

A08-806

**State of Minnesota
In Supreme Court**

David Swanson,

Plaintiff/Respondent,

v.

Rebecca Brewster and Christopher Brewster,

Defendants/Petitioners.

**REPLY BRIEF OF PETITIONERS
REBECCA BREWSTER AND
CHRISTOPHER BREWSTER**

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**UNDER MINNESOTA'S COLLATERAL SOURCE OFFSET STATUTE, THE
BREWSTERS ARE ENTITLED TO AN OFFSET WHICH INCLUDES
AMOUNTS THE MEDICAL PROVIDERS WROTE OFF PURSUANT TO THEIR
CONTRACTS WITH SWANSON'S MEDICAL INSURER**

Many health care insurers have contractually bound the health care provider to accept pre-agreed compensation at rates less than that charged by the health care provider. So, for example, a hospital might bill the tort plaintiff \$100,000, but will accept \$45,000 from the plaintiff's private insurer in full payment of its \$100,000 in charges. As Respondent/Plaintiff David Swanson (Swanson) argues in his Respondent's brief to this Court, the traditional common law collateral source rule allows the plaintiff to recover from the tortfeasor all the reasonable medical expenses necessitated by the tort, including the \$45,000. (Respondent's brief, p. 29). Swanson does not dispute that as to the \$45,000, the collateral source offset statute, Minn. Stat. § 548.36, applies and has changed the common law.

The issue in this case, using the above example, is whether the collateral source offset applies to the remaining \$55,000, representing medical charges for which no one has made a "direct" payment and for which the plaintiff has incurred and will incur no responsibility. Swanson takes the position that as to this \$55,000, the common law collateral source rule continues to apply, but there is no statutory offset. The basis for Swanson's argument is primarily that the collateral source offset statute is in derogation of common law and must be strictly construed by this Court. Based on this "strict construction," Swanson urges this Court to not apply the collateral source offset statute even though the \$55,000 writeoff is as much a collateral source benefit as is the cash

payment of \$45,000. (Respondent's brief, pp. 13-15). Swanson also asserts such a result is compelled by the doctrine of *stare decisis*, even though this Court has not addressed this issue. (Respondent's brief, p. 16). Appellants/Defendants Rebecca Brewster and Christopher Brewster (Brewsters) assert that to do as Swanson and Amicus Curiae Minnesota Association for Justice (MNAJ) request is contrary to the collateral source statute as written and is otherwise contrary to legislative intent.

A. Legislature's Intent Is Clearly Manifested by the Plain and Unambiguous Language of the Statute.

If the Legislature's intent is "clearly manifested by [the] plain and unambiguous language of the statute, statutory construction is neither necessary nor permitted." State by Beaulieu v. RSJ, Inc., 552 N.W.2d 695, 701 (Minn. 1996). Swanson asserts that this case fits within Minn. Stat. § 548.36, subd. 1(3) – "a contract or agreement of a group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital . . . or other health care services."¹ (Respondent's brief, p. 30). Notably, the Legislature used the word "provide" in addition to the words "pay for, or reimburse." The common meaning of the word "provide" is to make arrangements for. In re Marriage of Krause, 654 P.2d 963, 967 (Mont. 1982).

The very inclusion of subd. 1(3) within the definition of collateral source supports the Brewsters' argument. The Legislature recognized that there were contractual arrangements by which the plaintiff's costs of health services would be covered. That is exactly the

¹ The Florida statute, F.S.A. § 768.76(2)(a)(3) contains the identical phrase.

situation here. Those arrangements are collateral sources. See Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496 (Ariz. Ct. App. 2006), *rev. denied* (and cases cited therein).

Here, Swanson's health care provider wrote off the balance of Swanson's bill in compliance with the terms of a contract with Swanson's health insurer. While it is true that the Legislature does not define the term "payment" in Minn. Stat. § 548.36, the plain and ordinary meaning of payment includes the concept of the discharge of a debt through remittance of a contractually agreed-upon discounted amount. This writeoff factually and conceptually is a collateral source benefit paid for by way of the insurer's contractual agreement with the provider. See Dan B. Dobbs, 2 Law of Torts § 380 (2008 supp.). It is a payment.

B. This Court Has Stated Its Obligation Is to Give Every Statute a Fair Construction, Even a Statute in Derogation of Common Law.

If this Court concludes it must engage in statutory construction, the canons of statutory construction support the Brewsters' position. Every statute embodying new affirmative legislation, as distinguished from statutes that merely codify existing law, has the purpose and effect of changing some provision in the established body of traditional or statutory law. Teders v. Rothermel, 205 Minn. 470, 286 N.W. 353, 354 (1939) ("Legislatures intend by such statutes to replace or change rules of common law."). This Court has also long recognized that any *a priori* presumption against change is not a useful means to decide how much a statute changes prior law. State ex rel. City of St. Paul v. Minneapolis St. P. & S. S. M. Ry. Co., 190 Minn. 162, 251 N.W. 275, 277 (1933); Phelps v. Benson, 252 Minn. 457, 90 N.W.2d 533, 536 (1958).

In Teders, a case in which this Court held that a guest statute which by its terms excepted passengers for “payment” applied to a passenger who shared traveling expenses, this Court explained: “[W]e do not consider ourselves at liberty to apply any rule of ‘strict construction’ to this or any other statute, simply because it happens to be in derogation of the common law. Legislatures intend by such statutes to replace or change rules of the common law.” 286 N.W. at 354. This Court explained why every statute must instead be given a “fair construction”:

Too much judicial indulgence in “strict construction” of statutes has heretofore disguised “extraconstitutional obstacles to, or hindrances of, legislature purpose.” However radical the change, we do not permit ourselves, because it is an innovation, so to limit a statute by construction as to defeat or even hinder its purpose. Our effort is rather to give any statute “a fair construction, with the purpose of its enactment in view, not narrowed or restricted because it is a substitute for the discarded common law.”

Id. (internal citations omitted).

This attitude expressed by this Court in Teders toward construction of statutes that are in derogation of the common law has been described as “the more favored modern view . . . articulated by the Minnesota court.” Norman J. Singer and J.D. Shambie Singer, 3 Sutherland Statutory Construction § 58:3 (West 2009).²

² In discussing the strict construction standard, Norman J. Singer and J.D. Shambie Singer, in their treatise Sutherland Statutory Construction, explain: “However, modern society and judges also recognize that mechanical application of ancient doctrines disfavoring changes in existing law results in artificial, gratuitous, judicially fabricated obstacles to progress through legislation, and has no justification in principle.” Id.

As this Court is well aware, there are many canons of statutory construction, which include statutory acts are to be liberally construed if their nature is remedial. Norman J. Singer and J.D. Shambie Singer, 2A Sutherland Statutory Construction § 48A.8 at III (West 2009). The enactment of Minn. Stat. § 548.36 was part of the 1986 tort reform which is remedial in nature. This Court has held that despite a statute's alteration of the common law, if the statute is remedial in nature, it is to be liberally construed to give effect to the Legislature's expressed intent. Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886, 897 (1955), *reh'g denied*. The Court, however, cautioned that even if remedial, the court cannot give a construction to the statutory language that is not intended by the Legislature. Id. The Brewsters are simply asking that this Court honor the Legislature's intent in construing the statute.

C. Doctrine of Stare Decisis Is Not Applicable.

Swanson also asks this Court to apply the doctrine of *stare decisis*. (Respondent's brief, p. 16). Since this Court has not addressed the issue before this Court, Swanson's *stare decisis* argument is essentially this Court should defer to the Minnesota Court of Appeals. But it is this Court's obligation, as the court of last resort, to address the issue before it. And obviously, this Court is not bound by the decision of the Court of Appeals. Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc., 637 N.W.2d 270, 276 (Minn. 2002), quoting McClain v. Begley, 465 N.W.2d 680, 682 (Minn. 1991); Kmart Corp. v. County of Stearns, 710 N.W.2d 761, 769 (Minn. 2006), *reh'g denied*.

The issue presented in this case has not been before this Court. Because this issue has not been presented for this Court's examination, there is no past decision of this Court which is dispositive and, therefore, the doctrine of *stare decisis* does not apply. State v. Losh, 755 N.W.2d 736, 742 (Minn. 2008), citing Fletcher v. Stott, 201 Minn. 609, 277 N.W. 270, 272 (1938) ("The rule of *stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question."); accord Illinois v. Lidster, 540 U.S. 419, 424 (2004) ("[G]eneral language in judicial opinions" must be read "as referring in context to circumstances similar to the circumstances then before the court and not referring to quite different circumstances that the court was not then considering.").

1. Stout v. AMCO Ins. Co. is not a case decided under the collateral source offset statute.

Swanson turns to this Court's decision in Stout v. AMCO Ins. Co., 645 N.W.2d 108 (Minn. 2002). As Swanson admits, Stout was not decided under the collateral source offset statute. In Stout, this Court interpreted Minnesota's No-Fault Automobile Insurance Act, Minn. Stat. § 65B.41-.71, and concluded that a no-fault insurer is liable to its insured for the entire amount billed by medical service providers. Id. at 111-14. The No-Fault Act, however, "is a comprehensive and highly detailed statutory scheme that governs the compensation of persons injured in automobile accidents," Id. at 112, and is simply not analogous to the collateral source statute at issue in this case.

To preserve no-fault insurer status as the primary source of benefits for those injured in automobile accidents, the No-Fault Act prohibits no-fault insurers from

coordinating benefits or negotiating discounts with health care providers. *See* Minn. Stat. § 65B.44, subd. 1; *see also* Stout, 645 N.W.2d at 112. In relevant part, the No-Fault Act provides:

Notwithstanding any other law to the contrary, a person entitled to basic economic loss benefits under this chapter is entitled to the full medical expense benefits set forth in subdivision 2, and may not receive medical expense benefits that are in any way less than those provided for in subdivision 2, or that involve any preestablished limitations on the benefits

Minn. Stat. § 65B.44, subd. 1(b).

No reparation obligor or health plan company . . . may enter into or renew any contract that provides, or has the effect of providing, managed care services to no-fault claimants. For the purposes of this section, “managed care services” is defined as any program of medical services that uses health care providers managed, owned, employed by, or under contract with a health plan company.

Id. at subd. 1(c).

Plainly, the No-Fault Act’s purpose and statutory prohibition on coordinating benefits is far removed from the purpose underlying the collateral source statute, and the prevalent practice in the health care industry of negotiating discounted rates for medical services. While reducing the amount of a plaintiff’s loss on the basis of contractual discounts arranged between health care providers and insurers, or federal program writeoffs created under the Medicare or Medicaid framework, violates the No-Fault Act’s prohibition on the coordination of benefits, there is no similar prohibition under the collateral source statute or similar analogy to health care industry practice.

2. Court of Appeals failed to recognize difference between no-fault statute and collateral source offset statute.

Neither Foust v. McFarland, 698 N.W.2d 24 (Minn. Ct. App. 2005), nor Tezak v. Bachke, 698 N.W.2d 37 (Minn. Ct. App. 2005), the Court of Appeals cases on which Swanson primarily relies, address this obvious difference in the statutory schemes. In fact, these Court of Appeals cases do not even mention the No-Fault Act's statutory prohibition on coordination of benefits. For this reason, the Minnesota Court of Appeals' reliance on Stout is misplaced.

In Stout, this Court suggested that, under the No-Fault Act, any windfall "should go to the insured." Stout, 645 N.W.2d at 115. That purpose, however, is entirely inconsistent with – rather than similar to – the purpose underlying the collateral source offset statute (as opposed to the collateral source common law rule). Courts applying the common law collateral source rule often assert that a defendant tortfeasor should not benefit from the plaintiff's foresight in acquiring insurance, and sought to compensate an injured plaintiff even if it resulted in a windfall to the plaintiff. However, in applying the collateral source offset statute, this Court has observed that, contrary to the purposes underlying the common law rule, the statute was designed "to prevent plaintiffs from receiving windfall recoveries at the expense of defendants." Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42, 50 (Minn. 1997); *see also* Imlay v. City of Lake Crystal, 453 N.W.2d 326, 331 (Minn. 1990).

Swanson cannot dispute that the substance and purpose of the No-Fault Act differs from the substance and purpose underlying the collateral source offset statute. Nor can he

dispute that allowing a plaintiff to recover amounts written off by a medical service provider is entirely inconsistent with the collateral source offset statute's underlying purpose.

D. Minnesota Legislature Has Determined Minnesota's Public Policy.

Swanson cites multiple Minnesota cases that predate the collateral source statute for the proposition that Minnesota has routinely permitted the recovery of amounts billed for medical services. Yet, those cases were all decided before the collateral source offset statute was enacted, and thus have no bearing on this Court's interpretation of the statute. Indeed, all of these cases were decided under the common law collateral source rule and held, consistent with the purposes underlying that rule, that a plaintiff may recover damages from a tortfeasor, although the plaintiff has received money or services in reparation of the injury from a source other than the tortfeasor. *See Hueper v. Goodrich*, 314 N.W.2d 828, 830 (Minn. 1982).

However, as part of an effort to reform tort recovery in Minnesota in 1986, the Minnesota Legislature (along with myriad of other state legislatures across the country) has largely abrogated the common law rule. Whatever the Court's views may be of the common law collateral source rule, there is no question that the rule was largely abrogated in 1986. In so doing, the Minnesota Legislature determined the public policy of the State of Minnesota.

While not pertinent to the issue on appeal, the reasons given for the collateral source rule and referenced by Swanson in his brief have been refuted over the years. For

example, Swanson argues that the plaintiff paid for the health insurance benefit he is now receiving and that the defendant ought not to benefit from the plaintiff's investment. As explained in Dan B. Dobbs, 2 Law of Torts § 8.6(3), "[t]his argument looks backward at what the plaintiff has invested in the past, rather than forward to what he could save in the future by abolishing the collateral source rule." The treatise continues:

Since the collateral source rule permits all plaintiffs to whom it applies to recover more than 100% of their losses, the insurance funds used to make these added payments must be larger than they would otherwise need to be. There is a very great likelihood that they will be made larger by the charge of greater premiums, to be paid by the plaintiff and by all others who contribute to the insurance funds through their premiums.

Id.

Moreover, the plaintiff who paid for the insurance benefits "probably did not do so in hope of a double recovery. More probably, the plaintiff hoped to gain minimal security." Id. To deny a plaintiff double recovery does not frustrate the plaintiff's expectation and "it might make it possible for the plaintiff to provide himself security in the future at a cheaper price." Id.

In addition, although the plaintiff paid premiums for his insurance, he did not necessarily pay an amount equal to the benefits. Nor was the plaintiff the only contributor to the fund from which he draws benefits. The fund was created through the premiums of many others in similar situations.

Id.

The bottom line is "what the plaintiff has 'paid for' is really a function of the legal rule: if the collateral source rule were abolished, the plaintiff will have paid for security

and not for the opportunity of a double recovery. He has paid for more only because the law, by allowing double recovery, in effect requires him to pay for more.” Id. If the law denied him a double recovery, the probable result is the insurance would be more efficient. Id. What the plaintiff has paid for, then, is not a ground for adopting the collateral source rule but is instead a result of that rule. Id.

What has been referred to as the weakest argument in support of the collateral source rule is that the tortfeasor should not get the benefit of any reduction in the plaintiff’s damages by a collateral source. Id. The following has been offered as the answer to that argument:

- Since there is no standard amount payable for a tort, it is not meaningful to refer to diminished liability as a windfall.
- No one has suggested that the collateral source rule should be adjusted as fault increases or decreases.
- It is widely agreed that many tort cases based on fault involve no moral fault at all and that liability in a substantial number of cases is based on strict liability.
- In most cases, a judgment is insured against and it is the insurer, not the individual defendant, who pays. “Not only does this deprive the ‘wrongdoer’ of any support where there is insurance, it also means that the collateral source rule is responsible for higher insurance premium costs.”

Id.

One can presume that the Legislature heard these arguments and others in reaching the decision it did in 1986. It defies logic to reduce a plaintiff's recovery by cash payments because of collateral sources, but permit recovery of amounts written off because of collateral sources.

E. Subrogation by HealthPartners Is Not at Issue in This Case.

The Legislature did recognize that in some cases the plaintiff will not actually receive a double recovery, even if it collects fully from both the tortfeasor and the collateral source. This is because the collateral source may have a right of subrogation.

The Legislature did not, by means of Minn. Stat. § 548.36, seek to define what constitutes a subrogation right or the amount of such subrogation right, if it exists. The Florida appellate courts, based on a virtually identical collateral source offset statute to that of Minnesota, have concluded that the amount written off by a health care insurer could not be the subject of a subrogation right by that insurer. Goble v. Frohman, 848 So. 2d 406, 408 n.1 (Fla. Dist. Ct. App. 2003), *aff'd* 901 So. 2d 830, 832 (Fla. 2005). That fact did not preclude the conclusion that the writeoff was subject to the collateral source offset statute. The Florida appellate courts have held that “under [Florida’s collateral source offset statute] the amount of the contractual discount, for which no right of reimbursement or subrogation exists, is an amount that should be set off against an award of compensatory damages.” 901 So. 2d at 833.

Moreover, as this Court made clear in Heine v. Simon, 702 N.W.2d 752, 764 n.8 (Minn. 2005), which case is ignored by Swanson and MNAJ, subrogation is not at issue

for purposes of application of the collateral source offset statute if the subrogation claim has been waived. In fact, MNAJ's discussion on subrogation is directly at odds with the record in this case. MNAJ apparently believes that there was no waiver of HealthPartners' subrogation interest. Swanson certainly did not take that position before the district court.

MNAJ is also wrong in its assertion that the Brewsters' insurer somehow injected itself between HealthPartners and Swanson. Actually, HealthPartners contacted the Brewsters' auto insurer directly before the Swanson/Brewster case was even in suit. (A. 32). As explained to the trial court, the purpose of the Brewsters' auto insurer obtaining the release and assignment agreement from HealthPartners was to take the subrogation issue out of the case. If the case was tried to a verdict, the Brewsters would have the benefit of the collateral source offset and avoid any subrogation right being asserted. (Defendants' Memorandum in Support of Determination of Collateral Source, p. 5, dated 1/30/08). The Brewsters asserted to the trial court that without the assignment from HealthPartners, the Brewsters' collateral source offset would be limited to the "gap" – i.e., the amount written off or discharged. (Id. at p. 8.)

Before the trial court, it was Swanson's position that the Brewsters were entitled to "take a collateral source offset of \$17,643.76 in this matter, the same amount as the final subrogation claim of HealthPartners," less the insurance premiums for a "net collateral offset of \$13,073.12." (Plaintiff's Memorandum in Support of Motion for Judgment, p. 7, dated 2/5/08). As to the gap or discharged amount, Swanson asserted there was no

subrogation interest in this amount that was owned by HealthPartners and that this gap was not subject to the collateral source offset statute. (Id. at p. 4). That is how the trial court ruled.

There is no basis by which either Swanson or MNAJ can now argue on this record that there can be no offset for medical expenses under the collateral source offset statute because of a HealthPartners subrogation right.

If Swanson is allowed to recover from the Brewsters the \$40,000 plus “gap” or “writeoff,” then that burden shifts to the Brewsters’ liability insurance carrier.³ The net effect is precisely the evil that the Legislature sought to prevent by its enactment of Minn. Stat. § 548.36. Such a result is not in accord with Minn. Stat. § 548.36, subd. 1(3) as written. Nor is it in accord with legislative intent, if this Court should find the statute ambiguous.

F. The Florida Supreme Court Decision in Goble v. Frohman, 901 So. 2d 830 (Fla. 2005), Supports the Brewsters’ Position.

The Brewsters have referred this Court to the Florida Supreme Court’s decision in Goble because the Minnesota and Florida collateral source offset statutes which were

³ MNAJ makes the argument, with no factual support, that this case is “representative of an increasingly common and troubling practice” of a defendant purchasing “the subrogation interest from the health insurer.” (MNAJ brief, pp. 7-8). What MNAJ ignores is what occurred in Tezak v. Bachke, 698 N.W.2d 37, 39 (Minn. Ct. App. 2005), *rev. denied*. There, the trustee for the heirs and next-of-kin of Tezak purchased the health insurer’s subrogation rights and then initiated an action against the tortfeasor for special damages, including the full amount of medical expenses billed to Tezak by medical providers but written off per the health insurer’s contract. The Court of Appeals approved of such conduct. That result is troubling and directly at odds with the very purpose of the collateral source offset statute.

both enacted in the 1986 push for tort reform are virtually identical. The Florida Supreme Court has made its conclusion that the Brewsters seek based on the plain and ordinary reading of the terms used in the collateral source offset statute. As the Florida Supreme Court ruled, “contracted discounts negotiated by an HMO fall within the statutory definition of collateral sources subject to setoff.” Goble, 901 So. 2d at 833.

Swanson asserts Florida’s interpretation of its collateral source offset statute should be rejected in Minnesota based on a purported different environment for its common law. But what is at issue here is not the common law but the Legislature’s enactment which altered the common law. Western Nat’l Mut. Ins. Co. v. Casper, 549 N.W.2d 914, 916 (Minn. 1996) (collateral source offset statute alters common law measurement of damages and limits the amount a plaintiff is legally entitled to recover from a tortfeasor). The Florida Supreme Court’s opinion rests solely on the language of the statute before it. Goble, 901 So. 2d at 833.

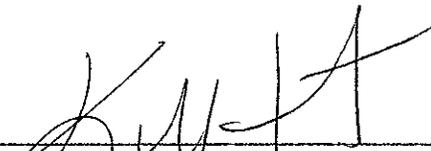
Swanson refers to the special concurring opinion of Justice Bell, but Justice Lewis wrote a concurring opinion disagreeing with Justice Bell’s view of compensatory damages under Florida’s common law. Goble, 901 So. 2d at 835-36. What the Florida justices ultimately did agree on is the language of the statute supports the Florida Court of Appeals’ conclusion that contractual discounts of medical bills are collateral sources subject to offset under Fla. Stat. § 768.76. It is that same holding under Minnesota law that the Brewsters request from this Court.

CONCLUSION

Appellants respectfully request that the lower courts' determination of collateral source offset be reversed and that the Court hold that Appellants are entitled to a collateral offset of \$62,259.30 less Swanson's payment for insurance premiums and co-pays.

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Dated: July 30, 2009

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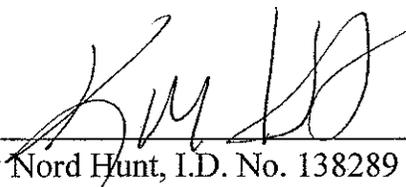
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,146 words. This brief was prepared using Word Perfect 12.

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Dated: July 30, 2009

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