NO. A07-1866

State of Minnesota
In Supreme Court

STEVEN BRUA et al.,

Respondents,

v.

THE MINNESOTA JOINT UNDERWRITING ASSOCIATION,

Appellant,

BRIEF OF *AMICUS CURIAE* MINNESOTA ASSOCIATION FOR JUSTICE

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STATEMENT OF THE ISSUE

Given that the Minnesota Civil Damages Act mandates a pool of bodily injury coverage in the amount of $100,000 and also lists pecuniary loss as a category of recovery for victims of illegally served dram shop patrons, may insurers list pecuniary loss under the category of bodily injury, and effectively reduce the amount recoverable by these innocent victims?

Apposite Cases:

Brault v. Acceptance Indem. Ins. Co.,
538 N.W.2d 144 (Minn. App. 1995)

Apposite Statutes:

Minn. Stat. §340A.409 and Minn. Stat. §380A.801

INTRODUCTION OF AMICUS CURIAE PARTY

The Minnesota Association for Justice, formerly Minnesota Trial Lawyers, was founded in 1954. MNAJ is an organization of trial attorneys dedicated to obtaining fair and just compensation for injured tort victims. The Minnesota Association for Justice promotes the cause of those harmed in person, property or human rights, defends the rights guaranteed by the Constitutions and Laws of Minnesota and the United States, and applies its knowledge and experience to advance professional excellence and promote the public good.[1]

[1] The following disclosure is made pursuant to Rule 129.03, Minnesota Rules of Civil Appellate Procedure: This brief was prepared by Michael Snyder, Esq. along with his law clerk, Rachel Smith. No party to this litigation authored any portion of this brief. No person or entity other than Amicus Curiae and Meshbesher & Spence, Ltd. made any financial contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

This is an appeal from the Minnesota Court of Appeals decision in a declaratory judgment action on a dram shop insurance policy. The Minnesota Court of Appeals agreed with the trial court that the Minnesota Joint Underwriter's policy amendments contravened Minn. Stat. §340A.409, which enumerates four types of permissible recovery in dram shop actions for injuries to "person, property, or means of support, or... other pecuniary loss." By listing pecuniary loss under the bodily injury category in the amendatory endorsement, the court of appeals found that the MJUA policy "impermissibly blended and potentially diluted the four types of recovery mandated by law."

The brief of Amicus Curiae, the Minnesota Association for Justice, is addressed to the issue of whether a dram shop insurance policy can list pecuniary loss under bodily injury, thus diluting the coverage available for both categories.

STATEMENT OF THE FACTS

Amicus Curiae, Minnesota Association for Justice, agree with the facts contained in Respondent's "Statement of the Facts."

ARGUMENT

I. Introduction

Amicus Curiae submit that the broad purpose of the Civil Damages Act ("CDA") is to compensate innocent victims of illegally served patrons at liquor establishments. In order to provide recovery to specified classes of victims, the legislature outlined different categories of damages in Minn. Stat. § 340A.801, and made financial responsibility mandatory for dram shops with Minn. Stat. § 340A.409. Insurance policies which subvert the statutory requirements should be required to change their policies to meet the expectations of their insureds, as well as the mandate of our Minnesota Legislature. Federal cases holding otherwise are not binding authorities on this Court. Otherwise, insurers could subvert the statute and existing Minnesota case law interpreting that statute, as well as contravene the public policy contemplated by the Legislature in crafting the CDA.

A. "Pecuniary Loss" Recovery Differs from Recovery for Bodily Injury Under the Civil Damages Act.

"Pecuniary loss" has undergone both judicial and legislative changes as Minnesota law developed. In 1962, The Minnesota Supreme Court extended the meaning of "pecuniary loss" under the Wrongful Death Act in the seminal case of Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (Minn. 1962). Judge Murphy held a pecuniary loss test that limited recovery by a parent for the death of their child by a wrongful act to strictly

loss of earnings, contributions and services in terms of dollars was unduly restrictive. *Id.* at 347. The court held the parent may also recover for loss of advice, comfort, assistance, and protection which a jury might find to be of a pecuniary value to the parent if the child had lived, thus expanding the meaning of pecuniary loss "to conform to present-day needs and experience." *Id.* at 352.

The Civil Damages Act did not catch up to the Wrongful Death Act in allowing pecuniary loss as a recoverable category until twenty years later in 1982, when the Minnesota Legislature passed S.F. 358[2] (now codified at §340A.801). Up until that time, the Supreme Court continually recognized pecuniary loss as separate and distinct from the other CDA damage categories, repeatedly holding that this type of damage was not compensable as damage or injury to the person unless explicitly added by statute. See Beck v. Groe, 245 Minn. 28, 70 N.W. 2d 886, 897 (1955) (pecuniary loss not compensable as an injury to the person). The CDA and the Wrongful Death Act differ in scope and purpose, but the definition of "pecuniary loss" under the CDA mirrors the definition under the Wrongful Death Act. After the 1982 addition of "pecuniary loss" to the CDA, courts sought to define the term using the same language used by the Wrongful Death Act. Under the CDA, ""Pecuniary loss" encompasses the loss of aid, advice, comfort, and protection that a deceased or injured person would have provided." Lefto v.

[2] Sponsored by Robert Tennessen, S.F. No. 358 changed the financial responsibility requirements for dram shops and added the key language of "or other pecuniary loss" to the statute.

Hoggsbreath Enterprises, Inc., 567 N.W.2d 746, 750 (Minn. App. 1997) affirmed 581 N.W. 2d 855 (Minn. 1998) (citations omitted).

The court of appeals recently held that "Pecuniary loss is not bodily injury, and a plaintiff's ability to recover damages for pecuniary loss is not subject to the policy limits for bodily injury." Brault v. Acceptance Indem. Ins. Co., 538 N.W.2d 144, 149 (Minn. App. 1995), review denied (Minn. Nov. 21, 1995).

B. The Civil Damage Act Contemplates Different Classes of Beneficiaries To Whom Different Categories of Recovery May Be Due.

The Civil Damages Act provides relief for people injured by establishments that illegally over-serve alcohol to adults or serve alcohol to minors, by naming persons who may recover under the statute. "A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss [...] has a right of action [...]"Minn.Stat. § 340A.801, subd. 1. The types or categories of loss also contemplate different classes of beneficiaries. First of all, "injured in person" means damages recoverable directly by someone who sustained, for example, a traumatic brain injury as a result of a car accident caused by an "AIP"[3] who was illegally served alcohol by a vendor. These injuries leave healthy adults with various permanent disabilities that forever affect their quality of life and ability to work. This type of injury is covered by the "bodily injury" category of Minn. Stat. § 340A.409 and is subject to a floor for insurance policies to cover at least $50,000 for one person and $100,000 for two or more persons in any one occurrence. Secondly, injury to property

[3] Allegedly Intoxicated Person.

could be the innocent third-party owner of a bicycle destroyed or an automobile damaged in a drunk-driving accident following illegal service of alcohol. Property damage has a floor for coverage at $10,000 under Minn. Stat. § 340A.409. Third, the class of beneficiaries who lose means of support includes spouses and children who depended on the injured AIP's income. Additionally, "loss of means of support" incorporates within it the requirement that a claimant be a dependent." Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud 649 N.W.2d 867, 872 (Minn.App.,2002). This category has a floor for insurance at $50,000 for one person in any one occurrence and $100,000 for loss of means of support of two or more persons in any one occurrence. Minn. Stat. § 340A.409.

Finally, the "other pecuniary loss" class of beneficiaries is much larger than the "injured in person" class of beneficiaries. For example, wrongful death beneficiaries with a pecuniary loss include a grandmother at the nursing home who enjoys visits from her grandson, or emancipated children who depend on the comfort and sage advice of their injured or deceased parent. Many heirs, while not dependent for loss of support, suffer pecuniary loss such as aid, advice, and companionship. They include the parents of emancipated adults, emancipated children, grandparents, and siblings. This class of beneficiaries may also include an employer, who "could suffer pecuniary loss if a valued employee-perhaps a creative inventor-were incapacitated and unable to work as a result of injury from an illegal sale of alcoholic beverages, [...] the statute recognizes this loss as compensable." Lefto v. Hoggsbreath Enterprises, Inc. 581 N.W.2d at 858.

To place pecuniary loss in the same damage pool as bodily injury in an insurance policy contravenes the broad legislative goal of making recovery available to all of these different classes of beneficiaries, since the person suffering damage to the "person" and the beneficiaries under "other pecuniary loss" are so fundamentally diverse. A policy that requires the person suffering from a bodily injury to fund all these other beneficiaries greatly dilutes the value of the already reduced guarantees made by the Civil Damage Act.[4]

C. The Public Policy of Providing Compensation to Victims Under the CDA Outweighs Public Policy for Freedom to Contract Insurance Policies.

The broad legislative purpose and public policy of the Civil Damage Act is to provide a remedy to "innocent third persons" injured by "the illegal furnishing of liquor causing a person's intoxication[.]" Lefto v. Hoggsbreath Enterprises, Inc., 581 N.W.2d at 857. Minnesota has maintained the goal of compensating innocent victims damaged by illegal sales of alcohol since 1911 when the Civil Damage Act was first codified. "Minnesota's policy is to extend coverage rather than allow it to be restricted by ambiguous or confusing language." Brault v. Acceptance Indem. Ins. Co., 538 N.W.2d 144, 147. Parties to the contract are free to form the agreement in the manner they see fit. However, if the terms of an insurance contract contradict statutory law or omit coverage required by law, it becomes unenforceable. Kelly v. State Farm Mut. Auto Ins. Co., 666 N.W.2d 328 (Minn. 2003).

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[4] $100,000.00 in 1982 has the same economic power as $218,801.04 in 2009, according to the Federal Reserve Inflation Calculator. http://www.usinflationcalculator.com/

In 18th Century England, thousands of "gin-shops" sold homemade gin by the dram (about a spoonful). When Parliament decided to tax the sale of gin, these "dram shops" quickly went underground in an attempt to avoid paying taxes. Today's legal system considers any establishment selling liquor illegally as a modern day equivalent of the "dram shops" of the 1750's. To allow MJUA to dilute mandatory coverage to these otherwise uninsurable liquor establishments and to inspire "A-rated" insurance companies to mimic MJUA policies and similarly dilute and merge coverage could be seen as an analogue to allowing dram shops to "go underground." If pecuniary loss is included in the coverage pool available for bodily injury, then liquor vendors, and their dram shop insurers, escape the full amount of coverage mandated by statute, all at the expense of the very people this coverage is intended to protect: innocent third parties injured or killed by illegal sales of alcohol.

Creative as insurance underwriters may be, it is not within their sphere to dilute the coverage required by the statute. The legislature wrote the CDA categories of damage and financial responsibility requirements to cover different classes of beneficiaries, and the statute must be complied with in order to effectuate their intent.

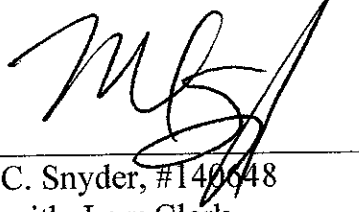
CONCLUSION

The decisions of the district court and the court of appeals correctly applied the plain statutory language of the CDA and found that MJUA's dram shop insurance policy language conflicts with statutory requirements. For the forgoing reasons, the Minnesota Association for Justice respectfully supports upholding the court of appeals decision.

Respectfully submitted,

MESHBESHER & SPENCE, LTD.

Date: 3/26/09

By 

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CERTIFICATE

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the forgoing brief in Times New Roman, a proportional 13-point font, on 8 ½ by 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. By automatic word count, the length of this brief is 1,995 words. This brief was prepared using Microsoft Word 2003 software.

MESHBESHER & SPENCE, LTD.

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