

NO. A11-11

State of Minnesota
 In Supreme Court

Vy Thanh Ho and Lein Ho,
Appellants/Cross-Respondents,

vs.

Bakita Isaac,
Respondent,
 and

Auto Club Insurance Association,
Respondent/Cross-Appellant.

**APPELLANT/CROSS-RESPONDENTS'
 RESPONSE AND REPLY BRIEF**

ARTHUR, CHAPMAN, KETTERING,
 SMETAK & PIKALA, P.A.
 Paul J. Rocheford (#19539X)
 Paul E. D. Darsow (#285080)
 J. Kevin Kirchner (#0317159)
 500 Young Quinlan Building
 81 South Ninth Street
 Minneapolis, MN 55402
 (612) 339-3500

*Attorneys for Appellants/Cross-Respondents
 Vy Thanh Ho and Lein Ho*

VOHNOUTKA & ASSOCIATES, LTD.
 Jason R. Vohnoutka (#251859)
 3109 Hennepin Avenue South
 Minneapolis, MN 55408
 (612) 827-6628

Attorneys for Respondent Bakita Isaac

JOHNSON & LINDBERG, P.A.
 John R. Crawford (#158033)
 Benjamin A. Johnson (#0387838)
 7900 International Drive, Suite 960
 Minneapolis, MN 55425-1582
 (952) 851-0700

*Attorneys for Respondent/Cross-Appellant
 Auto Club Insurance Association*

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APPELLANTS/CROSS-RESPONDENTS' RESPONSE TO CROSS-APPEAL

I. INTRODUCTION

Appellants/Cross-Respondents Vy Than Ho and Lein Ho (“the Hos”) have in their opening brief accurately stated the legal issue, statement of the case, and statement of the facts applicable to the issue Respondent/Cross-Appellant Auto Club Insurance Association (“Auto Club”) raises on appeal to this Court. *See* Brief, Addendum, and Appendix of Appellants/Cross-Respondents Vy Thanh Ho and Lein Ho (“Appellants’ Brief”) at 2-10. Pursuant to Minn.R.Civ.App.P. 131.01, subd. 5(d)(3) (2012), the Hos incorporate those sections of their opening brief by reference here. The Hos respectfully submit that the issue for purposes of Auto Club’s appeal is not whether Auto Club sufficiently *preserved* its right to subrogation by substituting its check for the settlement payment tendered by Progressive Preferred Insurance Company (“Progressive”), the Hos’ liability insurer. Rather, the issue is whether Auto Club can *recover* that substituted amount from the Hos, who undisputedly were are not underinsured. For the reasons set forth herein, the Hos maintain that the Minnesota Court of Appeals correctly reversed the Hennepin County District Court, holding that Auto Club could not recover its substitution from the Hos because they are not underinsured. *See* Appellants’ Addendum at 4-5.

II. AUTO CLUB’S APPEAL PRESENTS A PURE LEGAL ISSUE WHICH THIS COURT REVIEWS *DE NOVO*.

In their opening brief the Hos advised the Court of their legal basis for asserting that the *de novo* standard of review applies to the issue Auto Club raises. *See* Appellant’s Opening Brief at 32. Auto Club agrees. *See* Respondent/Cross-Appellant Auto Club

Insurance Association's P&R Brief ("Auto Club's P&R Brief") at 32-33. The Hos' agreement with Auto Club concerning the issue it raises on appeal ends with the standard of review.

III. THE MINNESOTA COURT OF APPEALS PROPERLY DETERMINED THAT AUTO CLUB CANNOT USE SUBROGATION AS A MEANS FOR RECOVERING ITS UIM SUBSTITUTION FROM THE HOS WHO ARE NOT UNDERINSURED.

The Minnesota Court of Appeals decided that Auto Club cannot recover its substitution from the Hos, who are not underinsured. *See* Appellants' Addendum at 4-5. General legal principles related to equitable subrogation support this decision. Substitution gave Auto Club only a *potential* right of subrogation. Because the Hos are not underinsured, Isaac cannot compel Auto Club to pay her UIM benefits. Auto Club, therefore, has no interest worthy of protection via equitable subrogation.

A. General Legal Principles Related To Equitable Subrogation Govern The Issue Auto Club Raises On Appeal.

Auto Club seeks to recover its UIM substitution from the Hos via equitable subrogation. *See* Auto Club's P&R Brief at 33. General legal principles related to equitable subrogation apply. "Subrogation is a limited, not absolute, right that comes into existence only after the insurer has paid benefits to its insured . . .". *Schmidt v. Clothier*, 338 N.W.2d 256, 261 (Minn. 1983). "The key element in subrogation cases is whether the party seeking subrogation was *compelled* to pay another's debt." *Iowa National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 464 N.W.2d 564, 566 (Minn.App. 1990) (emphasis added). Subrogation does not lie where the party seeking subrogation lacks any interest requiring protection. *See id.* at 567. Auto Club provides

this Court with no contrary legal authority. Accordingly, a UIM carrier has no subrogation right to recovery against a tortfeasor if it is not *compelled* to pay UIM benefits to its insured.

B. Auto Club Had But A *Potential* Right To Subrogation At The Time Of Substitution Because It Remained To Be Seen Whether The Hos Were Underinsured.

When Auto Club substituted its check, there was no judgment stating that the Hos were liable to Respondent Bakita Isaac (“Isaac”) for damages in excess of the \$50,000 limit of Progressive’s liability insurance policy covering the Hos. It remained to be seen whether the Hos’ liability would exceed policy limits. Accordingly, Auto Club’s subrogation right was only a potential right when substitution occurred. That is why this Court has defined a UIM substitution as “a payment to the plaintiff for the protection of the insurer’s *potential* right of subrogation . . .”. *Gusk v. Farm Bureau Mutual Insurance Company*, 559 N.W.2d 421, 424 (Minn. 1997).

Auto Club argues that *Schmidt* requires no more than substitution to preserve a UIM carrier’s subrogation right. *See* Auto Club’s P&R Brief at 34. But the issue is not whether Auto Club adequately *preserved* its right to make a later subrogation claim if the Hos happened to be underinsured. The issue is whether Auto Club can use subrogation to *recover* its substitution from tortfeasors who are *not underinsured*. Auto Club provides no legal authority supporting its position. Therefore, Auto Club’s position that it is entitled to recovery merely because of substitution is without merit.

C. Nothing Compelled Auto Club To Pay Isaac Benefits At The Time Of Substitution.

The Minnesota No-Fault Automobile Liability Insurance Act defines an “underinsured motor vehicle” as “a motor vehicle . . . to which a bodily injury liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages.” Minn. Stat. § 65B.43, subd. 17 (2010). Only when the tortfeasor is underinsured does a UIM carrier have any obligation to pay its insured UIM benefits. A UIM substitution is not a payment that Minnesota law compels a UIM carrier to make. Rather, a UIM substitution is a payment made as a result of the UIM carrier’s own considered judgment and choice. *Schmidt* requires that a UIM carrier be given 30-days written notice, during which time the UIM carrier can “evaluate relevant factors, the amount of liability insurance remaining, if any, the amount of assets held by the tortfeasor and the likelihood of their recovery via subrogation, the total amount of the insured’s damages, and the expenses and risks of litigating the insured’s cause of action.” *Schmidt*, 338 N.W.2d at 263. Based on those factors, the UIM carrier decides for itself whether to substitute its check or merely do nothing and forfeit its potential right of subrogation against the tortfeasor. *See id.*

Auto Club argues that substitution alone establishes its right to subrogation recovery. *See* Auto Club’s P&R Brief at 33. The right to subrogation recovery exists only “when the party seeking subrogation *was compelled* to pay another’s debt.” *Iowa Nat. Mut. Ins. Co.*, 464 N.W.2d at 566 (emphasis added). While substitution is necessary to *preserve* the subrogation right, nothing about the *Schmidt-Clothier* procedure *obligated*

Auto Club to substitute. Substitution was Auto Club's voluntary choice based entirely on its own deliberate consideration of the factors discussed in *Schmidt*. See *Schmidt*, 338 N.W.2d at 263. Therefore, Auto Club's position that substitution alone entitles it to subrogation recovery is without legal merit.

D. Because The Hos Were Not Underinsured, Auto Club Never Will Be Compelled To Pay UIM Benefits To Isaac.

Although the Jury awarded \$56,420.97 in gross damages, the district court diminished that award by deducting Isaac's comparative fault and collateral sources. See Addendum at 25-26. After the appropriate adjustments, including those for comparative fault and collateral sources, Isaac had a net damage award of **\$44,184.26**. See *id.* This net verdict amount is well under Progressive's \$50,000 liability policy limit. Auto Club cannot and does not dispute that the Hos are not underinsured. Under these circumstances, Auto Club is not compelled to pay Isaac UIM.

E. Under These Circumstances, Auto Club Has No Legal Basis To Recover Its Substitution From The Hos Via Subrogation.

The right to subrogation recovery exists only "when the party seeking subrogation *was compelled* to pay another's debt." *Iowa Nat. Mut. Ins. Co.*, 464 N.W.2d at 566. Because the Hos are not underinsured, Auto Club is not compelled to pay Isaac UIM benefits. Accordingly, equitable subrogation provides Auto Club with no valid legal basis for recovery from the Hos because it lacks a legal interest in its recovery.

Auto Club argues that the Hos' reliance on *Iowa National* is misplaced. See Auto Club's P&R Brief at 44. *Iowa National*, Auto Club protests, "deals with multiple construction subcontractors, not *Schmidt* substitutions." Auto Club's P&R Brief at 44.

But the Hos do not rely upon *Iowa National* for its facts. They rely on it for the general principle of equitable subrogation law that it states.

F. *Gusk* Does Not Support Auto Club’s Effort To Use Subrogation To Recover Its Substitution From The Hos.

In *Gusk*, this Court held that “[a UIM] substitution is a payment to the plaintiff for the protection of the insurer’s *potential right* of subrogation . . .”. *Gusk*, 559 N.W.2d at 424 (emphasis added). Although this Court uses the word “potential” to characterize the UIM carrier’s subrogation right at the time of substitution, Auto Club points to a statement in that case’s facts in order to obfuscate this Court’s use of the word “potential.” It notes that although the tortfeasor in *Gusk* was not underinsured, this Court stated *in the fact section of the opinion* that application of comparative fault and the addition of prejudgment interest left ““Spencer’s insurer liable to Farm Bureau as subrogee for \$29,815.85 (*i.e.*, Spencer’s share of liability).”” Auto Club’s P&R Brief at 36 (quoting *Gusk*, 559 N.W.2d at 422). The opinion never specifies whether the subrogation liability involved uninsured motorist (“UM”) coverage or underinsured motorist (“UIM”) coverage, although both kinds of coverage were involved. The opinion also does not say that any judgment was entered on the subrogation claim. Auto Club claims this statement means it can make subrogation recovery from the Hos, although they are not underinsured and although it never had to pay UIM benefits to Isaac. *See* Auto Club’s P&R Brief at 36. Auto Club simply misconstrues *Gusk* in an effort to avoid an inconvenient legal principal, namely that its subrogation right at the time of substitution is only a potential right.

G. The Hos Make No Attempt To Mislead The Court.

The last sentence on page 33 of the Hos' opening brief should read: *Schmidt* holds that an “*insured* may recover underinsurance benefits where the total damages sustained (as determined by either arbitration or judgment) *exceed* the limits of the tortfeasor’s liability policy even where the insured settles with the tortfeasor for less than the liability limits.” *Schmidt*, 338 N.W.2d at 261 (emphasis added). The Hos’ use of the word “underinsurer” rather than “insured” was accidental. The Hos offered that quote only to explain why a UIM carrier has no subrogation right against a tortfeasor who is not underinsured.

IV. CONCLUSION

The rule of law the Hos would have this Court apply to the issue Auto Club presents is that a UIM carrier cannot use subrogation to recover its substitution from tortfeasors who are not underinsured. The Hos are not underinsured, and Auto Club will never be compelled to pay Isaac UIM benefits as a result. Therefore, this Court must affirm the Minnesota Court of Appeals relative to the issue Auto Club presents by way of cross-appeal.

APPELLANTS/CROSS-RESPONDENTS’ REPLY ARGUMENT

I. INTRODUCTION

Progressive paid Isaac \$10,665.00 to settle her claims against the Hos, and Auto Club substituted its check for that amount. What happens next? The rule of law the Hos would have this court apply now and prospectively is that a UIM substitution does not void a settlement between the plaintiff and the defendant tortfeasor absent a specific

agreement to that effect between those parties. This rule of law conforms to this Court's description a UIM substitution's forensic effect in *Washington v. Milbank*, 562 N.W.2d 801, 806 n.3 (Minn. 1997).

II. THIS COURT MUST REVERSE THE JUDGMENT IN ISAAC'S FAVOR BECAUSE THE RECORD EVIDENCE UNDISPUTEDLY SHOWS THAT ISAAC UNCONDITIONALLY AGREED TO SETTLE HER CLAIMS AGAINST THE HOS WITHOUT REGARD TO WHETHER AUTO CLUB EXERCISED ITS SUBSTITUTION RIGHTS.

The *de novo* standard of review applies to the issue the Hos raise on appeal, which involves review of the district court's denial of their post-trial motion for judgment as a matter of law. The district court improperly relied on legally insufficient evidence in the form of void offers of judgment and Isaac's post-settlement *Schmidt-Clothier* notice to artificially impose a contingency term into the settlement agreement Isaac's counsel negotiated with Progressive. The Hos are entitled to reversal of the Judgment in Isaac's favor because the undisputed record evidence shows that Isaac agreed to settle her claims against the Hos without regard to any contingency.

A. The *De Novo*, Not The "Clearly Erroneous," Standard Of Review Applies To The Issue The Hos Submit On Appeal, Which Arises From The Denial Of A Post Trial Motion For Judgment As A Matter Of Law.

In this appeal, the Hos challenge the Hennepin County District Court's denial of their motion for judgment as a matter of law post trial and their summary judgment motion. This Court has held consistently that the *de novo* standard of review is the standard of review applicable to appeals involving summary judgment and post trial judgment as a matter of law. See *Bahr v. Boise Cascade Corporation*, 766 N.W.2d 910,

919 (Minn. 2009); *Christensen v. Milbank Insurance Company*, 658 N.W.2d 580, 584 (Minn. 2003) (*de novo* standard of review applies to appeal from summary judgment). In *Bahr*, this Court observed that “[t]he United States Court of Appeals for the Eighth Circuit has held, in a case . . . where both denial of summary judgment and a motion for JMOL were challenged on appeal, that it would not review the ‘denial of a motion for summary judgment after a trial on the merits.’” *Bahr*, 766 N.W.2d at 918 (quoting *Equal Employment Opportunity Commission v. Southwest Bell Telephone, L.P.*, 559 F.3d 704, 708 (8th Cir. 2008)). Finding that this approach is the majority rule used by federal appellate courts, this Court held that a denial of summary judgment is not properly within this Court’s scope of review when a party attacks both the denial of a motion for post trial judgment as a matter of law *and* the denial of a summary judgment motion. *See id.* at 918-920 (citing *Metropolitan Life Insurance Company v. Golden Triangle*, 121 F.3d 351, 355 (8th Cir. 1997)). Nevertheless, when applying the *de novo* standard of review to the denial of a post-trial motion for judgment as a matter of law, this Court “make[s] an independent determination of the sufficiency of the evidence to present a fact question to the jury.” *Nemanic v. Gopher Heating and Sheet Metal, Inc.*, 337 N.W.2d 667, 670 (Minn. 1983) (citing *Walton v. Jones*, 286 N.W.2d 710, 714 (Minn. 1979)). Within this context, “sufficient evidence” involves the legal sufficiency, not the quantum, of the evidence necessary to sustain the verdict. *See Murphy v. Country House, Inc.*, 307 Minn. 344, 351-352, 240 N.W.2d 507, 512 (1976) (comparing the similarity between the quality of evidence needed to avoid summary judgment and a motion for directed verdict).

Therefore, the *de novo*, and not the “clearly erroneous,” standard of review applies to the issue the Hos present on this appeal.

B. Void Offers Of Judgment And Isaac’s *Schmidt-Clothier* Notice Do Not Constitute Evidence That Is Legally Sufficient To Avoid Judgment As A Matter Of Law On The Issue Of Whether Isaac Unconditionally Settled Her Claims Against The Hos.

The Hennepin County District Court denied the Hos post trial motion for judgment as a matter of law, stating that “[Isaac] did not enter into a settlement with [the Hos] and therefore did not elect the ‘best settlement’ option.” Appellants’ Addendum at 15. The district court said: “The proposed settlement between [Isaac] and [the Hos] was expressly conditioned on Auto Club’s agreement to waive its subrogation interest.” *Id.* at 15-16. This “express condition” exists in only two places. One is Isaac’s two offers of judgment which were already void by the time Isaac’s counsel and Progressive negotiated their settlement. The other is Isaac’s *Schmidt-Clothier* notice, drafted *after* Isaac’s counsel concluded settlement negotiations with Progressive and sent *only* to Auto Club the day after Progressive tendered the settlement proceeds to Isaac. The contingency terms expressed in the offers of judgment and the *Schmidt-Clothier* notice never made it into the parties’ settlement negotiations. Accordingly, they are not legally sufficient evidence which presents a fact issue as to the terms of settlement.

- 1. Isaac’s offers of judgment are not legally sufficient to create a fact issue as to the settlement terms because the Hos rejected the first offer and let the second one expire prior to the negotiations between Isaac’s counsel and Progressive.**

Isaac and Auto Club oppose the Hos’ appeal by arguing that “the Hos and Isaac engaged in ongoing settlement negotiation during which Isaac’s counsel, Jason

Vohnoutka, sent two offers of judgment.” Auto Club’s P&R Brief at 11; *see also* Isaac’s Response Brief at 2, 6-7.¹ These arguments, however, ignore the fact that neither offer of judgment was legally effective when Isaac’s counsel and Progressive discussed settlement on October 2, 2009.

Offers of judgment are open for no longer than ten days. *See* Minn.R.Civ.P. 68.02(d) (2009). Isaac served the Hos with an offer of judgment containing the so-called contingency language on July 14, 2009. *See* AA at 33-34. The Hos rejected that offer by responding with their own Rule 68 offer of settlement without any contingency language on July 23, 2009. *See id.* at 137; *see also Health and Welfare Plan for Employees of REM, Inc. v. Ridler*, 942 F.Supp. 431, 434 (D.Minn. 1996) *aff’d.*, 124 F.3d 207 (8th Cir. 1997) (counter-offer on terms differing from original offer rejects the offer). Isaac, in turn, rejected the Hos’ Rule 68 offer of settlement on July 23, 2009 by serving the Hos with a second offer of judgment containing the so-called contingency language. *See* AA at 35-36; *Ridler*, 942 F.Supp. at 434. The Hos never responded to Isaac’s second offer of judgment which expired after ten days, becoming “revoked, null and void.” AA at 35; *see* Minn.R.Civ.P. 68.02(d) (stating that unaccepted offers are withdrawn automatically within ten days).

¹ Auto Club’s and Isaac’s argument begs two questions: If the offers of judgment were part of ongoing settlement negotiations, why was the Hos’ offer of settlement which contained no contingencies also not part of the ongoing negotiations? If the offers of judgment should have made it clear to the Hos that Isaac wished to settle on a contingent basis, why did the offer of settlement not make it clear to Isaac that the Hos were not interested in settling on a contingent basis? The Hos respectfully submit that Auto Club and Isaac cannot answer these questions satisfactorily and, therefore, have not bothered to address them.

Isaac's second offer of judgment remained open until August 3, 2009. *See* Minn.R.Civ.P. 6.01. The settlement discussions between Isaac's counsel and Progressive did not commence until October 2, 2009, nearly two months *after* Isaac's second offer of judgment expired. *See* AA at 16-17. At that time, Isaac's counsel said nothing about the settlement being contingent on Auto Club's substitution. Progressive's claims adjuster, Timothy Pothen, offered \$9,400 to settle Isaac's claims against the Hos, without mentioning any contingencies. *See id.* at 16-17. Isaac's counsel responded by saying he would recommend his client accept \$10,665, which represented the difference between the amount of Isaac's last offer and the amount Mr. Pothen offered. *See id.* at 16-17, 32. Those settlement discussions expressed no contingencies whatsoever, meaning there is no legal basis to impose them when the parties did not agree to them.

2. **Isaac's *Schmidt-Clothier* notice is not legally sufficient to create a fact issue as to the settlement terms because Isaac's counsel failed to provide the Hos with a copy of it until after Progressive accepted Isaac's demand through specific performance.**

Auto Club and Isaac also rely on contingency language contained in the *Schmidt-Clothier* notice Isaac's counsel sent Auto Club on October 7, 2009 as evidence that the parties agreed the settlement would depend on Auto Club's decision concerning substitution. *See* Auto Club's P&R Brief at 12-14; Isaac's Response Brief at 6. That argument also fails as a matter of law. As noted above, the discussions between Isaac's counsel and Pothen. After learning that Isaac's counsel vouched his ability to get Isaac to accept \$10,665 to settle her claims against the Hos, Progressive accepted Isaac's \$10,665 demand by sending a settlement check in that amount to Isaac's counsel on October 6,

2009. See AA at 20-21. After Progressive accepted Isaac's offer through specific performance, Isaac's counsel sent Auto Club the *Schmidt-Clothier* notice containing contingency language suggesting that Auto Club could, in effect, terminate the settlement between Isaac and the Hos by exercising its right. See AA at 37.

Terms not negotiated and agreed upon by the parties cannot be enforceable settlement terms as a matter of law. See *In re Pfenniger's Estate*, 135 Minn. 192, 197, 160 N.W. 487, 490 (1916). Yet that is precisely what the district court, and now the Minnesota Court of Appeals, has done by relying on the terms of Isaac's post-settlement *Schmidt-Clothier* notice to conclude that Isaac and the Hos agreed that Auto Club could void the settlement through substitution. The law, in addition to the facts, simply does not support that untenable position.

3. The parol evidence rule provides no valid legal basis for affirming the lower courts' decisions.

Although the Minnesota Court of Appeals did not rely on the parol evidence rule as a basis for affirming the district court, Auto Club continues to argue that the parol evidence rule supports the notion that Isaac and the Hos agreed that their settlement would fail if Auto Club protected its potential subrogation right through substitution. See Auto Club's P&R Brief at 7-11. The parol evidence rule states that "*where parties have reduced their contract to writing, the contract may not be proved by prior or contemporaneous utterances or writing and that these are entirely immaterial for the purpose of determining what the terms of the contract are.*" *Karger v. Wangerin*, 230 Minn. 110, 114, 40 N.W.2d 846, 849 (1950). This Court has held: "The rule is properly

applied *only* when the parties to a contract have assented to a particular writing as the complete and accurate integration of their contract.” *Fintel v. Tri-State Insurance Company*, 281 N.W.2d 875, 877 (Minn. 1979) (emphasis added and citing 3 Corbin, CONTRACTS, § 573). The parol evidence rule, by its very terms, applies only to *written* contracts. When it does apply, the rule is one of exclusion, not inclusion, stating that courts do not look to documents outside a written contract to prove or establish the written contract’s terms.

Auto Club acknowledges that “[n]either party memorialized the agreement in writing.” Auto Club’s P&R Brief at 9. If neither party memorialized the settlement agreement in writing, then the parol evidence rule simply does not apply to the facts of this case. Although Auto Club continues to rely upon the parol evidence rule as the basis for its untenable position on appeal, it has yet to identify a single case holding that courts may use the parol evidence rule to alter the terms of an oral contract. *See id.* at 9-11. Without such authority, Auto Club’s position necessarily fails.

If the settlement agreement at issue here was a written contract, the parol evidence rule would not bar the consideration of extrinsic evidence in order to construe ambiguous terms. *See Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966). Auto Club invites this Court to find ambiguity where none exists by arguing that this Court should affirm the Minnesota Court of Appeals if the settlement agreement’s terms were ambiguous. *See id.* at 12. In the same breath, Auto Club acknowledges that the district court determined that the subject settlement agreement was not ambiguous. *See id.* at 12 (suggesting this Court might find ambiguity) and 5, 23 (arguing that this Court should

affirm the district court's rulings). This Court, however, has held that courts are not free to read ambiguity into the plain language of any agreement. *See Farkas v. Hartford Accident and Indemnity Company*, 285 Minn. 324, 327, 173 N.W.2d 21, 24 (1969). Accordingly, Auto Club's parole evidence argument necessarily fails as a matter of law and therefore does not permit Isaac and Auto Club to escape reversal.

III. AUTO CLUB AND ISAAC HAVE FAILED TO DEMONSTRATE HOW *SCHMIDT* AND ITS PROGENY PERMIT UIM SUBSTITUTIONS TO DEPRIVE SETTLING PARTIES OF THEIR SETTLEMENT BARGAIN ABSENT AN AGREEMENT TO THAT EFFECT.

The record evidence does not support the view that Isaac and the Hos ever agreed that their settlement agreement would fail if Auto Club preserved its potential subrogation right by substitution. The only way for Isaac and Auto Club to prevail on this issue is to convince this Court that *Schmidt* and its progeny permit Isaac as a matter of law to use Auto Club's substitution as a basis for avoiding settlement with the Hos. Their opposition arguments completely fail in that regard for a variety of reasons. Auto Club's and Isaac's opposition arguments are without merit, requiring this Court to reverse the lower courts' decisions relative to the issue the Hos present on appeal.

A. This Court Accurately Explained The Forensic Effect Of A UIM Substitution In *Washington v. Milbank*.

In *Washington v. Milbank*, this Court explained the forensic effect of a UIM substitution. In footnote 3 of that opinion, this Court said:

Technically, no settlement is reached when the UIM carrier follows the *Schmidt-Clothier* procedure and substitutes its draft for that of the tortfeasor's insurance company. However, the UIM carrier's substitution *operates as a settlement* between the party claiming damages and the tortfeasor *because the tortfeasor is released from further liability to the*

party claiming damages, but, at the same time, the UIM insurer retains a subrogation right against the tortfeasor's insurance company.

Washington v. Milbank, 562 N.W.2d 801, 806 n.3 (Minn. 1997) (emphasis added). Even Auto Club acknowledges that this footnote "provides a two-sentence summary of the impact of a [UIM] substitution." Auto Club's P&R Brief at 24. Judge McShane evidently agreed with the Hos concerning the forensic effect of UIM substitutions, stating that this footnote "correctly lays out the current state of the law with respect to the effect of underinsurer substitutions on settlement agreements under *Schmidt v. Clothier*." Appellants' Addendum at 10. According to the footnote's plain language, the UIM substitution *operates as a settlement* because the tortfeasor is released from further liability to the injured party *as a matter of law*. That release must occur because the *Schmidt-Clothier* procedure "was not intended to deprive insureds of the benefit of their tentative settlement bargain." *Gusk*, 559 N.W.2d at 424. If the UIM carrier's insured gets the benefit of its bargain, it is only logical that the tortfeasor also should benefit.

1. *Washington's* third footnote compels reversal under the facts of this case.

The settlement agreement ultimately negotiated between Isaac's counsel and Progressive contained no conditions or contingencies. The record evidence fails to show that Isaac and the Hos actually agreed that the settlement they negotiated through their respective agents would fail if Auto Club substituted its check for Progressive's settlement payment. Isaac undisputedly accepted Auto Club's substituted check. That agreement, together with the substitution payment she admittedly received, should have

operated as a settlement of Isaac's claims against the Hos.² Both the district court, and the Minnesota Court of Appeals, denied this forensic effect of Auto Club's substitution, relying on void offers of judgment and Isaac's *Schmidt-Clothier* notice to alter the parties' settlement agreement. See Appellants' Addendum at 3-4, 10-11, 15-18. These rulings amount to legal error mandating reversal.

2. Auto Club and Isaac fail to explain why *Washington* does not compel reversal.

Unsurprisingly, neither Auto Club nor Isaac can find error in the Hos' application of *Washington's* third footnote. Auto Club acknowledges that the footnote supports the Hos' position on appeal. See Auto Club's P&R Brief at 25. After trying to distract this Court with an unnecessary discussion about *Washington's* effect on potential subrogation rights, Auto Club then argues without citing *any* legal authority that "case law consistently describes the agreement between a tortfeasor and an injured party who intends to pursue UIM benefits as an agreement that is not fully worked out, and says that the UIM carrier can keep the settlement from happening or existing." Auto Club's P&R Brief at 26. It then argues, citing the unpublished court of appeals decision in *Schulte*, that "[t]he parties can avoid this situation by *contracting outside of Schmidt*." *Id.* (emphasis added and citing *Schulte v. LeClair*, 2000 WL 16302 (Minn.App. Jan. 11, 2000) (unpublished)).

Auto Club's arguments are misleading and without merit, amounting to a proverbial smoke screen designed to obfuscate the issue the Hos present on this appeal.

² Auto Club's subrogation right against the Hos remains intact *subject to the Hos being found underinsured*.

The Hos do not invoke *Washington* to argue that a UIM substitution does not preserve a UIM carrier's potential subrogation rights. Settling parties do not have to "contract outside of *Schmidt*" in order for a UIM substitution to operate as a settlement. Rather, the opposite is true. Settling parties have to contract outside of *Schmidt* in order to prevent a UIM substitution from operating as a settlement. See *Washington*, 562 N.W.2d at 806 n.3 (UIM substitution operates as a settlement); *Gusk*, 559 N.W.2d at 424 (UIM substitutions do not deprive parties of their settlement bargain); *Schulte*, 2000 WL 16302, 2000 Minn. App. LEXIS 23 at *7; AA 186-187 (upholding settlement between injured party and torfeasor where no evidence to indicate the agreement was anything but a noncontingent, full, final, and complete settlement). Like the appellants in *Schulte*, Auto Club would have this Court rule as a matter of law that future negotiating parties could never reach a full and final settlement because of *Schmidt*. See *Schulte*, 2000 Minn. App. LEXIS 23 at *7, , AA 187; cf Auto Club's P&R Brief at 26. As the Minnesota Court of Appeals correctly observed in *Schulte*, "no language in that or later opinions suggests that the basic principles of contract law are now subservient to a 'tentative' settlement as a result of the *Schmidt* holding." *Schulte*, 2000 Minn. App. LEXIS 23 at *7, , AA 187. That is why Auto Club (and Isaac) so strenuously argue that Isaac's void offers of judgment and *Schmidt-Clothier* notice be regarded as settlement terms because they cannot avoid reversal without them.³

³ Contrary to Auto Club's assertion, the decision by the Minnesota Court of Appeals in this action directly conflicts with *Schulte*. See Auto Club's P&R Brief at 15-17. Here, as in *Schulte*, the settling parties did not agree that Auto Club's substitution would have any effect on their settlement. Like the plaintiff in *Schulte*, Auto Club and Isaac argues

Isaac's argument is even less persuasive than Auto Club's. She simply argues that the Minnesota Court of Appeals "was not persuaded" that the Hos correctly understand *Washington's* third footnote. See Isaac's Response Brief at 10. Then she tries to distinguish this action from *Washington* by noting that in *Washington* it was the UIM carrier, not the injured parties, who tried to put conditions on the settlement between the injured parties and the tortfeasor. See *id.* at 11.

Whether the lower courts were persuaded by the Hos' understanding of *Washington* is immaterial at this stage of litigation. The parties are before the Supreme Court of the State of Minnesota. The lower courts must follow this Court's precedents and give due regard to its judicial dictum, and this Court is not bound to accept the legal reasoning of the lower courts. See *Ortiz v. Gavenda*, 590 N.W.2d 119, 124 (Minn. 1999) (P. Anderson and Gilbert, JJ., dissenting); *State v. Rainer*, 258 Minn. 168, 177, 103 N.W.2d 389, 396 (1960) (judicial dictum entitled to greater weight than obiter dictum and should not be lightly disregarded); *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 439-440 (Minn.App. 2005) (holding that court of appeals is bound to follow Minnesota Supreme Court precedent). This Court's statement in *Washington's* third footnote reflects the current state of the law independent of any facts concerning a UIM

that a UIM carrier's substitution entitles the injured party to renege on a settlement. The *Schulte* court rejected that argument, finding no evidence in the parties' settlement agreement to support that position. See *Schulte*, 2000 Minn. App. Unpub. LEXIS 23 at *7; AA at 186-187. Here, the Minnesota Court of Appeals, like the district court, imposed contingencies to which the parties did not agree. See *Isaac*, 2011 Minn. App. Unpub. LEXIS 748 at 8; Appellants' Addendum at 3. The settlement agreement involved here is indistinct from *Schulte*, yet the results in the two cases differ. Hence, the results in both cases conflict.

substitution's forensic effect. It notes that the substitution operates as a settlement despite the fact that no settlement between the injured party and the tortfeasor actually occurs. *See Washington*, 562 N.W.2d at 806 n.3. Therefore, both Auto Club and Isaac fail to explain why *Washington's* third footnote does not compel reversal.

3. Auto Club and Isaac fail to reconcile *Washington* with cases speaking of UIM substitutions as “preventing” settlements.

Auto Club and Isaac continue to argue that both this Court and the Minnesota Court of Appeals have stated that UIM substitutions prevent settlements between the injured party and the tortfeasor. *See* Auto Club's P&R Brief at 22-26; Isaac's Response Brief at 8-9. The Hos already have explained in detail why most of these cases do not support Auto Club's and Isaac's position with respect to the issue the Hos raise on appeal.⁴ *See* Appellants' Brief at 20-31. Accordingly, the Hos focus only on the new cases that Auto Club and Isaac raise.

Auto Club raises only one additional decision by this court, namely *Richards v. Milwaukee Ins. Co.*, 518 N.W.2d 26 (Minn. 1994). *See* Auto Club's P&R Brief at 23. It appeals to footnote 1 of that opinion, which reads:

⁴ Those arguments fully address the cases Auto Club cites on pages 27 and 28 of its Response Brief, which simply amount to bullet-point references to decisions by the Minnesota Court of Appeals in *Traver*, *Stewart*, and *Husfeldt*. *See* Auto Club's P&R Brief at 27-28. They also address the argument Isaac offers on page 8 of her Response Brief. *See* Isaac's Response Brief at 8. Auto Club candidly admits that none of those decisions address “the issue of whether a UIM substitution requires dismissal of the original suit on appeal.” Auto Club's P&R Brief at 28. Isaac simply argues the dismissal of the Hos from this action “is contrary to all these Minnesota [a]ppellate decisions” without explaining why that is so and without explaining how intermediate appellate court decisions can bind this Court. Isaac's Response Brief at 8.

Richards gave the 30 day written notice of the proposed settlement as required under *Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983). This notice allows the UIM carrier to preserve its subrogation rights by either paying the UIM benefits or by substituting its draft for that of the tortfeasor's liability insurer. If the UIM carrier does not substitute its draft within 30 days, the claimant is free to settle with the defendant, execute a general release, and still pursue a claim for UIM benefits.

Richards, 518 N.W.2d at 27 n.1 (citing *Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983); *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 857 (Minn. 1993); *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 927 (Minn. 1990)). Neither the above-quoted language, nor anything else in *Richards* holds or implies that a UIM substitution does not operate as a settlement. *Richards* does not support Auto Club's and Isaac's position relative to the issue the Hos raise on appeal.

Both Auto Club and Isaac cite additional decisions by the Minnesota Court of Appeals for the proposition that UIM substitutions prevent settlements. See Auto Club Response Brief at 24; Isaac's Response Brief at 9. Those cases are *Ruddy v. State Farm Mutual Automobile Insurance Company*, 596 N.W.2d 679 (Minn.App. 1999) and *Van Kampen v. Waseca Mutual Insurance Company*, 754 N.W.2d 578 (Minn.App. 2008). In *Ruddy*, the Minnesota Court of Appeals described what a UIM carrier must do to protect its potential subrogation rights, saying: Contrary to State Farm's contention, it could have protected its subrogation interest by substituting its check for that of All Nation, thereby preventing the settlement." *Ruddy*, 596 N.W.2d at 684 (citing *American Family Mut. Ins. Co. v. Baumann*, 459 N.W.2d 923, 925 (Minn. 1990)). Similarly, the Minnesota Court of Appeals described how a UIM carrier protects its potential subrogation rights in *Van Kampen*, saying: "If the UIM insurer elects to preserve its subrogation rights, it can

object to the settlement and prevent an insured from settling the claim.” *Van Kampen*, 754 N.W.2d at 584 (citing *Schmidt*, 338 N.W.2d at 263). Neither of these decisions, however, stands for the proposition that a UIM substitution fails to operate as a settlement where, as here, no contrary agreement between the settling parties exists. Therefore, aside from containing language which Auto Club and Isaac try to spin to their advantage, neither provides any legal support for the position Auto Club and Isaac take.

B. Auto Club’s Argument Based On Canons Of Contractual And Statutory Construction Is Misplaced And Therefore Deserves Rejection.

It its latest effort to avoid the conclusion that its substitution operated as a settlement, Auto Club urges this Court to apply canons of contractual and statutory construction to appellate court opinions, particularly those which say that a UIM substitution “prevents” a settlement. *See* Auto Club’s P&R Brief at 25-26. Its argument is misplaced for a number of reasons. First, Auto Club provides no authority holding that canons of contractual and statutory construction apply to the interpretation of cases. Second, and more importantly, the Hos do not dispute that UIM substitutions prevent settlements in the sense that they prevent a complete, general release of the tortfeasor from claims by the UIM carrier. The Hos do dispute the notion that a UIM substitution destroys a settlement where, as here, the parties have not agreed to that contingency. For the reasons explained above and in the Hos’ opening brief, the UIM substitution *operates as a settlement*, immunizing the tortfeasor from further liability to the injured party while preserving the UIM carrier’s potential subrogation right against the tortfeasor. *See*

Washington, 562 N.W.2d at 806 n.3. Properly resolving the issue the Hos present on this appeal does not turn on how one construes the words “tentative” or “prevent.”

Under *Washington*, a UIM substitution operates as a settlement by requiring the injured party who receives the substituted payment to release the tortfeasor from further liability to the injured party absent a contrary agreement between the settling parties, which does not exist here. Because a UIM substitution operates as a settlement where the settling parties do not negotiate a different outcome, there is nothing “tentative” about the injured party’s decision to resolve her claims against the tortfeasor. The UIM carrier by its substitution also cannot stop the tortfeasor’s release from further liability *to the injured party*. Nor can the injured party unilaterally give the UIM carrier the ability to do so. Release of the tortfeasor from further liability to the injured party is the UIM substitution’s forensic effect. The settlement is tentative in the sense that the injured party must provide the UIM carrier with 30 days written notice of its intent to settle, during which time the UIM carrier can assess the claim and decide whether it is worthwhile to preserve its potential subrogation right through substitution. *See Baumann*, 459 N.W.2d at 925. The substitution prevents a settlement between the injured party and the tortfeasor in the sense that it prevents the tortfeasor from purchasing a full global release through its settlement payment. Therefore, Auto Club’s effort to apply canons of contractual and statutory construction to appellate court decisions has no bearing on this appeal.

IV. REFUSAL TO RECOGNIZE THE SETTLEMENT ISAAC NEGOTIATED WITH THE HOS MAKES FOR BAD PUBLIC POLICY.

The public policy arguments that Auto Club and Isaac advance are unpersuasive. The decisions of both the Minnesota Court of Appeals and the district court deprived the Hos of their settlement bargain by unnecessarily subjecting them to potentially uncapped damage exposure. Those decisions discourage defendants involved in automobile accident cases from making meaningful efforts to settle claims. The result undermines the spirit of this Court's decision in *Washington v. Milbank* and permits plaintiffs to use UIM substitutions to fund third-party personal injury litigation contrary to the purpose for those benefits under the No Fault Act. Judicial economy is not, and cannot be, a valid excuse for depriving a defendant the benefit of its settlement bargain under these circumstances.

A. The Lower Courts' Refusal To Enforce The Settlement Deprived The Hos Of Their Settlement Bargain, Unnecessarily Subjecting Them To Potentially Uncapped Damage Exposure.

The record evidence does not support the notion that Isaac and the Hos agreed that Auto Club's substitution would destroy their settlement. Accordingly, when Progressive paid Isaac the \$10,665.00 that her attorney demanded in settlement, it did so with the understanding that the Hos would face no further exposure to Isaac. The Hos had no reason to expect they would have further liability to Isaac even if Auto Club substituted its check for Progressive's settlement payment because a UIM substitution *operates as a settlement* between the injured party and the tortfeasor. *See Washington*, 562 N.W.2d at 806 n.3.

Progressive insured the Hos under an automobile liability insurance policy having a \$50,000 policy limit. Isaac claimed damages in excess of \$50,000. Any damage exposure the Hos might have had to Isaac in excess of \$50,000 is uncapped exposure which the Hos could owe Isaac *personally*. A tortfeasor in the Hos' position settles claims with the injured party in order to avoid this personal uncapped exposure.⁵ If the UIM carrier substitutes its check, and the injured party successfully presents a UIM claim, the tortfeasor's maximum exposure to the UIM carrier is capped at whatever amount the UIM carrier has to pay the injured party as a result of the tortfeasor being underinsured.

Auto Club minimizes the Hos' public policy argument by suggesting that the Hos are concerned only with the burden of having a trial. *See* Auto Club's P&R Brief at 29. Isaac argues that a defendant in the Hos' position "bears no risk and suffers no prejudice if the settlement ultimately fails due to substitution." Isaac's Response Brief at 11. The Hos' burden actually is much more significant than Auto Club paints it, and Isaac's assertion that the Hos bear no risk and suffer no prejudice is simply wrong.

⁵ An example makes the point clear. Suppose there are no settlement negotiations and Isaac tries the case, proves the Hos are 100 percent at fault, and proves net damages of \$150,000. Progressive's policy satisfies \$50,000 of the judgment. Isaac can recover \$50,000 from Auto Club in UIM benefits. But the Hos remain personally liable for \$100,000, \$50,000 to Isaac and \$50,000 to Auto Club by way of subrogation. Now, suppose instead that Isaac agrees to settle with the Hos for \$20,000. Auto Club substitutes its check. The UIM claim proceeds. Isaac establishes damages in the amount of \$100,000. Auto Club pays Isaac the remaining \$30,000 on its UIM policy. It then subrogates against the Hos, and Progressive pays its \$50,000 limit. The Hos have no personal exposure, because Auto Club's subrogation recovery is limited to what it was compelled to pay Isaac.

By refusing to recognize the settlement that Isaac's counsel negotiated with the Hos' liability insurer, the lower courts have deprived the Hos of their settlement bargain, *i.e.*, release of further potentially uncapped liability exposure to Isaac, the injured party. Accordingly, the lower courts' decisions truly prejudice the Hos. Auto Club, an outsider to the settlement negotiations between Isaac's counsel and Progressive, undermined the settlement through its voluntary payment. By doing so, it resurrected the Hos' potentially uncapped liability exposure to Isaac. The Hos did not get the benefit that naturally followed from their unconditional agreement to settle with Isaac because the lower courts refused to permit Auto Club's substitution to operate as a settlement.

B. The Only "Chilling Effect" The Lower Court Decisions In This Action Have Is That They Discourage Defendants From Settling Automobile Accident Claims With Plaintiffs.

Isaac argues that this Court's adoption of the Hos' position "would result in a chilling effect." Isaac's Response Brief at 11. She asserts that "if the Hos' position is adopted, plaintiffs would never be able to settle for anything less than policy limits for fear of UIM substitution, because in that event plaintiffs' claims against the defendant would automatically extinguish and plaintiffs would be forced to 'eat' the 'gap' between the settlement amount and the policy limits." *Id.* at 11-12. This argument is without merit.

Isaac is simply wrong when she asserts that the Hos' position would require her to settle with them for policy limits. This Court previously has held that a plaintiff may pursue a UIM claim following a "best settlement" which is less than the tortfeasor's liability insurance policy limits. *See Schmidt*, 338 N.W.2d at 263. Nothing about the

Hos' position on appeal undermines *Schmidt* and Isaac's ability to make the "best settlement." Accordingly, the Plaintiff is not subject to any "chilling effect" in this regard. See *Nordstrom*, 495 N.W.2d at 857.

Nor does a plaintiff in Isaac's position have to "eat" any "gap" if she chooses to settle her claim against the tortfeasor for less than the tortfeasor's liability insurance policy limits. This Court actually held the very opposite in *Broton v. Western National Mutual Insurance Company*, when it said:

The legislature's choice of language also has the effect of closing the "gap" discussed in *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983). In *Schmidt* we held that a UIM insured could not enter into a settlement with the tortfeasor for an amount less than the limit of the tortfeasor's liability insurance and then recoup the "gap" between the liability insurance limit and the settlement amount from the UIM insurer. . . . By pegging the UIM insurer's maximum liability to the "amount paid" the insured by or for the tortfeasor, the legislature effectively codified the position of the *Schmidt* dissenters, who argued that an insured who communicates the tortfeasor's settlement offer to the UIM insurer should be entitled to recover the gap from the UIM insurer.

428 N.W.2d 85, 89-90 (Minn. 1988) (citations omitted). This Court emphasized this point again in *Nordstrom*, saying: "If claimant does not choose to go to trial, she has the option of making a settlement with the tortfeasor's insurer . . ., and, since *Broton* has modified *Schmidt*, claimant is not required to absorb the gap if she settles in good faith for less than the liability policy limits." *Nordstrom*, 495 N.W.2d at 858. Accordingly, there is no "gap" for a plaintiff in Isaac's position to "eat."

The only "chilling effect" is the one produced by the lower court decisions in this case, and it is felt only by the Hos and other defendants involved in automobile accident cases. If a UIM substitution permits the injured party to avoid a previously agreed upon

settlement with the tortfeasor, then no tortfeasor would ever consider settlement as a means of capping its damage exposure to the injured party. Under these circumstances, a defendant in the Hos' position has little incentive to even try to settle claims with the plaintiff because an agreement to settle with the plaintiff accomplishes nothing. The UIM carrier always can use its substitution to "stop" or "prevent" the settlement, meaning that despite a defendant's best efforts to cap its potentially unlimited damage exposure to the plaintiff, those efforts could fail at any time due to circumstances outside the defendant's control. Thus, the lower courts' decisions have a "chilling effect" on a defendant's ability to settle automobile accident claims with plaintiffs.

C. By Frustrating Settlement Efforts, The Lower Court Decisions In This Action Undermine The Spirit Of This Court's Decision In *Washington*.

Auto Club's policy argument shows that, as a UIM carrier, Auto Club is interested in influencing settlements between its insureds and tortfeasors in order to manage its potential UIM exposure. It argues: "If this decision has any impact on settlement negotiations, it will serve as a reminder that tortfeasors and their insurers should not be able to obtain bargain basement settlements on the assumption that a UIM insurer will also offer to settle the case." Auto Club's P&R Brief at 29. Auto Club is justifiably concerned about the prospect of having UIM coverage converted into primary coverage. *See id.* at 30. That concern no doubt is what prompted UIM carriers to include exhaustion clauses in their policies prior to *Schmidt*. That concern likely played a role in Milbank Insurance Company's effort to characterize its *Schmidt-Clothier* substitution as a loan receipt in *Washington*. But this Court has rejected the efforts of UIM carriers to

control the costs associated with UIM litigation through exhaustion clauses and loan receipts, both of which are deemed to prevent the injured party from making the best possible settlement. *See Washington*, 562 N.W.2d at 806 n.4 (holding loan receipts to be nothing more than an exhaustion clause); *Schmidt*, 338 N.W.2d at 261 (holding exhaustion clauses void as contrary to the policy of the No-Fault Act).

The only difference between this action and the scenario addressed in *Washington* is that it was Isaac, Auto Club's insured, who unilaterally tried to place conditions on the settlement. The end result, however, is the same. A UIM substitution was the determining factor in whether the plaintiff settled with the tortfeasor. A rule of law that would allow a plaintiff to unilaterally condition settlement with the defendant on the UIM carrier's decision to substitute circumvents *Washington* and hardly promotes good faith settlement efforts on the plaintiff's part.

D. Allowing Plaintiffs To Use UIM Substitutions To Fund Third-Party Litigation Against Tortfeasors Is Contrary To The Purpose Of UIM Coverage.

Isaac admits that she used Auto Club's UIM substitution to fund her third-party litigation against the Hos, arguing that "what plaintiff chooses to do with the UIM money has no bearing" on the issue the Hos raise on appeal. Isaac's Response Brief at 12. In Isaac's mind, the situation is no different than one in which a plaintiff secures financing from a bank to fund litigation. *See id.* Actually, those situations are very different given the unique purposes that UIM coverage fulfills.

This Court has held that "UIM coverage is a tort based coverage designed to provide a supplemental source of recovery only when the damages that the insured is

legally entitled to recover from the tortfeasor *exceed* the tortfeasor's liability insurance limits." *Richards*, 518 N.W.2d at 28. UIM coverage, accordingly, is meant to compensate the plaintiff for injury sustained as a result of the tortfeasor's fault. No legal authority whatsoever supports Issac's view that she can utilize her UIM carrier's resources as if it were a bank.⁶ The lower courts' decisions must be reversed to the extent they permit plaintiffs to use UIM substitutions to fund third-party litigation against tortfeasors, as such a result is contrary to the purpose of UIM coverage under the No Fault Act.

E. The Fact That The Hos Are Not Underinsured Belies Auto Club's Argument Favoring Judicial Economy, A Consideration Which Never Should Deprive Tortfeasors Of Their Settlement Bargain.

Auto Club argues that the lower courts' decisions make for sound policy because they promote judicial economy. It states: "Had the Court dismissed the Hos from this suit, Isaac had already indicated an intent to pursue a UIM claim. Auto Club would have likely denied that claim and either joined the Hos as third-party defendants, or pursued the Hos in a third action after that suit. The likely outcome would have been one or more trials involving the same parties and the same issues." Auto Club's P&R Brief at 30. This argument is not a valid policy justification for the lower courts' decisions for at least two reasons.

Auto Club notes that Progressive agreed to settle Isaac's claims against the Hos for \$10,665.00. *See* Auto Club's P&R Brief at 30. It observes that "[a] settlement for

⁶ Auto Club, who claims to be concerned about the prospect of UIM coverage being converted into primary coverage, takes no issue with Isaac's view that she should be able to use a UIM substitution as if it were a loan.

21% of the tortfeasor's liability policy begs the question of whether the tortfeasor was underinsured." Auto Club's P&R Brief at 30. Indeed, that question turned out to be a valid one because the trial showed that the Hos were not underinsured. The Hos simply were not underinsured, just as Auto Club suspected. There is no strong need to promote judicial economy in these circumstances because Auto Club would never face a UIM exposure given Isaac's inability to establish that the Hos were underinsured.

More importantly, judicial economy never should be a basis for depriving the Hos of their settlement bargain. The Hos had every reason to believe that they faced no further liability to Isaac, given her unconditional agreement to settle her claims for \$10,665.00. Current law permits Isaac to present a UIM claim subsequent to a "best settlement," regardless of how unreasonably low Auto Club might regard that settlement. *See Nordstrom*, 495 N.W.2d at 858 (recognizing insured's right to present UIM claim following "best settlement"). This rule may mean multiple lawsuits involving the same parties. The Hos respectfully submit, however, that the desire for fewer lawsuits cannot and must not override their right to limit their otherwise potentially uncapped damage exposure to Isaac through settlement, particularly where the record evidence fails to show that the settlement was subject to any contingencies. The Hos have more than ample policy grounds to support their position on appeal. Therefore, this Court must reverse the district court's Judgment in favor of Isaac.

V. CONCLUSION

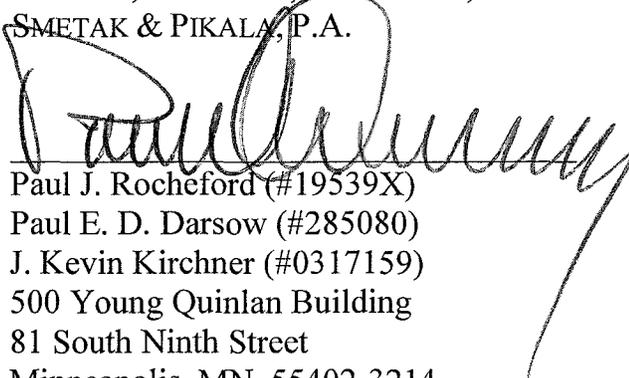
The rule of law the Hos would have applied to the issue they present on appeal is that a UIM substitution does not void a settlement between the plaintiff and the defendant

tortfeasor absent an agreement to that effect between those parties. The undisputed record fails to show that Isaac and the Hos agreed their settlement would fail if Auto Club substituted its check for Progressive's settlement payment. Accordingly, this Court must reverse the Judgment in Isaac's favor.

Respectfully submitted,

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.

Dated: 1/20/12



Paul J. Rocheford (#19539X)
Paul E. Darsow (#285080)
J. Kevin Kirchner (#0317159)
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
(612) 339-3500

*Attorneys for Appellants
Vy Thanh Ho and Lein Ho*

CERTIFICATE OF COMPLIANCE

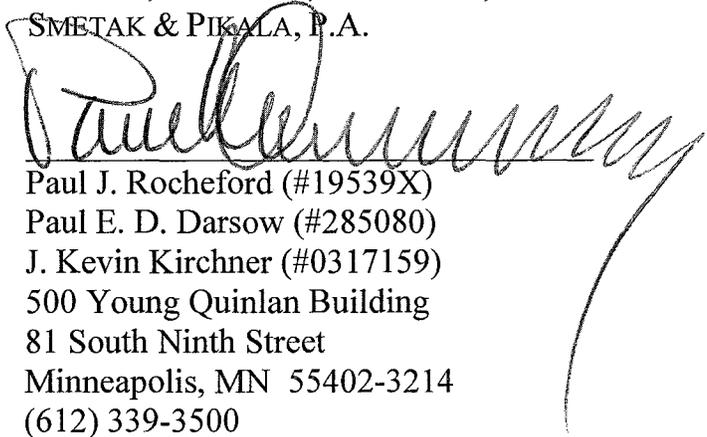
I hereby certify that the foregoing Brief of Appellants Vy Thanh Ho and Lein Ho conforms to Minn.R.Civ.App.P. 132.01, subd. 3(a)(1), for a brief produced with proportionally spaced font.

There are 9,056 words in this Brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this Brief was Microsoft® Office Word 2007.

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ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.



Paul J. Rocheford (#19539X)
Paul E. D. Darsow (#285080)
J. Kevin Kirchner (#0317159)
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
(612) 339-3500

*Attorneys for Appellants
Vy Thanh Ho and Lein Ho*