COURT OF APPEALS
DECISION
DATED AND RELEASED

June 11, 1996

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.

NOTICE

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

No. 95-2523

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

HAWKEYE-SECURITY INSURANCE COMPANY,

Plaintiff-Respondent,

v.

JOHN J. DELUHERY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. John J. Deluhery appeals from the trial court's judgment granting declaratory judgment in favor of Hawkeye-Security Insurance Company.[1] We affirm.

Deluhery claims that on May 9, 1992, he was the victim of a hit-and-run, having been struck by a pick-up truck while riding his bike. He notified neither the police nor his insurer, Hawkeye-Security Insurance Company. More than sixteen months after the accident, on September 18, 1993, Deluhery filed a claim with Hawkeye under the uninsured motorist provision of his policy. Hawkeye denied Deluhery's claim due to his delay in providing notice. Deluhery then filed for arbitration. He and Hawkeye stipulated to a stay of the arbitration pending the determination of coverage through a declaratory judgment action. Thus, on March 24, 1994, Hawkeye filed an action seeking a declaration that it was not required to provide uninsured motorist coverage for the alleged hit-and-run because Deluhery failed to comply with the terms of his policy requiring prompt notification.

In response to Hawkeye's action for declaratory judgment, Deluhery had asserted that he had never received a copy of his policy and, therefore, was unaware of his duty to promptly notify Hawkeye. Thus, he argued that Hawkeye was estopped from denying coverage based on the prompt notification requirement. The trial court concluded: that (1) even if Deluhery had not received his policy, he still must be held to its terms because he had failed to exercise due diligence in determining his duties under the policy; (2) Deluhery had failed to comply with the policy by failing to promptly notify Hawkeye; (3) Deluhery's failure to provide notice prejudiced Hawkeye; and, therefore (4) Hawkeye was not required to provide coverage. We agree.

Deluhery's policy provided that after an accident or loss, Hawkeye "must be notified promptly of how, when and where the accident or loss happened," and further, that one seeking uninsured motorist coverage must "[p]romptly notify the police if a hit-and-run driver is involved." While disputing Deluhery's allegation that he did not receive the policy, Hawkeye contends that this "factual issue is not material and does not otherwise defeat

[1] On appeal, the parties refer to the trial court's judgment as a summary judgment. They have presented their arguments, both in the trial court and here, under summary judgment standards.

Hawkeye's entitlement to judgment as a matter of law." Hawkeye emphasizes that even if Deluhery did not receive his policy, Deluhery concedes that he did receive the declaration page, billing statements, and the amendments to his policy. One of the amendments Deluhery received provided:

> VI. PART E - DUTIES AFTER AN ACCIDENT OR LOSS
>
> Part E is amended as follows:
>
> A.The following lead-in language is added to Part E:
>
> We have no duty to provide coverage under this policy unless there has been full compliance with the following duties: ....

The trial court concluded that it was unnecessary to make a factual finding on whether Deluhery received a copy of his policy because this amendment should have been a "red flag" to Deluhery that he had specific obligations under the policy.

Summary judgment should be granted when "there is no genuine issue as to any *material* fact." Section 802.08, STATS (emphasis added). We review the grant or denial of summary judgment *de novo*. ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis.2d 131, 140, 513 N.W.2d 609, 613 (1994).

For a fact to be "material," it "must concern a fact that affects the resolution of the controversy." ***Clay v. Horton Mfg. Co., Inc.***, 172 Wis.2d 349, 354, 493 N.W.2d 379, 381 (1992). We conclude that the trial court correctly determined that, under the undisputed circumstances of this case, the disputed fact of whether Deluhery received his policy was immaterial to the merits of the issues in the declaratory judgment action. As the trial court recognized, Deluhery, who also happens to be an insurance company claims supervisor, failed to exercise due diligence in ascertaining his duties under the policy and, accordingly, could not invoke estoppel against Hawkeye. *See* ***Rascar, Inc. v. Bank of Oregon***, 87 Wis.2d 446, 453, 275 N.W.2d 108, 112 (1978); *see also* ***Martinson v. North Central Life Ins. Co.***, 65 Wis.2d 268, 277, 222 N.W.2d 611,

616 (1974) (an insured is deemed to have knowledge of a policy's provisions, even if he has not read them).

Deluhery argues nonetheless, that Hawkeye was not prejudiced by his failure to provide prompt notice because he "did an exhaustive investigation immediately after the accident to determine the identity of the pick-up truck and the driver who struck him." He invokes § 632.26(2), STATS., which provides:

> Failure to give notice as required by the policy ... does not bar liability under the policy if the insurer was not prejudiced by the failure, but the risk of nonpersuasion is upon the person claiming there was no prejudice.

The trial court concluded, however, that the sixteen-month delay prejudiced Hawkeye because Deluhery's investigation "could not possibly reach the level of an investigation by professionals, either in intensity or sweep." The trial court was correct. Further, as Hawkeye argues on appeal, Deluhery could "not have the same incentive as Hawkeye to find the hit-and-run driver," given his expectation of uninsured motorist coverage. Thus, the trial court correctly concluded that as a matter of law, Hawkeye suffered prejudice because of Deluhery's failure to provide prompt notification.[2] Accordingly, we conclude that declaratory judgment in favor of Hawkeye was properly granted.

By the Court. – Judgment affirmed.

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

[2] We need not consider the parties' additional arguments under §§ 631.81(1) and 632.26(1)(b), STATS., because neither statute is applicable. Each requires that an insured provide notice as soon as "reasonably possible." Deluhery did not do so.