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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-183**

Economy Premier Assurance Company,
Appellant,

vs.

Nancy Hansen,
Respondent,

Christopher Davis, et al.,
Respondents,

Robert F Sawyer,
Respondent,

Marsha Sawyer,
Respondent.

**Filed August 15, 2011
Affirmed
Bjorkman, Judge**

Dakota County District Court
File No. 19HA-CV-10-796

Nicholas L. Klehr, Lori L. Jensen-Lea, Hopkins, Minnesota (for appellant)

Susan Bowden, Bowden Cyr Mortel, PLLC, St. Paul, Minnesota (for respondent Nancy Hansen)

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Robert and Marsha Sawyer, Burnsville, Minnesota (pro se respondents)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant insurance company challenges the district court's grant of summary judgment (1) declaring that respondent-insured provided proper notice of her personal-injury tort action and (2) determining that appellant is obligated to pay underinsured motorist benefits as established by the binding arbitration award rendered in that action. We affirm.

FACTS

On August 6, 2005, respondent Nancy Hansen sustained injuries in a motor-vehicle accident while riding as a passenger in respondent Marsha Sawyer's vehicle. The Sawyer vehicle was insured by appellant Economy Premier Assurance Company (Economy) with underinsured motorist (UIM) coverage in the amount of \$100,000. Sawyer's vehicle was struck from behind by a vehicle driven by respondent Alex Davis and owned by respondent Christopher Davis. On February 8, 2008, Hansen commenced a tort action against Alex and Christopher Davis.

On May 27, Hansen's attorney sent a letter advising Economy of the tort action, the December 15 trial date, and the Davises' \$50,000 liability insurance limit. The letter enclosed copies of the complaint and answer, and stated:

We are hereby notifying you of your right to intervene and participate in this matter. You will be bound by the verdict in this case pursuant to Malmin v. Minnesota Mutual Fire &

Casualty Company, 552 NW2d 723 (Minn. 1996) and my clients will be making an underinsured motorist claim for underinsured motorist exposure over and above the liability limits.

Economy did not attempt to intervene in the tort action.

Prior to trial, Hansen and the Davises decided to resolve the tort action through binding arbitration. Hansen notified Economy of this decision by letter on November 13, stating:

You are hereby placed on notice pursuant to Schmidt v. Clothier, 388 N.W.2d 256 (Minn. 1983), and American Family v. Bauman, 259 N.W.2d 923 (Minn. 1990), of our intention to enter into a Binding Arbitration and arbitrate the case against the defendant. . . . If you wish to preserve any possible right of subrogation which may arise against the tortfeasors in this instance, you have thirty (30) days from the date of this letter to either (1) substitute your draft of the tortfeasor's liability insurer in the amount of \$50,000, or (2) pay underinsured motorist benefits to your insured in an amount to be agreed upon and place the tortfeasor on notice. If neither of these options are exercised by you within thirty (30) days, the arbitration agreement will be signed for the Binding Arbitration.

May this letter also serve as notice of the potential arbitration under Butzer v. Allstate Ins. Co., 567 N.W.2d 534 (Minn. App. 1997). It will be our intent to bind you, the [UIM] carrier, to any decision by the arbitrator should we exceed the Defendant's limits. Pursuant to [Malmin], you have the right to intervene in the arbitration and may this letter serve as a Malmin notice as to your rights. . . . We would appreciate hearing from you quickly and if you are able, prior to thirty (30) days, as to whether or not you wish to substitute your draft in order to preserve any subrogation rights you may have in the event an underinsured motorist claim is made in the future, or give us your consent to sign the Binding Arbitration Agreement and proceed to arbitration.

On December 9, Economy filed a notice of intervention and complaint in intervention. Hansen objected. The district court denied Economy's request to intervene, determining that its interests were "adequately protected by existing parties." The parties arbitrated the tort claim on September 2, 2009, resulting in an award in Hansen's favor in the amount of \$172,079.86.

Economy initiated this action seeking a declaration that it is not bound by the arbitration award because Hansen failed to give proper notice of the tort proceedings. Both Hansen and Economy moved for summary judgment. Economy contended it is not required to pay UIM benefits to Hansen because the arbitration operated as a settlement, and Hansen did not provide the requisite *Schmidt* notice. Hansen argued that the notice was sufficient under *Malmin* and *Schmidt*, and that Economy is bound by the arbitration award. The district court granted Hansen's motion, determining that Hansen and the Davises "intended for the arbitration to act as a conclusion to the tort action," and that Economy "was afforded adequate notice in order to take the action contemplated by the *Malmin* court." This appeal follows.

D E C I S I O N

On appeal from summary judgment, we review the record de novo to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a

judgment as a matter of law.” Minn. R. Civ. P. 56.03. We view the evidence in the record “in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

UIM coverage is intended to protect against the risk that a negligent driver failed to purchase adequate liability insurance. *Meyer v. Ill. Farmers Ins. Grp.*, 371 N.W.2d 535, 537 (Minn. 1985). UIM coverage is excess coverage, to be utilized only after the cause of action against the insured tortfeasor has been concluded. *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 856 (Minn. 1993). Accordingly, an insured may only seek UIM benefits after she either (1) pursues a tort claim to its conclusion in district court, and obtains a judgment in excess of the liability limits or (2) obtains the best settlement of the tort claim and has uncompensated loss. *George v. Evenson*, 754 N.W.2d 335, 340 (Minn. 2008). Both scenarios require the insured to provide advance notice to the UIM carrier. *See id.*

In the first instance, a tort action pursued to its conclusion, the notice requirement is governed by *Malmin v. Minn. Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996). In the second scenario, a settlement agreement between the insured and the tortfeasor, the UIM carrier is entitled to notice of the proposed settlement and an opportunity to protect its potential subrogation rights by substituting payment to the insured pursuant to *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983). An arbitration proceeding may function “as either a settlement or a conclusion of a tort action.” *Kluball v. Am. Fam. Mut. Ins. Co.*, 706 N.W.2d 912, 916 (Minn. App. 2005). Thus, we must first determine whether the binding arbitration proceeding served as a settlement or the conclusion of the tort action.

I. The district court did not err in determining that the binding arbitration functioned as a final resolution of the tort action rather than a settlement.

In granting Hansen’s motion for summary judgment, the district court determined that Hansen and the Davises resorted to arbitration in order to “seek[] a final resolution of the tort action,” not “as a tool to negotiate a settlement.” Economy challenges this conclusion, arguing first that it was prejudiced by ambiguities in Hansen’s second letter, which referenced both *Schmidt* and *Malmin*, and that Hansen was “trying to have it both ways.” Economy further asserts that the references to *Schmidt* and *Malmin* demonstrate that Hansen “was of the mindset that arbitration produced a settlement” and that she should be held to this “original characterization” because Economy relied on it in evaluating her UIM claim. We disagree.

First, the district court emphasized that “no party to this action brought forth any evidence to indicate that Ms. Hansen and the Davises had negotiated a proposed settlement prior to the arbitration hearing.” The record supports this assertion. Affidavits of Hansen’s counsel and the Davises’ counsel reflect the parties’ intentions to use arbitration in lieu of a jury trial to finally determine the case. There is no evidence that the Davises’ insurer offered to pay the \$50,000 liability limit. Likewise, there is no evidence that Economy offered to pay \$50,000 to Hansen to prevent settlement of the tort action and preserve its potential subrogation rights.

Second, the notice letters indicate Hansen’s intent that Economy be bound by the arbitration. The November 13 letter referenced Hansen’s “intention to enter into a Binding Arbitration and arbitrate the case against the defendant,” and goes on to inform

Economy that “[i]t will be our intent to bind you . . . to any decision by the arbitrator.” The fact that the letter references both *Schmidt* and *Malmin* does not create “inconsistent positions” that overcomes other evidence of the parties’ intent to use arbitration to finally conclude the tort action and bind Economy to the arbitrator’s determinations. See *George*, 754 N.W.2d at 341 (holding that “inconsistent positions” by counsel do not compel a conclusion as to the character of the arbitration in light of evidence of the parties’ intent). On this record, we discern no genuine fact issue as to the intent of the parties to resolve the tort case through binding arbitration.

II. Hansen’s notice to Economy complied with the *Malmin* requirements.

Having concluded that this case presents a *Malmin* scenario, we turn to the adequacy of Hansen’s notice. In *Malmin*, the insured obtained a judgment against an underinsured motorist and sought UIM benefits. 552 N.W.2d at 724. The UIM carrier denied coverage because *Malmin* had not complied with the policy requirements that he notify the carrier of his potential UIM claim and obtain the carrier’s written consent to sue the tortfeasor. *Id.* The supreme court held that the consent-to-sue clause was void and unenforceable under Minnesota law. *Id.* at 728. But the supreme court noted that its holding did not invalidate the notification provision of the policy:

[W]hile a “consent to sue” clause is invalid under the No-Fault Act, a provision within an insurance contract which requires the insured to notify his or her insurer of the commencement of a lawsuit against a tortfeasor within a limited period of time (*i.e.*, 60 days) after service of process comports with due process principles and does not raise the same concerns under the No-Fault Act. Such a provision would permit the insurer to consider the nature of the tort claim and the tortfeasor’s liability limits, and thereby

determine whether to attempt to intervene in the litigation in order to protect its own financial interests.

Id. at 728 n.4.

In contending that Hansen’s notice did not comply with *Malmin*, Economy emphasizes the lack of a written arbitration agreement, which would have conclusively established whether the arbitration would function as a settlement or a conclusion of the tort action. Economy also cites the district court’s denial of its intervention request that left its rights inadequately protected. We address each argument in turn.

Hansen’s initial letter notified Economy that she had filed an action for personal injuries related to the accident and advised Economy of its “right to intervene and participate in” the case. The letter also informed Economy of the trial date, the amount of liability insurance available to the Davises, and Hansen’s position that Economy would “be bound by the verdict” pursuant to *Malmin*. Economy does not dispute that it received this letter and that it did not attempt to intervene. Economy’s arguments that the two notices were insufficient because there was no written arbitration agreement is unavailing. As the district court noted, the existence of a written arbitration agreement is “not relevant” to the notice issue. *Malmin* requires written notice after commencement of the tort action to permit the UIM carrier to evaluate its potential exposure and the merits of seeking to intervene. *Id.* *Malmin* does not require an insured who decides to arbitrate her tort claim to prepare a written arbitration agreement.

The district court’s denial of Economy’s request to intervene also does not undermine the adequacy of the *Malmin* notice. *Malmin* does not require that an insurer’s

motion to intervene be granted; *Malmin* protects an insurer's right to "attempt to intervene." See *Malmin*, 552 N.W.2d at 728 n.4. Whether a party may intervene depends upon the principles set forth in Minn. R. Civ. P. 24.01 (allowing intervention "unless the applicant's interest is adequately represented by existing parties"). See *Erickson v. Bennett*, 409 N.W.2d 884, 887-88 (Minn. App. 1987). *Malmin* did not change the law on intervention. Accordingly, a UIM carrier does not have an absolute right to intervene in a tort action. While Economy maintains that its rights were not adequately protected, the district court determined otherwise and the denial of Economy's request to intervene is not before us on appeal. On this record, we conclude Hansen's *Malmin* notice was adequate as a matter of law, and the district court properly granted summary judgment in favor of Hansen.

Affirmed.