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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1621**

Brent R. Richter,
Respondent,

vs.

Progressive Preferred Insurance Company,
Appellant.

**Filed June 8, 2010
Motion granted; appeal dismissed
Minge, Judge**

Hennepin County District Court
File No. 27-CV-08-27141

Michael C. Van Berkom, Borkon, Ramstead, Mariani, Fishman & Carp, Ltd.,
Minneapolis, Minnesota (for respondent)

William L. Davidson, Brian A. Wood, Jeffrey A. Muszynski, Lind, Jensen, Sullivan &
Peterson, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant insurer challenges the district court's determination that its policy provides uninsured-motorist (UM) benefits to respondent/insured/injured party, arguing that Minn. Stat. § 65B.49, subd. 3a(5) (2008) precludes coverage once the insured/injured

party has accepted UM benefits from another source. Because this issue was not argued to or considered by the district court, we grant respondent's motion to dismiss.

FACTS

On October 27, 2006, respondent Brent Richter was driving a marked State Patrol vehicle when he was struck from behind by an uninsured vehicle. As a result of the accident, Richter sustained injuries, some of which are permanent.

At the time of the accident, Richter's employer, the Minnesota State Patrol, had a benefit arrangement for its officers. The State Patrol paid Richter \$25,000, its UM type benefit limit, which did not fully compensate him for his injuries. Richter had UM coverage under a personal automobile policy provided by appellant, Progressive Preferred Insurance Company (Progressive policy), which provided a UM coverage limit of \$100,000. Richter sought UM benefits under his Progressive policy, but appellant denied coverage.

In October 2008, Richter sued appellant seeking UM coverage under his Progressive policy. Appellant moved for summary judgment, contending that its policy did not provide excess UM coverage to Richter. Appellant claimed that under Minnesota's No-Fault Automobile Insurance Act, Minn. Stat. §§ 65B.41–.71 (2008) (the No-Fault Act), an injured party had to be in a "motor vehicle" to be entitled to excess UM benefits and Richter's State Patrol vehicle was not a "motor vehicle" under the terms of either the Progressive policy or the No-Fault Act definition of a "motor vehicle."

The district court agreed that under the No Fault Act a marked patrol vehicle was not a "motor vehicle," and that the Act did not require the insurer to provide excess UM

coverage. However, the district court carefully analyzed the Progressive policy and concluded that its definition of motor vehicle was more expansive than the statute and denied appellant's motion for summary judgment, concluding that the Progressive policy provided excess UM coverage because it went beyond the No Fault Act.

In late June 2009, the parties settled Richter's claims and stipulated to a \$53,000 final judgment consistent with *Indep. Sch. Dist. 833 v. Bor-son Constr., Inc.*, 631 N.W.2d 437 (Minn. App. 2001), to facilitate an appeal of disputed legal issues. Based upon the stipulation, the district court ordered judgment in favor of respondent for \$53,000. This appeal followed.

Respondent moved to dismiss this appeal, arguing that it was based on an issue not argued to or considered by the district court or covered by the stipulation. We deferred ruling on this motion until consideration of the appeal on the merits.

D E C I S I O N

The first issue is whether appellant waived the argument that Minn. Stat. § 65B.49, subd. 3(a)(5) (2008), precludes coverage once the insured/injured party has accepted UM benefits from another source. Generally, we will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). "Nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Id.* "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Id.* at 582-83 (citing *Plowman v. Copeland, Buhl & Co., Ltd.*, 261 N.W.2d 581, 583 (Minn. 1977)).

But, we may review an argument raised on appeal that refines the argument made below, if the argument on appeal is not “different in kind” from the argument below, and the argument on appeal does not center upon “key facts” never presented to the district court. *Jacobsen v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 522-23 (Minn. 2007).

Further, *Thiele* is not an “ironclad rule.” *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (quotation omitted). A “well-established” exception to *Thiele* allows this court to consider an issue where that issue is “plainly decisive of the entire controversy on its merits, and where, as in [a case] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question.” *Watson v. United Servs. Auto. Ass’n*, 566 N.W.2d 683, 687 (Minn. 1997) (emphasis omitted, substitution in original). Additional factors favoring review include whether: the issue is a novel issue of first impression; “the issue was raised prominently in briefing; the issue was ‘implicit in’ or ‘closely akin to’ the arguments below; and the issue is not dependent on any new or controverted facts.” *Id.* at 687-88.

We first consider whether appellant raises an issue on appeal that was not raised below. To summarize, appellant argued below that neither the No Fault Act nor its policy definition of a “motor vehicle” includes a marked patrol car and that, therefore, Richter was not entitled to excess UM coverage under the Progressive policy. Appellant also argued that this policy obligated Richter to first seek UM benefits from the State Patrol, because he was not occupying a “covered vehicle” under the Progressive policy.

On appeal, appellant focuses solely on Minn. Stat. § 65B.49, subd. 3a(5). The argument based on this statute is intricate. Appellant continues to claim that the No-Fault Act definition of a “motor vehicle” does not include a marked patrol car. Thus, appellant argues that Richter was not occupying a “motor vehicle” during the accident. The argument continues that under Minn. Stat. § 65B.49, subd. 3a(5), because Richter as an injured party was not occupying a “motor vehicle,” he would be “entitled to select any one limit of liability for any one vehicle afforded by a policy” under which he had insurance coverage. Appellant’s argument concludes that because Richter already collected UM benefits from the State Patrol policy, he “selected” the limit of liability from that “policy,” and therefore could not recover excess UM benefits from the Progressive policy.

Thus, appellant argued that because the definition of a “motor vehicle” did not include a marked patrol car, the Progressive policy did not provide any excess UM benefits to Richter. But on appeal, appellant argues that Minn. Stat. § 65B.49, subd. 3a(5), precluded respondent from recovering UM benefits under more than one policy.

Unlike the *Jacobson* case, here appellant does not merely “refine” its argument to the district court. The appellant in *Jacobson* argued to the district court that he rebutted the presumption of forfeitability of currency found in proximity to illegal drugs by using the testimony of a witness and by “inferences reasonably drawn by all relevant evidence.” 728 N.W.2d at 523. On appeal, Jacobson argued that the district court erred in considering witness credibility in determining whether he rebutted the presumption of

forfeitability. *Id.* While both of Jacobson’s arguments involved the question of whether witness testimony rebutted the presumption of forfeitability, appellant’s arguments in this case are dissimilar. Appellant’s arguments on appeal are inconsistent with its apparent handling of this claim. At the outset, appellant told Richter that under the Progressive policy he was obligated to first seek coverage from the State Patrol policy. Now appellant claims that respondent “selected” the limit of liability from the State Patrol policy. Appellant’s initial strategy is “different in kind” from the argument appellant now makes.

Appellant asks us to apply the “well-established” exception to *Thiele* to consider the statutory-selection-of-coverage issue, arguing that this issue has been briefed and is “plainly decisive of the entire controversy on its merits.” *See Watson*, 566 N.W.2d at 687. Accordingly, we analyze the factors underlying the *Theile* exceptions.

The statutory-selection issue raises a discrete legal issue: whether Minn. Stat. § 65B.49, subd. 3a(5) precludes an insured party from recovering UM benefits under a personal policy where the party first received UM benefits from another source. Although the statutory language appears straightforward, resolution of this issue may depend on facts not found by or evidence not presented to the district court. Notably, although appellant argued to the district court that the policy required Richter to first seek UM benefits from the State Patrol, rather than under the Progressive policy, the trial record does not indicate why Richter did so. Conduct by Progressive or its agents may have indeed led Richter to first seek UM recovery from the State Patrol and could lead a trier of fact to determine that Richter did not freely “select” the limit of liability from the

State Patrol. Furthermore, the basis of UM benefits from the State Patrol is not identified in the record. Possibly a State Patrol benefit parallels UM benefits without being part of an actual insurance program to say nothing of being an insurance “policy” as required by the statute. Here, the basis for State Patrol UM benefits is neither in the record nor identified in the briefs. Because resolution of this statutory-selection issue on appeal may depend on facts not found or even appearing in the record, it is unsuitable for our review.

The statutory-selection issue is also not closely akin to appellant’s arguments below. Below, appellant argued that because the definition of a “motor vehicle” did not include a marked patrol car, the Progressive policy did not provide any excess UM benefits to Richter. But on appeal, appellant argues that Minn. Stat. § 65B.49, subd. 3a(5) precluded respondent from recovering UM benefits under more than one policy. Appellant’s argument below completely denies the possibility that Richter could have obtained UM benefits under the Progressive policy. But appellant’s argument on appeal appears to admit that Richter could have obtained UM benefits under the Progressive policy if Richter had first sought to obtain UM benefits from Progressive rather than the State Patrol. Moreover, appellant’s argument below that its policy obligated Richter to first seek UM coverage from the State Patrol policy is inconsistent with the argument appellant now makes—namely, that Richter “selected” the limit of liability from the State Patrol, according to Minn. Stat. § 65B.49, subd. 3a(5).

Based on the foregoing considerations, we conclude that “well-established” exceptions to *Thiele* do not apply to the statutory-selection-of-coverage issue raised by appellant in this appeal and we decline to consider it.

Additionally, we note that appellant did not brief the issue of whether the district court erred in deciding that the Progressive policy definition of a “motor vehicle” provides excess UM coverage to respondent. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Since appellant has waived this issue, we decline to consider it.

We finally note that this appeal is taken pursuant to a stipulation of the parties. This stipulation allowed a final judgment on damages while preserving appellant’s right to seek review of the district court’s decision. Richter argues that because appellant’s statutory-selection-of-coverage argument goes beyond anything considered in the district court decision, it is outside the stipulated scope for this appeal. Although the stipulation states that it is “limited to review of the district court’s decision to deny [appellant’s] Motion for Summary Judgment,” it preserves appellant’s right to “obtain a final appellate determination of the uninsured motorist benefits available, if any, under the motor vehicle *policy*” issued by appellant to respondent (emphasis added). This limits the appeal to the policy as opposed to statutory issues. Based on the provisions of the stipulation, we conclude that it restricts this appeal to the issue of UM benefits available under the Progressive policy and that the statutory-selection-of-coverage issue is not properly raised.

In conclusion, appellant’s statutory-selection-of-coverage argument was not argued to or considered by the district court, and we decline to address it. The policy-coverage issue that formed the basis of the district court’s decision was not briefed by

appellant and was waived on appeal. Accordingly, we grant respondent's motion to dismiss this appeal.

Motion granted; appeal dismissed.

Dated: