

STATE OF MINNESOTA

IN COURT OF APPEALS

No.: A08-1320

James Stroop,
Respondent,
vs.

Illinois Farmers Insurance
Company,
Appellant.

RESPONDENT'S BRIEF & APPENDIX

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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).

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ISSUE

Given that the rule in *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 402 (Minn. 2000), is that for “UIM claims . . . the statute of limitations begins to run when the UIM claim becomes ripe by settlement or adjudication of the claim against the tortfeasor,” did the trial court err as a matter of law in ruling that the trigger date for deciding when “settlement” occurred on the facts of this case was the date the settlement release was signed, since the signing of a release removed any contingencies in the tentative settlement negotiated with the tortfeasor’s insurer?

The trial court held in the negative.

Apposite Authority: *Antone v. Mirviss*, 720 N.W.2d 331, 340 (Minn. 2006) (J. Hanson, dissenting on an unrelated matter) (“an underinsured motorist claim is not ripe until the motorist’s contingent liability is fixed by the resolution in the underlying tort action against the motorist [as] . . . the injured motorist is not ‘damaged’ for purposes of an underinsured motorist lawsuit until his liability is fixed in the underlying tort claim,” because otherwise those damages are “entirely contingent on the occurrence of uncertain events” and contingencies must be completely resolved before the UIM claim may legally proceed); *Kwong v. Depositors Ins. Co.*, 627 N.W.2d 52, 56 (Minn. 2001) (“recovery from the tortfeasor’s insurer is a *condition precedent* to a claim for UIM benefits”); *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 402 (Minn. 2000) (“UIM claim becomes ripe by settlement or adjudication of the claim against the tortfeasor”); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 594 N.W.2d 243, 245 (Minn. App. 1999) (“the insured must first recover from the tortfeasor’s insurance company . . . before pursuing the UIM claim”) (emphasis omitted).

STATEMENT OF THE CASE

This is a claim for underinsured motorist (“UIM”) benefits arising from a February 13, 1996, motor vehicle collision. The Defendant-Appellant is the UIM insurer of the injured motorist, Plaintiff-Respondent Stroop. Appellant asserted the expiration of the six year statute of limitations as an affirmative defense and moved the trial court, Hon. Richard S. Scherer of Hennepin County District Court, for summary judgment on that ground.

The issue below focused on the date for accrual of a cause of action for UIM benefits, based on competing constructions of the six year time from the date of “settlement” of the underlying liability claim with the tortfeasor that had been articulated in *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 407 (Minn. 2000).

Appellant argued it was triggered by the date it decided not to substitute a draft to preserve its subrogation interest against the tortfeasor.¹ Respondent argued that it was

¹ Under *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), a plaintiff who desires to obtain UIM benefits in addition to the liability settlement offered by a tortfeasor’s insurer must give notice of the “tentative settlement” it had negotiated with the tortfeasor to its UIM carrier. This notice is the prerequisite to advancing a claim against one’s own UIM coverage under *Schmidt*, as a claimant may tentatively settle with the tortfeasor’s liability insurer for a designated sum, advise their own UIM carrier and afford the UIM carrier 30 days to decide whether or not to “substitute a draft” for the one tentatively offered by the liability insurer. If the UIM carrier substitutes a draft the tentative settlement is voided and the claimant may the UIM carrier may pursue the tortfeasor for reimbursement under principles of subrogation, and the claimant may then maintain a claim for underinsurance benefits against their UIM carrier. See *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 857 (Minn. 1993). If the UIM insurer declines to substitute a draft, the claimant may then accept the tentative offer of the tortfeasor’s liability insurer and pursue the UIM insurer for its UIM coverage, making the UIM carrier “eat the gap” or absorb any shortfall between the tentative offer and the tortfeasor’s liability limits, so long as the ultimate award of damages exceeds the amount of the tortfeasor’s liability

triggered by the date that all contingencies between the plaintiff and tortfeasor were resolved and a release resolving the “tentative settlement” of the underlying dispute was agreed to between the plaintiff and the tortfeasor’s insurer.

The trial court agreed with Plaintiff-Respondent and denied the motion for summary judgment and a request by Defendant-Appellant to certify the question as important and doubtful.

Thereafter, Defendant-Appellant agreed that Plaintiff’s injuries were sufficiently serious as to merit assigning the full value of its policy limits to the case and agreed to have judgment in that amount entered against it, so as to facilitate an appeal on the merits of its defense.

Once judgment was entered, a timely appeal was taken.

coverage so as to prove that the tortfeasor indeed was underinsured for the loss. *Id.*

STATEMENT OF FACTS

Plaintiff-Respondent and the liability insurer for the tortfeasor agreed to a “tentative settlement” of the dispute between them,² subject to the exchange of a notice letter by plaintiff with his UIM carrier under *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983)(A-38), and the UIM carrier declined to substitute its draft to preserve a right of subrogation, on April 2, 2001 (A-40). After the UIM insurer’s decision not to exercise a right of subrogation against the tortfeasor’s assets, *i.e.*, not to substitute its own draft for that which the tortfeasor’s insurer had agreed to provide, only two contingencies remained: the tortfeasor’s insurer proffering a settlement check and exchanging it for a mutually agreeable release by the plaintiff of his claims against the tortfeasor.

“There’s no evidence in this case of any unreasonable delay” in the completion of those contingencies (Tr. at 9, f. 23-24) (RA-11), and they were completed with the execution

² Under the protocol adopted by our courts for a so-called “*Schmidt* notice,” any settlement negotiated between the plaintiff and the liability insurer for the tortfeasor must be a “tentative” one, contingent on the right of the UIM carrier to decide whether it will pursue a right of subrogation against the personal assets of the tortfeasor, and contingent on resolving all other contingencies as to agreeing on proper terms for the settlement of that dispute (*e.g.*, what are the terms of the settlement and how are they to be memorialized in a release that is acceptable as to its terms to both sides). *See Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983) (requiring an insured to give their UIM insurer 30 days’ written notice of any “tentative settlement” with the tortfeasor’s liability insurer). In *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923 (Minn. 1990), the supreme court stated, “Henceforth, . . . [t]he notice shall identify the insured, the tortfeasor and the tortfeasor’s insurer and shall disclose the limits of the tortfeasor’s automobile liability insurance and the agreed upon amount of the settlement.” *Id.* at 927. The *Baumann* court prefaced this ruling by noting that the notice requirement “was not intended as a technical snare for unwary insureds.” *Id.*

of the release on April 17, 2001 (A-41). The UIM claim was commenced on April 12, 2007.

Less than six years intervened between the date the release was executed in the liability claim and the date that the UIM claim was commenced. More than six years intervened between the date the UIM carrier decided not to substitute its draft and the date that the UIM claim was commenced.

In summary, the pertinent time line is laid out below:

<u>Date</u>	<u>Event</u>
February 13, 1996	Motor vehicle collision occurs between plaintiff and tortfeasor followed by a period of lengthy treatment
March 2001	Tentative agreement is reached between plaintiff and tortfeasor's insurer to settle the claim and <i>Schmidt v. Clothier</i> notice letter sent to UIM carrier
April 2, 2001	UIM carrier advises it will not be substituting its own funds for those offered by the tortfeasor's insurer, <i>i.e.</i> , not be pursuing subrogation against the tortfeasor's personal assets
April 17, 2001	Plaintiff and tortfeasor's insurer finalize all details of the tentative settlement with exchange of a settlement check and a signed release by the plaintiff to the tortfeasor and the tortfeasor's insurer
Interim	Plaintiff's medical treatment and physical injuries continue and plaintiff determines to advance a UIM claim
April 12, 2007	Plaintiff formally commences a UIM claim against the UIM carrier with the service of a summons and complaint.

The significant facts are that less than six years - - the UIM statute of limitations - - intervened from the signing of the release to the start of the UIM claim, but more than six years intervened between the UIM carrier's decision not to substitute its draft and the commencement of the UIM claim.

SUMMARY OF ARGUMENT

There is a six year statute of limitations from “the date of the settlement or judgment” with the tortfeasor within which a plaintiff must commence a UIM claim under *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 407 (Minn. 2000). The UIM claim is thus timely here if “settlement” means the date that the release was signed, but not if it means the date the UIM carrier decided to decline to exercise its subrogation rights. The key to resolving this debate is what the Minnesota Supreme Court meant by the phrase “the date of the settlement” in *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000).

The UIM carrier argued below that the trigger date for “settlement” should be the date that it decided not to substitute a draft, rather than the date that the plaintiff completed his settlement with the tortfeasor by executing a release in exchange for a settlement check.

No statute or case supports the UIM carrier’s proposition. No court has ever expressed the time limit using the Appellant’s formulation. Repeatedly courts have said that the UIM claim accrues on the day the liability claim against the tortfeasor is “resolved” or “settled.” A case is settled between the plaintiff and tortfeasor when those two agree to terms and one side pays the other in exchange for the recipient signing a mutually agreeable release to memorialize those terms. The trigger of a check and release - - which was the one used by the trial court - - rather than the decision on substitution of a draft - - is the “condition precedent” to commencement of a UIM claim. Nothing is resolved between the plaintiff and tortfeasor by the UIM carrier’s decision regarding substitution of a draft, *i.e.*, deciding what to do about its own claim. No one is paid. Nothing is signed between the plaintiff and

tortfeasor at the time the UIM carrier decides to act. The UIM carrier's decision has an effect on the progress of the settlement between the plaintiff and the tortfeasor's insurer in electing between two scenarios, but it does not dictate the precise terms of their ultimate "resolution" or "settlement," as the two alternatives that exist between the plaintiff and the tortfeasor's insurer are:

1. If the UIM carrier substitutes its draft our "tentative" settlement is off and no terms are reached between us.
2. If the UIM carrier waives subrogation, we will proceed to exchange a settlement check for a release on specific terms that we will later develop.

The UIM carrier's decision is thus interesting, but relates to its *subrogation* claim, and does control the plaintiff's *UIM claim*. Nor does the *UIM carrier's* decision effectuate a "settlement" between the *plaintiff and the tortfeasor's insurer* ; those details are to be promptly worked out between the parties to the settlement: the plaintiff and the tortfeasor's insurer. The UIM carrier is not even a *party* to the settlement. It does not make sense that a non-party could be the one whose decision brings about the "resolution" or "settlement" between the parties to the settlement.

The approach taken by the trial court here was logical and based on precedent. It also took into account the facts of this settlement in which there was no undue delay between the date the UIM carrier waived its subrogation interest and the date the plaintiff and the tortfeasor's insurer finalized the terms of their settlement and exchanged a settlement draft for the release. The trial court thus did not err and should be affirmed.

ARGUMENT

I. Standard of Review is *de novo* for Errors of Law.

Where “[t]he facts . . . are undisputed, . . . the only issue is the correct application of the No-Fault Act.” *Schons v. State Farm Mut. Auto. Ins. Co.*, 621 N.W.2d 743, 745 (Minn. 2001). “Statutory construction is a question of law, which th[e] court reviews *de novo*.” *Gilder v. Auto-Owners Ins. Co.*, 659 N.W.2d 804, 806 (Minn. App. 2003) (No-Fault Act). A court’s “primary objective in interpreting statutory language is to give effect to the legislature’s intent as expressed in the language of the statute.” *Pususta v. State Farm Ins. Cos.*, 632 N.W.2d 549, 552 (Minn. 2001) (No-Fault Act).

II. Statute of Limitations for UIM Claim is Six Years from the date “the UIM claim becomes ripe by settlement or adjudication against the tortfeasor.”

The supreme court clearly set a six year statute of limitations in UIM cases in *Oanes v. Allstate Insurance Company*, 617 N.W.2d 401 (Minn. 2000), saying that “the UIM claim becomes ripe by settlement or adjudication against the tortfeasor.” *Id.* at 402.³

A. It Requires Satisfaction of all “Conditions Precedent” and Contingencies

Oanes explained that a “UIM claim will accrue when the condition precedent to raising the UIM claim that we identified in *Nordstrom* has been satisfied, not before.” *Id.* at 407, citing *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855 (Minn. 1993).

³ In the event that a case is not settled, but is taken to trial, the *Oanes* court explained that “adjudication” occurs or is complete for purposes of the accrual of a UIM claim when “judgment against the tortfeasor” is obtained. *Id.* at 407. The court did not explain what specifically was meant by the date of “settlement.”

Appellant takes the position that the only “condition precedent” is the UIM carrier’s decision to assert or waive its subrogation claim against the tortfeasor. There are several other contingencies, however, including the payment of a *recovery* to the plaintiff by the tortfeasor’s insurer and the plaintiff’s *execution of a release*, which are the conditions emphasized in the appellate case law.

In *Kwong v. Depositors Ins. Co.*, 627 N.W.2d 52, 56 (Minn. 2001), the Minnesota Supreme Court stated expressly that “*recovery* from the tortfeasor’s insurer is a *condition precedent* to a claim for UIM benefits.” In *Johnson v. State Farm Mut. Auto. Ins. Co.*, 594 N.W.2d 243, 245 (Minn. App. 1999), the court of appeals reiterated that “the insured must first *recover* from the tortfeasor’s insurance company . . . before pursuing the UIM claim.” This indeed is the Supreme Court’s language in *Nordstrom*.⁴ See also *Washington v. Milbank Ins. Co.*, 562 N.W.2d 801, 806 (Minn. 1997) (quoting *Nordstrom*’s “recover first” requirement).

Moreover, a second conditions precedent to the accrual of a UIM claim is described by the Minnesota Supreme Court as the entry of plaintiff into a release⁵ before a UIM claim may commenced, as “an underinsured motorist claim is not ripe until the motorist’s

⁴ *Nordstrom, supra*, 495 N.W.2d at 858 (“the fairest solution to our problem here is to continue to require an injured claimant to *recover first* from the tortfeasor’s liability insurance”) (emphasis added).

⁵ *Richards v. Milwaukee Ins. Co.*, 518 N.W.2d 26, 27 n.1 (Minn. 1994) (“If the UIM carrier does not substitute its draft within 30 days, the claimant is free to settle with the defendant, *execute a general release*, and still pursue a claim for UIM benefits.”) (emphasis supplied, citing *Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983)).

contingent liability is fixed by the *resolution* in the underlying tort action against the motorist [as] . . . the injured motorist is not ‘damaged’ for purposes of an underinsured motorist lawsuit until his liability is fixed in the underlying tort claim,” because otherwise those damages are “entirely contingent on the occurrence of uncertain events” and contingencies must be completely resolved before the UIM claim may legally proceed.⁶

B. Appellant’s Focus is on a Different “Condition Precedent,” which it says is the Only Contingency that needs to be Resolved before a “Settlement” is Effectuated, even if no Money or Release have been Exchanged between the Plaintiff and the Tortfeasor’s Insurer

While the case law thus strongly suggests that the *recovery* of funds and *execution of a release* are additional *conditions precedent* that have to mature before a UIM cause of action accrues, Appellant’s analysis overlooks them, and focuses on the nature of the *contract* between the UIM carrier and the plaintiff, relying on *National City Bank v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989), for the proposition that there can be no breach of contract action against it until the event required by the condition does not occur.

The event-required-by-the-condition in the UIM carrier’s mind is quite evidently its decision to either assert or waive its own subrogation interest, rather than on the resolution of the underlying tort action before its excess insurance coverage becomes available under *Nordstrom*. The Appellant UIM insurer’s perspective in focusing exclusively on its own decision about substituting a draft as the trigger for the plaintiff’s breach of contract claim

⁶ *Antone v. Mirviss*, 720 N.W.2d 331, 340 (Minn. 2006) (J. Hanson, dissenting on an unrelated matter) (emphasis added).

is thus fundamentally the wrong perspective.

Appellant's approach in focusing on its *own contract right to subrogation* overlooks the appellate cases' formulation of the issue of when a UIM cause of action accrues, instead in terms of the completion of the *contract to settle* the underlying dispute between the *plaintiff and the tortfeasor's insurer*. The Appellant is thus focusing on the wrong contract.

In *Nordstrom*, the Supreme Court said that "the fairest solution to our problem here is to continue to require an injured claimant to recover first from the tortfeasor's liability insurance." *Nordstrom, supra*, 495 N.W.2d at 858. That is the proper focus: deciding whether the liability claim between the plaintiff and the tortfeasor's insurer is "resolved," not on whether the UIM carrier has made a decision about its subrogation rights.

C. The Main Indicator that a Liability Claim has "Settled" is when Settlement Money is Exchanged for an Agreed upon and Fully Executed Release.

How can a plaintiff "recover" from the tortfeasor if they have not yet been paid by the tortfeasor? How can the contingencies of the "recovery" be "resolved" if the terms of a release have not been agreed between the parties and been evinced through the memorialization of a release?⁷

⁷ For example, these contingencies include whether there is a loss of consortium claim and whether the claimant's spouse should be included in the release or on the settlement draft, *see Huffer v. Kozitza*, 375 N.W.2d 480, 482 (Minn. 1985) ("claimants and defendants, in their settlement negotiations, should be left to protect themselves from duplication of damages for loss of consortium."), whether the release will include any requirements of confidentiality, *see Henricy v. Boettcher*, 2001 W.L. 950106, unpub. (Minn. App., Aug. 21, 2001) (confidentiality language in a settlement agreement is subject to enforcement notwithstanding the issue of whether proper payment had been

Courts will enforce the terms of a settlement when those terms are clear, whether or not a release is signed, so long as there has been a bargain reached that is readily understood and one that is capable of the court's specific enforcement.⁸ "Trial courts have[] 'the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous.'" *Lewis v. Benjamin Moore & Co.*, 574 N.W.2d 887, 888 (S.D. 1998) (emphasis and citation omitted). If material facts are disputed, an evidentiary hearing is required. *Id.* The thing that quite clearly eliminates every "contingency," however, is the signing of an agreed upon release.

That did not occur here until April 17, 2001, making the April 12, 2007 commencement of suit timely under the six year statute of limitations established by *Oanes*. "Before an injured claimant can pursue a UIM-benefits claim, she must first *recover* from the tortfeasor's liability-insurance policy." *Kluball v. American Fam. Mut. Ins. Co.*, 706

made), whether the settlement will be on terms of a general release or one that preserves claims against other tortfeasors, such as a *Pierringer* release does, see *Frey v. Snelgrove*, 269 N.W.2d 918, 920 n.1 (Minn. 1978), whether the plaintiff must agree to indemnify the tortfeasor and their insurer from claims of subrogation advanced by medical providers or health insurers, see *Member Services Life Ins. Co. v. American Nat'l Bk. & Trust Co.*, 130 F.3d 950, 958 (10th Cir. 1997)("ERISA neither requires . . . nor does it bar such clauses or otherwise regulate their content."), and numerous other considerations.

⁸ See generally *VoiceStream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 269 (Minn. 2008)(an agreement to settle a dispute is contractual in nature and "can be enforced by an ordinary action for breach of contract," *Mr. Steak, Inc. v. Sandquist Steaks, Inc.*, 309 Minn. 408, 410, 245 N.W.2d 837, 838 (1976), or can also be enforced by motion in the original lawsuit, *id.*, citing *Ryan v. Ryan*, 292 Minn. 52, 52-53, 193 N.W.2d 295, 296-97 (1971)). "As a general rule, the enforcement of a settlement agreement requires a hearing if the issues are sharply conflicting and there are questions of fact for the fact finder to decide." *VoiceStream, supra*, 743 N.W.2d at 269.

N.W.2d 912, 916 (Minn. App. 2005) (emphasis added), *citing Nordstrom, supra*, 495 N.W.2d at 858. This essential element of a “recovery” is missing completely from Appellant’s formulation of a test. The trial court’s decision to use the event of a recovery and specifically the date a release was signed, should be affirmed.

D. No Contrary Public Policy Consideration Dictates A Different Test

One of the concerns raised at the trial court by the Appellant was the prospect that a plaintiff could unduly delay the finalization of their settlement with a tortfeasor to unnaturally extend the six year time limit. That concern is in fact raised in *dicta* in *Oanes*.⁹

It is inapplicable here, however, as the trial court found that “[t]here’s no evidence in this case of any unreasonable delay” in the completion of the contingencies to settlement (Tr. at 9, f. 23-24) (RA-11), and only about two weeks intervened between April 2, 2001 - - when Appellant waived its subrogation claim - - and the plaintiff and tortfeasor’s insurer resolved all contingencies with the execution of the release in exchange for a settlement draft on April 17, 2001.

Frankly, the concern in *Oanes* about unreasonable delay by the plaintiff is not a real-world issue. Why would a plaintiff eager to settle their case with the tortfeasor and gain the settlement money offered *delay* processing the settlement to extend the *six-year* time limit to sue the UIM carrier? In the real world, they would want the money as soon as possible and frequently call the UIM carrier to ask if they are willing to waive their subrogation

⁹ *Oanes, supra*, 617 N.W.2d at 407 (“enabled to forestall the commencement of the limitations period indefinitely by failing to assert the UIM claim.”).

interest in advance of the full 30 days secured to the UIM carrier by *Schmidt v. Clothier*.

There is no reason for a plaintiff to delay settlement with the tortfeasor, and the trial court found none here, so the fear expressed in the *dicta* of *Oanes*, and argued by the Appellant here is inapplicable to change the result recommended by appellate case law and reached here by the trial judge; using the date a release was promptly signed as the trigger for the accrual of the UIM cause of action.

E. **Since UIM Coverage is “Excess” Coverage, it Logically Follows the Complete Resolution of the Liability Claim between the Plaintiff and the Tortfeasor’s Insurer**

Under *Employers Mutual Cos. v. Nordstrom*, 495 N.W.2d 855, 856 (Minn. 1993), “[u]nderinsured coverage has generally been understood as excess coverage, to be utilized only after the cause of action against the insured tortfeasor has been concluded.” “In other words, recovery from the tortfeasor’s liability insurance is a ‘condition precedent’ to bringing an underinsured claim.” *George v. Evenson*, 754 N.W.2d 335 (Minn. 2008), quoting *Nordstrom, supra*, 495 N.W.2d at 857.

The fundamental nature of UIM coverage as excess coverage also argues in favor of the full resolution of the liability claim and all its contingencies between the plaintiff and the tortfeasor’s insurer before a UIM claim is ripe. That is certainly finalized in the final release. That was the date used by the trial court here, and that decision is certainly not an error of law.

Appellant’s argument treats the underlying case as being “resolved” when the UIM carrier says it isn’t going to substitute a draft. That means the plaintiff’s right to sue the UIM

carrier would “accrue” before the plaintiff has even been paid. Since getting a check is contingent on signing an agreed form of release, a true real bright line test would be the date a release is signed. If there was an unusually lengthy delay in signing a release, the UIM insurer could show that affirmatively and argue for a different result on the facts on that hypothetical case.

The necessity of a signed release as a condition precedent is made clear by the Supreme Court in *Richards v. Milwaukee Ins. Co.*, a UIM procedures case that defined many of the practical aspects of UIM coverage including how to determine proper offsets from an award. *Richards* decreed that “If the UIM carrier does not substitute its draft within 30 days, the claimant is free to settle with the defendant, *execute a general release*, and still pursue a claim for UIM benefits.” 518 N.W.2d 26, 27 n.1 (Minn. 1994) (emphasis supplied, *citing Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983)).

Indeed, the payment by the tortfeasor’s insurer to the Plaintiff in exchange for a release was viewed as a condition precedent to the accrual of a UIM claim in the foreign cases that *Oanes* relied upon in setting its rule on the statute of limitations for UIM claims.

The *Oanes* court specifically said:

We instead adopt a third option for the time a UIM claim accrues and the statute of limitations begins to run. This option is the date of settlement with or judgment against the tortfeasor. *See Wheeler v. Nationwide Mut. Ins. Co.*, 749 F. Supp. 660, 662 (E.D. Pa. 1990) (holding that a UIM claim accrues when insured’s rights have vested, which does not occur until the insured knows that the tortfeasor was an underinsured motorist; citing similar holding with regard to UM claim in *Boyle v. State Farm Mut. Auto. Ins. Co.*, 456 A.2d 156, 162 (Pa. Sup. 1983)); *see also North Carolina Ins. Guar. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 446 S.E.2d 364, 369 (N.C. Ct. App. 1994) (holding

that the statute of limitations did not commence on UM claim until the tortfeasor's insurance company was declared insolvent and the UM claimant was then "at liberty to sue").

Oanes, supra, 617 N.W.2d at 406. In *Boyle v. State Farm Mut. Auto. Ins. Co.*, the Pennsylvania court said that every contingency had to be resolved before a claim could be deemed ripe. 310 Pa. Super. 10, 12, 456 A.2d 156, 157. In *North Carolina Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co.*, the North Carolina court said a plaintiff would not be "at liberty" to sue until all conditions precedent had been exhausted. 115 N.C. App. 666, 673, 446 S.E.2d 364, 369.

Under the precedents established by the Minnesota Supreme Court and followed for over a decade by the Minnesota Court of Appeals, the conditions precedent of executing a final release and recovering from the tortfeasor's insurance must be completed before a plaintiff can sue a UIM claim.

Those occurred effective with the execution of a release by Mr. Stroop on April 17, 2001. See Release, dated April 17, 2001, (A-41) previously attached as Ex. C to Affidavit of Daniel R. Mitchell. The UIM claim was begun here less than six years later. See Notice of Service of Process of UIM complaint, dated April 12, 2007, (A-1) previously attached as Ex. E to Affidavit of Daniel R. Mitchell. The six year statute of limitations did thus not expire. The summary judgment was thus properly denied and should be affirmed.

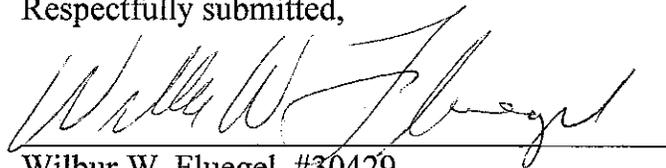
CONCLUSION

The key to this case is what the Minnesota Supreme Court meant by the phrase "the date of the settlement or judgment" in *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 407

(Minn. 2000). Appellant argues that the triggering date for “settlement” should be the date that it decided not to substitute a draft, rather than the date that the plaintiff completed his settlement with the tortfeasor’s insurer by executing a release in exchange for a settlement check.

This rationale is contrary to the literal language of *Schmidt*, *Oanes* and *Nordstrom*, as well as numerous Minnesota precedents and the foreign decisions upon which the Minnesota Supreme Court relied in formulating the “the date of the settlement or judgment” test in *Oanes*. All Minnesota UIM cases speak of the need for the plaintiff to first complete the “condition precedent” of an actual “recovery” of the settlement before a UIM claim may proceed, and expressly reference the need to execute a release before a UIM claim is deemed to have accrued. Case law says all contingencies must be resolved before a UIM claim is ripe. A clear bright line exists with the date the release is settled. It was thus not an error of law for the trial court to use that date as the accrual date here and thus to recognize that the UIM claim was timely commenced. The trial court’s denial of summary judgment should be affirmed.

Respectfully submitted,



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