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

Grady, Hayes & Neary, LLC
Attorneys for Defendant-Appellant-Petitioner,
ACUITY, A Mutual Insurance Company

Lance S. Grady
WI State Bar No. 1012521
lsg@ghnlawyers.com
Daniel K. Miller
WI State Bar No. 1041473
dkm@ghnlawyers.com

ADDRESS:
N14 W23777 Stone Ridge Drive
Suite 200
Waukesha, WI 53189

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITY

Case Name **Page Number**

Wisconsin

Minnesota

New Hampshire

Pennsylvania

Washington

Statutes:

Wisconsin

Secondary Sources:

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.

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

By:_____/s/_____
Lance S. Grady
lsg@ghnlawyers.com
State Bar No. 1012521
Daniel K. Miller
dkm@ghnlawyers.com
State Bar No. 1041473

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

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.

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

By:_____/s/_____
Lance S. Grady
lsg@ghnlawyers.com
State Bar No. 1012521
Daniel K. Miller
dkm@ghnlawyers.com
State Bar No. 1041473

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

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.

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

By:_____/s/_____
Lance S. Grady
lsg@ghnlawyers.com
State Bar No. 1012521
Daniel K. Miller
dkm@ghnlawyers.com
State Bar No. 1041473

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

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.

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

By:_____/s/_____
Lance S. Grady
lsg@ghnlawyers.com
State Bar No. 1012521
Daniel K. Miller
dkm@ghnlawyers.com
State Bar No. 1041473

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