

RECEIVED

STATE OF WISCONSIN **12-18-2009**

SUPREME COURT

**CLERK OF SUPREME COURT
OF WISCONSIN**

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

Plaintiffs-Respondents, District 2
v. Appeal No. 2008AP919
Case No. 07 CV 1146

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

REPLY BRIEF 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

	<u>Page Number</u>
<u>ARGUMENT</u>	1
I THE DECEMBER 9, 2005 INCIDENT WAS NOT A "HIT-AND-RUN" ACCIDENT BECAUSE NO "RUN" OCCURRED.....	1
II WISCONSIN STATUTE § 346.67 HAS NO APPLICATION TO THE PRESENT ACTION.	6
III EXTRAJURISDICTIONAL AUTHORITY RELIED UPON BY THE RESPONDENTS DOES NOT SUPPORT THE RESPONDENTS' POSITION AS THE "MAJORITY" POSITION IN SIMILARLY-SITUATED FACT SCENARIOS AND, MOREOVER, WILL NOT PERMIT A FINDING A "HIT-AND-RUN" ACCIDENT OCCURRED ON DECEMBER 9, 2005.....	9
<u>CONCLUSION</u>	13

TABLE OF CASES, STATUTES AND OTHER AUTHORITY

<u>Case Name</u>	<u>Page Number</u>
Wisconsin	
<i>DeHart v. Wis. Mut. Ins. Co.</i> , 2007 WI 91, 302 Wis. 2d 564, 734 N.W.2d 394.....	11
<i>Hayne v. Progressive Northern Insurance Company</i> , 115 Wis. 2d 68, 339 N.W.2d 588 (1983).....	1, 2, 3, 4, 11
<i>Smith v. General Casualty Insurance, Company</i> , 2000 WI 127, 239 Wis. 2d 646, 619 N.W.2d 6 2d 882.....	5
<i>State v. Kruse</i> , 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981)	2
<i>Theis v. Midwest Sec. Ins. Co.</i> , 2000 WI 15, 232 Wis. 2d 749, 606 N.W.2d 162.....	4
Massachusetts	
<i>Commerce Insurance Company v. Mendonca</i> , 57 Mass. App. Ct. 522, N.E.2d 43 (Mass. App. Ct. 2003).....	10, 11, 12
<i>Surrey v. Lumbermens Mut. Cas. Co.</i> , 384 Mass. 171, 176-177, 424 N.E.2d 234 (Mass. 1981)	11
Pennsylvania	
<i>Binczewski v. Centennial Insurance Company</i> , 354 Pa. Super 229, 511 A.2d 845 (Penn. Super. Ct. 1986)	11, 12
<u>Statutes:</u>	
Wisconsin	
Wis. Stat. § 346.67.....	7
Wis. Stat. § 346.67(1).....	7

Wis. Stat. § 632.32.....	5
Wis. Stat. § 632.32(4).....	1, 4
Wis. Stat. § 632.32(4)(a).....	5
Wis. Stat. § 632.32(4)(a)(1).....	5
Wis. Stat. § 632.32(4)(a)2.b.....	3

ARGUMENT

I. THE DECEMBER 9, 2005 INCIDENT WAS NOT A "HIT-AND-RUN" ACCIDENT BECAUSE NO "RUN" OCCURRED.

The Zarders argue Wisconsin case law is wholly bereft of analysis of the meaning of "run" as that word is used in the term "hit-and-run" in an uninsured motorist context. In support of this position, the Zarders criticize ACUIITY's reliance on this Court's decision in *Hayne v. Progressive Northern Insurance Company*, which ACUIITY asserts provides a clear definition of the "run" component of the term "hit-and-run" for purposes of Wisconsin law. 115 Wis. 2d 68, 339 N.W.2d 588 (1983). Basically, the Zarders seek to limit *Hayne's* controlling aspect by suggesting the discussion in *Hayne* regarding the meaning of "run" is dicta and is otherwise immaterial to this Court's analysis, claiming the *Hayne* court performed no analysis as to the meaning of "run." See Brief and Appendix of Plaintiffs-Respondents at 6.

The Zarders' assertion that the discussion of "run" in *Hayne* constitutes dicta because *Hayne* "provided no analysis to support its selection of the phrase 'fleeing from the scene of an accident' over other quoted definitions of 'hit-and-run,'" is incorrect. *Id.* First, the *Hayne* court did not simply select the phrase "fleeing from the scene of

an accident" from one of multiple dictionary definitions the court considered in attributing meaning to the term "hit-and-run." Rather, the *Hayne* court chose to accord "run" with "flee," despite the fact that none of the referenced dictionary definitions included "flee" in the "run" component of the term "hit-and-run." The fact that the *Hayne* court equated "run" with "flee" when considering less-than-identical definitions that did not, themselves, reference "flee" in connection with "run," lends credence to ACUITY's position that the *Hayne* court affirmatively sought to ascribe meaning to "run" and, further, shows the discussion of "run" was germane to the principal issue in *Hayne* and not dictum. *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981).

Second, the Zarders' contention ignores the *Hayne* court's efforts to assess the "legislature's intent" by according "hit-and-run" its "common and accepted meaning." *Hayne*, 115 Wis. 2d at 74 (citation omitted). Employing the referenced dictionary definitions, the *Hayne* court did just that, concluding specifically that the definitions "uniformly indicate that 'hit-and-run' includes two elements: a 'hit' or striking, **and a 'run,' or fleeing from the accident scene.**" *Id.* at 75 (emphasis added).

The Zarders further argue that to accord "run" with "fleeing from the scene of an accident" will require this Court to provide guidance in the future to what, exactly, is necessary for a "flee" to occur. See Brief and Appendix of Plaintiffs-Respondents at 7-8. On this point, the Zarders claim "flee" is a "relative" term "susceptible to numerous reasonable meanings," and brazenly contend that to accord "run" with "fleeing from the scene of an accident" would result in an increase in uninsured motorist insurance coverage disputes involving possible "hit-and-run" accidents "as there would be no logical 'bright line' view regarding when UM insurance coverage would apply or would not apply and, in many circumstances, would likely to lead to absurd results." *Id.*

In making this argument, the Zarders disregard the designed absence of a bright-line definition of the term "hit-and-run" in Wisconsin's Omnibus statute and flatly ignore this Court's commentary regarding the absence of a need for a bright-line rule as to the meaning of "hit-and-run." In *Hayne*, this Court concluded that the statutory language of Wis. Stat. § 632.32(4)(a)2.b. - including the term "hit-and-run" - is **unambiguous**. 115 Wis. 2d at 74. Citing to the legislative history of the same statute, this Court has acknowledged that "[a] precise definition of hit-

and-run is not necessary for in the rare cases where a question arises, the court can draw the line." See *Theis v. Midwest Sect. Ins. Co.*, 2000 WI 15, ¶ 18, 232 Wis. 2d 749, 606 N.W.2d 162. *Id.*

The instant case is not one of these "rare cases." It is undisputed there was no "flee" and in accordance with *Hayne*, absent a "fleeing," there can be no "run." Without a "run," there can be no "hit-and-run." Accordingly, insurance coverage to the Zarders is precluded.

Arguing there is no case law in Wisconsin construing "run" in a "hit-and-run" context, the Zarders seek to have this Court ignore *Hayne* altogether and, instead, ask this Court to "interpret Wisconsin statutes, specifically Wis. Stat. § 632.32(4)." See Brief and Appendix of Plaintiffs-Respondents at 9. In doing so, the Zarders - eschewing any statutory construction analysis - simply state that Section 632.32(4) does not define "hit-and-run" accident and, with that, the Zarders immediately turn their attention to the claimed "purpose of UM insurance coverage," as set forth in Section 632.32(4)(a)(1). *Id.* at 9-10. The Zarders argue that if uninsured motorist coverage is not available to insureds that are injured by unidentified motor vehicles in "hit-and-run" accidents, then insureds would be unable to seek recovery for damages caused by the unidentified

motorist's negligence, leaving a gap in insurance coverage. *Id.* at 10.

The Zarders' argument lacks coherency inasmuch as implicit in the argument is a contention that the ruling in ACUITY's favor will preclude wholly an award of uninsured motorist benefits to **all** insureds injured by unidentified motor vehicles in "hit-and-run" accidents. ACUITY is not asking this Court to endorse a denial of insurance coverage where injury results from a "hit-and-run" accident. Where a "hit-and-run" accident occurs and an unidentified motor vehicle otherwise satisfies the definition of "hit-and-run" vehicle as that phrase is used in an insurance policy and/or Wisconsin's Omnibus statute, coverage is warranted. Conversely, where no "run" occurs, there can be no "hit-and-run" accident and, likewise, no "hit-and-run" vehicle. In those case - of which, coincidentally, this case is one - uninsured motorist coverage ought to be precluded.

Citing to "public policy concerns" in *Smith v. General Casualty Insurance Company*, 2000 WI 127, 239 Wis. 2d 646, 619 N.W.2d 6 2d 882, the Zarders boldly assert "the public policy concern of mandating UM coverage pursuant to Wis. Stat. § 632.32(4)(a) prevails in this case." See Brief and Appendix of Plaintiffs-Respondents at 11. The Zarders provide no support for this assertion, apart from the

incredible claim that "[w]hen an unidentified motorist leaves the scene of an accident, regardless of the speed of the unidentified motor vehicle, a 'run' has occurred and an insurer is required to provide UM insurance coverage to its insureds." *Id.* at 12. The Zarders' position in this regard has no merit.

First, the position is contrary to the plain meaning of "hit-and-run." "Run" has not been defined, in *Hayne* or anywhere else, to simply mean "when an unidentified motorist leaves the scene of an accident."

Second, the Zarders' position is contrary to the meaning of "run" in *Hayne*, as well as extrajurisdictional case law authority detailed in ACUITY's Brief at pages 21 - 26. Here, the unidentified motorists attempted to render assistance to Zachary Zarder, and Zarder affirmatively acted to dismiss the occupants of the unidentified vehicle from the scene. It is undisputed there was no "flee" and, thus, there can be no "run." Without a "run," there can be no "hit-and-run." Accordingly, insurance coverage to the Zarders is precluded.

II. WISCONSIN STATUTE § 346.67 HAS NO APPLICATION TO THE PRESENT ACTION.

The Zarders argue the unidentified motorist involved in the December 2005 incident was required to provide

Zachary Zarder with identifying information in a manner consistent with that detailed in Wis. Stat. § 346.67(1). What the Zarders fail to state is how a failure to comply with § 346.67(1) impacts this Court's consideration of whether a "hit-and-run" accident occurred in the instant case.

ACUITY agrees that if the unidentified motorist provided identifying information to Zarder in manner consistent with Section 346.67, the present coverage issue would not be before this Court. At the same time, however, the fact that the unidentified motorist did not comply with Section 346.67 does not, in and of itself, command the result that a "hit-and-run" accident occurred.

The Zarders claim that by distinguishing the concept of "hit-and-run" in connection with the availability, if any, of uninsured motorist benefits under Wisconsin's Omnibus statute from the identification requirements of Section 346.67, ACUITY is aiming to punish Zarder "for failing to comprehend the ramifications of not insisting upon identifying information before the unidentified motorist left the scene of the accident." See Brief and Appendix of Plaintiffs-Respondents at 16. This is not the case.

An analysis of whether a "run" occurred in the present matter puts the focus squarely on the actions of the unidentified driver and despite the Zarders' contrary contention, creates no duty and/or obligation on the part of Zachary Zarder. This is the case, whether the analysis is based on *Hayne* or Section 346.67.

The requirements detailed in Section 346.67, however, have no application to this matter because there is nothing in the statute that accords its language with the language of the Omnibus statute. The Omnibus statute and Section 346.67 appear in different chapters of the Wisconsin Statutes and relate to different subject matters. Section 346.67 is contained within statutory provisions governing Wisconsin's Rules of the Road and details requirements for the operator of a vehicle, the failure to follow which may result in criminal penalties. The Omnibus statute, on the other hand, concerns insurance law and has as its purpose, not the enforcement of criminal laws, but, rather, the provision of coverage to the insured and compensation to victims of automobile accidents.

Section 346.67 is not significant in the Court's analysis of the instant case. *Hayne* controls and precludes a finding of insurance coverage to the Zarders.

III. EXTRAJURISDICTIONAL AUTHORITY RELIED UPON BY THE RESPONDENTS DOES NOT SUPPORT THE RESPONDENTS' POSITION AS THE "MAJORITY" POSITION IN SIMILARLY-SITUATED FACT SCENARIOS AND, MOREOVER, WILL NOT PERMIT A FINDING A "HIT-AND-RUN" ACCIDENT OCCURRED ON DECEMBER 9, 2005.

The Zarders claim that extrajurisdictional authority relied on by ACUITY equates with "the minority of states that have denied UM insurance coverage to a claimant when the unidentified motorist stops at a scene of an accident before leaving unidentified." See Brief and Appendix of Plaintiffs-Respondents at 17. Conversely, the Zarders argue that their position is consistent with the majority of states that have analyzed issues similarly situated to the present action. As noted in ACUITY's Brief and Appendix, a review of the second source materials submitted by the Zarders reveals the contrary. See Brief and Appendix of Defendant-Appellant-Petitioner at 27-28.

Of the cases detailed in connection with the Zarders' proposition, eighteen are described in relative detail. Of the eighteen cases with detailed descriptions, seven of the cases relate to the provision of false information by the unidentified motorist - a circumstance not present here - while the balance of the cases are factually dissimilar to the instant case, be it due to the absence of a means of learning the identity of the alleged hit-and-run driver or

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

Though the Zarders purport to argue the majority position, they cite in support of their Response only two cases, *Commerce Insurance Company v. Mendonca*, 57 Mass. App. Ct. 522, 784, N.E.2d 43 (Mass. App. Ct. 2003) and *Binczewski v. Centennial Insurance Company*, 354 Pa.Super 229, 511 A.2d 845 (Penn. Super. Ct. 1986). As with the other cases the Zarders claim support their arguments, the decisions in *Mendonca* and *Binczewski* are distinguishable from the present matter.

Mendonca involved an uninsured motorist claimant, Mendonca, who was a passenger in a car that was stopped for a red light when it was struck from behind by another vehicle. 57 Mass. App. Ct. at 522. As detailed in ACUITY's Brief and Appendix, to conclude flight is **not** an indispensable element of "run", the *Mendonca* court relied on Massachusetts courts' nonliteral approach to the meaning of "hit-and-run" as support for its decision. See Brief and Appendix of Defendant-Appellant-Petitioner at 28-29 (citing *Mendoca* at 524). Specifically, the *Mendonca* court relied on a decision that rejected a literal interpretation of "hit-and-run" and concluded that "physical contact is not part of the usual and accepted meaning of the term." *Id.* (citing

Surrey v. Lumbermens Mut. Cas. Co., 384 Mass. 171, 176, 424 N.E.2d 234 (1981)).

Such an analysis is inconsistent the more literal approach to the meaning of the term "hit-and-run" taken by Wisconsin courts. Wisconsin courts have established the term "unambiguously includes an element of physical contact[.]" *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶15, 734 N.W.2d 394. Employing the inverse of the methodology of the *Mendonca* court, then, *Hayne* and its definition of "hit-and-run" exist as ample authority for the proposition that Wisconsin treats flight as an indispensable element of "run."

Moreover, there was no evidence in *Mendonca* that the unidentified motorist was reassured that there was neither injury nor damage, only that the operator of the vehicle in which Mendonca was a passenger spoke with the unidentified motorist and agreed there was no significant damage to the vehicles. Here, conversely, the occupants of the unidentified vehicle stopped, attempted to provide aid to Zachary Zarder, and Zarder affirmatively acted to dismiss the unidentified motorists from the scene of the accident.

As with *Mendonca*, *Binczewski* has no application in the present action. 354 Pa.Super 229, 511 A.2d 845 (Penn. Super. Ct. 1986). As noted in ACUITY's Brief and Appendix,

though the very limited set of undisputed facts in *Binczewski* may appear similar to those in the present action, the *Binczewski* decision provides no insight into how this Court should analyze the present matter. See Brief and Appendix of Defendant-Appellant-Petitioner at 30-32.

First, there is no mention in *Binczewski* as to how the *Binczewski* court, or Pennsylvania courts, generally, define the term "hit-and-run," be it in an uninsured motorist context or any other context. In addition, the matter before the *Binczewski* court was one of first impression and one in which the *Binczewski* court relied on Pennsylvania's criminal hit-and-run driver statute to arrive at its conclusion, an approach that as noted above, is improper in the instant case.

As noted above, to conclude the historical facts give rise to a "hit-and-run" requires a "run," or "fleeing" from the scene of the accident. Because the operator of the unidentified vehicle stopped at the scene and inquired as to the well-being of Zachary Zarder, there was no "flee," and thus, pursuant to *Hayne*, no "run." Consequently, there is no "hit-and-run," precluding a finding of insurance coverage in favor of the Zarders.

CONCLUSION

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

Dated at Waukesha, Wisconsin this 18th day of
December, 2009.

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

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

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 Reply Brief of Defendant-Appellant-Petitioner, ACUITY, A Mutual Insurance Company conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this Brief is thirteen (13) pages.

Dated at Waukesha, Wisconsin this 18th day of December, 2009.

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

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

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

Dated at Waukesha, Wisconsin this 18th day of December, 2009.

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

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

P.O. ADDRESS:

N14 W23777 Stone Ridge Drive
Suite 200
Waukesha, WI 53188
262) 347-2001
262) 347-2205 fax