

NO. A06-1626

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State of Minnesota  
**In Court of Appeals**

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Theresa Mary Mitsch,

*Appellant,*

vs.

American National Property and Casualty Company,

*Respondent.*

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**RESPONDENT'S BRIEF**

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## STATEMENT OF LEGAL ISSUES

Did the trial court properly determine that a plain and unambiguous reducing clause contained within an insurance policy that did not contravene statute and/or controlling case law precluded Appellant's right to receive underinsured motorist coverage when the insurer previously paid its underlying liability limits under the same policy to the injured Appellant?

### Trial Court's Ruling:

The trial court held in the affirmative.

### List of Apposite Cases:

1. *Engle v. Estate of Fischer*, unpublished, 2003 WL 174541 (Minn. Ct. App. 2003) (Appellant's App. at 17).
2. *Jensen v. United Fire And Cas. Co.*, 524 N.W.2d 536 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 3, 1995).
3. *Lynch v. American Fam. Mut. Ins. Co.*, 626 N.W.2d 182 (Minn. 2001).
4. Minn. Stat. §65B.49, subd. 3a(1).

## STATEMENT OF THE CASE AND FACTS

Respondent American National Property And Casualty Company ("American National") concurs with Appellant Theresa Mary Mitsch ("Mitsch") that the facts pertinent to resolution of the issue on appeal are not in dispute. On September 23, 2003, at approximately 1:30 p.m., Appellant was riding as a passenger on a motorcycle being driven by her husband, Thomas Mitsch. (Appellant's App. at 1.) As they were proceeding northbound on Highway 169, north of the City of Milaca, Minnesota, they entered a road construction zone which narrowed the vehicle travel lanes for both northbound and southbound traffic. (*Id.*) As they approached the intersection of Highway 169 and County State Aid Highway 11, it is alleged that a truck being driven

carelessly and negligently by Joseph Henry Frank, which was proceeding eastbound on County State Aid Highway 11, invaded the northbound travel lane. (*Id.*) It is further alleged by Appellant that at said time and place, her husband, Thomas Mitsch, was carelessly and negligently traveling at a speed that was faster than he should have been traveling, given the road construction. (*Id.*) Thomas Mitsch was required to swerve to the right to avoid the truck being driven by Joseph Frank, causing the motorcycle Thomas Mitsch was driving to enter a ditch on the right side of the roadway. (*Id.*) As Thomas Mitsch entered the shoulder, Appellant was thrown from the motorcycle, sustaining injuries and damages. (*Id.*)

At the time of the subject accident, the vehicle being driven by Joseph Frank was insured through a policy of insurance issued by Austin Mutual Insurance Company with underlying liability limits of \$30,000 per person. (Appellant's App. at 2.) The motorcycle being driven by Thomas Mitsch at the time of the accident was insured through a policy of insurance issued by Respondent American National Property And Casualty Company (the "American National Policy") with limits of \$250,000 per person/\$500,000 per accident for both underlying liability and underinsured motorist ("UIM") coverages. (Appellant's App. at 2, 22.)

Following the accident, Appellant settled her underlying bodily claim against Thomas Mitch and American National for the sum of \$250,000, and her underlying liability claim against Joseph Frank and Austin Mutual Insurance Company, for the sum of \$30,000. Appellant then brought a claim against American National for underinsured motorist benefits under the same policy of insurance issued by American National which

covered the motorcycle on which Appellant was riding as a passenger on the day of the subject accident. American National denied Appellant's claim for UIM benefits under the clear and unambiguous language of the American National Policy which provided, among other things, that any amounts payable will be reduced by:

- (1) a payment made by the owner or operator of the ... **underinsured motor vehicle**, or organization which may be legally liable; (and)
- (2) a payment under the Liability Coverage or Personal Injury Protection Coverage of this policy; \* \* \*

(Appellant's App. at 35.)

Thereafter, Appellant commenced a lawsuit in Dakota County District Court. (Appellant's App. at 1.) American National brought a motion for summary judgment contending that, pursuant to the terms of the American National Policy, the \$250,000 it previously paid to Appellant in settlement of the underlying liability claim should be offset, thereby resulting in no further obligation under American National's Policy to compensate Appellant for any alleged UIM benefits.

On July 5, 2006, the Honorable Edward Lynch of the Dakota County District Court issued an order granting American National's motion for summary judgment and dismissed Appellant's Complaint with prejudice. (Appellant's App. at 9-14.) Judge Lynch determined that the reducing clause set forth in the American National Policy was valid and enforceable under controlling case law, did not contravene Minn. Stat. §65B.49, subd. 3a(1), and thereby precluded Appellant's right to UIM benefits. Judgment was entered on July 5, 2006, and Appellant filed a timely notice of appeal. (Appellant's App. at 15.)

## STANDARD OF REVIEW

Summary judgment is appropriate when no facts exist giving rise to a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Nicollet Restoration v. St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995). In responding to a summary judgment motion, “an adverse party may not rest upon mere averments or denials of the adverse party’s pleading, but must present specific facts showing that there is a genuine issue for trial”. *See, e.g., Nicollet Restoration*, 533 N.W.2d at 848. Genuine issues of material fact are not created by speculation, general assertions, and promises to produce evidence at trial. *Bob Useldinger & Sons, Inc. v. Hanglesben*, 505 N.W.2d 323, 328 (Minn. 1993) (speculation); *Erickson v. General United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977) (general assertions); *Borom v. City of St. Paul*, 289 Minn. 371, 374-75, 184 N.W.2d 595, 597 (1971) (promises to produce evidence at trial).

Interpretation of an insurance contract is a question of law. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). An insurance policy must be construed as a whole, and unambiguous language must be given its plain and ordinary meaning. *Henning Nelson Constr. Co. v. Fireman’s Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). Language is ambiguous if it is reasonably subject to more than one interpretation. *Hammer v. Investors Life Ins. Co.*, 511 N.W.2d 6, 8 (Minn. 1994). On review of a summary judgment, the reviewing court determines whether the trial court correctly applied the law. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). The interpretation of an insurance policy is a question of law reviewed de novo. *American Fam. Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001); *Haarstad v.*

*Graff*, 517 N.W.2d 582, 584 (Minn. 1999). Similarly, statutory construction is also a question of law reviewed de novo. *Sorensen v. St. Paul Ramsey Medical Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990).

## ARGUMENT

### I. THE REDUCING CLAUSE CONTAINED WITHIN AMERICAN NATIONAL'S POLICY IS VALID AND ENFORCEABLE, PRECLUDING FURTHER PAYMENT OF UIM BENEFITS TO APPELLANT.

The trial court properly determined that the reducing clause within American National's Policy is enforceable as applied to the facts of this case. The trial court's decision is based upon two prior decisions of this Court, as well as established case law upholding the validity of reducing clauses. *See, e.g., Engle v. Estate of Fischer*, unpublished, 2003 WL 174541 (Minn. Ct. App. 2003) (Appellant's App. at 17); *Jensen v. United Fire And Cas. Co.*, 524 N.W.2d 536 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 3, 1995).

It is well settled that an insurer's liability is determined by the contract between the insurer and its insured so long as the policy does not omit coverage required by law and the coverage does not violate applicable statutes. *Lynch v. American Fam. Mut. Ins. Co.*, 626 N.W.2d 182, 185 (Minn. 2001); *Engle*, 2003 WL 174541 at \*5 (Appellant's App. at 20). Reducing clauses have long been upheld as consistent with established case law that prevents converting first party UIM coverage into additional third party liability coverage. *Thommen v. Illinois Farmers Ins. Co.*, 437 N.W.2d 651 (Minn. 1989).

The underinsured motorist "Limits of Liability" section of the American National Policy provides that amounts payable will be reduced by:

- (1) a payment made by the owner or operator of the ... **underinsured motor vehicle**, or organization which may be legally liable; (and)
- (2) a payment under the Liability Coverage or Personal Injury Protection Coverage of this policy; \* \* \*

(Appellant's App. at 35.)

The trial court properly upheld the enforceability of the foregoing reducing clause contained within the American National Policy by applying this Court's analysis in two previous decisions: *Engle v. Estate of Fischer*, unpublished, 2003 WL 174541 (Minn. Ct. App. 2003) (Appellant's App. at 17); and *Jensen v. United Fire And Cas. Co.*, 524 N.W.2d 536 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 3, 1995).

In *Engle*, this Court affirmed the trial court's ruling that the language of the insurance policy at issue limited the insurer's total liability to include the amount paid to settle the underlying liability claim on behalf of its insured, such that the maximum amount the insurer would be obligated to pay for UIM benefits was reduced by any sum paid on behalf of a person who may be legally responsible for the bodily injury, including all sums paid under personal liability coverage. Indeed, this Court specifically held in *Engle* that a similar insurance contract reducing clause was enforceable and did not contravene Minn. Stat. §65B.49, subd 3(a). (Appellant's App. at 17.) Although the *Engle* is unpublished, it is instructive in the immediate case because the accident producing injury involved two motor vehicles.

In *Engle*, Tiesha Engle was injured while riding as a passenger in a vehicle driven by Brandon Thompson ("Thompson") and insured by Continental Casualty Company

("Continental"). Thompson's vehicle collided with a vehicle driven by Dorothy Fischer ("Fischer"). Fischer's vehicle was insured by Farmers Insurance Group with liability limits of \$100,000. Thompson's policy with Continental provided for \$100,000 per person and \$300,000 per accident limits for both liability and UIM coverages. Engle sued Thompson and Fischer for negligence, but settled both claims before trial. Fischer's insurer paid its policy limits of \$100,000 and Thompson's insurer, Continental, paid \$70,000 for a full and final release of Engle's claims against Thompson. As a passenger in Thompson's vehicle, Engle then asserted a claim for UIM benefits against Continental. Following trial, the jury found Fischer to be 100% at fault for the subject accident and Thompson to be 0% at fault and awarded Engle total damages of \$206,690.50. The trial court applied Minn. Stat. §548.36, subd. 3(a), the collateral source rule, to the verdict and reduced the total damages by the \$100,000 Engle received in settlement from Fischer, among other things. (Appellant's App. at 17-20.) Continental moved the trial court for a further reduction of the verdict based upon the \$70,000 it paid in settlement on behalf of its insured, Thompson. The trial court granted Continental's motion, determining that the plain language of Continental's policy limited its liability to \$100,000.<sup>1</sup> (Appellant's

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<sup>1</sup> The "limit of liability clause contained within Continental's policy reads in pertinent part:

"The limit of liability shown in the Coverage Summary for Underinsured Motorists Coverage is our maximum limit of liability for all damages resulting from any one accident with an underinsured motorist vehicle. The limit of liability applicable to Uninsured Motorists Coverage or Underinsured Motorists Coverage is the most we will pay regardless of the number of: 1. Covered persons; 2. Claims made; 3. Vehicles or premiums shown in the Coverage Summary; or 4. Vehicles involved in the accident.

App. at 18-19.) Thus, because Continental's liability to Engle was offset by the amount Continental previously paid in settlement of the liability claim, the trial court ordered Continental to pay \$28,500 in UIM benefits to Engle. (Appellant's App. at 18.)

Engle appealed the trial court's rulings, contending the "limit of liability clause" contained within Continental's policy was ambiguous and contravened Minn. Stat. §65B.49, subd. 3a(1), because it created a "difference in limits" approach to UIM benefits that was specifically abrogated by the Minnesota legislature in 1989. This Court affirmed the trial court's decision, holding that the plain language of Continental's policy allowed for an offset of the amount received by Engle in settlement of her liability claim with Continental's insured, Thompson, and, further, that Continental's policy language did not contravene Minn. Stat. §65B.49, subd. 3a(1).<sup>2</sup> (Appellant's App. at 19-20.)

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Any amounts otherwise payable for damages under these coverages shall be reduced by all sums: 1. Paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Personal Liability Coverage. 2. Paid or payable or which would be payable except for the application of a deductible under Personal Injury Protection Coverage." (Appellant's App. at 18-19.)

<sup>2</sup> Minn. Stat. §65B.49, subd. 3a(1) provides:

"No plan of reparation security may be renewed, delivered or issued for delivery, or executed in this state with respect to any motor vehicle registered or principally garaged in this state unless separate uninsured and underinsured motorist coverages are provided therein. Each coverage, at a minimum, must provide limits of \$25,000 because of injury to or the death of one person in any accident and \$50,000 because of injury to or the death of two or more persons in any accident. In the case of injury to, or the death of, two or more persons in any accident, the amount available to any one person must not exceed the coverage limit provided for injury to, or the death of, one person in any accident."

In deciding Engle, this Court rejected the arguments asserted by Engle and noted that language similar to that contained within Continental's policy, commonly characterized as a "reducing clause", has been upheld by this Court in Jensen v. United Fire And Cas. Co., 524 N.W.2d 536 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 3, 1995). Accordingly, this Court specifically held that the trial court in Engle did not err by reducing Continental's UIM payment by the \$70,000 it paid to settle Engle's liability claim against Thompson. (Appellant's App. at 19-20.)

In Jensen, this Court found language similar to that contained in the Continental policy at issue in Engle to be a valid and enforceable "reducing clause". In that case, Katie Jensen was severely injured in a single vehicle accident while riding as a passenger in a pickup truck driven by her sister and owned by a friend's father. Jensen, 524 N.W.2d at 537. Although Katie had no insurance in her own name, there were three insurance policies potentially covering the accident including a policy issued to her father, Roger Jensen, by Farmers Union. Farmers Union tendered its liability limit of \$100,000 on behalf of Katie's sister as driver of the pickup. Because Katie's injuries were still not fully compensated, her father brought a declaratory judgment action seeking a declaration that Katie was entitled to UIM benefits under the Farmers Union policy. The Farmers Union policy included the following language: "[a]ny [UIM] amounts payable will be reduced by: \* \* \* Any payment under the Liability Coverage of this policy." Id. at 538.

In affirming the trial court's decision granting summary judgment in favor of Farmers Union, this Court stated:

“Farmers Union is not attempting to use liability payments by *other* tortfeasors to reduce the available UIM coverage – which is what the legislature’s ‘add-on’ amendment sought to avoid. Rather, the limitation here is based on the relevant policy’s explicit language that excludes recovery when there has been a previous liability payment *under that same policy*.”

Jensen, 524 N.W.2d at 539 (emphasis in original).

In Jensen, the reducing clause was enforced because of “the relevant policy’s explicit language that excludes recovery when there has been a previous liability payment *under that same policy*.” (*Id.*) (Emphasis in original.) That is exactly what is involved here. American National previously paid its liability limits to Appellant under the same policy from which Appellant now seeks UIM benefits. The Jensen case suggests that as long as American National is not attempting to reduce its UIM benefits based upon liability payments made by another tortfeasor or pursuant to insurance coverage on another vehicle, the fact that there is another tortfeasor and another underinsured vehicle does not affect the validity of American National’s reducing clause.

Unless this Court determines that the Engle and Jensen decisions were decided in error, the same rationale set forth by this Court in Engle and Jensen is controlling in the immediate case. Indeed, the American National Policy contains a “reducing clause” identical in substance to those at issue in Engle and Jensen. The reducing clause within the underinsured motorist section of the American National Policy states as follows: “[a]mounts payable will be reduced by: (1) a payment made by the owner or operator of the \* \* \* underinsured motor vehicle, or organization which may be legally liable; (2) a payment under the Liability Coverage or Personal Injury Protection Coverage of this policy.” (Appellant’s App. at 35.) Here, it is undisputed that American National

tendered its liability limits of \$250,000 on behalf of its insured, Thomas Mitsch, as driver of the motorcycle on which Appellant was riding as a passenger when the subject accident occurred. It is further undisputed that Austin Mutual Insurance Company tendered its \$30,000 liability limits on behalf of its insured, Henry Joseph Frank, the truck that invaded Thomas Mitsch's lane of travel. Based upon the reducing clause contained within the American National Policy, any benefits to which Appellant may be entitled under the UIM coverage provided by the American National Policy must be reduced by the liability payments of \$250,000 and \$30,000, set forth above. Thus, because the limit of UIM benefit coverage provided under American National's Policy is \$250,000, the trial court properly held that Appellant is precluded from recovering further UIM benefits from American National.

In sum, it is a basic precept of insurance law that the extent of the insurer's liability is governed by the contract into which it entered as long as the policy does not omit coverage required by law and does not violate applicable statutes. *Lynch v. American Fam. Mut. Ins. Co.*, 626 N.W.2d 182, 185 (Minn. 2001); *American Fam. Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983); *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960). American National's Policy does not omit coverage required by law, nor does it violate the Minnesota No-Fault Act, Minn. Stat. §§65B.41 - .71. To the contrary, American National's Policy plainly and unambiguously provides that any amount paid under its UIM coverage must be reduced by any sum paid on behalf of a person who may be legally responsible for Appellant's bodily injury (i.e., Thomas Mitsch and Joseph Frank), including all sums paid under its liability coverage. This Court has

previously determined that identical “reducing clauses” do not to contravene Minn. Stat. §65B.49, subd. 3a(1). Accordingly, this Court must uphold the enforceability of American National’s reducing clause and affirm the ruling of the trial court.

**II. THE FIRST PROVISION OF THE AMERICAN NATIONAL REDUCING CLAUSE MANDATES REDUCTION OF UIM BENEFITS AVAILABLE TO APPELLANT BY THE AMOUNT OF AUSTIN MUTUAL’S LIABILITY PAYMENT.**

If the Court determines that American National may not reduce the UIM limits available to Appellant by the liability insurance payments made by American National on behalf of the negligence of Appellant’s husband and American National insured, Thomas Mitsch, then the Court should still reduce the amount of UIM coverage available to Appellant by the \$30,000 liability payment paid by Austin Mutual, the insurer for Joseph Frank. The first provision of the American National reducing clause provides for reduction of UIM benefits by “(1) a payment made by the owner...of the **underinsured motor vehicle** ...”. If the Court accepts that Appellant’s claim for UIM benefits is based upon the underinsured status of the Frank vehicle, then the \$30,000 payment by Austin Mutual must be applied to reduce the amount of UIM benefits available to Appellant. Under this scenario, Appellant would then have \$220,000 in available UIM coverage.

Historically, courts have permitted step-down provisions in policies which permit an insurer to provide a certain level of coverage to one class of an insured, but maintain a lesser level of coverage to other classes of insureds, so long as all insureds have at least the minimum levels of coverage required under the No-Fault Act. *See State Farm Mut.*

*Ins. Co. v. Universal Underwriters Ins. Co.*, 625 N.W.2d 160 Minn. Ct. App. 2001, *rev. denied* (Minn. June 27, 2001).

### CONCLUSION

For all of the foregoing reasons, and the arguments of counsel, Respondent American National Property And Casualty Company respectfully requests that this Court affirm the decision of the trial court granting summary judgment to American National. The trial court properly determined that American National's plain and unambiguous reducing clause did not contravene applicable statutes and/or controlling case law, thereby precluding Appellant's right to receive UIM benefits from American National. Upholding the reducing clause contained with American National's Policy prevents the impermissible conversion of first-party UIM coverage to third-party liability coverage and, further, serves to affirm the basic precept of insurance contract law which provides that the extent of the insurer's liability is governed by the contract into which it entered. The trial court's decision is based upon two well reasoned decisions of this Court (*see, e.g., Engle v. Estate of Fischer*, unpublished, 2003 WL 174541 (Minn. Ct. App. 2003) (Appellant's App. at 17) and *Jensen v. United Fire And Cas. Co.*, 524 N.W.2d 536 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 3, 1995), as well as established case law upholding the validity of reducing clauses.

If the Court determines that American National may not reduce the UIM limits available to Appellant by the liability insurance payments made by American National, then the Court should still reduce the amount of UIM coverage available to Appellant by the \$30,000 liability payment paid by Austin Mutual, the insurer for Joseph Frank.

Respectfully submitted,

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Dated: October 30, 2006.

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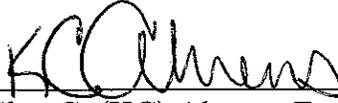
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,349 words. This brief was prepared using Microsoft Word 2002.

**HELLMUTH & JOHNSON, PLLC**

Dated: October 30, 2006.

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