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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1149**

Juanda R. White, individually and as trustee
for the next-of-kin of Deallo D. Felder, deceased,
Respondent,

vs.

American Family Insurance Company,
Appellant.

**Filed March 27, 2017
Affirmed
Kirk, Judge**

Hennepin County District Court
File No. 27-CV-15-7255

Richard P. Mahoney, Victor E. Lund, The Mahoney Law Firm, PLLC, Minneapolis,
Minnesota (for respondent)

Mark K. Hellie, Trial Staff Attorney, Eden Prairie, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

After a bench trial on stipulated facts in an underinsured motorist (UIM) benefits action, appellant-insurer argues that the district court erred in determining that the insurer lacked standing to make a priority-of-insurance claim when it failed to substitute its check

in the underlying action and that UIM coverage was not triggered because an existing umbrella policy provided coverage. We affirm.

FACTS

On April 15, 2009, Deallo Felder was killed in an automobile collision after the Pontiac sedan in which he was a front-seat passenger collided with a truck that was driven by K.T. and owned by a construction company. O.W. was the driver of the Pontiac. D.F. owned the Pontiac, and he had a \$500,000 primary auto-liability insurance policy through Progressive Preferred Insurance Company. D.F. had purchased the Pontiac for his daughter to drive, and she was an insured driver on the Progressive policy. D.F. also had a \$2 million umbrella policy through North Star Mutual Insurance Company. On the day of the accident, D.F.'s daughter had loaned the Pontiac to O.W. O.W. accepted full responsibility for the accident. At the time of his death, Felder was a resident relative of the household of respondent Juanda R. White, and White had a family policy providing UIM coverage of \$100,000 through appellant American Family Insurance Company.

In 2011, acting as the trustee of Felder's next of kin, White commenced a wrongful-death action against the drivers and owners of the Pontiac and the truck. By letter, North Star informed D.F. that his umbrella policy did not provide coverage for the Pontiac on the date of loss and that North Star would not indemnify or defend the wrongful-death action.

On March 8, 2012, White's attorney notified American Family in a letter that White had filed a wrongful-death action in Kandiyohi County District Court and that White would bring a UIM claim against American Family if recovery was in excess of available liability insurance limits. On April 23, American Family acknowledged receipt of the letter.

On May 23, 2013, in a separate action, North Star brought a declaratory-judgment action against White and the drivers and owners of the vehicles, seeking a declaration that North Star owed no duty of indemnity or defense to D.F. through the umbrella policy. Before the declaratory-judgment action was resolved, the parties agreed to mediate the wrongful-death action. On June 30, 2014, White's attorney wrote to an attorney for American Family and informed her that the parties had scheduled a mediation session in the wrongful-death action. White's attorney invited American Family's attorney to participate in the mediation, informed her of the status of the negotiations, and included a copy of White's settlement brochure and demand. The parties agreed that the damages in the wrongful-death action were in excess of \$650,000, but less than \$2.3 million.

On July 7, White settled her wrongful-death claims in a combined *Miller/Shugart-Drake/Ryan* release for \$530,000. In a letter dated the same day, White's attorney wrote to American Family's attorney advising her of the proposed global settlement. Under the terms of the settlement, Progressive would pay White \$450,000 in a combined single liability payout, the truck's owner and driver would pay \$40,000, and North Star, the umbrella policy insurer, would pay \$40,000. The letter acted as a *Schmidt-Clothier* notice, allowing American Family the opportunity to substitute its check for the proposed settlement amount in order to protect its subrogation rights.

An adjuster for American Family sent White's attorney two letters dated July 15 and August 19 informing White that American Family would not substitute its draft to preserve its subrogation rights under *Schmidt-Clothier*. In December, the district court

dismissed North Star's declaratory-judgment action on its merits and with prejudice. White accepted the \$530,000 settlement.

In April 2015, White sued American Family, alleging that O.W. was an underinsured motorist and that she was entitled to UIM benefits under her American Family policy to recover the gap between her settlement proceeds of \$530,000 and her claimed damages. On November 13, American Family responded by filing a declaratory-judgment/summary-judgment motion, arguing that White could not establish that O.W. was underinsured given the combined Progressive and North Star policy limits of \$2.5 million. American Family requested that the district court declare the scope of coverage provided under North Star's umbrella policy and find that North Star was the priority insurer. The district court denied American Family's motion.

Following a bench trial on stipulated facts, the district court filed an order for judgment in favor of White and directed American Family to pay her \$100,000 plus costs and disbursements. The district court concluded that American Family did not have standing to litigate a coverage claim against North Star through a declaratory-judgment action because it failed to substitute its check to preserve its subrogation rights.

American Family appeals.

DECISION

On appeal from a ruling based on stipulated facts, we review whether the district court properly applied the law to the facts of the case. *Miller v. Centennial State Bank*, 472

N.W.2d 349, 351 (Minn. App. 1991). “No deference is given to a lower court on questions of law.” *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

American Family argues that the district court erred in concluding that it did not have standing to raise a priority-of-insurance claim on whether the Pontiac was underinsured because it failed to protect its subrogation rights in the wrongful-death action under *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), *superseded in part by statute*, 1989 Minn. Laws ch. 213, § 2 at 648 (codified at Minn. Stat. § 65B.49, subd. 4a).

Here, American Family misconstrues the district court’s order as dismissing its claim entirely on the basis of standing. If the district court had concluded that American Family lacked standing to bring its claim, it would not have analyzed the underlying substantive issues raised in the case. Here, the district court concluded that American Family lost on the merits in the UIM action because it waived its right to challenge the scope of coverage of North Star’s umbrella policy in the wrongful-death action.

This conclusion is supported by caselaw. The Minnesota Supreme Court has addressed the rights of an insured to pursue a settlement with the tortfeasor and also pursue underinsurance benefits in *Schmidt*. The supreme court held that an insured who wants to pursue a UIM claim has two options: one option is to pursue a tort action to conclusion in the district court, and if the judgment exceeds liability limits, pursue a claim for underinsured motorist benefits. *Washington v. Milbank Ins. Co.*, 562 N.W.2d 801, 805 (Minn. 1997) (citing *Emp’rs Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 857 (Minn. 1993)). The second option is for the insured to settle the tort claim for the “best settlement,” give a *Schmidt-Clothier* notice to the underinsurer, and maintain a claim for UIM benefits. *Id.*

Here, American Family’s priority-of-insurance argument is essentially a challenge to the settlement terms agreed to by White in the wrongful-death action. White, as the insured, “has a right to full control over the lawsuit against the tortfeasor, a control which would include the right to make the best settlement possible.” *Schmidt*, 338 N.W.2d at 260. Further, the settlement need not reach the policy limits to get UIM coverage. “Where the best settlement available is less than the defendant’s liability limits, the insured should not be forced to forego settlement and go to trial in order to determine the issue of damages.” *Id.* at 260-61. Accordingly, “[t]he insured may recover underinsurance benefits where the total damages sustained (as determined by either arbitration or judgment) exceed the limits of the tortfeasor’s liability policy even where the insured settles with the tortfeasor for less than the liability limits.” *Id.* at 261. American Family does not explain in its brief how the existence of an umbrella policy materially changes this analysis under *Schmidt*.

In *Dohney v. Allstate Ins. Co.*, the Minnesota Supreme Court addressed whether a plaintiff’s insurer can deny a UIM claim based on the plaintiff’s failure to reach the “best settlement” with the tortfeasor, and instead accept a settlement with a tortfeasor for 40% of the tortfeasor’s liability limits. 632 N.W.2d 598, 599 (Minn. 2001). The court concluded that a UIM insurer cannot challenge “an insured’s below-limit settlement with the tortfeasor as not the *best settlement*.” *Id.* at 603. The court recognized that the best-settlement language in *Schmidt* “was the insured’s *best settlement*, not a UIM insurer’s *best settlement* or even a court-determined *best settlement*.” *Id.* at 604.

American Family argues that it is not required under *Schmidt* to substitute its check in the initial settlement of a wrongful-death action when it only seeks to challenge White's ensuing UIM claim. We disagree. A UIM claim does not accrue until there has been a settlement or adjudication of the claim against the tortfeasor. *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 407 (Minn. 2000). But when a UIM insurer fails to substitute its draft after the plaintiff provides *Schmidt-Clothier* notice and settles, the tortfeasors are released from any further liability. *See Schmidt*, 338 N.W.2d at 263-64 (holding that after plaintiff settled with tortfeasors and UIM insurer failed to substitute draft, the UIM insurer must proceed to arbitration of the UIM claim and is liable for the UIM amount because the tortfeasors had already been released). Here, North Star tendered a settlement offer to White, which she accepted, and North Star was released from any liability. Only by substituting its draft does the UIM insurer "retain[] a subrogation right against the tortfeasor's insurance company." *Washington*, 562 N.W.2d at 806 n.3. We conclude that the district court did not err in ordering American Family to pay UIM benefits to White. Accordingly, we do not need to reach American Family's claim that UIM coverage was not triggered because the North Star umbrella policy provided additional coverage.

Affirmed.