

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,

RISPENS SEEDS, INC. AND PAUL RUSSELL BREY,

Third-Party Defendants.

THIRD-PARTY DEFENDANT RISPENS' 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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STATEMENT OF THE LEGAL ISSUES

- I. **Is the underlying settlement enforceable against the defendants and third-party plaintiffs?**

STATEMENT OF THE CASE

Appellant Tena Van Kampen started an action against the Defendants and Third-Party Plaintiffs (Respondents herein), and Defendants and Third-Party Plaintiffs started a Third-Party action against Third-Party Defendants Rispens Seeds, Inc. and Paul Russell Brey (Respondents herein as well) claiming the Third-Party Plaintiffs were entitled to indemnity from the Third-Party Defendants. Third-Party Defendants filed a motion for summary judgment claiming the settlement reached in the underlying action precluded indemnity, the trial court granted the motion, and judgment of dismissal with prejudice was entered. No appeal followed, and it appears Appellant does not challenge this part of the judgment. If such remains true with the other Respondents, the question is moot.

STATEMENT OF FACTS

On August 1, 2000, Paul Russell Brey (“Brey”) was driving a car owned by Rispens Seed, Inc. (“Rispens”) when he hit a car owned and driven by Tena Van Kampen (“Van Kampen”) in which her daughter, Karen Posthumus, and Ms. Posthumus’ three children (Van Kampen’s grandchildren) were riding as passengers (“Posthumus family”). The Posthumus family and Van Kampen were

seriously hurt in the car accident. Brey was driving a car insured with Safeco Insurance Company with a \$1,500,000.00 liability limit.

An action was started against Brey and Rispens; Safeco defended them against the action and, on April 26, 2004, mediated a settlement of all claims against them by offering its policy limit to the Posthumous family and Van Kampen subject to all of them accepting the policy limits and giving Brey, Rispens and Safeco a general release discharging them from any further liability for the accident. The settlement contained no term conditioning the acceptance of the settlement or release upon the preservation of underinsured motors claims or coverage.

ARGUMENT

II. Standard of Review.

No genuine issue of material fact was raised with the trial court on this issue. When there is no genuine issue of material fact, the only question remaining is a question of law, and the appellate courts' review is *de novo*. Dairyland Ins. Co. v. Starkey, 535 N.W.2d 363, 364 (Minn. 1995).

III. Is the underlying settlement enforceable against the defendants and third-party plaintiffs?

As a result of the August 1, 2000 car accident, the Posthumus family and Van Kampen had two claims: 1) a liability claim against Brey and Rispens, and 2) a potential underinsured motorist claim against Waseca Mutual and Westfield.

Brey, Rispens and Safeco (as the liability insurer for Brey and Rispens) settled the liability claim. Preservation of potential underinsured motorists' coverage or subrogation rights was inconsequential to them. Their only interest for settling the liability claim was purchasing their peace from all potential claimants. Brey, Rispens and Safeco recognized the combined value of the personal injury claims exceeded the policy limits for the liability coverage. How the liability claimants divided the pot between themselves was inconsequential to Brey, Rispens and Safeco. Van Kampen's decision foregoing a share in the liability coverage for her damages, and letting her daughter and grandchildren divide the liability coverage between themselves was inconsequential to Brey, Rispens and Safeco as well. Her forbearance was sufficient consideration for her to settle her personal injury claim against them and create an enforceable settlement. Charles v. Hill, 260 N.W.2d 571, 573 (Minn. 1977). The general release contained no term making the settlement or release conditioned upon the preservation of any potential underinsured motorist coverage or subrogation rights.

Release of the tortfeasor destroys an insurer's potential subrogation rights. Bacich v. Homeland Insurance Co., 3 N.W.2d 665 (Minn. 1942). There falls on the tortfeasor and its liability insurer no duty to protect the claimant's uninsured motorist coverage or the UIM insurer's potential subrogation rights.

"The underinsurer, however, will have this subrogation right against the tortfeasor *only* if it has paid underinsurance benefits *prior* to release of the tortfeasor...[The] underinsurer could substitute its payment to the insured in an amount equal to the

tentative settlement...In this situation, the underinsurer's payment would protect its subrogation rights to the extent of the payment, and the insured would receive the amount of the settlement in cash." Schmidt v. Clothier, 338 N.W.2d 256, 263 (Minn. 1983). (Emphasis added.)

Van Kampen as the UIM insured rather than the tortfeasor and its liability insurer is required to take those steps needed to preserve the UIM coverage, and forfeits her UIM coverage when she fails to take those steps and failure to take those steps results in actual prejudice to the UIM insurer (Waseca and Westfield).

"Henceforth, the notice required of the insured shall be 30 days written notice of a settlement agreement which is contingent upon the decision of the injured complainants' underinsurer whether to preserve its potential right of subrogation either by paying underinsured motorist benefits or by substituting its draft for that of the tortfeasor's liability insurer...Absent the required 30-day written notice, release of the tortfeasor shall be deemed prejudicial to the underinsurer. That presumption of prejudice shall be rebuttable, but the burden of demonstrating by a preponderance of the evidence the absence of prejudice shall be borne by the insured. An insured's failure to sustain that burden of proving a lack of prejudice to the insurer shall result in a forfeiture." American Family Mut. Ins. Co. v. Baumann, 459 N.W.2d 923, 927 (Minn. 1990).

Respondents Brey and Rispen claim the release destroyed Waseca's and Westfield's potential UIM subrogation rights, and take no position on the adequacy of *Schmidt* notice, payment necessary to invoke UIM coverage and whether or not there is a genuine issue of material fact over actual prejudice to Respondents Waseca and Westfield because the answers to those questions are

germane only to the loss of UIM coverage rather than preserving the potential UIM subrogation rights.

CONCLUSION

For the reasons above-stated, Respondents Paul Brey and Rispens Seeds, Inc. ask the Court to affirm the trial court's order dismissing with prejudice the claims against Respondents Paul Brey and Rispens Seeds, Inc.

Dated: Aug. 29, 2007

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Third-Party Defendants.

CERTIFICATION OF BRIEF LENGTH

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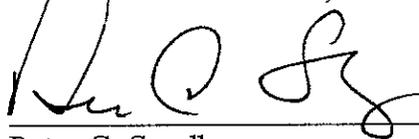
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ.App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 104 lines, 897 words. This brief was prepared using Microsoft Word 2002.

Dated: August 29, 2007

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