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STATE OF MINNESOTA
IN COURT OF APPEALS
C9-02-99

Susan M. Kassner,
Appellant,

vs.

Allstate Insurance Company,
Respondent.

Filed July 23, 2002
Reversed
Klaphake, Judge

Ramsey County District Court
File No. CX014146

Thomas J. Lyons, Thomas J. Lyons & Associates, P.A., 342 East County Road D, Little Canada, MN 55117 (for appellant)

Robert H. Tennant III, Stringer & Rohleder, Ltd., 1200 Norwest Center Tower, 55 East Fifth Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Halbrooks, Presiding Judge, Klaphake, Judge, and Hanson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

On February 20, 1997, appellant Susan Kassner's vehicle was struck by another vehicle and she was severely injured. The other vehicle was insured by State Farm Mutual Insurance Company (State Farm) and had a per-person liability limit of $100,000.

Respondent Allstate Insurance Company insured appellant's vehicle and provided underinsured motorist benefits (UIM) of $30,000 per person.

Following the accident, appellant initiated a tort action against State Farm, and State Farm offered $65,000 to settle the claim. On September 30, 1998, appellant's attorney sent a letter to respondent informing it of the State Farm offer, the amount of the offer, the liability limits of the State Farm policy, and appellant's intent to settle with State Farm. The letter also stated that appellant would not settle with State Farm until October 30, 1998, to allow respondent an opportunity to investigate its subrogation interests.

In this action seeking UIM benefits, appellant argues that the district court erred in granting summary judgment to respondent because she failed to give adequate notice of her tentative settlement agreement with State Farm as is required by *Schmidt v. Clothier,* 338 N.W.2d 256 (Minn. 1983). Because we conclude that the Schmidt notice was adequate, we reverse.

DECISION

Schmidt v. Clothier, 338 N.W.2d 256, 263 (Minn. 1983) requires an insured to give its UIM insurer 30 days' written notice of any "tentative settlement" with the tortfeasor's liability insurer. This notice affords the UIM insurer the opportunity to protect its potential subrogation rights by paying benefits before the tortfeasor is released from liability. *Id.* Since the issuance of *Schmidt,* the supreme court has further clarified

the requirements for adequate Schmidt notice. In *Am. Family Mut. Ins. Co. v. Baumann,* 459 N.W.2d 923 (Minn. 1990), the supreme court stated:

> Henceforth, * * * [t]he notice shall identify the insured, the tortfeasor and the tortfeasor's insurer and shall disclose the limits of the tortfeasor's automobile liability insurance and the agreed upon amount of the settlement.

Id. at 927. The court prefaced this ruling by noting that the notice requirement "was not intended as a technical snare for unwary insureds." *Id.*

We agree with appellant that she provided adequate Schmidt notice to respondent before settling her claim with State Farm. Her September 30, 1998 letter identified the insured, the tortfeasor, the tortfeasor's insurer, the tortfeasor's liability coverage limit of $100,000, and the proposed settlement of $65,000. The letter gave respondent ample notice of the "tentative" settlement and ample opportunity to investigate its potential subrogation interests.

After receiving the letter, respondent contacted a State Farm claims representative and proposed that the two insurers enter into an "eat the gap" agreement, whereby in exchange for respondent agreeing to the $65,000 settlement between State Farm and appellant, respondent agreed to handle the defense of any remaining UIM claim brought by appellant, and State Farm agreed to pay up to $35,000, the remainder of its liability limit, for any UIM award rendered in excess of the amount it had already paid. These actions by respondent demonstrate that it did undertake investigation of its subrogation interests.

Further, in response to appellant's September 30 letter, respondent did not claim that the Schmidt notice was inadequate. Rather, in an October 13, 1998 letter to appellant's attorney, respondent merely asked appellant to forward "all additional information" about the claim. Respondent failed to inform appellant of any alleged deficiency in her Schmidt notice until October 30, 1998, when respondent sent a second letter claiming the notice was deficient. Because this second letter was not sent until October 30, 1998, respondent ensured that appellant would not receive the letter until after expiration of the 30-day period appellant had agreed to wait before settling with State Farm.

This is not the first instance in which Minnesota courts have upheld the validity of a Schmidt notice even though the accident victim had not conditionally accepted the tortfeasor's settlement offer before sending notice of settlement to the UIM insurer. In *Baumann,* 459 N.W.2d at 924, the insured informed her UIM insurer that she had "made a demand for the policy limit of $25,000" to the tortfeasor's insurer. There, the supreme court ruled that that the Schmidt notice was adequate. *Id.* at 925.

In *Sutherland v. Allstate Ins. Co.,* 464 N.W.2d 150, 151 (Minn. App. 1990), *review denied* (Minn. Mar. 15, 1991), the insured's attorney sent two letters to the UIM insurer. In the first letter, counsel noted the insured "expect[ed]" to settle with the tortfeasor's liability insurer for the policy limits. *Id.* In the second letter, counsel forwarded to the UIM insurer a copy of a letter to the tortfeasor's insurer demanding $100,000 to settle the claim and verifying that the insured was injured in the amount of

$100,000. *Id.* This court concluded that the Schmidt notice was sufficient and, noting the admonition of *Baumann,* declined to allow the UIM insurer to engage in "cat and mouse correspondence" to thwart the insured's attempt to give Schmidt notice. *Id.* at 152.

Given this case law, we conclude that the notice here was adequate, even though appellant and State Farm did not have a firm settlement as of the time that appellant sent her Schmidt notice letter. The district court therefore erred by granting summary judgment to respondent. *See* Minn. R. Civ. P. 56.03 (summary judgment appropriate when there is no genuine issue of material fact and either party is entitled to judgment as matter of law).

Reversed.