

NO. A04-709

State of Minnesota
In Supreme Court

ZURICH AMERICAN INSURANCE COMPANY,
Respondent,

vs.

DONALD A. BJELLAND,
Appellant.

**APPELLANT DONALD A. BJELLAND'S
REPLY BRIEF**

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ARGUMENT

“The workers’ compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike.” Minn. Stat. § 176.001. Conspicuously absent from this statement of legislative intent is any reference to a renunciation of common law rights and defenses by an alleged tortfeasor. And, in considering the parties’ arguments, it must not be forgotten that Bjelland is defending against a tort claim, not a workers’ compensation claim. Zurich’s right to proceed against Bjelland may arise by statute, but as this Court already has observed “the fact that the Workers’ Compensation Act gives the employer-insurer the right to intervene and maintain the action as a subrogee does not change the essential ‘nature and character of the controversy.’” *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54, 57 (Minn. 1993).

The measure of damages in a tort action is whatever the jury determines the claim is worth, not what the workers’ compensation insurer paid or was required to pay. Thus, the parties to this case stipulated that, if tried to a jury, the jury would find fair and reasonable wrongful death damages for medical expenses, funeral expenses and loss of financial support to Angeline Bodeker in the amount of \$48,336.05.¹ In light of this Stipulation, the question

¹ Zurich repeatedly misquotes the Stipulation of Facts. The parties never stipulated that, under the Wrongful Death Act, fair and reasonable damages for medical expenses, funeral expenses and lost economic support was \$48,336.05. In this case nothing in the Wrongful Death Act acts as an obstacle to recovery. The Wrongful Death Act contains no limits on the amount of damages that can be recovered following an employee’s work-related death. Damages in a wrongful death case, however, are limited to whatever a jury would find fair and reasonable.

is whether Bjelland's liability is limited to this lesser amount, or whether Zurich is entitled to get whatever it paid regardless of how a jury would value the claim. Zurich's interpretation of the 2000 amendments to the Workers' Compensation Act, and that of the Court of Appeals, as "redefining" the measure of damages as the full amount of benefits paid and payable is not supported by the amendments' legislative history, or by the language of the amendments themselves. And it is far more reasonable to interpret the amendments as referring to categories or elements of benefits potentially recoverable given that the sole rationale presented to the Legislature focused on categories of compensation, and not on provable damages. *See* App. 54 (Rationale for Proposed Revisions to Minn. Stat. § 176.061 Simplifying Workers' Compensation Subrogation and Employer Liability).²

I. The Language of the 2000 Amendments Is Ambiguous.

The first eleven pages of Zurich's argument is devoted to a discussion of its belief that the "plain" and "unambiguous" language of the 2000 amendments demonstrates the Legislature's intent to overrule *Tyroll* and *M.W. Ettinger Transfer & Leasing Co. v. Schaper Mfg., Inc.*, 494 N.W.2d 29 (Minn. 1992). Such an intent, however, cannot be inferred from the language of the amendments alone, because it is indeed ambiguous.

² Zurich suggests at page 12 of its Brief that Bjelland bases his assertion regarding the purpose of the 2000 amendments to section 176.061 on an article written by Michael D. Carr, the author of the amendments. Bjelland's assertion, however, is derived not from that article, which was written after the legislation was enacted, but from the materials that were attached to that article – materials that Carr asserts he provided to the Workers' Compensation Advisory Council and the Minnesota Trial Lawyers in support of the legislative amendments included in their bill. *See* App. 52.

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995). *See also American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). The trial court in this case, and Bjelland, interpreted the “regardless” language of the 2000 amendments as clarifying that an employer’s subrogation claim includes all benefits or compensation paid or payable by the employer, including benefits that ordinarily might not be a recoverable element of damages in tort, but that the jury’s measure of damages still applies. In other words, the effect of the amendments is to permit the employer to put all categories of payments on the table, but it is still up to the jury to determine what those categories of damages are worth. This is a reasonable interpretation of the added language “regardless of whether such benefits [compensation] are recoverable by the employee or the employee’s dependents at common law or by statute . . .,” particularly since Minnesota case law prior to 2000 referred to elements of common law tort damages as being “recoverable” in workers’ compensation, and thus included in the subrogation right, and “non-recoverable.” *See, e.g., Tyroll*, 505 N.W.2d at 59.

On the other hand, the Court of Appeals, while at first stating that the employer is not automatically entitled to the full recovery of benefits paid and payable without first proving the employee’s damages, nevertheless interpreted the amendments as “redefining” the measure of recovery in workers’ compensation subrogation actions as the full amount of benefits paid and payable by the employer. *See App. 10*. This, too, may be a reasonable interpretation, but no more so than Bjelland’s and trial court’s. Indeed, it is perhaps less so,

because if the Legislature's intent was to "redefine" the measure of damages and allow an employer to recover the full amount of benefits paid, the Legislature could, as the trial court noted, easily have said so directly in the statute through use of terms such as "full amount," "all benefits," "all compensation," or "total amount." Or the Legislature could simply have said "the measure of recovery shall be the amount of the benefits paid or payable."

In short, the "regardless of whether such benefits are recoverable" language lacks clarity. Beyond the trial court's different interpretation, the inconsistency in the Court of Appeals' decision itself highlights the amendments' ambiguity.

II. The Legislative History Does Not Support the Conclusion That the 2000 Amendments Redefine the Measure of Recovery in Workers' Compensation Subrogation Actions as the Full Amount of Benefits Paid and Payable to the Employee, as Opposed to What a Jury Would Award.

Nothing in the legislative history supports Zurich's interpretation of the 2000 amendments. As Zurich notes, when the words of a statute are not explicit, a court may ascertain the intent of the Legislature by considering, among other matters:

1. The occasion and necessity for the law;
2. The circumstances under which it was enacted;
3. The mischief to be remedied;
4. The object to be attained;
5. The former law, if any, including other laws upon the same or similar subjects;
6. The consequences of a particular interpretation;
7. The contemporaneous legislative history; and

8. Legislative and administrative interpretations of the statute.

See Minn. Stat. § 645.16. While noting these considerations, Zurich never actually addresses them, perhaps because, with the possible exception of considerations 6 and 7, they are not particularly helpful since there was no discussion in the Legislature regarding the particular amendments to section 176.061 at issue in this case.

Instead, Zurich makes three points, none of which provide any insight into the Legislature's intent. First, Zurich again raises the "general proposition" that "statutory amendments are presumed to be intended to effect a change in the law." As discussed at page 16 of Bjelland's principal Brief, however, this presumption is neither absolute nor irrebutable. *See, e.g., Brotherhood of Railway and Steamship Clerks v. State by Balfour*, 303 Minn. 178, 195, 229 N.W.2d 3, 13 (1975) (noting presumption but concluding language of amendatory statute was drafted to clarify rather than enlarge broad powers). Nevertheless, it would be fair to infer that the Legislature may have intended to overrule only a portion of *Tyroll* – that part in which the court held that the employer's subrogation action "should be limited to recovery of common law damages for past and future wage loss, loss of earning capacity, and similar items of damages, if any," *Tyroll*, 505 N.W.2d at 60, as that would be the practical effect of an amendment allowing an employer to submit all elements of damage to the jury.

Second, Zurich maintains that its position is supported by the Senate Jobs, Energy and Community Development Committee Hearing transcript, which states:

... [L]anguage is added which will allow an employer who is required to pay workers' compensation benefits as a result of negligence of a third party the right to recover all benefits it has paid because of that negligence, regardless of whether those benefits were recoverable at common law or not.

App. 24, 36. This singular, in fact sole, reference to the amendments is not particularly helpful in ascertaining the Legislature's intent because all it does is state what the proposed amendments would say and does not add anything beyond the language of the amendments themselves.

Third, Zurich suggests that any doubt regarding the intent of the Legislature is resolved by an article written by Michael Carr for the Minnesota Defense Lawyers Association. With all due respect to Mr. Carr, his article is not part of the legislative history, and is not the intent of the Legislature, but instead is his view of the amendments' effect expressed after those amendments were adopted.

None of three points raised by Zurich suggests that the Legislature intended to supplant the jury measure of damages with the full amount of the benefits paid and payable to the employee. Certainly, such an intent is not expressed. Indeed, the Legislative record is more remarkable for what it does not contain. Specifically, there is no mention of *Tyroll* by name, no reference to the Supreme Court or decisions interpreting the prior statute, no reference to the precise "problem or mischief" that Zurich claims in this case the statute supposedly was designed to prevent and, significantly, there is no debate or even discussion regarding the amendments themselves. Given these absences, together with the repeated

references in the Legislative record to the amendments as merely “clarifying” the law, it can neither be presumed nor even inferred that the Legislature intended to overrule *Tyroll*.

III. Zurich’s Interpretation of Minn. Stat. § 176.061 Upsets the Delicate Balancing of Rights Among the Parties and Undermines the Statute’s “Comprehensive Plan.”

Zurich’s third primary argument, that neither common law principles of subrogation nor the pre-amendment balancing of interests justifies the trial court’s interpretation of the amendments, confuses the source of Zurich’s subrogation right with the nature of the third party action. This case is a tort action in which negligence, causation and damages were alleged. The fact that the Workers’ Compensation Act gave Zurich the right to either intervene in Mrs. Bodeker’s action and/or maintain an action in its own name, as a subrogee, does not change the essential “nature and character” of the controversy. *Tyroll*, 505 N.W.2d at 57. And because the essential nature and character of the controversy does not change depending on whether the employer intervenes or maintains its own action, or depending on whether the employee remains in the case or separately settles her claims, the alleged tortfeasor’s right to defend in the same manner it would defend any other tort action should not change either. *Id.* at 59-60; *see also Ettinger*, 494 N.W.2d at 33-34.

The absence of any debate in the Legislature aside, perhaps the strongest evidence supporting the conclusion that the Legislature did not, in adopting the 2000 amendments, intend to change the nature of the third party action or otherwise disturb the balancing of interests between the employee, the employer and the alleged tortfeasor, is the fact that the Legislature did not in any way alter the distribution formula set out in section 176.061,

subd. 6. Thus, absent the *Naig* settlement between Mrs. Bodeker and Bjelland, Mrs. Bodeker would have proceeded with her claim against Bjelland and, under subdivision 6, Zurich would have been permitted only a statutory share of the \$48,336.05 the jury would have awarded. Zurich's assertion that the amendments now harmonize a workers' compensation insurer's recovery in *Naig* and non-*Naig* situations is as unsupported as its ridiculous claim that, by entering into a *Naig* settlement, the employee and the tortfeasor previously could conspire to reduce the potential recovery of the workers' compensation insurer. Unless the Legislature sees fit to somehow alter Minn. Stat. § 176.061, subd. 6, a workers' compensation insurer is never entitled to recover the full amount of the benefits paid and payable because that subdivision expressly provides that the employer is entitled to only a share of what the injured employee actually recovers: "The proceeds of **all actions for damages** or of a settlement of an action **under this section**, . . . received by the injured employee or the employee's dependents or by the employer or the Special Compensation Fund, . . ., **shall be divided** as follows . . ." Minn. Stat. § 176.061, subd. 6 (emphasis added).

Zurich's additional argument that the 2000 amendments eliminated an incongruity between the employer's potential recovery on its claim for workers' compensation benefits and its exposure on a contribution claim is only partially correct. It is true that the 2000 changes eliminated this incongruity, but not through that portion of the amendments at issue in this case. Rather, the incongruity was corrected through the enactment of subdivision 11 to section 176.061, and not the addition of the "regardless" language.

Finally, with respect to Zurich’s “balancing” argument, Zurich persists in its policy-based argument that the cost of workers’ compensation benefits should be borne by culpable tortfeasors rather than “innocent” employers. But again, the workers’ compensation scheme, including its third-party liability provisions, are not concerned with ensuring that those responsible for an employee’s injury absorb their full share of the fault. *See* Bjelland’s principal Brief at pp. 18-19. Thus, although an innocent employer may in some cases have to bear some of the cost of workers’ compensation benefits, in other cases in which it might not be so innocent the employer may be able to foist its tort liability upon a less culpable tortfeasor.

IV. The Court of Appeals’ Interpretation of the 2000 Amendments Violates Due Process.

Bjelland does not contend that Minn. Stat. § 176.061, as amended, is unconstitutional.³ To the contrary, Bjelland’s interpretation of the statute, and that of the trial court, raises no constitutional issue. But the Court of Appeals’ conclusion that the amendments “redefine the measure of recovery in workers’ compensation subrogation actions as the full amount of benefits paid and payable to the employee” raises the very same constitutional due process issue of concern to this Court in *Ettinger*. *See Ettinger*, 494 N.W.2d at 33.

It is a well-established rule of statutory interpretation that construction raising constitutional issues is to be avoided:

³ Bjelland points this out to remove any argument or question that it has failed to notify the Attorney General’s office of a constitutional challenge as required by Minn. R. Civ. App. P. 144.

It is well established that if a statute is ambiguous, the construction which avoids constitutional conflict is preferred although such construction may be less natural. . . . If the act is reasonably susceptible to two different constructions, one of which would render it constitutional and the other unconstitutional, **we must adopt the one making it constitutional.**

State on Behalf of Forslund v. Bronson, 305 N.W.2d 748, 751 (Minn. 1981) (citations omitted and emphasis added).

In an effort to avoid this basic principle of statutory construction, Zurich maintains that the Court of Appeals' decision raises no due process concerns because the tortfeasor still has a right to a jury trial on issues of causation and negligence and may still challenge the reasonableness of the workers' compensation benefits paid and payable. The amount and reasonableness of the workers' compensation benefits paid by the employer, however, was not a jury issue before the 2000 amendments; and there is no reason to believe that reasonableness presents a jury issue now. *See, e.g., Tyroll*, 505 N.W.2d at 61 (setting forth procedure for determining the amount of the subrogation damages).⁴ More to the point, however, is the fact that whether or not Zurich overpaid benefits is an entirely separate issue from what the death or injury, as measured by a jury, is worth. This Court recognized as much when it held in *Ettinger* that an employer may not automatically recover the amount

⁴ Moreover, while it is nice of Zurich to concede in this case that the reasonableness of the benefits can still be challenged, what about the next case? Although Zurich asserts that those portions of *Tyroll* and *Ettinger* granting a tortfeasor the right to challenge the reasonableness and necessity of the payments are preserved, there is no more support in the wording of the statutes for this proposition than there is for Zurich's expansive reading of the statute as permitting the employer to recover the full or entire amount of the compensation or benefits paid and payable.

of benefits paid from a third party tortfeasor without allowing that third party to contest the nature and extent of the employee's damages, and when, in *Tyroll*, it reaffirmed the basic notion that:

The workers' compensation system is not intended to "shift the employer's obligations under the employment contract to third parties who are strangers to that contract in complete disregard of . . . the common law measure determinative of the nature and extent of damages recoverable in actions sounding in tort."

Tyroll, 505 N.W.2d at 60 (quoting *Allstate Ins. Co. v. Eagle-Picher Indus., Inc.*, 410 N.W.2d 324, 328 (Minn. 1987)). See also *Ettinger*, 494 N.W.2d at 33. In a tort action, a defendant is entitled to have the measure of damages determined by the jury. *Tyroll*, 505 N.W.2d at 61-62; *Ettinger*, 494 N.W.2d at 33-34.

It is clear that the Court of Appeals' interpretation of the 2000 amendments deprive an alleged tortfeasor of its right to have the jury determine the measure of damages. Notwithstanding its initial holding that "an alleged third-party tortfeasor in a workers' compensation subrogation action has a right to a jury trial on both damages and liability, and the insurer subrogee is not automatically entitled to full recovery of benefits paid and payable," the remainder of the Court of Appeals' decision rendered this "right" an empty one. Rather than proceeding with trial, the parties stipulated that if tried to a jury, a jury would find the fair and reasonable damages for medical expenses, funeral expenses and lost economic support to be \$48,336.05. Ultimately, however, it didn't matter what the jury would have determined the tort case to be worth – according to Zurich and the Court of Appeals, the measure of damages is not what the jury decides the case is worth, but what

workers' compensation paid, period. As this interpretation indeed raises serious due process concerns, it must be rejected in favor of the more reasonable interpretation offered by Bjelland in Part I of this Brief.

CONCLUSION

The trial court recognized the true nature of Zurich's third-party action against Bjelland – a tort action – and properly determined that the appropriate measure of damages in such an action is the amount the jury determines the claim is worth. The Court of Appeals' conclusion to the contrary is supported by neither the language of the 2000 amendments to section 176.061 nor the legislative history and raises constitutional due process concerns. For the reasons stated herein, and in Bjelland's principal Brief, the Court of Appeals should be reversed and the trial court's judgment in the amount of \$48,336.05 reinstated.

Respectfully submitted,

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