*, 79 Md. App. 741, 747, 558 A.2d 1247 (Md. Ct. Spec. App. 1989) (stating that the term "hit-and-run" "should be read to include all accidents caused by one who 'flees the scene without being identified.'").

[6] In his dissent from the Court of Appeals majority decision, Justice Harry G. Snyder observes this Court is the only state court with the power to "overrule, modify or withdraw language from a previous Supreme Court case." *Zarder v. Humana Ins. Co.*, 2009 WI App. 34, ¶ 45, 316 Wis. 2d 573, 765 N.W.2d 839 (citing *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997)). Consequently, the Court of Appeals cannot declare the *Hayne* definition of "run" dictum. Accordingly, the *Hayne* court's conclusion regarding the meaning of the "run" component of "hit-and-run" is otherwise controlling as to the present matter, requiring a finding of no insurance coverage under the policy of insurance issued by ACUITY to the Zarders.

C. Decisions In Similarly-Situated Extrajurisdictional Cases Instruct That No "Hit-And-Run" Occurs Where An Unidentified Driver Stops After An Accident, Speaks Directly To The Other Party And Inquires About The Injury, Makes No Attempt To Conceal The Unidentified Driver's Identity And Leaves Only After The Party Who Was Struck Assures The Driver He/She Is Uninjured.

Decisions in similarly-situated extrajurisdictional cases are in accord with *Hayne* insofar as they instruct that when there is no "flee" by the unidentified vehicle/driver, there is no "run" and, consequently, no "hit-and-run." Courts in these cases conclude no "hit-and-run" occurs where an unidentified driver stops after an accident, speaks directly to the other party to inquire about the injury, makes no attempt to conceal the unidentified driver's identity and leaves only after the other party assures the unidentified driver he/she is uninjured. On the topic of extrajurisdictional authority, ACUITY submits the decisions in *State Farm v. Seaman,* 96 Wn. App. 629, 980 P.2d 288 (Wash. App. D.V. 1999), *Lhotka v. Illinois Farmers Insurance Company*, 572 N.W.2d 772 (Minn. Ct. App. 1998) and *Sylvestre v. United Services Automobile Assoc. Casualty Ins. Co.*, 240 Conn. 544, 692 A.2d 1254 (Conn. 1997) are instructive, conceptually, regarding whether a "run," or "fleeing," and thus, a "hit-and-run," occurred in the present matter.

In *State Farm v. Seaman*, a Washington appellate court considered the issue of whether to award underinsured motorist benefits to a driver involved in an alleged hit-and-run accident where the parties to the accident exchanged no information, other than to inquire whether the other driver was injured. 96 Wn. App. 629, 980 P.2d 288 (Wash. App. D.V. 1999).

There, the claimant's vehicle was rear-ended by another vehicle while making a legal left hand turn. *Id.* at 631. Both the claimant and the driver of the other vehicle pulled over to inspect the presence of damage, if any, to the vehicles. *Id.* Finding no damage to the vehicles, each driver asked if the other was injured. Both drivers responded in the negative. *Id.* After this exchange, the drivers went their separate ways. *Id.* Neither driver complained of injury, nor did they seek to obtain additional information about the other. *Id.* Shortly after the accident, the claimant developed back and neck pain and, thereafter, sought underinsured motorist coverage from her insurer. *Id.*

The *Seaman* court addressed whether the accident was a "hit-and-run" and, if so, whether underinsured motorist coverage applied. The court concluded there was no "hit-and-run." In doing so, the court rejected the claimant's

argument to align the definition of "hit-and-run accident" in an insurance coverage context with language contained in Washington criminal statutes. In this regard, the *Seaman* court stated that:

> **[A] hit-and-run denotes only a situation where a driver flees the scene of an accident.** Accordingly, the definition of hit-and-run does not include a situation where a driver stops, inquires, and is reassured that there is neither personal injury nor property damage. Here, the unidentified driver did not flee; rather he promptly exited his car and approached [the claimant] to inquire about her condition and the condition of her automobile. (citation omitted)
>
> * * *
>
> [U]nder the facts of this case, we hold that the term 'hit-and-run' is not ambiguous. The term does not encompass a situation where a driver promptly exits his vehicle, undertakes an investigation, is assured that there is neither injury nor damage, and departs.

Id. at 635 (emphasis added).

The *Seaman* court analogized the facts giving rise to the action before it to those detailed in *Lhotka v. Illinois Farmers Insurance Company*, a Minnesota appellate court case decided a year earlier. 572 N.W.2d 772 (Minn. Ct. App. 1998). The *Lhotka* court considered whether uninsured motorist benefits were available to a claimant where an unidentified driver struck a pedestrian who, after the incident, represented to the driver that she was "okay" and requested no information from the unidentified driver.

In *Lhotka*, the claimant was struck and knocked down by an automobile while walking across a gas station parking lot. *Id.* at 773. "The driver of the automobile stopped, got out of her car, and asked [the claimant] if she was 'okay.'" *Id.* The claimant "responded that she had some pain in her head and elbow, 'but I think I'm okay.'" *Id.* The claimant "did not request any information from the driver[,]" and "[t]he driver did not provide [the claimant] with a name or address or any other information." *Id.* Following the encounter, the unidentified driver left. *Id.* While driving home, the claimant noticed swelling over her eye and the following morning, reported the incident to police after experiencing increasing pain in her neck, back and hips. *Id.*

Analyzing policy language similar to that in the present action and a definition of "hit-and-run" consistent with that detailed in the *Hayne* decision,[7] the *Lhotka* court stated that:

[7] Under the terms of the policy in *Lhotka*, an uninsured motor vehicle included "[a] hit-and-run vehicle whose operator or owner has not been identified and which causes bodily injury to you or any family member." *Id.* at 774.

According to the *Lhotka* court, the Minnesota Supreme Court "has succinctly defined hit-and-run as 'a vehicle involved in an accident causing damage where *the driver flees from the scene*.'" *Id.* (citations omitted).

> [T]he driver here did not commit a hit-and-run. The unidentified driver stopped after striking [the claimant], got out of her vehicle, and questioned [the claimant] about her condition. [The claimant] told the driver that her elbow and head hurt, 'but I think I'm okay.' **The driver made no attempt to leave until after [the claimant] assured her she was okay.** There is no evidence that anyone attempted to detain the driver when she did leave. There is no indication that [the claimant] or the driver even thought to exchange information; neither is there evidence that this information would not have been provided if either had thought to request it... We cannot say that a driver commits a 'hit-and-run' when the driver stops after the accident, speaks directly to the other party and inquires about the injury, makes no attempt to conceal her identity…, and the driver leaves only after the party who was struck assures the driver she is okay.

Id. at 774 - 775 (emphasis added).

An analysis similar to that in *Lhotka* was performed by the Connecticut Supreme Court in a case involving an uninsured motorist claim, where the claimant was struck by a slow moving vehicle when crossing the street. *See Sylvestre v. United Services Automobile Assoc. Casualty Ins. Co.*, 240 Conn. 544, 692 A.2d 1254 (Conn. 1997). "After striking the [claimant], the driver immediately brought his car to a halt, exited the vehicle and waited for several minutes while the [claimant] sat on a guard rail to compose himself and then walked about to test his leg." *Id.* at 545. "Thereafter the plaintiff, believing he was not seriously injured, sent the driver on his way without ascertaining

his name or address or vehicle's license number, and without obtaining insurance information." *Id.* Later the same day, the claimant began experiencing pain and sought medical attention for leg and knee injuries. *Id.*

The Supreme Court of Connecticut addressed the narrow question of whether a motor vehicle is "a 'hit-and-run vehicle whose operator cannot be identified' if, after an accident, the driver stops and is permitted by the injured party to leave the scene[.]" *Id.* at 546. The Supreme Court of Connecticut affirmed the "thoughtful and comprehensive" appellant court ruling, which held that the vehicle that struck the plaintiff was not a hit-and-run vehicle because the driver stopped and attempted to provide aid to the insured. *Id.* On this point, the appellate court had previously stated that:

> Because the driver of the vehicle that struck the [claimant] stopped to render assistance and because the [claimant] affirmatively acted to dismiss the driver from the scene of the accident, we conclude that the [claimant] was not struck by a hit-and-run vehicle. Accordingly, under the facts here, the policy's provisions for uninsured motorist coverage are inapplicable[.]

Sylvestre, 42 Conn. App. 219, 678 A.2d 1005.

At each level of review, the Zarders have ignored the clear language in *Hayne* and the practical similarity between the present matter and the foregoing decisions,

instead relying primarily on alternative extrajurisdictional decisions to oppose ACUITY's position. In doing so, the Zarders, relying on secondary source authority, claimed that the extrajurisdictional decisions relied on by ACUITY constitute the minority position in the states relative to issues analogous to those presently before this Court. Conversely, the Zarders have argued their own position is consistent with the majority of states that have analyzed cases involving similarly situated claimants. A review of materials cited by the Zarders, specifically, Allen I. Widiss & Jeffrey E. Thomas, UNINSURED AND UNDERINSURED MOTORIST COVERAGE 691-94 n.3 (2005) and cases cited therein, reveals the contrary.

The Zarders' reliance on this secondary source authority is questionable inasmuch as the Zarders ignore whether and to what extent case law detailed therein is appropriately analogized to this matter. Of the cases cited in connection with the materials, eighteen are described in relative detail. Of these eighteen cases, seven relate to the provision of false information by the unidentified motorist - a circumstance not present in this matter - while the balance of the cases are factually dissimilar to the present matter, due either to the absence of a means of learning the identity of the alleged hit-and-run driver or

the near instantaneous manner in which the unidentified motorist left the scene.

Ultimately, the Zarders have relied chiefly on only two cases, *Commerce Insurance Company v. Mendonca*, 57 Mass. App. Ct. 522, 784, N.E.2d 43 (Mass. App. Ct. 2003) and *Binczewski v. Centennial Insurance Company*, 354 Pa. Super 229, 511 A.2d 845 (Penn. Super. Ct. 1986), in opposing ACUITY's position. Each of the decisions is distinguishable from the facts of record and is otherwise uninstructive.

In *Mendonca*, the uninsured motorist claimant, Mendonca, was a passenger in a car that was stopped for a red light when it was struck from behind by another vehicle. *Id.* at 522. Joseph Corrigan, the owner and operator of the vehicle in which Mendonca was a passenger, asked Mendonca and another passenger if they were "okay." *Id.* at 523. When Mendonca and the passenger responded in the affirmative, Corrigan walked to the rear of his vehicle where he spoke with the unidentified motorist. *Id.*

According to the *Mendonca* decision, "Corrigan and the other operator inspected their respective vehicles and agreed that there was no significant damage." *Id.* They each then drove away. "No identifying information was requested or obtained from the other operator or his vehicle before he drove off[,]" and "[n]either Mendonca nor the other

passenger left Corrigan's vehicle during this incident." *Id.*

To remain consistent with Massachusetts courts' nonliteral approach to the meaning of "hit-and-run," the *Mendonca* court acknowledged that it did not treat flight as an indispensable element of "run." *Id.* at 524. In support of this proposition, the *Mendonca* court relied on appellate case law interpreting "hit-and-run," which rejected a literal interpretation of the phrase and concluded that "physical contact is not part of the usual and accepted meaning of the term." *Id.* (citing *Surrey v. Lumbermens Mut. Cas. Co.*, 384 Mass. 171, 176, 424 N.E.2d 234 (1981)).

Wisconsin takes a far more literal approach to construing "hit-and-run." As noted above, the *Hayne* court concluded § 632.32(4)(a)2.b. is "unambiguous." *Hayne*, 115 Wis. 2d at 74. Accordingly, the phrase "hit" "unambiguously includes an element of physical contact[.]" *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶ 15, 302 Wis. 2d 564, 734 N.W.2d 394. Consonance with Wisconsin courts' literal approach requires the conclusion that Wisconsin treats flight, or fleeing the scene, as an indispensable element of "run." Case in point: the resulting definition of "hit-and-run" found in *Hayne*.

Moreover, there is no evidence in the *Mendonca* decision that the unidentified motorist was reassured that there was neither injury nor damage to the passengers of the Corrigan vehicle. The only evidence is that Corrigan, the operator of the vehicle in which Mendonca was a passenger, spoke with the unidentified motorist and agreed there was no significant damage to the vehicles. In the present matter, conversely, the occupants of the unidentified vehicle stopped, attempted to provide aid to Zarder, the claimant, and then Zarder himself, affirmatively told the unidentified motorists that he was not injured and that was the only reason the motorists left the scene of the accident.

As with *Mendonca*, the decision in *Binczewski* has no application in the present action. 354 Pa. Super 229, 511 A.2d 845 (Penn. Super. Ct. 1986). There, Hyewon Binczewski was involved in an automobile accident. According to the Superior Court of Pennsylvania, the facts of record showed the following:

- "[t]he driver of the vehicle that struck Mrs. Binczwski's car stopped to ask if she was hurt and then immediately left the scene";
- "[n]o exchange of insurance information or names occurred";
- "[s]oon after, a police officer arrived."

Id. at 230. Though the limited set of undisputed facts appears similar to those in the present action, it is the Superior Court's analysis that is dissimilar and which bears mention here.

First, there is no evidence of the Superior Court's analysis of the meaning of "hit-and-run," if any, in an uninsured or underinsured motorist context. Apart from noting the class of motor vehicle which struck Binczewski's automobile complied with the definition of "uninsured motor vehicle" in the subject policy of insurance, no mention is made of the manner in which Pennsylvania courts construe "hit-and-run" accident.

Second, the matter before the *Binczewski* court was considered one of first impression in Pennsylvania. The Superior Court expressed agreement with the lower court's position that the insurance policy failed to contain language giving rise to a duty on the part of Binczewski to actively question the driver of the vehicle that struck her "when the driver almost instantaneously drove away and left no information." *Id.* at 232. The *Binczewski* court quoted the lower court opinion which notes that "'[t]he issue has not been discussed in Pennsylvania case law . . .'"

Finally, the *Binczewski* court relied on Pennsylvania's criminal hit-and-run driver statute in arriving at its

conclusion. As set forth below, Wisconsin's criminal hit-and-run statute is not applicable to the present matter.

The historical facts underlying the present matter will not permit a finding of a "hit-and-run" for purposes of insurance coverage under the ACUITY Policy. The definition of the term detailed in *Hayne*, as well as the foregoing extrajurisdictional decisions – excluding *Mendonca* and *Binczewski* - act only to solidify this position.

The occupants of the unidentified vehicle stopped after the incident, spoke directly to Zarder and "immediately checked on his wellbeing." *See* Affidavit of Jeffrey Kuehl, Exh. A. (R. 21 at 165-183; P-Ap 87-105) There is no evidence that the occupants of the vehicle attempted to conceal their identities, and the occupants left only after Zarder "told the occupants of the vehicle that he was not injured and that they could leave." *Id*. Thus, not only was there an attempt made to render assistance to Zarder, but Zarder affirmatively acted to dismiss the occupants of the unidentified vehicle from the scene. There simply was no "hit-and-run" and as a result, given the totality of the circumstances, the New Berlin Police Department did not investigate the December 9, 2005, incident as such.

As noted above, to conclude the historical facts give rise to a "hit-and-run" requires a "run" or "fleeing" from the scene of the accident. Because the operator of the unidentified vehicle, as well as the vehicle, itself, stopped at the scene, there was no "flee," and thus, no "run." Consequently, there is no "hit-and-run," precluding a ruling on the coverage issue in the Zarders' favor.

IV. WISCONSIN'S OMNIBUS STAUTE DOES NOT MANDATE UNINSURED MOTORIST COVERAGE FOR AN ALLEGED "HIT-AND-RUN" ACCIDENT INVOLVING AN UNIDENTIFIED MOTOR VEHICLE AND AN INSURED WHERE THERE IS NO "RUN."

Because the plain meaning of the term "hit-and-run," including the "run" component, is unambiguous and controls the Court's analysis, there is no need for the Court to analyze extrinsic sources to resolve this coverage issue. *See Bruno v. Milwaukee County*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656 (stating that where the process of statutory construction "...yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning").

That said, both the Circuit Court, as well as the Court of Appeals, took the liberty of ignoring the meaning of "run" ascribed by the *Hayne* court and, instead, looked to legislative history and the purpose of the Omnibus statute to decide the insurance coverage issue in the

Zarders' favor. ACUITY submits that although unnecessary, an examination the history and purpose of the Omnibus statute indicates a finding in ACUITY's favor is nevertheless warranted.

A. The Legislative History Of The Omnibus Statute Directs The Examining Party's Attention To *Hayne* And The Meaning Of "Run" Detailed Therein.

A review of the legislative history of Wis. Stat. § 632.32(4)(a)2.b. suggests the legislature was cognizant of the possibility of unpredictable scenarios leading to claims for uninsured motorist coverage. *See Theis v. Midwest Sec. Ins. Co.*, 2000 WI 15, ¶ 18, 232 Wis. 2d 749, 606 N.W.2d 162. In this regard, the legislature adopted Legislative Council Note in ch. 102, Laws of 1979, which explains that "[a] precise definition of hit-and-run is not necessary for in the rare case where a question arises, the court can draw the line." *Id.*

Assuming the present matter falls within the category of "rare instances" where this Court must draw a line regarding the meaning of "hit-and-run," ACUITY submits the Court in *Hayne* has already done so. Yes, the Omnibus statute is without an express definition of "hit-and-run." That, however, does not mean the phrase is necessarily ambiguous or lacking in clarity. *See e.g., United States Fire Ins. Co. v. Ace Baking Co.*, 164 Wis. 2d 499, 503-504,

476 N.W.2d 280 (Ct. App. 1991) (noting that in analyzing contractual terms, "a word is not ambiguous merely because it is undefined in the policy, ... or because the parties may disagree about its meaning"). The *Hayne* court concluded a "run" requires evidence of a "flee." The *Hayne* court thus "drew the line" regarding the construction of "run" for purposes of the present coverage dispute. Because the undisputed facts will not permit a conclusion that a "flee" occurred, there is no "hit-and-run" and, thus, there can be no finding of coverage under the ACUITY Policy.

B. Wisconsin Statutes § 346.67 Has No Application To The Court's Analysis In The Present Matter.

With that said, there is no need to analyze Wis. Stat. § 346.67, which sets forth a series of statutory obligations to be followed by an operator of a vehicle involved in an accident resulting in injury to a person or damage to a vehicle, to ascribe meaning to "run" in the present matter. Wis. Stat. § 346.67(1). Not only do the conclusions of the *Hayne* court make such an analysis unnecessary, ACUITY submits the requirements detailed in Section 346.67 have no application to this matter because

there is nothing in the statute that accords its language with the language of the Omnibus statute.[8]

"When multiple statutes in the same chapter relate to implementing the chapter's purpose, courts construe them to have a harmonized interpretation." *State v. Bobbie G. (In re Marquette S.)*, 2007 WI 77, ¶ 127, 301 Wis. 2d 531, 734 N.W.2d 81. This "canon of construction" is referred to as "in pari materia." *Id.* at ¶ 127, n.3. "In pari materia means '[o]n the same subject; relating to the same matter.'" *Id.* (citing Black's Law Dictionary 794 (7th Ed. 1999)).

As noted in Justice Abrahamson's dissent in *Hayne*, Wis. Stat. § 632.32(4)(a)2.b. and Section 346.67 are not in pari materia. 115 Wis.2d at 92, n.6. The Omnibus statute and Section 346.67 appear in different chapters of the Wisconsin Statutes and relate to distinctly different subject matters. Section 346.67 is contained within statutory provisions governing Wisconsin's Rules of the Road and details requirements for the operator of a vehicle, the failure to follow which may result in criminal

[8] The Circuit Court did not place reliance on Section 346.67 in ruling on ACUITY's declaratory judgment motion. In that respect, the Circuit Court noted that "[t]he duty under 346.67 pursuant to that is not related to the property, although is duty upon causing property damage and apparently none of that was ever reported." Transcript of Proceedings at 17. (R. 28; P-Ap. 39) The Circuit Court continued, noting that "[h]owever that is not the issue before the court[;] the issue ultimately boils down to 632.32 and the interpretation of that statute…" *Id.*

penalties. The Omnibus statute, on the other hand, concerns insurance law and has as its purpose, not the enforcement of criminal laws, but, rather, the provision of coverage to the insured and compensation to victims of automobile accidents. *Dahm v. Employer's Mut. Liab. Ins. Co.*, 74 Wis. 2d 123, 128, 246 N.W.2d 131 (1976) (citation omitted). As noted in Justice Abrahamson's dissent in *Hayne*, "... the use of criminal statutes is not significant in interpreting insurance laws." 115 Wis.2d at 92, n.6.

ACUITY agrees that if the unidentified motorist would have provided identifying information to Zarder in a manner consistent with Section 346.67, the present coverage issue would not be before this Court. At the same time, however, the fact the unidentified motorist did not comply with Section 346.67 does not, in and of itself, command the result that a "hit-and-run" accident occurred. Let it not be lost on the parties and the Court that the New Berlin Police Department did not investigate the December 9, 2005 incident as a hit-and-run accident because the unidentified vehicle stopped at the scene and its occupants inquired as to Zarder's health and wellbeing. *See* Affidavit of Jeffrey Kuehl, Exh. A (R. 21 at 165-183; P-Ap. 87-105)

There is no "run" in the present matter as the *Hayne* court defined the term. As such, a ruling in ACUITY's favor is required.

C. Analysis Of The Legislative Purpose Of The Omnibus Statue Is Unnecessary And Unwarranted Where The Language Of The Statute And Existing Case Law, Combined With The Factual Record, Require A Conclusion That No "Run" Occurred.

The Circuit Court unequivocally determined no "run" occurred on in connection with the underlying facts. The Circuit Court's ruling in this respect should have ended the analysis.

In spite of its conclusion that there was no "run," the Circuit Court nevertheless denied ACUITY's declaratory judgment motion. The Circuit Court concluded the unidentified vehicle constituted an uninsured vehicle for purposes of the Omnibus statute (and the ACUITY Policy) because the purpose of the Omnibus statute is for the "protection of persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles." The Circuit Court reasoned that because Zarder was thirteen years of age at the time of the incident, he fell within the class of persons needing protection under § 632.32. Transcript of Proceedings at 22-23. (R. 28 at 253-254; P-Ap. 44-45)

Theis v. Midwest Sec. Ins. Co., 2000 WI 15, 232 Wis. 2d 749, 606 N.W.2d 162, is instructive as to when a court may engage in an analysis of the legislative purpose of Wisconsin's Omnibus statute in mandating coverage. An analysis of *Theis* requires a finding the Circuit Court improperly denied ACUITY's motion, mandating insurance coverage for the Zarders.

When analyzing the meaning of "hit" in the term "hit-and-run," the *Theis* court examined the purpose of the Omnibus statute to discern legislative intent. 2000 WI 15 at ¶ 27. The *Theis* court undertook to examine legislative purpose **only because** "[n]either the language of the statute, the existing case law nor the legislative history mandates a decision in this case." *Id.* Such is not the state of affairs in the present matter.

Here, *Hayne* necessitates the conclusion that no "hit-and-run" occurred, given there was no "run." Once the Circuit Court determined that no "run" occurred, the Circuit Court was foreclosed from mandating coverage under the Omnibus statue. A coverage mandate could result only where there was proof of a "run." *See e.g., Theis* at ¶¶ 14-16 ("[t]hree elements must be met before uninsured motorist coverage is mandated by the statute," including "the unidentified motor vehicle must have run from the scene").

Without a "run," there can be no "hit-and-run" and, thus, a coverage mandate is prohibited.

Even if we assume the Circuit Court's reliance on the legislative purpose of § 632.32 was warranted, a finding that the Zarders fall within the class of persons "legally entitled to recover damages" under § 632.32 cannot rise solely from the fact Zarder was thirteen years of age at the time of the accident. ACUITY acknowledges that "uninsured motorist coverage seeks 'to compensate an insured who is the victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured.'" *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 24, 293 Wis. 2d 123, 717 N.W.2d 258 (citations omitted). "In other words, uninsured motorist coverage 'substitutes for insurance that the tortfeasor should have had.'" *Id*.

Here, the Circuit Court described the issue of negligence as "unsettled." Having made no ruling as to the negligence, if any, of the parties, the Circuit Court denied ACUITY's declaratory judgment motion solely in an effort to "protect" Zarder, relying on his minor status to characterizing him as one "legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury[.]" If the issue of

negligence is "unsettled," how can it be that the Zarders are "legally entitled" to uninsured motorist coverage under the ACUITY Policy? ACUITY respectfully submits the Circuit Court erred in reaching this conclusion.

CONCLUSION

An insurer has the right to limit its liability by the terms of its contract unless it is prohibited by statute, case law, or sound considerations of public policy. *See Resseguie v. American Mut. Liab. Ins. Co.*, 51 Wis. 2d 92, 101, 186 N.W.2d 236 (1971). Here, ACUITY rightly, and consistent with Wisconsin statutory and case law, has limited its liability with respect to the provision of uninsured motorist coverage in connection with "hit-and-run" accidents. The facts of record do not evidence a "hit-and-run" and as such, a no coverage determination under the ACUITY Policy is required.

For the arguments stated herein and the authority cited above, Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company, respectfully requests this Court reverse the ruling of the lower courts regarding the denial of ACUITY's Motion for Declaratory Judgment. Should the matter be remanded, ACUITY requests the Circuit Court be directed to enter an Order granting ACUITY's Motion for Declaratory Judgment.

Dated at Waukesha, Wisconsin this 19th day of November, 2009.

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CERTIFICATION

I certify that this Brief and Appendix of Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this Brief is forty-two (42) pages.

Dated at Waukesha, Wisconsin this 19th day of November, 2009.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the Appendix, if any, which complies with the requirements Wis. Stat. §809.19(12). I further certify that this electronic Brief is identical to the text of the paper copy of the Brief. A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all parties.

Dated at Waukesha, Wisconsin this 19th day of November, 2009.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Waukesha, Wisconsin this 19th day of November, 2009.

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INDEX TO PETITIONER'S APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2009

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP919 Cir. Ct. No. 2007CV1146

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

JAMES ZARDER, GLORY ZARDER AND ZACHARY ZARDER, BY ROBERT C. MENARD, GUARDIAN AD LITEM,

PLAINTIFFS-RESPONDENTS,

V.

HUMANA INSURANCE COMPANY,

DEFENDANT,

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 BROWN, C.J. What does *run* mean when an insurance policy covers "hit-and-run" as part of an uninsured motorist provision and the policy does not define the term? Does *run* mean to flee without stopping, or does it mean leaving the scene without providing identifying information even if the driver stopped to see if there was any injury? We hold that the latter definition controls and affirm the circuit court.

¶2 The facts relevant to this appeal are brief and undisputed. On December 9, 2005, twelve-year-old Zachary Zarder was riding his bicycle on the street. An unidentified motor vehicle cut the corner short, causing it to enter the wrong lane and strike Zarder. The vehicle stopped about one hundred feet away. Three males got out of the car and walked back towards Zarder. One asked Zarder if he was ok. Zarder said yes. So they walked back to their car and drove away. They never provided Zarder with identifying information or asked Zarder if he wanted it.

¶3 Witnesses also heard the accident and spoke to Zarder. They asked Zarder if he was hurt, and Zarder said he was ok. Zarder said he was just scared and wanted to remain where he was for a moment. So, the witnesses left. The witnesses did not attempt to identify the motor vehicle or the occupants.

¶4 A short while later, Zarder's family contacted the police. A police officer then questioned neighboring residents who had vehicles similar to the one involved in the accident, as so described by Zarder and the witnesses. The officer also contacted the nearest high school, thinking that the occupants might be students there. No information turned up, and the police did not thereafter continue the investigation of the accident as a "hit-and-run." This is most likely because, at that point, no one thought Zarder's injuries were serious.

¶5 Later, though, the Zarders realized that Zachary's injuries were serious. He suffered two fractures for which he had two surgeries and a lengthy recovery. The medical bills were more than Zarder's health insurance would cover. The Zarder family then sought coverage under their Acuity policy's uninsured motorist coverage. The Zarders asserted that the accident was a "hit-and-run" accident with an unidentified motor vehicle.

¶6 Acuity denied coverage and sought a declaratory judgment on coverage. It argued that the following provisions of the insurance policy issued to Zarder precluded Zarder's claim:

> We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. Bodily injury must be sustained by an insured person and must be caused by accident and result from the ownership, maintenance or use of the uninsured motor vehicle. (Emphasis omitted.)

The Acuity policy defined an "uninsured motor vehicle" as

> 2. ... a land motor vehicle or trailer which is
>
> ....
>
> c. A hit-and-run vehicle whose operator or owner is unknown and which strikes....

Acuity's position was that because the vehicle stopped and the operator inquired into Zarder's well-being, the accident was not a "hit-and-run."

¶7 The circuit court denied Acuity's claim based on public policy grounds. We granted leave to appeal because the issue is novel and because deciding it would further the administration of justice by definitively deciding the meaning of run in "hit-and-run."

¶8 The grant or denial of a declaratory judgment is addressed to the circuit court's discretion. ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶19, 249 Wis. 2d 623, 638 N.W.2d 575. However, when the exercise of such discretion turns on a question of law, we review the question de novo. ***Id.*** Here, the issue turns upon the construction of an insurance contract, which is a question of law we review de novo. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857.

WISCONSIN PRECEDENT

¶9 Acuity's main argument is that this issue has been previously decided. It cites ***Hayne v. Progressive Northern Insurance Co.***, 115 Wis. 2d 68, 339 N.W.2d 588 (1983). There, the plaintiff sustained injuries when the car he was driving swerved to avoid an oncoming vehicle resulting in a loss of control and a roll-over. ***Id.*** at 69. The driver of the oncoming vehicle did not stop and was unidentified. ***Id.*** Important to that case, there was no physical contact between the plaintiff's vehicle and the other vehicle. ***Id.*** The supreme court stated the issue as follows:

> The sole issue on appeal is whether sec. 632.32(4)(a)2.b., Stats., requires uninsured motorist coverage for an accident involving an insured's vehicle and an unidentified motor vehicle when there was no physical contact between the two vehicles.

Hayne, 115 Wis. 2d at 69.

¶10 In deciding the question before it, the court cited recognized dictionaries to discover whether the term "hit-and-run" includes "miss-and-run" or whether it requires actual physical striking. ***Id.*** at 73-74. In all the dictionaries, the "hit" in "hit-and-run" was defined as physical contact. ***Id.*** Therefore, the court reasoned that, since the legislature is deemed to use words and phrases

according to their common and approved usage and since "hit" in "hit-and-run" was commonly defined to include an element of "physical contact," the plaintiff could not recover because there had been no physical contact. *Id.* at 74. In making this statement, the court concluded that "[t]hese definitions clearly indicate that the plain meaning of 'hit-and-run' consists of two elements: a 'hit' or striking, and a 'run,' or fleeing from the scene of an accident." *Id.* at 73-74. After having so stated, the court addressed and discarded the plaintiff's contention that "hit-and-run" simply meant an automobile that was "involved in an accident, after which the driver flees the accident scene." *Id.* at 74-75. It was in this context that the court again wrote:

> We find his argument unpersuasive. The dictionary definitions we previously cited uniformly indicate that "hit-and-run" includes two elements: a "hit" or striking, and a "run," or fleeing from the accident scene.

Id. at 75. Acuity seizes upon these two passages to support its claim that the issue is dead and buried and that "run" is synonymous with "fleeing."

¶11 But, not so fast. First of all, the issue in that case, as cogently stated by the supreme court, was whether there was "physical contact" such that there was a "hit." When an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is not dicta but is a judicial act of the court which it will thereafter recognize as a binding decision. ***State v. Sanders***, 2007 WI App 174, ¶25, 304 Wis. 2d 159, 737 N.W.2d 44. However, when the court's opinion expresses language that extends beyond the facts in that case and is broader than necessary and not essential to the determination of the issues before it, that language is dicta and not controlling. ***State v. Sartin***, 200 Wis. 2d 47, 60 & n.7, 546 N.W.2d 449 (1996). Thus, the definition of a term is dicta when a court defines a term "only because that term and its definition were

part of the larger instruction that also addressed ... the conduct at issue in the case." ***State v. Harvey***, 2006 WI App 26, ¶19, 289 Wis. 2d 222, 710 N.W.2d 482.

¶12 The ***Hayne*** court did not intentionally take up and decide the "run" part of "hit-and-run." And the passages Acuity quoted were not germane to the outcome of ***Hayne***. Moreover, the statements Acuity relied on were obviously off-the-cuff statements, made without any careful thought or analysis, another indication of dicta. For example, while the court seemingly equated "run" with "flee," it did not define or discuss the circumstances that determine when a "flee" has occurred.

¶13 This is borne out by the supreme court's statement that the "dictionary definitions [it had] previously cited uniformly indicate that 'hit-and-run' includes two elements: a 'hit' or striking, and a 'run,' or fleeing from the accident scene." ***Hayne***, 115 Wis. 2d at 75. While in truth, the cited dictionary definitions *were* uniform on the "hit" part of "hit-and-run," these same authorities were anything but uniform on the "run" part of the phrase. *See* ***id.*** at 73-74. One definition said "run" meant "leaving the scene of the accident without stopping to render assistance or to comply with legal requirements," another said it was "illegally" continuing on one's way and another had it as "driv[ing] on after *striking*." ***Id.***

¶14 We conclude that ***Hayne***'s definition of "run" as a "fleeing from the scene of an accident" is dicta that begged the question. The facts in ***Hayne*** did not present an issue as to whether the unidentified vehicle "ran" from the scene. Instead, the issue presented was whether the term "hit" in "hit-and-run" includes accidents without any physical contact. ***Id.*** at 69. We conclude that ***Hayne*** discussed "run" in passing only because that term was part of the phrase "hit-and-

run." *See* ***id.*** at 73-74. Therefore, ***Hayne***'s mention of "run" is uninformative dicta and not controlling.[1]

¶15 Without ***Hayne*** as the anchor, we are back to square one with regard to defining "run" in "hit-and-run." We will hereafter analyze the case the way the law says we must interpret insurance policy language. So, we will start with the Acuity policy language.

THE ACUITY INSURANCE POLICY

¶16 Acuity's position, at bottom, is that its "hit-and-run" coverage requires a "run," or a fleeing from the accident scene. In its opinion, the meaning of "run" in "hit-and-run" is to flee without stopping. Acuity contends that no run occurred here because the unidentified vehicle stopped and left only after young Zarder assured the three occupants that he was unhurt. Therefore, Acuity argues that it properly denied coverage because its insurance policy covers only "hit-and-run" accidents.

¶17 We construe insurance policies to give effect to the intent of the parties as expressed in the language of the policy. ***Folkman***, 264 Wis. 2d 617,

[1] In a concurring opinion to ***Noffke v. Bakke***, 2009 WI 10, ¶60, No. 2006AP1886, Chief Justice Abrahamson commented on the risk of relying on dictionary definitions which furnish more than one meaning and warned that "a court has to be careful not to select a friendly definition it likes from the many offered without explaining its choice." Otherwise, she wrote: "resort to a dictionary can be, as Justice Scalia has written of the use of legislative history, 'the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.'" ***Id.*** We cannot believe that the ***Hayne*** court, learned as it was, would "definitively decide" (the dissent's words) the issue of what "run" means, knowing all the while that the dictionary definitions were all over the map regarding the meaning of "run" in the term "hit-and-run." Dissent, ¶44. At least, that court would not make such a decision without also explaining why it chose one meaning over another. This, as we pointed out, the ***Hayne*** court did not do. That is why the off-hand reference to "run" in ***Hayne*** was dicta. The ***Hayne*** court definitively decided nothing with regard to that word.

¶12. As a general rule, similar to the way we read statutory language, we give the policy language its common, ordinary meaning, that is, what the reasonable person in the position of the insured would have understood the words to mean. *See id.*, ¶17. We enforce unambiguous policy language as written, without resort to the rules of construction or applicable principles of case law. *Id.*, ¶13. However, if the policy language is susceptible to more than one reasonable interpretation, it is ambiguous. *Id.* We will construe ambiguous language in favor of the insured, since insurers have the advantage over insureds because they draft the contracts. *Id.*, ¶¶13, 16.

¶18 Acuity did not define "hit-and-run" in its uninsured motorist policy. It simply states that coverage extends to accidents with "[a] hit-and-run vehicle whose operator or owner is unknown and which strikes [an insured]." Therefore, we must find and give effect to the common and ordinary meaning of "hit-and-run." *See id.*, ¶17. In construing an insurance policy, we may look to dictionary definitions to find the common meaning and usage of words. ***Ennis v. Western Nat'l Mut. Ins. Co.***, 225 Wis. 2d 824, 831-32, 593 N.W.2d 890 (Ct. App. 1999). This is the same analysis the ***Hayne*** court conducted for the "hit" portion of "hit-and-run" as it appears in WIS. STAT. § 632.32(4)(a)2.b (2005-06).[2] *See* ***Hayne***, 115 Wis. 2d at 73-74.

¶19 Our review of recognized dictionaries reveals two different groups of definitions for the phrase "hit-and-run." One group of definitions includes only vehicles that continue driving away from the accident scene. The second group is

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

broader and includes vehicles that stop but do not complete their legal requirements before leaving the accident scene. This is not surprising since the dictionary definitions in the ***Hayne*** decision presented the same dichotomy, as we earlier pointed out.

¶20 In the first group, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 907 (2d ed. unabridged 1987) defines "hit-and-run" as "guilty of fleeing the scene of an accident, esp. a vehicular accident, thereby attempting to evade being identified and held responsible: *a hit-and-run driver*." "The American Heritage Dictionary 625 (1979) defines 'hit-and-run' as 'designating or involving the driver of a motor vehicle who drives on after striking a pedestrian or another vehicle.'" ***Hayne***, 115 Wis. 2d at 73 (emphasis omitted).

¶21 In the second group, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1074 (unabridged 1993), defines the driver of a "hit-and-run" vehicle as one who is "guilty of leaving the scene of an accident without stopping to render assistance or to comply with legal requirements." BLACK'S LAW DICTIONARY 730 (6th ed. 1990) defines a "hit and run accident" as a "[c]ollision generally between motor vehicle and pedestrian or with another vehicle in which the operator of the vehicle leaves the scene without identifying himself." And, "Funk and Wagnall's Standard College Dictionary 636 (1968) provides the following definition of 'hit-and-run:' 'designating, characteristic of, or caused by the driver of a vehicle who illegally continues on his way after hitting a pedestrian or another vehicle.'" ***Hayne***, 115 Wis. 2d at 73 (emphasis omitted).

¶22 We conclude that both groups of definitions are reasonable, so the policy language is ambiguous. "Run" has no one universal meaning in the context of a "hit-and-run." An ordinary insured could reasonably interpret the policy here

such that "hit-and-run" limits coverage to accidents where (1) the operator flees or drives on without stopping or (2) the operator stops but drives on without providing identification or complying with his or her other legal duties.

¶23 Since either interpretation is reasonable, we must adopt the interpretation favorable to the insured. *See* ***Folkman***, 264 Wis. 2d 617, ¶13. Therefore, the "run" of a "hit-and-run" occurs when the driver leaves the accident scene without providing identifying information, even though the driver stopped to see if there was injury. We thus affirm the circuit court and hold that the Acuity insurance policy covers Zarder's accident.

THE OMNIBUS STATUTE, WIS. STAT. § 632.32(4)(a)2.b.

¶24 The Omnibus statute provides an alternative rationale for deciding this issue in favor of affirming the circuit court. Assuming, only for the sake of argument, that Zarder's accident falls outside of his Acuity coverage, WIS. STAT. § 632.32(4)(a)2.b. still compels coverage. It is well-settled law that courts may compel and enforce coverage omitted from an insurance contract where the inclusion of such coverage is statutorily required. ***Hayne***, 115 Wis. 2d at 72. Section 632.32(4) requires insurance companies to provide uninsured motorist coverage. ***Theis v. Midwest Sec. Ins. Co.***, 2000 WI 15, ¶13, 232 Wis. 2d 749, 606 N.W. 2d 162. Thus, Acuity must provide insurance coverage for Zarder's accident if § 632.32(4) requires coverage for an accident involving a collision with an unidentified motor vehicle where the driver stopped and asked if the insured was injured, but left before providing identifying information.

¶25 WISCONSIN STAT. § 632.32(4) states in relevant part as follows:

> REQUIRED UNINSURED MOTORIST AND MEDICAL PAYMENTS COVERAGES. Every policy of insurance subject

> to this section that insures with respect to any motor vehicle ... in this state against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ... use of a motor vehicle shall contain ... the following provisions:
>
> (a) *Uninsured motorist.* 1. For the protection of persons injured 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, in limits of at least $25,000 per person and $50,000 per accident.
>
> 2. In this paragraph "uninsured motor vehicle" also includes:
>
> ....
>
> b. An unidentified motor vehicle involved in a hit-and-run accident.

The legislature has defined neither the phrase "hit-and-run," *see* ***Theis***, 232 Wis. 2d 749, ¶18, nor the word "run" used in § 632.32(4)(a)2.b.

¶26 In construing a statute, we must first look to the statutory language itself. ***State v. Derenne***, 102 Wis. 2d 38, 45, 306 N.W.2d 12 (1981). When the statutory language is clear and unambiguous, we must rely on its ordinary and accepted meaning to find the legislature's intent. ***Hayne***, 115 Wis. 2d at 74. As seen in ***Hayne***, we also look to dictionary definitions to discover the common, ordinary meaning of statutory language. *See* ***id.*** at 73. Since the statute uses the same phrase as the insurance policy—"hit-and-run"—and since we earlier wrote how the term was ambiguous when interpreting Acuity's policy language, we likewise conclude that the meaning of "run" in "hit-and-run" is ambiguous as applied to the statutory language.

¶27 Trying to isolate the word "run" to resolve any ambiguity in the colloquialism "hit-and-run" would be fruitless. THE RANDOM HOUSE

DICTIONARY OF THE ENGLISH LANGUAGE 1681-82 (1987) provides over 178 definitions for "run." Many are obviously irrelevant, but those that are relevant provide little clarity. For example, "run" means "to convey or transport, as in a vessel or vehicle," or "to leave, flee, or escape from: *He ran town before the robbery was discovered.*" ***Id.*** at 1682.[3] While we resolve ambiguities in insurance policies in favor of the insured, there is no similar default mechanism when construing statutes. So, to resolve the ambiguity, we must turn to another avenue.

¶28 And here, oddly enough, ***Hayne*** is helpful after all. Aside from dictionaries, our supreme court relied on three additional sources to decide the case: (1) the legislative history of WIS. STAT. § 632.32(4)(a)2.b., (2) the "hit-and-run" statute, WIS. STAT. § 346.67, and (3) the principle of construing statutes to avoid surplusage. ***Hayne***, 115 Wis. 2d at 75-77 & 75 n.5. We thus turn to these same sources.

¶29 We begin with the legislative history of WIS. STAT. § 632.32(4)(a)2.b. The legislature adopted the following Legislative Council Note in ch. 102, Laws of 1979: "A precise definition of hit-and-run is not necessary for in the rare case where a question arises, the court can draw the line." This note evidences that the legislature recognized the vast variety of unpredictable scenarios that lead to claims for uninsured motorist coverage. ***Theis***, 232 Wis. 2d 749, ¶18. Since that note leaves it to the courts to decide, we must look further.

---

[3] "[T]o convey or transport ..." is the sixty-fourth definition of run and "to leave, flee or escape ..." is the sixty-second. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1682 (2d unabridged 1987).

¶30 The hit-and-run-statute, WIS. STAT. § 346.67, provides the clearer guidance we seek as to what the legislature meant by the term "run" in "hit-and-run." The legislature is presumed to enact statutory provisions with full knowledge of existing laws. ***Hayne***, 115 Wis. 2d at 84. When the legislature added the "hit-and-run" provision, subsection (4)(a)2.b., to the Omnibus statute, WIS. STAT. § 632.32, the rules of the road chapter had included a hit-and-run statute for over twenty years. *See* § 346.67 (1957); 1979 Wis. Act 102, § 171 (repealing WIS. STAT. § 632.32 and recreating it with subsection (4)(a)2.b.). Therefore, we presume that the legislature had full knowledge of the requirements in the "hit-and-run" statute when it repeated that phrase in § 632.32(4)(a)2.b.

¶31 The hit-and-run statute states, in pertinent part:

> The operator of any vehicle involved in an accident ... shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:
>
> (a) *The operator shall give his or her name, address and the registration number* of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (b) *The operator shall, upon request and if available, exhibit his or her operator's license* to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (c) *The operator shall render to any person injured in such accident reasonable assistance*, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

WIS. STAT. § 346.67 (emphasis added).

¶32 The requirements in WIS. STAT. § 346.67 inform us that the definition of "hit-and-run" in WIS. STAT. § 632.32(4)(a)2.b. includes accidents, such as the one in this case, where the operator stopped to see if there was any injury, but left the scene without providing identifying information. Section 346.67 requires the operator to complete three legal requirements before he or she may leave the accident scene: (1) provide identifying information regardless of whether the insured requests it, (2) provide his or her driver's license if requested, and (3) provide reasonable medical assistance. ***Id.*** Based on these requirements, an accident is a "hit-and-run" even when the operator stops and offers assistance to any injured person if the operator leaves the accident scene without providing the identification required in § 346.67(a).

¶33 This definition also complies with the principle that "statutes must be construed, if possible, so that no word or clause is rendered surplusage." ***Hayne***, 115 Wis. 2d at 76. In ***Hayne***, our supreme court identified that WIS. STAT. § 632.32(4)(a)2.b. has three parts, all of which should have individual meaning: (1) an unidentified motor vehicle, (2) a "hit," and (3) a "run." *See* ***id.*** at 73-74, 76. Defining "hit-and-run" to include vehicles that stop to offer assistance but leave without providing identification would not render any part surplusage.

¶34 This is best shown by example: Say all the facts in this case are the same except that the witnesses to the accident were able to get the license plate number of the vehicle that hit Zarder. And say that the police were able to track the vehicle down and identify the driver. And say that the driver had insurance. If such were the facts, we would have a "hit," or striking, and a "run," or departure from the scene without providing identification, but we would not have an "unidentified motor vehicle." The Omnibus statute would be irrelevant under such facts because this would not be an uninsured motorist case.

¶35 The Omnibus statute was designed to protect insureds against situations where an insured is injured and there is no tortfeasor insurance available to pay for the physical injuries. *See* ***Theis***, 232 Wis. 2d 749, ¶¶28-29. The Omnibus statute works here. Including vehicles that stop but do not provide identification matches the purpose of WIS. STAT. § 632.32(4)(a). As our supreme court has concluded, there are two purposes of § 632.32(4)(a). ***Theis***, 233 Wis. 2d 749, ¶¶28, 29. One purpose is to "compensate an injured who is a victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured." ***Id.***, ¶28. A second purpose is to honor the insured's reasonable coverage expectations. ***Id.***, ¶29.

¶36 We are mindful that the key to the legislative intent as to 'hit-and-run' may be found in considering the problems that the legislature anticipated in the uninsured motorist statute and the goals the legislature sought to achieve. *See* ***id.***, ¶31 (considering the problems the legislature anticipated). We must consider not only the legislative purpose, but also any countervailing legislative policies or purposes that would dissuade us from adopting one interpretation of the statute over another. *See* ***id.***

¶37 Our supreme court has pointed out that we must read the Omnibus statute so as to foster the countervailing legislative policy of limiting fraudulent claims. *See* ***id.***, ¶30. So, in performance of this duty, we consider a treatise comment that, with regard to the "run" requirement, the fear may be that claimants will allege the motor vehicle or its operator could not be identified when, in fact, the insured could have ascertained the identity. *See* Allen I. Widiss & Jeffrey E. Thomas, UNINSURED AND UNDERINSURED MOTORIST COVERAGE 691-94 & n.3 (2005).

¶38 Different courts have guarded against this fear of fraudulent claims in three main ways. *See* ***id.*** at 690-94. On one end of the spectrum are courts that believe this fear is best resolved by a bright-line rule that run should be restricted to fleeing. *See, e.g.,* ***Lhotka v. Illinois Farmers Ins. Co.***, 572 N.W.2d 772, 774 (Minn. Ct. App. 1998). In the middle are courts that place a duty on the insured to make all reasonable attempts to ascertain the identity of the unidentified motor vehicle or its driver. *See, e.g.,* ***Jones v. Unsatisfied Claim & Judgment Fund Bd.***, 273 A.2d 418, 421-22 (Md. 1971). Within this middle ground are courts that disregard this duty when there was a reasonable impediment to identification at the time of the accident. *See, e.g.,* ***id.*** A reasonable impediment could be the claimant's disability (i.e., unconsciousness, an infant), misleading acts by the offending driver, fear, or confusion with police reports. *See, e.g.,* ***id.***; *see also* ***Walsh v. State Farm Mut. Auto. Ins. Co.***, 234 N.E.2d 394, 398-99 (Ill. App. Ct. 1968). While at the other end of the spectrum are courts which believe that the burden to produce identification is solely on the operator, not the insured, and if the operator does not do so, then the accident is due to a "hit-and-run" vehicle. *See, e.g.,* ***Binczewski v. Centennial Ins. Co.***, 511 A.2d 845, 847 (Pa. Super. Ct. 1986). Some of these courts reasoned that to impose a duty to ascertain the identity would be to read into the statute "language which does not there appear." *See, e.g.,* ***Mangus v. Doe***, 125 S.E.2d 166, 168 (Va. 1962).

¶39 Our review of case law, as supported by the Widiss and Thomas treatise, leads us to conclude that the vast majority of courts favor resolving any issue over the validity of a case based on findings of fact. *See* Widiss, *supra* page 15, at 691 (even courts that place a duty on the insured have concluded based on the facts that the insured's failure to ascertain the identity did not preclude recovery). Some of these courts then rely on the fact finder to determine if the

insured should have identified the vehicle or driver. *See, e.g.,* ***Scheckel v. State Farm Mut. Auto. Ins. Co.***, 720 A.2d 396, 400 (N.J. Super. Ct. App. Div. 1998). At least one state does not focus in on any duty, but instead concludes that "[i]f fraudulent actions do arise they may be ferreted out in the same manner in which courts and juries handle such situations in other cases." *See* ***Mangus***, 125 S.E.2d at 168.

¶40 We are convinced that reliance on the fact finder is proper because allegations of fraud require a careful examination of the underlying facts and an evaluation of the credibility of the parties and witnesses. *See* ***Stevens v. Berger***, 255 Wis. 55, 57, 37 N.W.2d 841 (1949); ***Teledyne Indus., Inc. v. Eon Corp.***, 373 F. Supp. 191, 195 (S.D.N.Y. 1974). We conclude that the proper way to combat fraudulent claims is to allow the fact finder to assess the genuineness of the insured's claim on a case-by-case basis when the opposing party alleges fraud. Then the claimant must carry his or her burden of proof and submit evidence to the fact finder that the driver left the scene without identifying himself or herself. Judging the credibility and the truthfulness of this allegation is then the fact finders job. This conclusion also accomplishes the fullest interpretation of the Omnibus statute's remedial purpose.

¶41 Therefore, as an alternative means of affirming the circuit court's decision denying judgment for Acuity, we hold that under WIS. STAT. § 632.32(4)(a), a "hit-and-run" occurs when the claimant can sustain the burden of proof to show that an unidentified motor vehicle left the accident scene without providing identifying information. We affirm the circuit court's order and remand with directions that the circuit court continue the proceedings on Zarder's uninsured motorist claim.

By the Court—Order affirmed and cause remanded with directions.

Recommended for publication in the official reports.

¶42 SNYDER, J. (*dissenting*). The majority concludes that the word "run" in WIS. STAT. § 632.32(4)(a)2. (Omnibus Clause), as used in the phrase "hit-and-run," is ambiguous when applied to an accident where a vehicle driver stops at the scene of an accident, is advised by the other party that no injury has occurred, and then leaves the scene of the accident without providing identification becoming an unknown operator or owner. Resolving the ambiguity in favor of the insured, the majority concludes that the Acuity policy provided coverage to the insured under the mandated Omnibus Clause uninsured motorist (UM) provision.[1]

¶43 Acuity contends that the phrase "hit-and-run," including both components "hit" and "run," has already been defined by our supreme court in ***Hayne v. Progressive Northern Insurance Co.***, 115 Wis. 2d 68, 339 N.W.2d 588 (1983). The *Hayne* court concluded that "the plain meaning of 'hit and run' consists of two elements: a 'hit' or striking, and a 'run,' or fleeing from the scene of an accident." *Id.* at 73-74. It is undisputed that the operator of the unknown vehicle here did not "run" or "flee." The operator and vehicle stopped at the scene of the accident. Accordingly, argues Acuity, no ambiguity exists that would lend itself to a judicial analysis by this court to resolve the Omnibus Clause UM coverage issue in favor of the insured.

[1] The circuit court decided the coverage issue in favor of the insured on a public policy basis. The majority opinion abandons that approach and affirms the existence of coverage based upon a statutory interpretation and construction analysis.

¶44 The majority seizes upon ***Hayne***'s specific focus on the "hit" portion of the phrase "hit and run" to conclude that the "run" part of the definition is dictum. Majority, ¶14. Having done so, the majority then opines that the application of the ambiguous term "run" to UM Omnibus Clause coverage is "novel" and that this court should decide what "run" means in "hit-and-run" in order to further the administration of justice by definitively deciding the meaning of "run" in "hit-and-run." Majority, ¶7. Because I disagree that this court can declare the ***Hayne*** definition of "run" dictum, and because the definition is controlling to our analysis, I must dissent.

¶45 The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Concerning the potential existence of dicta in supreme court opinions, however, the supreme court has directed that:

> While the statement in [an earlier supreme court opinion] was not decisive to the primary issue presented, it was plainly germane to that issue and is therefore not *dictum*.
>
> "It is deemed the doctrine of the cases is that when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision."

State v. Kruse, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981) (citing ***Chase v. Am. Cartage Co.***, 176 Wis. 235, 238, 186 N.W. 598 (1922)); *see also* ***Malone v. Fons***, 217 Wis. 2d 746, 753-54, 580 N.W.2d 697 (Ct. App. 1998) (analyzing prior supreme court statements as "dicta or holding").

¶46 Because the supreme court defined the term "run" as used in the Omnibus Clause phrase "hit and run," and because only the supreme court can withdraw language from or otherwise modify its own holding, *see* ***Cook***, 208 Wis. 2d at 189, I respectfully dissent.

STATE OF WISCONSIN CIRCUIT COUR WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v.

Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

FILED
IN CIRCUIT COURT
APR 1 2008
WAUKESHA CO. WI
CIVIL DIVISION

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CLERK OF CIRCUIT COURT
CIVIL DIVISION

ORDER

The parties to the above-captioned action, by their respective attorneys, having come before the Court for a hearing on the Defendant, ACUITY, A Mutual Insurance Company's Motion for Declaratory Judgment; the Plaintiffs, James Zarder, Glory Zarder and Zachary Zarder, appearing by their attorneys, Derzon & Menard S.C., by Attorney Robert C. Menard; the Defendant, ACUITY, A Mutual Insurance Company, appearing by its attorneys, Grady, Hayes & Neary, LLC, by Attorney Lance S. Grady; and, the Court having considered the argument of counsel and the pleadings filed in support of and in opposition to ACUITY's motion;

IT IS HEREBY ORDERED that ACUITY's Motion for Declaratory Judgment is DENIED for reasons set forth by the Court, on the record.

Dated at Waukesha County, Wisconsin this 1 day of April, 2008.

BY THE COURT:

/s/ Kathryn W. Foster
Honorable Kathryn W. Foster

COPY

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

Branch 12

JAMES ZARDER,

Plaintiff,

MOTION

-vs- Case No. 07-CV-1146

ACUITY MUTUAL INSURANCE,

Defendant.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter was heard before the HONORABLE KATHRYN W. FOSTER, Circuit Court, Branch 12, Waukesha County, Wisconsin, on the 17th day of March, 2008.

Appearances:

On behalf of the Plaintiff:

Attorney Robert Menard

On behalf of the Defendant:

Attorney Lance Grady

Karen A. Herbert, Court Reporter.

THE COURT: James Zarder vs. Acuity Mutual Insurance Company, 07-CV-1146. If I could have the appearances.

MR. GRADY: Good morning. Lance Grady appearing on behalf of defendant Acuity Mutual Insurance Company.

MR. MENARD: Attorney Robert Menard appearing on behalf of plaintiff Mr. Zarder.

THE COURT: Matter is here today on the defendant's motion seeking summary judgment, in effect declaratory judgment in the case, as to whether or not there is a duty on behalf of Acuity, the insured, for -- or Zarder or their insured and there's an appropriate claim or potential claim under the uninsured motorist provision in the policy the date of this accident or incident. I have reviewed the briefs of the parties and will hear any additional argument or any additional response. I did receive your reply brief Mr. Grady. I did that last week and with that in mind.

MR. GRADY: Judge, I think it is undisputed when you look through the facts we do not have fleeing by unidentified driver, and I think Plaintiff will stipulate to that. The question becomes whether that is an element for us -- for this to be a hit and run accident, and I think Judge if you look at that Hayne

decision, granted Hayne was a hit and miss or sorry hit and run accident. The significance of Hayne is that the court in looking at section 632.32, the uninsured motorist statute, the court looks at this section and concludes they had a hit and run is unambiguous. In defining that phrase the court went to state that the definitions that are looked at indicate that the plain meaning of hit and run constitutes two elements and it is or is described as a run or fleeing from the scene after an accident. And when you look at this case, Judge, we simply do not have a fleeing from the scene of the accident by the unidentified vehicle. I think the Plaintiff will stipulate to that and accordingly the requisite elements are not there for plaintiff to assert a claim under the uninsured motorist coverage of his policy.

THE COURT: Hayne dealt with the unambiguous reference in the policy in effect, not the statute.

MR. GRADY: Well, it actually looks to the statute. It looks to 632.32 and one of the things it looked at was whether hit and run under 632.32 was ambiguous.

THE COURT: And in terms of the traffic code, there's no reference in that statute as far as hit and run, correct?

MR. GRADY: Are you referring, Judge, to 346.67?

THE COURT: Correct.

MR. GRADY: It does not specifically use the words hit and run in that statute. However, Judge, it is our position that for a duty to arise under 346.67 I think if you look at that statute it says the operator of any vehicle involved in an accident resulting in injury. We don't have that here. During initial investigation by unidentified driver they ask the young man whether he was injured. He denies any injury. More significantly, Judge, the New Berlin Police Department they themselves also didn't investigate this as a hit and run accident and clearly they are the ones that have the authority to do so under that statute. Also Judge, getting back to your question of whether Hayne looks at 632.32, I would refer the court to Hayne decision where the court stated, we conclude that the statutory language of section 632.32(4)(a) (2)(b) statutes is unambiguous.

THE COURT: Let me ask you a hypothetical, totally unrelated to the case, and I am not that good at making them up. This is something I observed a long time ago and I thought of as I was reviewing the briefs. One day at lunch, coming back from lunch here in

Waukesha, I saw a motorcycle coming down the hill that had the right of way but it was apparently an elderly gentlemen who didn't realize that they had the light and he didn't, etc., but made a very slow left turn in front of the motorcycle and the motorcycle in my estimation tried to stop but didn't; hit, grazed the back of the station wagon and I use the word grazed. It wasn't any big loud collision but the guy lost control and wound up on the pavement and the elderly gentlemen in my observation didn't realize he got hit or hit the cycle and just kept driving away very slowly as he had in the turn. So you know I provided information to the police that eventually got there. I don't know if they ever found the gentlemen. I don't know if they ever pursued 346.67 violation. He didn't stop because he didn't realize and I had a license number, so I presume they found him unlike what happened here, but do you think that that gentlemen driving slowly away, no flight, no traditional accelerating away would fall under Hayne decision or not?

MR. GRADY: Judge, distinguishing fact there I think you are speculating as to that gentlemen's acknowledge. For all you know he may have realized there was an accident and decided just to continue driving and hope that no one -- so we don't know.

THE COURT: I agree. Do we think there's a fleeing or running, hit and run?

MR. GRADY: A little hard to know Judge unless we know the knowledge that gentlemen had. What's unidentified here, the knowledge, that's unidentified what the driver had. They made inquiry as to whether this young man is injured and they are told that there's no injury and the young man assures them that they can leave.

THE COURT: What about damage to the bike? I mean these two people out walking, heard a crash of sorts before because neither Millers didn't see anything. They clearly heard something. There's nothing in the record to say there was any discussion. I think there's some reference to bent frame. No discussion about obligation or the discussion about damage to the bicycle.

MR. GRADY: I still think Judge that under those circumstances this is not a run. I mean clearly the young man assured them they could leave and under those circumstances--

THE COURT: Did he assure them they could leave or did he answer the question of people that were older than him that he was okay.

MR. GRADY: I think if you look at the

affidavit Judge--

THE COURT: I am trying to imagine this conversation between -- identified as three juveniles and a 13 year old kid.

MR. MENARD: That's the key Judge.

THE COURT: I'll let you but for right now I am asking Mr. Grady what this conversation looks like on a dark snowy street in New Berlin.

MR. GRADY: The affidavit of Sandra Miller states that a male occupant of subject car asked Zarder if he was okay to which the boy responded that your affiant overheard Mr. Zarder assure occupants of subject car that he was okay; that after Zarder assured the occupants of subject car that he was okay, the occupants returned to the subject car and drove away. Did not appear that the subject car was fleeing the accident scene. I guess Judge, did he assure them that they could leave? I don't know. What we do know is that he assured--

THE COURT: Aren't we inferring that the thirteen year old knows what the obligation is of somebody that hits them.

MR. GRADY: No, no Judge, but I think that clearly a thirteen year old has enough sense to say you know look.

THE COURT: Do you have a thirteen year old? I happen to have one.

MR. GRADY: I have had two 13 year olds too.

THE COURT: Sense is not necessarily synonymous.

MR. GRADY: That depends on the circumstances.

THE COURT: Mr. Menard.

MR. MENARD: Thank you Judge. Judge, I think the bigger picture on this case is Acuity's attempt to deny Zarder's uninsured coverage, which is mandated by the legislature and which includes the hit and run. We do have a thirteen year old boy here. One of the things that we know on this case is that we do have a statute that does require identification, proper identification. One thing that's being skipped over here, we have uninsured motorist coverage if in fact the person who left the scene identified themselves properly and had no insurance, we have uninsured motorist coverage. If they identify and gave them false information we have uninsured motorist coverage.

The fact that the New Berlin Police did not investigate this as a hit and run is totally irrelevant to the issue of whether or not there's coverage. Whether or not there are -- what was said at the scene of the accident, whether or not this kid

assured this gentlemen that he was fine or this person that he was fine. Frankly as far as -- my analysis is irrelevant to the analysis of whether or not there's uninsured coverage. Again whether or not there was contributory negligence on the part of Mr. Zarder that is referenced in Mr. Grady's reply brief is irrelevant to the analysis of whether or not there's coverage. What we have here Judge, is analysis in -- analysis that needs to be looked at more on public policy standpoint and these days as it relates to uninsured motorist. And the legislature has to go to great extremes, I believe, in making sure there is an inclusive coverage in regards to this matter. I believe that the purpose behind uninsured to include the hit and run statutes gives court no leeway or no exception to carve out a run or a fleeing of the scene or however you want to describe that an exception for not covering for uninsured motorist. So those are kind of my analysis. I think we analyzed the case and provide the court with a broad spectrum of how other courts have done this across the country. I will agree with Mr. Grady this is a case of "first express -- impression", I'm sorry, in Wisconsin with regards to specifically analyzing and taking out the word run and what that describes. However, I would point to the court what I think, which

is extremely important in the case is we have a statute. We have a statute on the books that requires an identification of the individual who's hit, regardless if that individual falls in that information, we do have a statute on the books that does require.

One other thing, I know this is not authorized or whatever, I find it really interesting in the Hayne case, if you look at Judge Abrahamson's dissent in there, and I think she finds out for other reasons why she doesn't believe there needs to be a contact. She does state it will not do as a majority subject to bootstrap the definition of hit into the meaning of hit and run and makes no more sense to isolate and define the word hit than it does to isolate and define the word run, a verb not normally associated with movement of an automobile. And I find that kind of interesting when we are trying to piecemeal this idea of hit and run. I understand why on a public policy the State of Wisconsin doesn't want the physical contact because I think there's a great injustice out there when people are making up false claims. Oh, I was hit. I couldn't find the guy. I ran into a tree or, whatever. There has to be that hit, and I think there's a lot more abuse of fraud and that's one of the determinations

that -- one of the public policies behind the contact rule in the Hayne case is because of fraud. And when we are dealing with the word run with that statute I just don't see the argument being made by Acuity for noncoverage because we will have coverage any ways here. You also are looking at a thirteen year old boy, and I dismiss Mr. Grady's analysis of yeah, I've raised a couple. To think that this kid has got an injury, a fracture to the leg and a forearm and we go through this, maybe in shock; no one is a medical doctor. I think that's also one of the reasons we have a statute there. This idea whether or not you are injured, what the extent of your injury is, what's to say soft tissue injury is more important than a broken leg or somebody in a coma. I am using extremes on this, but that's why we have this statute.

The Zarders did everything they could immediately following that. There was injury. They contacted New Berlin. They run a ad in the local paper now asking anybody if they know anything about this. The Millers, the people that seen this, had no idea. They never saw the accident. They just heard. So for all those reasons and what we had written in our brief and in the position we have taken, we would respectfully ask the court to deny Acuity's motion for dismissal.

THE COURT: I throw this out here to -- yes, I guess start with you Mr. Menard, while there is confusion here, the police didn't investigate this as a hit and run. I am looking at what's attached to defendant's brief here and there is a heading on the incident here, "Motor vehicle hit and run to bicycle. Motor vehicle PI Accident." I realize this is all after the fact, but you know I've read a lot of police reports in my day and seems to me the police did investigate this as a hit and run whether or not they would have ever issued charges under the traffic code, I think is exactly what we were talking about in my hypothetical; actually much better than my hypothetical because they did have assurance what you told or highlighted but I am just looking at the accident report and they also list property damage $700 for this bike. Seems a little high but I don't know what kind of bike it was and that's what's listed here. Says damaged front rim, so that aside it does seem to be their way they initialed it into their system.

MR. GRADY: Judge, we do have an affidavit from Jeffrey Kuehl who was the investigating police officer and he specifically stated, "That the December 9, 2005 incident was not investigated by the New Berlin Police Department as a hit and run accident because the

unidentified vehicle stopped at the scene and inquired as to Zachary Zarder's health and well-being, as did other witnesses to the accident."

THE COURT: Which is contradictory what's in the New Berlin paperwork that maybe Officer Kuehl's idea he was assisting New Berlin. In my estimation have a very good reputation of doing their job, let's put it that way, and some say above and beyond if you are especially on the receiving end, but I think we are in a manner of semantics and I will just throw out here that I don't think that that is here nor there because we have this additional statute that's been talked about, 632.32, which is not the expertise of the police department now this 346.67 obligation.

MR. GRADY: But now Judge as this court is well aware a basic rule of statutory construction when construing a statute, you construe such a way that you give effect to all words in the statute. What's the sense in the statute having the word run if it is not a key element in these type of circumstances. There's a reason why the legislature included that word in 632.32. And under the circumstances here we do not have a run.

THE COURT: Anything else you wanted to respond to? Mr. Menard were you done? I know I

interjected that question in between here.

MR. MENARD: Nothing further Judge.

THE COURT: I have another question for you Mr. Menard. This Widiss and Thomas article you submit in your brief, do you want to elaborate what the article is.

MR. MENARD: Mr. Grady would probably have more of an expertise in that particular treatise because that is the insurance defense companies, is my understanding, their Bible per se in regards to insurance coverage issues. And that's mostly across the nation. That is the treatise. I have also provided you with excerpts that I take out of that. Before I even started this lawsuit and before Lance was involved in the case, opposing counsel was Mr. Art Simpson and Mr. Simpson and this isn't the first time I have gone around with Mr. Simpson in regards to coverage issues. I had talked to--

THE COURT: Not surprised.

MR. MENARD: I talked to Mr. Simpson about her denial issue on this thing. One of the areas on case law that I provided to Acuity was this treatise on insurance coverage, and I think it is adequate. I take it for whatever it is. I think it is a well written treatise on what is out there and what has happened and

it provides the court, I believe, with some guidance as to what they're doing out there and frankly on point with the topic that we are here today on.

THE COURT: Thank you. Well, in any motion such as before the court today for summary judgment or this case in essence declaratory judgment regarding interpretation as it were of an insurance policy that in this case incorporates under the statute so-to-speak Wisconsin Statute 632.32 and particularly (4) that's at issue here. The court will construe facts in the case contrary to the position set forth, although that's incorrect (in the light most favorable to the opposing party.)

In this particular case there are not contradictory facts that seem to be a concurrence of all the parties, the salient facts whether a 13 year old boy was riding a bicycle on a municipal street or residential street in New Berlin on a dark evening in December of `05. Roads are described as snow or slushy and that a couple living nearby out walking or en route to visit some neighbors to go out to dinner hears a crash of sorts and also hears one young man say there is a car coming. This is after the fact, observation, that a boy we now know as Zach Zarder who is sitting by or on a snow bank with his bicycle in the street and a

vehicle that turned out to being occupied by three individuals described as juveniles by the Millers in their affidavit stop approximately a hundred feet from the alleged point of impact and comes and confers with Zach to see if he's injured. His response is clearly, no. That is heard by the Millers and apparently they make their own independent inquiry before they walk out but as we know after the fact, Zach has very objective injuries whether in the form of the fracture to his leg that apparently required two surgeries and a fracture to an arm. I don't know if his right leg, left arm, whatever. There is information here that Zach was in the process or jumped from the bike before impact as opposed to actually being struck by the vehicle. By the sounds heard by the Millers who are obviously not immediate parties by any means to this action, this is an accident of sorts in the area. So the issue of hit is not here. Unlike many of the cases that this court has reviewed, there is no phantom car or phantom driver. There is no issue of contact. It was heard and as put forth in the police report apparently did result in property damage. Now I would agree with the position of the defense, however, that even with property damage to the bicycle that apparently wasn't thought of on this dark street. There is no averment there is lighting in the

area. It was winter so presume it was cold out. The duty under 346.67 pursuant to that is not related to the property, although is duty upon causing property damage and apparently none of that was ever reported. However that is not the issue before the court. The issue ultimately boils down to 632.32 and the interpretation of that statute as really directed by this court or to this court by the Hayne decision that both counsel cited and commented on and in their briefs and now again here in court. There's also no dispute in the record that the Hayne decision was focused on the issue of a hit and whether that required physical contact between vehicles. But in answering that question and decision the court has no problem with the phrase hit and run as determined -- as used in that 632.32 statute to be unambiguous and despite the fact that there apparently was some dissension, if you will, and dissent between members of the Supreme court is also highlighted here today by the plaintiff's counsel. About that there is no doubt that the focus of the court's decision in that case was the issue of a hit and going really hand in hand with that is the matter that public policy also is factored into their decision. There was obviously considerable discussion about that. Logical stopping point and most particularly being a

breeding ground of sorts or fraudulent. There are one car accidents and nobody -- no witnesses. Where is the protection if you will to the insurance company against fraudulent claims and certainly a valid consideration for any court. In this case the dissimilarity is we didn't or we don't have any issue about striking and there's no real claim of fraud because this young man has very objectionable or objective, I should say, not objectionable, objective injuries. We don't have a sore neck. We don't have those kind of things. And that slightly differentiates this case from the Connecticut and Minnesota case, Sylvestre out of Connecticut; Lhotka case out of Minnesota that clearly supports the position of the defendant here today that there should be no claim or there is no reason to grant or pay out on the claim for uninsured motorist where like here the driver of the other vehicle did stop in those cases; like here the individuals who apparently were adults had no reportable injuries and therefore did not ask for or obtain identifying information.

On the flip side of that the plaintiff here makes representation of cases that have dealt with individuals who have also stopped but provided false information and therefore are unidentified drivers and in those circumstances recovery under an uninsured

portion of a policy was permitted. And to that end we have a situation where there is no case directly on point in the State of Wisconsin that deals with that particular situation.

I am prepared to find today that clearly there was no run under any definition of ambiguous, unambiguous. The car did stop. The three individuals, we don't know if there were more in the vehicle, but at least three individuals got out and spoke with this young man and it is not controverted at this particular time he told them that he was okay. Good news for the three occupants of the vehicle, especially the driver and they leave. They don't speed off. I have no reason to doubt the observation of Mrs. Miller and her assessment of this circumstance and perhaps that's not any different than what happened in Sylvestre and Lhotka. People got the information and left. The problem is, as I see it, that we do have a very young victim, if you will, and thirteen year old certainly capable of reason. This isn't a five year old child. I think there is probably expectation of that happening that attempt would be made to locate a parent, all kinds of things. What I find, however, is that the circumstances despite these rather significant injuries, whether it was snowing, it was cold weather, it was some

kind of fear by a thirteen year old dealing with all those adults surrounding him; for all we know he wasn't supposed to be riding his bike at night, who knows what goes through the mind, there was an answer of no or simply not being aware of it. There's no way to assess what was in his mind at this particular time based on this record. We do have a situation where once it was known as argued here by Plaintiff's counsel that apparently the family "acted" promptly. It was reported to the police. There was extensive investigation by the New Berlin Police Department and even though I asked the question earlier, I guess I didn't mean to infer that I think that is a crucial factor for the court's consideration here today in construing this insurance statute and policy. But at least there was an effort, I think, to assist Acuity and the Zarders in determining identification of this vehicle that at least stopped and made inquiry at the scene.

In terms of public policy, I think what I am struggling with, if you will, is the fact that I believe there has to be coverage in the case. And not because there was a claim but because we are dealing with a child and because of the nature of the accident, if you will, the damage to the bike. The answer I am sure that the operators of the vehicle wanted to hear

and because of the Mendonca -- I don't know if I am saying that right, the case cited by plaintiff and the position put forth in the so-called defense Bible for insurance companies from Widiss and Thomas. I know there is not an itemization of exactly how many jurisdictions have allowed for coverages in this kind of situation. I realize I do believe this is a case of first impression notwithstanding the Hayne vs. Progressive Northern decision. I think we just have a different fact situation and I don't know if the cliche about bad facts make bad law or good facts make good law, which one applies here. I am sure it depends on the side of the aisle that the parties are on but I am very satisfied there isn't a hint of fraud here.

I think one unsettled issue is the issue of negligence. Unlike Lhotka we don't have a passenger here. We have a driver on a highway who is required to follow the rules of the road and apparently there's no dispute that there wasn't a light on the bicycle but there is also averment that the vehicle was not staying in its lane of travel. So we do have that issue that needs to be resolved one way or another. We don't have that nice meaning couldn't possibly be neglect. That's what counsel are going to work out in maybe a jury or maybe in court, but I think there is under this fact

scenario here, we're not opening the flood gate to fraud. I'm not trying to legislate. Maybe there needs to be some legislation dealing with the obligations to the operator of a vehicle when a child is involved or maybe not. Maybe common sense is supposed to take care of that and maybe common sense should dictate that. The parents were contacted by Millers who have no obligation here but we have got kids looking after kids. We are following the assessment that it was three juveniles who involved -- presumably involved, presumably newly licensed driver or with maybe limited experience in terms of the rules of the road in terms of something beyond what minimum is required under the statute and clearly 346.67 imposes the minimum on. There are certainly more things that can be done in the situation that at least moral or in common sense fashion do occur. But rather than getting ahead of myself or doing something that is not within the purview of this court, I am confining my decisions today to very limited facts of this case. The fact that here is the Massachusetts or the Mendonca case that I think is favorable to the Plaintiff and in my assessment of the facts of this case the reason we have this kind of statute, not only keeping in mind a prohibition of fraud to insurance companies but the purpose of that statute

is to protection of persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. The question -- the argument that the reason this court is in effect finding that this unidentified vehicle is synonymous with uninsured is partially or totally the fault of the plaintiff here, the thirteen year old, but that's a hard label to stick on someone who is thirteen and who has just suffered a substantial injury, two bones in any body or two parts of the body and I don't think that that is equitable with protecting people in the case and so I believe for purposes of 632.32 does trump anything else, if you will, as a need for specific facts in the case and for all those reasons the Court will deny the motion of the defense and suggest that we will continue then with the scheduling order, which means I will see you gentlemen Friday, April 11th for final pretrial, and I assume you are waiting the decision here today as far as mediation is concerned.

MR. GRADY: Actually Judge, we have put over all discovery too as well.

THE COURT: Do you want to talk about a different date then? We might as well. I have time here. I can readjust scheduling to accommodate this, and I assume you may want to a consider appeal.

MR. GRADY: We are going to appeal.

THE COURT: I had a hunch no matter what I did that's going to happen. That's very good.

MR. MENARD: Then do we need to--

THE COURT: Are you going to do interlocutory here?

MR. GRADY: Yeah.

THE COURT: Would you know by April 11th.

MR. GRADY: I doubt it based on my experience.

THE COURT: Let me -- let's cancel the April 11. How about give a date in early, mid May.

MR. GRADY: That's fine, Judge.

THE COURT: And when the appeal is filed we can take it off. If not, we can deal -- we just probably hold another scheduling conference. We will calendar it for my tracking purposes as final pretrial. Okay.

I am looking May 12th in the afternoon. Looks like 3:45. (Everyone agrees.)

MR. GRADY: Will just be a scheduling conference?

THE COURT: It is going to be tracked as adjourned final pretrial. It sounds like if you don't pursue appeal or maybe by then you will have a little more discovery and you can tell me exactly what time

frame you are going to need. But you won't do more discovery unless you decide on that. We will set some other dates.

MR. MENARD: Thank you, Judge.

MR. GRADY: Assume to Plaintiff will draft the order.

THE COURT: They prevailed.

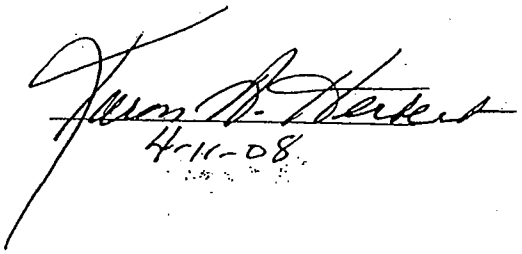
(End of proceedings.)

STATE OF WISCONSIN)

)SS

WAUKESHA COUNTY)

I, Karen A. Herbert, Court Reporter for Circuit Court Branch 12, Waukesha County, Wisconsin, do hereby certify that the foregoing is a true and correct transcript of my stenographic notes in the above-entitled matter.



STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES and GLORY ZARDER
14285 West Park Avenue
New Berlin, WI 53151

Case No.
Case Code: 30101
Personal Injury - Auto

ZACHARY ZARDER
By Robert C. Menard
Guardian Ad Litem
14285 West Park Avenue
New Berlin, WI 53151

Plaintiffs,

vs.

ACUITY, A MUTUAL INSURANCE COMPANY
c/o Its Registered Agent
James Loiacono
2800 South Taylor Drive
Sheboygan, WI 53081

HUMANA INSURANCE COMPANY
c/o Its Registered Agent
SCS-Lawyers Incorporating Service Company
25 West Main Street
Madison, WI 53703

Defendants.

SUMMONS

THE STATE OF WISCONSIN

TO DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY NOTIFIED that the plaintiffs named above have filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court

may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is:

Clerk of Circuit Court
Waukesha County Courthouse
515 West Moreland Boulevard
Waukesha, WI 53188

and to the law firm of Derzon & Menard, S.C., plaintiff's attorneys, whose address is:

Attorney Robert C. Menard
Derzon & Menard, S.C.
400 East Wisconsin Avenue, Suite 500
Milwaukee, Wisconsin 53202-4469

You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated at Milwaukee, Wisconsin this 20th day of April, 2007.

DERZON & MENARD, S.C.
Attorneys for Plaintiffs.

By: Robert C. Menard
State Bar No. 101012866

POST OFFICE ADDRESS:
400 East Wisconsin Avenue
Suite 500
Milwaukee, WI 53202
(414) 276-2100

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER,
GLORY ZARDER, and
ZACHARY ZARDER,
By Robert C. Menard,
Guardian Ad Litem

Plaintiffs,

vs.

ACUITY, A MUTUAL INSURANCE COMPANY, and
HUMANA INSURANCE COMPANY,

Defendants.

Case No.
Case Code: 30101
Personal Injury - Auto

COMPLAINT

NOW COME the plaintiffs by their attorneys, Derzon & Menard, S.C., by Robert C. Menard, and as and for a complaint against the above-named defendants, allege and show to the court as follows:

PARTIES

1. That the plaintiffs, James and Glory Zarder, are adult individuals residing at 14285 West Park Avenue, in the City of New Berlin, County of Waukesha, State of Wisconsin, 53151; and that at all times material herein are the parents and legal guardians of the minor plaintiff, Zachary Zarder.

2. That the plaintiff, Zachary Zarder, is a minor, age 15 (1/1/92) and resides at the same address as his parents, James and Glory Zarder, and he brings this action by his Guardian Ad Litem, Attorney Robert C. Menard.

3. That the defendant, Acuity, A Mutual Insurance Company, is an insurance company duly

organized and existing under the laws of the State of Wisconsin.

4. That the defendant, Humana Insurance Company, at all times is a foreign corporation, duly licensed to do business in the State of Wisconsin.

FIRST CAUSE OF ACTION
UNINSURED MOTORIST CLAIM

As and for a cause of action against the defendant, Acuity, A Mutual Insurance Company, the plaintiffs allege and show to the court as follows:

5. Repeat and re-allege all the allegations contained in paragraphs 1 through 4 of this complaint as if the same were set forth herein.

6. That on the 9th day of December, 2005, the plaintiff, Zachary Zarder, was operating his bicycle in a safe and lawful manner in the City of New Berlin, County of Waukesha, State Wisconsin and that at the same time and place, an unidentified vehicle was being operated in a negligent manner causing the motor vehicle that he/she was operating to strike the plaintiff, Zachary Zarder's bicycle, causing the plaintiff, Zachary Zarder, to be severely injured as more fully described herein.

7. That the foregoing act of negligence on the part of the unidentified vehicle was the direct and proximate cause of the injuries and damages sustained by the plaintiff, Zachary Zarder.

8. That the defendant, Acuity, A Mutual Insurance Company, is engaged in the business of writing and selling motor vehicle uninsured insurance; that prior to the date of the accident herein, to wit, the 9th day of December, 2005, the defendant insurance company issued its policy of insurance to the plaintiffs, affording them with uninsured motorist insurance and which policy of uninsured motorist insurance, policy number C80564-5, was in full force and effect at the time of the accident; that such policy of uninsured motorist insurance provided that said defendant insurance company

would pay all sums incurred for persons sustaining bodily injuries caused as a result of the negligent acts of unidentified vehicles; and that said insurance company is a proper defendant herein.

9. That as a result of the foregoing act of negligence of the unidentified vehicle, the plaintiff, Zachary Zarder, sustained permanent injuries to his body; that he has suffered emotional distress and anguish of mind; that he has suffered pain and will continue to suffer pain for an indefinite time in the future; that he was required to seek hospital and medical aid and to expend large sums of money for same; that he may be required to seek additional and continued medical aid in the future and to expend large sums of money for same; and that he was unable to attend to his normal activities for a period of time and continues to be unable to attend to his normal activities, all to his damage, in an amount to be determined.

SECOND CAUSE OF ACTION
BAD FAITH CLAIM

As and for a cause of action against the defendant, Acuity, A Mutual Insurance Company, the plaintiffs allege and show to the court as follows:

10. Repeat and re-allege all the allegations contained in paragraphs 1 through 9 of this complaint as if the same were set forth herein.

11. That the defendant, Acuity, A Mutual Insurance Company, at all times material hereto, had a duty to act in good faith as to all aspects of its dealing with plaintiffs in regard to the policy of uninsured motorist coverage, including its investigation into whether plaintiffs ' claim is covered under the policy.

12. That the defendant, Acuity, A Mutual Insurance Company, did not have a reasonable basis for denying payment of coverage afforded under the policy and its denial was with knowledge

or reckless disregard of the lack of a reasonable basis to deny the plaintiffs' claim, and therefore the denial was made in bad faith.

13. That as a direct and proximate result of the defendant, Acuity, A Mutual Insurance Company's bad faith, the plaintiffs have sustained emotional distress, inconvenience, incurred attorneys' fees and other costs of litigation and will continue to do so for an indefinite time into the future.

THIRD CAUSE OF ACTION
SUBROGATION CLAIM

14. Repeat and re-allege all the allegations contained in paragraphs 1 through 13 of this complaint as if the same were set forth herein.

15. That the defendant, Humana Insurance Company, to the best of the plaintiffs' knowledge, information and belief, have paid medical expense benefits or will pay medical expense benefits in the future on behalf of plaintiff, Zachary Zarder, resulting from the injuries he sustained in the hit and run accident on December 9, 2005. That the defendant, Humana Insurance Company, may have subrogation rights against the defendant, Acuity, A Mutual Insurance Company, which the plaintiffs request be determined in this action pursuant to Wis. Stats. §803.03(2).

16. That in the event the defendant, Humana Insurance Company, fails, refuses or neglects to assert their subrogation rights in a timely fashion in this action, the plaintiffs request the Court to dismiss with prejudice any subrogation claim of the defendant, Humana Insurance Company, and allow plaintiffs to recover that portion of any claim which may have been subject to subrogation.

FOURTH CAUSE OF ACTION
LOSS OF CONSORTIUM CLAIM

As and for a cause of action against the defendant, Acuity, A Mutual Insurance Company,

the plaintiffs, James and Glory Zarder, allege and show to the court as follows:

17. Repeat and reallege all the allegations contained in paragraphs 1 through 16 of this complaint as if the same is set forth herein.

18. That as a direct and proximate result of the alleged incident, the plaintiffs, James and Glory Zarder, were obliged and will continue to be obliged to expend monies for the medical care and attention for the plaintiff, Zachary Zarder, their son, and will further suffer the loss of society and companionship of the plaintiff, Zachary Zarder, their son, all to their damage in an amount to be determined.

WHEREFORE, the plaintiffs, James, Glory and Zachary Zarder, demand judgment against the defendant, Acuity, A Mutual Insurance Company and Humana Insurance Company, as follows:

1. On behalf of the plaintiffs, on the First Cause of Action, an amount to be determined;

2. On behalf of the plaintiffs, on the Second Cause of Action, an amount to be determined;

3. On behalf of the plaintiffs, on the Third Cause of Action, for an order determining the subrogation claims of the defendant, Humana Insurance Company, in accordance with Wisconsin Law.

4. Alternatively, for an order dismissing with prejudice the subrogation rights of the defendant, Humana Insurance Company, should they fail, refuse or neglect to assert their subrogation rights in a timely fashion in this action.

5. On behalf of the plaintiffs, James and Glory Zarder, on the Fourth Cause of Action, an amount to be determined;

6. Plaintiffs' costs, disbursements and attorney's fees associated with this action; and

7. For such other relief as may be just and equitable.

Dated at Milwaukee, Wisconsin this 20th day of April, 2007.

DERZON & MENARD, S.C.
Attorneys for Plaintiffs

By: Robert C. Menard
State Bar No. 01012866

POST OFFICE ADDRESS:
400 East Wisconsin Avenue, #500
Milwaukee, WI 53202
(414) 276-2100

April 4, 2007

Regarding: Zachary Zarder
DOB: 01/01/1992
DOI: 12/09/2005

Diagnosis #1: Pedestrian vs. Automobile
Diagnosis #2: Right Distal Radius Fracture
Diagnosis #3: Left Distal Femur Intraarticular Fracture

Zachary is a 14 year old male who was struck by a car while riding his bike on December 9, 2005. He sustained a right forearm fracture as well as a left distal femur fracture. His right radius fracture was treated with a short arm cast and this resolved uneventfully. He also had a left distal femoral fracture which extended into his knee joint. He underwent a diagnostic arthroscopy of his left knee under general anesthesia which was done on December 28, 2005. He was then placed into a long leg cast for treatment of his left distal femur fracture. His femur fracture healed but he had persistent loss of range of motion of his left knee. He required a second operative procedure on May 26, 2006 for removal of a bony prominence on the distal aspect of his left femur which was a direct result of the healing of his original femur fracture. Zachary continued to be on activity restrictions until August 28, 2006. He has done extensive physical therapy to try to regain all of his left knee range of motion and strength.

At his most recent visit on March 15, 2007 he reported some knee pain at the extreme of knee flexion but did not have any significant limitations on his ability to do activities. His femur fracture has healed well without any evidence of long term deformity. I have released him to do all activities without any limitations. He should not require any further follow up with me.

In summary, Zachary Zarder did have a prolonged recovery period from his left distal femur fracture and continues to have some mild left knee pain with certain activities. He will likely have permanent mild loss of range of motion of his left knee. I don't think this will result in any significant limitations in his activities of daily living, vocational activities, school or work. This may cause some mild limitations of high level sports and other activities that require maximal knee range of motion. I am not recommending any other treatment and don't anticipate the need for further medical therapy. He is unlikely to require any type of bracing or other assisted devices for activity. He is also unlikely to have any growth related abnormalities related to these injuries. He is unlikely to develop arthritis due to his injuries. The injuries and limitations stated above are direct results of the injuries sustained on December 9, 2005. All of these statements are within a reasonable degree of medical certainty.

M.D.

Roger Lyon, MD
Pediatric Orthopaedic Surgery

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZARCHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v.

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

COPY

Case No. 07 CV 1146

ANSWER AND AFFIRMATIVE DEFENSES

NOW COMES the Defendant, Acuity, A Mutual Insurance Company, by its attorneys, Grady, Hayes & Neary, LLC, and as and for an Answer to the Complaint, responds as follows:

1. That the plaintiffs, James and Glory Zarder, are adult individuals residing at 14285 West Park Avenue, in the City of New Berlin, County of Waukesha, State of Wisconsin, 53151, and that at all times material herein are the parents and legal guardians of the minor plaintiff, Zachary Zarder.

In answer to paragraph 1 of the Complaint, admit.

2. That the plaintiff, Zachary Zarder, is a minor, age 15 (1/1/92) and resides at the same address as his parents, James and Glory Zarder, and he brings this action by his Guardian Ad Litem, Attorney Robert C. Menard.

In answer to paragraph 2 of the Complaint, admit.

3. That the defendant, Acuity, A Mutual Insurance Company, is an insurance company duly organized and existing under the laws of the State of Wisconsin.

In answer to paragraph 3 of the Complaint, admit.

4. That the defendant, Humana Insurance Company, at all times is a foreign corporation, duly licensed to do business in the State of Wisconsin.

In answer to paragraph 4 of the Complaint, admit.

ANSWERING FIRST CAUSE OF ACTION
UNINSURED MOTORIST CLAIM

5. Repeat and re-allege all the allegations contained in paragraphs 1 through 4 of this complaint as if the same were set forth herein.

In answer to paragraph 5 of the Complaint, reallege and incorporate herein by reference as though fully set forth all responses to paragraphs 1 through 4 of the Complaint.

6. That on the 9th day of December, 2005, the plaintiff, Zachary Zarder, was operating his bicycle in a safe and lawful manner in the City of New Berlin, County of Waukesha, State Wisconsin and that at the same time and place, an unidentified vehicle was being operated in a negligent manner causing the motor vehicle that he/she was operating to strike the plaintiff, Zachary Zarder's bicycle, causing the plaintiff, Zachary Zarder, to be severely injured as more fully described herein.

In answer to paragraph 6 of the Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

7. That the foregoing act of negligence on the part of the unidentified vehicle was the direct and proximate cause of the injuries and damages sustained by the plaintiff, Zachary Zarder.

In answer to paragraph 7 of the Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

8. That the defendant, Acuity, A Mutual Insurance Company, is engaged in the business of writing and selling motor vehicle uninsured insurance; that prior to the date of the accident herein, to wit, the 9th day of December, 2005, the defendant insurance company issued its policy of insurance to the plaintiffs, affording them with uninsured motorist insurance and which policy of uninsured motorist insurance, policy number C80564-5, was in full force and effect at the time of the accident; that such policy of uninsured motorist insurance provided that said defendant insurance company would pay all sums incurred for persons sustaining bodily injuries caused as a result of

the negligent acts of unidentified vehicles; and that said insurance company is a proper defendant herein.

In answer to paragraph 8 of the Complaint, admit that Defendant, Acuity, A Mutual Insurance Company, issued a policy of insurance that was in full force and effect at the time of the alleged accident; further answering said paragraph, affirmatively allege that said policy of insurance is subject to all of its terms, conditions, limitations, definitions, and exclusions; further answering said paragraph, deny that under the circumstances of this case the policy in question provides uninsured motorist insurance coverage benefits since the vehicle that allegedly struck the Plaintiff, Zachary Zarder, did not constitute a "hit and run" vehicle under the law; further answering said paragraph, deny all remaining allegations contained therein.

9. That as a result of the foregoing act of negligence of the unidentified vehicle, the plaintiff, Zachary Zarder, sustained permanent injuries to his body; that he has suffered emotional distress and anguish of mind; that he has suffered pain and will continue to suffer pain for an indefinite time in the future; that he was required to seek hospital and medical aid and to expend large sums of money for same; that he may be required to seek additional and continued medical aid in the future and to expend large sums of money for same; and that he was unable to attend to his normal activities for a period of time and continues to be unable to attend to his normal activities, all to his damage, in an amount to be determined.

In answer to paragraph 9 of the Complaint, deny.

ANSWERING SECOND CAUSE OF ACTION
BAD FAITH CLAIM

10. Repeat and re-allege all the allegations contained in paragraphs 1 through 9 of this complaint as if the same were set forth herein.

In answer to paragraph 10 of the Complaint, reallege and incorporate herein by reference as though fully set forth all responses to paragraphs 1 through 9 of the Complaint.

11. That the defendant, Acuity, A Mutual Insurance Company, at all times material hereto, had a duty to act in good faith as to all aspects of its dealing with plaintiffs in regard to the policy of uninsured motorist coverage, including its investigation into whether plaintiffs ' claim is covered under the policy.

In answer to paragraph 11 of the Complaint, admit.

12. That the defendant, Acuity, A Mutual Insurance Company, did not have a reasonable basis for denying payment of coverage afforded under the policy and its denial was with knowledge or reckless disregard of the lack of a reasonable basis to deny the plaintiffs' claim, and therefore the denial was made in bad faith.

In answer to paragraph 12 of the Complaint, deny.

13. That as a direct and proximate result of the defendant, Acuity, A Mutual Insurance Company's bad faith, the plaintiffs have sustained emotional distress, inconvenience, incurred attorneys' fees and other costs of litigation and will continue to do so for an indefinite time into the future.

In answer to paragraph 13 of the Complaint, deny.

ANSWERING THIRD CAUSE OF ACTION
SUBROGATION CLAIM

14. Repeat and re-allege all the allegations contained in paragraphs 1 through 13 of this complaint as if the same were set forth herein.

In answer to paragraph 14 of the Complaint, reallege and incorporate herein by reference as though fully set forth all responses to paragraphs 1 through 13 of the Complaint.

15. That the defendant, Humana Insurance Company, to the best of the plaintiffs ' knowledge, information and belief, have paid medical expense benefits or will pay medical expense benefits in the future on behalf of plaintiff, Zachary Zarder, resulting from the injuries he sustained in the hit and run accident on December 9, 2005. That the defendant, Humana Insurance Company, may have subrogation rights against the defendant, Acuity, A Mutual Insurance Company, which the plaintiffs request be determined in this action pursuant to Wis. Stats. §803.03(2).

In answer to paragraph 15 of the Complaint, deny knowledge or information sufficient to form a belief as to the truth of allegations contained therein.

16. That in the event the defendant, Humana Insurance Company, fails, refuses or neglects to assert their subrogation rights in a timely fashion in this action, the plaintiffs request the Court to dismiss with prejudice any subrogation claim of the defendant, Humana Insurance Company, and allow plaintiffs to recover that portion of any claim which may have been subject to subrogation.

In answer to paragraph 16 of the Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

ANSWERING FOURTH CAUSE OF ACTION
LOSS OF CONSORTIUM CLAIM

17. Repeat and reallege all the allegations contained in paragraphs 1 through 16 of this complaint as if the same is set forth herein.

In answer to paragraph 17 of the Complaint, reallege and incorporate herein by reference as though fully set forth all responses to paragraphs 1 through 16 of the Complaint.

18. That as a direct and proximate result of the alleged incident, the plaintiffs, James and Glory Zarder, were obliged and will continue to be obliged to expend monies for the medical care and attention for the plaintiff, Zachary Zarder, their son, and will further suffer the loss of society and companionship of the plaintiff, Zachary Zarder, their son, all to their damage in an amount to be determined.

In answer to paragraph 18 of the Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

AFFIRMATIVE DEFENSES

NOW COMES the Defendant, Acuity, A Mutual Insurance Company, by its attorneys, Grady, Hayes & Neary, LLC, and as and for Affirmative Defenses to the Complaint, allege as follows:

1. As and for a first affirmative defense, allege that any injuries or damages allegedly sustained by the Plaintiffs were solely and proximately caused and contributed

to by the Plaintiffs' own contributory negligence. The nature of such negligence needs to be further ascertained and specified following discovery proceedings.

2. As and for a second affirmative defense, allege that any damages allegedly sustained by the Plaintiffs were solely and proximately caused and contributed by the negligence of third parties.

3. As and for a third affirmative defense, allege that any acts or omissions on the part of this answering Defendant are relieved and excused by the superceding and intervening acts and omissions of other individuals and/or entities.

4. As and for a fourth affirmative defense, allege upon information and belief that the Plaintiffs may have failed to mitigate their damages.

5. As and for a fifth affirmative defense, allege upon information and belief that the Plaintiffs' Complaint fails to state a claim upon which relief can be granted as to this answering Defendant.

6. As and for a sixth affirmative defense, allege upon information and belief that the Plaintiffs may have received benefits pursuant to a policy or plan of health or medical insurance and that, to the extent of any payments so made, such insurers or groups are subrogated and necessary parties hereto.

7. As and for a seventh affirmative defense, allege upon information and belief that the Court may lack personal jurisdiction over the Defendants due to insufficiencies in the service of process.

8. As and for an eighth affirmative defense, affirmatively allege that the insurance policy in question does not provide uninsured motorist insurance coverage

benefits to the Plaintiffs under the circumstances of this case since the vehicle in question does not constitute a "hit and run" vehicle under the law.

WHEREFORE, the Defendant, Acuity, A Mutual Insurance Company, demands judgment as follows:

A. For a dismissal of the Complaint on the merits;

B. For a declaratory judgment from the Court that the policy of insurance issued by Defendant Acuity, A Mutual Insurance Company, does not provide uninsured motorist coverage benefits to the Plaintiffs since the vehicle in question does not constitute a "hit and run" vehicle under the law;

C. For an award of costs, disbursements and attorneys' fees incurred in the defense of this lawsuit; and

D. For such other relief as the Court deems just and appropriate.

Dated at Waukesha, Wisconsin this 30th day of April, 2007.

GRADY, HAYES & NEARY, LLC
Attorneys for Defendants

By: _____
Lance S. Grady
State Bar No. 1012521

P.O. ADDRESS:
N14 W23777 Stone Ridge Drive
Suite 200
Waukesha, WI 53188
(262) 347-2001
(262) 347-2205 fax

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v.

Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

NOTICE OF MOTION AND MOTION FOR DECLARATORY JUDGMENT

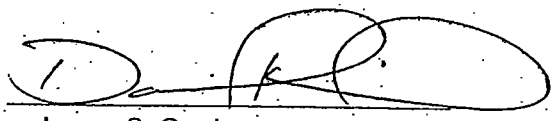
TO: All Counsel of Record

PLEASE TAKE NOTICE that the Defendant, ACUITY, A Mutual Insurance Company, by its attorneys, Grady, Hayes & Neary, LLC, will move that branch of the Circuit Court of Waukesha County presided over by the Honorable Kathryn W. Foster in her courtroom in the Waukesha County Courthouse, in the City of Waukesha, County of Waukesha, State of Wisconsin, on the 17th day of March, 2008, at 10:00 a.m. or as soon thereafter as counsel can be heard, for an Order declaring the absence of uninsured motorist coverage to the Plaintiffs, pursuant to Wisconsin's Declaratory Judgments Act and applicable law.

This motion is based upon the papers and pleadings filed herein, as well as the attached Brief in Support of Motion for Declaratory Judgment, Affidavit of Sandra Miller, Affidavit of Edward Miller, Affidavit of Jeffrey Kuehl and Affidavit of Daniel K. Miller.

Dated at Waukesha, Wisconsin this 11th day of January, 2008.

GRADY, HAYES & NEARY, LLC
Attorneys for Defendant,
ACUITY, A Mutual Insurance Company

By: 

Lance S. Grady
State Bar No. 1012521
Daniel K. Miller
State Bar No. 1041473

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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v. Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT

NOW COMES the Defendant, ACUITY, A Mutual Insurance Company, by its attorneys, Grady, Hayes & Neary, LLC, and as and for its Brief in Support of Motion for Declaratory Judgment, states as follows:

INTRODUCTION

The above-captioned action arises out of a December 9, 2005, motor vehicle accident involving the Plaintiff, Zachary Zarder. The Plaintiffs allege causes of action against the Defendant, ACUITY, a Mutual Insurance Company ("ACUITY") for uninsured motorists benefits and bad faith.[1]

ACUITY, by its attorneys, respectfully submits that a declaratory order is proper in the above-captioned action, denying insurance coverage for the Plaintiffs' claims. As

[1] The Plaintiffs, James and Glory Zarder, the parents of Zachary Zarder, are also seeking a loss of consortium claim against ACUITY.

grounds, ACUITY submits that the facts and circumstances giving rise to the above-captioned action do not evidence a hit-and-run accident, as that phase is understood under the policy of insurance applicable to this matter and Wisconsin law.

FACTS

A. The Accident.

The Plaintiffs, James and Glory Zarder, reside at 14285 West Park Avenue, New Berlin, Waukesha. *See* Complaint at ¶ 1. Their son, Zachary Zarder ("Zarder"), resides at the same address. *Id.* at ¶ 2.

Regarding the alleged accident, the Complaint claims:

> That on the 9th day of December, 2005, the plaintiff, Zachary Zarder, was operating his bicycle in a safe and lawful manner in the City of New Berlin, County of Waukesha, State of Wisconsin and that at the same time and place, an unidentified vehicle was being operated in a negligent manner causing the motor vehicle that he/she was operating to strike the plaintiff, Zachary Zarder's bicycle, causing the plaintiff, Zachary Zarder, to be severely injured as more fully described herein.

See Complaint at ¶ 6.

At the time of the alleged incident, Edward Miller and his wife, Sandra, were walking outside of their residence, which is located in the 2000 block of South East Lane in New Berlin. *See* Affidavit of Edward Miller at ¶¶ 1-3 and Affidavit of Sandra Miller at ¶¶ 1-2, 4, 7. While walking with her husband, Sandra Miller heard a young male voice state that "a car is coming." *See* Aff. of S. Miller at ¶ 4. After hearing the statement, Sandra Miller observed a vehicle driving east/northeast on South East Lane and, thereafter, heard a crash of metal. *Id.* at ¶ 5. The vehicle did not appear to be traveling fast or recklessly. *Id.* at ¶ 6.

Within seconds after hearing the crash, Sandra Miller and her husband arrived at the area where the sound occurred. *Id.* at ¶ 7. There, the Millers observed Zarder sitting on a snow bank near the mailbox at the end of the driveway at 2000 South East Lane. *Id.* at ¶ 7. *See also* Aff. of E. Miller at ¶ 6.

As the Millers reached the spot where Zarder was seated, they observed the unidentified vehicle stop approximately one hundred feet north/northeast of the driveway. *Id.* at ¶ 8. *See also* Aff. of E. Miller at ¶ 7. The occupants of the unidentified vehicle exited the vehicle, walked towards Zarder and questioned Zarder concerning his well-being. *Id.* at ¶ 9. The occupants of the unidentified vehicle asked Zarder if he was okay, to which Zarder responded "yes." *Id.* at ¶ 10. *See also* Aff. of E. Miller at ¶ 11.

After Zarder assured the occupants of the unidentified vehicle that he was okay, the occupants returned to the vehicle and drove away. *Id.* at ¶ 12. *See also* Aff. of E. Miller at ¶ 12. The unidentified vehicle did not flee the scene. *Id.*

Like the occupants of the unidentified vehicle, Sandra Miller, too, asked Zarder if he was hurt. Zarder responded in the negative, assuring Miller that he was uninjured. *Id. at* ¶ 13.

Sandra Miller also inquired whether the unidentified vehicle hit Zarder. *Id.* at ¶ 14. Zarder informed Miller that the unidentified vehicle did not hit him and, rather, hit his bike. According to Zarder, he jumped off of his bicycle before the unidentified vehicle hit the bike. *Id.* After Zarder again assured Miller that he was uninjured, Miller and her husband continued to their neighbors' home. *Id.* at ¶ 15, 18. See *also* Aff. of E. Miller at ¶ 14.

Accident report materials from New Berlin Police Department consistent with the observations by the Millers note, in the Accident Report's "Narrative" section, that:

> UNKNOWN DRIVER OF VEH. # 1 CHECKED ON BICYCLIST WHO ADVISED THAT HE WAS NOT INJURED.

Affidavit of Jeffrey Kuehl, Exh. A. Additional information detailed in the same report reveals that Zachary Zarder confirmed the occupants of the vehicle "immediately checked on his wellbeing[,]" and Zarder "told the occupants of the vehicle that he was not injured and that they could leave." *Id.* For these reasons, the New Berlin Police Department did not investigate the December 9, 2005, accident as a hit-and-run accident. *Id.* at ¶5.

B. **The ACUITY Policy.**

ACUITY issued a policy of insurance to the Plaintiffs, James and Glory Zarder, with a policy term of August 15, 2005 to August 15, 2006 (the "ACUITY Policy"). *See* Affidavit of Daniel K. Miller, Exh. B. The ACUITY Policy contains requirements relating to the provision of uninsured motorists coverage. Specifically, the ACUITY Policy provides that:

> **SECTION III – UNINSURED MOTORISTS AND UNDERINSURED MOTORISTS**
>
> **PART H – UNINSURED MOTORISTS**
>
> **We** will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle. Bodily injury** must be sustained by an **insured person** and must be caused by accident and result from the ownership, maintenance or use of the **uninsured motor vehicle**....

Id., Exh. B at Page 19 of 24 (emphasis in original).

Under its Uninsured Motorists part, the ACUITY Policy contains a detailed definition of "uninsured motor vehicle." "Uninsured motor vehicle" includes various categories of vehicle, including "hit-and-run" vehicles. In this regard, the ACUITY Policy states that:

> As used in this Section:
>
> * * *
>
> 2. **"Uninsured motor vehicle"** means a land motor vehicle or trailer which is:
>
> * * *
>
> c. A hit-and-run vehicle whose operator or owner is unknown and which strikes:
>
> (1) **You** or a **relative;**
> (2) A vehicle which **you** or a **relative** are **occupying;**
> (3) **Your insured car;** or
> (4) Another vehicle which, in turn, hits:
> (a) **You** or any **relative;**
> (b) A vehicle which **you** or any **relative** are **"occupying";** or
> (c) **Your insured car....**

Id., Exh. B at Page 19 of 24 and 20 of 24 (emphasis in original).

ARGUMENT

The above-captioned action was commenced with the filing of the Summons and Complaint on or about April 23, 2007. *See* Complaint. Against ACUITY, the Plaintiffs allege two principal claims, an uninsured motorist claim and a bad faith claim. With respect to the uninsured motorist claim, the Plaintiffs allege that:

> [T]he defendant, Acuity, A Mutual Insurance Company, is engaged in the business of writing and selling motor vehicle uninsured insurance; that prior to the date of the accident herein, to wit, the 9th day of December, 2005, the defendant insurance company issued its policy of insurance to the plaintiffs, affording them with uninsured motorist insurance and which policy of uninsured motorist insurance, policy number C80564-5, was in

full force and effect at the time of the accident; that such policy of uninsured motorist insurance provided that said defendant insurance company would pay all sums incurred for persons sustaining bodily injuries caused as a result of the negligent acts of unidentified vehicles; and that said insurance company is a proper defendant herein.

Id. at ¶ 8. With respect to the bad faith claim, the Plaintiffs allege that:

> [T]he defendant, Acuity, A Mutual Insurance Company, did not have a reasonable basis for denying payment of coverage afforded under the policy and its denial was with knowledge or reckless disregard of the lack of a reasonable basis to deny the plaintiffs' claim, and therefore the denial was made in bad faith.

Id. at ¶ 12.

ACUITY respectfully submits that a declaratory order is warranted, finding no insurance coverage for the Plaintiffs under the ACUITY Policy. Specifically, the unidentified vehicle involved in the December 9, 2005 incident is not an "uninsured motor vehicle" under the ACUITY Policy, given that the December 9 incident was not a hit-and-run accident.

I. DECLARATORY JUDGMENT STANDARDS.

Wisconsin's Uniform Declaratory Judgments Act is an appropriate vehicle for use in resolving the insurance coverage issues presented by this motion. *See* Wis. Stat. § 806.04. Section 806.04 provides relief that is "'primarily anticipatory or preventative in nature[,]'" and our Supreme Court has endorsed an insurer's use of a declaratory judgment action as one method by which the insurer may obtain a coverage determination. *Fire Insurance Exchange v. Basten*, 202 Wis. 2d 74, 85-90, 549 N.W.2d 690 (1996) (quoting *Lister v. Board of Regents*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976)).

Section 806.04 "gives a court power to define the rights and legal relationship of parties who are arguably affected by a writing in the nature of a contract." *Loy v. Bunderson*, 107 Wis. 2d 400, 407, 320 N.W.2d 175 (1982). For this reason, the construction of insurance policies "fall within the express ambit of the statute." *Id.*[2]

Loy v. Bunderson is the leading case in Wisconsin concerning declaratory judgments. 107 Wis. 2d 400, 320 N.W.2d 175 (1982). "*Loy* emphasized that a declaratory judgment is fitting when a controversy is justiciable." *Putnam v. Time Warner Cable of Southeastern Wis. P'ship.*, 2002 WI 108, ¶ 41, 255 Wis. 2d 447, 649 N.W.2d 626.

According to *Loy*, a controversy is justiciable when:

> '(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
> (2) The controversy must be between persons whose interests are adverse.
> (3) The party seeking declaratory relief must have a legal interest in the controversy–that is to say, a legally protectible interest.
> (4) The issue involved in the controversy must be ripe for judicial determination.'

Id. (quoting *Loy v. Bunderson*, 107 Wis. 2d at 410). Where "all four factors are satisfied, the controversy is 'justiciable,' and it is proper for a court to entertain an action for declaratory judgment." *Miller Brands – Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991).

Here, the facts and circumstances give rise to a justiciable controversy insofar as each of the aforementioned elements have been met. First, there is a controversy in which a claim of right is asserted against one who has an interest in contesting it. The

[2] In Wisconsin, both declaratory judgment and summary judgment are proper vehicles to address questions of law involving insurance coverage. *See e.g., Commercial Union Midwest Ins. Co. v. Vorbeck*, 2004 WI App. 11, ¶ 7, 269 Wis. 2d 204, 674 N.W.2d 665.

matter is presently before the Court in the form of a lawsuit. The Plaintiffs filed the suit seeking recovery under the provisions of an insurance contract. ACUITY, the Plaintiffs' insurance carrier, has an interest in contesting the Plaintiffs' claims and has joined issue in that regard.

Second, the controversy involves parties whose interests are adverse. The parties' respective positions are inapposite. The Plaintiffs are claiming the existence of a right under the terms of the insurance contract, while ACUITY claims that the right does not exist.

Third, ACUITY has a legally protectable interest in the controversy. A "legally protectable interest" has been defined as a "'pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, either immediate or prospective.'" *City of Jackson v. Heritage Savings & Loan Ass'n*, 639 S.W. 2d 142 (Mo. App. E.D. 1982) (quoting *Absher v. Cooper*, 495 S.W. 2d 696 (Mo. App. 1973)).[3] Here, at the very least, the parties have conflicting financial interests in the determination of whether insurance coverage is available to the Plaintiffs in connection with the underlying incident.

Finally, the issues involved in this action are ripe for judicial determination. The Court has before it the necessary facts to make a determination with respect to the availability of insurance coverage. The law simply requires that facts be sufficiently developed to permit a "conclusive adjudication." *Putnam*, 2002 WI at ¶ 44 (citations omitted). In other words, "the facts [must] be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Miller Brands - Milwaukee v. Case,*

[3] The Court in *Jackson* was interpreting the justifiable controversy requirement in the context of Missouri's declaratory judgment statute, which contains language mirroring Wisconsin's declaratory judgment statute.

162 Wis. 2d at 694 (citing *Loy v. Bunderson,* 107 Wis. 2d at 412, 414). The Court has before it the affidavit testimony of two witnesses to the accident, as well as report materials produced by the investigating police department, all of which paints a clear picture concerning the December 9, 2005, incident.

II. NEITHER THE ACUITY POLICY NOR WISCONSIN LAW WILL PERMIT A FINDING OF COVERAGE WITH RESPECT TO THE DECEMBER 9, 2005 INCIDENT BECAUSE THE DECEMBER 9 INCIDENT WAS NOT A HIT-AND-RUN ACCIDENT.

The parties' primary dispute lies with the interpretation of the ACUITY Policy's uninsured motorists provisions. Namely, the central issue is whether this unidentified vehicle involved in the December 9, 2005 accident is an "uninsured motor vehicle" for purposes of the ACUITY Policy. In other words, does the ACUITY Policy mandate uninsured motorists coverage for an alleged "hit-and-run" accident involving an unidentified motor vehicle and an insured where there is no "run"?

A. Insurance Contract Construction Standards.

There are "well-established black-letter principles" that govern the interpretation and construction of insurance policies. *Commercial Union Midwest Ins. Co. v. Vorbeck,* 2004 WI App. 11, ¶ 9, 269 Wis. 2d 204, 674 N.W.2d 665. Generally, the same rules of construction that govern general contracts also govern the language in insurance policies. *Folkman v. Quamme,* 2003 WI 116, ¶¶ 12-13, 16-17, 20, 264 Wis. 2d 617, 665 N.W.2d 857. The goal of a court in interpreting insurance contracts "is to discern and give effect to the intent of the parties." *Id.* "As a general rule, the language in an insurance contract 'is given its common, ordinary meaning[.]'" *Id.*

B. Hit-and-Run Accidents and Wisconsin Statutes Section 632.32.

The Wisconsin omnibus statute comments on the requirement of uninsured motorist benefits language in insurance contracts and states that:

> (4) REQUIRED UNINSURED MOTORISTS AND MEDICAL PAYMENTS COVERAGES.
>
> Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by lawful bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall contain therein or supplemental thereto provisions approved by the commissioner:
>
> (a) Uninsured Motorists.
>
> (1) For the protection of persons injured 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, in limits of at least $25,000 per person and $50,000 per accident.
>
> (2) In this paragraph "uninsured motor vehicle" also includes:
>
> * * *
>
> **(b) An Unidentified Motor Vehicle involved in a hit-and-run accident.**

Wis. Stat. § 632.32(4) (emphasis added).[4]

Our Supreme Court "has held that omnibus coverage is imputed to every automobile insurance policy, regardless of whether the policy actually incorporates the language of the omnibus statute." *LaCount v. General Cas. Co.*, 2006 WI 14, ¶ 12 N.8, 288 Wis. 2d 358, 709 N.W.2d 418. Here, though the ACUITY Policy defining an "uninsured motor vehicle" contains more detail than the omnibus statute requirement governing UM coverage in the same context, it does not expressly define what qualifies

[4] The provisions of motor vehicle insurance policies detailed in Section 632.32 apply "to every policy of insurance issued or delivered in this state against the insureds liability for loss or damage resulting from accident caused by any motor vehicle, whether the loss or damage is to property or to a person." Wis. Stats. §632.32(1).

as a "hit-and-run" vehicle. Consequently, Wisconsin courts' construction of the phrase "hit-and-run" in an insurance coverage context is instructive, given the absence of a definition of the same in either the policy or the omnibus statute.

Our Supreme Court has stated that "[t]he plain meaning of 'hit-and-run' consists of two elements: 'hit' or striking, and a 'run,' or fleeing from the scene of an accident." *Hayne v. Progressive Northern Ins. Co.*, 115 Wis. 2d 68, 73-74, 339 N.W.2d 588 (1983). Recently, our Supreme Court defined "hit-and-run" in the following manner:

> Pursuant to Wis. Stat. §632.32(4)(a)2.b., hit-and-run accidents are included within the statutorily mandated uninsured motor vehicle coverage. A hit-and-run occurs when three elements are satisfied: (1) there is an unidentified motor vehicle; (2) the unidentified vehicle is involved in a hit; and (3) the unidentified motor vehicle 'runs' from the scene of the accident.

Smith v. General Casualty Insurance Company, 2000 WI 127, ¶ 10, 239 Wis. 2d 646, 619 N.W.2d 882 (citing *Theis v. Midwest Sec. Ins. Co.*, 2000 WI 15, ¶ 14-16, 232 Wis. 2d 749, 606 N.W.2d 162). [5]

Wisconsin case law is replete with commentary concerning the "hit" component of the hit-and-run analysis in an insurance coverage context. However, Wisconsin courts have commented less specifically on what constitutes a "run" in the same context.

The clearest declaration of what constitutes the "run" component of "hit-and-run" was made by our Supreme Court in evaluating whether physical contact is required to constitute a "hit-and-run" accident. *Hayne v. Progressive Northern Ins. Co.*, 115 Wis. 2d

[5] The *Smith v. General Casualty Insurance Company* court analyzed prior Wisconsin "hit-and-run" decisions and divided the decisions into two categories. The first category of cases involved "miss-and-run" incidents, and the second category of cases involved "flying objects or auto parts[:]" *Id.* at ¶14. *See e.g., Hayne, Amidzich v. Charter Oak Fire Ins. Co.*, 44 Wis. 2d 45, 170 N.W.2d 813 (1969), and *Wegner v. Heritage Mutual Ins. Co.*, 173 Wis. 2d 118, 496 N.W.2d 140 (Ct. App. 1992)(miss-and-run); *see also Theis* and *Dehnel v. State Farm Mutual Auto. Ins. Co.*, 231 Wis. 2d 14, 604 N.W.2d 575 (Ct. App. 1999)(flying objects / auto parts).

68, 339 N.W.2d 588 (1983). Evaluating statutory language mirroring that applicable to the present circumstances, our Supreme Court looked to dictionary definitions in concluding that said statutory language is unambiguous. *Id.* at 72-74. The definitions of "hit-and-run" in the words our Supreme Court, "clearly indicate that the plain meaning of 'hit-and-run' consists of two elements: a 'hit' or striking, and a 'run,' **or fleeing from the scene of an accident.**" *Id.* at 73-74 (emphasis added).

When construing statutes, "[c]ommon and approved usage of words in a statute may be established by definitions contained in a recognized dictionary." *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981) (citation omitted). Expanding on our Supreme Court's second element of the "hit-and-run" definition, a reference to Webster's II *New College* Dictionary reveals the following definitions for "flee": to run away; to pass swiftly away; and, to run away from, *e.g.*, "*flee* an accident scene." *See Webster's* II *New College* Dictionary 427 (1995) (emphasis in original). Similarly, Dictionary.com details the following definitions for "flee": to run away, as from danger or pursuers; take flight"; "to move swiftly; fly; speed"; and, "to run away from (a place, person, etc.)." *See* Dictionary.com Unabridged (v1.1) at http://dictionary.reference.com/browse/flee.

Based on the facts of record, the circumstances giving rise to the above-captioned action do not constitute a "hit-and-run" accident. The occupants of the unidentified vehicle did not run away from the incident, as from trouble or danger, nor did the occupants pass swiftly or speed from the scene. According to the witnesses on scene, the unidentified vehicle did not appear to flee the scene. Rather, the occupants of the unidentified vehicle stopped and inquired as to Zachary Zarder's condition and

well-being following the collision between the unidentified vehicle and Zarder's bicycle. Moreover, given the manner in which the occupants of the vehicle questioned Zarder to gauge the state of his health, the incident was never investigated as a hit-and-run accident by New Berlin authorities.

Even if commonly accepted definitions are not enough to convince the Court that the situation at hand does not constitute a "hit-and-run" accident, authority outside Wisconsin is instructive in this regard. For example, a Washington appellate court considered the issue of whether to award underinsured motorist benefits to a driver involved in an alleged hit-and-run accident where the parties to the accident exchanged no information, other than to inquire whether the other driver was injured. *See State Farm v. Seaman,* 96 Wn. App. 629, 980 P.2d 288 (Wash. App. D.V. 1999). There, the claimant's vehicle was rear-ended by another vehicle while making a legal left hand turn. *Id.* at 631. Both the claimant and the driver of the other vehicle pulled over to inspect the presence of damage, if any, to the vehicles. *Id.* Finding no damage to the vehicles, each driver asked if the other was injured. Both drivers responded in the negative. *Id.* After this exchange, the drivers went their separate ways. *Id.* Neither driver complained of injury, nor did they seek to obtain additional information about the other. *Id.* Shortly after the accident, the claimant developed back and neck pain and, thereafter, sought underinsured motorist coverage from her insurer. *Id.*

The *Seaman* court addressed whether the accident was a "hit-and-run" and, if so, whether underinsured motorist coverage applied. The court concluded there was no "hit-and-run." In doing so, the court rejected the claimant's suggestion to align the

definition of "hit-and-run accident" in an insurance coverage context with language contained in Washington criminal statutes. In this regard, the *Seaman* court stated that:

> [A] hit-and-run denotes only a situation where a driver flees the scene of an accident. Accordingly, **the definition of hit-and-run does not include a situation where a driver stops, inquires, and is reassured that there is neither personal injury nor property damage.** Here, the unidentified driver did not flee; rather he promptly exited his car and approached [the claimant] to inquire about her condition and the condition of her automobile. (citation omitted)
>
> * * *
>
> [U]nder the facts of this case, we hold that the term 'hit-and-run' is not ambiguous. **The term does not encompass a situation where a driver promptly exits his vehicle, undertakes an investigation, is assured that there is neither injury nor damage, and departs.**

Id. at 635 (emphasis added).

The *Seaman* court analogized the facts giving rise to the action before it to those detailed in *Lhotka v. Illinois Farmers Insurance Company*, a Minnesota appellate court case decided a year earlier. 572 N.W.2d 772 (Minn. Ct. App. 1998). The *Lhotka* court considered whether uninsured motorist benefits were available to a claimant where an unidentified driver struck a pedestrian who, after the incident, represented to the driver that she was "okay" and requested no information from the unidentified driver.

In *Lhotka*, the claimant was struck and knocked down by an automobile while walking across a gas station parking lot. *Id.* at 773. "The driver of the automobile stopped, got out of her car, and asked [the claimant] if she was 'okay.'" *Id.* The claimant "responded that she had some pain in her head and elbow, 'but I think I'm okay.'" *Id.* The claimant "did not request any information from the driver[,]" and "[t]he driver did not provide [the claimant] with a name or address or any other information." *Id.* Following the encounter, the unidentified driver left. *Id.* While driving home, the claimant noticed

swelling over her eye and the following morning, reported the incident to police after experiencing increasing pain in her neck, back and hips. *Id.*

Analyzing policy language similar to that in the present action,[6] the *Lhotka* court stated that:

> The Supreme Court has succinctly defined hit-and-run as 'a vehicle involved in an accident causing damage where *the driver flees from the scene.*' (citations omitted) (emphasis in original) ... [T]he driver here did not commit a hit-and-run. The unidentified driver stopped after striking [the claimant], got out of her vehicle, and questioned [the claimant] about her condition. [The claimant] told the driver that her elbow and head hurt, 'but I think I'm okay.' The driver made no attempt to leave until after [the claimant] assured her she was okay. There is no evidence that anyone attempted to detain the driver when she did leave. There is no indication that [the claimant] or the driver even thought to exchange information; neither is there evidence that this information would not have been provided if either had thought to request it.... **We cannot say that a driver commits a 'hit-and-run' when the driver stops after the accident, speaks directly to the other party and inquires about the injury, makes no attempt to conceal her identity..., and the driver leaves only after the party who was struck assures the driver she is okay.**

Id. at 774 - 775 (emphasis added).

An analysis similar to that in *Lhotka* was performed by the Connecticut Supreme Court in a case involving an uninsured motorist claim, where the claimant was struck by a slow moving vehicle when crossing the street. *Sylvestre v. United Services Automobile Assoc. Casualty Ins. Co.*, 240 Conn. 544, 692 A.2d 1254 (Conn. 1997). "After striking the [claimant], the driver immediately brought his car to a halt, exited the vehicle and waited for several minutes while the [claimant] sat on a guard rail to compose himself and then walked about to test his leg." *Id.* at 545. "Thereafter the plaintiff, believing he was not seriously injured, sent the driver on his way without

[6] Under the terms of the *Lhotka* policy, an uninsured motor vehicle included "[a] hit-and-run vehicle whose operator or owner has not been identified and which causes bodily injury to you or any family member." *Id.* at 774.

ascertaining his name or address or vehicle's license number, and without obtaining insurance information." *Id.* Later the same day, the claimant began experiencing pain and sought medical attention for leg and knee injuries. *Id.*

The Supreme Court of Connecticut addressed the narrow question of whether a motor vehicle is "a 'hit-and-run vehicle whose operator cannot be identified' if, after an accident, the driver stops and is permitted by the injured party to leave the scene[.]" *Id.* at 546. The Supreme Court of Connecticut affirmed the "thoughtful and comprehensive" appellant court ruling, which held that the vehicle that struck the plaintiff was not a hit-and-run vehicle because the driver stopped and attempted to provide aid to the insured. *Id.* On this point, the appellate court had previously stated that:

> **Because the driver of the vehicle that struck the [claimant] stopped to render assistance and because the [claimant] affirmatively acted to dismiss the driver from the scene of the accident, we conclude that the [claimant] was not struck by a hit-and-run vehicle.** Accordingly, under the facts here, the policy's provisions for uninsured motorists coverage are inapplicable[.]

Sylvester v. United Services Auto. Assoc. Casualty Ins. Co., 42 Conn. App. 219, 678 A.2d 1005 (Conn. Ct. App. 1996)(emphasis added).

Here, there was no hit-and-run accident. The occupants of the unidentified vehicle stopped after the incident, spoke directly to Zarder and "immediately checked on his wellbeing." *See* Affidavit of Jeffrey Kuehl, Exh. A. There is no evidence that the occupants of the vehicle attempted to conceal their identities, and the occupants left only after Zarder "told the occupants of the vehicle that he was not injured and that they could leave." *Id.* Thus, not only was there an attempt made to render assistance to Zarder, but Zarder affirmatively acted to dismiss the occupants of the unidentified vehicle from the scene. There simply was no hit-and-run accident and as a result, the

New Berlin Police Department did not investigate the December 9, 2005, incident as such.

C. Wisconsin Statutes Section 346.67.

The Defendants anticipate the Plaintiffs will analogize the facts in the present action to language contained in Wisconsin's criminal hit-and-run statute. Namely, the Plaintiffs will likely contend the statute applies to the present action insofar as the unknown driver violated the same and is, therefore, a hit-and-run driver.

Wisconsin Statutes Section 346.67 details one's duty upon striking either a person or an attended or occupied vehicle and provides that:

> (1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:
>
> (a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (b) The operator shall, upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is request by the injured person.

Wis. Stats. §346.67(1).

Section 346.67 does not apply to the present facts and circumstances. First, as prerequisites to one's duty upon striking either a person or an attended or occupied vehicle, the statute requires that there be either "injury to or a death of any person," or "damage to a vehicle."

Here, when the occupants of the unidentified vehicle asked Zarder if he was injured, Zarder responded in the negative. *See* Aff. of S. Miller at ¶¶ 9-11. Moreover, Zarder denied to witnesses at the scene that he had suffered any injury. *Id.*

Additionally, Section 346.67's requirements do not encompass bicycles. Wisconsin Statutes Section 346.66 states that Section 346.67 does not apply "to accidents involving only snowmobiles, all-terrain vehicles or vehicles propelled by human power or drawn by animals." Wis. Stat. § 346.66. Further, the term "vehicle," as used in the ACUITY Policy, does not encompass a bicycle. Rather, a review of the policy reveals that the term "vehicle" is more closely analogized with a land motor vehicle or trailer.

An analogous argument was made in the *Seaman* decision detailed above. There, the claimant referenced Washington's criminal hit-and-run statute in support of the contention that the claimant was involved in a hit-and-run accident. Like the Wisconsin criminal statute, the Washington criminal hit-and-run statute "imposes a duty on a driver of a vehicle involved in an accident with another vehicle that is attended by another person to provide identification and insurance information to such other person only where property damage or personal injury has occurred[.]" *Seaman*, 96 Wn. App. at 634. The *Seaman* court concluded that the unidentified driver did not violate the statute and was not a hit-and-run driver. It ruled that the unidentified driver "undertook a

reasonable investigation of the accident scene by confirming that there were no signs of visible damage and in receiving [the claimant's] assurance that [the claimant] was not injured." *Id.*

Finally, and most importantly on this particular point, the New Berlin Police Department refused to investigate the incident as a hit-and-run accident. Because the unidentified vehicle stopped at the scene and its occupants inquired as to Zachary Zarder's health and well-being, as did other witnesses to the incident, the matter was not investigated as a hit-and-run accident.

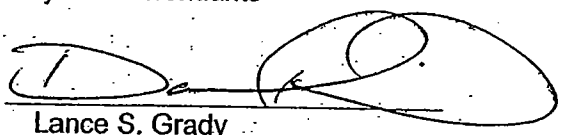
CONCLUSION

The facts and circumstances giving rise to the above-captioned action do not fall within the definition of "hit-and-run," and as a result, will not permit a finding of uninsured motorists coverage under the applicable provisions of the ACUITY Policy. Wisconsin law, dictionary definitions, extrajurisdictional authority and the actions of the New Berlin Police Department are all instructive in this regard and lead to only one conclusion: Zarder was not struck by a hit-and-run vehicle.

Based on the foregoing facts and authority, the Defendant, Acuity, A Mutual Insurance Company, respectfully requests an order, declaring that uninsured motorist benefits are not required under the terms and conditions of the subject insurance contract and, accordingly, the Plaintiffs' uninsured motorist, bad faith and loss of consortium claims must be dismissed.

Dated at Waukesha, Wisconsin this 11th day of January, 2008.

GRADY, HAYES & NEARY, LLC
Attorneys for Defendants

By: 

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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v. Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

FILED
IN CIRCUIT COURT
JAN 17 2008
WAUKESHA CO. WI
CIVIL DIVISION

AFFIDAVIT OF JEFFREY KUEHL

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Jeffrey Kuehl, being duly sworn under oath, attests and states to the Court as follows:

1. That your affiant is a law enforcement officer with the New Berlin Police Department, a capacity in which your affiant has acted for approximately fourteen (14) years.

2. That in the course of your affiant's activities as an officer of the New Berlin Police Department, your affiant was one of the officers that investigated a December 9, 2005 accident involving Zachary J. Zarder and an unidentified vehicle.

3. That in connection with the December 9, 2005 accident, your affiant prepared Wisconsin Motor Vehicle Accident Report No. 6721446. A true and correct copy of Wisconsin Motor Vehicle Accident Report No. 6721446 is attached as Exhibit A.

4. That as part of your affiant's investigation, your affiant spoke with, among others, Zachary Zarder, Zachary's parents and Sandra Miller, whose statements are detailed in narrative information submitted by your affiant in connection with Wisconsin Motor Vehicle Accident Report No. 6721446.

5. That the December 9, 2005 accident was not investigated by the New Berlin Police Department as a hit-and-run accident because the unidentified vehicle stopped at the scene and inquired as to Zachary Zarder's health and well-being, as did other witnesses to the accident.

6. That this affidavit is being submitted in connection with the above-captioned action.

Dated at New Berlin, Wisconsin this 11TH day of JANUARY, 2008.

Jeffrey Kuehl

Subscribed and sworn before me this 11 day of January, 2008.

KAREN M. REED
NOTARY PUBLIC
STATE OF WISCONSIN

Karen M. Reed
Notary Public, State of Wisconsin
My commission expires: 7/24/10

2

6721446

Wisconsin Motor Vehicle Accident Report

Document Number Override

INSTRUCTIONS: Please use a Black Ink Pen or #2 Pencil. Mark Areas as shown: Correct Mark, Incorrect Marks

Reportable Accident

County	MUN/TWP	Accident Date (Month / Day / Year)	Time of Accident (Military Time) (Hour / Min.)	Total Number (Units / Injured / Killed)
67	71	Feb / 09 / 05	1850	02 / 00 / 00

Hit & Run · Government Property · Fire (Narrative) · Photos Taken (Narrative) · Trailer or Towed (Narrative) · Truck or Bus (Last Page) · Load Spillage · Construction Zone · Names Exchanged

Unit # — Sheet No. 1 Of 1

ACCIDENT LOCATION: Public Highway, Intersection/Related · Public Highway, Non-Intersection · Parking Lot · Private Property or Road

LATITUDE (GPS) Degrees Minutes Seconds — LONGITUDE (GPS) Degrees Minutes Seconds

ON: Hwy No. and/or Street Name: S. EAST LN — Estimated 300 FT — FROM/AT Hwy No. and Street Name: WOODLAWN DR

House # / Fire # / Other / Utility # / Railroad # — Agency Space

	Unit 1	Unit 2
Unit Number / Unit Type / Total Number of Occupants / Direction of Travel (Before the Accident)		
Operator Last Name, First, M.I.	UNKNOWN	ZARDER, ZACHARY J.
Address, Street & Number		14285 W. PARK AVE.
City & State, ZIP, Phone Number		NEW BERLIN, WI 53151, 262 782-6432
Driver's License Number, State, Exp. Year		
Date of Birth		01-01-92
Sex / Operating as Classified / Class (Mark Only One) / Endorse (Mark All That Apply) / CMV		
On Duty Accident: Police, EMT/First Responder, Fire Fighter, Winter Hwy Maintenance		
Severity / Seat Position / Safety Equipment		1 / 0
Airbag: Deployed, Non Deployed, Not Applicable, Unknown		
Ejected: Not Applicable, Not Ejected, Totally Ejected, Partially Ejected, Unknown		
Trapped/Extricated: Not Applicable, Not Trapped, Trapped/Extricated, Trapped/Not Extricated, Unknown; Medical Transport		
Vehicle Owner Same — Last Name, First, M.I.	UNKNOWN	
Street Address / City & State / ZIP / Phone Number		
Year of Vehicle / Make / Model / Body Style / Color		
Vehicle ID Number		
License Plate Number / Plate Type / State / Exp. Year		
Policy Holder's Name / Same as		
Liability Insurance Company / Stat. #		

Occupant Unit Number — NAME Last, First, M.I. — Date of Birth — Sex — Severity — Seat Position — Safety Equipment — Airbag: Deployed, Non Deployed, Not Applicable, Unknown

ADDRESS Street & Number — City & State — ZIP

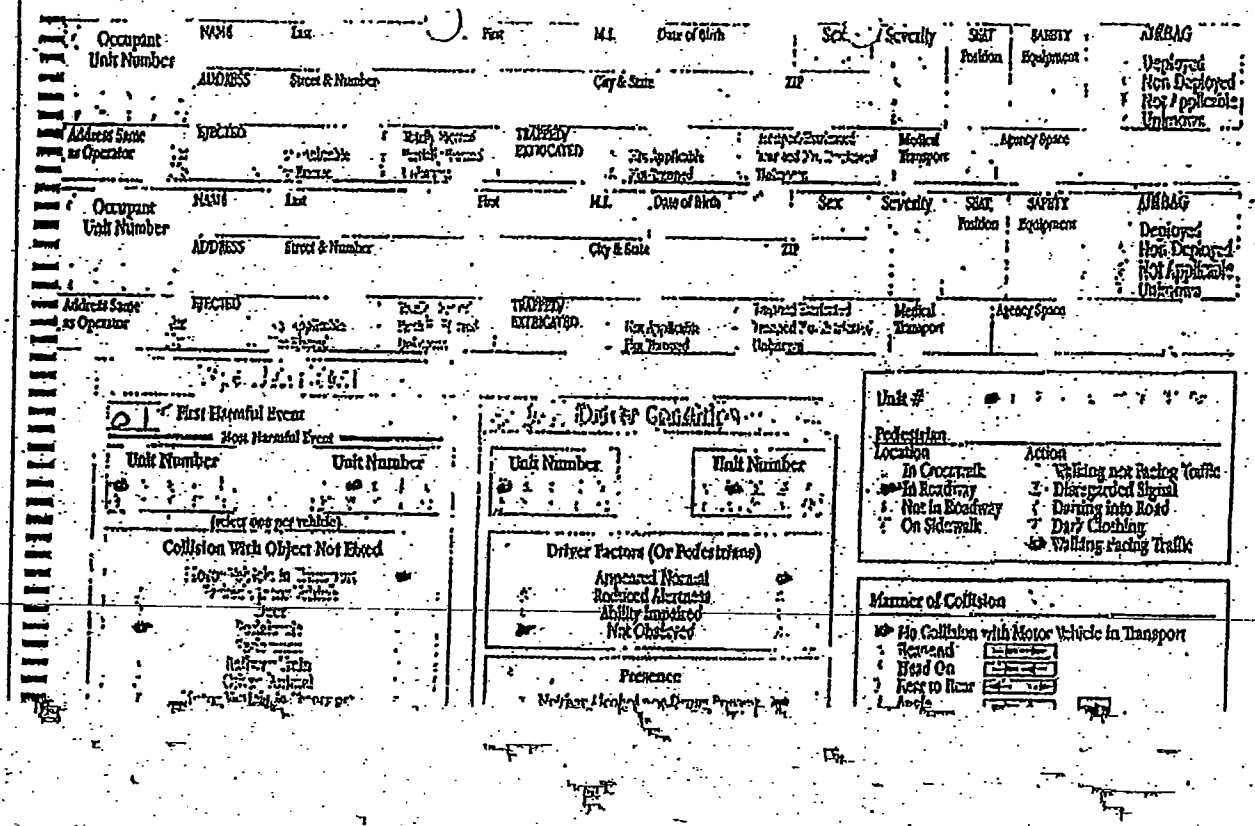
Address Same as Operator: Yes / No — EJECTED: 1. Not Applicable, 2. Not Ejected, 3. Totally Ejected, 4. Partially Ejected, 5. Unknown — TRAPPED/EXTRICATED: Not Applicable, Not Trapped, Trapped/Extricated, Trapped/Not Extricated, Unknown — Medical Transport — Agency Space

MV4000 1296 — EMS Number

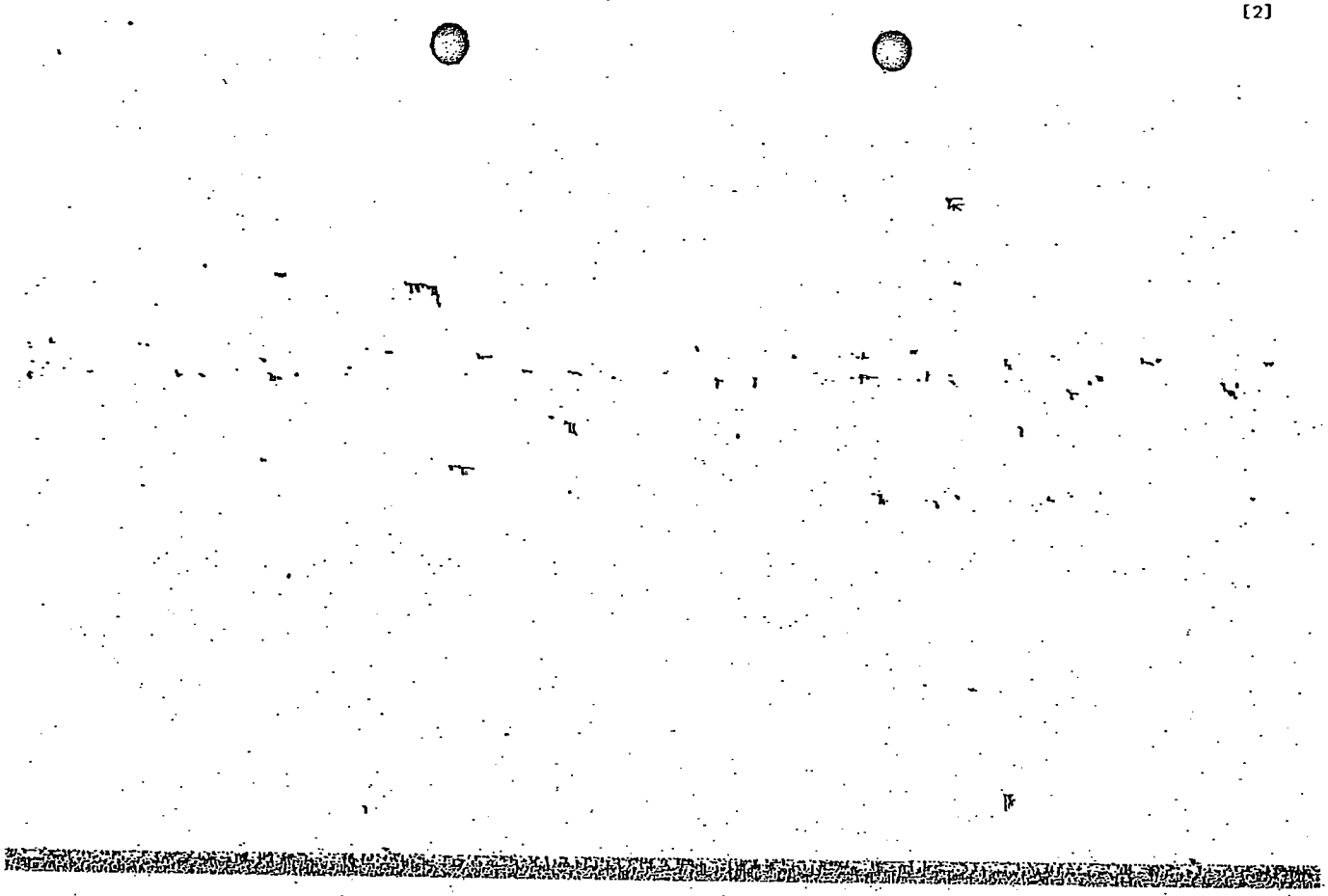
Location: 2016 S. EAST LN · Date: 12-09-05 · Accident No.: 6721446 · Tele/Abs: 05-4194

Please Do Not Write In This Shaded Space

EXHIBIT A


Occupant Unit Number
NAME Last First M.I. Date of Birth Sex Severity SEAT Position SAFETY Equipment AIRBAG
ADDRESS Street & Number City & State ZIP
Deployed
Not Deployed
Not Applicable
Unknown
Address Same as Operator
EJECTED
TRAPPED/ EXTRICATED
Not Applicable
Medical Transport
Agency Space
First Harmful Event
Most Harmful Event
Unit Number
Collision With Object Not Fixed
Driver Factors (Or Pedestrians)
Appeared Normal
Reduced Alertness
Ability Impaired
Not Observed
Presence
Unit #
Pedestrian
Location
In Crosswalk
In Roadway
Not In Roadway
On Sidewalk
Action
Walking not Facing Traffic
Disregarded Signal
Darting into Road
Dark Clothing
Walking Facing Traffic
Manner of Collision
No Collision with Motor Vehicle in Transport
Rear-end
Head On
Rear to Rear
Angle

[*]



DEC-21-2006 16:36 SHORESWEST NB 262 784 8359 P.003

Occupant Unit Number | NAME Last | First | M.I. | Date of Birth | Sex | Severity | SEAT Position | SAFETY Equipment | AIRBAG
ADDRESS Street & Number | City & State | ZIP
Address Same as Operator | EJECTED | TRAPPED EXTRICATED | Medical Transport | Agency Space
Deployed / Not Deployed / Not Applicable / Unknown

Occupant Unit Number | NAME Last | First | M.I. | Date of Birth | Sex | Severity | SEAT Position | SAFETY Equipment | AIRBAG
ADDRESS Street & Number | City & State | ZIP
Address Same as Operator | EJECTED | TRAPPED EXTRICATED | Medical Transport | Agency Space
Deployed / Not Deployed / Not Applicable / Unknown

21 First Harmful Event | Most Harmful Event
Unit Number | Unit Number
(check one per vehicle)

Collision With Object Not Fixed
Motor Vehicle in Transport
Train
Pedestrian
Pedalcyclist
Railway Train
Other Animal
Motor Vehicle in Transport in Other Roadway
Other Object (Not Fixed)

Collision With Fixed Object
Impact Attenuator
Bridge Pier or Support
Bridge Rail
Bridge Overhead Structure
Culvert
Curb
Ditch
Embankment
Guardrail Face
Guardrail End
Concrete Traffic Barrier
Other Traffic Barrier
Tree (Standing Only)
Utility Pole / Light Support
Other Fixed Object

Non-Collision
Rollover / Overturn
Fire / Explosion
Immersion

Fixed Object Struck
Unit #
Unit Number

Gov. Damage Tag #

Date of Condition
Unit Number | Unit Number

Driver Factors (Of Pedestrians)
Appeared Normal
Reduced Alertness
Ability Impaired
Not Observed

Presence
Neither Alcohol nor Drugs Present
Yes—Alcohol Present
Yes—Drugs Present
Yes—Alcohol & Drugs Present
Unknown

Alcohol
Test
Alc Value
Test Not Given
Test Refused
Test Given, Alcohol Unknown
Test Given, No Alcohol Detected

Drugs
Test Not Given
Test Refused
Test Given, Drugs Unknown
Test Given, No Drugs Detected
Test Reported, Results Pending
Pot / Hemp
Cocaine
Opiates
Amphetamines
Other Depressants, Stimulants, Hallucinogens
Other Narcotics

PROPERTY Last | First | M.I.
OWNER
ADDRESS Street & Number
City & State | ZIP | Phone Number

Unit #
Pedestrian
Location
In Crosswalk
In Roadway
Not In Roadway
On Sidewalk
Action
Walking not Facing Traffic
Disregarded Signal
Darting into Road
Dark Clothing
Walking Facing Traffic

Manner of Collision
No Collision with Motor Vehicle in Transport
Rearend
Head On
Rear to Rear
Angle
Sideswipe, Same Direction
Sideswipe, Opposite Direction
Unknown

Unit #
Damage Numbered Area(s) of Vehicle Damage
REAR
FRONT
None
Undercarriage
Total (Damage to all Areas)
Other
Unknown
Extent of Damage
None
Minor
Moderate
Severe
Very Severe
Unknown
Vehicle Towed Due to Damage
Vehicle Removed By OPERATOR

Unit #
Damage Numbered Area(s) of Vehicle Damage
REAR
FRONT
None
Undercarriage
Total (Damage to all Areas)
Other
Unknown
Extent of Damage
None
Minor
Moderate
Severe
Very Severe
Unknown
Vehicle Towed Due to Damage
Vehicle Removed By

DEC-21-2005 15:35 SHOREWEST NB 262 784 8369 P.004

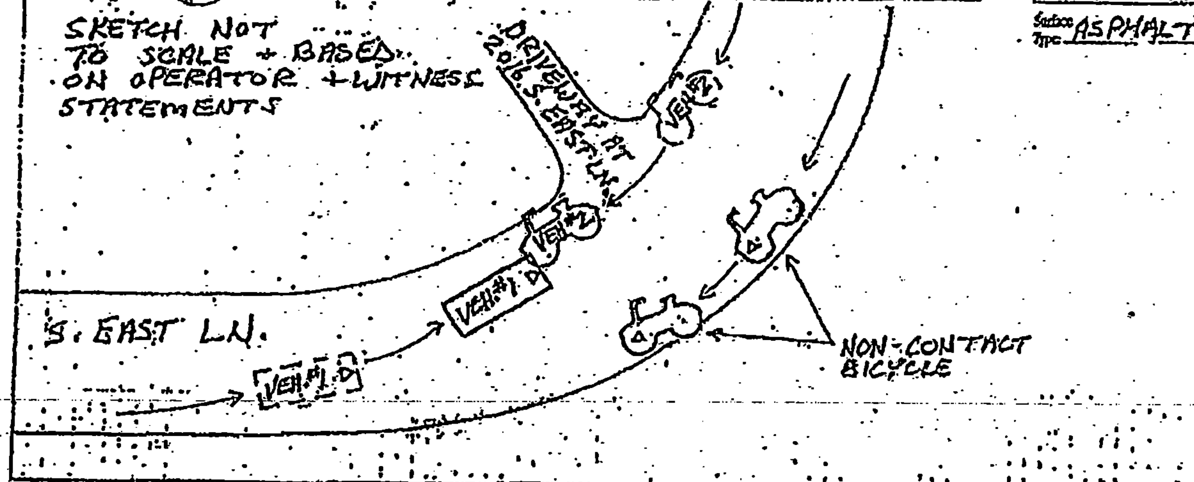
Draw Diagram of Accident & Indicate North with an arrow in the circle.

[P]ictorial Representation of Narr[ati]ve

Supplemental Reports — Witness Statements — Measurements Taken

Skidmarks to Impact: Unit 1 — Unit 2

Surface Type: ASPHALT



NARRATIVE

VEHICLE #1 WAS NEGOTIATING CURVE IN 2000 BLK. OF EAST LN. ATTEMPTING TO CONTINUE N/B. VEHICLE #2 WAS NEGOTIATING CURVE IN 2000 BLK ATTEMPTING TO CONTINUE S/B ON EAST LN. BICYCLE (VEH. #2) WAS BEING RIDDEN LEGALLY S/B WITH TRAFFIC BUT WITHOUT LIGHTS WHEN IT WAS STRUCK BY VEHICLE #1 WHICH HAD REPORTEDLY CUT THE CURVE SHORT WHEREBY DRIVING INTO THE S/B LANE WHILE GOING N/B. UNKNOWN DRIVER OF VEH #1 CHECKED ON BICYCLIST WHO ADVISED THAT HE WAS NOT INJURED. VEHICLE #1 LEFT SCENE + BICYCLIST REALIZED INJURED.

Photos By: NONE TAKEN

Witness Name: MILLER SANDRA J

Address: 2032 S. EAST LN. Date of Birth: 09-21-56

City, State, Zip: NEW BERLIN, WI 53146 Phone Number: (262) 784-3316

ACCESS CONTROL
- No Control (Unlimited Access)
- Full Control (Only Ramp Entry/Exit)
- Partial Control

ROAD TERRAIN
Part A
- Straight
- Curve

Part B
- Level/Flat
- Hill

LIGHT CONDITION
- Daylight
- Dark—Not Lighted
- Dark—Lighted
- Dawn
- Dusk
- Unknown

What Drivers Were Doing

Unit Number — Unit Number

- Going Straight
- Making Left Turn
- Making Right Turn
- Slowing or Stopping
- Stopped in Traffic
- Legally Parked
- Violating No Passing Zone
- Illegally Parked
- Parking Maneuver
- Backing Maneuver
- Changing Lanes
- Overtaking on left
- Overtaking on right
- Making U Turn
- Turning on red
- Merging
- Negotiating Curve
- Other

TRAFFICWAY
- Not Physically Divided (2-Way Traffic)
- Divided Highway, Median Strip, without Traffic Barrier
- Divided Highway, Median Strip, with Traffic Barrier
- One-Way Traffic
- Parking Lot or Private Property

ROAD SURFACE CONDITION
- Dry
- Wet
- Snow/Slush
- Ice
- Sand, Mud, Dirt, Oil
- Other
- Unknown

WEATHER
- Clear
- Cloudy
- Rain
- Snow
- Fog, Smog, Smoke
- Sleet, Hail (Freezing Rain or Drizzle)
- Blowing Sand, Soil, Dirt, Snow
- Severe Crosswinds
- Other
- Unknown

Traffic Control

Unit Number — Unit Number

- No Control
- Traffic Signal Operating
- Traffic Signal Flashing
- Stop Sign
- Stop Sign with Flasher
- Warning
- Warn sign with Flasher
- Yield Sign
- Traffic Control Person
- RR-xing Signal
- Other

RELATION TO ROADWAY
- On Roadway
- Parking Lot or Private Property
- Shoulder (Other than Shoulder within Median or Gore)
- Median (Other than Median within Gore)
- Outside Shoulder—Left
- Outside Shoulder—Right
- Off Roadway—Location Unknown
- Gore (Area between Ramp & Highway)
- On Ramp
- Unknown

DEC-21-2005 15:36 SHOREWEST NB 262 784 8359 P.005

6721446

Officer's Opinion of Possible Contributing Circumstances

Document Number Override

Unit Number	Unit Number
N/A	N/A

Unit Number	Unit Number
N/A	N/A

Driving System
Tires
Steering System
Turn Signals
Head Lamps
Side Lamps
Tail Lamps
Marked Hr Side Markers
Other Disabled
Others
Suspension System
Other

Unit Number	Unit Number
N/A	N/A

Snow, Ice or Wet
Narrow Shoulder
Low Shoulder
Soft Shoulder
Loose Gravel
Rough Pavement
Debris from Prior Accident
Other Defects
Sign Obscured or Missing
Narrow Bridge
Construction Zone
Visibility Obscured
Other

OFFICER INFORMATION

Last: KUEHL First: JEFFREY M.I.: E.

Law Enforcement Agency Address: 16300 W. NATIONAL AVE.

City & State: NEW BERLIN, WI. Zip: 53151

Phone Number: (262) 782-6640

Agency # 6771 Enforcement Agency: NEW BERLIN P.D. Officer ID #: 23833

Date Notified			Time Notified (Military Time)		Time Arrived (Military Time)		Date of Report		
MONTH	DAY	YEAR	HOUR	MIN.	HOUR	MIN.	MONTH	DAY	YEAR
	09	05	19	07	19	17		12	05

Truck & Bus Accident Information

(This Section Must Be Completed for Each Truck or Bus Involved in this Accident.)

When To Use This Section: Did the accident involve...

Part A
- A truck with at least two sides and six tires?
- A truck with a hazardous materials placard?
- A bus designed to carry 16 or more persons, including the driver?

STOP! If all the responses to Part A are "NO" do not complete this Truck & Bus Accident Information Section. If there are any "YES" answers, continue to Part B.

Part B
- Any person who was fatally injured?
- Any injured person requiring transport for immediate medical treatment?
- One or more vehicles that had to be towed from the scene as a result of the accident?

STOP! If all the responses to Part B are "NO" do not continue. If there are any "YES" answers, please complete this Truck & Bus Accident Information Section!...

- Hazardous Material Class Numbers (1-3digit):
- Hazardous Material "UN" Numbers (4 digit):
- Hazardous Material Placard Displayed?
- Hazardous Cargo was Released?

List the Hazardous Material(s) by name in this box:

List the Name(s) of Released Hazardous Material(s):

Carrier Identification Numbers

US DOT:

Sources: Vehicle Side, Shipping Papers, Trip Manifest, Driver, Log Book

SEQUENCE OF EVENTS FOR THIS VEHICLE

First Event
- Overturn/Rollover
- Fire/Explosion
- Cargo Loss or Shift
- Explosion or Fire
- Separation of Units
- Collision with Pedestrian
- Collision with Pedalcyclist
- Collision with Train
- Collision with Deer/Animal
- Collision with Other Object
- Other Non-Collision

Most Harmful Event
- Collision with Motor Vehicle in Transport
- Collision with Parked Motor Vehicle
- Collision with Fixed Object
- Collision with Pedestrian
- Collision with Pedalcyclist
- Collision with Train
- Collision with Deer/Animal
- Collision with Other Object
- Other Non-Collision

PROPERTY INVENTORY

NEW BERLIN POLICE DEPT.
NEW BERLIN, WI 531..

CIT./ORD. NO. 05-4194

ID USE ONLY

DATE 12-10-05 DAY SAT TIME 10:40 (AM) PM OFFICER SCHULTZ

RECOVERED AT 2016 S EAST LN

RECOVERED BY ☐ RECEIVED FROM ☒ NAME ZARDEZ JAMES H DOB 03-31-58

ADDRESS 14285 W PARK AVE N.B. 53151 TELEPHONE

OWNER ☐ CLAIMANT ☐ NAME DOB

ADDRESS TELEPHONE

DESCRIPTION OF CIRCUMSTANCES

10-57 CAR VS BICYCLIST

OFFICER'S RECOMMENDED ACTION OR DISPOSITION HOLD AS EVIDENCE

PROPERTY CODE (CHECK ONE OR MORE BOXES) PRISONER'S PROPERTY ☐ CONFISCATED ☐ FOUND ☐ CONTRABAND ☐ STOLEN ☐ EVIDENCE ☐ ABANDONED ☐ HFP ☐

1	3	CAR PARTS	8		TAN/GOLD COLOR PLASTIC PARTS	

COPY

RECEIVED BY SUPERVISOR [signature] DATE 12/12/05 TIME 12:50 AM (PM)

RECEIVED BY ID OFFICER DATE TIME AM PM

RECEIVED ALL PROPERTY DESCRIBED IN THIS INVENTORY FROM NEW BERLIN POLICE DEPT. NEW BERLIN, WI 53151 CHECK BOX ☐

OWNER ☐ CLAIMANT ☐ NAME ADDRESS

CITY STATE ZIP CODE

TX (HOME) AREA CODE ( ) TX (WORK/BUSINESS) AREA CODE ( )

DATE RELEASED TIME RELEASED OFFICER

ORIGINAL

NEW BERLIN POLICE DEPARTMENT
SUPPLEMENTARY INCIDENT REPORT

Case No. 2005-0004194A
Supp No. 001

a3. Mun Code	a4. Phone No.	a5. Prosecutor's Case No.	a6. Additional Reports
6804	(262) 782-0782		☐ Domestic ☐ Bias

a7. Incident	Now	a8. Cnts	a9. Offense Code	a10. Reported Date	a11. Time	a12. Day
M/V HIT & RUN TO BICYCLE		01	00006015	12/09/2005	19:07	FRI
M/V PI ACCIDENT		01	00006003	a13. Occrd From Date 12/09/2005	a14. Time 19:07	a15. Day FRI
				a16. Occrd To Date 12/09/2005	a17. Time 19:07	a18. Day FRI

PROPERTY / EVIDENCE

p1. Property Type	p2. Property Category	p3. Quantity	p4. Qty. Type
EVIDENCE	AUTO PARTS/ACCESSORY	3.00	# OF ITEMS

p5. Brand	p6. Model	p7. Color	p8. Caliber	p9. Serial No. or OAN

p10. Value	p11. Value Recovered	p12. TTY Activs	p13. TTY Cancel	p14. Inventory No.	Item No:	p15. Disposition

p20. Description

Gold or Tan plastic vehicle parts, possibly from mirror or front bumper

COPY

n. Submitted By Officer, I.D.	o2. Entered By Typist, I.D.	o. Supervisor's Signature, I.D.	Page
OFFICER KEVIN SCHULTZ 25348	K REED 31283	R MIZIA JR. 15846	1

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DEC-21-2005 15:36 SHOREWEST NB 262 784 8359 P.008

NEW BERLIN POLICE DEPARTMENT — CONTINUATION PAGE

a. Mun Code	a. Case No.	a. Supp No.	a. Prosecutor's Case No.	a. Reported Date	a. Time
6804	2005-0004194A	001		12/09/2005	19:07

On Saturday, 12/10/05 at 10:40AM, ZARDER reported finding parts of a suspect vehicle that struck his son (on bicycle) last evening in the 2000 block of S. East Lane.

I met with ZARDER at 2016 S. East Lane, where he showed me three vehicle parts in the matted snow covered tire prints of the roadway. ZARDER believed these vehicle parts were from the suspects vehicle. A vehicle struck his son, who was riding his bicycle on the roadway last evening. ZANDER told me Officer KUEHL took the report last evening.

After recovering the parts, I checked numerous addresses with vehicles of similar color parked in the driveway. I radio logged each address and license plate as I checked it, however, I was not able to find any vehicles with damage consistent with the parts recovered.

I kept possession of the parts until I was able to show them to Officer KUEHL.

On Monday December 12 2005 I secured the parts in evidence locker #8.

n. Submitted By Officer, I.D.	z. Entered By Typist, I.D.	a. Supervisor's Signature, I.D.	Page
OFFICER KEVIN SCHULTZ 26948	K.REED 31283	R MIZIA, JR. 15341	2 END

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NEW BERLIN POLICE DEPARTMENT

INCIDENT REPORT

Case No. 2005-0004194A

Supp No. 000

n5. Mun Code	n4. Phone No.	n6. Prosecutor's Case No.	n8. Additional Reports
6804	(262) 782-6840		☐ Domestic ☐ Bias

n7. Incident	n9. Cnts	n9. Offense Code	n10. Reported Date	n11. Time	n12. Day
MV HIT & RUN TO BICYCLE	01	00006015	12/09/2005	19:07	FRI
MV P/ACCIDENT	01	00006003	12/09/2005	18:30	FRI
			12/09/2005	18:50	FRI

n13. Occrd From Date	n14. Time	n15. Day
n16. Occrd To Date	n17. Time	n18. Day

n20. Location of Occurrence	n25. Type of Premise	n29. Ofcr Injured
2016 S EAST LANE		

n27. How Received	n28. Status	n29. Weather	n30. Weapon / Tools
TELEPHONE	ACTIVE		

INVOLVED PERSONS

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
OTHER ADULT	BRATKOWSKI	JOANNE	M

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	F	052	01/11/1953			B632-4356-3911-06	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'05"	135 lbs	SLIM		BLU	BRO		

n26. Residence Address	n29. Phone
17934 W WEST LN NEW BERLIN, WI 53146	(262) 785-0246

n32. Employer and Address	n33. Phone
M&I BANK 180 N EXECUTIVE DR. BROOKFIELD, WI	(262) 938-8962

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
OTHER ADULT	DELUCA	MARIO	F

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	M	040	06/15/1965			D420-5466-5215-00	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'06"	200 lbs			BRN	BRO		

n26. Residence Address	n29. Phone
17316 W TODD CT NEW BERLIN, WI 53146	

n32. Employer and Address	n33. Phone
UNKNOWN	

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
OTHER ADULT	GOTTSACKER	LORI	J

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	F	042	11/11/1963			G322-5306-3911-08	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'07"	150 lbs			GRN	BLN		

n26. Residence Address	n29. Phone
17941 W WESTWARD DR NEW BERLIN, WI 53146	(262) 786-2997

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
OTHER ADULT	KLINE	DAVID	LEE

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	M	056	12/08/1949			K450-1724-9448-05	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'06"	180 lbs	MEDIUM		BRO	BRO	BEARD	

n26. Residence Address	n29. Phone
17936 W ROGERS DR NEW BERLIN, WI 53146	(262) 938-0839

n32. Employer and Address	n33. Phone
UNISYS / FISERV 255 FISERV DR BROOKFIELD, WI	(262) 879-5253

n1. Submitted By Officer, I.D.	n2. Entered By Typist, I.D.	n3. Supervisor's Signature, I.D.	Page
OFFICER JEFFREY KUEHL 23833	M RYMER 23873	D JOHNSEN	17477 1

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DEC-21-2005 15:36 SHOREWEST NB 262 784 8359 P.010

NEW BERLIN POLICE DEPARTMENT — CONTINUATION PAGE

c3. Mun Code	c1. Case No.	c2. Supp No.	c4. Project	c5. Case No.	c10. Reported Date	c11. Time
6804	2005-0004194A	000			12/09/2005	19:07

n. INVOLVED PERSONS

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
OTHER ADULT	KUNE	KATHY	LYNN

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	F	048	10/25/1959			K450-5125-9886-01	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'10"	195 lbs	HEAVY		BRO	BRO		

n21a. Residence Address: 17936 W ROGERS DR NEW BERLIN, WI 53151 — n21b. Phone: (262) 938-0636

n22. Employer and Address: SELF EMPLOYED 17936 W ROGERS DR NEW BERLIN, WI — n23. Phone: (262) 938-0636

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
WITNESS-ADULT	LIEDTKE	THOMAS	J

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	M	021	01/20/1984			L320-8308-4020-07	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'11"	165 lbs			HAZ	BRO		

n21a. Residence Address: 2000 S EAST LN NEW BERLIN, WI 53146 — n21b. Phone: (414) 702-2770

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
PARENT	MARLEWSKI	LINDA	LOUISE

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	F	043	03/03/1962			M642-5328-2583-03	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'07"	190 lbs			HAZ	BLN		

n21a. Residence Address: 17448 W ROGERS DR NEW BERLIN, WI 53416 — n21b. Phone: (414) 430-9003

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
WITNESS-ADULT	MILLER	SANDRA	J

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	F	049	09/21/1958			M460-7905-8841-06	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
5'07"	170 lbs			GRN	RED		

n21a. Residence Address: 2032 EAST LN NEW BERLIN 53146 — n21b. Phone: (262) 784-3319

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
OTHER ADULT	PANAGIOTOPOULOS	HARALAMBOS	P

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	M	040	06/30/1965			P523-3356-5230-00	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
6'00"	193 lbs			BRO	BRO		

n21a. Residence Address: 17400 W ROGERS DR NEW BERLIN, WI 53146 — n21b. Phone: (262) 860-0291

n1. Name Type	n2. Last Name / Business / State of...	n3. First Name	n4. Middle Name
PARENT	ZARDER	JAMES	H

n5. Race	n6. Sex	n7. Age	n8. Date of Birth	n9. Place of Birth - City, State	n10. Soc Sec No.	n11 Operator's License No.	n12 State
W	M	047	03/31/1958			Z636-4486-9111-09	WI

n13 Height	n14 Weight	n15 Build	n16 Complexion	n17 Eyes	n18 Hair	n19. Facial Hair	n20. Speech
6'02"	240 lbs			GRN	BRO		

n21a. Residence Address: 14285 W PARK AVE NEW BERLIN, WI 53151 — n21b. Phone: (262) 782-6432

r. Submitted By Officer, I.D.	s. Entered By Typist, I.D.	o. Supervisor's Signature, I.D.	Page
OFFICER JEFFREY KUEHL 23833	M RYMER 23973	D JOHNSEN 17477	2

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DEC-21-2005 15:36 SHOREWEST NB 262 784 8369 P.011

NEW BERLIN POLICE DEPARTMENT — CONTINUATION PAGE

a. Mun Code	c1. Case No.	c2. Supp No.	c. Prosec.	c. Case No.	c10. Reported Date	c11. Time
6804	2005-0004194A	000			12/09/2005	19:07

NAME / PERSONS INVOLVED

m1. Name Type	m2. Last Name / Business / State of...	m3. First Name	m4. Middle Name
PARENT	ZARDER	GLORY	A

m5. Race	m6. Sex	m7. Age	m8. Date of Birth	m9. Place of Birth - City, State	m10. Soc Sec No.	m11 Operator's License No.	m12. State
W	F	046	12/14/1959			Z638-2815-9954-01	WI

m13 Height	m14 Weight	m15 Build	m16 Complexion	m17 Eyes	m18 Hair	m19. Facial Hair	m20. Speech
5'06"	115 lbs			BRO	BRO		

m21. Residence Address: 14285 W PARK AVE NEW BERLIN, WI 53151 — m29. Phone: (262) 782-8432

m22. Employer and Address: REFUSED — m23. Phone:

PROPERTY / VEHICLES / ITEMS

p1. Property Type	p2. Property Category	p3. Quantity	p4. Qty. Type
DAMAGED	BICYCLE,BOYS	1.00	# OF ITEMS

p5. Brand	p6. Model	p7. Color	p8. Caliber	p9. Serial No. or OAN
HOFFMAN	BMX	GRN GRN		01CZ4J2693

p10. Value	p11. Value Recovered	p12. TTY Active	p13. TTY Cancel	p14. Inventory No. Item No.	p16. Disposition
$700.00					

p20. Description

damaged front rim

COPY

n. Submitted By Officer, I.D.	n2. Entered By Typist, I.D.	o. Supervisor's Signature, I.D.	Page
OFFICER JEFFREY KUEHL 23833	M RYMER 23973	D.JOHNSEN	17477 3

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P-Ap. 100

NEW BERLIN POLICE DEPARTMENT — CONTINUATION PAGE

a. Mun Code	a1. Case No.	a2. Supp #		a. Prosec	j Case No.	aa. Reported Date	aa. Time
6804	2005-0004194A	000				12/09/2005	19:07

On Friday, 12/09/05 at 1907Hrs, I was dispatched to 17448 W. Rogers Drive in regards to a report of a possible hit and run, car versus pedestrian accident, which had occurred earlier in the evening.

Upon arrival at the scene, I was met by James and Gloria ZARDER and their son, Zachary, who was the victim of the accident. The ZARDER's advised that at approximately 1850Hrs, they had been contacted by Zachary, who had advised them that he had been struck by a car, while riding his bicycle in the 2000 block of East Lane. The ZARDER's advised that Zachary had told them that he was not injured as a result of the incident.

The ZARDER's advised that upon responding to the MARLEWSKI residence, at 17448 W. Rogers Drive, they had spoken with Zachary further in regards to the incident. They advised that while speaking with Zachary, he had told them that he and Jacob MARLEWSKI had been riding their bikes southbound on East Lane, going around a curve in the roadway, when Zachary was struck by a compact type foreign vehicle. Zachary advised that after having been struck, the vehicle stopped immediately and the occupants, three male white juveniles exited the vehicle and immediately checked on his wellbeing. Zachary advised that he had told the occupants of the vehicle that he was not injured and that they could leave. Zachary advised that after having proceeded to the MARLEWSKI residence with his friend, Jacob, who had been riding bikes with him, he had determined that his leg and wrist were injured as a result of the incident. Zachary advised that he then contacted his parents, who responded to the residence.

In checking the injuries on Zachary, I did observe slight swelling in his right wrist, as well as his left knee, which also had approximately a 1" laceration on the inside of the knee. Both Zachary and his parents advised that they did not feel the injuries were serious enough to be treated at the hospital at the time, though I did offer to have an ambulance respond to check on his injuries.

I spoke further with Zachary and Jacob in regards to the actual facts surrounding the accident. Jacob and Zachary advised that they had been riding their bikes southbound on East Lane going around a curve in the 2000 block. Jacob was reportedly riding on the left shoulder against traffic, while Zachary was riding on the right shoulder, with traffic. Zachary advised that he did not have lights on his bike, though he was riding at night. The boys advised that as they were going around bend, a vehicle heading northbound on East Lane appeared to have cut the corner short and crossed over into the southbound lane, whereby striking Zachary, as he was riding on the side of the road. Zachary estimated the speed of the vehicle was only approximately 10 - 15 mph at the time of the incident. Zachary advised that as a result of the accident, he was knocked off of his bicycle.

Zachary described the striking vehicle as a darker in color, foreign compact to midsize car. Zachary advised that he felt the car may have been a Honda. Zachary, again, reiterated the fact that immediately after the

f. Submitted By Officer, I.D.	f2. Entered By Typist, I.D.	g. Supervisor's Signature, I.D.	Page
OFFICER JEFFREY KUEHL 23533	M RYMER 23973	D JOHNSEN 17477	4

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NEW BERLIN POLICE DEPARTMENT — CONTINUATION PAGE

a. Mun Code	a1. Case No.	a2. Supp No.	a. Prosec	b. Case No.	c1a. Reported Date	c1t. Time
6804	2005-0004194A	000			12/09/2005	19:07

NARRATIVE

accident, the occupants of the vehicle had exited the car to check on his injuries. Zachary advised that the individuals in the car appeared to be approximately 17 years of age. Zachary advised that after they had checked on his wellbeing, he had assured them that he was all right and they were released from the scene. Zachary advised that he did not feel that the vehicle was driving recklessly or speeding at the time of the incident, however, he did advise that the vehicle appeared to have taken the corner too short thereby crossing into his lane and striking him.

After speaking with Zachary and Jacob, I did proceed to take a look at Zachary's bike, which did appear to have minor damage on the front tire portion of the bike, as well as a scuff on the left handle grip on the handle bar, apparently from the impact. No other damage was noted to the bike at that time.

After having cleared from the scene, I did check the neighborhood for vehicles matching the description, which was provided by Zachary and Jacob, however, I was unable to locate any vehicles matching the description they had provided.

On Saturday, 12/10/05 at approximately 1500Hrs, I made contact with Officer SCHULTZ who advised me that the ZARDERS had contacted him in regards to some vehicle parts they had located at the scene of the accident, which they believed were from the striking vehicle. SCHULTZ advised that he did respond to the area of 2016 S. East Lane, where he met with the ZARDERS and seized the vehicle items as possible evidence in regards to this incident. SCHULTZ showed me the aforementioned items which appeared to be small plastic pieces broken off of the bumper portion of the vehicle. The paint color on the seized items appeared to be tan or gold in color (See supplemental report by Officer SCHULTZ).

Shortly thereafter, I was also contacted by Thomas LIEDTKE, who advised that he lived in the 2000 block of S. East Lane. LIEDTKE advised that on the night of the incident, his attention had been drawn outside as a dog was barking at something in the roadway. LIEDTKE advised that in looking out the window, he saw, what appeared to be, a compact car, possiblya Toyota Corolla, beige or gold in color, stopped in the roadway in front of his residence. LIEDTKE advised that three juveniles exited the vehicle and ran up the road a short distance, however, he could not see what they doing, due to the large trees in his yard. LIEDTKE advised that after having heard of the accident, he suspected that the vehicle he had seen was the striking vehicle. LIEDTKE advised he did not know the identities of any of the juveniles from the vehicle. LIEDTKE was unable to provide any additional information in regards to the accident.

On 12/10/05 at approximately 1700Hrs, I contacted Sandra MILLER, who is a neighbor who lives in the area of the accident involving Zachary. MILLER advised that she had been out walking at the time of the incident and had heard the accident. She advised that though she did not actually see accident, she had walked up on it seconds after it had occurred. MILLER

a. Submitted By Officer, I.D.	a. Entered By Typist, I.D.	a. Supervisor's Signature, I.D.	Page
OFFICER JEFFREY KUEHL 23833	M RYMER 23973	D JOHNSEN 17477	5

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NEW BERLIN POLICE DEPARTMENT — CONTINUATION PAGE

a. Mun Code	b. Case No.	c. Supp No.		d. Prosec. Case No.	e/o. Reported Date	e1. Time
5804	2005-0004194A	000			12/09/2005	19:07

advised that all she could report in regards to the incident, was that she had observed a car driving westbound on East Lane and she too did not feel that the vehicle was driving recklessly or fast. MILLER advised that after the vehicle had struck the bike, the occupants did get out of the vehicle and check on Zachary's wellbeing. MILLER advised that she had heard Zachary assure them that he was ok, after which they left the scene. MILLER was unable to provide any additional information in regards to the striking vehicle or it's occupant as she was approximately (80) to (100) feet away from the vehicle and occupants while they were still on the scene. She further advised that it was extremely dark in the area that the accident had occurred as there were no street lights in the area. MILLER advised that after the striking vehicle had left, she too checked on Zachary and she advised that he also told her that he was all right but just a little scared as a result of the incident.

Based on the information that I had obtained in regards to a more accurate color and possible vehicle description, I did proceed back to the area and checked the neighborhood for any vehicles matching the description which had been provided. While checking the subdivision, I did make contact at the BRATKOWSKI, DELUCA, GOTTSACKER, KLINE and PANAGIOTOPOULOS residences, all of which had vehicles that were similar to the description which had been provided. After having spoken with the subjects, I did check their vehicles and none of them had damage which was consistent with having been involved in this incident.

The information in regards to this incident was also forwarded to New Berlin Police school resource officers, as it is suspected that the juveniles in question are possibly students at New Berlin West, due to the geographical area where the accident had occurred. There are no suspects for this incident at this time. (See M/4000 Accident report same IR).

f. Submitted by Officer, I.D.		g. Entered By Typist, I.D.		h. Supervisor's Signature, I.D.		Page
OFFICER JEFFREY KUEHL	23833	M RYMER	23973	D JOHNSEN	17477	6

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NEW BERLIN POLICE DEPARTMENT — CONTINUATION PAGE

m. Mun Code	m1. Case No.	m2. Supp No.		m3. Prosec. Case No.	m10. Reported Date	m11. Time
6804	2005-0004194A	000			12/09/2005	19:07

m1. Name Type	m2. Last Name / Business / State of...	m3. First Name	m4. Middle Name
JUVENILE WITNESS	MARLEWSKI	JACOB	J

m5. Race	m6. Sex	m7. Age	m8. Date of Birth	m9. Place of Birth - City, State	m10. Soc Sec No.	m11 Operator's License No.	m12 State
W	M	013	03/03/1992				

m13 Height	m14 Weight	m15 Build	m16 Complexion	m17 Eyes	m18 Hair	m19. Facial Hair	m20. Speech

m22. Residence Address: 17448 W ROGERS DR NEW BERLIN, WI 53146 — m29. Phone: (414) 430-9005

m34. School and Address: NB WEST (8TH) NEW BERLIN, WI. — m35. Phone:

m1. Name Type	m2. Last Name / Business / State of...	m3. First Name	m4. Middle Name
JUVENILE VICTIM	ZARDER	ZACHARY	J

m5. Race	m6. Sex	m7. Age	m8. Date of Birth	m9. Place of Birth - City, State	m10. Soc Sec No.	m11 Operator's License No.	m12 State
W	M	013	01/01/1992				WI

m13 Height	m14 Weight	m15 Build	m16 Complexion	m17 Eyes	m18 Hair	m19. Facial Hair	m20. Speech

m22. Residence Address: 14285 W PARK AVE NEW BERLIN, WI 53151 — m23. Phone: (262) 782-6432

m34. School and Address: NEW BERLIN WEST (9TH) 18695 W CLEVELAND AVE NEW BERLIN, WI — m35. Phone:

m. Submitted By Officer, I.D.		m. Entered By Typist, I.D.		m. Supervisor's Signature, I.D.		Page
OFFICER JEFFREY KUEHL	23833	M RYMER	23973	D JOHNSEN	17477	7 END

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NEW BERLIN POLICE DEPARTMENT
SUPPLEMENTAL INCIDENT REPORT

Case No. 2005-0004194A
Supp No. 001

s3. Mun Code	s4. Phone No.	s5. Prosecutor's Case No.	s6. Additional Reports
6804	(262) 782-0782		☐ Domestic ☐ Bias

s7. Incident		s8. Crits	s9. Offense Code	s10. Reported Date	s11. Time	s12. Day
MV HIT & RUN TO BICYCLE	New	01	00006015	12/09/2005	19:07	FRI
MV PI ACCIDENT		01	00006003	s13. Occrd From Date: 12/09/2005	s14. Time: 19:07	s15. Day: FRI
				s16. Occrd To Date: 12/09/2005	s17. Time: 19:07	s18. Day: FRI

PROPERTY/EVIDENCE ENTRY

p1. Property Type	p2. Property Category	p3. Quantity	p4. Qty. Type
EVIDENCE	AUTO PARTS/ACCESSORY	3.00	# OF ITEMS

p5. Brand	p6. Model	p7. Color	p8. Caliber	p9. Serial No. or OAN

p10. Value	p11. Value Recovered	p12. TTY Active	p13. TTY Cancel	p14. Inventory No.	Item No.	p15. Disposition

p20. Description

Gold or Tan plastic vehicle parts, possibly from mirror or front bumper

Submitted By Officer, I.D.	Entered By Typist, I.D.	Supervisor's Signature, I.D.	Page
OFFICER KEVIN SCHULTZ 25348	K REED 31283	R MIZIA, JR. 15341	1

Rev. 03/04 Copies To:

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v.

Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

AFFIDAVIT OF SANDRA MILLER

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Sandra Miller, being duly sworn under oath, attests and states to the Court as follows:

1. That your affiant is an adult resident of the State of Wisconsin, residing at 2032 South East Lane, New Berlin, Wisconsin 53146.

2. That your affiant was residing at the 2032 South East Lane, New Berlin address on December 9, 2005.

3. That in the evening hours of December 9, 2005, your affiant and her husband planned to meet with your affiant's neighbors for dinner.

4. That your affiant and her husband were walking outside when your affiant, after leaving her driveway, heard a young male voice state that "a car is coming."

5. That your affiant observed a car (hereinafter, the "subject car") driving east/northeast on South East Lane, and, thereafter, heard a crash of metal.

6. That the subject car did not appear to be traveling fast or recklessly.

7. That within seconds after hearing the crashing sound, your affiant, along with her husband, came upon the area where she heard the sound. Your affiant observed a boy, who your affiant later learned to be Zachary Zarder (hereinafter, "Zarder"), sitting on a snow bank near the mail box at the end of the driveway at 2000 South East Lane.

8. That as your affiant reached the driveway at 2000 South East Lane, your affiant could see the subject car stop roughly one hundred (100) feet north/northeast of 2000 South East Lane.

9. That the occupants of the subject car exited the car, walked back toward Zarder and questioned Zarder concerning his well-being.

10. That a male occupant of the subject car asked Zarder if he was okay, to which the boy responded "yes."

11. That your affiant overheard Zarder assure the occupants of the subject car that he was okay.

12. That after Zarder assured the occupants of the subject car that he was okay, the occupants returned to the subject car and drove away. It did not appear that the subject car was fleeing the accident scene.

13. That as the occupants of the subject car began walking back to the vehicle, your affiant asked Zarder if he was hurt, to which Zarder responded "no." Your affiant asked Zarder if he was sure he was not hurt, to which Zarder responded "yes."

14. That as the occupants of the subject car walked back toward the car, your affiant asked Zarder if the car hit him. Zarder stated that the subject car did not him. Rather, Zarder jumped off of his bicycle before the subject car hit the bike.

15. That your affiant again asked Zarder if he needed help and, further, if he was hurt. Zarder said he was okay, that he was scared and just wanted to remain where he was for a moment.

16. That your affiant estimates that she was between eighty (80) and one hundred (100) feet away from the subject car and the bicycle at the time of the accident.

17. That due to the absence of street lights in area, the location of the accident was dark and as a result, your affiant did not see the collision between the subject car and Zarder's bicycle.

18. That your affiant and her husband proceeded up the driveway to 2000 South East Lane to meet their neighbors, with whom your affiant and her husband traveled to a restaurant on Calhoun Road.

19. That your affiant provided information detailed in the foregoing affidavit to Officer Jeffery Kuehl of the New Berlin Police Department, as well as a representative of Acuity, A Mutual Insurance Company. A true and correct copy of your affiant's signed statement to Acuity, A Mutual Insurance Company, is attached as Exhibit A.

20. That this affidavit is being submitted in connection with the above-captioned proceedings.

Dated at New Berlin, Wisconsin this 22 day of June, 2007.

Sandra Miller
Sandra Miller

Subscribed and sworn to before me this
22 day of JUNE, 2007.

James R. Wangerin
Notary Public, State of Wisconsin
My commission expires: 10/5/2008

NOTARY PUBLIC
STATE OF WISCONSIN
JAMES R. WANGERIN

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ACUITY
PO Box 58
Sheboygan WI 53082

STATEMENT OF WITNESS

EXHIBIT A

Claim Number: KY6268 Claim Adjuster: Joshua Tegen

Name: Sandra Miller

Home Address: 2032 S East Lane, New Berlin, WI 53146

Business Address 2300 N. King Dr Milwaukee

Date of Statement 2-18-06

Age 49

Telephone 2622843316

Occupation Environmental specialist

Did you see the accident? NO Date of accident 12-09-05 Hour 630 pm

Where did the accident occur? South East Lane New Berlin

Where were you when the accident occurred? (If in an automobile, where were you sitting? If on the street, where and how near the place of accident?) On ~~22~~ South East Lane, about 100-150 feet from accident. (See Map).

Tell us in your own way how the accident occurred While walking east on S. East lane after leaving our driveway, I heard a young male voice say "A car is coming". I watched as a car continued E/NE on S. East lane, then heard a crash of metal. I walked up to where a boy was sitting on a snow bank near the mailbox at the end of the driveway at 2000 S. East lane. At about the time I reached the driveway at 2000 S. East lane, I could see that the car was stopping, about 100 feet N/NE of 2000 S East Lane. Three people got out of the car and walked back towards the boy sitting on the snowbank. As they started walking back, I asked the boy if he was hurt; He said no. I asked if he was sure; he said yes. A male asked the boy if he was okay, the boy said yes. The male said he didn't see the boy. As they walked back towards the car, → over

In your own opinion, who was to blame for the accident and why do you say so? Did not see accident to know who was to blame. However, it was dark, the road was snow/ice covered and estimated speed of car was 15-20 mph as it headed towards 2000 S. East lane.

(Witness to signature on statement)

Sandy Miller (Signed)

Please give the names and addresses of any other witnesses to the accident

Ernest and Marlene Iwanski, 2000 S East lane saw boys at end of their driveway after accident.

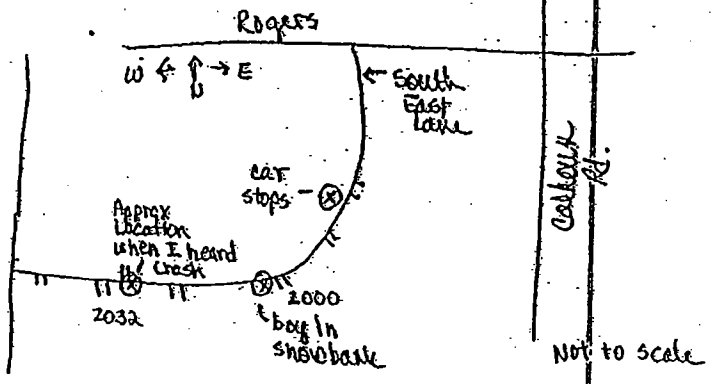
K-25(6-01)

(Use other side for further information.)

I asked the boy if the car hit him. The boy said no, he jumped off the bike before the car hit the bike. The car drove off.

I asked the boy again if he needed help and if he was hurt. The boy, still sitting on the snow bank, said he was okay. He said he was scared and just wanted to stay where he was for a minute.

My husband and I proceeded up the driveway at 2000 S. East Lane to meet Ernie & Marlene Iwanski at their door. The Iwanski's, my husband and I continued our walk to a restaurant on Calhoun Road. Upon leaving Iwanskis driveway, I noticed the two boys were still at the snowbank at the end of their driveway.



STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v. Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

AFFIDAVIT OF EDWARD MILLER

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Edward Miller, being duly sworn under oath, attests and states to the Court as follows:

1. That your affiant is an adult resident of the State of Wisconsin, residing at 2032 South East Lane, New Berlin, Wisconsin 53146.

2. That on December 9, 2005, your affiant and his wife came upon an accident scene located east/northeast of your affiant's residential driveway.

3. That your affiant and his wife came upon the location of the accident while walking to meet your affiant's neighbors for dinner.

4. That as your affiant and his wife reached the end of your affiant's driveway, your affiant observed a car coming from the west of the drive and heading east.

5. That prior to leaving the driveway, your affiant and his wife waited for the car to pass.

6. That as your affiant and his wife reached the area just east of your affiant's driveway, your affiant noticed two children, one of whom your affiant later learned was Zachary Zarder (hereinafter, "Zarder"). Zarder was sitting on a snow bank.

7. That the car that previously passed your affiant's driveway (the "subject car") stopped to the east of your affiant's driveway.

8. That your affiant's wife asked the children if they were hit by the car, to which the children responded "no."

9. That your affiant's wife asked whether the children were okay, to which the children replied "yes."

10. That one of the occupants of the subject car exited the car and walked back toward the children.

11. That the occupant of the subject car asked the children if they were okay. The children informed the car's occupant that they were okay.

12. That the occupant of the subject car walked back to the car and, thereafter, the car drove away.

13. That after the subject car left the area, your affiant's wife again inquired whether the children were okay and, further, if the children needed help. The children confirmed that they were okay and refused the offer for help.

14. That after their encounter, your affiant and his wife met with your affiant's neighbors and continued to walk towards a local restaurant.

15. That the information detailed in the foregoing affidavit was provided to a representative of Acuity, A Mutual Insurance Company. A true and correct copy of your affiant's signed statement to Acuity, A Mutual Insurance Company, is attached as Exhibit A.

16. That this affidavit is being submitted in connection with the above-captioned action.

Dated at New Berlin, Wisconsin this 22 day of June, 2007.

Edward Miller

Subscribed and sworn to before me this
22 day of June, 2007.

Notary Public, State of Wisconsin
My commission expires: 1-25-09

X:\A\Acuity\Zarder v. Acuity\Pleadings\Revised Affidavit of Edward Miller 070620 DKM bek.docx

ACUITY
PO Box 58
Sheboygan WI 53082

STATEMENT OF WITNESS

EXHIBIT A

Claim Number: KY6268 Claim Adjuster: Joshua Tegen

Name: Edward Miller

Home Address: 2032 S East Lane, New Berlin, WI 53146

Business Address _____

Date of Statement Feb. 19, 2006

Age 54

Telephone 262-784-3316

Occupation Engineer Supv

Did you see the accident? No Date of accident Dec 9, 2005 Hour ~ 6:30 pm

Where did the accident occur? on East Lane somewhere on the curve E + North of our drive

Where were you when the accident occurred? (If in an automobile, where were you sitting? If on the street, where and how near the place of accident?) Not exactly sure. Probably had just turned east after leaving our driveway

Tell us in your own way how the accident occurred We were walking to meet our neighbors at about 6:30 pm to continue walking to Alpha Gyros on Calhoun + Rogers for a fish fry. When we got to the end of our drive way a car was west of the drive heading east somewhat slower than normal. I said we should wait for the car to pass. When we got to the point where we were just east of our drive I was looking at the Christmas lights on the house just east of us. Next thing I saw were two kids, one sitting on the snow bank. The car had stopped east of there (end of Tiwanski's driveway was where the kids were) Sandy asked the kids if they were

In your own opinion, who was to blame for the accident and why do you say so? I can't state an opinion because I didn't see what was determined to be an accident. (over)

Sandy Miller
(Witness to signature on statement)

Edward M Miller
(Signed)

Please give the names and addresses of any other witnesses to the accident _____

K-25(6-01)

(Use other side for further information.)

were hit by the car. The reply was no. She said are you sure you're ok. The reply was yes. A guy got out of the car and walked back towards the kids. He asked if they were ok. They replied they were ok. I don't recall a lot of detail. No idea how old the guy was or what he looked like. He went back to the car and left. Sandy again asked if the kids were ok and if they wanted help. They said they were ok and didn't need any help. At this point Ernie and Marlene come out of the house. Sandy told them what was going on. The one kid was still sitting on the snowbank and the other one was standing around. I think Marlene asked them if they were ok or did they need help and they said they were ok and didn't need help. There was nothing more we could do so we walked N.E. on ~~Rodgers~~ East Lane towards Rodgers

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v.

Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

AFFIDAVIT OF DANIEL K. MILLER

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Daniel K. Miller, being duly sworn under oath, attests and states to the Court as follows:

1. That your affiant is an attorney licensed to practice law in the State of Wisconsin and is an associate attorney with the law firm of Grady, Hayes & Neary, LLC, which has been retained to represent the Defendant, ACUITY, A Mutual Insurance Company, in connection with the above-captioned matter.

2. That ACUITY, A Mutual Insurance Company, issued a policy of insurance to the Plaintiffs, James and Glory Zarder, with a policy term of August 15, 2005 to August 15, 2006. A true and correct copy of the ACUITY Policy is attached as Exhibit A.

3. That this affidavit is being submitted in support of the Defendant, ACUITY, A Mutual Insurance Company's Motion for Declaratory Judgment.

Dated at Waukesha, Wisconsin this 11th day of January, 2008.

Daniel K. Miller

Subscribed and sworn to before me this
11th day of January, 2008.

Notary Public, State of Wisconsin
My commission expires: 3-28-10

AFFIDAVIT

True Copy of Policy

STATE OF WISCONSIN)
) SS
SHEBOYGAN COUNTY)

Thomas C Gast, Personal Lines Underwriting Manager of ACUITY, A Mutual Insurance Company, being familiar with the forms used by the company in its regular course of business and being its custodian of underwriting records and files, certifies that he has checked the records for policy number C80564 issued to James & Glory Zarder and covering 2003 Cadillac Escalade, 2000 Cadillac Deville DTS 4dr, 2005 Saab 9.3 4dr, home at 14285 W Park Ave New Berlin WI 53151 & Excess Personal Umbrella Liability during the policy term from 08-15-05 to 08-15-06.

THAT said policy according to the records was subject to the Coverages and Limits, Insuring Agreements, Conditions, Exclusions, and applicable Endorsements as attached.

Thomas C Gast

Subscribed and sworn to before me
this 9th day of Nov, 2006

Notary Public, State of Wisconsin
My Commission Expires: 08-01-2010

DEBRA J. BORUCKI NOTARY PUBLIC STATE OF WISCONSIN

S-528(12-03)

EXHIBIT A

Your *ACUITY* Policy

Protecting and Enhancing Your Well-Being







ACUITY

2800 South Taylor Drive
Sheboygan, Wisconsin 53081
www.acuityin.com

ACUITY
A Mutual Insurance Company

ROAD AND RESIDENCE RENEWAL DECLARATIONS

Your Name and Address:

JAMES & GLORY ZARDER
14285 W PARK AVE
NEW BERLIN WI 53151

Agency: 2442-EA (414) 271-3575

ROBERTSON-RYAN & ASSOCIATES
TWO EAST PLZ STE 650
330 E KILBOURN AVE
MILWAUKEE WI 53202

Policy Number: C80564-5

Policy Period: Effective Date: 08-15-05
Expiration Date: 08-15-06

COVERAGES

Section I - Property Limit $1,012,500
Property Deductible $250
Dwelling Stated Value ..... $405,000 Replacement Value

Section II - Liability Limit $500,000
Medical Payments Limit $5,000
Medical Payments Limit if wearing a seat belt $10,000

Section III - Uninsured Motorists Limit $500,000
Underinsured Motorists Limit $500,000

Umbrella - Personal Umbrella Liability Insurance Limit $2,000,000
with self-insured retention of $250

DWELLING

The Insured's address is the location of the Residence Premises.
Endorsements: RR-146 (01-99) Sewer or Drain Backup - Broad Form $65.00
RR-193 (09-97) Premises Alarm or Fire Protection System $44.00-
RR-244 (06-02) Coverage Enhancements Plus $39.00
RR-245 (06-02) Limited Fungi, Wet or Dry Rot or Bacteria Coverage

VEHICLES

Car 1: 2003 CADILLAC ESCALADE Vehicle ID: 3GYFK66N53G254405 Private Passenger Car
Uninsured Motorists Property Damage Limit $10,000
Car Damage Coverages:
Damage by Collision ..... Actual Cash Value Less $500 Deductible
Damage Not by Collision ..... Actual Cash Value Less $100 Deductible
Towing and Labor ..... $50 Limit
Endorsements: RR-182 (07-98) Uninsured Motorists Property Damage
RR-248 (08-03) Coverage for Damage to Your Car Exclusion

Car 2: 2000 CADILLAC DEVILLE DTS 4DR Vehicle ID: 1G6KF5790YU329684 Private Passenger Car
Uninsured Motorists Property Damage Limit $10,000

Car Damage Coverages:
Damage by Collision .....Actual Cash Value Less $500 Deductible
Damage Not by Collision ...Actual Cash Value Less $100 Deductible
Towing and Labor .....$50 Limit
Endorsements: RR-182 (07-98) Uninsured Motorists Property Damage
RR-248 (08-03) Coverage for Damage to Your Car Exclusion

Car 3: 2005 SAAB 9.3 4DR Vehicle ID: YS3FB49S551054775 Private Passenger Car
Uninsured Motorists Property Damage Limit $10,000
Car Damage Coverages:
Damage by Collision .....Actual Cash Value Less $500 Deductible
Damage Not by Collision ...Actual Cash Value Less $100 Deductible
Towing and Labor .....$50 Limit

Lienholder:
SAAB LEASING COMPANY
PO BOX 7101
LITTLE ROCK AR 72223

Additional Insured:
SAAB LEASING COMPANY
PO BOX 7101
LITTLE ROCK AR 72223

Endorsements: RR-40 (09-87) Additional Insured
RR-182 (07-98) Uninsured Motorists Property Damage
RR-248 (08-03) Coverage for Damage to Your Car Exclusion

PRIMARY INSURANCE FOR UMBRELLA

PRIMARY INSURANCE - Exposures:

Type of Exposure	Limits of Insurance
PERSONAL LIABILITY EXPOSURE	$500,000 Each Occurrence
AUTO LIABILITY EXPOSURE	$500,000 Combined Single Limit

FORMS

RR-4 (03-04)	Road and Residence Policy	
RR-15 (06-02)	Wisconsin Personal Umbrella	$425.00
RR-19 (03-93)	Scheduled Personal Property	$263.00
RR-20 (03-99)	Boat and Outboard Motor Form	$370.00
RR-26 (08-98)	Home Computer	$28.00
RR-28 (08-02)	Watercraft Liability	$99.00
RR-53 (04-97)	Reimbursement of Car Rental Expense	$18.00

PREMIUMS

Total premium for the policy period .....$ 5,870.00

You qualify for this reduced premium because:
* you have your auto and homeowners insurance combined with this Road and Residence Policy.
* you have another car insured with *ACUITY*.
* your student driver qualifies for a good student discount.
* you have at least one car rated with an auto responsibility discount.
* you have received a home responsibility discount.
* you continue to insure this policy with *ACUITY*, earning an auto renewal discount.

ADDITIONAL RATING INFORMATION

Dwellings

Dwelling Number	Exposure State	Protection Class	Construction Type	Construction Year	Seasonal	Woodstove
1	WI	04	Brick	1990	No	No

Dwelling Number	Condominium	Number of Units	Basic Premium	Increased Section II Premium	Increased Condominium Part A Premium
1	No		662.00	23.00	

Vehicles

Car Number	Model Year	Car Description	Car ID Number	Exposure State
1	2003	CADILLAC ESCALADE	3GYFK66N53G254405	WI
2	2000	CADILLAC DEVILLE DTS 4DR	1G6KF5790YU329684	WI
3	2005	SAAB 9.3 4DR	YS3FB49S551054775	WI

Car Number	Driver Number	Class	Symbol	Fiberglass	Stated Amount
1	1	111230	016	No	
2	2	111130	H14	No	
3	3	141181	015	No	

Car Number	Liability Limit	Medical Limit	Liability and Medical Premium	Uninsured Motorists Limit	Uninsured Motorists Premium	Uninsured Motorists Property Damage Limit	Uninsured Motorists Property Damage Premium
1	500,000	5,000	326.00	500,000	21.00	10,000	Included
2	500,000	5,000	286.00	500,000	21.00	10,000	Included
3	500,000	5,000	1,092.00	500,000	26.00	10,000	Included

Car Number	UnderInsured Motorists Limit	UnderInsured Motorists Premium	Comprehensive Deductible	Comprehensive Premium	Collision Deductible	Collision Premium	Towing and Labor Limit	Towing and Labor Premium
1	500,000	22.00	100	160.00	500	242.00	50	5.00
2	500,000	22.00	100	101.00	500	163.00	50	5.00
3	500,000	28.00	100	545.00	500	851.00	50	6.00

Car Number	Car Premium
1	776.00
2	598.00
3	2,548.00

Drivers

Driver Number	Car Number	Driver Name	Birthdate	Sex	Married	Principal	Away at School	Good Student
1	1	ZARDER, JAMES H	03-31-58	Male	Yes	Yes	No	No
2	2	ZARDER, GLORY A	12-14-59	Female	Yes	Yes	No	No
3	3	ZARDER, APRIL V	04-13-89	Female	No	Yes	No	Yes

Secretary

President

ROAD AND RESIDENCE
TABLE OF CONTENTS

POLICY AGREEMENT

We agree with you, in return for your premium payment, to insure you subject to the terms of this policy. We will insure you for coverages and limits of liability only as shown in the Declarations of this policy.

WHAT TO DO IN CASE OF ACCIDENT OR LOSS

NOTICE OF ACCIDENT, OCCURRENCE OR LOSS

In the event of an accident, **occurrence** or loss, written notice must be given to **us** or **our** agent as soon as reasonably possible and within one year from the date of the accident, **occurrence** or loss. The notice must give the time, place and circumstances of the accident, **occurrence** or loss, including the names and addresses of injured persons and witnesses.

OTHER DUTIES

1. A person claiming any coverage of this policy must:
   a. Cooperate with **us** and help **us** in any matter concerning a claim or suit.
   b. Send **us** promptly any legal papers received relating to a claim or suit.
   c. Submit to physical examinations at **our** expense by doctors we choose as often as we may reasonably require.
   d. Authorize **us** to obtain medical and other records.
   e. Provide any written proofs of loss we require.
2. A person claiming coverage under Section I - Property must:
   a. Allow **us** to inspect and appraise the damaged property before its repair or disposal;
   b. Notify the police in case of loss by theft;
   c. Notify the credit card or fund transfer card company in case of loss under Credit Card or Fund Transfer Card coverage;
   d. (1) Protect the property from further damage;
      (2) Make reasonable and necessary repairs to protect the property; and
      (3) Keep an accurate record of repair expenses.
   e. Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;
   f. As often as we reasonably require:
      (1) Show the damaged property;
      (2) Provide **us** with records and documents we request and permit **us** to make copies; and
      (3) Submit to questions under oath and sign and swear to them.
   g. Send to **us** within 60 days after **our** request, **your** signed, sworn proof of loss which sets forth, to the best of **your** knowledge and belief:
      (1) The time and cause of loss;
      (2) The interest of the **insured** and all others in the property involved and all liens on the property;
      (3) Other insurance which may cover the loss;
      (4) Changes in title or occupancy of the property during the term of the policy;
      (5) Specifications of damaged buildings and detailed repair estimates;
      (6) The inventory of damaged personal property described in 2e above;
      (7) Receipts for additional living expenses incurred and records that support the fair rental value loss; and
      (8) Evidence or affidavit that supports a claim under the Credit Card, Fund Transfer Card, Forgery and Counterfeit Money coverage, stating the amount and cause of loss.
3. For claims submitted under item 9 of Additional Coverages and Payments - Section II, **you** must submit to **us** within 60 days after the loss, a sworn statement of loss and show the damaged property, if in the **insured's** control.
4. A person claiming Uninsured Motorists coverage must notify the police within 24 hours of the accident if a hit-and-run driver is involved.
5. A person claiming Underinsured Motorists Coverage must:
   a. Promptly send **us** copies of the legal papers if a suit is brought; and
   b. Promptly notify **us** in writing of a tentative settlement between the **insured person** and the insurer of the **underinsured motor vehicle** and allow **us** to advance payment to that **insured person** in an amount equal to the tentative settlement within 30 days after receipt of notification to preserve **our** rights against the insurer, owner or operator of such vehicle. However, this paragraph b does not apply if failure to notify **us** does not prejudice **our** rights against the insurer, owner or operator of such **underinsured motor vehicle.**
6. The **insured person** or the **insured** will not, except at their own cost, voluntarily make payment, assume obligation or incur expense other than:

a. For first aid to others at the time of the **bodily injury;**

b. To protect property as described in 2d of Other Duties.

DEFINITIONS

Throughout this policy and its endorsements, the words defined below appear in boldface.

1. **"Auto business"** means the business of selling, repairing, servicing, storing or parking cars.
2. **"Bodily injury"** means bodily harm, sickness or disease, including required care, loss of services and death that results.
3. **"Business"** includes:
   a. Trade, profession or occupation; and
   b. Home day care services regularly provided by an **insured** to a person or persons, other than **insureds,** if the **insured** receives monetary or other compensation for such services.

   Business does not include the mutual exchange of home day care services and the rendering of home day care services by an **insured** to a relative of an **insured.**
4. **"Insured"** means **you** and residents of your household who are:
   a. Related to **you** by blood, marriage or adoption.
   b. Other persons under the age of 21 and in the care of any person named above.

   Under Section II, **"insured"** also means:
   c. With respect to animals or watercraft to which this policy applies, any person or organization legally responsible for these animals or watercraft which are owned by **you** or any person included in 4a or 4b above. A person or organization using or having custody of these animals or watercraft in the course of any **business** or without consent of the owner is not an **insured;**
   d. With respect to any vehicle to which this policy applies:
      (1) Persons while engaged in **your** employ or that of any person included in 4a or 4b above; or
      (2) Other persons using the vehicle on an **insured location** with **your** consent.
5. **"Insured location"** means:
   a. The **residence premises;**
   b. The part of other premises, other structures and grounds used by **you** as a residence and;
      (1) Which is shown in the Declarations; or
      (2) Which is acquired by **you** during the policy period for **your** use as a residence.
   c. Any premises used by you in connection with a premises in 5a or 5b above;
   d. Any part of a premises:
      (1) Not owned by an **insured;** and
      (2) Where an **insured** is temporarily residing.
   e. Vacant land, other than farm land, owned by or rented to an **insured;**
   f. Land owned by or rented to an **insured** on which a one or two family dwelling is being built as a residence for an **insured;**
   g. Individual or family cemetery plots or burial vaults of an **insured;** or
   h. Any part of a premises occasionally rented to an **insured** for other than **business** use.
6. **"Occupying"** means in, on, getting into or getting out of.
7. **"Private passenger car"** means a four-wheel car of the private passenger type.
8. **"Property damage"** means physical injury to, destruction of, or loss of use of tangible property.
9. **"Relative"** means a person living in **your** household and related to **you** by blood, marriage or adoption, including a ward or foster child.
10. **"Rented car"** means a **private passenger car** rented for 30 consecutive days or less to:
    a. **You;** or
    b. A **relative** who does not own a **private passenger car** or **utility car.**
11. **"Residence employee"** means:
    a. An employee of an **insured** whose duties are related to the maintenance or use of the **residence premises,** including household or domestic services; or
    b. One who performs similar duties elsewhere not related to the **business** of an **insured.**
12. **"Residence premises"** means:
    a. The one family dwelling, other structures, and grounds; or
    b. That part of any other building;

    where **you** reside and which is shown as the **"residence premises"** in the Declarations.

    "Residence premises" also means a two family dwelling where **you** reside in at least one of the family units and which is shown as the **"residence premises"** in the Declarations.
13. **"Utility car"** means a car of the pickup, van or panel truck type with a gross vehicle weight of not more than 8,100 pounds.
14. **"Utility trailer"** means a vehicle designed to be towed by a **private passenger car** and includes a farm wagon or farm implement while towed by a **private passenger car** or **utility car.**
15. **"State"** means the District of Columbia, and any state, territory or possession of the United States.

and any province of Canada.

16. "We," "us" and "our" mean the company providing this insurance.
17. "You" and "your" mean the policyholder named in the Declarations and spouse if living in the same household.
18. **"Your insured car"** means:
    a. Any car described in the Declarations and any **private passenger car** or **utility car you** acquire as a replacement for a described car which **you** no longer own. If the replaced car was insured for Car Damage coverage and **you** want this coverage to apply to the replacing car, **you** must notify us within 30 days of its acquisition.
    b. Any additional **private passenger car** or **utility car** of which **you** acquire ownership, if **you** notify us within 30 days of its acquisition.
    c. Any **utility trailer you** own.
    d. Any car or **utility trailer** not owned by **you**, except a **rented car**, while being temporarily used as a substitute for any vehicle described in parts a, b or c of this definition because of its withdrawl from normal use due to breakdown, repair, servicing, loss or destruction.
    e. Any **rented car**.

SECTION I - PROPERTY

This Section includes Part A - Residence, Part B - Personal Property, Part C - Car Damage and other articles or classes of property separately described and specifically insured in this policy. The limit shown in the Declarations for Section I - Property is the most we will pay because of one occurrence for the total of all loss or damage covered under Part A - Residence and Part B - Personal Property. Special limits of liability stated in this policy for some property do not increase the amount of insurance.

The Dwelling Stated Value shown in the Declarations is the maximum we will pay for a covered loss to the dwelling under Part A. If **you** make alterations to the dwelling which increase its replacement cost by 5% or more, **you** must notify us within 30 days of completion. If **you** have notified us or if **you** have not made such alterations and elect to repair or replace the damaged dwelling after a loss, we will increase the dwelling stated value, if necessary, to equal the full replacement cost of the dwelling, but not to more than the Section I - Property Limit shown in the Declarations. The Section I - Property Limit is not increased when this occurs.

If the Dwelling Stated Value is increased under the above provision, we will increase the policy premium for the remainder of the policy term beginning the day after the loss. The premium will be based on the Dwelling Stated Value determined above. As part of this, effective the day after the loss, we will increase the Section I - Property Limit by the same percentage by which the Dwelling Stated Value was increased.

PART A - RESIDENCE

1. We cover:
    a. The dwelling on the **residence premises** shown in the Declarations, including structures attached to the dwelling.
    b. Other structures on the **residence premises** set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line or similar connection.

    We do not cover other structures:
    (1) Used in whole or in part for **business**; or
    (2) Rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage.
    c. Materials and supplies located on or next to the **residence premises** used to construct, alter or repair the dwelling or other structures on the **residence premises**.

    Coverage under 1a, 1b and 1c does not apply to land on which the dwelling or other structures are located.
2. If a loss covered under this Section makes that part of the **residence premises** where **you** reside not fit to live in, we cover, at your choice, either of the following: However, if the **residence premises** is not **your** principal place of residence, we will not provide the option under paragraph b below.
    a. **Additional Living Expense**, meaning any necessary increase in living expenses incurred by **you** so that **your** household can maintain its normal standard of living; or
    b. **Fair Rental Value**, meaning the fair rental value of that part of the **residence premises** where **you** reside less any expenses that do not continue while the premises is not fit to live in.

    Payment under a or b will be for the shortest time required to repair or replace the damage or, if **you** permanently relocate, the shortest time required for **your** household to settle elsewhere.
3. If a loss covered under this Part makes that part of the **residence premises** rented to others or held for rental by **you** not fit to live in, we cover the:

    Fair Rental Value, meaning the fair rental value of that part of the **residence premises** rented to others or held for rental by **you** less any expenses that do not continue while the premises is not fit to live in.

Payment will be for the shortest time required to repair or replace that part of the premises rented or held for rental.

4. If a civil authority prohibits you from use of the **residence premises** as a result of direct damage to neighboring premises by a peril insured against in this policy, we cover the Additional Living Expense or Fair Rental Value loss as provided under 2 and 3 above for no more than two weeks.

The periods of time under 2, 3 and 4 above are not limited by expiration of this policy.

We do not cover loss or expense due to cancellation of a lease or agreement.

Perils - Part A

We insure against risks of direct loss to property described in Part A only if that loss is a physical loss to property. However, we do not insure loss:

1. Involving collapse, other than as provided in Additional Coverages - Section I, item 8;
2. Excluded under Exclusions - Section I.

PART B - PERSONAL PROPERTY

We cover personal property owned or used by an **insured** while it is anywhere in the world. At your request, we will cover personal property owned by:

1. Others while the property is on the part of the **residence premises** occupied by an **insured**;
2. A guest or a **residence employee**, while the property is in any residence occupied by an **insured**.

Our limit of liability for personal property usually located at an **insured's** residence, other than the **residence premises** is $5,000. Personal property in a newly acquired principal residence is not subject to this limitation for the 30 days from the time you begin to move the property there.

Special Limits of Liability. The special limit for each numbered category below is the total limit for each loss for all property in that category.

1. $200 on money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins and medals.
2. $1,000 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, personal records, passports, tickets and stamps. This dollar limit applies to these categories regardless of the medium (such as paper or computer software) on which the material exists.

   This limit includes the cost to research, replace or restore the information from the lost or damaged material.
3. $1,000 on watercraft, including their trailers, furnishings, equipment and outboard motors.
4. $1,000 on grave markers.
5. $1,000 for loss by theft of jewelry, watches, furs, precious and semiprecious stones.
6. $2,000 for loss by theft of firearms.
7. $2,500 for loss by theft of silverware, silver-plated ware, goldware, gold-plated ware and pewterware. This includes flatware, hollowware, tea sets, trays and trophies made of or including silver, gold or pewter.
8. $2,500 on property, on the **residence premises**, used at any time or in any manner for any **business** purpose.
9. $250 on property, away from the **residence premises**, used at any time or in any manner for any **business** purpose.
10. $1,000 for loss to electronic apparatus, while in or upon a motor vehicle or other motorized land conveyance, if the electronic apparatus is equipped to be operated by power from the electrical system of the vehicle or conveyance while retaining its capability of being operated by other sources of power. Electronic apparatus includes:
    a. Accessories or antennas; or
    b. Tapes, wires, records, discs or other media;

    for use with any electronic apparatus described in this item 10.
11. $1,000 for loss to electronic apparatus, while not in or upon a motor vehicle or other motorized land conveyance, if the electronic apparatus:
    a. Is equipped to be operated from the electrical system of the vehicle or conveyance while retaining its capability of being operated by other sources of power;
    b. Is away from the **residence premises**; and
    c. Is used at any time or in any manner for any **business** purpose.

    Electronic apparatus includes:
    a. Accessories and antennas; or
    b. Tapes, wires, records, discs or other media;

    for use with any electronic apparatus described in this item 11.

Perils - Part B

We insure for direct physical loss to the property described in Part B caused by a peril listed below unless the property or the loss is excluded in Exclusions - Section I.

1. **Fire or lightning.**
2. **Windstorm or hail.**

   This peril does not include loss to the property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening

in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

This peril includes loss to watercraft and their trailers, furnishings, equipment, and outboard motors, only while inside a fully enclosed building.

3. **Explosion.**
4. **Riot or civil commotion.**
5. **Aircraft,** including self-propelled missiles and spacecraft.
6. **Vehicles.**
7. **Smoke,** meaning sudden and accidental damage from smoke.

   This peril does not include loss caused by smoke from agricultural smudging or industrial operations.
8. **Vandalism or malicious mischief.**
9. **Theft,** including attempted theft and loss of property from a known place when it is likely that the property has been stolen.

   This peril does not include loss caused by theft:

   a. Committed by an **insured;**

   b. In or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied; or

   c. From that part of a **residence premises** rented by an **insured** to other than an **insured.**

   This peril does not include loss caused by theft that occurs off the **residence premises** of:

   a. Property while at any other residence owned by, rented to, or occupied by an **insured,** except while an **insured** is temporarily living there. Property of a student who is an **insured** is covered while at the residence away from home if the student has been there at any time during the 45 days immediately before the loss;

   b. Watercraft, including their furnishings, equipment and outboard motors; or

   c. Trailers and campers.
10. **Falling objects.**

    This peril does not include loss to property contained in a building unless the roof or an outside wall of the building is first damaged by a falling object. Damage to the falling object itself is not included.
11. **Weight of ice, snow or sleet** which causes damage to property contained in a building.
12. **Accidental discharge or overflow of water or steam** from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance.

    This peril does not include loss:

    a. To the system or appliance from which the water or steam escaped;

    b. Caused by or resulting from freezing except as provided in the peril of freezing below; or

    c. On the **residence premises** caused by accidental discharge or overflow which occurs off the **residence premises.**

    In this peril, a plumbing system does not include a sump, sump pump or related equipment.
13. **Sudden and accidental tearing apart, cracking, burning or bulging** of a steam or hot water heating system, and air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

    We do not cover loss caused by or resulting from freezing under this peril.
14. **Freezing** of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance.

    This peril does not include loss on the **residence premises** while the dwelling is unoccupied, unless **you** have used reasonable care to:

    a. Maintain heat in the building; or

    b. Shut off the water supply and drain the system and appliances of water.
15. **Sudden and accidental damage from artificially generated electrical current.**

    This peril does not include loss to a tube, transistor or similar electronic component.
16. **Damage by glass or safety glazing material** which is part of a building, storm door or storm window.

    This peril does not include loss on the **residence premises** if the dwelling has been vacant for more than 60 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.
17. **Volcanic eruption** other than loss caused by earthquake, land shock waves or tremors.

PART C - CAR DAMAGE

1. We will pay for direct and accidental loss of or damage to **your insured car,** including its equipment:

   a. Caused by **collision,** if Damage by Collision coverage is indicated in the Declarations; or

   b. Not caused by **collision,** if Damage Not by Collision coverage is indicated in the Declarations.
2. **Towing and Labor Coverage.** If this coverage is shown in the Declarations, we will pay, up to the amount shown for towing and labor, costs **you** incur each time **your insured car** is disabled. The labor must be performed at the place of disablement.
3. **Transportation Expenses.** If there is a total theft of **your insured car,** we will pay up to $30 per day, but no more than $900, for the cost of nec-

essary transportation incurred by an **insured person.** This coverage begins 48 hours after the theft and ends when the car is returned to use or when we pay the loss, whichever comes first.

Additional Definitions - Part C

As used in this Part:

1. **"Collision"** means collision of **your insured car** with another object or upset of **your insured car.** Loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, colliding with a bird or animal, or breakage of glass is not deemed loss caused by **collision.** But, if breakage of glass results from a collision, **you** may elect to have it treated as loss caused by **collision.**
2. **"Your insured car"** is defined under the Definitions Section of this policy. As used in this Part, **your insured car** also includes any car or **utility trailer** not owned by, furnished to or available for regular use by **you** or a **relative** while **you** or a **relative** are using the vehicle with a reasonable belief of having permission to do so.

ADDITIONAL COVERAGES - SECTION I

1. **Debris Removal.** We will pay your reasonable expense for the removal of:
   a. Debris of property covered under Part A or Part B if a peril insured against that applies to the damaged property causes the loss; or
   b. Ash, dust or particles from a volcanic eruption that has caused direct loss to a building or property contained in a building.

   Debris Removal expense is included in the limit of liability that applies to Section I - Property.

   We will also pay your reasonable expense, up to $500 in the aggregate for any one loss, for the removal from the **residence premises** of:
   a. Your tree felled by the peril of windstorm; hail; or weight of ice, snow or sleet; or
   b. A neighbor's tree felled by a peril insured against under Part B;

   provided the tree damages a covered structure.
2. **Reasonable Repairs.** We will pay the reasonable cost incurred by **you** for necessary repairs made solely to protect property covered under Part A or Part B from further damage if a peril insured against causes the loss. This coverage does not increase the limit of liability that applies to the property being repaired.
3. **Trees, Shrubs and Other Plants.** We cover trees, shrubs, plants or lawns, on the **residence premises,** for loss caused by the following perils insured against: Fire or lightning, Explosion, Riot or civil commotion, Aircraft, Vehicles not owned or operated by a resident of the **residence premises,** Vandalism or malicious mischief or Theft.

   The limit of liability for this coverage will not be more than 5% of the dwelling stated value limit, or more than $500 for any one tree, shrub or plant. We do not cover property grown for **business** purposes.
4. **Fire Department Service Charge.** We will pay up to $500 for any one loss for fire department service charges billed by a government entity or a fire department for the response to save or protect covered property from a Peril Insured Against.

   This coverage is additional insurance. No deductible applies to this coverage.
5. **Property Removed.** We insure property covered under Part A or Part B against direct loss from any cause while being removed from a premises endangered by a peril insured against and for no more than 30 days while removed. This coverage does not change the limit of liability that applies to the property being removed.
6. **Credit Card, Fund Transfer Card, Forgery and Counterfeit Money.**

   We will pay up to $500 for:
   a. The legal obligation of an **insured** to pay because of the theft or unauthorized use of credit cards issued to or registered in an **insured's** name;
   b. Loss resulting from theft or unauthorized use of a fund transfer card used for deposit, withdrawal or transfer of funds, issued to or registered in an **insured's** name;
   c. Loss to an **insured** caused by forgery or alteration of any check or negotiable instrument; and
   d. Loss to an **insured** through acceptance in good faith of counterfeit United States or Canadian paper currency.

   We do not cover use of a credit card or fund transfer card:
   a. By a resident of **your** household;
   b. By a person who has been entrusted with either type of card; or
   c. If an **insured** has not complied with all terms and conditions under which the cards are issued.

   All loss resulting from a series of acts committed by any one person or in which any one person is concerned or implicated is considered to be one loss.

   We do not cover loss arising out of **business** use or dishonesty of an **insured.**

   No deductible applies to this coverage.

   Defense

   a. We may investigate and settle any claim or suit that we decide is appropriate. **Our** duty to defend a claim or suit ends when the amount

we pay for the loss equals our limit of liability.

b. If a suit is brought against an insured for liability under the Credit Card or Fund Transfer Card coverage, we will provide a defense at our expense by counsel of our choice.

c. We have the option to defend at our expense an insured or an insured's bank against any suit for the enforcement of payment under the Forgery coverage.

7. **Loss Assessment.** We will pay up to $1,000 for your share of any loss assessment charged during the policy period against you by a corporation or association of property owners. This only applies when the assessment is made as a result of each direct loss to the property, owned by all members collectively caused by a peril not excluded under Part A of this policy, other than earthquake or land shock waves or tremors before, during or after a volcanic eruption.

This coverage applies only to loss assessments charged against you as owner or tenant of the residence premises.

We do not cover loss assessments charged against you or a corporation or association of property owners by any governmental body.

8. **Collapse**

a. With respect to this additional coverage:

(1) Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

(2) A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.

(3) A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.

(4) A building that is standing or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

b. We insure for direct physical loss to covered property involving collapse of a building or any part of a building if the collapse was caused by one or more of the following:

(1) A peril shown under Perils - Part B. These perils apply to covered building and personal property for loss insured by this Additional Coverage;

(2) Decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

(3) Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;

(4) Weight of contents, equipment, animals or people;

(5) Weight of rain which collects on a roof; or

(6) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items 2, 3, 4, 5 and 6 unless the loss is a direct result of the collapse of a building or any part of a building.

This coverage does not increase the limit of liability applying to the damaged covered property.

9. **Ordinance or Law.**

a. You may use up to 10% of the Dwelling Stated Value shown in the Declarations for the increased costs you incur due to the enforcement of any ordinance or law which requires or regulates:

(1) The construction, demolition, remodeling, renovation or repair of that part of a covered building or other structure damaged by a Peril Insured Against;

(2) The demolition and reconstruction of the undamaged part of a covered building or other structure, when that building or other structure must be totally demolished because of damage by a Peril Insured Against to another part of that covered building or other structure; or

(3) The remodeling, removal or replacement of the portion of the undamaged part of a covered building or other structure necessary to complete the remodeling, repair or replacement of that part of the covered building or other structure damaged by a Peril Insured Against.

b. You may use all or part of this ordinance or law coverage to pay for the increased costs you incur to remove debris resulting from the construction, demolition, remodeling, renovation, repair or replacement of property as stated in a above.

c. We do not cover:

(1) The loss in value to any covered building or other structure due to the requirements of any ordinance or law; or

(2) The costs to comply with any ordinance or law which requires any insured or others to test for, monitor, clean up, remove,

contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of pollutants on any covered building or other structure.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

This coverage is additional insurance.

EXCLUSIONS - SECTION I

1. We do not insure under Parts A, B and C for loss:
   a. Caused by war, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequences of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.
   b. Caused by nuclear hazard meaning any nuclear reaction, radiation, or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these. Direct loss by fire resulting from the nuclear hazard is covered.
   c. To any device or instrument for the transmitting, recording, receiving or reproduction of sound or pictures which is operated by power from the electrical system of motor vehicles or other motorized land conveyances including accessories, antennas, tapes, wires, records, discs or other media for use with any such device or instrument. This exclusion does not apply:
      (1) Under Part B when the device or instrument:
         (a) Is not in or upon a motor vehicle or other motorized land conveyance; or
         (b) Is in or upon a vehicle or conveyance covered by Part B.
      (2) Under Part C if the device or instrument:
         (a) Was installed in your insured car as original equipment when the car was delivered new from the dealer to the original owner; or
         (b) If the unit is permanently installed in the dash or opening provided by the manufacturer for installation of a radio.
         (c) Is a mobile telephone for which the telephone and wiring are permanently installed in your insured car.
   d. To trailers except:
      (1) As included in the limited watercraft coverage given in Part B - Personal Property, Special Limits of Liability, item 3.
      (2) Trailers not used with watercraft are covered up to $1,000.
      (3) Part C applies to a utility trailer you own if described in the Declarations or if you ask us to insure it within 30 days after you acquire ownership of it.
      (4) Part C applies, up to a $500 limit, for a utility trailer not owned by you or a relative if you or a relative are legally liable for the loss.
2. We do not insure for loss to property described in Parts A or B caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
   a. Ordinance or Law, meaning any ordinance or law:
      (1) Requiring or regulating the construction, demolition, remodeling, renovation or repair of property, including removal of any resulting debris. This exclusion does not apply to the amount of coverage that may be provided for under Additional Coverages, Ordinance or Law;
      (2) The requirements of which result in a loss in value to property; or
      (3) Requiring the insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of pollutants.

      Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

      This exclusion applies whether or not the property has been physically damaged.

      This exclusion does not apply to a total loss or a constructive total loss to the dwelling building.
   b. Earth Movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide; mudflow; earth sinking, rising or shifting; unless direct loss by:
      (1) Fire;
      (2) Explosion; or
      (3) Breakage of glass or safety glazing material which is part of a building, storm door or storm window;

      ensues and we will pay only for the ensuing loss.

      This exclusion does not apply to loss by theft.

c. Water Damage, meaning:

(1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(2) Water which backs up through sewers or drains or which overflows from a sump; or

(3) Water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire, explosion or theft resulting from water damage is covered.

d. Power Failure, meaning the failure of power or other utility service if the failure takes place off the **residence premises.** But, if a peril insured against ensues on the **residence premises,** we will pay only for that ensuing loss.

e. Neglect, meaning neglect of the **insured** to use all reasonable means to save and preserve property at and after the time of a loss.

f. Intentional Loss, meaning we do not provide coverage for an **insured** who commits or directs an act with the intent to cause a loss.

3. We do not insure for loss to property, described in Part A, caused by any of the following. However, any ensuing loss to property described in Part A not excluded or excepted in this policy is covered.

a. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion applies only while the dwelling is vacant, unoccupied or being constructed unless you have used reasonable care to:

(1) Maintain heat in the building; or

(2) Shut off the water supply and drain the system and appliances of water;

b. Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(1) Fence, pavement, patio or swimming pool;

(2) Foundation, retaining wall or bulkhead; or

(3) Pier, wharf or dock;

c. Theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied;

d. Vandalism and malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 60 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;

e. Constant or repeated seepage or leakage of water or steam over a period of weeks, months or years from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance;

f. (1) Wear and tear, marring, deterioration;

(2) Inherent vice, latent defect, mechanical breakdown;

(3) Smog, rust, mold, wet or dry rot;

(4) Smoke from agricultural smudging or industrial operations;

(5) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against under Coverage C of this policy.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

(6) Settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings; or

(7) Birds, vermin, rodents, insects or domestic animals.

If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which this water escaped.

g. Weather conditions contributing in any way with a cause or event excluded in paragraph 1a, 1b or 2 above to produce the loss;

h. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

i. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, constructions, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property whether on or off the **residence premises.**

4. We do not cover under Part B:

a. Articles separately described and specifically insured in this or other insurance;

b. Animals, birds or fish;

c. Motor vehicles or all other motorized land conveyances. This includes:

(1) Their equipment and accessories; or

(2) Electronic apparatus that is designed to be operated solely by use of power from the electrical system of motor vehicles or all other motorized land conveyances. Electronic apparatus includes:

(a) Accessories or antennas; or

(b) Tapes, wires, records, discs or other media;

for use with any electronic apparatus described in this item 4c.

The exclusion of property described in c1 and c2 above applies only while the property is in or upon the vehicle or conveyance.

We do cover vehicles or conveyances not subject to motor vehicle registration which are:

(1) Used to service an **insured's** residence; or

(2) Designed for assisting the handicapped.

d. Aircraft and parts. Aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo;

e. Property of roomers, boarders and other tenants, except property of roomers and boarders related to an **insured**;

f. Property in an apartment regularly rented or held for rental to others by an **insured**;

g. Property rented or held for rental to others off the **residence premises**;

h. **Business** data, including such data stored in:

(1) Books of account, drawings or other paper records; or

(2) Electronic data processing tapes, wires, records, discs or other software media.

However, we do cover the cost of blank recording or storage media, and of prerecorded computer programs available on the retail market.

i. Credit cards or fund transfer cards except as provided in Additional Coverages - Section I, item 6.

5. We do not cover under Part C:

a. Loss to **your insured car** while used to carry persons or property for a charge. This exclusion does not apply to shared-expense car pools.

b. Loss to a pickup cap or camper body in excess of $500. But, coverage does apply to a newly acquired pickup cap or camper body if:

(1) The vehicle to which it is attached is insured for Car Damage coverage; and

(2) **You** ask us to insure the pickup cap or camper body within 30 days after you acquire ownership.

c. Loss to cabanas or equipment designed to provide additional living facilities.

d. Loss resulting from wear and tear, freezing, mechanical or electrical breakdown or failure, or road damage to tires. But, coverage does apply if the loss results from the total theft of **your insured car.**

e. Loss to a vehicle not owned by **you** when used in an **auto business.**

f. Increased cost of repair or replacement in excess of $500 because of loss to any custom furnishings or equipment, of a type not available from the manufacturer of the vehicle, in or upon any **utility car.** Custom furnishings or equipment include, but are not limited to:

(1) Special carpeting and insulation, furniture or bars;

(2) Facilities for cooking and sleeping;

(3) Height-extending roofs; or

(4) Custom murals, paintings or other decals or graphics.

g. Loss to a vehicle while being used in, or in preparation for a prearranged or organized racing, speed, demolition or stunting activity.

h. Loss to a car or **utility trailer** not owned by **you** or a **relative** unless **you** or a **relative** are legally liable for the loss.

LOSS SETTLEMENT - SECTION I

1. Part A - Residence and Part B - Personal Property

Losses covered under:

a. Part A;

b. Part B; and

c. The following articles or classes of property which are separately described and specifically insured in this policy:

(1) Jewelry;

(2) Furs and garments trimmed with fur or consisting principally of fur;

(3) Cameras, projection machines, films and related articles of equipment;

(4) Musical equipment and related articles of equipment;

(5) Silverware, silver-plated ware, goldware, gold-plated ware and pewterware, but excluding pens, pencils, flasks, smoking implements or jewelry; and

(6) Golfer's equipment meaning golf clubs, golf clothing and golf equipment.

are settled at replacement cost without deduction for depreciation, subject to the exceptions, limitations and conditions shown below.

d. We will pay no more than the smallest of the following amounts:

(1) If a loss to the dwelling, the dwelling stated value;

(2) Any special limits of liability for personal property stated in the policy;

(3) The replacement cost at the time of loss for equivalent property, construction on the same premises and use; or

(4) The amount actually and necessarily spent to repair or replace the property.

(5) For loss to any item separately described and specifically insured in this policy, the limit of liability that applies to the item.

e. Losses to property listed below are settled at actual cash value at the time of loss but not exceeding the amount necessary to repair or replace.

(1) Structures that are not buildings, other than outdoor antennas and outdoor equipment;

(2) Antiques, fine arts, paintings and similar articles of rarity or antiquity which cannot be replaced;

(3) Memorabilia, souvenirs, collector's items and similar articles whose age or history contribute to its value;

(4) Articles not maintained in good or workable condition;

(5) Articles that are outdated or obsolete and are stored or not being used.

f. When the replacement cost for loss to buildings exceeds $2,500 or when loss to personal property exceeds $500, we will pay no more than the actual cash value for the loss or damage until the actual repair or replacement is completed. You may make a claim for loss on an actual cash value basis and then make claim within 180 days after the loss for any additional liability on a replacement cost basis.

g. Losses to all other articles or classes of property separately described and specifically insured in this policy will be settled at the lesser of the following:

(1) The actual cash value of the lost or damaged item at the time of loss;

(2) The amount required to repair or replace the lost or damaged item; or

(3) The limit of liability that applies to the item.

2. Part C - Car Damage

a. Our limit of liability for loss shall not exceed the lesser of:

(1) The actual cash value of the stolen or damaged property; or

(2) The amount necessary to repair or replace the property;

b. If your insured car is a foreign car or discontinued model and we find it impossible to replace the car or any part of the car with another of the same type at a reasonable cost in the usual way from purchasable stock, then our liability is limited to the cost of repair or replacement of cars of standard models and similar type. This limitation does not apply to any vehicle described in the Declarations as an antique car.

3. Application of Deductible

When separate deductibles apply to different items of property involved in the same loss, we will deduct from the amount of the loss no more than the single highest deductible amount. We will not apply the Part C deductible to loss caused by a collision of your insured car with another vehicle insured by us.

OTHER PROVISIONS - SECTION I

1. **Insurable Interest and Limit of Liability.** Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:

a. To the insured for more than the amount of the insured's interest at the time of loss; or

b. For more than the applicable limit of liability.

2. **Loss to a Pair or Set.** In case of loss to a pair or set we may elect to:

a. Repair or replace any part to restore the pair or set to its value before the loss; or

b. Pay the difference between actual cash value of the property before and after the loss.

3. **Glass Replacement.** Loss for damage to glass caused by a peril insured against will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

4. **Appraisal.** If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the insured property is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail

to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

Each party will:

a. Pay its own appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

5. **Other Insurance.** If a loss covered by this Section is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss. But insurance provided under Part C does not apply to a vehicle you do not own if there is other valid and collectible insurance against the loss.

6. **Our Option.** Under Parts A and B, we may repair or replace any part of the damaged property with like property if we give you written notice within 30 days after we receive your signed, sworn proof of loss.

Under Part C, we may pay the loss in money or repair or replace damaged or stolen property. We may, at any time before the loss is paid or the property is replaced, return, at our expense, any stolen property either to you or to the address shown in the Declarations with payment for the resulting damage. We may keep all or part of the property at the agreed or appraised value.

7. **Loss Payment.** We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 30 days after we receive your proof of loss and:

a. Reach an agreement with you;

b. There is an entry of a final judgment; or

c. There is a filing of an appraisal award with us.

8. **Lienholder or Loss Payee.** The insurance covering the interest of any lienholder or loss payee shown in the Declarations shall apply except if invalidated by your fraudulent acts or omissions. But, we have the right to cancel this policy as provided by its terms, and the cancellation shall terminate this agreement with respect to the lienholder's or loss payee's interest. When we cancel, we will give 10 days' notice of cancellation to the lienholder or loss payee. Proof of mailing will be sufficient proof of notice.

When we pay the lienholder or loss payee, we are entitled to their rights of recovery, to the extent of our payment.

9. **Mortgage Clause.** The word "mortgagee" includes trustee.

If a mortgagee is named in this policy, any loss payable under Part A will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:

a. Notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. Pays any premium due under this policy on demand if you have neglected to pay the premium; and

c. Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

If the policy is cancelled or not renewed by us, the mortgagee will be notified at least 10 days before the date cancellation or nonrenewal takes effect. Proof of mailing of a cancellation or nonrenewal notice to the mortgagee will be sufficient proof of notice.

If we pay the mortgagee for any loss and deny payment to you:

a. We are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. At our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

10. **Recovered Property.** If you or we recover any property for which we have made payment under this policy, you or we will notify the other of the recovery. At your option, the property will be returned to or retained by you, or it will become our property. If the recovered property is returned to or retained by you, the loss payment will be adjusted based on the amount you received for the recovered property.

11. **Volcanic Eruption Period.** One or more volcanic eruptions that occur within a 72-hour period will be considered as one volcanic eruption.

SECTION II - LIABILITY AND MEDICAL PAYMENTS

This Section includes Part D - Residence and Personal Activities Liability, Part E - Residence and Personal Activities Medical Payments, Part F - Car Liability and Part G - Car Medical Payments.

The limit of liability shown for Liability coverage in the

Declarations is the maximum we will pay under Parts D and F as damages for **bodily injury** and **property damage** sustained in any one accident or **occurrence.**

The limit of liability for Medical Payments shown in the Declarations is the maximum we will pay under Parts E and G for all medical expense payable for **bodily injury** to one person as the result of one accident.

We will pay no more than the limits stated in the Declarations regardless of the number of vehicles, dwellings, **insureds, insured persons,** claims, claimants or policies involved in the accident or **occurrence.**

The maximum limit available under Car Medical Payments for **bodily injury** sustained by **you** or a **relative,** if not **occupying** a motor vehicle at the time of the accident, is the highest limit of medical payments coverage on any one motor vehicle we insure for **you.**

Damages paid under one Part in this Section will not be payable under another Part in this Section for the same damage. Amounts payable to or for an injured person under Part G will be reduced by payments to or for that person under Part F or Part I of this policy.

PART D - RESIDENCE AND PERSONAL ACTIVITIES LIABILITY

If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:

1. Pay up to **our** limit of liability for the damages for which the **insured** is legally liable; and
2. Provide a defense at **our** expense by counsel of **our** choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. We are not obligated to defend after we have paid an amount equal to the limit of **our** liability.

PART E - RESIDENCE AND PERSONAL ACTIVITIES MEDICAL PAYMENTS

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing **bodily injury.** Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage does not apply to **you** or regular residents of **your** household except **residence employees.** As to others, this coverage applies only:

1. To a person on the **insured location** with the permission of an **insured;** or
2. To a person off the **insured location,** if the **bodily injury:**
   a. Arises out of a condition on the **insured location** or the ways immediately adjoining;
   b. Is caused by the activities of an **insured;**
   c. Is caused by a **residence employee** in the course of the **residence employee's** employment by an **insured;** or
   d. Is caused by an animal owned by or in the care of an **insured.**

PART F - CAR LIABILITY

1. We will pay damages for which an **insured person** is legally liable because of **bodily injury** or **property damage** resulting from the ownership, maintenance or use, including loading and unloading, of a car or **utility trailer.**

   We will defend any suit or settle any claim for damages as we think appropriate. We are not obligated to defend after we have paid an amount equal to the limit of **our** liability.

   We will apply the limit of liability to provide any separate limits required by law for **Bodily Injury** Liability and **Property Damage** Liability. This provision, however, will not change **our** total limit of liability.
2. When we certify this policy as proof under a financial responsibility law, it will comply with the law to the extent of the coverage and limits of liability required by law. You agree to reimburse us for any payment made by us which we would not have been obligated to make under the terms of this policy.
3. If an **insured person** becomes subject to the financial responsibility law or the compulsory insurance law or similar laws of another **state** because of the ownership, maintenance or use of **your insured car** in that **state,** we will interpret this policy to provide any broader coverage required by those laws. But, any broader coverage so afforded will be reduced to the extent that other auto liability insurance applies. No person may, in any event, collect more than once for the same elements of loss.

PART G - CAR MEDICAL PAYMENTS

We will pay reasonable medical expenses incurred within three years from the date of accident for necessary medical, surgical, x-ray, dental and chiropractic services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral expenses because of **bodily injury,** caused by the accident, sustained by an **insured person.**

1. **If Not Wearing a Seat Belt**

   The "Medical Payments Limit" shown in the Declarations will apply if we have no accident report verifying the **insured person** was wearing a seat belt when the **bodily injury** was sustained.
2. **If Wearing a Seat Belt**

   The "Medical Payments Limit if wearing a seat belt" will apply if an accident report, completed by the law enforcement official on scene at the accident, indicates the **insured person** was wearing

a seat belt when the bodily injury was sustained.

ADDITIONAL DEFINITIONS - SECTION II

1. As used in Part D, **"occurrence"** means:

   An accident, including exposure to conditions, which results, during the policy period, in:

   a. **Bodily injury**; or

   b. **Property damage.**

2. As used in Part F, **"insured person"** means:

   a. **You** or a **relative** for the ownership, maintenance or use of **your insured car.**

   b. Any person while using **your insured car** with **your** permission or that of any adult member of **your** household.

   c. **You** or a **relative** while using a car or **utility trailer** other than **your insured car** with a reasonable belief of having permission to do so.

   d. Any other person or organization with respect only to legal liability for acts or omissions of:

      (1) Any person covered under this Part while using **your insured car.**

      (2) **You** or any **relative** covered under this Part while using any car or **utility trailer** other than **your insured car** if the car or **utility trailer** is not owned or hired by that person or organization.

3. As used in Part G, **"insured person"** means:

   a. **You** or a **relative** while **occupying your insured car.**

   b. **You** or a **relative** while **occupying** any car other than **your insured car** with a reasonable belief of having permission to do so.

   c. **You** or a **relative** if struck by a highway vehicle or trailer.

   d. Any other person **occupying your insured car** while being used by **you**, a **relative** or another person if that person has a reasonable belief of having permission to use the car.

ADDITIONAL COVERAGES AND PAYMENTS - SECTION II

We cover the following in addition to the limit of liability shown in the Declarations for Section II - Liability:

1. All costs we incur in the settlement of a claim or defense of a suit;

2. Premiums on appeal and attachment bonds required in a suit we defend, but not for bond amounts in excess of the Section II - Liability limit;

3. Up to $250 for a bail bond required by an **insured person** under Part F due to an accident, including related traffic law violations, resulting in **bodily injury** or **property damage** covered by Part F. We have no obligation to apply for or furnish a bond;

4. Up to $50 a day for loss of earnings, but not other income, when we ask you to help us investigate or defend any claim;

5. Interest on damages awarded in a suit we defend accruing after judgment is entered and before we have paid, offered to pay, or deposited in court that portion of the judgment which is not more than our limit of liability;

6. Expenses for first aid to others incurred by an **insured** for **bodily injury** covered under this policy; and

7. Any other reasonable expenses incurred at our request.

8. We will pay up to $1,000 for your share of any loss assessment charged during the policy period against you by a corporation or association of property owners, when the assessment is made as a result of:

   a. Each **occurrence** to which Part D of this policy would apply;

   b. Liability for each act of a director, officer or trustee in the capacity as a director, officer or trustee, provided:

      (1) The director, officer or trustee is elected by the members of a corporation or association of property owners; and

      (2) The director, officer or trustee serves without deriving any income from the exercise of duties which are solely on behalf of a corporation or association of property owners.

   Additional Coverage 8 applies only to loss assessments charged against you as owner or tenant of the **residence premises.**

   We do not cover loss assessments charged against you or a corporation or association of property owners by any governmental body.

   Under Exclusions - Section II, exclusion 3a(1) does not apply to this coverage.

9. We will pay, at replacement cost, up to $500 per **occurrence** for **property damage** to property of others caused by an **insured.**

   We will not pay for **property damage:**

   a. To the extent of any amount recoverable under Section I of this policy;

   b. Caused intentionally by an **insured** who is 13 years of age or older;

   c. To property owned by an **insured;**

   d. To property owned by or rented to a tenant of an **insured** or a resident in your household; or

   e. Arising out of:

      (1) **Business** pursuits;

      (2) Any act or omission in connection with a premises owned, rented or controlled by an **insured,** other than the **insured location;** or

(3) The ownership, maintenance, or use of aircraft, watercraft or motor vehicles or all other motorized land conveyances. This exclusion does not apply to a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and not owned by an **insured.**

OTHER INSURANCE - SECTION II

1. Part D - Residence and Personal Activities Liability

   Insurance afforded under Part D is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

2. Part F - Car Liability

   If there is other applicable auto liability insurance on a loss covered by this Part, we will pay **our** proportionate share as **our** limits of liability bear to the total of all applicable liability limits. But, insurance afforded under this Part for a vehicle **you** do not own is excess over any other collectible auto liability insurance.

3. Part G - Car Medical Payments

   If there is other medical payments insurance on a loss covered by this Part, we will pay **our** proportionate share as **our** limit of liability bears to the total of all applicable auto medical payments limits. But, insurance afforded under this Part for an **insured person** while **occupying** a vehicle **you** do not own is excess over any other applicable auto medical payments insurance.

EXCLUSIONS - SECTION II

1. This insurance does not apply, under Parts D, E, F and G to:

   a. **Bodily injury** or **property damage** caused directly or indirectly by war, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.

   b. **Bodily injury** or **property damage** caused by nuclear reaction, radiation or radioactive contamination, or a consequence of any of these.

   c. **Bodily injury** or **property damage** for which an **insured** or an **insured person** under this policy is also covered under a nuclear energy liability policy or would be but for the exhaustion of its limits of liability. A nuclear energy liability policy is one issued by:

      (1) American Nuclear Insurers;

      (2) Mutual Atomic Energy Liability Underwriters;

      (3) Nuclear Insurance Association of Canada; or

      (4) Any of their successors.

   d. **Bodily injury** or **property damage** arising out of an intentionally harmful act or omission committed by, or at the direction of, the **insured.** This exclusion applies if the injury or damage is substantially certain to follow from the intentionally harmful act or omission even if the actual injury or damage is different from that which was expected or intended.

      This exclusion does not apply to **bodily injury** or **property damage** resulting from an act committed to protect persons or property.

2. This insurance does not apply, under Parts D and E, to **bodily injury** or **property damage:**

   a. Arising out of **business** pursuits of an **insured** or the rental or holding for rental of any part of any premises by an **insured.**

      This exclusion does not apply to:

      (1) Activities which are usual to **nonbusiness** pursuits; or

      (2) The rental or holding for rental of an **insured location:**

         (a) On an occasional basis if used only as a residence;

         (b) In part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or

         (c) In part; as an office, school, studio or private garage.

   b. Arising out of the rendering of or failure to render professional services;

   c. Arising out of a premises:

      (1) Owned by an **insured;**

      (2) Rented to an **insured;** or

      (3) Rented to others by an **insured;**

      that is not an **insured location.**

   d. Arising out of;

      (1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an **insured;**

      (2) The entrustment by an **insured** of a motor vehicle or any other motorized land conveyance to any person; or

      (3) Vicarious liability, whether or not statutorily imposed, for the action of a child or minor using a conveyance excluded in paragraph 1 or 2 above.

This exclusion does not apply to:

(1) A trailer not towed by or carried on a motorized land conveyance.

(2) A motorized land conveyance designed for recreational use off public road, not subject to motor vehicle registration and:

(a) Not owned by an **insured**; or

(b) Owned by an **insured** and on an **insured location.**

(3) A motorized golf cart when used to play golf on a golf course.

(4) A vehicle or conveyance not subject to motor vehicle registration which is:

(a) Used to service an **insured's** residence;

(b) Designed for assisting the handicapped; or

(c) In dead storage on an **insured location.**

In this exclusion, land motor vehicle is defined to include vehicles operated on crawler-treads, including, but not limited to, snowmobiles.

e. Arising out of:

(1) The ownership, maintenance, use, loading or unloading of a watercraft described below;

(2) The entrustment by an **insured** of a watercraft described below to any person; or

(3) Vicarious liability, whether or not statutorily imposed, for the action of a child or minor using a watercraft described below.

Watercraft:

(1) With inboard or inboard-outdrive motor power owned by an **insured;**

(2) With inboard or inboard-outdrive motor power of more than 50 horsepower rented to an **insured;**

(3) That is a sailing vessel, with or without auxiliary power, 26 feet or more in length owned by or rented to an **insured;** or

This exclusion does not apply while the watercraft is stored.

f. Arising out of:

(1) The ownership, maintenance, use, loading or unloading of an aircraft;

(2) The entrustment by an **insured** of an aircraft to any person; or

(3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an aircraft.

An aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo.

g. Which arises out of the transmission of a communicable disease by an **insured.**

h. Arising out of sexual molestation, corporal punishment or physical or mental abuse.

i. Arising out of the actual, alleged or threatened ingestion, inhalation, absorption, exposure or presence of lead in any form or from any source.

Coverage also does not apply to any loss, cost, expense, fine or penalty arising out of any:

(1) Request, demand or order that any **insured** or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize, dispose of or in any way respond to or assess the effects of lead in any form; or

(2) Claim or suit by or on behalf of any governmental authority for damages or any other remedy because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, disposing of or in any way responding to or assessing the effects of lead in any form.

j. Arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 21 U.S.C.A. Sections 811 and 812. Controlled Substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician.

Exclusions c, d, e and f do not apply to **bodily injury** to a **residence employee** arising out of and in the course of the **residence employee's** employment by an **insured.**

3. This insurance does not apply, under Part D, to:

a. Liability:

(1) For your share of any loss assessment charged against all members of an association, corporation or community of property owners;

(2) Under any contract or agreement. However, this exclusion does not apply to written contracts:

(a) That directly relate to the ownership, maintenance or use of an **insured location;** or

(b) Where the liability of others is assumed by the **insured** prior to an **occurrence;**

unless excluded in 1 above or elsewhere in this policy.

b. **Property damage** to property owned by the **insured;**

c. **Property damage** to property rented to, occupied or used by or in the care of the **insured**. This exclusion does not apply to **property damage** caused by fire, smoke or explosion;

d. **Bodily injury** to **you** or an **insured** within the meaning of part a or b of "**insured**" as defined.

e. **Bodily injury** to any person eligible to receive any benefits:

(1) Voluntarily provided; or

(2) Required to be provided;

by the **insured** under any:

(1) Workers' Compensation law;

(2) Non-occupational disability law; or

(3) Occupational disease law.

4. This insurance does not apply, under Part E, to **bodily injury**:

a. To a **residence employee** if the **bodily injury**:

(1) Occurs off the **insured location**; and

(2) Does not arise out of or in the course of the **residence employee's** employment by an **insured**.

b. To any person, other than a **residence employee** of an **insured**, regularly residing on any part of the **insured location**.

c. To any person eligible to receive benefits:

(1) Voluntarily provided; or

(2) Required to be provided;

under any:

(1) Workers' Compensation law;

(2) Non-occupational disability law; or

(3) Occupational disease law.

5. This insurance does not apply, under Parts F and G, to:

a. **Bodily injury** or **property damage** resulting from the use or **occupancy** of any vehicle while being used in, or in preparation for, a prearranged or organized racing, speed, demolition or stunting activity.

b. **Bodily injury** or **property damage** resulting from the ownership, maintenance or use of a vehicle when used to carry persons or property for a charge. This exclusion does not apply to shared-expense car pools. Under Part G, this exclusion applies only to **bodily injury** to a person **occupying your insured car**.

c. **Bodily injury** or **property damage** resulting from the ownership, maintenance or use of a vehicle by a person while employed or otherwise engaged in a **business** other than the **auto business**, farming or ranching. This exclusion does not apply to the ownership, maintenance or use of a:

(1) **Private passenger car**;

(2) **Utility car** described in the Declarations or its replacement;

(3) **Utility trailer** used with a vehicle described in (1) or (2) above.

Under Part G, this exclusion applies only to **bodily injury** to a person **occupying** a vehicle while it is being used in the **business** of an **insured person**.

d. **Bodily injury** or **property damage** for which the United States Government is liable or required to pay the expenses incurred.

e. **Bodily injury** or **property damage** resulting from the ownership, maintenance, use or **occupancy** of a motorized vehicle with less than four wheels.

f. **Bodily injury** or **property damage** resulting from the use of any vehicle, other than **your insured car**, by a **relative** who owns a **private passenger car** or **utility car**.

g. A vehicle, other than **your insured car**, which is owned by, furnished to, or available for regular use by **you** or a **relative**. Part F does not apply to **bodily injury** or **property damage** resulting from the ownership, maintenance or use of such a vehicle. Part G does not apply to **bodily injury** to a person occupying or when struck by such a vehicle.

6. This insurance does not apply, under Part F, to:

a. **Bodily injury** or **property damage** resulting from **auto business** operations. But, coverage does apply for **you**, a **relative**, or anyone associated with or employed by **you** or a **relative** with respect to the operation of **your insured car** in the **auto business**.

Coverage also applies, only up to the limits required by the Wisconsin Financial Responsibility Law, for any person working in **auto business** operations if that person has no other available insurance, whether primary, excess or contingent.

b. Damage to property owned or being transported by an **insured person**.

c. Damages arising out of damage to property rented to, or in the care of, an **insured person** except a residence or private garage.

7. This insurance does not apply, under Part G, to **bodily injury** to a person **occupying** a vehicle while located for use as a residence or premises.

SECTION III - UNINSURED MOTORISTS AND UNDERINSURED MOTORISTS

PART H - UNINSURED MOTORISTS

We will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**. **Bodily injury** must be sustained by an **insured person** and must be caused by accident and result from the ownership, maintenance or use of the **uninsured motor vehicle**.

If suit is brought to determine legal liability or damages without our written consent, we are not bound by the resulting judgment.

Limits of Liability

The limit shown in the Declarations for this coverage is the maximum we will pay regardless of the number of vehicles or premiums described in the Declarations, premiums paid, **insured persons**, claims, claimants, policies or vehicles involved in the accident. The limit shown is subject to the following:

1. When **bodily injury** is sustained by an **insured person** while **occupying your insured car**, the Uninsured Motorists limit of that vehicle only will apply.
2. The maximum limit available for **bodily injury** sustained by **you** or a **relative**, if not **occupying your insured car** at the time of the accident, is the highest limit of Uninsured Motorists coverage on any one motor vehicle we insure for **you**.
3. The Uninsured Motorists limit will be reduced by any of the following that apply:
   a. Amounts paid by or on behalf of any person or organization that may be legally responsible for the **bodily injury** for which the payment is made.
   b. Amounts paid or payable under any Workers' Compensation law.
   c. Amounts paid or payable under any disability benefits laws.

PART I - UNDERINSURED MOTORISTS

We will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. **Bodily injury** must be sustained by an **insured person** and must be caused by accident and result from the ownership, maintenance or use of the **underinsured motor vehicle**.

We will pay under this coverage only if 1 or 2 below applies:

1. The limits of any applicable **bodily injury** liability bonds or policies have been exhausted by judgments or payments; or
2. A tentative settlement has been made between an **insured person** and the insurer of the **underinsured motor vehicle** and we:
   a. Have been given prompt written notice of such tentative settlement; and
   b. Advance payment to the **insured person** in an amount equal to the tentative settlement within 30 days after receipt of notification.

If suit is brought to determine legal liability or damages without our written consent, we are not bound by the resulting judgment unless we:

1. Received reasonable notice of the commencement of the suit resulting in the judgment; and
2. Had reasonable opportunity to protect our interests in the suit.

Limits of Liability

The limit shown in the Declarations for this coverage is the maximum we will pay regardless of the number of vehicles or premiums described in the Declarations, premiums paid, **insured persons**, claims, claimants, policies or vehicles involved in the accident. The limit shown is subject to the following:

1. When **bodily injury** is sustained by an **insured person** while **occupying your insured car**, the Underinsured Motorists limit of that vehicle only will apply.
2. The maximum limit available for **bodily injury** sustained by **you** or a **relative**, if not **occupying your insured car** at the time of the accident, is the highest limit of Underinsured Motorists coverage on any one motor vehicle we insure for **you**.
3. The Underinsured Motorists limit will be reduced by any of the following that apply:
   a. Amounts paid by or on behalf of any person or organization that may be legally responsible for the **bodily injury** for which the payment is made.
   b. Amounts paid or payable under any Workers' Compensation law.
   c. Amounts paid or payable under any disability benefits laws.

ADDITIONAL DEFINITIONS - SECTION III

As used in this Section:

1. **"Insured person"** means:
   a. **You** or a **relative**.
   b. Any other person while **occupying your insured car**.
   c. Any person for damages that person is entitled to recover because of **bodily injury** to **you**, a **relative** or another occupant of **your insured car**.

But, no person shall be considered an **insured person** if the person uses a vehicle without a reasonable belief of having permission to do so.

2. **"Uninsured motor vehicle"** means a land motor vehicle or trailer which is:
   a. Not insured by a **bodily injury** liability bond or policy at the time of the accident.
   b. Insured by a liability bond or policy at the time of the accident which provides **bodily injury** liability limits less than the minimum **bodily injury** liability limits required by the financial responsibility law of the **state** in which your **insured car** is principally garaged.
   c. A hit-and-run vehicle whose operator or owner is unknown and which strikes:
      (1) **You** or a **relative**;
      (2) A vehicle which **you** or a **relative** are **occupying**;
      (3) **Your insured car**; or
      (4) Another vehicle which, in turn, hits:
         (a) **You** or any **relative**;
         (b) A vehicle which **you** or any **relative** are **"occupying"**; or
         (c) **Your insured car**.
   d. Insured by a **bodily injury** liability bond or policy at the time of the accident but the bonding or insuring company denies coverage, or is or becomes insolvent.

   "Uninsured motor vehicle," however, does not include a vehicle:
   a. Owned by, furnished to, or available for regular use by **you** or a **relative**.
   b. Owned or operated by a self-insurer as contemplated by a financial responsibility law, motor carrier law or similar law.
   c. Owned by a government unit or agency.
   d. Operated on rails or crawler-treads.
   e. Which is a farm-type tractor or equipment designed for use principally off public roads, while not on public roads.
   f. Located for use as a residence or premises.
3. **"Underinsured motor vehicle"** means a land motor vehicle or trailer insured by a liability policy or bond at the time of the accident which provides **bodily injury** liability limits less than the limit of liability for this coverage. It does not include a vehicle:
   a. Which is an **uninsured motor vehicle**.
   b. Owned by, furnished to, or available for regular use by **you** or a **relative**.
   c. Owned by a government unit or agency.
   d. Owned or operated by a self-insurer as contemplated by a financial responsibility law, motor carrier law or similar law.
   e. Operated on rails or crawler-treads.
   f. Which is a farm-type tractor or equipment designed for use principally off public roads, while not on public roads.
   g. Located for use as a residence or premises.

EXCLUSIONS - SECTION III

1. This Section does not apply to **bodily injury** to a person:
   a. **Occupying**, or struck by, a land motor vehicle or trailer owned by **you** or a **relative** for which insurance is not afforded under this Section.
   b. If that person or the legal representative of that person makes a settlement without **our** written consent. However, this exclusion does not apply to a settlement made with the insurer of an **underinsured motor vehicle** in accordance with the procedure described under Part I - Underinsured Motorists.
   c. **Occupying your insured car** when used to carry persons or property for a charge. This exclusion does not apply to shared-expense car pools.
   d. If the **bodily injury** results from the use of any vehicle, other than **your insured car**, by a **relative** who owns a **private passenger car** or **utility car**.
   e. If the United States Government is required to pay the expenses incurred.
   f. **Occupying** a vehicle being used in, or in preparation for, a prearranged or organized racing, speed, demolition or stunting activity.
2. This Section shall not apply to benefit any insurer or self-insurer under any workers' compensation law, disability benefits law or similar law.
3. This Section does not apply to punitive or exemplary damages.

ARBITRATION - SECTION III

If an **insured person** and **we** do not agree (1) that the person is legally entitled to recover damages from the owner or operator of an **uninsured motor vehicle** or **underinsured motor vehicle**, or (2) as to the amount of payment under this Section, both **the insured person** and **we** may agree to have the disagreement settled by arbitration. If so agreed, **the insured person** will select an arbitrator and **we** will select another. The two arbitrators will select a third. If they cannot agree on the third arbitrator within 30 days, the judge of a court having jurisdiction will appoint the third arbitrator. **The insured person** will pay the arbitrator selected by that person. **We** will pay the arbitrator **we** select. The expense of the third arbitrator and all other expenses of arbitration will be shared equally.

Arbitration will take place in the county where **the insured person** lives. Local court rules governing procedures and evidence will apply. The decision in writing

of any two arbitrators will be binding subject to the terms of this insurance.

OTHER INSURANCE - SECTION III

If there is other similar insurance on a loss covered by this Section, we will pay our proportionate share as our limits of liability bear to the total limits of all applicable similar insurance. But, insurance afforded under this Section for an insured person while occupying a vehicle you do not own is excess over any other applicable similar insurance.

GENERAL PROVISIONS

The following provisions apply to the entire policy or to Policy Parts and Sections as identified in the specific provision:

POLICY PERIOD

The time of inception and the time of expiration of this policy and any attached schedules or endorsements shall be 12:01 A.M. standard time at your address as shown in the Declarations. To the extent that coverage in this policy replaces coverage in other policies terminating at noon standard time on the inception date of this policy, coverage under this policy shall not become effective until such other coverage has terminated.

TERRITORY

With respect to Parts C, F, G, H and I, this policy applies only to accidents and loss during the policy period shown in the Declarations while the car is within the United States, its territories or possessions, or Canada, or between their ports.

CHANGES

This policy and Declarations include all the agreements between you and us relating to this insurance. Our request for an appraisal or examination will not waive any of our rights. If a premium adjustment is necessary, we will make the adjustment as of the effective date of the change. We may adjust the dwelling stated value limit at each annual effective date according to construction cost changes in your area. When we broaden coverage during the policy period without charge, this policy will automatically provide the broadened coverage when effective in your state.

If there is a change to the information used to develop the policy premium, we may adjust your premium. Changes during the policy term that may result in a premium increase or decrease include, but are not limited to, changes in:

1. The number, type or use classifications of your insured car;
2. Operators using your insured car;
3. The place of principal garaging of your insured car; and
4. Coverage, deductibles or limits.

If a change requires a premium adjustment, we will make the premium adjustment in accordance with our manual rules.

MISREPRESENTATION, CONCEALMENT OR FRAUD

1. Under Section I - Property, with respect to all insureds covered under this policy, we provide no coverage for loss if, whether before or after a loss, one or more insureds have:
   a. Concealed or misrepresented any fact upon which we rely, and that concealment or misrepresentation is material and made with intent to deceive; or
   b. Concealed or misrepresented any fact and the fact misrepresented contributes to the loss.
2. Under Section II - Liability and Medical Payments, we do not provide coverage to one or more insureds who, whether before or after a loss, have:
   a. Concealed or misrepresented any fact upon which we rely, and that concealment or misrepresentation is material and made with intent to deceive; or
   b. Concealed or misrepresented any fact and the fact misrepresented contributes to the loss.

FAILURE TO COMPLY WITH A CONDITION

No failure to comply with a policy condition before the loss and no breach of a promissory warranty affects our obligations under this policy unless such failure or breach exists at the time of loss and either:

1. Increases the risk at the time of loss; or
2. Contributes to the loss.

This does not apply to failure to tender payment of premium.

ASSIGNMENT

Interest in this policy may not be assigned without our written consent.

DEATH

1. If you die, the coverages provided under Parts C, F, G, H and I of this policy will apply to:
   a. Your surviving spouse if residing in the same household.
   b. Your legal representative while acting within the scope of duties of a legal representative.
   c. Any person having proper custody of your insured car until a legal representative is appointed.

2. With respect to Parts A, B, D and E, if any person named in the Declarations or the spouse, if a resident of the same household, dies:
   a. We insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death;
   b. Insured includes:
      (1) Any member of your household who is an insured at the time of your death, but only while a resident of the residence premises; and
      (2) With respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

NO BENEFIT TO BAILEE

This insurance shall not in any way benefit any person or organization caring for or handling property for a fee regardless of any other provision of this policy.

ABANDONMENT OF PROPERTY

We need not accept any property abandoned by an insured.

SUIT AGAINST US

No action shall be brought against us by an insured person unless there has been compliance with the policy provisions. No action shall be brought against us under Parts A and B unless such action is started within one year after the date of loss.

OUR RECOVERY RIGHTS

In the event of a payment under this policy, we are entitled to all the rights of recovery that the person or organization to whom payment was made has against another. That person or organization must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to harm our rights. Our rights in this paragraph do not apply under Part C against any person using your insured car with a reasonable belief of having permission to do so. When a person or organization has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held in trust for us and reimbursed to us to the extent of our payment.

Under Parts A, B and D, an insured may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.

If an assignment is sought, an insured must sign and deliver all related papers and cooperate with us.

Our right to reimbursement out of the proceeds of any recovery from another may not be exercised until the person or organization to whom we have made payment under this policy has been fully compensated for their damages incurred less reduction for any contributory negligence.

Our recovery rights do not apply under Part E or to Damage to Property of Others under Additional Coverages of Part D.

Our rights do not apply under this provision with respect to Part I - Underinsured Motorists if we:

1. Have been given prompt written notice of a tentative settlement between an insured person and the insurer of an underinsured motor vehicle; and
2. Fail to advance payment to the insured person in an amount equal to the tentative settlement within 30 days after receipt of notification.

If we advance payment to the insured person in an amount equal to the tentative settlement within 30 days after receipt of notification:

1. That payment will be separate from any amount the insured person is entitled to recover under the provisions of Part I - Underinsured Motorists; and
2. We also have a right to recover the advanced payment.

KNOWLEDGE BY OUR AGENT

Knowledge by our agent of any fact which breaches a condition of this policy will be knowledge to us if such fact is known by the agent at the time the policy is issued or application is made or thereafter becomes known to the agent. Any fact which breaches a condition of this policy and is known to the agent when the policy is issued or application is made will not void this policy or defeat a recovery in the event of loss.

BANKRUPTCY

We are not relieved of any obligation under this policy because of bankruptcy or insolvency of an insured person or an insured.

TWO OR MORE POLICIES

If this policy and any other car insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

TWO OR MORE VEHICLES ON THIS POLICY

1. When two or more vehicles are insured under this policy, the policy terms apply separately to each vehicle. Policy coverages and limits for any one

vehicle are as stated in the Declarations.

2. A vehicle with an attached trailer is considered one vehicle with respect to limits of liability under Parts F, G, H and I. The vehicle and trailer are considered separate vehicles under Part C.
3. If you replace a vehicle described in the Declarations, our liability on the replacement vehicle is limited to the coverages and limits of the vehicle replaced.
4. If you temporarily use a vehicle, other than a rented car, as a substitute for any of your insured cars because of its withdrawl from normal use due to breakdown, repair, servicing, loss or destruction, our liability for the vehicle used as the substitute is limited to the coverages and limits of the vehicle withdrawn from use.
5. If you acquire an additional vehicle during the policy period, our liability for the additional vehicle is limited to the coverages and limits afforded to any one vehicle described in the Declarations.
6. If you or a relative use a vehicle other than your insured car with a reasonable belief of having permission to do so, our liability is limited to the coverages and limits afforded to any one vehicle described in the Declarations.
7. If you or a relative use a rented car, our liability is limited to the coverages and limits afforded to any one vehicle described in the Declarations.

TRAILER HOME AND MOTOR HOME

The following provisions apply to any vehicle described in the Declarations as a trailer home or motor home:

1. The coverage afforded under this policy does not apply:
   a. If the vehicle is or becomes subject to any bailment lease, conditional sale or purchase agreement not described in the Declarations.
   b. To contents within the vehicle not forming a permanent part of the vehicle.
   c. If the vehicle is rented or leased to others.
2. The coverage afforded under Part C includes built-in equipment and accessories usual to a trailer home or motor home, but does not include cabanas or equipment designed to create additional living facilities while the vehicle is off a highway.
3. The coverage afforded under Part C does not apply to loss by fire to the described vehicle while it is located as a permanent residence or premises.
4. Transportation expense coverage under Part C does not apply to trailer homes.

ANTIQUE CAR

The following provision applies to any vehicle described in the Declarations as an antique car:

The coverage afforded under this policy applies provided the vehicle is maintained solely for use in exhibitions, club activities, parades or other functions of public interest and is only occasionally used for other purposes.

CANCELLATION OR NONRENEWAL

We will not cancel or refuse to renew solely because of age, sex, residence, race, color, creed, religion, national origin, ancestry, marital status or occupation of any person who is an insured person under this policy.

You may cancel this policy by returning it to us or our authorized agent or by advising us in writing when at a future date the cancellation is to be effective.

We may cancel:

1. Only the auto coverage (Part C - Car Damage, Part F - Car Liability, Part G - Car Medical Payments, Part H - Uninsured Motorists and Part I - Underinsured Motorists) provided under this policy;
2. Only the homeowners coverage (Part A - Residence, Part B - Personal Property, Part D - Residence and Personal Activities Liability and Part E - Residence and Personal Activities Medical Payments) provided under this policy; or
3. The entire policy;

By mailing notice of cancellation to you at your last mailing address known to us or by delivering the notice not less than 10 days prior to the effective date of cancellation. Proof of mailing will be sufficient proof of notice. Delivery is equivalent to mailing.

If this policy has been in effect for 60 days or is a continuation or renewal policy, we may cancel only if:

1. You have failed to pay the premium when due;
2. The policy was obtained through material misrepresentation, fraudulent statements, omissions or concealment of fact material to the acceptance of the risk or to the hazard assumed by us;
3. There have been substantial breaches of contractual duties, conditions or warranties of the policy; or
4. Since the policy was issued, there has been a substantial change in the risk assumed by us, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the contract.

When this policy is written for a period longer than one year, we may cancel for any reason at anniversary by notifying you at least 60 days before the date cancellation takes effect.

Upon cancellation, you may be entitled to a premium refund. If so, we will send it to you, but our making or

offering a refund is not a condition of cancellation. If you cancel, the refund will be computed in accordance with the customary short-rate procedure. If we cancel, the refund will be computed on a pro rata basis. The effective date of cancellation stated in a notice is the end of the policy period.

We will mail to you at your last mailing address known to us or deliver to you notice of nonrenewal not less than 60 days before the end of the policy period, if we decide not to renew or continue this policy.

This policy will automatically terminate in any event on the expiration date:

1. If you have notified us or our agent that you do not wish to have this policy renewed; or
2. If we have mailed a notice of renewal premium due to you not more than 60 days nor less than 10 days prior to the expiration date and the renewal notice states clearly the effect of nonpayment of premium by the due date and you have failed to pay the renewal premium by that expiration date.

This policy will terminate on the effective date of any other insurance policy issued as a replacement for any insurance afforded by this, with respect to any insurance to which both policies apply.

MUTUAL POLICY CONDITIONS

1. **Membership, Notice of Annual Meeting**

   Every person, co-partnership or corporation insured by us is a member of the insurance company and has one vote. The annual meeting of the members is held on the first Tuesday in March at 1:30 P.M. of each year at our corporate headquarters in Sheboygan, Wisconsin.

2. **Dividends**

   You will participate in the distribution of dividends, if any are declared, as fixed and determined by the directors according to law.

3. **Policy Nonassessable**

   This policy is nonassessable. Your liability to us is limited to the payment of the premium.

CORPORATE HEADQUARTERS ADDRESS

ACUITY
2800 South Taylor Drive
PO Box 58
Sheboygan, Wisconsin 53082-0058

P-Ap. 148

ROAD AND RESIDENCE COVERAGE ENHANCEMENTS PLUS RR-244(6-02)

This endorsement modifies insurance provided under this policy.

1. Under Part B - Personal Property, Special Limits of Liability items 2, 5, 6 and 7 are replaced by the following:

2. $3,000 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, personal records, passports, tickets and stamps. This dollar limit applies to these categories regardless of the medium (such as paper or computer software) on which the material exists.

The limit includes the cost to research, replace or restore the information from the lost or damaged material.

5. $2,500 for loss by theft, misplacing or losing of jewelry, watches, furs, precious and semiprecious stones, subject to a limit of $1,000 per article.

6. $3,000 for loss by theft, misplacing or losing of firearms.

7. $3,500 for loss by theft, misplacing or losing of silverware, silver-plated ware, goldware, gold-plated ware and pewterware. This includes flatware, hollowware, tea sets, trays and trophies made of or including silver, gold or pewter.

2. Perils - Part B is replaced by the following:

Perils - Part B

We insure against risks of direct loss to property described in Part B only if that loss is a physical loss to property, however we do not insure loss excluded under Exclusions - Section I or loss caused by:

a. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion applies only while the dwelling is vacant, unoccupied or being constructed, unless you have used reasonable care to:

(1) Maintain heat in the building; or

(2) Shut off the water supply and drain the system and appliances of water;

b. Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(1) Fence, pavement, patio or swimming pool;

(2) Foundation, retaining wall, or bulkhead;

(3) Pier, wharf or dock;

c. Theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied;

d. (1) Wear and tear, marring, deterioration;

(2) Inherent vice or latent defect;

(3) Mechanical breakdown;

(4) Smog, rust, mold, wet or dry rot;

(5) Smoke from agricultural smudging or industrial operations;

(6) Release, discharge or dispersal of contaminants or pollutants;

(7) Settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings;

(8) Birds, vermin, rodents, insects or domestic animals.

If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance.

We do not cover loss to the system or appliance from which this water escaped.

e. Breakage of:

(1) Eyeglasses, glassware, statuary, marble;

(2) Bric-a-brac, porcelains and similar fragile articles other than jewelry, watches, bronzes, cameras and photographic lenses.

There is coverage for breakage of the property by or resulting from:

(1) Fire, lightning, windstorm, hail;

(2) Smoke, other than smoke from agricultural smudging or industrial operations;

(3) Explosion, riot, civil commotion;

(4) Aircraft, vehicles, vandalism and malicious mischief, earthquake or volcanic eruption;

(5) Collapse of a building or any part of a building;

(6) Water not otherwise excluded;

(7) Theft or attempted theft; or

(8) Sudden and accidental tearing apart, cracking, burning or building of:

(a) A steam or hot water heating system;

(b) An air conditioning or automatic fire protective sprinkler system; or

(c) An appliance for heating water.

f. Dampness of atmosphere or extremes of temperature unless the direct cause of loss is rain, snow, sleet or hail;

g. Refinishing, renovating or repairing property other than watches, jewelry and furs;

h. Collision, other than collision with a land vehicle, sinking, swamping or stranding of watercraft, including their trailers, furnishings, equipment and outboard motors;

i. Destruction, confiscation or seizure by order of any government or public authority.

j. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body. However, any ensuing loss to property described in Coverage C not excluded or excepted in this policy is covered.

Under items a through d, any ensuing loss to property described in Part B not excluded or excepted in this policy is covered.

3. Under Additional Coverages - Section I, the following paragraph is added to item 1, Debris Removal:

We will pay **your** reasonable expense incurred by **you** in the removal of debris of trees, shrubs, plants or lawns on the residence premises, for loss caused by the peril of windstorm, hail, or weight of ice, snow or sleet. The limit of liability for this coverage shall not exceed $500. This limit is excess over any deductible applicable to Section I.

4. The limit of liability for Additional Coverage 6, Credit Card, Fund Transfer Card, Forgery and Counterfeit Money, is increased to $2,000.

5. Under Additional Coverages - Section I, item 8 Collapse does not apply to Part B - Personal Property. Paragraph 8a is replaced by the following:

a. Perils insured against in Part A.

6. Under Additional Coverages - Section I, the following are added:

9. Refrigerated Products. We will pay up to $500 per **occurrence** for loss or damage to contents owned by the **insured** and kept in a freezer or refrigerated unit on the **insured location.** We cover loss or damage caused by a change in temperature resulting from:

a. Interruption of electrical service to refrigeration equipment caused by damage to the generating and transmission equipment; or

b. Mechanical or electrical breakdown of the refrigeration system.

You must exercise diligence in inspecting and maintaining refrigeration equipment. If interruption of electrical service or mechanical or electrical breakdown is known, you shall see that all reasonable means are used to protect the insured property from further damage, or there is no coverage.

No deductible applies to this coverage.

10. Lock Replacement. We will pay up to $250 to replace house locks to your dwelling due to loss or theft of an **insured's** keys.

A $25 deductible applies to this coverage.

11. Fire Extinguisher Recharge. We will pay up to $250 to recharge or replace a portable fire extinguisher which has been discharged to fight a fire or due to mechanical malfunction.

No deductible applies to this coverage.

12. Arson Reward. We will pay up to $1,000 to any individual or organization for information leading to a criminal conviction in connection with loss or damage to covered property by a covered peril. This amount is the most we will pay, regardless of the number of persons involved in providing information.

No deductible applies to this coverage.

7. Under Section I - Property, we insure for direct loss to property described in Parts A and B caused by landslide.

We do not cover loss:

a. To a fence, patio, pavement, swimming pool, retaining wall, bulkhead or outdoor equipment unless the loss is a direct result of the collapse of a building. Collapse does not include settling, cracking, shrinking, bulging or expansion;

b. Caused by or resulting from subsidence, earthquake or volcanic eruption. Direct loss by fire, explosion, theft or breakage of glass or safety glazing materials resulting from earth movement is covered.

8. Under Exclusion - Section 1, item 2a, Ordinance or Law, is deleted.

9. Under Part D - Residence and Personal Activities Liability, the definition of **bodily injury** is amended to include **personal injury.** **"Personal injury"** means injury arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment, or malicious prosecution;

b. Libel, slander or defamation of character; or

c. Invasion of privacy, wrongful eviction or wrongful entry.

Exclusions - Section II do not apply to **personal injury.** **Personal injury** insurance does not apply to:

a. Liability assumed by the **insured** under any contract or agreement except any indemnity obligation assumed by the **insured** under a written contract directly relating to the ownership, maintenance or use of the premises;

b. Injury caused by a violation of a penal law or ordinance committed by or with the knowledge or consent of an **insured;**

c. Injury sustained by any person as a result of an offense directly or indirectly related to the employment of this person by the **insured;**

d. Injury arising out of the **business** pursuits of any **insured;**

e. Injury arising out of any **business** for which a Home-Biz Endorsement attached to this policy provides any liability coverage; or

f. Civic or public activities performed for pay by any **insured.**

10. Under Additional Coverages and Payments - Section II, the limit of liability under item 9 is increased to $1,000.

11. Under Exclusions - Section II, exclusion 3c does not apply to **property damage** arising out of ownership or use of a waterbed by an **insured** on the **residence premises.**

WISCONSIN PERSONAL UMBRELLA RR-15(6-02)

The following provisions apply with respect to Personal Umbrella insurance provided by this endorsement.

AGREEMENT

We provide the insurance in this endorsement in return for the premium and compliance with this endorsement's provisions.

PART I - DEFINITIONS

The words defined below appear in boldface.

1. **"Auto"** means a land motor vehicle, trailer or semitrailer, including a motorcycle but not including a **recreational vehicle** or **farm equipment.**

2. **"Auto liability exposure"** means the ownership, maintenance or use of all **autos** owned, rented, leased or furnished to or available for regular use by **you.**

3. **"Bodily injury"** means:

a. Bodily harm, sickness, disease, disability or death of a person; and

b. Shock, mental anguish and mental injury resulting from **bodily injury** described above.

Bodily injury includes damages for required care and loss of services.

4. **"Business"** includes:

a. Trade, profession or occupation; and

b. Home day care services regularly provided by an **insured** to a person or persons, other than **insureds,** if the **insured** receives monetary or other compensation for such services.

Business does not include the mutual exchange of home day care services and the rendering of home day care services by an **insured** to a relative of an **insured.**

5. **"Farm equipment"** means a farm tractor, farm trailer or land motor vehicle or trailer used as a farm implement.

6. **"Fungi"** means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by **fungi.**

However, this does not include any **fungi** that are, are on, or are contained in, a good or product intended for consumption.

7. **"Insured"** means:

a. **You.**

b. A **relative.** A **relative** is not an **insured** with respect to:

(1) An **auto** owned by, furnished to or available for the regular use of that **relative** unless that **relative** is insured for use of that **auto** under a **primary insurance** policy; or

(2) Any other **auto** unless **primary insurance** insures that **relative** for use of that **auto.**

c. The following additional persons or organizations, but only with respect to the use of an **auto, farm equipment, recreational vehicle** or watercraft owned by **you** or a **relative** or in **your** care:

(1) Any person using such **auto, farm equipment, recreational vehicle** or watercraft; or

(2) Any other person or organization with respect to their legal liability for acts or omissions of an **insured** under item 6a, 6b or 6c(1) for use of such **auto, farm equipment, recreational vehicle** or watercraft.

(3) These additional persons or organizations, including their agents or employees, are not an **insured** if they:

(a) Own or lease an **auto, farm equipment, recreational vehicle** or watercraft which **you** or a **relative** hire, borrow or sublease;

(b) Have custody of **autos, farm equipment, recreational vehicles** or watercraft while engaged in a **vehicle business;** or

(c) Use an **auto** owned by a **relative** unless that **relative** is insured for use of that **auto** by one or more **primary insurance** policies.

d. With respect to animals, any person or organization legally responsible for animals owned by **you** or a **relative.** A person or organization which has custody of these animals in the course of any **business** or without consent of the owner is not an **insured.**

8. **"Occurrence"** means:

a. For **bodily injury** and **property damage,** an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in **bodily injury** or **property damage;** or

b. For **personal injury** other than **bodily injury,** an offense, including a series of related offenses, committed during the policy period which results in **personal injury.**

9. **"Personal injury"** means:

a. **Bodily injury;** or

b. Injury arising out of one or more of the following offenses:

(1) False arrest, detention or imprisonment, or malicious prosecution;

(2) Libel, slander or defamation of character; or

(3) Invasion of privacy, wrongful eviction or wrongful entry.

10. **"Personal liability exposure"** means:

a. The ownership, maintenance or use of all residences and vacant land owned, rented or leased by **you** and not rented or held for rent to others; and

b. **Your** personal activities and the personal activities of **relatives.**

Personal liability exposure does not include the ownership, maintenance or use of an **auto, farm equipment, recreational vehicle** or watercraft owned by **you** or a **relative** or in **your** care.

11. **"Primary insurance"** means:

a. Any liability policy with **you** as named insured providing initial or primary **personal injury** or **property damage** liability coverage for **personal liability exposures** or **auto liability exposures;** or

b. Any liability policy scheduled in the Declarations in which you or a relative:

(1) Are the named insured; or

(2) Are insured persons under the terms of that policy.

12. "Primary limit" means:

a. The total of:

(1) The applicable primary insurance limit shown in Primary Insurance for Umbrella in the Declarations or the actual limit maintained if greater; and

(2) The amount recoverable under all other insurance policies or self-insurance plans available to the insured which apply to the occurrence; or

b. If primary insurance does not insure against loss arising out of the occurrence and subject to Condition 8, Maintenance of Primary Insurance, then the primary limit is the greater of:

(1) The amount recoverable under all insurance policies or self-insurance plans available to the insured which apply to the occurrence; or

(2) The self-insured retention shown in the Declarations.

13. "Property damage" means damage to or loss of use of tangible property.

14. "Recreational vehicle" means any land motor vehicle which is:

a. Not subject to motor vehicle registration;

b. Used principally for leisure time activity; and

c. Not designed for use on public roads.

Recreational vehicle includes any vehicle which operates on crawler-treads, including, but not limited to, snowmobiles.

Recreational vehicle also includes any vehicle designed to be towed by a vehicle described in item a, b or c above.

15. "Relative" means a resident of your household who is:

a. Related to you by blood, marriage or adoption, including your ward or foster child; or

b. Under the age of 21 and in your care or the care of any person named in a above.

16. "Vehicle business" means the business of:

a. Selling;

b. Servicing, repairing or maintaining; or

c. Storing, parking, docking or mooring;

autos, farm equipment, recreational vehicles or watercraft.

17. "We," "us" and "our" mean the company providing this insurance.

18. "You," "your" and "yours" mean the policyholder named in the Declarations and spouse if living in the same household.

PART II - COVERAGE

We will pay sums in excess of the primary limit that an insured is legally obligated to pay as damages because of personal injury or property damage caused by an occurrence to which this insurance applies.

PART III - EXCLUSIONS

This insurance does not apply to damages because of:

1. Acts committed by or at the insured's direction with intent to cause bodily injury or property damage. This exclusion does not apply to bodily injury resulting from an act committed to protect persons or property.

2. Personal injury or property damage arising out of business pursuits of an insured.

This exclusion does not apply:

a. To the extent primary insurance for a personal liability exposure insures that business.

b. To the business use of a private passenger auto, unless used to carry persons or property for a charge. A shared expense car pool is not a business pursuit.

3. Personal injury or property damage arising out of the rental or holding for rental of any part of any premises by an insured. This exclusion does not apply to the extent primary insurance insures the rental or holding for rental of any part of any premises to any person.

4. Personal injury or property damage arising out of the rendering of or failure to render professional services.

5. Personal injury or property damage arising out of:

a. The ownership, maintenance, use, loading or unloading of a recreational vehicle; or

b. The entrustment by an insured of a recreational vehicle to any person.

c. Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a recreational vehicle excluded in paragraph a or b above.

Exclusion 5 does not apply to the extent that primary insurance applies to that recreational vehicle.

6. Personal injury or property damage arising out of:

a. The ownership, maintenance, use, loading or unloading of excluded watercraft as defined below; or

b. The entrustment by an insured of excluded watercraft as defined below to any person.

c. Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an excluded watercraft described below.

Exclusion 6 does not apply:

a. To a watercraft while in storage;

b. To a watercraft chartered with crew by or on behalf of an insured; or

c. To the extent primary insurance applies to that watercraft.

Excluded watercraft means any watercraft owned by an insured, with inboard or inboard-outdrive motor power, or that is a sailing vessel, with or without auxiliary power, 26 feet or more in length.

7. Personal injury or property damage arising out of:

a. The ownership, maintenance, use, loading or unloading of an aircraft; or

b. The entrustment by an **insured** of an aircraft to any person.

c. Vicarious liability whether or not statutorily imposed, for the actions of a child or minor using an aircraft.

Item a of this exclusion does not apply to an aircraft chartered with crew by or on behalf of an **insured**.

An aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo.

8. **Personal injury** or **property damage** caused directly or indirectly by war. War includes undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon shall be deemed a warlike act even if accidental.

9. Liability assumed under any unwritten contract or agreement.

10. **Property damage** to property owned by any **insured**.

11. **Property damage** to property rented to, occupied or used by, or in the care of the **insured**. This exclusion does not apply to the extent that coverage is provided by **primary insurance**.

12. **Bodily injury** to any person eligible to receive payments voluntarily provided by the **insured** or required to be provided by the **insured** under a Workers' Compensation law, nonoccupational disability law or occupational disease law.

13. **Bodily injury** or **property damage** for which an **insured** under this endorsement is also an **insured** under a nuclear energy liability policy or would be an **insured** but for the exhaustion of its limits of liability. A nuclear energy liability policy is a policy issued by:

a. American Nuclear Insurers;

b. Nuclear Energy Liability Insurance Association;

c. Mutual Atomic Energy Liability Underwriters;

d. Nuclear Insurance Association of Canada; or

e. Any of their successors.

14. **Personal injury** to you or a **relative**. This exclusion does not apply to damages arising out of the ownership, maintenance or use, loading or unloading of an **auto**.

15. **Bodily injury** or **property damage** arising out of the transmission of a communicable disease by an **insured**.

16. **Personal injury** arising out of sexual molestation, corporal punishment or physical or mental abuse.

17. **Personal injury** or **property damage** arising out of any act or omission of an **insured** as an officer or member of the board of directors of a corporation or other organization. This exclusion does not apply if the corporation or organization is not-for-profit and the **insured** receives no compensation.

18. **Personal injury** or **property damage** with respect to which an **insured** under this endorsement is also insured under a Commercial Excess Liability and Umbrella Policy issued by **us**, or would be insured under such policy but for its termination upon exhaustion of its limit of liability.

19. Any person using an **auto**, **farm equipment**, **recreational vehicle** or watercraft without a reasonable belief that the person is entitled to do so.

20. **Bodily injury** or **property damage** resulting from the use of any **auto**, **farm equipment**, **recreational vehicle** or watercraft while being used in, or in preparation for a prearranged or organized racing, speed, hill climbing, demolition or stunting activity. This exclusion does not apply to a sailboat used in a prearranged or organized race.

21. **Personal injury** or **property damage** arising out of the actual, alleged or threatened ingestion, inhalation, absorption, exposure or presence of lead in any form or from any source.

Coverage also does not apply for any loss, cost, expense, fine or penalty arising out of any:

a. Request, demand or order that any **insured** or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize, dispose of or in any way respond to or assess the effects of lead in any form; or

b. Claim or suit by or on behalf of a governmental authority for damages or any other remedy because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, disposing of or in any way responding to or assessing the effects of lead in any form.

22. **Personal injury** or **property damage** arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 21 U. S. C. A. Sections 811 and 812. Controlled Substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician. This exclusion does not apply to **personal injury** or **property damage** arising out of the ownership, maintenance or use, loading or unloading of an **auto**.

23. **Personal injury** or **property damage** arising directly or indirectly, in whole or in part, out of the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any **fungi**, wet or dry rot, or bacteria.

RESIDENCE EMPLOYEE EXCEPTION

Exclusions 5, 6, 7, 19 or 20 do not apply to **bodily injury** to an employee of **yours** or of a **relative** whose duties are related to the maintenance or use of the one or two family dwelling, other structures and grounds where **you** reside, including household or domestic services, or one who performs similar duties elsewhere not related to **your business** or that of a **relative** arising out of and in the course of their employment by an **insured**.

PART IV - LIMITS OF INSURANCE

Regardless of the number of **insureds**, claims made, claimants, injured persons, watercraft, **recreational ve-**

hicles, pieces of farm equipment or autos, the most we will pay as damages because of personal injury and property damage caused by an occurrence to which this insurance applies, shall not exceed the Personal Umbrella Liability Insurance Limit shown in the Declarations. This coverage is excess over the primary limit.

PART V - WHAT TO DO IN CASE OF ACCIDENT OR LOSS

Notice of Accident, Occurrence or Loss and Other Duties apply to the insurance provided by this endorsement.

PART VI - CONDITIONS

Only the following Road and Residence Policy General Provisions apply to the insurance provided by this endorsement: Policy Period; Changes; Representations, Warranties and Conditions; Assignment; Knowledge by Our Agent; Bankruptcy; Cancellation or Nonrenewal; Mutual Policy Conditions; and Corporate Headquarters Address.

1. Defense; Settlement.

If a claim is made or a suit is brought against an insured for damages because of personal injury or property damage caused by an occurrence to which this endorsement applies, we will provide a defense at our expense, in addition to the limit of insurance, by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle a claim or suit as we decide is appropriate. However, we are not obligated to defend if:

a. Primary insurance, other insurance or a self-insurance plan available to an insured applies to the occurrence; or

b. The amount of damages claimed or incurred is less than the primary limit.

We may join with the insured or any insurer providing primary insurance in the investigation, defense or settlement of any claim or suit which we believe may require payment under this endorsement.

However, we will not contribute to the costs and expenses incurred by any insurer providing a defense.

Our duty to settle or defend ends when the amount we pay as damages because of personal injury or property damage caused by an occurrence equals our limit of insurance.

In any country where we are prevented from defending an insured because of laws or other reasons, we will pay any expense incurred with our written consent for the insured's defense.

2. Additional Payments.

In addition to our limit of insurance, we will pay:

a. The expenses described below for a claim or suit we are obligated to defend:

(1) All expenses we incur and costs taxed against an insured.

(2) Premiums on required bonds, but not for bond amounts more than our limit of insurance. We need not apply for or furnish any bond.

(3) Reasonable expenses (other than loss of earnings) an insured incurs at our request.

(4) An insured's loss of earnings, but not other income, up to $100 per day, to attend trials or hearings at our request.

b. Interest accruing on our share of the amount of any judgment between the time the judgment is entered and the time we pay or tender or deposit in court, that part of the judgment which does not exceed our limit of insurance.

3. Appeals. We may appeal a judgment in excess of the applicable primary limit. We pay all costs, taxes, expenses and incidental interest. Our liability for damages does not exceed our limit of insurance for one occurrence.

4. Suits Against Us.

No action shall be brought against us by an insured unless there has been compliance with the policy provisions.

5. Other Insurance. This insurance is excess over all primary insurance and all other recoverable insurance (except insurance purchased to apply in excess of the sum of the primary insurance limit and our limit of insurance) available to an insured including a self-insurance plan.

6. Our Right to Recover Payment.

If payment is made by us, we will join the insured and any other insurer in exercising the insured's rights of recovery against any party. Our right to reimbursement out of the proceeds of any recovery from another may not be exercised until the insured has been fully compensated for damages incurred, less reduction for any contributory negligence. The insured shall not prejudice such rights after loss. Recoveries shall be made in the following order:

a. Repay the parties (including the insured) who paid in excess of our liability limit;

b. Repay us the amount we paid; and

c. Repay the parties (including the insured) to whom this insurance is excess, if they are entitled to any remainder.

7. Death. If you or a relative die, we insure the legal representative of the deceased but only while acting within the scope of his or her duties, for the rest of the policy period.

8. Maintenance of Primary Insurance.

a. Primary insurance must be maintained during the policy period at the limits as shown in the Primary Insurance for Umbrella in the Declarations.

If primary insurance is not maintained at the limits shown, or if an insured fails to comply with a provision of primary insurance after an occurrence, there will be no coverage or defense under this endorsement until the damages exceed the applicable limits shown in Primary Insurance for Umbrella in the Declarations.

b. If an insurer providing primary insurance becomes bankrupt or insolvent, there will be no coverage or defense under this endorsement until the damages exceed the limits shown in Primary Insurance for Um-

brella in the Declarations.

9. **Wisconsin Extension of Coverage.** We will cover as an insured any person who has custody of an auto owned, loaned or hired for use by you or on your behalf while employed or engaged in the business of selling, servicing, repairing, maintaining, parking or storing autos, but only up to the minimum limits required by the Wisconsin Financial Responsibility Law. This extension does not apply if that person has other available insurance whether primary, excess or contingent or if primary insurance covers this occurrence.

10. The following is added to the Cancellation or Nonrenewal General Provision, but only with respect to this endorsement:

We may cancel this endorsement at any time by notifying you in writing at least 10 days before the cancellation date, provided we notify the Commissioner of Insurance as to the grounds for cancellation no later than the time we notify you of the cancellation.

SCHEDULED PERSONAL PROPERTY RR-19(3-93)

The following provisions apply with respect to the personal property described in the Schedule of this endorsement.

Newly Acquired Property

With respect to jewelry, furs, cameras and musical instruments, we cover newly acquired property of a class of property already insured for an amount not to exceed 25% of the amount of insurance for that class of property or $10,000, whichever is less, provided the insured reports this newly acquired property to us within 30 days of acquisition and pays the additional premium from the date acquired.

When fine arts are scheduled, we cover other objects of art acquired during the policy period for their actual cash value but no more than 25% of the amount of insurance for fine arts scheduled, provided the insured reports these objects to us within 90 days of acquisition and pays the additional premium from the date acquired.

Perils Insured Against

We insure for all risks of physical loss to the property described except:

We do not pay for a loss if one or more of the following excluded perils apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as or after the excluded peril. We do not pay for a loss that results from:

1. Wear and tear, gradual deterioration, insects, vermin or inherent vice;

2. War, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon shall be deemed a warlike act even if accidental.

3. Nuclear hazard, meaning any nuclear reaction, radiation, or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these. Direct loss by fire resulting from the nuclear hazard is covered.

4. If fine arts are covered:

a. Damage caused by any repairing, restoration or retouching process;

b. Loss to property on exhibition at fairgrounds or premises of national or international expositions unless the premises are covered by this policy;

5. If either of the classes of property, postage stamps or rare and current coin collections, are covered:

a. Fading, creasing, denting, scratching, tearing, thinning, transfer of colors, inherent defect, dampness, extremes of temperature, gradual depreciation, or any damage from handling or being worked upon;

b. Disappearance of individual stamps, coins or other articles unless the item is described and scheduled with a specific amount of insurance, or if the item is mounted in a volume and the page to which it is attached is also lost;

c. Loss to property in the custody of transportation companies; nor shipments by mail other than registered mail;

d. Theft from any unattended automobile unless being shipped as registered mail;

e. Loss to property which is not an actual part of a stamp or coin collection.

6. Civil authority. This means:

a. Seizure or destruction under quarantine or customs regulations; or

b. Confiscation or destruction by order of a government or public authority; or

c. Risks of contraband or illegal transportation or trade.

We do not pay for such excluded loss even if the following contribute to, aggravate or cause the loss:

1. The act or decision of a person, group, organization or governmental body. This includes the failure to act or decide.

2. A fault, defect or error, negligent or not, in:

a. Planning, zoning, surveying, siting, grading, compacting, land use or development of property.

b. The design, blueprint, specification, workmanship, construction, renovation, remodeling or repair of property. This includes the materials needed to construct, remodel or repair the property.

c. Maintenance of property.

These apply whether or not the property is covered by this policy.

3. A condition of the weather.

4. The collapse of a building or structure.

Territorial Limits

We cover the property described while it is anywhere in the world, except fine arts are covered only while within the limits of the United States and Canada.

Special Provisions

1. Furs include garments trimmed with fur or consist-

ing principally of fur.

2. Cameras include related articles of equipment such as but not limited to projection machines and films.

3. Silverware, goldware, pewterware include silver-plated ware and gold-plated ware but excluding pens, pencils, flasks, smoking implements or jewelry.

4. Golfer's equipment includes golf clubs, golf clothing and other related golf equipment. We cover your golf clothing while contained in a locker when you are golfing. We cover golf balls for loss by fire or burglary provided there are visible marks of forcible entry into the building, room or locker.

5. Fine arts: You agree that the covered property will be packed and unpacked by competent packers.

6. Postage stamps includes postage due, envelope, official, revenue, match and medicine stamps, covers, locals, reprints, essays, proofs and other philatelic property, including their books, pages and mountings, owned by or in custody or control of the **insured.**

7. Rare and current coins includes medals, paper money, bank notes, tokens of money and other numismatic property, including coin albums, containers, frames, cards and display cabinets in use with such collection, owned by or in custody or control of the **insured.**

Conditions

1. Loss Clause

The amount of insurance under this endorsement shall not be reduced except for a total loss of a scheduled article. We will refund the unearned premium applicable to such article after the loss or you may apply it to the premium due for the replacement of the schedule article.

2. Loss Settlement

Covered property losses are settled as follows:

a. Fine arts: We will pay the amount shown for each scheduled article which is agreed to be the value of the article.

In case of loss to a pair or set, we agree to pay you the full amount of the set as shown in the Schedule and you agree to surrender the remaining article or articles of the set to us.

b. Postage stamps or rare and current coin collection: In case of loss to any scheduled item, the amount to be paid will be determined in accordance with paragraph 2c, Other property.

When coins or stamps are covered on a blanket basis, we shall pay the cash market value at time of loss but not more than $1,000 on any unscheduled coin collection nor more than $250 for any one stamp, coin or individual article or any one pair, strip, block, series sheet, cover, frame or card.

We shall not pay a greater proportion of any loss on blanket property than the amount insured on blanket property bears to the cash market value at time of loss.

c. Other property: The value of the property insured is not agreed upon but shall be ascertained at the time of loss or damage. We will not pay more than the least of the following amounts:

(1) The actual cash value of the property at the time of loss or damage;

(2) The amount for which you could reasonably be expected to have the property repaired to its condition immediately prior to loss;

(3) The amount for which you could reasonably be expected to replace the article with one substantially identical to the article lost or damaged; or

(4) The amount of insurance.

3. Pair, Set or Parts Other than Fine Arts

a. Loss to a pair or set

In case of a loss to a pair or set, we may elect to:

(1) Repair or replace any part to restore the pair or set to its value before the loss; or

(2) Pay the difference between actual cash value of the property before and after the loss.

b. Parts

In case of a loss to any part of covered property, consisting of several parts when complete, we shall pay for the value of the part lost or damaged.

4. Appraisal

If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

5. No deductible applies to this coverage.

Schedule

	Amount of Insurance
JEWELRY	
1. ONE LADY'S PAIR 14K YELLOW GOLD DIAMOND PIERCED EARRINGS. TWO ROUND-CUT BRILLIANT DIAMONDS WEIGHING 28/100CT TOTAL. FINE WHITE COLOR, VS CLARITY	$ 790
2. ONE GENT'S 14K YELLOW GOLD WEDDING BAND. ONE DIAMOND MELEE WEIGHING 03/100CT TOTAL. COLOR IS FINE WHITE, CLARITY IS VVS	295
3. LADIES 14K YELLOW GOLD GENEVE WATCH WITH QUARTZ MOVEMENT TWEN-	

TY DIAMONDS SURROUNDING FACE OF WATCH EACH DIAMOND APPX .02 POINTS TOTAL WEIGHT APPX .40 POINTS ENTIRE CASE AND BAND 14K. ALL SINGLE CUT WHITE

4. LADIES 14K YELLOW GOLD ROPE BRACELET WITH BAR OF DIAMONDS RUNNING THROUGH CENTER OF BRACELET. 17 DIAMONDS IN BRACELET EACH DIAMOND APPX .02 EACH TOTAL WEIGHT APPX .34 POINTS ALL SINGLE CUT DIAMONDS WHITE

1,900

5. 1 LADIES 14KT YG DIAMOND BRIDAL SET. 3 ROUND CUT BRILLIAN DIAMONS. WEIGHING 35/100 CT TOTAL. 1 ROUND 30/100 CT., 2 ROUND 05/100 CT COLOR IS FINE WHITE, CLARITY IS VVS

600

6. ONE (1) LADIES 14KT WHITE GOLD SOLID LINK FLAT POLISHED HERRINGBONE CHAIN WITH BEVELED EDGE MEASURING 24" IN LENGTH AND 5MM IN WIDTH. DESIGNATED STYLE #HER/121

1,240

7. ONE (1) GENTS 14KT YELLOW GOLD DIAMOND RING SET WITH ONE (1) ROUND BRILLIANT CUT DIAMOND MEASURING APPROXIMATELY 5.6MM IN DIAMETER, 2.6MM IN DEPTH AND WEIGHING APPROXIMATELY .46 CARATS; H COLOR AND VS2 CLARITY USING THE G.I.A. GRADING SCALE

1,500

8. ONE (1) GENTS 10KT WHITE GOLD LINDA STAR SAPPHIRE RING SET WITH ONE (1) OVAL BLUE LINDE STAR SAPPHIRE MEASURING APPROXIMATELY 9.0MM BY 7.0MM AND IS 4.1MM IN DEPTH. ALSO SET ARE TOW (2) ROUND SINGLE CUT DIAMONDS, EACH WEIGHING .02 CARATS.

1,600

9. ONE (1) LADIES 10KT WHITE GOLD LINDE STAR SAPPHIRE RING SET WITH ONE (1) OVAL BLUE LINDE STAR SAPPHIRE MEASURING APPROXIMATELY 7.0 BY 5.0MM AND TWO (2) ROUND SINGLE CUT SIDE DIAMONDS, EACH WEIGHING APPROXIMATELY .02 CARATS EACH

300

10. ONE (1) LADIES 14KT YELLOW GOLD TRI-COLOR NECKLACE MEASURING APPROXIMATELY 18" IN LENGTH, AND WEIGHING APPROXIMATELY 4.1 GRAMS

175

11. ONE (1) LADIES 14KT YELLOW GOLD DIAMONDS HEART NECKLACE SET WITH FOURTEEN (14) ROUND SINGLE CUT DIAMONDS HAVING AN APPROXIMATE WEIGHT OF .03 CARATS EACH. ATTACHED IS A 14KT OPEN LINK CHAIN MEASURING 18" IN LENGTH

125

12. ONE (1) LADY'S 14KT YELLOW GOLD AND DIAMOND ENGAGEMENT RING SET WITH ONE (1) MAJOR FULL-CUT DIAMOND MEASURING 6.6MM IN DIAMETER, 3.9MM IN DEPTH, HAVING AN APPROXIMATE WEIGHT OF 1.00 CARATS, F COLOR AND, VS2 CLARITY USING THE GIA DIAMOND GRADING SCALE. ALSO SET ARE FIFTEEN (15) ROUND FULL CUT SURROUNDING DIAMONDS GRADUATING IN SIZE AND HAVING AN APPROXIMATE TOTAL WEIGHT OF .72 CARATS. DESIGNATED STYLE NO. UJ248 — 10,200

475

13. ONE (1) GENTLEMAN'S SWISS MADE 17-JEWEL MECHANICAL MOVEMENT, 14KT YELLOW GOLD OMEGA WRISTWATCH FEATURING AN OCTAGONAL SHAPED CHAMPAGNE COLORED DIAL SURROUNDED BY A DIAMOND BEZEL SET WITH FIFTY-EIGHT (58) ROUND SINGLE CUT DIAMONDS HAVING AN APPROXIMATE TOTAL WEIGHT OF .58 CARATS. ATTACHED IS A 14KT YELLOW GOLD TAPERED MESH BRACELET. DESIGNATED STYLE NO DD6957. SERIAL NO 117712 — 5,000

14. ONE (1) LADYS HIGH POLISHED 14KT YELLOW GOLD "OMEGA" LINK LINK NECKLACE MEASURING 10MM IN WIDTH, MEASURING 16" IN LENGTH, AND WEIGHING 62.3 GRAMS. DESIGNATED STYLE NO 05-1979 A — 1,775

Total Amount — $ 25,975

FURS AND GARMENTS

1. NATURAL LUNERAINE LETOUT MINK COAT WITH CRYSTAL FOX TUXEDO #3075-3315-83 — $ 8,000

SILVER, GOLD, AND PEWTER

1.	13 TEASPOONS	$ 1,664
2.	13 PLACE KNIVES	1,794
3.	13 PLACE FORKS	2,405
4.	13 SALAD FORKS	1,872
5.	2 BUTTER SERVING KNIVES	204
6.	2 TABLESPOONS	610
7.	1 PIERCED TABLESPOONS	305
8.	1 COLD MEAT FORK SMALL	305
9.	1 CHEESE SERVING KNIFE	117
10.	1 BON BON SPOON	120
11.	1 CREAM LADLE	150
12.	1 FLAT SERVER	341
13.	1 GRAVY LADLE	305
14.	1 JELLY SPOON	144
15.	1 OLIVE OR PICKLE FORK	102
16.	1 LEMON FORK	93
17.	1 PIE OR CAKE SERVING KNIFE	161
18.	1 SUGAR SPOON	161
19.	1 ROAST CARVING SET 2 PC KNIFE & FORK	493

Total Amount — $ 11,346

BOAT AND OUTBOARD MOTOR FORM RR-20(03-99)

What We Cover

We cover the property described in the Schedule of this endorsement against all risks of direct physical loss from any external cause. Certain exceptions are listed below.

Losses Not Covered

We do not pay for a loss if one or more of the following excluded perils apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as or after the excluded peril.

1. We do not pay for any loss resulting directly or indirectly from:

a. Wear and tear, gradual deterioration, insects, vermin or inherent vice;

b. War. This means undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, or destruction, seizure or use of property for a military purpose. It includes any consequence of any of these. Discharge of a nuclear weapon shall be deemed a warlike act even if accidental;

c. Nuclear hazard. This means loss caused by nuclear reaction, nuclear radiation or radioactive contamination (whether controlled or uncontrolled and whether caused by, contributed to or aggravated by any peril insured against by this policy). Loss caused by nuclear hazard shall not be considered loss caused by fire, explosion or smoke. However, if the fire peril is covered by this policy, direct loss by fire resulting from the nuclear hazard is covered;

d. Deterioration caused by marine life;

e. Rust or corrosion;

f. Freezing or overheating;

g. Latent defect, structural, mechanical or electrical breakdown or failure;

h. Any work done on the property, unless it results in a fire or explosion (in this case we only cover the loss caused by fire or explosion.);

i. The infidelity of persons (other than common carriers) entrusted with the property; or

j. Civil authority. This means:

(1) Seizure or destruction under quarantine or customs regulations; or

(2) Confiscation or destruction by order of a government or public authority; or

(3) Risks of contraband or illegal transportation or trade.

2. We cover loss caused only by fire or lightning while:

a. The property is being used to transport people or goods for compensation;

b. Rented to others; or

c. Being operated in any official race or speed contest. This does not apply to sailboats.

We do not pay for such excluded loss even if the following contribute to, aggravate or cause the loss:

1. The act or decision of a person, group, organization or governmental body. This includes the failure to act or decide.

2. A fault, defect or error, negligent or not, in:

a. Planning, zoning, surveying, siting, grading, compacting, land use or development of property.

b. The design, blueprint, specification, workmanship, construction, renovation, remodeling or repair of property. This includes the materials needed to construct, remodel or repair the property.

c. Maintenance of property.

These apply whether or not the property is covered by this policy.

3. A condition of the weather.

4. The collapse of a building or structure.

Territory

We cover the property insured only while on land, inland waters or coastal waters of the forty-eight contiguous states of the United States of America, the District of Columbia and Canada.

Special Conditions

1. Property Damage Liability and Expense Extension

We will pay on behalf of any insured any money the insured is legally obligated to pay for damage to property of others caused by an accidental collision of the covered boat and motor. This extension does not include liability assumed by any insured under a contract or agreement. This extension only applies while the boat is afloat. We will not pay more than $500 for all damages resulting from any one accident.

Insureds may contest their liability. If they do and they receive our consent in writing, we will also pay up to $500 in costs which may be incurred as a result of this action.

We are not relieved of our duties under this extension if the insured or the insured's estate becomes bankrupt or insolvent.

The deductible does not apply to claims paid under this extension.

2. Substitute Acquisition Extension

If you acquire similar property in replacement for the covered property, we will cover the newly acquired property for (a) the limit of liability for the property disposed of or (b) the invoice cost of the new property, whichever is less; provided you acquire the property during the policy term and report it to us within thirty days of the date you acquire it and pay any additional premium from that date.

3. How We Settle Claims

The policy provisions pertaining to loss settlement are modified as follows:

a. With respect to outboard motorboats, we will repair plywood, plastic, fiberglass and molded hull boats, when repairable, according to manufacturer's specifications or accepted repair practice.

b. With respect to equipment, we will not pay a greater proportion of any loss than the amount of insurance bears to the actual cash value at the time of loss.

4. Maintenance of Property

It is a condition of this insurance that the insured property is and will be maintained in sound condition,

including the caulking of any boats.

5. Theft of Property

In the event of damage or loss caused by theft, you will give prompt notice to the appropriate authorities.

6. Other Insurance

If at the time of loss or damage there is other insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess over the other insurance.

7. Accessories

Accessories do not include sporting equipment unrelated to the operation or safety of the boats.

8. Deductible

Each adjusted claim will be reduced by the deductible amount shown in the Schedule for the lost or damaged property. If more than one item is lost or damaged in the same occurrence, only the highest applicable deductible amount will be applied.

Schedule

	Amount of Insurance
BOAT	
1. 2001 GLASTRON GX205 250 020 G1A28181E101 $250	$ 24,000
BOAT ACCESSORIES	
2. $250	$ 500
BOAT TRAILER	
3. 2001 EZ LOADER IL81RGX131A0 $250	

HOME COMPUTER RR-26(8-98)

We cover computer equipment for the coverage described below.

Property

The term "Computer Equipment" means:

a. Electronic data processing hardware and related peripheral equipment, including CRT screens, disc drives, printers and modems; and

b. Discs, tapes, wires, records or other software media used with the equipment in a above.

Perils

We cover computer equipment against risks of direct physical loss or damage from any external cause except:

1. Loss or damage caused by or resulting from wear and tear, an original defect in the property covered, gradual deterioration, insects, vermin, inherent vice, dampness, dryness, cold or heat.

2. War, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon shall be deemed a warlike act even if accidental.

3. Nuclear hazard, meaning any nuclear reaction, radiation or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these. Direct loss by fire resulting from the nuclear hazard is covered.

Loss Settlement

In the event of a covered loss, we will pay the cost of repair or replacement, without deduction for depreciation. In no event will we be liable for more than the limit of liability.

Additional Provisions

1. Business use of your computer equipment is permitted.

2. Section I - Property, Part B - Personal Property, Special Limits of Liability items 8 and 9 do not apply to coverage provided by this endorsement.

3. Any deductible stated in the Declarations does not apply to this coverage. A $100 deductible applies instead.

4. Additional Coverages

a. Newly Acquired Computer Property

We will cover computer equipment acquired during the policy period up to 30 days after it is acquired. You must provide us with a complete description of each item within this 30 day period and pay the additional premium. The most we will pay for all such items is $5,000.

b. Electrical and Magnetic Injury Coverage

We will also pay for loss which arises out of artificially generated electrical current if such loss or damage is caused by or results from:

(1) An occurrence that took place within 100 feet of the described premises; or

(2) An interruption of electric power supply, power surge, blackout or brownout if the cause of such occurrence took place within 100 feet of the described premises.

c. Mechanical Breakdown

We will also pay for loss which arises out of Mechanical Breakdown.

d. Software

We will also pay for loss or damage to computer software. Software includes data processing recording or storage media such as films, tapes, discs, drums or cells, data stored on such media and programming records used for electronic data processing or electronically controlled equipment. The most we will pay under this additional coverage is $1,000.

e. Extra Expense - Reconstruction Costs

We will pay the necessary expenses you incur to research, replace or restore lost information used for business on damaged electronic or magnetic media. The most we will pay under this additional coverage is $1,000.

Limit of Liability

Our limit of liability for loss shall not exceed $3,887.

WATERCRAFT LIABILITY RR-28(8-02)

Part D - Residence and Personal Activities Liability and Part E - Residence and Personal Activities Medical Payments apply to **bodily injury** or **property damage** for a watercraft of the length and maximum rated speed described in the Schedule below, arising out of:

a. The ownership, maintenance, use, loading or unloading of the watercraft;

b. The entrustment by an **insured** of the watercraft to any person; or

c. Statutorily imposed vicarious parental liability for the actions of a child or minor using the watercraft.

This insurance does not apply with respect to watercraft with inboard or inboard-outdrive motor power or sailing vessels:

a. To **bodily injury** to any employee of an **insured** arising out of and in the course of employment by the **insured** if the employee's principal duties are in connection with maintenance or use of a watercraft; or

b. While the watercraft is used to carry persons for a charge or is rented to others.

c. To **bodily injury** arising out of a water-skiing accident. This exclusion does not apply if at least two responsible people are in the watercraft pulling the water-skier.

d. To **bodily injury** or **property damage** arising out of ski-jumping, para-sailing or kite-skiing.

Schedule

Watercraft: 1

Property Type:	IB/O DRV
Identification Number:	G1A28181E101
Year Built/Manufactured:	2001
Builder/Manufacturer:	GLASTRON
Model:	GX205
Rated Speed (miles per hour):	40

ADDITIONAL INSURED RR-40(09-87)

This endorsement applies only to the vehicle for which this endorsement is shown in the Declarations.

The insurance afforded by this policy under Part F - Car Liability applies to the person or organization named in the Declarations as an additional **insured person**, but only with respect to the person's or organization's liability for **bodily injury** or **property damage** arising out of the acts or omissions of an **insured person** under 2a, 2b or 2c of the definition of **"insured person"** in Additional Definitions - Section II.

This endorsement does not increase the limits of our liability.

REIMBURSEMENT OF CAR RENTAL EXPENSE RR-53 (4-97)

This endorsement modifies insurance provided under this policy.

The following coverage applies only to vehicles described in the Declarations as a **private passenger car** or **utility car**.

Under Part C - Car Damage, we agree to reimburse **you** for expenses **you** incur in renting a substitute car when there is a loss of **your insured car** which:

1. Results in its withdrawal from normal use for more than twenty-four hours; and

2. The loss is covered under Part C of this policy.

This coverage does not apply in the case of the total theft of a car for which transportation expense reimbursement is covered under the policy.

We will pay up to $30 per day only during that period of time reasonably required to repair or replace the car, but no more than $360 maximum.

SEWER OR DRAIN BACKUP - BROAD FORM RR-146(1-99)

The following is added to Section I - Property:

1. We insure, up to the limit shown in the Schedule below, for direct physical loss to property covered under Part A - Residence or Part B - Personal Property caused by:

a. Water which backs up through sewers or drains; or

b. Water which overflows from a sump even if such overflow results from the mechanical breakdown of the sump pump. This coverage does not apply to direct physical loss of the sump pump, or related equipment, which is caused by mechanical breakdown.

This endorsement does not increase the limits of liability stated in the policy Declarations for Section I.

2. Special Deductible

The following deductible provision replaces any other deductible provision in the policy with respect to loss covered under this endorsement.

We will pay only that part of the loss which exceeds $500. No other deductible applies to this coverage. This deductible does not apply with respect to Additional Living Expense or Fair Rental Value.

3. Section I - Exclusions

a. When this endorsement is added after the original effective date of the current policy period, we will not pay for loss or damage which occurs within 30 days of the effective date of this endorsement.

b. We do not cover loss caused by the negligence of any insured.

c. Item 2c, Water Damage, is deleted and replaced by the following with respect to the coverage provided under this endorsement.

Water Damage, meaning:

(1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind; or

(2) Water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire or explosion resulting from water damage is covered.

d. Item 3f(2) is deleted, with respect to coverage for

loss caused by overflow of sumps, and replaced by the following:

(2) Inherent vice or latent defect;

Schedule

Dwelling Number	Amount of Insurance
01	$10,000

UNINSURED MOTORISTS - PROPERTY DAMAGE RR-182(7-98)

The following is added to Section III - Uninsured Motorists and Underinsured Motorists:

Uninsured Motorists - Property Damage

We will pay damages which an **insured person** is legally entitled to recover as compensatory damages from the owner or operator of an **uninsured motor vehicle**, notwithstanding any statutory or common law immunity available to such owner or operator. The damages must result from **property damage** caused by an accident. The owner's or operator's liability for these damages must result from the ownership, maintenance or use of the **uninsured motor vehicle**.

If suit is brought to determine legal liability or damages without our written consent, we are not bound by the resulting judgment.

Limits of Liability

The Uninsured Motorists Property Damage limit of liability shown in the Declarations applies regardless of the number of vehicles described in the Declarations, **insured persons**, premiums paid, claims, claimants, policies or vehicles involved in the accident. Under no circumstances may the limits applying to more than one vehicle be added together to increase the applicable limit of liability.

The most we will pay under Uninsured Motorists Property Damage Coverage for all **property damage** caused by any one accident is the lesser of the following:

1. The "each accident" limit of liability; or

2. The total amount of damages not paid or payable under any property or auto physical damage insurance.

Under no circumstances will any **insured person** be entitled to receive duplicate recovery for the same element of loss.

No deductible applies to this coverage.

Additional Definition - Section III

"Property damage" means injury to or destruction of:

1. **Your insured car**; and

2. Any property owned by:

a. **You** or a **relative** while the property is contained in **your insured car**; or

b. Any other person while **occupying your insured car** while the property is contained in **your insured car**.

But, property damage shall not include loss of use of damaged or destroyed property.

Exclusions - Section III

This coverage does not apply to:

1. **Property damage** which occurs while **your insured car** is being used to carry persons or property for a charge. This exclusion does not apply to shared-expense car pools.

2. Any claim settled without our written consent.

3. **Property damage** sustained if the United States Government is required to pay the expenses incurred.

4. **Property damage** sustained while **occupying** a vehicle being used in, or in preparation for, a prearranged racing, speed, demolition or stunting activity.

5. The direct or indirect benefit of any insurer of property.

6. Punitive or exemplary damages.

7. **Property damage** caused by a hit-and-run vehicle for which neither the owner nor the operator can be identified.

PREMISES ALARM OR FIRE PROTECTION SYSTEM RR-193(9-97)

For a premium credit, we acknowledge the installation of an alarm system or automatic sprinkler system approved by us on the **residence premises**. You agree to maintain this system in working order and to notify us promptly of any change made to the system or if it is removed.

LIMITED FUNGI, WET OR DRY ROT, OR BACTERIA COVERAGE RR-245(6-02)

DEFINITIONS

The following definition is added:

"Fungi" means:

a. Any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi;

b. Under Section II, this does not include any fungi that are, are on, or are contained in, a good or product intended for consumption.

SECTION I - PROPERTY

PART B - PERSONAL PROPERTY

Under Perils - Part B

Paragraph 12.d. is added:

d. Caused by constant or repeated seepage or leakage of water or the presence or condensation of humidity, moisture or vapor, over a period of weeks, months or years unless such seepage or leakage of water or the presence or condensation of humidity, moisture or vapor and the resulting damage is unknown to all **insureds** and is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

ADDITIONAL COVERAGES - SECTION I

The following Additional Coverage is added:

Fungi, Wet or Dry Rot, Or Bacteria

a. The amount shown in the Schedule is the most we will pay for:

(1) The total of all loss payable under Section I - Property caused by **fungi**, wet or dry rot, or bacteria;

(2) The cost to remove **fungi**, wet or dry rot, or bacteria from property covered under Section I;

(3) The cost to tear out and replace any part of the building or other covered property as needed to gain access to the **fungi**, wet or dry rot, or bacteria; and

(4) The cost of testing of air or property to confirm the absence, presence or level of **fungi**, wet or dry rot, or bacteria, whether performed prior to, during or after removal, repair, restoration or replacement. The cost of such testing will be provided only to the extent that there is a reason to believe that there is the presence of **fungi**, wet or dry rot, or bacteria.

b. The coverage described in a. only applies when such loss or costs are a result of a Peril Insured against that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured against occurred.

c. The amount shown in the Schedule for this coverage is the most we will pay for the total of all loss or costs payable under this Additional Coverage regardless of the:

(1) Number of locations insured under this endorsement; or

(2) Number of claims made.

d. If there is covered loss or damage to covered property, not caused, in whole or in part, by **fungi**, wet or dry rot or bacteria, loss payment will not be limited by the terms of this Additional Coverage, except to the extent that **fungi**, wet or dry rot, or bacteria causes an increase in the loss. Any such increase in the loss will be subject to the terms of this Additional Coverage.

This coverage does not increase the limit of liability applying to the damaged covered property.

EXCLUSIONS - SECTION I

Paragraph 3.f.(3) is deleted and replaced by the following:

(3) Smog, rust or other corrosion;

Paragraph 3.f.(8) is added:

(8) Constant or repeated seepage or leakage of water or the presence or condensation of humidity, moisture or vapor, over a period of weeks, months or years unless such seepage or leakage of water or the presence or condensation of humidity, moisture or vapor and the resulting damage is unknown to all **insureds** and is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

Exclusion 2.g. is added:

g. **Fungi**, Wet or Dry Rot or Bacteria

Fungi, Wet or Dry Rot, or Bacteria meaning the presence, growth, proliferation, spread or any activity of **fungi**, wet or dry rot, or bacteria.

This exclusion does not apply:

(1) When **fungi**, wet or dry rot, or bacteria results from fire or lightning; or

(2) To the extent coverage is provided for in the **Fungi**, Wet or Dry Rot, or Bacteria Additional Coverage under Section I - Property with respect to loss caused by a Peril Insured against other than fire or lightning.

Direct loss by a Peril Insured against resulting from **fungi**, wet or dry rot, or bacteria is covered.

SECTION II - LIABILITY AND MEDICAL PAYMENTS

Under **PART - D RESIDENCE AND PERSONAL ACTIVITIES LIABILITY**

The following paragraph is added:

Our total liability under Part D for the total of all damages arising directly or indirectly, in whole or in part, out of the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any **fungi**, wet or dry rot, or bacteria will not be more than the Section II Part D Aggregate Sublimit of Liability for **Fungi**, Wet or Dry Rot, or Bacteria. That sublimit is the amount shown in the Schedule. This is the most we will pay regardless of the:

a. Number of locations insured under the policy to which this endorsement is attached;

b. Number of persons injured;

c. Number of persons whose property is damaged;

d. Number of **insureds**; or

e. Number of **occurrences** or claims made.

This sublimit is within, but does not increase, the **SECTION II - LIABILITY AND MEDICAL PAYMENTS** limit of liability. It applies separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations.

With respect to damages arising out of **fungi**, wet or dry rot, or bacteria described in this endorsement under Part - D Residence and Personal Activities Liability, the following paragraph is added:

Severability of Insurance

This insurance applies separately to each **insured** except with respect to the Aggregate Sublimit of Liability described in this endorsement under Part D - Residence and Personal Activities Liability. This condition will not increase the limit of liability for this coverage.

GENERAL PROVISIONS

Policy Period is deleted and replaced with the following for the purpose of this endorsement:

POLICY PERIOD

This policy applies only to loss or costs in Section I or **bodily injury** or **property damage** in Section II, which occurs during the policy period.

Schedule

	Amount of Insurance
Section I - Property Coverage Limit of Liability for the Additional Coverage **Fungi**, Wet or Dry Rot, or Bacteria	$10,000
Section II - Part D Aggregate Sublimit of Liability for **Fungi**, Wet or Dry Rot, or Bacteria	$50,000

COVERAGE FOR DAMAGE TO YOUR CAR EXCLUSION RR-248(8-03)

With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by the endorsement.

1. Under Part C - Car Damage of Section I - Property the following is added to Additional Definitions:

"Diminution in value" means the actual or perceived loss in market or resale value which results from a direct and accidental loss.

2. Under Exclusions - Section I the following exclusion is added to item 5:

We do not cover under Part C loss to your insured car or any non-owned car due to **diminution in value.**

AFFIDAVIT

True Copy of Policy

STATE OF WISCONSIN)
) SS
SHEBOYGAN COUNTY)

Thomas C Gast, Personal Lines Underwriting Manager of ACUITY, A Mutual Insurance Company, being familiar with the forms used by the company in its regular course of business and being its custodian of underwriting records and files, certifies that he has checked the records for policy number C80564 issued to James & Glory Zarder and covering 2003 Cadillac Escalade, 2000 Cadillac Deville DTS 4dr, 2005 Saab 9.3 4dr, home at 14285 W Park Ave New Berlin WI 53151 & Excess Personal Umbrella Liability during the policy term from 08-15-05 to 08-15-06.

THAT said policy according to the records was subject to the Coverages and Limits, Insuring Agreements, Conditions, Exclusions, and applicable Endorsements as attached.

Thomas C Gast

Subscribed and sworn to before me
this 9th day of Nov, 2006

Notary Public, State of Wisconsin
My Commission Expires: 08-01-2010

DEBRA J. BORUCKI NOTARY PUBLIC STATE OF WISCONSIN

S-528(12-03)

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v.

Case No. 07 CV 1146

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

TABLE OF NON-WISCONSIN AUTHORITIES

1. *City of Jackson v. Heritage Savings & Loan Ass'n,* 639 S.W. 2d 142 (Mo. App. E.D. 1982).
2. *State Farm v. Seaman,* 96 Wn. App. 629, 980 P.2d 288 (Wash. App. D.V. 1999).
3. *Lhotka v. Illinois Farmers Insurance Company*, 572 N.W.2d 772 (Minn. Ct. App. 1998).
4. *Sylvestre v. United Services Automobile Assoc. Casualty Ins. Co.*, 240 Conn. 544, 692 A.2d 1254 (Conn. 1997).
5. *Sylvester v. United Services Auto. Assoc. Casualty Ins. Co.*, 42 Conn. App. 219, 678 A.2d 1005 (Conn. Ct. App. 1996).

Dated at Waukesha, Wisconsin this 11th day of January, 2008.

GRADY, HAYES & NEARY, LLC
Attorneys for Defendant, ACUITY
A Mutual Insurance Company

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LEXSEE 639 S.W. 2D 142

Cited
As of: Jan 11, 2008

City Of Jackson, Missouri, Plaintiff-Respondent, v. Heritage Savings And Loan Association and First Federal Savings and Loan Association, Defendants-Respondents, and Cape County Bank and Jackson Exchange Bank and Trust Company, Defendants-Appellants

Nos. 44337, 44287

Court of Appeals of Missouri, Eastern District

639 S.W.2d 142; 1982 Mo. App. LEXIS 3180

July 20, 1982

SUBSEQUENT HISTORY: [**1] Motion for Rehearing Overruled, Transfer Denied September 17, 1982. Application Denied October 18, 1982.

PRIOR HISTORY: From the Circuit Court of Cape Girardeau

Civil Appeal

Special Judge Paul McGhee

DISPOSITION: Reversed and Remanded With Directions.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff city filed an action against defendants, banks and savings and loan associations, seeking a declaratory judgment resolving a question involving the deposit of its money. The bank appealed the declaratory judgment entered by the Circuit Court of Cape Girardeau (Missouri).

OVERVIEW: The city field a petition for declaratory judgment seeking a resolution of certain questions involving the deposit of its monies. The trial court held that the city was permitted to deposit its funds in more than one institution and that it was permitted to deposit funds into savings and loans. The court noted that the underlying issue was a matter of importance to financial institutions and municipalities throughout the state. However, it was not the province of the courts to render advisory opinions on abstract or hypothetical questions of law arising from differences of opinion of the law. It was the province of courts to adjudge actual legal controversies between parties. The court did not find an actual legal controversy sufficient to have invoked the jurisdiction of the courts.

OUTCOME: The court reversed the judgment and remanded the case to the trial court with instructions to dismiss the petition.

LexisNexis(R) Headnotes

Business & Corporate Law > Distributorships & Franchises > Terminations > General Overview
Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
Governments > Local Governments > Ordinances & Regulations

[HN1] *Mo. Rev. Stat. § 527.020* provides in part: any person whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. A municipal corporation is a "person" under the statute. *Mo. Rev. Stat. § 527.130*; Mo. R. Civ. P. 87.05. Mo. Rev. Stat. § 527.050 further provides that the listing is not exclusive and Mo. R. Civ. P. 87.02(d) provides that an-

yone may maintain a declaratory judgment action in any instance in which it will terminate a controversy or remove an uncertainty. The law is remedial and is to be liberally construed and administered. *Mo. Rev. Stat. § 527.120.*

Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Ripeness
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview
[HN2] For the court to have jurisdiction, even in a declaratory judgment case, it must have before it a justiciable controversy. The petition must present a real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory decree upon a hypothetical situation. The question is not whether the petition shows that plaintiff is entitled to a declaration in accordance with the theory he states, but whether he is entitled to a declaration at all. Plaintiffs must show that they have a legally protectible interest at stake and that the question they present is appropriate and ripe for judicial decision. The facts on which the decision is demanded must have accrued so that the judgment declares the existing law on an existing state of facts. A mere difference of opinion or disagreement or argument on a legal question does not afford adequate ground for invoking the judicial power.

Civil Procedure > Justiciability > Case or Controversy Requirements > Actual Disputes
Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions
[HN3] No justiciable controversy exists unless an actual controversy exists between persons whose interest are adverse in fact. Actions are merely advisory when there is an insufficient interest in either plaintiff or defendant to justify judicial determination, that is, where the judgment sought would not constitute a specific relief to one party or the other. Such actions are merely advisory when the judgment would not settle actual rights. If actual rights cannot be settled the decree would be a pronouncement of only academic interest.

Civil Procedure > Justiciability > Case or Controversy Requirements > General Overview
Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
[HN4] To qualify as "any person" under *Mo. Rev. Stat. § 527.020*, a party seeking a declaratory judgment must have a legally protectible interest at stake and the declaration sought must be of a question appropriate and ready for judicial resolution. A legally protectible interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective.

Civil Procedure > Justiciability > Case or Controversy Requirements > General Overview
[HN5] Opinions of the Attorney General merely establish a difference of opinion on a question of law and such difference of opinion does not establish a justiciable controversy.

COUNSEL: David G. Beeson, Jackson, Missouri, J. Michael Payne, Cape Girardeau, Missouri, Attorneys for Appellants.

Kenneth L. Waldron, Jackson, Missouri, Attorney for Plaintiff-Respondent.

Richard G. Steele, Cape Girardeau, Missouri, Attorney for Defendant-Respondent First Federal Savings and Loan Association.

JUDGES: Smith, P.J., Satz, Pudlowski, JJ.

OPINION BY: SMITH

OPINION

[*143] The City of Jackson filed a petition for declaratory judgment to seek resolution of certain questions involving the deposit of city monies. Joined as defendants were two banks (Jackson Exchange and Cape County) and two savings and loan associations (Heritage and First Federal). The City specifically asked the trial court (1) whether it could deposit funds in more than one institution at the same time, (2) whether it could deposit funds in savings and loan associations, and (3) whether its ordinance providing for deposit of funds in "banking institutions in the City of [**2] Jackson, Missouri, in such amounts so that the City funds in such banking institutions shall be of as nearly equal amounts as possible" was valid. The trial court gave an affirmative answer to the first two questions, a negative answer to the third question, and both banks appealed. Those appeals were consolidated. The financial institutions have been respectively joined in briefing before this court by the Missouri Bankers Association and Missouri Savings and Loan League as *amici curiae.*

Before us, the parties and *amici* have devoted much of their efforts to an exposition of whether Sec. 369.194, authorizing investment by political subdivisions or instrumentalities of the state in savings and loan associa-

tions, is constitutional in view of *Mo. Const. Art. VI, § 23*, precluding such subdivisions from owning stock in "any . . . association." If such an issue must be resolved on this appeal, *Mo. Const. Art. V, § 3*, does not provide jurisdiction for us to make such a resolution. We do not find such resolution necessary because the trial court lacked jurisdiction to enter a judgment in the absence of a justiciable controversy.

1 All statutory references are to RSMo. 1978.

[**3] [HN1] *Sec. 527.020* provides, "Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." *See also*, Rule 87.02(a). A municipal corporation is a "person" under the statute. *Sec. 527.130*, Rule 87.05. The statute further provides that the listing is not exclusive and the Rule provides that anyone may maintain a declaratory judgment action "in any instance in which it will terminate a controversy or remove an uncertainty." Sec. 527.050, Rule 87.02(d). We are admonished that the law is remedial and is to be liberally construed and administered. *Sec. 527.120; Pollard v. Swenson, 411 S.W.2d 837 (Mo. App. 1967)* [3-10].

[*144] However, despite the broad language of the statute and rule, courts are limited in the circumstances in which they may properly issue a judgment. [HN2] For the court to have jurisdiction, even in a declaratory judgment case, it must have before it a "justiciable controversy." [**4] *City of Joplin v. Jasper County, 349 Mo. 441, 161 S.W.2d 411 (1942)* [2-4]; *Pollard v. Swenson, supra*, [3-10]. The petition [2] must present a real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory decree upon a hypothetical situation. The question is not whether the petition shows that plaintiff is entitled to a declaration in accordance with the theory he states, but whether he is entitled to a declaration at all. *Pollard v. Swenson, supra.* Plaintiffs must show that they have a legally protectible interest at stake and that the question they present is appropriate and ripe for judicial decision. The facts on which the decision is demanded must have accrued so that the judgment declares the existing law on an existing state of facts. *Higday v. Nickolaus, 469 S.W.2d 859 (Mo. App. 1971)* [1-3]. A mere difference of opinion or disagreement or argument on a legal question does not afford adequate ground for invoking the judicial power. *Tietjens v. City of St. Louis, 359 Mo. 439, 222 S.W.2d 70* (banc 1949) [1-4]. [HN3] "No justiciable controversy exists . . . unless an actual controversy exists between persons [**5] whose interest are adverse in fact . . . . Actions are merely advisory when there is an insufficient interest in either plaintiff or defendant to justify judicial determination, i.e., where the judgment sought would not constitute a specific relief to one party or the other. Such actions are merely advisory when the judgment would not settle actual rights. If actual rights cannot be settled the decree would be a pronouncement of only academic interest." *State ex rel. Chilcutt v. Thatch, 359 Mo. 122, 221 S.W.2d 172* (banc 1949) [5-7]. [HN4] To qualify as "any person" under the statute, a party seeking a declaratory judgment must have a legally protectible interest at stake and the declaration sought must be of a question appropriate and ready for judicial resolution. "A legally protectible interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective." *Absher v. Cooper, 495 S.W.2d 696 (Mo. App. 1973)* [1-4].

2 There is some confusion in the law as to whether the court should look only to the petition in determining the existence of a justiciable controversy, or may also look to the answer, or even to the entire record. Compare *Pollard v. Swenson, supra, Land Clearance For Redevelopment Authority v. City of St. Louis, 270 S.W.2d 58* (Mo. banc 1954) [2], *City of Joplin v. Jasper County, supra.* Here we find no such controversy regardless of what we examine.

[**6] Having set forth these oft-recited principles we turn to the specifics of the case before us. Plaintiff's petition alleged that it is a city of the fourth class and set forth the nature and location of the defendants. It stated that each of the banks are depositories for plaintiff's funds. The banks desire to remain so to the exclusion of the savings and loan associations, although Heritage in fact has funds of plaintiff on deposit. Plaintiff's current ordinance provides that city funds "shall be deposited in all banking institutions in the City . . . in such amounts so that the City funds in such banking institutions shall be of as nearly equal amounts as possible." The petition then sets forth the provisions of Secs. 95.355, 110.010, and 110.020, and alleges that 369.325(3) [sic] states that accounts of savings and loan associations are legal investments for funds of municipalities in Missouri. The petition then alleges that the City has "received numerous requests" from the savings and loan defendants for deposit of city funds and this has created a "perplexing problem of where a Fourth Class City in Missouri can or cannot deposit its funds." The petition then cites two opinions [**7] of the Attorney General which are alleged to be inconsistent, one of which would appear to preclude the city from depositing funds in more than one depository. It is alleged that there are no reported decisions on the subject.

[*145] Plaintiff's remaining allegations deal with intensification of questions and problems; media coverage; direct and indirect pressure being applied to city officials; the need for judicial clarification and construction; the concerns of city officials about having a checking account; their concern about the process of purchasing tax bills and city bonds; and the position of the savings and loan association officers that they could not purchase tax bills and might not be able to purchase bonds. The petition concluded by asserting that the competition between banks and savings and loan associations and the economic climate have intensified problems and pressures facing City officials presenting an actual controversy between plaintiff and all defendants, so that plaintiff needs a judicial determination to avoid future controversy and legal exposure for incorrect actions "that may result from inactment [sic] of an invalid ordinance relating to deposit [**8] of funds."

The prayer asked the court to find and declare (1) whether Plaintiff is required to deposit its funds in one or more banking institutions, (2) "whether and under what circumstances may Plaintiff deposit funds in savings and loan associations . . .," (3) whether plaintiff's Ordinance 1897 is valid and complies with Missouri law, and, if not, "the proper wording for same." There was nothing in the answers of the parties indicating an actual justiciable controversy. The defendants did allege a difference of opinion as to whether deposits could be made in a savings and loan association, and one bank made an unadorned allegation that Ordinance 1897 is "invalid."

Notable by their absence are any allegations of any incipient litigation, demands, or claims of right by any defendant to the deposits of the city. Equally notable is the absence of any allegation of legal challenge by anyone to the present ordinance or depository practices of the city. Section 95.355 provides that boards of aldermen in fourth class cities *may* select a depository for the funds of their cities. Such a grant vests a discretion in the board in selecting such depository. It does not compel the exercise [**9] of that discretion in any way. The board has exercised that discretion in Ordinance 1897, and, while some or all of the defendants may prefer a different exercise of that discretion, none have made a specific challenge to the legality of the ordinance. No challenge has been leveled at the practice of the City in depositing funds in an institution which may not be a "banking institution" under the ordinance nor have the parties raised any question about the meaning of the term "banking institution" in the ordinance. Viewing the petition in its most controversial light, it seeks at most a declaration from the court of what would be the legal status of a different ordinance if and when the city passes one pursuant to requests from some of the defendants. [3] This would not be a declaration of existing law to existing fact, but purely an advisory opinion on a hypothetical state of facts. It does not present a justiciable controversy.

3 The record does reflect that the Board passed a different ordinance, allowing use of savings and loan associations as depositories, which was vetoed by the mayor because of doubts of its validity. The veto was not overridden. Whether the city would again pass such an ordinance is speculative at best.

[**10] Under certain circumstances a city may seek a declaration of the validity of its own ordinances as in *City of Nevada v. Welty, 356 Mo. 734, 203 S.W.2d 459 (1947)*. There the city sued to have an ordinance outlawing stockpens in a given area declared valid. The owner had refused to remove the stockpens and the city sought a declaratory judgment to determine its liability for removing the stockpens itself. The Supreme Court found such a declaration was not advisory because the city and the defendant were involved in a present controversy over the validity of the ordinance and the parties' rights thereunder. For the reasons previously discussed, we find no such present controversy here.

We also find no justiciable controversy because of the allegedly conflicting opinions of the Attorney General. Such [*146] [HN5] opinions merely establish a difference of opinion on a question of law and such difference of opinion does not establish a justiciable controversy. *Gershman Investment Corp. v. Danforth, 517 S.W.2d 33* (Mo. banc 1974).

We do not lack appreciation of the fact that the law regarding deposit of municipal funds in savings and loan associations has not been definitely addressed [**11] in this state by the courts. We also appreciate that resolution of the underlying issue is a matter of importance to financial institutions and municipalities throughout the state. But, it is not the province of the courts to render advisory opinions on abstract or hypothetical questions of law arising from differences of opinion of the law. It is the province of courts to adjudge actual legal controversies between parties. We find no such actual legal controversy here sufficient to invoke the jurisdiction of the courts.

Judgment reversed and remanded with directions to dismiss plaintiff's petition for lack of jurisdiction.

All concur.

LEXSEE 96 WN. APP. 629

Cited
As of: Jan 11, 2008

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Respondent*, v. ANNE E. SEAMAN, *Appellant*.

No. 23784-9-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

96 Wn. App. 629; 980 P.2d 288; 1999 Wash. App. LEXIS 1313

July 16, 1999, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant insured appealed an order of the Superior Court of Clark County (Washington), that granted plaintiff insurer's motion for summary judgment and denied defendant's similar motion, in plaintiff's declaratory judgment action regarding the coverage available to defendant under the underinsured motorist provisions of her automobile insurance policy.

OVERVIEW: Defendant insured carried a policy of automobile insurance with plaintiff insurer. While defendant was stopped at light, her car was hit in the rear by another vehicle. Both drivers exited their vehicles and, after inspection, found no damage. Each driver also asked if the other was okay. Neither complained of any injuries, and neither obtained any information about the other. Defendant soon developed back and neck pain, but she failed to report the incident to the police as required by her policy. Defendant then submitted a claim for underinsured motorist (UIM) benefits to plaintiff, on the basis that she was involved in an accident with a "hit-and-run" driver. Plaintiff denied her claim and sought a declaratory judgment. Defendant counterclaimed for benefits under her insurance policy. Both parties moved for summary judgment. The trial court granted summary judgment in favor of plaintiff. Defendant appealed. The court affirmed because the hit-and-run provisions in the policy were not applicable when the other driver promptly exited his vehicle, undertook an investigation, was assured there was neither injury nor damage and departed.

OUTCOME: The court affirmed the trial court's order granting summary judgment for plaintiff insurer because defendant insured's claims were not covered by the underinsured motorist provisions of her policy and because the term "hit-and-run" was not ambiguous and did not include a situation where the other driver promptly exited his vehicle, undertook an investigation, was assured there was neither injury nor damage and departed.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview

[HN1] On review of summary judgment, an appellate court engages in the same inquiry as the trial court. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court considers all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers
Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings

[HN2] Undefined terms in an insurance policy are to be accorded their plain, ordinary, and popular meaning and not a technical, legal meaning. If the language is clear and unambiguous, the court may not modify the written terms nor create an ambiguity where none exists. But, if there are ambiguities in the insurance policy, they are strictly construed against the insurer. When analyzing the policy and reviewing for an ambiguity, policy language is construed as if read by an average insurance purchaser.

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > General Overview
[HN3] Under *Wash. Rev. Code § 46.52.020*, if there is no apparent bodily injury or property damage, a driver has no duty to proffer identification and insurance information.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > General Overview
Insurance Law > Motor Vehicle Insurance > Coverage > Property > Hit & Run Accidents > General Overview
Torts > Transportation Torts > General Overview
[HN4] The term "hit-and-run" in an automobile insurance policy is not ambiguous. The term does not encompass a situation where a driver promptly exits his vehicle, undertakes an investigation, is assured there is neither injury nor damage, and departs.

SUMMARY:

[***1] **Nature of Action:** An automobile insurer sought declaratory relief after its insured submitted a claim for underinsured motorist benefits based on her alleged involvement in a collision with a "hit-and-run" driver. The insured alleged that the other driver had left the scene of the accident without leaving identification or insurance information after the insured told him there had been no injuries or property damage. The insured filed a counter-claim for benefits.

Superior Court: The Superior Court for Clark County, No. 98-2-00978-4, Edwin L. Poyfair, J., granted summary judgment in favor of the insurer on September 18, 1998.

Court of Appeals: Holding that the driver of the other vehicle was not a "hit-and-run" driver within the meaning of the insured's policy, the court *affirms* the judgment.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Judgment – Summary Judgment – Determination – Interpretation of Facts All facts submitted and all reasonable inferences from them must be considered in the light most favorable to the nonmoving party when ruling on a motion for summary judgment. Summary judgment is appropriate only if reasonable persons could reach but one conclusion, considering all the evidence.

[2] Insurance – Construction of Policy – Meaning of Words – Undefined Terms – In General Undefined terms in an insurance policy are given their plain, ordinary and popular meaning, not a technical, legal meaning.

[3] Insurance – Construction of Policy – Ambiguity – Determination – Average Purchaser In determining whether an insurance policy is ambiguous, policy language is construed as if read by an average insurance purchaser. Any ambiguities are strictly construed against the insurer.

[4] Automobiles – Hit and Run – Elements – Stop and Investigate The criminal hit and run statute (*RCW 46.52.020*) requires a motorist involved in an accident with another vehicle to stop and investigate. The statute does not require the motorist to provide identification or insurance information to the other vehicle's driver if the investigation reveals neither property damage nor personal injury.

[5] Insurance – Construction of Policy – "Hit-and-Run" – What Constitutes A driver of a vehicle involved in a collision who promptly exits the vehicle, is assured there is neither injury nor property damage, and departs does not qualify as a "hit-and-run" driver for purposes of an automobile insurance policy's under-insured motorist provision.

COUNSEL: *Ben Shafton* of *Morse & Bratt*, for appellant.

Jackson H. Welch of *Landerholm, Memovich, Lansverk & Whitesides P.S.*, for respondent.

JUDGES: Authored by Elaine M. Houghton. Concurring: David H. Armstrong, Karen G. Seinfeld.

OPINION BY: ELAINE M. HOUGHTON

OPINION

[**288] [*631] Houghton, J. – After claiming she was involved in a hit-and-run accident, Anne Seaman sought underinsured motorist (UIM) coverage from her insurer, State Farm. State Farm denied the claim and filed an action seeking declaratory relief. Seaman coun-

terclaimed for benefits under her insurance policy. Both parties [**289] moved for summary judgment. The trial court concluded that there was no coverage and entered a summary judgment dismissing her claim. Seaman appeals. We affirm.

FACTS

In the midafternoon hours of February 17, 1997, Seaman's vehicle was rear-ended by another vehicle when she was making a legal left-hand turn. Both Seaman and the driver of the other vehicle pulled over and inspected the vehicles, which apparently were not damaged. Each driver asked if the other [***2] was okay. Both drivers responded in the positive. Whereupon the driver of the vehicle that hit Seaman's stated, "I guess it's okay then." He went to his vehicle and drove away. So did Seaman.

In a deposition, Seaman stated that when her vehicle was hit she felt a popping sensation in her neck and back. She also stated that for up to 10 minutes following the accident she felt "stunned" and described her mental state as "[s]hook up," "[t]ense," and "[f]rightened." Seaman neither asked for nor obtained any information from the driver of the other vehicle before he left the scene. She did not write down the license plate number nor the make and model of the other vehicle. She stated that she failed to do so because she was "stunned" and "shook up."

[*632] One day after the accident, Seaman developed neck and back pain. But she failed to report the incident to the police as required by her insurance policy. [1] Approximately one-and-one-half years later, a State Farm adjuster suggested that Seaman try to find the driver of the unidentified vehicle by waiting at the same location in the event he may reappear. This method of investigation was unsuccessful.

1 Under the insured's duties, State Farm requires that "[t]he person making claim . . . shall . . . under the underinsured motor vehicle coverages: (1) report a 'hit-and-run' accident or a 'phantom vehicle' accident to the police within 72 hours and to us within 30 days."

[***3] Seaman then submitted a claim for UIM benefits to her insurer, State Farm, on the basis that she was involved in an accident with a "hit-and-run" driver. State Farm disagreed, denied her claim, and sought a declaratory judgment. [2] Seaman counterclaimed for benefits under her insurance policy. Both parties moved for summary judgment. The trial court determined that Seaman's claims were not covered under her policy and granted summary judgment in favor of State Farm. Seaman appeals.

2 The parties' dispute over the amount of personal injury protection benefits to which Seaman claims she is entitled is not part of this appeal. The parties have submitted that issue to arbitration.

ANALYSIS

The parties dispute the meaning of "hit-and-run" within the policy language under the facts of this case. Seaman offers several definitions, urging us to adopt one based upon either *RCW 46.52.020*, the criminal hit-and-run statute, or standard dictionary definitions. According to Seaman, the terms "hit-and-run" within the meaning of the insurance policy should be liberally interpreted to effectuate the legislative intent behind the UIM statutes, namely, to protect motorists from underinsured drivers.

[1] [HN1] On review of summary judgment, an appellate court engages in the same inquiry as the trial court. *Hill v. J.C. Penney, Inc., 70 Wn. App. 225, 238, 852 P.2d 1111, review* [*633] *denied,* [***4] *122 Wn.2d 1023, 866 P.2d 39 (1993).* Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).* The court considers all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Id. at 249.* The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.*

Seaman's insurance policy with State Farm includes a UIM provision that State Farm:

> will pay damage for *bodily injury* sustained by an *insured* that an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle.* [**290] The *bodily injury* must be caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle.*

The policy's definition of an "underinsured motor vehicle" includes "a 'hit-and-run' land motor vehicle whose owner or driver remains unknown and which strikes: (a) the *insured;* or (b) the vehicle [***5] the *insured* is occupying and causes *bodily injury* to the *insured.*"

[2] [3] [HN2] Undefined terms in an insurance policy are to be accorded their plain, ordinary, and popular meaning, and not a technical, legal meaning. *Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997).* If the language is clear and unambiguous, the

court may not modify the written terms nor create an ambiguity where none exists. *Morgan v. Prudential Ins. Co of Am., 86 Wn.2d 432, 435, 545 P.2d 1193 (1976).* But if there are ambiguities in the insurance policy, they are strictly construed against the insurer. *Peasley, 131 Wn.2d at 424; see also Greer v. Northwestern Nat'l Ins. Co., 109 Wn.2d 191, 201, 743 P.2d 1244 (1987)* (where insurance policy may be reasonably interpreted in multiple ways, court should apply meaning most favorable to insured). When analyzing the policy and reviewing for an ambiguity, policy language is construed as [*634] if read by an average insurance purchaser. *Peasley, 131 Wn.2d at 424.*

[4] Seaman cites the criminal hit-and-run statute, *RCW 46.52.020*, as support for her contention that she was involved in a hit-and-run [***6] accident. *RCW 46.52.020* imposes a duty on a driver of a vehicle involved in an accident with another vehicle that is attended by another person to provide identification and insurance information to such other person only where property damage or personal injury has occurred. *RCW 46.52.020(1)-(3).* As the court explained in *State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983), RCW 46.52.020* "requires the motorist to stop and investigate" because this requirement "serves the underlying rationale of facilitating investigation of accidents and providing immediate assistance to those injured." But the statute does not require more than stopping and investigating if the inquiry reveals that there is neither property damage nor physical injury.

Here, the unidentified driver complied with his duties under *RCW 46.52.020*. Upon striking Seaman's vehicle, he exited his own vehicle, investigated the cars for property damage, and asked Seaman about her physical well-being. Finding no apparent property damage and based upon Seaman's representation that she was not injured, the unidentified driver returned to his car and departed. He undertook a reasonable investigation [***7] of the accident scene by confirming that there were no signs of visible damage and in receiving Seaman's assurance that she was not injured. Thus, he was not a "hit-and-run" driver within the meaning of the criminal hit-and-run statute.

Nor are we persuaded by Seaman's argument, based upon a dictionary definition, that a hit-and-run collision is one where the operator of the vehicle leaves the scene without identifying himself or herself. *See* BLACK'S LAW DICTIONARY 372 (5th ed. 1983). Our Supreme Court in *Hartford Accident & Indem. Co. v. Novak, 83 Wn.2d 576, 585, 520 P.2d 1368 (1974)*, defined a "hit-and-run" as "a car involved in an accident causing damages where the driver flees from [*635] the scene." Thus, as defined by the Supreme Court, a hit-and-run denotes only a situation where a driver flees the scene of an accident. Accordingly, the definition of hit-and-run does not include a situation where a driver stops, inquires, and is reassured that there is neither personal injury nor property damage.

Here, the unidentified driver did not flee; rather he promptly exited his car and approached Seaman to inquire about her condition and the condition of her automobile. [***8] *Accord Lhotka v. Illinois Farmers Ins. Co., 572 N.W.2d 772 (Minn. Ct. App. 1998)* (where unidentified driver struck pedestrian who represented to driver that she was "okay" and requested no information from driver, court held that no "hit-and-run" occurred, basing its decision upon state criminal statute defining "hit-and-run").

Seaman also relies upon *Courmier-Trahan v. Service Cab. Co., 546 So. 2d 513 (La. Ct. App.), review denied, 551 So. 2d 1325 (La. 1989)*, to support her argument. But the [**291] statute at issue in *Courmier-Trahan* differs significantly from *RCW 46.52.020* in that the Louisiana statute defines "hit-and-run" as "the intentional failure of the driver of a vehicle involved in or causing *any accident*, to stop such vehicle at the scene of the accident, to give his identity, and to render reasonable aid. . . ." 9A *LA. REV. STAT. ANN. § 14:100(A)* (West Supp. 1999) (emphasis added). The Louisiana statute places a greater burden upon a driver involved in an accident because information must be exchanged in "any accident." Whereas, [HN3] under *RCW 46.52.020*, if there is no apparent bodily injury or property damage, a driver has no duty to proffer identification and insurance information.

[5] [***9] Finally, under the facts of this case, [HN4] we hold that the term "hit-and-run" is not ambiguous. The term does not encompass a situation where a driver promptly exits his vehicle, undertakes an investigation, is assured there is neither injury nor damage, and departs. Thus, the trial court [*636] properly concluded that Seaman's UIM claims are not covered under her State Farm insurance policy.

ATTORNEY FEES

Because we affirm the trial court's decision regarding denial of coverage, we deny Seaman's request for attorney fees at trial and on appeal.

Affirmed.

Armstrong, A.C.J., and Seinfeld, J., concur.

LEXSEE 572 N.W. 2D 772

Caution
As of: Jan 11, 2008

Marcia Lhotka, Appellant, vs. Illinois Farmers Insurance Company, Respondent.

C2-97-1126

COURT OF APPEALS OF MINNESOTA

572 N.W.2d 772; 1998 Minn. App. LEXIS 10

January 6, 1998, Filed

SUBSEQUENT HISTORY: Rehearing Denied March 19, 1998, Reported at: *1998 Minn. LEXIS 813.*

PRIOR HISTORY: [**1] Stearns County District Court. File No. C1962956.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant insured challenged a judgment of the Stearns County District Court (Minnesota), which granted summary judgment in favor of respondent insurer in the insured's action for uninsured motorist benefits.

OVERVIEW: The insured was struck and knocked down by an automobile while walking across a gas station parking lot. The driver stopped, got out of her car, and asked the insured if she was "okay." The insured thought she was until later, when she exhibited injuries. The insured filed an action against the insurer for uninsured motorist benefits. The trial court granted summary judgment to the insurer on the ground that the accident was not a hit-and-run as a matter of law. Affirming, the court held that the driver did not commit a hit-and-run in the ordinary meaning thereof as she did not leave until the insured assured her she was fine. The court found no material issue of fact regarding the insured's injuries because the insured admitted that they were not apparent at the time of the incident.

OUTCOME: The court affirmed the trial court's grant of summary judgment for the insurer.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > General Overview
[HN1] On appeal from summary judgment, a reviewing court must ask whether genuine issues of material fact exist and whether the lower court erroneously applied the law. In such cases, the appellate court must consider the evidence in the light most favorable to the party against whom judgment was granted.

Contracts Law > Contract Interpretation > General Overview
Contracts Law > Defenses > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview
[HN2] The interpretation of insurance contract language is a question of law as applied to the facts presented. Further, whether ambiguity exists in an insurance policy is a question of law and is, therefore, reviewed de novo. The language of an insurance policy is ambiguous only if it can reasonably be given more than one meaning, and the court shall fastidiously guard against the invitation to create ambiguities where none exist. Any ambiguous language is construed in favor of the policyholder, but the court must give policy language its usual and accepted meaning if no ambiguity is found.

Torts > Transportation Torts > General Overview
Transportation Law > Private Motor Vehicles > Traffic Regulation
[HN3] Minnesota law states: The driver of any vehicle involved in an accident resulting in bodily injury to or death of any person shall stop and give the driver's name, address, date of birth and the registration number of the vehicle being driven, and shall, upon request and if available, exhibit the driver's license or permit to drive to the person struck. *Minn. Stat. § 169.09, subd. 3(a)* (1996).

Insurance Law > Motor Vehicle Insurance > Coverage > Property > Hit & Run Accidents > General Overview
Insurance Law > Motor Vehicle Insurance > Coverage > Uninsured Motorists > General Overview
Torts > Transportation Torts > General Overview
[HN4] "Uninsured motorist coverage" is defined by statute as coverage for bodily injury from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles. *Minn. Stat. § 65B.43, subd. 18* (1996).

Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings
Insurance Law > Motor Vehicle Insurance > Coverage > Property > Hit & Run Accidents > General Overview
Torts > Transportation Torts > General Overview
[HN5] Minnesota statutes do not define "hit-and-run." Courts should, however, apply the ordinary meaning of terms not defined in an insurance policy, as well as the interpretations adopted in prior cases. The supreme court succinctly defines hit-and-run as a vehicle involved in an accident causing damages where the driver flees from the scene.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > General Overview
Insurance Law > Claims & Contracts > Policy Interpretation > Questions of Law
Insurance Law > Motor Vehicle Insurance > Coverage > Property > Hit & Run Accidents > General Overview
[HN6] The interpretation of insurance policy language is a question of law, and whether such language is ambiguous is also a question of law.

SYLLABUS

A driver who strikes a pedestrian does not commit a hit-and-run when the driver stops; inquires about the pedestrian's condition; is not requested by the pedestrian to exchange names, addresses, and insurance information; and does not leave until assured by the pedestrian that the pedestrian has no apparent injuries.

COUNSEL: Timothy W. Nelson, Nelson Personal Injury Attorneys, First Bank Place, Suite 440, 1010 West St. Germain, St. Cloud, MN 56301 (for appellant).

Peter G. Mikhail, Askegaard & Robinson, P.A., 206 North 7th Street, P.O. Box 826, Brainerd, MN 56401 (for respondent).

JUDGES: Considered and decided by Toussaint, Chief Judge, Randall, Judge, and Foley, Judge. *

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. Art. VI, § 10.

OPINION BY: RANDALL

OPINION

[*773] OPINION

RANDALL, Judge

Appellant challenges the district court's order granting summary judgment in favor of respondent in an action for uninsured motorist benefits. We affirm.

FACTS

On February 13, 1995, Appellant Marcia Lhotka was struck and knocked down by an automobile [**2] while walking across a gas station parking lot in Sartell, Minnesota. The driver of the automobile stopped, got out of her car, and asked Lhotka if she was "okay." Lhotka responded that she had some pain in her head and elbow, "but I think I'm okay." Lhotka did not request any information from the driver. The driver did not provide Lhotka with a name or address or any other information. After being satisfied that nothing needed to be done, the driver left. While driving herself home, Lhotka noticed swelling over her eye. She reported the incident to police the next morning, after she noticed increasing pain in her neck, back, and hips.

Lhotka brought suit against respondent Illinois Farmers Insurance Company (Farmers), her automobile insurance carrier, after Farmers denied her request for uninsured motorist benefits. Farmers moved for summary judgment on three grounds: (1) the accident was not a hit-and-run as a matter of law, and Lhotka failed to provide any evidence that the vehicle was uninsured; (2) Lhotka failed to give Farmers adequate notice of the claim as required by the insurance contract and Minnesota law; and (3) Lhotka primarily assumed the risk of loss. The district [**3] court granted Farmer's motion

for summary judgment, ruling the accident was not a hit-and-run as a matter of law. The district court did not rule on the alternative grounds Farmers raised in support of its motion. This appeal by Lhotka followed.

ISSUES

1. Did the district court err as a matter of law in holding that the unidentified driver was not a hit-and-run driver?

2. Do genuine issues of material fact exist precluding a determination of this issue by summary judgment?

ANALYSIS

[HN1] On appeal from summary judgment, a reviewing court must ask whether genuine issues of material fact exist and whether the lower court erroneously applied the law. *State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990)*. In such cases, the appellate court must consider "the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993)*.

I.

[HN2] "The interpretation of insurance contract language is a question of law as applied to the facts presented." *Meister v. Western Nat'l Mut. Ins. Co., 479 N.W.2d 372, 376* [*774] *(Minn. 1992)*. Further, whether ambiguity exists in an insurance policy [**4] is a question of law and is, therefore, reviewed de novo. *American Commerce Ins. Brokers, Inc. v. Minnesota Mut. Fire & Cas. Co., 551 N.W.2d 224, 227 (Minn. 1996)*.

The language of an insurance policy is ambiguous only if it can reasonably be given more than one meaning, and the court shall "'fastidiously guard against the invitation to "create ambiguities" where none exist.'" *Id.* (quoting *Columbia Heights Motors v. Allstate Ins. Co., 275 N.W.2d 32, 36 (Minn. 1979)*). Any ambiguous language is construed in favor of the policyholder, but the court must give policy language its "usual and accepted meaning" if no ambiguity is found. *American Commerce, 551 N.W.2d at 227-28*.

Lhotka argues on appeal that the district court erred in holding as a matter of law that the driver in this case was not "uninsured." She asserts that the definition of "uninsured motor vehicle," which includes a hit-and-run vehicle whose driver has not been identified, should be interpreted as referencing drivers not identified at the time the claim is made without regard for whether the driver *could* have been identified at the time of the accident. Because her [**5] policy does not indicate the time at which the lack of identification warrants policy coverage, she argues, the policy is ambiguous and must be interpreted in her favor.

Lhotka additionally argues that because she experienced only minor physical symptoms and had no apparent bodily injuries at the scene, it was reasonable for her to determine that no accident occurred which necessitated insurance involvement or exchanging information with the driver. She maintains that the court should look at the reasonableness of her actions at the time. She also insists the law places the obligation to provide information on the unknown driver. [HN3] Minnesota law states:

> The driver of any vehicle involved in an accident resulting in bodily injury to or death of any person * * * shall stop and give the driver's name, address, date of birth and the registration number of the vehicle being driven, and shall, upon request and if available, exhibit the driver's license or permit to drive to the person struck * * *.

Minn. Stat. § 169.09, subd. 3(a) (1996). Lhotka argues the unknown driver violated this statute, and Lhotka should not be penalized for the driver's violation.

Farmers asserts [**6] in response that, in addition to showing the driver fled the scene, appellant must show there was an accident causing damages. *See Halseth v. State Farm Mut. Auto. Ins. Co., 268 N.W.2d 730, 733 (Minn. 1978)* (defining hit-and-run as "an accident causing damages where the driver flees the scene"). Farmers notes that according to Minnesota law, "The driver of any vehicle involved in an accident resulting in *immediately demonstrable bodily injury* to or death of any person shall immediately stop * * *." *Minn. Stat. § 169.09, subd. 1* (1996) (emphasis added). Farmers asserts that, because Lhotka did not suffer "immediately demonstrable bodily injury" from the driver's perspective, no "accident causing damages" occurred.

Lhotka's insurance policy with Farmers covers accidents caused by an uninsured motor vehicle. Under the terms of the policy, an uninsured motor vehicle includes: "A hit-and-run vehicle whose operator or owner has not been identified and which causes bodily injury to you or any family member." [HN4] "Uninsured motorist coverage" is defined by statute as "coverage * * * for bodily injury from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles." [**7] *Minn. Stat. § 65B.43, subd. 18* (1996).

[HN5] Neither the policy, nor Minnesota statutes, defines "hit-and-run." Courts should, however, apply the ordinary meaning of terms not defined in an insurance

policy, "as well as the interpretations adopted in prior cases." *Boedigheimer v. Taylor, 287 Minn. 323, 327, 178 N.W.2d 610, 613 (1970)*. The supreme court has succinctly defined hit-and-run as "a vehicle involved in an accident causing damages where *the driver flees from the scene.*" *Halseth, 268 N.W.2d at 733* (emphasis added).

Applying the ordinary meaning of hit-and-run and the interpretation adopted in *Halseth*, the driver here did not commit a [*775] hit-and-run. The unidentified driver stopped after striking Lhotka, got out of her vehicle, and questioned Lhotka about her condition. Lhotka told the driver that her elbow and head hurt, "but I think I'm okay." The driver made no attempt to leave until after Lhotka assured her she was okay. There is no evidence that anyone attempted to detain the driver when she did leave. There is no indication that Lhotka or the driver even thought to exchange information; neither is there evidence that this information would [**8] not have been provided if either had thought to request it.

Lhotka acknowledges that she suffered no immediately apparent injuries and that the driver was aware of none when she drove away. We cannot say that a driver commits a "hit-and-run" when the driver stops after the accident, speaks directly to the other party and inquires about injury, makes no attempt to conceal her identity (the facts show that neither party thought of nor attempted to exchange information), and the driver leaves only after the party who was struck assures the driver she is okay. The district court properly held as a matter of law that the driver did not commit a hit-and-run, and that, therefore, Lhotka was ineligible for uninsured motorist benefits from Farmers.

II.

Lhotka argues material facts are at issue in this case; thus, summary judgment was inappropriate. First, Lhotka argues that there is a factual dispute over whether Lhotka was injured. Lhotka explains that in one instance Farmers alleges Lhotka did not suffer bodily injury, while in another instance Farmers contends that Lhotka had a duty under her policy's notice requirement to attempt to get information from the driver because [**9] Lhotka suffered bodily injury. Second, Lhotka argues that whether or not the unidentified driver committed a hit-and-run within the meaning of the policy is a question of fact. [1] Farmers is not denying that Lhotka was injured. Rather, Farmers argues only that Lhotka's injuries were not demonstratively apparent at the time of the incident, and that, therefore, the driver was not required by law to provide identification. Farmers' argument regarding Lhotka's duty under the policy's notice requirement was raised only as an alternative argument, applicable only if the court determined apparent injury did exist at the time of the incident. This is not a material issue of fact as Lhotka concedes her injuries were unapparent at the time of the accident.

1 Lhotka cites a district court case in which the driver of a vehicle that rear-ended another vehicle got out of his car, told the other driver there was no damage, then got back in his car and drove away without identifying himself. *See Fisher v. National Family Ins. Corp.*, (Stearns County Dist. Court File No. C8-91-3597). There, the district court refused to grant summary judgment, after determining that whether the driver fled from the scene was "a genuine issue of material fact." *Id.*

Fisher is not before this court, and is distinguishable on its facts.

[**10] Whether the accident here falls within the meaning of hit-and-run under Lhotka's policy is not a question of fact. [HN6] The interpretation of insurance policy language is a question of law, and whether such language is ambiguous is also a question of law. *American Commerce, 551 N.W.2d at 227; Meister, 479 N.W.2d at 376*. The facts regarding the driver's actions following the accident are not in dispute. Thus, the district court correctly determined that no material facts are at issue in this case, and summary judgment was appropriate.

DECISION

We affirm the district court's order awarding summary judgment in Farmers' favor. The driver's actions here did not constitute hit-and-run as a matter of law. She stopped, questioned Lhotka about her condition, and did not leave until Lhotka assured her she was okay.

Finally, no material issues of fact exist here. Both parties concede that although appellant was injured, her injuries were not immediately apparent. Additionally, whether a hit-and-run occurred here is not a question of fact because there is no dispute about the actions taken by Lhotka or the driver [*776] after the accident. The interpretation of insurance [**11] policy language is a question of law. *Meister, 479 N.W.2d at 376*. Therefore, summary judgment was appropriate.

Affirmed.

LEXSEE 240 CONN. 544

Caution
As of: Jan 11, 2008

ALAN SYLVESTRE v. UNITED SERVICES AUTOMOBILE ASSOCIATION CASUALTY INSURANCE COMPANY

(15519)

SUPREME COURT OF CONNECTICUT

240 Conn. 544; 692 A.2d 1254; 1997 Conn. LEXIS 86

March 20, 1997, Argued
April 22, 1997, officially released

PRIOR HISTORY: [***1] Action to recover proceeds allegedly due pursuant to the uninsured motorist provision of an automobile liability insurance policy issued by the defendant, brought to the Superior Court in the judicial district of Hartford-New Britain at New Britain, where the court, Handy, J, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, Dupont, C. J., and Lavery and Spear, Js., which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff insured sought review of a decision from the Superior Court in the Judicial District of Hartford-New Britain at New Britain (Connecticut), which granted summary judgment to defendant insurer in the insured's action to collect on an uninsured insurance policy.

OVERVIEW: The insured was a pedestrian who was crossing a street. He was struck by a slow moving vehicle. The insured thought he was not injured so he told the driver of the vehicle he could leave, and the insured failed to get any identifying information from the driver. Subsequently, the insured suffered pain and received medical treatment for the leg and knee that was struck by the vehicle. Because he had no means of locating the driver, the insured brought a claim under his uninsured motorist provision of his insurance with the insurer. While the insured claimed that the accident involved a hit and run vehicle whose operator could not be identified, the superior court disagreed and granted summary judgment to the insurer. The court affirmed, agreeing with the superior court's ruling that the vehicle that struck the insured was not a hit and run vehicle because the driver had stopped and attempted to provide aid to the insured.

OUTCOME: The court affirmed the grant of summary judgment to the insured.

LexisNexis(R) Headnotes

Insurance Law > Motor Vehicle Insurance > Coverage > Uninsured Motorists > General Overview
Torts > Transportation Torts > Motor Vehicles > General Overview
[HN1] A motor vehicle is not a hit and run vehicle whose operator cannot be identified if, after an accident, the driver stops and is permitted by the injured party to leave the scene.

COUNSEL: Peter M. Appleton, with whom were Morton W. Appleton and, on the brief, Peter T. Evans, for the appellant (plaintiff).

Frederick M. O'Brien, for the appellee (defendant). Joram Hirsch filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

JUDGES: Callahan, C. J., and Borden, Berdon, Norcott and Katz, Js.

OPINION

[*545] [**1254] PER CURIAM. The plaintiff, Alan Sylvestre, a pedestrian, was struck in the leg by a slow moving vehicle while he was crossing a street at an intersection in Bristol. The vehicle that struck the plaintiff previously had been stopped at a stop sign at the intersection. [***2] After striking the plaintiff, the driver immediately brought his car to a halt, exited the vehicle and waited for several minutes while the plaintiff sat on a guardrail to compose himself and then walked about to test his leg. Thereafter the plaintiff, believing he was not seriously injured, sent the driver on his way without ascertaining his name or address or his vehicle's license number, and without obtaining insurance information. Later that day, the plaintiff began to experience pain in his knee and sought medical attention at Hartford Hospital, where he was treated and released.

The plaintiff subsequently filed a claim for uninsured motorist benefits pursuant to an insurance policy issued to him by the defendant, United Services Automobile [*546] Association Casualty Insurance Company. The plaintiff's claim was based on the language in the uninsured motorist portion of [**1255] his policy that provided for coverage where the insured person is injured in an accident involving "a hit and run vehicle whose operator or owner cannot be identified."

The defendant denied the plaintiff's claim, and the plaintiff subsequently commenced this action in the Superior Court. The defendant moved for summary [***3] judgment on the ground that the plaintiff had failed to prove that the driver of the vehicle that struck him was unidentifiable or uninsured. The trial court granted the defendant's motion, concluding that the plaintiff could not recover because he had affirmatively dismissed the driver without ascertaining his identity. The Appellate Court affirmed the trial court's judgment, concluding that the plaintiff was not struck by a "hit and run vehicle," as required by his insurance policy, because the driver had stopped to render assistance and had been affirmatively dismissed by the plaintiff. *Sylvestre v. United Services Automobile Assn. Casualty Ins. Co., 42 Conn. App. 219, 224, 678 A.2d 1005 (1996).*

We granted certification limited to the following issue: [HN1] "Is a motor vehicle a 'hit and run vehicle whose operator cannot be identified' if, after an accident, the driver stops and is permitted by the injured party to leave the scene?" *Sylvestre v. United Services Automobile Assn. Casualty Ins. Co., 239 Conn. 916, 682 A.2d 1014 (1996).*

After examining the record on appeal and after considering the briefs and arguments of the parties, we conclude that the judgment of the [***4] Appellate Court should be affirmed. The issue on which we granted certification was properly resolved in the Appellate Court's thoughtful and comprehensive unanimous opinion. It would serve no purpose for us to repeat the [*547] discussion contained therein. See *Gajewski v. Pavelo, 236 Conn. 27, 30, 670 A.2d 318 (1996); Sharp v. Wyatt, Inc., 230 Conn. 12, 16, 644 A.2d 871 (1994); Whisper Wind Development Corp. v. Planning & Zoning Commission, 229 Conn. 176, 177, 640 A.2d 100 (1994).*

The judgment of the Appellate Court is affirmed.

LEXSEE 42 CONN. APP. 219

Caution
As of: Jan 11, 2008

ALAN SYLVESTRE v. UNITED SERVICES AUTOMOBILE ASSOCIATION CASUALTY INSURANCE COMPANY

(14874)

APPELLATE COURT OF CONNECTICUT

42 Conn. App. 219; 678 A.2d 1005; 1996 Conn. App. LEXIS 364

April 16, 1996, Argued
July 16, 1996, officially released

PRIOR HISTORY: [***1] Action to recover proceeds allegedly due pursuant to the uninsured motorist provisions of an automobile liability insurance policy issued by the defendant, brought to the Superior Court in the judicial district of Hartford-New Britain at New Britain, where the court, Handy, J., granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff insured sought review of a summary judgment granted by the Superior Court in the Judicial District of Hartford-New Britain at New Britain (Connecticut) in favor of defendant insurer in the insured's action to recover uninsured motorist benefits.

OVERVIEW: The insured, as a pedestrian, was struck by a vehicle as he was crossing the street. Although the driver of the vehicle stopped to make sure that the insured was not seriously injured, the insured sent him on his way without obtaining any identification or a license number. The trial court granted summary judgment to the insurer, finding that the insured had a duty to ascertain the driver's identity and insurance status. On appeal, the court affirmed, although on a different basis. The court determined that uninsured motorist coverage was available to the insured if he was struck by a hit-and-run vehicle. Because that term was not defined in the policy, the court relied on the ordinary meaning given to the term, which defined a hit-and-run vehicle as one involving a driver who leaves the scene without stopping to render assistance. As the driver in the instant action had stopped to assist the insured, the court held that the insured was not struck by a hit-and-run vehicle and, therefore, no coverage for uninsured motorist benefits existed under the policy provisions. The court did not reach the issue of the insured's duty to ascertain the driver's identity and insurance status.

OUTCOME: The court affirmed the summary judgment in favor of the insurer.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN1] Conn. Gen. Prac. Book, R. Super. Ct. § 384 mandates that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A "material fact" is a fact that will make a difference in the result of the case. The party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law, and the party op-

posing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. The test is whether a party would be entitled to a directed verdict on the same facts.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Insurance Law > Claims & Contracts > Policy Interpretation > Appellate Review
Insurance Law > Claims & Contracts > Premiums > General Overview
[HN2] Construction of a contract of insurance presents a question of law for the trial court which the appellate court reviews de novo.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Unambiguous Terms
Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings
[HN3] Under Connecticut law, the terms of an insurance policy are to be construed according to the general rules of contract construction. If the terms of an insurance policy are plain and unambiguous, courts cannot indulge in a forced construction that distorts the meaning of a term so as to accord a meaning other than that evidently intended by the parties. Policy language must be interpreted reasonably; words are to be given their ordinary meaning in order to deduce the intent of the parties.

Civil Procedure > Appeals > Standards of Review > General Overview
[HN4] The appellate court may affirm a trial court's decision even though it is based on other grounds if the same result is required by law.

COUNSEL: Peter M. Appleton, with whom was Peter T. Evans, for the appellant (plaintiff).

Frederick M. O'Brien, for the appellee (defendant).

Jeffrey S. Wildstein, and Joram Hirsch filed a brief for the Connecticut Trial Lawyers Association of amicus curiae.

Lisa M. Faris filed a brief for the Connecticut Defense Lawyer Association as amicus curiae.

JUDGES: Dupont, C.J., and Lavery and Spear, Js. In this opinion the other judges concurred.

OPINION BY: Dupont

OPINION

[**1006] [*220] DUPONT, C. J. The plaintiff, Alan Sylvestre, commenced this action against the defendant, United Services Automobile Association Casualty Insurance Company, seeking uninsured motorist benefits for injuries sustained when he was struck by an automobile while crossing the [***2] street. The trial court granted the defendant's motion for summary judgment from which the plaintiff appeals. We affirm the judgment of the trial court.

The trial court found that "the parties agreed that the vehicle struck the plaintiff, that the driver stopped and waited for several minutes while the plaintiff sat down and walked around, that the plaintiff believed he would not need medical attention, and that the plaintiff ultimately sent the driver on his way." The plaintiff did [*221] not ask for the driver's identification and did not note the license number of the driver's automobile. The plaintiff claims that at the time of his accident, he maintained an automobile liability insurance policy issued by the defendant. The policy's uninsured motorist provisions included coverage for injuries caused by a hit and run vehicle that hit a covered person or vehicle. [1]

1 Part C of the insurance policy issued by the defendant described the policy's uninsured motorist coverage. The policy obligated the defendant to pay damages because of bodily injury arising "out of the ownership, maintenance or use of the uninsured motor vehicle." The policy defined the term "uninsured motor vehicle" as "a land motor vehicle or trailer of any type:

"1. To which no bodily injury liability bond or policy applies at the time of the accident.

"2. For which the sum of the limits of liability under all bodily injury liability bonds or policies applicable at the time of the accident is less than the sum of the limits of liability for Uninsured Motorists Coverage applicable to each vehicle for this coverage under this policy.

"3. Which is *a hit and run vehicle whose operator or owner cannot be identified and which hits:*

"a. you or any family member;

"b. a vehicle which you or any family member are occupying; or

"c. your covered auto.

"4. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:

"a. denies coverage; or

"b. is or becomes insolvent." (Emphasis added.)

[***3] The defendant sought summary judgment claiming that the plaintiff could not sustain his burden of proof that he was injured by an uninsured motorist. The trial court granted the defendant's motion for summary judgment and issued a memorandum of decision in which it determined: "It is difficult for this court to comprehend why an insurance company should have to pay for an insured's injury when that insured chose to dismiss the driver because he was more concerned with getting to class on time. On these facts, it is undisputed that the driver was available to the plaintiff. The driver waited while the plaintiff assessed his injury, but the plaintiff affirmatively dismissed him. Although coverage [*222] is available when the driver truly cannot be identified, the insured cannot choose to make sure that the driver is unidentifiable. [2] As this case shows, without [**1007] eyewitnesses, the only time that information is available is at the time of the accident, and the claimant attested that his leg felt bruised *before* the driver left the scene. Because the plaintiff has not presented any evidence that supports his claim that the driver was unidentifiable or uninsured, the [***4] defendant's motion for summary judgment is granted." (Emphasis in original.)

2 The panties stipulated that the owner or operator of the automobile that struck the plaintiff could not be identified after the operator left the scene of the accident.

We initially note the standard of review of a trial court decision granting a motion for summary judgment. [HN1] Practice Book § 384 mandates that summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A "material fact" is a fact that will make a difference in the result of the case. *Hammer v. Lumberman's Mutual Casualty Co., 214 Conn. 573, 578, 573 A.2d 699 (1990).* "The party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law [***5] . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts." (Citations omitted; internal quotation marks omitted.) *Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 105-106, 639 A.2d 507 (1994).* [*223] [HN2] "Construction of a contract of insurance presents a question of law for the [trial] court which this court reviews de novo." *Aetna Life & Casualty Co. v. Bulaong, 218 Conn. 51, 58, 588 A.2d 138 (1991).*

Under the provisions of the plaintiff's automobile liability insurance policy, the plaintiff may be entitled to uninsured motorist coverage if he was struck by a "hit and run vehicle" whose operator or owner cannot be identified. The parties have concentrated on the issue of whether a claimant seeking uninsured motorist coverage as a result of a hit and run vehicle has a duty to exercise reasonable diligence to ascertain the identity and insurance [***6] status of the operator of such a vehicle. [3] We conclude that the determinative issue in this appeal, as framed by the pleadings, is *not* whether the plaintiff had a duty to ascertain the identity and insurance status of the operator of the automobile that struck him, but rather whether the plaintiff was struck by a hit and run vehicle as set forth in the policy.

3 The trial court framed the issue as "whether an insured has any obligation to ascertain the identity of a tortfeasor before requesting uninsured motorist coverage from his own insurance company."

A review of the plaintiff's automobile liability insurance policy reveals that one of the components of the policy's definition of an uninsured motor vehicle is a hit and run vehicle whose owner or operator cannot be identified. The term hit and run vehicle, however, is not defined in the definitions section or anywhere else in the plaintiff's automobile liability insurance policy.

[HN3] "Under our law, the terms of an insurance policy are to be construed [***7] according to the general rules of contract construction." *Simses v. North American Co. for Life & Health Ins., 175 Conn. 77, 84, 394 A.2d 710 (1978).* If the terms of an insurance policy are plain and unambiguous, courts cannot indulge in a forced construction that distorts the meaning of a term so as [*224] to accord a meaning other than that evidently intended by the parties. *Kershaw v. Lumbermens Mutual Casualty Co., 2 Conn. Cir. Ct. 164, 166, 196 A.2d 817,* cert. denied, *151 Conn. 720, 197 A.2d 937 (1963).* "Policy language must be interpreted reasonably; words are to be given their ordinary meaning in order to deduce the intent of the parties." *Remington v. Aetna Casualty & Surety Co., 35 Conn. App. 581, 585, 646 A.2d 266 (1994).*

We look to dictionary definitions to ascertain the ordinary meaning of a "hit and run vehicle." See *Wrinn v. State, 234 Conn. 401, 406, 661 A.2d 1034 (1995)*. The term has meaning in common parlance. "Hit-and-run," as it refers to the driver of a vehicle, has been defined as "guilty of leaving the [**1008] scene of an accident without stopping to render assistance or to comply with legal requirements." Webster's [***8] Third New International Dictionary. It has also been defined as "designating or involving the driver of a motor vehicle who drives on after striking a pedestrian or another vehicle." American Heritage Dictionary (New College Ed. 1981). Because the driver of the vehicle that struck the plaintiff stopped to render assistance and because the plaintiff affirmatively acted to dismiss the driver from the scene of the accident, we conclude that the plaintiff was not struck by a hit and run vehicle. Accordingly, under the facts here, the policy's provisions for uninsured motorist coverage are inapplicable and we, therefore, do not reach the issue of whether the plaintiff had a duty to ascertain the identity and insurance status of the operator of the automobile that struck him.

We concur with the trial court's decision to grant the defendant's motion for summary judgment, although on a different basis. [HN4] This court may, however, affirm a trial court's decision even though it is based on other grounds if the same result is required by law. *Kelley v. Bonney, 221 Conn. 549, 592, 606 A.2d 693 (1992); Brunswick v. Inland Wetlands Commission, 25 Conn. App. 543, 554,* [*225] [***9] *596 A.2d 463 (1991),* rev'd on other grounds, *222 Conn. 541, 610 A.2d 1260 (1992).*

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORIA ZARDER, and ZACHARY ZARDER, by Robert C. Menard, Guardian ad Litem,

Plaintiffs,

-vs

ACUITY, A Mutual Insurance Company, and HUMANA INSURANCE COMPANY,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR DECLARATORY JUDGMENT

Case No. 07-CV-1146

CASE CODE: 30101

INTRODUCTION

Defendant Acuity denied uninsured motorist (UM) coverage to their insureds, the Plaintiffs. Defendant Acuity moved this Court to declare their denial of UM coverage is appropriate.

This action was commenced by Plaintiffs against their automobile insurer, Defendant Acuity, to recover damages the Plaintiffs sustained as a result of a December 9, 2005 hit-and-run automobile/bicycle accident. Plaintiffs' claims against Defendant Acuity arise from the UM insurance coverage provided by Defendant Acuity's policy, as mandated by Wisconsin law. Plaintiffs further allege that Defendant Acuity's denial of UM coverage is made in bad faith.

Defendant Acuity's recital of facts regarding the December 9, 2005 accident are not disputed by Plaintiffs. However, it should be noted that Plaintiff, Zachary Zarder, did sustain fractures to his right forearm and left leg as a result of this accident. It is Plaintiffs' understanding that Defendant Acuity is not disputing that Plaintiff, Zachary

Zarder, sustained injury. Therefore, the relevant undisputed facts can be summarized as follows:

- On December 9, 2005, Plaintiff, Zachary Zarder, a 13-year old minor at that time, was operating his bicycle in a safe and lawful manner, traveling southbound on S. East Lane in the City of New Berlin, Waukesha County.
- An unidentified motor vehicle, traveling northbound on S. East Lane entered the southbound lane and struck Plaintiff, Zachary Zarder's, bicycle.
- After the unidentified motor vehicle stopped, 3 unidentified occupants exited the vehicle and asked if Plaintiff, Zachary Zarder, was "OK".
- Plaintiff, Zachary Zarder, responded "yes", and the occupants returned to their vehicle and drove away from the scene of the accident.
- No identifying information was ever provided to Plaintiff, Zachary Zarder, and, to this day, the vehicle and occupants have not been identified.
- Not long after the accident occurred, Zachary Zarder discovered he was injured, informed his parents (Plaintiffs, James and Gloria Zarder), and the police were contacted.
- Plaintiff, Zachary Zarder, eventually sought treatment for his injuries, which primarily consisted of a right forearm and left femur fracture.
- Plaintiff, Zachary Zarder's, left femur fracture required two surgical procedures.

Defendant Acuity argues that the facts surrounding this December 9, 2005 accident do not constitute a "hit-and-run" accident. Plaintiffs' oppose Defendant Acuity's motion and request the Court declare that this December 9, 2005 accident was a "hit and run" accident for the purposes of UM insurance coverage.

Plaintiffs acknowledge that declaratory judgment and summary judgment are appropriate methods for a Court to address questions of law involving insurance coverage issues, even those issues that involve bad faith denials of insurance.

ARGUMENT

I. THE DECEMBER 9, 2005 AUTOMOBILE/BICYCLE ACCIDENT WAS A "HIT-AND-RUN" ACCIDENT PURSUANT TO WISCONSIN LAW, SPECIFICALLY WIS. STAT. §632.32(4).

The Wisconsin Supreme Court has stated,

> Pursuant to Wis. Stat. §632.32(4)(a)2.b., hit-and-run accidents are included within the statutorily mandated uninsured motor vehicle coverage. A hit-and-run occurs when three elements are satisfied: (1) there is an unidentified motor vehicle; (2) the unidentified vehicle is involved in a hit; and (3) the unidentified motor vehicle "runs" from the scene of the accident. Smith v. General Casualty Insurance Company, 2000 WI 127 at ¶ 10, 239 Wis.2d 646, 619 N.W.2d 882 (citing Theis v. Midwest Sec. Ins. Co., 2000 WI 15 at ¶ 14-16, 232 Wis.2d 749, 606 N.W.2d 162).

Defendant Acuity does not dispute that the December 9, 2005 automobile/bicycle accident involved an unidentified motor vehicle nor does it dispute that the unidentified vehicle was involved in a hit with Plaintiff, Zachary Zarder's, bicycle. Defendant Acuity's sole argument for denying UM coverage is that the "runs" element has not been met in this accident.

Defendant Acuity cites Hayne v. Progressive Northern Insurance Company, 115 Wis.2d 68, 73-74, 339 N.W.2d 588 (1983) for the premise that a "run" must be a "fleeing from the scene of an accident." See Defendants' Brief, pgs. 11-12.

The Wisconsin Supreme Court's use of the phrase "fleeing from the scene of an accident" as a definition of "run" is dicta.

In Hayne, "The **sole issue** on appeal is whether sec. 632.32(4)(a)2.b., Stats., requires uninsured motorist coverage for an accident involving an insured's vehicle and an unidentified motor vehicle when there was **no physical contact** between the two vehicles." *Id.*, at 69 (Emphasis Added).

The Court in Hayne never analyzed nor decided the issue of "run". Rather the Court reviewed various definitions of "hit-and-run" to determine the definition of "hit". The Court provided no analysis to support its selection of the phrase "fleeing from the scene of the accident" over other quoted definitions of "hit-and-run".[1] The Court could have easily used the phrase "leaving the scene of an accident without providing identifying information", for "run" because the term "run" was irrelevant to the Court's determination of the definition of "hit".

At the present time, the Wisconsin Supreme Court and the Wisconsin Court of Appeals have never specifically addressed the issue of "run" in a "hit-and-run" accident.

For this reason, the Court must analyze Wis. Stat. §632.32(4), which states in relevant part,

> REQUIRED UNINSURED MOTORIST AND MEDICAL PAYMENTS COVERAGES. Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state 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 contain therein or supplemental thereto provisions approved by the commissioner:
>
> (a) *Uninsured motorist.* 1. **For the protection of persons injured 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, in limits of at least $25,000 per person and $50,000 per accident. . . .
>
> 2. In this paragraph, **"uninsured motor vehicle" also includes:**
>
> a. An insured motor vehicle if before or after the accident the liability insurer of the motor vehicle is declared insolvent by a court of competent jurisdiction.

[1] These definitions varied from ". . . guilty of leaving the scene of an accident without stopping to render assistance or to comply with legal requirements . . .", ". . . designating or involving the driver of a motor vehicle who drives on after striking a pedestrian or another vehicle . . .", and ". . . designating, characteristic of, or caused by the driver of a vehicle who illegally continues on his way after hitting a pedestrian or another vehicle . . ." *Id.*, at 73.

b. An **unidentified motor vehicle involved in a hit-and-run accident.** *Id.* (Emphasis added).

Unfortunately, Wis. Stat. §632.32(4)(a)2.b. does not define "hit-and-run" accident. However, §632.32(4)(a)(1) does set forth the purpose of UM insurance coverage. The purpose of the coverage is, "[f]or the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ." *Id.*

The legislature included unidentified motor vehicles involved in a "hit-and-run" accident as uninsured motor vehicles. See, *Id.*

If uninsured motorist coverage was not available to insureds that were injured by unidentified motor vehicles, than insureds would be unable to seek recovery for damages caused by unidentified motorists' negligence that they would otherwise have been legally entitled to recover from a negligent driver. Wis. Stat. §632.32's inclusion of "hit-and-run" was meant to provide increased coverage to insureds injured, not restrict coverage.

However, the Wisconsin Supreme Court has declined uninsured motorist coverage for "miss and run" accidents due to their public policy concern of fraud.

In Smith v. General Casualty Insurance Company, 2000 WI 127 at ¶ 25, 239 Wis.2d 646, 619 N.W.2d 882, the Supreme Court addressed two public policy concerns arising from unidentified motor vehicles involved in "hit-and-run" accidents:

> One public policy concern is of primary relevance to our analysis, that of preventing fraud. The physical contact element unambiguously included in the term "hit-and-run" in Wis. Stat. §632.32(4)(a)2.b. prevents fraudulent claims from being brought by an insured driver who is involved in an accident of his or her own making.

> Under the circumstances of this case, when physical contact has been applied by an unidentified motor vehicle to an intermediate motor vehicle and then transmitted through to the insured's vehicle, and where this physical contact may be confirmed in such a way as to provide safeguards against fraud, this purpose for the physical contact requirement is satisfied. *Id.*, at ¶ 25, citing Theis, 2000 WI 15 at ¶ 30, n. 10.

The Court further addressed the second public policy concern mandating UM insurance coverage in "hit-and-run" accidents as follows:

> An additional policy concern is that the purpose of the statutorily mandated uninsured motorist coverage in Wis. Stat. §632.32(4)(a) "is to compensate an injured person who is the victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured." Here, if the vehicle that negligently started the chain reaction collision had been identified and was insured, Smith could have recovered under that policy. Thus, by interpreting the statute to mandate coverage in the present case, Smith would be compensated "to the same extent as if the uninsured motorist was insured." *Id.*, at ¶ 26.

In this case it is undisputed that the unidentified motor vehicle hit Plaintiff, Zachary Zarder's, bicycle. Therefore, the public policy concern of fraud expressed in Smith is not present. Rather, the public policy concern of mandating UM coverage pursuant to Wis. Stat. §632.32(4)(a) prevails in this case.

Defendant Acuity is requesting this Court to narrowly construe the definition of "run" so that it can deny compensation to Plaintiffs who are the victims of the unidentified motorist's negligence. This position by Defendant Acuity is contrary to the purpose of including unidentified vehicles involved in a "hit-and-run" accident as an uninsured motor vehicle.

There is no question that if Plaintiffs knew the identity of the motorist that hit Plaintiff, Zachary Zarder's, bicycle that they would be legally entitled to recovery of damages they sustained as a result of that motorist's negligence from him and/or his insurer. Furthermore, there is no question that Plaintiffs would be legally entitled to

recover damages from Defendant Acuity if it was found that the unidentified motorist did not have any automobile insurance in effect on December 9, 2005. However, Defendant Acuity attempts to punish Plaintiffs in this case because the negligent driver is unidentified.

Finally, it is difficult to follow the logic of Defendant Acuity's argument regarding a "run", as Defendant Acuity is attempting to create a UM exception that prevents coverage when a Plaintiff is injured by a hit-and-run unidentified motorist who stops before leaving the scene of an accident, but UM coverage will be provided if the unidentified driver made no effort to stop. The problem with this logic is that if this exception is created, at what point is a stop created? What if an unidentified motorist stops and provides false information? What if an unidentified motorist stops but never leaves his vehicle before leaving the scene of the accident?

Pursuant to Wisconsin law, specifically Wis. Stat. §632.32(4), and the strong public policy considerations mandating uninsured motorist coverage to the Plaintiffs in this case, Defendant Acuity should be required to provide UM coverage to the Plaintiffs.

II. THE MAJORITY OF STATES THAT HAVE SPECIFICALLY ANALYZED THE "RUN" ISSUE IN A HIT-AND-RUN ACCIDENT HAVE PROVIDED UNINSURED MOTORIST COVERAGE TO CLAIMANTS IN SITUATIONS SIMILAR TO THE DECEMBER 9, 2005 MOTOR VEHICLE ACCIDENT.

Defendant Acuity urges the Court to follow the holdings in Sylvestre v. United Servs. Auto. Assn. Cas. Ins. Co., 240 Conn. 544, 546, 692 A.2d 1254 (1997) and Lhotka v. Illinois Farmers Insurance Company, 572 N.W.2d 772, 775 (Minn. Ct. App. 1998). In these cases, uninsured motorist coverage was denied to claimants who were injured by an unidentified motorist. The Minnesota and Connecticut courts denied uninsured motorist coverage because the unidentified drivers in those cases stopped to

check on the injured claimants before leaving the scene of the accident. However, Sylvestre and Lhotka are in the minority of jurisdictions that deny UM coverage when the unidentified motorist stops at the scene of an accident before leaving unidentified.

Unidentified Motorists Who Stopped at the Accident Scene

> One group of cases has involved situations in which the "unknown" driver stopped after the collision, but could not be located later either because the claimant had failed to secure sufficient information from the other motorist or because the information provided by the other motorist turned out to be false. Insurance companies have sometimes argued that in instances in which the tortfeasor stops at the scene of the accident, but when for one reason or another not enough information is taken to locate the driver later, no claim can be asserted under the hit-and-run coverage provision. In these cases, insurance companies have urged that the insured could or should have fully ascertained the identity of the driver of the other vehicle at the scene of the accident.
>
> In contrast to the rigid and literal construction sometimes accorded the "physical contact" requirement in "hit-and-run" cases discussed in the preceding sections, courts have almost invariably rejected the insurer's arguments with respect to the failure of a claimant to ascertain the identity of the tortfeasor in these situations. Courts generally have not allowed insurance companies to restrict the coverage to situations when the unknown motorist flees the scene of the accident without stopping to give any opportunity for identification. In most of the cases in which an issue has been raised as to whether the claimant could or should have ascertained the identity of a hit-and-run motorist, the courts have concluded that the insured's failure did not preclude recovery. §9.10, *The requirement of an unascertainable driver or owner*, Uninsured and Underinsured Motorist Coverage, 3rd Edition, Allen I. Widiss and Jeffrey E. Thomas (2005) at pg. 691.

Massachusetts is a jurisdiction that reflects the majority of states that provides UM coverage for claimants injured by an unidentified motorist who stops to check on the injured party in a "hit-and-run" accident.

In Commerce Insurance Company v. Mendonca, 57 Mass.App.Ct. 522, 784 N.E.2d 43 (Mass. App. Ct. 2003), the uninsured motorist claimant, Mendonca, was the passenger in a vehicle that was rear-ended by an unidentified motorist. The

unidentified motorist then asked claimant is she was "OK" and when Mendonca answered she was, the unidentified motorist eventually left the scene of the accident without providing any identifying information. When Mendonca discovered she was injured by this motor vehicle accident, she made a UM claim with her insurance company, Commerce Insurance. Her insurer denied UM coverage and sought a declaratory order denying coverage. Commerce was successful at the trial court level, but lost on appeal. At the appellate level, Commerce relied on Sylvestre and Lhotka, ironically, these are the same cases relied upon by Defendant Acuity in this case, to support their denial of UM coverage.

The Court of Appeals in Mendonca was not persuaded by Commerce's arguments and declared that UM coverage existed for Mendonca because there was a "hit-and-run" accident. In reaching its decision to provide UM coverage for this "hit-and-run" accident, the Court stated as follows: "An injured person who is not aware of his injury until it is too late to take steps to make the necessary identification is in precisely the same situation of deprivation of remedy as he would be if he knew he were hurt but the other driver left the scene without opportunity to identify him." *Id.* at 525.

The Court further stated that,

> Relying on jurisdictions that treat flight from the scene as the "focal element" of the term "hit and run", Commerce argues that where, as here, the driver who caused the collision stopped, Mendonca cannot prove the "presumptatively at fault vehicle" was a "hit and run" auto. [Footnote 4 referencing cases cited by the insurer, Commerce.] This narrow interpretation effectively would leave a gap in mandated coverage by providing protection to a person injured by an identified, but uninsured, operator or by an operator whose post-accident flight prevents identification, while denying protection when the operator does not immediately flee but nevertheless leaves the accident without being identified. Such a coverage gap is contrary to the general purpose of legislatively mandated liability and uninsured motorist insurance, which is

to give some measure of financial protection to persons injured by the negligent driving of others. *Id.*, at 525-526.

A declaratory judgment providing UM coverage for Plaintiffs in this case would not only be appropriate under Wisconsin law, but would also be consistent with the majority of jurisdictions that have directly addressed the "run" element of "hit-and-run" accidents involving unidentified motorists who stop at the scene of the accident before leaving.

III. THE UNIDENTIFIED MOTORIST WAS REQUIRED TO PROVIDE PLAINTIFF, ZACHARY ZARDER, WITH IDENTIFYING INFORMATION PURSUANT TO WIS. STAT. §346.67(1).

At page 17 of Defendant Acuity's Brief, they quote Wis. Stat. §346.67(1) in its entirety. Defendant Acuity further indicates, though, that Wis. Stat. §346.67(1) does not apply to this case because the December 9, 2005 automobile/bicycle accident was outside the scope of Wis. Stat. §346.66.

Wis. Stat. §346.66 states, in part, that ". . . [346.67 to 346.70] do not apply to private parking areas at farms or single-family residences or to accidents involving **only** snowmobiles, all-terrain vehicles or **vehicles propelled by human power** or drawn by animals." *Id.* (Emphasis added).

The December 9, 2005 automobile/bicycle accident did not involve **only** a bicycle. It involved a motor vehicle **and** a bicycle. Therefore, Wis. Stat. §346.67(1) applies to this type of accident.

The unidentified motorist that caused the December 9, 2005 motor vehicle accident was required to provide Plaintiff, Zachary Zarder, with his identifying information. Defendant Acuity further indicates that because the New Berlin Police Department did not investigate the December 9, 2005 motor vehicle accident as "hit-

and-run" accident, that Wis. Stat. §346.67(1) was not violated. This determination by the New Berlin Police Department is completely irrelevant for the purposes of determining whether or not a "hit-and-run" accident occurred for the purposes of determining if uninsured motorist coverage exists.

Arguably, from a criminal prosecution standpoint, the conduct of this unidentified motorist was not as egregious as an unidentified motorist who causes an accident and completely disregards the well-being of the injured party, but a thorough reading of Wis. Stat. §346.67(1) required that the unidentified motorist in this case stay at the accident scene until he provided his identifying information to Plaintiff, Zachary Zarder. The statute does not set forth an exception allowing an unidentified motorist to leave the scene of an accident just because he thought the injured party was "OK" when in fact he was injured.

If the unidentified motorist would have provided identification, Plaintiffs would have been able to seek recovery against the identified driver, rather than be denied UM coverage by Defendant Acuity.

CONCLUSION

Wisconsin law mandates that UM coverage be provided to Plaintiffs in this case for recovery of the damages they sustained as a result of the December 9, 2005 automobile/bicycle accident. Furthermore, UM coverage for this "hit-and-run" accident is consistent with the majority of jurisdictions that have had to determine the specific issue of what constitutes a "run" in a "hit-and-run" accident when the unidentified motorist stops before leaving the scene of the accident. Therefore, Plaintiffs request the

Court to deny Defendant Acuity's motion to seek a declaratory judgment denying Plaintiffs coverage and order that UM coverage is available to Plaintiffs in this case.

Dated this 12TH day of February, 2008.

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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORIA ZARDER, and ZACHARY ZARDER, by Robert C. Menard, Guardian ad Litem,

Plaintiffs,

-vs

ACUITY, A Mutual Insurance Company, and HUMANA INSURANCE COMPANY,

Defendants.

TABLE OF NON-WISCONSIN AUTHORITIES

Case No. 07-CV-1146

CASE CODE: 30101

1. §9.10 - 9.11, "The requirement of an unascertainable driver or owner", Uninsured and Underinsured Motorist Coverage, 3d Edition, Allen I. Widiss and Jeffrey E. Thomas (2005), pg. 690-704.

2. Commerce Insurance Company v. Mendonca, 57 Mass.App.Ct. 522, 784 N.E.2d 43 (Mass. App. Ct. 2003).

Dated this 12TH day of February, 2008.

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a modification in the coverage provisions, claimants will be forced to determine—jurisdiction by jurisdiction and circumstance by circumstance—the enforceability of both (a) the coverage terms and (b) the interpretations of the coverage terms adopted by insurers. At best this is a wasteful process; at worst, it might be viewed as an unconscionable approach by the insurance industry to the public's clearly manifested interest in providing indemnification for innocent victims. Reform of this aspect of the coverage terms is long overdue. The failure of the insurance industry to adjust this aspect of the coverage is as unfortunate as the delay which preceded the modification of the Other Insurance provisions.[1]

The insurance industry generally prefers to avoid the judicial invalidation and the legislative prescription of coverage terms. Continued obstinacy in regard to the "physical contact" provision already has and almost certainly will continue to elicit such determination by courts and legislatures.

A general reconsideration of the appropriateness of the physical contact requirement is clearly warranted. This is not to suggest that the proverbial "flood gates" to claims should be opened. So long as the coverage is keyed to the fault of an unknown motorist, there certainly needs to be some means for assuring that insurance companies are provided adequate evidence to support the alleged negligence of the unidentified driver. The coverage terms should provide that a claimant bears the initial burden of proof, and the insurance company should be assured the right to introduce evidence to refute the claim and to raise fraud or collusion as a defense to any claim.

§ 9.10 The requirement of an unascertainable driver or owner

A second requirement for the hit-and-run coverage is that the identity of the operator or owner of such a highway vehicle is not ascertainable.[1] If the identity of a motorist can be ascertained, compensation for damages caused by the negligence of an identified driver will come either from the driver's liability insurance, or, if the identified driver turns out to be uninsured, as a "regular" uninsured motorist claim. This requirement has produced several distinct types of coverage questions.[2]

[1] *See* Ch. 13.

[1] *See* ISO forms, available from LexisNexis at www.lexis.com/research.

[2] **Illinois.** Muller v. Firemen's Fund Ins. Co., 224 Ill. Dec. 770, 682 N.E.2d 331, 336 (Ill. App. Ct. 1997) (An insured who lost consciousness during a multi-car accident and was unable to identify the vehicle or vehicles which struck her was entitled to recover uninsured motorist insurance benefits under an insurance policy that defined an uninsured motor vehicle as a "hit and run vehicle" whose operator or owner cannot be identified.) ("Here, Muller was allegedly rendered unconscious and was, therefore, unable to specify which of the many vehicles involved in the accident had hit her. While it is true that the plaintiff in Walsh was able to identify the make of the vehicle that hit her, we find this to be a distinction without a difference. We see no reason why an Ins. Co. would accept this fleeting identification as sufficient to allow coverage for a 'hit-and-run' driver and would reject an insured's statement that she was hit by another car but was rendered unconscious and incapable of providing

Unidentified Motorists Who Stopped at the Accident Scene

One group of cases has involved situations in which the "unknown" driver stopped after the collision, but could not be located later either because the claimant had failed to secure sufficient information from the other motorist or because the information provided by the other motorist turned out to be false. Insurance companies have sometimes argued that in instances in which the tortfeasor stops at the scene of the accident, but when for one reason or another not enough information is taken to locate the driver later, no claim can be asserted under the hit-and-run coverage provision. In these cases, insurance companies have urged that the insured could or should have fully ascertained the identity of the driver of the other vehicle at the scene of the accident.

In contrast to the rigid and literal construction sometimes accorded the "physical contact" requirement in "hit-and-run" cases discussed in the preceding sections, courts have almost invariably rejected the insurer's arguments with respect to the failure of a claimant to ascertain the identity of the tortfeasor in these situations. Courts generally have not allowed insurance companies to restrict the coverage to situations when the unknown motorist flees the scene of the accident without stopping to give any opportunity for identification. In most of the cases in which an issue has been raised as to whether the claimant could or should have ascertained the identity of a hit-and-run motorist, the courts have concluded that the insured's failure did not preclude recovery.[3]

any details of the vehicle or vehicles that struck her. . . . For the reasons stated above, we believe that the stipulations of the parties together with the terms of Muller's policy with Firemen's establish that Muller was involved in an accident with a 'hit and run vehicle whose operator or owner cannot be identified,' thus bringing her claim within the uninsured motorist coverage afforded under her policy.").

New Jersey. *Cf.* Kenny v. N.J. Mfrs. Ins. Co., 328 N.J. Super. 403, 746 A.2d 57 (App. Div. 2000) (An insured's failure to comply with a requirement—in the applicable insurance policy—to promptly notify the police of an occurrence involving a hit-and-run driver did not ipso facto disqualify the insured from recovering uninsured motorist insurance benefits and the pertinent questions were (a) whether the attempt to identify the driver was reasonable, (b) whether efforts to do so would have been futile, and (c) whether the failure to promptly file a police report was excusable under the circumstances.).

Oklahoma. Brown v. United Servs. Auto. Ass'n, 684 P.2d 1195, 1199 (Okla. 1984). "The injured victim of a hit-and-run accident should not be required to chase a fleeting hit-and-run driver. The statutes clearly place the burden of identification on the hit-and-run driver. Nothing in our statutes places any duty of investigation on the innocent victim."

[3] **Colorado.** *Cf.* White v. Farmers Ins. Exch., 946 P.2d 598 (Colo. Ct. App. 1997) (Uninsured motorist insurance benefits are available when an insured is prevented from obtaining information concerning the identity of an allegedly uninsured driver following an accident.) (There was a material issue of fact—as to whether the other driver involved in an accident surreptitiously made off with a slip of paper on which the insured had noted information concerning the other driver's identity and address, thereby preventing the insured from identifying the alleged tortfeasor—that precluded summary judgment in a suit to collect uninsured motorist insurance benefits.).

Florida. *See* McKay v. Highlands Ins. Co.,

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287 So. 2d 393, 395 (Fla. Dist. Ct. App. 1973). The claimant (an experienced insurance adjuster) was involved in an automobile collision. Following the accident, in the course of discussing the accident with the other parties involved, the claimant failed to obtain the license number of the other vehicle—a truck—or the name of its driver. The truck driver apparently agreed to meet at the claimant's office to exchange information, but never arrived. The appellate court affirmed the denial of coverage on the ground that the claimant failed to satisfy "the 24 hour notice requirement to the police or appropriate government authority." However, the court also observed that "In addition, we noted from the record that defendant [claimant] had the opportunity to obtain the necessary information at the scene of the accident with regards to the name of the truck driver and the registration number of his truck, but failed to do so."

Georgia. Norman v. Daniels, 142 Ga. App. 456, 236 S.E.2d 171, 124 (1977). The court decided that the insured could proceed to assert a claim under the uninsured motorist coverage where the alleged tortfeasor had disclosed a name and address which apparently was not accurate. They reasoned that where a diligent search fails to locate the tortfeasor, he is in fact an unknown motorist.

See also Brown v. Doe, 125 Ga. App. 22, 186 S.E.2d 293 (1971). The claimant collided with a truck that someone moved from a driveway into the street, where it was parked unlighted in a traffic lane. The appellate court concluded that the trial court should not have granted a summary judgment because there was "a genuine issue of fact as to whether an unknown person moved, and, if so, how . . ." 186 S.E.2d 294.

Cf. McCoy v. S. Bell Tel. & Tel. Co., 172 Ga. App. 26, 322 S.E.2d 76, 77–78 (1984). The trial court should not have granted a summary judgment in favor of State Farm Insurance Co. in regard to the applicability of uninsured motorist insurance coverage. The appellate court held that the trial court erred "by concluding that no genuine issues of material fact existed concerning the identity of the owner of the subject motor vehicle" on the basis of testimony by the claimant and his wife "that a white pick-up truck with colored stripes on its side and the words 'Southern Bell Telephone' and the Southern Bell symbol on its door struck a car directly behind appellant [the claimant], which in turn struck appellant's vehicle." The court noted that "Southern Bell consistently never admitted it owned the subject truck."

Cf. Wentworth v. Fireman's Fund Am. Ins. Cos., 147 Ga. App. 854, 250 S.E.2d 543, 546 (1978). The court quoted an 1880 judicial comment that "to constitute due diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises." In this case, the identity of the negligent tortfeasor was known, but his whereabouts became unknown sometime after the accident.

Illinois. *Cf.* Country Mut. Ins. Co. v. Kuzmickas, 2 Ill. App. 3d 313, 276 N.E.2d 357 (1971).

Louisiana. Powell v. Hendon, 308 So. 851 (La. Ct. App. 1975). The court concluded that even though the operator of a truck stopped, gave a name to both the claimant and a police officer (who also noted the vehicle's inspection number and cited the driver for operating the truck without a license), the claimants thereafter had done everything possible to locate the driver who apparently had provided a fictitious name. The court decided that "a preponderance of evidence" indicated that the identity of neither the operator nor the owner could be ascertained.

Maryland. Jones v. Unsatisfied Claim & Judgment Fund Bd., 261 Md. 62, 273 A.2d 418 (1971). In Jones, the claim was allowed. The driver stopped immediately to render assistance and took the claimant to the hospital before disappearing without identifying himself.

Cf. Rosenberg v. Manager of Unsatisfied Claim & Judgment Fund Bd., 271 A.2d 692 (Md. 1970); Grady v. Unsatisfied Claim & Judgment Fund Bd., 259 Md. 501, 270 A.2d 482 (1970); Hickman v. Unsatisfied Claim & Judgment Fund Bd., 255 Md. 267, 257 A.2d 426 (1969). These cases, which denied recov-

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ery, are distinguishable because the actions were against the Maryland Unsatisfied Claim and Judgment Fund. The statute governing such claims requires that "all reasonable efforts" be made to ascertain the identity of an unknown driver, and the courts concluded that while such a statute should be construed liberally in order to give effect to its beneficial purpose, at the same time it is essential in the court's view to protect the fund from fraud or abuse. Thus, one could not equate "no" effort with "all reasonable" efforts.

Massachusetts. Commerce Ins. Co. v. Mendonca, 784 N.E.2d 43 (Mass. App. Ct. 2003) (Insurer brought a declaratory action against insured, who sought UM benefits under her policy. The insured was riding as a passenger in a third party's automobile when they were struck from behind by the tortfeasor's vehicle at a stop light. The two drivers got out of their vehicles, they decided that there was no significant damage, and the tortfeasor was allowed to drive away without giving any identifying information. The insured did not realize she had been injured in the accident until afterwards. The insured then sought UM benefits under the hit-and-run provision of her policy. The trial court granted summary judgment in favor of the insurer.) (Appellate Court reversed on the basis that the UM statute's hit-and-run provision extended to instances in which the tortfeasor does not immediately flee the scene, but nevertheless leaves the scene without being identified. The court noted that this interpretation is appropriate because an injured person under these circumstances is in the same position as one who knew of an injury immediately after an accident in which the tortfeasor fled the scene without being identified.).

Missouri. *Cf.* Basore v. Allstate Ins. Co., 374 S.W.2d 626 (Mo. Ct. App. 1963).

New Jersey. *See* Scheckel v. State Farm Mut. Auto. Ins. Co., 316 N.J. Super. 326, 720 A.2d 396, 400 (App. Div. 1998) (An insured bicyclist's claim that he acted reasonably in not obtaining the identity of a driver and in filing a late police report was relevant to the claim for uninsured motorist insurance benefits.) ("... the judge erred in rejecting as irrelevant plaintiff's claim that he acted reasonably, and in impliedly concluding that a rational fact-finder could not draw conflicting inferences from the facts presented. In Norman, we determined that the question of whether plaintiff's efforts to identify a phantom vehicle were reasonable should ordinarily be left to the fact-finder to resolve, especially where such efforts might prove futile. 249 N.J.Super. at 111, 113, 592 A.2d 24.").

See Selimo v. Hartshorn, 99 N.J. Super. 146, 238 A.2d 718 (Law Div. 1968).

Tinsman v. Parsekian, 65 N.J. Super. 217, 167 A.2d 407 (App. Div. 1961).

New York. Darby v. Motor Vehicle Accident Indemnification Corp., 52 Misc. 2d 1045, 277 N.Y.S.2d 302, 304 (1967), *aff'd*, 30 A.D.2d 936, 293 N.Y.S.2d 988 (1968). A nine-year-old boy was struck by a driver who stopped and then drove the boy and his mother to the hospital. He also supplied the mother with information about his identity that subsequently proved to be false. In discussing this case in an opinion which allows the recovery from MVAIC, the court made the following points:

"While in the statute . . . and in the insuring agreement of a Standard New York Automobile Accident Indemnification Endorsement the term 'hit and run' is used, I feel it is a misnomer. At least, the word 'run' is a misnomer because no running of any kind is contemplated either by statute or by the endorsement. Both require as a prerequisite to liability: (1) that there be physical contact of the automobile involved either with the injured person or with another automobile and (2) that the identity of the driver or the owner be unascertainable. In the case before me both conditions have been met. The automobile involved struck the injured boy and the identity of the driver and the owner is unascertainable. . . . In this case we have a helpless nine-year-old boy who must depend upon others to ascertain the identity of the driver or owner of the automobile which struck him. The boy very logically depended upon his mother. Perhaps a more sophisticated mother

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license and have insisted that a policeman be present either at the scene of the accident, at her home or at the hospital, but I do not feel that this injured boy should be held responsible for the failures of his mother. I feel very strongly that one of the purposes of the Accident Indemnification Law is to protect persons in the infant-plaintiff's situation. . . . I find after trial that the situation herein involves a 'hit and run' occurrence and that the actual identity of the driver or owner of the automobile is lacking and I further find that timely notice of the accident was given to the proper authorities, all within the terms and conditions of the Standard New York Automobile Accident Indemnification Endorsement."

Motor Vehicle Accident Indemnification Corp. v. Gianni, 53 Misc. 2d 1064, 280 N.Y.S.2d 808 (1965), *aff'd*, 28 A.D.2d 826, 282 N.Y.S.2d 717 (1967). The court concluded that "the claimant was not reasonably required to anticipate that she was being deliberately victimized" by the truck driver, who gave false information. The court stated that the claimant need not have required the operator to display his license or examine his license plates, and, therefore, since the owner's identity could not be obtained, the truck driver was a hit-and-run motorist within the meaning of the policy.

Shaw v. Motor Vehicle Accident Indemnification Corp., 24 Misc. 2d 466, 199 N.Y.S.2d 689 (1960). The plaintiff had been given the former address of the tortfeasor and was unable to determine a current address. The court stated that the plaintiff was required to offer proof that the identity of the motor vehicle and of the operator and owner thereof could not be ascertained, but then concluded that the plaintiff had made a reasonable effort to identify the offending motorist.

See also McKay v. Motor Vehicle Accident Indemnification Corp., 56 Misc. 2d 777, 290 N.Y.S.2d 234 (1968); Riemenschneider v. Motor Vehicle Accident Indemnification Corp., 20 N.Y.2d 547, 232 N.E.2d 630, 285 N.Y.S.2d 593 (1967); Casanova v. Motor Vehicle Accident Indemnification Corp., 36 Misc. 2d 489, 232 N.Y.S.2d 713 (1962).

But cf. Urkowitz v. Motor Vehicle Accident Indemnification Corp., 21 Misc. 2d 586, 194 N.Y.S.2d 241 (1959). A hearsay statement that a vehicle was stolen and operated without the owner's consent was insufficient to warrant finding that the automobile had been stolen.

But cf. Cudahy v. Motor Vehicle Accident Indemnification Corp., 36 A.D.2d 717, 319 N.Y.S.2d 560 (1971). The court concluded that in the absence of establishing that the owner and operator were unknown (or that the vehicle was operated without consent), the claimant was not entitled to sue MVAIC directly.

Ohio. *Cf.* Citizens Ins. Co. of N.J. v. Burkes, 56 Ohio App. 2d 88, 10 Ohio Op. 3d 119, 381 N.E.2d 963 (1978).

Oregon. *See* Turlay v. Farmers Ins. Exch., 259 Or. 612, 488 P.2d 406 (1971). The Oregon Supreme Court upheld the trial court's determination that the claimant could recover when he did not know and had no means of learning the identity of a hit-and-run driver that allegedly struck another vehicle, which rear-ended the claimant's vehicle.

Pennsylvania. *See* Hartford Ins. Co. v. Blackburn, 702 F. Supp. 1199, 1201 (E.D. Pa. 1989) (When an accident occurred in Pennsylvania, the insured was a resident of Pennsylvania, and the insurer did business in Pennsylvania, Pennsylvania law governed the resolution of the insurer's action for a declaratory judgment that the insured had not been involved in an accident with an uninsured motorist.) ("Under the insurance policy issued by Hartford, Blackburn qualifies as a covered person struck by a 'hit and run vehicle whose owner or operator cannot be identified.' The other driver 'almost instantaneously drove away and left no information' that would enable Blackburn to locate her or to ascertain whether she had motor vehicle insurance. I therefore find that Blackburn was involved in an accident with an uninsured motorist.").

Binczewski v. Centennial Ins. Co., 511 A.2d 845, 847 (Pa. Super. Ct. 1986). The driver of the other vehicle stopped to inquire whether the claimant was hurt. However, the driver left before the arrival of a police officer and no exchange of insurance information or names occurred. The Superior Court affirmed the lower court conclusion "that nothing in the

However, there are instances when courts have concluded that there was no hit-and-run accident when the driver stopped.[4]

insurance policy imposes a duty upon . . . [an insured] to actively question the driver of the vehicle which struck her 'when the driver almost instantaneously drove away and left no information.'"

South Carolina. Hart v. Doe, 261 S.C. 116, 198 S.E.2d 526, 528–529 (1973). The court concluded that a claimant was negligent when she was "in full possession of her mental faculties" and "she made no effort to ascertain the identity of the [driver who stopped and remained at the scene until after the ambulance departed for the hospital with the claimant] . . . or to ask any of her family or acquaintances upon the scene to ascertain any information about him or the vehicle he was driving." The court observed that "her only excuse . . . is that she was in pain," but that the record showed "that her pain did not interfere with her being in possession of her faculties sufficiently to give directions about everything else which she thought needed to be done."

Texas. *See* Doyle v. United Servs. Auto. Ass'n, 482 S.W.2d 849 (Tex. 1972).

Virginia. Mangus v. Doe, 203 Va. 518, 125 S.E.2d 166, 168 (1962). At the time of the accident, the insured, who was suffering from an arthritic condition, was not aware that he sustained any physical injury and there was no property damage to the vehicles. Several months later, the claimant's physician discovered a ruptured disc. The Virginia Supreme Court concluded that in such a situation, the court would not read into the coverage a requirement of the "exercise [of] due care or diligence to ascertain the identity of an unknown motorist causing him bodily injury" and, therefore, in this situation "there was no necessity for him to obtain the name and address of the operator, whom he did not know, or the license number. . . ."

[4] **Minnesota.** *Cf.* Soeung v. Am. Family Ins. Group, 1999 Minn. App. LEXIS 464 (affirming the District Court decision "that the uninsured motorist provision of their policy did not apply because the car that hit them did not qualify as a hit-and-run vehicle.") ("The Soeungs' attorney would have us incorporate the criminal statutes into the policy and place the burden on the other driver to come forward with information, such as his name and address, or be classified as a 'hit-and-run' driver for uninsured motorist coverage purposes. But the policy at issue in this civil cause of action places a contractual duty on the insured to make a reasonable attempt to find out such information. Appellants had an hour in which to reasonably attempt to obtain information about the driver, such as his name and address, and they did not ask any questions other than to request proof of a driver's license and insurance information. The other driver stated that he could not produce these items, but there is no indication on the record that he would not have answered other questions if asked.").

Lhotka v. Ill. Farmers Ins. Co., 572 N.W.2d 772, 773 (Minn. Ct. App. 1998) (Syllabus by the Court: "A driver who strikes a pedestrian does not commit a hit-and-run when the driver stops; inquires about the pedestrian's condition; is not requested by the pedestrian to exchange names, addresses, and insurance information; and does not leave until assured by the pedestrian that the pedestrian has no apparent injuries.") ("The unidentified driver stopped after striking Lhotka, got out of her vehicle, and questioned Lhotka about her condition. Lhotka told the driver that her elbow and head hurt, 'but I think I'm okay.' The driver made no attempt to leave until after Lhotka assured her she was okay. There is no evidence that anyone attempted to detain the driver when she did leave.").

Washington. *Cf.* State Farm Mut. Auto. Ins. Co. v. Seaman, 980 P.2d 288 (Wash. Ct. App. 1999) (underinsured motorist insurance) (An unknown driver—who promptly exited his vehicle after colliding with an insured driver, undertook an investigation, and was assured by the insured driver that no injury or damage had occurred—was not a "hit-and-run" driver under the criminal hit-and-run statute or under the definition of an "underinsured motor vehicle" in the insured driver's automobile insurance policy and, therefore, the insured driver was not entitled to underinsured motorist insurance benefits.).

Several New York courts were among the first tribunals to consider whether a claim is permitted when the unknown motorist stopped at the scene of the accident, but either (1) no one ascertained the individual's identity or (2) the information about the person was not sufficient to thereafter allow the individual to be contacted. For example, one court allowed recovery under the "hit-and-run" coverage where the tortfeasor not only stopped, but went with the claimant to describe the incident to a policeman, and finally accompanied the claimant to the hospital, before disappearing without leaving his name.[5]

Similar views have been applied by courts in other states. An excellent illustration of this is an Illinois decision ruling the "hit-and-run" coverage applied in a case where the claimant did not get out of her automobile after an accident to attempt to determine the identity of the other driver (who had stopped) because his erratic and provocative behavior made her fear for her safety.[6] In a somewhat broader decision, the Virginia Supreme Court concluded that due diligence in ascertaining the identity of the other motorist is not a requirement of the Virginia statute which only decrees that the offending driver must be "unknown."[7] The court reasoned that to impose a standard of due diligence with respect to ascertaining the identity of the operator or owner of the tortfeasor's vehicle would be to read into the statute something that the legislature may not have intended. Speaking to the question of possible fraud, the court observed:[8]

> We recognize that this interpretation could open the door to the filing of fraudulent claims, but persons who have valid causes of action should not be denied the right to recover because of the possibility of the presentation of fraudulent claims by others. If fraudulent actions do arise they may be ferreted out in the same manner in which courts and juries handle such situations in other cases.

The import of these and other decisions is summarized by the comments in two separate New York opinions in a case in which the claimant (a passenger) did not realize at the time of the accident that she had sustained any physical injuries. The drivers, having concluded that there was no damage to either of the vehicles, did not exchange identification. The trial court ruled:[9]

> Although the offending vehicle in the ordinary sense of the expression cannot be said to be a "hit-and-run" automobile, it was a vehicle "whose

[5] New York. Casanova v. Motor Vehicle Accident Indemnification Corp., 36 Misc. 2d 489, 232 N.Y.S.2d 713 (1962).

McKay v. Motor Vehicle Accident Indemnification Corp., 56 Misc. 2d 777, 290 N.Y.S.2d 234 (1968).

[6] Illinois. Walsh v. State Farm Mut. Auto. Ins. Co., 91 Ill. App. 2d 156, 234 N.E.2d 394 (1968).

[7] Virginia. Mangus v. Doe, 203 Va. 518, 125 S.E.2d 166 (1962).

[8] Virginia. Mangus v. Doe, 203 Va. 518, 520, 125 S.E.2d 166 (1962).

[9] New York. Riemenschneider v. Motor Vehicle Accident Indemnification Corp., 47 Misc. 2d 549, 262 N.Y.S.2d 950, 952 (1965), *aff'd*, 26 A.D.2d 309, 274 N.Y.S.2d 71 (1966), 20 N.Y.2d 547, 285 N.Y.S.2d 593, 232 N.E.2d 638 (1967).

owner or operator cannot be identified." [T]he operator of the other vehicle . . . remained at the scene of the occurrence, apparently ready to respond to any questions. . . . Whether because of ignorance or negligence, the petitioner did not bestir himself, in an attempt to secure the identification when it was available. * * * However, neither the statute nor the policy preclude an unusual situation, such as that presented here, from falling within the beneficial intendment of the statute. For the sole criterion is whether the identity of either the operator or the owner of the other vehicle cannot be ascertained.

When this decision was appealed, the court added:[10]

Whatever the connotations of precipitate flight because of guilt and fear the term "hit-and-run" may bear in colloquial usage, they have notably been permitted no expression in the insurance policy definition or in cognate MVAIC legislation . . . . The cause of the inability [to identify] may most frequently be reprehensible flight, but that is not made a sine qua non. To make it one would in our opinion constrict gratuitously the remedial purpose underlying the MVAIC endorsement.

Unidentified Driver of a Vehicle in a Single Car Accident in Which the Claimant Was a Passenger[11]

Viewed as a group, the decisions in these cases clearly represent a rejection of the argument that a claimant is always obligated to ascertain the identity of another motorist involved in an accident. Courts have used a wide variety

[10] New York. Riemenschneider v. Motor Vehicle Accident Indemnification Corp., 20 N.Y.2d 547, 552, 285 N.Y.S.2d 593 (1967) (Scileppi, Van Voorhis, and Burke, J.J., dissenting). The majority opinion in the Court of Appeals decision noted: "The requirement of law that all operators report accidents resulting in injury minimizes the possibility of abuse of the facility by falsely stating identity is unknown."

See also Hanavan v. Motor Vehicle Accident Indemnification Corp., 60 Misc. 2d 407, 303 N.Y.S.2d 117, 120–121 (1969).

[11] New Jersey. *See* Samuel v. Doe, 158 N.J. 134, 727 A.2d 1016, 1017 (1999) (". . . twenty-one-year-old plaintiff Margaret Samuel was returning to the home of her aunt and uncle on Long Beach Island from her college in West Virginia, she stopped at the Ketch, a tavern on the south end of Long Beach Island. She there met old friends and made new acquaintances. Samuel appears to have overindulged and in the enjoyment of the homecoming to have made an ill-advised choice of a designated driver. All that is known for certain thereafter is that she was involved in a serious one-car automobile accident. When police arrived at the scene of the accident, they found that her car had run into a telephone pole. There was no one in the driver's seat. Samuel was in the back seat with her seatbelt fastened. She was bleeding and appeared dazed. Her injuries were serious and disabling. Because of her condition, Samuel could not later recall the name of her companion who was driving the car, even after hypnosis.") (The inability of a passenger to identify an alleged driver did not preclude an action to recover under an automobile liability insurance for injuries from a single-vehicle accident; rather, the passenger was required to engage in a two-phase proceeding, initially establishing the existence of permissive user and then negotiating with or directly suing the insurer if she could establish the existence of the driver.).

of grounds to justify a claimant's failure to exchange identification. In addition, these cases also represent an important extension of coverage to a group of accident claims that in some sense do not conform exactly to the coverage definitions of either an uninsured motorist or "hit-and-run" motorist. When a driver stops to converse or render assistance, it is not the type of collision that is normally viewed as a "hit-and-run" accident. However, the inability to locate the driver following the accident not only means that it is impossible to know whether the driver was uninsured, but also that there is no possibility of indemnification from liability insurance. This situation involves a hybrid claim in which the critical factor is that the other motorist's identity is unknown, and since it is impossible to ascertain whether the tortfeasor was insured or uninsured, the courts approve claims for indemnification under the uninsured motorist coverage. Although courts often permit a uninsured motorist claim when the identity of the driver is not ascertainable, some courts are starting to develop rules that are intended to reduce the probability of fraud. For example, although New York recognizes uninsured motorist claims for unidentified drivers, a claimant has the obligation of at least identifying the vehicles involved in the accident before he or she can recover uninsured motorist benefits.[12]

§ 9.11 The unascertainable identity requirement and the ascertained operator or owner: Is there coverage?

Uninsured motorist insurance usually provides coverage for "hit-and-run" accidents only when neither the operator nor the owner can be identified.[1]

[12] New York. *See, e.g.*, Jenkins v. Empire/Allcity Ins. Co., 289 A.D.2d 331 (2001) (Petitioner was involved in an 18-car accident, and held UM coverage with the appellant. The policy provided for UM coverage where neither the owner nor the driver could be identified, therefore the petitioner was required to show that the vehicles that struck her was either uninsured or could not be identified. The police report of the accident identified all vehicles that were involved. The claim went to arbitration and the arbitrator denied it because the petitioner did not identify the vehicles that struck her. The trial court vacated the arbitrator's decision.) (The appellate court reversed on the basis that the petitioner was required to identify the vehicles that had struck her. Under the circumstances, all vehicles involved in the accident had been fully recorded, and the petitioner had already brought suit against at least two of the vehicles, showing that identification was possible.).

[1] Georgia. Wentworth v. Fireman's Fund Am. Ins. Cos., 147 Ga. App. 854, 250 S.E.2d 543, 544-546 (1978); Nomian v. Daniels, 142 Ga.App. 456, 236 S.E.2d 121 (1977). If a claim is pending against a motorist who cannot be located, the tortfeasor is treated as an uninsured motorist since " 'whereabouts unknown' is now equal to 'identity unknown' and 'identity unknown' is equal to 'uninsured motorist' . . .". In Wentworth, the court held that "Due diligence 'is a question of fact which addresses itself in the first instance to the discretion of the trial court'," but that the trial court had abused its discretion because the evidence in the record made a "compelling showing that the applicant had used due diligence. . . ."

New Jersey. N.J. Stat. Ann. § 17:28-1.1. Coverage applies when the identity of the operator and the owner cannot be ascertained or "it is established that the motor vehicle was at the time said accident occurred in the possession of some person other than the owner

Insurance companies have rejected claims in a variety of circumstances when the owner of a hit-and-run vehicle has either been identified or arguably could be identified. In some instances, the result produced by adhering to a strict application of the requirement that both the operator and the owner remain unidentified seems questionable; while in other cases, the insurance company position seems reasonable.

A. The Ascertained Owner and the Operator Who Lacks Permission

In several cases, insurance companies have denied claims when the owner of a "hit-and-run" vehicle was determined—through the vehicle's license number, characteristic features, or markings—even though the owner proved that the vehicle was operated without permission at the time of the accident. For example, in a Louisiana case the person who caused the accident stopped his car, but then disappeared from the scene before he could be identified.[2] The owner of the vehicle was ascertained from the registration certificate in the glove compartment of the automobile that had been left at the accident site by the unknown driver. Subsequently, the owner of the vehicle proved that he had not been driving the automobile at the time of the accident and that he had not given anyone permission to drive the automobile, which exculpated him from liability. There was evidence that the car had been taken by the owner's brother without permission, and, accordingly, was not covered by the owner's insurance.[3] Consequently, the only available insurance was the uninsured motorist coverage. The court stated it felt "constrained" by the definition of a "hit-and-run" vehicle to decide that the uninsured motorist coverage was inapplicable because the owner was identified.[4] Obviously, this type of situation

without the owner's consent and that the identity of such person cannot be ascertained."

See also Liberty Mut. Ins. Co. v. Massey, 188 N.J. Super. 631, 458 A.2d 152 (1983).

New York. Bellavia v. Motor Vehicle Accident Indemnification Corp., 28 Misc. 2d 420, 211 N.Y.S.2d 356 (1961). The court held that the "unascertainable" requirement only applies to the driver of the vehicle. Therefore, if this precedent is followed, even if the owner is subsequently determined, the accident will still be classified as a hit-and-run for purposes of the uninsured motorist coverage.

But cf. Travelers Indem. Co. v. Velez, 124 Misc. 2d 226, 476 N.Y.S.2d 48, 49 (1984). The claimant alleged that he "was pulled from his parked car by . . . unknown ruffians" and the assailants drove the car away with the claimant "hanging on to it . . . and when he could no longer hold on, the car went over his left foot and ankle." The court concluded that the owner is ascertainable because the owner is the claimant, and that "it is irrelevant that the identity of the operator of Mr. Velez's vehicle is not known" so that "his only recourse is to sue the Motor Vehicle Accident Indemnification Corporation (MVAIC) for benefits."

But cf. Gonzales v. Motor Vehicle Accident Indemnification Corp., 48 Misc. 2d 958, 266 N.Y.S.2d 640 (1966).

See also N.Y. Ins. Law § 617.

Texas. *Cf.* Doyle v. United Servs. Auto. Ass'n, 482 S.W.2d 849 (Tex. 1972).

See generally ISO forms, available from LexisNexis at www.lexis.com/research.

[2] **Louisiana.** Frazier v. Jackson, 231 So. 2d 629 (La. Ct. App. 1970).

[3] **Louisiana.** Frazier v. Jackson, 231 So. 2d 629, 632 (La. Ct. App. 1970).

[4] **Colorado.** *See* Claire v. State Farm Mut. Auto. Ins. Co., 973 P.2d 686, 688–689 (Colo.

(Text continued on page 701)

Ct. App. 1998) (". . . it is undisputed that Mahna's identity, physical description, social security number, driver's license number, and past addresses are known. Additionally, the names, addresses, and telephone numbers of several of Mahna's relatives are known. USAA has not denied liability coverage. Plaintiff's difficulty in effecting service of process on Mahna is no equivalent to not knowing his identity. Therefore, Mahna is not uninsured.").

Georgia. Fid. & Cas. Co. of N.Y. v. Wilson, 124 Ga. App. 444, 184 S.E.2d 21 (1971). Coverage was denied although the claimant had sued the alleged tortfeasor, but had not been able to locate or serve the defendant. The claimant's attorney stated that he had been unable to trace the defendant through either the driver's license or vehicle license numbers that were recorded at the time of the accident. In this situation, it would seem that the court might have found that the motorist was not identified or known from such information.

See also Quattlebaum v. Allstate Ins. Co., 119 Ga. App. 791, 168 S.E.2d 596, 597 (1969). The court stated that "a motorist whose identity is known does not income an 'unknown' motorist . . . merely because his whereabouts is unknown."

Cf. Brown v. Doe, 125 Ga. App. 22, 186 S.E.2d 293 (1971). This case involved an accident with a truck that had been left by an unknown person in a traffic lane in an unlighted portion of a street. The court concluded that there was a genuine issue of fact as to whether an unknown person had moved the vehicle. The court observed that although there was a time lapse between the negligent operation and the collision, recovery should not be precluded since if the unknown person had been sitting in the truck at the time of the accident there would be little question that the person operated it in a negligent manner. The court then reasoned that the abandonment aggravated—rather than mitigated—the negligence. It should be noted, however, that while the case involved the negligence of an unknown driver, thereby creating the possibility of a claim under the uninsured motorist coverage, the suit was brought as a condition precedent to the uninsured claim as required by Georgia law; and, therefore, the court did not consider whether the fact that the owner of the truck was known would preclude coverage under the endorsement terms.

Illinois. *Cf.* Bankers Multiple Line Ins. v. McGuire, 593 N.E.2d 617 (Ill. App. Ct. 1992). (underinsured motorist insurance) (A vehicle which struck the insured's vehicle and continued without stopping did not fall within the definition of a "hit and run vehicle" in the insured's underinsured motorist coverage provisions of the policy.) ("Bracey's car clearly does not fall under this definition since it was ascertained that Bracey was the owner of the vehicle. In light of the policy's definition and the facts present here, defendants' contentions regarding the hit and run coverage are meritless.").

Louisiana. Frazier v. Jackson, 231 So. 2d 629, 633 (La. Ct. App. 1970).

See also Jones v. Bickham, 633 So. 2d 778, 781 (La. Ct. App. 1994) (uninsured/underinsured motorist insurance) (The insured motorist knew the name of the truck driver who rear-ended the motorist and, therefore, the accident was not a "hit-and-run" and the truck was not an uninsured vehicle within the meaning of the coverage provision, even though the truck driver gave a false address to the insured and did not give his license number which might have subjected him to criminal liability for "hit-and-run" driving.) ("We agree with our brothers in the Second, Third and Fourth Circuits that the name of the offending owner or driver is the key element in a hit and run situation. Furthermore, in the present case, the driver is not unknown as required by the policy definition cited hereinabove.").

Cf. Winfield v. Porter, 618 So. 2d 890, 893 (La. Ct. App. 1993) ("We conclude that Budget proved by a preponderance of the evidence the identity of the truck and that the truck was insured. When considering the purpose of uninsured motorist and hit-and-run provisions, it is apparent that these provisions would not apply where, although identity of the driver of the other vehicle was not known, the owner of that vehicle is known.").

is not unique. Similar cases can arise—as when a driver acts outside the scope of his employment or a person loans a car to an uninsured friend in violation of the owner's express instructions.

A denial of coverage for claims such as the one in the Louisiana case not only defeats what a reasonable person would understand to be the scope of protection afforded by this type of insurance, but also frustrates the legislative intent in requiring the coverage. For the courts to allow insurers to invoke the coverage provisions as a justification for the rejection of such a claim is to blatantly defeat the raison d'etre of the coverage. It amounts to a disregard of both the public policy represented by the uninsured motorist legislation and of the requirement of justice.[5] Courts should remember that the coverage terms have been unilaterally promulgated by the insurance industry.[6] For companies to continue to use a provision which is subject to such abuse is to confirm the validity of criticism which has so often been directed at the industry in recent years.

In a New York case involving an analogous factual situation, the court allowed the claimants to pursue their actions against the New York Motor Vehicle Accident Indemnification Corporation (MVAIC).[7] The New York case is distinguishable from the Louisiana case in that the identification of the owners was not completely certain.[8] The question before the New York court was whether the claimant was required to proceed against the owner of the suspected vehicle before bringing an action to recover under MVAIC's coverage for hit-and-run accidents or whether the owner would be permitted to join MVAIC as a party defendant. Justice Wegman decided that MVAIC should be joined, thereby reaching a result that is contrary to several earlier New York decisions cited in his opinion.[9] What is particularly relevant to the discussion here is the tone of the opinion with respect to accidents involving unknown

[5] **New York.** *See* Allstate Ins. Co. v. McCouey, 42 A.D.2d 730, 346 N.Y.S.2d 115 (1973).

[6] *See* Ch. 2.

New York. *But see* Allstate Ins. Co. v. McCouey, 42 A.D.2d 730, 346 N.Y.S.2d 115 (1973).

[7] **New York.** DeLorenzo v. Motor Vehicle Accident Indemnification Corp., 59 Misc. 2d 691, 299 N.Y.S.2d 978 (1969).

See also Smith v. Motor Vehicle Accident Indemnification Corp., 33 A.D.2d 786, 307 N.Y.S.2d 124 (1969).

[8] The New York cases are also distinguishable because in the event no coverage is provided by the uninsured motorist insurance, a claim for indemnification can be made to the Motor Vehicle Accident Indemnification Corporation (MVAIC). For example, in Travelers Indem. Co. v. Velez, 124 Misc. 2d 226, 476 N.Y.S.2d 48, 49 (1984). The court concluded that where the owner was ascertainable because the owner is the claimant who alleged he was run over by assailants who stole his car, "it is irrelevant that the identity of the operator of Mr. Velez's vehicle is not known" and "his only recourse is to sue the Motor Vehicle Accident Indemnification Corporation (MVAIC) for benefits."

[9] **New York.** Milstein v. Clark, 57 Misc. 2d 842, 293 N.Y.S.2d 554 (1968).

drivers when the vehicle's owner has subsequently been ascertained. In one portion of the opinion Justice Wegman commented that:[10]

> I cannot perceive how, in the light of the statutory declaration of purpose, it may fairly be said that the act was intended for the benefit of MVAIC rather than for the benefit of the innocent victim of a hit-and-run driver, but, surely, unless MVAIC may be joined so that all questions of liability can be adjudicated in a single action, the inevitable result of so interpreting the act is to benefit MVAIC and unduly burden the innocent victim of a hit-and-run driver.

The same reasoning could be applied with equal justice in other states. As the Motor Vehicle Accident Indemnification Fund is "intended for the benefit . . . of the innocent victim of a hit-and-run driver," so too is the statutory requirement in other states for the provision of uninsured motorist coverage to hit-and-run victims. While there is a significant difference between the procedural question which confronted the New York court and the coverage issue presented to the Louisiana court,[11] the hardship resulting from the Louisiana decision is far more persuasive consideration. The result of accepting this definition for "hit-and-run" coverage is to place an undue burden on the innocent victim. Such a burden should be held to be violative of the uninsured motorist insurance statutes and, therefore, should be held unenforceable, as other provisions of the endorsement have been. Finally, to accept the often-made argument that coverage for "hit-and-run" accidents is supplied voluntarily by the insurer and, therefore, that the insurer should be free to develop any terms it desires for this portion of the coverage, is to ignore the fact that such accidents are now clearly recognized as one type of uninsured motorist risk.

B. The Ascertainable Owner and the "Indolent" Claimant

In some cases there is considerable justification for an insurer's denial of an insurance benefits claim for injuries that allegedly resulted from injuries sustained in a "hit-and-run" accident when the identity of the owner of the offending vehicle either (a) has been ascertained or (b) is ascertainable. For example, when an Ins. Co. introduced evidence showing that a motorist had entered a guilty plea to the charge of injuring the claimant and unlawfully failing to stop at the accident scene, a majority of the Georgia Court of Appeals concluded that the insurance company was entitled to a summary judgment when the claimant offered no probative evidence to rebut the insurer's

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[10] New York. DeLorenzo v. Motor Vehicle Accident Indemnification Corp., 59 Misc. 2d 691, 299 N.Y.S.2d 978 (1969).

See also Brown v. Motor Vehicle Accident Indemnification Corp., 35 A.D.2d 339, 316 N.Y.S.2d 173 (1970). The court concluded that in light of the improbability that the claimants would recover a judgment from the owner of the vehicle identified as the one that struck the claimants, the trial court could properly order the joinder of the Motor Vehicle Accident Indemnification Corporation (MVAIC).

[11] *See* § 9.10.

identification of the "hit-and-run" motorist.[12] Similarly, where a claimant remembered that the truck that was involved in the collision bore the name "Mushroom Transportation Co. of Philadelphia" and such a corporation did operate vehicles in the state, a Pennsylvania Court decided the arbitrator was justified in concluding that the owner had been identified.[13] Both of these cases affirm, at least implicitly, the requirement that the owner and operator must be unknown is a continuing one which must still exist at the time when a claim is settled or litigated, rather than being fixed as of the moment of the accident or any other time thereafter before the final resolution of the claim between the company and the insured. Considering these cases and other decisions interpreting this coverage provision, a tenable case can be made for the proposition that in order for coverage to apply as a result of a "hit-and-run" accident the identity of the operator and owner of such a vehicle must not only remain unknown,[14] but it also must not be possible with a reasonable effort—based on the facts available to the claimant—to discover the identity of the operator or owner of the vehicle.[15]

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[12] **Georgia.** State Farm Mut. Auto. Ins. Co. v. Godfrey, 120 Ga. App. 560, 171 S.E.2d 735 (1969) (Dissent). In separate dissents, two of the justices argued persuasively that the evidence offered by the insurer wasn't sufficient to support a finding that the unknown motorist had been identified.

But see Fid. & Cas. Co. of N.Y. v. Wilson, 124 Ga. App. 444, 184 S.E.2d 21 (1971). The claimant's attorney was unable to trace the alleged tortfeasor by use of information taken after the accident.

[13] **New York.** Franklin v. Motor Vehicle Accident Indemnification Corp., 53 A.D.2d 614, 384 N.Y.S.2d 20 (1976).

Cf. Smith v. Motor Vehicle Accident Indemnification Corp., 33 A.D.2d 786, 307 N.Y.S.2d 124 (1969).

Pennsylvania. Smith v. Employer's Liab. Assurance Corp., 217 Pa. Super. 31, 268 A.2d 200 (1970).

[14] **New York.** Franklin v. Motor Vehicle Accident Indemnification Corp., 53 A.D.2d 614, 384 N.Y.S.2d 20 (1976).

[15] **Iowa.** Christiansen v. Am. Family Mut. Ins. Group, 683 N.W.2d 127 (Iowa Ct. App. 2004) (After one driver had already struck the insured at a stop light, a second driver ran into her. The insurer's suit against the first driver was dismissed by the trial court, and the insured then filed suit against the second driver, but was unable to serve him. The insured then filed suit against her insurer, arguing that the second driver was uninsured or underinsured.) (The insurer was entitled to a directed verdict because the insured did not make "all reasonable efforts" to determine whether or not the other driver had liability insurance. The insured hired a process server for only a short period of time, three years before trial. In addition, the fact that no liability insurance carrier contacted her after the accident was not "substantial evidence of reasonable efforts.").

Louisiana. Arceneaux v. Motor Vehicle Cas. Co., 341 So. 2d 1287, 1290 (La. Ct. App. 1977). The appellate court commented "that the identity of either the owner or the operator of the offending vehicle . . . could have been ascertained without any great difficulty on plaintiff's part."

New Jersey. *Cf.* Nash v. Iamurri, 76 N.J. Super. 167, 183 A.2d 887 (Law Div. 1962) (involving a claim against the New Jersey Unsatisfied Claim & Judgment Fund).

New York. *Accord* Simmons v. Motor Vehicle Accident Indemnification Corp., 44 A.D.2d 673, 354 N.Y.S.2d 642 (1974). The majority of the justices concluded that where the claimants who were injured described the type of vehicle operated by a local taxi company, their subsequent failure to make any effort to ascertain the identity of the vehicle's owner or operator meant that they could not recover. The court

When such coverage disputes arise, the real issue often is whether the claimant seeking compensation under his uninsured motorist endorsement or the insurer should bear the obligation and the cost of determining whether a "hit-and-run" vehicle whose owner is subsequently identified was an uninsured highway vehicle when the accident occurred. Obviously, this is a function of who bears the burden of proof in the event the issue is disputed. Several aspects of these questions are considered in the next section.

A better approach would be to require the company to pay the claim under the "hit-and-run" provision of the uninsured motorist coverage, leaving open to the insurer the possibility of subsequently asserting its right of subrogation in an action either jointly or successively against the owner of a "hit-and-run" vehicle and the owner's insurer.

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decided they failed to make "all reasonable efforts to obtain such information [which] must be made before resort may be had to the relief" provided by MVAIC (354 N.Y.S.2d 643). The dissenting justice urged that even with the information available it was not possible to ascertain the owner or operator of such a vehicle since there were gypsy cabs that were operated throughout Jamaica, New York. The dissenting opinion also pointed out that in response to a criminal complaint, detectives were not able to ascertain the owner of the vehicle, and thus the appellate court should affirm the trial court's decision in favor of the insured.

See also Carmichael v. Gov't Employees Ins. Co., 54 A.D.2d 140, 388 N.Y.S.2d 354 (1976). The court decided that there were triable issues of fact since there was evidence that the insured claimant's own car rolled forward after having been parked with the handbrake set, and injured her just after a stranger was observed reaching into the car and doing something with his hands.

See also Rooney v. Motor Vehicle Accident Indemnification Corp., 36 A.D.2d 599, 318 N.Y.S.2d 359 (1971).

Rhode Island. Hardguitinni v. City of Providence, 837 A.2d 704 (R.I. 2003) (The insurer denied UM coverage based on the insured's failure to provide information showing that the alleged tortfeasor was an uninsured motorist. The insured claimed that the police took an accident report, then either lost or misplaced it, thus making it impossible to provide that information.) (The insurer was entitled to summary judgment, based on a statute that requires the claimant to submit basic identifying information about the alleged at-fault operator to establish that operator's UM or UIM status. It was unreasonable for the insured to rely solely on the police report, because the statute requires the claimant (except in hit-and-run situations) to attempt to identify the potential tortfeasor and his or her vehicle.).

Texas. *Accord* Members Mut. Ins. Co. v. Tapp, 469 S.W.2d 792 (Tex. 1971). The court concluded that where there was no evidence that the claimant had made any effort to locate the other motorist by using information in the police department accident report, the case would be remanded in the interest of justice (rather than being reversed).

See also Doyle v. United Servs. Auto. Ass'n, 482 S.W.2d 849, 851 (Tex. 1972). The Texas Supreme Court agreed with the insured's position that when the identity of the driver of a hit-and-run automobile was learned after a summary judgment was granted, "the trial court erred in restricting her [the insured] to the 'hit-and-run' coverage and in denying her an opportunity to recover under the . . . uninsured motorist coverage."

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Commerce Ins. Co. v. Mendonca
Mass.App.Ct.,2003.

Appeals Court of Massachusetts,Middlesex.
COMMERCE INSURANCE COMPANY
v.
Maria A. MENDONCA.
No. 01-P-335.

Argued Oct. 15, 2002.
Decided March 5, 2003.

Insurer brought declaratory action against insured who sought compensation under her uninsured motorist (UM) coverage after she was injured as a passenger in a vehicle involved in rear-end automobile collision. The Superior Court Department, Middlesex County, Ernest B. Murphy, J., granted summary judgment in favor of insurer. Insured appealed. The Appeals Court, Jacobs, J., held that: (1) uninsured motorist statute's "hit-and-run" provision extended to cover situations in which the tortfeasor does not immediately flee but nevertheless leaves the accident scene without being identified; (2) UM policy provision stating that insurer would "pay for hit-and-run accidents only if the owner or operator causing the accident cannot be identified" did not violate uninsured motorist statute; and (3) any due diligence duty to identify motorist causing a hit-and-run accident did not extend to passengers who were unaware of injury at the time of the collision.

Reversed.

West Headnotes

[1] Insurance 217 ⇐2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases
Uninsured motorist (UM) statute requiring UM insurers to provide coverage for injuries caused by "hit-and-run" motor vehicles encompasses situations in which the tortfeasor does not immediately flee but nevertheless leaves the accident scene without being identified. M.G.L.A. c. 175, § 113L.

[2] Insurance 217 ⇐2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases
Provision in uninsured motorist (UM) coverage portion of policy stating that insurer would "pay for hit-and-run accidents only if the owner or operator causing the accident cannot be identified" did not erect an artificial, arbitrary barrier to recovery, as would violate uninsured motorist statute. M.G.L.A. c. 175, § 113L(1).

[3] Insurance 217 ⇐2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases
Even if a due diligence duty was imposed on driver of a vehicle by provision in uninsured motorist (UM) coverage stating that insurer would "pay for hit-and-run accidents only if the owner or operator causing the accident cannot be identified," such a duty would not be transferred to a passenger in driver's vehicle who was unaware of an injury at the time of the collision.

[4] Insurance 217 ⇐2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases

"Hit-and-run" provision in uninsured motorist (UM) coverage portion of insured's automobile insurance policy provided coverage to insured when insured failed to obtain identifying information when she was injured as a passenger in a rear-end collision with another motorist, even though other motorist did not immediately flee the scene; insured's injury was not immediately apparent at time of collision, and other motorist left the scene without giving identifying information because of insured's declaration that she was not injured and because of lack of damage to either automobile. M.G.L.A. c. 175, § 113L.

**44*522 Caroline B. Playter, Boston, for the defendant.
John R. Callahan for the plaintiff.

Present: JACOBS, COWIN, & KAFKER, JJ.

JACOBS, J.

Maria Mendonca was a passenger in a car that was stopped for a red light when it was struck from behind by another vehicle. The collision occurred at approximately *523 10:30 P.M. on August 6, 1996, at the intersection of Massachusetts and Rindge Avenues in Cambridge. Joseph Corrigan, the owner and operator of the vehicle in which Mendonca was a passenger, asked her and another passenger if they were "ok," and when they answered that they were, he walked to the rear of his vehicle. There, he spoke with the other operator, who was standing outside his vehicle, which was stopped at the point of impact. Corrigan and the other operator inspected their respective vehicles and agreed that there was no significant damage. They each then drove away. There was evidence that the other operator drove through a red light when he left the scene of the collision. No identifying information was requested or obtained from the other operator or his vehicle before he drove off. Neither Mendonca nor the other passenger left Corrigan's vehicle during this incident.

After later discovering she had been injured, Mendonca sought compensation under the uninsured motorist provision of a policy issued by Commerce Insurance Company (Commerce) on a motor vehicle owned by her.[FN1] Following the filing of this declaratory judgment action, a Superior Court judge allowed Commerce's motion for summary judgment, denied Mendonca's similar motion, and ordered a judgment declaring that Mendonca was not entitled to uninsured motorist benefits under the standard Massachusetts automobile insurance policy issued to her. We reverse.

FN1. Part 3 of the compulsory insurance section of the sixth edition of the standard Massachusetts automobile insurance policy provides in relevant part as follows: "Sometimes an owner or operator of an auto legally responsible for an accident is uninsured. Some accidents involve unidentified hit-and-run autos. Under this Part, we will pay damages for bodily injury to people injured or killed in certain accidents caused by uninsured or hit-and-run autos. We will pay only if the injured person is legally entitled to recover from the owner or operator of the uninsured or hit-and-run auto. We will pay for hit-and-run accidents only if the owner or operator causing the accident cannot be identified."

1. *Hit-and-run.* Because the term "hit-and-run" is not defined in the policy or in the uninsured motorist statute, G.L. c. 175, § 113L,[FN2] we must consider how that term is to be interpreted in the circumstances of this case, where the presumptively at fault *524 operator stopped after the collision and talked to the operator of the car in which Mendonca was a passenger. See *Cody v. Connecticut Gen. Life Ins. Co.*, 387 Mass. 142, 146, 439 N.E.2d 234 (1982) ("The responsibility of construing the language of **45 an insurance contract is a ques-

tion of law for the trial judge, and then for the reviewing court").

> FN2. General Laws c. 175, § 113L(1), as appearing in St.1988, c. 273, § 46, in relevant part provides as follows: "No policy shall be issued ... with respect to a motor vehicle ... unless such policy provides coverage ... 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...."

In the only Massachusetts appellate decision interpreting the term "hit-and-run," in the context of the uninsured motorist statute, the Supreme Judicial Court rejected a literal interpretation of "hit" and concluded that "physical contact is not part of the usual and accepted meaning of the term." *Surrey v. Lumbermens Mut. Cas. Co.*, 384 Mass. 171, 176, 424 N.E.2d 234 (1981). The court viewed the statutory words "in light of the aim to be accomplished by the Legislature ... to minimize the catastrophic financial loss for victims of automobile accidents caused by the negligence of uninsured tortfeasors," and concluded that the retention of the "arbitrary physical contact requirement" in a policy would be inconsistent with the "broad remedial purpose" of the statute. *Id.* at 177, 424 N.E.2d 234.

[1] Consistent with the nonliteral approach taken to the meaning of "hit-and-run" in *Surrey* is an interpretation that focuses on the failure to give identifying information and does not treat flight as an indispensable element of "run." [FN3] This approach is widely accepted in other jurisdictions. See 1 Widiss, Uninsured *525 and Underinsured Motorist Insurance § 9.10, at 632-633 (2d ed. rev. 1999 & Supp.2002), and cases cited ("In contrast to the rigid and literal construction sometimes accorded the 'physical contact' requirement in 'hit-and-run' cases ... courts have almost invariably rejected the insurer's arguments with respect to the failure of a claimant to ascertain the identity of the tortfeasor [where a motorist stops at an accident scene]"). Prominent among these courts is the decision of the New York Court of Appeals in *Riemenschneider v. Motor Vehicle Acc. Indemnification Corp.*, 20 N.Y.2d 547, 285 N.Y.S.2d 593, 232 N.E.2d 630 (1967), where, in circumstances nearly identical to the present case, the court treated "hit and run" policy language more expansively than as colloquially understood. The court stated as follows: "An injured person who is not aware of his injury until it is too late to take steps to make the necessary identification is in precisely the same situation of deprivation of remedy as he would be if he knew he were hurt but the other driver left the scene **46 without opportunity to identify him." *Id.* at 550, 285 N.Y.S.2d 593, 232 N.E.2d 630.

> FN3. Contrary to Commerce's assertion, the dictum in *Surrey v. Lumbermens Mut. Cas. Co., supra* at 175-176, 424 N.E.2d 234 (that "[i]n all other lexical and decisional construction, 'hit-and-run' is uniformly 'synonymous with a car involved in an accident causing damages where the driver flees from the scene' " [citations omitted], does not mandate, as matter of law, that flight be a necessary element of "run" in determining whether there has been a hit-and-run accident. Resort to dictionary definitions is hardly conclusive as to whether flight is an essential element. For example, Black's Law Dictionary 730 (6th ed.1990) defines a hit-and-run accident as a "[c]ollision generally between motor vehicle and pedestrian or with another vehicle in which the operator of vehicle leaves scene without identifying himself and without giving certain other information to other motorist and police as usually required by statute."

To the extent that other Massachusetts statutes deal with hit-and-run scenarios, they do not require a literal definition of "run" as involving flight. General Laws c. 260, § 4B, in prescribing the statute of limitations for hit-and-run tort actions, refers to an operator who "failed to make himself ... known at the time of the accident." Also, language in G.L. c.

90, §§ 24(2)(*a*), 24(2)(*a* 1/2)(1), can be read as imposing criminal penalties on an operator who causes a collision and who stops but does not identify himself, although the incident might not colloquially be described as a hit-and-run accident or as involving flight. In relevant part, § 24(2)(*a*), which *Surrey v. Lumbermens Mut. Cas. Co., supra* at 176, 424 N.E.2d 234, describes as defining "hit-and-run," states, "whoever without stopping and making known his name ... goes away after knowingly colliding with or otherwise causing injury to any other vehicle."

Relying on jurisdictions that treat flight from the scene as the "focal element" of the term hit-and-run, Commerce argues that where, as here, the driver who caused the collision stopped, Mendonca cannot prove the "presumptively at fault vehicle was a 'hit-and-run auto.' " [FN4] This narrow interpretation effectively would leave a gap in mandated coverage by providing protection to a person injured by an identified, but uninsured, operator or by an operator whose postaccident flight prevents identification,*526 while denying protection when the operator does not immediately flee but nevertheless leaves the accident scene without being identified. Such a coverage gap is contrary to the general purpose of legislatively mandated liability and uninsured motorist insurance, which is to give some measure of financial protection to persons injured by the negligent driving of others. See *Hartford Ins. Co. v. Hertz Corp.,* 410 Mass. 279, 285, 572 N.E.2d 1 (1991) ("General Laws c. 175, § 113L, was enacted with the broad objective of ensuring that victims of automobile accidents would be adequately compensated for their injuries when the accidents are caused by the negligence of unidentified motorists or motorists with insufficient or no liability coverage"). See also *Surrey v. Lumbermens Mut. Cas. Co.,* 384 Mass. at 177, 424 N.E.2d 234.[FN5]

FN4. Commerce principally relies on *Sylvestre v. United Servs. Auto. Assn. Cas. Ins. Co.,* 240 Conn. 544, 546, 692 A.2d 1254 (1997), which affirmed rulings of lower courts that the "plaintiff was not struck by a 'hit and run vehicle,' as required by his insurance policy, because the driver had stopped to render assistance and had been affirmatively dismissed by the plaintiff." To the same effect is *Lhotka v. Illinois Farmers Ins. Co.,* 572 N.W.2d 772, 775 (Minn.Ct.App.1998).

FN5. Given our decision, we do not address Mendonca's argument invoking the policy provision for payment for damages caused by uninsured autos. In any event, there are no facts presented from which a reasonable inference can be drawn that the other vehicle was uninsured.

[2][3] 2. *Mendonca as claimant.* Commerce, claiming only that there was no hit-and-run, makes no argument as to the policy provision which states as follows: "We will pay for hit-and-run accidents only if the owner or operator causing the accident cannot be identified." We examine the effect of that clause in this declaratory judgment action so as to comply with the purpose of G.L. c. 231A, § 9, to "remove, and to afford [the parties] relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations." See *Massachusetts Assn. of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins.,* 373 Mass. 290, 292, 367 N.E.2d 796 (1977). Although the clause is not apparent in or required by G.L. c. 175, § 113L(1), we view it, for purposes of this decision, as not improperly "erecting an artificial, arbitrary barrier to recovery." See *Surrey v. Lumbermens Mut. Cas. Co., supra* at 177, 424 N.E.2d 234. Similarly, even if the words "cannot be identified" were to be generously interpreted as imposing a due diligence duty on the operator of a vehicle which is in a collision with another vehicle to obtain identifying information if the other operator stops, such duty should not automatically be transferred to a passenger. Analogous to decisions not permitting the imputation of a driver's negligence to an ordinary passenger, see, e.g., *527*Smerdon v. Fuller,* 353 Mass. 774, 234 N.E.2d 908 (1968); Nolan & Sartorio, Tort Law § 391 (2d ed.1989), Corrigan's **47 action or inaction is not chargeable to Mendonca in

the circumstances.[FN6] In any event, it would be inequitable to impose such a duty on a passenger who is unaware of an injury at the time of the collision. See *Massa v. Southern Heritage Ins. Co.*, 697 So.2d 868, 872 (Fla.Dist.Ct.App.1997) (where the plaintiff braked hard to avoid a collision, drove away without being aware of any injury, and did not identify other vehicle, the court held that any reasonable obligation to identify commences with the insured's awareness of an injury). See also *Mangus v. Doe*, 203 Va. 518, 125 S.E.2d 166 (1962) (at time of the accident, the plaintiff did not know he had been injured, and "there was no necessity for him to obtain [identification of the other operator or vehicle]"). In *Riemenschneider*, where, as noted above, the circumstances were nearly identical to the present case, the court permitted access to coverage where the policy described a hit-and-run driver as including one whose identity "cannot be ascertained." *Riemenschneider v. Motor Vehicle Acc. Indemnification Corp.*, 20 N.Y.2d at 550, 285 N.Y.S.2d 593, 232 N.E.2d 630. Other reasons for an inability to identify the presumptively negligent operator often are accepted as grounds for recognizing uninsured coverage.[FN7]

FN6. The facts recited in the body of this opinion are based on an agreed statement of facts submitted by the parties. To the extent that deposition evidence in the summary judgment submissions reflects a dispute as to whether Mendonca and another passenger rejected an offer by Corrigan to obtain identifying information from the other operator, the dispute did not, in light of our decision, encompass a material fact in the context of the summary judgment motion. See *Kyte v. Philip Morris Inc.*, 408 Mass. 162, 166, 556 N.E.2d 1025 (1990).

We make no determination whether, if later proven, Mendonca's rejection of such an offer constituted a waiver of coverage. Similarly outside the scope of the declaration requested in this case is the judge's conclusion that Mendonca gave her "permission" for, or "tacitly consented" to, Corrigan's actions. Further, nothing in the summary judgment materials indicates that Mendonca had any right of control of the vehicle operated and owned by Corrigan.

FN7. Among the examples cited for the inability of claimants to identify another operator or vehicle are the following: (1) claimants who have insufficient opportunity to identify the operator or the vehicle; (2) operators who provide false, inaccurate, or incomplete information; (3) operators who provide correct information at the time of a collision, but who later cannot be found; (4) injured persons who are rendered unconscious by the collision; (5) claimants who do not have an opportunity to clearly observe the vehicle causing the collision; and (6) intimidated claimants who reasonably fear seeking information from the other operator. See generally Annot., *Automobile Insurance: What Constitutes an "Uninsured" or "Unknown" Vehicle or Motorist, Within Uninsured Motorist Coverage*, 26 A.L.R.3d 883 §§ 13, 14 (1969 & Supp.2002); 1 Widiss, Uninsured and Underinsured Motorist Insurance § 9.10 (2d ed. rev. 1999 & Supp.2002).

[4] *Conclusion.* Mendonca, as the insured, has met her burden of *528 establishing that, in the circumstances, her asserted damages fall "within the description of the risks covered." *Markline Co. v. Travelers Ins. Co.*, 384 Mass. 139, 140, 424 N.E.2d 464 (1981). Accordingly, the order allowing Commerce's motion for summary judgment and the judgment declaring that Mendonca was not entitled to uninsured motorist benefits are reversed, and judgment is to enter declaring that Mendonca is not precluded from benefitting from the uninsured motorist coverage under the automobile insurance policy issued to her by Commerce with respect to any damages for bodily injury suffered by her in the collision of August 6, 1996. This judgment shall not obviate the necessity for proof of the negligence of the other operator or **48 other relevant matters not addressed by the ordered declaration.

So ordered.

Mass.App.Ct.,2003.
Commerce Ins. Co. v. Mendonca
57 Mass.App.Ct. 522, 784 N.E.2d 43

END OF DOCUMENT

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, By Robert C. Menard, Guardian Ad Litem,

Plaintiffs,

v.

Case No. 07 CV 1846

ACUITY, A MUTUAL INSURANCE COMPANY, and HUMANA INSURANCE COMPANY,

Defendants.

REPLY BRIEF

NOW COMES the Defendant, ACUITY, A Mutual Insurance Company, by its attorneys, Grady, Hayes & Neary, LLC, and as and for its Reply Brief, states as follows:

INTRODUCTION

The Defendant, ACUITY, A Mutual Insurance Company ("ACUITY"), filed with the Court a Motion for Declaratory Judgment, seeking a declaratory order, denying insurance coverage for the Plaintiffs' claims. As grounds, ACUITY submits that the facts and circumstances giving rise to the present action do not evidence a "hit-and-run" accident, as that phrase is understood under the policy of insurance applicable to this matter and Wisconsin law.

The Plaintiffs, by their attorneys, have opposed ACUITY's motion. The Plaintiffs do not dispute the facts detailed by ACUITY in its Motion for Declaratory Judgment, nor

are they disputing that declaratory judgment and/or summary judgment are appropriate vehicles for use by the Court in addressing the issue presently before it. Rather, the Plaintiffs argue that:

1. The December 9, 2005 accident was a "hit-and-run" accident, pursuant to Wis. Stat. § 632.32(4);
2. The majority of states analyzing the "run" component in a "hit-and-run" analysis have provided uninsured motorist coverage to claimants in similarly situated positions as the Plaintiffs; and,
3. The unidentified motorist in the present action was required to provide the Plaintiff, Zachary Zarder, with identifying information, pursuant to Wis. Stat. § 346.67(1).

ARGUMENT

I. THE DECEMBER 9, 2005 INCIDENT WAS NOT A "HIT-AND-RUN" ACCIDENT BECAUSE NO "RUN" OCCURRED.

The Wisconsin omnibus statute details the requirement of uninsured motorist benefits language in insurance contracts and states that every policy of insurance subject to the strictures of Wisconsin Statutes Chapter 632 is required to contain an uninsured motorists provision for the protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. *See* Wis. Stat. § 632.32. In the context of the omnibus statute's uninsured motorist requirement, the definition of "uninsured motor vehicle" includes an unidentified motor vehicle involved in a "hit-and-run accident." Wis. Stat. § 632.32(4).

The ACUITY policy of insurance at issue in the present action contains a detailed definition of "uninsured motor vehicle." There, uninsured motor vehicle includes various

categories of vehicle, including "hit-and-run" vehicles. Neither the omnibus statute nor the ACUITY policy expressly defines what qualifies as a "hit-and-run" vehicle. Consequently, Wisconsin courts' construction of the phrase "hit-and-run" in an insurance coverage context is instructive in the present analysis.

Like ACUITY, the Plaintiffs acknowledge the relative lack of commentary from our Supreme Court or Wisconsin appellate courts concerning the "run" component in the "hit-and-run" analysis. At the same time, the Plaintiffs bemoan ACUITY's reliance on our Supreme Court's decision in *Hayne v. Progressive Northern Insurance Company*, which provides the clearest declaration of what constitutes the "run" component of "hit-and-run" for purposes of Wisconsin law. 115 Wis. 2d 68, 339 N.W.2d 588 (1983).

ACUITY does not dispute that the *Hayne* court addressed a factual scenario wherein the court was required to analyze whether a "hit-and-run" accident occurred where no physical contact occurred between the vehicles involved. *Id.* at 69. However, ACUITY disputes the Plaintiffs' contention that the *Hayne* court only reviewed dictionary definitions of "hit-and-run" to determine the meaning of "hit," alone.

Rather, the *Hayne* court relied on common dictionary definitions regarding the common and approved usage of both "hit" and "run" to arrive at the "plain meaning" of the phrase "hit-and-run." Specifically, after detailing multiple dictionary definitions of "hit-and-run," the *Hayne* court expressly stated that "[t]hese definitions clearly indicate that the plain meaning of 'hit-and-run' consists of two elements: a single 'hit' or striking, and a 'run' **or fleeing from the scene of an accident.**" *Id.* at 73-74 (emphasis added).

Inasmuch as the Plaintiffs claim the *Hayne* court provided "no analysis to support its election of the phrase 'fleeing from the scene of the accident' over other quoted

definitions of 'hit-and-run,'" it was the dictionary definitions, alone, that the *Hayne* court relied on to conclude that statutory language in the omnibus statute – the phrase "hit-and-run" – is "unambiguous." *Id.* at 74. Moreover, in rejecting the appellant's reliance on alternative dictionary definitions and extra jurisdictional authority, the *Hayne* court again stated its position, noting that "[t]he dictionary definitions we ... cited uniformly indicate that 'hit-and-run' includes two elements: a 'hit' or striking, and 'run,' or fleeing from the accident scene." *Id.* at 75.

When construing statutes, "[c]ommon and approved usage of words in a statute may be established by definitions contained in a recognized dictionary." *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981) (citation omitted). Based on the foregoing, in viewing the facts of record, the circumstances giving rise to the above-captioned action do not constitute a "hit-and-run" accident insofar as the occupants of unidentified vehicle did not flee from the scene.

The Plaintiffs argue that ACUITY's position is contrary to public policy considerations underpinning Wisconsin's omnibus statute. Specifically, the Plaintiffs claim ACUITY is requesting the Court narrowly construe the definition of "run" so ACUITY can deny compensation to the Plaintiffs "who are the victims of the unidentified motorists' negligence." *See* Memo. of Law in Opposition at 6. The Plaintiffs' position in this regard is without merit.

First, though it is undisputed that contact occurred between the bicycle operated by the Plaintiff, Zachary Zarder ("Zarder"), and the unidentified vehicle, there has been no determination as to the alleged negligence of the unidentified vehicle. Accident report materials prepared by the New Berlin Police Department do suggest the

unidentified vehicle cut short the curve on South East Lane where Zarder and his friend were riding bicycles. *See* Affidavit of Jeffrey Kuehl, Exh. A.[1] However, those same report materials describe the road surface condition as "Snow/Slush" and the light conditions at the time of the incident as "Dark-Not Lighted." *Id.* Despite these conditions, Zarder was operating his bicycle without lights when the incident occurred. *Id.*

Based on the facts available to the parties and in spite of the Plaintiffs' claims to the contrary, there is a legitimate question of whether, assuming the Plaintiffs knew the identity of the motorist whose vehicle contacted Zarder's bicycle, the Plaintiffs would be legally entitled to the recovery of damages as a result of the unidentified motorist's conduct. Thus, the Plaintiffs' contention that ACUITY is somehow attempting to punish the Plaintiffs is misplaced.

On this point, the Plaintiffs also claim ACUITY is "attempting to create a UM exception that prevents coverage when a Plaintiff is injured by a hit-and-run unidentified motorist who stops before leaving the scene of an accident, but UM coverage will be provided if the unidentified driver made no effort to stop." *See* Memo. of Law in Opposition at 7. This is an obvious mischaracterization of ACUITY'S position.

ACUITY is not claiming that an exception to UM coverage exists where an uninsured motorist claimant is injured by an unidentified motorist who stops before leaving the scene of an accident. Rather, ACUITY submits that where, as in the present action, the unidentified motorist does not flee the scene of an accident and, rather, stops, inquires, and is reassured that there is neither personal injury nor property damage.

[1] The Affidavit of Jeffrey Kuehl was filed in connection with ACUITY's Motion for Declaratory Judgment.

Here, the occupants of the unidentified vehicle stopped after the incident, spoke directly to Zarder and "immediately checked on his well being." *See* Affidavit of Jeffrey Kuehl, Exh. A. There is no evidence that the occupants of the vehicle attempted to conceal their identities, and, further, the occupants left only after Zarder "told the occupants of the vehicle that he was injured and that they could leave." *Id.* Thus, not only was there an attempt made to render assistance to Zarder, but Zarder affirmatively acted to dismiss the occupants of the unidentified vehicle from the scene.

There is no "problem" with the logic underlying ACUITY's position as the Plaintiffs' argue. Zarder claimed he was uninjured and dismissed the unidentified motorists from the scene. It is not the stop, in and of itself, that lends support to ACUITY'S position. Rather, as detailed in authority supporting ACUITY's position, it is the affirmative dismissal of the unidentified motorist that precludes coverage. The unidentified motorists made no attempt to leave until after Zarder assured the motorists he was uninjured. There is no evidence that anyone attempted to detain the unidentified motorists. When the motorists did leave, there was no indication that Zarder or the occupants thought to exchange information, and there is no evidence that the information would not have been provided if it was requested.

Simply put, a review of materials submitted in connection with ACUITY's motion reveals, from both a factual and legal perspective, that the facts and circumstances in the present action fail to give rise to a "hit-and-run" accident. Based on the foregoing, ACUITY respectfully requests the Court grant its Motion for Declaratory Judgment.

II. EXTRAJURISDICTIONAL AUTHORITY RELIED ON BY THE PLAINTIFFS DOES NOT SUPPORT THE PLAINTIFFS' POSITION AS THE "MAJORITY" POSITION IN CONNECTION WITH THE PRESENT ACTION.

The Plaintiffs claim that extrajurisdictional authority relied upon by ACUITY in its Motion for Declaratory Judgment equates with the "minority of jurisdictions that deny UM coverage when the unidentified motorist stops at the scene of an accident before leaving unidentified." *See* Memo. of Law in Opposition at 8. Conversely, the Plaintiffs argue that their position is consistent with the majority of states that have analyzed issues similarly situated to the present action. A complete review of materials submitted by the Plaintiffs reveals information to the contrary.

The Plaintiffs place heavy reliance on secondary source authority in claiming the majority of states provide UM coverage to claimants injured by an unidentified motorist who stops to check on the injured party in a "hit-and-run" accident. The Plaintiffs misconstrue the nature of the case law supporting the secondary source authority's statement concerning the majority rule in an unascertainable driver context.

The secondary source authority cited by the Plaintiffs cites case law from sixteen different states, which purportedly stands for the proposition that courts in those states have concluded an insured's failure to ascertain the identity of a hit-and-run motorist did not preclude recovery where an issue had been raised as to whether the claimant could have or should have ascertained the identity of the motorist. Of the cases detailed in connection with this proposition, eighteen are described in relative detail. Of the eighteen cases with detailed descriptions, seven of the cases relate to the provision of false information by the unidentified motorist, while the balance of the cases are factually dissimilar to the case at hand, be it due to the absence of a means of learning the identity of the alleged hit-and-run driver or the near instantaneous manner in which the unidentified motorist left the scene.

Acknowledging the unconvincing nature of authority cited in support of the Plaintiffs' proposition, the Plaintiffs cite as support for their Memorandum of Law in Opposition only one of the cases, the decision in *Commerce Insurance Company v. Mendonca*, 57 Mass. App. Ct. 522, 784, N.E.2d 43 (Mass. App. Ct. 2003). As with many of the cases detailed in the Plaintiffs' secondary source authority, the *Mendonca* decision is distinguishable from the factual scenario at hand.

In *Mendonca*, the uninsured motorist claimant, Mendonca, was a passenger in a car that was stopped for a red light when it was struck from behind by another vehicle. *Id.* at 522. Joseph Corrigan, the owner and operator of the vehicle in which Mendonca was a passenger, asked Mendonca and another passenger if they were "okay." *Id.* at 523. When Mendonca and the passenger responded in the affirmative, Corrigan walked to the rear of his vehicle where he spoke with the unidentified motorist. *Id.*

According to the *Mendonca* decision, "Corrigan and the other operator inspected their respective vehicles and agreed that there was no significant damage." *Id.* They each then drove away. "No identifying information was requested or obtained from the other operator or his vehicle before he drove off[,]" and "[n]either Mendonca nor the other passenger left Corrigan's vehicle during this incident." *Id.*

To remain consistent with Massachusetts courts' nonliteral approach to the meaning of "hit-and-run," the *Mendonca* court acknowledged that it did not treat flight as an indispensable element of "run." *Id.* at 524. In support of this proposition, the *Mendonca* court relied on appellate case law interpreting the term "hit-and-run," which rejected a literal interpretation of "hit-and-run" and concluded that "physical contact is

not part of the usual and accepted meaning of the term." *Id.* (citing *Surrey v. Lumbermens Mut. Cas. Co.*, 384 Mass. 171, 176, 424 N.E.2d 234 (1981).

Wisconsin takes a far more literal approach to the meaning of "hit-and-run." In this regard, Wisconsin courts have established that the phrase "unambiguously includes an element of physical contact[.]" *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶15, 734 N.W.2d 394. Using the methodology of the *Mendonca* court – and considering the definition of "hit-and-run" in the *Hayne* decision detailed above – there is ample authority for the proposition that Wisconsin does treat flight as an indispensable element of "run."

Moreover, there is no evidence in the *Mendonca* decision that the unidentified motorist was reassured that there was neither injury nor damage, only that the operator of the vehicle in which *Mendonca* was a passenger spoke with the unidentified motorist and agreed there was no significant damage to the vehicles. Here, conversely, the occupants of the unidentified vehicle stopped, attempted to provide aid to the claimant, Zarder, himself, and Zarder affirmatively acted to dismiss the unidentified motorists from the scene of the accident.

Based on the foregoing, ACUITY respectfully requests the Court grant its Motion for Declaratory Judgment.

III. WIS. STAT. § 346.67 HAS NO APPLICATION TO THE PRESENT ACTION.

The Plaintiffs argue that the unidentified motorist involved in the incident giving rise to the present litigation was required to provide Zarder with identifying information. The Plaintiffs suggest that if the unidentified motorist would have provided identification,

the Plaintiffs would have been able to seek recovery against the driver, rather than be denied UM coverage by ACUITY.

First, the Plaintiffs ignore than an analogous argument was made, and rejected, in the *State Farm v. Seaman* decision detailed in ACUITY's Brief in Support of Motion for Declaratory Judgment. 96 Wn. App. 629, 980 P.2d 288 (Wash. App. DV 1999). The *Seaman* court concluded there was no violation of a Washington criminal hit-and-run statute that imposed similar duties as that of the Wisconsin statute because the unidentified driver "undertook a reasonable investigation of the accident scene by confirming that there were no signs of visible damage and in receiving [the claimant's] assurance that [the claimant] was not injured." *Id.* at 634.

Second, the Plaintiffs suggest that a determination by the New Berlin Police Department not to investigate the incident as a hit-and-run accident is "completely irrelevant" to the present analysis. ACUITY disagrees.

At the end of the day, an analysis of Section 346.67 lets no insight into the Court's analysis as to whether the facts and circumstances available to the parties give rise to a "hit-and-run" accident. Nevertheless, if the Plaintiffs maintain that Section 346.67 provides statutory authority for their position, the decision of officers who the statute empowers to take action, based on the statute's requirements, is relevant.

For that reason, the New Berlin Police Department's refusal to investigate the incident as a "hit-and-run" accident speaks volumes as to whether the Court should consider the facts and circumstances giving rise to this matter as a "hit-and-run" accident. The New Berlin Police Department's decision to not pursue the investigation lends support for the proposition that no "hit-and-run" accident occurred.

CONCLUSION

Based on the foregoing facts and authority, the Defendant, ACUITY, A Mutual Insurance Company, respectfully request the Court grant its Motion for Declaratory Judgment.

Dated at Waukesha, Wisconsin this 29th day of February, 2008.

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STATE OF WISCONSIN

SUPREME COURT

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, by Robert C. Menard, Guardian Ad Litem,

Plaintiffs-Respondents

-vs-

HUMANA INSURANCE COMPANY,

Defendant,

ACUITY, A MUTUAL INSURANCE COMPANY,

Defendant-Appellant-Petitioner.

District 2
Appeal No. 2008AP919

Waukesha County Circuit Court Case
No. 07CV1146

Review of the February 18, 2009 Decision of the Wisconsin Court of Appeals, District II, Affirming an Order of the Circuit Court for Waukesha County, the Honorable Kathryn W. Foster Presiding, Denying the Motion for Declaratory Judgment of the Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company

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BRIEF AND APPENDIX OF PLAINTIFFS-RESPONDENTS ZARDER

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STATEMENT OF ISSUES

1. **Is Defendant-Appellant-Petitioner, Acuity, required to provide uninsured motorist insurance coverage to Plaintiffs-Respondents, Zarders, pursuant to Wis. Stat. §632.32(4)(a) for a "hit-and-run" accident involving an unidentified motorist who stopped after the collision, but left the scene of the accident without providing any identifying information?**

The Waukesha County Circuit Court answered in the affirmative, based upon public policy grounds.

The Wisconsin Court of Appeals, District II, answered in the affirmative, based upon its analysis of Wisconsin law, including, but not limited to, Hayne v. Progressive Northern Insurance Co., 115 Wis.2d 68, 339 N.W.2d 588 (1983), Wis. Stat. §632.32(4)(a) and Wis. Stat. §346.67.

2. **Is Hayne's definition of "run" as a "fleeing from the scene of an accident" dicta?**

This was not specifically addressed by the Waukesha County Circuit Court.

The Wisconsin Court of Appeals, District II, answered in the affirmative. See, Zarder v. Acuity, 2009 WI App. 34, at ¶¶ 11-14. However, the dissenting opinion answered that the Wisconsin Court of Appeals was not allowed to declare that the Hayne's definition of "run" was dictum. See, *Id*. at ¶ 44.

STATEMENT OF THE CASE

On December 9, 2005, Zachary Zarder (a 13-year old minor on the date of the accident) was injured in a "hit-and-run" automobile/bicycle accident.

Zarders sought uninsured motorist (UM) insurance coverage from their insurer, Acuity, to recover damages they sustained as a result of this "hit-and-run" accident. However, Acuity denied UM benefits to the Zarders.

Zarders commenced suit against Acuity to recover, among other things, UM benefits. Furthermore, Zarders alleged that Acuity's denial of UM coverage was made in bad faith. Acuity moved the Waukesha County Circuit Court to declare that Acuity's denial of UM insurance coverage was appropriate.

The Waukesha County Circuit Court, the Honorable Kathryn W. Foster, denied Acuity's motion for declaratory judgment.

Acuity appealed Judge Foster's decision and presented this insurance coverage dispute to the Court of Appeals, District II.

The Court of Appeals affirmed Judge Foster's decision.

Acuity has petitioned this Court to review these decisions by the Waukesha County Circuit Court and the Court of Appeals, District II.

INTRODUCTION

The crux of Acuity's arguments throughout this case for denying uninsured motorist coverage to the Zarders can be summarized as follows:

1. The "run" element of "hit-and-run" was not satisfied because an unidentified motorist stopped after the collision and did not leave the scene of the accident at a high enough rate of speed to be considered a "flee".

2. Zarders should be punished, by being deprived of UM insurance coverage, because Zachary Zarder allowed the unidentified motorist to leave the December 9, 2005 accident scene without requesting identifying information.

As set forth below, Acuity is required to provide UM insurance coverage to Zarders.

FACTS

The relevant undisputed facts can be summarized as follows:

- On December 9, 2005, Zachary Zarder, a 13-year old minor at that time, was operating his bicycle while traveling southbound on S. East Lane in the City of New Berlin, Waukesha County.

- An unidentified motor vehicle, traveling northbound on S. East Lane entered the southbound lane and struck Zachary Zarder's bicycle.

- After the unidentified motor vehicle stopped, 3 unidentified occupants exited the vehicle and asked if Zachary Zarder was "OK".

- Zachary Zarder responded "yes", and the occupants returned to their vehicle and drove away from the scene of the accident.

- No identifying information was ever provided to Zachary Zarder and, to this day, the vehicle and occupants have not been identified.

- Within 24 hours after the accident occurred, Zachary Zarder discovered he was injured, informed his parents (James and Gloria Zarder) and the police were contacted.

- Zachary Zarder eventually sought treatment for his injuries, which primarily consisted of a right forearm and left femur fracture.

- Zachary Zarder's left femur fracture required two surgical procedures.

ARGUMENT

I. STANDARD OF REVIEW.

This Court has set forth the following standard applicable to this review; "Statutory interpretation and the interpretation of an insurance policy present questions of law that we review de novo." Teschendorf v. State Farm Insurance Companies, 2006 WI 89, at ¶ 9, 293 Wis.2d 123, 717 N.W.2d 258 (2006). See also Folkman v. Quamme, 2003 WI 116, ¶16, 264 Wis.2d 617, 665 N.W.2d 857.

II. THE DECEMBER 9, 2005 AUTOMOBILE/BICYCLE ACCIDENT WAS A "HIT-AND-RUN" ACCIDENT PURSUANT TO WISCONSIN LAW, SPECIFICALLY WIS. STAT. §632.32(4).

This Court has stated,

> Pursuant to Wis. Stat. §632.32(4)(a)2.b., hit-and-run accidents are included within the statutorily mandated uninsured motor vehicle coverage. A hit-and-run occurs when three elements are satisfied: (1) there is an unidentified motor vehicle; (2) the unidentified vehicle is involved in a hit; and (3) the unidentified motor vehicle "runs" from the scene of the accident. Smith v. General Casualty Insurance Company, 2000 WI 127 at ¶ 10, 239 Wis.2d 646, 619 N.W.2d 882 (citing Theis v. Midwest Sec. Ins. Co., 2000 WI 15 at ¶ 14-16, 232 Wis.2d 749, 606 N.W.2d 162).

Acuity does not dispute that the December 9, 2005 automobile/bicycle accident involved an unidentified motor vehicle nor does it dispute that the unidentified motor vehicle was involved in a "hit" with Zachary Zarder's

bicycle. Acuity's argument for denying UM coverage is that the "run" element was not met in the December 9, 2005 accident.

Wisconsin case law had not specifically addressed the "run" element, until the Court of Appeals published decision of this case, Zarder v. Humana Insurance Company, 2009 WI App. 34, 316 Wis.2d 573, 765 N.W.2d 839.

However, Acuity cites to, and argues from, a Wisconsin Supreme Court case that mentions, without analysis, a definition of "run". The Supreme Court case is Hayne v. Progressive Northern Ins. Co., 115 Wis.2d 68, 73-74, 339 N.W.2d 588 (1983). Acuity uses this case for the premise that a "run" is a "fleeing from the scene of the accident". See Petitioner's Brief, pgs. 12-16. This Court's use of the phrase "fleeing from the scene of the accident" as a definition of "run" in Hayne is dicta.

This Court has previously stated that "Dicta is a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." State v. Sartin, 200 Wis.2d 47, 60 at n. 7, 546 N.W.2d 449 (1996).

In Hayne, "The **sole issue** on appeal is whether sec. 632.32(4)(a)2.b., Stats., requires uninsured motorist

coverage for an accident involving an insured's vehicle and an unidentified motor vehicle when there was **no physical contact** between the two vehicles." *Id.*, at 69 (Emphasis Added).

In Hayne, this Court took up, discussed and decided the issue of whether or not physical contact must occur for there to be uninsured motorist insurance coverage pursuant to Wis. Stat. §632.32(4)(a)2.b. This Court's definition for the term "hit" was germane to deciding this issue. For this reason, the Court thoroughly analyzed "hit" and applied a definition that it felt was appropriate.

This Court's definition of "run" in Hayne was not germane to the physical contact issue. This Court provided no analysis to support its selection of the phrase "fleeing from the scene of the accident" over other quoted definitions of "hit-and-run".[1] Furthermore, this Court provided no explanation of why it even selected a phrase to define "run" when addressing the physical contact issue.

Acuity asks, ". . . if the Hayne Court's definition of the "run" component of "hit-and-run" was an "off-the-cuff"

[1] These definitions varied from ". . . guilty of leaving the scene of an accident without stopping to render assistance or to comply with legal requirements . . .", ". . . designating or involving the driver of a motor vehicle who drives on after striking a pedestrian or another vehicle . . .", and ". . . designating, characteristic of, or caused by the driver of a vehicle who illegally continues on his way after hitting a pedestrian or another vehicle . . ." *Id.*, at 73.

statement, as suggested by the Court of Appeals, why take the affirmative step of applying meaning to "run" in the first place?" Petitioner's Brief at pages 17-18.

Acuity's question is rhetorical because Hayne does not provide an explanation why it briefly selected a definition for "run" when "run" was not germane to the issue at hand.

Acuity further claims "It is undisputed that the operator of the unidentified vehicle did not "flee" from the scene." Petitioner's Brief at page 16. Zarders dispute this.

If this Court is so inclined to accept Acuity's definition that "run" is "fleeing from the scene of an accident", then this Court will need to provide some guidance regarding what is necessary for a "flee" to have occurred.

"Flee" is a relative term. In previous arguments filed by Acuity, it has equated "flees" with the relative phrase "swiftly away". See P-Ap. 78.

Due to their relative meanings, it is difficult, if not impossible, to establish consistent UM insurance coverage results with the use of these terms. For example, exactly how fast does a motor vehicle have to travel before a reasonable insured would consider it to be moving "swiftly away"? Would a motor vehicle have to leave the scene of an

accident faster than a human being could walk? Would the vehicle have to travel faster than a human being can run? Would a vehicle be moving "swiftly away" if it was traveling faster than one mile per hour over the posted speed limit? Would the vehicle have to be traveling twice the speed limit? The hypotheticals could go on forever because the relativeness of "flee" or move "swiftly away" is susceptible to numerous reasonable meanings. In other words, these are ambiguous terms.

Furthermore, what if an unidentified motor vehicle "stops" after committing a "hit"? Would this eliminate the possibility that the unidentified motor vehicle ran, fled, or moved swiftly away from the scene of the accident after stopping?

Acuity's position, if accepted, would do nothing but encourage further UM insurance coverage disputes regarding "hit-and-run" accidents as there would be no logical "bright line" rule regarding when UM insurance coverage would apply or would not apply and, in many circumstances, would likely lead to absurd results. See, Teschendorf, at ¶¶ 11-43 (discussion of statutory ambiguity and statutory plain meaning that leads to absurd results).

Due to the absence of Wisconsin case law (other than the Court of Appeals decision in Zarder) regarding analysis

of the issue of "run" in a "hit-and-run" UM insurance coverage dispute, this Court must interpret Wisconsin statutes, specifically Wis. Stat. §632.32(4).

Wis. Stat. §632.32(4) states in relevant part,

> REQUIRED UNINSURED MOTORIST AND MEDICAL PAYMENTS COVERAGES. Every policy of insurance subject to this section that insures with respect to any motor vehicle registered or principally garaged in this state 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 contain therein or supplemental thereto provisions approved by the commissioner:
>
> (a) *Uninsured motorist.* 1. For the protection of persons injured 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, in limits of at least $25,000 per person and $50,000 per accident. . .
>
> 2. In this paragraph, **"**uninsured motor vehicle" also includes:
>
> a. An insured motor vehicle if before or after the accident the liability insurer of the motor vehicle is declared insolvent by a court of competent jurisdiction.
>
> b. An unidentified motor vehicle involved in a hit-and-run accident. *Id*.

Unfortunately, Wis. Stat. §632.32(4)(a)2.b. does not define "hit-and-run" accident. However, §632.32(4)(a)(1) sets forth the purpose of UM insurance coverage. The purpose of coverage is, "[f]or the protection of persons

injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ." *Id*.

The Wisconsin legislature decided to include unidentified motor vehicles involved in a "hit-and-run" accident as uninsured motor vehicles for the purposes of uninsured motorist coverage. See, *Id*.

If uninsured motorist coverage was not available to insureds that were injured by unidentified motor vehicles in "hit-and-run" accidents, then insureds would be unable to seek recovery for damages caused by the unidentified motorist's negligence. This would create a gap in insurance coverage. Wis. Stat. §632.32's inclusion of "hit-and-run" was meant to provide increased coverage to injured insureds, not restrict coverage available to them.

However, this Court has declined UM insurance coverage for "miss-and-run" accidents due to this Court's public policy concern of fraud.

In Smith v. General Casualty Insurance Company, 2000 WI 127 at ¶ 25, 239 Wis.2d 646, 619 N.W.2d 882, this Court addressed two public policy concerns arising from unidentified motor vehicles involved in "hit-and-run" accidents:

> One public policy concern is of primary relevance to our analysis, that of preventing fraud. The physical contact element unambiguously included in the term "hit-and-run" in Wis. Stat. §632.32(4)(a)2.b. prevents fraudulent claims from

> being brought by an insured driver who is involved in an accident of his or her own making.
>
> Under the circumstances of this case, when physical contact has been applied by an unidentified motor vehicle to an intermediate motor vehicle and then transmitted through to the insured's vehicle, and where this physical contact may be confirmed in such a way as to provide safeguards against fraud, this purpose for the physical contact requirement is satisfied. *Id.*, at ¶ 25, citing Theis, 2000 WI 15 at ¶ 30, n. 10.

This Court further addressed the second public policy concern mandating UM insurance coverage in "hit-and-run" accidents as follows:

> An additional policy concern is that the purpose of the statutorily mandated uninsured motorist coverage in Wis. Stat. §632.32(4)(a) "is to compensate an injured person who is the victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured." Here, if the vehicle that negligently started the chain reaction collision had been identified and was insured, Smith could have recovered under that policy. Thus, by interpreting the statute to mandate coverage in the present case, Smith would be compensated "to the same extent as if the uninsured motorist was insured." *Id.*, at ¶ 26.

In this case it is undisputed that the unidentified motor vehicle hit Zachary Zarder's bicycle. Therefore, the public policy concern of fraud expressed in Smith is not present. Rather, the public policy concern of mandating UM coverage pursuant to Wis. Stat. §632.32(4)(a) prevails in this case.

Zarders have paid their premium payments to Acuity for UM insurance coverage. As mandated by Wis. Stat. §632.32(4)(a), damages sustained by Zarders as a result of an unidentified motor vehicle involved in a "hit-and-run" accident are recoverable by Zarders pursuant to their UM insurance coverage with Acuity.

Wisconsin case law (other than the Court of Appeals decision in Zarder) has not specifically addressed the "run" issue. However, the three elements constituting a "hit-and-run" accident are (1) an unidentified motor vehicle, (2) causes a "hit", and (3) "runs". See Smith, at ¶10. When an unidentified motorist leaves the scene of an accident, regardless of the speed of the unidentified motor vehicle, a "run" has occurred and an insurer is required to provide UM insurance coverage to its insureds. Whether or not the unidentified motorist stopped before leaving the scene of the accident is irrelevant. All three elements have occurred in this December 9, 2005 motor vehicle/bicycle accident involving Zachary Zarder. Therefore, Acuity is required to provide UM insurance coverage to the Zarders.

III. IN THE DECEMBER 9, 2005 AUTOMOBILE/BICYCLE ACCIDENT, THE UNIDENTIFIED MOTORIST WAS REQUIRED TO PROVIDE ZACHARY ZARDER WITH IDENTIFYING INFORMATION PURSUANT TO WIS. STAT. §346.67(1).

Wis. Stat. §346.67(1) states in relevant part:

> The operator of any vehicle involved in an accident resulting in injury to . . . any person or in damage to a vehicle which is driven . . . by any person shall immediately stop such vehicle at the scene of the accident . . . and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:
>
> (a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (b) The operator shall, upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person. *Id*.

Wis. Stat. §346.66 states, in part, that ". . . [346.67 to 346.70] do not apply to private parking areas at farms or single-family residences or to accidents involving **only**

snowmobiles, all-terrain vehicles or **vehicles propelled by human power** or drawn by animals." *Id*. (Emphasis added).

The December 9, 2005 automobile/bicycle accident did not involve **only** a bicycle. It involved a motor vehicle **and** a bicycle. Therefore, Wis. Stat. §346.67(1) applies to this type of accident.[2]

The unidentified motorist that caused the December 9, 2005 motor vehicle accident was required, pursuant to Wis. Stat. §346.67(1), to provide Zachary Zarder with identifying information before the unidentified motorist left the scene of the accident.

The fact that the New Berlin Police Department did not investigate the December 9, 2005 motor vehicle accident as a "hit-and-run" accident is irrelevant to whether or not Wis. Stat. §346.67(1) was violated.

Acuity argues at pages 36-37 of Petitioner's Brief that §632.32(4)(a)2.b. and §346.67 are not *in pari materia*.

This Court has stated, "*In pari materia* refers to statutes relating to the same subject matter or having the same common purpose. (Citation omitted). As a rule of statutory construction, *in pari materia* requires the Court to read, apply and construe statutes relating to the same

[2] Acuity's initial argument was that Wis. Stat. §346.67 could not apply because Zachary Zarder was operating a bicycle when it was struck by a motor vehicle, but Acuity has subsequently abandoned that argument. See, P-AP. 84.

subject matter together." Beard v. Lee Enterprises, Inc., 225 Wis.2d 1, 12 at n.7, 591 N.W.2d 156 (1999).

Regardless of whether or not §632.32(4)(a)2.b. and §346.67 are *in pari materia,* this Court is not prohibited from analyzing Wis. Stat. §346.67 when determining a definition for "run".

As indicated by the Court of Appeals,

> The hit-and-run statute, Wis. Stat. §346.67, provides the clearer guidance we seek as to what the legislature meant by the term "run" in "hit-and-run". The legislature is presumed to enact statutory provisions with full knowledge of existing laws. Hayne, 115 Wis.2d 84. When the legislature added the "hit-and-run" provision, subparagraph (4)(a)2.b., to the Omnibus statute, Wis. Stat. §632.32, the rules of the road chapter had included a hit-and-run statute for over twenty years. See §346.67 (1957); 1979 Wis. Act 102, § 171 (repealing Wis. Stat. §632.32 and recreating it with subsection (4)(a)2.b.). Therefore, we presume that the legislature had full knowledge of the requirements in the "hit-and-run" statute when it repeated that phrase in §632.32(4)(a)2.b."
> See Zarder at ¶ 30.

Acuity has previously argued that Zachary Zarder's "dismissal" of the unidentified motorist eliminates the unidentified motorist's duty from following the requirements of Wis. Stat. §346.67(1) and subsequently prevents Zachary Zarder from being provided UM insurance coverage from Acuity. See, P-Ap. 82.

In other words, Acuity wants this Court to punish its insured, Zachary Zarder (a 13-year old minor on the date of

the accident) for failing to comprehend the ramifications of not insisting upon identifying information before the unidentified motorist left the scene of the accident. However, no such statutory nor contractual duty has been placed upon Zachary Zarder.

The only relevant contractual duties placed upon Zarders by Acuity's insurance policy are as follows:

> **1**. A person claiming any coverage of this policy must:
>
> a. Cooperate with **us** and help **us** in any matter concerning a claim or suit. . . .
>
> **4**. A person claiming Uninsured Motorist coverage must notify the police within 24 hours of the accident if a hit-and-run driver is involved.
>
> (See P-AP 126, Petitioner's Brief and Appendix, Emphasis in original)

As indicated by Officer Jeffrey Kuehl's report, this automobile/bicycle accident was reported to the police on the date of the accident, December 9, 2005. See, pg. P-Ap. 98-103.

Zarders have satisfied their contractual duties to Acuity in this case.

Obviously, if the unidentified motorist would have provided correct identifying information to Zachary Zarder on December 9, 2005, this would not be a "hit-and-run" accident by an unidentified motorist. However, the

unidentified motorist remains unidentified in this case. Therefore, the Zarders should not be penalized, through a denial of UM insurance coverage by Acuity, for the unidentified motorist's failure to satisfy his statutory duty pursuant to Wis. Stat. §346.67(1).

IV. THE MAJORITY OF STATES THAT HAVE SPECIFICALLY ANALYZED THE "RUN" ISSUE IN A HIT-AND-RUN ACCIDENT HAVE PROVIDED UNINSURED MOTORIST COVERAGE TO CLAIMANTS IN SITUATIONS SIMILAR TO THE DECEMBER 9, 2005 MOTOR VEHICLE ACCIDENT.

Acuity urges this Court to follow the holdings in Connecticut, Minnesota and Washington that have denied UM insurance coverage to claimants who were injured by an unidentified motorist. Although Wisconsin courts are not bound by holdings in other jurisdictions, this Court should be aware that the jurisdictions set forth by Acuity are in the minority of states that have denied UM insurance coverage to a claimant when the unidentified motorist stops at the scene of an accident before leaving unidentified.

> *Unidentified Motorists Who Stopped at the Accident Scene*
>
> One group of cases has involved situations in which the "unknown" driver stopped after the collision, but could not be located later either because the claimant had failed to secure sufficient information from the other motorist or because the information provided by the other motorist turned out to be false. Insurance companies have sometimes argued that in instances in which the tortfeasor stops at the scene of the accident, but when for one reason or another not enough information is taken to locate the driver

> later, no claim can be asserted under the hit-and-run coverage provision. In these cases, insurance companies have urged that the insured could or should have fully ascertained the identity of the driver of the other vehicle at the scene of the accident.
>
> In contrast to the rigid and literal construction sometimes accorded the "physical contact" requirement in "hit-and-run" cases discussed in the preceding sections, courts have almost invariably rejected the insurer's arguments with respect to the failure of a claimant to ascertain the identity of the tortfeasor in these situations. Courts generally have not allowed insurance companies to restrict the coverage to situations when the unknown motorist flees the scene of the accident without stopping to give any opportunity for identification. In most of the cases in which an issue has been raised as to whether the claimant could or should have ascertained the identity of a hit-and-run motorist, the courts have concluded that the insured's failure did not preclude recovery. §9.10, *The requirement of an unascertainable driver or owner*, Uninsured and Underinsured Motorist Coverage, 3rd Edition, Allen I. Widiss and Jeffrey E. Thomas (2005) at pg. 691.

As indicated above, the majority of states provide UM insurance coverage to claimants that have been injured by an unidentified motorist who stops to check on an injured party in a "hit-and-run" accident. There are 14 such jurisdictions that for one reason or another have provided UM insurance coverage in accidents where a claimant could or should have ascertained the identity of a "hit-and-run" motorist. See *Id.*, at footnote 3, pg. 691-695. Examples of

two such jurisdictions that provided uninsured motorist coverage are Massachusetts and Pennsylvania.

In Commerce Insurance Company v. Mendonca, 57 Mass.App.Ct. 522, 784 N.E.2d 43 (Mass. App. Ct. 2003), the uninsured motorist claimant, Mendonca, was the passenger in a vehicle that was rear-ended by an unidentified motorist. The unidentified motorist then asked claimant if she was "OK" and when Mendonca answered she was, the unidentified motorist eventually left the scene of the accident without providing any identifying information. When Mendonca discovered she was injured by this motor vehicle accident, she made a UM claim with her insurance company, Commerce Insurance. Her insurer denied UM insurance coverage and sought a declaratory order denying coverage. Commerce was successful at the trial court level, but lost on appeal. At the appellate level, Commerce relied on Sylvestre and Lhotka, ironically, these are two of the minority cases that Acuity relies upon in this case to support their denial of UM insurance coverage to Zarders.

The Court of Appeals in Mendonca was not persuaded by Commerce's arguments and declared that UM insurance coverage existed for Mendonca because there was a "hit-and-run" accident. In reaching its decision to provide UM insurance coverage for this "hit-and-run" accident, the Court stated

as follows: “An injured person who is not aware of his injury until it is too late to take steps to make the necessary identification is in precisely the same situation of deprivation of remedy as he would be if he knew he were hurt but the other driver left the scene without opportunity to identify him.” *Id*. at 525.

The Court further stated that,

> Relying on jurisdictions that treat flight from the scene as the “focal element” of the term “hit and run”, Commerce argues that where, as here, the driver who caused the collision stopped, Mendonca cannot prove the “presumptatively at fault vehicle” was a “hit and run” auto. [Footnote 4 referencing cases cited by the insurer, Commerce.] This narrow interpretation effectively would leave a gap in mandated coverage by providing protection to a person injured by an identified, but uninsured, operator or by an operator whose post-accident flight prevents identification, while denying protection when the operator does not immediately flee but nevertheless leaves the accident without being identified. Such a coverage gap is contrary to the general purpose of legislatively mandated liability and uninsured motorist insurance, which is to give some measure of financial protection to persons injured by the negligent driving of others. *Id*., at 525-526.

In Binczewski v. Centennial Insurance Company, 354 Pa.Super. 229, 511 A.2d 845 (1986), “This case arose from a motor vehicle collision involving appellee Hyewon Binczewski. Appellee was involved in an automobile accident on January 11, 1984. The driver of the vehicle that struck Mrs. Binczewski’s car stopped to ask if she was hurt and

then immediately left the scene. No exchange of insurance information or names occurred. Soon after, a police officer arrived." See *Id*. at 230.

In the Binczewski case, the appeal of UM insurance coverage occurred after an arbitration panel awarded Binczewski a recovery. One of the arguments on appeal in Binczewski was that Mrs. Binczewski intentionally allowed the operator of the other vehicle to leave the scene. As stated by the Pennsylvania court, ". . . appellant [Centennial Insurance Company] claims that Mrs. Binczewski intentionally allowed the operator of the other vehicle to leave the scene of the accident without taking any information on the operator." *Id*.

The Court addressed this issue as follows:

> In the insurance policy issued by Centennial to Mrs. Binczewski, one of the definitions of an uninsured motor vehicle is "a hit and run vehicle whose operator or owner cannot be identified . . ." . . . This is precisely the class of motor vehicle which struck Mrs. Binczewski's automobile. The driver in this case stopped momentarily to ascertain whether appellee was in need of emergency assistance, but he is nonetheless a hit-and-run driver. He had a duty to "give his name, address and the registration number of the vehicle he (was) driving . . ." 75 Pa.Cons.Stat.Ann. Sec. 3744(a) (Purdon 1977). That he neglected that duty is no fault of appellee. *Id*. at 231.

The 2008 version of 75 Pa.Cons.Stat.Ann. §3744(a) (Purdon 2008) states that, "The driver of any vehicle

involved in an accident resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person **shall give his name, address and the registration number of the vehicle he is driving**, and shall upon request exhibit his driver's license and information relating to financial responsibility to any person injured in the accident . . ." *Id*. (Emphasis added).

The Mendonca and Binczewski cases both found insurers' arguments unpersuasive regarding their denial of UM insurance coverage arising from a "hit-and-run" accident by an unidentified motorist who stops following an accident but does not provide identifying information to a claimant.

As indicated by these cases, Pennsylvania and Massachusetts were not persuaded to create gaps in UM insurance coverage and shift the duty of providing identifying information from an unidentified "hit-and-run" driver to an injured claimant.

When applying Wis. Stat. §632.32(4) and Wis. Stat. §346.67(1) to the undisputed facts of this December 9, 2005 automobile/bicycle accident, this Court should reach a similar result, as set forth in the Mendonca and Binczewski cases, thereby mandating Acuity to provide UM insurance coverage to Zarders arising from damages they sustained as a

result of the December 9, 2005 automobile/bicycle "hit-and-run" accident.

CONCLUSION

Acuity's arguments are unpersuasive and rely primarily on dicta from Hayne.

Acuity urges this Court to apply relative terms such as "flees" or move "swiftly away" as definitions that must be met for an unidentified motorist to meet the "run" requirement in a "hit-and-run" accident. This standard would only lead to future UM insurance coverage disputes because these terms are susceptible to more than one reasonable meaning. A more appropriate definition of "run" is that a "run" exists whenever an unidentified motorist leaves the scene of the accident following a "hit". A temporary stop by the unidentified motorist is irrelevant. The "run" element has been met in this case, and Acuity is required to provide UM insurance coverage, as Zarders have satisfied their contractual and legal duties.

Zarders respectfully request this Court to affirm the decisions of the Court of Appeals, District II, and the Waukesha County Circuit Court's denial of Acuity's motion for declaratory judgment.

Respectfully submitted this 7th day of December, 2009.

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CERTIFICATION

I certify that this Response Brief and Appendix of Plaintiffs-Respondents Zarder conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this Response Brief is 24 pages.

Dated this 7th Day of December, 2009.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the Appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12). I further certify that this electronic Brief is identical to the text of the paper copy of the Brief. A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all parties.

Dated this 7th day of December, 2009.

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INDEX TO RESPONDENTS' APPENDIX

Westlaw.
511 A.2d 845
354 Pa.Super. 229, 511 A.2d 845

C
Binczewski v. Centennial Ins. Co.
Pa.Super.,1986.

Superior Court of Pennsylvania.
Hyewon BINCZEWSKI, Appellee,
v.
CENTENNIAL INSURANCE COMPANY, Appellant.
Argued April 3, 1986.
Filed June 16, 1986.

Insured sought uninsured motorist coverage after she was injured in automobile accident. The Court of Common Pleas, Philadelphia County, Civil No. 3559, White, J., awarded insured damages of $100,000, the full amount of the uninsured motorist coverage policy. Insurer challenged award. The Superior Court, No. 02644 Philadelphia 1985, Olszewski, J., held that: (1) for purpose of automobile collision victim's entitlement to uninsured motorist coverage, driver of offending vehicle, who stopped momentarily to ascertain whether victim was in need of emergency assistance, was nonetheless a "hit-and-run driver," and (2) automobile collision victim was entitled to uninsured motorist coverage.

Affirmed.

West Headnotes

[1] Insurance 217 ⇐2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases
(Formerly 217k467.51(4.1), 217k467.51(4))
For purpose of automobile collision victim's entitlement to uninsured motorist coverage, driver of offending vehicle, who stopped momentarily to ascertain whether victim was in need of emergency assistance, was nonetheless a "hit-and-run driver." 75 Pa.C.S.A. § 3744(a).

[2] Insurance 217 ⇐2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases
(Formerly 217k467.51(4.1), 217k467.51(4))
Automobile collision victim, who was struck by hit-and-run vehicle whose owner and operator could not be identified, even though he had stopped momentarily to ascertain whether victim was in need of emergency assistance, was entitled to uninsured motorist coverage, where victim notified police officer of driver's departure at scene of collision. 42 Pa.C.S.A. § 3744(a).

[3] Insurance 217 ⇐2786

217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(D) Uninsured or Underinsured Motorist Coverage
217k2785 Uninsured Motorists or Vehicles
217k2786 k. In General. Most Cited Cases
(Formerly 217k467.51(4.1), 217k467.51(4))
Nothing in insurance policy imposes duty upon insured to actively question driver of vehicle which struck her when driver almost instantaneously drove away and left no information, for purpose of entitlement to uninsured motorist coverage. 42 Pa.C.S.A. § 3744(a).

[4] Insurance 217 ⇐2694

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217 Insurance
217XXII Coverage--Automobile Insurance
217XXII(A) In General
217k2689 Evidence
217k2694 k. Weight and Sufficiency. Most Cited Cases
(Formerly 217k467.62)
Record, including result of examination by automobile insurer's physician, who could not state that automobile collision victim's injuries were not caused by accident, contained ample evidence to allow finder of fact to determine that victim suffered injuries which were caused by accident.

**846 *230 Francis T. McDevitt, Philadelphia, for appellant.
Ira B. Shrager, Philadelphia, for appellee.

Before McEWEN, OLSZEWSKI and KELLY, JJ.

OLSZEWSKI, Judge:
Appellant, Centennial Insurance Company ("Centennial"), challenges the denial of its petition to correct and modify an award of arbitrators. This case arose from a motor vehicle collision involving appellee Hyewon Binczewski. Appellee was involved in an automobile accident on January 11, 1984. The driver of the vehicle that struck Mrs. Binczewski's car stopped to ask if she was hurt and then immediately left the scene. No exchange of insurance information or names occurred. Soon after, a police officer arrived. At the time of the accident, appellee was insured by appellant. Following an arbitration hearing, a decision was rendered in favor of Mrs. Binczewski. She was awarded damages of $100,000,*231 the full amount of the uninsured motorist coverage in the policy issued to her by Centennial.

Centennial challenges this award on three grounds. First, appellant claims that Mrs. Binczewski intentionally allowed the operator of the other vehicle to leave the scene of the accident without taking any information on the operator. Appellant argues that because of this, appellee, as a matter of law, cannot prove that the accident was caused by an "uninsured motor vehicle." Appellant's second issue is merely an extension of the first. Appellant argues that, as a matter of law, it is entitled to a modification or correction of the award because appellee did not prove that an uninsured motor vehicle was involved. Finally, appellant argues that appellee's proofs as to damages were insufficient. We do not agree with any of appellant's contentions and affirm the order of the court below.

[1] In the insurance policy issued by Centennial to Mrs. Binczewski, one of the definitions of an uninsured motor vehicle is "a hit and run vehicle whose operator or owner cannot be identified...." Reproduced record at 14a. This is precisely the class of motor vehicle which struck Mrs. Binczewski's automobile. The driver in this case stopped momentarily to ascertain whether appellee was in need of emergency assistance, but he is nonetheless a hit-and-run driver. He had a duty to "give his name, address and the registration number of the vehicle he (was) driving...." 75 Pa.Cons.Stat.Ann. Sec. 3744(a) (Purdon 1977). That he neglected that duty is no fault of appellee.

[2][3] That portion of the insurance policy entitled "Duties After an Accident or Loss" states that "(a) person seeking Uninsured Motorists Coverage must also: 1. Promptly notify the police if a hit and run driver is involved. 2. Promptly send us copies of the legal papers if a suit is brought." Reproduced record at 11a. Under the policy issued by Centennial, Mrs. **847 Binczewski is entitled to coverage. Appellee was struck by a hit-and-run vehicle whose owner and operator cannot be identified. Appellee notified *232 the police officer at the scene of the collision. We agree with the lower court that nothing in the insurance policy imposes a duty upon appellee to actively question the driver of the vehicle which struck her "when the driver almost instantaneously drove away and left no information. The issue has not been discussed in Pennsylvania case law and we find the cases cited by petitioner, of other jurisdictions, to be unpersuasive." Lower

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court opinion at 2-3.

[4] We find appellant's final argument, that the medical evidence was insufficient to justify an award for damages, to be without merit. The record contains ample evidence to allow the finder of fact to determine that appellee suffered injuries which were caused by the accident, including the results of an examination by appellant's physician, who could not state that Mrs. Binczewski's injuries were not caused by the accident. The evidence was sufficient to support the damages awarded to appellee.

The order of the lower court is affirmed.

Pa.Super.,1986.
Binczewski v. Centennial Ins. Co.
354 Pa.Super. 229, 511 A.2d 845

END OF DOCUMENT

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Westlaw.

75 Pa.C.S.A. § 3744

Effective: [See Text Amendments]

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES
TITLE 75 PA.C.S.A. VEHICLES
PART III. OPERATION OF VEHICLES
CHAPTER 37. MISCELLANEOUS PROVISIONS
SUBCHAPTER C. ACCIDENTS AND ACCIDENT REPORTS

§ 3744. Duty to give information and render aid

(a) General rule.--The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving, and shall upon request exhibit his driver's license and information relating to financial responsibility to any person injured in the accident or to the driver or occupant of or person attending any vehicle or other property damaged in the accident and shall give the information and upon request exhibit the license and information relating to financial responsibility to any police officer at the scene of the accident or who is investigating the accident and shall render to any person injured in the accident reasonable assistance, including the making of arrangements for the carrying of the injured person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if requested by the injured person.

(b) Report of accident to police.--In the event that none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subsection (a) and no police officer is present, the driver of any vehicle involved in the accident after fulfilling all other requirements of section 3742 (relating to accidents involving death or personal injury) and subsection (a), in so far as possible on his part to be performed, shall forthwith report the accident to the nearest office of a duly authorized police department and submit to the police department the information specified in subsection (a).

(c) Duty of occupants if driver disabled.--Whenever the driver of a vehicle is physically unable to give the information or assistance required in this section and there are other occupants in the vehicle at the time of the accident who are physically able to give the information or assistance required in this section, each of the other occupants shall fully reveal the identity of himself and the identity of the driver of the vehicle and of the owner of the vehicle of which they are occupants and shall otherwise perform the duties of the driver as set forth in subsection (a).

Current through Act 2008-18

END OF DOCUMENT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(3)(b) and that it includes a table of contents.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of December, 2009.

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STATE OF WISCONSIN

SUPREME COURT

JAMES ZARDER, GLORY ZARDER, and
ZACHARY ZARDER, by Robert C. Menard,
Guardian Ad Litem,

Plaintiffs-Respondents,

v.

HUMANA INSURANCE COMPANY,

Defendant,

ACUITY, A MUTUAL INSURANCE COMPANY,

Defendant-Appellant-Petitioner.

District 2
Appeal No. 2008AP919
Case No. 07 CV 1146

Review of the February 18, 2009 Decision of the Wisconsin Court of Appeals, District II, Affirming an Order of the Circuit Court for Waukesha County, the Honorable Kathryn W. Foster Presiding, Denying the Motion for Declaratory Judgment of the Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER, ACUITY, A MUTUAL INSURANCE COMPANY

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ARGUMENT

I. THE DECEMBER 9, 2005 INCIDENT WAS NOT A "HIT-AND-RUN" ACCIDENT BECAUSE NO "RUN" OCCURRED.

The Zarders argue Wisconsin case law is wholly bereft of analysis of the meaning of "run" as that word is used in the term "hit-and-run" in an uninsured motorist context. In support of this position, the Zarders criticize ACUITY's reliance on this Court's decision in *Hayne v. Progressive Northern Insurance Company*, which ACUITY asserts provides a clear definition of the "run" component of the term "hit-and-run" for purposes of Wisconsin law. 115 Wis. 2d 68, 339 N.W.2d 588 (1983). Basically, the Zarders seek to limit *Hayne*'s controlling aspect by suggesting the discussion in *Hayne* regarding the meaning of "run" is dicta and is otherwise immaterial to this Court's analysis, claiming the *Hayne* court performed no analysis as to the meaning of "run." *See* Brief and Appendix of Plaintiffs-Respondents at 6.

The Zarders' assertion that the discussion of "run" in *Hayne* constitutes dicta because *Hayne* "provided no analysis to support its selection of the phrase 'fleeing from the scene of an accident' over other quoted definitions of 'hit-and-run,'" is incorrect. *Id.* First, the *Hayne* court did not simply select the phrase "fleeing from the scene of

an accident" from one of multiple dictionary definitions the court considered in attributing meaning to the term "hit-and-run." Rather, the *Hayne* court chose to accord "run" with "flee," despite the fact that none of the referenced dictionary definitions included "flee" in the "run" component of the term "hit-and-run." The fact that the *Hayne* court equated "run" with "flee" when considering less-than-identical definitions that did not, themselves, reference "flee" in connection with "run," lends credence to ACUITY's position that the *Hayne* court affirmatively sought to ascribe meaning to "run" and, further, shows the discussion of "run" was germane to the principal issue in *Hayne* and not dictum. *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981).

Second, the Zarders' contention ignores the *Hayne* court's efforts to assess the "legislature's intent" by according "hit-and-run" its "common and accepted meaning." *Hayne*, 115 Wis. 2d at 74 (citation omitted). Employing the referenced dictionary definitions, the *Hayne* court did just that, concluding specifically that the definitions "uniformly indicate that 'hit-and-run' includes two elements: a 'hit' or striking, **and a 'run,' or fleeing from the accident scene.**" *Id.* at 75 (emphasis added).

The Zarders further argue that to accord "run" with "fleeing from the scene of an accident" will require this Court to provide guidance in the future to what, exactly, is necessary for a "flee" to occur. *See* Brief and Appendix of Plaintiffs-Respondents at 7-8. On this point, the Zarders claim "flee" is a "relative" term "susceptible to numerous reasonable meanings," and brazenly contend that to accord "run" with "fleeing from the scene of an accident" would result in an increase in uninsured motorist insurance coverage disputes involving possible "hit-and-run" accidents "as there would be no logical 'bright line' view regarding when UM insurance coverage would apply or would not apply and, in many circumstances, would likely to lead to absurd results." *Id.*

In making this argument, the Zarders disregard the designed absence of a bright-line definition of the term "hit-and-run" in Wisconsin's Omnibus statute and flatly ignore this Court's commentary regarding the absence of a need for a bright-line rule as to the meaning of "hit-and-run." In *Hayne*, this Court concluded that the statutory language of Wis. Stat. § 632.32(4)(a)2.b. - including the term "hit-and-run" - is **unambiguous**. 115 Wis. 2d at 74. Citing to the legislative history of the same statute, this Court has acknowledged that "[a] precise definition of hit-

and-run is not necessary for in the rare cases where a question arises, the court can draw the line." *See Theis v. Midwest Sect. Ins. Co.*, 2000 WI 15, ¶ 18, 232 Wis. 2d 749, 606 N.W.2d 162. *Id.*

The instant case is not one of these "rare cases." It is undisputed there was no "flee" and in accordance with *Hayne*, absent a "fleeing," there can be no "run." Without a "run," there can be no "hit-and-run." Accordingly, insurance coverage to the Zarders is precluded.

Arguing there is no case law in Wisconsin construing "run" in a "hit-and-run" context, the Zarders seek to have this Court ignore *Hayne* altogether and, instead, ask this Court to "interpret Wisconsin statutes, specifically Wis. Stat. § 632.32(4)." *See* Brief and Appendix of Plaintiffs-Respondents at 9. In doing so, the Zarders - eschewing any statutory construction analysis - simply state that Section 632.32(4) does not define "hit-and-run" accident and, with that, the Zarders immediately turn their attention to the claimed "purpose of UM insurance coverage," as set forth in Section 632.32(4)(a)(1). *Id.* at 9-10. The Zarders argue that if uninsured motorist coverage is not available to insureds that are injured by unidentified motor vehicles in "hit-and-run" accidents, then insureds would be unable to seek recovery for damages caused by the unidentified

motorist's negligence, leaving a gap in insurance coverage. *Id.* at 10.

The Zarders' argument lacks coherency inasmuch as implicit in the argument is a contention that the ruling in ACUITY's favor will preclude wholly an award of uninsured motorist benefits to **all** insureds injured by unidentified motor vehicles in "hit-and-run" accidents. ACUITY is not asking this Court to endorse a denial of insurance coverage where injury results from a "hit-and-run" accident. Where a "hit-and-run" accident occurs and an unidentified motor vehicle otherwise satisfies the definition of "hit-and-run" vehicle as that phrase is used in an insurance policy and/or Wisconsin's Omnibus statute, coverage is warranted. Conversely, where no "run" occurs, there can be no "hit-and-run" accident and, likewise, no "hit-and-run" vehicle. In those case - of which, coincidentally, this case is one - uninsured motorist coverage ought to be precluded.

Citing to "public policy concerns" in *Smith v. General Casualty Insurance Company*, 2000 WI 127, 239 Wis. 2d 646, 619 N.W.2d 6 2d 882, the Zarders boldly assert "the public policy concern of mandating UM coverage pursuant to Wis. Stat. § 632.32(4)(a) prevails in this case." *See* Brief and Appendix of Plaintiffs-Respondents at 11. The Zarders provide no support for this assertion, apart from the

incredible claim that "[w]hen an unidentified motorist leaves the scene of an accident, regardless of the speed of the unidentified motor vehicle, a 'run' has occurred and an insurer is required to provide UM insurance coverage to its insureds." *Id.* at 12. The Zarders' position in this regard has no merit.

First, the position is contrary to the plain meaning of "hit-and-run." "Run" has not been defined, in *Hayne* or anywhere else, to simply mean "when an unidentified motorist leaves the scene of an accident."

Second, the Zarders' position is contrary to the meaning of "run" in *Hayne*, as well as extrajurisdictional case law authority detailed in ACUITY's Brief at pages 21 - 26. Here, the unidentified motorists attempted to render assistance to Zachary Zarder, and Zarder affirmatively acted to dismiss the occupants of the unidentified vehicle from the scene. It is undisputed there was no "flee" and, thus, there can be no "run." Without a "run," there can be no "hit-and-run." Accordingly, insurance coverage to the Zarders is precluded.

II. WISCONSIN STATUTE § 346.67 HAS NO APPLICATION TO THE PRESENT ACTION.

The Zarders argue the unidentified motorist involved in the December 2005 incident was required to provide

Zachary Zarder with identifying information in a manner consistent with that detailed in Wis. Stat. § 346.67(1). What the Zarders fail to state is how a failure to comply with § 346.67(1) impacts this Court's consideration of whether a "hit-and-run" accident occurred in the instant case.

ACUITY agrees that if the unidentified motorist provided identifying information to Zarder in manner consistent with Section 346.67, the present coverage issue would not be before this Court. At the same time, however, the fact that the unidentified motorist did not comply with Section 346.67 does not, in and of itself, command the result that a "hit-and-run" accident occurred.

The Zarders claim that by distinguishing the concept of "hit-and-run" in connection with the availability, if any, of uninsured motorist benefits under Wisconsin's Omnibus statute from the identification requirements of Section 346.67, ACUITY is aiming to punish Zarder "for failing to comprehend the ramifications of not insisting upon identifying information before the unidentified motorist left the scene of the accident." *See* Brief and Appendix of Plaintiffs-Respondents at 16. This is not the case.

An analysis of whether a "run" occurred in the present matter puts the focus squarely on the actions of the unidentified driver and despite the Zarders' contrary contention, creates no duty and/or obligation on the part of Zachary Zarder. This is the case, whether the analysis is based on *Hayne* or Section 346.67.

The requirements detailed in Section 346.67, however, have no application to this matter because there is nothing in the statute that accords its language with the language of the Omnibus statute. The Omnibus statute and Section 346.67 appear in different chapters of the Wisconsin Statutes and relate to different subject matters. Section 346.67 is contained within statutory provisions governing Wisconsin's Rules of the Road and details requirements for the operator of a vehicle, the failure to follow which may result in criminal penalties. The Omnibus statute, on the other hand, concerns insurance law and has as its purpose, not the enforcement of criminal laws, but, rather, the provision of coverage to the insured and compensation to victims of automobile accidents.

Section 346.67 is not significant in the Court's analysis of the instant case. *Hayne* controls and precludes a finding of insurance coverage to the Zarders.

III. EXTRAJURISDICTIONAL AUTHORITY RELIED UPON BY THE RESPONDENTS DOES NOT SUPPORT THE RESPONDENTS' POSITION AS THE "MAJORITY" POSITION IN SIMILARLY-SITUATED FACT SCENARIOS AND, MOREOVER, WILL NOT PERMIT A FINDING A "HIT-AND-RUN" ACCIDENT OCCURRED ON DECEMBER 9, 2005.

The Zarders claim that extrajurisdictional authority relied on by ACUITY equates with "the minority of states that have denied UM insurance coverage to a claimant when the unidentified motorist stops at a scene of an accident before leaving unidentified." *See* Brief and Appendix of Plaintiffs-Respondents at 17. Conversely, the Zarders argue that their position is consistent with the majority of states that have analyzed issues similarly situated to the present action. As noted in ACUITY's Brief and Appendix, a review of the second source materials submitted by the Zarders reveals the contrary. *See* Brief and Appendix of Defendant-Appellant-Petitioner at 27-28.

Of the cases detailed in connection with the Zarders' proposition, eighteen are described in relative detail. Of the eighteen cases with detailed descriptions, seven of the cases relate to the provision of false information by the unidentified motorist - a circumstance not present here - while the balance of the cases are factually dissimilar to the instant case, be it due to the absence of a means of learning the identity of the alleged hit-and-run driver or

the near instantaneous manner in which the unidentified motorist left the scene.

Though the Zarders purport to argue the majority position, they cite in support of their Response only two cases, *Commerce Insurance Company v. Mendonca*, 57 Mass. App. Ct. 522, 784, N.E.2d 43 (Mass. App. Ct. 2003) and *Binczewski v. Centennial Insurance Company*, 354 Pa.Super 229,511 A.2d 845(Penn. Super. Ct. 1986). As with the other cases the Zarders claim support their arguments, the decisions in *Mendonca* and *Binczewski* are distinguishable from the present matter.

Mendonca involved an uninsured motorist claimant, Mendonca, who was a passenger in a car that was stopped for a red light when it was struck from behind by another vehicle. 57 Mass. App. Ct. at 522. As detailed in ACUITY's Brief and Appendix, to conclude flight is **not** an indispensible element of "run", the *Mendonca* court relied on Massachusetts courts' nonliteral approach to the meaning of "hit-and-run" as support for its decision. *See* Brief and Appendix of Defendant-Appellant-Petitioner at 28-29 (citing *Mendoca* at 524). Specifically, the *Mendonca* court relied on a decision that rejected a literal interpretation of "hit-and-run" and concluded that "physical contact is not part of the usual and accepted meaning of the term." *Id.* (citing

Surrey v. Lumbermens Mut. Cas. Co., 384 Mass. 171, 176, 424 N.E.2d 234 (1981)).

Such an analysis is inconsistent the more literal approach to the meaning of the term "hit-and-run" taken by Wisconsin courts. Wisconsin courts have established the term "unambiguously includes an element of physical contact[.]" *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶15, 734 N.W.2d 394. Employing the inverse of the methodology of the *Mendonca* court, then, *Hayne* and its definition of "hit-and-run" exist as ample authority for the proposition that Wisconsin treats flight as an indispensable element of "run."

Moreover, there was no evidence in *Mendonca* that the unidentified motorist was reassured that there was neither injury nor damage, only that the operator of the vehicle in which Mendonca was a passenger spoke with the unidentified motorist and agreed there was no significant damage to the vehicles. Here, conversely, the occupants of the unidentified vehicle stopped, attempted to provide aid to Zachary Zarder, and Zarder affirmatively acted to dismiss the unidentified motorists from the scene of the accident.

As with *Mendonca*, *Binczewski* has no application in the present action. 354 Pa.Super 229, 511 A.2d 845 (Penn. Super. Ct. 1986). As noted in ACUITY's Brief and Appendix,

though the very limited set of undisputed facts in *Binczewski* may appear similar to those in the present action, the *Binczewski* decision provides no insight into how this Court should analyze the present mater. *See* Brief and Appendix of Defendant-Appellant-Petitioner at 30-32.

First, there is no mention in *Binczewski* as to how the *Binczewski* court, or Pennsylvania courts, generally, define the term "hit-and-run," be it in an uninsured motorist context or any other context. In addition, the matter before the *Binczewski* court was one of first impression and one in which the *Binczewski* court relied on Pennsylvania's criminal hit-and-run driver statute to arrive at its conclusion, an approach that as noted above, is improper in the instant case.

As noted above, to conclude the historical facts give rise to a "hit-and-run" requires a "run," or "fleeing" from the scene of the accident. Because the operator of the unidentified vehicle stopped at the scene and inquired as to the well-being of Zachary Zarder, there was no "flee," and thus, pursuant to *Hayne*, no "run." Consequently, there is no "hit-and-run," precluding a finding of insurance coverage in favor of the Zarders.

CONCLUSION

For the arguments stated herein and the authority cited above, Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company, respectfully requests this Court reverse the ruling of the lower courts regarding the denial of ACUITY's Motion for Declaratory Judgment. Should the matter be remanded, ACUITY requests the Circuit Court be directed to enter an Order granting ACUITY's Motion for Declaratory Judgment.

Dated at Waukesha, Wisconsin this 18th day of December, 2009.

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CERTIFICATION

I certify that this Reply Brief of Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this Brief is thirteen (13) pages.

Dated at Waukesha, Wisconsin this 18th day of December, 2009.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, which complies with the requirements Wis. Stat. §809.19(12). I further certify that this electronic Brief is identical to the text of the paper copy of the Brief. A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all parties.

Dated at Waukesha, Wisconsin this 18th day of December, 2009.

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STATE OF WISCONSIN
SUPREME COURT
2008AP919

JAMES ZARDER, GLORY ZARDER, and ZACHARY ZARDER, by Robert C. Menard, Guardian Ad Litem,

Plaintiffs-Respondents,

v.

HUMANA INSURANCE COMPANY,
Defendant,

ACUITY, A MUTUAL INSURANCE COMPANY,
Defendant-Appellant-Petitioner.

Appeal No. 2008AP919

Cir. Ct. Case No. 07 CV 1146

Review of a February 18, 2009 Decision of the Wisconsin Court of Appeals, District II, Affirming an Order of the Circuit Court for Waukesha County, the Honorable Kathryn W. Foster Presiding

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INTRODUCTION

The issue in this case is whether Zachary Zarder is entitled to Uninsured Motorist (UM) benefits under the terms of Acuity's insurance policy and/or the omnibus insurance statute. Zachary was struck by an unidentified motor vehicle while riding his bike. The driver of the vehicle briefly stopped and then fled the scene without providing identifying information. This Court must decide whether such an unidentified motor vehicle constitutes a "hit-and-run" vehicle.

The Wisconsin Association For Justice ("WAJ") respectfully submits that the phrase "hit-and-run" vehicle can reasonably be read—and should be read—to include an unidentified vehicle that strikes an insured, whose operator is unknown, and who flees the scene of an accident without providing identifying information. No Wisconsin case or statute limits the definition of "hit-and-run" to an accident involving an unidentified vehicle that "immediately flees" the scene of an accident. Such a result would be contrary to the purpose of "hit-and-run" UM insurance—to provide the victim of an accident compensation where the tortfeasor driver cannot be identified. This result is supported by the common, ordinary meaning of

the term "hit-and-run," as well as its use in Wisconsin's omnibus insurance statute, and the requirements of Wisconsin's criminal "hit-and-run" statute.

Hayne v. Progressive Northern Insurance Co., 115 Wis. 2d 68, 339 N.W.2d 588 (1983), is not dispositive because, although the Court equated "running" with "fleeing," the Court never defined the term "flee" and never addressed *when* a "flee" must occur. "Flee," can mean either leaving an area with haste or leaving an area when required by law to stay. Because Wisconsin law requires a motorist to stay at a scene of an accident and furnish identifying information to the injured driver, "fleeing" is properly interpreted as leaving a scene without providing such information.

Therefore, WAJ respectfully requests that this Court hold that an unidentified vehicle whose operator fails to provide identifying information before leaving the scene of an accident constitutes a "hit-and-run" vehicle within the meaning of Acuity's policy and Wis. Stat. § 632.32(4)(a)2.b[1]—regardless of whether and how long the driver may "stop" at the scene.

BACKGROUND

Zachary Zarder was seriously hurt after being struck by an unidentified vehicle while riding his bicycle. The occupants of the

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

unidentified vehicle fled the scene without providing any identifying information after briefly stopping to inquire as to Zachary's well-being. Zarder v. Humana Ins. Co., 2009 WI App 34, ¶¶ 2-4, 316 Wis. 2d 573, 765 N.W.2d 839. Zachary's parents made a claim for UM benefits under their policy with Acuity. The policy states that an "uninsured motor vehicle" includes "a hit and run vehicle whose operator or owner in unknown." "Hit and run" is not defined. Acuity denied coverage because the unidentified driver briefly stopped before leaving the scene of the accident. Id., ¶¶ 5-6.

ARGUMENT

I. THE TERM "HIT-AND-RUN" IN ACUITY'S POLICY IS NOT LIMITED TO A VEHICLE THAT IMMEDIATELY FLEES THE SCENE OF AN ACCIDENT.

Acuity argues the term "hit-and-run vehicle" in its policy means a vehicle that immediately flees the scene of an accident without ever stopping. There is nothing in the text of its policy, Wisconsin case law, or Wisconsin statutes that support this restricted definition of the phrase. Rather, the term "hit-and-run vehicle" can be reasonably interpreted to include a vehicle operated by a driver that temporarily stops at the scene of the accident but then flees without providing any identifying information.

A. The Term "Hit-and-Run Vehicle" Can Reasonably Be Interpreted to Mean a Motor Vehicle Whose Operator Flees The Scene of an Accident Without Identifying Himself.

Because the phrase "hit-and-run vehicle" is undefined in Acuity's policy, this Court must apply the common, ordinary meaning of that phrase as understood by a reasonable insured. See State Farm Mut. Auto. Ins. Co. v. Rechek, 125 Wis. 2d 7, 10, 370 N.W.2d 787 (Ct. App. 1985). To this end, "the test is not what the insurer intended its words to mean but what a reasonable person in the position of an insured would have understood the words to mean." McPhee v. Am. Motorists Ins. Co., 57 Wis. 2d 669, 676, 205 N.W.2d 152 (1973).

If there are two competing reasonable interpretations of a word or phrase, the policy is ambiguous. "Whatever ambiguity exists in a contract of insurance is resolved in favor of the insured." Caporali v. Washington National Insurance Co., 102 Wis. 2d 669, 666, 307 N.W.2d 218, 221 (1981).

Zarder and General Casualty have presented this Court with a series of foreign cases that take differing approaches as to whether the term "run" requires fleeing after an accident without stopping or fleeing after an accident without providing identifying information. Clearly, there is a split

of judicial authority on the issue and reasonable courts have reached different conclusions. As the New Hampshire Supreme Court astutely noted in Wilson v. Progressive Northern Insurance Company, 868 A.2d 268, 274 (N.H. Sup. Ct. 2005): "First, a hit-and-run vehicle can be construed as a vehicle that does not stop at the scene of an accident. . . . Alternatively, a vehicle that stops at the scene of the accident but then leaves before the driver provides identifying information may also be considered a hit-and-run vehicle."

Notably, the Court in Hayne recognized that the phrases "hit-and-run" and "hit-and-run driver" have several definitions, including:

- a person "guilty of leaving the scene of an accident without stopping . . . to comply with legal requirements";
- "one that hits and runs away; esp. a hit-and-run driver";
- "the driver of a vehicle who illegally continues on his way after hitting a pedestrian or other vehicle."

Hayne, 115 Wis. 2d at 73 (emphasis added).

As discussed below, Wisconsin's "legal requirements" under these circumstances include both stopping at the scene and furnishing several pieces of identifying information to the injured person. Therefore, as applied to the facts of this case, the term "hit-and-run" in Acuity's policy is

reasonably susceptible to more than one meaning, and, as such, is ambiguous, and must be construed in favor of coverage.

B. No Wisconsin Case Requires a "Hit-and-Run" Vehicle to "Immediately Flee" the Scene of an Accident.

Contrary to Acuity's assertions, no Wisconsin case holds that the term "hit-and-run" requires the immediate flight of an unidentified vehicle from the scene of an accident in order for there to be a "run." Other than the Court of Appeals opinion below, no Wisconsin case has even addressed the issue. Instead, Wisconsin courts have consistently used the word "run" in a general sense of leaving the scene of an accident—without describing *when* the run must occur. Smith v. Gen. Cas. Ins. Co., 2000 WI 127, ¶ 10, 239 Wis. 2d 646, 619 N.W.2d 882.

1. *Hayne* is not dispositive because the Court never defined the word "flee" and never addressed at what point "fleeing" must occur.

The parties spend a significant amount of time discussing whether the language in Hayne that refers to "fleeing" is dicta. WAJ respectfully submits that this misses the point. Regardless of whether Hayne's "fleeing" language is binding or not, the fact remains that neither Hayne nor any other decision in Wisconsin sets forth the point in time at which a vehicle must "flee" to be considered a "hit-and-run vehicle."

The admitted "sole issue" in Hayne was whether the word "hit" in the phrase "hit-and-run" requires physical contact between two vehicles. Hayne, 115 Wis. 2d at 69. Hayne discussed several definitions of the phrase "hit-and-run" and determined all definitions had two components: "a 'hit' or striking, and a 'run', or fleeing from the scene of the accident." Id. at 73-74.

The Court in Hayne did not elaborate as to what "fleeing" means or address *when* a vehicle must flee in order to be a "hit-and-run vehicle." The Court did not consider whether "fleeing" means leaving the scene of an accident immediately or leaving the scene of an accident without providing identifying information. Hayne had no reason to do so, as the only issue it addressed was whether the phrase "hit-and-run vehicle" contained a physical contact requirement. Hayne's discussion of "run" and "fleeing" was merely incidental to its analysis of the meaning of "hit."

Thus, even acknowledging that Hayne equated the word "run" with "fleeing," Hayne does not resolve this case.

2. The word "flee" itself has multiple definitions and is ambiguous as applied to the facts of the present case.

Just as the word "run" can have multiple meanings when used in the phrase "hit-and-run," the dictionary definition of "flee" reveals that it can

be understood in two different fashions: "1. To run away, as from trouble or danger. 2. To pass swiftly away." The American Heritage College Dictionary at 529 (4th Ed. 2004). These definitions of the word "flee" mirror the dictionary definitions the Hayne court noted for the term "run." See Hayne, 115 Wis. 2d at 73. Both can be understood to mean leaving a place to avoid "legal requirements" and "trouble," or to leave a place "swiftly," "without stopping."

Indeed, people commonly use the word "flee" to refer both to the act of leaving an area quickly and to the act of leaving an area under circumstances where the person is required to remain there by law. For instance, people commonly refer to a criminal "fleeing the scene of a crime." However, a person can "flee" even if he has momentarily "stopped." No one can reasonably argue that a driver who pulls over to the side of the road after being chased by a police car but then speeds away after the officer exits the vehicle did not "flee" the scene—notwithstanding the momentary stop.

Because the terms "hit-and-run" and "flee" are ambiguous and a reasonable interpretation of both supports the insured's position, Acuity's policy should be construed to provide coverage for Zachary.

II. SECTION 632.32(4)(a) SHOULD BE INTERPRETED TO COVER AN ACCIDENT WHERE AN UNKNOWN DRIVER LEAVES THE SCENE WITHOUT PROVIDING IDENTIFYING INFORMATION.

The version of Wisconsin's omnibus insurance statute that was in effect at the time Zachary was hit, § 632.32(4)(a)2.b., required all polices of insurance to include coverage for injures caused by an "uninsured motor vehicle," which it defined to include "a vehicle involved in a hit-and-run accident." The statute did not define the term "hit-and-run accident" and, like Acuity's policy, it is ambiguous as to whether it applies to the present fact scenario.

Instead, the Wisconsin Legislature left it up to the courts to decide how that phrase should be applied on a case-by-case basis. Theis v. Midwest Sec. Ins. Co., 2000 WI 15, ¶ 28, 232 Wis. 2d 749, 606 N.W.2d 162; Legislative Council Note in § 632.32, ch. 102, Laws of 1979. As such, this Court must examine the scope, context, and purpose of the § 632.32(4)(a)2.b., as well as the language of surrounding statutes to arrive at a reasonable meaning and avoid absurd results. State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

A. The Purpose, Context and Scope of § 632.32(4)(a)2.b Supports Construing "Hit-and-Run Accident" as One Where a Vehicle Leaves the Scene of an Accident Without Providing Identifying Information.

The "primary purpose" of the UM requirement in § 632.32(4)(a) is "to compensate an injured person who is the victim of an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured." Theis, 232 Wis. 2d 749, ¶ 28. As applied to "hit-and-run" accidents, UM coverage provides an insured compensation when he is unable to identify the tortfeasor-driver and the tortfeasor's insurer. Smith, 239 Wis. 2d 646, ¶ 26 (The purpose of UM insurance is furthered by providing coverage because "if the vehicle that negligently started the chain reaction collision had been identified and was insured, Smith could have recovered under that policy.") (emphasis added).

Thus, the purpose of "hit-and-run" UM coverage is frustrated if an injured person is denied compensation simply because the driver of an unknown vehicle momentarily stops after an accident. The important consideration is whether the tortfeasor can be identified, not whether the tortfeasor "stopped" for any given period of time. See id.

Likewise, the context and scope of the statute supports providing compensation to an injured person in these circumstances. The phrase "hit-

and-run accident" in § 632.32(4)(a)2.b. is immediately preceded by the phrase "an unidentified vehicle." Thus, the focus should be on whether the driver of the vehicle involved in the accident provided identifying information—not whether the driver "ran" or "fled" within some arbitrary period of time. Therefore, an accident involving a driver who "runs" without identifying himself should fall within the definition of "hit-and-run," even if the driver momentarily stops.

B. The Criminal "Hit-and-Run Statute" Supports Construing "Hit-and-Run Accident" as One Where a Vehicle Leaves the Scene of an Accident Without Providing Identifying Information.

Wisconsin Stat. § 346.67, part of Wisconsin's "Rules of the Road," is also helpful in resolving the ambiguity in the definition of "hit-and-run." This statute creates Wisconsin's criminal "hit-and-run offense" and sets forth the legal obligations of a Wisconsin motorist upon striking another person or vehicle. State ex rel. McDonald v. Douglas County Circuit Court, 100 Wis. 2d 569, 574, 580, 302 N.W.2d 462 (1981).

The statute requires, inter alia, that the driver "stop . . . at the scene of the accident" and that "[t]he operator . . . give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle

collided with[.]" Wisconsin Stat. § 346.67(1)(a). The statute also requires the driver to identify himself as the operator of the vehicle. Wuteska, 303 Wis. 2d 646, ¶ 13.

Its purpose is to "require the disclosure of information so that responsibility for the accident may be placed." State v. Wuteska, 2007 WI App 157, ¶ 15, 303 Wis. 2d 646, 735 N.W.2d 574. Violation of the statute is a felony. McDonald, 100 Wis. 2d at 580.

The statute is relevant because the definitions of "hit-and-run" and "flee" mentioned supra refer to a driver "illegally contin[uing] on his way" to "run[] away . . . from trouble," and who fails to "comply with legal requirements." Hayne, 115 Wis. 2d at 73 (emphasis added). Section 346.67 sets forth those "legal requirements" in Wisconsin and provides that a driver "illegally continues on his way" if he fails to provide identifying information to the person struck. Because the driver who struck Zachary failed to provide identifying information before fleeing, Zachary's accident was a "hit-and-run accident."

C. The Policy Embodied in the Recent Changes to Wis. Stat. § 632.32 Support the Court of Appeals' Decision.

Although not in effect at the time of Zachary's accident, the recent amendments to the omnibus insurance statute are relevant in that they are

an indication of Wisconsin's current public policy as to UM coverage. See 2009 Wis. Act. 28, § 3155. While newly enacted Wis. Stat. § 632.32(2)(g) does not define "hit-and-run accident," it does expand the definition of "uninsured motor vehicle" to include "an unidentified motor vehicle, provided that an independent 3rd party provides evidence in support of the unidentified motor vehicle's involvement in the accident." Wis. Stat. § 632.32(2)(g)2.[2]

Thus, the new statute includes an unidentified "miss-and-run" vehicle within the definition of "uninsured motor vehicle." This addition supports the notion that the focus of term "hit-and-run" should be on whether the tortfeasor-driver is unidentified—not how quickly the motorist fled. Indeed, it would be quite odd if § 632.32(2)(g)2. were interpreted to require UM coverage when an unidentified vehicle never makes contact with an insured vehicle but not to require coverage where an unidentified vehicle actually hits the insured vehicle but momentarily stops before fleeing.

[2] It is undisputed that Zachary's accident was witnessed by third parties who observed the occupants of the unidentified vehicle briefly stop and then flee the scene.

D. It is Unreasonable to Deny UM Coverage Based an Unidentified Driver's Felonious Behavior.

Under Acuity's position, a vehicle involved in an accident whose driver pauses momentarily, rolls down the window, and yells out "are you ok" to the victim before leaving would not be a "hit-and-run" vehicle. Likewise, a vehicle in an accident that spins out and comes to a complete stop for any period of time before speeding off would not be a "hit-and-run" vehicle. Despite the fact that such behavior would violate the criminal hit-and-run statute, Acuity would have the Court rule that these are not "hit-and-run accidents" under § 632.32(4)(a)2.b.

Momentarily stopping at the scene of an accident, whether for two seconds or two minutes, does no one any good if the driver never identifies himself to the victim so that insurance coverage can be determined. As noted, the purpose of the felony "hit-and-run" statute is "to require the disclosure of information so that responsibility for the accident may be placed." Wuteska, 303 Wis. 2d 646, ¶ 15. Likewise, the purpose of mandatory hit-and-run UM coverage is to provide a victim with the same amount of coverage he would have if the tortfeasor were identified and had insurance. Smith, 239 Wis. 2d 646, ¶ 26. It is simply absurd, unreasonable, and inherently inequitable to deny UM coverage to the

victim of a hit-and-run accident based on the felonious behavior of a tortfeasor driver who violates § 347.67.

CONCLUSION

Therefore, WAJ respectfully requests that this Court affirm the Court of Appeals' decision and hold that an unidentified vehicle that strikes the insured, whose operator is unknown, and who fails to stop and provide identifying information at the scene of an accident constitutes a "hit-and-run vehicle."

Dated in Madison, Wisconsin this 21st day of January, 2010.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes).

The length of this brief is 2947words.

ELECTRONIC FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: January 21, 2010.

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