

STATE OF MINNESOTA

IN SUPREME COURT

No.: A08-806

David Swanson,
Respondent,

vs.

Rebecca Brewster and
Christopher Brewster,
Appellants.

RESPONDENT'S BRIEF AND ADDENDUM

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(CONTINUED ON REVERSE)

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).

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ISSUES

1. Whether the trial court erred as a matter of law in applying the settled case law to grant the surplus value of a medical bill claim to the plaintiff and limiting the set-off purchased by Defendant from HealthPartners to just the value of the reimbursement interest that HealthPartners had owned.

The trial court held in the negative

Apposite Cases: *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108, 113-114 (Minn. 2002) (“A reduction in the amount billed, whether obtained pursuant to a settlement agreement or a health insurer’s fee schedule, does not modify the amount of medical expense incurred.”); *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 275 (Minn. 1995) (compensatory damages are generally synonymous with actual damages, meaning the full value of damages incurred); *Collins v. Farmers Ins. Exch.*, 271 Minn. 239, 240-41, 135 N.W.2d 503, 504-05 (1965) (an insurer to whom premiums have been paid is responsible for the “reasonable [medical] expenses actually incurred,” not just what the insurer has paid for those services); *Smith v. Am. States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn., Feb. 18, 1999) (“if the plaintiff’s special damages . . . such as hospital or medical expenses . . . are paid for . . . on the basis of some contractual obligation, this circumstance does not bar the plaintiff from recovering this item from the defendant, even though it may in effect accord to the plaintiff a double benefit or a double recovery.” (internal quotation omitted)).

2. Whether the trial court erred as a matter of law in following the calculations dictated by Minn. Stat. § 548.36, subd. 2, 3 to determine the proper collateral source deduction from the jury’s award of medical bills to the Plaintiff.

The trial court held in the negative

Apposite Cases: *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005), *review denied* (Minn., Aug. 24, 2005) (“the collateral-source statute does not apply to the [gap between the value of services and what a health insurer actually paid for them], because the gap between the bills and the settlement was not a payment made to anyone and therefore is not a collateral source as defined by the statute. . . . Although the collateral-source statute abrogated the common-law collateral-source rule in some situations, when benefits are not subject to the collateral-source statute, the common-law collateral-source rule still applies.” (internal quotation omitted)); *Duluth Steam Co-op v. Ringsred*, 519 N.W.2d 215, 217 (Minn. App. 1994) (the “tortfeasor’s responsibility to compensate for all harm that he causes [is] not confined to the net loss that the injured party receives,” as “[t]he law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.”).

STATEMENT OF THE CASE & OF FACTS

1. The Motor Vehicle Accident

Appellant Rebecca Brewster negligently operated a motor vehicle owned by Appellant Christopher Brewster [collectively “Appellants”] on October 18, 2005, causing it to collide with the motorcycle operated by Respondent David Swanson, and injuring him.¹

2. Payment of Medical Expenses by the Health Carrier and Assignment of its Subrogation Claim

A motorcycle accident falls outside the coverage of the No-Fault Act,² so the medical expenses incurred by Respondent Swanson were submitted to and paid by his health insurer, pursuant to the policy he had purchased and paid for from HealthPartners.

HealthPartners asserted a right of subrogation against Respondent Swanson, asking that when he received compensation from those who injured him that he reimburse HealthPartners what it had actually paid for those services.³ Respondent Swanson had received medical services valued at \$62,259.93 by the time of the trial.⁴ HealthPartners had,

¹ Fault was admitted and the jury was submitted damage questions by special verdict. *See* Special Verdict, Ex. D, *printed at* Appellant’s Appendix at A-38.

² Under MINN. STAT. § 65B.46, subd. 3, “injuries suffered by a person while on, mounting or alighting from a motorcycle do not arise out of the maintenance or use of a motor vehicle [even if] . . . a motor vehicle is involved in the accident causing the injury.”

³ *See* March 1, 2008 Letter from Ruth Rathbun of HealthPartners’ Subrogation Department, Ex. A, *printed at* Appellant’s Appendix at A-32; Affidavit of Ruth Rathbun of HealthPartners’ Subrogation Department, Ex. 2, *printed at* Appellant’s Appendix at A-81.

⁴ *See* Detailed Analysis of Swanson Medical Bills, Ex. 1, *printed at* Appellant’s Appendix at A-43, and attached bills Ex. A-J, *printed at* Appellant’s Appendix at A-44 to -80.

however, negotiated in advance with various medical providers and secured their agreement to take reduced or discounted payments for performing medical services, and thus HealthPartners had only actually paid \$17,643.76 for the services provided to Respondent Swanson.⁵ HealthPartners asserted the right to get the latter amount back from Respondent Swanson out of any tort recovery he obtained against Appellants.⁶

Before trial, the liability insurer for the Appellants purchased the subrogation interest that HealthPartners owned, paying \$10,500 for it.⁷ The sale was of

all subrogation rights which Health Partners shall have against any person or organization legally liable for the bodily injuries, if any, to David M. Swanson, and assigns to State Farm the full benefit of any collateral source offset which may be available in future litigation.⁸

Amounts for which subrogation is claimed are not subject to Minnesota's Collateral Source Statute.⁹ When subrogation rights are assigned to someone else, however, they are subject

⁵ *Id.*, printed at Appellant's Appendix at A-43. Plaintiff-Respondent Swanson had also paid \$1,169.80 as co-pays on those services. *Id.*

⁶ See March 1, 2008 Letter from Ruth Rathbun of HealthPartners' Subrogation Department, Ex. A, printed at Appellant's Appendix at A-32; Affidavit of Ruth Rathbun of HealthPartners' Subrogation Department, Ex. 2, printed at Appellant's Appendix at A-81.

⁷ See Release and Assignment Agreement, Ex. B, printed at Appellants' Appendix at A-34.

⁸ *Id.*, A-34.

⁹ The Collateral Source Statute was renumbered from § 548.36 at the time of the case at issue to § 548.251. It is referred to herein by the former designation. Under § 548.36, subd. 2(1), at the close of a trial, based on submissions of the parties "the [trial] court shall determine . . . 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." MINN. STAT. § 548.36, subd. 2(1)

to being paid to that entity.¹⁰

When a tortfeasor purchases the subrogation interest in a case for which they are ordered to pay compensation to someone they have injured, rather than “pay themselves,” they usually simply seek to setoff the amount of the subrogation interest from their obligation. The Respondent agreed that such a reduction should occur here, and the trial court so ruled, setting off from the jury award, the amount of the subrogation interest assigned by HealthPartners: \$17,643.76.

3. The Jury Award

When the claim came before a Hennepin County jury, it awarded compensation as follows:

Future pain and suffering	\$ 30,300.00
Past pain and suffering	38,000.00
Past wage loss	4,230.00
Past medical bills	<u>62,259.30</u> ¹¹
Total	\$134,789.30

Of the foregoing, the past medical award is actually \$0.63 less than the \$62,259.93 value of services that Plaintiff-Respondent received from HealthPartners’ physicians.

(emphasis added).

¹⁰ See, e.g., *Buck v. Schneider*, 413 N.W.2d 569, 571-72 (Minn. App. 1987) (litigant may purchase an assignment of a medical or wage loss insurer’s subrogation claim and assert it as their own and when that occurs, it falls outside the scope of a collateral source under § 548.36, subd. 2(1), but would be paid to the entity that owns it following the assignment) (involving assignment of workers’ compensation benefits from the workers’ compensation insurer to the injured employee).

¹¹ See Special Verdict, Ex. D, *printed at* Appellants’ Appendix at A-38 to -39 (the medical bills were itemized by individual provider by the jury and the total of their award is stated above).

4. The “Gap” in the Valuation of the Medical Services

As noted above, while the full fair market value of the medical services provided to the Plaintiff-Respondent by his care givers was \$62,259.93, HealthPartners had actually only had to pay \$17,643.76.

The “gap” between the actual value and the contractual value of the services is a frequent occurrence in the modern health insurance arena. It happens because large health insurers have significant negotiating power with medical providers and their clinics, being able to induce them to take a cut in what they will accept by virtue of the promise of referring numerous patients to them by listing the care givers in the health insurer’s “approved provider” list. Volume of business induces the medical providers to “write down” or forgive part of the bill they would normally charge for the services.

Presumably, the health insurer is able to charge a lesser premium to their insured by virtue of the health insurer’s superior negotiating power.

The issue that arises therefore, is who stands to benefit from the “gap” in the cost of this medical care. More specifically, is the tortfeasor who caused the insured’s injuries the one who can claim the benefit of that “gap” by reducing the tortfeasor’s exposure to pay compensation to the “wholesale” value of the care, or is the “gap” something that inures to the benefit of the injured party who frequently paid the premiums that secured its benefits?

5. Approaches at Common Law

It has been conceded by the parties to this dispute that at common law,

if the plaintiff’s special damages . . . , such as hospital or medical expenses or loss of wages, are paid for by some third person, either as a gift or on the basis of some contractual obligation, this circumstance does not bar the plaintiff

from recovering this item from the defendant, even though it may in effect accord to the plaintiff a double benefit or a double recovery.¹²

Where the common law collateral source rule applies, therefore, the “gap” or benefit of discounted medical services that have been written down by a health insurer, goes to the injured party or plaintiff and not to the tortfeasor.

If the “gap” is considered a “payment” under the Collateral Source Statute for some reason, it would concededly be offset from the jury award.

6. The Collateral Source Statute

Minnesota’s Collateral Source Statute provides that certain specific “payments” received from a source other than the defendant - - a “collateral source” - - must be subtracted from a personal injury verdict to avoid the injured party from being paid twice for the same thing: once by the collateral source and once by the defendant.

The statute does not cover all types of “payments,” but to the extent that a “payment” is included in the list of collateral sources articulated by the statute, “the collateral-source statute abrogated the common-law collateral-source rule,”¹³ though “when benefits are not subject to the collateral-source statute, the common-law collateral-source rule still applies,”¹⁴ which grants the injured party the benefit of any double recovery, rather than the tortfeasor.

¹² *Smith v. American States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), review denied (Minn., Feb. 18, 1999) (quotation omitted).

¹³ *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005), review denied (Minn., Aug. 24, 2005).

¹⁴ *Id.*, citing *Smith v. American States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), review denied (Minn., Feb. 18, 1999).

7. Appellants' Further Demand for Set Offs

In addition to the setoff of the subrogation claim, Appellants also asked the trial court to reduce the verdict by the amount of the “gap,” arguing that among the definitions of “payments” that are to be setoff from an injured party’s jury award under the Collateral Source Statute should be the “discharge or settle[ment]” of a debt or obligation. *Swanson v. Brewster*, 2009 WL 511747, at * 3, n.4, unpub. (Minn. App., Mar.3, 2009), quoting AMERICAN HERITAGE DICTIONARY 1291-92 (4th ed. 2000) (A-8).

8. Prior Precedent on the Question Rejects “Discharge” or “Write-Down” as a Payment

In one supreme court decision and two published court of appeals decisions, the courts have expressly ruled that the definition of “payment” under the Collateral Source Statute does not include the “gap” representing the discounted or write-off amounts of billed medical services.¹⁵ The central holding of these cases was that,

¹⁵ See *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108, 114 (Minn. 2002) (“we therefore conclude that AMCO’s failure to reimburse Stout for the discounted portions of his medical bills violates section 65B.61, subd. 3.”); *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005), review denied (Minn., Aug. 24, 2005) (“We next conclude that the collateral source-source statute does not apply to the [discounted amount of the medical bills], because the gap between the bills and the settlement was not a payment made to anyone and therefore is not a collateral source as defined by the statute.”); *Foust v. McFarland*, 698 N.W.2d 24, 36 (Minn. App. 2005), review denied (Minn., Aug. 16, 2005) (“We conclude the district court was correct in its determination that appellants are not entitled to a collateral source deduction for medical charges billed by medical providers but not paid for by the insurance companies and not paid for by the victim.”).

It should be noted that *Stout* - - as a No-Fault benefits claim in an auto accident case - - was not decided under the Collateral Source Statute, but under the collateral source principles of the No-Fault Statute. See MINN. STAT. § 65B.42 (5) (goals of the No-Fault Act include “to provide offsets to avoid duplicate recovery”). The goals of the

a reduction in the amount billed, whether obtained pursuant to a settlement agreement or a health insurer's fee schedule, does not modify the amount of medical expense incurred. We therefore conclude that the medical expense incurred by [the claimant] is the full amount reflected on his medical bills, and not the amount that was paid in satisfaction of those bills as the result of collateral transactions involving [the claimant's] health insurer.¹⁶

9. The Appellants' Argument

Contrary to these rulings, the Appellants argued that the discharge of indebtedness or partial forgiveness of a medical bill that creates a "gap" should be viewed as a "payment," and cited for support to a 1990 unpublished court of appeals decision,¹⁷ that had ruled that a write-down of the plaintiff's medical bills by a governmental insurer should be considered a type of "payment" under the Collateral Source Statute based on the forgiveness of debt.¹⁸ No published case has since applied that ruling, and the supreme court in a case twelve years later,¹⁹ that also involved both governmental and private health insurance benefits,²⁰ rejected

No-Fault Act and the Collateral Source Statute are similar. *See Johnson v. Consolidated Freightways, Inc.*, 420 M.W.2d 6608, 614 (Minn. 1988) (regarding "sections 65B.51 [collateral source offsets from auto accident claims under the No-Fault Act] and 548.36 [the Collateral Source Statute,] . . . [t]he purpose of both statutes is to prevent duplicate recovery."); *Foust, supra*, 698 N.W.2d at 36 ("the applicable statute in *Stout* was the Minnesota No-Fault [Law] . . . not the collateral source statute. . . . However, we find the purpose behind both statutes to have similarities.").

¹⁶ *Stout, supra*, 645 N.W.2d at 113 (citations omitted).

¹⁷ *Mikulay v. Dial Corp.*, 1990 WL 57530, unpub. (Minn. App. May 8, 1990).

¹⁸ *Id.* at * 3 ("we hold that the trial court properly deducted the . . . debt write-off from [the claimant's] medical expense award as a collateral source payment.").

¹⁹ *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108 (Minn. 2002).

²⁰ *Id.* at 110 ("the total amount billed for the treatment of Stout's knees was \$25,638.73. The amount billed was ultimately discounted by \$13,167.29 pursuant to

the notion that a “discount” or “write down” was a form of “payment.”²¹ Appellants also asserted that a Florida case which reached a result similar to the 1990 unpublished Minnesota decision was persuasive.²²

10. The Trial Court’s Collateral Source Deduction

In light of the well-established precedents that were previously mentioned, the trial court rejected the Appellants’ arguments for a set-off of the full value of medical services received by the Respondent, as the “gap” was not a “payment” under these decisions. Instead, the trial court ruled only that the value of the subrogated amount of the medical services should be deducted as the Appellants had purchased that from HealthPartners. Respondent had conceded this deduction was proper. The trial judge then performed the calculation of setoffs pursuant to the Collateral Source Statute

The Collateral Source Statute requires a trial judge to make certain subtractions from a gross personal injury verdict, that are further adjusted by adding back in the cost incurred by the plaintiff-insured in paying the premiums on the insurance.²³

[federal and state governmental programs under] Medicaid and MinnesotaCare fee schedules, leaving a balance of \$12,471.44. Stout’s health insurer paid \$5,328.72 of this balance, and Stout paid \$2,627.72. The remaining balance of \$4,515 had not been paid as of the date of the district court’s order.”).

²¹ *Id.* at 114 (“we therefore conclude that AMCO’s failure to reimburse Stout for the discounted portions of his medical bills violates section 65B.61, subd. 3.”).

²² *Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005).

²³ The statute provides 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, by or pursuant to . . . (2) health, accident and sickness . . . insurance that provides health benefits” MINN. STAT. § 548.36, subd. 1. Under

Since the Respondent had paid \$4,570.64 for two years of health premiums,²⁴ the trial judge subtracted that amount from the actual payment made by HealthPartners of \$17,643.76,²⁵ to yield the net collateral source deduction of \$13,073.12.²⁶

When the trial judge added in allowed costs and disbursements to the prevailing Respondent of \$5,309.59,²⁷ and pre-judgment interest of \$7,496.32,²⁸ to the \$134,789.30

subdivision 2 of that law, “when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion . . . requesting determination of collateral sources” with the parties submitting evidence so that the court can “determine: (1) 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” MINN. STAT. § 548.36, subd. 2. The court’s duty under subdivision 3 of the statute is then to “reduce the award by the amounts determined under subdivision 2, clause (1)” The statute goes on to allow for a readjustment to the deduction for premiums the plaintiff shows he incurred in obtaining the coverage. Indeed Plaintiff’s two years of health premiums amounted to \$4,570.64. *See* Letter from Ruth Rathbun, Dec. 7, 2007, Ex. 3, *printed at* Appellants’ Appendix at A-83 to -84. When the premiums of \$4,570.64 are subtracted from the actual payments of \$17,643.76, the net collateral source deduction is \$13,073.12. *See* Order for judgment, Apr. 10, 2008, *printed at* Appellants’ Appendix at A-14.

²⁴ *See* Letter from Ruth Rathbun, Dec. 7, 2007, Ex. 3, *printed at* Appellants’ Appendix at A-83 to - 84.

²⁵ *See* Detailed Analysis of Swanson Medical Bills, Ex. 1, *printed at* Appellants’ Appendix at A-43.

²⁶ *See* Order for Judgment, Apr. 10, 2008, *printed at* Appellants’ Appendix at A-14.

²⁷ *Id.*, A-14; Affidavit of Mark S. Genereux, Ex. 4, *printed at* Appellants’ Appendix at A-42.

²⁸ *See* Order for Judgment, Apr. 10, 2008, *printed at* Appellants’ Appendix at A-14; Affidavit of Mark S. Genereux, Ex. 5, *printed at* Appellants’ Appendix at A-42.

verdict and then subtracted out the net collateral source deduction of \$13,073.12,²⁹ as calculated above, this left a net judgment to be entered in the amount of \$134,522.09.³⁰ He ordered judgment for that sum.³¹

11. Appeal and the Parties Respective Positions

Appellants appealed to the court of appeals, arguing that the trial court erred by just setting off the value of the subrogation interest that HealthPartners sold to their liability insurer, and in failing instead to set off the full value of medical services. Respondent maintained that the trial court properly followed the law as the Collateral Source Statute has been repeatedly construed to grant to the injured party the “gap” represented by the difference between the market value of medical services and what a health insurer actually paid for them.

The court of appeals affirmed the trial court ruling that it was bound by precedent to do so,³² as the “doctrine of *stare decisis* directs us to adhere to our prior published decisions

²⁹ See Order for Judgment, Apr. 10, 2008, *printed at Appellant’s Appendix at A-14.*

³⁰ See Order for Judgment, Apr. 10, 2008, *printed at Appellant’s Appendix at A-14.*

³¹ *Id.* at Order, ¶ 2, *printed at Appellant’s Appendix at A-14.*

³² *Swanson v. Brewster*, 2009 WL 511747, at * 4, unpub. (Minn. App., Mar. 3, 2009) (A-10) (“Because we addressed the issue presented here in our published decisions in *Tezak* and *Foust* and expressly determined that write-offs are not subject to deduction under the collateral source statute, we affirm the district court.”).

to promote stability in the law.”³³ In *dicta*, however, the decision expressed sympathy for the Appellants’ position,³⁴ and noted that the court of appeals had not previously considered the dictionary definition of “payment” of the “discharge or settle[ment] . . . [of] a debt or obligation”³⁵

Appellants sought discretionary review from the supreme court and it was granted.

³³ *Id.*, citing *State v. DeShay*, 645 N.W.2d 185, 189 (Minn. App. 2002), *aff’d* 669 N.W.2d 878 (Minn. 2003).

³⁴ *Id.* (“We recognize the logic in appellants’ assertion that the discharge of debt may function in the same way as an actual expenditure of funds for purposes of the collateral source statute.”).

³⁵ *Id.* at 3, n.4.

ARGUMENT

I. The Trial Court Properly Applied the Law

A. Review of Statutory Construction is *De Novo*

At issue is the construction of the Collateral Source Statute.³⁶

The interpretation of a statute is a question of law that is reviewed by the appellate court *de novo*. See *Hertz Corp. v. State Farm Mut. Ins. Co.*, 573 N.W.2d 686, 688 (Minn. 1998) (no-fault benefit statute); *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985) (interpretation of statutes generally); *Fire Ins. Exch. v. Adamson Motors*, 514 N.W.2d 807, 809 (Minn. App. 1994) (right of subrogation).

B. In Areas to which the Collateral Source Statute is Silent, the Common Law Rule Operates, and it Expressly Allows Double Recovery to a Victim in Preference to Affording the Benefit of a Windfall to the Tortfeasor who has Caused the Injury

1. The Collateral Source Statute is in Derogation of the Common Law and thus is to be Strictly Construed so that the Common Law Rule Applies to Situations not Addressed by the Statute

“Generally, statutes in derogation of the common law are to be strictly construed.” *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327 (Minn. 2004), citing *Shaw Acquisitions Co. v. Bank of Elk River*, 639 N.W.2d 873, 877 (Minn. 2002). “[I]t is not presumed that the legislature intended to abrogate or modify a rule of the common law on the subject any further than which is expressly declared or clearly indicated.” *Id.* at 328, quoting 73 AM.JUR.2D, *Statutes*, § 191 (2001).

³⁶ The Collateral Source statute was renumbered from § 548.36 to § 548.251. No substantive changes occurred when the renumbering was done. For consistency, the statute is referred to by its former designation through this brief.

“[T]he collateral-source statute abrogated the common-law collateral-source rule in some situations,” *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005), *review denied* (Minn., Aug. 24, 2005), but “when benefits are not subject to the collateral-source statute, the common-law collateral-source rule still applies.” *Id.*, citing *Smith v. American States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn., Feb. 18, 1999).

“While a primary purpose of the collateral source statute is to prevent double recoveries by a plaintiff, the statute does not prohibit double recoveries in all instances.” *Smith v. American States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn., Feb. 18, 1999), citing *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990).

The supreme court in *Imlay* noted that the Collateral Source Statute “abrogate[s] a plaintiff’s common law right to be over-compensated and now prevent[s] double recoveries in many circumstances by requiring the deduction from the verdict of certain benefits received by a plaintiff.” *Imlay, supra*, 453 N.W.2d at 331 (emphasis added).

Under the common law collateral source rule,

if the plaintiff’s special damages . . . , such as hospital or medical expenses or loss of wages, are paid for by some third person, either as a gift or on the basis of some contractual obligation, this circumstance does not bar the plaintiff from recovering this item from the defendant, even though it may in effect accord to the plaintiff a double benefit or a double recovery.

Smith v. American States Ins. Co., 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn., Feb. 18, 1999) (quotation omitted).

2. **Appellant Argues for an Expansive Construction of the Statute based on Legislative History, but such History is Irrelevant to an Unambiguous Law**

Appellant has quoted from some of the legislative history of the Collateral Source statute, suggesting that the framers of that law were motivated to extend its concepts as broadly as possible to avoid duplicate recoveries, and urged that this “intent” should manifest itself in an expansive - - rather than a narrow - - construction of the law.

First, this approach is contrary to the previously articulated rule, that statutes in derogation of common law are to be narrowly construed. *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327 (Minn. 2004)(“statutes in derogation of the common law are to be strictly construed.”).

Second, it should be noted that this view - - urging the “spirit” over the “letter” of the law - - would be contrary to the tenants of statutory construction established in MINN. STAT. § 645.16, which provides, “When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”

Finally, under both statutory and case law, legislative history is not to be consulted unless a statute is ambiguous, as it is only when “the words of a law are not explicit, [that] the intention of the legislature may be ascertained by . . . (7) the contemporaneous legislative history,”³⁷ and when a statute is unambiguous, “no construction is necessary or permitted.” *Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn. 1995); *citing Lenz v. Coon Creek*

³⁷ MINN. STAT. § 645.16.

Watershed Dist., 278 Minn. 1, 9, 153 N.W.2d 209, 216 (1967).

3. Stare Decisis Commands Respect for Precedent

“The doctrine of *stare decisis* directs that [courts] adhere to former decisions in order that there might be stability in the law.” *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000), *citing Naftalin v. King*, 257 Minn. 498, 509, 102 N.W.2d 301, 308 (1960). An exception allows change when an original rule no longer makes sense in practice:

[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.

Id., quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 150 (1921).

4. Sound Public Policy Supports Application of the Common Law Collateral Source Rule to the “Gap”

“When payments are not subject to the statutory deduction, the common law collateral source rule still applies.” *Smith v. American States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn., Feb. 18, 1999), *citing Duluth Steam Coop. Ass’n v. Ringsred*, 519 N.W.2d 215 (Minn. App. 1994)(property damage payments fall under common law rule and not Collateral Source Statute), and *Bruwelheide v. Garvey*, 465 N.W.2d 96, 98 (Minn. App. 1991), *review denied* (Minn., Mar. 15, 1991)(sick leave not encompassed by statute and thus subject to common law rule).³⁸

³⁸ It should be noted that when “subrogation” has once been asserted, the collateral source statute does not apply. *See Kahnke v. Green*, 695 N.W.2d 148 (Minn. App. 2005) (holding an assertion of subrogation rights - - even as late as post-verdict motions - - takes the claim outside the collateral source statute, as § 548.36, subd. 2(1) calls for reduction of “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”) (emphasis added). Here, Appellant is asserting the

One justification for the common law collateral source rule is to grant the benefit to the injured party of their own foresight and prudence in securing a health insurance policy, rather than rewarding the one who has caused their injuries:

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. . . . If the benefit is a gift from a third party, such as an employer, a relative or a charity, the argument is that the donor intended the injured party receive the gift and not that the benefit be shifted to the tortfeasor.

Hueper v. Goodrich, 314 N.W.2d 828, 830 (Minn. 1982). This rationale influenced the supreme court in *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108 (Minn. 2002).

In *Stout* the court addressed whether the “gap” should inure to the benefit of an insurer or its insured. After a serious car accident John Stout confronted substantial medical bills. Some were paid by a federal government program and others by a private health insurance policy he owned. Both sources of payment “wrote down” or discounted the medical services from their stated or actual value to a lower amount based on contract provisions that the government and Stout’s health insurer had negotiated in advance. Stout then applied to his No-Fault insurer to satisfy his bills. This created an issue about whether the No-Fault insurer - - which had primary exposure to satisfy the auto accident related medical bills - - was responsible for satisfying the full amount of the bill or only the discounted value.

subrogation interest it purchased from Respondent’s health insurer, as an off-set. Definitionally, this falls outside the scope of the Collateral Source statute.

The *Stout* court considered the purposes of the No-Fault Act³⁹ - - which include avoiding double compensation to injured parties⁴⁰ - - and the basic legal doctrine that a claim for compensatory damages includes the full value of medical services incurred rather than their discounted value,⁴¹ to “conclude that AMCO’s failure to reimburse Stout for the discounted portions of his medical bills violates section 65B.61, subd. 3.”⁴²

While *Stout* was a No-Fault case, the decision echoed the exact principles of the common law collateral source rule to relations between insurer and insured, saying “if there is to be a windfall either to an insurer or an insured, the windfall should go to the insured.” *Stout, supra*, 645 N.W.2d 108, 114 (Minn. 2002).

Stout relied on the reasoning in *Collins v. Farmers Ins. Exch.*, 271 Minn. 239, 135 N.W.2d 503 (1963). *See Stout, supra*, 645 N.W.2d at 112-13. In *Collins* an insured sought to recover medical expenses under a pre-No-Fault era auto policy that provided coverage for

³⁹ *Stout, supra*, 645 N.W.2d at 114.

⁴⁰ MINN. STAT. § 65B.42(5) (“to provide offsets to avoid duplicate recovery”).

⁴¹ *Stout, supra*, 645 N.W.2d at 113, *citing Collins v. Farmers Ins. Exch.*, 271 Minn.. 239, 244, 135 N.W.2d 503, 507 (1965).

⁴² *Stout, supra*, 645 N.W.2d at 114. It should be noted that *Stout*, as a No-Fault benefits claim was not decided under the Collateral Source Statute, but under the collateral source principles of the No-Fault Statute. The courts have noted that the goals of the No-Fault Act and of the Collateral Source Statute are similar. *See Johnson v. Consolidated Freightways, Inc.*, 420 M.W.2d 6608, 614 (Minn. 1988) (regarding “sections 65B.51 [collateral source offsets from auto accident claims under the No-Fault Act] and 548.36 [the Collateral Source Statute,] . . . [t]he purpose of both statutes is to prevent duplicate recovery.”); *Foust, supra*, 698 N.W.2d at 36 (“the applicable statute in *Stout* was the Minnesota No-Fault [Law] . . . not the collateral source statute. . . . However, we find the purpose behind both statutes to have similarities.”).

“reasonable expenses actually incurred,”⁴³ and when the injured party negotiated bills for \$5,000 of care down to a discounted amount of \$2,250, the issue was whether the “gap” was something that the injured party would gain the benefit of or whether it would go to his insurer. The supreme court in *Collins* ruled that the term “incur” in the policy should be read to mean “become liable for” as opposed to actually “pay for.”⁴⁴ The supreme court said, “It would be wrong to permit defendant to gain by its denial of a meritorious claim, or to encourage it to deny claims in the hope that a claimant will settle his liabilities.”⁴⁵ To the same effect is the supreme court decision in *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 187, 207 N.W.2d 348, 352 (1973), remarking about the preference,

that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that for which it collected a premium.

While the comments in *Collins* and *Van Tassel* were about a medical insurer forcing its insured to compromise with his medical creditors as the result of the insurer’s delay and denial of a claim, the logic applies in equal measure to a tortfeasor who protracts a litigated tort claim and induces a plaintiff to settle with his creditors using the limited personal resources the plaintiff possesses, and then claim that the “gap,” discount or write-down should limit the tortfeasor’s exposure to pay compensation to the plaintiff. By analogy, the pain and suffering the tortfeasor caused to the injured party is the “premium” paid by the

⁴³ *Collins v. Farmers Ins. Exch.*, 271 Minn. 239, 240-41, 135 N.W.2d 503, 504-05 (1963).

⁴⁴ *Id.* at 244, 135 N.W.2d at 507.

⁴⁵ *Id.*

plaintiff for the right to benefit from any windfall created by his enterprise in negotiating a “gap” directly or through the offices of a health carrier with which the plaintiff was prudent enough to secure coverage before being involved in the accident with the tortfeasor.

Compensatory damages available to an injured party are their “actual damages,” *see Phelps v. Commonwealth Land Title Ins.*, 537 N.W.2d 271, 275 (Minn. 1995), *citing* BLACK’S LAW DICTIONARY 390 (6th ed. 1990), and the medical expenses the plaintiff “incurs” is the amount that is billed, making that the rational number to use in setting compensation, rather than the discounted value achieved through some effort by the plaintiff or others on his behalf.

This construction goes back to *Schmitt v. Emery*, 215 Minn. 288, 292, 9 N.W.2d 777, 780 (1943), which ruled that “to incur an expense means to become liable therefor or subject thereto,” and the *Stout* court agreed with that interpretation 65 years later. *See Stout, supra*, 645 N.W.2d at 113. A plaintiff “incurs” a bill in the amount of its full value, and that sets the “actual damage” for which he may sue the tortfeasor for compensatory damages.

Unless the Collateral Source Statute makes the “write-down,” forgiveness or discount of the bill into a “payment” to the plaintiff, of the type clearly expressed by that statute to be in derogation of the common law, the common law collateral source rule operates by default. No case has thus far divined that the legislature’s intent in an otherwise unambiguous statute was to intend that “payment” be extended to items not actually “paid.” The closest any Minnesota court has come is the unpublished court of appeals case of *Mikulay*, relied on by the Appellants.

These analogous principles in cases other than *Mikulay*, prompted the court of appeals

to rule expressly in two published cases that a tortfeasor may not reduce an injured party's jury verdict by the "gap" between the full value of medical services and their discounted value, and to expressly note that the reason is that the "gap" is not a "payment" to which Collateral Source Statute applies.

In *Tezak v. Bachke*, 698 N.W.2d 37 (Minn. App. 2005), *review denied* (Minn., Aug. 24, 2005), the court confronted a wrongful death claim for which the trustee was pursuing reimbursement of the full value of the decedent's last medical expenses, rather than merely their discounted value under health care contracts. The court of appeals said that it "conclude[d] that the collateral source-source statute does not apply to the [discounted amount of the medical bills], because the gap between the bills and the settlement was not a payment made to anyone and therefore is not a collateral source as defined by the statute." *Id.* at 41. The *Tezak* court noted that even more than in the case of a dispute with one's own insurer, if the choice of who should derive a benefit comes down to picking between the injured party and the one who injured him, the benefit of the "gap" should go to the person who paid the premiums to secure the additional insurance coverage, rather than reward or benefit the one causing injury. *Tezak, supra*, 698 N.W.2d at 40. The *Tezak* court also noted that when the common law collateral source rule applies, even the value of gratuitously rendered medical services are recoverable as compensatory damages by an injured party.⁴⁶

⁴⁶ *Tezak, supra*, 698 N.W.2d at 42, *citing Hueper v. Goodrich*, 314 N.W.2d 828, 831 (Minn. 1982), *and Dahlin v. Kron*, 232 Minn. 312, 25 N.W.2d 833 (1950). *Tezak* observed, "[w]e do not see a distinction between the value of services gratuitously rendered in the cases cited above and the \$68,000 debt extinguished by the action of the decedent's health insurer in this case, and we conclude that the \$68,000 difference between the amount billed and the amount paid is covered by the common-law collateral-

Similarly, in *Foust v. McFarland*, 698 N.W.2d 24 (Minn. App. 2005), *review denied* (Minn., Aug. 16, 2005), when Jeff Foust was badly injured in a collision with a semitrailer truck and received a jury award including the full value of his medical care, the tortfeasor asked that the compensatory damages awarded be reduced by the full value of the services, rather than just the amounts actually paid by Foust's health insurer. Foust asked that only the lower figure be deducted as the "payment" and that he be granted the value of the "gap". Mirroring the *Tezak* court's approach, the *Foust* court observed,

The issue is, does the [tortfeasor's] insurance company get a collateral source reduction in the verdict for money [the health insurer] did not pay, but the victim did not have to pay either. The district court ruled that the benefit had to fall someplace and he placed it with the injured victim, who had indirectly paid for the reduction in what the [health] insurance company had to pay, by paying premiums to his [health] insurance company who, in turn, negotiated favorable terms with their subscribers. We conclude the district court was correct in its determination that [defendants] are not entitled to a collateral source deduction for medical charges billed by medical providers but not paid for by the insurance companies and not paid for by the victim.

Id. at 36.⁴⁷

source rule.").

⁴⁷ Judge Minge filed a partial dissent in *Foust*, but did so on the basis that the majority had improperly relied on *Stout* which was "based on claims under the No-Fault Act . . . [not] under the collateral source statute." *Id.* at 37 (Minge, J., concurring in part, dissenting in part). As was previously noted, the similarity in the two statutes has previously been observed by both the supreme court and by the majority in *Foust*. See *Johnson v. Consolidated Freightways, Inc.*, 420 M.W.2d 6608, 614 (Minn. 1988) (regarding "sections 65B.51 and 548.36 . . . [t]he purpose of both statutes is to prevent duplicate recovery."); *Foust, supra*, 698 N.W.2d at 36 ("the applicable statute in *Stout* was the Minnesota No-Fault [Law] . . . not the collateral source statute. . . . However, we find the purpose behind both statutes to have similarities."). This similarity makes somewhat less compelling Judge Minge's colorful epithet about the "surreal world of healthcare billing." See *id.* at 37 (Minge, J., concurring in part, dissenting in part). Read

5. The Common Law Collateral Source Rule has been Widely Applied

The common law collateral source rule has been embodied in Restatement § 920A:

Payments made to or benefits conferred on the injured party from other sources [than the tortfeasor or his liability insurer] are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

RESTATEMENT OF TORTS, 2D, § 920A (2) (2d ed. 1965).

Comment *b* elaborates on the application of the doctrine:

Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.

RESTATEMENT OF TORTS, 2D, § 920A , Comment *b*, at 514 (2d ed. 1965).

The reasons are grounded in a sense of what is just:

If the plaintiff was himself responsible for the [collateral] benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers. The law does not differentiate

in context, Judge Minge was concerned that “the luxury of windfalls” could not benefit an already complex and costly health care delivery system. *Id.* If the windfall must go to someone, however, then neither approach eliminates the “windfall” issue; it either goes to the injured party or the tortfeasor. Moreover, it is not the health insurer or medical provider who are disadvantaged by a “windfall” going to the injured party. The tortfeasor is made to pay it, and he is the one who caused the injury. Many cases characterize this as simply the operation of justice. *See, e.g., Hubbard Broadcasting, Inc. v. Loescher*, 291 N.W.2d 216, 222 (Minn. 1980) (though an injured party may receive a double recovery under the common law collateral source rule, it effects the sound public policy of “requir[ing] that a wrongdoer pay for the full extent of the damages he has caused.”).

between the nature of the benefits, so long as they did not come from the defendant or a person acting for him. One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all the harm he causes, not confined to the net loss that the injured party receives.

Id. (emphasis added). While the comments to the Restatement acknowledge that “[p]erhaps there is an element of punishment of the wrongdoer involved,” *id.*, they also note that it “is regarded as a means of helping to make the compensation more nearly compensatory to the injured party.” *Id.* These principles have been applied in a variety of contexts throughout the United States as part of the common law.

In *Molzof v. United States*, 6 F.3d 461, 464-65 (7th Cir. 1993), the personal representative of a Veteran’s Administration hospital patient was allowed to sue for the value of medical care the patient received even though as a veteran he was entitled to free care from the government. While this amounted to the VA both furnishing free care and paying for the value of the care it rendered as an item of damage, the court analogized the situation to health coverage secured to an injured party under an employment health package secured through the person’s work, saying in either case the full value of the health care should be allowed to the injured person as it was their benefit, not the tortfeasor’s. To similar effect regarding a private hospital that furnished care for free after it committed malpractice is *Rose v. Via Christi Health System, Inc.*, 78 P.3d 798, 807-11 (Kan. 2003), which allowed the plaintiff to receive the services for free and to sue for their value.

In *Pipkins v. TA Operating Corp.*, 466 F. Supp.2d 1255, 1260 (D. N.M. 2006), a tortfeasor brought a motion to offset the injured party’s jury award of medical expenses for the amount by which the plaintiff’s health care provider had “written down” his bill for

medical services under provisions of the federal Medicare law. The court refused, saying that the discount was essentially a gratuitous provision of services that fell within the common law collateral source rule and would be allowed to the plaintiff even if it produced a double recovery to the injured party. A similar ruling regarding state government health benefits was made in *Ellsworth v. Schelbrock*, 611 N.W.2d 764, 767-68 (Wis. 2000), in which a severe car accident caused the injured party to incur \$597,448 of medical expenses, but the tortfeasor sought to limit the plaintiff's recovery of past medical expenses to the \$354,941 sum to which the services had been discounted by virtue of the state's public assistance program through negotiated rates achieved by its department of human services. The court ruled that the subrogated state agency was entitled to \$354,941 and the plaintiff to the "gap" between that amount and the full \$597,448 value of those services.

To similar effect regarding health insurer and provider discounts is *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487, 491-93 (Ariz App. 2006). There the injured party slipped and fell at the defendant's store and the defendant sought to limit plaintiff's recovery of medical expenses to the discounted amount that her medical providers had actually accepted, rather than allow her to recover for the "gap" between that number and the actual value of the services. The court denied the request noting that the tortfeasor should not gain a windfall by virtue of their victim's prudence in achieving cost savings regarding her medical care. This was also the ruling in *Montgomery Ward & Co., Inc. v. Anderson*, 976 S.W.2d 382, 383-85 (Ark. 1998), in which the court said that the partial forgiveness of the injured party's medical bills should not inure to the benefit of the party injuring her, allowing her to claim the "gap." See also *Arthur v. Catour*, 833 N.E.2d 847, 851-62 (Ill. 2005) (premise visitor's

injury from a fall; medical care discounted by the injured party's health insurer). To similar effect in motor vehicle claims is the case of *Acuar v. Letourneau*, 531 S.E.2d 316, 323 (Va. 2000), *on remand* 2001 WL 35815962 (Va. Cir. Ct. 2001), and *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366, 369 (Ill. App. 1999) (auto accident dram shop claim where health insurance discounted medical bills).

The public policy justifications underlying both Minnesota and foreign rulings under Restatement § 920A must not be disregarded. Appellants urge that those principles be supplanted by the reasoning in a 1990 unpublished court of appeals decision called *Mikulay v. Dial Corp.*, 1990 WL 57530 at *3, unpub. (Minn. App., May 8, 1990).

C. The Mikulay Formulation is Non-Precedential and of Questionable Value in Light of Later Published Decisions

1. Mikulay's Reasoning has been Distinguished by Later Published Cases

Mikulay found the claimant's argument that the "write-off [amount] should be treated as a donated service [to be] not persuasive." *Mikulay v. Dial Corp.*, 1990 WL 57530 at *3, unpub. (Minn. App., May 8, 1990)(emphasis added).

Yet in the published case of *Tezak* fifteen years later, the court of appeals noted that under the common law collateral source rule, the injured party may recover from the defendant even gratuitously rendered medical services,⁴⁸ and said expressly that it did "not

⁴⁸ *Tezak, supra*, 698 N.W.2d at 42, *citing Hueper v. Goodrich*, 314 828, 831 (Minn. 1982) (father has right to recover from tortfeasor the special damages for the reasonable value of medical care provided free of charge to the family by Shriner's Hospital for Crippled Children), *and Dahlin v. Kron*, 232 Minn. 213, 45 N.W.2d 833 (1950) (fact that medical attention was rendered gratuitously to the claimant does not preclude the injured person from recovering against the tortfeasor the full value of those

see a distinction between the value of services gratuitously rendered in the cases cited above and the . . . debt extinguished by the action of the [claimant's] health insurer in this case,"⁴⁹ thereby rejecting the underlying assumptions of the *Mikulay* court.

2. **There is a Reason that Unpublished Cases are Designated in that Manner**

The supreme court has pointed out repeatedly the inappropriateness of the reliance by courts at all levels on unpublished decisions of the court of appeals, saying such reliance is

misplaced, both as a matter of law and as a matter of practice. . . . [W]e pause here to stress that unpublished opinions of the court of appeals are not precedential. See MINN. STAT. § 480A.08, subd. 3(c) (2002); *Powell v. Anderson*, 660 N.W.2d 107, 123 (Minn. 2003). The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts. See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 801 (Minn. App. 1993). Unpublished decisions should not be cited by the district courts as binding.

Vlahos v. R & I Constr., 676 N.W.2d 672, 676, n.3 (Minn., Apr. 1, 2004). If unpublished cases have a bearing on a disposition it is for the underlying logic they bring to the question under scrutiny. *Mikulay* cannot claim that character, since *Tezak* rejected is foundational assumption fifteen years later, and the vast bulk of foreign decisions supports *Tezak's* analysis.

3. **Numerous other Unpublished Cases Directly on Point Expressly Reject the Notion that the "Gap" is a "Payment" under the Collateral Source Statute**

services as part of compensatory damages). See also *Wells v. Minneapolis Baseball & Ath. Ass'n*, 122 Minn. 327, 142 N.W. 706 (1913) (the value of nursing services provided by a family member without the expectation of payment is still allowed as an item of special damages to the injured person).

⁴⁹ *Tezak, supra*, 698 N.W.2d at 42 (emphasis added).

The strong weight of all unpublished Minnesota decisions on the issue of whether “write downs” or debt forgiveness are “payments” under the Collateral Source Statute or rather fall into the category of matters that are subject to the common law collateral source rule, is exclusively in the latter camp.⁵⁰

4. **The Collateral Source Statute does not Define “Payment” in a Manner that Implies the Legislature Intended it to Bar a Plaintiff’s Recovery of the “Gap”**

The Collateral Source statute does not define what “payments” are subject to offset treatment, but it does afford an extensive list of definitions for what type of payments are

⁵⁰ See, e.g., *Swanson v. Brewster*, 2009 WL 511747, at *3, unpub., Mar. 3, 2009) (“the collateral source statute does not apply to the gap between the amount of the medical bills and the discounted amount paid by the health insurer because the gap is not a ‘payment’ under the statute.”)(citing *Tezak* for this proposition); *Fischer v. Western Nat’l Mut. Ins. Co.*, 2008 WL 3290064, at *4 (Minn. App., Aug. 12, 2008), *review denied* (Minn., Oct. 22, 2008) (“The collateral-source, statute does not apply to the gap between the amount of medical bills and the discounted amount paid by the health insurer because the gap is not a payment and therefore not a collateral source under the statute . . . [W]hen benefits are not subject to the collateral-source statute, the common-law collateral source rule still applies.”)(citing *Tezak* and *Smith*)(internal quotation omitted); *Davis v. St. Ann’s Home*, 2008 WL 126607, at *5, unpub. (Minn. App. Jan. 15, 2008) (“The [collateral source] statute defines collateral sources as ‘payments related to injury or disability.’ . . . The dictionary definition of payment is ‘an amount paid’ The statute does not provide for amounts billed but written-off [to be included as a type of payment under its scope], and this court cannot supply the omissions of the legislature. . . . We conclude that no money was paid or exchanged when the medical providers wrote-off [a portion of the medical bills], and therefore the [collateral source] statute does not apply. * * * The common law [collateral source] rule explicitly permits double recovery, and, therefore, we reject [defendant’s] argument that [the claimant] impermissibly received a windfall.”)(numerous internal citations omitted); *Picasso v. Progressive Northern Ins. Co.*, 2002 WL 31012240, at * 3, unpub. (Minn. App., Sept. 10, 2002), *review denied* (Minn., Dec. 17, 2002) (Claimant’s “windfall is troubling to this court. But it appears clear from *Stout*. That, as between the insurer and the insured, the insured should prevail with respect to receiving medical expense sums over and above the discount given”).

considered as “collateral sources.” Specifically, the statute provides:

For purposes of this section, “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, subd. 1 (emphasis added).

The question reduces to this: is a discount, “write down,” or forgiveness of a medical bill a payment made to or on behalf of an injured plaintiff? Certainly the actual “amount paid” is a payment to or on behalf of an injured plaintiff, so the first dictionary definition of “payment” makes sense in this application.⁵¹

Forgiveness of debt as a “payment[] . . . made to the plaintiff, or on the plaintiff’s

⁵¹ See *Swanson v. Brewster*, 2009 WL 511747, at * 3, unpub. (Minn. App., Mar. 3, 2009), quoting AMERICAN HERITAGE DICTIONARY 1291-92 (4th ed. 2000), quoting *Davis v. St. Ann’s Home*, 2008 WL 126607, at *5, unpub. (Minn App., Jan. 15, 2008) (“The dictionary definition of payment is ‘an amount paid’ and pay is defined as ‘to give money to in return for goods or services rendered.’”).

behalf” does not make sense in this application. Forgiveness of debt is an un-payment or the opposite of a payment.

The Collateral Source Statute lists “public program [s] providing medical expenses, disability payments, or similar benefits,” in subdivision 1(1). The positive reference to “providing medical expenses” strongly implies that payments in this context means “to give money to” as in the first dictionary definition of payment described in the notes above. Subdivision 1(2) of the statute includes in the definition of what a “collateral source” is under the statute, “accident . . . or liability insurance that provides health benefits,” and again the provision of health expenses implies a positive rather than a negative benefit.

The most germane definition to our case is likely contained in subdivision 1(3) of the Collateral Source Statute, which defines payments as those made by “contract or agreement of a group . . . to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services.” MINN. STAT. § 548.36, subd. 1(3). HealthPartners provided a group health insurance agreement promising to reimburse the costs of hospital, medical . . . or other health care services.” *Id.* If HealthPartner’s agreement was to “pay for” or “reimburse” health costs, that sounds much more like an affirmative act of payment, than HealthPartners “providing” forgiveness of indebtedness.

Logically, if HealthPartners arranging with doctors to get a discount on medical bills is “payment” by HealthPartners and HealthPartners has a subrogation interest for its “payments,” then while HealthPartners only sought \$17,643.76 - - what it “paid” - - back from Plaintiff’s recovery against the tortfeasor, HealthPartners was arguably possessed of a right to get back the full \$62,259.93 value it had paid by arranging debt forgiveness. Why

was its subrogation claim only for \$17,643.76 if it actually had “paid” \$62,259.93? HealthPartners didn’t think or act like it owned more than what it had actually expended as “amounts paid,” and that is what it assigned to the tortfeasor’s insurer. In the real world, the health insurers like HealthPartners only possess the right to get back what they “actually pay” and not what they arrange to get forgiven by medical providers. How does the Collateral Source Statute - -which is silent on the concept of write-downs - - apply more broadly to health insurers than health insurers themselves consider it to apply?

The definition sections of the statute do not easily comport with the strained definition that the Appellants seek to apply.

5. Sound Public Policy Supports the Application of the Common Law Collateral Source Rule to the “Gap”

In *American Family Insurance Group v. Kiess*, 680 N.W.2d 552 (Minn. App. 2004), the court of appeals said that as to the issue of the amount of bills that may be submitted in a claim, since the primary purpose of the Collateral Source Statute is to avoid double recovery by a plaintiff,⁵² and not “to prevent respondent from recovering the cost of his [care] from both Blue Cross and [the defendant insurer],”⁵³ the plaintiff held the right to make a

⁵² 680 N.W.2d at 553, citing *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990).

⁵³ *Id.*, citing *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108, 112-14 (Minn. 2002) (“a no-fault insurer has a duty to provide basic economic loss benefits to reimburse an injured person’s loss even when the injured person is entitled to compensation for the same loss from a different source” and a “reduction in the amount billed, whether obtained pursuant to a settlement agreement or a health insurer’s fee schedule, does not modify the amount of medical expense incurred . . . [so] therefore . . . the medical expense incurred by [the claimant] is the full amount reflected on his medical bills, and not the amount that was paid in satisfaction of those bills as the result of collateral transactions involving [the

claim for the “gap” as an item of compensatory damages.⁵⁴

For the policy reason described earlier - - rewarding the plaintiff’s prudence in purchasing additional insurance sources, rather than rewarding the tortfeasor by granting him a discount for the harm he caused - - and for other valid reasons,⁵⁵ the “gap” should belong to the injured party and not inure to the benefit of the tortfeasor.

Indeed, the court of appeals in our case - - while acknowledging “the logic in appellants’ assertion” about the unattractive nature of granting a “windfall” to anyone,⁵⁶ also

recognize[d] the public policy the common-law collateral-source rule advances. The common-law rule reflects the fact that a “tortfeasor’s responsibility to compensate for all harm that he causes [is] not confined to the net loss that the injured party receives.”⁵⁷

The tortfeasor is responsible at law for the total loss, and that means the full fair market value of the medical care needed due to his negligence, not its discounted value. Such a rule encourages responsible conduct in personal interaction, rather than being able to cause harm

claimant’s] health insurer.”).

⁵⁴ *Kiess* was affirmed on other grounds by the supreme court the following year. *American Family Insurance Group v. Kiess*, 697 N.W.2d 617 (Minn. 2005), *aff’g*, 680 N.W.2d 552 (Minn. App. 2004).

⁵⁵ Another frequently given justification is to “punish” the tortfeasor for causing the injury. See *Hubbard Broadcasting, Inc. v. Loescher*, 291 N.W.2d 216, 222 (Minn. 1980) (though an injured party may receive a double recovery under the common law collateral source rule, it effects the sound public policy of “requir[ing] that a wrongdoer pay for the full extent of the damages he has caused.”).

⁵⁶ *Swanson v. Brewster*, 2009 WL 511747, at *4, unpub. (Minn. App., Mar. 3, 2009).

⁵⁷ *Id.*, quoting *Duluth Steam Coop. Ass’n v. Ringsred*, 519 N.W.2d 215, 217 (Minn. App. 1994).

at “wholesale” prices.

The result urged by the Appellants would have the supreme court reject these rulings.

The other basis urged for this departure is the reasoning in a Florida case cited by Appellants.

D. Foreign Cases do not Share Minnesota’s History of Common Law or they Address a Broad Definition of “Payment” only as *Dicta* while Construing Laws other than Collateral Source Statutes.

As has already been established, the Collateral Source Statute is to be narrowly construed to the extent that it is in derogation of the common law collateral source rule.

In support of their argument for an expansive reading, Appellants look to several foreign cases, including a Florida decision called *Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005).⁵⁸ While the Florida collateral source statute has some language similar to Minnesota’s statute, there are important differences in the common law of the two states. The reason that is so important to the application of *Goble* in Minnesota, is that the states follow their respective common law collateral source rules anytime their collateral source statutes don’t apply. If Florida’s underlying common law is different, it will lead to markedly different results and as a result limits the utility that *Goble* thus presents as an interpretive aid to the Court. In Florida, as the lengthy concurrence of Justice Bell in *Goble*, points out, they follow a different common law rule:

Florida has followed the rule that damages awarded to a plaintiff should be equal to and precisely commensurate with the loss sustained. Appellee’s loss for past hospitalization expenses was the sum of \$35,000 [which plaintiff’s medical-services provider agreed to accept as full payment for plaintiff’s past hospitalization expenses] and not the original greater sum.

⁵⁸ For convenience, the decision is attached at RA-11.

Goble, supra, 901 So.2d at 833, n.1 (Bell, J., concurring specially), *quoting Hollins v. Perry*, 582 So. 2d 786, 786-87 (Fla. App. 1991)(Diamantis, J., concurring specially).

That is a remarkably different climate than the common law rule in Minnesota which expressly allows double payments. Florida reached a different result because it has a different environment for its common law and a different language for its statute. The *Goble* decision is unavailing for Appellants here.

Similarly, the definition of “payment” used in the other foreign court decisions cited by Appellant is equally unhelpful to what the term should mean in Minnesota’s Collateral Source statute. In *Bryant v. Ohio Cas. Ins. Co.*, 378 N.J. Super. 603, 876 A.2d 844 (N.J. Super. 2005), while the court did indeed reference a broad dictionary definition of “payment,” *id.* at 606, 876 A.2d at 846, the case was decided without the use of this part of the definition, as the matter involved a statute of limitations for medical payments under the state’s automobile insurance law, and the court ruled that “payment” was accomplished only by “place[ment] in the United States mail in a properly addressed, postpaid envelope” of a check. *Id.* at 608, 876 A.2d at 847. An expansive definition of “payment” as embracing the discharge of a debt was thus *dicta* in *Bryant*.

In *Bussner v. United States*, 130 F.2d 537 (3d Cir. 1942), the definition of “payment” was again one that embraced the full satisfaction of a debt, *id.* at 538-39, but the case involved a partial payment by a taxpayer of a tax obligation, declaring the general rule that when a “payment” is made by a debtor and is accepted by the creditor, it discharges the full debt owed to the creditor. While certainly a logical application to disputed obligations under

contracts for the sale of goods, bankruptcy discharge,⁵⁹ or tax obligations, it has no inherent meaning for treatment of the “gap” between a payment and the full bill in the context of a collateral source statute. In *Parker v. Artery*, 889 P.2d 520 (Wyo. 1995), while noting that “payment” includes “the discharge of a debt,” *id.* at 527, the broad definition is again *dicta*, as the issue was what constituted “payment” for the equivalent of Minn.R.Civ.P. 67.01, for payment of funds into court for allocation among multiple claimants, and thus the court’s holding addressed funds actually held under Wyoming’s statutory equivalent to that rule, *id.* at 528, where any “gap” would be meaningless. Finally, in *Lawson v. Kentucky Retirement Systems*, - - S.W.3d - -, 2009 WL 1440744 (Ky. 2009), again the broad definition is *dicta*, as the case focused on a retirement plan beneficiary’s election of an improper payment method, making the discharge-of-debt definition of payment superfluous to the case’s outcome. *Id.* at 1. The issue in *Lawson* was how much time an employee had to elect a form of payment, and the court’s ultimate decision on a trigger date was solely on when a “check . . . is delivered [or] . . . in the possession of the person to whom it is made payable.” *Id.* at * 2. Whether a debt was discharged had no bearing on the case’s outcome.

While certainly some foreign cases have quoted a broad dictionary definition of “payment” that includes the discharge of debt, they are readily distinguishable from our circumstances. Only *Goble* involved construction of a collateral source statute, but that

⁵⁹ Such is the nature of the case of *In re Delta Airlines, Inc.*, 381 B.R. 57, 68 (Bankr. S.D.N.Y. 2008), also cited by Appellant. The case ruled that the term “paid” in a tax indemnification agreement was broad enough to include satisfaction of a stipulated loss value to lenders occasioned by the premature termination of leveraged, leased aircraft as part of an airline’s chapter 11 plan),

state's history on the common law collateral source rule is the opposite of Minnesota's common law rule. The difference of that common law history makes *Goble* inapposite to resolve how Minnesota's common law rule would operate by default in the absence of a statutory definition of "payment" that expressly articulates this "discharge of debt" definition. The other foreign cases referenced by Appellant all cite the broad definition of "payment" as *dicta* and none of the cases involve a collateral source statute. The foreign cases are thus of marginal utility. Minnesota decisions construing what is a "payment" under Minnesota law for purposes of the Collateral Source statute should direct this court.⁶⁰

E. The Trial Court Ruling was Proper

Here, the jury awarded as the value of medical care \$62,259.30⁶¹ - - approximately the full value of all care received - - and HealthPartners paid \$17,643.76⁶² for \$62,259.93⁶³ worth of medical services. The trial judge ruled that \$17,643.76 - - less the value of \$4,570.64 of premiums paid by the Plaintiff-Respondent in the two years before the claim arose - - for the

⁶⁰ Appellant cites to the unpublished case of *Raddatz v. Gustafson Fin. Group Ltd. of St. Paul*, 1993 WL 515806, at *2, unpub. (Minn. App., Dec. 14, 1993) (A-90), as evidence of the adoption by the Minnesota Court of Appeals of this expansive definition of "payment." *Raddatz* is unpublished. *Raddatz* did not construe the Collateral Source statute. *Raddatz* construction of "payment" was in the context of when performance was due under a contract requiring payment of a promissory note, making the reference to "payment" into *dicta* in that unpublished decision.

⁶¹ See Special Verdict, Ex. D, *printed at* Appellants' Appendix at A-38 to -39.

⁶² *Id.*, *printed at* Appellants' Appendix at A-43. Respondent Swanson had also paid \$1,169.80 as co-pays on those services. *Id.*

⁶³ See Detailed Analysis of Swanson Medical Bills, Ex. 1, *printed at* Appellants' Appendix at A-43, and attached bills Ex. A-J, *printed at*. Appellants' Appendix at A-44 to -80.

HealthPartners' coverage,⁶⁴ or \$13,073.12,⁶⁵ should be the net collateral source deduction.

Subdivisions 2(2) and 3 of the Collateral Source Statute dictate this two year add-back of premium costs to adjust the calculation of the actual or net collateral source deduction or off-set.⁶⁶

Since HealthPartners could only assign what it owned - - the right to get \$17,643.76 back - - that amount (less the two year premium costs) is the proper amount of the offset, even though the result is to give the Respondent the full value of those services worth \$62,259.30. The ultimate result reflects the legal reality that the injured party owns the difference between the market place value of medical services and what a health insurer has actually paid for them.

II. It is not for the Courts to Supply Terms that the Legislature Failed to Enact

The court of appeals below noted that the "legislature's failure to define 'payment' or 'paid' in Minnesota's collateral source statute has created uncertainty and led to inconsistent decisions in this court." *Swanson v. Brewster*, 2009 WL 511747, at *4, unpub. (Minn. App., Mar. 3, 2009). The truth is that the only inconsistent decision is the

⁶⁴ See Letter from Ruth Rathbun, Dec. 7, 2007, Ex. 3, *printed at* Appellants' Appendix at A-83 to - 84.

⁶⁵ See Order for Judgment, Apr. 10, 2008, *printed at* Appellants' Appendix at A-14.

⁶⁶ MINN. STAT. § 548.36, subd. 2(2), subd. 3 (defining a net collateral source deduction to include a subtraction from the collateral source offset for the "amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate family for the two years period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.").

unpublished *Mikulay* case that was likely superseded by *Tezak*.

In his dissent in *Tezak*, then-Judge Dietzen stressed that statutes in derogation of the common law like the Collateral Source Statute are to be “strictly construed,” *Tezak, supra*, 698 N.W.2d at 43 (Dietzen, J., dissenting), but he worried about a “financial windfall” to the injured party. Before assuming his responsibilities at the supreme court, Judge Dietzen also wrote the majority decision in *Davis v. St. Ann’s Home*, 2008 WL 126607, unpub. (Minn. App., Jan. 15, 2008). There he remarked that the collateral source “statute does not provide for amounts billed but written off” to be treated as payments, and he cautioned that “this court cannot ‘supply the omissions of the legislature.’” *Id.* at * 5, quoting *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001)(further quotation omitted). *See also State v. Moseng*, 254 Minn. 263, 269, 95 N.W.2d 6, 11-12 (1959) (when a question of statutory construction involves a failure of expression rather than an ambiguity of expression, “courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature.”)

The court of appeals decision in this case,⁶⁷ seems to invite the supreme court to provide a cure for the “legislature’s failure to define ‘payment,’” *Swanson, supra*, 2009 WL 511747, at * 4, but that type of super-legislating by the courts does not advance respect for the rule of law.⁶⁸ There are sound reasons why a write-down, discount or debt forgiveness

⁶⁷ The court of appeals’ decision in *Swanson* was written by Judge Bjorkman, who was the advocate for the defense in *Davis*, which was written by then-Judge Dietzen.

⁶⁸ Amici - - the MJUA, MDLA and Insurance Federation of Minnesota - - push this invitation further, urging the Supreme Court to rule that if set-offs are held not to be a collateral source, the court should “conclude that the amount billed does not establish the

have never been viewed as a “payment” under the strictly-to-be-construed Collateral Source Statute. Those should continue to be enforced. The apparently reluctant decision of the court of appeals should be affirmed. It was right on the law.

CONCLUSION

The trial court properly resolved the issue of collateral source offsets based on the evidence before it in the record and based on the arguments advanced to it, properly applying the precedents and principles established by the supreme court in *Stout* and the subsequent court of appeals cases that have followed in its wake.

While the liability insurer for Appellants took an assignment from HealthPartners, it could not acquire rights beyond those that HealthPartners had to assign. HealthPartners’ interest is only in the amounts it actually paid for the services, not in their actual value. The liability insurer for Appellants could thus not offset the full value of the services, only what HealthPartners had paid. That is what the trial court did here, and that was correct.

No principled argument supports abandonment of repeated and long-standing policies of the Minnesota courts to allow the benefit of the “gap” (between the actual value of medical services and what a health insurer was able to pay for them under a the contractual terms of a group policy discount) to go to the injured party rather than to reward the tortfeasor who caused the injury.

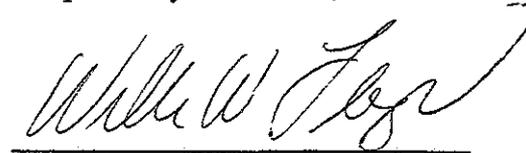
The “gap” falls outside the scope of the Collateral Source Statute and that should be the supreme courts ruling in this case.

‘reasonable value’ of the medical services received.” *Joint Amicus Brief* at 14. This issue was not raised by Appellant below, and has no place in the resolution of the instant claim.

The supreme court should affirm the result at the court of appeals and trial court for the reasons stated herein.

Respectfully submitted,

DATED: July 17, 2009



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IN SUPREME COURT

No.: A08-806

David Swanson,

Plaintiff-Respondent,

vs.

Rebecca Brewster and
Christopher Brewster,

Defendants-Appellants.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional front. The length of this brief is 1,026 lines and 12,424 words. This brief was prepared using Corel WordPerfect 12.

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