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APPELLATE COURT CASE NUMBER A10-2090

TRIAL COURT CASE NUMBER 68-CV-10-180

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State of Minnesota

In Court of Appeals

Tammy Pepper,

Appellant,

v.

State Farm Mutual Automobile Insurance Company
a/k/a State Farm Fire and Casualty Company
a/k/a State Farm Insurance Companies,

Respondent.

BRIEF AND APPENDIX OF APPELLANT TAMMY PEPPER

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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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II.

STATEMENT OF THE ISSUES

- I. NEITHER OF THE TWO POLICIES ISSUED TO FRANK MATLACHOWSKI EXCLUDE APPELLANT'S ABILITY TO RECEIVE BOTH UNDERINSURED AND LIABILITY BENEFITS.

- II. APPELLANT, AS A PEDESTRIAN RATHER THAN OCCUPANT OF A VEHICLE UNDER MINNESOTA STATUTE 65B.49, Subd. 3a(5) IS ENTITLED TO UNDERINSURED MOTORIST BENEFIT COVERAGE.

III.

STANDARD OF REVIEW

On an appeal from summary judgment, this Court asks two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2,4 (Minn. 1990).

A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

No genuine issue of material fact exists when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party....." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). [T]he party resisting summary judgment must do more than rest on mere averments." *Id.* at 71. Summary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *Id.* at 69.

A reviewing court is not bound by and need not give deference to a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656

N.W.2d 389, 393 (Minn. 2003) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)). When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo by the appellate court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998) citing *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995).

IV.

STATEMENT OF THE FACTS

Appellant was outside a home owned by her mother and stepfather, Frank Matlachowski. (A-9) Appellant was standing 10 feet behind a vehicle owned by her sister, Tracie Drew, when the driver, Frank Matlachowski, pressed on the accelerator and it stuck wide open pushing Appellant into a wall causing injuries. (A-10) The vehicle was known by Tracie Drew to have defects in the accelerator controls which information was not provided to Frank Matlachowski. (A-13) The vehicle owned and maintained by Tracie Drew was a 1994 Ford F150 Pickup insured by her through State Farm Mutual Insurance Company which paid the \$100,000 in liability coverage limits. (A-2, A-10)

Frank and Dawn Matlachowski had two separate policies insuring different vehicles in effect at the time of the accident also through State Farm. (A-2, A-14 thru A-21) Each policy declarations page stated coverage of \$100,000 limits of liability and each

provided for \$100,000 per person in underinsured motorist coverage and insured different vehicles with separate premiums. (A-19 thru A-21) Appellant received \$100,000 to settle any potential "liability" claim against Frank Matlachowski from one of the policies. The other policy paid nothing to Appellant. (A-2, A-3) Appellant filed this lawsuit for UIM benefits. (A-3) For the purposes of this appeal, Tracie Drew is the party who may be deemed primarily at fault. It is disputed whether Frank Matlachowski was negligent at all. The injured Appellant was listed as a driver on both policies. (A-15 thru A-19) It is disputed whether she was a resident of the Matlachowski household.

Appellant is underinsured having incurred medical bills in excess of \$170,000. (A-14 thru A-18).

V.

ARGUMENT

I. NEITHER OF THE TWO POLICIES ISSUED TO FRANK MATLACHOWSKI EXCLUDE APPELLANT'S ABILITY TO RECEIVE BOTH UNDERINSURED AND LIABILITY BENEFITS.

Appellant is the underinsured victim of multiple tortfeasers. The narrow line of cases allowing exclusions that prevent 3rd party coverage conversion to 1st party coverage do not apply due to the substantial liability of Tracie Drew.

The parties agree there is a dispute as to whether Appellant is a "household member" under the policy. This issue is not before the Court as it is disputed. The issue on the policy

interpretation is more narrow and focused on whether both policies prevent recovery of liability benefits on one policy and underinsured benefits on either policy, both of which the policy holders paid premiums.

The Trial Court determined the following language in the policy supported an exclusion of Appellant's UIM benefits. An **underinsured motor vehicle** does not include a motor vehicle or motorcycle:

2. Insured under the liability coverage of **this policy**.
3. Furnished for the **regular** use of you, your spouse, or any relative.

First, there is no dispute that Appellant collected liability coverage under one policy and is now pursuing underinsured motorist benefits under a separate policy. Thus, there are two policies and the language of the exclusion is singular (policy vs. policies). Further, liability coverage is only provided by law under one policy as stacking of liability is prohibited. There can be no liability coverage under the second policy.

Finally, there is no evidence the at fault vehicle was furnished for the **regular** use of you, your spouse, or any relative.

The Court of Appeals recently addressed policy exclusions in the context of multiple tortfeasors. In *Mitsch v. American National Property and Casualty Company*, 736 N.W.2d 355 (2007), the Court relied on *Lahr v. American Family Mutual Insurance Company*, 528

N.W.2d 57 (Minn. App. 1995), in distinguishing a *Myer's* type exclusion from the situation as in the instant case. In *Mitsch*, the Court citing the language of *Lahr* acknowledged the premise that an insured is prohibited from obtaining UIM benefits that would convert lesser expensive underinsured motorist benefits into liability coverage. The prohibition was "confined to situations where only the passenger's driver is liable either because that vehicle is involved or because the other involved vehicle is not at fault" and that the prohibition thus "does not extend to situations where a passenger seeks UIM benefits from her driver's insurer for the other at-fault vehicle's lack of adequate liability coverage." Id.

The Court in *Mitsch* further went on to adopt language of other commentators noting that "if there is another motoring tortfeasor, unrelated to the claimant, there is no obstacle to collecting both the liability coverage and underinsured motorist coverage under one single policy because there are then two distinct separately insured risks." "One such risk involves the liability claim. If there is a second, unrelated third vehicle that is also at fault, the other unrelated vehicle involves a separate risk... if the other vehicle were inadequately insured, it would trigger precisely the underinsured motorist risks for which the UIM coverage was issued." Theodore J. Smetak, *Underinsured Motorist Coverage in Minnesota: Old Precedents in a New Era*, 24 Wm. Mitchell L. Rev.,

857, 902 (1998); see also Theodore j. Smetak et al., *Minnesota Motor Vehicle Insurance Manual 401* (3d ed. 2000) ("The *Myers* case also has no application in a case where a guest passenger is seeking recovery of UIM benefits under the host driver's vehicle policy based on the fault of the 'other' motorist. The passenger is permitted to recover under the liability coverage on the host vehicle for the negligence of the host driver and under the UIM coverage of the host policy based upon the negligence and inadequate coverage of the other at-fault motorist. In such a case, there is no improper conversion of UIM into additional liability coverage because the UIM claim is based on the negligence of the driver of the other motor vehicle." (citations omitted)). Respondent may argue the case *Lynch v. American Family Mutual Automobile Insurance Co.*, 626 N.W.2d 182 (Minn. 2001) is somehow applicable. In *Lynch*, the Court merely found that the Minnesota No-Fault Act does not prohibit terms of automobile policy that would convert underinsured motorist coverage into purely liability coverage. *Lynch* dealt with limited facts where the sole negligence of an insured that insures both the tortfeasor and the injured party under one policy was at issue. The case is inopposite to the case at hand.

In the instant case, the negligence of the owner of the vehicle, Tracie Drew, who was neither a family member nor an insured under the two policies that covered Frank Matlachowski. It

is undisputed that Frank Matlachowski, while operating the pick up truck that was in excess of 15 years old, complained the accelerator stuck wide open for unknown reasons. The high mileage older vehicle had admitted undisclosed defects. The nondisclosure and failure to warn was the cause of the injuries.

In *Lynch*, the Court determined under the basic precept of insurance contract law, that the extent of the insured's liability is governed by the contract to which it is entered as long as the policy does not omit coverage required by law and does not violate applicable statutes. *American Family Mutual Insurance Company v. Ryan*, 330 N.W.2d 113 (Minn. 1983). *Lynch* essentially addressed a basic Myers exclusion as set forth in *Myers v. State Farm Mutual Insurance Co.*, 336 N.W.2d 288 (Minn. 1983). Mindfully, *Myers*, *Lynch* and *Kelly* all involved exclusions permissible for occupants of a motor vehicle who are injured by its negligent driver. Further, under *Kelly*, *Lynch*, and *Myers* and the cases cited by the Court, there was a sole tortfeasor from which damages were sought, not multiple tortfeasors. Therefore, the reasoning in *Kelly* and its predecessors would simply not apply. The Appellant in this case is not attempting to obtain excess liability insurance by converting Frank Matlachowski's underinsured motorist benefits to liability insurance for his sole fault. In this case, the fault of Tracie Drew is at issue and to permit State Farm to consider the fault 100% Frank Matlachowski's and thus liability conversion is

improper. In *Kelly, Lynch*, and its successors, the Court's focus was on "using UIM coverage to supplement his or her otherwise inadequate liability insurance." It is Tracie Drew that has insufficient liability coverage.

In the instant case, Appellant is not attempting to receive more money for the negligence of Frank Matlachowski. Appellant is merely attempting to collect the underinsured motorist benefits of Appellant due to Drew's negligence as owner of an underinsured vehicle, vicarious liability, for her failure to warn.

II APPELLANT, AS A PEDESTRIAN RATHER THAN OCCUPANT OF A VEHICLE UNDER MINNESOTA STATUTE 65B.49, Subd. 3a(5) IS ENTITLED TO UNDERINSURED MOTORIST BENEFIT COVERAGE.

Appellant was undisputedly a pedestrian. She was standing behind a vehicle operated by her stepfather when according to the undisputed facts, the accelerator pedal stuck wide open and the vehicle pushed her into the wall of a house causing severe injuries. *Minnesota Statute 65B.49, Subd. 3a(5)*, states, "If at the time of the accident the injured person is not occupying a motor vehicle or motorcycle, the injured person is entitled to select any one limit of liability (underinsured motorist benefits) for any one vehicle afforded by one policy which the injured person is insured." In this case it is not at issue whether Appellant is an underinsured person. Appellant has elected to receive underinsured motorist benefits from the policy insuring her which Respondent claims has made no payments to her.

Tracie Drew is also statutorily liable under vicarious liability under *Minnesota Statute 169.09A, Subd. 5a* which provides,

"Whenever a motor vehicle shall be operated within the State, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in the case of accident, be deemed agent of the owner of such motor vehicle in the operation thereof."

This statute which was renumbered from *Minnesota Statute 170.54* remains good law. The Motor Vehicle Safety Act is to be construed liberally and to effectuate its purpose with encouraging owners of motor vehicles to obtain the required insurance. See *Shuck v. Means, 226 N.W.2d 285 (Minn. 1974)*. The focus of the statute is on the victim, and it insures the person injured by others will have some source of compensation. See *Milbank Insurance Company v. United States Fidelity Guaranty Co., 332 N.W.2d 160 (Minn. 1983)*. The negligence of Tracie Drew and her underinsured motor vehicle has not been addressed and Appellant is allowed to access her own underinsured motorist benefits for Tracie Drew's direct and vicarious liability separate from any negligence of Frank Matlachowski.

The legislature mandated that automobile owners insure themselves in situations where the at-fault party does not have sufficient liability coverage to make whole the victim's injury. See *Minnesota Statute 65B.49, Subd. 3a*. Policy exclusions that contravene the purpose of the No-Fault Act will not be enforced.

See *American Motorist Insurance Company v. Sarvela*, 327 N.W.2d 77 (Minn. 1982). In *Holmstrom v. Illinois Farmers Insurance*, 631 N.W.2d 102 (Minn. App. 2001), a motorist struck and killed a pedestrian. The deceased was a resident of his parent's home and insured as a resident family member under his father's automobile policy with underinsured motorist benefits of \$100,000. In addition, decedent owned his own car under a separate policy with a separate insurance company that had UIM limits of only \$30,000. The decedent's trustee sought coverage under the higher \$100,000 UIM policy owned by the father to which he was a residential family member. The Court of Appeals, in ruling in favor of the decedent's trustee, distinguished between a pedestrian under the Minnesota No-Fault Act and a passenger in an automobile as they are treated differently under what policies may apply and what exclusions may apply to resident household members collecting underinsured motorist benefits. The Court made the following observation:

"The relevant guide when underinsured motorist coverage is imposed by operation of law is the language of the No-Fault Act." *Osterdyke v. State Farm Mut. Auto. Ins. Co.*, 420 N.W.2d 900, 903 (Minn. 1998).

'In separate paragraphs, this statute first states the uninsured/underinsured entitlements of those who occupy a motor vehicle and then declares the benefits for those, such as pedestrians, who do not.' *Northrup v. State Farm Mut. Auto. Ins. Co.*, 601 N.W.2d 900 (Minn. App. 1999), review denied (Minn. Jan. 25, 2000).

The first paragraph governs injuries to those occupying a vehicle, and allows the injured person who is not the named insured, or the spouse, minor, or resident relative of the named insured on the policy of the occupied vehicle to seek excess UIM coverage from another insurance policy. See *Becker v. State Farm Mut. Auto Ins.*

Co., 611 N.W.2d 7, 10-12 (Minn. 2000). The second paragraph governs injuries to those not occupying a vehicle and indicates the injured person may select any one limit afforded by a policy under which the person is insured. Cf. *Continental Cas. Ins. Co. v. Teachers Ins. Co.*, 532 N.W.2d 275, 277 (Minn. App. 1995) (holding that where injured pedestrian selects UIM benefits from one of two separate insurers, selected insurer may receive contribution from unselected insurer), review denied (Minn. June 6, 1995)."

The Court went on to conclude, "The statute reflects a clear legislative policy that injured pedestrians are entitled to greater latitude in selection of excess UIM coverage than occupants of motor vehicles." Further, the Court in *Holmstrom* rejected any claim that the policy language which is comparable to the case at hand created an exclusion as it would violate Minnesota Statutes.

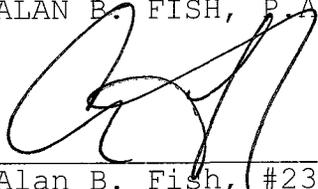
Attempts have unsuccessfully been made to write-in policy provisions that bar availability of underinsured motorist benefits that are mandated to be provided under *Minnesota Statute 65B.49, Subd. 3a*. See *American National Property and Casualty Co. v. Norman Loren*, 597 N.W.2d 291 (Minn. 1999). Appellant's status as a pedestrian and victim of multiple tortfeasors distinguishes her from the narrow exception carved out in cases discussed above.

VI.

CONCLUSION

For the foregoing, the Appellant requests the Court to reverse the decision of the Court below and remand the case for further proceedings.

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Dated: December 28, 2010

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CERTIFICATION OF WORD COUNT

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