

A09-173

STATE OF MINNESOTA
IN SUPREME COURT

CURTIS R. GRAFF,

Respondent,

vs.

ROBERT M. SWENDRA AGENCY, INC.,

Appellant.

APPELLANT'S BRIEF, ADDENDUM & APPENDIX

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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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LEGAL ISSUES

1. Does a written release between the plaintiff and insurer also release a claim against the insurer's agent when, viewing the facts most favorably to the plaintiff, the insurer's agent contractually obligated the insurer to provide coverage?

Trial Court Holding: The trial court did not address defendant's primary argument that if plaintiff's allegations were true, the insurer was contractually bound to provide coverage and therefore the agent could not be casually negligent. Rather, it addressed defendant's alternative argument concerning circular indemnity holding that the plaintiff's release of the insurer did not release the agent because, according to the trial court, the insurer had no indemnity obligation to its negligent agent.

Court of Appeals Holding: The Court of Appeals held that an agent may always be sued for negligent procurement, regardless of whether the agent contractually bound the insurer to provide coverage, unless the agent were to admit he agreed to provide coverage at the beginning of the dispute. Further, an agent—even if acting within the scope of his authority—has no right of indemnity from the insurer, and therefore a *Pierringer* release between the plaintiff and insurer does not create circular indemnity.

Most apposite authorities: *Paull v. Columbian Nat. Fire Ins. Co.*, 171 Minn. 118, 213 N.W.2d 539, 540 (1927); *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).

2. Did the trial court properly apply the collateral source statute (Minn. Stat. § 548.251) when it excluded attorney's fees from the lump sum payments Plaintiff received under the Minnesota Workers' Compensation Act?

Trial Court Holding: The trial court excluded attorney's fees from plaintiff's lump sum worker's compensation payments when it applied the collateral source reduction (Minn. Stat. § 548.251) to the judgment.

Court of Appeals Holding: The trial court properly excluded attorney's fees from plaintiff's lump sum worker's compensation payments when it applied the

collateral source reduction (Minn. Stat. § 548.251) to the judgment because it did not create a double recovery.

Most apposite authorities: Minn. Stat. § 548.251; *Do v. American Family Mut. Ins. Co.*, 752 N.W.2d 109, 114 (Minn. Ct. App. 2008); *Pemberton v. Theis*, 668 N.W.2d 692, 697-698 (Minn. App. 2003); *Heine v. Simon*, 702 N.W.2d 752, 766-767 (Minn. 2005);

STATEMENT OF THE CASE¹

The plaintiff (Graff) was injured by an underinsured driver and sought underinsured (UIM) motorist coverage from his insurer, American Family Mutual Insurance Company. There is no dispute the underlying motor vehicle policy contained \$100,000 of (UIM) motorist coverage. At issue was a one million dollar umbrella policy. Both the written application Graff signed and the umbrella policy American Family issued covered liability only. Nonetheless, Graff claimed he was entitled to the full one million dollars in UIM coverage under the umbrella policy because, he alleged, American Family's agent (Swendra) orally represented to him the umbrella policy included UIM coverage at the time he purchased it. (T. 131-134, 219, 227). Swendra denied making any representations as to UIM coverage. (T. 449, 450). American Family likewise refused Graff's request for umbrella UIM coverage. (AAP2, Complaint, p. 2).² Graff then brought suit against American Family and Swendra. His claim against American Family

¹ The Statement of the Case and Statement of Facts are combined.

² Appellant's Appendix is referenced as AAP, followed by the page number. Appellant's Addendum (attached to this brief) is referenced as AAD, followed by the page number.

alleged breach of contract. In particular, Graff alleged that American Family was directly liable to him because Swendra, an agent of American Family acting within the scope of his authority, had bound UIM coverage when he told Graff the umbrella included UIM coverage. (AAP2 and AAP4, Complaint, pp. 2, 4). Graff's claim against Swendra alleged negligent procurement. In particular, Graff alleged that *Swendra* was directly liable to him because he was negligent in failing to procure the promised UIM coverage from American Family as represented. (AAP3, Complaint, p. 3). Both claims were based upon the same facts: Swendra's alleged representations to Graff that the umbrella included UIM coverage.

On February 14, 2008, Graff signed a *Pierringer* release with American Family. (AAD 45-47; Release). Graff released American Family "from any and all claims" related to his August 13, 2004, accident, and agreed to indemnify American Family for any claims made against it. (AAD 13; Order on Motion for Judgment as a Matter of Law & Memorandum of Law, filed 10/29/2008 (hereinafter Postverdict Decision), p. 5).

After learning of the settlement, Swendra requested a hearing to consider the impact of the release on the claim against him. The request was denied. (T459-460; AAD 50-51; Transcript Excerpt). Swendra then filed a Trial Memorandum

asking the Court to dismiss the suit.³ Swendra argued that assuming everything Graff said was true, i.e. that Swendra did represent to Graff the umbrella policy included UIM coverage, Swendra was acting within the scope of his authority and bound the insurer. As a result, the insurer was contractually obligated to provide coverage and was thus solely responsible for paying the claim. By releasing the insurer, Graff released the agent. Alternatively, Swendra argued he had a right of indemnity against the insurer for any personal liability he may have to Graff. As Graff agreed to indemnify the insurer under the *Pierringer* release for any claims against it, circular indemnity resulted, thus defeating Graff's claim. (AAP18-39, Trial Memorandum as to Release between Graff and American Family Insurance Group).

Swendra argued the same motion on the morning of trial. (T. 9-19). The trial court took the motion under advisement, and allowed the case to proceed on Graff's direct negligence claim against Swendra. (T. 18). After Graff rested his case, Swendra again moved to dismiss, arguing he could not be independently liable to Graff when he bound coverage acting within the scope of his agency. (T. 337-338). The trial court again took the motion under advisement. (T. 338).

³ In its Trial Memorandum Swendra stated: "Swendra requests a hearing for summary judgment because as an agent for American Family, Swendra cannot, as a matter of law, be held individually liable for actions taken within the scope of his agency. Based upon the allegations in the complaint and the discovery record, any liability incurred by Swendra would flow directly to American Family. By releasing American Family, Graff released the only responsible party. Therefore, this lawsuit must be dismissed."

Concerned that he would be unable to present evidence contesting Swendra's agency status if the motion was heard postverdict, Graff asked the trial court if he could "reserve the right to request additional [postverdict] testimony from Mr. Swendra..." (T. 339). The trial court responded:

THE COURT: Regarding the Agency business?

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.* You don't have a post trial motion or something like that. I mean you're going to have them at – I mean if you want to recall your client or anyone else to develop those other aspects, I mean you can do that I suppose.

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.* But the point what I'm saying is that if you want to call, I mean let's get this witness out of the way, but if you want to recall one of your clients to address that agency thing, you can do that. *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. And again, if you want to recall for the purpose of this particular issue, obviously you can. But this is the same issue we've been talking about, so –*

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

Swendra was on the witness stand when the trial court adjourned for the day. Jury instructions and verdicts were discussed in chambers later that evening, including a verdict Swendra proposed concerning his agency status. (T. 457-458, AAD 48-49; Transcript Excerpt). In support of his motion, Swendra proposed a special verdict 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?

(AAD 14, Postverdict Decision, p. 6 and AAP53, Swendra's Requested Special Verdict). As a result of those discussions, Graff agreed to a stipulation concerning Swendra's agency status. 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.*

THE COURT: All right. I think in fairness to both sides on this particular topic, I believe that the discussion in chambers was that *although the parties are stipulating that the answer to question number 8 would be "yes," that there is an agreement I believe of the parties not to inform the jury.* In other words, what we weren't going to do is we leave the question in. And, when we present the verdict form to the jury we usually, we sometimes just fill in "yes." Or sometimes, we even fill in a dollar amount on certain lines. But in this instance, it's my understanding that there was an agreement of the parties that we'll just not allow that in the special verdict form. *That's just a stipulation outside the earshot of the jury.*

MR. MONTILINO: Correct.

MR. GHERTY: Correct, Your Honor.

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

Swendra moved for a directed verdict at the close of the evidence. He again argued he could not be independently liable if he bound coverage on American Family's behalf. (T. 494). As before, the trial court took the matter under advisement. (T. 495). The trial court did, however, order a post-verdict briefing schedule. (T. 566).

On May 23, 2008, a verdict was returned finding Swendra 90% casually negligent. Damages of \$753,000.00 were assessed. (T. 571-572; APP57-59; Jury Verdict).

Postverdict motions were filed and oral argument was heard on August 1 and 8, 2008. (T. 575-604). Graff agreed his settlement with American Family was a “*Pierringer-type*” release. (T. 582). He also agreed “that Mr. Swendra was within the scope of his agency agreement at the time of the transaction.” (T. 583). Graff also made clear his position that agency was not a material issue:

...[when] somebody is trying to hook the insurance company for the actions of the agent, ...[then] whether you’re a broker or an agent makes a difference. *It doesn’t matter when you are going directly at the agent.*

We did not claim we wanted to bind the company. We claim negligence and negligence only. There’s no binding going on. So *Julien* and *Anderson* and those cases like *Paull* that say there’s no independent agent liability *are premised on the insurer already being bound, and that’s the key distinction.*

The distinction that makes a difference in my view, You Honor, is not broker versus agent. It’s not [whether the agent was acting] within or without the scope of an agreement. *It’s what is the claim of the plaintiff. Is he trying to bind or reform the contract? We never did that. The claim was negligence. That’s why it doesn’t matter.*

(Emphasis added) (T. 584-585).

The trial court issued a written memorandum decision on October 29, 2008, denying Swendra’s motion. The trial court did not address Swendra’s primary contention that he could not be liable because American Family was contractually

bound to pay the claim. Rather, the trial court denied the motion by rejecting Swendra's alternative circular indemnity argument. The trial court reasoned that in the absence of an independent indemnity obligation between the settling and non-settling defendants, the release of one does not release the other. (AAD 23; Postverdict Decision, p. 15). Thus, in the case of both active and vicariously liable defendants, a release of the principal does not release the actively negligent agent. (AAD 22-23). Further, citing *Kellen v. Mathias*, 519 N.W.2d 218, 222 (Minn Ct. App. 1994), the trial court held: "[n]o policy reason exists to release an agent where the principal is released, absent an intent to release both parties." (*Id.*). Because the stipulation as to agency did not create an indemnity obligation between Swendra and American Family, the release of American Family had no effect on Swendra.⁴

This appeal ensued. In a published decision dated December 29, 2009, the Court of Appeals cited three reasons for affirming the negligence claim against Swendra: 1) a plaintiff may bring a separate action against an agent for tortious conduct, regardless of whether the agent's actions bound the insurer (AAD 58-59; Court of Appeals Decision pp.7-8); 2) Swendra contested whether he agreed to provide the UIM coverage, and therefore, the issue of whether he bound coverage

⁴ Additional facts relating to this and Swendra's second issue will be included in the argument portion of the brief.

and created a contract between Graff and the insurer was not before the jury and not established (AAD 59-60; Court of Appeals Decision, pp. 8-9); and 3) there was no circular indemnity because Swendra had no right of indemnity from the insurer for his own negligence (AAD 60-62; Court of Appeals Decision, pp.10-12). The Court of Appeals also affirmed the trial court's holding on the collateral source rule (Minn. Stat. § 548.251). In particular, it held that attorney fees were properly removed from the deduction because they did not go to Graff, and therefore did not result in a double recovery. (AAD 68; Court of Appeals Decision, p. 18).

On January 27, 2010, Swendra petitioned this Court for review. This Court granted review on March 16, 2010.⁵

ARGUMENT

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

1. Introduction: Argument Summary.

The parties stipulated at trial that Swendra was an agent of American Family and was acting within his scope of authority when he told Graff the umbrella contained UIM coverage. Under Minnesota law, an agent's oral representations as

⁵ The Court of Appeals also decided a cross-appeal filed by Graff concerning certain reductions under the collateral source rule. The trial court was affirmed. Graff did not cross-petition this Court. Therefore, the only issues on appeal are Swendra's.

to coverage bind the insurer when the agent acts within the scope of his or her authority.

Consistent with Graff's testimony, implicit in the jury verdict, and conceded by Swendra for the purposes of his motion to dismiss, is the finding that Swendra bound UIM coverage by his representations to Graff. Because Swendra's oral representations created a binding contract between Graff and American Family, there was no failure to procure. Graff was covered as a matter of law. Swendra, therefore, did not cause Graff any damages. Any failure on Swendra's part to comply with American Family's internal procedures for procuring coverage is matter strictly between Swendra and his principal. Once bound by its agent, moreover, American Family was exclusively responsible for paying the claim. The release of American Family therefore ended the lawsuit as it eliminated the only liable party.

Alternatively, because Swendra was entitled to indemnification from American Family for any damages he must pay; and pursuant to the release, Graff must reimburse American Family for anything it must pay to Swendra; circular indemnity offsets any recovery Graff may receive from Swendra and thereby effectively releases him.

Each of these will be addressed in turn

2. Standard of Review on Appeal.

The procedural posture is somewhat unusual as Swendra first raised this issue prior to trial, based upon conceded facts. (AAP18-29, Trial Memorandum as to Release between Graff and American Family Insurance Group). The motion was also raised the first morning of trial. (T. 9-19). A motion for directed verdict was made on similar grounds after Graff rested his case (T. 337-338); and after the close of the evidence. (T. 494-495). Each time the trial court took the motion under advisement. *Id.* After a jury verdict was returned in Graff's favor, the trial court advised counsel that the motion could "properly be addressed as a judgment as a matter of law and/or post-trial motion,...." (AAD 16; Postverdict Decision, p. 8). Swendra then filed a postverdict motion raising the same issue. (T. 575-604).

The legal question is the same regardless of which motion is considered. The essential allegation supporting all of Graff's claims—that Swendra told Graff the umbrella policy included UIM coverage—has not changed since the complaint was filed, and is likewise implicit in the jury finding. Apart from Swendra's agency, the facts underlying Graff's negligence claim are the same facts underlying Swendra's motion. As these facts are conceded, undisputed, or were implicitly found by the jury, this Court need only apply the law. Review is therefore *de novo*. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003); *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998); Minn. R. Civ. P. 50.02(a).

3. Graff's release of American Family released its agent, Swendra.

- (i) As Swendra was an agent for American Family acting within the scope of his authority, his alleged representations to Graff that the umbrella policy included UIM coverage contractually bound American Family to provide it.**

At trial, the parties stipulated that Swendra was an agent of American Family acting within the scope of his authority. (T. 457-460). No one has ever disputed Swendra's authority to bind.⁶ In addition, the evidence is undisputed that had Swendra submitted a request for UIM umbrella coverage for Graff from American Family's underwriters, such a policy would have been issued. (T. 433).

An agent's representations will bind the insurer if they are within the "actual, implied, or apparent authority of the agent." *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) ("Once it is established that one who purports to represent an insurance company as its agent, a parol contract will bind the company if [the agent's acts are] within the actual, implied, or apparent authority of the agent"); *Eddy v. Republic Nat. Life Ins. Co.*, 290 N.W.2d 174, 176-177 (Minn. 1980) (An insurance company is liable for the actions of its agents when they are acting within the scope of their agency); *Anderson v. Minnesota Mut. Fire and Cas. Co.*, 399 N.W.2d

⁶ Swendra testified in his deposition he had direct binding authority, and that has never been disputed. See June 6, 2007, Deposition of Robert Swendra, p. 11, unsealed in open court at T. 474, where he stated he had binding authority. (AAP17).

233 (Minn. App. 1987) (Agent's representation to insured that new policy had same coverage as the policy it was replacing bound new insurer to provide similar coverage); *Julien v. Spring Lake Park Agency, Inc.*, 283 Minn. 101, 104-105, 166 N.W.2d 355, 357 (1969) (Agent's representation to insured that new building was "covered" bound insurer to provide coverage even though agent failed to make request to insurer); *Reserve Ins. Co. v. Netzer*, 621 F.2d 314 (8th Cir. 1980) (Agent's representation that resort was "fully covered" when in fact policy did not cover dock area bound insurer to provide dock coverage).

Swendra conceded for the purposes of his motion to dismiss; his motions for directed verdict; and his post-trial motion that Graff's allegations were true—i.e. that he did represent to Graff the umbrella policy included UIM coverage. This finding is also implicit in the jury verdict as the jury could not have found Swendra had a duty to procure UIM coverage had no such representation been made. As Swendra was acting within the scope of his agency when he made the representations to Graff, he contractually bound American Family to provide UIM coverage.

(ii) Having legally bound American Family to provide UIM coverage, Swendra cannot be individually liable to Graff.

Graff has no actionable claim against Swendra because, assuming Graff's allegations are true, Swendra did not cause Graff any harm. Regardless of

Swendra's alleged "negligence," American Family was contractually obligated to pay Graff's claim. Coverage was bound. The cause of Graff's loss was not Swendra, but Graff's decision to release the contractually liable party.

The case of *Paull v. Columbian Nat. Fire Ins. Co.*, 171 Minn. 118, 213 N.W.2d 539, 540 (1927) is directly on point. In *Paull*, the insured sought fire insurance for a building he owned. The agent, acting within his scope of authority, agreed to provide it, but just like Swendra, failed to procure it. The agent's agreement to provide the fire insurance, however, bound the insurer. *Paull*, at 540. The issue on appeal was whether the insured had an independent cause of action against the agent. The court said no:

The above conclusion [that coverage was bound] *defeats any right of recovery of either plaintiff against [the agent]. It is plain that if the acts or conduct of the agent binds his principal, the other party to the transaction cannot hold the agent personally [liable].* [cite omitted]. There was no contract with [the agent] personally...to procure insurance, but he was requested, as agent of the insurer who had issued the policy, to consent to a change of ownership and make the needed entries on that policy protecting these plaintiffs. *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.*

(Emphasis added). *Id.* at 541.

More recent cases confirm the underlying rationale of *Paull's* holding.

In *Anderson*, for example, the insured agreed to change insurance companies when the agent he was doing business with changed his agency affiliation. The

agent offered to provide a new auto policy with the same coverage. The old policy included UIM coverage. When completing the application for the new policy, however, the agent neglected to include a request for UIM coverage and the new policy was issued without it. The insured later suffered damages caused by an underinsured driver. The agent then called the insurer's underwriter and asked her to add UIM coverage and backdate it to the policy's initial effective date. The agent did not tell the underwriter about the accident. When a claim was made, the insurer refused to pay. The insured brought a declaratory judgment action against the insurer and sued the agent for breach of contract and negligence. The agent and insurer brought cross-claims against each other for contribution and indemnity. Because the agent had authority to bind the insurer and the insurer would have issued coverage had a request been made, the insurer was not only liable to the insured, it could not seek indemnity from the agent. The Court rejected the insurer's argument that the agent committed fraud when it failed to inform it of the accident prior to backdating the policy. The Court reasoned that since the insurer "was already obligated to provide underinsured coverage by virtue of [the agent's] agreement with [the insured], [the agent's] failure to disclose the accident when requesting that the policy be back-dated did not affect [the insurer's] liability." *Id.* at 235-236.

In *Julien*, the facts and result were similar. The insured sought coverage on two houses he was building identical to the coverage the agent had provided on other properties owned by the insured. The agent told the insured he was “covered,” but negligently failed to request coverage for one of the houses. The non-insured property was destroyed by a tornado. The insured sued the insurer and the agency. There were two issues before the court: (1) whether the insurance company was obligated to provide coverage based on the agent's oral agreement with the insured, and (2) whether the insurer could bring an indemnity claim against the agent. The Court affirmed the trial court, holding that the agent’s oral agreement with the insured bound coverage. In addition, the insurer was not entitled to indemnity from the agent. *Id.* at 357. In denying the claim for indemnity, the court stated:

It is conceded that the Agency had the power to bind the company, and the branch manager of Ohio acknowledged that the policy would have been written had the information been promptly transmitted. No claim is made that the delay increased the risk of loss or caused Ohio damage. Since under these circumstances the Agency performed a function it was authorized to carry out, we hold that no damage attributable to it was realized by Ohio because of its failure to advise Ohio of the risk before it occurred.

Id. at 357.

In *Reserve Ins. Co. v. Netzer*, 621 F.2d 314 (8th Cir. 1980), the agent informed the insured his resort was “fully covered” and did not need more

insurance. In fact, the policy in place failed to include liability coverage for the dock area and the cabins. A customer of the resort sued the owner when she slipped and fell on the dock. The insurer denied coverage. The resort owner sued the insurer seeking a declaratory judgment. The court held the insurer was bound by the agent's representation as to coverage, including the dock area. After paying its policy limits, the insurer filed a suit seeking indemnity from the agent. The Court held that even if the agent was negligent or culpable, the action for indemnity could not be sustained. There was no evidence the insurer would have cancelled the policy or refused to insure the expanded premises. The most it lost was the additional premium it would have charged.

The facts in this case are analogous. According to Graff, Swendra told him the umbrella included UIM coverage. By making that representation, Swendra bound coverage. Just as in *Anderson, Julien and Reserve*, Swendra's failure to notify American Family's underwriting department did nothing to change American Family's responsibility to provide coverage. Once the oral representation was made, American Family was bound. What happened afterwards had no impact on American Family's liability or Graff's damages. Indeed, as the court notes in *Paull*, 213 N.W.2d at 541, the agent did no harm to the insured because coverage was bound and all damages would be paid. The injury to Graff was not caused by Swendra's alleged negligence—i.e. his failure to procure the

necessary endorsement from American Family—but Graff’s inexplicable release of American Family’s obligation to make good on the coverage bound by its authorized agent.

(iii) Graff’s release of American Family released its agent, Swendra, when American Family was contractually bound to pay the claim.

On February 14, 2008, Graff signed a *Pierringer* type release settling all claims against American Family.⁷ 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). As Swendra is not liable as a matter of law, the release of American Family “from any and all claims” related to Graff’s August 13, 2004, accident released “the entire portion of fault” for which Graff is entitled to damages. The judgment against Swendra, therefore, cannot stand. *Hoffman*, 411 N.W.2d at 926, n. 3. Swendra is entitled to judgment notwithstanding the verdict. See Minn. R. Civ. P. 50.02(a).

The case of *Eddy v. Republic Nat. Life Ins. Co.*, 290 N.W.2d 174 (Minn. 1980) leaves little doubt that Swendra’s argument is the correct one. In *Eddy*, the plaintiff made the same choice Graff made here—she settled with the insurer on

⁷ Graff released American Family “from any and all claims” related to his August 13, 2004, accident. This includes “any underinsured motorist endorsement of any policy and any umbrella policy that I held with American Family Mutual Insurance Company.” (AAD13; Postverdict Decision, p. 5; AAD45; Release).

her breach of contract claim but continued an independent negligence action against the agent for misrepresentation and failure to procure. *Eddy*, at 176. The agent moved for summary judgment arguing that as an agent of the principal acting within the scope of his authority, he could not be independently liable. *Id.* Therefore, a release of the principal released him as well. *Id.* The trial court granted the motion. *Id.* This Court agreed that an insurance company is liable for its agents' oral representations when they are acting within the scope of their authority. "[B]efore that rule can be applied," however, "it is essential to determine whether the person claimed to be an agent was, in fact, acting in that capacity." *Id.* This Court determined that the agent's status was a disputed issue, however, and reversed the summary judgment. If the agent was actually a broker, he would be "independently liable to the insured." *Id.* Therefore, the agent/broker issue had to be resolved "before the impact of [the insurer's] settlement on his liability, if any, can be ascertained." *Id.*, at 177. While the ultimate question of agent liability in light of the release was not decided, the court left no doubt that were there a finding of agency, a release of the insurer would have released the agent. Who the plaintiff chose to sue and on what grounds never entered the discussion. The pivotal issue was agent or broker. *Eddy*, 290 N.W.2d at 176.

The same rationale applies here. Unlike *Eddy*, however, Swendra's agency is stipulated. The release of American Family, therefore, released Swendra.

The trial court completely ignored the *Paull, Eddy, Anderson, Julien* and *Reserve* line of cases and made no mention of them in its postverdict decision. Rather, it chose only to address Swendra's alternative circular indemnity argument.⁸ This will be addressed in the next section.

The Court of Appeals rejected Swendra's contract binding argument, holding that it was:

...inconsistent with the common law of agency which recognizes that agents can be held individually liable for torts they commit:

An agent is subject to liability to a third party *harmed* by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent...with actual or apparent authority.

Restatement (Third) of Agency § 7.01 (2006). This liability is based on an agent's conduct and is justified because persons are responsible *for the legal consequences* of the torts they commit. *Id.* cmt. B. the Restatement emphasizes that an agent's liability is unaffected by the possibility of liability of the principal:

It is consistent with encouraging responsible conduct by individuals to impose individual liability on an agent for the

⁸ The trial court summarized Swendra's argument as follows:

Swendra essentially argues the following: by signing the Release, Graff released American Family which ends the lawsuit; because Swendra is entitled to indemnification from American Family for any damages he has to pay, and pursuant to the Release, Graff must reimburse American Family for anything American Family must pay to Swendra, circular indemnity offsets any recovery Graff may receive from Swendra, thereby releasing Swendra; and Graff's admission in the release that the policy limits have been exhausted defeats his claim against Swendra.

(AAD 18, Postverdict Decision, p. 10).

agent's torts although the agent's conduct *may also* subject the principal to liability.

It is ordinarily immaterial to an agent's liability that the agent's tortious conduct may, additionally, subject the principal to liability.

Id.

(Emphasis added) (AAD 58, 59, Court of Appeals Decision, pp. 7-8). The Court of Appeals further explained that an insurance agent “may be held liable under a negligence theory for a failure to procure insurance” citing, *Peterson v. Brown*, 457 N.W.2d 745, 749 (Minn. App. 1990), and *Johnson v. Farmers & Merchants State Bank*, 320 N.W.2d 892, 898 (Minn. 1982). In such negligence actions, “insureds do not seek coverage under their policy, *but rather damages caused by the agent's negligent failure to procure insurance,....*” (Emphasis by the Court of Appeals), citing *Yule v. Iowa Nat'l Mut. Ins. Co.*, 390 N.W.2d 391, 393-94 (Minn. App. 1986). Swendra, according to the Court of Appeals, “misses the point” of these cases by “pointing out they do not discuss whether the agent had binding authority....” A negligent procurement claim is not an action seeking coverage under the policy, but a “separate action” based upon the agent's tortious conduct....” It does not “depend on the agent's status and binding authority.” (AAD 59, Court of Appeals Decision, p. 8). In short, nothing prevents a plaintiff from bringing a separate action against an agent for his own “tortious” conduct.

In addition, “there was never a factual determination that Swendra bound coverage and created a contract between American Family and Graff.” Such a “legally enforceable contract” was “not actually at issue and not established.” It was “undisputed that the only issue tried was whether Swendra was negligent in failing to procure additional UIM coverage.” (AAD 59-60, Court of Appeals Decision, pp. 8-9).

The first problem with the Court of Appeals’ analysis is that it fails to distinguish between an agent’s act which may create vicarious liability and one which does create contractual liability. When an agent commits a tort which harms a third-party, the agent may no doubt be sued directly, regardless of whether the principal may also be vicariously liable. When an agent binds his principal to a contractual commitment, on the other hand, no harm is done. The principal and the agent are legally indistinguishable. In the insurance context, the agent has merely bound the coverage he was authorized by the principal to bind. Any “negligence” on the agent’s part in failing to follow internal company procedure is not actionable because it does not affect the principal’s contractual obligation, and therefore causes no harm to the insured. The insured has the same coverage as if a written policy had been issued.

The Court of Appeals demonstrates its confusion on this point when it first holds an agent may be sued for his own “torts,” regardless of the principal’s potential liability, but then states:

Swendra could have chosen at the beginning of this dispute to admit that he agreed to provide the coverage, in which case American Family likely would have been contractually obligated to provide the additional UIM coverage. But he did not, and as a consequence, contrary to Swendra’s argument, there was never a factual determination that Swendra bound coverage and created a contract between American Family and Graff; that issue was not before the jury.

(AAD 59, Court of Appeals Decision, p. 9). This appears to be a recognition that if coverage *were* bound, there could be no *causal* negligence by the agent, but only if the agent made the necessary admissions “at the beginning of [the] dispute....” *Id.* The Court of Appeals fails to explain how this squares with its holding that any agent may be sued, regardless of the principal’s liability. More importantly, the Court of Appeals fails to explain how an early admission on Swendra’s part would prevent Graff’s negligence claim, while a motion to dismiss conceding these same facts would not.

Indeed, it’s assertion “there was never a factual determination that Swendra bound coverage and created a contract between American Family and Graff” completely misses the mark. This case should have never gone to trial in the first place. Swendra effectively conceded (indeed advocated) that he made the representations Graff alleged when he brought the motion to dismiss. See *W.J.L. v.*

Bugge, 573 N.W.2d 677, 680 (Minn. 1998) (Evidence in summary judgment must be viewed in a light most favorable to the nonmoving party). He made the same concession as well in his motion for directed verdict, and in his postverdict motions. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 Minn. 1998) (The legal standard for judgment as a matter of law is whether the facts at trial, *construed in a light most favorable to the prevailing party*, support the necessary findings in the verdict.)

The jury also made the same finding when it decided Swendra negligently failed to procure requested insurance. The verdict could have only been based on Graff's testimony that Swendra told him the umbrella policy included UIM coverage. In other words, the jury could not have found Swendra had a duty to procure UIM coverage unless it agreed he discussed UIM coverage with Graff and told him he would provide it. Had the jury not found such an agreement between Swendra and Graff, Graff's negligent procurement claim would have failed.

Swendra, therefore, had no reason to put the coverage binding question before the jury. Swendra conceded Graff's allegations for the purposes of the pretrial motion, and the motions for directed verdict. Graff, moreover, never disputed Swendra's agency, having alleged in his complaint that Swendra had authority to, and did, bind coverage. The question of whether Swendra was an agent of American Family would have nonetheless been testified to and submitted

to the jury in a special verdict had Graff not stipulated. As the stipulation rendered Swendra's agency status with American Family undisputed, an agreement with Swendra *was the same* as an agreement with American Family. The question of whether Swendra bound coverage, therefore, was ripe for a legal determination.

The district court should have decided Swendra's motion before trial, or at least before the verdict, but instead, repeatedly took it under advisement. When the trial proceeded on Graff's negligent procurement claim, Swendra had no choice but to testify according to his previously sworn testimony. Swendra never abandoned his argument, however, that even if everything Graff said was true, Swendra could not be individually liable. In short, the facts essential to Swendra's motion were both conceded *and* "determined."

Alternatively, the question of whether Swendra bound coverage and created a contract between American Family and Graff is not a "factual determination" at all, but a matter of applying the law to the facts. The relevant facts—Swendra's representations to/agreement with Graff, and his agency—were conceded, stipulated to, or implicit in the jury verdict. As the trial court noted, it was going to be "a pure legal call." (T. 340).

The cases cited by the Court of Appeals also fail to support its legal hypothesis. See *Peterson v. Brown*, 457 N.W.2d 745, 749 (Minn. Ct. App. 1990); *Atwater Creamery Co. v. Western Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn.

1985); *Johnson v. Farmers & Merchants Bank*, 320 N.W.2d 892, 898 (Minn. 1982); and *Yule v. Iowa National Nut. Ins. Co.*, 390 N.W.2d 391, 392-93 (Minn. Ct. App. 1986). (AAD 59, Court of Appeals Decision, p. 8). None of these cases raise or discuss the matter at issue here, namely, whether an agent can be sued directly for failing to procure requested insurance when the agent, acting within the scope of his authority, bound coverage by his or her representations. In *Peterson*, for example, there is no mention of whether the “agent” had authority to bind her principal, much less who her principal was. The agent may, in fact, have been a broker. What the agent promised the insured was that she “*could* obtain coverage.” (Emphasis added). 457 N.W.2d at 746. From who or from where, however, is unclear. In the *Atwater Creamery Co.* and *Johnson* cases, the issue was whether the agent had an affirmative duty to review coverage and make recommendations. Neither case involved a failure to procure requested insurance. Neither case discussed the agent’s authority to contractually bind the principal. 366 N.W.2d at 279; 320 N.W.2d 898. In *Yule*, a cursory reading does suggest the plaintiff may chose between an action against the agent or reformation of the policy. The problem with *Yule*, however, is that the facts are so sketchy it’s impossible to tell whether the insurance agency involved had binding authority over the insurer or was a broker, and therefore whether an oral contract claim could even be brought. 390 N.W.2d at 392-393.

The Court of Appeals also cites a “similar” Wisconsin case, *Schurman v. Neau*, 2001 WI App 4, 240 Wis.2d 719, 624 N.W.2d 157, as “consistent” with its holding. (AAD 60, Court of Appeals Decision, p. 10, n. 5). The Court of Appeals decision omits important facts, however, which distinguish this case.

In *Schurman*, the “agent” told the insured a disability policy he purchased would pay him a \$4,000 per month. When Schurman made a claim, however, the insurer determined that his past income was insufficient to qualify him for that amount, and that he was only entitled to receive \$1,500 per month. When the promised payout did not transpire, Schurman sued the agent, alleging he had *intentionally* misrepresented the amount of the payout. The insurer settled with Schurman for substantially less than the agent’s promised coverage. The question on appeal was whether the settlement with the insurer barred Schurman’s intentional tort claim against the agent. The Wisconsin court held that Schurman was entitled to sue the agent for the benefit of the bargain. Because the promised payout was higher than the settlement with the insurer, Schurman was entitled to sue the agent for the difference.

The critical distinction between *Schurman* and this case is that nothing in *Schurman* suggests the defendant was an “agent” of the insurer who could have contractually bound the insurer to provide the type of coverage the agent had promised. *Schurman* identified the defendant as an “independent insurance agent,”

but did not address whether the agent involved was actually an “agent” or a “broker,” a critical distinction under Minnesota law. *Schurman*, at 159. See e.g. *Frank*, 528 N.W.2d at 914 (citing *Eddy*, 290 N.W.2d at 176-177) (“...the distinction between an agent and a broker is important because a broker ‘is independently liable to the insured in either contract or tort for failing to procure insurance as instructed.’”). The decision clearly implies, moreover, that Schurman could not have qualified for the promised \$4,000 per month disability policy. As such, Schurman, had damages above and beyond any policy the agent could have bound, even assuming the “agent” had such authority. Finally, Schurman sued the “agent” for an *intentional* tort, an allegation which clearly placed the “agent” beyond his scope of authority.

Even more telling than the Court of Appeals’ misplaced reliance on *Schurman* is its failure to discuss or even acknowledge this Court’s decision in *Eddy*. Both the facts and legal issues in *Eddy* are virtually identical to those here. The only difference is that *Eddy* required a remand to determine whether the defendant was an “agent” of the insurer, or a “broker” who would be “independently liable to the insured....” *Eddy*, 290 N.W.2d at 176-177. As the question of agency is undisputed in this case, the import of *Eddy* is clear—a settlement with a contractually bound insurer bars an action against an agent acting within the scope of his authority. *Id.*; See also *Paull*, at 541.

4. Alternatively, circular indemnity releases Swendra.

American Family has a common law duty to indemnify Swendra “for expenses, losses, and liabilities incurred on behalf of the principal.” *Art Goebel, Inc. v. Northern Suburban Agencies, Inc.*, 555 N.W.2d 549, 551, (Minn. App. 1996), *reversed on other grounds*, 567 N.W.2d 511 (Minn. 1997). See also *Hill v. Okay Construction Co., Inc.*, 312 Minn. 324, 252 N.W.2d. 107, 120 (Minn. 1977) (The law implies a promise of indemnity from a principal to his agent for any damages resulting from the acts of the agent in the good faith execution of that agency). When the principal has an indemnity obligation to the agent, a *Pierringer* release of the principal also releases the agent. See *Kellen v. Mathias*, 519 N.W.2d 218, 223 (Minn. App. 1994). In *Kellen*, the court explained how circular indemnity works in the context of a municipal employee who has the right of indemnity from the employer:

Under certain situations, a principal may have an obligation to indemnify its agent. Under Minn.Stat. § 466.07, subd. 1 (1992), a municipality is required to “defend and indemnify any of its officers and employees” for damages arising when the officer or employee was acting in the performance of the duties of the position and was not guilty of malfeasance in office, willful neglect of duty or bad faith. A plaintiff may enter into a *Pierringer* release with the municipality to the effect that the plaintiff agrees to indemnify the municipality for any claims of contribution or indemnity. To the extent a judgment is rendered against the employee, the municipality has an obligation to indemnify the employee, and pursuant to the *Pierringer* release, the plaintiff would have to indemnify the municipality. Thus, the plaintiff would recover nothing from the employee, effectively releasing the

employee from liability. ***Thus, the release of a principal who has an indemnity obligation will release the agent.***

(Emphasis added). *Kellen*, at 223. Graff concedes his agreement with American Family is a *Pierringer* release. (T. 582). The release states Graff will indemnify American Family for any claims made against it resulting from the accident. (AAD 47; AAD 55, Court of Appeals Decision, p. 4). This would presumably include any indemnity American Family would have to pay Swendra. Graff, therefore, would have no net gain. This destroys the claim. *Hoffman*, 411 N.W.2d at 926.

The trial court rejected this argument by finding American Family had no indemnity obligation to Swendra. There was no indemnity in the agency agreement, and the “agency” stipulation at trial did not create an indemnity obligation. (AAD 25-26, Postverdict Decision, pp. 17-18). The Court of Appeals concurred, finding no common law indemnity obligation:

At common law, ‘[a] principal’s duty to indemnify does not extend to losses that result from the agent’s own negligence.’ Restatement (Third) of Agency § 8.14 cmt. B (2006). The Minnesota Supreme Court follows this rule: ‘[W]e know of no rule of law whereby, absent an express agreement to the contrary, a duty of indemnity is imposed upon a principal for ***losses incurred due to the agent’s fault.*** Rather, the rule is that such a duty does not exist under those circumstances.’ *Shair-A-Plane v. Harrison*, 291 Minn. 500, 503, 189 N.W. 2d 25, 27-28 (1971) (citing Restatement (Second) of Agency §§ 438, 440(a) (1958)). Here, as in *Shair-A-Plane*, the losses Swendra faces are due to his own negligence. Absent an agreement or other special circumstances,

American Family has no obligation to indemnify Swendra against losses caused by his negligence.

(italicized emphasis original; bold emphasis added). (AAD 61, Court of Appeals Decision, p. 11).

The Court of Appeals also found that an insurer's inability to obtain indemnity from an agent who orally bound coverage did not give an agent a corollary right to indemnity from the insurer when sued directly: "Graff's negligence action against Swendra as an agent is distinct from an action on the policy and is based upon Swendra's own conduct, it does not follow that a principal would have to indemnify Swendra as an agent." (AAD 62, Court of Appeals Decision, p. 12).

The Court of Appeals is wrong: 1) the rule it cites against agent indemnification does not apply because Swendra's "negligence" did not cause Graff any loss; and 2) denying indemnification based solely on the plaintiff's choice to sue the agent rather than the insurer is not only illogical, it amounts to a prohibited de facto indemnification of the principal.

The Court of Appeals cites Restatement (Third) of Agency § 8.14 cmt. B (2006) and *Shair-A-Plane v. Harrison* for the proposition that a principal's duty to indemnify does not extend to *losses that result* from the agent's own negligence. This rule cannot be applied here, however, because Swendra *did not cause* Graff

any harm. Swendra's "negligence" in failing to "procure" coverage had no effect on American Family's obligation to cover Graff. As the *Paull, Eddy, Anderson, Julien* and *Reserve* line of cases make clear, when an agent acting within the scope of his authority represents to an insured that he is covered, and the principal would have provided such coverage had it been requested, the principal is legally obligated to provide it. As the court specifically notes in *Paull*, the agent does no harm to the insured when coverage is bound. *Paull*, 213 N.W.2d at 541. As such, Swendra caused no loss. He is, therefore, entitled to indemnity. *Hill*, 252 N.W.2d at 120.

Alternatively, it defies logic that an agent would be obligated to pay the entire claim, without a right of contribution from the insurer, based solely on who the insured decides to sue, when the insurer would otherwise be contractually obligated to pay the entire claim without indemnity from the agent.

An insurer cannot seek indemnity for the negligent acts of its agent if two factors are met: "(1) ...the agent acted within the scope of his authority when binding the insurer to provide coverage and (2) ...the insurance company would have issued a policy had the application been transmitted to the insurer." *Anderson*, at 235. This is based upon the recognition that the insurer has not, in fact, been harmed. *Julien*, 166 N.W.2d at 357 (Insurer suffered no loss when agent orally bound coverage); *Norby v. Bankers Life Co. of Des Moines*, 304 Minn. 464, 231

N.W.2d 665, 671 (1975) (When insurer is not prejudiced by the agent's negligence, even though loss is paid out to the insured, agent need not indemnify insurer); *Peterman v. Midwestern Nat'l Ins. Co.*, 177 Wis.2d 682, 705-06, 503 N.W.2d 312, 321-22 (Ct. App. 1993) (Where insurer would have provided coverage but for Agent's mistake, insurer not entitled to indemnification from agent because the agent's negligence is not the cause of any "loss" to the insurer. Insurer would have had to pay the same amount to the insured had the agent properly handled the insured's request for coverage.)

Had Graff pursued its breach of contract claim against American Family, American Family would have been contractually liable to pay the entire judgment without any right of indemnity against Swendra. According to the Court of Appeals, however, if Graff chooses to settle with American Family and sue Swendra, Swendra is on the hook for the entire judgment. It makes no logical sense that an agent could, on the one hand, legitimately bind the insurer to provide coverage without being subject to an indemnity claim; but on the other hand could, at the plaintiff's whim, be sued directly and required to pay the insurer's obligation in full without further recourse. Not only does a direct negligence suit shift liability from the contractually obligated insurer, it amounts to a de facto indemnification contrary to the holdings in *Paull*, *Eddy*, *Anderson*, *Julien*, and *Reserve*. By using a settlement to shift liability to the individual agent, the insurer

avoids what it would otherwise be liable to pay. Thus, the only way to reconcile those cases with, *arguendo*, an insured's 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.

Eddy, in particular, clearly undermines the Court of Appeals holding. Again, the plaintiff in *Eddy* made the same choice Graff made here—he settled with the insurer and continued a negligent procurement action against the “agent.” *Eddy*, 290 N.W.2d at 176. Yet the critical issue for this Court was not who the plaintiff chose to sue, but whether the defendant was an agent or a broker. The answer to that question is what determined whether a release of the insurer released the “agent.”

There are, of course, many circumstances under which an agent could be individually liable. If the agent promised coverage the insurer would not or did not offer, for example, the agent could not bind the insurer to provide it. He would be acting outside the scope of his authority. The agent would then be liable to the insured for damages incurred in reliance on the agent's representations. In this case, however, Swendra *did* create a binding contract. Not only because he had the authority to do so, but because the insurer offered the product and would have provided it to Graff. As coverage was bound, Swendra caused no loss to either

Graff or American Family. As Swendra caused no loss, he is entitled to indemnity from his principal.

Because Swendra is entitled to indemnity from American Family for any judgment Graff obtained against him, and the release requires Graff to indemnify American Family for any claim against it, indemnity is entirely circular. *Kellen*, 519 N.W.2d at 223.

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 FOR FUTURE WAGE LOSS BENEFITS AND MEDICAL EXPENSES.

Under Minnesota law, Swendra is entitled to reduce the damages he must pay by the amount plaintiff receives from certain collateral sources. Collateral source payments are defined as:

...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. § 548.251 subd. 1 (formerly Minn. Stat. § 548.36). Upon Defendant's motion, the Court is required to 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;

(Emphasis added) Minn. Stat. § 548.251, subd. 2.

Defendant is entitled to reduce the plaintiff's award by all qualified payments made prior to the verdict, regardless of whether they represent past or future damages. See e.g. *Pemberton v. Theis*, 668 N.W.2d 692, 697-698 (Minn. App. 2003) (Lump sum settlement for future medical expenses paid prior to verdict properly used to reduce damage award). In this case, however, Graff did not submit past lost wages or past medical expenses to the jury. (AAP155, Graff Collateral Source Memorandum). Therefore, only payments for future lost medical expenses and future lost wages are at issue.

Swendra identified four collateral source payments to Graff that may have been applied to reduce the damage award: Lump sum Worker's Compensation

payments for future disability and future lost wages (\$80,917.09); PERA disability pension paid as of date of verdict (\$72,816.00); bodily injury settlement from the tortfeasor (\$30,000.00); and the UIM bodily injury settlement from American Family (\$100,000.00). (AAP120-125, Swendra Collateral Source Memorandum).

Graff has conceded both the \$30,000.00 and \$100,000.00 settlement amounts as collateral source payments under Minn. Stat. § 548.251. (T. 586, 590). Swendra, moreover, is not contesting the trial court's decision to exclude the PERA disability pension. The sole issue on appeal concerns the worker's compensation benefits.

Graff received a total of \$213,815.00 in payments from Worker's Compensation (WC) prior to the verdict. (AAP122 and AAP128-129, Swendra Collateral Source Memorandum and attached Exhibit 113 Notice of Benefit Payment). Of the \$213,815.00 Graff received in WC benefits, however, only two lump sum payments—one on May 18, 2006, for \$17,800.00; and one on December 29, 2006, for \$67,500.00—contain future damages. These payments explicitly compensated Graff for *permanent* partial disability.⁹ Because Graff did not submit past lost wages or past medical expenses to the jury, however, the trial court was required to separate out past damages (prior to the verdict) from future damages

⁹ (AAP123, AAP130-143, Swendra Collateral Source Memorandum and attached Exhibits 114 & 114A)

(after the verdict). See e.g. *Heine v. Simon*, 702 N.W.2d 752, 766-767 (Minn. 2005) (Where Worker's Compensation made one lump sum payment for two separate accidents, court must allocate for collateral source purposes).

The trial court began its analysis, however, by subtracting attorney's fees from each of the lump sum awards. Thus, \$3,760.00 was subtracted from \$17,800.00, for a sub-total of \$14,040.00; and \$7,500.00 was subtracted from \$67,500.00, for a sub-total of \$60,000.00. (AAD 34-35, Order On Collateral Sources & Memorandum of Law, filed 10/29/2008, (hereinafter "Decision"), pp. 8, 9, footnote 3, 6). In order to determine which (non-deductible) portion pertained to the period between the date of payment in 2006 and the May 23, 2008, verdict, the trial court divided each lump sum payment by the months remaining in Graff's life expectancy at the time the payment was made. It then multiplied the amount per month by the number of months between the date of the award and the date of the verdict.¹⁰ (AAD 34-34, Decision, pp. 8, 9, footnotes 4, 8). Thus, \$917.76 was subtracted from \$14,040.00 for a sub-total of \$13,122.24; and \$2,861.95 was

¹⁰ On May 18, 2006, Plaintiff's life expectancy was 367.2 months. \$14,040.00, the lump sum awarded, divided by 367.2 months, equals \$38.24 per month. Approximately 24 months passed between the date of payment, May 18, 2006, and the May 23, 2008 verdict. 24 months multiplied by \$38.24 equals \$917.76.

....
On December 13, 2006, Plaintiff's life expectancy was 356.4 months. \$60,000.00, the lump sum awarded, divided by 356.4, equals 168.35 per month. Approximately 17 months passed between the date of payment, December 13, 2006, and the May 23, 2008 verdict. 17 months multiplied by 168.35 equals \$2,861.95.

subtracted from \$60,000.00 for a sub-total of \$57,138.05. The total amount of Worker's Compensation payments subject to Minn. Stat. § 548.251, therefore, was \$13,122.24 plus \$57,138.05 equals \$70,260.29.

Swendra does not challenge the trial court's methodology. The trial court erred, however, when it started its analysis by subtracting attorney fees from the lump sum awards. The trial court did not subtract attorney fees from either the \$30,000.00 tortfeasor settlement or the \$100,000 UIM settlement from American Family, and there is no legal basis for doing so. 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).

Minn. Stat. § 548.251 provides no exclusion for attorneys fees. In fact, it expressly includes payments made "on the plaintiff's behalf..." or "for the benefit of the plaintiff" as long as they are related to the injury or disability. The statute cited by the trial court, Minn. Stat. § 176.081, merely establishes the maximum allowable attorney fees in worker's compensation cases when an attorney has been retained. In short, the trial court had no legal authority to subtract attorney fees from the lump sum payments made to Graff for the purposes of Minn. Stat. § 548.251.

Therefore, starting with a lump sum payment of \$17,800.00 rather than \$14,040.00; and a lump sum payment of \$67,500.00 rather than \$60,000.00, and

employing the trial court's same methodology, the amount subject to deduction from the verdict under Minn. Stat. § 548.251 is \$80,917.09¹¹ rather than \$70,260.29. The current judgment of \$497,465.73 should be reduced by \$10,656.80.

CONCLUSION

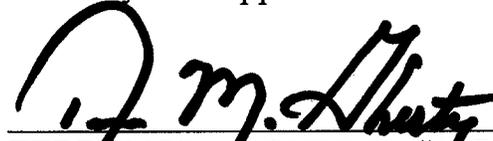
The judgment against Swendra should be reversed and Graff's claim dismissed. Graff's release of American Family also released Swendra because, under these facts, American Family is solely responsible for paying Graff's claim. Alternatively, circular indemnity offsets any recovery Graff may receive from 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

¹¹ On May 18, 2006, Graff's life expectancy was 367.2 months, divided into \$17,800, equals \$48.47 per month. 24 months multiplied by \$48.47 equals \$1,163.28, for a subtotal of \$16,636.72. On December 29, 2006, Graff's life expectancy was 356.4 months, divided into \$67,500, equals \$189.39 per month. 17 months multiplied by \$189.39 equals \$3,219.63, for a subtotal of \$64,280.37. The deduction from WC payments is thus \$16,636.72 plus \$64,280.37 equals \$80,917.09.

order the trial court to subtract \$10,656.80 from the judgment pursuant to Minn.
Stat. § 548.251.

Respectfully submitted this 12 day of April, 2010.

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STATE OF MINNESOTA
IN SUPREME COURT

CURTIS R. GRAFF,

Respondent,

vs.

ROBERT M. SWENDRA AGENCY, INC,

Appellant,

CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds, 1 and 3, for a brief produced with a proportional font. The length of the brief is 10,344 words. This brief was prepared using Microsoft Office Word 2003.

Dated this 12 day of April, 2010

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