

A08-806

State of Minnesota
In Court of Appeals

David Swanson,

Plaintiff/Respondent,

v.

Rebecca Brewster and Christopher Brewster,

Defendants/Petitioners.

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

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THE INTERESTS OF MINNESOTA ASSOCIATION OF JUSTICE

The Minnesota Association of Justice (“MNAJ”), founded in 1954, is an organization of legal professionals who primarily represent plaintiffs in personal injury, workers compensation, family, and commercial cases. One of MNAJ’s missions is to advance the cause of those who are damaged in person, property, or civil rights and who must therefore seek redress in the courts.¹

STATEMENT OF THE ISSUES

This appeal concerns the interpretation of the Minnesota Collateral Source Statute, Minn. Stat. § 548.251 (formerly § 548.36). This brief addresses the following two issues:

1. Minn. Stat. § 548.251 does not apply to collateral sources for which a subrogation right was asserted. Under Minnesota law, a subrogation right is asserted if it is not waived. Was it error to not apply the statute where the subrogation right to injury-related medical expenses had not been waived?
2. Minn. Stat. § 548.251 applies to reduce a jury award by the amount of certain injury-related “payments” that a collateral source made on plaintiff’s behalf. The collateral source (health insurer) settled the full amount of plaintiff’s medical bill with a partial payment, because the care provider “wrote off” part of the bill. Was it error to consider what the collateral source actually paid — and not the “write off” — as the collateral source “payment”?

FACTUAL BACKGROUND

Legislative History of Minn. Stat. § 548.251

The Minnesota legislature passed Minn. Stat. § 548.251 in the midst of what some have termed an “insurance crisis.” After the insurance industry posted a net loss in 1984

¹ Minn. R. App. P. Rule 129.03 certification: Counsel for any party did not author any part of this brief. No one other than amicus curiae or its counsel made a monetary contribution to the preparation of this brief.

for the first time in three decades,² the industry raised premiums and reduced coverage.³ The industry, as well as its backers, blamed the civil justice system for their troubles.⁴

Empirical evidence, however, showed that the economic cycle of the insurance industry — not the legal system — principally caused the crisis of the mid-1980s.⁵ In the late 1970s and early 1980s, as interest rates increased rapidly to historic levels (21.5% in 1981), the insurance industry engaged in “years of substantial underpricing.”⁶ To generate cash flow for investment, “insurers competed aggressively for premium dollars, knocking prices more and more out of line with costs.”⁷ When market conditions changed, with interest rates plummeting in mid-1980s, the premiums became inadequate to pay for losses.⁸ The industry responded by sharply increasing premiums and reducing coverage.⁹

² Letter from M Misukanis, Senate Researcher, Senate Counsel & Research, State of Minnesota, to W Luther, Senator, State of Minnesota, November 26, 1985, at 1 (“Available data indicates this [1984] was the only year since 1960 that the industry suffered a net loss.”).

³ *Id.*

⁴ See J Hunter & J Doroshov, Center for Justice & Democracy, *Premium Deceit: The Failure of “Tort Reform” To Cut Insurance Prices*, 2002 at 5, at <http://www.centerjd.org/air/PremiumDeceit.pdf> (noting, for example, that in the mid-1980s the industry purchased millions of dollars of advertising to “change the widely held perception that there is an ‘insurance crisis’ to a perception of a ‘lawsuit crisis’”).

⁵ See generally *id.* at 3, 15-18; T Baker, *Medical Malpractice And The Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393, 394, 436-37 (2005).

⁶ Insurance Committee of the National Association of Attorneys General (NAAG), *Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance*, May 1986, at 38 (quoting Insurance Services Office, *1985: A Critical Year*, May 1985, at 5).

⁷ *Id.* at 39 (quoting Insurance Services Office, *1985: A Critical Year*, May 1985, at 4).

⁸ *Id.* at 39-40.

⁹ See, e.g., Insurance Services Office, *1985: A Critical Year*, May 1985, at 5 (“the brutal price wars of the last 6 years is over” and that “significant premium increases are needed, especially for the current commercial line products.”).

In 1986, the Insurance Committee of the National Association of Attorneys General (NAAG) reviewed the data and concluded that, “the industry itself bears much, if not all, of the responsibility for the current pricing and availability problem.”¹⁰ Quoting from industry publications, the NAAG committee summarized, “[p]ricing that failed to keep pace with loss costs and lagged the nation’s overall economic growth has brought insurers into their current predicament.”¹¹ The committee further found that the facts do not bear out “the allegations of an ‘explosion’ in litigation” or “any correlation between the current crisis in availability and affordability of insurance and such a litigation explosion.”¹²

That same year, the Minnesota Office of the Legislative Auditor issued a report echoing those findings.¹³ The commission analyzed the problems of high cost and availability of insurance in Minnesota and observed:

The industry is currently at a low point in the cycle. The current cycle has been particularly severe and diminished the industry’s profits and its capacity to underwrite new business. The industry has been retrenching and abandoning what it considers less profitable Prospects for the future availability of insurance will improve as profits are restored as a result of recent price increases.¹⁴

The commission further noted that despite the “general belief” that a cause of the crisis was escalating tort awards, it could “find little systemic evidence on increases in liability

¹⁰ NAAG report, *supra* note 6, at 38.

¹¹ *Id.* at 39 (quoting Insurance Services Office, 1985: *A Critical Year*, May 1985, at 5. Industry leaders regularly acknowledged the same. *Businesses Struggling To Adapt As Insurance Crisis Spreads*, WALL STREET JOURNAL, January 21, 1986 at 31 (“Insurers acknowledge that many of their financial wounds are self-inflicted”).

¹² NAAG report, *supra* note 6, at 45.

¹³ Program Evaluation Division, Office of the Legislative Auditor, State of Minnesota, *Insurance Regulation* (January 1986).

¹⁴ *Id.* at xii.

awards” and no evidence specific to Minnesota.¹⁵ The commission only recommended further study on tort reform.¹⁶

History bore out these measured viewpoints. So-called “insurance crises” have occurred three times in the last 30 years — in the mid-1970s, mid-1980s, and early 2000s.¹⁷ Litigation behavior did not change in any significant sense leading up the mid-1980s crisis, just as it did not leading up to the other crises; instead, insurers changed pricing based on the prevailing market conditions.¹⁸

Responding to the crisis of the mid-1980s, the Minnesota legislature made numerous changes to the regulation of the insurance industry.¹⁹ The legislature also made changes to the civil justice system. One change in this regard was the partial abrogation of the common law collateral source rule.

Minn. Stat. § 548.251 & the Partial Abrogation of the Common Law Rule

The common law collateral source rule provides that “payment for some of the plaintiff’s personal injury costs by a source other than the defendant could not be used to

¹⁵ *Id.* at 81.

¹⁶ *Id.* at xiii.

¹⁷ See T Baker, *supra* note 5, at 394.

¹⁸ *Id.*; see also L Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L. JOURNAL 1263, 1272-1276 (Summer 2004).

¹⁹ See Minn. Session Law, 1986, Regular Session, Ch. 455 (S.F. 2078) (“An act relating to insurance; ... requiring certain annual reports of property and casualty insurers; prohibiting certain tying arrangements; providing for remitting of certain premiums; providing deposit requirements for domestic companies; ... broadening fair plan coverage; regulating rates, forms and cancellations;”); see also Minn. Session Law, 1986, Regular Session, Ch. 313 (S.F. No. 1612); Minn. Session Law, 1986, Regular Session, Ch. 321 (S.F. 1349); Minn. Session Law, 1986, Regular Session, Ch. 397 (S.F. 1782).

reduce the plaintiff's damage award against the defendant."²⁰ This common law rule creates the prospect of a double recovery. A plaintiff, for example, could recover the same medical expense payments: (1) from his insurer, the collateral source, and (2) from the defendant. Commentators primarily criticized the rule on this ground.²¹

Minn. Stat. § 548.251 prevents the application of the common law collateral source rule — and thus the prospect of a double recovery — “in some situations.”²² Generally speaking, the statute allows a court to reduce a jury award “by amounts of collateral sources that have been paid.”²³ Payments from collateral sources are injury-related payments “made to the plaintiff, or on the plaintiff's behalf,” by one of several enumerated collateral sources, including health insurers, automobile insurers, and public disability programs.²⁴

By its own terms, the statute does not alter the common law rule in many other situations.²⁵ The statute, for instance, does not apply to arbitration awards.²⁶ Nor does the statute apply to situations where a subrogation right has been asserted.²⁷ The statute also does not apply to private disability benefits; payments for property losses;²⁸ sick

²⁰ See *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990) (citing *Hueper v. Goodrich*, 314 N.W.2d 828, 830 (Minn.1982)).

²¹ See *Imlay*, 453 N.W.2d at 331 (citations omitted).

²² *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005) (citation omitted); see also *Imlay*, 453 N.W.2d at 331 (the rule applies “in many circumstances”).

²³ Minn. Stat. § 548.251, subd. 2(1).

²⁴ *Id.*, subd. 1.

²⁵ The common law rule continues to apply in situations where the collateral source statute does not. See, e.g., *Tezak*, 698 N.W.2d at 41 (citation omitted).

²⁶ See *W. Nat'l Mut. Ins. Co. v. Casper*, 549 N.W.2d 914, 917 (Minn. 1996).

²⁷ Minn. Stat. § 548.251, subd. 2(1); see also *Imlay*, 453 N.W.2d at 334.

²⁸ *Schmuckler v. Creurer*, 585 N.W.2d 425, 427-28 (Minn. App. 1998).

leave benefits;²⁹ and payments from a tortfeasor's liability insurer.³⁰ Further, the statute does nothing to change the common law rule that a plaintiff recovers the reasonable value of gratuitous medical services.³¹

Given the plain limits of the statute's application, the most that can be said of what the Minnesota legislature intended to change in the civil justice system was a partial abrogation of the common law rule. Legislative history materials support this inescapable conclusion.³² The Minnesota Supreme Court in *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990) correctly observed the same, when it explained that the statute serves to

abrogate plaintiff's common law right to be over-compensated and now prevent double recoveries in many circumstances by requiring the deduction from the verdict of certain benefits received by a plaintiff.³³

To say otherwise, that with Minn. Stat. § 548.251, the legislature sought to generally "prevent windfalls" or "abolish the collateral source rule," is inaccurate in its breadth and generality. The statute has no such effect.

²⁹ See *Bruwelheide v. Garvey*, 465 N.W.2d 96, 98-99 (Minn. App. 1991).

³⁰ *Dean v. Am. Family Mut. Ins. Co.*, 535 N.W.2d 342, 345 (Minn. 1995).

³¹ See, e.g., *Hueper*, 314 N.W.2d at 831; *Wells v. Minneapolis Baseball & Athletic Ass'n*, 122 Minn. 327, 333-34, 142 N.W.2d 706, 708 (1913).

³² See Minn. Session Law, 1986, Regular Session, Ch. 455 (S.F. 2078) ("An act relating to insurance; ... changing the collateral source rule ..."); Research Department, Minnesota House of Representatives, *H.F. 1950 Conference Committee Report (amended unto S.F. 2078)*, dated March 20, 1986 (The statute "[r]equires reduction of a verdict by compensation for injury received by the plaintiff ... to prevent double recovery.") (A.108).

³³ 453 N.W.2d at 331 (emphasis added).

ARGUMENT

I. Minn. Stat. § 548.251 Does Not Apply to Collateral Sources for Which a Subrogation Right Has Been Asserted.

The Subrogation Right to Plaintiff-Respondent's Medical Expenses

Plaintiff-Respondent's health insurer, HealthPartners, made payments for injury-related expenses and subsequently asserted its subrogation rights.³⁴ Minnesota law recognizes subrogation as "the right of the insurer ... to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer."³⁵ A subrogation claim is not an independent claim; it is derivative to the insured's underlying claim against a third party.³⁶ For health insurers, the claim is contractual.

Minnesota law regulates a health insurer's subrogation right. The injured plaintiff must give notice of the claim against a third party. The health insurer, per Minn. Stat. § 62A.095, can only include a subrogation clause into an insurance contract if (1) the right does not arise until the insured realizes a full recovery and (2) the insurer agrees to compensate the insured for the costs of recovery.³⁷

Typically, during the course of litigating the underlying action, the insured will negotiate with his or her health insurer to settle the subrogation claim with due consideration given to the prospect of full recovery and the costs of recovery. In this case, and representative of an increasingly common and troubling practice, Defendant-

³⁴ A-32; A-81.

³⁵ *Hermeling v. Minnesota Fire & Cas. Co.*, 548 N.W.2d 270, 273 (Minn. 1996) (quoting 16 G Couch, Couch Encyclopedia of Insurance Law § 61:1 (2d ed. 1983) (overruled on other grounds)).

³⁶ *Id.*; see also *Employers Liab. Assurance Corp v. Morse*, 261 Minn. 259, 263, 111 N.W.2d 620, 624 (1961) (concluding insurer "steps into shoes" of insured).

³⁷ Minn. Stat. § 62A.095, subd 2.

Petitioners purchased the subrogation interest from the health insurer.³⁸ Defendant-Petitioners then sought to collect or offset all of the injury-related medical expenses.

The Language and Purpose of Minn. Stat. § 548.251 Make Clear That the Statute Does Not Apply to Medical Expenses for Which a Subrogation Right Has Been Asserted

By its own terms, Minnesota Statute § 548.251 does not apply to medical expenses for which a subrogation right exists. The statute only applies to allow a court to reduce a jury award

by the amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted.³⁹

For purposes of the collateral source statute, “an asserted subrogation right is simply one that has not been waived.”⁴⁰ Waiver may be “explicitly in writing, or ... by conduct.”⁴¹

With this language, the legislature elected to remove from collateral source consideration any issues involving subrogation. This approach reflects sound public policy, given the derivative nature of the subrogation claims and the various contractual relationships involved. Rather than try to anticipate the numerous scenarios that arise in individual cases and contracts involving subrogation, the legislature simply removed it from consideration of the damages owed by the defendant tortfeasor. The injured plaintiff receives the damages awarded and resolves the various subrogation claims.

The legislative history and primary purpose of Minn. Stat. § 548.251 further explain why a collateral source deduction under the statute does not involve subrogation.

³⁸ A-34.

³⁹ Minn. Stat. § 548.251, subd. 2 (emphasis added).

⁴⁰ See *Kahnke v. Green*, 695 N.W.2d 148, 151 (Minn. App. 2005). *Accord Imlay*, 453 N.W.2d at 334 (citing *Buck v. Schneider*, 413 N.W.2d 569, 571 (Minn. App. 1987)).

⁴¹ See *Kahnke*, 695 N.W.2d at 151 (citation omitted).

The only effect — and thus the primary purpose — of the statute is to prevent certain double recoveries.⁴² As the Minnesota Supreme Court in *Imlay* explained,

Because the primary purpose of this statute is to prevent double recoveries, no deduction is allowed where subrogation rights are asserted.⁴³

A subrogation right itself “ensure[s] that the amount of collateral sources” received by the plaintiff will be deducted from an award.⁴⁴

In this case, subrogation rights existed for the injury-related medical expenses. The insurer asserted the right. No one waived it.⁴⁵ Thus, Minn. Stat. § 548.251 does not apply to allow a defendant to seek an offset for medical expenses. There is no double recovery to prevent.

Sound Public Policy Should Prevent the Defense Purchase of the Subrogation Interest in a Plaintiff's Medical Expenses

When a defendant, like Defendant-Petitioners in this case, purchases the subrogation interest for a plaintiff's medical expenses, the defendant interjects itself between (1) the plaintiff and his or her medical insurer; (2) the plaintiff and his or her attorney; and (3) the plaintiff's insurer and care providers. In doing so, the defendant

⁴² See notes 22 through 35 and associated text. See also *Dean*, 535 N.W.2d at 344 (“the primary purpose of this statute is to prevent double recoveries”); *Rush v. Jostock*, 710 N.W.2d 570, 579 (Minn. App. 2006) ([T]he primary goal of section is to prevent double recoveries by plaintiffs...”); *American Family Ins. Group v. Kiess*, 680 N.W.2d 552, 558-59 (Minn. App. 2004) (“The primary purpose of the collateral-source statute is to avoid double recovery by a plaintiff.”).

⁴³ *Imlay*, 453 N.W.2d at 334.

⁴⁴ *Id.*; see also *Buck*, 413 N.W.2d at 571 (observing that the statute “refers to ‘asserted’ subrogation rights, we believe, to ensure that waived subrogation rights are not excepted from collateral source-deductions.”).

⁴⁵ Defendant-Petitioner certainly never waived the right. Defendant-Petitioners asserted the right, whether by purchasing it or by continuing to assert it. See *Buck*, 413 N.W.2d at 571-72.

upsets contractual and professional relationships. Gaining nothing in the process, the effort raises the specter of an imprudent litigation tactic.

With Minn. Stat. § 548.251, the legislature signaled that where a collateral source has a contractual right of subrogation, the defendant should not involve itself in the collection or offset of that right. There is good reason for this directive.

Allowing the plaintiff to negotiate the subrogation claim with his or her insurer encourages settlement.⁴⁶ In many cases, there is substantial room for negotiate the subrogation right. Issues of medical causation, pre-existing conditions, and comparative fault drive down case valuations and raise the prospect of a less-than-full recovery. The plaintiff and not the defendant remains in the best position to value the case and encourage settlement on a global basis, negotiating both with the health insurer to determine an acceptable reimbursement and the tortfeasor's insurer to reach a full and final settlement that would resolve all of the subrogation claims.

In addition, the injured party has contractual and statutory rights that are interfered with if a defendant negotiates directly with the health insurer. What if at the trial in this case the jury had awarded less than the full past medical expenses? The plaintiff was unable to negotiate a better arrangement with the health insurer, based on the contractual and statutory requirement of a full recovery of damages before the subrogation claim becomes viable. In addition, the statutory and contractual obligation of the health insurer

⁴⁶ See, e.g., *Karon v. Karon*, 435 N.W.2d 501, 504 (Minn. 1989) (“In the interest of judicial economy, parties should be encouraged to compromise their differences and not to litigate them.”).

to share in the costs of collection is also ignored when a defendant tortfeasor interferes with that relationship.

When reading Minn. Stat. § 548.251, it is clear that the legislature exempted subrogation claims from consideration in post-trial collateral source proceedings. If subrogation is asserted, it is better not to apply the statute. Subrogation issues are largely governed by contract and by another statute, Minn. Stat. § 62A.095, both which do not involve the defendant. The sensible coordination of Minn. Stat. § 548.251 and Minn. Stat. § 62A.095 occurs when the collateral source statute is read to exempt such claims.

II. Minn. Stat. § 548.251 Does Not Allow the Reduction of a Jury Award for the Amount of a Medical Expense “Write-Off.”

The “Write Off” of Medical Expenses

Health care providers may “write off” or forgive part of a medical bill. Large health insurers, and not the general public, are able to obtain this “write off” because the insurers hold significant negotiating power with medical providers. The insurers do a great volume of business with providers. Insurers also are able induce providers with steady and voluminous referrals.

As illustrated in the present case, the care provider valued the Plaintiff-Respondent’s injury-related medical services at \$62,259.93 and then “wrote off” or forgave part of the bill, allowing the medical insurer, HealthPartners, to pay \$17,643.76 to satisfy the expenses in full.⁴⁷ In this appeal, Defendant-Petitioners seek to benefit from the “write off” — or “gap” between the amount that the insurer actually paid and the full value of the medical expenses.

⁴⁷ See A-43, A-44 to A-80.

Under the Language of Minn. Stat. § 548.251, a “Write off” Is Not a “Payment” Subject to a Collateral Source Reduction

The statutory language of Minn. Stat. § 548.251 is unambiguous and provides the strongest indication of the legislature’s intent to not allow defendants to reduce an injured plaintiff’s award by a medical expense “write off.”

Under Minn. Stat. § 548.251, a court can only reduce a jury award by the amounts that have been paid by the collateral source.

The court shall reduce the award by ... the amounts of collateral sources that have been paid for the benefit of the plaintiff⁴⁸

“Collateral sources” mean injury-related “payments ... made to the plaintiff, or on the plaintiff’s behalf .”⁴⁹

The statute does not define the terms “paid” or “payment.” Undefined words and phrases are interpreted in accordance with their common usage.⁵⁰ In *Davis v. St Ann’s Home*, 2008 WL 126607 (Minn. App. 2008), the Minnesota Court of Appeals noted that the dictionary definition of “payment” is “an amount paid.” The definition of “pay” is “to give money to in return for goods or services rendered.”⁵¹ This definition captures the common usage of the term. When the public “pays” for medical expenses, the public submits money or its equivalent for the medical services rendered.

In common usage, the term “payment” does not include a “write off” — which is, by definition, an unpaid medical expense. No money is paid or exchanged when a

⁴⁸ Minn. Stat. § 548.251, subd. 3(a) (emphasis added), subd 2(1) (emphasis added).

⁴⁹ Minn. Stat. § 548.251, subd. 1 (emphasis added).

⁵⁰ Minn. Stat. § 645.08(1); *Stewart Title Guar. Co. v. Commissioner of Revenue*, 757 N.W.2d 874, 877 (Minn. 2008).

⁵¹ *Id.* at 5 (citing *The American Heritage Dictionary of the English Language* 1291-92 (4th ed. 2000)).

medical provider writes off medical expenses. In analyzing this issue, Minnesota appellate courts have rightly reasoned that the write off “was not a payment made to anyone” and thus not a collateral source.⁵² Other state courts, including those from jurisdictions that have statutorily modified the common law collateral source rule, have similarly understood that “[b]ecause no one pays the write-off, it cannot possibly constitute payment of any benefit from a collateral source.”⁵³

In the context of Minn. Stat. § 548.251, the term “payment” cannot possibly mean a “discharge of a debt.” To say that a “payment” equates to a “discharge of the debt” is only to speak to the quality or effect of the payment. A payment may, in effect, discharge a debt. This observation, however, cannot answer what the statute asks for — that is, what was the quantity or amount of the payment. To answer this, one must view the collateral source payment as the “money given in return for services rendered.”

Consider the hypothetical where a person pays \$100 in cash to settle a \$500 debt. Assuming that the “payment” is the “discharge of the debt,” what is the “amount of the payment?” Is it \$100, \$500, or the difference thereof, \$400? The sum of \$100 is a payment of cash. Under any reasonable construction, it is the amount of the payment. The sum of \$500 is not the amount of the payment; it is the amount of the debt. The

⁵² *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005); *see also Foust v. McFarland*, 698 N.W.2d 24, 36 (Minn. App. 2005), rev. denied (Minn. Aug. 16, 2005) (concluding that the defendants were not entitled to deduct the write-offs because “[t]hat amount was never paid, but rather represents an amount which the medical insurance providers billed Foust but did not attempt to collect”).

⁵³ *Robinson v. Bates*, 857 N.E.2d 1195, 1200 (Ohio 2006) (“Because no one pays the write-off, it cannot possibly constitute payment of any benefit from a collateral source.”); *see also, e.g., Butler v. Indiana Dept. of Ins.*, 875 N.E.2d 235, 240 (Ind. App. 2007) (“However, a write-off is not a payment because money is not delivered to the creditor.”).

difference between the two, the “write off,” is also not the payment. The “write off,” by definition, is a non-payment.

Other provisions in Minn. Stat. § 548.251 further highlight how unreasonable it is to say that a “collateral source payment” includes “write offs.” Under this notion, the subrogation right to the “collateral source payment,” is not just what the collateral source actually paid to settle the debt — but also the debt itself. This outcome not only violates fundamental notions of subrogation law and contractual rights, but it defeats the very end that defendants seek with their strained analysis of the statutory language. Subrogated rights, as discussed, fall outside the statute.

Notably, where the legislature wished to expand the definition of “payment” beyond the common usage of “giving money in return for services rendered,” the legislature simply used different words. Minn. Stat. § 548.251 also allows for the offset of any collateral source deduction. The offset accounts for what the plaintiff, or others, expended to secure the collateral source benefit. The legislature defined that offset not simply as “amounts that have been paid,” but as “amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff ...”⁵⁴ If the term “payment” equates to the “discharge of a debt,” then the terms “contribution” or “forfeiture” are superfluous. The legislature would not intend such a result.

The proper interpretation of the term “payment” is that it does not include “write offs.”

⁵⁴ Minn. Stat. § 548.251, subd. 2(2) (emphasis added).

The Purpose of Minn. Stat. § 548.251 Directs That “Write Offs” Cannot Reduce Jury Awards.

The legislature, as discussed, intended to affect a singular change in the common law collateral source rule with Minn. Stat. § 548.251: to prevent the double recovery of collateral source payments in some situations.

There, of course, is no risk of a double recovery with “write offs.” “Write offs” are not collateral source payments that the plaintiff received. They are non-payments. With “write offs,” the plaintiff cannot possibly receive the same two recoveries (1) from the collateral source and (2) from the defendant. There thus is no risk of a double recovery with “write-offs.” This situation, as many other situations,⁵⁵ does not implicate the collateral source statute.

If a legislative purpose is to guide the application of the collateral source statute, it is this one alone. The legislature affected nothing else but to prevent certain double recoveries. The statute’s language, as well as its history, speaks to this directive. Minnesota courts repeatedly have done so as well, guiding the statute’s application by this objective measure.⁵⁶ To otherwise guide the statute’s application with the generalized defense interest of “preventing windfalls,” a purely subjective measure, would ignore the plain and unambiguous language of the statute and the statute’s history, intent, and purpose.

⁵⁵ See notes 26 to 31 and accompanying text.

⁵⁶ See, e.g., *Imlay*, 453 N.W.2d at 334 (holding that “[b]ecause the primary purpose of this statute is to prevent double recoveries, no deduction is allowed where subrogation rights are asserted”); *Midway Nat. Bank of St. Paul v. Estate of Bollmeier*, 504 N.W.2d 59, 65-66 (Minn. App. 1993) (holding that Minn. Stat. § 548.36 did not apply to settlement payment, reasoning that where “there will be no double recovery, the collateral source statute is inapplicable.”).

Sound Public Policy Supports Not Allowing a Defendant to Reduce a Jury Award by “Write Offs.”

Not allowing a defendant to deduct “write offs” as a collateral source payment would advance many long-held policies of Minnesota law.

Minnesota law has long held that tortfeasors are responsible for the plaintiff’s full loss. Defendants, for example, are liable for the reasonable value of medical services even if the services were free.⁵⁷ Otherwise, the civil justice system would hold one wrongdoer less responsible because he injures a poor person (on Medicaid, for example) or a person with a spouse who could provide gratuitous services.

The same principles apply with “write offs.” The plaintiff’s loss is the billed, or market value, of medical expenses. That is the amount that the public would pay. Defendants should be held responsible for it and not be rewarded simply because the plaintiff had the wherewithal to have insurance.⁵⁸

To the degree that “write offs” necessarily benefit either the injured or the wrongdoer, the benefit should inure to the injured party. In weighing this issue, the Minnesota Supreme Court ruled in *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108 (Minn. 2002), a no-fault case, echoed this preference.

Under our case law, if there is to be a windfall either to an insurer or to an insured, the windfall should go to the insured.⁵⁹

⁵⁷ See note 33 and cases cited therein.

⁵⁸ *Hueper v. Goodrich*, 314 N.W.2d 828, 830 (Minn. 1982) (“Where the plaintiff has paid for the benefit such as by buying an insurance policy, the rationale is that the plaintiff should be reimbursed and the tortfeasor should not get a windfall.”).

⁵⁹ *Stout*, 645 N.W.2d at 114 (citing *Van Tassel v. Horace Mann Mut. Ins. Co.*, 296 Minn. 181, 187, 207 N.W.2d 348, 352 (1973)).

This reasoning is sound, because the interests of society are likely better served in this outcome: the law encourages the use of insurance (which the injured person obtained) and discourages harm (which the insured caused).⁶⁰

The alternative result would retract rights that the Minnesota public have long held under Minnesota law. To protect against this end, Minnesota courts strictly construe statutes in derogation of the common law.⁶¹ Minn. Stat. § 548.251 is in derogation of the common law. Under any reasonable construction, the statute cannot be read to have “payments” equal “non-payments,” such that the public would lose long-held rights, decades after the statute’s enactment and outside the legislative process.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: July 24, 2009

Respectfully submitted,

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⁶⁰ *80 South Eighth Street Ltd. Partnership v. Carey-Canada, Inc.*, 486 N.W.2d 393, 398 (Minn. 1992) (“One objective of tort law is to deter unreasonable risks of harm”); *Pletan v. Gaines*, 494 N.W.2d 38, 42 (Minn. 1992) (“Tort liability seeks to compensate the injured and to deter wrongdoing”).

⁶¹ *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327 (Minn. 2004) (“Generally, statutes in derogation of the common law are to be strictly construed.”)

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CERTIFICATE

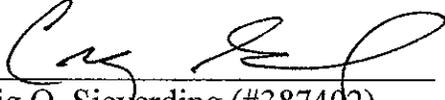
Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing memorandum of law in Times New Roman, a proportional 13-point font, on 8 1/2 by 11 inch paper with written matter not exceeding 6 1/2 by 9 1/2 inches. The resulting amicus brief is 18 pages in length, and contains 5,670 words, as determined by employment the word count of the word processing software, Microsoft® Office Word Version 2003, used to prepare it.

Dated: July 24, 2009

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