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**State of Minnesota**  
**In Court of Appeals**

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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.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### 1. **The Loan Receipt Agreement between the Posthumus Family and Appellant is irrelevant to this case.**

Both Respondents correctly point out that on the same day she signed the Settlement Agreement, Appellant also entered into a Loan Receipt Agreement with the Posthumus Family. Pursuant to the terms of that Agreement, the Posthumus Family loaned Appellant \$30,000 of its settlement proceeds, which is repayable only if Appellant recovers UIM benefits. Respondents incorrectly characterize this loan as liability coverage in disguise, which they say Appellant is attempting to replace with UIM benefits (Westfield Brief p. 19-20). Austin Mutual goes so far as to say that for Appellant to accept a \$30,000 loan from her family is the same as if Appellant had accepted \$30,000 in settlement proceeds from the tortfeasors (Austin Mutual Brief p. 11). Respondent Austin Mutual complains that Appellant did not give it notice of this Loan, presumably in her *Schmidt-Clothier* notice (Austin Mutual Brief pp. 5, 10, 11).

The fact that Appellant accepted a loan from her family is irrelevant to this case. It has no bearing on whether she settled with the tortfeasors, or whether her settlement was a “best settlement.” It has no bearing on whether she was underinsured, which she certainly was. Finally, it has no bearing on whether her *Schmidt-Clothier* notice was valid. It is simply a “red herring,” on which Respondents are focusing, instead of focusing on their responsibility to pay UIM benefits to Appellant.

Respondent Westfield contends that Appellant is illegally attempting to convert UIM benefits to liability benefits, citing *Kelly v. State Farm Mut. Auto. Ins. Co.*

(Westfield Brief p. 20). But *Kelly* can be distinguished from the facts in the present case.

In *Kelly*, a passenger was injured in a car owned and driven by her husband. Mrs.

Kelly's damages exceeded the liability limit on her husband's car, so she brought a UIM claim against a separate policy that insured a second car owned by her and her husband.

The insurance company denied her claim and the court affirmed, holding:

“When a liability claim is made on one policy and a UIM claim is made on a second policy, both of which list the tortfeasor as an insured, allowing the UIM claim would result in the payment of additional benefits for injuries caused by the negligence of the insured tortfeasor, which is, as we stated in *Lynch*, the “essence of liability coverage.” *Kelly v. State Farm Mut. Auto. Ins. Co.*, 666 N.W.2d 328, 331 (Minn. 2003).

In *Kelly*, the court declined to benefit a tortfeasor, who had neglected to obtain adequate liability coverage, by requiring his insurance company to supplement that coverage with UIM coverage. In the present case, Appellant was not the tortfeasor; therefore, the holding in *Kelly* does not apply here. Appellant is not attempting to convert any policy; she is simply attempting to obtain the UIM benefits to which she is entitled. It is not Appellant's fault that the Safeco liability policy was not adequate to pay all the damages sustained in the accident involving its insured.

Respondent Austin likewise claims that Appellant's UIM benefits were purchased by her as excess coverage only and may not be used as primary coverage, citing *Continental Cas. Co v Reserve Ins. Co.*, 307 Minn. 5, 238 N.W.2d 862 (1976).

However, a close reading of the language in that case indicates that it actually supports Appellant's position:

“Primary coverage is designed to cover liability from zero to certain policy limits (in this case \$50,000); excess coverage is designed to cover liability only after those initial limits are exhausted.” *Continental Cas. Co.*, 238 N.W.2d at 865.

If the Safeco policy is the “primary coverage” and the Respondents’ policies are the “excess coverage” in this case, it is clear that the primary coverage has been exhausted and the excess coverage should now be available to cover the remaining liability. It should be noted that the *Continental* case was not a UIM case, but rather a dispute between various insurers.

There is no fraud or collusion going on here between Appellant and the Posthumus Family, as suggested by Respondent Westfield (Westfield Brief p. 30). Accepting a loan from her daughter’s family enabled Appellant to receive funds sooner than she would have received them from Respondents. And, no matter what Respondents say, the liability policy in this case was exhausted by the staggering amount of damages, triggering UIM benefits for any party, including Appellant, who did not receive adequate compensation.

**2. Appellant’s *Schmidt-Clothier* notice is not defective just because she did not specify that she intended to sign the Settlement Agreement.**

Respondent Westfield complains that Appellant’s *Schmidt-Clothier* notice did not specifically indicate that she intended to sign the Settlement Agreement and release the tortfeasors from any liability to her (Westfield Brief p. 6). Respondent Westfield wants the court to believe that it did not know Appellant was going to release the tortfeasors, despite the fact Westfield attended the mediation at which the settlement was negotiated. Respondent Westfield argues that it attended the mediation solely because the Posthumus

family was seeking liability benefits from it, and not because of Appellant's potential UIM claim (Westfield Brief p. 6, Footnote 2). Yet, Westfield was represented at the mediation and, therefore, would have known that any settlement in favor of its insureds (the Posthumus Family) was conditioned upon Appellant signing the Settlement Agreement and releasing the tortfeasors.

Respondent Westfield does not dispute that it received a *Schmidt-Clothier* notice from Appellant. Yet Respondent claims it could not tell from the notice that Appellant intended to release the tortfeasors and that this oversight made the notice defective (Westfield Brief p. 26). The notice plainly states: "This letter is our Schmidt v. Clothier notice." Respondents repeatedly cite *Schmidt v. Clothier* and successive cases to point out flaws in Appellant's notice, yet fail to appreciate that the only time a *Schmidt-Clothier* notice is sent is when an injured party intends to settle with a tortfeasor. Why else would Appellant have sent a *Schmidt-Clothier* notice if she did not intend to settle with Safeco and release Brey and Rispen Seeds? The fact that she did not specifically state her intentions in the notice does not make it defective, since the whole purpose of a *Schmidt-Clothier* notice is to communicate an intent to settle. There is no requirement that the notice state the obvious. Pursuant to *Elwood*, if either Respondent questioned why Appellant was sending them a *Schmidt-Clothier* notice, it was their obligation to contact Appellant and request more information. *Elwood v. Horace Mann Ins. Co.*, 531 N.W.2d 512, 516 (Minn. Ct. App. 1995).

Respondents misstate the facts when they say that Appellant was never identified in the Posthumus litigation as a plaintiff or a claimant (Westfield Brief pp. 10 and 24-5).

Respondents fail to acknowledge that in her answer to the Posthumus Family Complaint, Appellant also cross-claimed against Brey and Rispens Seeds (A57-59). Incidentally, this Answer and Cross-Claim was prepared and filed by the attorney Westfield provided to Appellant. Therefore, Appellant was a “claimant” in any settlement negotiations with Safeco, Brey and Rispens Seeds.

**3. Respondent Westfield may not raise a new issue on appeal: whether Appellant entered into the Settlement Agreement without receiving consideration.**

Respondent Westfield argues that Appellant entered into the Settlement Agreement without receiving consideration (Westfield Brief p. 18). In other words, Westfield argues that the Settlement Agreement was not valid because Appellant did not receive any settlement proceeds. In making this argument, however, Westfield raises a new issue, or at least a new theory, on appeal, which this Court may not consider, since this issue was not addressed by the trial court in the summary judgment hearing.

In *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988), the Minnesota Supreme Court held: “A reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it,’” citing *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982). *Id.*, at 582. Further, the Court held: “Nor may a party obtain review by raising the same general issue litigated below but under a different theory,” citing *Pomush v. McGroarty*, 285 N.W.2d 91, 93 (Minn. 1979) and *Security Bank of Pine Island v Holst*, 298 Minn. 563, 564, 215 N.W.2d 61, 62 (1974). *Id.*, at 582.

Further, this is not Respondent's issue to raise. Neither Appellant, nor Safeco, nor either of the tortfeasors is challenging the Settlement Agreement for lack of consideration. Respondent is not a party to the Settlement Agreement and therefore not in a position to raise issues regarding the Settlement Agreement, including lack of consideration.

Even if this issue had been raised below, it is clear that Appellant did receive consideration in return for signing the Settlement Agreement and releasing the tortfeasors. Her consideration was enabling her daughter and her daughter's children to be more fully compensated for their injuries than they would have been if Appellant had taken some of the settlement proceeds. Appellant acted out of love for her family, the value of which cannot be quantified.

The law recognizes that consideration can be valuable without having to be monetary and that a contract can be valid even if one party agrees to do something without receiving a monetary benefit. See *Galbraith v. Clark*, 138 Minn. 255, 258, 164 N.W. 902, 903 (1917), *Albert Lea College v. Brown's Estate*, 88 Minn. 524, 534, 93 N.W. 672, 675 (1903) and *Ketterer v. Independent School Dist. No. 1 of Chippewa County*, 248 Minn. 212, 222-223, 79 N.W.2d 428, 436 (1956) (valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers of value to him).

## CONCLUSION

Appellant was injured in an auto accident that was not her fault. Because of the extent of her passengers' injuries, it has been determined that the at-fault vehicle was underinsured by more than \$185,000, not including Appellant's damages. Appellant received no compensation from the liability policy on the at-fault vehicle, and the extent of her damages has yet to be determined. Because the at-fault vehicle was underinsured, UIM benefits should be available from two policies to pay Appellant's damages. Yet Respondents, who wrote those policies, decline to pay Appellant anything simply because she took nothing from the liability policy. The trial court agreed with the Respondents and granted them summary judgment. This is the wrong result under the Minnesota No Fault Automobile Insurance Act. The intent of the Act is that UIM benefits be paid to individuals, like Appellant, who are underinsured.

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

Dated: Sept 14, 2007

Respectfully submitted,



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