2002

The Estate of Dorothy Berkemeir v. Hartford Insurance of the Midwest : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

THE ESTATE OF DOROTHY BERKEMEIR; by and through its Executor, KAREN NIELSEN, Plaintiff / Appellee, vs. HARTFORD INSURANCE COMPANY OF THE MIDWEST, Defendant / Appellant.	Case No. 20030321-SC

On Certiorari from an Opinion
Issued by the Utah Court of Appeals on March 20, 2003

BRIEF OF APPELLANT

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are identified in the caption on appeal.

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JURISDICTION

This Court granted the Hartford's initial petition for interlocutory appeal, and subsequently transferred the case to the Utah Court of Appeals. Prior to the transfer, jurisdiction in this Court was proper pursuant to Utah Code Ann. § 78-2-2(3)(j). The decision of the Court of Appeals was issued on March 20, 2003, and is included in the Appendix. This Court's order granting certiorari is proper under Utah Code Ann. §§ 78-2-2(3)(a) and 78-2-2(5), which confer sole jurisdiction upon this Court to resolve judgments and rulings of the Utah Court of Appeals.

ISSUE PRESENTED FOR REVIEW

The following issue is presented to this Court for review:

Did the Court of Appeals err in ruling that the term "causes of action arising out of personal injury" in Utah's Survival Statute is limited solely to "tort" actions, and therefore the Survival Statute had no affect on the UIM claim of an injured party who died of unrelated causes prior to judgment or settlement?

STANDARD OF REVIEW: The interpretation of a statute is a question of law reviewed *de novo*. *Cook v. Zions First National Bank*, 2002 UT 105 ¶ 8, 57 P.3d 1084.

PRESERVATION OF ISSUE: This issue was briefed by both parties in connection with The Hartford's Motion for Summary Judgment, and at the Court of Appeals.

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statute is determinative of the outcome of this appeal:

Utah Code Ann § 78-11-12(1).

(a) Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal representatives or heirs of the person who died have a cause of action against the wrongdoer or the personal representative of the wrongdoer for special and general damages, subject to subsection (1)(b).

(b) If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that person as a result of his injury.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition Below

This case arises out of a claim for underinsured motorist benefits. Dorothy Berkemeir, the UIM claimant, died of causes unrelated to the underlying automobile accident before her UIM claim was resolved, and a dispute then arose as to the effect of Utah's Survival Statute on the UIM benefits.

Berkemeir's estate filed a complaint, after which the parties stipulated to certain facts, and filed cross-motions for summary judgment. The trial court ruled that the Survival Statute did not affect Berkemeir's claim for UIM benefits (R. 138), and entered an order granting the Estate's motion for partial summary judgment and denying Hartford's motion for summary judgment. (R. 189-196).

This Court granted Hartford's petition for interlocutory appeal, and transferred the case to the Court of Appeals. The Court of Appeals affirmed the trial court, and this Court granted certiorari.

Statement of Facts

On October 16, 1995, Dorothy Berkemeir ("Berkemeir") was a passenger in her automobile when an oncoming car driven by James Alexander ("Alexander") inexplicably turned in front of the vehicle, causing a collision. Due to Alexander's negligence, Berkemeir sustained personal injuries with associated pain and suffering, and incurred medical expenses of approximately $38,000.00. (R. 20, 35). Opinion ¶ 2.

On October 9, 1996, approximately a year after the accident, Berkemeir settled with Alexander for the $50,000 limits of his liability insurance policy with Allstate Insurance Company ("Allstate"). If Berkemeir were still alive, the Allstate settlement would not have fully compensated her for her loss. (R. 21). Opinion ¶¶ 2-3.

Berkemeir's vehicle was covered by a personal automobile insurance contract issued by the Hartford ("the Policy"). Berkemeir's Policy included UIM coverage with limits of $100,000 per person and provided, in pertinent part:

> We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury:
> (1) Sustained by an insured; and
> (2) Caused by an accident.

(R. 20, 72-73). Opinion ¶ 6.

Berkemeir demanded the UIM Policy's $100,000 limits. (R. 22). The Hartford agreed that Berkemeir's damages exceeded the $50,000 she received from Alexander, but it did not believe that they reached an additional $100,000. Although the Hartford was entitled to demand a trial to determine Berkemeir's damages, it agreed to an expedited disposition in the form of binding arbitration. Opinion ¶ 3. (Under the Policy, neither

party could demand arbitration unilaterally; the consent of both parties was required. (R. 74)).[1]

On August 15, 1997, prior to the scheduled arbitration, Berkemeir died of causes unrelated to the automobile accident. (R. 22). After her death, Hartford withdrew its consent to arbitrate, believing that because Berkemeir died of causes unrelated to the accident, Utah's Survival Statute limited any claim that her Estate could assert to "out-of-pocket expenses," which were less than the $50,000 that Berkemeir had already received from Allstate. (R. 23, 25-26). The Estate reduced its settlement demand after Berkemeir's death to $45,580, but the parties did not reach an agreement, and the Estate filed the present action. (R. 1, 23). Opinion ¶ 3.

The parties stipulated to certain facts, and filed cross-motions for summary judgment. (R. 82-116). The trial court ruled that because UIM benefits are based upon a first-party insurance contract, they are unaffected by Utah's Survival Statute. (R. 191-195). The Court of Appeals affirmed. Opinion ¶ 17.

SUMMARY OF ARGUMENT

The Court of Appeals erred in concluding that Utah's Survival Statute does not affect a claim for underinsured motorist benefits. Under this Court's precedent, whether an insured is "legally entitled to recover" against the underlying tortfeasor -- as required

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[1] An arbitration was originally scheduled for July 21, 1997. As is typical when the extent of personal injury damages is at issue, the Hartford requested an independent medical examination. Berkemeir failed to appear at the first IME, and both the IME and arbitration were rescheduled. The new date for the arbitration was September 23, 1997.

to recover UIM benefits -- depends on whether the insured has a "viable" claim against the tortfeasor under applicable law. In this case, Berkemeir's death precluded a viable claim against the tortfeasor (except for out-of-pocket expenses, the full amount of which she had already received).

The Court of Appeals, however, applied a wholly new test, concluding that Berkemeir was legally entitled to recover against the tortfeasor because Hartford had "settled" by acknowledging that Alexander was an underinsured tortfeasor, and agreeing to arbitrate the extent of Berkemeir's damages. This conclusion was patently erroneous, as these circumstances fall far short of essential terms of a settlement.

The Court of Appeals further erred in its interpretation of the term "arising out of personal injury" in the Survival Statute. The court first failed to consider the plain meaning of the phrase, and then compounded the omission by construing it as limited solely to "tort" claims, a reading that can only be achieved by rewriting the statute.

Finally, the Court erred by holding that, because a claim for UIM benefits is contract-based, it automatically cannot "arise out of personal injury." This conclusion is not supported by citation to any authority, and in fact holds directly opposite to the only case on point cited by the court. By its very nature, a UIM claim derives from, exists because of, is measured by, is co-extensive with, and is inextricable from, the underlying personal injury action against the tortfeasor. Indeed, the Court of Appeals recognized that a UIM carrier "stands in the shoes" of a tortfeasor. Under these circumstances, it is irrelevant that UIM benefits are provided through an insurance contract; they clearly "arise out of" personal injury, and Berkemeir's UIM claims did not survive her death.

ARGUMENT

I. UNDERINSURED MOTORIST COVERAGE

Underinsured motorist coverage is a required (but waivable) component to automobile liability insurance policies under Utah law. *See* Utah Code Ann. §§ 31A-22-302, -305. "Underinsured motorist coverage . . . provides coverage for covered persons who are legally entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury, sickness, disease, or death." Utah Code Ann. § 31A-22-305(9).

The purpose of UIM coverage is to "provide protection to the insured against damages caused by a negligent motorist *as if the motorist had another liability policy in the amount of the underinsured policy.*" 7 *Am. Jur. 2d Automobile Insurance* § 37, Underinsured Motorist Coverage (citing *United States Fidelity & Guar. Co. v. Sandt*, 845 P.2d 519 (Utah 1993) (emphasis added).[2] UIM coverage is considered to "give a personal injury claimant access to insurance protection to compensate for the damages that would have been recoverable if the underinsured motorist had maintained an adequate policy of liability insurance." *Id.*

As the Court of Appeals noted in its opinion, with UIM coverage, "[t]he insurer stands in the shoes of the [under]insured motorist and must pay if the motorist would be

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[2] For example, suppose a plaintiff sustains $40,000 of damages in an automobile accident, under circumstances where the tortfeasor who caused the accident only has $25,000 in liability coverage. Under these circumstances, the injured person could seek an additional $15,000 from her own UIM insurer.

required to pay." Opinion ¶ 7. Ironically, though, the Court of Appeals' ruling places a person in a *better* position if she is injured by an underinsured motorist than if the tortfeasor were fully insured. (*See* p. 11, *infra*.)

II. UTAH'S SURVIVAL STATUTE

At common law, actions for personal injuries abated upon the death of either the wrongdoer or the injured party. *Kynaston v. United States*, 717 F.2d 506, 509 (10th Cir. 1983) (analyzing history of Utah's survival statute). To mitigate this harsh effect, the Utah legislature adopted its first "survival statute" in 1953, preserving certain actions upon the wrongdoer's death, but not upon the injured person's death. *Id.* at 510.

In 1967, the statute was amended to provide limited nonabatement upon the injured party's death. Significantly, however, the 1967 amendment expressly rejected survival of any "claims relating to pain and suffering." *Id.* (According to the amendment's sponsor, "pain and suffering is a personal thing that's suffered by the individual; it's not suffered by anyone else." *Id.* at 511 n.10 (quoting Utah S. Jour., 37th Sess. 197-98 (1967) remarks of Senator Welch)).

The Survival Statute was amended again in 1977. With respect to an injured person who died prior to judgment or settlement, the statute provided that her personal representatives or heirs could "receive no more than the out-of-pocket expenses incurred by or on behalf of that injured person as the result of his injury . . . ." *Id.* Largely cosmetic amendments in 1991 brought the statute to the form in effect at the time of the events in this case:

(a) Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal representatives or heirs of the person who died have a cause of action against the wrongdoer or the personal representative of the wrongdoer for special and general damages, subject to subsection (1)(b).

(b) If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that person as a result of his injury.

Utah Code Ann. § 78-11-12(1) (1996).[3]

III. APPLICATION OF THE SURVIVAL STATUTE TO BERKEMEIR'S UIM CLAIM.

It is uncontroverted in this case that if Berkemeir had died while pursuing a claim against Alexander, her Estate would have been limited to out-of-pocket expenses, which totaled less than the $50,000 she had already received. She could not recover any additional sum. It is also well established that, in order to seek underinsured motorist coverage, a claimant must possess a "viable claim that is able to be reduced to judgment in a court of law." *Lieber v. ITT Hartford Insurance Center, Inc.*, 2000 UT 90, ¶ 4, 15

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[3] Subsection (b) was amended in 2001 to read: "If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representative or heirs of that person *have a cause of action against the wrongdoer only for special damages occurring prior to death that result from the injury caused by the wrongdoer, including income loss. 'Special damages' does not include pain and suffering, loss of enjoyment of life, and other not readily quantifiable damages frequently referred to as general damages.*" (New language italicized). Utah Code Ann. § 78-11-12(1)(b) (2001 supp.)

P.3d 1030, 1034, quoting *Peterson v. Utah Farm Bureau Ins. Co.*, 927 P.2d 192, 195 (Utah App. 1996).

Putting these two principles together, it seems irrefutable that, because the Estate was precluded upon Berkemeir's death from recovering against Alexander under the Survival Statute, it likewise had no claim for UIM benefits. The Court of Appeals, however, reached a different conclusion. In holding that the Survival Statute did not affect Berkemeir's claim for UIM benefits, the court followed a three-step process:

1) First, it held that Berkemeir was "legally entitled to recover" damages from the underinsured motorist because a "settlement" had occurred between Berkemeir and the Hartford with respect to the UIM benefits that was "able to be reduced to judgment in a court of law." Opinion ¶ 10. (This contention had not been briefed or argued below by either party, or addressed by the district court.)

2) The Court of Appeals next held that the Survival Statute's reference to claims "arising out of personal injury" is ambiguous, and construed that language as limited solely to "tort" claims. Opinion ¶ 12.

3) Pursuant to those conclusions, the Court of Appeals held that because a claim for UIM benefits is not a tort claim, it does not "arise out of personal injury," and therefore the Survival Statute is irrelevant to Berkemeir's UIM claim. Opinion ¶¶ 13-15.

As discussed below, the *Berkemeir* opinion conflicts not only with this Court's precedent, but also that of another panel of the Court of Appeals.

A. The Court of Appeals' determination that a "settlement" occurred is contrary to the ordinary meaning of the term, and without factual or legal basis.

The Court of Appeals first addressed the issue of whether Berkemeir was "legally entitled to recover" damages from the tortfeasor, as required to claim UIM benefits. In answering that question, the court took a novel approach: Instead of examining the underlying law governing Berkemeir's claim against Alexander (which would include the Survival Statute), the court instead decided that, as a matter of law, three "concessions" by the Hartford created a "settlement" with Berkemeir that was "able to be reduced to judgment in a court of law." Opinion ¶ 10. From that, the court concluded that the "legally entitled to recover" prerequisite to UIM benefits was satisfied. *Id.*

This conclusion subjugates the plain meaning of "settlement" to an entirely new and, frankly, strange meaning. The ordinary meaning of "settlement" requires that parties have achieved a meeting of the minds as to the "essential terms" of the resolution of their claims against each other. *See, e.g., Sackler v. Savin*, 897 P.2d 1217, 1221 (Utah 1995). In this case, the Court of Appeals found a settlement based entirely upon three factors: 1) the Hartford agreed that the tortfeasor, Alexander, was negligent, and did not object when Berkemeir settled with Alexander's liability insurer for his policy limits; 2) the Hartford acknowledged that it owed *something* to Berkemeir in terms of UIM benefits, and 3) the Hartford consented to have an arbitrator decide just what that something was. Opinion ¶ 10.

Where is the "settlement" here? Surely the essential terms of a settlement of a UIM claim must at least include the *amount of money* that the insurer is to pay. *See, e.g.,*

Sackler, 897 P.2d at 1221 (no settlement without meeting of minds as to payment terms). Obviously, Berkemeir could not have filed a motion to enforce this so-called "settlement," which is simply non-existent under Utah law.[4]

The sole authority cited by the Court of Appeals for its ruling was the principle that insurance policies should be "liberally construed in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance." *Id.* Ironically, though, the opinion instead *defeats* the purpose of UIM insurance, which is to place the injured party in the same position as if the tortfeasor had additional liability insurance.

A simple hypothetical illustrates this point. Assume that Alexander has a liability policy through Allstate with $100,000 limits. Further, assume that Allstate does not dispute Alexander's negligence, but the parties cannot agree on the extent of Berkemeir's injuries, and therefore agree to arbitrate that issue. Berkemeir dies for reasons unrelated to the accident before the arbitration. Under these circumstances, it is uncontroverted that the Survival Statute would limit the Estate's recovery against Alexander to out-of-pocket expenses. Under the Court of Appeal's ruling, though, if Berkemeir were "lucky" enough to have been struck by a tortfeasor with insufficient liability insurance limits, her estate could continue to seek $100,000.

This aspect of the ruling not only lacks legal support, but is contrary to public policy. Under the Court of Appeals' reasoning, any party who acknowledges some

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[4] Perhaps Berkemeir might have sought to compel the arbitration, although the Policy allows either party to withhold consent. In any event, though, there is nothing to arbitrate if the Estate has no viable claim under the Survival Statute.

degree of fault or responsibility has "settled" a claim, and the survival statute no longer applies -- even if damages are hotly contested. Thus, the fairly common (and socially desirable) practice of admitting negligence early on in some automobile accident claims will now be discouraged, to avoid waiving any later reliance on the provisions of the Survival Statute. Defendants also now have an incentive to refuse arbitration, lest that too deprive them of Survival Statute protections. These undesirable, yet inevitable, results of the Court of Appeals opinion further show the need for reversal by this Court.

B. The Court of Appeals erred by holding that a UIM claim for benefits does not "arise out of personal injury," and therefore survives the claimant's death.

Regardless of the resolution of Point A, the Court of Appeals committed a fundamental error by deeming the key language of the Survival Statute ambiguous, and concluding that a contract claim for UIM benefits does not "arise out of" personal injury. Utah Code Ann. § 78-11-12(1)(a).

"When interpreting a statute, we look first to its plain language and go no further unless we find the language ambiguous." *Cook v. Zions First National Bank*, 2002 UT 105 ¶ 8, 57 P.3d 1084. The Court of Appeals concluded that the Estate offered a "plausible" reading of the Survival Statute's wording, and therefore the statute was ambiguous. Opinion ¶ 12. Interestingly, the Court of Appeals omitted any discussion of the ordinary and plain meaning of the phrase "arising out of." Instead, it simply adopted the Estate's argument "focusing more on the general fact that tort actions 'arise out of personal injury,' and asserting, therefore, that the Survival Statute applies only to actions in tort." *Id.*

In other words, the Court of Appeals ruling was based upon its assumption that, because all tort claims arise out of personal injury, then all claims that arise out of personal injury must be torts. (This brings to mind the old school lesson that just because all dogs are mammals does not mean that all mammals are dogs.) The legislature is presumed to use all words advisedly. If the legislature had intended to use the word "torts," it would have been easy enough for it to do so, particularly as the statute has been amended four times. It chose instead to address all claims "arising out of" personal injury, a more expansive category.

There is a long line of cases in Utah finding the plain meaning of the term "arising out of" to be unambiguous -- and quite broad in its scope. *See, e.g., Meadow Valley Contractors, Inc. v. Transcontinental Ins. Co.*, 2001 UT App 190, ¶ 14, 27 P.2d 594, 597. ("[T]he term 'arising out of' is ordinarily understood to mean originating from, incident to, or in connection with the item in question.") (quoting *National Farmers Union Prop. & Cas. Co. v. Western Cas. & Sur. Co.*, 577 P.2d 961, 963 (Utah 1978)); *Cook, supra.*

The phrase "has much broader significance than 'caused by,'" requiring only some type of "nexus" between the event and the damage. *Meadow Valley Contractors*, 2001 UT App 190, at ¶ 14. In the UIM context, there is far more than a mere "nexus" between UIM benefits and the claimant's personal injury. Berkemeir's UIM claim would not even exist but for the underlying automobile accident and her personal injury claim against Alexander. The UIM claim is measured by the extent of Berkemeir's personal injury, and is subject to same elements, defenses, and all other aspects of personal injury law. Indeed, the Hartford "stands in the shoes" of the tortfeasor. Opinion ¶ 7.

Consistent with that principle, this Court has held that where Utah's wrongful death statute barred an action for the death of an unborn child, it identically barred a claim for UIM benefits. In *State Farm Mut. Ins. Co. v. Clyde*, 920 P.2d 1183 (1996), the insureds' pregnant daughter died in a car accident. The insureds received the underinsured tortfeasor's policy limits "for both deaths," and then sought UIM benefits under their own State Farm policy, which, like the Hartford's Policy, covered damages that an insured was "legally entitled to recover" from the tortfeasor. State Farm asserted that the insureds were not legally entitled to maintain an action for wrongful death of the unborn child, and therefore had no entitlement to UIM benefits. This Court affirmed summary judgment for State Farm, denying UIM benefits because the plain language of the wrongful death statute precluded a viable action. *Id.* at 1187.

Later that year, the Court of Appeals affirmed summary judgment for a UIM insurer in *Peterson*, *supra*, on the grounds that the Workers' Compensation Act would have barred an action brought by the insured. Because the Act prevented the plaintiff from establishing a "legal determination of the [underinsured's] liability" and "the extent of damages sustained," the court observed, the insurer's obligation to provide UIM coverage was not implicated. 927 P.2d at 196-97.

Adopting *Peterson*'s reasoning, this Court held in *Lieber*, *supra*, that where the Workers' Compensation Act did not bar an action against third parties, the plaintiff likewise was not barred from claiming uninsured (UM) benefits. There, the plaintiff-employee was injured in a multi-car accident while driving on the job and brought suit against two drivers who allegedly caused the accident but fled the scene. The plaintiff

also named his employer's UM insurer in a representative capacity for the two drivers and for any "underinsured drivers involved in the accident." 2000 UT 90, ¶ 5.

The trial court granted summary judgment in part on the grounds that the Act precluded the employee from collecting from his employer, and thus from his employer's UM carrier. This Court reversed, recognizing that workers' compensation immunity barred a viable claim against the plaintiff's co-worker (and thus any UM claim as well), but noting that the Act did not preclude an action against third parties. Accordingly, the insurer's obligation to provide UM coverage was implicated with respect to the latter.

In every sense of the phrase, UIM claims "arise out of" personal injury. The legislature has characterized underinsured motorist benefits as providing coverage for "damages from owners or operators of underinsured motor vehicles *because of* bodily injury, sickness, disease, or death." Utah Code Ann. § 31A-22-305(9) (emphasis added). The Policy similarly states that Hartford will provide "compensatory damages" recoverable from the owner or operator of an underinsured motor vehicle *because of bodily injury*; (1) sustained by an insured; and (2) *caused by an accident.* (R. 3, 21, 36, 91, 191) (emphases added).

This same result was reached in the only case cited in the Court of Appeal's Opinion regarding application of a survival statute to UIM benefits -- which, interestingly, happened to reach the *opposite* conclusion than the Court of Appeals. *See* Opinion ¶ 15 ("[B]ecause the Estate's claim sounds in contract, not tort, it is unaffected by the Survival Statute. *But see Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11, 13-14 (Minn. 1994) (concluding, under nearly identical circumstances, that the cause

of action was limited by Minnesota's Survival Statute)").[5] (A copy of *Beaudry* is included in the appendix.)

Because *Beaudry* is the only known case to address this specific issue, and because Minnesota's survival statute is quite similar to Utah's,[6] it is helpful to examine in some detail that decision, which truly does involve strikingly similar facts. Like Berkemeir, Beaudry was the passenger in her own vehicle driven by one of her children, and was injured in a car accident. Beaudry's vehicle had UIM coverage of $100,000 per person. She settled with the underlying liability carrier for its limits without objection from her UIM carrier, then died of unrelated causes before reaching an agreement as to the amount of UIM benefits to which she was entitled.

As in this case, Beaudry's estate argued that her claim for UIM benefits "survived" her death. The Minnesota Supreme Court wrote:

> The issue before us may be framed as follows:
>
> When an underinsured motorist claimant dies of causes unrelated to the auto accident, does her underinsured motorist claim survive the abatement of the underlying tort claim against the tortfeasor? The answer to this question depends on whether the underinsured motorist claim is viewed as a cause of action arising out of an injury to the person, which does not survive the death of the person, or as a contract action, which does survive the person's death.

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[5] Although not mentioned in the Court of Appeals opinion, the Hartford notes that *Beaudry* was later overruled on other (statute of limitations) grounds. *Oanes v. Allstate Insurance Co.*, 617 N.W.2d 401, 406 (Minn. 2000).

[6] Minnesota's statute reads: "A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in Section 573.02 [allowing recovery of special damages]." *Beaudry*, 518 N.W.2d at 12.

518 N.W.2d at 12.

The court began its analysis by noting that, if Beaudry had died before settling with the tortfeasor, even if a lawsuit were already pending, her claim against him would have abated. "Beaudry's estate seeks to circumvent the survival statute by characterizing her UIM lawsuit as a contract action for underinsured motorist benefits," it stated. "As a contract action, her estate would be able to recover underinsured motorist benefits measured by the general damages that would have been recoverable against the tortfeasor." *Id.* at 13.

The court recognized that a claim for UIM benefits is a first-party coverage claim based on contract, as in Utah. Nevertheless, the court wrote, "liability for UM and UIM benefits is determined by tort law, *i.e.*, by what the tortfeasor would have had to pay the claimant if the tortfeasor had not been uninsured or underinsured." *Id.* In that sense, the court observed, a UIM policy "has generally been understood as excess coverage, to be utilized only after the cause of action against the insured tortfeasor has been concluded." *Id.* (citation omitted).

The test for survivability lies in the substance, not the form, of the cause of action, the court stated. *Id.* Thus, it was not persuaded by the plaintiffs' argument that "they are not seeking recovery for pain and suffering but rather enforcement of their contractual rights," and that all conditions precedent to a UIM claim had been met before Beaudry died. "At the time of her death, the liability under that coverage still remained to be determined, and her UIM claim was still unresolved and pending," the court wrote. *Id.* at 14.

The *Beaudry* court pointed to the language of the UIM policy, which, like the Hartford's policy, obligated the insurer to "pay damages for bodily injury an insured is legally entitled to collect" from the underinsured driver. *Id.* "Put another way," the court wrote, "the UIM claimant can collect from State Farm what the claimant could have collected in damages for bodily from the tortfeasor if the tortfeasor had not been underinsured. And that determination is directly dependent on the law governing 'a cause of action arising out of an injury to the person.'" The court concluded that "the primary cause of the damages sought to be recovered as UIM benefits is the injury Alice Beaudry suffered in the auto accident." *Id.* Consequently, an argument that the plaintiffs were not seeking damages for pain and suffering "elevates form over substance," *id.*, the court held, and Beaudry's UIM claim did not survive her death.

The Minnesota Supreme Court's reasoning is sound, and is consistent with Utah precedent. *Peterson* and *Lieber* each recognized that, although UIM or UM claims are contractual in nature, a viable tort claim against the tortfeasor must exist to trigger the insurer's duty to provide those benefits. *Peterson*, 927 P.2d at 194 n. 1, 195; *Lieber*, 2000 UT 90 ¶¶ 4, 11. The two claims are inextricable, and the Court of Appeals' opinion that UIM claims do not arise out of personal injury should be reversed.

CONCLUSION

For the reasons set forth above, the appellant respectfully requests the Court to reverse the Court of Appeals, and to remand to the district court with instructions to enter judgment in favor of the Hartford.

DATED this 20th day of August, 2003.

CHRISTENSEN & JENSEN, P.C.

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CERTIFICATE OF SERVICE

This is to certify that on the 20th day of August, 2003, two true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, postage prepaid, to:

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APPENDIX

Exhibit A	Court of Appeals opinion, *Estate of Dorothy Berkemeir v. Hartford Insurance Company of the Midwest*, 2003 UT App 78, 469 Utah Adv. Rep. 10
Exhibit B	Transcript of Judge's Ruling, January 29, 2001 (R. 135-39)
Exhibit C	Order Granting the Estate's Motion for Partial Summary Judgment and Denying Hartford's Motion for Summary Judgment, March 7, 2001 (R. 189-195)
Exhibit D	*Beaudry v. State Farm Mutual Automobile Insurance Co.*, 518 N.W.2d 11 (Minn. 1994)

EXHIBIT A

IN THE UTAH COURT OF APPEALS

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Estate of Dorothy Berkemeir, by and through its executor, Karen Nielsen, Plaintiff and Appellee, v. Hartford Insurance Company of the Midwest, Defendant and Appellant.	OPINION (For Official Publication) Case No. 20010437-CA F I L E D (March 20, 2003) 2003 UT App 78

Third District, Salt Lake Department
The Honorable Timothy R. Hanson

Attorneys: Anneliese L. Cook and Mark L. Anderson, Salt Lake City, for Appellant
Mark A. Larsen and Lisa C. Rico, Salt Lake City, for Appellee

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Before Judges Jackson, Billings, and Thorne.

THORNE, Judge:

¶1 Hartford Insurance Company of the Midwest (Hartford) appeals the trial court's grant of partial summary judgment in favor of the Estate of Dorothy Berkemeir (the Estate) and the denial of Hartford's motion for summary judgment. We affirm.

BACKGROUND

¶2 On October 16, 1995, James Alexander inexplicably turned his vehicle into oncoming traffic on Interstate 80 causing a collision with Dorothy Berkemeir's car.[1] Berkemeir was injured, and the medical costs associated with treating her injuries

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1. Berkemeir was a passenger in the vehicle at the time.

exceeded $38,000.[2] Alexander conceded liability. Subsequently, on October 9, 1996, Berkemeir, without objection from Hartford, her insurer, executed a settlement agreement and release with Alexander and his insurance company for the $50,000 limit of his automobile liability policy. Berkemeir then filed a claim with Hartford demanding additional coverage under her underinsured motorist policy (UIM).[3]

¶3 Hartford conceded that Berkemeir's damages exceeded Alexander's liability coverage; however, Hartford disputed the amount Berkemeir was entitled to under her contract. Thus, the parties entered into arbitration to determine the deficiency in coverage that occurred as a result of Alexander's underinsured status. The parties agreed to a hearing date of July 21, 1997. However, because Hartford desired an independent medical examination, the hearing was later rescheduled. Unfortunately, before the arbitration hearing was held, Berkemeir died of causes unrelated to the accident. Following her death, the Estate reduced its demand from $100,000 to $45,580.40, but based on its interpretation of Utah Code Ann. § 78-11-12(1) (1996) (the Survival Statute) Hartford denied the Estate's claim and withdrew from the arbitration. The Estate then filed a complaint in the district court claiming breach of contract, preemptively arguing that the Survival Statute was inapplicable. After Hartford filed an answer, the parties submitted cross-motions for summary judgment preceded by a joint factual stipulation and summary of the parties' legal positions, including argument concerning the applicability of the Survival Statute. Following oral argument, the trial court granted the Estate's motion for partial summary judgment concluding that the action arose out of contract and that the Survival Statute was inapplicable. Hartford petitioned for interlocutory review. The Utah Supreme Court granted the request and transferred the matter to this court. We affirm.

ISSUE AND STANDARD OF REVIEW

¶4 Hartford argues that following Berkemeir's death the Estate's claim was limited by the Survival Statute, thus, the trial court erred in granting the Estate partial summary judgment. "Because summary judgment is not granted as a matter of fact, but rather as a matter of law, we review the trial court's legal conclusions for correctness." Pixton v. State Farm

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2. In compliance with Berkemeir's insurance policy, Hartford paid her the limits on both her extended coverage provision and personal injury protection clauses, a total of $10,000.

3. Berkemeir demanded the limit of her UIM policy, $100,000.

Mut. Auto. Ins. Co., 809 P.2d 746, 748 (Utah Ct. App. 1991). Moreover, "'[i]n matters of pure statutory interpretation, [we] review[] a trial court's ruling for correctness and give[] no deference to its legal conclusions.'" Lieber v. ITT Hartford Ins. Ctr., Inc., 2000 UT 90,¶7, 15 P.3d 1030 (quoting Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997)).

ANALYSIS

¶5 Hartford asserts that Berkemeir's death from causes unrelated to the underlying accident relieves Hartford from the duty to pay the Estate any additional UIM benefits.[4] Hartford predicates this argument on its reading of Berkemeir's UIM policy language and the effect that the Survival Statute has on Hartford's duty under the policy. Accordingly, to determine if the trial court erred, we must determine both Hartford's duty under the contract and what effect the Survival Statute has on that duty under these circumstances.

¶6 We turn first to the language of Berkemeir's UIM policy. We construe insurance policy language "liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance." U.S. Fid. & Guar. Co. v. Sandt, 854 P.2d 519, 521 (Utah 1993) (quotations and citations omitted). Moreover, "provisions that limit or exclude coverage should be strictly construed against the insurer" and "must be interpreted and construed as an ordinary purchaser of insurance would understand it." Id. at 523. Berkemeir's UIM policy promised that Hartford would pay Berkemeir

> compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury:
>
> 1. Sustained by an insured; and
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle.

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4. This argument is based on the assumption that the prior amounts paid to Berkemeir satisfied her out-of-pocket expenses, which is all that is required under the Survival Statute. See Utah Code Ann. § 78-11-12(1) (1996). Because we conclude that the Survival Statute has no impact on the present case, we do not address in this context the meaning or impact of the phrase "out-of-pocket expenses."

> We will pay damages under this coverage caused by an underinsured motor vehicle only if 1 or 2 below applies:
> 1. The limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements; or
> 2. A tentative settlement has been made between an insured and the insurer of the underinsured motor vehicle and we:
> a. have been given prompt written notice of such tentative settlement; and
> b advance payment to the insured in an amount equal to the tentative settlement within 30 days after receipt of notification.

(Emphasis added.)

¶7 We have previously determined that "for an insured to satisfy the 'legally entitled to recover' criterion, Utah law requires a viable claim that is able to be reduced to judgment in a court of law." Peterson v. Utah Farm Bureau Ins. Co., 927 P.2d 192, 195 (Utah Ct. App. 1996) (emphasis added). This "typically entails a lawsuit against the [under-]insured tortfeasor to litigate the issues of liability and damages. A judgment favorable to the insured fixes the insurer's contractual duty to satisfy that judgment, within policy limits." Lima v. Chambers, 657 P.2d 279, 281 (Utah 1982). Thus, the simplest way "for an insured to satisfy the 'legally entitled to recover' criterion" is in the form of "'a legal determination of the liability of the [under-]insured motorist and the extent of the damages sustained.'" Peterson, 927 P.2d at 195-96 (interpreting Lyon v. Hartford Accident & Indem. Co., 25 Utah 2d 311, 480 P.2d 739, 745 (1971)). However, the Utah Supreme Court has stated, in the context of uninsured motorist insurance;

> "The aim of the uninsured motorist statute is to minimize the catastrophic financial loss for victims of automobile accidents caused by the negligence of uninsured tortfeasors. We believe it is wholly inconsistent with this broad remedial purpose to permit the insurer to evade mandated coverage by erecting an artificial, arbitrary barrier to recovery."

Marakis v. State Farm Fire & Cas. Co., 765 P.2d 882, 884 (Utah 1988) (quoting Surrey v. Lumbermens Mut. Cas. Co., 424 N.E.2d

234, 238 (Mass. 1981)). Moreover, "'the purpose of mandatory uninsured-motorist insurance is "protection equal to that which would be afforded if the offending motorist carried liability insurance. . . . [T]he insurer stands in the shoes of the uninsured motorist [UM] and must pay if [the motorist] would be required to pay."'" Chatterton v. Walker, 938 P.2d 255, 260 (Utah 1997) (quoting Fetch v. Quam, 530 N.W.2d 337, 339 (N.D. 1995)). While the court clearly made this statement in reference to uninsured motorist coverage, we see no reason that this logic should not apply equally to statutorily mandated UIM coverage. See Utah Code Ann. § 31A-22-305 (2001); Lieber v. ITT Hartford Ins. Ctr., Inc., 2000 UT 90,¶8, 15 P.3d 1030 (accepting our application of UM case law to cases involving UIM claims).

¶8 The supreme court has also determined that once an insured claims under their UIM coverage, the relationship between the parties changes from a third-party relationship, to a first-party adversarial relationship. See Beck v. Farmers Ins. Exch., 701 P.2d 795, 799 (Utah 1985). As a result, the supreme court concluded that "the duties and obligations of the parties are contractual rather than fiduciary. Without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort." Id. at 800 (footnote omitted) (emphasis added).

¶9 Hartford, after acknowledging the existence of the preceding authority, argues that this case is instead controlled by Peterson v. Utah Farm Bureau Ins. Co., 927 P.2d 192 (Utah Ct. App. 1996), and that absent a legal determination of Berkemeir's damages, they were under no contractual duty concerning Berkemeir's claim either before or after her death. In Peterson, we concluded that "'a legal determination of the liability of the [under-]insured motorist and the extent of the damages sustained,'" id. at 196 (citation omitted), are predicate elements necessary to trigger an insurer's contractual duty. However, in Lieber the Utah Supreme Court adopted a different interpretation of the phrase "legally entitled to recover," and concluded that a claimant is legally entitled to recover if they "have 'a viable claim that is able to be reduced to judgment.'" Lieber, 2000 UT 90 at ¶8 (emphasis added) (quoting Peterson, 927 P.2d at 195). In so concluding, the supreme court, by inference, chose not to adopt the more rigorous standard we set forth in Peterson. Accordingly, to qualify under the "legally entitled to recover" language of a UIM contract, a party is not required to establish that a legal determination has been made. Rather, absent specific language to the contrary contained within the contract, a party is "legally entitled to recover" if they can show the existence of a "'viable claim that is able to be reduced to judgment.'" Id. (emphasis added) (citation omitted). We see no reason that this showing cannot be made with either a judgment

entered by a trial court, or a formal, or informal, settlement agreement between the parties.

¶10 Here, Hartford accepted from the outset the fact that Alexander caused the accident that resulted in Berkemeir's injuries. Hartford, without objection, allowed Berkemeir to enter into a settlement and release with Alexander and his insurance company for the limits of his policy. Then, when Berkemeir approached Hartford and submitted a demand under the terms of her UIM policy, Hartford conceded that her injuries exceeded the limits of Alexander's policy. To determine the amount due, the parties, under the terms of Berkemeir's policy, entered into arbitration. We conclude that Hartford's concessions concerning Alexander's liability and its concession that Berkemeir's damages exceeded Alexander's policy limits, as well as its reliance on language from Berkemeir's insurance contract relating to arbitration, qualify as a settlement "that is able to be reduced to judgment in a court of law." Id. at 195. Thus, by its own actions, Hartford acknowledged its duty under the contract concerning Berkemeir's UIM claim. See U.S. Fid. & Guar. Co. v. Sandt, 854 P.2d 519, 521 (Utah 1993) (setting forth our rule requiring this court to construe insurance policy language "liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance" (quotations and citations omitted)).

¶11 Our conclusion does not, however, necessarily resolve the question of whether the Estate's claim is limited by the Survival Statute. To make that determination, we must examine the Survival Statute to determine its effect on this claim. When we are "called upon to interpret a statute, 'our primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve.'" Lieber, 2000 UT 90 at ¶7 (quoting Evans v. State, 963 P.2d 177, 184 (Utah 1998)). The Survival Statute in force at the time of Berkemeir's death provides;

> (a) Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person.
>
> . . . .
>
> (b) If prior to judgment or settlement the injured person dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the

> personal representative or heirs of that person are entitled to receive no more than the out-of-pocket expenses incurred by or on behalf of that injured person as a result of his injury.

Utah Code Ann. § 78-11-12 (1996). Hartford's argument relies on the phrase "arising out of personal injury" and focuses on the intended scope of this language. Thus, we examine the statute to determine the intended scope of its coverage.

¶12 Hartford's interpretation of the phrase "arising out of personal injury" suggests that the statute is meant to limit any claim involving a personal injury when the person injured dies before the action is fully adjudicated. The Estate, on the other hand, urges a different interpretation focusing more on the general fact that tort actions "arise out of personal injury" and asserting, therefore, that the Survival Statute applies only to actions in tort. Because we conclude that both interpretations are reasonable, see Derbidge v. Mutual Protective Ins. Co., 963 P.2d 788, 791 (Utah Ct. App. 1998) ("'Ambiguous' means capable of '"two or more plausible meanings."'" (citations omitted)), we look beyond the statute's plain language to determine the legislative intent. See id. ("When statutory ambiguity exists, we must determine the 'legislature's intent in light of the entire statute's purpose.' . . . Our analysis is further guided by the Legislature's blanket directive that statutes 'be liberally construed with a view to effect the objects of the statutes and to promote justice.'" (citations omitted)).

¶13 In Kynaston v. United States, 717 F.2d 506 (10th Cir. 1983), the Tenth Circuit Court of Appeals addressed Utah's Survival Statute and described its genesis in relatively specific terms. The court explained;

> At common law, actions for personal injury torts . . . do not survive the death of the wrongdoer. To remedy this defect, Utah enacted its first survival statute in 1953. The purpose of the statute was not to create a new cause of action as the wrongful death statute did, but rather to abrogate the common law rule of abatement and continue or perpetuate ("survive") a cause of action in existence before the wrongdoer's [or victim's] death.

Id. at 509. The court further stated, "[s]urvival statutes provide for the continuance of an injured person's cause of action in order to preserve any interests which have accrued in

the recovery of damages to his estate should he die prior to the resolution of the suit." Id. at 511. We agree with the Tenth Circuit's reading, and after reviewing the history of Survival Statutes in general, we agree with the position urged by the Estate. Our conclusion is supported by the general history surrounding survival statutes, which clearly indicates that "[b]oth at common law and under statute, it is a general rule that a cause of action founded on a contract survives the death of either party and a pending contract action does not abate on the death of a party." 1 C.J.S. Abatement and Revival § 147(a) (1994) (footnotes omitted). Moreover, our conclusion is further supported by the fact that at common law, actions that are only "nominally laid in tort," but actually lay in contract, generally are not subject to abatement. Id. § 147(b) (footnote omitted).

¶14 We conclude that the Survival Statute was adopted to abrogate the common law rule of abatement in tort actions that was applied following the death of either the tortfeasor or the injured party. See id. § 130. Because we can discern no other reason for the legislature's adoption of the Survival Statute beyond its desire to mitigate the common law rule of abatement, we conclude that the elimination of the abatement of tort actions was the intended target of the Survival Statute.

¶15 Here, while there is no dispute that the origins of Berkemeir's claim against Alexander "arose out of personal injury," the subject of the present dispute does not actually arise from her physical injuries. Rather, the present dispute arose only after Hartford's duty under the contract was triggered and Hartford then allegedly failed to meet its obligation. Thus, the Estate's claim arose solely from Hartford's alleged breach of the contract and not from Berkemeir's personal injury. Therefore, because the Estate's claim sounds in contract, not tort, it is unaffected by the Survival Statute. But see Beudry v. State Farm Mut. Auto. Ins. Co., 518 N.W.2d 11, 13-14 (Minn. 1994) (concluding, under nearly identical circumstances, that the cause of action was limited by Minnesota's Survival Statute).

¶16 Accordingly, we affirm the trial court's order denying Hartford's motion for summary judgment and granting the Estate partial summary judgment. Thus, we remand this case to the trial court to determine the extent of the contractual damages.

CONCLUSION

¶17 Hartford's concessions concerning liability and the extent, if not the specific amount, of damages resulting from Berkemeir's accident triggered its duties under the contract. Moreover, the Survival Statute is intended to abrogate the common law rule of

abatement in tort actions and has no affect on contract claims. Accordingly, we affirm the trial court's decision to grant the Estate partial summary judgment.

William A. Thorne Jr. Judge

¶18 WE CONCUR:

Norman H. Jackson,
Presiding Judge

Judith M. Billings,
Associate Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of March, 2003, a true and correct copy of the attached OPINION was deposited in the United States mail to:

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and a true and correct copy of the attached OPINION was placed in Interdepartmental Mailing to the judge listed below:

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Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 990911059
APPEALS CASE NO.: 20010437-CA

EXHIBIT B

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ESTATE OF DOROTHY BERKEMEIR,	:	
	:	Civil No. 990911059
Plaintiff,	:	Judge Hanson
	:	
-vs-	:	
	:	TRANSCRIPT OF
HARTFORD INSURANCE COMPANY,	:	JUDGE'S RULING
	:	
Defendant.	:	

January 29, 2001

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P R O C E E D I N G

THE COURT: Well, counsel, I think I'm prepared to rule on this, because I don't think I need to go into all the niceties of what we do if this statute applies because I don't think 78-11-12 applies. And I'm not willing to give-- I'm not willing to give it the broad reading that the defendant has suggested I do.

If I look at the statute and try to define what the--from the words what the legislature had in mind, it seems pretty clear to me what they're saying--perhaps in some people's judgment inappropriately, but what they're saying is that for claims of personal injury, tort claims, those, in certain circumstances, like if somebody dies, will not survive the death. At least a portion of it won't. That is, the so-called general damages, the pain and suffering. What they had--why they wanted to do that, I don't know.

But I don't think the legislature had in mind, nor does this statute tell us, that it also applies to first-party claims. And I think to make it apply to first-party claims against the insurance company and therefore limit the insurance company's otherwise obligation because their insured happens to die is--it just flies in the face of insurance coverage law and contractual interpretation.

And I'm just not going to read the statute to say that because you might not be able to sue the underlying tort

feasor after the underlying tort feasor has paid the policy limits--I mean, the smart thing to do, had this been known--had people understood that she was going to die and this thing wouldn't get resolved before she died would have been to litigate the underlying claim. But apparently no one thought we ought to do that and it got settled and then they made the claim.

And I don't think it's appropriate for the courts to start telling people that, Well, you have to litigate claims where its just an exercise in futility so that you can assert a first-party claim against the insurance coverage for underinsured motorist coverage. I think Hartford has an obligation to pay and I don't think the death of their insured, as it relates to the first-party claim, has anything to do with this statute.

And for those reasons, I'm going to grant the partial summary judgment that is sought by the plaintiff and deny the defendant's motion for summary judgment. I think there's still an issue as to what the total claims are and Hartford is entitled to certainly defend against that.

But I'm not--I'm going to look at this claim and if there's a jury in this case--I don't know if there is or not--but the finder of fact will be looking, at least as far as this (inaudible) of this court are concerned, as to the claims that were available to the deceased in this case up

until the time she died. I mean, all it does is reduce the amount. That's all it really does, because we know when she died. We don't have to guess how long her pain and suffering is going to last. So, in any event, that's still an issue that remains outstanding and obviously that was contemplated in the plaintiff's motion for partial summary judgment.

So, Mr. Larson, prepare an appropriate order. Please do so in accordance with Rule 52A, specifying the reasons so that it's clear to any reviewing court. And, if necessary, one of the appellate courts can take a look at it and decide whether or not my interpretation of this is right. But I just can't see the survival statute being designed to, nor the wording making it applicable to first-party claims for underinsured motorist coverage.

All right. Thank you, counsel. Interesting issue but we'll resolve it in that fashion and then proceed forward as may be appropriate.

MR. LARSON: Your Honor, point of clarification to Rule 52A. May we include the reasons specified in our memorandum, the reasons that you've announced today? They're consistent.

THE COURT: Well, you might. Why don't you do it, but I'm not sure that I thought through carefully all those and whether I'm willing to grant it on those additional bases. I'm willing to grant your motion that the statute

doesn't apply, in my judgment. But--but I'm not sure I want to sign an order saying, But even if it does apply, here's a whole bunch of other reasons why it would not work. I'm not willing to do that.

MR. LARSON: And I'm saying just on the application here--the order will say it's denied because the statute doesn't apply for these reasons, boom, boom, boom. And those are the reasons that we enumerated in our memorandum.

THE COURT: And that would be appropriate, I guess.

MR. LARSON: Pardon me?

THE COURT: Yeah. And that would be appropriate.

MR. LARSON: Thank you.

THE COURT: I don't suggest to mean that because I didn't happen to touch on the word here that it shouldn't be included when I make these brief oral rulings. Thank you, counsel. We'll be in recess.

(Partial transcript concluded at this point.)

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C E R T I F I C A T E

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, RENEE STACY, a Certified Shorthand Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing tape-recorded proceedings were transcribed into typewriting under my direction and supervision and that the foregoing pages contain a true and correct partial transcription of said proceedings to the best of my ability to do so.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this 1st day of March 2001.

Renee L. Stacy

RENEE STACY, CSR

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EXHIBIT C

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE ESTATE OF DOROTHY BERKEMEIR, by and through its Executor, KAREN NIELSEN, Plaintiff, vs. HARTFORD INSURANCE COMPANY OF THE MIDWEST, Defendant.	**ORDER GRANTING THE ESTATE's MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING HARTFORD's MOTION FOR SUMMARY JUDGMENT** Civil No. 990911059 Honorable Timothy R. Hanson

On January 29, 2001, at 10:00 a.m., Defendant Hartford Insurance Company of the Midwest's Motion for Summary Judgment and the Estate's Motion for Partial Summary Judgment came on for hearing before the above-captioned Court, the Honorable Timothy R. Hanson, presiding. Mark A. Larsen and Lisa C. Rico appeared and represented Plaintiff. Mark L. Anderson appeared and represented Defendant. Based upon the oral argument of counsel, the Stipulation to Facts and Legal Positions ("the Stipulation"), which

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was filed with the Court on August 11, 2000, and the Motions and Memoranda filed by the parties, it is ORDERED as follows:

1. Hartford's Motion for Summary Judgment is denied.

2. The Estate's Motion for Partial Summary Judgment is granted.

3. On October 16, 1995, Berkemeir sustained personal injuries in an automobile accident. On October 9, 1996, Berkemeir settled her personal injury claim against James Alexander ("Alexander"), the driver of the other vehicle involved in the collision, for the $50,000 limit of his liability insurance policy with Allstate Insurance Company ("Allstate"). Hartford did not object to Berkemeir's settlement of all claims against Alexander for the $50,000 limit of his policy with Allstate. The proceeds of the settlement agreement, however, coupled with the $10,000 in personal injury and medical benefits Hartford paid to Berkemeir under her insurance policy, did not fully compensate her for the damages she sustained as a result of the collision.

4. As a result, Berkemeir demanded that Hartford pay the $100,000 in underinsured motorist benefits. An arbitration proceeding under the policy originally was scheduled for July 21, 1997. It was continued until September 23, 1997, to allow for Berkemeir's Independent Medical Examination. Berkemeir died in the interim on August 15, 1997, of causes unrelated to the injuries she sustained in the October 16, 1995, collision. Prior to Berkemeir's death, initially Hartford refused to pay her claim for

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underinsured motorist benefits. Hartford later refused the claim, asserting that Utah Code Ann. § 78-11-12(1)(b) precludes the Estate from collecting under the insurance contract.

5. In support of its refusal to pay the Estate underinsured motorist benefits, Hartford relies upon the personal injury tort provisions of Utah Code Ann. § 78-11-12 to interpret the underinsured motorist provision of the insurance policy, the latter of which provides in pertinent part:

> A. We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:
>
> 1. Sustained by an insured; and
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle. Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

6. The parties stipulated to the material facts of this case, leaving only questions of law for resolution.

7. Utah Code Ann. § 78-11-12 does not apply to the facts of this case because the Estate's claim is based in contract law rather than personal injury tort law. The Utah Supreme Court in *Beck v. Farmers Insurance Exchange,* held: "[I]n a first-party[1]

[1] The Court used the term "first-party" to refer to an insurance contract under which the insurer agrees to pay claims submitted to it by the insured for losses the insured has sustained.

relationship between an insurer and its insured, the duties and obligations of the parties are *contractual* rather than fiduciary. Without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not tort." *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 800 (Utah 1985)(emphasis added). Accordingly, the Court held such causes of action are based in contract and not tort law.

8. Utah Code Ann. § 78-11-12(1) specifically applies to "[c]auses of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or injured person," (emphasis added). Berkemeir's personal injury claim against Alexander was settled for the limits of his insurance policy with Allstate. What remains is the Estate's claim against Hartford based on the insurance contract between Berkemeir and Hartford. Hartford's interpretation of Utah Code Ann. § 78-11-12(1)(b), reads into the statute meaning beyond its plain words. "The best evidence of the true intent and purpose of the legislature is the plain language of the statute." *Lieber v. ITT Hartford Insurance Center, Inc.*, 2000 UT 72, 78; 403 Utah Adv. Rep. 3, 5. The Estate's cause of action does not arise out of the personal injury Berkemeir suffered as a result of Alexander's negligence. The Estate's cause of action arises from Hartford's refusal to pay Berkemeir's claim for underinsured motorist benefits, in whole or in part, in breach of the terms set forth on the face of the insurance contract.

9. Unlike the courts that have adopted the tort approach as a means of providing an insured with an *adequate* remedy for an insurer's recalcitrance, Hartford seeks to *eliminate* any further liability to the Estate by applying the tort provisions of Utah Code Ann. § 78-11-12 to the insurance contract. Hartford seeks this result despite stipulating that Berkemeir was not fully compensated for the damages she incurred as a result of the accident. To apply Utah Code Ann. § 78-11-12 to the Estate's breach of contract claim is not only contrary to the policy concerns of encouraging an insurance carrier to delay the proper resolution of the claims of the elderly, but also is a distortion of contract law and statutory interpretation.

10. Further, if Hartford wanted underinsured motorist benefits to expire if the death of the insured occurred before the arbitration was conducted and an award entered, it could easily have directly said so in the insurance contract. In *Sandt*, the Utah Supreme Court stated: "Insurance policies should be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by insurance companies." 854 P.2d 519, 522 (Utah 1993). The Court also explained that "insurance policies should be construed liberally in favor of the insured *and their beneficiaries* so as to promote and not defeat the purposes of insurance. *Id.* at 521-22 (citations omitted).

11. Moreover, Berkemeir's cause of action against Hartford accrued, and the statute of limitations on her claim against Hartford began running, on either the date of her settlement with Alexander or upon Hartford's refusal to pay underinsured motorist benefits

to Berkemeir in breach of the insurance contract. Utah Code Ann. § 31A-21-313 sets forth the statute of limitations for bringing a claim on an insurance policy, stating: "An action on a written policy or contract of first part insurance must be commenced within three years after the inception of the loss." The damages would be measured as of the date of the breach of the contract, when the cause of action accrued, and would not change based upon subsequent events.

12. In *Lang v. Aetna Life Insurance,* the court discussed the "inception of loss" language of § 31A-21-313, stating: "The statute of limitations was triggered *not* by the personal injury giving rise to the suit but rather by the insurer's alleged breach [of contract] in refusing to defend against the suit." 196 F.3d 1102, at 1105 (10th Cir. 1999)(emphasis added). Similarly, the inception of Berkemeir's loss and the breach of contract claim was not triggered by the personal injury Berkemeir suffered but rather by Hartford's breach of contract in refusing to pay the underinsured motorist benefits. If Hartford's argument in this case were accepted, the statute of limitations would not be triggered until Alexander's liability was reduced to a judgment. This would require or at least encourage unnecessary, pointless litigation if the claim against the tortfeasor had to be reduced to judgment before an insured could maintain a claim against the underinsured motorist carrier.

13. No one ever questioned Alexander's obvious liability, to which the parties in this case stipulated. The damages for that breach of contract are measured on the date of the breach, which is when the cause of action accrues, not at some later date after

Berkemeir's death. In *Becton Dickinson & Co. v. Reese*, the Utah Supreme Court held a claim accrues on the occurrence of the last event necessary to complete the cause of action. 668 P.2d 1254, 1257 (Utah 1983).

14. Prior to her settlement with Alexander and Hartford's refusal to pay underinsured motorist benefits, Berkemeir did not have a claim against Hartford. When Hartford breached the insurance contract, however, the last event necessary to create Berkemeir's cause of action against Hartford occurred. Hartford's breach of the insurance contract did not create a "cause[ ] of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another." Rather, the Alexander settlement combined with Hartford's refusal created a cause of action for breach of the insurance contract.

15. The only remaining issue for trial in this case is the amount of the Estate's damages.

Dated: March 7, 2001.

BY THE COURT:

Honorable Timothy R. Hanson
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2001, a copy of the foregoing Order Granting the Estate's Motion for Partial Summary Judgment and Denying Hartford's Motion for Summary Judgment was mailed to the following counsel of record:

Mark L. Anderson
CHRISTENSEN & JENSEN, P.C.
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144

Eric Rasmussen

EXHIBIT D

Supreme Court of Minnesota.

William BEAUDRY, et al., Respondents,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, Appellant.

No. C9-93-689.

June 17, 1994.

Insured's estate brought action against insurer for underinsured motorist benefits. The District Court, Chisago County, Linn Slattengren, J., entered summary judgment for insurer, and estate appealed. The Court of Appeals, Lansing, J., 506 N.W.2d 673, reversed. After granting petition for review, the Supreme Court, Simonett, J., held that underinsured motorist claim of estate did not survive abatement of underlying personal injury action.

Reversed.

West Headnotes

[1] Abatement and Revival ⇐54
2k54

With "abatement," general damages, such as pain and suffering, die with person. M.S.A. § 573.01.

[2] Abatement and Revival ⇐54
2k54

Even where injured person dies from cause related to injuries and personal injury action is converted into wrongful death action, general pain and suffering damages are not recoverable.

[3] Abatement and Revival ⇐52
2k52

Test for survivability of claim upon death of claimant is in substance, not form, of cause of action. M.S.A. § 573.01.

[4] Abatement and Revival ⇐53
2k53

Insured's claim for underinsured motorist benefits abated, under survival statute, at her death, where primary cause of damages sought to be recovered as underinsured motorist benefits was injury insured suffered in automobile accident. M.S.A. § 573.01.

**11 Syllabus by the Court*

The underinsured motorist claim of the estate of an injured person, who dies of causes unrelated to the auto accident, does not survive the abatement of the underlying personal injury action.

William M. Hart, Joseph W.E. Schmitt, Meagher & Geer, and Albert J. Dickinson, Stringer & Rohleder, St. Paul, for appellant.

James F. Dunn, Dunn & Elliott, St. Paul, for respondents.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

A cause of action for injury to the person dies with that person (except for special damages). But does the deceased person's claim for underinsured motorist benefits survive the abatement of the underlying tort claim? We answer the question "no" and reverse the contrary ruling of the court of appeals.

On July 29, 1990, Alice Beaudry, age 75, was severely injured when the car in which she was a passenger and which was driven by her husband collided with a car driven by Leonard Defoe. The accident was Defoe's fault.

Alice Beaudry's injuries required extensive medical care, her medical expenses eventually totaling $67,785.83. In October 1990, State Farm paid Alice Beaudry $20,000, the limits of its no-fault medical expense coverage. Initially, it appeared that the other driver, Defoe, was uninsured, and Mr. and Mrs. Beaudry were preparing for an uninsured motorist claim against their own insurer, State Farm.

In May 1991, however, it was learned that Defoe had liability insurance with $30,000/60,000 limits. The Beaudrys negotiated a settlement with Defoe's

liability carrier, with the carrier to pay its $30,000 limit on Alice Beaudry's claim (and $22,500 on William Beaudry's claim). State Farm was given notice of the proposed settlement pursuant to *Schmidt v. Clothier,* 338 N.W.2d 256 ***12** (Minn.1983), but it elected not to substitute its own settlement draft. The Beaudrys then proceeded, in mid-November 1991, to conclude their settlement with Defoe on the terms proposed.

At the same time, Beaudrys' counsel also formally advised State Farm it was making a claim for underinsured motorist benefits. The Beaudrys' State Farm policy provided underinsured motorist coverage of $100,000 per person and $300,000 per occurrence. In early January 1992, more medical information having been supplied by the claimants, the Beaudrys twice made demands for the policy limits.

On January 16, 1992, the Beaudrys first informed State Farm that Alice Beaudry was terminally ill with breast cancer and made another demand for the policy limits. On the same day, the Beaudrys commenced this lawsuit against State Farm for breach of contract for failure to pay underinsured motorist limits. Three days later, on January 19, Alice Beaudry died. The cancer which was the cause of her death was unrelated to the injuries received in the auto accident.

The lawsuit alleged William and Alice Beaudry were each entitled to $100,000 in benefits. State Farm moved for summary judgment on the grounds that Alice Beaudry's claim for underinsured motorist benefits abated at her death under Minnesota's survival statute, Minn.Stat. § 573.01 (1992). The trial court granted State Farm's motion. The court of appeals reversed, ruling that the underinsured motorist claim of Alice Beaudry was a contract action not subject to the survival statute. *Beaudry v. State Farm Auto. Ins. Co.,* 506 N.W.2d 673, 675 (Minn.App.1993). We granted State Farm's petition for further review.

The issue before us may be framed as follows: When an underinsured motorist claimant dies of causes unrelated to the auto accident, does her underinsured motorist claim survive the abatement of the underlying tort claim against the tortfeasor? The answer to this question depends on whether the underinsured motorist claim is viewed as a cause of action arising out of an injury to the person, which does not survive the death of the person, or as a contract action, which does survive the person's death.

Our survival statute, Minn.Stat. § 573.01 (1992), reads:

> A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02. [FN1] All other causes of action by one against another, whether arising in contract or not, survive to the personal representative of the former and against those of the latter.
>
> FN1. Minn.Stat. § 573.02 provides two exceptions to the nonsurvivability of a deceased plaintiff's action arising out of an injury. Under subdivision 1, the personal injury action is converted into a wrongful death action when the death is attributable to the injuries sustained. When death is unrelated to the injuries, then subdivision 2 provides for survivability of a claim for "special damages" as follows:
>
> When injury is caused to a person by the wrongful act or omission of any person or corporation and the person thereafter dies from a cause unrelated to those injuries, the trustee appointed in subdivision 3 may maintain an action for special damages arising out of such injury if the decedent might have maintained an action therefor had the decedent lived.
>
> Minn.Stat. § 573.02, subd. 2. Special damages would include medical expenses, lost wages to date of death, and the like.

[1][2] If Alice Beaudry had died before settling with the tortfeasor, even if she then had a lawsuit pending against the tortfeasor, her claim against the tortfeasor would have abated. With abatement, general damages, such as pain and suffering, die with the person. Indeed, even where the injured person dies from a cause *related* to the injuries and the personal injury action is converted into a wrongful death action, general pain and suffering damages are not recoverable. *See, e.g., Fussner v. Andert,* 261 Minn. 347, 351-52, 113 N.W.2d 355, 358 (1961) (damages in a wrongful death action are for pecuniary loss).

In this case Alice Beaudry's estate [FN2] seeks to circumvent the survival statute by characterizing ***13** her UIM lawsuit as a contract action for underinsured motorist benefits. As a contract action, her estate would be able to recover

underinsured motorist benefits measured by the general damages that would have been recoverable against the tortfeasor. The Beaudrys concede that these general damages, such as pain and suffering, would be recoverable only up to the time of death, in this case for the period of approximately a year and a half that Alice Beaudry lived after the auto accident.

> FN2. The parties have agreed that if Alice Beaudry's UIM claim survives here, on return to the trial court a personal representative will be appointed for her estate to continue with the claim. *See Witthuhn v. Durbahn,* 279 Minn. 437, 439, 157 N.W.2d 360, 361 (1968). For convenience of expression, we will continue in this opinion to refer to "the Beaudrys" rather than, with respect to Alice Beaudry, her estate.

Recently, in *McIntosh v. State Farm Mutual Automobile Insurance Co.,* 488 N.W.2d 476 (Minn.1992), and in *Employers Mutual Cos. v. Nordstrom,* 495 N.W.2d 855 (Minn.1993), we discussed the nature of uninsured and underinsured motorist coverage. These are first party coverages, *i.e.,* claims based on contract against one's own insurance company, unlike third party liability coverage where the insurer indemnifies the insured against claims of injured third parties. Nevertheless, as we pointed out in these two cases, liability for UM and UIM benefits is determined by tort law, *i.e.,* by what the tortfeasor would have had to pay the claimant if the tortfeasor had not been uninsured or underinsured.

Thus, in *McIntosh* we cautioned, "In other words, under uninsured motorist coverage, the distinction between *coverage* and *liability under that coverage* is radically different than it is under first party coverage." *McIntosh,* 488 N.W.2d at 479. In *Nordstrom,* we observed that "[a]n underinsured motorist claim is both alike and unlike a tort cause of action." *Nordstrom,* 495 N.W.2d at 856. We went on to say, "Underinsured coverage has generally been understood as excess coverage, to be utilized only after the cause of action against the insured tortfeasor has been concluded." *Id.*

Whether an uninsured or underinsured motorist claim is to be viewed from its contract or tort aspects depends on the question being asked. Thus, for example, in *O'Neill v. Illinois Farmers Insurance Co.,* 381 N.W.2d 439, 440 (Minn.1986), we held that for the purpose of what statute of limitations applied to an underinsured claim, the claim "sounds in contract and is governed by the 6-year statute of limitations for contracts"; at the same time, in deciding when the statute of limitations begins to run, we held it was "when the accident giving rise to the injury happens." *Id.* An Eighth Circuit case written by Judge Sanborn, *Webber v. St. Paul City Ry. Co.,* 97 F. 140 (8th Cir.1899), which has stood the test of time, is also instructive. There it was held that the estate of a plaintiff injured in a train accident who then died of unrelated causes could not evade the survival statute by alleging a cause of action for breach of contract to transport the plaintiff safely. *Id.* at 141. The contract claim, said the court, arose from an injury to the person and ended with that person's death. *Id.* at 145.

[3] This much is clear. The test for survivability is in the substance, not the form, of the cause of action. *Id.* The test, said *Webber,* is whether breach of contract or injury to the person is the "primary and moving cause of the damages sought." *Id.* This is consistent with the test adopted in *Fowlie v. First Minneapolis Trust Co.,* 184 Minn. 82, 85, 237 N.W. 846, 847 (1931), where we said that "the nature of the damages sued for rather than the form of the remedy is the test."

Another case which might be mentioned, and on which the Beaudrys rely, is *Johnson v. Taylor,* 435 N.W.2d 127 (Minn.App.1989). There an attorney breached the attorney-client contract by missing the personal injury statute of limitations, even though he had represented the injured client for almost the entire 6 years following the auto accident. When the plaintiff-client subsequently died of unrelated causes, the court of appeals held that his estate was not precluded by the survival statute from maintaining a legal malpractice action for the "economic loss to the estate." *Id.* at 128. The court of appeals reasoned that "the legal malpractice action arose from respondent's misconduct rather than from Johnson's personal injury." *Id.* at 129. Or in the language of *Webber,* we might ***14** say that the legal malpractice was the primary cause of the plaintiff's damages, and that trial of the "lawsuit within the lawsuit," *i.e.,* trial of the personal injury claim, was relatively incidental to the primary wrong visited on plaintiff by his attorney.

This brings us, then, to the Beaudrys' case. The

Beaudrys argue that they are not seeking recovery for pain and suffering but rather enforcement of their contractual rights. They point out that prior to Alice Beaudry's death, her personal injury claim against the tortfeasor was concluded by settlement, so that at the time of her death all conditions precedent to bringing her UIM claim had been met; that her contract action had "matured"; and "there existed *nothing but* a contract cause of action against State Farm." (Respondent's emphasis.)

We agree that at the time of Alice Beaudry's death her UIM claim was ready to be concluded and that her right to recover benefits from State Farm was based on the contractual provisions in her policy. But having said this, it is also true that Alice Beaudry had not liquidated her underinsured motorist claim by settlement, verdict, or award prior to her death. At the time of her death, the "liability under that coverage," *see McIntosh,* 488 N.W.2d at 479, still remained to be determined, and her UIM claim was still unresolved and pending.

Significantly, State Farm's policy contractually bound the insurer to "pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle or underinsured motor vehicle." Put another way, the UIM claimant can collect from State Farm what the claimant could have collected in damages for bodily injury from the tortfeasor if the tortfeasor had not been underinsured. And that determination is directly dependent on the law governing "[a] cause of action arising out of an injury to the person." Minn.Stat. § 573.01 (1992).

[4] We conclude that the primary cause of the damages sought to be recovered as UIM benefits is the injury Alice Beaudry suffered in the auto accident. The Beaudrys contend they are not seeking damages for pain and suffering, but this argument elevates form over substance. If the UIM claim can circumvent the survival statute, the UIM claimant recovers damages for pain and suffering up to her death. Under *Fowlie,* 184 Minn. at 85, 237 N.W. at 847, we look to the nature of the damages sought rather than the form of the remedy. Under this test, it is inescapable that Alice Beaudry's claim, sounding primarily in tort for injury to the person, abated with her death.

We must, therefore, reverse the contrary ruling of the court of appeals, thereby reinstating the trial court's summary judgment in favor of State Farm.

We note, however, that the UIM claim of Alice Beaudry's estate for UIM benefits survives to the extent the underlying claim for "special damages" survives under Minn.Stat. § 573.02, subd. 2 (1992). Also, of course, William Beaudry's separate claim for UIM benefits for his own injuries is not involved in this appeal.

Reversed.

COYNE, J., took no part in the consideration or decision of this case.

518 N.W.2d 11

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