
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.

RESPONDENT AUSTIN MUTUAL GROUP'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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STATEMENT OF THE LEGAL ISSUES

- I. **Did the District Court properly determine that Appellant forfeited her right to pursue underinsured motorist benefits from Austin Mutual Group and properly granted summary judgment against her? YES**

District Court's Ruling: The District Court properly granted summary judgment in favor of Austin Mutual Group, Appellant's underinsurance provider, because Appellant failed to give her insurer a proper *Schmidt v. Clothier* notice, thus, not providing the insurance carrier an opportunity to preserve its subrogation rights against the tortfeasor.

List of Most Apposite Cases and Statutory Provisions

- *American Fam. Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923 (Minn. 1990)
- *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983)
- *Behrens v. American Fam. Mut. Ins. Co.*, 520 N.W.2d 763 (Minn. Ct. App. 1994), *review denied* (Oct. 14, 1994)
- Minn. Stat. §65B.49, Subd. 4a

- II. **Did Appellant accept a "best settlement" for her claimed significant injuries by accepting zero in damages from the tortfeasor's policy that had a liability benefit of \$1.5 million? NO**

District Court's Ruling: The District Court made no findings regarding this issue as it became a moot point once the Court held that Respondent's properly refrained from substituting its checks for the \$1.5 million settlement recovered by the Posthumus family who were not insureds of Respondent Austin and that Appellant's release of the liability insurer destroyed Respondents' ability to pursue their subrogation interests.

List of Most Apposite Cases and Statutory Provisions

- *Dohney v. Allstate Ins. Co.*, 632 N.W.2d 598 (Minn. 2001)
- *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983)

STATEMENT OF THE CASE

Appellant Tena Van Kampen commenced an action for underinsured motorist (“UIM”) benefits against Respondents Austin Mutual Group and Westfield Group in July of 2006. Defendants and Third-Party Plaintiffs (Austin and Westfield) commenced a Third-Party action against Third-Party Defendants Rispen Seeds, Inc. and Paul Brey claiming they were entitled to indemnity from the Third-Party Defendants. Respondents Austin Mutual Group and Westfield Group joined in motions for summary judgment claiming the settlement reached in the underlying action resulted in Appellant forfeiting her right to receive UIM benefits. The trial court granted the motions for summary judgment and judgment was entered on May 31, 2007. Appellant appeals from that judgment dismissing her claims against Respondents Austin Mutual Group and Westfield Group.

STATEMENT OF FACTS

Appellant Tena Van Kampen (“Appellant”) was involved in a motor vehicle accident on August 1, 2000 involving Third Party Defendant Paul Brey (“Brey”). [AA-2, AA-4, AA-14, AA-31.] Appellant claims she suffered significant personal injuries as a result of this accident. [AA-3] At the time of the accident, Brey was driving a vehicle owned by Rispen’s Seeds (Rispen), his employer. [AA-2, AA-14, AA-31.] The Rispen’s vehicle was insured by Safeco Insurance Company (“Safeco”) with liability limits of \$1.5 million [AA-14, AA-31.] Appellant was driving a motor vehicle owned by Jeffrey Posthumus, her son-in-law [AA-2, AA-4.] Appellant’s passengers included her daughter, Karen

Posthumus, and her three granddaughters, Kristin, Kayla, and Mariah Posthumus. [AA-14, A-31, AA-84-86.] All of the passengers in the Posthumus' vehicle suffered injuries. [Id.] 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. [AA-1-2, AA-15.] Appellant was insured by Respondent Austin Mutual Group ("Austin") with underinsured motorist coverage limits of \$250,000 per person [AA-1, AA-8.]

The Posthumus family brought a civil suit against Brey and Rispens and Appellant for personal injuries suffered in the August 2000 automobile accident. [AA-46, 47, AA-121.] Appellant did not commence a personal injury action against Brey and Rispens; however, she answered the Posthumus' Complaint and cross-claimed against Brey and Rispens. [AA-57-60.] Appellant has misstated the facts as it pertains to a payment Austin made to the Posthumus family to settle their claims against Appellant. In fact, Austin and the Posthumus family agreed that Austin would pay \$205,000 to the Posthumuses in exchange for a release of their claims against Appellant.

With regard to the claims against Brey and Rispens, the Posthumus family and Appellant reached a settlement agreement with Safeco through mediation on April 26, 2004. [A-122.] The Settlement Agreement and Pierringer Release was signed by the Posthumus family and Appellant on May 24, 2004. [A-122.] Under the terms of the settlement agreement, Safeco agreed to tender its policy limits of \$1.5 million. [AA-66-AA72; AA-97.] The Posthumus family, including

Appellant, decided to split the proceeds as follows: Karen Posthumus received a total value of \$392,000 in settlement of their claims and the three Posthumus children received the following amounts in an approved minor settlement for each child: Kristin Posthumus received \$925,000 as her share of the total recovery; Kayla Posthumus received \$50,000 as her share of the total recovery; and Maria Posthumus received \$50,000 as her share of the total recovery. Appellant agreed to take nothing for her injuries from Safeco. [AA-79, 80.] In exchange for the settlement, the Posthumus family and Appellant executed a "Settlement Agreement and Pierringer Release" on May 24, 2004, to settle all claims against Brey and Rispens Seeds and its insurer Safeco. [AA-66-71.] On that same date, the Posthumus family and Appellant entered into a Loan Receipt Agreement wherein it was agreed that "[t]he Posthumuses shall loan Van Kampen \$30,000 of the settlement proceeds paid by Brey and Rispens upon receipt of the proceeds." [AA-81, 82.] No notice of the Loan Receipt Agreement between the Posthumus family and Appellant was given to Austin.

On or about May 6, 2004, Appellant's attorney sent a letter to Austin, advising that Appellant would not be receiving any proceeds from Safeco and that all of the proceeds from the Safeco Insurance policy would be paid to the Posthumus family. [AA-79.] The May 6th letter further advised that Austin had "the opportunity to substitute their check(s) for the proceeds (\$1.5 million) that are being paid by Safeco to the Posthumus family." On or about May 24, 2004, a representative of Austin sent a response letter to Appellant's attorney advising him

that “Austin Mutual Insurance Group will not be substituting any checks for the BI settlements of the Posthumus claims.” [AA-123.]

Austin did not insure any member of the Posthumus family and; therefore, had no obligation to provide UIM benefits to them and did not substitute its check for \$1.5 million that was offered to the Posthumus family in settlement. Austin did not substitute its check to Appellant, its insured, because Appellant advised Austin that she would receive nothing for her injuries from Safeco, the primary liability carrier in this case. [AA-79, 80.] Appellant admits that Austin could not have substituted its draft to Appellant because she was going to receive nothing from Safeco for her damages. [App. Brief at p. 17.] Appellant did not; however, advise Austin that she was receiving \$30,000 through a Loan Receipt Agreement she entered into with her family on the same day she agreed to take nothing from Safeco directly.

Appellant commenced a case for underinsured motorist benefits against Austin and Westfield in July 2006. [AA-3.] Austin moved for summary judgment alleging Appellant waived her right to receive UIM benefits because she released the primary insurer without claiming any damages under the liability policy and she failed to provide a proper *Schmidt-Clothier* notice to Austin. Austin was unable to protect its subrogation rights based on the settlement and the defective notice provided by Appellant. The district court properly granted summary judgment in favor of Austin. Respondent Austin Mutual Group submits this brief in opposition to Appellant Tena Van Kampen’s appeal.

ARGUMENT

Standard of Appellate Review: Rule 56.03 of the Minnesota Rules of Civil Procedure provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that either party is entitled to judgment as a matter of law.” The non-moving party has the burden of producing specific facts that raise a genuine issue for trial after the moving party has shown that there is an absence of evidence to support an essential element of the non-moving party’s case. *See Hunt v. IBM America Employees Fed. Credit Union*, 284 N.W.2d 853, 855 (Minn. 1986). The non-moving party may not rely upon general factual assertions, but is required to identify specific facts that create a genuine issue for trial. *Id.*; *See Carlisle v. City of Minneapolis*, 437 N.W.2d 712 (Minn. Ct. App. 1989).

On appeal from summary judgment, the Court of Appeals must determine (1) whether there are any genuine issues of material fact and (2) whether the trial court erred in its application of the law. *Lawrence v. Hollerich*, 394 N.W.2d 853, 855 (Minn. Ct. App. 1986). Where there were no material facts in dispute as in this case, summary judgment will only be reversed on appeal if the trial judge incorrectly applied the law to the undisputed facts. *See Id.* Because the trial court in this case properly applied the law relevant to Appellant’s UIM claim, its decision should be upheld by this Court.

I. Summary judgment was properly granted dismissing Respondent Austin Mutual Group from this case because Appellant is not entitled to underinsured motorist benefits when she released the primary liability insurer after accepting nothing for her damages.

A. The purpose of underinsurance coverage is not to provide primary liability coverage to an injured party.

There are two distinct forms of insurance coverage at issue in this case. First, there is primary insurance coverage which provides liability coverage for a motor vehicle accident. In this case, Safeco is the liability insurer and its liability coverage limits were \$1.5 million. Second, there is underinsurance coverage (UIM coverage) which is designed to cover damages only after the primary limits are exhausted and the injured party remains less than fully compensated for her injuries.¹ UIM benefits is purchased by the injured party as part of her own motor vehicle insurance policy. It is impermissible under Minnesota law to convert UIM benefits into primary liability insurance.²

In this case, Appellant took nothing from the \$1.5 million policy limits offered by the liability insurer but is seeking to recover UIM benefits from her own insurer. Appellant is impermissibly seeking to turn her UIM benefits into primary liability insurance. Appellant may not seek to recover her first dollar for her injuries from her UIM carrier rather than the liability insurer.³ Austin's UIM benefits were purchased by Appellant as excess coverage only and it may not be used to bear the full loss and, in effect, be placed into the position of the primary

¹ See *Dohney v. Allstate Ins. Co.*, 632 N.W 2d 598, 606 (Minn. 2001); see also *Washington v. Milbank Inc. Co.*, 562 N W 2d 801, 805 (Minn 1997).

² See *Id.*

³ See Minn. Stat. § 65B.47, Subd 4(b)

insurer's role.⁴ Recovering something from the liability insurer first is "a nonarbitrable condition precedent to bringing an underinsured claim."⁵ Because Appellant voluntarily took nothing from Safeco, she may not now maintain a claim for UIM benefits.

B. Appellant forfeited her right to seek UIM benefits by failing to provide a proper *Schmidt-Clothier* notice to Austin and by accepting nothing for her injuries from the primary liability insurance carrier before releasing it from any further liability in this case.

An injured party may seek UIM benefits from her own insurer in one of only two ways. A claimant may either: (1) commence a lawsuit against the tortfeasor and if she recovers a judgment that exceeds the tortfeasor's insurance liability limits, then she may pursue a UIM claim against her own insurer for the difference between the judgment and her actual injuries; or (2) settle with the tortfeasor and his liability insurer for her "best settlement" which may be less than the liability policy limits, give a *Schmidt Clothier* notice to her UIM carrier, and then maintain her claim for UIM benefits against her own insurer.⁶ In this case, Appellant settled her claim with Safeco by accepting zero from the \$1.5 million offered to the Posthumus family and Appellant and now argues that she can maintain her claim for UIM benefits against Westfield and Austin. Appellant; however, forfeited her right to seek UIM benefits from both Westfield and Austin.

Appellant failed to provide a proper *Schmidt-Clothier* notice to Westfield and Austin. In *Schmidt v. Clothier*, the Minnesota Supreme Court held that an

⁴ See *Continental Cas. Co v. Reserve Ins Co.*, 238 N.W.2d 862 (Minn. 1976).

⁵ *Employer's Mut Companies v Nordstrom*, 495 N.W.2d 856, 857 (Minn. 1993).

⁶ See *Id.*

injured party must give notice to her UIM carrier before accepting a settlement for her injuries from the primary insurer. The notice is meant to allow a UIM carrier to protect its subrogation interests by paying UIM benefits before the tortfeasor is released.⁷ The notice requirement is not just a superficial step in the settlement process, but serves a very important role in the UIM carrier's assessment of the case. A *Schmidt-Clothier* notice must include the following:

- (1) the identity of the insured;
- (2) the identity of the tortfeasor;
- (3) the identity of the tortfeasor's liability insurer;
- (4) the limits of the tortfeasor's liability insurance;
- (5) the agreed upon settlement amount; **and**
- (6) the allowance of a thirty day period for the UIM carrier to consider its position in the matter.⁸

In *Baumann*, the Supreme Court explained that *Schmidt v. Clothier* required that an insured give a 30 day written notice before the insured may release an underinsured tortfeasor so that the UIM carrier has "suitable opportunity" to protect its potential subrogation rights.⁹ In this case, Appellant sent "notice" to Westfield and Austin on May 6, 2004.

When proper notice is given, the UIM carrier is posed with the opportunity to (1) substitute its own check for the proposed settlement; or (2) to waive its right to recover any subrogation interest and allow the insured to accept the settlement and release the tortfeasor.¹⁰ In considering this decision, a UIM carrier will

⁷ See *Behrens v Am. Family Mut. Ins. Co.*, 520 N.W.2d 763, 767 (Minn. Ct. App. 1994), *review denied* (Oct. 14, 1994).

⁸ See *Am. Family Mut. Ins. Co. v Baumann*, 459 N.W.2d 923, 927 (Minn. 1990).

⁹ See *Id.* at 925.

¹⁰ *Id.* at 927.

evaluate relevant factors, including: “(1) the amount of liability insurance remaining, if any; (2) the amount of assets held by the tortfeasor and the likelihood of their recovery via subrogation; (3) the total amount of the insured’s damages; and (4) the expenses and risks of litigating the insured’s cause of action.”¹¹ Austin sent notice to Appellant’s attorney on May 24, 2004, advising that it would not be “substituting any checks for the BI settlements for the Posthumus claims.” Austin was not aware that on May 24, 2004, the same day Appellant signed the Settlement Agreement and Pierringer Release where she agreed to take nothing for her damages from the liability carrier, she also entered into a Loan Receipt Agreement with her family wherein it was agreed they would loan her \$30,000 of the proceeds recovered from Brey and Rispens. Furthermore, it was not until just before the summary judgment motion hearing that Austin learned Rispens held assets sufficient to satisfy or secure a satisfaction of a settlement, judgment, or award in an amount up to \$100,000 and that it was a financially viable company that had not sought any form of bankruptcy protection. [AA-98, 99.] Appellant destroyed Austin’s subrogation interest before it had a chance to appropriately assess its position in this case by taking nothing and then releasing Safeco on May 24, 2004.

“Subrogation is a limited right that comes into existence only after the insurer has paid benefits to its insured.”¹² If a tortfeasor is released before

¹¹ *Behrens*, 520 N.W.2d at 767.

¹² *Behrens*, 520 N.W.2d at 767 (citing *Schmidt v. Clothier*, 338 N.W.2d 256, 261-62 (Minn 1983)).

payment is made to the injured party, then no subrogation interests ever arise.¹³ Appellant's proposition that Austin failed to protect its subrogation interest by neglecting to substitute its check for the \$1.5 million to the Posthumus family, who are not Austin's insureds, is absurd and inconsistent with Appellant's own argument. As stated in Appellant's Brief, "[a]dmittedly, **it was not possible** for Respondents (Austin and Westfield) to substitute their drafts for that of Safeco's payment when Safeco was not making a payment to Appellant." [App. Brief at p. 17 (emphasis added).] If it was impossible for Austin to substitute its draft as admitted by Appellant, then Austin had no ability to protect its subrogation interests. Appellant has admitted that she prevented Austin from being able to protect its subrogation interests in this case.

The Appellant's *Schmidt-Clothier* notice is also defective because the undisputed facts of this case show that Appellant really did recover something from Brey and Rispen on May 24, 2004. The Settlement Agreement and Pierringer Release signed by the Posthumuses and Appellant states that Appellant would take nothing for her injuries; however, she actually took \$30,000 through the Loan Receipt Agreement she signed with the Posthumuses. In actuality, Appellant accepted \$30,000 of the \$1.5 million on the day the settlement agreement was signed but she neglected to inform Austin of the Loan Receipt Agreement. [AA-79, 80.]

¹³ See *Id.*

The District Court properly granted summary judgment to Austin and Westfield because Appellant failed to provide a proper *Schmidt-Clothier* notice as explained above. *Schmidt v. Clothier* intended to protect the subrogation interests of UIM carriers. Appellant has interfered with Austin's ability to protect its own interests and her claim for UIM benefits was properly denied because interfering with a UIM carrier's ability to maintain its subrogation rights results in a forfeiture of her right to claim UIM benefits from Austin. The consequence for failing to provide a proper *Schmidt-Clothier* notice is forfeiture of the insured's right to seek UIM benefits;¹⁴ therefore, Appellant's appeal should be denied.

II. Appellant failed to secure her "best settlement" when she accepted zero from the \$1.5 million offered in settlement for her injuries and that her agreement to release Safeco from any further liability has prejudiced Austin.

Not only did Appellant fail to give a proper *Schmidt-Clothier* notice to the prejudice of Austin, but Appellant also failed to secure her best settlement when she accepted \$0.00 from the \$1.5 million settlement offer from Safeco. A plaintiff should negotiate her best possible settlement before releasing the tortfeasor from further liability.¹⁵ In this case, Appellant sustained injuries in a motor vehicle accident and the car at fault for the accident was insured by a \$1.5 million liability policy. Appellant's daughter and three granddaughters were also injured as passengers in the car that Appellant was driving. Safeco offered its policy limits to the Posthumus family and Appellant. Appellant made a decision after

¹⁴ See *Behrens*, 520 N.W.2d at 767.

¹⁵ See *Schmidt*, 338 N.W.2d at 264 (Justice Todd's dissenting and concurring opinion).

conferring with her family that two of her granddaughters, Kayla and Maria Posthumus, would each receive \$50,000 for their minor injuries and that she, their grandmother, would take nothing for her significant injuries. The \$50,000 award to Kayla and Maria was a gross exaggeration of their damages. Kayla only incurred \$7,515.28 in medical expenses and Maria only incurred \$5,427.95 in medical expenses. A jury later awarded these children only \$22,515.28 (includes \$15,000 for past bodily and mental harm) and \$20,427.95 (includes \$15,000 for past bodily and mental harm) respectively. [AA-85.] Based on the disparity in the injuries between Appellant's two granddaughters and herself, and the settlement offered by Safeco, Appellant's settlement cannot credibly be characterized as her "best settlement."

There are myriad possibilities for apportioning the \$1.5 million among the injured parties in this case. The best possible settlement for Appellant would have been to demand a percentage of the settlement proceeds offered based on the extent of her injuries. In fact, Appellant believed her damages were at least \$30,000 because she entered into a Loan Receipt Agreement with her family on the same day she signed the Settlement Agreement and Pierringer Release with Safeco. The terms of the agreement were that Appellant's family would loan her \$30,000 of their recovery and the same would only be repayable to them if Appellant recovered any UIM benefits. [AA-81-AA-82.] Appellant agreed that her damages were worth at least \$30,000; therefore, she admittedly did not accept her best settlement when she took nothing from Safeco.

It is a fallacy for Appellant to argue that “[i]n essence, any settlement is a ‘best settlement.’” [App. Brief at p. 12.] If that were taken to its literal meaning, then any plaintiff could accept zero for her injuries and look to her UIM benefits for compensation as a first party insurer. The Supreme Court in *Dohney v. Allstate Insurance Company*,¹⁶ did not adopt a new test for determining the “best settlement” requirement promulgated under *Schmidt v. Clothier*; however, this does not stand for the conclusion that accepting zero is an insured’s “best settlement.” In *Dohney*, the Court echoed its holding in *Schmidt v. Clothier* with regard to an insured’s best settlement by stating that “[t]he insured has the right to accept *what he or she considers the best settlement available* and to proceed to arbitrate the underinsurance claim * * *.”¹⁷ In this case, Appellant did not negotiate her best settlement, but rather, negotiated the “best settlement” for her daughter and young granddaughters.

Appellant’s UIM claim was properly denied because she forfeited her right to claim UIM benefits when she released Safeco without taking anything for her damages and by interfering with Austin’s right to protect its subrogation interests, all of which has prejudiced Austin’s position in this case. The Supreme Court has confirmed that there shall be a presumption of prejudice to the UIM carrier when the injured party releases the tortfeasor without a proper *Schmidt-Clothier* notice.¹⁸ The burden of rebutting this presumption falls on Appellant who must demonstrate

16 632 N.W.2d 598 (Minn. 2001).

17 *Dohney*, 632 N.W.2d at 604.

18 See *Behrens*, 520 N.W.2d at 767 (citing *Baumann*, 459 N.W.2d at 927).

by a preponderance of the evidence that Austin has not been prejudiced by her release of Safeco.¹⁹ Appellant has not carried her burden in this case. As argued above, Appellant did not provide a proper *Schmidt-Clothier* notice. Furthermore, Austin's position has been prejudiced since it was discovered later that the tortfeasor's financial status is such that it could have satisfied a judgment or settlement in an amount of up to at least \$100,000. In fact, Appellant points out that it was not until *after* she released Safeco that Austin and Westfield discovered the tortfeasor's "financial wherewithal to pay a subrogation claim" through their own discovery efforts and not through any pre-settlement information offered by Appellant. [AA-115.] The tortfeasor's financial status is one of the factors a UIM carrier would likely consider in assessing the likelihood of recovery of those assets via subrogation.²⁰ Because Appellant cannot disprove the prejudice that has attached to Austin, the legal consequence is forfeiture of her UIM claim.

CONCLUSION

Appellant Tena Van Kampen forfeited her UIM claim against Austin Mutual Insurance. Austin Mutual Group was properly dismissed from this action as a matter of law and Appellant cannot shift the burden of proof to Respondents because she failed to protect her claim for UIM benefits. For all of the reasons stated above, Respondent Austin Mutual Group respectfully requests this Court affirm the decision of the district court.

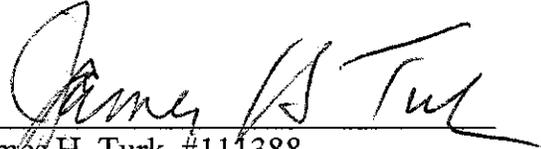
¹⁹ See *Id.*

²⁰ See *Id.* at 768 (citing *Schmidt*, 338 N.W.2d at 263); see also *Elwood v. Horace Mann Ins. Co.*, 531 N.W.2d 512, 516 (Minn. Ct. App. 1995)(holding that no prejudice attached to the UIM carrier because the claimant had presented evidence that the tortfeasors were poor prospects for subrogation))

Dated this 5th day of September, 2007.

Respectfully Submitted,

BLETHEN, GAGE & KRAUSE, PLLP

A handwritten signature in black ink, appearing to read "James H. Turk". The signature is written in a cursive style and is positioned above a horizontal line.

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