

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0485**

Brenda Becker, et al.,
Appellants,

vs.

Estate of Edward Schenatzki,
Defendant,

Dairyland Insurance Company,
Respondent.

**Filed October 25, 2021
Affirmed
Connolly, Judge**

Otter Tail County District Court
File No. 56-CV-18-764

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

Donald W. Teed, Jr., Law Offices of Donald W. Teed, Minneapolis, Minnesota (for
appellants)

William P. Harrie, Nilles Law, Fargo, North Dakota (for respondent)

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

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellants-insureds challenge the grant of summary judgment in favor of
respondent-underinsured-motorist(UIM)-insurer, which refused appellants' claims for the

amount of their policy because respondent had not waived its right to subrogation as to the tortfeasor's umbrella policy although it had waived its right to subrogation as to the tortfeasor's liability policy when it permitted appellants to settle with the tortfeasor's insurer for the amount of that policy. We affirm.

FACTS

In July 2016, appellants-insureds Brenda Becker and Troy Drewes were injured by a car driven by Edward Schenatzki, an insured of American Family Insurance Company (AF) with a \$100,000-per-person liability policy and a \$1,000,000 umbrella policy.¹ Drewes held a \$100,000 Underinsured Motorist (UIM) Policy with respondent Dairyland Insurance Company; his policy also covered Becker.

Appellants received settlement offers of the liability policy limits from AF. They provided respondent with *Schmidt-Clothier* notices giving the name of the tortfeasor, the tortfeasor's insurer, the limits of the tortfeasor's liability policy, the amount agreed on in settlement, and their intention to pursue claims under the tortfeasor's umbrella policy. Respondent replied to the notice by giving permission for the settlements and waiving its right to subrogation; the replies made no reference to the umbrella policy.²

¹ Although it is listed as a respondent, the estate of Edward Schenatzki takes no part in this appeal.

² See *Schmidt v Clothier*, 338 N.W.2d 256, 258 (Minn. 1983) (holding that “[a]n insured must give the underinsurer written notice of a tentative settlement agreement, after which the underinsurer has 30 days in which to either acquiesce in the settlement and lose its potential right to subrogation or prevent the settlement by exchanging its draft for the amount of the settlement offer for the tendered draft of the liability insurer”).

Drake-Ryan releases³ between appellants and Schenatzki/AF provided that: (1) AF would pay appellants each \$100,000 under Schenatzki's liability policy; (2) appellants would satisfy any judgments in their favor against Schenatzki to the full extent of the \$100,000 received from AF; (3) appellants would refrain from attempting to collect any unsatisfied portion of the judgments from personal assets of Schenatzki other than his umbrella policy and would release him when all proceedings under that policy were concluded; and (4) if any other parties sought subrogation for indemnity because of payment to appellants, appellants would indemnify Schenatzki and AF from any such claims against them. The agreement did not mention respondent except implicitly as a party seeking subrogation. Appellants informed respondent of the *Drake-Ryan* releases and of their action against Schenatzki, which respondent declined to join.

Schenatzki died in September 2018. A search revealed that his only asset at the time of his death was a car worth about \$12,000; he and his deceased wife had sold their real property in 2009 and moved to an apartment.

The April 2019 jury trial of appellants' claim against the umbrella policy resulted in a verdict for appellants against Schenatzki of \$2,580,000. In May 2019, appellants each claimed \$100,000 from respondent under Drewes's UIM policy. Respondent refused

³ See *Drake v. Ryan*, 514 N.W.2d 785, 790 (Minn. 1994) (holding that "the defendant is not entitled to dismissal of the claims against him in a negligence action where the plaintiffs have fully released the defendant and his primary liability insurer up to the limits of the primary liability coverage but have expressly retained the right to pursue their claims against the defendant for additional damages up to the limits of the defendant's excess liability coverage").

payment, and appellants brought this action against it. The parties stipulated that, if the district court ruled that respondent did not waive its subrogation rights as to the umbrella policy because it never received a *Schmidt-Clothier* notice of a settlement offer under that policy, appellants would be obligated to indemnify Schenatzki and AF under the *Drake v. Ryan* agreement, and respondent would seek subrogation/indemnity directly against appellants, and not against AF.

Agreeing that there were no genuine issues of material fact, both parties moved for summary judgment on the issue of whether the *Schmidt-Clothier* notices and respondent's waiver of its subrogation right applied only to the \$100,000 liability policy or also to the \$1,000,000 umbrella policy. The district court granted respondent's motion and denied appellants' motion, concluding that, "There was no notice of settlement provided to [respondent] regarding the umbrella policy; therefore, [respondent] could not have waived its right to subrogation of the policy."

Appellants challenge the grant of summary judgment, arguing that respondent waived its subrogation rights to both the liability and the umbrella policies.⁴

DECISION

"Where the facts are undisputed, this court applies a de novo standard of review to determine whether the district court erred in its application of the law. The existence and extent of subrogation rights is a question of law that we review de novo." *Com. Union Ins. Co. v. Minn. School Bd. Ass'n*, 600 N.W.2d 475, 478 (Minn. App. 1999) (citation omitted).

⁴ Appellants also argue issues not presented to or addressed by the district court, which we do not address. See *Thiele v. Stich*, 482 N.W.2d 580, 582 (Minn. 1988).

Summary judgment is appropriate when a nonmoving party fails to make a showing sufficient to establish the existence of an element essential to the party's case. *Bersch v. Rgnonti & Assocs.*, 584 N.W.2d 783, 786 (Minn. App. 1998).

The requisite *Schmidt-Clothier* notices provided for the \$100,000 AF liability policy: identified the insureds, the tortfeasor, the tortfeasor's insurer, the limits of the policy, and the amount of the settlement; they also stated that appellants, under *Drake-Ryan* releases, preserved their right to make claims under Schenatzki's \$1,000,000 umbrella policy, would release Schenatzki from personal liability under such claims, and would indemnify Schenatzki and A.F.

The district court wrote:

The purpose of the [*Schmidt-Clothier*] notice is to allow the UIM insurance company [here, respondent] the option of substituting its payment for the amount which the tortfeasor has offered as settlement. *See [American Family Mut. Ins. Co. v.] Baumann*, [459 N.W.2d 923, 927 (Minn. 1990)], *Schmidt v. Clothier*, 338 N.W.2d 256 [(Minn. 1983).] Logic would dictate that in order for the purpose of the notice to be realized, there would need to be a settlement offer.

Here, there was no settlement offer regarding the [\$1,000,000] umbrella policy. In fact, the notice explicitly stated that [appellants] would be pursuing a claim under the umbrella policy.

Because there was no settlement offer, [respondent] had no opportunity to substitute payment on the umbrella policy and did not waive [its] right to subrogation.

[Appellants] argue that even if there was no notice, that [respondent] was not prejudiced because [respondent] had already determined that Defendant Schenatzki was a poor prospect for subrogation. Whether [respondent] thought that the Defendant Schenatzki was a good candidate for subrogation is irrelevant when the caselaw is so clear. *Schmidt v. Clothier*, and its progeny, require a settlement offer. Where there is no settlement offer, there can be no *Schmidt-Clothier*

notice. Therefore, [respondent] did not waive its right to subrogation of the umbrella policy.

Appellants argue that, with this language, “[t]he district court ruled that UIM benefits were not payable by [respondent] to [appellants], finding that [appellants] had inadvertently waived them by entering into a *Drake* agreement with [AF] on the first layer of liability coverage, which the district court felt [released] any obligation beyond the liability and umbrella coverages because the *Drake* pledged to ‘indemnify’ Schenatzki.” But the issue the district court addressed was whether, absent a *Schmidt-Clothier* notice of a settlement offer on the umbrella policy, respondent had waived its subrogation right as to the umbrella policy, not what rights appellants had inadvertently or otherwise waived under the *Drake* agreement. Moreover, a *Drake-Ryan* agreement, “like any other settlement document, is a contract, and we review the language of the contract to determine the intent of the parties.” *Booth v. Gades*, 778 N.W.2d 701, 706 (Minn. 2010).⁵

There is no basis to overturn the district court’s clear and concise decision that respondent did not waive its subrogation right to the umbrella policy.

Affirmed.

⁵ In a footnote in their reply brief, appellants state that whether the *Schmidt-Clothier* notice applied to one policy or both policies is irrelevant because “[s]ubrogation is against the tortfeasor,” citing *Ronning v. State Farm Mut. Auto. Ins. Co.*, 887 N.W.2d 35 (Minn. App. 2016), *rev. denied* (Minn. Jan 17, 2017), in support. But *Ronning* does not address whether a UIM insurer waives subrogation rights to all of a tortfeasor’s policies by declining to substitute its payment for an insurer’s settlement payment on one of the policies, which is the issue here.