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CASE NO. A08-1315

State of Minnesota
In Court of Appeals

LARRY BENJAMIN JOHNSON,

Appellant,

vs.

BRIAN CLETUS CUMMISKEY AND
MARGARET KATHRYN CUMMISKEY, AND
ILLINOIS FARMERS INSURANCE COMPANY,

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. UIM cases involving out-of-state residents are inapposite to the present case.

Respondent argues that Minnesota courts have declined to reform insurance contracts when the coverage requested is not required by the Minnesota No-Fault Act ("Act"). Respondent cites three cases to support this argument, but all three can be distinguished because they all involve non-Minnesota residents. In all three cases, the court held that the out-of-state policies would not be reformed because Minnesota law does not require a non-resident's UIM coverage (or uninsured motorist coverage), under a policy issued in another state, to comply with Minnesota law.

In *Aguilar v. Texas Farmers Ins. Co.*, 504 N.W.2d 791 (Minn. Ct. App. 1993), a Texas resident was injured in an accident in Minnesota and claimed UIM benefits from his mother's auto policy on her Texas auto insured by a Texas company. The district court awarded UIM benefits consistent with Minnesota law, but this court reversed, holding that an auto policy, issued to an out-of-state insured by an insurer not licensed to do business in Minnesota, was not required to include the same "add-on" UIM benefits required of insurers issuing policies in Minnesota. *Id.*, at 794.

This followed *Hedin v. State Farm Mut. Auto. Ins. Co.*, 351 N.W.2d 407 (Minn. Ct. App. 1984), in which Indiana residents, driving a borrowed car owned by a Minnesota resident, were involved in an accident in Minnesota. They claimed *uninsured* motorist benefits from the auto policies on their Indiana autos, insured by Indiana companies, in the minimum amount required by Minnesota law. The court held that the insurance

company, which was licensed to sell insurance in Minnesota, was not required to "write up" uninsured motorist coverage issued in another state (Indiana) to the minimum required by Minnesota when the non-resident insureds were involved in an accident in Minnesota. *Id.*, at 409.

Finally, in *Warthan v. American Family Mut. Ins. Co.*, 592 N.W.2d 136 (Minn. Ct. App. 1999), a Wisconsin couple was involved in an accident while driving their Wisconsin auto in Minnesota, and brought suit against their Wisconsin insurer, seeking reformation of their policy to provide UIM benefits in accordance with Minnesota law. Citing *Hedin* and *Aguilar*, the court held that when a nonresident is injured in a Minnesota traffic accident, Minnesota law does not require that non-resident's UIM (or uninsured) coverage, under a policy issued in another state, to be reformed to comply with Minnesota law. *Id.*, at 139.

Respondent attempts to draw an analogy between cases involving non-resident UIM benefits and the present case involving a Minnesota resident's UIM benefits purchased in conjunction with a motorcycle policy. Respondent urges the court to treat the Minnesota resident (Appellant) as it has treated non-residents. The analogy does not work because UIM benefits purchased by non-residents do not need to comply with Minnesota law. The Act provides:

> "Subdivision 1. Filing. Every insurer licensed to write motor vehicle accident reparation and liability insurance in this state shall, on or before January 1, 1975, or as a condition to such licensing, file with the commissioner and thereafter maintain a written certification that it will afford at least the minimum security provided by section 65B.49 to all policyholders, *except that in the case of nonresident policyholders it need only certify that security is provided with respect to accidents occurring in this state. . . .*" (emphasis added) Minn. Stat. § 65B.50.

The "security" referred to in Minn. Stat. § 65B.50 includes only basic-economic loss and residual-liability coverages, not UIM coverage. If non-residents purchase UIM coverage, it does not need to comply with Minnesota law. *See Schossow v. First Nat. Ins. Co. of America*, 730 N.W.2d 556, 559 (Minn. Ct. App. 2007).

The same is not true of UIM coverage sold to a Minnesota resident in conjunction with a motorcycle liability policy. Insurance coverage sold to Minnesota residents must comply with the Act. In the present case, Appellant is a Minnesota resident and was involved in an accident that occurred in Minnesota. The Policy was written in Minnesota on a vehicle located in this state. As a result, the Policy must comply with the No-Fault Act, including Minn. Stat. § 65B.49, Subd. 4a, since it includes UIM benefits.

2. Appellant purchased UIM coverage and is entitled to receive the full limit.

Defendant attempts to avoid its liability under Subdivision 4a by citing *Mutual Service Cas. Ins. Co. v. League of Minnesota Cities Ins. Trust*, 659 N.W.2d 755, 762 (Minn. 2003) (the purpose of the No-Fault Act was not to provide universal relief for uncompensated motorists). The court in that case held that, because a marked patrol car is not a "motor vehicle" for the purposes of the Act, and so not required to be insured under the Act, a pedestrian who was injured as a result of being struck by the car may not recover basic economic loss benefits from the city's insurer. In that case, the pedestrian's insurer sued the city's insurer for payment of medical expenses incurred as a result of the accident.

Mutual Service involves a very different set of facts, and is easily distinguished, from the present case. In the present case, even though a motorcycle is not a "motor vehicle" for purposes of the Act, and a liability policy issued on a motorcycle is not required to include UIM coverage, Appellant personally purchased and paid for UIM coverage and is now claiming those UIM benefits in compensation for his injuries. Appellant is entitled to receive the full limit of UIM benefits available from the Policy as provided by Minnesota law.

3. All UIM coverage sold in Minnesota must comply with the Act.

In his initial Brief, Appellant states, "[i]t is possible for a person who does not even own a vehicle to purchase UIM coverage for protection in the event of injury while walking, riding a bike, riding as a passenger, or driving a vehicle owned by someone else." Appellant's Brief p. 9. Respondent calls this an "unfounded hypothetical scenario" and complains that it is not mandated by the Act. Respondent's Brief p. 17. Appellant acknowledges that it is hypothetical and not mandated by the Act, but disputes that it is unfounded. Certainly an insurer would be happy to sell UIM coverage to a person who did not own a car, but intended to drive a rental car, for example. If the insured were injured by another vehicle, any UIM benefits paid should be add-on benefits, even though that UIM coverage was originally optional coverage.

This is not an inconsistent reading of the Act, as Respondent alleges. Respondent's Brief pp. 17-8. Appellant's argument is entirely consistent. Appellant agrees with Respondent that the Act does not require UIM coverage be included in a

liability policy sold for a motorcycle. However, if UIM coverage is included, it must comply with the requirements of Minn. Stat. § 65B.49, Subd. 4a.

CONCLUSION

Appellant Larry Johnson respectfully requests this court to reverse the trial court's decision in this case.

Dated this 3 day of October, 2008.

Respectfully submitted,

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