

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

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

Respondent

vs.

**SAFECO Insurance Company of America, a corporation,  
a/k/a and/or d/b/a First National Insurance Company of America,**

Appellant.

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**RESPONDENT'S BRIEF**

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## STATEMENT OF THE FACTS

The Respondent adopts the Appellant's Statement of the Facts for the purposes of this Response, with the following exceptions and clarifications:

Ann Schossow ("Ann") was tragically killed as a result of injuries sustained after being struck by a vehicle on County Road 25 in St. Louis Park, Minnesota, on November 4, 2002, while walking to her place of employment with Qwest Communications. (A. 89-90; A. 22-23).

After taking a job transfer in January 2001, Ann moved from Fargo, North Dakota, to the Twin Cities area. (A. 17-19). Upon arrival in the Twin Cities, Ann first rented an apartment in St. Paul and then rented an apartment closer to her workplace in St. Louis Park in July 2001, where she resided at the time of her death. (A. 92; A. 94).

During the time Ann resided in the Twin Cities, her husband, Steve Schossow, continued to reside in Fargo, North Dakota. It was Ann's intention to move back to North Dakota in 2005, after she had vested in the Qwest pension plan. (A. 17-19). However, she considered, and her husband certainly considered, the Twin Cities to be her place of residence. (A. 20-21). Between January 2001 and the date of this accident, Ann lived, worked, shopped, slept, and drove in Minnesota, returning to Fargo only two days per month on average. (A. 19). When Ann had time off, it was more common for Steve to go to the Twin Cities than for Ann to come back to Fargo. (A. 19).

At the time of her death, Ann was insured on three policies of insurance with Safeco. (A. 30; A. 36; A. 41). During the time Ann resided in the Twin Cities, premiums were being paid on a 1991 Ford Aerostar which the Defendant totaled out for \$3,963.00 as a result of an accident on December 11, 2001. (A. 30-31; A. 33). Copies of these checks were sent to the insurance agent at Far North Insurance Company. (A. 119-20.).

After the accident in December 2001, the Respondent's agent, Mike Meagher, was acutely aware that Ann was living and working in Minneapolis. (A. 36). Specifically, after December 2001, Meagher was aware Ann resided close to work in the Twin Cities and that she planned to stay there until vesting in her retirement with Qwest. (A. 40).

Through Meagher, the Schossows obtained an auto insurance policy through First National Insurance Company of America in May 2002. (A. 29-30). The proposal submitted was prepared by Meagher's assistant and listed Ann's address as simply "Fargo, North Dakota," with no street address provided. (A. 96). The policy lists both Ann and Steve Schossow as insured and lists only the Fargo address at which Steve was residing. (A. 57). While First National contends that the Schossows received a more advantageous insurance rate due to the policy having been issued in North Dakota rather than Minnesota, First National cannot produce any evidence that would suggest that Ann or Steve Schossow misrepresented Ann's place of residence to First National. To the contrary, First National's agent knew that Ann was working in the Twin Cities area when

the policy was issued. (A. 36). At the time the policy was issued, Ann had been living and working in the Twin Cities for approximately 18 months.

### ARGUMENT

This case is about whether Ann Schossow, who had lived in Minnesota for approximately two years and owned an auto insurance policy issued by a company licensed to do insurance business in Minnesota, is entitled to underinsurance coverage under Minnesota law. Minn. Stat. §65B.50 subd. 1 requires insurers licensed to issue insurance policies in Minnesota to certify that it will afford at least the minimum security provided by Minn. Stat. §65B.49 to all policyholders. The trial court held that because Ann Schossow was a Minnesota resident, and because Minnesota law requires that insurance companies provide Minnesota residents with the security necessitated by Minnesota law, the Schossows are entitled to underinsured motorist coverage.

First National has identified two issues on appeal: 1) whether the trial court erred in reforming the contract to comply with Minnesota law; and 2) whether the trial court erred in concluding that Ann Schossow was a Minnesota resident.

Although First National moved for summary judgment and declared to the trial court that no issues of material fact were in dispute, the Appellant now claims for the first time on appeal that a fact issue existed to preclude entry of judgment as a matter of law. See Reply Brief in Support of Motion for Summary Judgment, pg. 1 (“the facts of this case are not in dispute”). Prior to moving for summary judgment, First National had also

entered into a formal Stipulation declaring that the only issue that remained in dispute was whether the plaintiff is entitled to underinsured motorist coverage. See Stipulation, October 25, 2005. First National conceded that only an issue of law remained for the court's determination, but because First National is not satisfied with the trial court's ruling on the issue, it now contends that issues of fact exist precluding the judgment entered by the trial court. The Respondent respectfully requests that this Court reject these untimely arguments and affirm the trial court's judgment for the numerous reasons set forth below.

**I. The district court did not err in reforming the insurance contract to comply with Minnesota law.**

Under Minnesota law, underinsured coverage is added to liability coverage received (Minn. Stat. §64B.49 subd. 4(a)), while North Dakota uses a "modified difference-in-limits approach" (Decoteau v. Nodak Mut. Ins. Co., 603 N.W.2d 906, 909 (N.D. 2000)), which would leave the Respondent without coverage. First National is licensed to issue policies in Minnesota and has thereby certified that it will afford at least the minimum security required under Minn. Stat. §64B.49 to all policyholders. See Minn. Stat. §64B.50 subd. 1. Minnesota case law has clarified that this provision obligates licensed insurers to provide coverage within Minnesota statutory requirements to Minnesota residents but holds insurers to no such obligation to nonresidents. See Warthan v. American Family Mut. Ins. Co. (examining Hoeschen v. South Carolina Ins. Co., 349 N.W.2d 833 (Minn.App. 1984), *aff'd on other grounds*, 378 N.W.2d 796 (Minn.

1985); Hedin v. State Farm Mut. Auto. Ins. Co., 351 N.W.2d 407 (Minn.App. 1984); and Aguilar v. Texas Farmers Ins. Co., 504 N.W.2d 791 (Minn.App. 1993). Accordingly, the trial court properly concluded that the issue of Ann Schossow's residency was determinative on this issue.

This Court previously examined the importance of residency in determining the availability of underinsurance benefits in Hoeschen v. South Carolina Ins. Co., 349 N.W.2d 833 (Minn.App. 1984). In this case, the Court established that due process is not violated where Minnesota law is applied in lieu of another state's conflicting law relating to UIM coverage. The plaintiff's circumstances in Hoeschen mirror those of Ann Schossow in this case.

In Hoeschen, a Minnesota resident owned a vehicle that was insured by a North Carolina company. Id. at 834-35. While Hoeschen's vehicle was physically located in North Carolina, he was injured in an accident in Minnesota while a passenger in another vehicle. Id. Hoeschen collected the liability limit of \$25,000 from the at-fault driver's insurance, but his North Carolina insurance company refused to pay additional UIM benefits because, like the instant case, his North Carolina policy limit was equal to the driver's coverage amount of \$25,000, and under North Carolina law, the two limits could not be "added on". Id. at 835.

Hoeschen argued that Minnesota law should apply, enabling him to recover the \$25,000 limit from the driver's policy, as well as the \$25,000 coverage limit from his

own policy to compensate him for his injuries that exceeded the \$50,000 combined total. Id. The Court of Appeals granted the insured's request for declaratory judgment, concluding that application of Minnesota law was required in order to comport with Minnesota's "legislative policy of adequately compensating insured parties . . .". Id. at 838. The Court went on to state that a contrary holding would undermine the purpose of underinsured motorist protection, "to protect the named insured . . . from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile". Id. at 838. As such, the North Carolina insurer was ordered to pay Hoeschen's UIM coverage amount of \$25,000, "added on" to the \$25,000 he had received from the driver's policy. Id.

Like in Hoeschen, it is not disputed by the parties that the Respondent's injuries exceed the total UIM coverage if the two policy limits were added together as required by Minnesota law. Because the district court properly concluded that the Respondent was a resident of Minnesota at the time of her fatal accident, the district court properly applied Minnesota law and ordered the Appellant to "add on" the \$100,000 UIM coverage provided in her insurance policy to the \$100,000 the Respondent recovered from the at-fault driver.

The Court explained its holding in Hoeschen in Warthan v. American Family Mut. Ins. Co., 592 N.W.2d 136 (Minn. Ct. App. 1999). In Warthan, the Court distinguished Hoeschen, holding that Minnesota law did not require that UIM coverage be reformed to

conform with Minnesota law when the insured was a *nonresident*. Id. In reaching its holding, the Court explained that “the Hoeschen court determined that when a Minnesota resident is injured in an accident in Minnesota, the resident’s UIM policy will be reformed to comply with Minnesota law.” Id. at 139.

As such, the trial court correctly held that the determinative issue was whether Ann Schossow was a Minnesota resident at the time of the accident. The court concluded that from the undisputed factual record, Ann Schossow was a Minnesota resident, and, under the applicable statutes and case law, the Respondent was entitled to coverage under the Schossows’ UIM policy.

First National relies almost exclusively on Cantu v. Atlanta Casualty Companies 535 N.W.2d 291 (Minn. 1995), in its attempt argue that the Schossows should not be entitled to UIM coverage. The Supreme Court’s one-paragraph opinion in Cantu reversed an appellate court order that had allowed UIM coverage despite the insured’s failure to obtain UIM coverage while living out of state. However, the facts in Cantu are easily distinguishable.

First, unlike Ann Schossow, before relocating to Minnesota, Cantu purchased a Florida insurance policy *without* UIM coverage from a Florida insurer. Cantu v. Atlanta Casualty Companies, 532 N.W.2d 261, 262 (Minn.Ct.App. 1995). In fact, at the time he purchased the policy, Cantu expressly declined such coverage, which was optional in

Florida. Id. Cantu had not made any changes to his Florida policy prior to his wife's fatal accident in Minnesota. Id.

Unlike Cantu, the Schossows held a policy containing \$100,000 of UIM coverage at the time of her fatal accident. 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 Schossows' 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. (A. 36). Further, the Respondent had lived in Minnesota for nearly two years at the time of her fatal accident.

Cantu purchased his policy in Florida, moved to Minnesota, and his wife was killed in a fatal car accident shortly thereafter. Cantu, 532 N.W.2d at 262. His policy was not renewed in the time subsequent to his move, or prior to the accident, forming the basis for the Supreme Court's decision not to apply Minnesota law to his UIM claim. Cantu, 535 N.W.2d at 291. Unlike the chronology of events in Cantu, Ann Schossow moved to Minnesota nearly two years before her fatal car accident, and the First National policy was issued to her after she had lived there for nearly a year and a half. Her insurance agent was aware of her Minnesota residency. Because Ann's policy was issued while she was a resident of Minnesota, her policy must be reformed under Minnesota law.

Finally, as was noted in Hoeschen, public policy clearly demands stacking of policies and disregarding anti-stacking clauses:

When an insurance company doing business in a number of states writes a policy on an automobile, the company knows the automobile is a movable item which will be driven from state to state. The company, therefore, accepts the risk that the insured may be subject to liability not only in the state where the policy is written, but also in states other than where the policy is written, and that in many instances those states will apply their own law to the situation.

Hoeschen, 349 N.W.2d at 837 (citing Hague v. Allstate Insurance Co., 289 N.W.2d 43, 50 (Minn. 1978)(on rehearing)(also holding that “such a contract [auto insurance contract] is not like the usual commercial transaction where the law of the state where the contract is made should and does play a more important role”).

In sum, the Schossows’ auto insurance policy must be reformed to comply with Minnesota law. The determinative issue is not whether the Schossows’ policy *can* be reformed but whether it *must* be reformed due to Ann Schossow’s residency. As demonstrated below, the district court did not err in concluding that Ann was a resident of Minnesota at the time of her accident.

**II. The district court did not err in concluding that the Respondent, Ann Schossow, was a resident of Minnesota at the time of her fatal accident.**

**A. Ann Schossow was a resident of Minnesota as a matter of law.**

The trial court granted summary judgment based on undisputed facts; however, First National now argues that the court erred in its conclusion that Ann Schossow was a Minnesota resident. First National argues that determination of residency is a question of

fact and cannot be determined as a matter of law. In its brief, the Appellant misstates the law and entirely omits mention of the record before this Court wherein the Appellant moved for summary judgment arguing no factual disputes existed and further omitting mention of its Stipulation wherein Appellant notes the same absence of any factual disputes.

Even though a determination of residency is *based on facts specific to each case*, when the relevant facts are undisputed, as they are in this case, the question of whether a person is a resident may be decided as a matter of law. Krause by Krause v. Mutual Service Cas. Co., 399 N.W.2d 597, 600 (Minn.Ct.App. 1987); see American Family Mut. Ins. Co. v. Thiem, 503 N.W.2d 789, 790-91 (Minn. 1993) (concluding that undisputed facts clearly supported legal conclusion that son was resident of father's household); see also French v. State Farm Mut. Auto. Ins. Co., 372 N.W.2d 839, 841 (Minn.App. 1985); LeDoux v. Iowa National Mutual Insurance Co., 262 N.W.2d 418 (Minn. 1978); Engeldinger v. State Automobile and Casualty Underwriters, 306 Minn. 202, 236 N.W.2d 596 (1975) (supporting court's legal conclusion where it is supported by uncontradicted facts).

In Krause, a minor son William brought an action through his mother against his father's insurer to recover underinsured motorist coverage for injuries sustained while he was crossing the street in front of his mother's home. Krause, 399 N.W.2d at 599. The District Court granted summary judgment in favor of the insurer, finding that, *as a matter*

*of law*, William was not a resident of the father's household for purposes of UIM coverage. Id. (emphasis added). While the Court of Appeals reversed the holding of the District Court, it did so not because the lower court erred in making a legal conclusion based on undisputed facts, but rather because the law was erroneously applied to the facts of the situation. Id. at 602.

In the instant matter, the district court properly imposed summary judgment in favor of the Respondent after thorough consideration of the undisputed facts, as stipulated to and argued by Appellant in its summary judgment motion below, and thereafter concluding, as a matter of law, that Ann Schossow was a resident of Minnesota at the time of her fatal accident.

First National asserts that the trial court erred in concluding that Ann Schossow was a resident of Minnesota for purposes of Minn. Stat. §65B.50 and states that the legislature did not define the term "resident" for purposes of Minn. Stat. §65B.50, leaving interpretation to the courts. While acknowledging that "the term 'resident' is given different meaning depending on the context of its use," the Appellant proceeds to ignore existing case law defining "resident" specific to Minn. Stat. §65B.50 and urges the Court of Appeals to instead interpret the term to mean "domicile", without citing any case law in support of this argument. Id.; See Jacobson v. Universal Underwriters Ins. Group, 645 N.W.2d 741, 743 (Minn.Ct.App. 2002); Schoer v. West Bend Mutual Ins. Co., 473 N.W.2d 73, 76 (Minn.Ct.App. 1991) (cases addressing the issue of residency relative to

payment of UIM benefits). The applicable case law supports the trial court's interpretation of the word "resident", pursuant to Minn. Stat. §65B, and the court's conclusion that, under that definition, Ann Schossow was a resident of Minnesota at the time of her fatal accident.

The Court of Appeals previously considered the issue of residency, as pertaining to UIM coverage, in Schoer v. West Bend, 473 N.W.2d at 76. The issue before the Schoer court was whether Jeffrey Schoer was a resident of his mother's Wisconsin household at the time of his car accident in Minnesota for purposes of UIM coverage under Minn. Stat. §65B.50. Id. at 75. The court determined that Jeffrey's mother's Wisconsin home was his residence because Jeffrey had established no other permanent living arrangements away from his mother's home and had led somewhat of a transient lifestyle since dropping out of high school as evidenced by his lack of other living arrangements, transportation of his belongings in a suitcase, and frequent returns to his mother's home in Wisconsin. Id.

Under the Schoer analysis, Ann Schossow was clearly a resident of Minnesota. Unlike Schoer, Ann leased her own apartment and held a permanent job in Minnesota. Instead of "living out of a suitcase", she kept her clothing and personal effects in her apartment in Minnesota. Instead of returning home as frequently as possible, she only returned to Fargo two days per month on average, with her husband coming to Minnesota for the majority of their visits. Id. The Appellant's argument emphasizes that Ann

intended to return to North Dakota after serving Quest in Minnesota for two years, which the Respondent does not dispute. However, even where residency may not be indefinite, a person can still be considered a resident for purposes of UIM coverage. See Jacobson, 645 N.W.2d at 746 (holding that even where decedent may have intended to return to Iowa after school, he was still a resident of Minnesota for purposes of determining that Minnesota law should be applied in determining UIM benefits).

This Court also interpreted the issue of residency in determining whether to extend UIM coverage in Jacobson v. Universal Ins. Group, 645 N.W.2d 741 (Minn.Ct.App. 2002). Adam Jacobson was killed in Hennepin County while a passenger in a vehicle. Id. at 743. At the time of his death, he rented an apartment in Minnesota and worked as a convenience store clerk while also attending school. Id. He maintained an Iowa driver's license, and his mail was delivered to his parent's home in Iowa. Id. His parents brought a claim for UIM, and the Court was called upon to determine whether Iowa or Minnesota law would govern the arbitration of the UIM claim. Id. In holding that Minnesota law applies, the Court minimized the importance of where Adam was licensed to drive and where his mail was delivered, noting that "the accident was occurred in Minnesota, decedent was living in Minnesota, and the summary judgment motions were heard in a Minnesota court." Id.

The Appellant attempts to distinguish Jacobson by declaring that "[r]esidency" is a term carrying for [sic] greater legal connotations than does the term "lives", without

citing legal authority. However, when compared to Jacobson and contrasted with Schoer, the facts of the instant case compel the district court's finding that Ann was a resident of Minnesota at the time of her fatal accident for purposes of UIM coverage, and First National has presented no authority to support that the district court's decision was erroneous in that regard.

**B. "Resident," as utilized in Minn. Stat. §65B.50, does not mean "Domicile."**

First National urges the Court to interpret residency for purposes of Minn. Stat. §65B.50 to mean "domicile". In doing so, First National ignores existing case law rejecting this argument and asks the Court to do the same. Moreover, the non-insurance-related cases cited by the Appellant in support of this assertion are actually founded on reasoning that would support a contrary finding when applied to cases pertaining to UIM coverage.

For example, the Appellant relies on Chapman v. Davis, 45 N.W.2d 822 (Minn. 1951), to support the position that the Court may interpret "residency" to mean "domicile." The issue before the Court in Chapman was whether the term "non-resident" within Minn. Stat. §170.05 (1941)(a statute relating to service of legal process in car accident cases) is based upon a concept of domicile, actual residence, or temporary abode. Id. at 824. The Court noted that in the absence of a statutory definition, the legislative intent "may be ascertained by considering, among other matters, the mischief to be remedied, the object to be attained, and the consequences of a particular

interpretation.” Id. at 66. The Court proceeded to analyze the object of Minn. Stat. §170.05 and concluded that public policy demanded that out-of-state motorists be held responsible locally, requiring a more strict interpretation of the word “non-resident” as used in that statute. Id. at 67.

Applying the same public policy analysis, the opposite result is reached in this case. Nationally, “there are three distinct underinsured motorist programs, each capable of yielding a different dollar figure for a given claim . . . because of the system’s rules.” Smetak, No-Fault Automobile Insurance Law Consumer Choice in the Minnesota Auto Insurance Market, 24 Wm. Mitchell L. Rev. 857, 858 (1998). But Minnesota has a fourth, and even more liberal, UIM system in place that favors the insured motorist involved in an accident where the at-fault motorist’s insurance is inadequate to compensate the injured party for his or her damages. See Id. As such, under the rationale applied in Chapman, the district court did not err in its determination that Ann was a resident of Minnesota for the purposes of UIM, for this interpretation advances the state’s policy of adequately compensating injured motorists.

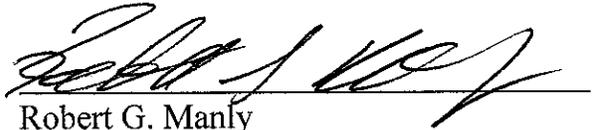
In sum, First National’s allegation that the “residency” under Minn. Stat. §65B.50 means “domicile” is without merit. First National should also be barred from bringing this issue for the first time on appeal. Regardless, First National’s unduly restrictive interpretation of “residency” is inconsistent with Minnesota’s underinsured motorist statutes and Minnesota case law, and this interpretation must be rejected.

**CONCLUSION**

Based on the foregoing, Respondent, Steven Schossow, as Trustee for the heirs and next of kin of Ann Elizabeth Schossow, respectfully requests that the district court's judgment be affirmed.

Dated this 31<sup>st</sup> day of July, 2006.

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