

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2007AP2854

Cir. Ct. No. 2006CV219

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PROGRESSIVE NORTHERN INSURANCE CO.,

PLAINTIFF-RESPONDENT,

V.

MARK A. PHILLIPS AND NANCY R. PHILLIPS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Mark and Nancy Phillips appeal a judgment and an order of dismissal dismissing their insurance coverage claim against Progressive Northern Insurance Company. We affirm for the reasons discussed below.

BACKGROUND

¶2 According to the summary judgment materials, the Phillipses were riding their motorcycles behind an open-topped semi-truck loaded with sand. A big chunk of sandy material flew off the semi-truck and struck and blinded Nancy, who lost control of her motorcycle and sustained serious injuries. The semi-truck did not stop and neither it nor its driver was ever identified.

¶3 The Phillipses sought uninsured motorist coverage from their insurer for a hit-and-run accident. The insurer filed a declaratory judgment action seeking to deny coverage on the grounds that there had been no physical contact with the semi-truck. The Phillipses filed a counterclaim, but the circuit court granted summary judgment in favor of the insurer.

STANDARD OF REVIEW

¶4 This court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *Id.*, ¶24. We view the materials in the light most favorable to the party opposing the motion. *Id.*, ¶23.

DISCUSSION

¶5 Wisconsin law defines an “uninsured motorist” to include “[a]n unidentified motor vehicle involved in a hit-and-run accident.” WIS. STAT.

§ 632.32(4)(a)2.b. (2005-06).¹ The term “hit-and-run” requires “an element of physical contact.” *DeHart v. Wisconsin Mut. Ins. Co.*, 2007 WI 91, ¶15, 302 Wis. 2d 564, 734 N.W.2d 394. Physical contact, in turn, requires an actual hit from the unidentified motor vehicle or a part thereof, and a hit to the insured’s vehicle or a part thereof. *Id.*, ¶40. The purpose of the physical contact requirement is “to prevent a fraudulent claim about a phantom motor vehicle when the insured’s loss of control causes the accident.” *Theis v. Midwest Sec. Ins. Co.*, 2000 WI 15, ¶30, 232 Wis. 2d 749, 606 N.W.2d 162. The question before us here is whether a chunk of sand flying off from a semi-truck’s cargo is a “part” of the semi-truck.

¶6 Several Wisconsin cases have considered whether an object flying off of a vehicle could be considered part of that vehicle for purposes of hit-and-run coverage. For instance, in *Dehnel v. State Farm Mut. Auto. Ins. Co.*, 231 Wis. 2d 14, 604 N.W.2d 575 (Ct. App. 1999), we held that a chunk of ice which flew off a passing semi-truck was not “part” of that truck. We noted that the chunk of ice was not an integral part of the vehicle, and that expanding the definition “to cover extraneous objects that may be carried by vehicles would have no reasonable ending point for coverage.” *Id.* at 22. In contrast, in *Theis*, 232 Wis. 2d 749, we held that a leaf spring which detached from a vehicle was part of that vehicle.

¶7 We conclude, as did the circuit court, that *Dehnel* controls the outcome here. A chunk of sand, even when part of a truck’s cargo, is akin to a chunk of ice, not a leaf spring. It is not a vehicle component. Moreover, the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

general policy concern about potentially fraudulent claims based on items from phantom vehicles applies here. That is, even if a chunk of sand were to be recovered from the scene, there would be nothing inherent about it to link it to a vehicle.

¶8 Because the sand was not an integral part of the semi-truck, the accident here cannot be categorized as a hit-and-run under Wisconsin law, and the circuit court properly determined that the Phillipses were not entitled to uninsured motorist coverage.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

