

NO. A11-11

State of Minnesota
In Supreme Court

Vy Thanh Ho and Lien Ho,

Appellants/Cross-Respondents,

vs.

Bakita Isaac,

Respondent,

and

Auto Club Insurance Association,

Respondent/Cross-Appellant.

BRIEF AND APPENDIX OF RESPONDENT ISAAC

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.
Paul J. Rocheford (#19539X)
Paul E. 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 Lien Ho*

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

Attorney for Respondent Bakita Isaac

JOHNSON & LINDBERG, P.A.
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*

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE LEGAL ISSUES.....1

STATEMENT OF CASE AND FACTS.....2

ARGUMENT.....4

I. THE LOWER COURTS CORRECTLY HELD THAT THE PROPOSED SETTLEMENT BETWEEN THE HOS AND ISAAC WAS ONLY TENTATIVE AT THE TIME THAT AUTO CLUB WAS PROVIDED WITH THE *SCHMIDT* NOTICE AND AUTO CLUB’S DRAFT SUBSTITUTION OPERATED TO PREVENT THE SETTLEMENT FROM BECOMING FINAL.....4

 A. The language of the parties’ proposed settlement agreement between Isaac and the Hos and the Hos’ lack of response to the *Schmidt* substitution and intervention supports that there was a “tentative” agreement, not a “full and final settlement” and Auto Club’s substitution of its check prevented the tentative settlement from becoming final.....4

 B. Underinsured Motorist (“UIM”) substitution does not require the Hos’ dismissal.....7

II. IF THIS COURT AFFIRMS THE COURT OF APPEALS RULING THAT AUTO CLUB HAD NO SUBROGATION RIGHT AGAINST THE HOS THEN THE AMOUNT OF THE JUDGMENT ENTERED IN FAVOR OF AUTO CLUB SHOULD BE ADDED TO THE JUDGMENT IN FAVOR OF ISAAC.....12

CONCLUSION.....15

CERTIFICATE OF COMPLIANCE16

TABLE OF AUTHORITIES

Cases Cited

<i>Bahr v. Boise Cascade Corp.</i> , 766 N.W.2d 910 (Minn. 2009).....	4-5
<i>Capital Warehouse Co. v. McGill-Warner-Farnham Co.</i> , 276 Minn. 108, 114, 149 N.W.2d 31 (1967).....	5
<i>Employers Mut. Cos. V. Nordstrom</i> , 495 N.W.2d 555 (Minn. 1993).....	10
<i>Fletcher v. St. Paul Pioneer Press</i> , 589 N.W.2d 96 (Minn. 1999).....	5
<i>Graff v. Robert M. Swendra Agency, Inc.</i> , 800 N.W.2d 112 (Minn. 2011).....	13, 14
<i>Gusk v. Farm Bureau Mut. Ins. Co.</i> , 559 N.W.2d 421 (Minn. 1997).....	8, 9, 12
<i>Hengemuhle v. Long Prairie Jaycees</i> , 358 N.W.2d 54 (Minn. 1984).....	5
<i>Husfeldt v. Willmsen</i> , 434 N.W.2d 480 (Minn. App. 1989).....	8
<i>Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.</i> , 711 N.W.2d 811 (Minn. 2006).....	5
<i>J.N. Sullivan & Assocs., Inc. v. F.D. Chapman Constr. Co.</i> , 304 Minn. 334, 336, 231 N.W.2d 87 (1975).....	5
<i>McEwen v. State Farm Mut. Ins.</i> , 281 N.W.2d 843 (Minn.1979).....	5
<i>Morrisette v. Harrison Intern. Corp.</i> , 486 N.W.2d 424 (Minn. 1992).....	5
<i>Riverview Muir Doran, LLC v. JADT Development Group, LLC</i> , 790 N.W.2d 167 (Minn. 2010).....	4
<i>Ruddy v. State Farm Mut. Auto Ins. Co.</i> , 596 N.W.2d 679, 684 (Minn. App. 1999).....	9
<i>Schmidt v. Clothier</i> , 338 N.W.2d 256 (Minn. 1983).....	4, 7, 9
<i>Stewart v. Anderson</i> , 478 N.W.2d 527 (Minn. App. 1991).....	8
<i>Swanson v. Brewster</i> , 784 N.W.2d 264 (Minn. 2010).....	13
<i>Traver v. Farm Bureau Mut. Ins., Co.</i> 418 N.W.2d 727 (Minn. App. 1988).....	8

Van Kampen v. Waseca Mut. Ins. Co.,
754 N.W.2d 578 (Minn. App. 2008).....9

Washington v. Milbank, 561 N.W.2d 801 (Minn. 1997).....10, 11

Wildman v. K-Mart Corp.,
556 N.W.2d 10 (Minn. App. 1996), review denied
(Minn. Jan. 29, 1997).....5

Statutes Cited

Minn. Stat. 548.251 Subd. 1.....13

STATEMENT OF THE LEGAL ISSUES

I. WHETHER THE LOWER COURTS CORRECTLY HELD THAT THE PROPOSED SETTLEMENT BETWEEN THE HOS AND ISAAC WAS ONLY TENTATIVE AT THE TIME THAT AUTO CLUB WAS PROVIDED WITH THE *SCHMIDT* NOTICE AND AUTO CLUB’S DRAFT SUBSTITUTION OPERATED TO PREVENT THE SETTLEMENT FROM BECOMING FINAL4

 A. The language of the parties’ proposed settlement agreement between Isaac and the Hos and the Hos lack of response to the *Schmidt* substitution and intervention supports that there was a “tentative” agreement, not a “full and final settlement” and Auto Club’s substitution of its check prevented the settlement from becoming final.....4

 B. Underinsured Motorist (“UIM”) substitution does not require the Hos’ Dismissal.....7

II. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT AUTO CLUB HAD NO SUBROGATION RIGHT AGAINST THE HOS AND IF SO, THEN WHETHER THE AMOUNT OF THE JUDGMENT ENTERED IN FAVOR OF AUTO CLUB SHOULD BE ADDED TO THE JUDGMENT IN FAVOR OF ISAAC12

STATEMENT OF THE CASE AND FACTS

Respondent (“Isaac”) concurs with most of what Appellants/Cross-Respondents (“the Hos”) offer in their Statement of the Case and Statement of Facts. Isaac wishes to clarify only a few points.

Isaac disputes as factually inaccurate the Hos’ characterization of the tentative settlement agreement as “unconditional”. See Brief of Appellants/Cross-Respondents at 4, 10.

Over the course of this case the parties engaged in numerous settlement discussions and several offers were exchanged by both sides. On two separate occasions Isaac served the Hos with written settlement offers. See Appellants’ Appendix (“AA”) at 32, 33, 35. Both offers made it absolutely clear that the offers were subject to proper *Schmidt* notice to the UIM carrier “to allow them to exercise their right to *stop the settlement* by substituting their check...” *Id.*

On or about October 2, 2009, Isaac’s counsel received a telephone call from Timothy Pothen, an insurance adjuster with Progressive Preferred Insurance Company (“Progressive”), which was the Hos’ liability insurance carrier. See AA at 32. Mr. Pothen resumed settlement talks by indicating Progressive had previously made a Rule 68 offer of \$7,400 and they would be willing to offer an additional \$2,000 to settle the case as that is what they anticipated they would have to spend for an IME. *Id.*

Isaac’s counsel told Mr. Pothen that if Progressive was willing to split the difference between their \$9,400 and Isaac’s last Rule 68 Offer of \$11,929, he would recommend it, or may have said something to the effect of “I will get her to take it.” *Id.*

When that conversation ended Isaac’s counsel was left with the impression that Mr. Pothen was going to try and get authority for the \$10,665; however, on or about October 6, 2009, Progressive’s check arrived in the mail. *Id.*

The oral negotiations between Isaac’s counsel and Progressive that culminated in the tentative settlement agreement were premised upon Isaac’s written settlement offers, both of which expressly stated that the offers were subject to “proper notice to the underinsured motorist carrier(s) to allow them to exercise their right to stop the settlement by substituting their check...” *Id.*

Within one day of receiving Progressive’s tendered \$10,665 check, Isaac’s counsel sent a letter with proper notice to the UIM carrier which expressly stated that Isaac had received an “offer of settlement” and that they could “prevent such settlement by exchanging your draft for that of Progressive Insurance Company in the amount of the *proposed* settlement.” *See* AA at 37. (emphasis added).

Within three weeks of receiving Progressive’s tendered \$10,665 check, Isaac’s counsel left several telephone messages for the Hos’ counsel informing him of the UIM substitution and also sent the Hos’ counsel a letter informing him of the substitution and returning Progressive’s check without the Release and without the Stipulation for Dismissal. *See* AA at 139.

On October 26, 2009—also within three weeks—Respondent/Cross-Appellant (“Auto Club”) served its Notice of Intervention and Complaint in Intervention on Isaac’s counsel and the Hos’ counsel and at no time did the Hos’ counsel serve an objection to Auto Club’s substitution or intervention in these proceedings. *See* AA at 54 – 60.

LEGAL ARGUMENT

I. THE LOWER COURTS CORRECTLY HELD THAT THE PROPOSED SETTLEMENT BETWEEN THE HOS AND ISAAC WAS ONLY TENTATIVE AT THE TIME THAT AUTO CLUB WAS PROVIDED WITH THE *SCHMIDT* NOTICE AND AUTO CLUB'S DRAFT SUBSTITUTION OPERATED TO PREVENT THE SETTLEMENT FROM BECOMING FINAL

The Minnesota Court of Appeals affirmed the Hennepin County District Court, holding that “Contrary to [the Hos’] arguments, the proposed settlement between them and Isaac was only tentative at the time that Auto Club was provided with the *Schmidt* notice; Auto Club’s draft substitution operated to prevent their settlement from becoming final. *See* Appellants/Cross-Respondents’ Addendum (“Addendum”) at 3. The Court of Appeals based its decision not only on the language of the parties’ agreement but also on the principles outlined in *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983). *See* Addendum at 3.

A. The language of the parties’ proposed settlement agreement between Isaac and the Hos and the Hos’ lack of response to the *Schmidt* substitution and intervention supports that there was a “tentative” agreement, not a “full and final settlement” and Auto Club’s substitution of its check prevented the tentative settlement from becoming final.

The reviewing court conducts a *de novo* review on an appeal from the denial of a motion for summary judgment. *Riverview Muir Doran, LLC v. JADT Development Group, LLC*, 790 N.W.2d 167, 170 (Minn. 2010)). In doing so, the review is limited to questions of “whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Id.*

The reviewing court also conducts a *de novo* review on an appeal from the denial of a post trial motion for judgment as a matter of law. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d

910, 919 (Minn. 2009). In reviewing a denial of a motion for judgment as a matter of law, the evidence must be considered in the light most favorable to the prevailing party. *Id.*

Judgment as a matter of law should be granted “only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence or where (2) it would be contrary to the law applicable to the case.” *Jerry’s Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006)(quoting *J.N. Sullivan & Assocs., Inc. v. F.D. Chapman Constr. Co.*, 304 Minn. 334, 336, 231 N.W.2d 87, 89 (1975)).

The district court acts as a fact-finder in disputes concerning pretrial settlements. *Wildman v. K-Mart Corp.*, 556 N.W.2d 10, 13 (*Minn. App.* 1996), *review denied* (Minn. Jan. 29, 1997). A district court’s determination of questions of fact should only be overturned where they are clearly erroneous. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999)(“On appeal, a trial court’s findings of fact are given great deference, and shall not be set aside unless clearly erroneous.”).

If in dispute, the existence and terms of a contract are questions for the fact finder. *Morrisette v. Harrison Intern. Corp.*, 486 N.W.2d 424, 427 (Minn. 1992)(citing *McEwen v. State Farm Mut. Ins.*, 281 N.W.2d 843, 846 (Minn.1979)). “Given this court’s limited review over findings of fact, the finding may only be overturned if it is manifestly contrary to the evidence.” *Id.* (citing *Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54, 61 (Minn. 1984)). “In determining whether a contract was formed a court does not need to rely on words alone, but can ‘consider the surrounding facts and circumstances in the context of the entire transaction, including the purpose, subject matter, and nature of it.’” *Id.* (quoting *Capital Warehouse Co. v. McGill-Warner-Farnham Co.*, 276 Minn. 108, 114, 149 N.W.2d 31, 35 (1967)).

In the present case, the district court found that the proposed settlement agreement between the Hos and Isaac was only a tentative settlement and was subject to the condition that Auto Club's substitution of its draft would stop the settlement; and, by substituting its draft for Progressive's, Auto Club stopped the settlement. *See* Addendum at 9, 10, 11, 16.

In making its findings, the district court properly considered that Isaac provided two Rule 68 offers of settlement, both of which contained express language that the offers were subject to "proper notice to the underinsured motorist carrier(s) to allow them to exercise their right to *stop the settlement by substituting their check*" *See* AA at 33 – 36. (Emphasis added).

The district court also properly considered that the *Schmidt* notice provided to Auto Club clearly stated that Isaac had received an "offer of settlement," and informed Auto Club that it had "thirty (30) days in which to either acquiesce in that settlement...or to *prevent such settlement* by exchanging your draft...in the amount of the *proposed* settlement." (Emphasis added.). *See* AA at 3, 37. The notice further provided that Isaac would finalize the proposed settlement in the event Auto Club opted not to substitute its draft. *See* AA at 3, 37.

The district court found that this language in both of the Rule 68 offers and the October 7, 2009 *Schmidt* letter to Auto Club was evidence of the parties' clear intent to provide Auto Club the right to stop the settlement by substituting its draft. *See* Addendum at 10, 18.

The Court of Appeals held that this notice made it "clear that the settlement proposed by the Hos was not full and final and was instead subject to acquiescence by Auto Club." *See* AA at 3.

Additionally, the response, or lack thereof, by the Hos' counsel after the *Schmidt* notice and substitution gives further support that the proposed settlement was intended and clearly understood by the Hos' counsel to be just that—a proposed settlement. Within three weeks of

receiving Progressive's tendered \$10,665 check, Isaac's counsel left several messages for the Hos' counsel informing him of the UIM substitution and also sent the Hos' counsel a letter informing him of the substitution and returning Progressive's check without the Release and without the Stipulation for Dismissal. *See* AA at 139. The Hos' counsel made no response or objection.

On October 26, 2009—also within three weeks—Auto Club served its Notice of Intervention and Complaint in Intervention on Isaac's counsel and the Hos' counsel and at no time did the Hos' counsel serve an objection to Auto Club's substitution or intervention in these proceedings. *See* AA at 54 – 60.

The clear language in both of Isaac's written settlement offers and in Isaac's *Schmidt* notice, in light of the Hos' failure to object to the *Schmidt* substitution and subsequent intervention by Auto Club or even respond to the phone messages, letter and return of the Progressive check and unsigned release by Isaac's counsel, clearly support that the proposed settlement agreement was not intended by the parties to be a full and final settlement and was instead subject to acquiescence by Auto Club. Therefore, the district court's ruling and the decision of the Court of Appeals should be affirmed.

B. Underinsured Motorist (“UIM”) substitution does not require the Hos' dismissal.

The Court of Appeals found, and no party to this appeal disputes, that the *Schmidt* notice Isaac provided to Auto Club conformed with Minnesota Law and Auto Club properly substituted its draft within the thirty-day period. *See* Addendum at 3.

The Hos moved for summary judgment and judgment as a matter of law arguing that, pursuant to the principles of *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), Auto Club's

substitution *ipso facto* required Isaac to dismiss her claims against the Hos. See AA at 11, 123. The district court denied both motions and the Court of Appeals affirmed the denial. See Addendum at 1. The standard of review of this issue is *de novo*.

Nothing in *Schmidt* requires a plaintiff to dismiss its lawsuit after a UIM carrier substitutes its payment and there are no cases in Minnesota with that holding. Conversely, as both the Court of Appeals and district court noted, there are a number of cases where the UIM carrier substituted its draft pursuant to *Schmidt*, after which the tortfeasor sought dismissal of the claims against him, the tortfeasor's motion was denied and the case proceeded to trial against the tortfeasor. See *Traver v. Farm Bureau Mut. Ins., Co.* 418 N.W.2d 727 (Minn. App. 1988)(where the insurer offered its policy limit to the Plaintiffs, the Plaintiffs gave a *Schmidt* notice to their UIM insurer, the UIM insurer substituted its check to preserve its subrogation rights and the Plaintiffs continued the litigation against the tortfeasor); See also *Husfeldt v. Willmsen*, 434 N.W.2d 480 (Minn. App. 1989)(where Plaintiff entered into settlement negotiations with the insurer, the insurer issued a check, and the UIM insurer substituted its check, the tortfeasor moved to dismiss the case and the case went to trial); See also *Stewart v. Anderson*, 478 N.W.2d 527 (Minn. App. 1991)(where Plaintiff and insurer entered into a settlement and the UIM insurer substituted its check with the insurers, and the suit continued against the defendant); See also *Gusk v. Farm Bureau Mut. Ins. Co.*, 559 N.W.2d 421 (Minn. 1997)(where Plaintiff filed suit against the Defendant, the insurer provided a check, the UIM insurer substituted a check and the case continued to trial). To find that the Hos must be dismissed from this case because of the substitution, as the Hos here suggest, is contrary to all of these Minnesota Appellate decisions, which proceeded to trial after a substitution occurred. Since clearly UIM substitution does not require dismissal of the tortfeasor from the lawsuit, it would be illogical for a plaintiff to

continue its lawsuit directly against the tortfeasor if the plaintiff's claims were extinguished and the only issue was the UIM insurer's right to subrogation. If that were the case, the plaintiff would always be better off proceeding directly against her UIM insurer as the named defendant.

Additionally, the principles of *Schmidt* support the position that a UIM carrier's substitution prevents a settlement between a plaintiff and a tortfeasor from taking place. In *Schmidt*, the Court noted in the syllabus:

An insured must give an automobile underinsurer written notice of a tentative settlement agreement, after which underinsurer has 30 days in which to either acquiesce in the settlement and lose its potential right to subrogation or prevent the settlement by exchanging its draft for amount of settlement offer for the tendered draft of the liability insurer;....

Schmidt, at 258. (emphasis added).

As the Court of Appeals noted, in *Schmidt*, the Court characterized an agreement subject to the procedures outlined therein as a "tentative settlement agreement". *Schmidt* at 263. The Court in *Schmidt* also stated that a UIM insurer that substituted its check "could thereafter attempt to negotiate a better settlement or could proceed to trial in the insured's name." *Id.*

There are a number of other cases that also support the position that a UIM insurer's substitution prevents a settlement between a plaintiff and tortfeasor. In *Van Kampen v. Waseca Mut. Ins. Co.*, 754 N.W.2d 578, 584 (Minn. App. 2008) the Court noted that under the Schmidt-Clothier procedure, if the UIM insurer elects to preserve its subrogation rights, it can object to the settlement and prevent an insured from settling the claim. In *Ruddy v. State Farm Mut. Auto Ins. Co.*, 596 N.W.2d 679, 684 (Minn. App. 1999) the Court noted that the UIM carrier could have substituted its check "thereby preventing the settlement". In *Gusk v. Farm Bureau Mut. Ins. Co.*, 559 N.W.2d 421, 424 (Minn. 1997) this Court wrote "...*Schmidt v. Clothier* substitutions, by their very nature, prevent settlements between insureds and tortfeasors."

While the Hos urge this Court to disregard the language in *Gusk* that "...*Schmidt v. Clothier* substitutions, by their very nature, prevent settlements between insureds and tortfeasors", the Hos place heavy reliance on a footnote in *Washington v. Milbank*, 562 N.W.2d 801 (Minn. 1997) in support of their position that they are entitled to dismissal. In *Washington*, the Court's discussion regarding the impact of its decision in *Employers Mut. Cos. V. Nordstrom*, 495 N.W.2d 555 (Minn. 1993) on the procedure set forth in *Schmidt*, contained the following footnote:

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 the equivalent of 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.

Id. At 806 fn. 3.

The Hos argue that the language in this footnote stands for the proposition that UIM substitution extinguishes a plaintiff's rights or claims as against a tortfeasor and serves merely to preserve the UIM carrier's right of subrogation and therefore UIM substitution *ipso facto* requires dismissal of a plaintiff's claims. Based on this premise Appellants have taken the position that Auto Club's substitution automatically required dismissal of Isaac's claims.

The Court of Appeals was not persuaded that the Supreme Court's comment in this footnote is dispositive of this issue. See Addendum at 3. Further, both the district court and the Court of Appeals found that *Washington* was distinguishable from the present case. The issues raised by Milbank in *Washington* were premised on the argument that Nordstrom fundamentally altered the *Schmidt v. Clothier* landscape to require that, before an insured may pursue arbitration under a UIM policy, the insured must litigate its claim with the tortfeasor to judgment in the

district court or reach a settlement in the underlying action equal to or greater than the tortfeasor's liability insurance policy limits. *Washington* at 805. The Supreme Court stated that the basic procedure set forth in *Schmidt* did not change as a result of *Nordstrom*. *Id.* at 806. The Court went on to state "because we reaffirm the basic procedures announced by this court in *Schmidt v. Clothier*, we need not address the specific issues raised by *Milbank*." *Id.* Furthermore, in *Washington*, it was the UIM insurer that imposed conditions on the substitution, including the condition that plaintiff must pursue a tort action in trial court and must agree that the payment is a loan, which the court held the UIM carrier could not do because it is against public policy and discourages settlements. *Washington*, at 804. Accordingly, the Court of Appeals concluded that the Hos' reliance on *Washington* is misplaced and therefore there was no error in the district court's denial of the Hos' JMOL. *See* Addendum at 4.

Lastly, The Hos contend that the district court's decision frustrates the public policy favoring settlements and will have a disastrous effect on the willingness of defendants to settle as they will have no incentive to settle for fear that the UIM carrier will substitute; and, that it is somehow unfair because the plaintiff can use the UIM money to fund further litigation.

Isaac disagrees and contends the adoption of the Hos' position would result in a chilling effect. A defendant who enters into a tentative settlement bears no risk and suffers no prejudice if the settlement ultimately fails due to substitution. The defendant is not out any money because the check is returned. The defendant does not waive or "lose out" on any potential defenses. In fact, the defendant is in no worse position after a failed tentative settlement than it would have been had the case proceeded to trial without settlement discussions.

Conversely, 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. *See Gusk*, 559 N.W.2d at 423 (Minn. 1997).

With regard to the Hos’ assertion that it is unfair that a plaintiff post-substitution can then use the UIM money to fund further litigation, what plaintiff chooses to do with the UIM money has no bearing on this issue. This would be no different than a plaintiff who secures financing through a lender to fund litigation and in exchange offers the lender a lien against future recovery proceeds.

II. IF THIS COURT AFFIRMS THE COURT OF APPEALS RULING THAT AUTO CLUB HAD NO SUBROGATION RIGHT AGAINST THE HOS THEN THE AMOUNT OF THE JUDGMENT ENTERED IN FAVOR OF AUTO CLUB SHOULD BE ADDED TO THE JUDGMENT IN FAVOR OF ISAAC

The district court initially ordered entry of judgment in favor of Isaac against the Hos in the amount of \$56,420.97. *See* Respondent’s Appendix at 9. The district court later amended its Order to provide for entry of judgment in favor of Isaac against the Hos in the amount of \$45,765.97 and in favor of Auto Club against the Hos in the amount of \$11,152.70. *See* Addendum at 20.

The Court of Appeals held that because the jury ultimately determined that Defendants’ were not underinsured, Auto Club’s right of subrogation did not mature and its payment of \$10,665 was a voluntary payment for which Auto Club has no right of subrogation. Citing the Supreme Court in *Gusk* at 424 that “[a] substitution is a payment to the plaintiff for the protection of an insurer’s potential right of subrogation;....” the Court of Appeals held that “Auto Club’s payment to Isaac of \$10,665 was based on its assessment of the worth of a potential subrogation claim. By substituting its check, Auto Club assumed the risk that a UIM claim might not arise and that it might

forfeit its payment.” See Addendum at 5. The Court of Appeals concluded that the district court erred in ordering judgment in the amount of \$11,152.70 in favor of Auto Club, and reversed that judgment. *Id.* Therefore, since Auto Club is not entitled to a return of its \$10,665 substitution payment, judgment should be entered in favor of Isaac for the full amount of the award.

The Hos will undoubtedly argue again that the \$10,665 payment by Auto Club was a collateral source which should be offset from the \$56,420.97 verdict regardless. However, “[w]hen calculating a collateral source offset, the court may reduce an award ‘only by or pursuant to’ the provisions listed in the statute.” *Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 121 (Minn. 2011)(quoting *Swanson v. Brewster*, 784 N.W.2d 264, 274 (Minn. 2010)). Auto Club’s substitution payment does not meet the definition of a “collateral source” within the meaning of the statute. *Minn. Stat. §548.251* provides:

§548.251. Collateral source calculations

Subdivision 1. Definition. For purposes of this section, “collateral sources” means 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;...
- (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,....

Id. (Emphasis added)

Clearly, the no-fault payments made by Auto Club to Isaac for her wage loss and to Isaac's medical providers for her medical expenses were "collateral sources" within the definition of part (2) above, and thus were properly deducted. However, according to the Court of Appeals, Auto Club's substitution payment was a payment to the plaintiff for the protection of Auto club's potential right of subrogation *not* for the "injury or disability in question".

The Supreme Court in *Graff* addressed the issue of whether attorney's fees paid to Graff's counsel as part of a workers' compensation settlement constituted a "collateral source" subject to reduction under the collateral source statute. This Court held that "attorney fees paid to Graff's counsel as part of the workers' compensation settlements do not constitute payments related to Graff's "injury or disability" resulting from the August 2004 motor vehicle accident." *Graff* at 121.

The Court reasoned that:

The mere fact that the attorney fees are related to Graff's claims for workers' compensation benefits based on his work-related injury and resulting disability does not mean that the attorney fees are related to Graff's "injury or disability" within the meaning of the term "collateral source." Unlike payments made for past and future pain, lost wages, the loss of future earning capacity, disability and emotional distress, which flow directly and inextricably from a given injury or disability, payments made for attorney fees do not flow from the injury or disability at all. The attorney fees flow only from Graff's claim for compensation and therefore are not related to any given injury or disability.

Id. at 121.

Since Auto Club's substitution payment was held to be a payment to the plaintiff for the protection of Auto club's potential right of subrogation as opposed to a payment for the injury or disability in question, it is not a "collateral source" and thus should not be offset.

Alternatively, if the Court were to deem the substitution payment a "collateral source", then according to the holding in *Graff* the Court should remand to the district court to determine and

deduct that portion of the substitution payment that was allocated for attorney fees and proportional costs.

CONCLUSION

Based on the foregoing, Respondent Isaac respectfully requests that the decision of the Court of Appeals be affirmed, but that the portion of the judgment allocated in favor of Auto against the Hos be entered in favor of Isaac; or, alternatively, remanded to the district court for recalculation of the judgment in favor of Isaac pursuant to the principles set forth in *Graff*.

Respectfully submitted,

Dated: 12-16-2011

VOHNOUTKA LAW OFFICE, Ltd.

BY: 

Jason R. Vohnoutka (#251859)
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-6628

Attorney for Respondent Isaac

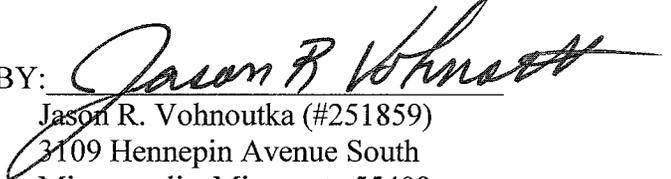
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Respondent Bakita Isaac conforms to Minn.R.Civ.App.P. 132.01, Subd. 3(a)(1), for a brief produced with proportionally spaced font.

There are 4,466 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.

Dated: 12-16-2011

VOHNOUTKA LAW OFFICE, Ltd.

BY: 
Jason R. Vohnoutka (#251859)
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-6628

Attorney for Respondent Isaac