

Case No. A06-1003
STATE OF MINNESOTA
IN COURT OF APPEALS

**Steven Schossow, as trustee for the heirs and next of kin of
Ann Elizabeth Schossow, deceased,**

Respondent,

vs.

First National Insurance Company of America

Appellant.

**BRIEF & APPENDIX OF FIRST NATIONAL INSURANCE
COMPANY OF AMERICA**

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STATEMENT OF LEGAL ISSUES

The specific issues on appeal are:

1. Whether an insurer licensed to do business in this state must comply with Minnesota underinsured motorist law where the accident occurs in Minnesota but the policy has not been issued, renewed, continued, delivered, issued for delivery or executed in this state.

The district court held "yes" reforming the First National policy to provide underinsured motorist coverage.

Apposite Authority:

Minn. Stat. §65B.49 subd. 3a

Minn. Stat. §65B.50

Cantu v. The Atlanta Cas. Cos., 535 N.W.2d 291 (Minn. 1995).

2. Whether the respondent's decedent, Ann Schossow, was resident of Minnesota as a matter of law at the time of her death?

The district court held that Ann Schossow was a resident of Minnesota at the time of her death.

Apposite Authority:

Minn. Stat. §65B.50 subd. 1

Minn.R.Civ.Pro. 56.03

Studer v. Kiffenmeyer, 712 N.W.2d 553 (Minn. 2006)

Chapman v. Davis, 45 N.W.2d 822 (Minn. 1951)

Dreyling v. Commissioner of Revenue, 711 N.W.2d 491 (Minn. 2006)

Laurich v. Mickow Corp, 455 N.W.2d 527 (Minn. App. 1990)

STATEMENT OF THE CASE

This case originated in the District Court of the Fourth Judicial District, County of Hennepin, through Respondent Steven Schossow's ("Respondent") Summons and Complaint dated November 1, 2004. The Honorable Judge John L. Holahan presided over the case. Defendant First National Insurance Company of America ("First National") made its motion for summary judgment on September 13, 2006. In an Order and Memorandum dated December 1, 2005, Judge Holahan denied First National's motion for summary judgment and ordered that summary judgment be entered on behalf of Respondent as to underinsured motorist coverage under the First National policy. Judgment was entered on April 6, 2006.

STATEMENT OF THE FACTS

Ann Schossow ("Ann") was born on April 21, 1956, in Fargo, North Dakota. (A. 15 - A. 16). She married Respondent on April 8, 1994. (A.16). Shortly after the marriage, the Schossows purchased a home at 1215 - 8th Street North in Fargo. (A. 17). Respondent still lives in the home at 1215 - 8th Street North in Fargo.

Ann began working for Qwest Communications ("Qwest") in Fargo, North Dakota, in approximately 1975. (A. 17). In 2000, Ann was informed that her position as a toll operator in Qwest's Fargo office would be eliminated. (A. 17 - A. 18). She was given the option of taking early retirement or accepting a position with Qwest in either Minnesota or Colorado. (A. 17 - A. 18). Since Ann would vest in the Qwest pension plan in 2005, she decided to accept the Qwest job in Minnesota to finish her years of service. (A. 17 - A. 19).

She planned to retire from Qwest as soon as she vested in the Qwest pension in 2005 and return to Fargo, North Dakota. (A. 17 - A. 19). Ann rented an apartment in St. Paul with a Qwest coworker, Candace Erickson. (A. 18). She rented that apartment from January 29, 2001, through July 1, 2001. (A. 92). In July of 2001, Ann rented an apartment at 4501 Park Glen Road in St. Louis Park. (A. 94).

Ann had purchased insurance through Mike Meagher (“Meagher”) of Far North Insurance Agency, Inc., (“Far North”) in Fargo, North Dakota for many years. (A. 29 - A. 30) Ann was insured under an automobile liability insurance policy issued by Farmers Home Mutual Insurance Company (“Farmers Home”) through Meagher at the time she started working in Minnesota in 2001. (A.31 and A. 35). The insured vehicle was a 1991 Ford Aerostar. (A. 31). While insured by Farmers Home, Ann was involved in more than one accident, the last of which occurred on December 14, 2001. (A. 30 - A. 33). The 1991 Ford Aerostar was apparently significantly damaged as the result of the December 2001 accident and was totaled out by Farmers Home. (A. 30 - A. 33). Meagher testified that after the December 2001 accident, Respondent called Meagher and informed him in general terms that Ann was working in Minneapolis. (A. 36, A. 39 - A. 40). It was his understanding that it was a temporary arrangement and that the Schossows were taking turns driving back and forth between Fargo and Minneapolis. (A. 40). Meagher does not believe his agency provided First National any information indicating Ann was working or staying part of the workweek in Minneapolis. (A. 42 - A. 43).

In May of 2002, Farmers Home nonrenewed Ann's policy because of her loss history. (A. 30 - A.32). Because of the nonrenewal of her policy by Farmers Home, Ann had to find other coverage. The Schossows applied for an automobile insurance policy through First National Insurance Company of America ("First National") in May of 2002. (A. 29 - A. 30). The policy was issued in North Dakota through Meagher and Far North in Fargo, North Dakota. (A. 29 - A. 30). The proposal submitted to First National by Far North was prepared by Melissa Roettger ("Roettger") for Ann, listing her address as Fargo, North Dakota. (A. 96). The policy was issued to the Schossows listing their residence as 1215 - 8th St. North, Fargo, North Dakota. (A. 57). Among other things, the First National policy provided underinsured motorist coverage with applicable limits of \$100,000. (A. 57). According to Meagher, the premium on the First National policy would probably have been higher if the Schossows had indicated the vehicle would be primarily garaged in Minnesota. (A. 41). The policy was issued effective May 14, 2002, so that there would be no gap in coverage due to the Farmers Home nonrenewal. (A. 29 - A. 30). First National cancelled the policy for nonpayment of premium on July 4, 2002. (A. 31). The policy was subsequently reinstated effective July 1, 2002, after payment was received. (A. 31, A. 57). The policy did not renew until January 3, 2003. (A. 54, A. 57).

There has been some confusion which vehicle was insured under the First National policy. The insured vehicle listed on the Declarations page of the policy is a 1991 Ford Aerostar. (A. 57). However, the Aerostar had been totaled out as the result of the accident

which Ann was involved in December of 2001. (A. 19 - A. 20); (A. 33). On December 19, 2001, the Schossows acquired a 2000 Chevy Venture to replace the 1991 Ford Aerostar. (A. 19 - A. 20); (A. 103 - A. 105). When Roettger of Far North prepared the proposal for insurance to First National, she believed the Schossows still owned and meant to insure the 1991 Ford Aerostar. (A. 30). Apparently, Respondent informed Roettger that the Schossows no longer owned the Aerostar and wanted to insure the Chevy Venture. (A. 30). Roettger requested a vehicle identification number for the Chevy Venture. (A. 30). The vehicle identification number was never supplied and the proposal was submitted to First National listing the 1991 Aerostar as the insured vehicle. (A. 30).

Ann was walking to work on the morning of November 4, 2002. (A. 89 - A. 90; A. 22 - A. 23). As she crossed County Road 25 in St. Louis Park, she was struck by a 1999 Jeep Cherokee operated by Randy Hammad ("Hammad"). (A. 89 - A. 90; A. 22 - A. 23). After the accident, Ann was taken to the Hennepin County Medical Center ("HCMC"), where she was treated for severe head trauma. (A. 89 - A. 90; A. 22 - A. 23). Ann spent approximately 20 days at HCMC, after which she was transported by air ambulance to a hospital in Fargo. (A. 89 - A. 90; A. 22 - A. 23). Ann passed away on November 29, 2002, from the injuries she received in the accident. (A. 23). Funeral services were held in Fargo, North Dakota, and her cremation was arranged for through Riverside Cemetery. (A. 23).

At the time of this accident, Hammad was insured under a motor vehicle liability policy issued by MSI Preferred Insurance Company ("MSI"). (A. 23 - 26b). Hammad's

policy with MSI provided liability limits of \$100,000. (A. 23 - 26b). Respondent made a wrongful death claim against Hammad. (A. 23 - 26b). Respondent also submitted a claim for underinsured motorist benefits under the First National policy. On June 10, 2003, First National wrote the Respondent's attorney informing him there was no coverage for underinsured motorist benefits under the policy. (A. 101). Respondent eventually reached a tentative settlement with Hammad and MSI for the liability limits available under the MSI policy. (A. 3 - A. 6; A. 23 - A. 26b, A. 101). Through a letter from his attorney dated September 10, 2003, Respondent notified First National of the proposed settlement of his claim with Hammad and gave First National an opportunity to substitute its draft for that of the liability carrier to protect its subrogation interest. (A. 101). The letter purported to give notice under *Schmidt v. Clothier*, 33 N.W.2d 256 (Minn. 1983). (A. 101). Based on the prior denial of the Respondent's claim for underinsured motorist benefits, First National elected not to exercise its right to substitute funds. On October 23, 2003, Respondent finalized his settlement with Hammad for the \$100,000 liability limits available under the MSI policy. (A. 3 - A. 6, A. 23, and A. 26a - 26b).

At the time of the accident, Ann's drivers license was issued by the State of North Dakota. (A. 107). Ann renewed her North Dakota driver's license on March 11, 2002, over a year after she first leased an apartment in Minnesota. (A. 107). The Chevy Venture the Schossows purchased to replace the Aerostar after the December 2001 accident was registered and titled in North Dakota on December 19, 2001, nearly eleven months after Ann

first leased an apartment in Minnesota. (A. 20, A. 103 - A. 105). The Schossows' tax returns indicate both Steve and Ann were residents of North Dakota for the entire tax year 2002. (A. 109 - A. 112). The 2002 state tax return was filed in North Dakota, indicating the Schossows were filing as residents of the state. (A. 20, A. 112). Ann Schossow's 2002 Qwest W-2 indicates her address as the marital home at 1215 - 8th Street North in Fargo, North Dakota. (A. 114).

SUMMARY INTRODUCTION

The underinsured motorist coverage insuring agreement of the First National policy issued to Ann Schossow provides:

UNDERINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

- A. We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:
1. Sustained by an **insured**; and
 2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **underinsured motor vehicle**.

The term "underinsured motor vehicle" is a defined term in the policy, which provides:

- C. "**Underinsured motor vehicle**" means a land motor vehicle or **trailer** of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is:
1. Less than the limit of liability for this coverage; or

2. Reduced by payments to others injured in the accident to less than the limit of liability for this coverage.

This definition incorporates the “modified difference in limits” trigger for underinsured motorist coverage called for under North Dakota law in N.D.C.C. §26.1-40-15.1(2). Since the liability limits covering Hammad’s vehicle (\$100,000) equal the underinsured motorist limits of the Schossow vehicle (\$100,000), the Hammad vehicle was not “underinsured” as that term is defined in the policy and North Dakota law.

The First National policy and the North Dakota “modified difference in limits” approach to underinsured motorist coverage is in stark contrast to the “add on” approach adopted in Minnesota law. Under the “add on” approach of Minnesota law, a vehicle is underinsured if bodily injury liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages. Minn. Stat. §65B.43, subd. 17. Since the \$100,000 liability limits admittedly are less than the amount needed to compensate respondent for damages in this case, underinsured motorist coverage is triggered under the Minnesota “add on” approach. Therefore, the only question in this case is whether the First National policy must be reformed to provide underinsured motorist coverage under the “add on” approach to underinsured motorist coverage applied in Minnesota under Minn. Stat. §65B.43, subd. 17, rather than the “modified difference in limits” approach required by N.D.C.C. §26.1-40-15.1(2) and the First National policy.

ARGUMENT

I. The district court erred in reforming First National's policy since the policy was not issued, renewed, continued, delivered, issued for delivery or executed in Minnesota prior to the accident.

In imposing summary judgment against First National, the District Court determined that Ann Schossow was a resident of Minnesota at the time of the accident and, therefore, Minnesota law required the First National policy be reformed to comply with Minnesota law regarding underinsured motorist coverage. The District Court based its ruling on Minn. Stat. §65B.50, which provides:

Subdivision 1. Every insurer licensed to write motor vehicle accident reparation and liability insurance in this State shall, . . . maintain certification that it will afford at least the minimum provided by Section 65B. 49 to all policy holders, except that in the case of non-resident policy holders it need only certify that security is provided with respect to accidents occurring in this State.

Minn. Stat. §65B.50 subd. 1. Clearly, if Minn. Stat. §65B.49 does not require the reformation of the First National policy under these circumstances, neither does Minn. Stat. §65B.50. Unfortunately, the District Court did not cite to, nor did the Respondent argue, the provisions of Minn. Stat. §65B.49, which provides:

(1). No plan of reparation security may be renewed, delivered or issued for delivery, or executed in this State with respect to any motor vehicle registered or principally garaged in this State unless separate uninsured and underinsured motorist coverages are provided therein. Each coverage, at a minimum, must provide limits of \$25,000 because of injury to or the death of one person in any

accident and \$50,000 because of injury to or the death of two or more persons in any accident.

* * *

(2). Every owner of a motor vehicle registered or principally garaged in this State shall maintain uninsured and underinsured motorist coverages as provided in this subdivision.

Minn. Stat. §65B.49 subd. 3a (1) and (2) (emphasis added). The clear, unambiguous provisions of the statute require coverage only for policies renewed, delivered or issued for delivery, or executed in Minnesota. The statute does not deal with policies issued to residents of states other than Minnesota or to those residents of Minnesota where the resident did not purchase the policy in Minnesota and did not renew the policy in Minnesota. In this case, the First National policy was never issued, delivered, or renewed in Minnesota. As such, Minn. Stat §65B.49 subd. 3a does not require the First National policy be reformed to comply with Minnesota's "add-on" approach to underinsured motorist coverage.

The district court relied exclusively on its conclusion that Ann Schossow was a Minnesota resident at the time of the accident as the basis for reforming the First National policy. Respondent did argue that Schossow was a resident of Minnesota requiring reformation under Minn. Stat. §65B.50 subd. 1. He argued the vehicle was "primarily garaged" in Minnesota requiring reformation without citing any authority for that proposition. However, even if you assume Ann Schossow was a resident of Minnesota at the time of the accident, a fact which First National disputes, the District Court's analysis is flawed. The Minnesota Supreme Court has addressed similar arguments on a number of

occasions and has clearly rejected that position unless the policy at issue has been renewed, delivered, or executed in the state under Minn. Stat. §65B.49. It has long been the law of this state that, generally, a statute enacted during the term of an insurance policy does not usually apply to that policy until the policy is issued or renewed in Minnesota. *Hauer v. Integrity Mut. Ins. Co.*, 352 N.W.2d 406, 409 (Minn. 1984)(where legislature eliminates insurer's obligation to offer underinsured motorist coverage, the coverage will not be read into existing policies renewed after the date of repeal); *Murphy v. Milbank Ins. Co.*, 388 N.W.2d 732, 736 (Minn. 1986) (a change in an insurance statute requires the insurer to offer optional coverage only if a policy is issued or renewed after the effective date of the statute); *AMCO Ins. Co. v. Lang*, 420 N.W.2d 895, 898 (Minn. 1988) (“[A] statute enacted during the term of an insurance policy does not apply to that policy until the policy is renewed.”). It is worth noting that each of these three decisions involved the interpretation to be given the a version of Minn. Stat. §65B.49.

Hauer, supra, Murphy, supra, and AMCO, supra, each dealt with the reformation of an existing insurance policy to comply with statutory provisions enacted prior to the renewal of an insurance policy. They are analogous to this case. However, their rational was applied by the Minnesota Supreme Court in *Cantu v. Atlanta Cas. Cos.*, in the context of an uninsured motorist claim where the issue was the incorporation of Minnesota to a policy issued out of state where the insured subsequently becomes a resident of Minnesota. 535 N.W.2d 291 (Minn. 1995) Jose Cantu, while a resident of Florida, purchased motor vehicle

insurance from Atlanta Casualty. *Cantu v. The Atlanta Cas. Cos.*, 532 N.W.2d 261, 262 (Minn. App. 1995). He rejected uninsured motorist coverage, which was optional in Florida. *Id.* In May of 1991, Cantu moved his family to Minnesota. *Id.* Cantu notified his Atlanta Casualty agent about the move to Minnesota a number of times. *Id.* His wife was killed in an automobile accident in Minnesota in 1991 while a passenger in an uninsured motor vehicle. *Id.* Atlanta Casualty was not aware that Cantu had become a resident until the accident occurred. *Id.* Atlanta Casualty denied coverage Cantu's claim because the policy did not provide uninsured motorist coverage. *Id.* Atlanta Casualty moved for summary judgment, which the district court granted holding that the addition of mandatory uninsured motorist coverage to a policy issued out-of-state occurs only when the policy is subsequently renewed, delivered, or executed in Minnesota, not contemporaneously with the move. *Id.*

Cantu appealed the district court's decision. The Court of Appeals reversed, holding that *AMCO*, *supra*, *Hauer*, *supra*, and *Murphy*, *supra*, were inapplicable and that Minn. Stat. §65B.49 requires that an automobile insurance policy issued out-of-state automatically and immediately provides uninsured motor vehicle coverage when the policyholder becomes a Minnesota resident. *Id.* at 264. Atlanta Casualty petitioned the Minnesota Supreme Court for review of this Court's decision. *Cantu*, 535 N.W.2d at 292. The Minnesota Supreme Court reversed, holding that the Atlanta Casualty policy need not be reformed because, though Cantu was a resident of Minnesota, the policy had not been "renewed, delivered, or issued for delivery, or executed" in Minnesota. *Id.* Therefore, Minn. Stat. §65B.49 subd.

3a(1) was inapplicable under the cumulative analysis of *AMCO, supra*, and *Hauer, supra*.

Id.

Cantu is remarkably similar to this case. Like Atlanta Casualty in *Cantu*, First National issued the policy to its insured in a state other than Minnesota. Like *Cantu*, the First National policy had not yet been renewed when the accident causing the death of Respondent's wife occurred. Indeed, the facts presented in *Cantu* provided great justification for applying Minnesota uninsured or underinsured motorist law than in this case. *Cantu* was apparently moving to Minnesota on a permanent basis whereas Ann Schossow was working in Minnesota temporarily until she vested in Qwest's pension plan in 2005. At that time, Ann planned to retire and live in Fargo full time. Under the Minnesota Supreme Court's rationale in *Cantu*, Minn. Stat. §65B.49 subd. 3a is inapplicable because the First National policy was neither issued in Minnesota nor renewed in Minnesota. 535 N.W.2d at 291. Accordingly, Minn. Stat. §65B.50 does not require the First National policy to be reformed to provide underinsured motorist coverage on an "add on" basis.

The District Court found that First National had "some knowledge that Ann was living in Minnesota because" Meagher knew about the job transfer. (A. 126a). Like *Cantu*, there were some discussions between the Respondent and Meagher concerning the fact that Ann Schossow was working in Minnesota and spent some of her time living there. In fact, it appears that in *Cantu*, the agent was actually told that *Cantu* had moved his entire family to Minnesota on a permanent basis. 532 N.W.2d at 262. Respondent's conversation with

Meagher was much more vague and ill-defined. The agent's knowledge was not imputed to Atlanta Casualty by the Minnesota Supreme Court in *Cantu*. Meagher's knowledge, even more far removed, should not be imputed to First National.

The District Court also determined that First National had knowledge that Ann was living in Minnesota due to her prior motor vehicle accident. There are two reasons why the District Court's conclusion is clearly erroneous. First, even if you assume First National had knowledge of a Minnesota accident, that in no way shows knowledge that Ann was living in Minnesota. She had lived in Fargo, North Dakota, a border town. It goes without saying that people from Fargo travel extensively in Minnesota. That doesn't mean they are all residents of Minnesota. Second, and more importantly, Respondent argued to the District Court that First National was the insurer that totaled out the Schossow's 1991 Ford Aerostar after Ann's accident in 2001. This is likely the source of the District Court's conclusion that First National had notice of Ann's employment in Minneapolis. However, Respondent's argument was factually incorrect. The 1991 Ford Aerostar was totaled out by Farmers Mutual. Indeed, the December 2001 accident provided the basis for Farmers Mutual nonrenewing Ann's coverage. First National did not begin insuring Ann until May of 2002, well after the December 2001 accident. The fact that Ann was involved in an accident in December of 2001 did not provide any notice to First National regarding the status of her residency and does not justify reforming the policy.

The Schossows purchased insurance from First National with the clear understanding

that North Dakota law would apply. In addition, they represented themselves as North Dakota residents after Ann began working in Minneapolis. The First National policy was issued in North Dakota with an effective date of May 14, 2002. The policy was reinstated in North Dakota with an effective date of July 3, 2002. They likely paid less for the coverage than they would have had the policy been issued in Minnesota. In addition, the vehicle the Schossows sought to insure was titled and registered in North Dakota. Likewise, Ann was licensed in North Dakota. As such, the express terms of the policy and North Dakota law should apply

II. The trial court erred in concluding the Respondent's decedent, Ann Schossow, was a resident of Minnesota as a matter of law.

A. Residency is a question of fact.

The District Court agreed with First National's argument that, if Ann Schossow was not a resident of this state, Minnesota law does not require underinsured motorist coverage be included in the policy under *Hedin v. State Farm Mut. Auto. Ins. Co.*, 351 N.W.2d 407 (Minn. App. 1984). (A. 125). Therefore, if Ann was not a resident of Minnesota, the First National policy did not have to be reformed to provide underinsured motorist coverage on an "add on" basis. (A. 125). Conversely, the Court determined that if Ann was a resident of Minnesota at the time of her death, Minn. Stat. §65B.50 subd. 1 required First National to provide underinsured motorist coverage to Ann on an "add on" basis, since First National is licensed to issue policies in Minnesota. Therefore, the District Court found that Ann

Schossow's residency was the "determinative fact" at issue in the case. Further, the District Court held that residency is a legal determination and that Ann Schossow was a resident of Minnesota as a matter of law since she was renting an apartment in Minnesota, worked full time in this state, and visited North Dakota an average of one weekend per month.

The District Court's finding that residency is a legal questions is clearly erroneous. Longstanding Minnesota precedent provides that residency is a question of fact. *E.g., Studer v. Kiffenmeyer*, 712 N.W.2d 553, 556 (Minn. 2006)(holding that the factors establishing residency for purposes of qualifying for elections are largely questions of fact). Summary judgment is appropriate only when there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn.R.Civ.Pro. 56.03. On appeal, this court reviews the district court decision *de novo* to determine whether the evidence submitted in the district court raises any genuine issues of material fact precluding summary judgment. *Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997). If such a question of fact exists, the district court's imposition of summary judgment must be reversed.

The district court relied upon *Jacobson v. Universal Underwriters Ins. Group*, 645 N.W.2d 741 (Minn. App. 2002) as authority on the question of residency. However, residency was not at issue in *Jacobson*. The question before the Court in *Jacobson* was the location of an arbitration proceeding under the policy. *Id.* at 744. Adam Jacobson was a named insured, along with his parents, on an automobile insurance policy issued in Iowa by Universal Underwriters. *Id.* at 743. Adam was attending the Dunwoody Institute in

Minneapolis when he was killed in a car accident. *Id.* An underinsured motorist claim arose out of the accident. *Id.* The arbitration provisions of the policy provided that the “arbitration will take place in the county in which the INSURED lived.” *Id.* Adam’s father, Kirk, demanded the arbitration take place in Minneapolis. *Id.* Universal Underwriters demanded the arbitration take place in Iowa. *Id.* The Court concluded that “lives” for purposes of the arbitration clause to mean Hennepin County, where Adam Jacobson was attending school. *Id.* “Residency” is a term carrying for greater legal connotations than does the term “lives.” The term is given many different meanings in the variety of contexts that it is used. *Chapman v. Davis*, 45 N.W.2d 822, 825 (Minn. 1951). In addition, this case is factually distinct from *Jacobson*. Adam Jacobson had obtained a Minnesota license, where Ann Schossow had not. In addition, the *Jacobson* case is silent as to whether Adam Jacobson intended to remain in Minnesota. Respondent admits that Ann Schossow did not intend to make Minnesota a permanent home. She intended to work in Minnesota only until 2005, when she vested in the Qwest pension plan. Then she would retire and live in North Dakota full time.

First National argued to the district court that Ann Schossow was a resident of North Dakota. Several facts were presented to the district court which support that conclusion. First, Ann intended to work in Minnesota only until she vested in the Qwest pension in 2005. At that time, she intended to retire and live full time in North Dakota. Ann spent 2 days per month at the marital home in Fargo, generally on the weekends. (A. 18 - A. 19). At the time

of the accident, Ann's driver's license was issued by the State of North Dakota. (A. 107). Ann renewed her North Dakota driver's license on March 11, 2002, over a year after she first leased an apartment in Minnesota. (A. 107). The Chevy Venture which the Schossows purchased to replace the Ford Aerostar after the December 2001 accident was registered and titled in North Dakota on December 19, 2001, nearly eleven months after Ann first leased an apartment in Minnesota. (A. 20, A. 103 - A. 105). The Venture was purchased in Minnesota and registered as an out-of-state vehicle. (A. 104). The check with which the Schossows paid for the Venture lists Ann's address as the marital home in Fargo, North Dakota. (A. 103). The application for Certificate of Title lists Ann's address as the marital home in Fargo, North Dakota. (A. 104). The Schossows' tax returns for 2002 indicate Ann's address as the marital home in Fargo, North Dakota. (A. 110). In fact, Respondent checked the box in Part VII of the federal tax return indicating Ann was a resident of North Dakota for the entire tax year 2002. (A. 109 - A. 112). The 2002 state tax return was filed in North Dakota, indicating the Schossows were filing as residents of the state. (A. 20, A. 112). Ann Schossow's 2002 Qwest W-2 indicates Ann's address as the marital home at 1215 - 8th Street North in Fargo, North Dakota. (A. 114).

The considerable facts listed above all indicate Ann Schossow considered herself a resident of North Dakota, not of Minnesota. At the very least, a question of fact exists on the issue of residency precluding summary judgment. Therefore, the district court's grant of summary judgment to Respondent must be reversed.

B. Residency for purposes of Minn. Stat. §65B.50 subd. 1 should be interpreted to mean “domicile.”

The district court determined Ann Schossow was a resident of Minnesota as a matter of law without defining the term “resident,” or more accurately, “non-resident” for purposes of Minn. Stat. §65B.50 subd.1. However, the Legislature did not define the term non-resident for purposes of Minn. Stat. §65B.50 subd. 1. In the absence of a statutory definition, the term “resident” is given different meaning, depending on the context of its use. *Chapman v. Davis*, 45 N.W.2d 822, 825 (Minn. 1951). The term resident can mean “(1) a legal domicile, (2) an actual residence, or (3) a temporary abode.” *Id.* While the district court did not define it, residency for purposes of Minn. Stat. §65B.50 sub. 1 should be interpreted to mean “domicile.”

The term “domicile” means bodily presence coupled with an intent to make that place ones home. *Dreyling v. Commissioner of Revenue*, 711 N.W.2d 491, 494 (Minn. 2006). Like residency, domicile is generally a question of fact. *In re: Estate of Smith*, 64 N.W.2d 129, 132 (Minn. 1954). This Court has on many occasions outlined the principles to observed when construing statutes:

Statutory construction is a question of law, which this court reviews de novo. *State v. Azure*, 621 N.W.2d 721, 723 (Minn. 2001). The purpose of interpreting statutes is to ascertain and effectuate the intent of the legislature. Minn. Stat. §645.16 (2000). Every law shall be construed, if possible, to give meaning to all its provisions. *Id.* If a statute is unambiguous, the court examines only its plain language. *State v. Edwards*, 589 N.W.2d 807, 810 (Minn. App. 1999), review denied (Minn. May 18, 1999). The fundamental rule is to “look first to the specific statutory language and be guided by its

natural and most obvious meaning." *Id.* (quotation omitted). If, however, there is any doubt concerning the legislature's intent, the statute must be strictly construed in favor of the defendant. *State v. Olson*, 325 N.W.2d 13, 19 (Minn. 1982).

State v. Richardson, 633 N.W.2d 879, 884 (Minn. App. 2001). In this case, the only way to give meaning to each and every word of both Minn. §65B.50 subd. 1 and Minn. Stat. §65B.49 subd. 3 is to interpret residency to mean domicile in Minn. Stat. §65b.50 subd. 1. A background of the case law interpreting Minn. Stat. §65B.49 subd. 3a will illustrate.

As the district court noted in its memorandum opinion, underinsured motorist coverage is required when the vehicle is "principally garaged" in Minnesota. Specifically, Minn. Stat. §65B.49, subd. 3, provides:

Subd. 3a. Uninsured and underinsured motorist coverages. (1) No plan of reparation security may be renewed, delivered or issued for delivery, or executed in this state with respect to any motor vehicle registered or principally garaged in this state unless separate uninsured and underinsured motorist coverages are provided therein. . . .

(2) Every *owner* of a motor vehicle registered or principally garaged in this state shall maintain uninsured and underinsured motorist coverages as provided in this subdivision.

Minn. Stat. §65B.49 subd. 3. (emphasis added). *Laurich v. Mickow Corp*, 455 N.W.2d 527 (Minn. App. 1990), addressed the issue of whether a policy must be reformed to provide coverage where the vehicle is "principally garaged" in Minnesota but the policy issued out of state. The Laurichs were Minnesota residents injured in a motor vehicle accident in Wisconsin. 455 N.W.2d at 527. Mickow Corporation ("Mickow") is an Iowa corporation with a business address in Minnesota in the form of a truck terminal in St. Paul. *Id.* Because

the Mickow Corporation leased the vehicle in which the Laurichs were injured, it was considered the vehicle's "owner" for purposes of Minn. Stat. §65B.43. *Id.* at 528. Defendant Mickow Corporation admitted the vehicle was "principally garaged" in Minnesota. *Id.* Mickow was insured through Emcasco Insurance Company. *Id.* The Laurichs brought an action against Emcasco seeking a declaration that Emcasco was obligated to provide uninsured motorist coverage. *Id.* Emcasco impleaded Mickow alleging Mickow was obligated to provide the coverage. *Id.* The trial court granted Emcasco's motion for summary judgment holding Mickow was obligated to provide uninsured motorist coverage to the Laurichs. *Id.* The primary question on appeal was the construction of Minn. Stat. §65B.49 Subd. 3a (1) and (2). *Id.* In holding that Emcasco had no duty to provide underinsured motorist coverage to the Laurichs, the Minnesota Court of Appeals stated:

The statute draws a clear distinction between the obligations of owners and the obligations of insurers. Mickow's argument that section 65B.49 refers only to insurers is unconvincing, as subd. 3a(2) thereof makes specific reference to owners.

Id. Accordingly, though Mickow was required to provide underinsured motorist coverage to the Laurichs because it owned a vehicle "principally garaged" in Minnesota, Mickow's insurer was not required to provide such underinsured motorist coverage complying with Minnesota law, since the policy was not issued in Minnesota. *Id.* Therefore, it was Mickow's duty to provide the coverage, not Emcasco's.

Laurich stands for the proposition that it is the owner's duty to provide underinsured motorist coverage where the vehicle is principally garaged in Minnesota but the policy was

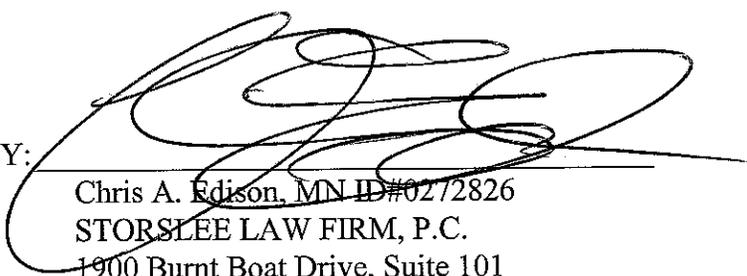
issued in another state. Assume for argument that the district court's interpretation of residency is correct. What happens to the interpretation give Minn. Stat. §65B.49 subd. 3 by the Court in *Laurich*? Mickow "resided" in Minnesota under the district court's opinion, since it maintained a business office in St. Paul, though it was domiciled in Iowa. Therefore, the Emcasco policy should have been reformed pursuant to Minn. Stat. §65B.50. Under the district court's interpretation of "residency," the owner of a vehicle "principally garaged" in Minnesota will concurrently be a resident of this state. Such an interpretation eliminates the distinction between the duties imposed on "owners" under Minn. Stat. §65B.49 subd 3a(2) and those placed on insurers in Minn. Stat. §65B.49 subd 3a(1). By providing the distinction between the duties of owners and insurers where the vehicle is principally garaged in Minnesota but the policy is issued in another state, the Legislature showed a clear intent that, for purposes of Minn. Stat. §65B.50, residency should be interpreted to mean domicile. Therefore, the district court must be reversed.

CONCLUSION

Based on the foregoing, Appellant First National Insurance Company of America requests that the Court reverse the District Court's denial of Appellant's motion for summary judgment and imposition of summary judgment in favor of Respondent.

Dated this 26th day of June, 2006.

BY:



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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).