

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.

**REPLY BRIEF OF FIRST NATIONAL INSURANCE
COMPANY OF AMERICA**

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ARGUMENT

The parties have submitted their respective briefs. In its brief, Respondent Steven Schossow (“Schossow”) makes several arguments why the district court’s judgment should be affirmed. A number of the assertions made by Schossow in its brief merit a response from Appellant First National Insurance Company (“First National”).

1. Schossow’s reliance on *Hoeschen v. South Carolina Ins. Co.*, 349 N.W.2d 833 (Min. App. 1984), is misplaced.

Schossow argues this Court’s decision in *Hoeschen v. South Carolina Ins. Co.*, 349 N.W.2d 833 (Minn. App. 1984), mirrors this case and stands for the proposition that the issue of residency is the determinative issue. First National agrees that *Hoeschen*, is factually very similar to the case at hand. However, it is clear that in *Hoeschen* this Court treated the terms “residency” and “domicile” as synonyms for purposes of an underinsured motorist claim. Therefore, the holding of *Hoeschen* supports First National’s position in this case, not Schossow’s.

Mr. Hoeschen was living in Ft. Bragg, North Carolina, where he was stationed for his job as an army serviceman. *Hoeschen*, 349 N.W.2d at 834 - 835. He maintained a vehicle in North Carolina and was insured by South Carolina Insurance Company. *Id.* However, he maintained his “domicile” in Minnesota and also maintained a Minnesota driver’s license. *Id.* at 834. While on leave from the army, Hoeschen was a passenger in a one-car rollover accident in Minnesota. *Id.* Hoeschen made a claim for underinsured motorist benefits, which the insurer declined to pay asserting, among other things, “anti-stacking” provisions

contained in the policy. *Id.* at 835. Hoeschen brought a declaratory judgment action against the insurer. *Id.* The district court granted summary judgment in favor of Hoeschen and the insurer appealed. *Id.*

After resolving the intra-military immunity argument in favor of Hoeschen, this Court turned to the insurer's argument that the provisions of the policy barred the claim. This Court stated that the accident "involved a Minnesota resident," *Id.* at 836-37, for purposes of choice of laws analysis. In light of Hoeschen's "residency" in Minnesota, this Court determined that Minnesota law should be applied and affirmed the district court. *Id.* at 837. *Hoeschen* was affirmed on other grounds by the Minnesota Supreme Court on the particular peculiarities of North Carolina underinsured motorist law. See, *Hoeschen v. South Carolina Insurance Co.*, 378 N.W.2d 796 (Minn. 1985). As such, the holding is not as important to this case as this Court's treatment of Hoeschen as a "resident" of Minnesota. Hoeschen was considered a "resident" of Minnesota because that was his state of domicile, despite that fact that he was living and working in North Carolina at the time of the accident. *Hoeschen*, 349 N.W.2d at 834-35. In other words, this Court essentially determined residency and domicile were synonyms in the context of an underinsured motorist claim. That is precisely the position argued by First National. It is undisputed that Ann Schossow was domiciled in North Dakota, despite the fact that she was working in Minnesota at the time of her death. In *Hoeschen*, this Court also found it to be a legally operative fact that Hoeschen maintained his Minnesota drivers license. It is undisputed that Ann Schossow's driver's license was

issued in North Dakota. In addition, Ann Schossow registered and insured her vehicles in North Dakota after she began working in Minnesota. To be consistent with the holding in *Hoeschen, supra*, the district court's opinion must be reversed.

Schossow attempts to distinguish *Cantu v. Atlanta Casualty Companies*, 535 N.W.2d 291 (Minn. 1995)(reversing *Cantu v. Atlanta Casualty Companies*, 532 N.W.2d 261 (Minn. App. 1995)), by claiming that:

Furthermore, Cantu's insurer had no knowledge of his family's relocation to Minnesota until after the fatal accident, which occurred only three months after leaving Florida. *Cantu*, 532 N.W.2d at 262. Unlike Cantu, the Schossow's insurance agent was fully aware of Ann's residency in Minnesota well prior to her fatal accident and should have expected that Minnesota law might be applied to its policy.

Br. at 8. However, Schossow's assertions concerning the facts of *Cantu* are incorrect. While Atlanta Casualty did not have actual knowledge of Cantu's relocation to Minnesota, Cantu had several discussions with the Atlanta Casualty agent concerning the move prior to the accident which killed Mrs. Cantu. *Cantu*, 532 N.W.2d at 262. The insurer was unaware simply because the agent had erroneously confused Cantu's file with that of a Jose T. Cantu, who lived in Texas. *Id.* In this case, it is undisputed that First National did not have actual knowledge that Ann Schossow was working in Minnesota at any time. The agent, Mike Meagher, has a vague recollection of speaking with Schossow on one occasion in approximately December of 2001. (A. 39 - A. 40). This was well after Ann Schossow had accepted the Qwest transfer. It was Meagher's understanding that the Qwest job was temporary and that the Schossows were taking turns driving back and forth between Fargo

and Minneapolis. (A. 40). It is clear that the facts of *Cantu* and this case are nearly identical as to the knowledge of the company and the agent with respect to the insured's state of residence.

Schossow has not attempted to refute the undisputed fact that the First National policy had not been "renewed, delivered or issued for delivery, or executed" in Minnesota for purposes of Minn. Stat. §65B.49, subd. 1. As such, *Cantu* controls and the provisions of Minnesota underinsured motorist law are not incorporated into the First National policy. 535 N.W.2d at 291. The knowledge of the agent and whether it should be imputed to First National is a separate factual issue, which was not briefed in the district court. To the extent the District Court indicated the insurer had knowledge of the alleged change of residency, it was based on a clearly erroneous understanding of the facts.

2. The District Court erred in determining Ann Schossow was a resident of Minnesota.

While Schossow admits questions of residency are generally questions of fact, he contends that the issue of residency is a question of law in this case. It is axiomatic that questions of fact can, under some circumstances, be questions of law for the court to determine. However, questions of fact are not questions of law when reasonable persons might draw different conclusions from the evidence presented. First National provided ample facts on which a fact finder could conclude that Ann Schossow was not a resident of Minnesota at the time of her death. Reasonable minds could differ as to conclusions that

could be drawn from those facts and the inferences to be drawn from them. Therefore, residency was not a question of law for the District Court to determine and summary judgment was inappropriate.

Schossow cites *Krause v. Mutual Service Cas. Co.*, 399 N.W.2d 597 (Minn. Ct. App. 1987), *American Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789 (Minn. 1993), and *French v. State Farm Mut. Auto Ins. Co.*, 372 N.W.2d 839 (Minn. App. 1985) in support of his argument that residency can be a question of law. Schossow also cites *Schoer v. West Bend*, 473 N.W.2d 73 (Minn. Ct. App. 1991) as authority for a definition of residency relative to underinsured motorist benefits. However, these cases are all inapposite. Each of them deals with whether a child was a resident of the household for purposes of coverage, not state residency. Minnesota's statutory scheme defines an insured as any relative of the named insured "residing in the same household as the named insured if that person's home is usually in the same family unit, even though temporarily living somewhere else." Minn. Stat. §65B.43, subd. 5 (1988); See, *Krause*, 399 N.W.2d at 600-01; *French*, 372 N.W.2d at 841; *Schoer*, 473 N.W.2d at 76. The courts resolved each of these cases, including *Schoer, supra*, by applying the definition of Minn. Stat. §65B.43, subd. 5. That statute does not apply in this case and the cases provide no guidance for the issue involved in this case.

Schossow has not directed the Court's attention to a single case or statute which supports the trial court's reformation of the First National policy. Schossow has not provided any guidance to the Court as to the correct definition of the term "resident" for purposes of

Minn. Stat. §65B.50 other than *Hoeschen, supra*, which supports First National's position that the terms "resident" and "domicile" are synonyms for purposes of Minn. Stat. §65B.50. As such, the district court's judgment should be reversed.

3. First National did not stipulate that there were no questions of fact regarding coverage and preserved all issues concerning residency for appeal.

Schossow argues at several points in his brief that by bringing a motion for summary judgment in the district court, First National declared there were no fact issues for the Court to resolve. The argument is a red herring. In its brief in support of its motion for summary judgment, First National clearly set forth the facts upon which it based its contention that Ann Schossow was not a resident of Minnesota. In First National's opinion, those facts establish as a matter of law that Ann Schossow was a resident of North Dakota at the time of the accident and not a resident of Minnesota. However, the district court simply reached a different conclusion as to the import of the facts. Clearly, First National had disputed Ann Schossow's residency in Minnesota. At that point, the sole question for the district court to determine was whether First National had presented enough facts to send the issue to the jury. The district court erred in determining the issue as a matter of law.

Schossow also intimates First National stipulated that there were no factual disputes regarding coverage. Schossow's interpretation of the stipulation is clearly incorrect. Prior to making the summary judgment motion, First National entered into a stipulation concerning damages. The stipulation was not included in the Appellant's appendix. However, it is part

of the record in this case. The stipulation simply clarified for the district court that the only dispute in the case was whether the respondent was entitled to underinsured motorist coverage under the First National policy. It stated that, if coverage was found, the parties agreed that Schossow's uncompensated damages equaled or exceeded the applicable policy limits. The obvious purpose of the stipulation was to allow the district court to enter judgment after all coverage issues were determined, thereby avoiding trial on the issue of damages. Contrary to Schossow's assertions, the stipulation does not in any way indicate that there were no factual issues to be resolved regarding coverage.

Schossow also complains that First National's arguments regarding the definition of residency and any question of fact that exists on that issue are made for the first time on appeal and, therefore, should not be considered. However, First National set forth the facts concerning Ann Schossow's residency during the arguments to the district court. Indeed, Ann Schossow's residency status was the fundamental premise upon which First National's arguments were based. Under these circumstances, First National has preserved all residency issues for appeal. See, *Lietz v. Northern States Power Co.*, 2006 Minn. Lexis 500, * 7 (Minn App. 2006)(holding that an issue referred to by a party in the district court and utilized by the district court in reaching its decision is sufficiently preserved for appeal).

It must also be noted that Schossow did not argue to the district court that the First National policy must be reformed under Minn. Stat. 65B.50 because Ann Schossow was a resident of Minnesota. Instead, Schossow argued almost exclusively that a conflicts of law

analysis required the application of Minnesota law. Schossow gave little or no analysis of why a conflict existed between Minnesota and North Dakota law. He simply made a one paragraph argument that, because this case involved a fatal pedestrian/vehicle collision, the First National policy should be reformed to comply with Minnesota law. That Minn. Stat. § 65B.50 required reformation of the First National policy as the basis that Ann Schossow was a resident of Minnesota was an issue arrived at by the District Court *sua sponte*, to which First National did not have the opportunity to reply. First National cannot be expected to brief the district court on any issue not raised by Schossow. As such, First National's arguments concerning Ann Schossow's residency and the definition that should be given that term for purposes of Minn. Stat. § 65B.50 were preserved for appeal.

CONCLUSION

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

Dated this 10th day of August, 2006.

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