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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0281**

Michael Marchio, Trustee for the
Next of Kin of Ida Marchio,
Appellant,

vs.

Western National Mutual Insurance Company,
Respondent.

**Filed August 18, 2009
Reversed and remanded
Harten, Judge***

Ramsey County District Court
File No. 62-CX-04-006770

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and
Harten, Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

Summary judgment was granted to respondent, a driver's insurer, on the ground that the driver's collision with an uninsured motorist (UM) less than a minute earlier was not a cause of the accident. Appellant, trustee for the heirs and next of kin of a decedent killed in the accident, challenges the judgment. Because we conclude that there is a genuine issue of material fact as to causation of the accident, we reverse the summary judgment and remand.

FACTS

Michele Marchio, then age 70, was driving his wife, Ida Marchio, in St. Paul on a projected route north on John Ireland Boulevard, then west on Rev. Dr. Martin Luther King Jr. Boulevard.

At the intersection of Kellogg Boulevard and John Ireland Boulevard, a black Nissan Pathfinder turning left from the southbound left-turn lane of John Ireland Boulevard, collided with the left rear quarter panel of Marchio's vehicle. Neither vehicle stopped. The Nissan continued with its left turn and went east on Kellogg Boulevard; its driver was never identified.

Marchio's vehicle continued north on John Ireland Boulevard. The vehicle increased its speed, struck the curb, traveled .4 miles down John Ireland Boulevard through a semaphore-controlled intersection, weaved around a car stopped at a stop sign, and turned west onto Rev. Dr. Martin Luther King Jr. Boulevard. It then left the road and went onto the grass in front of the State Capitol, between a streetlight and a tree, and

smashed its right front corner into another tree, fatally injuring Ida Marchio. Marchio told a police officer who arrived at the scene that, after the impact with the Nissan, he attempted to brake but instead put his foot on the accelerator.

Marchio was insured by respondent Western National Mutual Insurance Company. Appellant Michael Marchio, as trustee for the heirs and next of kin of Ida Marchio (appellant), executed a *Pierringer* release of respondent in exchange for Marchio's policy liability limit of \$100,000. Appellant then brought this action against respondent for uninsured motorist (UM) benefits under the policy.

Respondent moved for summary judgment on two grounds: an exclusion in the policy precludes further payments after the liability limit has been paid and no UM vehicle (UMV) was involved in the fatal collision. The district court did not address the absence of UMV involvement in the fatal collision but granted summary judgment based on the policy exclusion. That judgment was reversed by this court. *Marchio v. W. Nat'l Mut. Ins. Co.*, 747 N.W.2d 376 (Minn. App. 2008) (holding that policy exclusion violated Minn. Stat. § 65B.49, subd. 3a(1) (2006)). The case was remanded to the district court.

Respondent again moved for summary judgment on the ground that no UMV was involved in the fatal accident. Following a hearing, the district court granted the motion, concluding as a matter of law that Ida Marchio's death did not arise out of the accident with the UMV.

DECISION

“Construction of an insurance policy involves a question of law.” *General Cas. Co. of Wis. v. Outdoor Concept*, 667 N.W.2d 441, 443 (Minn. App. 2003).

Marchio's policy defines "uninsured motor vehicle" (UMV) to include "a hit-and-run vehicle whose operator or owner cannot be identified and which hits . . . '[a] covered auto.'" The policy provides that it "will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an [UMV] . . . because of 'bodily injury' . . . [s]ustained by an 'insured' . . . and . . . [c]aused by an accident." It further provides that the liability of the owner or operator of the UMV "must arise out of the ownership, maintenance or use of the [UMV]." Thus, the issue is whether the death of Ida Marchio arose out of the use of the UMV in the first collision.¹

Summary judgment on that issue is appropriate only if "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation and citation omitted). On review of summary judgment, evidence must be considered in the light most favorable to the party opposing the motion. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006). "A party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an

¹ We note that other cases involving injuries caused by the second of two accidents have been resolved not on summary judgment but after trial. See, e.g., *Tandeski v. Barnard*, 265 Minn. 339, 121 N.W. 2d 708 (1963) (after impact with side of truck, car stopped in front of truck, causing truck to swerve into oncoming traffic and collide with another car); *Walker v. Stecher*, 219 Minn. 152, 17 N.W.2d 317 (1944) (car imbedded in snowbank so that it blocked traffic lane by impact with one car struck by another car traveling in that lane); *Holmberg v. Villaume*, 158 Minn. 442, 197 N.W. 849 (1924) (car stopped crosswise in road after bumping two other cars caused a third car traveling on that road to swerve and hit the driver of one of the bumped cars, who was standing outside his car); *Maanum v. Aust*, 364 N.W.2d 827 (Minn. App. 1985) (driver who was following car without lights towing fish house without lights lost sight of fish house, strayed across center line, and collided with oncoming vehicle), *review denied* (Minn. 14 June 1985).

issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Id.* at 507. In *Schroeder*, the supreme court concluded that, when the operator of a vehicle stated that his lights were on at a particular time and the nonmoving party presented an affidavit from an independent witness asserting that the vehicle’s lights were not on, “the district court erred when it concluded that there was ‘no factual dispute at all’” as to whether the lights were on. *Id.*

Moreover, “[c]ausation is generally a question of fact left to the finder of fact” *Paidar v. Hughes*, 615 N.W.2d 276, 281 (Minn. 2000). “[A] district court’s proper function on summary judgment is not to decide issues of fact but solely to determine whether there is an issue of fact to be tried.” *Id.* (quotation omitted). “[Causation] only becomes a question of law where different minds can reasonably arrive at only one result.” *Id.* (quotation omitted).

Here, appellant has presented sufficient evidence to permit reasonable persons to draw different conclusions as to whether Marchio’s collision with the UMV was a cause of his wife’s death. The record includes Minnesota State Patrol’s accident reconstruction report, stating:

Marchio stated he observed the [UMV] and attempted to brake. He continued to depress what he thought was the brake, but his vehicle continued to accelerate through the intersection. Marchio was possibly disoriented from the impact [with the UMV] and his foot moved from the brake to the accelerator pedal.

The record also includes the deposition testimony of independent witnesses. One of them testified that he saw Marchio’s car travel down John Ireland Boulevard. When asked if he saw any brake lights, the witness said, “Not—not to any extent” and clarified that

“[t]here may have been like a flash [of brake light], . . . but nothing that would indicate any sort of major stopping effort.” Another witness testified that Marchio’s vehicle was moving “at a higher rate of speed as it moved toward the State capitol” and that the driver appeared to have “very little control of the vehicle after the accident [with the UMV].”

When this evidence is viewed in the light most favorable to appellant, a fact issue exists as to whether Marchio’s collision with the UMV was a cause of his wife’s death, and summary judgment is inappropriate. *See Schroeder*, 708 N.W.2d at 507 (summary judgment is inappropriate if opponent presents sufficient evidence to permit reasonable persons to draw different conclusions); *Paidar*, 615 N.W.2d at 281 (causation is fact question left to finder of fact).²

Reversed and remanded.

² Appellant raises the issue of superseding intervening cause; respondent claims that this issue was not raised to the district court, which, in any event, did not reach the issue, having determined that the UMV collision was not causally related to the fatal collision. This court does not generally address matters not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We note, however, that where more than one theory of causation exists, “[t]his type of causation dispute is *exactly* the type to be submitted to a jury, for it is ultimately the jury’s responsibility to determine which theory is more credible.” *Ingram v. Syverson*, 674 N.W.2d 233, 237 (Minn. App. 2004) (reversing summary judgment granted on the ground that nonmoving party’s expert witness testimony was not based on adequate foundation), *review denied* (Minn. Apr. 20, 2004).