

A09-173**A09-522****STATE OF MINNESOTA
IN COURT OF APPEALS**

CURTIS R. GRAFF,

Respondent (A09-173),
Appellant (A09-522),

vs.

ROBERT M. SWENDRA AGENCY, INC.,

Appellant (A09-173)
Respondent (A09-522).

APPELLANT – RESPONDENT’S REPLY BRIEF

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ARGUMENT

I. GRAFF'S RELEASE OF AMERICAN FAMILY ALSO RELEASED SWENDRA, ITS AGENT.

As an agent for the insurer, acting within the scope of his authority, Swendra bound American Family to provide UIM coverage. Because Swendra's representations created a legally enforceable contract, his alleged negligence in failing to procure coverage from American Family is of no legal consequence. It caused no harm. Because American Family is the only liable party, moreover, Graff's settlement with American Family ended the case.

Graff responds to Swendra with two core arguments: 1) Swendra was not an agent for American Family acting within the scope of his authority (Graff's Brief pp. 15, 17-18, 22-23); and 2) Graff has a separate cause of action against Swendra for "negligence" in failing to procure requested insurance, regardless of whether he bound coverage (Graff's Brief, pp. 13-14, 18-21, 28-32). In either case, Graff can settle with American Family and maintain his suit against Swendra.

Swendra's reply to the agency argument is two-fold: First, Graff never disputed Swendra's agency status and authority to bind American Family before or during trial. Second, Graff is bound by the stipulation he made at trial that the Robert Swendra Agency was "acting in the scope of its agency agreement with American Family Insurance at the time of its negligence." (AAD14; AAP53). In

short, Swendra had both the authority to bind coverage and based upon the jury findings, did so.

Swendra's reply to Graff's argument that he can bring a separate "negligence" claim against Swendra is, essentially, that Graff fails to acknowledge or understand the difference between contractual liability and vicarious liability. Graff's argument, and the law he cites, addresses vicarious liability. Here, with full authority as American Family's agent, Swendra made American Family contractually liable to Graff. Because of that contractual liability, American Family is responsible for paying Graff's claim. Because American Family is responsible for paying Graff's claim, Swendra neither failed to procure coverage nor did he cause Graff any harm. There is no separate cause of action against Swendra.

Graff also makes a number of miscellaneous arguments which are either irrelevant or become irrelevant once the above two issues are resolved: e.g. the *Pierringer* release preserved Graff's claim against Swendra; Swendra failed to make a cross-claim against American Family; the jury made findings on Swendra's causal negligence; and finally, that Swendra contested whether he made representations that bound coverage. Graff also rejects Swendra's circular indemnity argument because American Family had no indemnity obligation to Swendra. All of these arguments are either irrelevant or unsupported.

1. Swendra had authority to and did bind coverage as American Family's agent.

Graff first argues Swendra was not an agent for American Family but, in essence, a broker. Pointing to Swendra's written "agent agreement" with American Family, Graff argues Swendra was an "independent contractor" operating as a "separate and distinct legal entity." (Graff's Brief, pp. 1, 15, 17-18, 22-23).

Swendra's response is two-fold: First, Graff has never before disputed Swendra's agency status or his authority to bind. Second, Graff stipulated at trial that the Robert Swendra Agency was "acting in the scope of its agency agreement with American Family Insurance at the time of its negligence." (AAD14; AAP53). For either of these reasons, Swendra's agency status and authority to bind are established for the purposes of this appeal.

Graff never disputed Swendra's agency before or during trial. Graff's own expert twice agreed that Swendra was acting as an American Family agent. (T.312, 314). Even in his post-judgment argument, Graff agreed "that Mr. Swendra was within the scope of his agency agreement at the time of the transaction." (T.583). Indeed, Graff argued that Swendra's agency status was irrelevant to the postjudgment arguments. (T. 584-585). Graff also acknowledges in his Response Brief that "American Family had potential

liability for vicarious liability based on actions of Appellant Swendra Agency,....” (Graff’s Brief, p. 25).

Graff not only failed to dispute Swendra’s agency status at trial, he affirmatively alleged it in his complaint. Graff made two claims. First, American Family was directly liable to him because its agent, Swendra, bound umbrella UIM coverage by agreeing to provide it (or by representing the umbrella included UIM coverage). (AAP2 and AAP4; Complaint, pp. 2, 4); alternatively, Swendra was directly liable to Graff because he was negligent in failing to procure UIM coverage from American Family as he had promised. (AAP3; Complaint, p. 3).

Graff dropped his first claim when he settled with American Family. Swendra then moved for dismissal, arguing that if he had made such representations, he bound coverage, and could not be individually liable. The trial court took the motion under advisement, however, and the case proceeded to trial on Graff’s remaining negligence claim against Swendra.

Contrary to Graff’s appellate argument, the factual issue at trial was not whether Swendra failed *to procure* UIM coverage. That was never disputed. What Graff had to prove was that he requested, and Swendra agreed to provide, UIM coverage. (See T.131-134, 219, 227). Only if Graff

requested UIM coverage and Swendra agreed to provide it would Swendra have a duty to procure it. Swendra denied he discussed UIM coverage with Graff before the accident. Had the jury agreed with Swendra, Graff's claim against him would have failed, and Swendra's contract argument would have been moot. In order to preserve his contract defense in the event the jury disagreed, however, Swendra sought a special verdict question on his agency status. The proposed verdict read as follows:

8. Was Robert Swendra Agency, Inc. acting in the scope of its agency agreement with American Family Insurance at the time of its negligence?

(AAD14; Postverdict Decision, p. 6 and AAP53; Swendra's Requested Special Verdict). The trial court expressly advised Graff that if agency was disputed, he had better put in whatever evidence he had to the contrary:

MR. MONTILINO: About the agency part that I'm not going to go into in this case because it's not part of what we are trying to prove.

MR. GHERTY: I don't understand quite frankly.

MR. MONTILINO: I'm trying to prove a negligence claim. I'm not trying to prove agency or anything else.

THE COURT: No, no. ***But Terry [Gherty] is right. That sounds – that's a killer if he's right. So, yeah, I think you need to develop that. I think you need to develop a record during this trial. I mean in essence it's what he's been doing for half, but yeah, I mean – but now is the time to develop it.***

MR. MONTILINO: It just seems weird because the jury is not going to decide that issue on the verdict.

THE COURT: ***No, no, I'm going to decide that on a legal basis.***

MR. MONTILINO: Okay.

THE COURT: ***And the facts based on the testimony and so forth***

and then the legal submissions afterwards. I'm just thinking that is going to be a pure legal call and there's not going to be a factual dispute, I wouldn't think.

MR. MONTILINO: All right.

THE COURT: Obviously you guys make your own call.

MR. MONTILINO: Well, I'll just have to do some additional stuff with Swendra that I probably wouldn't do ordinarily.

THE COURT: *Yeah, I think you need to develop that.*

(Emphasis added) (T.339-340).

That evening the parties agreed to stipulate on the agency question.

The stipulation was put on the record the following morning:

MR. GHERTY:Your honor, when we finished with Mr. Swendra yesterday when our business day ended *I at that moment thought that this morning I would ask many questions about his agency role with American Family. We've also reached a stipulation of fact and I would just want to record that now because I will be asking Mr. Swendra very few questions in light of this stipulation. So in our work last evening we agreed that we will stipulate that Robert Swendra Agency, Inc. was acting in the scope of his Agency Agreement with American Family Insurance at the time of the transactions with Curtis Graff.*

THE COURT: And more specifically *that relates to what has previously been discussed as question number 8 on the previous drafts of the special verdict form.*

MR. GHERTY: Yes. Your honor.

THE COURT: I have something for the record based on our discussions yesterday, the points I made, but anything else at this time?

MR. MONTILINO: I would agree a stipulation has been entered as outlined by defense counsel.

(Emphasis added) (T.457-460; ADD48-51; Transcript Excerpt).

As this exchange makes clear, the purpose of the stipulation was to establish Swendra's agency without having to take additional evidence and without having to submit the question to the jury. The parties agreed there was no point to informing the jury. (T.339-340; 460). With the agency issue resolved, Swendra's contract defense would be a question of law in the event the jury agreed with Graff's version of the facts.¹

Graff now tries to qualify the stipulation by arguing "there was not a specific stipulation that he [Swendra] was operating as an agent." (Graff's Brief, p. 23). Rather, the stipulation refers to Swendra acting "within the scope of his agency agreement...." According to Graff, this means the "agent agreement" (Graff's Brief, RA1-8), which designates Swendra as "an independent contractor for all purposes" and not an "employee." (T.457-458; Graff's Brief, p. 15, RA4).

Graff knows full well the point of the stipulation was to establish Swendra's agency and binding authority. Graff's attempt to contest agency using a partial record is particularly disingenuous when, by stipulating, he knowingly prevented a factual record from being developed and knowingly caused the proposed jury verdict to be withdrawn. (T. 547). Graff is bound

¹ The evidence is undisputed that American Family would have provided Graff with UIM

by the stipulation. A stipulation made by a party at trial, absent a showing of fraud, mistake, or some other justifiable reason for disregarding it, is binding on the party both at trial *and on appeal*. (Emphasis added) *Amundson v. Cloverleaf Memorial Park Association*, 221 Minn. 353, 358, 22 N.W.2d 170, 172 (1946).

Graff's reliance on the written "agent agreement" is, in any event, both misplaced and misleading. (Graff's Brief, RA1-8). For one thing, the stipulation refers to Swendra acting within the scope of his "agency agreement" as a whole, and not any particular document. Indeed, as the written "*agent agreement*" makes clear, Swendra's actual authority is primarily determined by other documents. (Emphasis added). Swendra's authority to "obligate the company," for example, includes that "expressly authorized under the rules and regulations of the Company or previously authorized in writing by the Company." (Graff's Brief, RA2). In short, the scope of Swendra's "agency agreement" is only partly defined by the written "agent agreement." For this reason alone Graff's reliance on the "agent agreement" must be rejected.

coverage had it been requested. (T.433).

In addition, the written “agent agreement” expressly establishes an agency relationship. While Swendra is not an employee of the company, he is an agent. The “agent agreement” is entitled: “American Family *Agent Agreement*.” (Emphasis added) (Graff’s Brief, RA2). It defines “you” as “the *agent* named on page one of the agreement.” (Emphasis added); *Id.* It further states, referring to Swendra, that “[y]ou shall not represent the Company *as agent* under this agreement *until* you are licensed to act as an insurance agent....” (Emphasis added) *Id.* Swendra’s agency, moreover, is exclusive. He may only sell American Family products. *Id.*

In summary, Graff never disputed Swendra’s agency or his authority to bind American Family. Indeed, he alleged Swendra’s authority to bind in his complaint. In addition, Graff stipulated at trial, in lieu of testimony and in lieu of a jury question, that Swendra “*was acting in the scope of his Agency Agreement with American Family Insurance at the time of the transactions with Curtis Graff.*” (T. 457-8). Finally, even if one considers the partial record and in particular the written “agent agreement,” Swendra’s “agent” status is clearly established.

- 2. Graff has no claim against Swendra when American Family is contractually obligated to provide coverage.**

Graff next argues that nothing prevents him from suing an agent for his or her own active negligence when it causes the plaintiff harm. As a general proposition, this is true. What Graff fails to understand or acknowledge throughout his brief, however, is that causal harm does not exist when the agent contractually obligates the principal to cover the loss. In other words, Graff confuses vicarious liability with contractual liability. (See e.g. Graff's Brief, p. 25: "American Family had potential liability for vicarious liability based on actions of Appellant Swendra Agency,..."). In this case, as in *Frank v. Winter*, 528 N.W.2d 910, 914 (Minn. App. 1995); *Morrison v. Swenson*, 274 Minn. 127, 135, 142 N.W.2d 640, 645 (1966); *Eddy v. Republic Nat. Life Ins. Co.*, 290 N.W.2d 174, 176-177 (Minn. 1980); *Anderson v. Minnesota Mut. Fire and Cas. Co.*, 399 N.W.2d 233 (Minn. App. 1987); *Julien v. Spring Lake Park Agency, Inc.*, 283 Minn. 101, 104-105, 166 N.W.2d 355, 357 (1969); and *Reserve Ins. Co. v. Netzer*, 621 F.2d 314 (8th Cir. 1980), Swendra's representations contractually obligated American Family to provide coverage. Graff has never disputed this. As a result, Swendra caused Graff no harm. See e.g. *Paull v. Columbian Nat. Fire Ins. Co.*, 171 Minn. 118, 213 N.W.2d 539, 540 (1927). (Insurance contract created by agent's representations "defeats any right of recovery of either

plaintiff against [the agent]. ... The omission or mistake of [the agent] to make the agreed entries upon the policy did no harm to either plaintiff, for in law the company was bound as if the proper entries had been made.”).

American Family has a contractual obligation to pay the claim. Because he caused Graff no harm, Swendra cannot be liable to him. Swendra’s alleged “negligence” in failing to procure the requested coverage is a matter strictly between him and his principal. It is of no legal consequence to Graff.

Graff’s extensive discussion of vicarious liability simply has no application here. Again, Swendra does not deny that in the vast majority of claims involving vicarious liability the agent could be liable as well. An agent can commit torts that cause harm to a third party and subject the agent to suit, even when the principal is vicariously liable. There are an untold number of circumstances under which this would be the case. If, for example, Swendra did not have binding authority, or made promises to the insured his principal could not keep, then this case would be one of them. An insured has no claim against an agent, however, when the agent has express authority to bind the principal contractually, and by his actions or words, does so. When this happens, the agent and principal are legally indistinguishable. The principal is, by definition, contractually obligated to

pay the claim. The agent, therefore, cannot be sued because he caused the insured no harm. The insured cannot “choose” to sue him. The agent merely bound coverage as he is authorized by the principal to do. If the principal refuses to meet its contractual obligation, the insured’s remedy is against the principal, not the agent. See *Paull*, 213 N.W.2d at 540. Again, any “negligence” on the agent’s part in failing to follow internal company procedure is of no legal consequence as far as the insured is concerned, because it does not affect the principal’s contractual obligation. It simply doesn’t matter whether Swendra turned in the right paperwork or not. A binding contract was made when the promises were made.

Swendra has already distinguished the cases cited by Graff in his Appellant’s Brief and will not do so here. Again, the fundamental problem with Graff’s analysis is that he fails to distinguish between the very broad topic of vicarious liability on the one hand, with the very specific circumstance of contractual liability on the other.

3. Neither the *Pierringer* release nor Graff’s other miscellaneous assertions support a cause of action against Swendra.

Graff also makes a number of miscellaneous arguments which have no bearing on whether Swendra bound coverage; whether Graff can sue

Swendra for negligence; or whether the release of American Family released Swendra as well.

Graff argues, for example, that his *Pierringer* release with American Family preserved his claim against Swendra. That is only true, however, if Graff had a claim against Swendra to preserve. A *Pierringer* release does nothing to change the rights of the non-settling party. *Hoffman v. Wiltscheck*, 411 N.W.2d 923, 926-7 (Minn. App. 1987). Once coverage was contractually bound, Graff's only claim was against American Family. Because Graff had no claim against Swendra, a *Pierringer* release preserved nothing.

Graff also argues that Swendra failed to cross-claim against American Family; that the jury found Swendra was causally negligent; and finally, that Swendra contested whether he in fact made representations that bound coverage.

Graff does not articulate how Swendra's failure to cross-claim against American Family is relevant. A cross-claim is a matter between Swendra and American Family. As liability between Graff and Swendra has yet to be decided, moreover, an action for indemnity has yet to accrue. Graff also makes the point that Swendra contested whether he made representations that

bound coverage and further, that Graff's "active" negligence claim against Swendra was approved by the jury. Again, Graff fails to articulate how either of these points prevent Swendra's appellate argument. In order to prevail on his negligence claim, Graff had to prove that he requested and Swendra agreed to provide UIM coverage. Swendra denied both. Had the jury believed Swendra, Graff's negligence claim would have failed and the case would have been over. Swendra also argued in the alternative, however, that assuming Graff did request coverage and Swendra agreed to provide it, he was not liable. Coverage was bound. American Family was contractually obligated to provide it. The argument was clearly preserved in Swendra's pretrial motion to dismiss. Rather than decide the motion, however, the trial court took it under advisement and proceeded with the negligence claim against Swendra. Swendra therefore had no choice but to contest whether UIM representations were made. In finding Swendra negligent, the jury necessarily found both a request and agreement to provide coverage. The only difference now is that Swendra's appellate argument is based upon actual findings rather than assumed ones. The legal ramifications, however, are the same. The jury verdict cannot stand if, as a matter of law, Graff has

no negligence claim against Swendra as a result of American Family's contractual obligation.

4. Alternatively, Graff's claim against Swendra is defeated because indemnity is circular.

Swendra argued in the alternative that *if* Graff can bring an action against Swendra after he bound coverage, his claim still fails because of circular indemnity. Graff responds there is no circular indemnity because Swendra has no right to indemnity from American Family. Neither his agency contract nor Minnesota statutes require it. (Graff's Brief, p. 33-34). Swendra believes he would be entitled to indemnity, however, because that is the only way the case law can be logically interpreted.

In those cases where the insurer is liable to pay a claim because coverage was contractually bound by its agent, the insurer has no indemnification remedy. See e.g. *Anderson*, at 235; *Julien*, at 357; and *Reserve*, at 316. Had Graff pursued his claim against American Family, for example, and the jury found that coverage was bound, American Family would have been required to pay the entire claim without a right of indemnification against Swendra. Graff argues, however, that because he chose to settle with American Family and sue Swendra, Swendra is on the hook for the entire judgment. This makes no logical sense. An agent cannot,

on the one hand, legitimately bind the insurer to provide coverage without being subject to an indemnity claim; and then, on the other hand, be sued directly by the insured and be required to pay the insurer's entire obligation without any further recourse. If this were true, insurers would simply collude with plaintiffs to settle, leaving the agent with the bulk of the damages. The result would be *de facto* indemnification for the insurer. The only way to reconcile the holdings in *Paull*, *Eddy*, *Anderson*, *Julien*, and *Reserve*, with, *arguendo*, the right to an independent action against the agent, would be to require the insurer to indemnify the agent in the event he is found liable. Therefore, because Swendra would be entitled to indemnity from American Family, and the release requires Graff to indemnify American Family for any claim against it, indemnity is circular. For this alternative reason Graff's claim against Swendra fails.

II. THE TRIAL COURT DID NOT PROPERLY APPLY THE COLLATERAL SOURCE STATUTE (MINN. STAT. § 548.251) WHEN IT EXCLUDED "ATTORNEYS FEES" FROM THE WORKER'S COMPENSATION PAYMENT GRAFF RECEIVED.

According to Graff, the trial court properly excluded attorney's fees from the worker's compensation payouts. His rationale is that he did not receive this money

and therefore, there was no double recovery. (Graff's Brief, pp. 37, 40). Graff cites no authority to support his argument.

Minn. Stat. § 548.251 provides no exceptions for subtracting attorneys fees from an otherwise qualified collateral source. The trial court did not subtract attorney's fees from either the \$30,000.00 tortfeasor settlement or the \$100,000 UIM settlement from American Family. See e.g. *Do v. American Family Mut. Ins. Co.*, 752 N.W.2d 109, 114 (Minn. Ct. App. 2008) (Full amount of settlement with tortfeasor deductible under Minn. Stat. § 548.251 by UIM insurer). As there is no legal basis for subtracting attorney's fees from a tortfeasor or UIM settlement, there is likewise no legal basis for subtracting attorney's fees from a worker's compensation benefit. Both are qualified collateral source payments under Minn. Stat. § 548.251 and must be deducted in full.

III. THE TRIAL COURT PROPERLY DEDUCTED WORKER'S COMPENSATION BENEFITS UNDER THE COLLATERAL SOURCE STATUTE (MINN. STAT. § 548.251).

In this separate appeal (A09-522), Graff claims the trial court erred when it included worker's compensation benefits under the collateral source statute (Minn. Stat. § 548.251). Two lump sum worker's compensation payments are at issue: one paid on May 18, 2006, for \$17,800; and one paid on December 13, 2006, for \$67,500.

With regard to the May 18, 2006, payout, Graff argues:

...the Trial Court improperly characterized the permanent partial disability payment as a wage loss benefit, and as a result, improperly considered it a collateral source deduction. Since this permanent partial disability payment does not correspond to any of the damages awarded by the jury, there is no duplication in recovery, and the Trial Court should not have considered this a collateral source offset.

(Graff's Brief, p. 37). With regard to the December 13, 2006, payout, Graff argues:

[This payment] closed out various worker's compensation claims and was not simply a claim for wage loss. (AAP134-135) Among the items closed out were rehabilitation and retraining claims, claims for additional permanent partial disability, claims for certain types of medical expense, in addition to some wage loss. As such, it was improper for the Court to consider the full amount of the settlement as wage loss and to consider \$57,138.05 as a collateral source offset.

....

These benefits were benefits he could not claim at trial, and therefore there would be no duplication of recovery for these matters.

(Graff's Brief, p. 38).

In essence, Graff makes the same argument with regard to both payouts. They both include benefits Graff could not claim at trial, and therefore are not duplicative of the jury award. Because they are not duplicative of the jury award, there is no double recovery. Therefore, they should not have been deducted as a collateral source payment.

The trial court found these payouts *were* for future losses and *were* included in the jury verdict. (AAD-29, 34). The May 18, 2006, payout was for "permanent

partial disability.” (AAD-34). This was a lump sum payment “intended to compensate Plaintiff over his life expectancy of 30.6 years.” (AAD-34). The December 13, 2006, payout included “temporary total, temporary partial, permanent total and/or permanent partial *disability benefits*, adjustment of benefits, out-of-pocket medical expenses and/or medical mileage, interest or penalties, rehabilitation or retraining benefits.” (Emphasis added) (AAD-35). As the trial court noted, “[a]lthough this description is broad, the settlement payment appears to compensate Plaintiff for future losses.” (*Id.*). This was also a lump sum payment “which was meant to compensate Plaintiff over his life expectancy of 29.7 years.” (*Id.*). The trial court is correct. Both payouts clearly compensate for future losses, including loss of earning capacity, disability, and medical expenses.² The May 18, 2006, payout covered “permanent partial disability.” The December 13, 2006, payout primarily covered “disability benefits.” As such, they were more than covered by the jury verdict which included all “[f]uture pain, *disability*, and emotional distress”; and “*loss of future earning capacity*.” (Emphasis added) (AAD-30, 34-35).

Even if some of the payout benefits were not covered by the jury verdict, this does not prevent them from being counted as a collateral source payment. Minn.

² The trial court discounted the payouts for the period between the date of payment and

Stat. § 548.251 requires only that the worker's compensation benefit be "related to the injury or disability in question made to the plaintiff..." Minn. Stat. § 548.251. As long as, for example, the "rehabilitation and retraining benefits" are "related" to Graff's "injury or disability," it doesn't matter whether they were covered under the jury verdict. They must be deducted from the judgment. The only reason the jury verdict comes into play in this case is because Graff did not seek damages for past medical expenses or past wage or earning losses. Therefore, the trial court had to divide the worker's compensation payouts to reflect payment for those losses which were incurred before the verdict and those which were incurred after. There is no evidence that any of the benefits contained in the December 13, 2006, payout covered losses that occurred prior to the verdict (except as already discounted by the trial court). Indeed, all the benefits included in the May 18 and December 13 payouts are based upon Graff's life expectancy, and therefore clearly reflect future losses.

Alternatively, Graff's argument must be rejected because the December 13, 2006, final settlement agreement does not make clear whether money was awarded for anything other than disability benefits, much less how much. The agreement

the verdict. (AAD-34-35).

simply closes out all of Graff's possible future claims.³ Graff makes no effort to put a value on any particular one. He essentially argues that since the payout *might* include items not covered by the jury verdict, the entire payout should be excluded. Because Graff cannot demonstrate what, if any, portion of the December 13, 2006, settlement compensated him for items not contained in the jury verdict, his argument must be rejected for this alternative reason as well.

Finally, Graff argues that because the judgment was against Swendra, rather than American Family, worker's compensation has "a potential right of subrogation" which would exclude collateral source consideration. See Minn. Stat. § 548.251, subd. 2 (1). The statute, however, does not refer to those losses for which there is a "potential" right of subrogation, but those losses "for which a subrogation right *has been asserted*;...." (Emphasis added). In this case, no right of subrogation has been asserted. Therefore, this argument fails.

In addition, no subrogation rights exist against a UIM insurer, and by extension, Swendra. Minn. Stat. § 176.061(5)&(6); *Austin v. State Farm Mut. Auto. Ins. Co.*, 486 N.W.2d 457, 460 (Minn. App. 1992) (Worker's Compensation has no

³ The December 13, 2006, settlement covers "a full, final and complete resolution of any and all claims, known or unknown, and involving any and all body parts, *that the employee may have against the employer*...., including, but not limited to temporary total, temporary partial, permanent total, and/or permanent total, and/or permanent partial disability benefits, [etc.]...."

subrogation rights against UIM insurer); and *Cooper v. Younkin*, 339 N.W.2d 552, 553 (Minn.1983) (Subrogation provisions apply to damages based on tort liability, not to sums the injured party is entitled to by contract with his own insurer). Graff argues that because the judgment is against Swendra, a negligent agent, rather than a UIM insurer, the rule does not apply. He cites no authority for this proposition. Swendra was not the tortfeasor who caused Graff's injuries. Graff's judgment against Swendra, moreover, is directly related to UIM coverage which Swendra is now, in essence, providing. The same policy reasons that prevent subrogation against a UIM insurer would apply with equal force to Swendra. See e.g. *Cooper*, at 553.

CONCLUSION

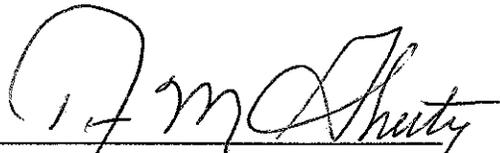
The judgment against Swendra should be reversed and Graff's claim dismissed. Graff's release of American Family also released Swendra because, under these facts, American Family is solely responsible for paying Graff's claim. Alternatively, circular indemnity offsets any recovery Graff may receive from Swendra and therefore effectively releases him. In the event the court does not reverse the judgment and dismiss the claim against Swendra, it should remand and order the trial court to subtract \$10,656.80 from the judgment pursuant to Minn.

Stat. § 548.251. Further, it should reject Graff's appeal and affirm the collateral source judgment with the exception of the excluded attorney's fees.

Respectfully submitted this 21 day of May, 2009.

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A09-173
A09-522

**STATE OF MINNESOTA
IN COURT OF APPEALS**

CURTIS R. GRAFF,

Respondent (A09-173),
Appellant (A09-522),

vs.

ROBERT M. SWENDRA AGENCY, INC.,

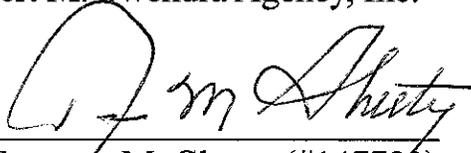
Appellant (A09-173)
Respondent (A09-522).

CERTIFICATION AS TO 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 font. The length of the brief is 5,230 words. This brief was prepared using Microsoft Office Word 2003.

Dated this 21 day of May, 2009

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