

STATE OF MINNESOTA
IN COURT OF APPEALS

No.: A05-0436

Lori Kluball,

Plaintiff-Appellant,

vs.

American Family Mutual Insurance
Company,

Defendant-Respondent.

APPELLANT'S BRIEF & APPENDIX

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ISSUES

1. Whether the district court erred in ruling that the UIM insurer's "consent to sue" clause was enforceable under *Malmin*, when the record showed no prejudice to the UIM carrier from a lack of ability to intervene in the liability determination.

The district court held in the negative.

Apposite Authority: *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996).

2. Whether the district court erred in ruling that the UIM insurer was not bound by the damages finding in the liability determination based on the Plaintiff's providing the UIM insurer with a *Malmin* notice.

The district court held in the negative.

Apposite Authority: *Butzer v. Allstate Ins. Co.*, 567 N.W.2d 534, 538 (Minn. App. 1997) ("Because the prior arbitration award collaterally estopped appellants from relitigating the amount of their damages, the trial court properly granted summary judgment for the respondent.").

3. Whether the district court erred in ruling that the Plaintiff's *Schmidt* notice was fatally defective, when the record showed no prejudice to the UIM carrier from a lack of ability to substitute its draft.

The district court held in the negative.

Apposite Authority: *See American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 927 (Minn. 1990); *Hopkins v. LaFontaine*, 474 N.W.2d 209, 213 (Minn. App. 1991) ("Whether an insurer has been prejudiced by its insured's late notification . . . is a question of fact.").

STATEMENT OF THE CASE

In this case Lori Kluball claimed underinsured motorist benefits from her insurer, American Family Mutual Insurance Company, for a serious motor vehicle accident.¹ The insurer contended that the claimant had resolved the claim against the underlying tortfeasor in a way that prejudiced the insurer's right to claim subrogation against the motorist who had caused Ms. Kluball's injuries, and moved for dismissal of the UIM claim by summary judgment.

The matter came before the Honorable John L. Holahan, who issued an order for summary judgment in favor of the Defendant American Family and also directed dismissal

¹ Underinsured coverage under MINN. STAT. § 65B.43, subd. 19 "means coverage for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of underinsured motor vehicles." An underinsured motor vehicle is defined in § 65B.43, subd. 17 as one that carried liability insurance "but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages." Pursuant to *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 857 (Minn. 1993), the underlying tort claim against the responsible driver must first be resolved by settlement, arbitration or trial before a UIM claim may be pursued. Once the underlying claim has been "tentatively settled," the claimant must generally give their UIM insurer "notice" of the resolution so as to afford the UIM carrier the opportunity to investigate the feasibility of its pursuit of the tortfeasor for "subrogation" to recoup any UIM benefits it may be asked to later pay. See *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983). The UIM insurer has 30 days within which to complete its investigation and decide whether or not to "substitute" its own money for the funds offered by the tortfeasor's liability insurer. See *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 927 (Minn. 1990). If the insured fails to give this opportunity to the UIM insurer before signing a release with the liability carrier, it is "deemed prejudicial to the underinsurer [but the] presumption of prejudice shall be rebuttable" with "the burden of demonstrating by a preponderance of the evidence the absence of prejudice . . . [being] borne by the insured." *Id.* "An insured's failure to sustain that burden . . . result[s] in forfeiture." *Id.*

of Plaintiff's entire claim against the sole defendant on January 13, 2005, with final judgment also being entered on that date. This is an appeal as of right, pursuant to MINN.R.CIV.APP.P. 103.03(a) from a final judgment. MINN.R.CIV.APP.P. 104.01, subd. 1, limits the appeal to 60 days following entry of a final judgment. A timely appeal was taken on March 3, 2005.

STATEMENT OF FACTS

This is a claim for underinsured motorist ["UIM"] benefits under an automobile insurance policy with American Family Mutual Insurance Company ["American Family"] covering the Plaintiff, Lori Kluball ["Kluball"] for a December 29, 1994 collision in which an underinsured tortfeasor named Denys Lynn Craven ["Craven"] caused injuries to Kluball that were beyond the limits of liability coverage Craven carried with her liability insurer - - Metropolitan Property and Casualty ["Metropolitan"].

The liability insurer, Metropolitan agreed to submit the liability claim against Ms. Craven to binding arbitration rather than to a jury to save both sides the costs of a trial. A mutually agreed upon neutral was selected to determine Kluball's "actual damages,"² and he issued findings that confirmed that Ms. Kluball had sustained damages in the amount of \$119,805.82, whereas the tortfeasor only had \$50,000 of liability coverage with Metropolitan.

Prior to the arbitration hearing Plaintiff Kluball's attorney sent a notice letter to American Family in its capacity as Ms. Kluball's UIM carrier, advising American Family of the proposed arbitration proceeding that Metropolitan had already agreed to in its capacity as Ms. Craven's liability carrier.³

² A UIM carrier is responsible for paying the "actual damages" incurred by their insured, to the extent that these actual damages exceed the amount of available liability insurance. *See Richards v. Milwaukee Ins. Co.*, 518 N.W.2d 26 (Minn. 1994).

³ The notice letter is attached as Ex. 3 to the Affidavit of Gary Manka, A-10.

After the arbitration proceeding, Metropolitan as the liability insurer tendered its \$50,000 insurance limits in partial satisfaction of the award, and since Ms. Kluball had UIM coverage with American Family sufficient to pay the entire balance of the arbitration award beyond the \$50,000 of liability coverage, Plaintiff Kluball's lawyer sent a demand for the amount of the excess owed to American Family in its capacity as her UIM carrier, reminding them of their prior notice.⁴

Meanwhile, Plaintiff proceeded to finalize the acceptance of the first \$50,000 of liability coverage with a release to American Family in its capacity as the tortfeasor's liability insurer,⁵ and to remind American Family about the pending UIM part of the payment with a letter dated October 23, 2003.⁶

Plaintiff's counsel did give American Family as UIM carrier the opportunity - - if it wished - - to substitute its draft for that of American Family as liability carrier so that American Family as UIM carrier could sue its own insured, Ms. Craven, to recoup UIM benefits it may have to pay.⁷

Instead of paying its UIM coverage, American Family took the position that an

⁴ The UIM demand letter is attached as Ex. 6 to the Affidavit of Gary Manka, A-18.

⁵ The Release and Satisfaction is attached as Ex. 5 to the Affidavit of Gary Manka, A-15.

⁶ The letter of October 23, 2003 is attached as Ex. 7 to the Affidavit of Gary Manka, A-20.

⁷ This letter is attached as Ex. 7 to the Affidavit of Gary Manka, A-20.

unpublished case called *Mattila v. American Family Mutual Ins. Co.*, 1998 WL 170113 (Minn. App. 1998), controlled the disposition of the arbitration and that - - since the plaintiff agreed with American Family as liability carrier to submit the case to an arbitrator to determine damages - - the maximum exposure of American Family in any capacity was the \$50,000 limit of its liability insurance recited in the agreement with it as liability insurer and that its UIM coverage would never be exposed, because the parties to the arbitration had agreed to limit the tortfeasor's exposure to the \$50,000 of liability coverage, and - - having capped the tortfeasor's exposure at \$50,000 - - the tortfeasor could never become "legally obligated" to pay more than the amount of liability coverage so the tortfeasor could not be "underinsured" (*i.e.*, be "legally obligated" to pay in excess of the liability coverage).⁸

American Family also took the position that its UIM insurance policy had special language that would defeat any effort to bind it as a UIM carrier to any award issued by a jury or arbitrator against a tortfeasor, in that it should always be entitled to re-try the value of the case and hope for a second jury or second arbitrator with a more conservative nature.⁹ Finally, American Family took the position that it had not been given enough time under

⁸ American Family's letter memorializing this position is attached as Ex. 8 to the Affidavit of Gary Manka, A-22.

⁹ See Ex. 8 at 2, A-23. In *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996), the Minnesota Supreme Court declared that a UIM carrier was bound by a prior determination of damages in a claim by the plaintiff against the tortfeasor if the plaintiff gave notice to the UIM carrier of the liability proceeding. Plaintiff's notice to American Family here was in the letter that is attached as Ex. 3 to the Affidavit of Gary Manka.

Schmidt to decide if it should “substitute its draft” and sue its own insured.¹⁰

Plaintiff disagreed with these positions, and argued to the district court that: (1) *Mattila* is an unpublished case, which is not precedential,¹¹ and is distinguishable in that the main issue in *Mattila* was whether the plaintiff and tortfeasor had reached the “best possible settlement” by agreeing to cap the tortfeasor’s exposure to the amount of available insurance, (2) as to the language in the policy, no insurer can rely on terms in its contract that are at variance with Minnesota No-Fault law,¹² and the appellate courts already declared that a UIM

¹⁰ See, Ex. 8 at 1, ¶ 3, A-22.

¹¹ See *Vlahos v. R & I Constr.*, 676 N.W.2d 672 (Minn. 2004), saying that a trial court’s reliance on an unpublished case that had been issued by the Court of Appeals

was misplaced, both as a matter of law and as a matter of practice. . . . [W]e pause here to stress that unpublished opinions of the court of appeals are not precedential. See MINN. STAT. § 480A.08, subd. 3(c) (2002); *Powell v. Anderson*, 660 N.W.2d 107, 123 (Minn. 2003). The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts. See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 801 (Minn. App. 1993). Unpublished decisions should not be cited by the district courts as binding.

676 N.W.2d at 676, n. 3.

¹² See *Am. Motorist Ins. Co. v. Sarvela*, 327 N.W.2d 77, 79 (Minn. 1982).

carrier may be bound by the damage figure set by a liability trial¹³ or arbitration,¹⁴ and (3) the *Schmidt* notice was unnecessary in any event since it merely allows a UIM insurer to subrogate against a tortfeasor and in Minnesota, an insurer may not sue its own insured for subrogation.¹⁵

For these reasons, the Plaintiff Kluball opposed the summary judgment motion of American Family and she moved for judgment herself - - each party seeking a determination as a matter of law regarding the viability of the Plaintiff Kluball's UIM claim against Defendant American Family.

The trial court, Hon. John L. Holahan held a hearing on November 30, 2004 and issued a ruling on January 13, 2005, denying the Plaintiff's motion for summary judgment and granting the Defendant's motion. Judgment was immediately entered. This timely appeal followed.

¹³ See discussion of *Malmin* in note 9 *supra*. One of the potentially confounding rules established by the Supreme Court is that a plaintiff must first completely resolve her liability case before she may commence a UIM claim. See *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 858-59 (Minn. 1993).

¹⁴ The Court of Appeals case of *Butzer v. Allstate Ins. Co.*, 567 N.W.2d 534, 538 (Minn. App. 1997), held that a liability arbitration also binds the UIM carrier.

¹⁵ See, e.g., *St. Paul Companies v. Van Beek*, C6-99-1764, 609 N.W.2d 256 (Minn. App. 2000) (Minnesota law bars an insurer from subrogating against the employee of its insured tenant, when the employee negligently starts a fire that damages its insured's property).

ARGUMENT

I. Standard of Review Examines Record for Genuine Factual Issues.

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law. MINN. R. CIV. P. 56.03.

On appeal from summary judgment, the court must determine (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. *City of Virginia v. Northland Office Props.*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991).

In this case, the Plaintiff sought to bind her UIM insurer to the results of the arbitration she participated in with the tortfeasor's liability insurer. The UIM insurer defended on three grounds: (1) that it was not bound by a liability arbitration despite *Malmin*, (2) that a binding liability arbitration prejudices its rights under the unpublished case of *Mattila* and so it should be relieved from the obligation to pay any UIM benefits, and (3) the Plaintiff failed to give an adequate *Schmidt* notice and it was also prejudiced by that so it should be relieved from paying UIM benefits under the *Baumann* case.

The first point to make clear is that a UIM insurer may indeed be legally bound by the results of a liability trial or arbitration. That general point of law was declared by the Minnesota Supreme Court in *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723

(Minn. 1996). *Malmin* is important not only for that general principle, but because it also disallowed a defense based on insurance contract language. The reason the latter point is important is that the UIM insurer in this case has raised similar language as a defense to its obligations. To the extent that *Malmin* disposes of that defense, the Plaintiff-Appellant will prevail on the initial controversy over whether the liability arbitration can be binding. That opens the door for further analysis into the other two defenses raised by the UIM insurer.

II. Notwithstanding a “Consent to Sue” Clause, a UIM Insurer may be Bound by a Damages Finding in the Liability Determination

A. The Type of UIM Insurance Policy Language American Family Seeks to Enforce has been held Unenforceable.

In *Malmin v. Minnesota Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996), the Minnesota Supreme Court confronted a case in which the plaintiffs sought to make the damage findings - - that the jury in a liability case had made - - binding upon their UIM carrier in the subsequent UIM claim. The UIM carrier argued that it should not be held to the prior decision, pointing to language in its UIM insurance policy with the Malmins that said, among other things “Any judgment for damages arising out of a ‘suit’ brought without our written consent is not binding on us.” *Id.* at 724, n.1.

The Supreme Court ruled,

we hold that a consent to sue clause which requires written consent from the insurer before the insurer will be bound by a judgment against a tortfeasor is contrary to the purposes of the No-Fault Automobile Insurance Act, Minn. Stat. §§ 65B.41-.71 (1994). Thus, [the UIM insurer] is bound by the damages award obtained by the Malmins in [the liability trial in] Hennepin County District Court.

Id. at 726. This ruling is in line with “the reasoning of courts in other jurisdictions that have refused to enforce consent to sue clauses in automobile insurance contracts [which would otherwise] . . . forc[e] the insured to relitigate his or her claim against a tortfeasor [in a UIM proceeding] simply because the insured neglected to obtain written consent from the insurer,” *id.*, as such a clause “violates the public policy behind our No-Fault Act and erects unnecessary barriers to the insured’s recovery of UIM benefits.” *Id.*

Here, American Family has argued that its policy included language that decreed “You must notify us of any suit brought to determine legal liability of damages . . . at the time it is commenced,” stating “We are not bound by any resulting judgment where we have not received timely notice of the commencement of the lawsuit.”¹⁶ By requiring written notice of suit commencement, American Family is essentially requiring that it “consent” to the suit in order to be bound by its damages determination. This was the position rejected in *Malmin*.

B. Justification for Notice is to Assure that Liability Claim will be Adequately Defended

Here, there is no good reason of policy or procedure not to bind American Family to the results of the good faith liability arbitration that was secured at arm’s length especially when, during the arbitration, Metropolitan took the position that Plaintiff Kluball was entitled to actual damages in an amount of less than its \$50,000 liability limits.¹⁷

Metropolitan was represented throughout the liability proceedings by well-respected,

¹⁶ See Policy language in Ex. 1, A-4 - A-6.

¹⁷ See Affidavit of Gary Manka, ¶ 14, A-3.

independent counsel,¹⁸ so American Family cannot show that it needed to attempt to intervene in the arbitration and obtain the services of a more skilled advocate to supplement the efforts of Metropolitan's counsel. The interests of Metropolitan and American Family in holding the plaintiff's damages down to a number below the \$50,000 liability coverage of the tortfeasor were thus the same.

The general rule of *Malmin* should apply here and the language requiring consent to suit should not be enforced. This means that the Defendant-Respondent UIM carrier would be bound by the liability arbitration award, unless one of the two other defenses it has raised applies.

III. Mattila is Distinguishable and at Most Requires the Entry of Judgment for Enforcement of the Arbitration Award.

The second defense raised below by the UIM insurer was that the concept of a binding "high-low" arbitration agreement¹⁹ between the Plaintiff and the tortfeasor's liability insurer represents an interference with the UIM carrier's rights that should cut off its obligation to pay

¹⁸ *Id.*, A-3.

¹⁹ A "high-low" agreement is one that assures each party of some protection as they enter into a hearing to determine the value of a claim. A "low" is set so that even if the Plaintiff loses the case, he/she receives some minimal agreed payment. A "high" is set so that the liability insurer will not expose its insured - - the tortfeasor - - to unlimited damages when the compensation is set by an arbitrator. Traditionally, the "high" is set at the liability policy limits of the tortfeasor's liability insurer - - the maximum amount that the insurer would ever be obliged to pay on their insured's behalf. Also traditionally, the Plaintiff is allowed as part of the agreement to give a precautionary *Schmidt* notice to their UIM carrier to preserve the UIM carrier's right of subrogation, should it chose to exercise that right.

any UIM benefits. Specifically, the UIM carrier argued that by agreeing to a maximum “high” as part of the liability arbitration agreement, the Plaintiff impaired the right of the UIM carrier to assert a claim against the tortfeasor for subrogation.

The unpublished *Mattila* case relied upon by American Family is distinguishable both because it is non-precedential and because in published cases of the Court of Appeals, the court has held that the determination of damages in a high-low arbitration proceeding like that used here, may bind the parties to a UIM claim. *See Butzer v. Allstate Ins. Co.*, 567 N.W.2d 534, 538 (Minn. App. 1997) (“Because the prior arbitration award collaterally estopped appellants from relitigating the amount of their damages, the trial court properly granted summary judgment for the respondent.”).

Moreover, at most, *Mattila* stands for the proposition that to be enforceable, a prior arbitration award in the liability claim must be reduced to “judgment,”²⁰ as it does not bar enforcement of a prior arbitration award, but expresses the preference that such an award first be reduced to “judgment.” Since the instant claim seeks enforcement of the award, if entry of judgment on the arbitration award is a condition precedent to that, then this Court may do that procedural undertaking before the grant of summary judgment.

Finally, the main focus of *Mattila* was over whether the Plaintiff and liability insurer had already achieved the “best possible settlement” by negotiating for the “high” amount of

²⁰ *See Mattila, supra*, 1997 WL 170113, at *2, A-45.

the arbitration to be capped at the available insurance limits.²¹ Noting that the agreement also referred to a guaranteed “low” to protect the Plaintiff against a conservative arbitrator and that it referenced underinsured coverage, the *Mattila* court concluded that the agreement was at worst “ambiguous” and required a fact-finder to construe it. Even if *Mattila* had direct application to our case, therefore, the solution would not be summary judgment for American Family, but jury resolution of the party’s intentions.

IV. Schmidt Notice was Sufficient

The Plaintiff chose to give a *Schmidt* notice to the UIM carrier in this case. The purpose of a *Schmidt* notice is to afford a UIM carrier the opportunity to decide if it will sue the tortfeasor for subrogation for the UIM benefits it must pay. In this case, American Family has argued that the time period for it to decide this question was too short.

When there are procedural defects alleged to exist in a *Schmidt* notice, the case of *Baumann v. American Family*,²² makes clear that there must be a showing of “actual prejudice,” and none has been demonstrated here.²³ In the absence of a showing that American family would have normally exercised a right to subrogate against Ms. Craven, or that she had substantial “collectable” assets at the time the notice was owed, there is no “prejudice” to American Family from any failure to give them 30 days notice. Traditionally,

²¹ *Id.* at *3, A-45.

²² 459 N.W.2d 923 (Minn. 1990).

²³ *See* Affidavit of Gary Manka, ¶ 15, A-3.

most UIM insurers do not “substitute” their drafts and American Family has not indicated that it would have done so here. In the absence of prejudice, any failings in the *Schmidt* notice cannot form the basis for a refusal to enforce the damage findings made in good faith by the neutral arbitrator at the liability hearing.

A UIM insurer has 30 days within which to complete its investigation and decide whether or not to “substitute” its own money for the funds offered by the tortfeasor’s liability insurer. *See American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 927 (Minn. 1990). If the insured fails to give this opportunity to the UIM insurer before signing a release with the liability carrier, it is “deemed prejudicial to the underinsurer [but the] presumption of prejudice shall be rebuttable” with “the burden of demonstrating by a preponderance of the evidence the absence of prejudice . . . [being] borne by the insured.” *Id.* “An insured’s failure to sustain that burden . . . result[s] in forfeiture.” *Id.*

“*Baumann* did not indicate how much evidence is required to rebut the presumption of prejudice,” *Behrens v. American Fam. Mut. Ins. Co.*, 520 N.W.2d 763, 768 (Minn. App. 1994), *review denied* (Minn., Oct. 14, 1994), but in cases in which the matter went to an evidentiary hearing, the absence of “the financial status of the tortfeasor,” *id.*, or of their “assets . . . and the likelihood of [the insurer’s] recovery via subrogation” have been viewed as significant. *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 661 N.W.2d 680, 687 (Minn. 2003), *quoting Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983).

Here, the UIM carrier produced no financial evidence and the Plaintiff offered an

affidavit of her attorney indicating that his review of financial information failed to show any prejudice to the insurer. Since the issue arose here in the context of a summary judgment motion, it is significant that there was no evidentiary hearing as in *Behrens* or *Schwickert*, but instead the rule laid down in *Hopkins v. LaFontaine*, 474 N.W.2d 209, 213 (Minn. App. 1991), should apply:

As a general rule, an insured's breach of a policy provision, such as the notice provision in the [UIM carrier's] policy will not lead to a forfeiture of insurance benefits absent a showing that the insurer has been prejudiced. *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 926-27 (Minn. 1990). Whether an insurer has been prejudiced by its insured's late notification of suit is a question of fact. See *Ryan v. ITT Life ins. Corp.*, 450 N.W.2d 126, 130 (Minn. 1990) (denial of summary judgment on whether insurer was prejudiced); *Reliance Ins. Co. v. St. Paul Ins. Cos.*, 307 Minn. 338, 343, 239 N.W.2d 922, 925 (1976) (holding that delay in notification was not prejudicial, but could be in other factual settings).

Hopkins, supra, 474 N.W.2d at 213 (emphasis added). In the context of summary judgment - - such as was presented here - - the issue is a fact question for the jury.

Such should have been the determination here. Instead the district court resolved the factual debate and ruled in the UIM insurer's favor. That was contrary to standard of review and should be reversed.

CONCLUSION

The economic use of judicial resources would suggest that there is no need to try a case twice when one reasonable form of damages determination has already been completed. Such was the Supreme Court's decision in *Malmin*, and the Court of Appeals' ruling in *Butzer*, which held a binding high-low arbitration of the liability claim to be a reasonable way to

assess binding damages.

The motion of American Family for summary judgment - - seeking to be relieved from the damages fixed by the prior arbitration award - - should have been denied, and thus the Court of Appeals should reverse and remand the matter for trial so that the genuine factual issues may be resolved.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).