

NO. A05-0436

State of Minnesota
In Court of Appeals

Lori Kluball,

Plaintiff-Appellant,

vs.

American Family Mutual Insurance Company,

Defendant-Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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ISSUES

- I. WHETHER THE DISTRICT COURT ERRED IN RULING THAT APPELLANT FORFEITED HER UNDERINSURED MOTORIST CLAIM BY FAILING TO PROVIDE RESPONDENT WITH A VALID *SCHMIDT V. CLOTHIER* NOTICE PRIOR TO RELEASING THE TORTFEASOR.

ANSWER: NO.

- II. WHETHER THE DISTRICT COURT ERRED IN RULING THAT APPELLANT'S FAILURE TO COMPLY WITH AN ENFORCEABLE NOTICE PROVISION IN HER UNDERINSURED MOTORIST ENDORSEMENT PRECLUDED RESPONDENT FROM BEING BOUND BY THE ARBITRATION AWARD.

ANSWER: NO.

STATEMENT OF THE CASE

Appellant Lori Kluball (hereinafter "Appellant"), the Plaintiff in the case below, brought an underinsured motorist suit against Respondent American Family Mutual Insurance Company (hereinafter "Respondent"), the Defendant in the case below, in Hennepin County District Court in November 2003, after Respondent denied her claim. An Answer was served by Respondent in December 2003. On March 9, 2004, Appellant filed the case with the District Court.

Respondent brought a motion for summary judgment on November 2, 2004, and Appellant responded with a cross-motion. Both motions were heard in oral argument on November 30, 2004, by District Court Judge John L. Holahan. Respondent's motion was granted by Judge Holahan. Appellant's motion was denied. An Order dismissing Appellant's case was issued by Judge Holahan on January 12, 2005. An appeal was taken by Appellant under Minn. R.Civ.App.P.104.01 on March 3, 2005.

STATEMENT OF FACTS

This underinsured motorist claim arises from an automobile accident which occurred between Appellant and Denys Craven (also referred to herein as the “tortfeasor”) in Eagan, Minnesota on December 29, 1994. Appellant brought a lawsuit against Ms. Craven, alleging her negligence was the direct cause of this automobile accident. Appellant alleged injuries to her neck, shoulders and back.

At the time of the accident, Appellant had an automobile insurance policy with Respondent under policy number 01-406601-01. That policy included an endorsement for underinsured motorist (hereinafter refer to as “UIM”) coverage, with liability limits of \$100,000/\$300,000. The insuring agreement of the UIM endorsement contained a notice provision.¹

Appellant served her lawsuit against Ms. Craven on or before December 29, 2000, in order to comply with Minnesota’s six year statute of limitations on negligence actions. The lawsuit continued into the year 2003, with no notice given to Respondent. On June 25, 2003, an Agreement for Voluntary Binding Arbitration (hereinafter referred to as the “Arbitration Agreement”) was executed between Appellant and Ms. Craven. The Arbitration Agreement provided that “claimant [Appellant Kluball] and respondent [Ms. Craven] understand and agree that the highest money damages that claimant can be awarded, following the hearing, is \$50,000, and the lowest money damages is \$7,500.”²

¹ The provision included the following language: “You must notify us of any suit brought to determine legal liability or damages. If any lawsuit is brought to determine liability or damages, the only or operator of the underinsured motorist vehicle must be made a defendant and we must be notified of the lawsuit at the time it is commenced. We are not bound by any resulting judgment where we have not received timely notice of the commencement of the lawsuit.” See also Appellant’s Brief, A-5-6.

² Agreement for Voluntary Binding Arbitration is attached to Appellant’s Brief as Exh 2,A-7-9.

The Arbitration Agreement made no mention of Appellant's right to pursue UIM benefits, or of UIM coverage at all. In its final paragraph, the Arbitration Agreement stated that "this document contains the entire agreement between the parties".

On September 11, 2003, Respondent was first notified of Appellant's lawsuit against Ms. Craven, via letter from Appellant's attorney, Gary Manka.³ In what purported to be a *Malmin* notice, pursuant to *Malmin v. Minnesota Mutual Fire and Casualty Company*, 552 N.W.2d 723 (Minn. 1996), attorney Manka also advised Respondent that "there is a binding arbitration in front of a single arbitrator scheduled for September 16, 2003." No mention was made of the limits of the liability coverage, the identity of the arbitrator, or the location of the hearing.

Three business days later, on September 16, 2003, the binding arbitration hearing was held before arbitrator John W. Carey. One week after the hearing, on September 23, 2003, arbitration Carey found damages of \$119,805.82 in damages in his Arbitration Award and Memorandum (hereinafter referred to as the "Arbitrator's Award").⁴

On October 3, 2003, attorney Manka wrote to Respondent, reminding it of his representation of Appellant for the automobile accident of December 29, 1994.⁵ Attorney Manka referred to the Arbitrator's Award, which was enclosed, and the Arbitration Agreement, which was not enclosed.⁶ He also referred to his letter of September 11, 2003, and requested payment of the Arbitrator's Award minus Ms. Craven's \$50,000 liability insurance policy limit, which was to be collected from her liability insurer, MetLife Auto and Home. (hereinafter referred to as "MetLife").

³ Attorney Manka's September 11, 2003 letter is attached to Appellant's Brief as Exhibit 3, A-10

⁴ Arbitrator's Award and Memorandum is attached to Appellant's Brief as Exhibit 4, A-11-14.

⁵ Attorney Manka's October 3, 2003 letter is attached to Appellant's Brief as Exhibit 6, A-18-19.

⁶ See Affidavit of American Family Casualty Claim Specialist Debra Waldorf, attached to Brief as RA-1-2.

Pursuant to the Arbitration Agreement and the Arbitrator's Award, Appellant executed a Complete Release and Satisfaction of Award twelve days later, on October 15, 2003. (hereinafter referred to as the "Release").⁷

The Release acknowledged that the "highest money damages" Appellant could be awarded following the hearing was \$50,000. It expressed Appellant's intention to "release and satisfy all of the claims of Releasing Party [Appellant] against Denys Craven and MetLife Auto and Home", and to satisfy the Arbitrator's Award. In its concluding paragraph, the Release stated that "This Release and Satisfaction of Award contains the entire agreement between the parties hereto and that the terms of the Release and Satisfaction of Award are contractual and not a mere recital." All terms were in "sole consideration of fifty thousand dollars (\$50,000)".

Shortly after execution of the Release, on October 23, 2003, attorney Manka again wrote to Respondent, this time directly to the attention of Ms. Waldorf.⁸ In that letter, attorney Manka characterized MetLife's payment of Ms. Craven's \$50,000 policy limit as a "settlement." The letter purported to give a *Schmidt* notice, pursuant to *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn.1983), and requested a reply from Respondent as to whether it would substitute its draft for that of MetLife's. Attorney Manka concluded by stating that "assuming I hear nothing, the appropriate releases will be executed." This notice was sent eight days **after** the Release had been signed.

On November 3, 2003, Respondent's Regional Claims Counsel Jon K. Hammarberg responded with a letter to attorney Manka.⁹ Mr. Hammarberg outlined Respondent's reasons for denying Appellant's UIM claim. He referred to the language of the June 25, 2003 Arbitration

⁷ The Release is attached to Appellant's Brief as Exhibit 5, A-15.

⁸ Attorney Manka's October 23, 2003 letter is attached to Appellant's Brief as Exhibit 7, A-20.

⁹ The November 3, 2003 letter is attached to Appellant's Brief as Exhibit 8, A-22-23.

Agreement, and noted that it limited Appellant's money damages to \$50,000, which were fully collectable from Ms. Craven's liability policy.

Mr. Hammarberg also alleged the invalidity of the October 23, 2003 *Schmidt* notice, asserting that this notice was given eight days after Appellant had released Ms. Craven and her insurer. He also noted the timing of Appellant's purported *Malmin* notice of September 11, 2003, and stated that it was insufficient under the terms of the UIM endorsement.

ARGUMENT

I. The Standard for Summary Judgment.

Rule 56.03 of the Minnesota Rules of Civil Procedure sets forth the standard for a grant of summary judgment. It provides in pertinent part that: “Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

The purpose of this rule is to afford a procedure for the just, speedy, and inexpensive disposition of actions where there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *Lindgren v. Sparks*, 239 Minn. 22, 58 N.W.2d 317, 319-20 (1953). A party may not rely upon general factual assertions to defeat a summary judgment motion, but must demonstrate specific facts that create a genuine issue for trial. *See, Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989).

On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). It must determine both whether there is a genuine issue of material fact and whether the district court erred in applying the law. *See, Fairview v. Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337 (Minn. 1995).

II. Appellant forfeited any right she had to UIM benefits by failing to provide Respondent with a valid *Schmidt v. Clothier* notice.

There are two possible ways to characterize a binding arbitration decision in an underlying liability settlement for purposes of pursuing a UIM claim. It can either be

characterized as an award, which can then be converted into a judgment, or it can be characterized as a settlement. Appellant has sought to characterize its Arbitrator's Award both ways. Regardless of which way she seeks to define it, she has failed to comply with applicable Minnesota law, and has therefore forfeited any right to UIM benefits she may have had against Respondent..

If Appellant decides to characterize the binding arbitration as a method of determining a settlement, as her attorney Gary Manka did in his letter of October 23, 2003, she has clearly failed to give the requisite notice to Respondent required by the Minnesota Supreme Court in *Schmidt*, 338 N.W. 2d 256. There, the Court held that an injured party must provide written notice of settlement to the appropriate UIM insurer at least 30 days prior to concluding the settlement. *Id.* at 263. Sufficient notice of settlement is required so that a UIM insurer will have a fair opportunity to preserve its subrogation claim, which is destroyed if the tortfeasor has been released. See, *Id.* at 262.

Appellant concluded her "settlement" eight days prior to that notice, when she released the tortfeasor on October 15, 2003. The Release followed payment of the Arbitrator's Award of \$50,000 by the liability insurer, MetLife. By the time American Family was given notice of this settlement on October 23, 2003, Respondent's UIM subrogation rights had already been extinguished. Respondent had no opportunity whatsoever to preserve those rights. The Release rendered the October 23, 2003 *Schmidt* notice moot.

Even if the October 2003 letter of attorney Manka is somehow construed as a *Schmidt* notice, it was only given twelve day prior to the Release, far short of the *Schmidt* requirement.

Appellant has no argument that her purported *Schmidt* notice was timely, because the records speak for themselves. She is left to argue that her notice has “procedural defects”, and as such is still valid unless Respondent can show prejudice. This is argument is without merit.

Appellant classifies the defect in her notice as procedural because, in her words, the time given Respondent to decide whether to substitute its draft and preserve its subrogation rights was “too short.” This is not true. The time given was wasn’t too short. **It didn’t exist at all.** There is nothing procedural about this defect.

Appellant tries two different routes to show how Respondent was not prejudiced. Initially, in the “Statement of Facts” section of Appellant’s Brief, she states as fact that Respondent is not only the UIM insurer here, but also the tortfeasor’s insurer. Appellant then asserts that Respondent claims it was not given enough time to “sue its own insured”, and infers that because subrogating one’s own insured is a prohibited practice, Respondent was not prejudiced at all by Appellant’s mistake. This would indeed be true if not for one small fact: **Respondent was not the tortfeasor’s liability carrier!** Respondent would not have been subrogating its own insured, and was perfectly free to subrogate here..

Later in her Brief, Appellant chooses a more factually accurate basis to support her argument. This one, however, is lacking in legal authority. Appellant relies on *American Family Mutual Insurance Company v. Baumann*, 549 N.W.2d 923 (Minn. 1990), as authority for her contention that Respondent must show prejudice from Appellant’s failure to give a proper *Schmidt* notice in order for Appellant to forfeit her UIM claim. Ironically, this case actually supports Respondent’s position.

Baumann is the one of the latter in a line of Minnesota Supreme Court cases that establishes the UIM notice requirements and the penalties for non-compliance. *Schmidt v.*

Clothier first announced the thirty (30) day notice requirement. 338 N.W.2d 256. In *Klang v. American Family Insurance Group*, 398 N.W.2d 49 (Minn. App. 1986) and *Fladager v. Farm Bureau Mutual Insurance Company*, 414 N.W.2d 551 (Minn. App.1987), the Court of Appeals held that failure to comply with the *Schmidt* notice was grounds for forfeiture of a plaintiff's UIM claim, where the UIM insurer had lost its subrogation rights. The *Fladager Court* noted that it felt compelled to find forfeiture of plaintiff's UIM claim "despite our recognition of the harshness of this remedy". *Id.*, 414 N.W.2d at 554.

The Supreme Court further clarified the law in *Baumann*, 459 N.W.2d 923. As Appellant states, *Baumann* did permit a plaintiff to proceed with a UIM claim despite failure to give a *Schmidt* notice until after the liability settlement was concluded. The Court based its ruling on a previous letter from plaintiff's counsel to the UIM insurer, which the Court held "afforded the underinsurer suitable opportunity to protect its interest." *Id.* at 925. Plaintiff's earlier letter advised the UIM insurer of the tortfeasor's liability limits, that she considered them insufficient, and that she intended to bring a UIM claim. Plaintiff also attached a prior demand letter to the liability carrier.

The Court felt this imposed upon the UIM insurer an obligation to respond. The Court noted plaintiff's obvious belief that its letter was a *Schmidt* notice, as she delayed cashing of the settlement draft for more than six weeks. *Id.* at 926. The Court also noted the UIM insurer's similar belief, as it made an offer and requested counter offers prior to any assertion of inadequate notice. *Id.* at 926. The Court did note the UIM carrier's apparent lack of prejudice, but did not base its decision on that finding.

Perhaps if the present case had been was before the *Baumann* Court at that time, she may have had a colorable argument that the October 3, 2003 letter was a sufficient *Schmidt* notice.

She has no such argument now, however, because *Baumann* set specific, prospective guidelines for future cases. While its ruling indicated that the October 3, 2003 letter may arguable be sufficient, it specifically stated that “the notice required of the insured shall be thirty days’ written notice of a settlement agreement”, that the insured, the tortfeasor, the tortfeasor’s insurer, the liability limits, and the amount of settlement must be disclosed in that notice, and that the penalty for a plaintiff’s failure to comply is forfeiture of the UIM claim. *Id.* at 927-28.

The *Baumann* Court further held that Release of the tortfeasor created a rebuttable presumption of prejudice to the UIM insurer, and that the plaintiff bears the burden of rebutting that presumption by a preponderance of the evidence. *Id.* at 928.

Appellant cannot rebut the presumption of prejudice to Respondent. Without even the Arbitration Agreement to evaluate the actual amount of compensable damages, Respondent was prejudiced in attempting to determine what value, if any, appellant’s UIM claim would have. This is the kind of prejudice inferred by the *Baumann* Court. Furthermore, even if an assessment of the tortfeasor’s assets is part of this equation, attorney Manka’s affidavit assertion “that investigation conducted by your Affiant fails to disclose the availability of any meaningful assets of the tortfeasor which would have been available to American Family Mutual Insurance Company to subrogation against” falls far short of rebutting the presumption of prejudice.¹⁰

¹⁰ The Affidavit of Gary Manka is attached to Appellant’s Brief at A-3.

III. The District Court did not err in ruling that Appellant's failure Plaintiff to comply with the notice provision in her UIM endorsement precluded Respondent from being bound by the Arbitrator's Award.

Appellant's preferred option in this case is to not to characterize the liability payment from MetLife as a settlement at all, but rather as an arbitration award in lieu of a jury trial, which can be converted to judgment by judicial confirmation. Minn. Stat. Secs. 572.18; 572.12 (1996). Respondent does not dispute that this conversion can be done under Minnesota law. However, that is not the issue here.

Rather, the issue is whether this Arbitrator's Award is binding on Respondent, and the answer under Minnesota law is "no". In order for an arbitrator's award in an underlying liability claim to be binding on a UIM insurer, the claimant must give the insurer timely notice of the litigation (i.e., the liability claim and the binding arbitration), so that the UIM insurer can have an opportunity to be heard. *Malmin*, 552 N.W.2d at 728 (Minn.1996). The District Court correctly ruled that this did not happen in the present case.

A. The notice provision in Respondent's UIM endorsement is enforceable.

Appellant is seeking recovery of damages from Respondent pursuant to the UIM endorsement of her automobile insurance policy. That endorsement contains language which states in pertinent part: "You must notify us of any suit brought to determine legal liability or damages."¹¹ It is further states that "We are not bound by any resulting judgment where we have not received **timely notice** of the commencement of the lawsuit." (emphasis added).

¹¹ See UIM endorsement, attached to Appellant's Brief as A -5.

This type of clause has been held to be enforceable by the Minnesota Supreme Court in *Malmin*. In that case, the Court did hold that an UIM insurer's "consent to sue" clause was invalid under the Minnesota No-Fault Act. However, in its oft-cited footnote 4, the Court differentiated between that clause and a "timely notice" provision, which it validated.¹²

That is precisely the argument Respondent successfully raised to the court below in support of its notification requirement. That provision in its UIM endorsement is needed to ensure an adequate opportunity to investigate and evaluate the claim, assess its potential exposure as UIM carrier, decide whether to intervene and, if so, how to best defend the claim. Without such an opportunity, the UIM insurer cannot possibly represent its own interests. The *Malmin* Court held that it is legally entitled to that opportunity. Pursuant to *Malmin*, Respondent's notification provision is enforceable.

Malmin makes it clear that "consent to sue" and "timely notice" are two entirely distinct concepts. *Malmin* rejects the one ("consent to sue") and requires the other ("timely notice"). Nevertheless, Appellant would have this Court believe that Respondent is seeking enforcement of a "consent to sue" clause, not a "timely notification" clause. On page 11 of her brief, she states "By requiring written notice of suit commencement, [Respondent] is essentially requiring that it 'consent' to the suit in order to be bound by its damages determination."

Respondent agrees that a "consent to sue" clause is unenforceable. But that is completely irrelevant, as Respondent is not relying on such a clause, and never has in this case. From

¹² Fn4 states in pertinent part: A provision within an insurance contract which requires the insured to notify his or her insurer of the commencement of a lawsuit against the tortfeasor within a limited period of time (i.e. 60 days) after service of process comports with due process principles and does not raise the same concerns under the No-fault Act. Such a provision would permit the insurer to consider the nature of the tort claim and the tortfeasor's liability limits, and thereby determine whether to attempt to intervene in the litigation in order to protect its own financial interest". Id. footnote 4 at 728.

Regional Counsel Jon Hammarberg's letter of October 23, 2003, to its summary judgment memorandum, to its responsive memorandum to Appellant's cross-motion for summary judgment, Respondent never once argues that it cannot be bound by trial or arbitration unless it consents, whether or not in writing. In fact, Respondent expressly states it is **not** making that argument in the latter memorandum.¹³ It is hard to understand how Appellant could so badly misconstrue, or misrepresent, Respondent's UIM endorsement or its position in this case.

B. Appellant failed to comply with Respondent's timely notice provision.

Appellant did not comply with Respondent's enforceable notice provision when she finally advised Respondent of the lawsuit and binding arbitration in the liability case. That notice provision requires notification of the lawsuit "at the time it is commenced", and later expresses Respondent's refusal to be bound unless "timely notice" is given. While *Malmin* does not explicitly state how short an interval between lawsuit and notice would still be considered enforceable, it does make clear that a period as little as sixty (60) days satisfies due process principles and the Minnesota No-fault Act.

In the present case, it is undisputed that Respondent did not receive notice of the liability claim within anywhere near sixty (60) days of the commencement of litigation. The shortest possible time period between service of process and Appellant's purported *Malmin* notice was almost three years, from December 29, 2000 to September 11, 2003. It may have been much longer. While *Malmin* leaves unclear how short a delay may be non-complaint. It leaves no doubt that a thirty-three (33) plus month delay here is definitely non-complaint!

¹³ Defendant's Memorandum In Response To Plaintiff's Motion For Summary Judgment is attached to Respondent's Brief as RA-3-9.

That is only part of the problem with Appellant's notice. The letter purporting to be a *Malmin* notice was mailed to Respondent on September 11, 2003. In addition to advising Respondent of the lawsuit for the very first time, it informed Respondent of the binding arbitration hearing set for September 16, 2003. There were a mere a mere five days (and only three business days) from the mailing of the letter to the hearing date. There was even less time between receipt of the letter and the hearing. Somehow, in that extremely limited time frame, Appellant believes Respondent is supposed to gather information about the accident, the damages, the underlying liability limits, and even the identity of the arbitrator, so an evaluation of the case and Respondent's potential UIM exposure can be made. Then, and only then, can an informed decision on whether to intervene be made. Appellant did not comply with the enforceable notice requirement of her UIM endorsement, and she cannot seek to bind Respondent with the Arbitrator's Award.

C. Respondent was prejudiced by Appellant's failure to comply with the timely notification provision.

Appellant makes the same argument with regard to her inadequate *Malmin* notice that she did with her inadequate *Schmidt* notice. She states that her failure to provide adequate notice of the liability lawsuit is irrelevant, because Respondent was not prejudiced by her conduct. Appellant is essentially saying, in the popular vernacular of sports, "no harm, no foul." Neither *Malmin* nor subsequent Minnesota case law, however, has placed a burden on the UIM insurer to show prejudice.

Notwithstanding this, Respondent has indeed been prejudiced by Appellant's failure to provide the requisite timely notice. Appellant has yet again missed the point on this issue. She

argues on pages 11-12 of her brief that Respondent could not have been prejudiced because MetLife, the liability insurer, was “represented throughout the liability proceedings by well-respected, independent counsel”. Appellant’s characterization of defense counsel may in fact be true, but it is of no bearing here.

It is neither the skill nor the reputation of the tortfeasor’s counsel that protects Respondent’s financial interests, the protection of which the *Malmin* Court gave as the reason for the notice requirement. *Malmin*, 552 N.W. 2d at 738, FN4. Rather, it is the identity of interests that is crucial to adequate protection. *See, Butzer v. Allstate Ins. Co.*, 567 N.W. 2d 534, 536-537 (Minn. App. 1997). That identity of interests was lacking in the present case.

The interests of a tortfeasor and UIM insurer may be in general agreement, but the nature and extent of that interest may vary greatly, as they do here. The tortfeasor and her insurer, MetLife, have an interest in the first \$50,000 of damages awarded to Appellant, and no more. Respondent, on the other hand, has an interest in the damages from \$50,001 to \$150,000. Those interests are not at all identical.

This can easily be illustrated by referring to the Arbitrator’s Award in this case.¹⁴ The past medical expenses and lost wages claimed by Appellant (particularly the past medicals) were very high, as reflected in the total award of \$44,805.82 for those past specials. That portion of the award comprised almost the entire \$50,000 liability limit, which was the agreed upon cap for the tortfeasor’s liability in the Arbitration Agreement. With past damages such a substantial portion of the liability limits, the tortfeasor’s counsel may well have confined his defense strategy to disputing the relatedness of past special damages to the accident, and not worried about future damages or past general damages such as pain and suffering. The reason would be

¹⁴ See Appellant’s Brief, Exhibit 4, A-11-14.

simple. It is unlikely the arbitrator would award general damages if he did not find the special damages to be related. That may be why he relied solely on the independent medical examination (IME) report, and why he did call a live medical expert.

While future damages were probably not a priority for the tortfeasor, they most certainly would have been for Respondent, as those were the damages that would impact its interests. One need look no further than the Arbitrator's Award itself, which included \$75,000 in general damages. After quoting the evidence from several of Appellant's treating physicians, the arbitrator concluded that Appellant "is the victim of chronic pain, and that she has a "permanent myofascial injury that has resulted in persistent, unrelenting chronic pain."¹⁵ Respondent would certainly have wanted to mount an aggressive defense against these damage claims.

The issue is not whether Respondent would have been successful in that defense. Rather, it is whether Respondent was prejudiced by not having the opportunity. There is no dispute that Respondent was prejudiced by Appellant' late *Malmin* notice, and should not be bound by the Arbitrator's Award.

D. Regardless of whether the Arbitrator's Award is binding on Respondent, the compensable damages are limited to the tortfeasor's \$50,000 policy limit.

Finally, Appellant would have no UIM claim even if the Arbitrator's Award were binding upon Respondent. That is because the legal effect of the Award is a finding of \$50,000 in compensable damages, not \$119,805.82. That is because of the language of the Arbitration Agreement, which states in paragraph II: [Appellant] and [tortfeasor] understand and agree that the highest money damages that can be awarded, following the hearing, is \$50,000.00 and the

¹⁵ See Appellant's Brief, Exhibit 2, A-7-9.

lowest money damages is \$7500.00.¹⁶ That is the lone reference anywhere in the Arbitration Agreement to the potential recovery available to Appellant. There is no mention of preserving the right to additional UIM coverage.

That is significant because of this Court's previous decision in the case of *Mattila v. American Family*, 1998 WL 170113 (Minn. App.).¹⁷ Although it is an unpublished case, *Mattila* dealt with the same exact issue, on similar facts, and as such is very instructive. Once again, however, Appellant has misrepresented not only the argument Respondent derives from *Mattila*, but also the holding of the case itself.

The Court's decision in ruling in *Mattila* to reverse and remand to the lower court had nothing to do with deciding whether an award can be converted to a judgment, on whether a "best possible settlement" was reached, as Appellant alleges on page 13 of her brief. *Mattila* dealt with the effect of a binding arbitration award on the total amount of compensable damages available, and thus a plaintiff's right to make a UIM claim.

Appellant also alleges on page 9 of her brief that one of Appellant's three grounds of defense in this case is that "a binding liability arbitration prejudices its rights under the unpublished case of *Mattila* and so it should be relieved from the obligation to pay any UIM benefits." That is not Respondent's position at all. As argued above, it is not the award itself that has prejudiced Respondent's rights, but rather Appellant's failure to comply with the notice provisions set forth in *Malmin*.

¹⁶ See Appellant's Brief, Exhibit 2, A-7.

¹⁷ *Mattilla* is an unpublished case, and is included in Appellant's Brief, at A 44-46.

In *Mattila*, plaintiff and the alleged tortfeasor in the underlying liability claim entered into an agreement for binding arbitration, and set the ceiling for recovery against the tortfeasor at \$1.1 million, the total amount of available liability insurance. The arbitration agreement established \$1.1 million as the “highest money damages” that could be awarded, using the same language that set a \$50,000 ceiling in the present case. *Id.*, 1998 WL 170113. However, unlike the present case, the arbitration agreement in *Mattila* contained another paragraph which set forth the procedure for pursuing a UIM claim if the award was in excess of the policy limits ceiling set forth earlier in the agreement.¹⁸

The arbitrator’s award in *Mattila* came back at approximately \$1.7 million. This created a dispute between plaintiff and the UIM insurer as what the actual amount of compensable damages was, \$1.1 million or \$1.7 million, and hence whether plaintiff had a right to pursue UIM benefits. In reversing the District Court, the Court of Appeals found the arbitration agreement to be ambiguous because of the two irreconcilable paragraphs, and remanded the case so the lower court could take evidence as to the parties’ true intent.

No ambiguity exists in the Arbitration Agreement in this case. The “highest money damages” phrase used here is the precise language the *Mattila* Court cites as evidence that “[plaintiff] would be completely satisfied with the [tortfeasor’s] policy limits.” *Id.* at 1998 WL 170113. There is no basis for finding a contrary interpretation, or any ambiguity, in this Arbitration Agreement. Appellant has accepted a damages ceiling in exchange for a damages

¹⁸ *Mattila* stated “in another section, however, the agreement refers to procedures for pursuing a UIM claim, should the Arbitrator’s Award exceed the [tortfeasor’s] liability limits. We therefore conclude that the settlement agreement in this particular instance is ambiguous.” *Id.* at WL 170113.

floor. Absent ambiguity in the plain language of the Agreement, the \$50,000 damages cap in the Arbitration Agreement should be enforced.

CONCLUSION

The District Court correctly granted summary judgment to Respondent American Family Mutual Insurance Company, for the reasons stated above. Even when viewed in the light most favorable to Appellant, no genuine issue of material fact has been raised to support the validity of Appellant's *Malmin* notice or *Schmidt* notice. Nor has the District Court erred as a matter of law in its ruling. Respondent respectfully requests that this Court affirm in full the decision of the District Court.

Dated: May 2, 2005



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STATE OF MINNESOTA
IN COURT OF APPEALS

No.: A05-0436

Lori Kluball,

Plaintiff-Appellant,

vs.

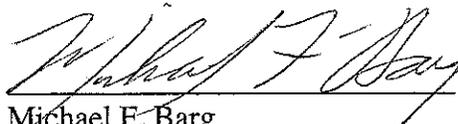
American Family Mutual Insurance
Company,

Defendant-Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief confirms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a Times New Roman font. The length of this brief is 5345 words and 511 lines. This brief was prepared using Microsoft Word Times New Roman 12.

Dated: *May 2, 2005*



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).