

**RECEIVED**

STATE OF WISCONSIN **12-10-2009**

SUPREME COURT

**CLERK OF SUPREME COURT  
OF WISCONSIN**

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

District 2  
Appeal No. 2008AP919

Plaintiffs-Respondents

Waukesha County Circuit  
Court Case  
No. 07CV1146

-vs-

HUMANA INSURANCE COMPANY,

Defendant,

ACUITY, A MUTUAL INSURANCE  
COMPANY,

Defendant-Appellant-Petitioner.

-----  
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 PLAINTIFFS-RESPONDENTS ZARDER**

-----  
WAGNER LAW FIRM, S.C.  
LUKE M. WAGNER  
Attorney for Plaintiffs/  
Respondents  
393 Red Cedar Street  
Suite 1  
Menomonie, WI 54751  
(715)235-6400  
Wisconsin State Bar  
No. 1056153

DERZON & MENARD, S.C.  
By Robert Menard  
400 West Wisconsin Avenue  
Suite 500  
Milwaukee, WI 53202  
(414) 276-2100  
Wisconsin State Bar  
No. 1012866

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CASES, STATUTES AND OTHER AUTHORITY . . .	ii
STATEMENT OF ISSUES. . . . .	1
STATEMENT OF THE CASE. . . . .	1
INTRODUCTION . . . . .	2
FACTS. . . . .	3
ARGUMENT	
I.    STANDARD OF REVIEW . . . . .	4
II.   THE DECEMBER 9, 2005 AUTOMOBILE/BICYCLE ACCIDENT WAS A "HIT-AND-RUN" ACCIDENT PURSUANT TO WISCONSIN LAW, SPECIFICALLY WIS. STAT. §632.32(4). . . . .	4
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). . . . .	13
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 . . . . .	17
CONCLUSION . . . . .	23

**TABLE OF CASES, STATUTES AND OTHER AUTHORITY**

<b><u>Case Name</u></b>	<b><u>Page No.</u></b>
<b><u>Wisconsin</u></b>	
<u>Beard v. Lee Enterprises, Inc.</u> , 225 Wis.2d 1, 591 N.W.2d 156 (1999) . . . . .	14, 15
<u>Folkman v. Quamme</u> , 2003 WI 116, 264 Wis.2d 617, 665 N.W.2d 857. . . . .	4
<u>Hayne v. Progressive Northern Insurance Co.</u> , 115 Wis.2d 68, 339 N.W.2d 588 (1983). . . . .	1, 5, 6, 7, 15, 23
<u>Smith v. General Casualty Insurance Company</u> , 2000 WI 127, 239 Wis.2d 646, 619 N.W.2d 882 . . . . .	4, 10, 11, 12
<u>State v. Sartin</u> , 200 Wis.2d 47, 546 N.W.2d 449 (1996). . . . .	5
<u>Teschendorf v. State Farm Ins. Companies</u> , 293 Wis.2d 123, 717 N.W.2d 258, 2006 WI 89. . . . .	4, 8
<u>Theis v. Midwest Sec. Ins. Co.</u> , 2000 WI 15, 232 Wis.2d 749, 606 N.W.2d 163. . . . .	4, 11
<u>Zarder v. Humana Insurance Company</u> , 2009 WI App. 34, 316 Wis.2d 573, 765 N.W.2d 839. . . . .	1, 5 8, 12, 15
<b><u>Other Jurisdictions</u></b>	
<u>Binczewski v. Centennial Insurance Company</u> , 354 Pa.Super. 229, 511 A.2d 845 (1986). . . . .	20, 21, 22
<u>Commerce Insurance Company v. Mendonca</u> , 57 Mass. App. Ct. 522, 784 N.W.2d 43 (Mass. App. Ct. 2003) . . . . .	20, 21, 22
<u>Lhotka v. Illinois Farmers Insurance Company</u> , 572 N.W.2d 772 (Minn. Ct. App. 1998). . . . .	19

<u>Sylvestre v. United Services Automobile Assoc. Casualty Ins. Co.</u> , 240 Conn. 544, 692 A.2d 1254 (Conn. 1997). . . . .	19
---	----

**Statutes**

**Wisconsin**

Wis. Stat. §346.66. . . . .	13
Wis. Stat. §346.67(1) . . . . .	1, 13, 14, 15, 17, 22
Wis. Stat. §632.32(4) . . . . .	1, 4, 5, 6, 9, 10, 11, 12, 14, 22

**Other Jurisdictions**

75 Pa.Cons.Stat.Ann. §3744(a) . . . . .	21, 22
---	--------

**Secondary Sources**

<u>Uninsured and Underinsured Motorist Coverage</u> , 3 <sup>rd</sup> Edition, Allen I. Widiss and Jeffrey E. Thomas (2005). . . . .	17, 18
--	--------

**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".<sup>1</sup> 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"

---

<sup>1</sup> 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.<sup>2</sup>

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

---

<sup>2</sup> 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*, 3<sup>rd</sup> 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 "presumptively 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 7<sup>th</sup> day of December, 2009.

WAGNER LAW FIRM, S.C.

By /s/ Luke M. Wagner  
LUKE M. WAGNER  
Attorney for Respondents  
393 Red Cedar Street, Suite 1  
Menomonie, Wisconsin 54751  
(715) 235-6400  
WI State Bar No. 1056153

DERZON & MENARD, S.C.  
By Robert Menard  
400 East Wisconsin Avenue  
Suite 500  
Milwaukee, Wisconsin 53202  
(414) 276-2100  
WI State Bar No. 1012866

**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 7<sup>th</sup> Day of December, 2009.

WAGNER LAW FIRM, S.C.

By /s/ Luke M. Wagner

LUKE M. WAGNER

Attorney for Plaintiffs/Respondents

393 Red Cedar Street, Suite 1

Menomonie, Wisconsin 54751

(715) 235-6400

Wisconsin State Bar No. 1056153

DERZON & MENARD, S.C.

By Robert Menard

400 East Wisconsin Avenue

Suite 500

Milwaukee, Wisconsin 53202

(414) 276-2100

Wisconsin State Bar No. 1012866

**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 7<sup>th</sup> day of December, 2009.

WAGNER LAW FIRM, S.C.

By /s/ Luke M. Wagner  
LUKE M. WAGNER  
Attorney for Plaintiffs/Respondents  
393 Red Cedar Street, Suite 1  
Menomonie, Wisconsin 54751  
(715) 235-6400  
Wisconsin State Bar No. 1056153

DERZON & MENARD, S.C.  
By Robert Menard  
400 East Wisconsin Avenue  
Suite 500  
Milwaukee, Wisconsin 53202  
(414) 276-2100  
Wisconsin State Bar No. 1012866