

NO. A09-591

State of Minnesota
In Court of Appeals

DAVID S. KASID,

Appellant,

vs.

COUNTRY MUTUAL INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF AND 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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Statement of Legal Issue

Did the district court err in concluding that Appellant David Kasid was not entitled to uninsured motorist (UM) coverage when he offered no evidence that the other car that injured him was uninsured and admitted that no hit-and-run accident occurred?

Most apposite authority:

Halseth v. State Farm Mut. Auto Ins. Co., 268 N.W.2d 730 (Minn. 1978)

Lhotka v. Illinois Farmers Ins. Co., 572 N.W.2d 772 (Minn. Ct. App. 1998)

Sao v. American Fam. Ins. Group, 1999 WL 262138 (Minn. Ct. App. May 4, 1999)

Minn. Stat. § 65B.43, subd. 18

Statement of the Case

Appellant David S. Kasid seeks uninsured motorist (UM) coverage and appeals the summary judgment granted to Respondent Country Mutual Insurance Company ("Country"). The Ramsey County District Court, the Honorable M. Michael Monahan, granted summary judgment to Country, A.76, and determined that Kasid failed "to provide any evidence tending to show that the [other] vehicle was an uninsured vehicle under the policy language." A.81 (¶ 18). The district court noted that Kasid conceded he had no evidence that the other car vehicle lacked insurance. A.79 (¶ 9). The district court also concluded that "there was not a hit-and-run accident here because the at fault vehicle did stop and did provide some identifying information." A.81 (¶ 18).

Statement of Facts

The facts are undisputed, as the district court concluded. A.80 (¶ 14). Kasid did not contest the facts below and does not do so on appeal.

Kasid was a passenger in a car that was rear-ended while waiting at a stoplight. A.2 (Complaint, ¶¶ I and III); A.38 (J.Arlt Aff., ¶ 2). Country insured the car and provided uninsured motorist coverage. A.3 (Complaint, ¶ VI); A.41-74 (Country's policy); A.38 (J.Arlt Aff., ¶ 1).

Everyone in the car – the driver, the car's owner, and Kasid – exited the car to inspect it for any property damage. A.38 (J.Arlt Aff., ¶ 3). Except for some marks on the rear bumper cover, there was no damage to the car in which Kasid rode. *Id.* No one, including Kasid, said they were hurt. *Id.*

The car's owner, Joyce Mancino (now Joyce Arlt), and the driver of the other car spoke, and Mancino obtained the other driver's telephone number and license plate number. A.39 (J.Arlt Aff., ¶ 4). Mancino wrote this information down on a receipt and put it into her purse. *Id.* Kasid was close enough to overhear this conversation and also was able to see the other driver's license plate number. *Id.* (¶¶ 4-5). Kasid admits he had an opportunity at the scene to determine the identity of the other driver and obtain the license plate number. A.36 (Response to Requests 4 and 5).

Five or six months after the accident, Kasid asked Tim Arlt to ask Mancino for the information on the other driver. A.39 (J.Arlt Aff., ¶ 6). By then, however, Mancino could no longer locate the receipt with the information on it, and she does not know what happened to it. *Id.*

In response to requests for admissions, Kasid admitted he had no evidence that the other driver's car was uninsured, *i.e.* that it was operated without appropriate liability insurance coverage. A.36 (Response to Request No. 8; admitting that "ha[d] no evidence that the Defendant [Jane Doe] was or was not insured"). Kasid also admitted that the other car was not a hit-and-run vehicle as defined in Minnesota – "a vehicle involved in an accident causing damages where the driver flees from the scene." A.35 (Response to Request No. 1).

Argument and Authorities

I. Introduction and Standard of Review

In an appeal from a summary judgment, an appellate court determines whether any genuine issues of material fact exist and whether the district court erred in its application of the law. *Offerdahl v. University of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). A party opposing summary judgment must do more than create a metaphysical doubt as to a factual issue and may not rest on mere averments. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Insurance coverage issues ordinarily present questions of law that are reviewed *de novo*. *See State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). Parties to an insurance contract, as in other contracts, are free to contract as they see fit, and an insurer's liability is governed by the contract the parties entered. *American Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983); *Bobich v. Oja*, 258 Minn. 287, 104

N.W.2d 19, 24 (1960). The language used in the contract must be given its usual and accepted meaning. *Id.*

Courts will not redraft insurance policies to provide coverage where the plain language of the policy indicates no coverage exists. *Newberg v. Commercial Union Ins. Co.*, 619 N.W.2d 757, 759 (Minn. Ct. App. 2000). Courts may not read an ambiguity into the plain language of a policy in order to construe it against the insurer. *Bobich*, 258 Minn. 287, 104 N.W.2d at 24. Nor do they thrust upon an insurer a risk it did not accept and for which it was not paid a premium. *Simon v. Milwaukee Auto. Mut. Ins. Co.*, 262 Minn. 378, 115 N.W.2d 40, 49 (1962).

II. The district court did not err in concluding that Kasid was not entitled to underinsured motorist coverage.

On appeal, Kasid has neither argued nor shown that the district court erred in its analysis of Country's policy or controlling Minnesota authority. Significantly, Kasid candidly concedes he "has not found any Minnesota case with a similar fact scenario to his own." Kasid's brief at 10. Accordingly, this Court should affirm.

In Minnesota, uninsured motorist coverage exists to protect those who sustain damages from the owners or operators of uninsured motor vehicles and hit-and-run vehicles. Minn. Stat. § 65B.43, subd. 18 (defining "uninsured motorist coverage"). Consistent with this, Country's policy provided UM coverage triggered where an insured's damages are caused by the owner or operator of an uninsured vehicle. A.50 ("We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** . . ."). Under the policy's definition of an

uninsured motor vehicle, there are three ways a vehicle qualifies as an uninsured motor vehicle for UM coverage: 1) it was uninsured; 2) it was a hit-and-run vehicle; or 3) it was insured but the insurer is insolvent or denies coverage. *Id.* This third possibility is not at issue in this case. Because Kasid failed to show that the other car was either uninsured or was a hit-and-run vehicle, the district court correctly granted summary judgment.

First, Kasid presented no evidence that the other car was uninsured. He admitted in response to Request for Admission No. 8 that he had "no evidence that the defendant [Jane Doe] was or was not insured." A.34. Given this concession, the district court correctly concluded that Kasid failed to meet his burden of showing that an uninsured vehicle injured him.

Second, as for the possibility of UM coverage because a hit-and-run vehicle was involved, Kasid expressly admitted that he was not injured by such a vehicle. A.35. The request and response to Request for Admission No. 1 was as follows:

1. The vehicle operated by Defendant Jane Doe was not a hit-and-run vehicle as defined in *Halseth v. State Farm Mut. Auto. Ins. Co.*, 268 N.W.2d 730, 733 (Minn. 1978), namely "a vehicle involved in an accident causing damages where the driver flees from the scene".

RESPONSE: Admit

Id.

Three decades ago, the Minnesota Supreme Court defined hit-and-run vehicle within the context of UM coverage as noted in Request No. 1, *i.e.* "a vehicle involved in an accident causing damages where the driver flees from the scene." *Halseth*, 268 N.W.2d at 733. On appeal, Kasid agreed that the *Halseth* definition "is the correct

definition." Kasid's brief at 9. Given Kasid's candid response to the request for admission, the district court did not err in concluding that Kasid was not entitled to UM coverage because he was not injured by a hit-and-run vehicle.

A decade ago this Court closely examined whether UM coverage existed due to an alleged hit-and-run vehicle, and followed the Supreme Court's succinct definition of a hit-and-run vehicle from *Halseth*. In *Lhotka v. Illinois Farmers Ins. Co.*, 572 N.W.2d 772 (Minn. Ct. App. 1998), a driver struck a pedestrian and then stopped and asked the pedestrian if she was hurt. The pedestrian indicated that while she had some pain in her head and elbow, she thought she was "okay" and did not ask the driver for any information. *Id.* at 773. The driver made no attempt to flee the scene, and only left after she believed that the pedestrian was fine and that nothing more needed to be done. *Id.* The pedestrian later noted some swelling and pain and then brought a UM claim against her insurer. *Id.* She claimed coverage because she did not know the identity of the driver. *Id.* at 774.

This Court affirmed the district court's grant of summary judgment for the insurer. *Id.* at 775. This Court agreed that the driver was not a hit-and-run driver where there was no attempt to flee the scene and no evidence to suggest that the driver would have withheld his identifying information if the pedestrian had asked for it. *Id.* at 774-75.

This case presents a similar situation. The undisputed evidence is that the other driver did not attempt to flee the accident scene. To the contrary, she stayed at the scene and provided contact information to Mancino. As in *Lhotka*, there is also no evidence that the other driver would have withheld identifying information. Instead, the

undisputed evidence is that the other driver did stop and readily provided identifying information. As the plaintiff did in *Lhotka*, Kasid failed to ask for or obtain that contact information from the other driver, even though he had the opportunity to do so at the scene. Kasid also could have asked for this information from Mancino sooner, but inexplicably chose not to do so for some five or six months, by which time the information had been lost.

The district court did not err in following *Lhotka*. On appeal, Kasid has offered no principled distinction between his failure to ask for the other driver's information and the plaintiff's failure to do so in *Lhotka*.

Kasid argues that he has an excuse for not obtaining the other driver's contact information, and that this excuse distinguishes this case from *Lhotka*. The excuse Kasid offers is that he knew that Mancino had the other driver's contact information, but that she lost that information before Kasid realized he was hurt and asked for the information some five or six months later. While this is a factual distinction from *Lhotka*, it is a distinction without significance. The plaintiff in *Lhotka* and Kasid each had an opportunity to obtain the other driver's contact information at the scene, failed to obtain that information, and the opportunity passed before they realized they were injured.

When Mancino eventually lost the paper that had the other driver's contact information, this was the equivalent of the driver in *Lhotka* leaving the scene after believing there was nothing more needed to be done. In both cases, the opportunity to obtain the driver's contact information ended not because of a hit-and-run driver who fled the scene, but because of the claimant's failure to obtain the information.

Another instructive decision from this Court is *Sao v. American Fam. Ins. Group*, 1999 WL 262138 (Minn. Ct. App. May 4, 1999). As in this case, *Sao* involved a two-car accident. The at-fault driver remained at the scene for about an hour. When the plaintiff asked the at-fault driver for his driver's license and insurance card, the driver responded that he had left both at home. Notably, the plaintiff did not attempt to obtain the other driver's name or telephone number. The plaintiff did write down the other driver's license plate number, but wrote the number down incorrectly. The plaintiff then sought UM coverage, but the district court granted summary judgment to the UM insurer because there was no hit-and-run vehicle.

This Court affirmed the district court because there was no hit-and-run vehicle. As Judge Huspeni observed in a concurring opinion, ". . . appellant's error in writing down the license plate number in this case precludes any recovery" of UM benefits. Here, Kasid did not even attempt to write down the license plate number. There is no principled distinction between Mancino eventually losing the other driver's information and the plaintiff in *Sao* incorrectly writing down the license plate number. Both cases did not involve a hit-and-run vehicle, *i.e.* a vehicle that fled the scene, and in both cases the party seeking UM coverage failed to obtain the other driver's contact information. Given this clear Minnesota authority, the district court correctly granted summary judgment to Country. This Court should affirm that ruling.

III. The district court correctly relied upon controlling Minnesota decisions and properly distinguished the foreign authority Kasid cited.

As he did below, on appeal Kasid tries to avoid controlling Minnesota precedent and instead seeks to rely upon inapposite foreign authority. In arguing that he "should be able to recover" UM coverage from Country, Kasid's brief at 10, Kasid cites to a case from Massachusetts, *Pilgrim Ins. Co. v. Molard*, 897 N.E.2d 1231 (Mass. App. Ct. 2008), and a case from New York, *Riemenschneider v. Motor Vehicle Acc. Indem. Corp.*, 20 N.Y.2d 547, 232 N.E.2d 630 (1967). Neither case trumps controlling Minnesota precedent or the language of Country's policy, and the district court did not err in declining to follow those decisions and thereby change Minnesota law.

In *Pilgrim*, the Appeals Court of Massachusetts reversed after holding that a genuine issue of material fact existed. *Id.*, 897 N.E.2d at 1236 and 1239 (fact issue as to when the injured party realized that he had been injured). Here, however, the facts are undisputed and Kasid has not argued that any genuine issues of material fact exist that need to be resolved. Additionally, in *Pilgrim* the reason the insurer denied coverage was that the claimant failed to provide timely notice. *Id.* at 1235-36. Finally, *Pilgrim* is inapposite because Massachusetts' law is different and looks to a different definition of a hit-and-run vehicle when determining if UM coverage exists.

Significantly, Massachusetts has chosen to take "an expansive approach to the meaning of the term hit-and-run." *Pilgrim*, 897 N.E.2d at 1237 (citing *Commerce Ins. Co. v. Mendonca*, 57 Mass.App.Ct. 522, 784 N.E.2d 43 (2003)). Indeed, the *Pilgrim* court expressly recognized that Massachusetts' expansive view "is not the universal

approach" and cited as one example of a contrary view this Court's decision in *Lhotka*. See *Pilgrim*, 897 N.E.2d at 1238 n. 9 (also citing *Sylvestre v. United Servs. Auto Ass'n Cas. Ins. Co.*, 240 Conn. 544, 546, 692 A.2d 1254 (1997)). Because contrary and controlling Minnesota authority exists, *Pilgrim* does not help Kasid – particularly because Massachusetts recognizes that its expansive view differs from Minnesota's. Given this distinction, any supposed factual similarity in *Pilgrim* to this case is irrelevant. Accordingly, the district court did not err when it followed controlling precedent and declined to expand and change Minnesota law.

Similarly, *Riemenschneider* follows an expansive view of when UM coverage exists. In New York, coverage is determined by statute, which provides that UM coverage exists if the identity of the other driver "is unascertainable" and does not define UM coverage in terms of the colloquial usage of the term hit-and-run. *Id.*, 20 N.Y.2d at 549-50, 232 N.E.2d at 631. As well, the policy in *Riemenschneider* provided UM coverage for situations where the other driver's identity "cannot be ascertained." *Id.*, 20 N.Y.2d at 550, 232 N.E.2d at 631.

As noted, Minnesota does not provide such broad UM coverage. Instead, Minnesota defines UM coverage in terms of whether there was a hit-and-run vehicle. Because Country's policy provides coverage consistent with the definition Minnesota's statute and decisions follow, Kasid's argument for an expansive view should be rejected. Kasid's desire for greater coverage does not establish that the district court erred.

IV. Kasid's argument that the driver had a duty to collect information and that the district court so held misstates the issue and what occurred below.

Kasid's primary argument on appeal is based on an incorrect premise. He contends that the district court concluded that Kasid owed a duty to obtain information from the other driver. The district court made no such conclusion. Instead, the district court correctly concluded that Kasid was not entitled to UM coverage because he failed to show that an uninsured vehicle caused his claimed injuries.

On appeal, Kasid tries to frame the issue as whether a passenger has a duty to obtain information regarding another driver's identity, and mistakenly claims that the district court ruled that passengers have that duty. Kasid brief at 2, 6. Importantly, the driver is not a party in this case. Even if the driver had such a duty and was a party to this case, that would not create UM coverage where coverage does not exist under Country's policy or under the statute.

Surprisingly, Kasid confuses Country with Mancino in terms of responsibilities. See Kasid's brief at 12. Kasid argues that "Respondent failed to do that which *she* should have done . . ." *Id.* (emphasis added). But Country is not Mancino. Its policy language determines its obligations to Kasid, and it is not bound by any alleged duty that Kasid claims that Mancino breached.

Additionally, the argument Kasid raises – that Minn. Stat. § 169.09 requires drivers to obtain information when involved in accidents – was specifically considered in *Lhotka* when this Court concluded that no UM coverage existed when there was no

evidence the driver was uninsured and there was not a hit-and-run vehicle. *Lhotka*, 572 N.W.2d at 774.

Kasid tries to excuse his failure to obtain the other driver's contact information by arguing that he did not have this responsibility because he was not the named insured on the Country policy. Country acknowledges that Kasid was an "insured" and not a "named insured." This is a distinction without significance. Kasid is an "insured" for UM benefits because he was occupying Mancino's car. As such, he and the named insured are subject to the same policy terms and conditions. To obtain UM coverage, Kasid was required to produce evidence that the other vehicle met one of the policy definitions of an uninsured motor vehicle. The district court correctly concluded that Kasid failed to do so.

The unarticulated lynchpin in Kasid's argument is that Mancino owed him a duty to keep the other driver's contact information, and breached this duty. Kasid asserts that Mancino's alleged breach somehow relieved him of his obligation to show that the other car was uninsured. Kasid cites no authority for imposing such a duty upon Mancino, or for excusing him from showing that an uninsured motorist injured him. A person generally has no duty to act for the protection of another person, even if he realizes or should realize that action on his part is necessary. *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979). Instead, a legal duty to act for the protection of another person only arises when a special relationship exists between the parties. *Id.* Minnesota courts have limited the situations in which special relationships exist to parents and children, common carriers, innkeepers, and persons who have custody of another person under

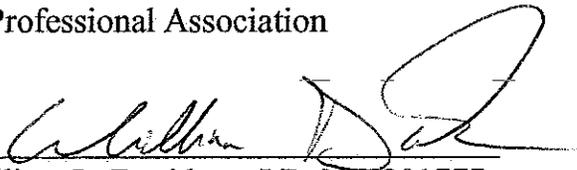
circumstances in which that other person is deprived of normal opportunities of self-protection. *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993). Here, no special relationship existed between Mancino and Kasid, and Kasid does not claim that there was a special relationship. Kasid had as much opportunity at the accident scene to obtain the other driver's contact information as Mancino did. But Kasid's failure to obtain the information does not excuse him from meeting his burden of showing that he is entitled to UM coverage.

Conclusion

Kasid failed to establish that he is entitled to UM coverage under the plain language of Country's policy. Kasid admittedly has no evidence that the other car was uninsured, and Kasid concedes that the other car was not a "hit-and-run" vehicle under controlling Minnesota caselaw. Accordingly, this Court should affirm the summary judgment the district court entered in Country's favor.

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