STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1886

Jessica Jean Strong,
Appellant,

vs.

Joanne Rose Lange,
Respondent,

State Farm Insurance Company,
Respondent.

Filed April 21, 2014
Affirmed; motions denied
Randall, Judge[*]

Winona County District Court
File No. 85-CV-11-335

Scott Wilson, Minneapolis, Minnesota; and

James Vander Linden, LeVander & Vander Linden, P.A., St. Louis Park, Minnesota (for respondent Joanne Rose Lange)

Paul J. Rocheford, Paul E. D. Darsow, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for appellant)

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota; and

Nicholas L. Klehr, Minnetonka, Minnesota (for respondent State Farm Insurance Company)

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Paul D. Peterson, Lori L. Barton, Harper & Peterson, P.L.L.C., Woodbury, Minnesota (for amicus curiae Minnesota Association for Justice)

Considered and decided by Rodenberg, Presiding Judge; Johnson, Judge; and Randall, Judge.

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

In this consolidated appeal, appellant challenges the district court's confirmation of an arbitration award ordering appellant to pay $89,296.92 in damages. Appellant argues that she and respondent Joanne Lange agreed to arbitration as a means to settle their dispute and that their arbitration agreement contractually limited appellant's liability to $30,000, the amount of appellant's insurance-policy limit.

We conclude that the district court did not err by determining that the parties' arbitration agreement was ambiguous and that arbitration was intended to conclude their tort action. Judgment exceeding appellant's liability limit was required to bind Lange's underinsured motorist (UIM) carrier, State Farm Insurance Company (State Farm), to the damage award. We affirm the district court's order that respondent Lange is entitled to $89,296.92. Of this amount, appellant is responsible for $30,000, State Farm is responsible for $59,296.92, and State Farm retains its subrogation rights.

FACTS

On February 12, 2009, respondent Joanne Lange suffered personal injury as a result of an incident involving a vehicle driven by appellant Jessica Strong. At the time of the incident, Lange was insured by respondent State Farm with an UIM policy limit of

$100,000. Appellant was insured by Progressive Insurance, with a liability policy limit of $30,000.

In February 2011, Lange brought suit against appellant. The day after she filed suit, Lange sent her insurer, State Farm, notice of the suit and her intent to seek UIM benefits. During the course of litigation, counsel opted to resolve the suit via binding arbitration. Appellant's attorney suggested "high/low arbitration" in lieu of a jury trial. Lange's counsel agreed that "high/low arbitration" was a good solution, but wanted to first confirm that if he gave notice to State Farm he could "stick them with any amount over [appellant's] policy limits." In May 2012, Lange notified State Farm that she and appellant were planning to attend arbitration and that Lange intended to seek UIM benefits from State Farm for any damages exceeding $30,000.

In June 2012, Lange and appellant executed a contract entitled "Best Settlement Agreement." Under this agreement an arbitrator would determine the "best settlement" of Lange's claims. The parties acknowledged that they had a right to a jury or bench trial, and expressly waived that right in favor of a "binding best settlement determination." They agreed that the highest settlement of the claims would be $30,000 and the lowest would be $0. The arbitrator would determine Lange's damages by making "all of the appropriate deductions or set-offs from the award that would have been mandated by Minnesota law had this matter been tried to the court and jury. . . ." And Lange "reserve[d] the right to have an opportunity to protect her rights to underinsured motorist (UIM) coverage under Schmidt v. Clothier and/or Butzer notice to her underinsured motorist carrier."

On July 12, 2012, State Farm filed its motion to intervene with the district court. That same day, the district court issued an order staying arbitration to provide State Farm a chance to be heard as to whether it should be bound to the arbitration award. Appellant and Lange, having not yet received the district court's order, proceeded to arbitration on July 16; State Farm did not participate. On July 20th an arbitration award was issued finding appellant 100% negligent and awarding Lange a total of $109,296.92 in damages.

Lange filed a motion to confirm the arbitration award with the district court. Lange sought confirmation of $89,296.92, which represented the amount that the arbitrator had determined Lange was entitled to, $109, 296.92, minus a $20,000 offset for the no-fault benefits Lange had already received. Lange also filed a motion for summary judgment, requesting that State Farm be ordered to pay $59,296.92, the balance of the amount awarded by the arbitrator after Lange had collected $30,000 from appellant. The district court entered judgment against appellant in the amount of $89,296.92, finding that "[d]espite the title of the agreement . . . the parties intended the award to address the total damages to which [Lange] would be entitled, not just the amount of damages to be paid by [appellant]." That same day the court issued a "companion order" granting Lange's motion for summary judgment, ordering State Farm to pay Lange $59,296.92.

Both State Farm and appellant filed separate appeals, which were consolidated. However, due to State Farm's failure to properly serve its appeal papers, we dismissed State Farm's appeal as untimely. We allowed State Farm to remain a respondent in the present action, limiting its interests to the protection of its subrogation rights should we

reverse in appellant's favor and order reduced payments. In this appeal appellant has also motioned to strike portions of appellant's brief and the brief of the amicus curiae.

D E C I S I O N

Before an individual can make a UIM claim, an injured party's cause of action must conclude, and the injured party must first recover from the tortfeasor's liability insurance policy. *Emp'rs Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 856 (Minn. 1993). There are two ways in which this can be done:

> [T]he injured claimant can either (1) pursue a tort claim to a conclusion in a district court action, and then, if the judgment exceeds the liability limits, pursue underinsured benefits; or (2) settle the tort claim for "the best settlement," give a *Schmidt–Clothier* notice to the underinsurer, and then maintain a claim for underinsured benefits.

Id. at 857.

In the first instance, a tort action pursued to its conclusion, the notice requirement is governed by *Malmin v. Minn. Mut. Fire & Cas. Co.*, 552 N.W.2d 723 (Minn. 1996). Under *Malmin*, the UIM carrier is provided with an opportunity to intervene, and is bound to the damages award. 552 N.W.2d at 727-28. The second scenario is governed by *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), and typically referred to as a *Schmidt*-type settlement. Under *Schmidt*, after the injured party and tortfeasor settle, a UIM carrier can protect its subrogation interests by "substitut[ing] its payment to the insured in an amount equal to the tentative settlement" and then, as subrogee, maintain the insured's tort action against the tortfeasor. 338 N.W.2d at 263. An arbitration proceeding may function as either a settlement or a conclusion of a tort action. *Kluball v.*

Am. Family Mut. Ins. Co., 706 N.W.2d 912, 916 (Minn. App. 2005). But "an insured must characterize an arbitration award as either a settlement or a conclusion of a tort action and may not rely on both characterizations when pursuing UIM benefits." *Id.*

I.

Appellant argues that because the parties agreed to a *Schmidt*-type settlement the district court erred by ordering her to pay $89,296.92 when the agreement expressly limited her liability to $30,000. We must determine whether the parties' arbitration agreement unambiguously expressed an intention to enter into a *Schmidt*-type settlement, and if the agreement was ambiguous, whether extrinsic evidence shows that a *Schmidt*-type settlement was intended all along.

A. The parties' arbitration agreement was ambiguous.

Contract principles apply to agreements to arbitrate. *Lucas v. Am. Family Mut. Ins. Co.*, 403 N.W.2d 646, 648 (Minn. 1987). "The interpretation of a contract is a question of law if no ambiguity exists, but if ambiguous, it is a question of fact and extrinsic evidence may be considered." *City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). A contract is ambiguous if its language is reasonably susceptible of more than one meaning. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982).

Here, the parties' contract could be interpreted as either a *Schmidt*-type settlement or the conclusion of a tort action. The disputed contract is entitled "Best Settlement Agreement" and repeatedly references the phrase "best settlement." The agreement also

contains a citation to *Schmidt v. Clothier*, indicating an intent to enter into a *Schmidt*-type settlement.

But the agreement also affords Lange the right to protect her UIM coverage under *Butzer*, which acts to bind UIM carriers to an arbitration award so that neither party may relitigate the issue of damages. *Butzer v. Allstate Ins. Co.*, 567 N.W.2d 534, 536 (Minn. App. 1997). Binding State Farm to the arbitrator's award is consistent with the finding that this was a conclusion of a tort action, not a *Schmidt* settlement. *Cf. George v. Evenson*, 754 N.W.2d 335, 341 (Minn. 2008) (determining that the parties' agreed to a settlement while noting that the injured party had conceded that his UIM carrier was not bound by the arbitrator's determination of fault and damages and was free to relitigate those issues). The agreement also states that appellant's liability is limited to $30,000, suggesting that Lange would be completely satisfied with this amount. If this were true, then Lange would not be able to collect UIM benefits, she would be made whole by appellant's insurance policy. Thus, having the arbitrator decide damages in an amount exceeding $30,000, as the parties agreed, would be futile. *See Murray v. Puls*, 690 N.W.2d 337, 343 (Minn. App. 2004) (holding that "[b]ecause the [agreement] does not clarify whether the high was a complete settlement or a limit on Puls's liability, and because high-low arbitration agreements concern maximum payment, not maximum damages, the [agreement] could reasonably be susceptible of more than one interpretation").

Moreover, the agreement allows the arbitrator to make all of the appropriate deductions as if "this matter been tried to the court and jury." It specifically waives the

parties' right to a jury trial. And it requires Lange to accept $0 as the "low" end of the "settlement." In other cases, the injured party was set to receive some award as part of the settlement. *See George*, 754 N.W.2d at 338 (agreeing to a low of $15,000); *Murray*, 690 N.W.2d at 340 (agreeing to a low of $20,000).

We agree with the district court that this agreement is susceptible to two different interpretations and is ambiguous.

B. Extrinsic evidence reveals that the parties' intended to conclude the tort action.

Due to the ambiguity of the arbitration agreement, the district court correctly relied on extrinsic evidence in interpreting the agreement. *See Blattner*, 322 N.W.2d at 321 (stating general rule that if contract is ambiguous, "courts may resort to extrinsic evidence of intent to construe the contract"). Here, the district court examined the extrinsic evidence and determined that the parties intended for arbitration to conclude their tort action. The district court's determination on this issue is a question of fact, and this court will not disturb the district court's findings of fact unless they are clearly erroneous. *Murray*, 690 N.W.2d at 344.

The day after Lange filed suit, she sent notice to State Farm under *Malmin* indicating her intent to seek UIM benefits. Emails between counsel indicated that Lange always intended to bind State Farm to any damages exceeding $30,000. The parties allowed the arbitrator to be the sole finder of damages, refusing to advise the arbitrator of appellant's $30,000 limit. The parties wanted Lange's total damages to be determined so that she could bind State Farm to the excess amount and not be forced to relitigate the

issue in a subsequent action. This indicates an intention to fully conclude the tort action. It does not indicate an intent to settle claims against one party and pursue another action against a third party. Moreover, State Farm filed a motion to intervene. If the understanding was that arbitration was to effect a settlement, State Farm would not have needed to intervene. Instead, it would have substituted its draft payment of $30,000 to Lange and then, as subrogee, maintained Lange's tort action against appellant. *See Schmidt*, 338 N.W.2d at 263 (finding when underinsurer tenders payment to insured, it protects its subrogation rights). The record does not indicate that this occurred.

The record supports the district court's determination that the parties intended arbitration as a means to conclude Lange's tort claim. Under a clearly erroneous standard, Lange is entitled to an affirmance. We therefore affirm the district court's orders. Lange is entitled to $89,296.92 in damages; appellant is responsible for $30,000; and State Farm, as Lange's UIM provider, must pay the remaining $59,296.92. We further affirm the district court's order allowing State Farm to maintain its subrogation rights against appellant. The notice requirements were fulfilled under *Malim*.

II.

Appellant moved this court to strike a portion of appellant's brief and the brief of the amicus curiae. Because we have concluded that the parties' arbitration agreement was ambiguous we deny appellant's motion to strike the portion of Lange's brief that discusses contract ambiguity. Appellant repeatedly argues in its own brief that the parties' arbitration agreement is not ambiguous. Lange can only be expected to rebut that assertion.

Appellant's motion to strike the amicus curiae brief is similarly denied. The amicus brief supports the arguments of the prevailing party. Because it was not relied on in our decision to affirm, there is no reason to strike it. It is part of the record and could be helpful should appellant seek further review.

Affirmed; motions denied.