

NO. A07-1461

State of Minnesota
In Supreme Court

Dean Do,

Plaintiff/ Appellant,

vs.

American Family Mutual Insurance Company,

Defendant/ Respondent.

RESPONDENT'S BRIEF AND APPENDIX

D. Scott Dunham (#249191)
D. SCOTT DUNHAM, P.A.
109 Myrtle Street East
Suite 100
Stillwater, MN 55082
(651) 342-1505

Attorney for Appellant

Tammy M. Reno (#327773)
BROWN & CARLSON, P.A.
5411 Circle Down Avenue
Suite 100
Minneapolis, MN 55416
(763) 591-9950

Attorney for Respondent

Paul D. Peterson (#203919)
Lori L. Barton (#332070)
HARPER & PETERSON, P.L.L.C.
3040 Woodbury Drive
Woodbury, MN 55129-9617
(651) 738-8539

*Attorneys for Amicus Curiae
Minnesota Association for Justice*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

Table of Authorities ii

Statement of Facts 1

Argument:

Pursuant to the collateral source rule of Minn. Stat. § 548.36 (2006), in a case involving claims for both no-fault and underinsured motorist benefits, the injured party’s prior settlement with the tortfeasor for unspecified general damages should be offset from an ultimate jury award that encompasses no-fault damages.....2

The Court of Appeals’ decision is not contrary to the public policy considerations concerning the No-Fault Act, judicial economy, and the encouragement of settlements.....18

Conclusion..... 21

TABLE OF AUTHORITIES

Minnesota Decisions:

Balderrama v. Milbank Mut. Ins. Co., 324 N.W.2d 356 (Minn. 1982)13, 14, 15

Buck v. Schneider, 413 N.W.2d 569 (Minn. Ct. App. 1987)4

Behr v. American Family Mutual Ins. Co., 638 N.W.2d 469 (Minn. 2002)8

Dean v. American Family Mutual Insurance Company, 535 N.W.2d 342 (Minn. 1995)
.....5, 8

Employers Mut. Co. v. Nordstrom, 495 N.W.2d 855 (Minn. 1993)
.....3, 8, 9, 14

Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990)4, 5

Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 342 (Minn. 1998)
.....12

Lee v. Hunt, 642 N.W.2d 57 (Minn. Ct. App. 2002)5

Richards v. Milwaukee Ins. Co., 518 N.W.2d 26 (Minn. 1994)3, 8, 9, 10, 11, 14

Wertish v. Salvhus, 558 N.W.2d 258 (Minn. 1995)
.....8

W. Nat'l Mut. Ins. Co. v. Casper, 549 N.W.2d 914 (Minn. 1996)4, 7

Statutes, Rules or Regulations:

Minn. Stat. § 548.36 (2006)4, 8, 10

Minn. Stat. § 65B.42 (2006).....18

Minn. Stat. § 65B.43 (2005).....8

Minn. Stat. § 65B.51 (2005).....8, 10

Minn. Stat. § 65B.44 (2005).....14

Minn. Stat. § 65B.61 (2005).....15

ISSUES PRESENTED

- I. PURSUANT TO THE COLLATERAL SOURCE RULE OF MINN. STAT. § 548.36 (2006), IN A CASE INVOLVING CLAIMS FOR BOTH NO-FAULT AND UNDERINSURED MOTORIST BENEFITS, SHOULD THE INJURED PARTY'S PRIOR SETTLEMENT WITH THE TORTFEASOR FOR UNSPECIFIED GENERAL DAMAGES BE OFFSET FROM AN ULTIMATE JURY AWARD THAT ENCOMPASSES NO-FAULT DAMAGES?**

The Court of Appeals correctly held that Appellant's prior settlement with the tortfeasor's liability insurer is a collateral source under Minn. Stat. § 548.36 (2006), and the district court did not err in deducting it from the ultimate jury award. If the prior settlement is not offset, the Appellant would receive more damages than the jury determined he was entitled to at trial.

- II. IS THE COURT OF APPEALS' DECISION CONTRARY TO THE PUBLIC POLICY CONSIDERATIONS CONCERNING THE NO-FAULT ACT, JUDICIAL ECONOMY, AND THE ENCOURAGEMENT OF SETTLEMENTS?**

The Court of Appeals' decision is not contrary to the public policy considerations concerning the No-Fault Act, judicial economy, and the encouragement of settlements. The Court of Appeals' decision is in line with the public policy considerations set forth in the No-Fault Act, and the decision does not in any way discourage settlements. Also, the decision comports with the principles of judicial economy.

STATEMENT OF THE FACTS

Respondent adopts the facts set forth in Appellant's Brief and adds the following additional facts. When Respondent brought its Motion for Collateral Source Offset and Amended Findings following trial, it argued that the jury verdict should be reduced by the \$28,000.00 liability settlement Appellant reached with the tortfeasor based on the contract of insurance between Respondent and Appellant. (See Memorandum of Law in Support of Motion for Collateral Source Offset and Amended Findings, Respondent's

Appdx. A-12.) The insurance contract in effect at the time of this motor vehicle accident provided that Respondent would “pay compensatory damages for bodily injury to an insured person who is legally entitled to recover from the owner or operator of an underinsured motor vehicle.” (See Insurance Policy, Respondent’s Appdx. A-23.) Respondent argued that the \$28,000.00 liability settlement must be deducted from the jury verdict in order to determine whether Appellant was entitled to underinsured motorist benefits under his policy and to prevent a double recovery. (Memorandum of Law in Support of Motion for Collateral Source Offset and Amended Findings, Respondent’s Appdx. A-12 – A-14.)

ARGUMENT

I. PURSUANT TO THE COLLATERAL SOURCE RULE OF MINN. STAT. § 548.36 (2006), IN A CASE INVOLVING CLAIMS FOR BOTH NO-FAULT AND UNDERINSURED MOTORIST BENEFITS, THE INJURED PARTY’S PRIOR SETTLEMENT WITH THE TORTFEASOR FOR UNSPECIFIED GENERAL DAMAGES SHOULD BE OFFSET FROM AN ULTIMATE JURY AWARD THAT ENCOMPASSES NO-FAULT DAMAGES.

At issue in this appeal is simply whether Appellant’s \$28,000.00 settlement with the tortfeasor should be offset from the gross verdict to reach the net verdict. Respondent contends the liability settlement must be offset. If it is not, Appellant will receive an impermissible double recovery and will recover more damages than the jury determined he was entitled to receive. Both the district court and the Court of Appeals agreed with Respondent. Because the Court of Appeals accurately interpreted and analyzed Minn. Stat. § 548.36 (2006) and applicable case law, Respondent respectfully requests that the

Court of Appeals be affirmed.

B. Appellant's settlement with the tortfeasor's liability insurer is a collateral source under Minn. Stat. § 548.36.

As the Court of Appeals correctly pointed out, injured people are typically compensated through his or her no-fault benefits as the losses and expenses are incurred. (Appellant's Appdx. A-8.) At the outset, it must be pointed out that Appellant never attempted to arbitrate his medical bills as he is permitted to do under the No-Fault Act. The motor vehicle accident occurred on September 13, 2002. (*Id.* A-5.) He brought the present claim for underinsured motorist benefits and no-fault benefits on or around April 25, 2006, long after his settlement with the tortfeasor's liability insurer. (*Id.* A-5, 16.) After Respondent paid \$865.00 of medical bills on his behalf and subsequent bills were denied, Appellant waited nearly three and one-half years after the accident to pursue his claim for No-Fault benefits. (*Id.* A-5.) Appellant chose to pursue his claims this way and chose to have his damages determined by a jury.

Minnesota law is clear; the tort award is what constitutes Appellant's amount of total damages. Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn. 1994)(*citing* Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 858-59 (Minn. 1993)). Because the jury determined the extent of Appellant's total damages in this case, his settlement with the tortfeasor's liability insurer must be offset pursuant to Minn. Stat. § 548.36 in this joint underinsured motorist/no-fault case. Minn. Stat. § 548.36 provides the definition of collateral source as follows:

"collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

- (1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
- (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;
- (3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or
- (4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

Minn. Stat. § 548.36 (2006).

The purpose of Minn. Stat. § 548.36 is to “prevent windfalls by plaintiffs at the expense of defendants.” Buck v. Schneider, 413 N.W.2d 569, 572 (Minn. Ct. App. 1987). The Court of Appeals recognized that this statute is typically “applied in actions against a tortfeasor, but nothing in its language limits its application in this manner. It has been applied in actions against insurers in the past.” (Appellant’s Appdx. A-10)(citing W. Nat’l Mut. Ins. Co. v. Casper, 549 N.W.2d 914, 916-17 (Minn. 1996)). As the statute makes clear, injury-related payments made to a plaintiff and made pursuant to automobile accident insurance are collateral sources that must be deducted from a jury award. Minn. Stat. § 548.36, subd. 1(2); Imlay v. City of Lake Crystal, 453 N.W.2d 326,

333-34 (Minn. 1990). Underinsured motorist and no-fault payments fall within the category of automobile accident insurance. See id.; Lee v. Hunt, 642 N.W.2d 57, 60 (Minn. Ct. App. 2002).

The Court of Appeals' decision stated from the outset that the circumstances of this case are "unique." (Appellant's Appdx. A-7.) It concluded the tortfeasor's automobile accident insurance paid Appellant \$28,000.00 for the injuries he sustained in the accident. Under the plain language of the statute, the Court of Appeals determined that was a payment made to Appellant pursuant to automobile accident insurance that provides health benefits. (Id. A-11.) Therefore, the Court of Appeals held the district court properly determined the \$28,000.00 was a collateral source that must be offset against the jury award. Id.

Appellant argues the district court and Court of Appeals erred in making that conclusion, because he believes the court in Dean v. American Family Mut. Ins. Co., 535 N.W.2d 342 (Minn. 1995), held that a tortfeasor's liability insurance cannot, by definition, constitute a collateral source. (Appellant's Brief, p. 6.) However, Appellant misstates the holding in that case.

In Dean, the Minnesota Supreme Court specifically stated from the outset of its decision that the only issue it had to address was whether "an automobile accident liability insurance payment from an underinsured tortfeasor triggers the collateral source rule in a claim for underinsured motorist benefits when the claimant is partially at fault." Id. at 343. The court had to decide whether that plaintiff's percentage of fault should be

subtracted from the gross verdict before or after the liability settlement payment was deducted. Id. at 344. If the court subtracted the liability settlement payment before subtracting the plaintiff's comparative fault, the plaintiff would have received \$10,000.00 more than his actual damages. Id. The court determined that neither the language of the collateral source offset statute nor the underlying justifications for applying the collateral source offset statute warranted application in that case. Id. 345. In this case, there is no reason to analyze the specific provisions of Minn. Stat. § 548.36 addressed in Dean, because this case does not involve a reduction for fault on the part of Appellant.

While the court addressed the collateral source rule and the fact the legislature has not yet clarified exactly what constitutes a collateral source, the holding in Dean narrowly addressed the facts specific to that case. See id. Regardless of whether the court in Dean applied certain provisions of the collateral source rule, it is clear from that decision that the court reduced the verdict by the \$100,000.00 liability insurance payment in reaching the net verdict. See id. at 344.

The Court of Appeals refused to accept Appellant's interpretation of the Dean decision. It pointed out that the statement that a payment made pursuant to a tortfeasor's liability insurance can never be a collateral source "is dictum and may be in conflict with the actual holding in the Dean case." (Appellant's Appdx. A-13.) In Dean, the court deducted the prior settlement amount from the judgment for UIM benefits and did not provide an alternate explanation for doing so. Id. The Court of Appeals also pointed out the Dean court emphasized the importance of preventing double recoveries, so that is in

conflict with Appellant's position that the Dean court held a settlement with the tortfeasor's insurer could never, by definition, be a collateral source. Id. The Court of Appeals correctly stated that application of the Dean dictum would permit Appellant to receive \$30,000.00 in no-fault benefits and \$28,000.00 from his prior settlement, for a total of \$58,000.00 in a case where the jury concluded his damages totaled \$49,416.13. Id.

The Court of Appeals also pointed out that settlements with a tortfeasor's liability insurer are to be offset from an arbitration award for underinsured motorist benefits. W. Nat'l Mut. Ins. Co. v. Casper, 549 N.W.2d 914, 916-17 (Minn. 1996). That case was decided after Dean and "makes no reference to Dean as precluding the application of the collateral source statute to a prior insurance settlement." (Appellant's Appdx. A-14.)

In addition, the insurance contract entered into between Respondent and Appellant requires that the \$28,000.00 liability settlement be offset in calculating whether Appellant is entitled to an underinsured motorist recovery under the policy. The policy provided that Respondent would "pay compensatory damages for bodily injury to an insured person who is legally entitled to recover from the owner or operator of an underinsured motor vehicle." (See Insurance Policy, Respondent's Appdx. A-23.) The definition of an "underinsured motor vehicle" is contained in Minn. Stat. § 65B.43. It specifically provides that an "underinsured motor vehicle" means "a motor vehicle or motorcycle to which a bodily injury liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual

damages.” Minn. Stat. § 65B.43 (2005)(emphasis added).

The operation of underinsured motorist benefits in Minnesota is outlined in Behr v. American Family Mutual Ins. Co., 638 N.W.2d 469 (Minn. Ct. App. 2002). As outlined in Behr, Minnesota has employed a “damages-less-paid” system since 1989. The court held, “to calculate whether a motor vehicle is underinsured and an insured is entitled to underinsured motorist (UIM) benefits under a damages-less-paid system, a tort-feasor’s damages payment is subtracted from the insured’s total damages.” Behr at 473-74. It has been held that:

UIM [underinsured motorist 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 established exclusively 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. . . .

Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn. 1994)(*citing* Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 858-59 (Minn. 1993))(emphasis added). Collateral source offsets are intended to prevent double recovery. See Minn. Stat. § 65B.51, subd. 1; Minn. Stat. §548.36, subd. 2; Wertish v. Salvhus, 558 N.W.2d 258 (Minn. 1997); Dean v. American Family Mut. Ins. Co., 535 N.W.2d 342, 344 (Minn. 1995).

Appellant accepted \$28,000.00 in settlement of his claim against the tortfeasor. In determining whether he is entitled to underinsured motorist benefits, the jury award must be further reduced by the \$28,000.00 settlement amount. The case law is clear that the amount paid in settlement of the claim against the tortfeasor must be deducted to

determine entitlement to underinsured motorist benefits. The jury verdict in this case totaled \$49,416.13. With the offset for the \$865.50 of no-fault benefits paid before trial and with the reduction for the \$28,000.00 Appellant received from the underinsured driver, the net verdict should be \$20,550.63.

If the \$28,000.00 settlement amount is not subtracted from the jury's award, Appellant will be receiving a double recovery. Again, the tort award is what constitutes Appellant's amount of total damages. Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn. 1994)(citing Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 858-59 (Minn. 1993)). The jury in the instant case awarded a total verdict of \$49,416.13. If the Court were to calculate Appellant's award in the manner he is asking for, Appellant would get the \$28,000.00 from the tortfeasor's insurer, plus \$29,134.50 in no-fault benefits from Respondent. That would mean Appellant would receive \$58,000.00 in a case where the jury decided he was only entitled to \$49,416.13. That is not permissible under the law and is a clear demonstration of why it is necessary to offset the \$28,000.00 settlement amount. Not only is it required to determine entitlement to underinsured motorist benefits, but it is also required to prevent double recoveries such as the one Appellant is now trying to receive.

Here, Appellant has been fully compensated in tort. To give him the additional benefits he is requesting would result in a double recovery. The maximum amount Appellant is entitled to is \$20,550.63 (the amount of damages he was not compensated for by both his no-fault carrier and the tortfeasor's liability insurer). Anything above that

amount would be an impermissible double recovery.

B. The jury's award cannot constitute a collateral source for purposes of determining whether Appellant is entitled to a recovery under his underinsured motorist policy.

Under Minnesota law, the jury's award is not a collateral source that is used in determining Appellant's net verdict. The only way to properly calculate the net verdict in this case is to offset collateral source payments that were made before trial. There is nothing in the statute or in case law cited by Appellant that provides authority to support his argument that certain damages awarded as part of the verdict in a joint no-fault/underinsured motorist case must be offset after trial to determine whether he recovers under his no-fault claim, his underinsured motorist claim, or both. This appears to be a case of first impression in the Minnesota appellate courts.

Appellant correctly states that in order to calculate the net verdict in this case, a multi-step approach must be taken. Under Minn. Stat. §§ 548.36 and 65B.51, no-fault payments made up until the time of trial shall be deducted from a jury award to reach the net verdict. The collateral source offset statute specifically states that "collateral sources" means "payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict. . . ." Minn. Stat. § 548.36, subd. (2006) (emphasis added). Minn. Stat. § 65B.51 provides that, in claims for recovery due to negligence arising out of a motor vehicle accident, the court shall deduct from any recovery the value of basic economic loss benefits paid or payable by the no-fault carrier. Minn. Stat. § 65B.51 (2005). Appellant claims Richards v. Milwaukee Ins. Co., 518

N.W.2d 26, 28 (Minn. 1994) stands for the proposition that the medical expenses awarded by the jury as part of the verdict are included in the no-fault payments that must be offset before determining whether the tortfeasor is underinsured. The jury awarded Appellant \$39,416.13 in past medical expenses. (Appellant's Appdx. A-6.) Appellant's no-fault policy limit was \$30,000.00, and up to the time of trial, Respondent paid \$865.50 in no-fault benefits to Appellant. (Id. A-5.) Appellant argues that because he was awarded \$39,416.13 in past medical expenses, he is entitled to a no-fault award of his remaining no-fault policy limits, or \$29,134.50.

Appellant further argues that the second step in the analysis of his claim is a determination of whether or not the tortfeasor is underinsured. Appellant believes Richards holds that the no-fault offset in this case would be \$30,000.00 (no-fault benefits voluntarily paid, plus the no-fault recovery as part of the verdict), making the net verdict \$19,416.13. Appellant concedes that he is not entitled to recover anything in his underinsured motorist claim, because, based on his argument, the net verdict is less than the tortfeasor's liability limits of \$30,000.00.

Richards is distinguishable from the present case. In Richards, the plaintiff settled his claim against the tortfeasor for \$20,000.00 out of his \$30,000.00 liability limits. Id. at 27. He then brought an underinsured motorist claim against his insurance carrier. Id. Before trial, his insurer paid him some no-fault benefits, but some of his medical bills were in dispute. Rather than arbitrate that amount, the parties presented the no-fault claim to the jury along with the underinsured motorist claim. Id. The jury awarded him

\$34,690.50 in total damages, which included his entire past medical claim. That resulted in uncompensated medical in the amount of \$1,367.14 (after what was previously paid in no-fault benefits was offset). The plaintiff's insurer paid the uncompensated medical in full after the verdict. Id. Once that amount was paid, the trial court determined that the plaintiff was not underinsured because his total "actual damages" were \$29,890.00 and did not exceed the \$30,000.00 liability limit of the tortfeasor's coverage. Id.

Ultimately, the Minnesota Supreme Court determined that it did not matter if the no-fault payments actually made by the plaintiff's insurer happened before or after the verdict because the result would have been the same. Id. The court went on to state that, in that case, "the amount of no-fault benefits received by Richards reduced the tort liability of the negligent party below the limits of the bodily injury coverage; therefore, there is no UIM coverage." Id. (emphasis added).

It must be pointed out again that underinsured motorist benefits are designed to provide a supplemental source of recovery only when the damages the insured person is legally entitled to recover from the tortfeasor exceed the tortfeasor's liability limits. Id. at 28. To prevent a double recovery, the no-fault offset provision set forth in Minn. Stat. § 65B.51 was enacted. Id. The possibility of double recovery is avoided if the insured recovers from the tortfeasor only amounts not compensated by basic economic loss benefits. Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 614 (Minn. 1988). The purpose is to "prevent the tortfeasor having to pay for damages paid or payable by the no-fault carrier." Richards, 518 N.W.2d at 28.

One of the key differences between Richards and this case is that Respondent has not paid Appellant the additional no-fault benefits he is seeking since the verdict was rendered. All that Respondent has paid is \$865.50 in no-fault benefits on Appellant's behalf, and \$20,550.63 (the judgment amount ordered by the district court). The \$865.50 is the only no-fault offset that should be deducted from the verdict. While it makes sense to have the no-fault benefits that have been paid offset from the verdict, Appellant does not cite any authority that supports his position that damages awardable in a jury verdict should be offset when no payment has been made.

The purpose of the collateral offset statute is not served by offsetting an alleged no-fault award that was made as part of this verdict and that has not been paid by Respondent. In fact, the opposite is true. If the \$29,134.50 is offset, Appellant is receiving exactly what the collateral offset statute was intended to prohibit, namely a double recovery. The proper approach is to take the gross verdict, deduct all collateral sources paid up until the time of trial, and then reach the net verdict.

C. It would be a double recovery to permit Appellant to recover the additional no-fault benefits he is seeking.

Appellant argues it is not a double recovery to claim basic economic loss benefits after settlement of a common law liability claim. He bases that argument on Balderrama v. Millbank Mut. Ins. Co., 324 N.W.2d 356 (Minn. 1982). Appellant misstates the holding in Balderrama. In Balderrama, the court held that it is permissible to seek no-fault benefits after settlement of a common law liability claim. Id. at 356. The holding does not address the issue of double recoveries. That decision focused on whether the

plaintiff in that case was entitled to no-fault benefits under the policy of the driver who hit him, because he himself was not insured. The court ultimately held the plaintiff was not entitled to no-fault benefits under that policy, so the decision did not address damages. See id. at 356-58. Appellant's reliance on Balderrama to support his position that he will not be receiving a double recovery in this case is obviously misplaced.

The primary question is what amount of money Respondent needs to pay its insured to make sure he is fully compensated. The proper amount can only be calculated if the \$28,000.00 settlement and the \$865.00 no-fault payment are deducted from the jury verdict to reach the net verdict amount. That amount is \$20,550.63.

Again, under Minnesota law, the tort judgment exclusively establishes the damages to which the claimant is legally entitled, and if those damages exceed the tortfeasor's liability insurance limits, the excess is payable by the underinsurance carrier to the extent of its coverage. Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn. 1994)(*citing* Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 858-59 (Minn. 1993))(emphasis added). Here, the jury determined Appellant's damages were \$49,416.13, and that award included pain and disability. (Appellant's Appdx. A-3.) Claims for pain and disability are undisputedly tort damages that are not compensable as basic economic loss benefits under the No-Fault Act. See Minn. Stat. § 65B.44 (2005).

Appellant and the Minnesota Association for Justice suggest that because no-fault benefits are "primary," that somehow means an injured party's no-fault benefits must be exhausted before he or she can recover from any other source. They argue an injured

party's no-fault recovery must be made first. (See Appellant's Brief, p. 10; Amicus Brief 3-5.) The Appellant and the Minnesota Association for Justice are mistaking "primary coverage" in the sense of primary over conflicting coverage from another source for a requirement, never stated in the law, that no-fault benefits must be fulfilled before any other source can be required to pay for injuries. It is true that "[b]asic 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. All that means is that when an injured person has conflicting benefits available (i.e, no-fault, social security, and personal health care benefits, etc....), the no-fault benefits are to be paid first. However, that does not mean that no-fault benefits must be exhausted before other available coverage can be reached.

An injured person is not required to bring a claim for no-fault benefits. An injured person could, since he or she controls how to pursue his or her claim for damages, pursue only his or her claim against the tortfeasor and never bring a claim for no-fault benefits, or underinsured motorist benefits for that matter. If a person chose to simply pursue a claim against a tortfeasor and never bring a no-fault claim, the tortfeasor's liability insurer cannot "recoup" the money paid to the injured person from his or her no-fault carrier. Both Appellant and the Minnesota Association for Justice claim because Balderrama v. Milbank Mutual, 324 N.W.2d 355, 356 (Minn. 1982) held a settlement of an underlying tort claim does not affect the statutory right to no-fault benefits, injured parties are entitled to the maximum amount of no-fault coverage available to them no

matter what amount of money he or she has received from other sources. That is not what Balderrama held, and they cite no authority to support that proposition.

There are plenty of injured people who settle their liability claim and later make a claim for no-fault benefits. Oftentimes, those claims are arbitrated. Parties often never see a courtroom, let alone a jury. As such, injured people often resolve their claims without ever having a jury determine what the full extent of their damages are. Therein lies the crucial point in this case.

It is imperative that the Court understand Respondent is not arguing that a person who settles his or her liability claim against the tortfeasor can never later bring a claim for no-fault benefits. Respondent is arguing, very narrowly, that a person who settles his claim with a tortfeasor and later brings a claim for both no-fault and underinsured motorist benefits to verdict is limited to the damages awarded by the jury.

Here, Appellant decided how he wanted to pursue his damages. He chose to pursue both his no-fault claim and underinsured motorist claim in the same lawsuit. It is that choice that has created the issues presented on appeal. Because he chose to pursue it this way, he has no choice but to be bound by the amount and type of damages to which the jury decided he was entitled. There is no way to avoid offsetting the \$28,000.00 liability settlement when reaching the net verdict in this case. It is simple. The jury determined he was entitled to a maximum damage award of \$49,416.13. Appellant could have pursued the no-fault claim in arbitration or could have tried the no-fault claim separately from the underinsured motorist claim so as to avoid being bound by a tort

judgment. He did not. Therefore, he cannot now claim he is entitled to more damages than the jury determined he should be awarded. If the Court does what Appellant is asking it to do, Appellant will receive \$58,000.00 in a case in which the jury determined he was only damaged in the amount of \$49,416.13.

The Court of Appeals recognized that the order and manner in which Appellant sought his damages and the lack of any specific allocation for the settlement with the tortfeasor “benefitted his own carrier by reducing its ultimate no-fault liability.”

(Appellant’s Appdx. A-15.) However, the Court of Appeals also succinctly stated that does not entitle Appellant to double compensation. Id. The Court of Appeals stated:

Ultimately, our decision is relatively simple. A jury determined as a result of Do’s injuries, he sustained damages in the amount of \$49,416.13. He has previously been paid \$865.50 by American Family and \$28,000 pursuant to a settlement with the tortfeasor’s automobile-insurance carrier. The \$28,000 settlement is a collateral source as defined in Minn. Stat. § 548.36, subd. 1(2). Do has remaining damages of \$20,550.63, which American Family, as his no-fault insurer, is obliged to pay in order to satisfy the judgment. Do is owed no more.

Id.

The Court of Appeals accurately interpreted and analyzed Minn. Stat. § 548.36 (2006) and applicable case law in deducting Appellant’s \$28,000.00 settlement with the tortfeasor’s insurer from the gross verdict in reaching the net verdict. As such, Respondent respectfully requests that the Court of Appeals be affirmed.

II. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO THE PUBLIC POLICY CONSIDERATIONS CONCERNING THE NO-FAULT ACT, JUDICIAL ECONOMY, AND THE ENCOURAGEMENT OF SETTLEMENTS.

In its brief, the Minnesota Association for Justice makes several policy arguments in favor of reversal of the Court of Appeals. Those arguments fail. Because the facts of this case are unique and the Court of Appeals' holding is very narrow, the Court of Appeals' decision in this case does not frustrate the public policy considerations concerning the No-Fault Act, judicial economy, and the encouragement of settlements.

The public policy behind the No-Fault Act is to (1) relieve uncompensated automobile accident victims from the economic stress of an accident by providing them with prompt payment for their economic losses without regard to fault; (2) prevent overcompensation of those injured in automobile accidents; (3) encourage receipt of appropriate medical treatment by ensuring the guarantee of prompt payment of medical bills; (4) speed the administration of justice, ease the burden of litigation on state courts, and create an efficient arbitration system; and (5) prevent those injured in accidents from receiving duplicate recovery. Minn. Stat. § 65B.42 (2006); Scheibel v. Ill. Farmers Ins. Co., 615 N.W.2d 34, 37 (Minn. 2000).

The Minnesota Association for Justice argues if the Court of Appeals' decision is affirmed, attorneys representing parties like Appellant 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" (Amicus Brief, p. 8.) It also argues affirmation of the Court of Appeals

would discourage accident victims from making settlements and force them to fully litigate their PIP claims, because the liability payment will later be deducted from the PIP recovery. (*Id.* p. 11.) It claims 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 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.” *Id.*

Again, it is crucial to remember that Appellant chose to pursue his claims this way. It is not Respondent’s fault that Appellant did not pursue his claim for no-fault benefits sooner than three and one-half years after the accident. As the Court of Appeals pointed out, Appellant has never claimed Respondent acted in bad faith in denying his no-fault claim. (Appellant’s Appdx. A-5-6.) Respondent will not reiterate all of the arguments set forth above about why Appellant is not entitled to more damages than what the jury determined he was entitled to receive. He took his case to verdict, thereby agreeing to be bound by the jury’s determination of damages. The Minnesota Association for Justice is correct in stating Appellant could have arbitrated his medical bills prior to taking his case before a jury. The parties are in this situation because Appellant dictated the process. He cannot now ignore the jury’s verdict because he did not get the maximum recovery he thinks he could have gotten had he resolved his claims outside of the courtroom. There is more incentive to resolve disputes short of trial because injured people will not then be bound by a jury’s determination of damages.

What is interesting is that the Minnesota Association for Justice argues more will

be spent on litigation if this decision is affirmed, because people will be forced to pursue their claims piecemeal and in a certain order. It is because of the unique procedural history chosen by Appellant in this case that the parties have not only tried this case to a jury, but that they have also had their case heard before the Court of Appeals and now the Supreme Court. If anything, this decision encourages insureds and their insurers to resolve no-fault claims early on in the process, which is what happens in most cases. If the procedural course chosen by Appellant were common, this would not be the first time the courts of the State of Minnesota would be deciding this issue. The decision is narrow. It does not have a far reaching impact, and it comports with the law of this State.

Not surprisingly, the Minnesota Association for Justice's brief fails to set forth some of the other purposes of the No-Fault Act, which are preventing automobile accident victims from being overcompensated and from prohibiting double recoveries. This decision is directly in line with the policy behind the No-Fault Act. It encourages people injured in accidents to promptly bring no-fault claims, which they can do cheaply through the arbitration process. It prohibits them from receiving double recoveries and prohibits them from being overcompensated. It is difficult to see how the purposes of the No-Fault Act are served to ensure accident victims get quick access to appropriate medical treatment that is promptly paid for in situations like this. Appellant waited three and one-half years to seek no-fault benefits. It is important that all of the purposes of the No-Fault Act are served, not just the purposes that benefit Appellant. The Court of Appeals' decision is actually consistent with the policy considerations set forth by the

Association for Justice, while a reversal of the decision would have the opposite effect.

The Court of Appeals stated Appellant pointed out Respondent would have been liable for \$30,000.00 in no-fault medical benefits if he had not first settled his claims with the tortfeasor's liability carrier. (Appellant's Appdx. A-15.) The Court of Appeals went on to say "[h]e did not seek recovery in that sequence and that result is not determinative." *Id.* Again, Appellant selected this procedural course to pursue his various claims. He cannot now ask the Court to ignore the jury's verdict because he potentially could have recovered more money had he selected a different procedural course. The jury's verdict determined the maximum extent of Appellant's damages. With the payment of the \$20,550.63, plus interest, Appellant has been fully compensated for his injuries and is not entitled to a double recovery.

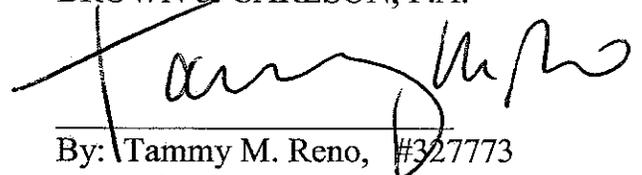
CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Supreme Court affirm the Court of Appeals' decision that the \$28,000.00 settlement with the tortfeasor's insurer is a collateral source that must be offset in reaching the net verdict and that Appellant's net recovery should be \$20,550.63, plus interest and costs.

Dated: Nov. 21, 2008

Respectfully submitted,

BROWN & CARLSON, P.A.

A handwritten signature in black ink, appearing to read "Tammy M. Reno", written over a horizontal line.

By: Tammy M. Reno, #327773
5411 Circle Down Avenue
Suite 100
Minneapolis, MN 55416-1311
(763) 591-9950

Attorneys for Respondent