2017 WL 1548630
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Court of Appeals of Minnesota.

Allan FISHEL, et al., Appellants,
v.
ENCOMPASS INDEMNITY COMPANY, Respondent.

A16–1659
|
Filed May 1, 2017

Hennepin County District Court, File No. 27–CV–16–116

Attorneys and Law Firms

E. Curtis Roeder, Timothy D. Johnson, Alexander M. Jadin, Jerri C. Adams, Roeder Smith Jadin, PLLC, Bloomington, Minnesota (for appellants)

William L. Davidson, Eric J. Steinhoff, João C. Medeiros, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

***1** After the district court dismissed appellants' claim for prejudgment interest under rule 12.02(e), appellants argue that the district court erred in (1) determining that prejudgment interest is not available on an appraisal award under Minn. Stat. § 549.09, subd. 1(b) (2016), and (2) applying the two-year statute of limitations under Minn. Stat. § 65A.01, subd. 3 (2016), and the insurance policy to appellants' claim. We affirm.

FACTS

On March 14, 2013, a fire rendered appellants Allan and Jane Fishel's house uninhabitable. At the time of the fire, respondent Encompass Indemnity Company insured the property under a homeowner's policy that provided coverage for the fire damage. The policy contained an appraisal clause, which required respondent to participate in an insurance appraisal to determine the amount of loss upon written demand from appellants. The parties disagreed on the amount of loss and participated in an insurance appraisal on January 7, 2015. The appraisal panel issued an appraisal award on January 19, 2015, which determined that the policy covered the loss and the total cost to repair the property was $376,720.88. Respondent paid the appraisal award on January 20, 2015.

On January 5, 2016 appellants filed a summons and complaint arguing, among other things, that respondent owed preaward interest to appellants pursuant to Minn. Stat. § 549.09 (2016). [1] In lieu of an answer, respondent filed a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) or, in the alternative, a motion for summary judgment under Minn. R. Civ. P. 56.03, arguing that (1) the statute of limitations has run on all claims and (2) appellants were not entitled to recover interest on an arbitration award that was timely paid and, therefore, appellants failed to state a claim for which relief can be granted. The district court granted respondent's motion to dismiss, concluding that appellants' policy addresses interest and states that it shall accrue from the time when the loss shall become payable–language in compliance with Minn. Stat. § 65A.01 (2016). The district court concluded that because the policy addressed interest, Minn. Stat. § 549.09 was not applicable. Because the district court concluded that Minn. Stat. § 65A.01 applied and not Minn. Stat. § 549.09, the court concluded that the two-year statute of limitations prescribed by Minn. Stat. § 65A.01, subd. 3, precluded appellants' claim for preaward interest.

DECISION

Respondent brought a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) or, in the alternative, for summary judgment pursuant to Minn. R. Civ. P. 56.03. The district court granted the motion to dismiss pursuant to 12.02(e). Regardless of whether the motion was considered under Minn. R. Civ. P.

12.02(e) or under Minn. R. Civ. P. 56.03, our standard of review is de novo.

"When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before [an appellate] court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). "The standard of review is therefore de novo. The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true, and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted). This court also reviews de novo a grant of summary judgment based on the application of a statute to undisputed facts. *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006).

I. Are appellants entitled to preaward interest on an insurance appraisal award under Minn. Stat. § 549.09?

***2** "The availability of pre[award] interest is a legal issue that we review de novo." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 390 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). "Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages shall be computed ... from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first ...." Minn. Stat. § 549.09, subd. 1(b). However, "the statute does not apply to appraisal awards pursuant to an insurance policy in the absence of an underlying breach of contract or actionable wrongdoing." *Poehler v. Cincinnati Ins. Co.*, 874 N.W.2d 806, 807 (Minn. App. 2016), *review granted* (Minn. Mar. 29, 2016).

Even though decisions of the court of appeals "do not have precedential effect until the deadline for granting review has expired," *State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998), *review denied* (Minn. July 16, 1998), this court typically follows the rule of law announced in a published opinion, even one subject to further review, until the Minnesota Supreme Court announces a different rule of law. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (stating that we are "bound by supreme court precedent and the published opinions of the court of appeals"), *review denied* (Minn. Sept. 21, 2010). Citing *Hoyt Inv. Co. v. Bloomington Commerce & Trade Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988), and *Collins*, 580 N.W.2d at 43, appellants argue that the decision in *Poehler* is not applicable law because "when the Minnesota Supreme Court accepts review of a Court of Appeals decision, that decision is not precedential authority until the Minnesota Supreme Court affirms or reverses it." We disagree. *Hoyt Inv. Co.* does not state that a decision is not precedential authority until the supreme court affirms or reverses it; rather, it says that an original court of appeals' decision becomes final by virtue of a denial of a petition for further review. 418 N.W.2d at 176. In that case, the supreme court actually concluded that they agreed with the decision of the court of appeals directing the trial court to enter judgment in favor of the appellant, but, on review, the supreme court modified the basis for the court of appeals' grant of extraordinary relief. *Id.* Until the supreme court announces a different rule of law, we will follow our rule in *Poehler*.

Because there has been no alleged breach of contract or actionable wrongdoing, Minn. Stat. § 549.09, subd. 1(b), does not provide appellants with preverdict interest relief. *See Poehler*, 874 N.W.2d at 807. However, in the interest of judicial economy, we also consider the district court's second reason for dismissal.

II. Does a two-year limitation for suit under an insurance policy control appellants' right to recover preaward interest under Minn. Stat. § 549.09?

Appellants argue that their claim is not subject to the two-year statute of limitations in the policy. Instead, they argue that their action for preaward interest is governed by Minn. Stat. § 549.09. Because Minn. Stat. § 549.09 does not have a statute of limitations, appellants argue that the six-year statute of limitations for a "liability created by statute" should apply. *See* Minn. Stat. § 541.05, subd. 1(2) (2016). Even if the supreme court does not affirm this court's decision in *Poehler*, we cannot conclude that a six-year statute of limitations applies in this case.

"Interpretation of an insurance policy and statutory language are questions of law which we review de novo." *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 343–44 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). "When the language in an insurance policy is clear and unambiguous, it must be given its usual and accepted meaning." *Id.* The court interprets insurance policies to avoid an interpretation

that "will forfeit the rights of the insured under the policy, unless such an intent is manifest in clear and unambiguous language." *Id.* (quotation omitted).

***3** Appellants' insurance policy states "[*n*]*o action can be brought* unless the policy provisions have been complied with and the action is started ... [w]ithin two years after the date of loss." (Emphasis added.) This language is slightly different from the language called for in Minn. Stat. § 65A.01, subd. 3, which states "No suit or *action on this policy* for the recovery of any claim shall be sustainable ... unless all the requirements of this policy have been complied with, and unless commenced within two years after inception of the loss." (Emphasis added.) Appellants argue that the language, "action on this policy," must be read into their insurance policy. They argue that if the policy's limitation for suit is broader than "actions on the policy," it would be an impermissible deviance from the Minnesota standard fire policy and its limitation period for suit.

Minn. Stat. § 65A.01 (the Minnesota standard fire insurance policy) "was intended to secure uniformity in fire insurance policies. Use of the statutory form is mandatory, and its provisions may not be omitted, changed, or waived. This principle is reflected in the statute's conformity clause ...." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 690 (Minn. 1997) (citation and quotation omitted). "[T]he Minnesota standard fire insurance policy guarantees a minimum level of coverage that supersedes any attempt to limit coverage to less than the statutory minimum. Insurance companies may, however, incorporate additional or different terms into their policies *that offer more coverage than the statutory minimum*." *Id.* (emphasis added) (citation omitted). The question becomes whether the policy's expansion of the two-year statute of limitations to cover more than "actions on the policy" is an attempt to limit coverage to less than the statutory minimum. We conclude that it is not.

Under the Minnesota standard fire insurance policy, all actions on the policy must be brought within two years. Minn. Stat. § 65A.01, subd. 3. Therefore, after two years from the time of the loss, no claim under the Minnesota standard fire insurance policy can be made. *Id.* It is not a limit on the protections of the Minnesota standard fire insurance policy to extend the two-year statute of limitations to cover more than the Minnesota standard fire insurance policy. Appellants would have every right and protection under the standard fire insurance policy and the clause would merely restrict other actions that would not fall under the policy.

As a result, the policy provision stating "[n]o action can be brought unless ... the action is started ... [w]ithin two years after the date of loss" applies to an action brought for preaward interest in this particular case. Minn. Stat. § 549.09 subd. 1(b), states, "[e]xcept as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages shall be computed ... from the time ... of a written notice of claim[.]" Because the policy is broad enough to include an action for preaward interest in its two-year limitation period, Minn. Stat. § 549.09, subd. 1(b), does not apply given that protection is "otherwise provided by contract."

Appellants argue that the preaward-interest claim is entirely separate from the loss claim and therefore is outside the policy's prohibition on suits more than two years old. Appellants characterize the interest claim as an "extra-contractual statutory right." This argument also fails. "Unlike conventional interest, pre[award] interest cannot be calculated until the amount on which interest is allowed has been fixed by verdict." *Lessard v. Milwaukee Ins. Co.*, 514 N.W.2d 556, 558 (Minn. 1994). Because of the connection between preaward interest and the amount fixed by the award, preaward interest is part of the underlying claim giving rise to the liability. *See id.* at 558–59 n.5 (concluding that, in the context of automobile insurance coverage, prejudgment interest was part of the underlying claim of damages from an automobile accident). Therefore, the time limitation on the underlying policy claim would apply to preaward interest as well.

***4** Appellants also argue that enforcement of the two-year limitation would lead to absurd results and unjust consequences. "A statute is to be construed ... so as to avoid irreconcilable difference and conflict with another statute. The general terms of a statute are subject to implied exceptions founded on rules of public policy and the maxims of natural justice so as to avoid absurd and unjust consequences." *Erickson v. Sunset Memorial Park Ass'n*, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (1961). Appellants argue that "[a]ppraisals are frequently demanded prior to the two-year deadline under policies, but routinely take place after the two-year deadline to accommodate scheduling concerns or due to Minnesota weather conditions that require waiting for ice and snow to melt in order to review property damage." Additionally, appellants argue that the limitation language in the policy stating "no action can be brought unless the policy provisions have been complied with" prevents

appellants from bringing an action until after the appraisal takes place.

However, this court is "not in a position to choose between public policy choices when [the law] unambiguously addresses the question before us." *Auto–Owners Ins. Co. v. Second Chance Invs., LLC*, 827 N.W.2d 766, 773 n.3 (Minn. 2013). "Within section 549.09 the legislature expressly forbade an award of pre[award] interest under that section when interest is otherwise provided by contract or allowed by law." *Burniece v. Ill. Farmers Ins. Co.*, 398 N.W.2d 542, 544 (Minn. 1987) (quotation omitted). "When an insurance policy contains a suit limitations clause which requires suit to be brought within a certain period, failure to bring suit within that period bars suit unless the limitation clause conflicts with a specific statute or is unreasonably short." *L & H Transport, Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 224 (Minn. 1987). Minn. Stat. § 549.09 does not have a specific statute of limitations. Additionally, because two years is an acceptable time period for claims arising under the policy pursuant to the Minnesota standard fire insurance policy, we conclude that the limit in the policy is not an unreasonably short period of time to bring a suit for preaward interest.

Affirmed.

All Citations

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Footnotes

1 The other claims raised by appellants have been dismissed or settled. The only remaining claim on appeal is the denial of preaward interest.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Larry Maurice TAYLOR, Appellant.

No. A14–0938.
|
April 20, 2015.
|
Review Denied June 30, 2015.

Ramsey County District Court, File No. 62–CR–13–7548.

Attorneys and Law Firms

Lori Swanson, Attorney General, John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, MN, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal–Hill, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by CHUTICH, Presiding Judge; RODENBERG, Judge; and SMITH, Judge.

UNPUBLISHED OPINION

SMITH, Judge.

***1** We affirm appellant's convictions for pattern of stalking conduct, aggravated stalking, and terroristic threats because the district court properly admitted history-of-relationship evidence under Minn.Stat. § 634.20 (Supp.2013) and because appellant's pro se arguments lack merit.

FACTS

Appellant Larry Maurice Taylor was charged with (1) pattern of stalking conduct, (2) aggravated stalking, and (3) terroristic threats. Before trial, the state noticed its intent to introduce history-of-relationship evidence under Minn.Stat. § 634.20 regarding Taylor's past domestic abuse of a former girlfriend, D.W. Taylor moved to preclude the introduction of this evidence. Citing *State v. Valentine,* 787 N.W.2d 630 (Minn.App.2010), *review denied* (Minn. Nov. 16, 2010), the district court allowed the state to introduce the relationship evidence under section 634.20. The district court found that the evidence was admissible and that "the probative value outweigh[ed] unfair prejudice to [Taylor]."

DECISION

I.

Taylor argues that the district court committed reversible error by admitting evidence of his prior relationship with D.W. under Minn.Stat. § 634.20. We review a district court's admission of evidence under section 634.20 for an abuse of discretion. *State v. Lindsey,* 755 N.W.2d 752, 755 (Minn.App.2008) (citing *State v. McCoy,* 682 N.W.2d 153, 161 (Minn.2004)), *review denied* (Minn. Oct. 29, 2008). On appeal, the appellant has the burden to show that the district court abused its discretion and that the appellant was prejudiced by the evidentiary ruling. *Id.*

Evidence of prior crimes or bad acts is generally not admissible to show that a person acted in conformity with prior behavior. Minn. R. Evid. 404(b). But

> [e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn.Stat. § 634.20. "Domestic conduct" includes "evidence of domestic abuse" and evidence of the violation of an order for protection or a harassment restraining order. *Id.*

In *Valentine,* we stated that section 634.20 "unambiguously authorize[s] the admission of similar-conduct evidence against the accused's (not the victim's) family or household members." 787 N.W.2d at 637. We explained that "evidence showing how a defendant treats his family or household members, such as his former spouses or other girlfriends, sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Id.* As a result, we concluded that the district court did not err in admitting evidence of the appellant's abuse of another girlfriend under section 634.20. *Id.* at 638.

***2** As in *Valentine,* the district court properly admitted evidence of Taylor's abuse of a previous girlfriend under section 634.20. *See id.* But Taylor argues that the supreme court has not yet adopted this court's interpretation of section 634.20, and that, therefore, the district court erred by admitting the evidence. [1] Taylor suggests that we should instead rely on *McCoy,* in which the supreme court adopted section 634.20 "as a rule of evidence for the admission of evidence of similar conduct by the accused against the alleged victim of domestic abuse." 682 N.W.2d at 161. But *McCoy* only addressed the admissibility of evidence of prior domestic abuse between the accused and the victim. The supreme court did not address the admissibility of evidence of prior domestic abuse against someone other than the victim, which is the issue addressed in *Valentine.* And, because the supreme court denied review, *Valentine* is binding on both this court and the district court. *See State v. Collins,* 580 N.W.2d 36, 43 (Minn.App.1998) (explaining that an opinion of this court has precedential effect once the deadline for granting review has expired), *review denied* (Minn. July 16, 1998). We therefore apply *Valentine* and conclude that the district court properly admitted evidence of Taylor's relationship with D.W. under section 634.20.

Taylor also argues that the probative value of D.W.'s testimony was substantially outweighed by the danger of unfair prejudice. Taylor again relies on *McCoy* and argues that the evidence of Taylor's prior relationship with D.W. lacked probative value because it could not illuminate the history of Taylor's relationship with A.D. *See McCoy,* 682 N.W.2d at 159 ("[E]vidence of prior conduct between the accused and the alleged victim ... may be offered to illuminate the history of the relationship."). But, as we stated in *Valentine,* evidence concerning abuse of a former spouse or girlfriend "sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." 787 N.W.2d at 637. As in many other domestic abuse cases, only A.D. could testify to the events that occurred between her and Taylor in their homes. *See McCoy,* 682 N.W.2d at 161 (explaining that domestic abuse generally occurs "in the privacy of the home," goes underreported, and lacks eyewitness testimony). D.W.'s testimony therefore provided a context for the relationship between A.D. and Taylor, and had significant probative value. *See Lindsey,* 755 N.W.2d at 756 ("Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." (quotation omitted)). The testimony also assisted the jury in assessing A.D.'s credibility. *See id.* at 757.

Even though D.W.'s testimony created a danger of prejudice to Taylor, it did not persuade the jury by illegitimate means or give the state an unfair advantage. *See State v. Bell,* 719 N.W.2d 635, 641 (Minn.2006) ("[U]nfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." (quotation omitted)). Taylor had notice before trial that the state intended to introduce history-of-relationship evidence under section 634.20. In addition, D.W.'s testimony was limited to the incident in which Taylor choked her and his subsequent phone calls in violation of the no-contact order. Finally, the district court twice gave the jury a cautionary instruction that D.W.'s testimony was "being offered for the limited purpose of demonstrating the nature and the extent of the relationship between [Taylor and A.D.]" and that the jury must not convict Taylor based on his previous conduct toward D.W. We presume that the jury followed the district court's cautionary instructions. *State v. Miller,* 573 N.W.2d 661, 675 (Minn.1998). [2] Contrary to Taylor's assertion, no evidence suggests that the cautionary instructions were confusing to the jury, and Taylor did not object to the instructions at trial. The district court's cautionary instructions lessened any danger of unfair prejudice to Taylor. *See State v. Waino,* 611 N.W.2d 575, 579 (Minn.App.2000) (stating that the prejudicial effect of prior-relationship evidence "is mitigated by the [district] court's cautionary instruction to the jury").

***3** We conclude that the district court did not err in admitting D.W.'s testimony under section 634.20 and in concluding that the probative value of the testimony outweighed the danger of unfair prejudice to Taylor. In addition, there is

no evidence that D.W.'s testimony significantly affected the verdict. *See Benton,* 858 N.W.2d at 541. Even though the prosecutor compared the testimonies of A.D. and D.W. in his closing argument, he repeated the district court's cautionary instructions regarding the purpose of D.W.'s testimony. The prosecutor did not discuss D.W.'s testimony as "propensity evidence," as Taylor suggests. Because both the district court and the prosecutor cautioned the jury regarding the purpose of D.W.'s testimony and because other evidence (including A.D.'s testimony and the text-message exhibits) provided sufficient evidence of Taylor's guilt, the relationship evidence did not significantly affect the verdict. *See id.* at 542 (concluding that the relationship evidence did not significantly affect the verdict when the prosecutor "made sparse use of the relationship evidence in closing argument," the prosecutor and district court provided several cautionary instructions regarding the purpose of the evidence, and the other evidence of guilt was overwhelming).

II.

Taylor also raises several arguments in his pro se supplemental brief. Even though Taylor fails to cite legal authority, we will briefly discuss the merits of his arguments.

Taylor first argues that his trial attorney was ineffective. In making this argument, Taylor cites facts that are not in the record. Because we do not have the record to review Taylor's argument, we decline to consider it. *See State v. Alvarez,* 820 N.W.2d 601, 626 (Minn.App.2012) ("[A]n ineffective-assistance-of-counsel claim should typically be raised by a postconviction petition for relief."), *aff'd sub. nom. State v. Castillo–Alvarez,* 836 N.W.2d 527 (Minn.2013).

Taylor also argues that the district court erred in allowing reference to his gang membership. Before trial, the district court stated that it was "concerned" about references to gang membership, but would not preclude reference to Taylor's statements in his text messages to A.D. that he was in a gang. The district court explained that the statements were not being introduced to establish that Taylor was in a gang, but were relevant to show "how the statements were meant to have been perceived" and "how they were in fact perceived by [A.D.]" Taylor is correct that the references to his gang membership created a danger of prejudice to him. But the state was required to prove that Taylor intended to or had reason to know that he would cause A.D. to feel threatened or terrorized and that A.D. actually felt that way. *See* 10 *Minnesota Practice,* CRIMJIG 13.56 (2006) (stalking); 10 *Minnesota Practice,* CRIMJIG 13.58 (2006) (pattern of stalking conduct); 10 *Minnesota Practice,* CRIMJIG 13.107 (2006) (terroristic threat). Taylor's text-message references to his gang membership were therefore relevant to the elements of the three charges, and the district court did not abuse its discretion in allowing reference to Taylor's gang membership. *See State v. Amos,* 658 N.W.2d 201, 203 (Minn.2003) ("Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.").

***4** Finally, Taylor appears to suggest that the evidence was insufficient to convict him of pattern of stalking conduct because he and A.D. lived together and "were together until the day of [his] arrest." But a pattern of stalking conduct can be proven by showing two or more acts of domestic assault or terroristic threats within five years, Minn.Stat. § 609.749, subd. 5(b) (2012), and domestic assault is committed against a family or household member, Minn.Stat. § 609.2242, subd. 1 (2012). Contrary to Taylor's assertion, the evidence that Taylor and A.D. lived together as a couple supports Taylor's conviction for pattern of stalking conduct.

Affirmed.

All Citations

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Footnotes

1 The supreme court recently declined to determine whether a district court erred by admitting evidence of domestic abuse against someone other than the victim under section 634.20 because the evidence did not significantly affect the verdict in the case. *See State v. Benton,* 858 N.W.2d 535, 541 (Minn.2015).

2 Taylor cites previous caselaw doubting the jury's ability to follow cautionary instructions. *See* *State v. Caldwell,* 322 N.W.2d 574, 590–91 (Minn.1982). But "doubts about instructions have not held sway," and we now presume that jurors follow instructions. *State v. McCurry,* 770 N.W.2d 553, 558–59 (Minn.App.2009), *review denied* (Minn. Oct. 28, 2009).

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Michael Anthony LINDSEY, Appellant.

No. A12–0109.
|
Jan. 14, 2013.
|
Review Granted March 27, 2013.
|
Stay Granted March 27, 2013.
|
Stay Vacated/Denied Nov. 12, 2013.

Hennepin County District Court, File No. 27–CR–11–4690.

Attorneys and Law Firms

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David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, MN, for respondent.

Considered and decided by SCHELLHAS, Presiding Judge; ROSS, Judge; and KIRK, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

***1** Appellant challenges his conviction of second-degree assault, arguing that (1) the district court erred by denying his pretrial-suppression motion, (2) his stipulated-facts trial was not valid and constituted plain error, and (3) he received ineffective assistance of counsel. We affirm.

FACTS

At 11:20 p.m., on February 7, 2011, victim A.R. called 911 twice. During the first call, she told the operator that she was in the house of her boyfriend, appellant Michael Lindsey, that he had assaulted her, including threatening her with a knife, and that he refused to allow her to leave. During the second call, A.R. told the operator that Lindsey had "beat [her] up" and that she had left the house. During both calls, A.R. was crying.

At 11:24 p.m., Minneapolis Police Officer David Swierzewski arrived at Lindsey's house [1] and located A.R., who was "shaking, crying, and appeared very frightened." A.R. told Officer Swierzewski that Lindsey was angry, upset, and intoxicated; she and Lindsey had fought because Lindsey believed A.R. broke his TV; Lindsey threw the TV at her; Lindsey hit her several times; Lindsey had a knife and refused to let her leave his bedroom; Lindsey told A.R. that if she left, he would cut off his ankle monitoring bracelet, drive to her sister's house in Crystal, and kill her sister; Lindsey had been violent towards the police in the past, was very aggressive, and would possibly be violent; and Lindsey was on supervised release for making terroristic threats against an ex-girlfriend. A.R. also told Officer Swierzewski that at least one other man was in Lindsey's house, and A.R. thought that maybe two men were in the house. Officer Swierzewski did not observe that A.R. was physically injured, and A.R. refused medical attention.

After additional officers, including Officer Jesse Trebesch, arrived and surrounded the house, A.R. told Officer Trebesch the same facts that she related to Officer Swierzewski and also said that one of the men in the house was Lindsey's nephew, with whom Lindsey had fought two weeks earlier. The police made numerous attempts to contact the inhabitants of the house by knocking on the doors, announcing that they were the police, shining flashlights into the windows of the house, activating their emergency lights, calling the telephone number listed for the house, and attempting to find family members who lived across the street. Ultimately, the police forcibly entered the house. Upon entry, Lindsey's nephew approached the officers and said that although he heard them knocking, Lindsey had instructed him not to answer the door. The nephew also said that he had not heard A.R. and Lindsey

fighting that night, but that Lindsey and A.R. were "always fighting."

After the police sent a K–9 unit up the stairs, Lindsey came down and police immediately handcuffed and arrested him. Police then looked through the house to determine whether a third man was present. They did not find anyone else in the house but did see a knife in plain view in Lindsey's bedroom. Two or three hours later, the police re-entered the house with a search warrant.

***2** Respondent State of Minnesota charged Lindsey with second-degree assault. Lindsey moved to suppress the knife that the police found in his bedroom, and the state moved to admit Lindsey's prior conviction of second-degree assault as *Spreigl* evidence. The district court denied Lindsey's suppression motion and granted the state's *Spreigl* motion. Lindsey waived his right to a jury trial and proceeded with a stipulated-facts trial under Minn. R.Crim. P. 26.01, subd. 3(a). The stipulated evidence included a Minneapolis police report from the incident on February 7, 2011; a Columbia Heights police report from November 29, 2010, of a domestic disturbance between A.R. and Lindsey which resulted in Lindsey's arrest but no charges against him; photographs of A.R., which revealed facial bruises, Lindsey's mother's house, the knife and TV found in the house, and A.R.'s torn clothing found in Lindsey's bedroom; the audio recording and transcript of A.R.'s 911 calls; a memorandum that described a police interview of A.R. on October 17, 2011; and the fact that A.R. was married to someone other than Lindsey at the time of the incident. The district court found Lindsey guilty.

This appeal follows.

DECISION

Denial of Suppression Motion

Lindsey argues that the district court erred by admitting the knife because the exigencies of the situation did not justify the warrantless entry by police into the house. "When reviewing a pretrial order on a motion to suppress, we review the district court's factual findings under our clearly erroneous standard. We review the district court's legal determinations ... de novo." *State v. Milton,* 821 N.W.2d 789, 798 (Minn.2012) (citation omitted).

The United States Constitution and the Minnesota Constitution both guarantee "[t]he right of the people to be secure in their persons, houses, papers and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. 1, § 10. "The touchstone of the Fourth Amendment is reasonableness...." *State v. Johnson,* 813 N.W.2d 1, 5 (Minn.2012) (quotation omitted). "It is a basic principle of constitutional law that warrantless searches are presumptively unreasonable." *State v. Shriner,* 751 N.W.2d 538, 541 (Minn.2008). But "because the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions." *Id.* (quotations omitted). "One such exception is exigent circumstances [as] [w]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.* (quotations omitted). To justify a warrantless search based on the exigencies of the situation, the state must show "the presence of probable cause that an individual has committed a felony and exigent circumstances related to its investigation." *State v. Lussier,* 770 N.W.2d 581, 586 (Minn.App.2009) (citing *State v. Outhoudt,* 482 N.W.2d 218, 223 (Minn.1992)), *review denied* (Minn. Nov. 17, 2009). Lindsey does not dispute the existence of probable cause, so we address only whether the exigencies of the situation justified the warrantless police entry into the house.

***3** Two tests are used to determine whether the exigencies of a situation justify a warrantless search: " '(1) single factor exigent circumstances, and (2) in the absence of any of these factors, a totality of the circumstances test.' " *Shriner,* 751 N.W.2d at 541–42 (quoting *State v. Gray,* 456 N.W.2d 251, 256 (Minn.1990)) (other quotation omitted). Single factors that create exigent circumstances include hot pursuit, imminent destruction or removal of evidence, protection of human life, likely escape of a suspect, and fire. *Gray,* 456 N.W.2d at 256. "It is only when 'none of the single factor exigent circumstances is clearly implicated' that we apply a 'totality of the circumstances' test to determine whether exigent circumstances are present." *Shriner,* 751 N.W.2d at 542 (quoting *Gray,* 456 N.W.2d at 256). "Whether exigent circumstances exist is an objective determination, and the individual officer's subjective state of mind is irrelevant." *Id.*

Here, the district court applied the totality-of-the-circumstances test and concluded that the exigencies of the situation justified the warrantless entry by the police. We agree.

Under the totality-of-the-circumstances test, the court considers six factors adopted by the supreme court in *Gray* from *Dorman v. United States,* 435 F.2d 385, 392–93 (D.C.Cir.1970):

> (a) whether a grave or violent offense is involved; (b) whether the suspect is reasonably believed to be armed; (c) whether there is strong probable cause connecting the suspect to the offense; (d) whether police have strong reason to believe the suspect is on the premises; (e) whether it is likely the suspect will escape if not swiftly apprehended; and (f) whether peaceable entry was made.

Gray, 456 N.W.2d at 256. "[T]here is no requirement that all of the *Dorman* factors be equally satisfied before a warrantless search is justified." *State v. Hummel,* 483 N.W.2d 68, 73 (Minn.1992); *see* *State v. Johnson,* 689 N.W.2d 247, 252 (Minn.App.2004) (concluding that the totality-of-the-circumstances test justified a warrantless entry of property when only four of the *Dorman* factors were present), *review denied* (Minn. Jan. 20, 2005). The *Dorman* factors are "not exhaustive," *Gray,* 456 N.W.2d at 256, and "[d]etermining whether exigent circumstances exist under the totality of the circumstances is a flexible approach that encompasses all relevant circumstances." *Shriner,* 751 N.W.2d at 541 (quotations omitted). In addition to the *Dorman* factors, a court may consider several other circumstances. *See Gray,* 456 N.W.2d at 257 (considering " 'the risk of danger, the gravity of the crime and likelihood that the suspect is armed' " (quoting *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 1690, 109 L.Ed.2d 85 (1990)).

Here, the district court determined that "four of the six *Dorman* factors support a finding that exigent circumstances existed at the time of the forced entry" and that Lindsey posed a risk of harm to "himself and to the other persons present inside the house," which "further support[ed] the existence of exigent circumstances." Lindsey challenges the court's finding on the first *Dorman* factor—whether the offense was a violent one, arguing that the offense was not violent because A.R. did not show signs of "injury or bruising" and "refused medical help," even though she claimed that he repeatedly punched her. Lindsey's argument is unpersuasive.

***4** The Minnesota Legislature has defined second-degree assault as a violent offense. *See* Minn.Stat. § 609.1095, subd. 1(d) (2010) (including second-degree assault in definition of "[v]iolent crime"). Moreover, the district court's determination that the offense was a violent one is supported by the record. Without repeating the facts in their entirety, the facts reveal that A.R. twice called 911 crying and reporting that Lindsey assaulted her. She supplemented her report when the police arrived. We conclude that the district court's determination that a violent offense was involved was not clearly erroneous.

Lindsey also challenges the district court's determination that the warrantless entry was supported by the risk of harm to Lindsey and to "other persons present inside the house." He argues that because he did not threaten to hurt himself or his nephew, the belief by police that he might do so is baseless and not supported by testimony. Lindsey attempts to bolster his argument with the fact that the police waited 20 to 40 minutes before entering the house. Lindsey's argument is unpersuasive. The concern by police that Lindsey might take action that would risk his own welfare or jeopardize his nephew's safety was reasonable under the circumstances.

The district court did not err by determining, based on the *Dorman* factors and the totality of the circumstances, that the existence of exigent circumstances justified a warrantless entry by police into Lindsey's house.

Validity of Stipulated–Facts Trial

Relying almost entirely on *Dereje v. State,* 812 N.W.2d 205, 211 (Minn.App.2012), *review granted* (Minn. June 27, 2012), Lindsey argues that his trial "was not a valid stipulated-facts trial because the parties did not stipulate to the *facts,* although the facts were very much in dispute. Instead, the state submitted *evidence* that included police reports, photographs, audio recordings of the 911 calls and their transcripts." Lindsey argues that the invalidity of his stipulated-facts trial affected his substantial rights, requiring reversal of his conviction.

In *Dereje,* this court concluded that a stipulated-facts trial was not valid because the parties submitted a body of evidence to the district court rather than submitting solely facts agreed

upon by the parties. 812 N.W.2d at 209–11. The supreme court has accepted review of *Dereje,* so it is not a final decision and therefore does not have precedential effect. *See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.,* 418 N.W.2d 173, 176 (Minn.1988) (stating that decisions of court of appeals become "final by virtue of the denial of petition for further review"); *see also State v. Collins,* 580 N.W.2d 36, 43 (Minn.App.1998) (stating that when supreme court granted review of court of appeals case and did not affirm but remanded, court of appeals case was "not binding precedent"), *review denied* (Minn. July 16, 1998). Because *Dereje* is not controlling authority in this case, we consider whether Lindsey's stipulated-facts trial conformed to Minn. R.Crim. P. 26.01, subd. 3.

***5** In a stipulated-facts trial under Minn. R.Crim. P. 26.01, subd. 3(a), "[t]he defendant and the prosecutor may agree that a determination of defendant's guilt, or the existence of facts to support an aggravated sentence, or both, may be submitted to and tried by the court based on stipulated facts." "[I]n a stipulated-facts trial under rule 26.01, subd. 3, the facts are not disputed," but a stipulated-facts trial does not reduce the state's burden of proof, *State v. Mahr,* 701 N.W.2d 286, 292 (Minn.App.2005), *review denied* (Minn. Oct. 26, 2005), and both parties are permitted to offer evidence to the court. Before the stipulated-facts trial begins, the defendant must waive his right to testify, call witnesses, and question or hear the prosecution's witnesses. Minn. R.Crim. P. 26.01, subd. 3(a). After the parties submit the case, the "court must proceed ... as in any other trial to the court." *Id.,* subd. 3(d). And a defendant may raise issues on appeal as from any trial to the court. *Mahr,* 701 N.W.2d at 292.

Although the facts are not disputed in a stipulated-facts trial—disputed facts being the antithesis of stipulated facts—this court has affirmed a conviction that resulted from a stipulated-facts trial when a district court considered a disputed body of evidence over a defendant's objection. In *State v. Eller,* 780 N.W.2d 375, 381 (Minn.App.2010), *review denied* (Minn. June 15, 2010), this court upheld the district court's consideration of the probable-cause portion of a criminal complaint as sufficiently competent and reliable evidence of a prior conviction. We rejected the appellant's argument that the court's consideration of the evidence was improper because "the sole purpose for which appellant stipulated to the complaint was to inform the court of the offenses with which appellant had been charged." *Eller,* 780 N.W.2d at 381. Although we agreed that "a defendant may qualify his stipulation to the admission of the criminal complaint in a stipulated-facts trial for th[e] limited purpose" of informing the court of the offenses with which a defendant has been charged, we noted that the appellant "did not object to, or otherwise qualify his stipulation as to how the complaint could be used." *Id.* We "discern[ed] no error in the district court's treatment or use of the facts alleged in the factual portion of the probable-cause section of the complaint ... because [the appellant] stipulated to the complaint as evidence." *Id.*

Here, as in *Eller,* Lindsey stipulated to all of the evidence that the state submitted to the district court, submitted his own evidence, and did not object or otherwise qualify his stipulation as to how the evidence would be used.

Lindsey also argues that the stipulated-facts trial was invalid because the district court "determined credibility not based on live testimony but from pieces of paper." Lindsey's argument lacks merit. Lindsey waived his right to "(1) testify at trial; (2) have the prosecution witnesses testify in open court in [his] presence; (3) question those prosecution witnesses; and (4) require any favorable witnesses to testify for [his] defense in court." Minn. R.Crim. P. 26.01, subd. 3(a). He therefore waived his right to have the district court determine the credibility of witnesses through live testimony.

Ineffective Assistance of Counsel

***6** Lindsey argues that he received ineffective assistance of counsel at his stipulated-facts trial that constituted structural error because his counsel did not subject the state's case to meaningful adversarial testing.

A criminal defendant has a constitutional right to a fair trial. U.S. Const. amend. XIV § 1; Minn. Const. art. I, § 7; *Spann v. State,* 704 N.W.2d 486, 493 (Minn.2005) ("Due process guarantees in our state and federal constitutions include the right to a fair trial."). Lindsey cites *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984), in which the United States Supreme Court stated that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal." "Claims of ineffective assistance of counsel are reviewed de novo because they involve mixed questions of fact and law." *State v. Hokanson,* 821 N.W.2d 340, 357 (Minn.2012). Generally, to prevail on an ineffective-assistance-of-counsel claim, a defendant "must show that

his trial counsel's representation fell below an objective standard of reasonableness *and* that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quotation omitted) (emphasis added). But "[c]ertain counsel-related errors ... may be structural errors, which do not require a showing of prejudice [because] the situation presents circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *State v. Dalbec,* 800 N.W.2d 624, 627 (Minn.2011) (quotation omitted). One such circumstance is "when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* (quotation omitted).

Lindsey argues that his trial counsel's assistance was so ineffective that it constituted structural error because his counsel did not challenge the state's case, including challenging A.R.'s credibility. Specifically, he complains that, at his stipulated-facts trial, his counsel failed to bring to the district court's attention (1) the lack of bruising on A.R.'s face despite her statement to the police that Lindsey punched her so hard she blacked out, (2) the lack of injuries on A.R.'s face from the knife with which Lindsey allegedly threatened her, and (3) the fact that Lindsey always kept in his room the knife with which he allegedly threatened A.R. But all of these facts were included in the stipulated evidence submitted to the district court. Moreover, Lindsey's trial counsel challenged the stipulated evidence submitted by the state, including A.R.'s credibility, by submitting the stipulation that A.R. was married to someone other than Lindsey at the time of the incident and the Columbia Heights police report. And Lindsey's trial counsel orally challenged A.R.'s credibility during the stipulated-facts trial.

Based on our careful review of the record, we conclude that Lindsey's argument that he received ineffective assistance from his trial counsel and that it constituted structural error is entirely lacking merit. Lindsey voluntarily waived his right to a jury trial, elected to proceed with a stipulated-facts trial, and stipulated without objection or qualification to the state's exhibits.

***7 Affirmed.**

All Citations

Not Reported in N.W.2d, 2013 WL 141633

Footnotes

1 The house was that of Lindsey's mother.

End of Document

2002 WL 1837992
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Marcia A. KELLY, Appellant,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Respondent.

No. C0-02-217.
|
Aug. 13, 2002.

Ramsey County District Court, File No. C9007576.

Attorneys and Law Firms

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Katherine A. McBride, John C. Hughes, Meagher & Geer, P.L.L.P., Minneapolis, MN, for respondent.

Considered and decided by HALBROOKS, Presiding Judge, KLAPHAKE, Judge, and HANSON, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** Appellant Marcia Kelly, injured while a passenger in an automobile owned and operated by her husband, challenges the district court's grant of summary judgment in favor of respondent State Farm Mutual Automobile Insurance Company. Because the district court did not err by concluding that an insurance policy covering an automobile not involved in the accident and naming appellant's husband as an insured excluded underinsured motorist coverage for appellant's injuries, we affirm.

FACTS

Appellant was injured when a Dodge automobile in which she was a passenger crashed on the freeway. The Dodge was driven and solely owned by appellant's husband and was insured by a State Farm Mutual Automobile Insurance Company (State Farm) policy naming both appellant and her husband as insureds. At the time of the accident, appellant and her husband jointly owned a Pontiac automobile insured by a second State Farm policy that named both appellant and her husband as insureds.

Appellant brought a damages claim against her husband. State Farm settled the claim by paying appellant $100,000, the liability limit of the Dodge policy. Appellant then brought a claim against State Farm to recover underinsured motorist (UIM) benefits under the Pontiac policy. The district court concluded that appellant was entitled to UIM coverage under the Pontiac policy despite the fact that appellant's husband, the tortfeasor, was a named insured on the Pontiac policy.

Shortly thereafter, we issued *Johnson v. St. Paul Guardian Ins. Co.,* 627 N.W.2d 731 (Minn.App.2001), *review denied* (Minn. Sept. 11, 2001). In *Johnson,* we held that a wife who was injured while riding on a motorcycle driven by her husband could not recover UIM benefits under an insurance policy covering an uninvolved vehicle and naming her husband as an insured. *Id.* at 732.

On reconsideration, the district court ruled that under *Johnson,* plaintiff was not entitled to UIM coverage, and granted summary judgment in favor of State Farm. This appeal follows.

DECISION

On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether the district court correctly applied the law. *Vue v. State Farm Ins. Cos.,* 568 N.W .2d 527, 529 (Minn.App.1997). The facts relevant to this appeal are undisputed. "On established facts, an insurance coverage issue is a question of law, which this court reviews de novo." *Id.* (citation omitted). The parties have stipulated that if appellant prevails, respondent shall pay the full $100,000 UIM benefits, and if respondent prevails, appellant shall not be entitled to any portion of the UIM coverage.

Every owner of a motor vehicle in Minnesota must obtain UIM coverage. Minn.Stat. § 65B.49, subd. 3a(2) (2000). UIM insurance provides personal benefits intended to

compensate an accident victim when the policy limit of the at-fault driver's liability insurance is less than the victim's damages. *See Johnson v. St. Paul Guardian Ins. Co.,* 627 N.W.2d 731, 732 (Minn.App.2001), *review denied* (Minn. Sept. 11, 2001) (UIM insurance provides "excess coverage that is available when the tortfeasor carries inadequate liability insurance."). UIM coverage is generally first-party coverage in the sense that it follows the person insured, and not the vehicle the person may be occupying. *Myers v. State Farm Mut. Auto. Ins. Co.,* 336 N.W.2d 288, 291 (Minn.1983). By contrast,

> ***2** [l]iability insurance is third-party coverage, meaning that it pays for damage the insured is legally obligated to pay another person, a third party, for bodily injury arising out of the insured's ownership, maintenance or use of a motor vehicle.

Lynch ex rel. Lynch v. Am. Fam. Mut. Ins. Co., 626 N.W.2d 182, 188 (Minn.2001) (citations omitted).

Automobile insurance policies such as those at issue here frequently contain a standard "family vehicle exception" that defines "underinsured motor vehicle" to exclude a vehicle owned by or furnished or made available for the regular use of the party claiming the UIM benefit. *See Myers,* 336 N.W.2d at 292. The family-vehicle exception prevents an insured from collecting UIM benefits and liability benefits from the same policy on the theory that claiming first-party benefits under the policy of the owner or insurer of the at-fault vehicle would be tantamount to converting less expensive UIM coverage into more expensive third-party liability coverage. *See id.* at 291 (noting that an underinsured motorist policy "is not designed to compensate [the owner] or his additional insureds from [the owner's] failure to purchase sufficient liability insurance."). "First party coverage and third party coverage contemplate different risks. They are not the same and they are not priced the same." *Petrich by Lee v. Hartford Fire Ins. Co.,* 427 N.W.2d 244, 246 (Minn.1988); *see also Johnson v. Am. Fam. Mut. Ins. Co.,* 426 N.W.2d 419, 422 (Minn.1988) ("Underinsured motorist coverage is not an alternative to liability coverage."). The Myers rule, which authorizes the family-vehicle exception,

> arises out of a fact pattern where the same person owns the at-fault vehicle and the policy under which the injured claimant seeks first-party [UIM] coverage. Recovery in this situation inevitably compensates the owner who failed to adequately insure one of his vehicles.

Petrich, 427 N.W.2d at 245-46.

One line of Minnesota cases, beginning with *Myers,* has upheld the family-vehicle exclusion when the plaintiff first collected liability limits from the tortfeasor and then attempted to collect UIM benefits on the same or additional policies carried by the tortfeasor himself. *See Johnson,* 627 N.W.2d at 734; *Linder by Linder v. State Farm Mut. Auto. Ins. Co.,* 364 N.W.2d 481, 483 (Minn.App.1985) (holding Myers anti-conversion rule prevents insured from collecting UIM benefits from the tortfeasor's separate policies covering uninvolved vehicles), *review denied* (Minn. May 1, 1985); *Myers,* 336 N.W.2d at 291.

A second line of cases, however, has invalidated the family-vehicle exclusion when the injured party sought UIM coverage under a separate policy under which the tortfeasor was not a named insured. *See, e.g., Northrup v. State Farm Mut. Auto. Ins. Co.,* 601 N.W.2d 900, 906 (Minn.App.1999), *review denied* (Minn. Jan. 25, 2000); *DeVille v. State Farm Mut. Auto. Ins. Co.,* 367 N.W.2d 574, 577 (Minn.App.1985), *review denied* (Minn. July 26, 1985). In *DeVille,* we permitted a wife injured while a passenger on a motorcycle driven by her husband to recover UIM benefits under a UIM policy

> ***3** purchased by her for her own individual protection [because] * * * [s]he paid separate premiums for the car registered to her, and the policy was issued to her.

DeVille, 367 N.W.2d at 577.

In *Johnson,* we considered facts virtually identical to those here: a wife was injured in an accident while riding on a motorcycle owned, insured, and driven by her husband. 627 N.W.2d at 732. She settled with the husband's motorcycle liability insurer and then filed a UIM claim under a separate policy insuring an uninvolved vehicle owned by both herself and her husband and naming both spouses as insureds. *See id.* We concluded that allowing the wife to collect benefits under her tortfeasor husband's liability policy as well as benefits under a separate UIM policy naming the tortfeasor as an insured would impermissibly convert UIM coverage into liability coverage. *See id.* at 734. We held that the wife was not entitled to UIM coverage, stating

> [t]he purpose of UIM benefits is to protect the insured from those who carry inadequate liability coverage. Here, the tortfeasor, appellant's husband, had liability insurance on his motorcycle that was inadequate to cover appellant's injuries. This cannot be rectified by allowing the separate policy providing UIM coverage for appellant *and the tortfeasor* on their other motor vehicle to be converted to third-party coverage to cover his inadequate liability coverage.

Id. (citation omitted) (emphasis in original).

It is undisputed that appellant and her husband are both named insureds on the Pontiac policy and are both listed as owners on the Pontiac title. Appellant argues that her husband's name only appears on the Pontiac policy and the Pontiac title pursuant to a requirement imposed by husband's credit union, which financed the Pontiac purchase. Nonetheless, to allow appellant to collect UIM benefits under the Pontiac policy, which names appellant's husband as an insured, would "be an impermissible conversion of the underinsured motorist coverage purchased by the tortfeasor into what [is], in effect, additional liability limits for that tortfeasor." *DeVille,* 367 N.W.2d at 577. The Pontiac policy is simply not a separate policy under *Myers,* and the policy's family-vehicle exclusion, therefore, bars appellant's UIM claim here.

The district court did not err in determining that the Pontiac policy excluded underinsured motorist coverage for appellant's injuries in excess of the amount of liability coverage on the vehicle insured by State Farm that was involved in the accident.

Affirmed.

HANSON, Judge (concurring specially).

I concur in the result reached by the majority because our prior decision in *Johnson v. St. Paul Guardian Ins. Co.,* 627 N.W.2d 731 (Minn.App.2001), *review denied* (Minn. Sept. 11, 2001) is precedential and cannot be materially distinguished from the present case. *See State v. Collins,* 580 N.W.2d 36, 43 (Minn.App.1998) (implying that court of appeals decisions have precedential effect after the deadline for granting review has expired), *review denied* (Minn. Jul. 16, 1998); *Morgan v. Illinois Farmers Ins.,* 392 N.W.2d 37, 40 (Minn.App.1986) (stating court was "bound" by a prior court of appeals decision), *review denied* (Minn. Oct. 22, 1986). I concur specially, however, because, were it not for *Johnson,* I would decide the matter differently. I believe that the distinctions drawn in *Johnson* lack substance and are not grounded in the public-policy considerations that underlie the statutory requirement of underinsurance coverage.

***4** Our two lines of cases are difficult to reconcile. The majority correctly observes that one line of our cases has invalidated the family-vehicle exclusion where the UIM coverage was provided under a policy that was "separate" from the policy in which the tortfeasor was a named insured, even though the injured party was a member of the same household as the tortfeasor. *See, e.g., Northrup v. State Farm Mut. Auto. Ins. Co.,* 601 N.W.2d 900, 906 (Minn.App.1999), *review denied* (Minn. Jan. 25, 2000); *DeVille v. State Farm Mut. Auto. Ins. Co.,* 367 N.W.2d 574, 577 (Minn.App.1985), *review denied* (Minn. Jul. 26, 1985). But in today's prevalent circumstance of multiple-car families, the fact that the UIM benefits for one of the injured family members exists in a separate policy may be (and under the present facts, is) completely fortuitous. The decision whether to include multiple cars in separate policies or a single policy is likely made by the family's insurance agent, who may join them for administrative efficiency, without any thought that the joinder has any coverage implications. Similarly, the decision about whose name will be placed on

the title of any vehicle is also likely made for reasons of efficiency, without thought of any insurance implications. This sheer fortuity of the UIM coverage being either in a separate policy or a joint policy has no real relevance to the public policy underlying the statute requiring underinsurance coverage, which is to assure that victims of vehicle accidents receive adequate compensation for their injuries. I would conclude that the analysis in *Johnson* was incomplete because it was based on fact distinctions that were not material to the policy goals of the statute.

This point is underscored by Kelly's observation that, even when the UIM coverage is provided in a "separate policy" in which the injured victim is a named insured, the tortfeasor who is a member of the same household is necessarily included as an "additional insured" on the separate policy. Thus, the only real distinction between *Northrup* and *DeVille,* on the one hand, and *Johnson* and the present facts, on the other hand, is a distinction in labels: in the former cases, the tortfeasor is not a "named insured" but is an "additional insured," whereas in the latter cases, the tortfeasor is a joint "named insured." This distinction seems too flimsy to be used as a basis to deny victims of vehicle accidents the adequate compensation that was intended by the statutory requirement of underinsurance coverage.

I also am not convinced by the argument that the invalidation of the family-vehicle exclusion in these circumstances (involving liability coverage applicable to one vehicle and UIM coverage applicable to another vehicle) is tantamount to converting UIM coverage to third-party liability coverage.

First, where the victim owns a separate vehicle, the victim's UIM insurance on that vehicle is first-party coverage that follows the person of the victim and does not become third-party coverage on the tortfeasor's vehicle.

***5** Second, even though the UIM coverage might exist in a single policy covering several vehicles, it will always be excess to the liability coverage applicable to the tortfeasor's vehicle. It will not be available unless that third-party liability coverage does not fully compensate for the injuries. For this very reason, the UIM coverage would naturally be less expensive than third-party liability coverage and this difference in cost does not require the conclusion that the two coverages (so long as they are applicable to different vehicles) should be mutually exclusive.

Finally, an insurance company that provides coverage in a single policy for several vehicles is in the best position to determine the adequacy of the third-party liability coverage when it prices the UIM coverage.

The only supreme court decision in these two lines of cases, *Myers v. State Farm Mut. Auto Ins. Co.,* 336 N.W.2d 288, 292 (Minn.1983), upheld the family-vehicle exclusion in the situation where the injured party attempted to recover UIM on the tortfeasor's vehicle after recovering liability insurance on the same vehicle. The application of the family-owned vehicle exclusion made sense there because the victim did not own a separate car and, consequently, had no first-party UIM coverage to follow his person. But the application of the family-owned vehicle exclusion to preclude UIM insurance on the injured victim's separate vehicle, because the victim recovered liability insurance applicable to the tortfeasor's vehicle, does not make sense and conflicts with the statutory goals.

For these reasons, I conclude that the two lines of our cases cannot be fully reconciled and that this case would benefit from further review.

All Citations

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Althea Milisse WILLETTE, et al., Respondents,
v.
Deborah J. SMITH, et al., Appellants.

No. CX-99-1668.
|
May 30, 2000.

Attorneys and Law Firms

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J. Brian O'Leary, O'Leary & Moritz Chartered, Springfield, MN, for appellants.

Considered and decided by HALBROOKS, Presiding Judge, KALITOWSKI, Judge, and WILLIS, Judge.

UNPUBLISHED OPINION

KALITOWSKI.

***1** On appeal following this court's remand to the district court for a determination of damages, appellant Archie D. Smith contends the district court erred in awarding damages and attorney fees to respondent Althea M. Willette. We affirm.

DECISION

The scope of review on appeal after remand is limited by the law of the case doctrine. The law of the case doctrine applies when an appellate court has ruled on a legal issue and has remanded the case to a district court for further proceedings. *Mattson v. Underwriters at Lloyds of London,* 414 N.W.2d 717, 719-20 (Minn.1987). The law of the case doctrine is a discretionary doctrine used to effectuate the finality of appellate decisions. *Loo v. Loo,* 520 N.W.2d 740, 744 n. 1 (Minn.1994). "Issues determined in a first appeal will not be relitigated in the trial court nor re-examined in a second appeal." *Mattson,* 414 N.W.2d at 720. But the law of the case doctrine should not be applied where, in the time between the two appeals in a case, there has been a change in the law that is entitled to deference. *Brezinka v. Bystrom Bros., Inc.,* 403 N.W.2d 841, 843 (Minn.1987).

This case arose out of respondent's purchase of real estate from appellant Archie D. Smith and his wife Deborah J. Smith. The district court originally found that appellant violated the Consumer Fraud Act, Minn.Stat. §§ 325F.68-.70 (1998), in connection with the sale of the property but that there were no damages from the violation. Respondent appealed the district court's failure to award damages and attorney fees for appellant's violation of the act. This court issued an unpublished decision holding that the district court was "required to determine damages" once it found that appellant had violated the act. *Willette v. Smith,* No. CX-97-1410, 1998 WL 171404, at *2 (Minn.App. Apr. 14, 1998). We accordingly remanded the case for a determination of the amount of damages resulting from the violation and for an award of attorney fees. *Id.*

Appellant first contends the Consumer Fraud Act does not apply because respondent did not suffer any actual damages. But in the previous appeal this court stated it would not consider arguments challenging the application of the act because a notice of review was not filed. *Id.* at *2 n. 3. Therefore, under the law of the case doctrine, appellant's arguments regarding the application of the Consumer Fraud Act are not properly before us.

Appellant also contends we must reverse the district court's damage award, citing a recent case holding that the Consumer Fraud Act applies only if the fraud or misrepresentation is disseminated to others. *Minh Ly v. Nystrom,* 602 N.W.2d 644, 647 (Minn.App.1999), *review granted* (Minn. Jan. 25, 2000). We disagree. First, the precedential value of *Minh Ly* is uncertain given that review has been granted. *See State v. Collins,* 580 N .W.2d 36, 43 (Minn.App.1998) (stating that this court's decisions have no precedential effect until deadline for granting review has expired), *review denied* (Minn. July 16, 1998); *State v. Cornell,* 491 N.W.2d 668, 672 n. 2 (Minn.App.1992) (noting that precedential value of Minnesota Supreme Court case was uncertain given that U.S. Supreme Court had granted review). Moreover, *Minh Ly* does

not require a reversal because there is evidence in the record here indicating that the fraud was disseminated to others.

***2** Thus the only issue properly before us on this appeal is appellant's argument that the district court's findings are insufficient to support its award of damages and attorney fees. On appeal, the district court's findings of fact "are given great deference" and are not set aside unless clearly erroneous. *Fletcher v. St. Paul Pioneer Press,* 589 N.W.2d 96, 101 (Minn.1999). If there is reasonable evidence to support the district court's findings of fact, a reviewing court will not disturb those findings. *Id.* If underlying findings of fact are sustainable, the district court's "ultimate" findings must be affirmed in the absence of a demonstrated abuse of the court's broad discretion. *Maxfield v. Maxfield,* 452 N.W.2d 219, 221 (Minn.1990). The reasonable value of attorney fees is a question of fact and we must uphold the district court's findings on that issue unless they are clearly erroneous. *Amerman v. Lakeland Dev. Corp.,* 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973).

Appellant argues that the district court erred because it did not specify whether the damages were related to the consumer fraud violation or specify how it determined the damages. We disagree. First, the district court stated that respondent "suffered out-of-pocket damages of $7495.00 *as a result of Defendant Archie Smith's violation of the Consumer Fraud Act.*" (Emphasis added.) Second, the district court stated that the damages covered respondent's expenses of converting the previously commercial area of the building to residential use. The amount of damages awarded is supported by evidence that respondent spent nearly $6,000 converting the formerly commercial area of the property into residential use and approximately $1,500 making repairs in this same part of the property.

Appellant also argues that the district court erred because it did not specify whether the attorney fees were related to the consumer fraud violation and how it determined the amount of the award. We disagree. The district court stated that: (1) the fees related to the case against appellant as opposed to other parties; and (2) the total amount of attorney fees in the case was $52,000 but that it "believed that the amount awarded herein is justified *as to this Defendant.*" (Emphasis added.) This conclusion is supported by the evidence. Respondent's attorney testified that the work was related to appellant because (1) the pre-complaint stage focused on the Smiths; and (2) the summary judgment work pertained to the Smiths' motion for summary judgment as well as the other defendants'. Moreover, the basis for the attorney-fee award is supported by the evidence. The district court cited the appropriate factors in determining the reasonableness of attorney fees and the record indicates that respondent's estimate of fees was modest.

Finally, because appellants did not submit their own calculations of damages or fees to the district court, it was reasonable for the district court to accept respondent's evidence and calculations. We conclude the district court's findings were sufficient to support its award of damages and attorney fees.

***3** Affirmed.

All Citations

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