
State of Minnesota
In Court of Appeals

TENA V. VAN KAMPEN

Appellant,

vs.

WASECA MUTUAL INSURANCE COMPANY,
n/k/a AUSTIN MUTUAL GROUP, AND
WESTFIELD INSURANCE, a/k/a WESTFIELD GROUP,
Respondents,

vs.

WESTFIELD INSURANCE, a/k/a WESTFIELD GROUP,
Third-Party Plaintiff,

vs.

RISPENS SEEDS, INC. AND PAUL RUSSELL BREY,
Third-Party Defendants

APPELLANT'S BRIEF AND APPENDIX

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

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LEGAL ISSUES

- I. Whether a person who is injured in an automobile accident may recover underinsured benefits if she, along with other claimants injured in the same accident, enters into a settlement agreement which releases the tortfeasor and provides that the at-fault driver's automobile insurance liability limits be paid entirely to the other injured claimants.**

Trial court held: The trial court held that Appellant forfeited her right to pursue underinsured motorist benefits and granted motions for summary judgment against her, but did not make any specific findings on this issue.

Apposite cases: *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983)
Washington v. Milbank Ins. Co., 562 N.W.2d 801 (Minn. 1997)
Minn. Stat. § 65B.49, Subd. 4a

- II. Whether such a settlement is a "best settlement" under *Dohney v. Allstate*, 632 N.W. 2d 598 (Minn. 2001).**

Trial court held: The trial court made no findings regarding this issue.

Apposite cases: *Dohney v. Allstate*, 632 N.W. 2d 598 (Minn. 2001)

- III. If so, what information must be contained in a notice of settlement to the underinsured carriers and what must the underinsured carriers do to protect their subrogation interests?**

Trial court held: The trial court made no findings regarding this issue.

Apposite cases: *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923 (Minn. 1990)
Elwood v. Horace Mann Ins. Co., 531 N.W.2d 512 (Minn. Ct. App. 1995)

- IV. Whether Appellant interfered with Respondents' subrogation rights.**

Trial court held: The trial court held that Appellant's actions had the effect of interfering with Respondents' subrogation rights.

Apposite cases: None

V. Whether Respondents were prejudiced by any defect in the settlement notices provided in this case.

Trial court held: The trial court made no findings regarding this issue.

Apposite cases: *Klang v. American Family Ins. Group*, 398 N.W.2d 49 (Minn. Ct. App. 1986)

STATEMENT OF THE CASE

Appellant Tena Van Kampen initiated this action in Blue Earth County District Court, Fifth Judicial District, in July of 2006, claiming underinsured motorist (“UIM”) benefits from Respondent underinsured carriers (“UIM carriers”). Respondents and Third Party Defendants joined in motions for summary judgment, claiming that Appellant forfeited her right to receive UIM benefits. Presiding judge, The Honorable Norbert P. Smith, granted the motions for summary judgment and judgment was entered on May 31, 2007. Appellant appeals from that judgment.

STATEMENT OF FACTS

On August 1, 2000, Appellant was injured in a motor vehicle accident while driving a vehicle owned by her son-in-law, Jeffrey Posthumus (A2, A4). Appellant’s daughter, Karen Posthumus, and three grand-daughters, Kristin, Kayla, and Mariah Posthumus, were also passengers in the vehicle and were all injured in the same accident (A14, A31, A84-86).

The vehicle that collided with the Posthumus vehicle was driven by Third Party Defendant Paul Brey and owned by his employer, Third Party Defendant, Rispens Seeds, Inc. (A2, A14, A31). The Rispens Seeds vehicle was insured by Safeco Insurance Company (“Safeco”) with liability limits of \$1.5 million (A14, A31). The Posthumus vehicle was insured by Respondent, Westfield Group (“Westfield”), with underinsured motorist coverage limits of \$50,000 per person and \$100,000 per occurrence (A1-2, A15). Appellant was insured by Respondent Austin Mutual Group (“Austin”), with underinsured motorist coverage limits of \$250,000 per person (A1, A8).

Jeffrey, Karen, Kristin, Kayla and Mariah Posthumus (hereinafter referred to collectively as the "Posthumus family") sued Appellant, Paul Brey and Rispens Seeds (A46-47, A121). Appellant answered that complaint and cross-claimed against Paul Brey and Rispens Seeds (A57-60). The parties to that lawsuit reached a settlement whereby Safeco agreed to pay its full policy limits of \$1.5 million to the Posthumus family in exchange for a full release of all future liability by the Posthumus family and by Appellant (A122). Under the terms of the settlement agreement, Appellant would receive no payment from Safeco (A66-73). Both Westfield and Austin were represented at the mediation and were well aware that Appellant agreed to settle without receiving any money from the Safeco policy (A122).

By letter dated May 6, 2004, Appellant's then-attorney sent written notice to the Respondents, notifying them of the proposed settlement. The notice indicated that Appellant would not be receiving any payment from the Safeco policy, and stated Appellant's intention to pursue her UIM benefits (A79-80). By letter dated May 24, 2004, Austin replied to the notice, stating that it would "not be substituting any checks." Austin had also, on May 24, 2004, informed Appellant's then-attorney by telephone that it would be sending him a letter authorizing the settlement (A117-120). That same day, Appellant and the Posthumus family signed the settlement agreement (A66-73).

By its own admission, Westfield lost Appellant's settlement notice and did not reply to it until, by letter dated June 10, 2004, thirty-five days after the date of the notice, Westfield wrote back to Appellant's attorney and declined to substitute its check. (A83). Earlier, on May 5, 2004, Westfield had already responded to the Posthumus family's

settlement notice by letter, wherein Westfield waived its right to substitute its draft for the Safeco settlement draft payable to the Posthumuses (A126). Neither Austin nor Westfield took any further actions to preserve their subrogation rights against the Third Party Defendants.

After settling with Safeco, the Posthumus family proceeded to trial against Appellant. At trial, the jury found that Paul Brey was 100% negligent and that Appellant was not negligent in causing the accident, and awarded the Posthumus family total damages of \$1,685,446 (A84-86). The jury verdict established that the Rispens Seeds vehicle was underinsured, since its liability policy limit of \$1.5 million was less than the total damages awarded to the Posthumus family. As a result, Westfield paid \$50,000 in UIM benefits to Appellant's daughter, Karen Posthumus (A74). Appellant's damages have not been determined.

Appellant commenced this case in July of 2006, claiming UIM benefits from both Respondents (A3). Although agreeing that the at-fault vehicle was an underinsured vehicle, Respondents and Third Party Defendants brought motions for summary judgment, claiming that Appellant had forfeited her right to receive UIM benefits for various reasons (A61-63, A101-102, A103-104). The district court granted summary judgment in favor of the Respondents and Third Party Defendants. The district court did not make findings with regard to the issues raised by the parties, but did state in the memorandum accompanying the order that Appellant's actions "had the effect of interfering with the subrogation rights of the defendant UIM carriers" (A135).

ARGUMENT

Standard of Review for Summary Judgment: On an appeal from summary judgment, the appellate court examines two questions, whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. An appellate court must view the evidence in the light most favorable to the party against whom judgment was granted. *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn. 1997). On appeal from summary judgment where no material facts are in dispute and the only question is one of law, the appellate courts review *de novo*. *Dairyland Ins. Co v. Starkey*, 535 N.W.2d 363, 364 (Minn. 1995).

- I. **A person who is injured in an automobile accident may recover underinsured benefits if she, along with other claimants injured in the same accident, enters into a settlement agreement, which releases the tortfeasor and provides that the at-fault driver's automobile insurance liability limits be paid entirely to the other injured claimants.**

The Minnesota No-Fault Automobile Insurance Act defines "underinsured motor vehicle" as a motor vehicle or motorcycle to which a 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. With regard to UIM coverage, the "the maximum liability of an insurer is the amount of damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at fault vehicle." Minn. Stat. § 65B.49, Subd. 4a. In this case, Appellant's damages have not yet been determined, but it is clear that none of her damages will be paid by Safeco, the insurer of the at-fault vehicle, because that policy

was exhausted by payments made to the Posthumus family. Therefore, Appellant's only recourse is to seek UIM benefits.

Procedures for bringing UIM claim were first established by the Minnesota Supreme Court in *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), where the court held that a UIM claimant should either: (1) pursue a tort claim to conclusion in district court, and then, if the judgment exceeds the liability limits of the tortfeasor's policy, pursue UIM benefits; or (2) sue the at-fault driver and/or his insurer for "the best settlement," give notice of settlement to the UIM carrier, and then initiate a claim for UIM benefits. *See Washington v. Milbank Ins. Co.*, 562 N.W.2d 801, 805 (Minn. 1997). In this case, Appellant chose the latter option. She settled with the at-fault driver, gave notice to Respondent UIM carriers, signed a settlement agreement with Safeco, and is now seeking UIM benefits.

At the time settlement was reached, Appellant was a defendant in the same tort action brought by the Posthumus family as were Paul Brey and Rispens Seeds. She was claimed to have been negligent in causing the accident, although her negligence had not been determined. Her liability insurer (Austin) refused to pay any amount at all to the Posthumus family to settle their claims against her, and their claims against her were obviously going to trial. There does not appear to be any compelling reason why she should have depleted the available liability limits of the Safeco policy by claiming a part of them, to the detriment of other members of her family who were passengers in the same vehicle and obviously without fault in causing the accident.

Respondents argue that Appellant has not settled with the at-fault driver because she did not receive payment from that driver's liability policy. In making this argument, Respondents rely on *Schmidt v. Clothier* and cases following *Schmidt*, which involved single claimants who received payment from the liability carrier. In this case, Appellant is one of multiple claimants. Her rights against the UIM carriers should not be determined by rulings in earlier cases involving single claimants who reached settlements with liability carriers before making UIM claims. In this case, the combined damages of all injured claimants exceeded the limits of the liability policy, meaning that one or more of the injured claimants would not be fully compensated for damages by payments from the tortfeasor's policy.

Respondents herein have seized upon wording in *Schmidt* and subsequent opinions referring to the "amount of settlement" and to "substituting of payment drafts" to support a claim that, because those matters are referred to in prior opinions, it is the law of this state that an injured party must collect some minimum amount from the at-fault driver so that there is some amount recovered for which the UIM carrier may "substitute its draft."

Notice and procedural requirements set out in *Schmidt v. Clothier* should not be transformed into substantive requirements by which the validity of a tort settlement and entitlement to UIM benefits are determined. Just because the court in *Schmidt*, when dealing with cases that involved payments from the at-fault driver, required the amount of the settlement payment be revealed to the UIM carrier (because the UIM carrier needed that information to make an intelligent decision on whether or not to preserve subrogation rights) does not establish a substantive requirement that a person injured in an auto

collision must collect money from the at-fault driver before being entitled to bring a UIM claim. In this case, Respondents' reliance on *Schmidt v Clothier* and subsequent "notice" cases is misplaced, because, in all of those cases, the injured party settled for some payment from the at-fault driver. Those cases do not stand for the proposition that Appellant must receive some payment from the at-fault driver before she is entitled to recover UIM benefits; opinions in those cases were simply dealing with the particular facts involved.

Respondents complain that Appellant had to collect a payment from the Safeco policy before she is entitled to bring a UIM claim. However, Respondents, in hindsight, are not at liberty to decide on behalf of injured claimants which should be paid and which should not be paid from the at-fault driver's policy, so as to minimize their UIM payments. Here, the liability policy limits would have been exhausted, and the at-fault vehicle would have been underinsured, whether or not Appellant received any payment from the liability policy. This is not a case where a single claimant has released the liability carrier without receiving any compensation at all, and now seeks underinsured benefits, as Respondents suggest.

UIM benefits are intended for individuals, like Appellant, who are underinsured. Appellant should not be penalized and prevented from recovering in this case, just because she received nothing in the settlement with Safeco. There is no provision in Minnesota law that prevents Appellant from seeking UIM benefits in this case where she agreed to settle without receiving any payment from the liability policy. Stated another

way, Minnesota law does not require Appellant, one of multiple claimants, to receive a payment from the tortfeasor's policy before pursuing UIM benefits.

To allow Appellant to pursue her UIM claim does not contravene any of the principles or policy decisions behind the Minnesota No-Fault Automobile Insurance Act. Here, the limits of the liability policy were exhausted without Appellant being compensated for her injuries in the accident. She paid premiums for UIM coverage. Respondents should be required to pay Appellant's damages in this case.

II. Appellant's settlement is a "best settlement" under *Dohney v. Allstate*, 632 N.W. 2d 598 (Minn. 2001).

Respondents contend that Appellant's settlement was not a "best settlement" as required by *Schmidt v. Clothier*, because she received nothing from Safeco. See *Schmidt v. Clothier*, 338 N.W.2d at 261 ("The insured has the right to accept what he or she considers the best settlement available and to proceed to arbitrate the underinsurance claim for a determination of whether the damages do indeed exceed the tortfeasor's liability limits"). On the contrary, Appellant's settlement was a "best settlement" under current Minnesota law and Respondent UIM carriers may not deny UIM benefits to her.

The Minnesota Supreme Court ruled, in *Dohney v. Allstate*, 632 N.W.2d 598 (Minn. 2001), that an insurer may not deny an underinsured claim on grounds that the insured has not reached the best settlement with the tortfeasor. *Id.*, at 607. Respondents argue that *Dohney* can be distinguished because, in that case, the insured settlement for "something" instead of "nothing." However, the *Dohney* Court dealt with the "best settlement" issue on a very broad scale, arguably referring even to the current fact

situation where one of multiple claimants injured in an automobile accident foregoes any payment from the liability policy and instead agrees to seek compensation for damages only from the UIM carrier.

In *Dohney*, the Minnesota Supreme Court grappled with whether it should establish objective criteria by which to determine whether a settlement was a “best settlement” under *Schmidt v. Clothier*. The court, at the urging of the insurance industry, explored a number of potential tests or criteria that could be applied to make this determination. The alternatives suggested to the court included (1) a subjective best settlement test that would require a court to inquire into the UIM claimant’s reasons for settlement; (2) an objective/bright line test, such as a set percentage rule of 90% of the limits of the liability policy; (3) a requirement that, if a best settlement was not reached, the courts would revert to making the injured plaintiff “eat the gap;” and (4) a rule making it a rebuttable presumption that a settlement was not a best settlement if it was less than 50% of the tortfeasor’s policy limit, unless there were multiple claimants. If there were multiple claimants, as there are in this case, the court could then consider other factors, such as exhaustion of coverage or insurer insolvency.

The *Dohney* Court rejected all such tests or criteria and decided that any settlement reached between an injured party and a tortfeasor was the “best settlement” required by *Schmidt v. Clothier*. The court said:

“Instead, we maintain the status quo—a best settlement with a tortfeasor for purposes of a UIM claim is an insured’s best settlement. We conclude that an insurer may not deny a UIM claim based upon the insured’s failure to reach the best settlement with the tortfeasor.” *Dohney v. Allstate*, 632 N.W.2d at 607.

The *Dohney* Court did not limit its holding to cases involving single claimants, nor did it set out a separate definition for a “best settlement” in cases involving multiple claimants. *Dohney*, therefore, stands for the proposition that if there is a settlement between the injured claimants and the tortfeasor, no matter what the terms or the settlement amount, an injured claimant may subsequently claim UIM benefits to which she is entitled. A “best settlement” means the insured’s best settlement, not a UIM carrier’s best settlement or even a court-determined best settlement. *Id.*, at 604. In essence, any settlement is a “best settlement.”

III. The settlement notice given in this case contained sufficient information to allow Respondent UIM carriers to make informed decisions as to whether to protect their subrogation rights, but Respondents did not protect their subrogation rights.

Pursuant to *Schmidt v Clothier*, an injured claimant, who has reached a settlement with the tortfeasor (or the liability carrier) must give notice of such settlement to all UIM carriers prior to accepting the settlement, in order to give the carriers the opportunity to preserve rights of subrogation. The requirements of this so-called “*Schmidt-Clothier*” notice are that it must:

- Be a 30 days’ written notice;
- Identify the insured;
- Identify the tortfeasor;
- Identify the tortfeasor’s insurer;
- Disclose the limits of the tortfeasor’s automobile liability insurance; and
- Disclose the agreed upon amount of the settlement.

American Family Mut Ins. Co. v. Baumann, 459 N.W.2d 923, 927 (Minn. 1990), citing *Schmidt v. Clothier*, 338 N.W.2d at 263. The purpose of a *Schmidt-Clothier* notice is to

allow a UIM carrier 30 days to decide whether to acquiesce in the settlement and lose its subrogation rights, or to preserve its subrogation rights by substituting its payment (draft) to the injured claimant for that of the liability carrier's payment. *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d at 925.

Respondents argue that Appellant's notice of settlement was defective because it did not meet all six requirements of *Schmidt v. Clothier*. Specifically, Respondents claim that Appellant's notice did not designate a settlement amount received from the tortfeasor for which the Respondents could substitute their checks and thus preserve their subrogation rights, and also claim that the notice was not a 30-day notice. Neither Respondent, however, complained about these alleged deficiencies when they received the notice; Respondents instead waited until after Appellant initiated the present action against them for UIM benefits.

Appellant's notice met all six requirements of a *Schmidt-Clothier* notice. Her attorney's letter to Respondents (A79-80), which stated that "this letter is our Schmidt v. Clothier notice," clearly identified the insured (Appellant Tena Van Kampen), the tortfeasors (Paul Brey and Rispens Seeds), and the tortfeasor's insurer (Safeco, as Rispens Seeds' insurer). It also disclosed the limits of the tortfeasor's automobile liability policy and the agreed upon amount of the settlement by stating that there was a "policy limits offer" and referencing the "proceeds (\$1.5 million) that are being paid by Safeco to the Posthumus family." Appellant's notice identified a settlement amount attributable to Appellant, when it stated, "The result of mediation was a policy limits offer (on behalf of Rispens) under which [Appellant] will not be receiving any proceeds

from Safeco Insurance” (emphasis added). Lastly, the notice informed Respondents that Appellant intended to pursue a UIM claim against them.

A. The 30-day requirement was waived by Respondents.

Respondents claim that the settlement notice given to the UIM carriers here was not a 30-day notice. However, both carriers waived their subrogation rights. Austin waived prior to expiration of the 30 days, and Westfield lost the notice and consequently failed to notify Appellant within 30 days that it wished to preserve its rights of subrogation.

Appellant and the Posthumus family reached their settlement with Safeco in mediation on April 26, 2004. Respondents were represented at the mediation and were well aware of the terms of the settlement on that day. Appellant’s written notice of settlement to Respondents was dated May 6, 2004. Respondent Austin advised Appellant’s attorney by telephone that it was waiving subrogation, and then sent Appellant a letter dated May 24, 2004 stating that it would not be substituting its check, meaning that it would not be preserving its subrogation rights. That same day, Appellant signed the settlement agreement. These actions constitute a waiver of the 30 day requirement. Austin cannot write to Appellant prior to expiration of the 30 day notice period and say, in effect, “go ahead with your settlement,” and later complain that it was not allowed the full 30 days within which to preserve subrogation rights.

At no time before waiving its subrogation rights on May 24, 2004 did Austin object to the fact that Appellant had not received any payment from Safeco. Respondent

Austin has waived its right to now challenge the validity of the notice in that regard, as a means to deny Appellant her UIM benefits.

Respondent Westfield admittedly lost Appellant's notice, but later located it and replied to Appellant's attorney by letter dated June 10, 2004 stating that it would not be substituting its check, also meaning that it would not be preserving its subrogation rights. Through no fault on Appellant's part, Respondent Westfield failed to notify Appellant within the allowed 30 days that it chose to preserve its subrogation rights. Respondent Westfield's right to preserve subrogation lapsed when it did not respond to Appellant within the 30 day period. As stated in *Schmidt*:

“If the underinsurer were to determine after assessment that recovery of underinsurance benefits it paid was unlikely (e.g. where the liability limits are exhausted or nearly so and the tortfeasor is judgment-proof), it could simply let the ‘grace period’ expire and permit the settlement and release.” *Schmidt v. Clothier*, 338 N.W.2d at 263.

Westfield argues that, by the time it found its copy of the settlement notice, Appellant had signed a settlement agreement and had released Safeco and its insured, and it was too late for them to preserve subrogation. However, after finding the notice, Westfield wrote to Appellant waiving subrogation. It did not complain about the form of Appellant's notice, nor the fact that Appellant had settled with the at-fault driver without receiving any payment. Like Austin, Westfield has waived its right to challenge the validity of the notice as a means to deny Appellant her UIM benefits.

Even though the information included in Appellant's notice was not laid out in a particular manner preferred by the Respondents, this court has held that strict compliance

with *Schmidt v. Clothier* is not required in every case. *Elwood v. Horace Mann Ins. Co.*, 531 N.W.2d 512, 516 (Minn. Ct. App. 1995). In fact, “[t]he supreme court has cautioned that ‘*Schmidt* was not intended as a technical snare for unwary insureds’ and that once a UIM carrier receives a certain amount of information from other sources, it has an obligation to respond-if only to tell its insured that if she released the tortfeasor without giving [the carrier] 30 days’ written notice of any settlement agreement she might make with [the tortfeasors], she would be deemed to have forfeited ... [UIM] benefits.” *Id.*, citing *American Family Mut. Ins. Co. v Baumann*, 459 N.W.2d at 927.

In *Elwood*, the insured (Elwood) conceded that he did not send a formal written *Schmidt-Clothier* notice to the UIM carrier (Horace Mann), but argued that Horace Mann had already received the equivalent or was otherwise on constructive notice of his settlements with the tortfeasors. This court agreed, reversing the trial court and holding that the purposes of a *Schmidt-Clothier* notice had been fulfilled. The court found that Horace Mann had been actively involved in monitoring the underlying tort case, knew all the information that would have been included in a *Schmidt-Clothier* notice, had sufficient time and information to investigate its subrogation prospects, and knew Elwood intended to settle with the tortfeasors. Further, the court held that Horace Mann had an obligation to inform Elwood that a formal *Schmidt-Clothier* notice was necessary prior to any settlement with the tortfeasors and that its failure to do so would not preclude Elwood from receiving UIM benefits. *Id* at 516.

Likewise, in the present case, Respondents had all the information they needed to decide whether they were going to preserve their subrogation rights with regard to

Appellant's claim. They were represented at the mediation on April 26, 2004, knew that Appellant intended to settle, and were familiar with the identities of all the participants, the policy limits, and the proposed settlement payments. Both then received a written settlement notice. If either Respondent needed more information, they had the obligation, under *Elwood*, to so inform Appellant within the 30-day notice period. Neither one of them did that. Instead, both Respondents waived their subrogation rights, Austin within the 30-day period, and Westfield by failing to respond within the 30-day period.

B. Appellant's notice identified the settlement amount (zero dollars).

Respondents argue that, because Appellant did not receive a payment from Safeco, they were unable to substitute their payment and were therefore unable to preserve their subrogation rights against the tortfeasors. Admittedly, it was not possible for Respondents to substitute their drafts for that of Safeco's payment when Safeco was not making a payment to Appellant. But that does not mean that Respondents were unable to preserve their subrogation rights against the tortfeasors.

It seems obvious that, in order to protect their subrogation rights in this case, Respondents merely needed to reply to Appellant's notice, saying something to this effect: "Since you (Appellant) have not received payment from the liability carrier, there is no payment coming to you for which we need to substitute our own payment. However, we hereby inform you that we do not waive our subrogation rights and inform you that if you complete the intended settlement, you will not be entitled to UIM benefits." Such a response would have placed Appellant on notice of the Respondents'

election to preserve their subrogation rights, and that, if she signed the settlement and released the tortfeasor, she would forfeit her UIM claim. Appellant did not receive any such notice from either Respondent.

IV. Appellant did not interfere with Respondents' subrogation rights.

Respondents argue that Appellant should be denied UIM benefits because her settlement notice referenced substituting a draft for amounts payable to the Posthumus family in order to preserve subrogation, even though it was Appellant who had settled and was asserting the UIM claim. The trial court's memorandum can be interpreted as identifying language in Appellant's notice, referring to repaying \$1.5 million dollars to the Posthumus family, as the "interference" with Respondents' subrogation rights which is the basis of the order granting summary judgment to Respondents. The trial court, in its memorandum accompanying the order for summary judgment, states in part: "The Plaintiff proposes that the defendant UIM carriers could have substituted their check for the money paid to plaintiff's family. And that by failing to do so, they willfully forfeited their subrogation rights. That is legally absurd, unless the defendants desired to preserve their subrogation rights on behalf of the Posthumus family." The memorandum is correct that such an assertion is legally absurd. The memorandum is incorrect that Appellant has made such an assertion. See Appellant's Memorandum in Opposition to Motion for Summary Judgment (A105-116), which contains no such assertion.

It is not clear what Respondents' present objection is to that clearly extraneous language in the settlement notice. Although the notice was inartfully drafted, it was obvious at the time the notice was given that the UIM carriers did not need to substitute

their drafts for money payable to the Posthumus family in order to preserve subrogation for any UIM benefits that might ultimately be paid to Appellant. Surely Respondents do not claim that by mistakenly including such language in the settlement notice, Appellant could actually require them to repay the \$1.5 million paid to the Posthumus family in order to preserve subrogation rights for amounts paid to Appellant. Only the legislature and/or the courts can establish criteria by which subrogation rights may be protected, not Appellant.

Respondents are established insurance companies. Both companies can and do regularly avail themselves of competent legal advice and representation. Both have competent and experienced employees with years of experience dealing with UIM claims. UIM practice and procedure respecting preservation of subrogation rights has long been established in Minnesota case law. Neither Respondent can credibly claim that they did not know, or could not determine in the days following receipt of Appellant's settlement notice, whether or not they really needed to pay \$1.5 million to the Posthumus family to preserve subrogation rights against Appellant. Appellant had advised Respondents in her settlement notice that she had not received any payment from the insurer for the at-fault driver. The presence of extraneous, albeit erroneous, language in the settlement notice should not defeat the effect of the other plain language contained in the notice.

Westfield had already responded to the Posthumous family's settlement notice, indicating that it would not substitute its draft, and has paid \$50,000 in UIM benefits to Karen Posthumus. Surely Westfield understood, at the time it received Appellant's

notice, that none of the Posthumus family was again claiming UIM benefits, and that the company need not pay \$1.5 million to Appellant to preserve subrogation.

Austin did not insure the Posthumus vehicle involved in the collision, and did not insure the Posthumus family. Surely that company knew that, in dealing with Appellant's UIM claim, it had no reason to substitute its draft for amounts payable to the Posthumus family.

Respondents have been dealing with underinsurance issues since inception of the Minnesota No-Fault Automobile Insurance Act. Their employees were familiar with the terms of the settlement in the present case; they knew that Appellant was not going to receive any payment from Safeco and that Appellant intended to claim her UIM benefits from them. It was obvious to them that, without some action by them, Appellant would sign the settlement and release in favor of Paul Brey and Rispens Seeds, and their subrogation rights would be gone. They did nothing to preserve those rights and yet they now claim they were helpless to do so under the prescribed procedures of *Schmidt v. Clothier*.

Until now, Minnesota appellate courts have not been called upon to establish criteria for notice to a UIM carrier in a case where the liability carrier paid its limits to all but one of multiple injured claimants, and the uncompensated injured claimant elected to pursue UIM benefits only. But just because Minnesota cases decided to date have always dealt with instances where some amount was paid by the liability carrier, and have discussed preserving subrogation rights in terms of the UIM carrier "substituting a payment draft" for the settlement amount offered by the liability carrier, it does not

follow that it is impermissible for an injured claimant to settle by taking nothing from the liability carrier.

V. Respondent underinsured carriers were not prejudiced by any defect in the settlement notices provided in this case.

Although *Schmidt v. Clothier* did not specify the consequences of an injured claimant's failure to provide the required notice to its UIM carrier, later cases have held that such failure can result in forfeiture of the claimant's UIM benefits. See *Klang v. American Family Ins. Group*, 398 N.W.2d 49, 52 (Minn. Ct. App. 1986). In *American Family Mut. Ins. Co. v. Baumann*, the Minnesota Supreme Court held that when the injured claimant fails to provide the 30-day written notice of a pending settlement, release of the tortfeasor creates a rebuttable presumption that the UIM carrier has been prejudiced by its inability to protect its subrogation rights. *Baumann*, 459 N.W.2d at 927. Respondents in this case argue that when Appellant signed the release in favor the tortfeasors, prior to the expiration of the *Schmidt-Clothier* 30-day notice, they were somehow prejudiced as a result.

The facts in the present case are not at all similar to the facts in *Klang, supra*. In *Klang*, the injured claimant gave no notice to her UIM carrier prior to settling with the liability carrier. By contrast, Appellant sent a timely *Schmidt-Clothier* notice to Respondents. In *Klang*, the UIM carrier did not have independent knowledge of the settlement, as opposed to the present case where Respondents participated in the mediation leading up to the settlement. In *Klang*, because the UIM carrier did not receive notice and did not have independent knowledge, it was unable to preserve its subrogation

rights. In the present case, where Respondent UIM carriers knew the details of the proposed settlement, neither chose to preserve their subrogation rights. In *Klang*, the injured claimant's underinsured policy specifically provided that failure to comply with notice requirements precluded suit against the underinsurer. There has been no showing in the present case that either underinsured policy contained the same language. *Klang v. American Family Ins. Group*, 398 N.W.2d at 52.

The real issue in this case is not whether Appellant complied with *Schmidt v. Clothier*, but whether the notice given contained sufficient information to allow Respondents to make an informed decision as to whether to preserve their subrogation rights. Appellant sent Respondents a notice that fully complied with all six requirements of *Schmidt v. Clothier*, as discussed above. Both Respondents received the notice, and both waived subrogation. Therefore, they cannot say they were prejudiced, as the underinsurance company in *Klang* was prejudiced, for not receiving notice of Appellant's proposed settlement.

Appellant acknowledges that she signed the release prior to the expiration of the 30-day notice. Her settlement notice was dated May 6, 2004 and she signed the release on May 24, 2004, just eighteen days later. However, Respondent Austin, having first advised Appellant's then-attorney in a telephone conversation that it would send him a letter waiving subrogation rights, did send such a letter dated May 24, 2004, the same day Appellant signed the release. Respondent Westfield admittedly lost Appellant's notice until after expiration of the 30 days and, upon finding the notice, immediately sent its letter dated June 10, 2004, also waiving subrogation.

Because both Respondents waived their subrogation rights, neither was prejudiced as a result of Appellant signing a release in favor of the tortfeasors and Safeco prior to expiration of the 30 days. Respondents' letters clearly establish that neither intended to preserve subrogation rights, whether or not they had 30 days within which to do so. There is no evidence to show that either Respondent even knew that Appellant had signed the release at the time they sent their letters in response to Appellant's notice.

By their own actions, Respondents waived not only their subrogation rights, but also any alleged defects in the notices they received. *See Elwood v. Horace Mann Ins. Co.*, 531 N.W.2d at 516. Any defects that were arguably present in Appellant's notice were as obvious during the 30-day notice period as they are now, yet Respondents did not complain about the length of the notice period in May of 2004. Now, at this late date, Respondents have reconsidered their earlier responses and are attempting to seize upon alleged notice defects which they earlier ignored, in order to defeat Appellant's UIM claim.

This is not the same situation as in *Klang*, where the injured claimant gave no notice at all to the underinsurer. Both Respondents had full knowledge of the terms of Appellant's settlement as early as April 26, 2004. Both Respondents obviously received Appellant's notice, as both responded to it. The timing of Appellant's release has not been shown to be a factor in the decision by either Respondent to waive subrogation rights. Therefore, Respondents have not been prejudiced as a result of Appellant signing the release prior to the expiration of the 30-day notice period and Appellant should not have to forfeit her right to UIM benefits.

CONCLUSION

The district court order in this case held that “[Respondents] fully complied with the *Schmidt-Clothier* protocol when they refrained from sending any money to anyone.” The court implied that nothing further was required of Respondents to preserve subrogation rights against the tortfeasors, but that, by releasing the tortfeasors, Appellant barred Respondent’s subrogation rights. The court stated, “[Appellant] cannot with one hand create legal obstacles for the [Respondents] while with the other she asserts legal claims against those same defendants.” The court concluded: “Given that [Appellant’s] actions had the effect of interfering with the subrogation rights of [Respondents], [Appellant] must be held to have forfeited her right to pursue UIM benefits.”

Clearly, the district court erred in this decision. Nowhere does Minnesota case law define “interfering” with subrogation rights, hold that such interference defeats an otherwise valid *Schmidt-Clothier* notice, or hold that such interference causes an injured claimant to forfeit UIM benefits. Even so, Appellant contends that she did not interfere with Respondents’ subrogation rights, that she did everything that was required of her under the law, and that it was Respondents who were required to act, and did not, in order to preserve their subrogation rights. Appellant, by merely settling for \$0, did not forfeit her right to pursue UIM benefits.

Although the reference to substituting a draft for the \$1.5 million dollar settlement with the Posthumus family was incorrect, the remaining information in Appellants notice of settlement sent to the UIM carriers was sufficient for them to make an informed decision on whether to preserve their subrogation rights.

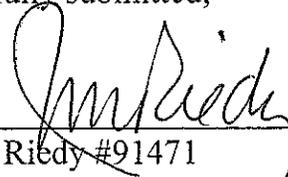
Appellant did not interfere with Respondents' subrogation rights by signing the release prior to the expiration of the 30-day notice period, because both Respondents waived subrogation, one earlier on the same day on which Appellant signed the release, and the other after the expiration of the 30-day notice period. In no way did either Respondent ever object to Appellant signing the release, and they cannot argue now that they were prejudiced as a result.

Finally, Appellant did not interfere with Respondents' subrogation rights or forfeit her right to pursue UIM benefits by agreeing to receive nothing from the Safeco policy. Appellant's settlement was her "best settlement" under *Dohney v. Allstate*, and Respondents cannot deny her UIM benefits just because she received nothing from the liability policy. It was Respondents' failure to act, not anything Appellant did, that caused Respondents to lose their subrogation rights.

Appellant respectfully requests this court to reverse the trial court's order granting summary judgment to Respondents, and remand the matter for trial.

Dated: Aug 8, 2007

Respectfully submitted,



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