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STATE OF MINNESOTA

IN COURT OF APPEALS

No.: A05-0436

Lori Kluball,

Plaintiff-Appellant,

vs.

American Family Mutual Insurance Company,

Defendant-Respondent.

APPELLANT'S REPLY BRIEF, MOTION TO STRIKE & APPENDIX

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MOTION TO STRIKE

Pursuant to MINN.R.CIV.APP.P. 127, Appellant moves to strike the Affidavit dated May 2, 2005, from the Respondent's Appendix, as extra-record material under MINN.R.CIV.APP.P 110.01 and *Deike v. Gopher Smelting*, 413 N.W.2d 590, 592 (Minn. App. 1987). Since the matter was appealed on March 3, 2005, and since the record on appeal consists of the "papers filed in the trial court" under MINN.R.CIV.APP.P 110.01, the affidavit submitted with Respondent's appendix dated May 2, 2005, would be extra-record material, that must be excluded. *See Deike, supra*, 413 N.W.2d at 592.

ARGUMENT

This short brief replies to the "prejudice" argument of the Respondent. The *Malmin*, *Mattila* and consent-to-sue issues were adequately addressed in Appellant's initial brief.

I. Record Showed a Lack of Prejudice to the Insurer from a Late *Schmidt* Notice

Following *Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983), cases at first ruled that the failure to provide a notice prior to settlement with the tortfeasor automatically forfeited the UIM coverage that might otherwise be available to a claimant. *See, e.g., Lenssen v. Farm Bureau Mut. Ins. Co.*, 421 N.W.2d 414 (Minn. App. 1988).

The automatic forfeiture rule was modified by *Baumann v. American Family,* 459 N.W.2d 923 (Minn. 1990), which established the rule that while the lack of notice was presumed to be prejudicial, the presumption was a rebuttable one that looked to whether there was "actual prejudice" to the insurer.

Here, the Claimant submitted an affidavit of counsel indicating that his "investigation . . . fails to disclose the availability of any meaningful assets of the tortfeasor which would have been available to American Family Mutual Insurance Company to seek subrogation against," had they received a timely *Schmidt* notice. *See* Affidavit of Gary Manka, ¶ 15, A-3.

While case law does not present a crystal clear elaboration of what must be "shown" to rebut the "presumption" of prejudice, the Court has suggested that a claimant must generally establish that the tortfeasor did not have assets which might be used to satisfy a subrogation claim. *See Behrens v. American Family Mut. Ins. Co.*, 520 N.W.2d 763, 768 (Minn. App. 1994) ("Although *Baumann* did not indicate how much evidence is required to rebut the presumption of prejudice, there was <u>no evidence</u> presented in this case as to the financial status of the tortfeasor. This type of evidence is relevant to the underinsurer's assessment of its subrogation interest.").

A. <u>Courts have Held Similar Information was Adequate to Rebut Prejudice</u>

The level of detail of a financial investigation is not specified by the case law, but unlike *Behren's* it is clear that evidence <u>was</u> presented here, that the tortfeasor had no assets against which the underinsurer might have asserted a subrogation claim. In those cases in which the courts have held that the claimant has fulfilled her burden of rebutting the presumption of prejudice, some nominal proof of the impecunious nature of the tortfeasor was shown. *See, e.g., Elwood v. Horace Mann Ins. Co.*, 531 N.W.2d 512, 516 (Minn. App. 1995) ("strict compliance with *Schmidt* is not required in every case" as "'*Schmidt* was not intended

as a technical snare for unwary insureds'"); *Springstroh v. St. Paul Fire & Marine Ins. Co.*, 1994 WL 687662, at * 1 (Minn. App. Oct. 18, 1994), *review denied* (Minn., Dec. 20, 1994) ("tortfeasor . . . never owned real estate, owned one car with 100,000 miles on it, never had a savings account or owned stocks, bonds or other assets with a monetary value. . . . [So the plaintiff] rebutted the presumption of prejudice to the underinsurer caused by the lack of notice.")(AA-1); *Rousselow v. American Family*, 1991 WL 151357, at *1 (Minn. App. Aug. 13, 1991)(plaintiff's attorney "averred that . . . he had investigated the tortfeasor's personal assets and determined 'there would be no point in attempting to pursue him on a personal level'" and evidence later showed the tortfeasor only had "heavily mortgaged" property)(AA-3).

B. <u>At a Minimum a Fact Issue Existed on Prejudice, so Reversal and Remand is Necessary</u>

Summary judgment may be granted only file shows 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. A fact is material when it aids the establishment of a claim so as to have an affect on the claim's outcome. *See Brenner v. Nordby*, 306 N.W.2d 126, 127 (Minn. 1981) All doubts and inferences about the facts are resolved against the moving party. *See Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981).

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 in the present case and the courts have held that "Whether an insurer has been prejudiced by its insured's late notification of suit is a question of fact." *Hopkins v. LaFontaine*, 474 N.W.2d 209, 213 (Minn. App. 1991). In the context of summary judgment - - such as was presented here - - the issue of prejudice is a fact question for the jury. The court's grant of summary judgment as a matter of law on the prejudice issue was thus an error of law and should be reversed.

II. <u>The Court Should Adjust who has the Burden of Proof on Prejudice.</u>

Appellant recognizes that the Court of Appeals is an "error correcting" and not a precedent establishing court. *See generally Lake George Park LLC v. IBM Mid-America*, 576 N.W.2d 463, 466 (Minn. App. 1998) ("this court, as an error correcting court, is without authority to change the law"). Nonetheless, since the issue of what level of evidence is needed to preserve access to coverage is relevant, to preserve the issue for further review by the Supreme Court, Appellant wishes to note that Minnesota's rule of "forfeiture" for an inadequate notice as expressed in *Baumann* is now in the minority of jurisdictions, as a "clear majority of states hold that once it is demonstrated that the insured breached the notice provision, the burden of proof is allocated to the insurer to prove that it has been prejudiced by the breach."[1] This is because "it is the insurer that is seeking to escape its obligations under

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[1] Alcazar v. Hayes, 982 S.W.2d 845, 853-54 (Tenn. 1998), *citing* Nat'l Un. Fire Ins. Co. v. FDIC, 957 P.2d 357, 368 (Kan. 1998); Weaver v. State Farm, 936 S.W.2d 818, 821 (Mo. 1997); Coop. Fire Ins. Ass'n v. White Caps, Inc., 694 A.2d 34, 36 (Vt. 1997) (insurer must show "substantial prejudice"); Vermont Mut. Ins. v. Singleton, 446 S.E.2d 417, 421-22 (S.C. 1994)(insurer must show "substantial prejudice"); Marquis v. Farm

an adhesive contract . . . ." *Ferrando v. Auto-Owners Mut. Ins. Co.*, 781 N.E.2d 927, 936 (Ohio 2002). Some states make "prejudice" one of several factors to consider in deciding whether or not to make the insurance coverage at issue available.[2] A minority of states follow Minnesota's approach of placing the burden of proof on the insured to rebut a presumption of prejudice.[3]

Since some experience has now been gained both in Minnesota (since *Baumann*) and elsewhere nationwide, should the question of the adequacy of the Plaintiff's showing of "no actual prejudice" be deemed insufficient as a matter of law and the matter reach the Supreme Court of Minnesota, it would be appropriate to reassess the wisdom of placing any burden on the Plaintiff.

Meanwhile, it is clear that at a minimum a genuine fact issue existed on the prejudice issue that requires reversal of summary judgment and remand.

Mut. Ins. Co., 628 A.2d 644, 649 (Me. 1993); Jones v. Bituminous Cas. Corp., 821 S.W.2d 798, 803 (Ky. 1991); Weaver Bros., Inc. v. Chappel, 684 P.2d 123, 126 (Alaska 1984); Great Amer. Ins. Co. V. C.G. Tate Constr. Co., 279 S.E.2d 769, 775 (N.C. 1981), *appeal after remand*, 340 S.E.2d 743 (N.C. 1986); Indep. Sch. Dist. No. 1 v. Jackson, 608 P.2d 1153, 1155 (Okl. 1980); Brakeman v. Potomac Ins. Co., 371 A.2d 193, 198 (Pa. 1977); Oregon Auto Ins. Co. v. Salzberg, 535 P.2d 816, 819 (Wash. 1975); Rampy v. State Farm, 278 So.2d 428, 434 (Miss. 1973)(insurer must show "substantial prejudice"); Cooper v. Gov't Employees Ins. Co., 237 A.2d 870, 874 (N.J. 1968); Campbell v. Allstate Ins. Co., 384 P.2d 155, 157 (Cal. 1963).

[2] *See, e.g.,* Koski v. Allstate Ins. Co., 572 N.W.2d 636, 639 (Mich.1998); State Auto.Mut. Ins. Co. v. Youler, 396 S.E.2d 737 (W. Va. 1990); State Farm v. Walton, 423 S.E.2d 188, 192 (Va. 1992).

[3] *See, e.g.,* WIS. STAT. § 631.81; Clementi v. Nat'l Mut. Fire Ins. Co., 16 P.3d 233, 231 (Colo. 2001); Miller v. Dilts, 463 N.E.2d 257, 265-66 (Ind. 1984).

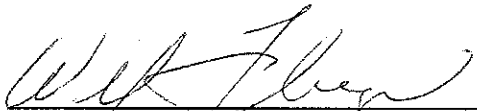
CONCLUSION

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,

DATED: 5-12-05



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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).