

NO. A07-1461

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State of Minnesota  
**In Supreme Court**

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Dean Do,

*Plaintiff/ Appellant,*

vs.

American Family Mutual Insurance Company,

*Defendant/ Respondent.*

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**BRIEF OF AMICUS CURIAE  
MINNESOTA ASSOCIATION FOR JUSTICE**

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## **I. INTRODUCTION**

This *Amicus Curiae* brief is respectfully submitted on behalf of the Minnesota Association for Justice and in support of the position of the Appellant in this matter with respect to the public policy issues identified below. The decision of the Court of Appeals is inconsistent with the public policy considerations underlying the enactment of the Minnesota No-Fault Act, the purposes expressed therein, well-recognized principles of law relating to the promotion of settlements, the efficient and final resolution of claims, and judicial economy. Consequently, the decision of the Court of Appeals should be reversed and the matter remanded back to the District Court.

This appeal arises from a jury verdict and subsequent calculation of set-offs by the District Court following the verdict of the jury. This case involves the trial of claims for two distinct types of coverage under an automobile insurance policy purchased by the Appellant from the Respondent. The two distinct coverages are the personal injury protection (PIP) coverage and the underinsured motorist coverage. From a public policy standpoint, it is important to keep in mind the distinctions between these two very different coverages when determining how to calculate a final judgment following the verdict of a jury in a case of this nature.

In addition to the public policy considerations underlying both types of coverage that are involved in this appeal, it is also important for the Court to keep in mind that this appeal also involves the public policy to encourage judicial economy. The third public policy consideration presented on this appeal is the public policy in favor of promoting settlements, including partial settlements, in an effort to resolve cases and narrow issues

in civil litigation. This last public policy consideration involves the appropriate analysis and definition of "double recovery." In this final public policy consideration, it is important to note that Courts should be mindful that a true "double recovery" should be prevented where appropriate. It is also necessary, however, to understand that in promoting the public policy of settlements, including partial settlements, there are situations where a party may take a risk associated with a partial settlement but then also be able to realize a reward with respect to the settlement that does not present a prohibited "double recovery."

## **II. PUBLIC POLICY ISSUES**

1. Whether the decision of the Court of Appeals below represents a departure from the public policy and statutory position that personal injury protection benefits are primary benefits in automobile accident cases?

**The decision of the Court of Appeals below is contrary to this public policy consideration and statutory system.**

2. Whether the decision of the Court of Appeals below encourages consolidated or piecemeal litigation through the presentation of distinct claims under an automobile insurance policy by way of different and consecutive legal proceedings?

**The decision of the Court of Appeals below does not promote judicial economy because it encourages attorneys representing injured parties to approach the resolution of distinct first-party coverages against the same insurer in multiple legal actions as opposed to one consolidated action.**

3. Whether the decision of the Court of Appeals below is contrary to the strong public policy consideration repeatedly identified by this Court to encourage the settlement of civil disputes, including partial settlements?

**The decision of the Court of Appeals below is adverse to the encouragement of the settlement of all or part of civil disputes, in part because of an erroneous analysis of whether a "double recovery" occurred in this case.**

### III. ANALYSIS

**A. THE DECISION OF THE COURT OF APPEALS BELOW IS CONTRARY TO THE PUBLIC POLICY AND STATUTORY DIRECTION THAT PERSONAL INJURY PROTECTION BENEFITS ARE PRIMARY BENEFITS UNDER THE NO-FAULT STATUTORY SYSTEM IN MINNESOTA**

Personal injury protection benefits for medical expense payments are a primary coverage under the Minnesota no-fault system. "Basic economic loss benefits shall be primary with respect to benefits, except for those paid or payable under a workers' compensation law . . . ." Minn. Stat. § 65B.61, Subd. 1.

Automobile insurance companies may not coordinate benefits in order to reduce their obligation to pay benefits by any amount paid on an accident, disability, or health policy. Minn. Stat. § 65B.61, Subd. 3. While this Court has recognized that some double recovery may result from this public policy approach, it has also determined that some potential "double recovery" was intended by the Legislature. *Wallace v. Tri-State Ins. Co.*, 302 N.W.2d 337 (Minn. 1980), *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108 (Minn. 2002) (no-fault insurer must pay health care expenses originally billed by providers, not amounts discounted for health insurer); *Hoeschen v. Mutual Service Casualty Ins. Co.*, 359 N.W.2d 677 (Minn. App. 1984) (army paid health care costs); *Demning v. Grain Dealers Mut. Ins. Co.*, 411 N.W.2d 571 (Minn. App. 1987) (social security benefits).

Since the no-fault insurer is primary, all benefits must be awarded to the claimant, without regard to whether payments have been made for medical expenses or wage loss from other sources. This includes voluntary payments in the form of liability insurance settlements. Whether there has been a settlement of an underlying tort claim, and the

amount of any such settlement, are issues irrelevant to the no-fault claim. Settlement with the at-fault party does not affect the statutory right to no-fault benefits. *Balderrama v. Milbank Mutual*, 324 N.W.2d 355, 356 (Minn. 1982).

Underinsured motorist coverage, on the other hand, is not a primary coverage. It is by definition an “add-on” coverage, designed to supplement liability coverage that was not sufficient to pay the total damages suffered by an injured insured.

UIM coverage is a tort based coverage designed to provide a supplemental source of recovery only when the damages that the insured is legally entitled to recover from the tortfeasor exceed the tortfeasor’s liability insurance limits. The tort judgment establishes conclusively the damages to which the claimant is legally entitled, and if these damages exceed the tortfeasor’s liability insurance limits, the excess is payable by the underinsurance carrier to the extent of its coverage \* \* \* .

*Dean v. American Family Mut. Ins. Co.*, 535 N.W.2d 342, 344 (Minn. 1995) (citing *Richards v. Milwaukee Ins. Co.*, 518 N.W.2d 26, 28 (Minn. 1994)).

Due to the status of no-fault personal injury protection benefits as “primary,” it is important in a combined action involving no-fault and underinsured motorist coverage that the recovery of personal injury protection benefits be calculated first, prior to any set-offs or other deductions. It is important to first calculate the no-fault benefits payable, because no-fault personal injury protection benefits are to be paid regardless of fault for causation of the accident. Minn. Stat. § 65B.42, Subd. (1). It is a distinct coverage from underinsured motorist coverage, which is coverage that is designed to supplement coverage over that available for an at-fault driver, in order to compensate the injured party for injuries and damages over and above the amount of liability coverage. In

determining both the liability coverage and the right to underinsured motorist coverage, it is necessary that no-fault benefits paid be calculated and then deducted from the damages awarded by the jury. Underinsured motorist coverage, unlike personal injury protection benefits, is a fault-based coverage, and the attribution of partial fault for the accident will serve to diminish the injured party's right to underinsured motorist coverage.

It is interesting to review the decision of this Court in *Ferguson v. Illinois Farmers Insurance Group Co., et al.*, 348 N.W.2d 730 (Minn. 1984), when addressing the proper post-verdict calculation in this case on appeal. In *Ferguson*, this Court reversed a trial court's post-verdict calculation in a consolidated trial of the liability/tort case and the claim for No-Fault/PIP benefits. *Id.* at 731. While the discussion in *Ferguson* centered upon the treatment of the jury's award of future medical expenses, which are not at issue here, it is important to note that the Court in *Ferguson* began the post-verdict calculations with a determination of the Personal Injury Protection benefits due and owing based upon the jury's verdict and the conditions surrounding the calculation of benefits under the No-Fault Act. Once those benefits were calculated, the PIP benefits were deducted from the total damages awarded. It was only after that calculation was performed that the responsibility of the involved tortfeasors was determined. *Id.* at 732.

Similar to the *Ferguson* decision, the case currently on appeal involves the consolidation of two claims and coverages, one of which is primary and payable without regard to fault, and the other of which is excess and liability dependent. The primary coverage must first be calculated so that the remaining, excess coverage can be determined, a determination that necessarily includes the deduction of the benefits

payable under the primary PIP coverage. The calculation adopted by the courts below did not follow this formula, resulting in an erroneous result and a methodology that will run contrary to the previous cases of the appellate courts and the statutory provisions identified herein.

The reliance of the courts below on the Collateral Source Statute, Minn. Stat. § 548.36 (2006), to justify the judgment ordered following the verdict in this case is misplaced. The *Amicus* will not repeat the statutory analysis of the Minnesota Collateral Source Statute and the decision of this Court in *Dean v. American Family Mut. Ins. Co.*, 535 N.W.2d 342, which was provided by the Appellant in his brief. The *Amicus Curiae* Minnesota Association for Justice joins in that analysis submitted by the Appellant and urges this Court to confirm that liability settlements are not collateral sources under the statute.

**B. PUBLIC POLICY, THE MINNESOTA NO-FAULT ACT, AND THE MINNESOTA COURTS FAVOR THE SPEEDY, EFFICIENT, AND FINAL RESOLUTION OF CONTROVERSIES**

Minnesota's No-Fault Act, Minn. Stat. §§ 65B.41-.71, contains a statement of purpose, which provides in pertinent part that the Act's purposes are:

- (1) To **relieve the severe economic distress** of uncompensated victims of automobile accidents \* \* \*;
- (3) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by **assuring prompt payment** for such treatment;
- (4) To **speed the administration of justice, to ease the burden of litigation on the courts of this state**, and to create a system of small claims arbitration to **decrease the expense of and to simplify litigation**, and to create a system of mandatory intercompany arbitration to **assure a prompt and proper allocation of the costs of insurance benefits between motor vehicle insurers**;

Minn. Stat. 65B.42 [emphasis added]. Minnesota courts heed these stated purposes when construing the No-Fault Act. *Nelson v. American Family Ins. Group*, 651 N.W.2d 499, 503 (Minn. 2002), rehearing denied Oct. 9, 2002.

Minnesota courts consistently favor that litigation proceed in such a manner to promote principles of judicial economy. *See, e.g., Hoyt Inv. Co. v. Bloomington Commerce and Trade Center Associates*, 418 N.W.2d 173 (Minn. 1988) (Minn. R. Civ. App. P. 106 authorizes a respondent to obtain review of issues not raised on appellant's appeal but which may adversely affect respondent and promotes judicial economy by allowing an appellate court to resolve all disputed issues in a single appeal).

On this appeal, it is anticipated that the Respondent will argue that the Appellant chose to consolidate his actions and, therefore, he is not entitled to a calculation of the judgment that recognizes the distinct nature of the payments sought. This argument is contrary, however, to public policy encouraging judicial economy. The Respondent may argue that the Appellant could have pursued arbitration (which would have required Appellant to waive a significant portion of his medical expense claim and the medical PIP coverage purchased) or separate lawsuits.

First, it must be remembered that the verdict of the jury stated one thing loud and clear: that American Family's denial of medical payments other than the \$865.50 paid at the time of trial was unlawful. Insurers like American Family should not benefit by denying medical expense payments, by either forcing a waiver of claims or coverage to achieve mandatory arbitration or by forcing the expense and delay of separate lawsuits

for PIP benefits and underinsured motorist coverage. Second, this Court should promote judicial economy by directing that proper calculations recognizing the distinct nature of the coverages sought must occur so that these claims may be consolidated in a single lawsuit.

If the decision of the Court of Appeals below is affirmed, attorneys representing injured parties in a situation such as Mr. Do's will be forced to first bring an action to determine PIP benefits, receive a jury award limited to those past damage claims, and then pursue the underinsured claim, which will determine the non-PIP damages, such as pain, suffering, disability, and disfigurement, as well as future medical expenses and future loss of earning capacity. The Minnesota Association for Justice suggests that the better approach is to allow for a consolidated trial on all damages, followed by a proper determination of payments owed, if any, under the distinct coverages at issue and based upon the verdict of the jury.

**C. THE PUBLIC POLICY ENCOURAGING SETTLEMENTS, INCLUDING PARTIAL SETTLEMENTS, SUPPORTS A REVERSAL OF THE DECISION OF THE COURT OF APPEALS**

Civil litigation, including automobile injury cases, often results in partial settlements. It has long been the public policy of Minnesota to encourage settlement of disputes, either partial or complete. "[T]he effective and expeditious resolution of lawsuits is a commendable goal; one fully consistent with the public policy of Minnesota. . . . Minnesota has a history of approving and encouraging partial settlements of claims."

*Cincinnati Ins. Co. v. Franck*, 644 N.W.2d 471, 475 (Minn. Ct. App. 2002), citing *Frey v. Snelgrove*, 269 N.W.2d 918, 921-22 (Minn. 1978); *Kellen v. Mathias*, 519 N.W.2d 218, 223 (Minn. Ct. App. 1994); *Klimek v. State Farm Mut. Auto. Ins. Agency*, 348 N.W.2d 103, 106 (Minn. Ct. App. 1984).

In *Drake v. Ryan*, 514 N.W.2d 785, 788 (Minn. 1994), rehearing denied June 23, 1994, the Court recognized and approved of the use of various types of releases to effectuate partial settlements:

[T]his court has recognized other types of releases that have dissected a defendant's liability, preserved part of a claim, and agreed to take a judgment only from an insurance policy rather than from a defendant's personal assets. In *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982), we held that when an insurer unreasonably disputes coverage, the plaintiff and the insured tortfeasor may stipulate a settlement in plaintiff's favor and agree that the judgment will be taken from the insurance policy and not from the tortfeasor's personal assets. In *Shantz v. Richview, Inc.*, 311 N.W.2d 155, 156 (Minn. 1980), we found that a *Pierringer* release permits a plaintiff to settle with one of the two tortfeasors and reserve a claim against the tortfeasor who is not a party to the agreement. In *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 893-94 (Minn. 1977), we allowed an employee to settle a tort claim for damages not recoverable under workers' compensation without affecting the employer's subrogation claim against the tortfeasor for compensation benefits paid.

*Id.* at 788.

Pre-trial settlements involve risk/reward for all parties. For example, in a pre-trial *Pierringer* release situation, the damages attributable to the discharged portion of the whole cause of action cannot be known until trial. Therefore, since neither party can unfairly manipulate the situation, the courts have consistently held that the plaintiff takes on the risk of having made a bad bargain, but also the benefit of having made a good one.

For example, in *Lange v. Schweitzer*, 295 N.W.2d 387 (Minn. 1980), the plaintiff gave a *Pierringer* release in return for \$15,000. The jury later attributed 60% causal fault to the settling defendant, and awarded damages of \$81,000. Because plaintiff discharged 60% of his \$81,000 cause of action for \$15,000, he obtained a judgment against the non-settlers which provided for \$33,600 less than full compensation (60% of \$81,000 = \$48,600 discharged, less \$15,000 received = \$33,600 undercompensation). Similarly, in *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794 (Minn. 1987), the plaintiff gave a *Pierringer* release in return for \$20,000. The jury later attributed 40% causal fault to the settling defendant and awarded damages of \$800,000. Because plaintiff discharged 40 percent of his \$800,000 cause of action for \$20,000, he obtained a judgment against the non-settlers for \$300,000 less than full compensation (40% of \$800,000 = \$320,000 discharged, less \$20,000 received = \$300,000 undercompensation).

By contrast, in *Rambaum v. Swisher*, 435 N.W.2d 19 (Minn. 1989), plaintiff gave a *Pierringer* release in return for \$200,000. The jury later attributed 10% causal fault to the settling defendant and made a net damage award of \$268,241. Plaintiff had obtained \$200,000 for discharging that part of his cause of action worth \$26,824. Upon full recovery, he would realize substantial “overcompensation,” the Respondent would no doubt agree here. Rejecting the argument of the non-settlers that Minn. Stat. § 604.01 required a \$200,000 *pro tanto* reduction of the award—instead of the 10% (or \$26,824) reduction called for under the release—the supreme court noted that “[i]n accepting the settlement payment, the plaintiff accepted the likelihood of being undercompensated as well as being overcompensated.” *Id.* at 23. See also, *Shantz v. Richview, Inc.*, 311

N.W.2d 155, 156 (Minn. 1980) (“in some cases (like this one, where it was later determined by the jury that the settling defendant was not negligent) plaintiff will have made the better bargain; in others, the settling defendant will have made the better bargain”).

In many cases of this nature, an injured party often faces the decision of whether to accept an offer of settlement from the tortfeasor’s insurer while at the same time the insurance company for that injured party has denied responsibility for payment of PIP benefits. To uphold the Court of Appeals’ decision here will discourage injured people from making a settlement with the liability carrier, even if the liability carrier is being reasonable in its evaluation of the case and the PIP carrier is not. Instead, those parties will have no choice but to fully litigate their No-Fault/PIP claims and refuse even reasonable settlement offers from a liability carrier, because the liability payment will later be deducted from the PIP recovery. They will have no choice because the decision below imposes the risk of the liability settlement offer being insufficient on the injured party but removes the reward of making a good bargain. This flies in the face of public policy and common sense, and it rewards insurers that force litigation with their insureds over the payment of PIP benefits, because that insurer receives the benefit of the injured plaintiff’s bargain, with no downside risk to its decision to contest the benefits owed.

**IV. CONCLUSION**

For the reasons stated above, the decision of the Court of Appeals should be reversed and the matter remanded to the District Court for a recalculation of the coverage owed by Respondent consistent with Appellant's analysis, which should be adopted by this Court.

Respectfully submitted,

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Dated: 10-29-08

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing *Amicus Curiae* brief submitted on behalf of the Minnesota Association for Justice, conforms to Minn. R. Civ. App. P. 132.01, subd. 3(c)(1) for a brief produced with a proportionally spaced font.

There are 3,142 words in this brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this brief was Microsoft Word 2004 for Mac, Version 11.2.

HARPER & PETERSON, P.L.L.C.

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