

NO. A07-1457

State of Minnesota
In Court of Appeals

TENA V. VAN KAMPEN,

Appellant,

vs.

WASECA MUTUAL INSURANCE COMPANY,
n/k/a AUSTIN MUTUAL GROUP, AND
WESTFIELD INSURANCE, a/k/a WESTFIELD GROUP,

Respondents,

vs.

WESTFIELD INSURANCE, a/k/a WESTFIELD GROUP,

Third-Party Plaintiff,

vs.

RISPENS SEEDS, INC. AND PAUL RUSSELL BREY,

Third-Party Defendants.

RESPONDENT WESTFIELD'S BRIEF

MASCHKA, RIEDY & RIES
John M. Riedy, Esq. (#91471)
Jorun Groe Meierding, Esq. (#167423)
201 North Broad, #200
P.O. Box 7
Mankato, Minnesota 56002-0007
(507) 625-6600

Attorneys for Appellant

McCOLLUM, CROWLEY, MOSCHET
& MILLER, LTD.
Richard P. Wright, Esq. (#119039)
Cheryl Hood Langel, Esq. (#220012)
700 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431
(952) 831-4980

Attorneys for Respondent Westfield

(Additional Counsel on Following Page)

BLETHEN, GAGE & KRAUSE
James H. Turk, Esq. (#111338)
127 South Second Street
P.O. Box 3049
Mankato, Minnesota 56002
(507) 345-1166

DUNLAP & SEEGER, P.A.
Peter C. Sandberg, Esq. (#095515)
206 South Broadway, Suite 505
P.O. Box 549
Rochester, Minnesota 55903-0549
(507) 288-9111

Attorneys for Respondent Austin Mutual Attorneys for Third-Party Defendants

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LEGAL ISSUES

1. Schmidt v. Clothier established the necessary procedures for an injured insured seeking UIM benefits. Prior to seeking UIM benefits, an insured must commence an action against or settle with the tortfeasors. Appellant neither commenced an action against nor accepted any settlement proceeds from the tortfeasors prior to giving them a full release and extinguishing Westfield's subrogation rights. May Appellant seek UIM benefits from Westfield?

No. The trial court correctly held that Appellant forfeited her right to pursue UIM benefits because she extinguished Westfield's subrogation rights when she released the tortfeasors from liability without first validly settling her tort claims.

2. Prior to settling with tortfeasors, an insured must provide a Schmidt v. Clothier notice to a UIM insurer, which must contain a settlement figure for the insurer to consider when deciding whether to preserve its subrogation interests, and which must give the insurer 30 days to make its decision. Appellant's purported Schmidt notice provided a settlement figure relating only to other insureds (because Appellant did not accept any settlement proceeds) and failed to indicate that Appellant, who was then only a named defendant, intended to release her own claims. Appellant thereafter released the tortfeasors from liability only 18 days after she sent the purported notice and without receiving any response from Westfield. May Appellant pursue UIM benefits from Westfield?

No. The trial court correctly held that Appellant failed to comply with Schmidt-notice requirements, forfeiting her right to pursue UIM benefits.

3. If a proper Schmidt notice is not provided to the UIM insurer, prejudice to that insurer is presumed. Unless adequately rebutted by the insured with evidence relating to the financial status of the tortfeasors, the presumed prejudice results in the insured's forfeiture of UIM benefits. The undisputed evidence shows that the tortfeasors had sufficient assets to satisfy a subrogation claim. May Appellant pursue UIM benefits from Westfield?

No; Appellant failed to offer any evidence rebutting the presumed prejudice to Westfield, and thus she forfeited her right to pursue UIM benefits. The trial court did not rule on this issue.

STATEMENT OF THE CASE

This contract action was brought in Blue Earth County District Court, Fifth Judicial District, Court File No. 07-CV-06-3202, with The Honorable Norbert P. Smith presiding over the summary judgment hearing.

In July 2006, Appellant commenced an action against Respondents seeking underinsured motorist (“UIM”) benefits. (A.1, Compl. (undated) ¶¶ X, XI.) Both Respondents answered by asserting that Appellant had waived her claim to UIM benefits. (A.4, Westfield Ins. Group’s Am. Answer Pl.’s Compl. ¶ 10; A.8, [Austin Mut. Group’s] Answer Compl. ¶ 10.)

In March 2007, Respondents brought summary judgment motions against Appellant on the ground that Appellant had forfeited her right to recover UIM benefits because of her failure to protect Respondents’ subrogation interests against the tortfeasors responsible for her injuries. (A.61, Def. Westfield Ins.’s Notice Mot.; Def. Westfield Ins.’ Mem. Supp. Mot. Summ. J.; A.101, Def. Austin Mut. Group’s Not. Mot.; Def. Austin Mut. Group’s Mem. Supp. Mot. Summ. J.)

The motions for summary judgment were heard by Judge Smith on May 1, 2007. (A.131, Order Re: Summ. J. 1.) On May 31, 2007, Judge Smith granted the motions, dismissing Appellant’s action for UIM benefits. (A.132, Order ¶¶ 1, 2.) In his Order, Judge Smith noted that the only issue to be decided was “whether [Appellant] forfeited her right to pursue underinsured motorist benefits.” (A.133.) The Judge affirmatively ruled that Appellant had forfeited her right, stating:

[Respondents] could [have] readily pursue[d] a subrogation action against Mr. Brey and Rispens Seeds. However, such action is barred by the fact that [Appellant] signed a full release of her liability rights against Mr. Brey and Rispens Seeds. In doing so, she effectively fully released all of the UIM [Respondents'] subrogation rights. [Appellant] cannot with one hand create legal obstacles for the [Respondents] while on the other she asserts legal claims against those same [Respondents].

This Court finds the Supreme Court intended to preserve the subrogation interests of UIM carriers when it developed the *Schmidt-Clothier* settlement notice procedure. Given that [Appellant's] actions had the effect of interfering with the subrogation rights of the [Respondents] UIM carriers, [Appellant] must be held to have forfeited her right to pursue UIM benefits.

(A.135, Order 5.)

The Blue Earth County clerk entered summary judgment against Appellant on May 31, 2007. (A.136, Summ. J.) By Notice of Appeal dated July 27, 2007, Appellant appealed the trial court's summary judgment decision to this Court. (A.138, Notice Appeal Ct. App.)

STATEMENT OF FACTS

The Automobile Collision

On August 1, 2000, Appellant Tena Van Kampen was injured in a two-vehicle collision while driving an automobile owned by Jeffrey Posthumus, her son-in-law. (A.2, Compl. ¶ IV; A.4, Westfield Ins. Group's Am. Answer ¶ 3.) Also in that automobile were Ms. Van Kampen's daughter, Karen Posthumus (Jeffrey's wife), and Ms. Van Kampen's granddaughters, Kristin, Kayla, and Mariah Posthumus. (A.14, Third-Party Compl. ¶ 6; A.31, Answer Third-Party Compl. ¶ III; A.66, Langel Aff. Ex. 1 (5-24-04 Settlement Agreement) at 1, Recital A.) All four Posthumuses were also injured in the accident. (Id.)

The driver of the vehicle that collided with the Posthumus vehicle was Third-Party Defendant Paul Brey. (A.2, Compl. ¶¶ IV, V; A.14, Answer ¶ V; Third-Party Compl. ¶ 4; A.31, Answer Third-Party Compl. ¶ III.) Mr. Brey was driving a van owned by his employer, Third-Party Defendant Rispens Seeds, Inc. (Id.)

Insurance Coverage

The Rispens Seeds vehicle was insured by Safeco Insurance Company with liability limits of \$1.5 million. (A.14, Third-Party Compl. ¶ 7; A.31, Answer Third-Party Compl. ¶ III.) The Posthumus vehicle was insured by Respondent Westfield Insurance with underinsured motorist coverage limits of \$50,000 per person and \$100,000 per occurrence.¹ (A.1-2, Compl. ¶ III; A.15, Third-Party Compl. ¶ 10.) Ms. Van Kampen was separately insured by Respondent Austin Mutual, and that policy also includes underinsured motorist coverage. (A.2-3, Compl. ¶¶ VII, X.)

Prior Lawsuits: Posthumus Personal-Injury Action Number 1:

At some point after the automobile collision, the five Posthumuses commenced a personal-injury action against Mr. Brey, Rispens Seeds, and Appellant Van Kampen. (A.75, Langel Aff. Ex. 3 (5-24-04 Order approving minor settlement in Court File No. 71-C1-03-2023).) Ms. Van Kampen did *not* commence any personal-injury action for her injuries. (Id. (identifying Appellant only as a defendant); A.58, Def. Van Kampen's

¹ Pursuant to the Minnesota No Fault Act, *infra*, the Westfield policy also includes liability coverage and coverage for basic-economic-loss benefits. Basic-economic-loss benefits and the per-person limit of \$50,000 of UIM benefits were paid to the Posthumuses by Westfield. (A.74, Ex. 2 (4-22-05 letter from Westfield relating to the payment of UIM benefits).) Ms. Van Kampen is seeking the remaining \$50,000 of UIM coverage on a per-occurrence basis from Westfield. (A.3, Compl. ¶ XI.)

Cross Claim ¶ I (seeking only indemnity and contribution from Brey and Rispens Seeds).)

On April 26, 2004, the parties to the Posthumuses' personal-injury action participated in mediation and reached a settlement. (A.79, Langel Aff. Ex. 4 (5-6-04 letter from Donald Savelkoul, Ms. Van Kampen's attorney in that prior action, to Westfield and Austin Mutual).) Westfield was not informed (at any time) that Ms. Van Kampen was to be identified as a "Claimant" on the future written settlement document, nor was Westfield informed (at any time) that Ms. Van Kampen intended to release the tortfeasors from any liability to her. (*Id.* at 2 (noting only that Appellant intended to "proceed with underinsured negotiations and/or litigation," but saying nothing about Appellant's intent to release her claims against the tortfeasors, particularly when she would "not be receiving any proceeds" being paid to the Posthumuses in the settlement of their claims).)²

Pursuant to the terms of the settlement of the Posthumuses' action, Safeco agreed to tender the limits of its insurance policy (\$1.5 million) to the Posthumuses (but *not* to Ms. Van Kampen) for a complete release of all liability by the Posthumuses *and by*

² Appellant states that Westfield was "well aware of the terms of the [April 26, 2004] settlement" because Westfield was present at the mediation. (Appellant's Br. 14.) But Westfield was present, not because it was protecting its possible UIM subrogation rights relating to Appellant's inchoate tort or UIM claims, but because its own insureds, *the Posthumuses*, were seeking liability benefits directly from Westfield due to the potential fault of Appellant in the collision. (Appellant's Br. 7 (conceding that when settlement was reached, the Posthumus family was claiming Appellant was negligent).) Appellant's former attorney conceded that Westfield did not participate in any UIM negotiations at that settlement conference. (A.80, Ex. 4, (admitting that the attorney representing Westfield and/or Austin Mutual "did not get involved with underinsured negotiations").)

Ms. Van Kampen. (A.66, Langel Aff. Ex. 1 (5-24-04 Settlement Agreement, there for the first time identifying Ms. Van Kampen as a “Claimant” and not as a “Defendant”).)

By letter dated May 6, 2004 (about 2 weeks after the mediation), Ms. Van Kampen’s former attorney sent a purported Schmidt v. Clothier notice to Westfield and Austin Mutual, advising the two insurers of the settlement reached by the Posthumuses at the mediation on April 26, 2004. (A.79, Langel Aff. Ex. 4.) The letter indicated that Rispens Seeds’ insurer had “offered its full policy limits [of \$1.5 million] to the Posthumus family” and that the underinsurers thus had “the opportunity to ‘substitute’ their check(s) for the proceeds (\$1.5 million) that are being paid by Safeco to the Posthumus family.” (Id. at 1, 2.) The letter further advised that “Tena VanKampen *will not be receiving any proceeds* from Safeco Insurance.” (Id. at 2 (emphasis added).)³

Prior to receiving any response from Westfield, and less than 30 days after sending the purported Schmidt notice, on May 24, 2004, the Posthumus family, Ms. Van Kampen, Rispens Seeds, Mr. Brey and Safeco executed a written “Settlement Agreement and Pierringer Release” to settle all claims by the Posthumuses *and Ms. Van Kampen* against Rispens Seeds, Mr. Brey, and Safeco, but *not against Ms. Van Kampen.* (A.66, Ex. 1.)

³ Given that Ms. Van Kampen was not to receive any of the settlement proceeds paid by the tortfeasors to the Posthumuses, it is not clear why she believes that Westfield should have assumed that she intended to release the tortfeasors from liability to her. At that point in time, no negotiations had yet transpired relating to Van Kampen’s potential injury claims, and Van Kampen could still have commenced her own personal-injury action against the tortfeasors (who would have been directly liable to her despite the lack of adequate liability insurance coverage).

By Order of the same date (May 24, 2004), the Freeborn County District Court approved, as required by law, the settlement as to the three minor Posthumus children, indicating that the value of the settlement for those three totaled \$787,726. (A.75, Ex. 3 at 1, 2.) Thus, the value of the settlement for Mr. and Mrs. Posthumus totaled \$712,274 (\$1.5 million less \$787,726). The value of the settlement for Ms. Van Kampen, who was inexplicably identified on the Release as a “Claimant” rather than a “Defendant,” was \$0. (A.66, Ex. 1.)

Contemporaneously with the execution of the Settlement Agreement, Karen and Jeff Posthumus and Ms. Van Kampen executed a Loan Receipt Agreement. (A.81, Ex. 5 (5-24-04 Loan Receipt Agreement).) Pursuant to that Agreement, the Posthumuses agreed to *loan* Ms. Van Kampen \$30,000 of the liability settlement proceeds paid by Safeco. (Id. at 2 ¶ 1.) The loan was to be repayable only if Ms. Van Kampen recovered underinsured motorist benefits from Austin Mutual “or any other [company]”, e.g., Westfield. (Id. at ¶ 2.)

By letter dated June 10, 2004, Westfield provided a written response to the May 6, 2004 letter from Ms. Van Kampen’s attorney, indicating that it would not “substitute its check for Safeco’s \$1,500,000.00” tendered to the Posthumuses. (A.83, Ex. 6 (6-10-04 letter identifying the “insured” as Jeff Posthumus).) The letter was (understandably) silent as to any settlement or claims relating to Ms. Van Kampen. (Id.) The letter does not indicate that Westfield ever saw or was even aware of the terms of the May 24, 2004 settlement agreement. (Id.)

Prior Lawsuits: Posthumus Personal-Injury Action Number 2:

At some point, the Posthumuses commenced a second personal-injury action involving the same parties as the first action. (A.84, Ex. 7 (3-28-05 Special Verdict Form in Court File No. C4-03-1572).) Again, Appellant was named only as a defendant and not as a plaintiff. (Id.) A jury trial was eventually held, resulting in the completion of a Special Verdict Form dated March 28, 2005. (Id.) Pursuant to the terms of that verdict, Ms. Van Kampen was found not negligent and Mr. Brey was found negligent and the sole cause of the collision. (Id.) The jury then awarded damages totaling \$1,685,446.30, with specific allocations for each of the five Posthumuses. (Id.) No damage allocation was made for Ms. Van Kampen because she was only involved as a defendant. (Id.)

Shortly after the Special Verdict Form was completed, Westfield offered Karen Posthumus the \$50,000 per-person limit of UIM benefits due to her confirmed underinsured status. (A.74, 4-22-05 letter.)

Throughout this second action, Westfield provided Appellant with defense counsel at Westfield's expense. (RA.1, Posthumus v. Brey, 2006 WL 1704141 at *2 (Minn. Ct. App. June 20, 2006) (Langel Aff. Ex. 11 below) (stating that "As required by the policy, Westfield provided defense counsel for Van Kampen".)) After the Westfield-appointed attorney successfully defended Appellant against the Posthumuses' claims, Appellant, over Westfield's objection, waived the costs incurred by Westfield. (Id.) This Court rejected Appellant's waiver. (Id. (stating "Van Kampen had a duty to cooperate with Westfield and could not waive payment of costs and disbursements without Westfield's consent.").)

Throughout the Posthumus litigation, Ms. Van Kampen was never identified as a plaintiff (or a “claimant”), nor did Ms. Van Kampen ever commence her own action against Rispens Seeds or Mr. Brey. (A.87, Ex. 8 (Pl.’s Answers Def. Austin Mut. Group’s Interrog. at 7 No. 15 (stating that her only involvement in any legal proceedings was as a named party *defendant* in the Posthumus suit)).)

Current Lawsuit

Upon completion of both Posthumus personal-injury actions, Appellant commenced the present suit seeking to recover UIM benefits as a result of the same August 1, 2000 collision involving the Posthumuses. (A.1, Compl.) Because Appellant never commenced her own person-injury action against the tortfeasors, and because Appellant did not in the alternative protect Westfield’s subrogation rights by validly settling with the tortfeasors and then providing an effective Schmidt v. Clothier notice to Westfield so that it could substitute its draft for the amount paid to Appellant, Westfield moved to dismiss Appellant’s action. Westfield now requests this Court to affirm the trial court’s dismissal of Appellant’s action.

ARGUMENT

I. Standard of Review.

Summary judgment is appropriate when the evidence shows that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; Anderson v. State Dep't of Natural Res., 693 N.W.2d 181, 186 (Minn. 2005). “When reviewing a grant of summary judgment, an appellate court must consider (1) whether there are any genuine issues of material fact, and (2) whether the lower court erred in its application of the law.” Leamington Co. v. Nonprofits' Ins. Ass'n, 615 N.W.2d 349, 353 (Minn. 2000).

The appellate court reviews the record to determine whether there are any genuine issues of material fact. Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). A genuine issue of fact is one which, depending upon its resolution, will affect the result or outcome of the case. Nw. Nat'l Cas. Co. v. Khosa, Inc., 520 N.W.2d 771, 773 (Minn. Ct. App. 1994).

In the present case, there are no disputed facts; the parties agree that Appellant did not commence her own personal-injury action and that Appellant instead attempted to settle her claims and send a purported Schmidt notice to Respondents. The sole issue is thus whether the trial court erred as a matter of law when ruling that Appellant's attempted settlement and subsequent Schmidt notice were defective, thereby forfeiting her right to UIM benefits.

II. Minnesota's No Fault Act governs necessary UIM Coverage and Minnesota's Case Law governs Procedures for pursuing UIM Benefits.

This section will discuss the background of underinsured motorist coverage, including the necessary procedures for obtaining underinsured benefits. The following section (III.) will then identify how Appellant failed to comply with these procedures. As will be explained, her failure to follow these procedures resulted in the destruction of Westfield's subrogation interests, which means that Appellant forfeited her right to receive underinsured motorist benefits.

A. UIM Coverage under the No Fault Act.

Ms. Van Kampen's claim for underinsured motorist benefits is governed by Minnesota's No Fault Automobile Act. See generally, Minn. Stat. §§ 65B.41 - .71. Under the No Fault Act, every owner of a motor vehicle in Minnesota must obtain UIM coverage. Minn. Stat. § 65B.49, subd. 3a(2). The No Fault Act was first enacted in 1975, and the courts have been balancing the interests of UIM insurers and insureds ever since. Dohney v. Allstate Ins. Co., 632 N.W.2d 598, 606 (Minn. 2001). Under the current state of the law, UIM benefits become available only when the tortfeasor's policy limits are less than the actual damages sustained by the injured UIM policyholder. Id. at 601. The purpose of UIM coverage is to protect against the risk that a tortfeasor failed to purchase adequate liability insurance. Kelly v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 328, 331 (Minn. 2003).

The two provisions of the No Fault Act relevant to UIM benefits include Minn. Stat. §§ 65B.43, subd. 17 (defining an underinsured motor vehicle);⁴ and 65B.49, subd. 4a (explaining how to calculate the amount of UIM benefits by applying a statutory setoff provision).⁵ See Kothrade v. Am. Family Mut. Ins. Co., 462 N.W.2d 413, 415 (Minn. Ct. App. 1990) (examining these two provisions while explaining the two-step process used to determine UIM coverage).

It is undisputed that the Rispens Seeds' vehicle is an underinsured motor vehicle pursuant to the No Fault Act because its liability insurance limit of \$1.5 million is less than the damages to the Posthumus family totaling more than \$1.6 million. Under the statutory setoff provision, Westfield has a maximum underinsured benefits exposure of \$50,000, the difference between its limit of \$100,000 per occurrence less the \$50,000 in underinsurance benefits already paid. (To date, there has not been a finding as to the extent of Appellant's damages resulting from the August 1, 2000 collision.)

⁴ Minn. Stat. § 65B.43, subd. 17 states:

“Underinsured motor vehicle” means a motor vehicle or motorcycle to which a bodily injury liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages.

⁵ Minn. Stat. § 65B.49, subd. 4a states:

With respect to underinsured motorist coverage, the maximum liability of an insurer is the amount of damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at fault vehicle. If a person is injured by two or more vehicles, underinsured motorist coverage is payable whenever any one of those vehicles meets the definition of underinsured motor vehicle in section 65B.43, subdivision 17. However, in no event shall the underinsured motorist carrier have to pay more than the amount of its underinsured motorist limits.

B. An Injured Insured has Two Options for Pursuing UIM Benefits.

In 1983, the Minnesota Supreme Court decided the seminal Schmidt v. Clothier case. 338 N.W.2d 256 (Minn. 1983). In Schmidt, the court first announced the procedure for resolving a UIM claim. Washington v. Milbank Ins. Co., 562 N.W.2d 801, 805 (Minn. 1997) (citing Schmidt and noting the procedure). Later, the court clarified and refined the procedure for resolving a UIM claim in the Nordstrom case. Id.; Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855 (Minn. 1993).

Under both Schmidt and Nordstrom, an injured insured seeking UIM benefits has two options. Washington, 562 N.W.2d at 805. Under the first option, “the insured may pursue a tort action to conclusion in district court, and then, if the judgment exceeds the liability limits, pursue a claim for underinsurance benefits.” Id. Under the second option, “the insured may settle the tort claim for ‘the best settlement,’ give a *Schmidt v. Clothier* notice to the underinsurer, and then maintain a claim for underinsurance benefits.” Id. As noted by the Washington court, the Nordstrom court merely clarified that “the insured must first recover from the tortfeasor’s insurance company by either pursuing the tort claim to conclusion in a district court action or by reaching a settlement in accordance with the procedures set forth in *Schmidt v. Clothier* before pursuing the UIM claim.” Id. at 806 (footnote omitted).

In the present case, Appellant Van Kampen is attempting to recover UIM benefits without following either of the two options articulated in Schmidt and Nordstrom. Each option will be addressed separately below.

III. Appellant forfeited Her Right to receive UIM Benefits by failing to follow either of the Two Options.

A. Appellant did not pursue UIM Benefits under the First Option.

As stated, under the first option for obtaining UIM benefits, an injured insured may pursue a tort action against the tortfeasors to conclusion. Washington, 562 N.W.2d at 805. The Posthumuses followed this first option, and because they pursued a tort action to conclusion, they were entitled to UIM benefits. (A.74 (Westfield offering its UIM per-person limit of \$50,000 to Karen Posthumus because she properly established that she was underinsured in her jury trial).)

But unlike the Posthumuses, Appellant Van Kampen never commenced a tort action against Mr. Brey or Rispens Seeds. (A.87, Ex. 8 (denying in her discovery responses that she was ever a named plaintiff in an action prior to the present case).⁶ Appellant concedes that she never complied with the requirements for the first option to pursue UIM benefits. (Appellant's Br. 7 (stating "Appellant chose the latter [of the two] option[s]," and thereafter arguing issues relating solely to the second option); A.106-111, Pl.'s Mem. Opp'n Mot. Summ. J. (arguing only "best settlement" issues relating to the second option); A.111-16 (arguing only Schmidt-notice issues also relating to the second option).)

⁶ Appellant implies that it would have been pointless for her to commence an action against Mr. Brey and Rispens Seeds because she knew that the Posthumus action had already exhausted the limits of the tortfeasors' liability insurance. (Appellant's Br. at 9.) But Westfield cannot protect its subrogation interests if Appellant fails to comply with proper UIM procedure. And tortfeasors are still legally responsible for claims against them regardless of the availability of sufficient insurance coverage.

Thus, regardless of whether the tortfeasor's limits are less than the tortfeasor's liability, Appellant's failure to pursue an action against the tortfeasor precludes her from pursuing UIM benefits under the first option articulated in Schmidt and Nordstrom.

B. Appellant did not pursue UIM Benefits under the Second Option:

Under the second option for pursuing UIM benefits, Appellant was required to settle her tort claim against the tortfeasors for her "best settlement," give a 30-day Schmidt v. Clothier notice to Westfield, and then commence the present action. If a plaintiff does follow this option and provides the underinsurer with a Schmidt v. Clothier notice, the underinsurer then has two options.

First, it may let the 30-day grace period expire and permit the settlement between the plaintiff and the tortfeasor. Schmidt, 338 N.W.2d at 263. Alternatively, the underinsurer could substitute its draft to the insured in an amount equal to the tentative settlement. Id. By doing so, the underinsurer would protect its subrogation interest to the extent of the payment. Id. The underinsurer could then pursue its subrogation interest through arbitration, settlement, or trial (in the insured's name). Id. See also Am. Family Mut. Ins. Co. v. Baumann, 459 N.W.2d 923, 925 (Minn. 1990).

As explained below, however, Appellant failed to follow the required procedure. She neither "settled" for her "best settlement," nor gave a proper Schmidt notice to Westfield. Westfield thus had no opportunity to preserve its subrogation interests.

1. Appellant did not "Settle" for the "Best Settlement."

In an end-run around proper UIM procedures, Appellant "settled" her claim against the tortfeasors for nothing. (A.66, Settlement Agreement (identifying Appellant

as a “Claimant” rather than as a “Defendant” in the Posthumus action, and then indicating that Appellant took nothing for her release of liability of the defendant tortfeasors).) Under the circumstances of this case, Appellant cannot legitimately argue that she reached any settlement, let alone a “best settlement.”

In general, an injured insured has the right to accept what she believes to be the best settlement from a tortfeasor’s insurer, even if that settlement amount is less than the liability limits. Schmidt, 338 N.W.2d at 261. To prevent second-guessing of the wisdom of reaching a particular settlement, “an insurer may not deny a UIM claim based on the insured’s failure to reach the *best settlement* with the tortfeasor.” Dohney, 632 N.W.2d at 607 (emphasis in original). See also Behr v. Am. Family Mut. Ins. Co., 638 N.W.2d 469, 479 (Minn. Ct. App. 2002) (stating that Dohney forecloses an argument over the amount of a settlement because “the best settlement” is simply “an insured’s best settlement”).

But in the present case, Appellant made no settlement of her claims at all. Rather, she agreed to “settle” her personal-injury claims against the tortfeasors by accepting *nothing* in return! (A.67-69, Settlement Agreement ¶¶ 1.2, 2.1, 2.2 (indicating that Appellant released all of her claims against the tortfeasors even though she received nothing for that release); A.79, Appellant’s purported Schmidt notice (conceding that Appellant “will not be receiving any proceeds from Safeco”).) Westfield is not challenging whether the amount that Appellant received in her settlement was her best effort under Dohney and its progeny; Westfield is challenging whether Appellant made any settlement at all.

Settlement agreements are contracts. Chalmers v. Kanawyer, 544 N.W.2d 795, 797 (Minn. Ct. App. 1996). Contracts must be supported by consideration. Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 665 (Minn. 1960). “Consideration requires the voluntary assumption of an obligation by one party on the condition of an act or forbearance (sic) by the other.” Cady v. Coleman, 315 N.W.2d 593, 596 (Minn. 1982). The determination of whether sufficient consideration underlies a contract raises a question of law. Brooksbank v. Anderson, 586 N.W.2d 789, 794 (Minn. Ct. App. 1998).

In this case, Appellant gave up her tort action (and Westfield’s corresponding subrogation action) against the tortfeasors when she signed a release. But the tortfeasors offered and provided nothing to Appellant in return for her act of forbearance. Given the total lack of consideration provided to Appellant, her release was not a valid settlement agreement. Thus, she cannot be heard to argue that her “settlement” for nothing is her “best settlement.”

Appellant argues that the law “does not establish a substantive requirement that a person injured in an auto collision *must collect money* from the at-fault driver before being entitled to bring a UIM claim.” (Appellant’s Br. 8-9 (emphasis added).) But the distinguishing characteristic in all cases confronted with the issue of a “best settlement” is that the insured settled for *something*. Schmidt, 338 N.W.2d at 259 (noting the insured settled with the tortfeasor for \$26,000 from two liability insurers); Dohney, 632 N.W.2d at 599 (noting the insured settled with the tortfeasor for \$20,000 out of a \$50,000 liability limit); Behr, 638 N.W.2d at 472 (noting the insured settled with the tortfeasor for \$400,000 out of a \$1 million liability limit).

Here, by contrast, Westfield is not challenging the particular percentage or amount of the settlement reached by Appellant. Instead, Westfield is challenging that Appellant can “settle” with the liability insurer for nothing.⁷ It is one thing for the courts to refuse to question the efficacy of a settlement that is lower than the liability insurer’s limits, but it is another thing entirely for a court to refuse to question the efficacy of a settlement with the liability insurer for *nothing*.

Further, it is disingenuous in the circumstances in this case for Appellant to argue that she reached a “best settlement” for \$0 with the tortfeasor because she and her daughter controlled the allocation of the settlement proceeds! (A.96, Langel Aff. Ex. 9 at No. 1 (the tortfeasors and their insurer admitting that they had no input into the allocation of the settlement proceeds of \$1.5 million paid to the Posthumuses and Appellant).) After deciding amongst themselves pursuant to their own private agenda that Appellant would not receive any money directly from the tortfeasors, Appellant and her daughter entered into a contemporaneous agreement in which her daughter “loaned” Appellant \$30,000 from those very same proceeds. (A.81, Loan Receipt Agreement dated the same day as the Settlement Agreement.) This so-called “loan” was repayable only if Appellant recovered the “loan” amount from Westfield or Austin Mutual. (Id. ¶ 2.)

Appellant in essence accepted liability coverage from the Posthumuses (who “loaned” her a portion of their liability coverage) and is now attempting to replace that

⁷ It is perhaps the situation presented here that prompted the dissent in Dohney to advocate allowing challenges to a “best settlement” when the purpose of the settlement is collateral, i.e., to reach UIM benefits. Dohney, 632 N.W.2d at 609 (Stringer, J. dissenting).

liability coverage with UIM coverage from Westfield. But the law does not allow conversion of UIM benefits to liability benefits. See, e.g., Kelly v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 328, 331-32 (Minn. 2003) (upholding a UIM policy exclusion to prevent coverage conversion when UIM benefits are used as a substitute for the tortfeasor's inadequate liability coverage).

The collusive nature of the dealings between the Posthumuses and Appellant is further supported by Appellant's actions at the conclusion of the Posthumus trial against her. After Van Kampen (through her Westfield-provided counsel) successfully defeated the Posthumuses' liability claims against her, Van Kampen, over the objection of Westfield, waived costs from the Posthumuses. Both the trial court and this Court rejected Van Kampen's attempts to benefit her daughter at the expense of Westfield. Posthumus v. Brey, 2006 WL 1704141 at *2 (Minn. Ct. App. June 20, 2006) (RA.1) (this Court stating "Van Kampen had a duty to cooperate with Westfield and could not waive payment of costs and disbursements without Westfield's consent").

Appellant argues that there were no "compelling reason[s] why she should have depleted the available liability limits of the Safeco policy by claiming a part of them to the detriment of other members of her family." (Appellant's Br. 7.) But there were. Just as the Posthumuses received injuries in the underlying collision, so too did Appellant receive injuries, likewise entitling her to recover for those injuries. And she has to recover for those injuries, just like the Posthumuses, from the tortfeasors and/or their liability insurer first before pursuing UIM benefits.

Further, Appellant was *required* to accept a portion of the proceeds from the tortfeasor's insurer if for no other reason than to protect Westfield's subrogation interests. (See section III.B.2. *infra* explaining that this is the whole point of the Schmidt notice procedure.)

Finally, although Appellant argues that she did not want to "deplete" the funds available to her family members, she turned right around and took \$30,000 of those very same funds from her family the same day that she "settled" her claim against the tortfeasors for nothing. The only possible explanation for her actions is that she wanted to obtain the limits of Westfield's UIM benefits without having to follow proper procedures.

There was simply no reason for Appellant to forego receipt of a portion of the liability limits paid by the tortfeasors' insurer. Even if Appellant received a portion of the settlement funds, both she and her family members would have been entitled to pursue UIM benefits from Respondents, who in turn could pursue reimbursement of those benefits from the tortfeasors. Indeed, that is exactly what the Posthumus family did, requesting and receiving the \$50,000 per-person UIM-coverage limit from Westfield after establishing the extent of their damages in a jury trial.

There is also no reason that Appellant could not have included her own personal-injury claims in the Posthumus suit, thereby establishing the measure of her damages. Had she not "settled" her claim for nothing, she could then have recovered the entire amount of her injuries from the tortfeasors, regardless of the liability limits of the tortfeasors' insurance policy. (A.99, Rispens Seeds admitting that it is a financially

viable entity with sufficient assets to satisfy a judgment against it, at least up to the \$100,000 combined total of the UIM coverage in dispute here.)

Appellant also argues that Respondents should not be “at liberty to decide on behalf of injured claimants which should be paid and which should not be paid from the at-fault driver’s policy.” (Appellant’s Br. 9.) Respondent Westfield has never suggested that it should participate, or even that it has any interest, in the specific allocation of proceeds among injured claimants. That is not the issue in dispute. Had Appellant taken any settlement proceeds at all, even \$10 (and then, of course, properly advised Westfield of her intent to release the tortfeasors for that amount), then Westfield could have substituted its check for that amount and preserved its subrogation interests. But Westfield cannot issue a blank check, especially when Westfield had no reason to know that Appellant intended to release the tortfeasors from liability to her without paying her any money.

Under the circumstances of this case, Appellant cannot reasonably claim that a settlement of \$0 is a “best settlement.” It is no settlement at all. Thus, even if an underinsurer is not allowed to question a settlement below policy limits, an underinsurer is certainly allowed to challenge a “settlement” for nothing. Given Appellant’s failure to reach any settlement, let alone a “best settlement,” she cannot pursue UIM benefits under the second option. Therefore, the trial court properly rejected Appellant’s attempt to recover UIM benefits. Westfield respectfully requests that the trial court’s dismissal of Appellant’s action be affirmed.

2. Appellant did not provide an Effective Schmidt v. Clothier Notice.

Even if Appellant had reached a proper settlement with the tortfeasors, the inquiry does not end there. After reaching a “best settlement” under the second option, an injured party is required to provide a Schmidt v. Clothier notice to the underinsurer prior to accepting the “best settlement.” The notice must allow 30 days for the underinsurer to substitute its draft in place of the tortfeasor’s insurer’s check to protect the underinsurer’s right to pursue the tortfeasor or tortfeasor’s insurer for subrogation. Schmidt, 338 N.W.2d at 263; Kluball v. Am. Family Mut. Ins. Co., 706 N.W.2d 912, 916 (Minn. Ct. App. 2005). The Schmidt court did not indicate the requirements of the notice or identify the effect of a failure to provide the required notice.

In 1990, the supreme court identified both the requirements of the Schmidt v. Clothier notice and the consequences of a failure to provide the required notice. Am. Family Mut. Ins. Co. v. Baumann, 459 N.W.2d 923, 927 (Minn. 1990). Since 1990, the Schmidt v. Clothier notice must:

- (1) identify the insured;
- (2) identify the tortfeasor;
- (3) identify the tortfeasor’s liability insurer;
- (4) identify the limits of the tortfeasor’s automobile liability insurance;
- (5) identify the agreed upon settlement amount; and
- (6) allow the underinsurer 30 days to decide whether to preserve its subrogation interest (either by paying its underinsured benefits or by substituting its draft for that of the tortfeasor’s liability insurer).

Baumann, 459 N.W.2d at 927.

As indicated earlier, Appellant attempted to provide a Schmidt v. Clothier notice to Westfield. See A.80, Ex. 4 at 2 (letter stating that it “is our Schmidt v. Clothier

notice”). However, as explained below, Appellant’s purported Schmidt notice failed to provide the final two Baumann requirements.

a. **Appellant’s purported Schmidt Notice failed to provide a Settlement Amount.**

First, Appellant’s purported Schmidt notice failed to identify any settlement amount attributable to Appellant so that Westfield could meaningfully substitute its own check and preserve its subrogation interests. (A.79-80.) Instead, Appellant’s notice letter states that she did not accept *any* settlement proceeds from Safeco. (Id. at 80 (stating “Tena VanKampen will not be receiving any proceeds from Safeco Insurance”).) So in essence Westfield was being asked to substitute a check in the amount of \$0. Given the lack of any settlement amount to Appellant, Westfield understandably declined to substitute a pointless check.⁸

Appellant, however, asked Westfield to substitute a draft in the amount of \$1.5 million. Id. But Appellant admittedly did not receive \$1.5 million. That amount went exclusively to the Posthumus family and not to Appellant. (Id. See also A.66, Ex. 1, 5-24-04 Settlement Agreement (allocating the entire \$1.5 million among the Posthumuses and allocating nothing for Appellant).)

And importantly for this case, nothing in Appellant’s purported notice letter advised Westfield that Appellant intended to enter into a settlement agreement

⁸ The purported Schmidt notice would more accurately be characterized as a notice on behalf of the Posthumus family. (A.79 (stating that “Safeco * * * has offered its full policy limits to the Posthumus family” and that Westfield “now ha[s] the opportunity to ‘substitute’ [its] check[] for the proceeds (\$1.5 million) that are being paid by Safeco to the Posthumus family”).) Westfield declined and paid Karen Posthumus \$50,000 in UIM benefits after the Posthumuses properly established her underinsured status.

identifying her as a “Claimant” rather than as a “Defendant,” and further that she intended to release her liability claims against the tortfeasors in that settlement agreement. (A.79-80.) At the time Westfield received Appellant’s purported Schmidt letter, Appellant was only a named *defendant* and was not yet pursuing (at least to Westfield’s knowledge) either liability or UIM benefits. (See A.75 (first action identifying Appellant only as a defendant); A.84 (second action likewise identifying Appellant only as a defendant); A.87 (Appellant conceding in discovery in this action that her only involvement in any legal proceedings was as a named defendant in the former two actions by the Posthumuses).)

The point of identifying a settlement amount to a UIM insurer is so that the insurer can meaningfully evaluate its subrogation interests. If the insurer has no reason to suspect that a party is contemplating a release of liability of the tortfeasors (where, like here, the party is to take *nothing* from the tortfeasors), then the insurer has no reason to suspect that its subrogation interests are at stake.

Appellant did not attach a copy of the proposed settlement agreement, which would have revealed to Westfield that Appellant was being identified as a “claimant” and was going to release her liability claims despite not receiving any settlement proceeds. (A.80; A.66.) Nor did Appellant attach a copy of the loan receipt agreement between Appellant and her daughter, which also would have revealed to Westfield that Appellant was taking some of the liability proceeds from Safeco indirectly, perhaps implying Appellant’s belief that she could release the tortfeasors. (A.80; A.81.)

So Appellant's purported Schmidt notice is defective because she did not state that she intended to settle her potential liability claims. She merely advised that her daughter's family intended to settle its claims for \$1.5 million, inviting Westfield to substitute its check for that \$1.5 million to preserve its subrogation interests as to the Posthumus claims. Westfield opted not to preserve its subrogation interests as to the Posthumuses. (A.83, A.125 (both letters from Westfield stating that it would not be substituting a check for the \$1.5 million paid to its insured, Jeffrey Posthumus).)

Contrary to any argument by Appellant, Westfield could not substitute a draft for an amount that was paid to one party in order to preserve a subrogation interest on behalf of a separate party. There was simply no way for Westfield to protect its subrogation interests against the tortfeasors (or even to know that its subrogation interests needed protecting) given the inappropriate manner in which Appellant "settled" her claim and presented the Schmidt notice.

For example, had Ms. Van Kampen accepted \$30,000 out of the \$1.5 million settlement figure (the amount of the contemporaneous "loan" from the Posthumus family to Appellant as an acknowledgement of her injuries), then her notice would have advised Westfield that it could substitute its check for \$30,000. Given the likelihood of recovering subrogation from Rispens Seeds, a viable business (see A.99), Westfield could have substituted its check to preserve its interests. In a subsequent subrogation action, Ms. Van Kampen would have been required to prove her damages, but then Westfield would have been entitled to recover those damages (up to the amount of the substituted check) from Rispens Seeds. But because Appellant took nothing in the settlement from

Rispens Seeds (instead taking \$30,000 as an undisclosed “loan” from the Posthumus family), Ms. Van Kampen extinguished Westfield’s subrogation interest without allowing Westfield any meaningful opportunity to protect itself.

Appellant argues that her notice letter properly contained all of the requirements, and that the burden then shifted to Westfield to respond and advise Appellant not to sign a release with the tortfeasors. (Appellant’s Br. at 13 (stating that her letter “met all six requirements of a *Schmidt-Clothier* notice”), 17 (stating that to preserve its subrogation interests, Westfield “merely needed to reply to Appellant’s notice” by explaining the effect of Appellant’s release of the tortfeasors).) But Appellant misses the point that her notice letter fulfilled the Schmidt requirements only as to the Posthumuses. Without Appellant actually letting Westfield know that she rather than just the Posthumuses were going to release the tortfeasors from liability, Westfield had no way to know its subrogation interests as to Appellant were at stake.

Moreover, while she wants to place the burden on Westfield, it is Appellant’s burden in the first instance to provide sufficient information to Westfield to evaluate its position. Although Appellant suggests that Westfield should have come forward and provided her with legal advice, Appellant did not attempt to make any contact with Westfield to verify that Westfield understood her intentions prior to her execution of the release 18 days later. Had Appellant called Westfield, she would have learned that Westfield did not know that she intended to release her own liability claims. If she had then properly advised Westfield of her intentions, then arguably Westfield could not now

be claiming that Appellant's notice was deficient (at least aside from the lack of 30-day notice discussed below).

Appellant also argues that strict compliance with the Schmidt notice requirements is not necessary, relying on Elwood v. Horace Mann Ins. Co., 531 N.W.2d 512 (Minn. Ct. App. 1995). (Appellant's Br. 15-16.) But Appellant's reliance on Elwood is misplaced. In that case, the UIM claimant "had sued the tortfeasors" and the UIM insurer had been "actively involved" and was "monitoring [that] tort case." 531 N.W.2d at 513. Further, "the parties discussed the possibility of a UIM claim." Id. at 514. In addition, "it was clear that [the UIM claimant] intended to settle with the tortfeasors." Id. (identifying various such communications between the parties). Finally, the court did not indicate that a proper notice was not required, but merely held that under the circumstances of that case, the UIM insurer had to inform the insured that a formal Schmidt notice was necessary prior to any settlement with the tortfeasors. Id. at 516.

Here, by contrast, Appellant never commenced a tort action against the tortfeasors, and Appellant and Westfield never discussed the possibility of a UIM claim by Appellant. (A.75; A.84; A.87; A.80 (conceding the lack of UIM negotiations).) Under these circumstances, a formal Schmidt notice containing all six requirements was necessary. Westfield could not inform Appellant about that necessity because, unlike the insurer in Elwood, it did not have sufficient information about Appellant's claims and intentions.

Because Appellant failed to identify any settlement amount relating to her own claims, and because Appellant failed to indicate that she intended to settle her own

liability claims despite receiving no settlement proceeds from the at-fault tortfeasors, Appellant's purported Schmidt notice was deficient.

b. Appellant's purported Schmidt Notice failed to provide the requisite 30-Day Notice.

In addition to Appellant's failure to provide a required settlement amount, Appellant failed to provide the requisite 30-day period for Westfield to respond to the purported Schmidt notice. The notice letter is dated May 6, 2004, but the Settlement Agreement was executed by Appellant on May 24, 2004, only 18 days later. (Compare A.66, Ex. 1 with A.79, Ex. 4.)⁹ Appellant's former attorney was well aware of the 30-day notice requirement. (A.80 (stating "There is a 30-day period within which the decision [by Westfield] must be made").)

On appeal, Appellant concedes that she signed the release "prior to the expiration of the 30-day notice." (Appellant's Br. 22.) Appellant argues, however, that Westfield lost the Schmidt notice until after expiration of the 30 days, and further argues that Westfield then waived subrogation in a belated letter. (Id.)

But Appellant ignores the fact that she could not have known at the time she signed the release that Westfield had lost her notice letter. And while Appellant apparently provided Austin Mutual with a courtesy call about the notice letter, which Austin Mutual confirmed in a subsequent written communication, Appellant does not

⁹ While Westfield responded to the notice letter more than 30 days after receipt, Westfield was denied the opportunity to substitute a check in a timely manner because the settlement agreement was already binding when it was signed only 18 days after the notice letter was sent. Further, Westfield's response simply refused to substitute the requested check of \$1.5 million received by the Posthumuses, the only parties it knew were settling liability claims.

explain her failure to communicate with Westfield about her purported Schmidt notice. And the prejudice that occurred to Westfield when Appellant prematurely signed the release occurred prior to any action required on Westfield's part. So the temporary loss of the notice letter by Westfield is irrelevant.

In addition, Appellant's position ignores the fact that her notice was defective. Even had Westfield timely received and responded to her notice letter, Westfield would not have known that Appellant intended to sign a release as a claimant, particularly when she had yet to receive any settlement proceeds.

Allowing Appellant to pursue UIM benefits in this case would encourage fraud and collusion any time multiple parties are injured in a car accident and the liability insurer's limits are insufficient to compensate all those parties. The underinsurer would be in the anomalous position of substituting its draft in place of the amount paid to some of the injured parties to protect its subrogation interests relating to different injured parties. And the underinsurer would be required to guess as to the intent of the various parties to settle their claims, even when those parties have never commenced an action or sought or received any settlement moneys. The law does not support such a result.

IV. Appellant's failure to provide an effective Schmidt Notice results in Presumed Prejudice to the Underinsurer, and Appellant failed to rebut that Presumption.

As explained in section III., Appellant forfeited her right to pursue UIM benefits on two independently sufficient grounds: (1) by failing to properly settle her tort claims prior to pursuing UIM benefits; and (2) by failing to provide an effective Schmidt notice. If this Court affirms on only the second ground relating to the deficient Schmidt notice,

then Appellant will argue that she can still pursue UIM benefits if she overcomes the presumption of prejudice to Westfield. (Appellant's Br. 21-23.) But as explained below, Appellant's argument lacks merit.

If a Schmidt v. Clothier notice fails to provide all six requirements, any release by an insured plaintiff of a tortfeasor "shall be deemed prejudicial to the underinsurer." Baumann, 459 N.W.2d at 927. See also Schmidt, 338 N.W.2d at 262 (explaining the basis for the finding of prejudice by noting that if the injured insured releases the tortfeasor before the underinsurer pays any UIM benefits, no subrogation rights ever arise). The trial court held that Appellant failed to properly follow the Schmidt requirements. (A.134-35 (stating that Appellant's position on the Schmidt notice issue "is legally absurd").) Thus, prejudice to Westfield is presumed.

The presumption of prejudice is, however, rebuttable. Baumann, 459 N.W.2d at 927. The burden of demonstrating that there was no prejudice "by a preponderance of the evidence" is on the insured, that is, on Appellant. Id. The failure to meet the burden of lack of prejudice will result in the insured's forfeiture of underinsurance benefits. Id. See also Kluball, 706 N.W.2d at 917-18 (Minn. Ct. App. 2005).

The Baumann court did not identify the amount or type of evidence required to rebut the presumption of prejudice to the underinsurer due to the lack of the required Schmidt v. Clothier notice. Kluball, 706 N.W.2d at 918. However, as subsequently explained by the court of appeals, the courts will examine the "financial status of the tortfeasor" including the "amount of assets held by the tortfeasor and the likelihood of recovery of those assets via subrogation." Id.

It is undisputed that Rispens Seeds is a viable entity. During discovery in the present action, Rispens admitted that it has sufficient assets to cover liability to Appellant, at least up to the limits of Westfield's underinsurance coverage. (A.99, Ex. 10 (Third-Party Def. Rispens Seeds, Inc.'s Reply Third-Party Pl. Westfield's Request Admissions at Nos. 1, 2).) Rispens is financially viable and has not sought bankruptcy protection or defaulted on an account payable. (Id. at Nos. 3, 4.) Thus, given that Westfield could have pursued subrogation against Rispens Seeds if Appellant had not released Rispens Seeds from all further liability, Westfield has been prejudiced. That prejudice results in the forfeiture of underinsurance benefits by Appellant.

CONCLUSION

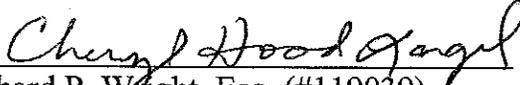
The trial court properly determined that Appellant did not pursue the first available option to pursue UIM benefits because she never commenced a personal-injury action against the tortfeasors. The trial court also properly determined that Appellant failed to properly pursue the alternative option available to pursue UIM benefits. Specifically, Appellant did not properly settle her claims against the tortfeasors, choosing instead to accept nothing in return for a full release of her claims. In addition, the trial court properly determined that Appellant's purported Schmidt v. Clothier notice, which asked Westfield to substitute a check for \$1.5 million paid to other parties, and which failed to indicate Appellant's intent to settle her own as-of-then inchoate liability claims, did not adequately provide Westfield with an opportunity to protect its subrogation interests. Further, the purported notice failed to provide the requisite 30-day period prior to

Appellant's execution of a release of the tortfeasors. For these reasons, Westfield respectfully requests that the trial court's grant of summary judgment be affirmed.

Respectfully submitted,

**McCOLLUM, CROWLEY,
MOSCHET & MILLER, LTD.**

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Richard P. Wright, Esq. (#119039)
Cheryl Hood Langel, Esq. (#220012)
7900 Xerxes Avenue South
700 Wells Fargo Plaza
Minneapolis, MN 55431-1141
(952) 831-4980

Attorneys for Respondent Westfield