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NO. A11-11

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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.*

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**RESPONDENT/CROSS-APPELLANT AUTO CLUB INSURANCE  
 ASSOCIATION'S REPLY BRIEF**

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## **RESPONDENT/CROSS-APPELLANT'S REPLY ARGUMENT**

### **I. INTRODUCTION**

In their Response Brief, the Hos reiterate the arguments they made in their initial memorandum. The Hos agree that the principles of equitable subrogation apply to this case, but argue that the Hos should not be required to pay for Vy Thanh Ho's negligence. In support of that argument, the Hos (1) re-assert that Auto Club had a "potential" right of subrogation when it substituted its check in an amount equal to the proposed settlement between Isaac and the Hos, (2) repeat their claim that Auto Club was not compelled to make the substitution payment, and (3) misstate the facts of this Court's decision in *Gusk v. Farm Bureau Mut. Ins.*, 559 N.W.2d 421 (Minn. 1997). Respondent Isaac has not taken a position on the accuracy of the court of appeals' decision. Isaac asserts that, if the court of appeals' decision is upheld, the judgment entered by the district court in favor of Auto Club should be entered in favor of Isaac. Since the positions espoused by both Isaac and the Hos are contrary to established public policy, the Court should affirm the decision of the district court and allow Auto Club to recover the amount it substituted.

### **II. THE EQUITIES BALANCE IN FAVOR OF AUTO CLUB.**

The parties agree that the principles of equitable subrogation apply to this case. The goal of such subrogation is to "place the charge where it ought to rest" by requiring payment of a debt by the party "who ought in equity to pay it." *Northern Trust Co. v. Consolidated Elevator Co.*, 171 N.W. 265, 268 (Minn. 1919). The Hos do not present any argument to support their position that Auto Club ought to pay for damages caused

by Vy Thanh Ho's negligence. Indeed, as argued in Auto Club's Principal Brief, this Court's decision in *Schmidt* found that, in cases like this, "the equities to be balanced are those between the underinsurer, which has paid benefits, and the underinsured tortfeasor, who has not paid for the damages he or she has caused. Between these two parties, the equities balance in favor of the underinsurer." *Schmidt v. Clothier*, 338 N.W.2d 256, 262-63 (Minn. 1983). The Hos are the party liable for the negligence that caused Isaac's injuries, and they ought to pay any debt owed as a result of Vy Thanh Ho's negligence.

### **III. AUTO CLUB'S RIGHT TO SUBROGATION IS NO LONGER A "POTENTIAL" RIGHT.**

The Hos repeat their argument that a *Schmidt* substitution only protects a "potential" right of subrogation. As in their Principal Brief, the Hos rely exclusively on a fragment of a sentence in this Court's decision in the *Gusk* case. In *Gusk*, this Court referred to a "potential right of subrogation." *Gusk*, at 424. The same decision referred to the right of subrogation other times without referring to that right as a "potential" right:

- "The issue, then, is whether Farm Bureau's *Schmidt v. Clothier* substitution, which protected its subrogation rights as an *underinsurer*, limits Farm Bureau's contractual obligation to compensate Gusk for damages attributable to an *uninsured* motorist." *Id.*, at 423.
- "Farm Bureau's substitute payment protected a right of subrogation against Spencer as an *underinsured* motorist." *Id.*, at 424.

The question for the Court is what the decision in *Gusk* intended by the use of the word "potential."

Contrary to the Hos' argument, there is nothing in *Gusk* that suggests a subrogation interest protected by a *Schmidt* substitution is "potential" in that it requires a later determination that the tortfeasor was underinsured. Indeed, as will be explained again below, the tortfeasor's insurer in *Gusk* had to make a payment to the UIM carrier despite the fact that the tortfeasor was not underinsured.

The *Gusk* decision involved a set of facts under which the tortfeasor's insurer offered to settle the case for dramatically more than the jury determined it was worth. *Id.*, at 422. The UIM carrier substituted its check in an amount equal to the proposed settlement, and the jury's verdict dramatically reduced the value of the UIM carrier's subrogation claim. *Id.* Under the facts of the case, it is clear that a substitution protects a "potential" right in that there is always a risk that a jury will determine that the alleged tortfeasor was not at fault. When a UIM carrier substitutes its check, it does not know if a jury will return a verdict placing fault on the alleged tortfeasor. If that alleged tortfeasor was not at fault, then the UIM carrier would have no right of subrogation. When a jury determines that the alleged tortfeasor was at fault, then the subrogation rights are no longer "potential" rights.

The *Gusk* decision supports this interpretation. When discussing the subrogation rights as they existed before the verdict, the Court used the word "potential." For example, the Court indicated that, after being notified of the tentative settlement, the UIM carrier substituted its check and protected its "potential right of subrogation." *Id.* at 423. When describing the right of subrogation that existed after the jury's verdict, the Court did not use the word "potential." *Id.*

In short, Auto Club's right of subrogation was "potential" until the jury returned a verdict which found that the Hos were liable for Isaac's damages. Once the verdict established that liability, Auto Club's subrogation interest was no longer "potential." Therefore, this Court should find that Auto Club has a valid subrogation interest.

**IV. AUTO CLUB WAS COMPELLED TO MAKE THE SUBSTITUTION PAYMENT.**

The Hos make repeated claims that Auto Club was not compelled to substitute its check in the amount of the tentative settlement with Isaac. They rely on *Iowa Nat. Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 464 N.W.2d 564 (Minn. App. 1990) rev. den'd (March 15, 1991). That case addresses construction subcontractors, and does not address the question of whether a UIM insurer is compelled to make a *Schmidt* substitutions. *Id.*, at 565. The Hos rely on that case to argue that Auto Club was not compelled to make the *Schmidt* substitution.

If Auto Club intended to pursue its subrogation claim, it had to either pay UIM benefits or substitute its check in an amount equal to the tentative settlement. *See Gusk*, 599 N.W.2d at 423. Where, as here, Auto Club believed that the Hos were not underinsured, failure to make the substitution payment would have resulted in surrendering the right of subrogation. *Id.* Auto Club was obligated to make the payment to protect its subrogation rights. That is, Auto Club was compelled to make the substitution payment.

**V. THE HOS' POSITION WOULD CREATE AN ABSURD RESULT.**

The Hos have argued that nothing in the *Schmidt v. Clothier* procedure compels a UIM carrier to substitute its check in the amount of a tentative settlement. They also

argue that a subrogation right only exists if the party that made the payment was compelled to do so. Under that logic, a *Schmidt* substitution would never be sufficient to protect a subrogation right because the UIM carrier could have chosen to not make the substitution. Clearly *Schmidt* intended to preserve a UIM carriers subrogation rights after a substitution payment. *Schmidt*, 338 N.W.2d at 263. The Hos' argument would lead to an absurd result and should not be adopted by this Court.

**VI. THIS COURT'S DECISION IN *GUSK* SUPPORTS AUTO CLUB'S POSITION.**

As explained in Auto Club's Principal Brief, the facts of this Court's decision in *Gusk* provide strong support for Auto Club's position. In their response, the Hos misread the facts of that case.

In *Gusk*, the plaintiff settled with one tortfeasor, Spencer, for \$80,000 and his UIM carrier substituted its check in that amount. *Gusk*, at 422. The plaintiff also made a claim for UM benefits, alleging that an unidentified driver caused his injuries. *Id.* The jury found that the plaintiff's share of fault was 20%, Spencer's share was 30%, and the unidentified driver's share was 50%. *Id.* Spencer was not underinsured, but this Court noted that the final determination of fault left "Spencer's insurer liable to Farm Bureau as subrogee for \$29,815.85 (*i.e.*, Spencer's share of liability)." *Id.*

The Hos, at page 6 of their Reply Brief, argue that this Court did not specify "whether the subrogation liability involved uninsured motorist ("UM") coverage or underinsured motorist ("UIM") coverage." That statement is not accurate.

In its decision, this Court clearly established that the subrogation in question dealt with the UIM claim. This Court clearly stated that the amount Spencer's insurer had to

pay Farm Bureau to satisfy Farm Bureau's subrogation claim was equal to the amount of Spencer's liability and had no relation to the liability of the unidentified motorist. That is, the subrogation liability related only to the UIM coverage. This Court's description of the facts in *Gusk* is clear, and clearly establishes that a UIM insurer has a right of subrogation even where a tortfeasor was not underinsured.

**VII. THE POSITIONS OF THE HOS AND OF ISAAC ARE CONTRARY TO PUBLIC POLICY.**

As discussed above, the doctrine of equitable subrogation aims to require the party responsible for an injury to bear the cost of compensating the injured party. *Northern Trust Co. v. Consolidated Elevator Co.*, 171 N.W. 265, 268 (Minn. 1919). In addition, "[t]he purpose of the underinsured provisions of the No-Fault Act is to compensate injured persons without allowing for double recoveries." *Dean v. American Family Mut. Ins. Co.*, 535 N.W.2d 342, 344 (Minn. 1995). In this case, the jury determined that the Hos were liable for Isaac's injuries. *See* AA, at 140-42. The district court determined that the total judgment was \$56,918.67. *See* A/C-R Add., at 31. Of that amount, the district court awarded \$11,152.70 to Auto Club and \$45,765.97 to Isaac. *Id.*

The Hos argue that the judgment in favor of Auto Club should be set aside. If the judgment is set aside, then the total judgment in this case would be reduced by \$11,152.70. As a result, the Hos and their insurer would receive a windfall equal to that amount. That is, Auto Club would pay for the injuries caused by Vy Thanh Ho.

Isaac argues that the judgment in favor of Auto Club should be entered in her favor. Under that scenario, Isaac would receive a \$10,665, the amount Auto Club paid in

its *Schmidt* substitution, from both Auto Club and the Hos. In short, Isaac would receive a double recovery.

The positions taken by both the Hos and Isaac are contrary to established public policy. In contrast, the judgment of the district court required the party responsible for Isaac's injuries to pay for those injuries, and prevented Isaac from receiving a double recovery. Therefore, this Court should affirm the decision of the district court.

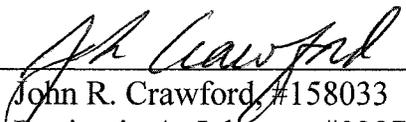
### CONCLUSION

The court of appeals' determination that Auto Club's subrogation rights did not arise because the Hos were not underinsured is not supported by the relevant case law. Therefore, this Court should affirm the underlying ruling of the district court by reversing the court of appeals' holding that Auto Club's subrogation rights were contingent on a determination that the Hos were underinsured.

Respectfully submitted,

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Dated: January 26, 2012

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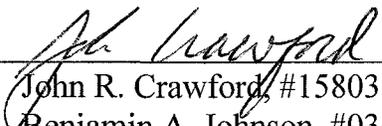
**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Brief of Respondent / Cross-Appellant Auto Club conforms to Minn.R.Civ.App.P. 131.01, subd. 5(7), for a brief produced with a proportionally spaced font.

There are 1,875 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.

**JOHNSON & LINDBERG, P.A.**

Dated: January 26, 2012

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