COURT OF APPEALS
DECISION
DATED AND RELEASED

August 22, 1995

NOTICE

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

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

No. 94-3276

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

ALLEN P. TAPPA,

Plaintiff-Appellant,

v.

GREGORY T. BARUTHA,

Defendant,

AMERICAN STANDARD INS. CO. OF WI,
a domestic corporation,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Reversed and cause remanded.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Allen P. Tappa appeals from a judgment granting American Standard Insurance Company of Wisconsin's summary judgment

motion and dismissing his action. Because an issue of fact exists regarding whether the named-insured failed to cooperate under the American Standard policy and thus excluded coverage for Tappa, we reverse and remand for further proceedings.

On November 2, 1990, Tappa was a passenger in a car driven by Barutha (American Standard's named-insured), which was involved in a one-car accident. Tappa was injured.

On November 20, 1990, Barutha cancelled his American Standard policy, saying he had lost his license. He did not inform American Standard of the accident. He did, however, give the American Standard agent his new address, which was for a half-way house.

Tappa's attorney reported the accident to the insurance company, and on June 24, 1991, Barutha signed for a certified reservation of rights letter from American Standard. This letter stated, in part, "[t]he service of this notice does not deprive you of any rights you may have against this Company." The letter did not ask Barutha to contact American Standard. A few days later, American Standard sent Barutha an auto accident loss report by certified mail to his old address. The letter was returned. A second certified letter was sent to the half-way house, but it was also returned. On June 26, 1993, American Standard sent Barutha two letters to the half-way house asking him to contact it, but both letters came back "attempted, not known," because Barutha had moved. American Standard, plaintiff's counsel, and the conflicts counsel hired for Barutha under the duty to defend portion of the policy have been unable to locate Barutha since.[1]

Tappa sued, bringing a third-party liability claim against Barutha and American Standard, and, alternatively, a first-party uninsured motorist claim. The trial court granted summary judgment to American Standard,

[1] Barutha was served by publication with the summons and complaint. Barutha does not participate in this appeal. After concluding that Barutha's failure to cooperate barred both of Tappa's claims, the trial court further concluded that American Standard no longer had a duty to defend and granted Barutha's lawyer's motion to withdraw. The matter as it relates to Barutha has been stayed pending our resolution of this appeal.

concluding that under § 632.34, STATS.,[2] liability coverage was extinguished by Barutha's noncooperation and that his noncooperation also extinguished Tappa's first-party UM claim.

Section 802.08, STATS., governs summary judgment. The methodology for reviewing summary motions has been recited in many cases, *see, e.g.*, ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987), and need not be repeated here. Our review is *de novo*. ***Id.***

Material questions of fact exist as to Barutha's alleged noncooperation. According to the summary judgment submissions, Barutha failed to notify American Standard of the accident, gave American Standard a forwarding address after cancelling the policy, and received a certified reservation of rights letter from American Standard that did not request that he contact the insurance company. Whether, under all the circumstances, Barutha's conduct amounted to noncooperation is a question for the jury. *See* ***Modl v. National Farmers Union Property & Casualty Co.***, 272 Wis.650, 656-657, 76 N.W.2d 599, 602 (1956). Therefore, we reverse the trial court's judgment and remand for further proceedings.[3]

By the Court. – Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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[2] Section 632.34, STATS., provides:

> **Defense of noncooperation.** If a policy of automobile liability insurance provides a defense to the insurer for lack of cooperation on the part of the insured, the defense is not effective against a 3rd person making a claim against the insurer ... unless the claimant was a passenger in or on the insured vehicle.

[3] Because we conclude that a jury question exists on the issue of whether Barutha failed to cooperate, we do not reach Tappa's alternative argument that he is entitled to first-party UM benefits despite Barutha's alleged noncooperation. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).