

NO. A09-1138

State of Minnesota
In Supreme Court

Gregory Latterell, trustee for the heirs
of Jared Travis Boom, decedent,

Appellant,

vs.

Progressive Northern Insurance Company and
AIG Insurance Company,

Respondents.

APPELLANT'S BRIEF AND 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. Whether the Minnesota Court of Appeals erred as a matter of law in determining that Respondents' exclusionary clause in its policy did not violate the Minnesota No-Fault Automobile Insurance Act even though the Minnesota No-Fault Act mandates underinsured motorist coverage, and Respondents' exclusionary clause was not a restriction or exception authorized by Minnesota statute.

The Minnesota Court of Appeals held in the negative. (Order and Memorandum at 3, AA-12-AA-14).

Apposite Authority: MINN. STAT. § 65B.49, subd. 3a (2010); *Ill. Farmers Ins. Co. v. Eull*, 594 N.W.2d 559 (Minn. Ct. App. 1999); *Marchio v. Western Nat'l Mut. Ins. Co.*, 747 N.W.2d 376 (Minn. Ct. App. 2008); *Smith v. Ill. Farmers Ins. Co.*, 455 N.W.2d 499 (Minn. Ct. App. 1990).

2. Whether the Minnesota Court of Appeals erred as a matter of law in determining Respondent, Progressive's exclusionary clause was not susceptible to more than one meaning, when prior Minnesota Court of Appeals decisions found similar clauses to be ambiguous.

The Minnesota Court of Appeals held in the negative. (Order and Memorandum at 5, AA-14-AA-16).

Apposite Authority: MINN. STAT. § 65B.49 (2010); *Closner v. Ill. Farmers Ins. Co.*, No. A08-0512, 2009 WL 22286, *1 (Minn. Ct. App. Jan. 6, 2009); *Kissoondath v. SAFECO Ins. Co.*, No. CX-96-1462, 1996 WL 665906 (Minn. Ct. App. Nov. 19, 1996); *Progressive Casualty Ins. Co. v. Metcalf*, 501 N.W.2d 690 (Minn. Ct. App. 1993).

3. Whether the Minnesota Court of Appeals erred as a matter of law in determining Appellant, as trustee for the heirs of Decedent, Jared Boom was not entitled to seek excess UIM coverage from Respondent, AIG when Decedent, Jared Boom was not insured under his own policy because of an exclusionary clause that denied him underinsured motorist coverage.

The Minnesota Court of Appeals held in the negative. (Order and Memorandum at 8, AA-17-AA-18).

Apposite Authority: MINN. STAT. § 65B.49, subd. 3a (2010).

STATEMENT OF FACTS

Jared Travis Boom died as a result of a head-on motor vehicle collision. On October 4, 2007, Joshua Nelson attempted to pass at least three vehicles when his vehicle struck and killed Jared Boom. Jared Boom was delivering books to the Kerkhoven Library as a sub-carrier with National Dispatch of Albany, Inc. at the time of the crash. Mr. Boom's employer paid him a daily wage for his route plus a gas surcharge per day. Mr. Boom used his own car he insured with Respondent, Progressive when delivering books. (A-1-A-3). At the time of the crash, Jared Boom was living with his mother and stepfather, Appellant, Gregory Latterell. Appellant Latterell had a car insurance policy with Respondent, AIG that covered resident relatives. (A-5-A-9).

Appellant, Gregory Latterell, initiated a claim against Nelson's insurance provider, American Family Insurance. The matter settled for Nelson's policy limits of \$100,000.00. Jared Boom's damages surpassed Nelson's policy limits. Since Nelson's vehicle was underinsured at the time of the accident, a Schmidt Clothier letter was sent to Progressive and AIG and neither chose to substitute its drafts. (A-10-A-11); (A-12-A-13).

Subsequently, Gregory Latterell sought UIM benefits from Jared Boom's insurance provider, Respondent, Progressive. Mr. Boom's policy provided UIM coverage with a \$100,000.00 limit per person. (A-1). Mr. Latterell demanded Mr. Boom's UIM policy limits. Respondent, Progressive denied UIM benefits stating UIM coverage was limited by an exclusionary clause for claims incurred while carrying property for

“compensation or a fee.” (A-3; A-14). After Respondent denied coverage, Appellant, Gregory Latterell sought UIM coverage from AIG under the resident relative terms of his policy. AIG denied coverage on the basis that Jared Boom was the named insured on Respondent, Progressive’s policy that insured his vehicle involved in the crash. (A-4-A-9); (A-15).

Appellant, Gregory Latterell initiated a lawsuit against Respondents after both refused to pay UIM benefits. On December 31, 2008, Appellant Latterell brought a summary judgment motion. (A-18). Appellant Latterell contended that Respondent, Progressive’s exclusionary clause violated the Minnesota No-Fault Automobile Insurance Act and contained ambiguous, unenforceable language. Appellant Latterell submitted that if Jared Boom was excluded from UIM coverage under Respondent, Progressive’s policy, he would be entitled to coverage under AIG’s policy as a household relative.

Hennepin County District Court Judge, William R. Howard, denied Appellant Latterell’s motion but granted Respondents’ motions for summary judgment. (AA-1-AA-9). The trial court ruled that the exclusionary clauses were valid as a matter of law, and that decedent, Jared Boom was insured with Defendant, Progressive such that he was not entitled to UIM benefits from Respondent AIG. Appellant, Gregory Latterell appealed to the trial court’s decision as of right, pursuant to Minnesota Rule of Civil Procedure 103.3(a) from an April 30, 2009, final judgment disposing of all issues among all parties on June 23, 2009. (A-19-A-20). Oral arguments were heard before Court of Appeals Judges, Lansing, Halbrooks, and Randall. Judge Halbrooks affirmed the opinion of the

trial court on March 2, 2010. (AA-10-AA-18). Appellant, Gregory Latterell filed a Petition for Discretionary Review with this Court pursuant to Minnesota Rule of Civil Appellate Procedure 117. (A-21-A-25). This Court granted further review of the decision of the court of appeals on May 18, 2010. (AA-19).

ARGUMENT

I. Appellate court erred in ruling that Respondent, Progressive's exclusionary clause did not violate the Minnesota No-Fault Automobile Insurance Act based on the mandatory requirements of UIM coverage

A. Statutory Construction of the No-Fault Act

The No-Fault Act, a statutory creature, was created to relieve the severe economic stress of uncompensated, injured persons involved in automobile accidents within Minnesota. MINN. STAT. § 65B.42 (2009); *Tuenge v. Konetski*, 320 N.W.2d 420, 421 (Minn. 1982). The No-Fault Act requires all automobiles operated in Minnesota to be insured. MINN. STAT. § 65B.48 (2009). Each insurance policy must provide third-party, liability insurance, and first-party benefits, including UIM coverage. MINN. STAT. § 65B.49, subd. 1, 3 (2010); Minn. Stat. § 65B.49, subd. 3a(1) (2010); *Marchio v. Western Nat'l Mut. Ins. Co.*, 747 N.W.2d 376, 380 (Minn. Ct. App. 2008).

Liability insurance is third-party coverage in that it pays another party for damages arising out of the insured's use of a motor vehicle. *Lynch v. Am. Family Mut. Ins. Co.*, 626 N.W.2d 182, 188 (Minn. 2001). Liability coverage protects an insured from having to pay damages when the insured's negligence injures another. *Id.* at 188. Minnesota law provides that insurance policies must provide at least \$30,000 for bodily injury per person

per accident, \$60,000 bodily injure per accident for multiple people, and \$10,000 property damage per accident. MINN. STAT. § 65B.49, subd. 3(1) (2010).

UIM coverage, first-party coverage, is intended to provide complete recovery, and protect the named insured against the risk that a negligent driver of another vehicle will have failed to purchase adequate liability insurance. *Meyer v. Ill. Farmers Ins. Group*, 371 N.W.2d 535, 537 (Minn. 1985). The Minnesota No-Fault Act mandates minimum liability limits of at least \$25,000 per person and \$50,000 per accident. MINN. STAT. § 65B.49, subd. 3a(1) (2010).

B. Progressive's exclusionary clause contravenes Minnesota Statute Section 65B.49, subd. 3a

The contractual agreement between the insurer and the insured determine an insurer's liability to the extent that the policy does not omit coverage required by law and the coverage does not violate statutes such as the Minnesota No-Fault Automobile Insurance Act. *Marchio*, 747 N.W.2d at 380 (citing *Am. Fam. Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000)). Mandatory coverage may contain restrictions and exceptions but only as authorized by statute. MINN. STAT. § 65B.49, subd. 8 (2010) (stating that contract provisions give way to statutory requirements). Policy exclusions within the contract are given the same consideration in determining coverage so long as the exclusionary clause complies with the provisions of the section and does not omit required coverage. *Marchio*, 747 N.W.2d at 380.

The Minnesota No-Fault Act defines the scope of mandatory UIM coverage in eight numbered paragraphs that explicitly identify exceptions and limitations to that coverage allowed to be imposed on insurance policies. Minn. Stat. § 65B.49, subd. 3a (2010). The No-Fault Act provides that parties to an automobile insurance contract may agree to more benefits and coverage than the minimum required by the No-Fault Act. MINN. STAT. § 65B.49, subd. 7 (2010). However, clauses that seek to reduce the amount payable for UIM benefits requested when another person is at-fault has been held to violated Minnesota Statute Section 65B.49, and thus, is unenforceable. MINN. STAT. § 65B.49, subd. 4a (2010); *Mitsch v. Am. Nat'l Prop. & Cas. Co.*, 736 N.W.2d 355, 363 (Minn. Ct. App. 2007).

In this case, the Minnesota Court of Appeals addressed the exclusionary clause issue in its opinion by comparing the case at hand to *Smith v. Ill. Farmers Ins. Co. Smith*, 455 N.W.2d 499 (Minn. Ct. App. 1990), *rev. denied* (Minn. July 13, 1990). In *Smith*, several plaintiffs were injured in a taxicab accident in Mexico. *Id.* The plaintiffs tried to recover UM coverage from their own policies but were denied coverage based on territorial exclusions in the policies. *Id.* (*citing* MINN. STAT. § 65B.49, subd. 3(2) (2010)).

The court found that clauses purporting to exclude certain types of coverages have been uniformly upheld if they are unambiguous and do not conflict with statutory provisions. *Id.* In *Smith*, the court of appeals rationalized the validity of the UM exclusion based on the risk that the insured would be struck by an uninsured vehicle in another country. *Id.* at 501. The court held that the policy was sound to exclude UM

benefits in countries where the number of uninsured motorists was unknown or so high to make coverage impractical. *Id.* The *Smith* court found the territorial limitation provisions in *Smith* were identical to the restrictions contained in the No-Fault Act and thus, the territorial restrictions were valid and enforceable. *Id.* at 502.

Unlike the territorial exclusion in *Smith*, that can be found in the No-Fault Act, the business-use exclusion in this case is not found under any provision in UIM section of the No-Fault Act. Rather, Minnesota Statute 65B.49, subd. 3a mandates first-party, UIM coverage. The statute even sets minimum policy limits all UIM insurance policies must contain.

The appellate court's opinion in this case indicates it has upheld business-use exclusions similar to the one in this case but in the context of liability coverage. To support its assertion, the court of appeals relies on *Ill. Farmers Ins. Co. v. Eull*, 594 N.W.2d 559, 562 (Minn. Ct. App. 1999). The plaintiff in *Eull*, delivered pizzas using his father's vehicle insured by Illinois Farmers Insurance Company. *Id.* at 560. While delivering pizzas, the plaintiff's vehicle collided with a vehicle driven by defendant, Eull. *Id.* at 561. The plaintiff filed a claim for liability insurance coverage. *Id.* Illinois Farmers Insurance Company denied his claim because the policy contained a business use exclusion. *Id.* at 560-61.

The court in *Eull*, stated that because the use of the car was more than incidental, it was beyond reasonable to expect coverage for commercial use. *Id.* at 561. The court went on to find that the business-use exclusion applied only to the plaintiff's liability

coverage, which was paid to a third party, not to his first-party benefits which are paid to the insured party. *Id.* at 562.

The problem with the court's comparison of Jared Boom's case to the plaintiff in *Eull* is two-fold in that the court does not take into account the distinctions between first-party and third-party coverage as stated above, including the distinct differences in policy considerations and purposes underlying each type of coverage. The appellate court compared Jared Boom's case to *Eull*, even though the exclusion in *Eull* applied only to liability coverage, which would be paid to a third party. In Jared Boom's case, however, Respondent, Progressive has attempted to exclude his first-party benefits, which are paid to the insured person. Second, the appellate court assumed that the exclusion in Jared Boom's case was not so broad as to practically foreclose mandated UIM coverage.

In this case, Respondent, Progressive's policy conflicts with the No-Fault Act's coverage scheme because the exclusion operates to not only limit UIM coverage, but to practically foreclose an insured from recovering UIM benefits under the policy. When looking at the exceptions and limitations to UIM coverage, an authorization for exclusionary clauses such as Respondent, Progressives business-use limitation is conspicuous by its absence. If an insurer wanted to regulate commercial usage, employment usage, or another usage, it should have contracted for additional provisions rather than taking away mandated coverage. The remedy for this type of situation should not have been a denial of coverage, but rather a claim for additional premiums proportionate with the additional risk entailed. Respondent, Progressive has attempted to

eliminate UIM benefits based on an exclusionary clause. Attempts by insurance carriers to reduce or eliminate mandated UIM coverage violate the No-Fault statute, making the business-use exception invalid and unenforceable as a matter of law.

II. Appellate court erred in ruling that Respondent's exclusionary clause was not ambiguous as a matter of law based on a matter of semantics

Minnesota law "embraces a strong public policy of extending coverage rather than allowing it to be restricted by ambiguous or confusing language. *Kissoondath v. Safeco Ins. Co.*, No. CX-96-1462, 1996 WL 665906 (Minn. Ct. App. Nov. 19, 1996) (A-26-A-29). Interpretation of an insurance policy is a question of law. *Progressive Casualty Ins. Co. v. Metcalf*, 501 N.W.2d 690, 691-92 (Minn. Ct. App. 1993). Policy language will be deemed ambiguous where it is reasonably susceptible to more than one interpretation. *Id.* at 692 (citing *ICC Leasing Corp. v. Midwestern Mach. Co.*, 257 N.W.2d 551, 554 (Minn. 1977)). An ambiguity may also result from irreconcilable conflict between terms or provisions within the policy. *Metcalf*, 501 N.W.2d at 692 (citing *Morris v. Weiss*, 414 N.W.2d 485, 487 (Minn. Ct. App. 1987)). Courts must construe ambiguous language in an insurance policy against the insurer and in favor of the insured. *Metcalf*, 501 N.W.2d at 692; *Closner v. Ill. Farmers Ins. Co.*, No. A08-0512, 2009 WL 22286, at *4 (Minn. Ct. App. Jan. 6, 2009) (citing *Marchio v. Western Nat'l Mut. Ins. Co.*, 747 N.W.2d 376, 380 (Minn. Ct. App. 2008)) (A-26-A-33). The two principle cases Appellant has consistently relied on to support his contention are *Metcalf* and *Closner*.

In *Metcalf*, Watroba, a pizza delivery person was operating a motor vehicle that collided with an automobile owned by Allen Metcalf. *Metcalf*, 501 N.W.2d at 691. Watroba sought and was denied coverage from Northland Insurance Company. *Id.* The insurer denied coverage based on a liability exclusionary clause that eliminated coverage for “liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. *Id.*

The court found the exclusionary clause to be ambiguous. *Id.* at 692. Specifically, the court reasoned that the term “fee” was susceptible to more than one meaning. *Id.* A “fee” could refer to a per trip charge or wages paid to an employee for driving. *Id.* The court held that the driver’s wages could not be considered a “fee” within the meaning of the exclusion because Watroba received the same wage whether he was driving his car or performing other duties. *Id.* Given the various possible meanings of the word “fee,” the exclusion was subject to more than one interpretation and thus ambiguous. *Id.* at 692. Given the ambiguity, the court construed the exclusion against the insurer and found coverage for the delivery person. *Id.*

Similarly, in *Closner*, the defendant driver, Zimmerman was a newspaper delivery person using her private passenger car when she collided head-on with a vehicle driven by Julie Closner. *Id.* at *1. Zimmerman, an independent contractor, purchased newspapers and sold them to subscribers. *Id.* At the time of the crash, Zimmerman was insured by Illinois Farmers Insurance Company. *Id.* Illinois Farmers Insurance Company denied coverage citing two liability coverage exclusions. *Id.*

The first clause excluded liability coverage when an auto was “used to carry persons or property for a charge.” *Id.* at *1. The second provision excluded liability coverage when an injury claim arose “out of ownership, maintenance or use of any vehicle by any person employed or otherwise engaged in a business [except when a] . . . [p]rivate passenger car [is] . . . used in employment by any person whose primary duties are the delivery of products or services.” *Id.*

In reaching its conclusion excluding coverage, the district court relied on *Metcalf* stating that the liability coverage exclusion for using an automobile to carry persons or property for a charge is not ambiguous. *Id.* at *2. The appellate court disagreed with the district court seeing no basis for interpreting the phrase “for a charge” as not ambiguous. *Id.* Applying *Metcalf*, the appellate court reasoned that the using the phrase “for a charge” in lieu of “for a fee” would not have resolved the ambiguity in the exclusion. *Id.* Instead, the *Metcalf* court merely used the word “charge” when trying to explain possible meanings of the policy term “fee.” *Id.* Because the exclusionary clause in *Closner* did not clearly state whether it applied to the different possibilities, the phrase “for a charge” was ambiguous and unenforceable. *Id.*

Here, the court of appeals distinguished the exclusionary clause from *Metcalf* finding that the language in Jared Boom’s policy with Respondent, Progressive was broader. Specifically, the appellate court found that simply including the term “compensation” removed any ambiguity in *Metcalf*. Similar to the court of appeals rationale, the insurance company in *Closner*, tried to argue that using the phrase “for a

charge” in lieu of “fee” cleared up any ambiguity. However, the appellate court in *Closner*, did not find this argument persuasive stating the issue was not with the term, whether it be “fee” or “charge.” Rather, the problem was with the meaning of the term as was applied in the *Metcalf* decision.

The words “fee,” “charge,” or “compensation” could refer to wages paid to an employee for driving, a per trip charge or an amount included in the price of books to reflect the costs of making the delivery, a charge received by Jared Boom for the use of his car, or a charge received by the delivery company for delivering the books. The word compensation is a vague term because it could imply money or some type of tangible or intangible benefit. Because the exclusionary clause is silent as to whether the person delivering or picking up must be employed in some capacity, any person receiving some type of “compensation,” whether monetary or otherwise, for delivering an item could also fall under this exclusion. Since “compensation” and “fee” are reasonably subject to more than one interpretation, Respondent, Progressive’s policy must be deemed ambiguous.

**A. Similar to Respondent, Progressive’s exclusionary clause, Respondent
AIG’s policy exclusion is ambiguous and invalid as a matter of law**

Respondent, AIG’s insurance policy contained a similar UIM coverage exclusion for persons carrying property for compensation or a fee. The court of appeals validated the exclusionary clause indicating the language did not violate the No-Fault Act using a similar analysis as it did with Respondent, Progressive. Because the language of the exclusionary clause was contrary to Minnesota law, and because the specific terms used

in the exclusionary clause were ambiguous, the court of appeals erred by granting Respondent, AIG's motion for summary judgment.

B. Using a vehicle for employment does not extend beyond the scope of a personal auto policy but may adjust the premium for the additional UIM exposure

In its analysis, the court of appeals, citing *Eull*, held that using a vehicle for commercial use extends beyond the scope of a personal auto policy. The problem with the court of appeals' analysis is that the court fails to take into account the fact that insurance company's have the ability to increase insurance premiums to account for increased UIM exposure. Instead of foreclosing UIM coverage, insurance companies could raise premiums in their contracts.

C. Even if this Court finds there is no ambiguity in the insurance policy, the doctrine of reasonable expectations and public policy demand that the exclusionary clause be held invalid

Minnesota law requires that all automobiles operated in the state must insured. MINN. STAT. § 65B.48 (2010). The insurance must include liability coverage as well as no-fault benefits. MINN. STAT. § 65B.49 (2010). One of the main purposes for creating the No-Fault Act is to relieve the severe economic distress of uncompensated victims of automobile crashes within this state. MINN. STAT. § 65B.42 (2010).

In this case, Respondent, Progressive sold Jared Boom an insurance policy that purported to satisfy mandatory insurance requirements in Minnesota. Once an insurer provides compulsory insurance coverage, the insurer should not escape liability employing exclusions that will eventually foreclose an injured's ability to seek

compensation in order to make the insured whole. The remedy should not be a complete denial of coverage, but rather a claim for additional premiums in conjunction with the increased risk in commercial usage.

III. Appellate court erred in assuming that Jared Boom was an “insured” when his policy foreclosed him from UIM benefits.

The Minnesota No-Fault Act contains a hierarchy in determining UIM coverage.

When a person covered by multiple policies occupies a vehicle at the time of the accident, the initial UIM claim must be made on the coverage for the occupied vehicle. MINN. STAT. § 65B.49, Subd. 3a(5) (2010). If the person is not an insured on the policy covering the vehicle, a claim for excess coverage may then be made against UIM coverage “afforded by a policy in which the injured party is otherwise insured.” *Id.* Therefore, an injured person is entitled to excess coverage if that person occupied a motor vehicle of which that person was not “an insured.”

In this case, the court of appeals concluded that the simple existence of Respondent, Progressive’s policy prevented looking to any other policy for benefits. Jared Boom’s policy with Respondent, Progressive was present, it just happened to be a policy for zero coverage in this case. This argument seems contrary to the mandatory minimums of the No-Fault statute and seems to fly in the face of what coverage really means. These claims are not made just to see if a policy exists. Rather, these claims are made for the money the policy embodies.

Appellant, Gregory Latterell submits that zero coverage is in all affects, both literally and figuratively no coverage. No coverage from the primary policy should allow the insured to pass to the next available coverage under the statutory scheme. For this reason, if this Court finds Jared Boom was excluded from Respondent, Progressive's policy, then Jared Boom's estate would simply be attempting to recover UIM benefits from Respondent, AIG as is allowed according to the resident relative exception of the No-Fault Act.

CONCLUSION

Respondents' exclusionary clauses run afoul to Minnesota law because they forecloses UIM coverage that is mandated by the Minnesota No-Fault Act. Exclusionary clauses containing language susceptible to multiple meanings have been found to be ambiguous and invalid as a matter of law. Respondent, Progressive, by ruling out Appellant, Gregory Latterell's attempt to seek UIM benefits, left Jared Boom uninsured under his policy but entitled to seek UIM coverage from Respondent, AIG as a resident relative. For the foregoing reasons, Appellant, Gregory Latterell, as trustee to the heirs of Jared Travis Boom, respectfully requests this Court to find the court of appeals erred in affirming the trial court's granting of summary judgment for Respondents, Progressive and AIG.

Dated this 17th day of June, 2010.

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A handwritten signature in black ink, appearing to read "Michael A. Bryant", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record, pursuant to Rule 132.01, subd. 3(a) of the Rules of Civil Appellate procedure, hereby certifies that the attached brief has been prepared using WordPerfect, Times New Roman, with a font size of 13 pt. and a word count of 4529.

Dated this 17th day of June, 2010.

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