**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 12, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-0659**

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

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**BETTY L. HULL,**

**PLAINTIFF-APPELLANT,**

**V.**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

NETTESHEIM, J. Betty L. Hull appeals from a declaratory judgment entered in favor of her insurer, State Farm Mutual Automobile Insurance Company. Hull argues that the trial court erroneously concluded that she was not entitled to recover uninsured motorist benefits under her two State Farm motor

vehicle liability insurance policies. Relying on ***Hemerley v. American Family Mutual Insurance Co***., 127 Wis.2d 304, 379 N.W.2d 860 (Ct. App. 1985), the court denied coverage because the driver of the vehicle which struck and killed Hull's husband was insured. Although we disagree with the ***Hemerley*** ruling, we are duty bound to follow it. Accordingly, we affirm the judgment.

## *FACTS*

The facts underlying this appeal are undisputed. On July 14, 1994, Hull's husband, Lucien Hull, was struck and killed by a pickup truck operated by William Borth, an employee of the Badger State Auto Auction in Fond du Lac, Wisconsin. The accident occurred on the Badger State property when Borth attempted to stop the truck as he was moving it onto the auction ring. The brake pedal went to the floor and the truck struck and killed Mr. Hull. The owner of the vehicle, who had consigned the vehicle to be sold at auction by Badger State, did not have any insurance coverage in effect covering the truck or its operation.

Borth was insured by Milwaukee Mutual Insurance Company, through his employer Badger State. However, Hull did not assert any claim against Borth. Instead, Hull filed this action against her insurer, State Farm, seeking to recover damages resulting from the wrongful death of her husband under the uninsured motor vehicle provisions of her State Farm policies. Hull alleged that State Farm was liable because the owner of the truck was negligent in failing to maintain the truck and the owner was uninsured.

State Farm denied that the truck was an uninsured vehicle because Borth was insured by Milwaukee Mutual at the time of the accident. State Farm filed a motion for a declaratory judgment seeking dismissal of Hull's claim. The

trial court granted State Farm's motion based on the court of appeals' decision in ***Hemerley***. Hull appeals.

## *DISCUSSION*

The decision to grant or deny relief in a declaratory judgment action is within the trial court's discretion. *See* ***Allstate Ins. Co. v. Gifford***, 178 Wis.2d 341, 346, 504 N.W.2d 370, 372 (Ct. App. 1993). We will uphold the trial court's discretionary decision if it is founded upon the proper legal standards. *See* ***id***.

The issue in this case is whether the truck causing Mr. Hull's death was an "uninsured motor vehicle" as defined in State Farm's insurance policies. The construction of an insurance policy presents a question of law, which we review independently of the trial court. *See* ***American States Ins. Co. v. Skrobis Painting & Decor., Inc***., 182 Wis.2d 445, 450, 513 N.W.2d 695, 697 (Ct. App. 1994).

Hull raises three arguments in support of her argument for uninsured motorist coverage. First, Hull argues that the truck is an "uninsured motor vehicle" as defined in the State Farm policies. Next, Hull argues that even if the terms of the State Farm policies do not provide coverage, coverage must be held to exist pursuant to the uninsured motorist statute, § 632.32(4)(a), STATS. Finally, Hull argues that this court's decision in ***Hemerley*** does not mandate a determination that coverage is unavailable because the facts of ***Hemerley*** are distinguishable from those in this case. We conclude that ***Hemerley*** controls as to Hull's arguments under the statute and under her State Farm policies. We further conclude that any factual distinctions between this case and ***Hemerley*** do not permit a different result.

We begin with ***Hemerley***. There, the parents of Annette Hemerley claimed uninsured motorist coverage for an accident in which Annette was seriously injured while riding as a passenger in a vehicle. *See* ***Hemerley***, 127 Wis.2d at 306, 379 N.W.2d at 861. Although the automobile was not insured, the operator of the automobile was insured under his father's insurance policy. The parents in ***Hemerley*** argued that under § 632.32(4), STATS., a motor vehicle is uninsured unless a policy insures the vehicle. *See* ***Hemerley***, 127 Wis.2d at 306, 379 N.W.2d at 861.

The ***Hemerley*** court construed the language of § 632.32(4), STATS., which provided—and still provides—in relevant part:

> 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.
>
> 3. Insurers making payment under the uninsured motorists' coverage shall, to the extent of the payment, be subrogated to the rights of their insureds.

The ***Hemerley*** court concluded that the statute, in referring to both the "uninsured motorist" and the "uninsured motor vehicle," is ambiguous because reasonable

persons could read it "either to require coverage to protect persons injured by a motor vehicle which is not insured, or to require coverage to protect persons injured when the vehicle's owner or operator has no insurance." ***Hemerley***, 127 Wis.2d at 308, 379 N.W.2d at 862.

Looking to the purpose of the statute, the ***Hemerley*** court construed "uninsured motor vehicle" in § 632.32(4), STATS., "to include a vehicle, *neither the owner nor the operator of which* is insured by liability insurance." ***Hemerley,*** 127 Wis.2d at 308, 379 N.W.2d at 863 (emphasis added). Since the operator of the vehicle was insured, the court concluded that the statute did not mandate uninsured motorist coverage for the accident. Here, although the owner of the vehicle did not have insurance covering the accident, Borth, the operator of the truck, was insured by Milwaukee Mutual through his employer Badger State. Thus, under ***Hemerley***, the truck was not an "uninsured motor vehicle" under § 632.32(4).

Next, the ***Hemerley*** plaintiffs contended that the automobile was an uninsured vehicle under the terms of the Hemerleys' insurance policy. The ***Hemerley*** court determined that it was not. The policy at issue in ***Hemerley*** contained the following language:

> "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….(3) Uninsured motor vehicle means a motor vehicle which is: (a) not insured by a bodily injury liability bond or policy at the time of the accident."

***Hemerley***, 127 Wis.2d at 309, 379 N.W.2d at 863. Recognizing that the same ambiguity existed in the policy as exists in § 632.32(4), STATS., the court concluded that "having construed 'uninsured motor vehicle' in sec. 632.32(4)(a)1 to include a vehicle, neither the owner nor the operator of which is insured by

liability insurance, we so construe the 'uninsured motorist coverage' provision in the Hemerley policy." ***Hemerley***, 127 Wis.2d at 310, 379 N.W.2d at 863.

> Here, the State Farm insurance policies issued to Hull provide:
>
> We will pay damages for **bodily injury** an **insured** is legally entitled to collect from the owner or driver of an **uninsured motor vehicle**. The **bodily injury** must be caused by accident arising out of the operation, maintenance or use of an **uninsured motor vehicle**.

An "uninsured motor vehicle" is defined by the policies in relevant part as: "a land motor vehicle, the ownership, *maintenance* or use of which is: a. not insured … at the time of the accident." (Emphasis added.) Hull argues that because the gravamen of her action against the owner is that the vehicle was not properly maintained, she is entitled to recover damages under this language of the State Farm policies. We reject Hull's argument as contrary to the law set forth in ***Hemerley***.

The policy in ***Hemerley*** provided coverage when the insured is entitled to recover from the "owner or operator" of an uninsured motor vehicle. *See* ***Hemerley***, 127 Wis.2d at 309, 379 N.W.2d at 863. Although the language of the policy seemingly created two scenarios under which an insured may recover—when either the owner or operator is uninsured—the ***Hemerley*** court nevertheless interpreted the policy as providing coverage only when "neither the owner nor the operator … is insured by liability insurance." *See* ***id***. at 310, 379 N.W.2d at 863.

Here, the State Farm policies provide coverage for an uninsured motor vehicle, "the ownership, maintenance or use" of which is not insured for bodily injury liability at the time of the accident. Thus, it would seem that Hull's policies create three distinct scenarios in which an insured is entitled to uninsured motor vehicle coverage—when there is no ownership liability insurance, no

maintenance liability insurance or no use liability insurance. However, the same can be said of the two distinct scenarios in the ***Hemerley*** policy. Despite this apparently clear language, ***Hemerley*** concluded that there is but one scenario in which an insured is entitled to coverage—when no coverage exists under any scenario. Thus, we must reject Hull's argument that the use of the word "or" in State Farm's policies create separate categories of coverage.

Based on the foregoing, we also reject Hull's final argument that ***Hemerley*** is distinguishable from this case on the facts. The ***Hemerley*** court construed the language of § 632.32(4), STATS., and the language of the uninsured motorist provision of the insurance policy in that case. Hull is requesting this court to do the same. Because the language of § 632.32(4) has not changed since the court's decision in ***Hemerley*** and because the uninsured motorist provision in this case is, in essence, the equivalent of the uninsured motorist provision in ***Hemerley***, we conclude that ***Hemerley*** governs this case. The factual distinctions in this case do not allow us to avoid the law of ***Hemerley***.

We conclude by explaining our disagreement with ***Hemerley.*** ***Hemerley*** itself acknowledged that "[t]he purpose [of § 632.32(4), STATS.] is to compensate an injured person when liability coverage is unavailable to the person who ought to pay.… [T]he supreme court has said the purpose is to compensate for 'an uninsured motorist's negligence to the same extent as if the uninsured motorist were insured.'" ***Hemerley***, 127 Wis.2d at 308, 379 N.W.2d at 863. Yet, the ***Hemerley*** conclusion seems at odds with the statutory goal. Instead, the decision seems, in our judgment, to defeat the purpose of § 632.32(4). As such, we believe that ***Hemerley*** was decided incorrectly. We are nevertheless bound by that decision. *See* ***Cook v. Cook***, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997) (the court of appeals may not overrule, modify or withdraw language from

a previously published decision of the court of appeals). Hull must therefore pursue her arguments before the supreme court.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.