STATE OF MINNESOTA
IN COURT OF APPEALS
A07-935

Kelly J. Reinke,
Appellant,

vs.

State Farm Mutual Automobile Insurance Company,
Respondent.

Filed May 13, 2008
Reversed and remanded
Willis, Judge

Hennepin County District Court
File No. 27-CV-06-17468

Benjamin A. Lavoie, Lindell & Lavoie, LLP, 431 South Seventh Street, Suite 2420, Minneapolis, MN 55415 (for appellant)

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Considered and decided by Toussaint, Chief Judge; Willis, Judge; and Crippen, Judge.*

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

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

WILLIS, Judge

Appellant challenges the grant of summary judgment to respondent, arguing that the district court erred by concluding that appellant's claim for underinsured-motorist benefits was barred by her failure to provide notice of the commencement of a lawsuit against the tortfeasor. We reverse and remand.

FACTS

The material facts are not in dispute. In November 1996, the car that appellant Kelly Reinke was driving was struck from behind by a vehicle driven by Sara Banks, and Reinke was injured. Banks was insured by American Family Insurance, and Reinke had liability and underinsured-motorist (UIM) coverage with respondent State Farm Mutual Insurance Company. Reinke reported the accident to State Farm several days later. Thereafter, Reinke saw a number of health-care providers, and State Farm paid the maximum amount of no-fault benefits available to her under the policy. State Farm also paid wage-loss benefits to Reinke of $20,000, which was the policy limit.

In August 2002, Reinke sued Banks for damages resulting from the accident. Reinke did not notify State Farm of the suit. Before trial, Reinke and Banks reached a proposed settlement of $25,000 of Banks's policy limit of $50,000. In May 2004, Reinke notified State Farm of the proposed settlement.

After State Farm received notice of the proposed settlement, it substituted its draft for American Family's proposed payment on behalf of Banks to preserve its subrogation rights against Banks. Nearly a year later, in May 2005, counsel for Banks and American Family

informed State Farm that "it is our position that the statute of limitations governing any such [subrogation] claim elapsed prior to the date on which State Farm substituted its draft for American Family's." State Farm agreed with this assessment and sought reimbursement from American Family of the $25,000 that it had substituted. In late 2005, American Family reimbursed to State Farm the $25,000 that it had paid to Reinke, in exchange for State Farm's release of Banks from any liability. A stipulation of dismissal of Reinke's claim against Banks was filed in February 2006.

Reinke's damages exceeded the amount that she received in her settlement with Banks, and, in March 2006, Reinke brought this suit against State Farm to recover UIM benefits. In January 2007, State Farm moved for summary judgment, arguing that Reinke was not entitled to UIM benefits because she failed to provide it notice of the commencement of her suit against Banks. The district court granted State Farm's motion, and Reinke appeals.

D E C I S I O N

The district court granted summary judgment to State Farm, concluding that under *Malmin v. Minn. Mut. Fire & Cas. Co.*, 552 N.W.2d 723, 728 (Minn. 1996), Reinke's failure to notify State Farm of her suit against Banks foreclosed Reinke's claim for UIM benefits. Reinke contends that under the circumstances here, she was not required to notify State Farm of her suit against Banks to preserve her right to seek UIM benefits from State Farm. Specifically, Reinke claims that the district court erred because a *Malmin* notice is required only if an insured intends that her UIM carrier be bound by a judgment resulting from a suit, and the failure to provide such a notice is of no effect if the insured and the

tortfeasor settle the suit before it reaches judgment. Additionally, Reinke asserts that, even if she were required to provide a *Malmin* notice, State Farm was not prejudiced by the failure to give such a notice and, therefore, the district court improperly granted summary judgment.

On an appeal from summary judgment, this court asks two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). We review the evidence in the light most favorable to the party against whom judgment was granted. *Id*. Here, the parties agree that the issue on appeal is a question of law.

An injured claimant may pursue a UIM claim only after recovering from the tortfeasor's liability-insurance policy. *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 858 (Minn. 1993). That is, the claimant may recover from the UIM carrier only after "(1) pursu[ing] a tort claim to a conclusion in a district court action, . . . or (2) settl[ing] the tort claim for 'the best settlement.'" *Id.* at 857.

When a claimant sues a tortfeasor, the claimant must give her UIM carrier sufficient and timely notice of the commencement of the suit to bind her UIM carrier to the judgment. *See Malmin*, 552 N.W.2d at 728 n.4. Notice to the UIM carrier within 60 days after service of process is considered timely. *Id*. Such notice "permit[s] the insurer to consider the

nature of the tort claim and the tortfeasor's liability limits, and thereby determine whether to attempt to intervene in the litigation in order to protect its own financial interests." *Id.* If proper notice is not given, the claimant forfeits any UIM benefits unless she can rebut the presumption of prejudice to the UIM insurer that arises as a result of the failure to provide notice. *Kluball v. Am. Family Mut. Ins. Co.*, 706 N.W.2d 912, 917-18 (Minn. App. 2005).

But if the claimant pursues the "best settlement" option, before settling any claims with the tortfeasor, she "must provide her UIM carrier with a 30-day written notice of tentative settlement agreements in order to give the underinsurer an opportunity to protect its potential right of subrogation." *Id.* at 916 (citing *Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983)). The *Schmidt v. Clothier* notice allows the UIM carrier to evaluate the claim, the settlement offer, and the tortfeasor's financial circumstances. 338 N.W.2d at 263. If the UIM carrier wishes to preserve its subrogation rights against the tortfeasor, it can substitute its draft for the tortfeasor's proposed settlement payment and attempt to obtain a better settlement or proceed to trial. *Id.* If the UIM carrier declines to substitute its draft, it loses its subrogation rights, and its insured may accept the tortfeasor's settlement, release the tortfeasor from liability, and seek recovery of UIM benefits from the UIM carrier. *See id.* A proper *Schmidt v. Clothier* notice (1) identifies the insured, the tortfeasor, and the tortfeasor's insurer; (2) discloses the limits of the tortfeasor's automobile-liability insurance; and (3) sets out the terms of the proposed settlement. *Am. Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 927 (Minn. 1990). In the event of an untimely or substantively deficient *Schmidt v. Clothier* notice, it is presumed that the UIM carrier has been prejudiced. *Id.* And

like the consequences for failing to provide a *Malmin* notice, if the claimant does not rebut this presumption, she forfeits her UIM benefits. *Id*.

State Farm contends that to preserve an insured's right to seek UIM benefits, the insured must provide a *Malmin* notice whenever the insured sues a tortfeasor, regardless of whether the suit proceeds to judgment. We disagree. Although Reinke did not notify State Farm of her suit against Banks, Reinke's failure to provide State Farm with a *Malmin* notice is of no consequence because she is not attempting to bind her UIM carrier to a judgment. The purpose of requiring an insured to provide her UIM carrier with a *Malmin* notice is to give the UIM carrier "some opportunity to protect its financial interests" in a judgment that its insured obtains against the tortfeasor, a judgment by which the UIM carrier will be bound. *Malmin*, 552 N.W.2d at 728 n.4. But if there is a settlement (even after litigation between the insured and tortfeasor commences), then there is no possibility that a UIM carrier will be bound by a judgment in a suit in which it did not have an opportunity to intervene, and, therefore, there are no "financial interests" to protect. *See id.* (stating that the concern about the UIM carrier's financial interest in the suit between the insured and the tortfeasor occurs when the suit proceeds to judgment).

Here, Reinke reached a proposed settlement with Banks and, therefore, the principles of *Schmidt* apply. *See Kluball*, 706 N.W.2d at 916. And it is undisputed that, on May 18, 2004, Reinke sent a letter notifying State Farm of her intention to settle with Banks. This letter, which is titled "*SCHMIDT V. CLOTHIER NOTICE*," was timely and contains all of the required information, including the parties, the limits of Banks's insurance policy, and the terms of the proposed settlement. Because Reinke had reached a proposed settlement

with Banks, she was required to provide a *Schmidt v. Clothier* notice to her UIM carrier, State Farm, to protect her right to seek UIM benefits. She did this. And State Farm, after receiving this notice, even agreed to substitute its draft in an attempt to preserve its subrogation rights. The district court, therefore, erred by concluding that Reinke was required to provide a *Malmin* notice and that because she failed to do so, the burden was on her to rebut the presumption of prejudice to State Farm.

We note that if Reinke had not settled and had proceeded to judgment in her suit against Banks, then Reinke's failure to provide a *Malmin* notice to State Farm would have precluded her from seeking UIM benefits (unless Reinke could show that State Farm was not prejudiced by her failure to provide such a notice). Therefore, prudent practitioners will notify the UIM carrier within 60 days after the commencement of any suit against the tortfeasor to protect the insured's ability to seek UIM benefits in the event that the suit proceeds to judgment. But here, the parties settled, and the suit between Reinke and Banks was dismissed. Reinke, therefore, was required to provide only a *Schmidt v. Clothier* notice to State Farm. Because we conclude that Reinke was not required to provide a *Malmin* notice, we do not reach Reinke's alternative argument.

Reversed and remanded.