

NO. A11-1719

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State of Minnesota  
**In Court of Appeals**

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Kari Renswick,

*Respondent,*

vs.

Jason Wenzel,

*Appellant.*

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**BRIEF OF AMICUS CURIAE  
THE MINNESOTA ASSOCIATION FOR JUSTICE**

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## STATEMENT OF THE ISSUES

This *amicus curiae* brief is respectfully submitted on behalf of the Minnesota Association for Justice. The Association urges affirmance of the trial court's ruling that payments made and/or discounted by Medicare are excluded from collateral source treatment under Minn. Stat. § 548.251, subd. 1. So as not to repeat arguments already submitted to the Court by the Respondent, this brief will focus on the following issues:

1. How does the decision of the Minnesota Supreme Court in *Swanson v. Brewster*, together with the provisions of the Federal Social Security Act, and particularly the Medicare provisions of that Act, impact the scope of the Federal Government's right of subrogation and, consequently, the application of the Minnesota Collateral Source Statute to the case before the Court?
2. What are the public policy concerns regarding the decision of the Minnesota Supreme Court in *Swanson v. Brewster*, and should the Minnesota Supreme Court revisit and reverse that decision?

## LEGAL ANALYSIS

### **A. Differences Between the Case Before the Court on This Appeal from the Decision of the Minnesota Supreme Court in *Swanson v. Brewster*.**

There are two primary differences between the case presented on this appeal and the case presented in *Swanson v. Brewster*.

First, there was no "purchase" of the subrogation interest by the defense in this case, as there was in *Swanson v. Brewster*. In the case now before this Court, the subrogation claim on behalf of the Federal Government, which is established by statute, remains asserted. Therefore, Minnesota's Collateral Source Statute is not applicable,

because the statute by its own terms does not apply to any amounts for which a subrogation claim has been asserted. *See* Minn. Stat. § 548.251, subd. 2(1).

The second difference between this case and *Swanson v. Brewster* is that *Swanson v. Brewster* has now been decided. This last statement is not meant to be facetious, but is offered to illustrate this point: Until *Swanson v. Brewster* was decided, no Minnesota court had defined the plain meaning of the word “payment” to include discounts to medical billing statements.<sup>1</sup> That definition becomes important when this Court examines the scope of Medicare’s subrogation interest in this case, which, in turn, determines whether the Collateral Source Statute should even be applied in this situation.

**B. If One Assumes That the Collateral Source Statute Does Not Exclude Medicare as a Component of the Social Security Act, Then What is the Scope of Medicare’s Subrogation Right to Respondent’s Medical Expenses?**

Generally, a subrogation claim is not an independent claim; it is derivative to an injured party’s underlying claim against a third party. *Medica, Inc. v. Atlantic Mut. Ins.*

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<sup>1</sup> *See Mikulay v. The Dial Corporation*, No. C9-89-1711, 1990 WL 57530, \*3 (Minn. Ct. App., May 8, 1990). In *Mikulay*, the Court of Appeals affirmed the trial court’s deduction of a Medicare write-off from her medical expense award as a collateral source payment without first defining the meaning of “payments,” even though the Plaintiff-Appellant asserted that such write-offs were not “payments” within the meaning of the Collateral Source Statute. The *Mikulay* Court also affirmed the holding of the trial court narrowing the scope of the asserted subrogation claim to the amounts that were actually paid out of pocket by Medicare. Although *Mikulay* is an unpublished opinion and thus has no precedential value, it is cited as a contrary holding in order to be fully candid with the court.

Co., 566 N.W.2d 74, 76-77 (Minn. 1997).<sup>2</sup> Medicare's right of subrogation is secured by Federal statute. That statute reads:

(iv) Subrogation rights

The United States shall be subrogated (to the extent of *payment made under this subchapter for such an item or service*) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.

42 U.S.C. § 1395y(b)(2)(B)(iv) (emphasis added).

A "primary plan" includes liability insurance provided to a negligent third party.

42 U.S.C. § 1395y(b)(2)(A)(ii).

By its own terms, Minnesota Statutes § 548.251 does not apply to medical expenses for which a subrogation right exists. The statute only applies to allow a court to reduce a jury award by the

amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses **except those for which a subrogation right has been asserted.**<sup>3</sup>

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<sup>2</sup> The Medicare Secondary Payer Act authorizes the Federal Government to initiate a direct action "against any or all entities that are or were required or responsible . . . to make payment with respect to [an] item or service (or any portion thereof) under a primary plan," including an insurer, in order to recover payments made by Medicare for such item or service (42 U.S.C. § 1395y(b)(2)(B)(iii)). However, in this case, Medicare has relied on its right of subrogation and has not started a direct action.

<sup>3</sup> Minn. Stat. § 548.251, subd. 2(1) (emphasis added).

For purposes of the Collateral Source Statute, “an asserted subrogation right is simply one that has not been waived.”<sup>4</sup> Waiver may be “explicitly in writing, or ... by conduct.”<sup>5</sup> Under Medicare, the only way that a subrogation claim may be waived is by a determination of the Secretary of Health and Human Services that such a waiver is in the best interests of the program. 42 U.S.C. § 1395y(b)(2)(B)(v).

With this language at subdivision 2(1) of the Collateral Source Statute, the legislature elected to remove from collateral source consideration any issues involving subrogation. This approach reflects sound public policy, given the derivative nature of the subrogation claims and the various legal relationships involved. Rather than try to anticipate the numerous scenarios that arise in individual cases, statutes and/or contracts involving subrogation, the legislature simply removed it from consideration of the damages owed by the defendant tortfeasor. The injured plaintiff receives the damages awarded and resolves the various subrogation claims.

In this case, subrogation rights existed for the injury-related medical expenses. The Social Security/Medicare statute asserted the right and it was not waived. The question then turns to what is the scope of Medicare’s subrogation right? If the plain meaning of the word “payment” includes discounted amounts that were part of the resolution of the total medical bill, as the Supreme Court in *Brewster* concluded it did, then Medicare’s asserted subrogation claim includes not only the direct payments made

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<sup>4</sup> See *Kahnke v. Green*, 695 N.W.2d 148, 151 (Minn. Ct. App. 2005). Accord *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 334 (Minn. 1990) (citing *Buck v. Schneider*, 413 N.W.2d 569, 571 (Minn. Ct. App. 1987)).

<sup>5</sup> See *Kahnke*, 695 N.W.2d at 151 (citation omitted).

by the Federal Government to the medical service providers, but also the discounts to the original bills secured pursuant to the Social Security Act as it pertains to Medicare.

In *Brewster*, the Supreme Court recognized that “a payment may be something other than cash; it is ‘[t]he money or *other valuable thing* so delivered in satisfaction of an obligation.’” *Brewster*, 784 N.W.2d at 275 (citing *Black’s Law Dictionary* 1243 (9<sup>th</sup> ed. 2009), emphasis in original).

[I]n exchange for HealthPartners referring its policyholders to [the medical providers], [the medical providers] would provide medical services at a discount to these policyholders.” Each party to such an understanding would gain something valuable. The medical providers would not have discounted Swanson’s bills absent an agreement with HealthPartners. Therefore, we conclude the negotiated discount was a payment because it involved the exchange of things of value to discharge Swanson’s medical bill contractual obligations.

*Id.*

Medicare is subrogated “(to the extent of *payment made under this subchapter for such an item or service*) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.” U.S.C. § 1395y(b)(2)(B)(iv) (emphasis added).

The Minnesota Supreme Court in *Brewster* held that “payment” includes negotiated discounts or write-offs of a medical bill. If the *Brewster* definition of “payment” includes negotiated discounts, then “payments” made by Medicare must also include any discounts to the original medical bills that were secured pursuant to the Social Security Act as it pertains to Medicare. Medicare has asserted its subrogation rights in this case. Since the Collateral Source Statute does not apply to medical

expenses for which a subrogation right exists, and since Medicare’s “payment” includes any discounts to the original medical bills, the collateral source statute should not be applied.

**C. Carrying Through Brewster’s Definition of “Payment” to the Use of the Word in Medicare’s Subrogation Provision, and Subrogation Claim More Generally, Supports Public Policy Favoring Settlements.**

With Minn. Stat. § 548.251, the legislature signaled that where a collateral source has asserted a right of subrogation, the defendant should not involve itself in the collection or offset of that right. There is good reason for this directive. Allowing the plaintiff to negotiate the subrogation claim with his or her insurer encourages settlement.<sup>6</sup> In many cases, there is substantial room to negotiate the subrogation right. Issues of medical causation, pre-existing conditions, and comparative fault drive down case valuations and raise the prospect of a less-than-full recovery. The plaintiff—and not the defendant—remains in the best position to coordinate settlement on a global basis, negotiating with one or more tortfeasors and with subrogated interests or other lien

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<sup>6</sup> See, e.g., *Karon v. Karon*, 435 N.W.2d 501, 504 (Minn. 1989) (“In the interest of judicial economy, parties should be encouraged to compromise their differences and not to litigate them.”); *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 271 (Minn. 2008) (“Settlement of claims is encouraged as a matter of public policy.”); and *Sorensen v. Coast-to-Coast Stores, Inc.*, 353 N.W.2d 666, 669 (Minn. Ct. App. 1984), *rev. denied* (Minn. Nov. 7, 1984) (“The law encourages the settlement of disputes.”).

holders to reach a full and final settlement that resolves all claims in the case, including the net amount to be received by the Plaintiff.<sup>7</sup>

Pre-*Brewster*, there was an incentive for all parties to try to negotiate a settlement short of trial when it came to the issue of medical expenses. For the injured party, a trial may confirm or make viable a subrogation claim that was in question before trial, thus giving the injured party an incentive to work out an arrangement with the subrogated carriers as a part of the settlement process. For the defendant, there was an incentive to settle, because at trial the defendant faced the prospect of paying the full “gap” between what was directly paid for the medical service and the total amount billed, but often had

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<sup>7</sup> In many subrogation situations, there is a direct contract between the injured party and the health insurer or other party seeking subrogation. In *Brewster*, the insurer “purchased” the subrogation claim by making a deal directly with the health insurer to obtain an assignment of the subrogated interest. However, since a subrogation claim in many circumstances is not even viable until it has been determined that the injured party has made a full recovery of his or her damages, and since there is a contract between the injured party and the health insurer or other party to establish this derivative subrogation claim, such a “purchase” is of questionable legality and effectiveness. In fact, subrogation clauses in such contracts are important enough that the Minnesota Legislature has chosen to regulate them. See Minn. Stat. § 62A.095, subd. 2, controlling the terms of such contracts.

In *Brewster*, the jury awarded all of plaintiff’s claimed medical expenses, so the viability of the “purchased” claim did not come into question. But what if the jury had awarded only part of the expenses, due to evidence that the negligent event did not cause the medical treatment to occur? What would have been “purchased” then?

Such agreements also constitute intentional interference with a plaintiff’s contractual relationships with his health insurer and wrongful interference with a prospective advantage the plaintiff had in terms of negotiating with any medical providers having a subrogation interest in the matter. See Minn. CIVJIG 40.30, 5<sup>th</sup> ed.; *Furlev Sales Assocs., Inc. v. North Am. Automotive Warehouse, Inc.*, 325 N.W.2d 20, 27 (Minn. 1982) (“Interference is unjustifiable when it is done for the indirect purpose of injuring the plaintiff or benefiting the defendant.”); *Wild v. Rarig*, 302 Minn. 419, 443, n.16, 234 N.W.2d 775, 791, n.16 (Minn. 1975) (wrongful interference with prospective advantage cause of action protects an interest in the reasonable expectation of an economic advantage).

the opportunity to use the risks of trial for the injured party and the fact that the gap was not an out of pocket expense for anyone to make offers that resolved all interests. The uncertainties created by competing proof of causation and permanency, and thus the relationship of the medical bills and services to the tortious event, left much room for negotiation and resolution of claims.

Now, however, defendants and their insurers are starting from the actual out of pocket payments and negotiating downward from there based on the uncertainties in the evidence created by factual disputes over causation of injuries and the permanency of the same. Members of the Minnesota Association for Justice can and do attest to the significant chilling effect the *Brewster* decision has had on the settlement of cases to this point.<sup>8</sup> To carry through the plain meaning of the word “payment” to also apply when defining the amounts to which a subrogation claim is being asserted corrects this problem and favors the stated public policy of encouraging the settlement of civil disputes.

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<sup>8</sup> Following the *Brewster* decision, defendants no longer have the same incentive to settle, since the defense industry believes it now receives the benefit of the “gap” between what was directly paid for the medical service and the total amount billed. This is particularly true in cases involving catastrophic injuries; the more catastrophically injured a plaintiff is due to the wrongful conduct of the tortfeasor, the greater the benefit or windfall to the wrongdoer. This conflicts with the sentiments expressed by the Minnesota Supreme Court in *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108, 114 (Minn. 2002) (“[I]f there is to be a windfall either to an insurer or to an insured, the windfall should go to the insured.”) (citing *Van Tassel v. Horace Mann Mut. Ins. Co.*, 296 Minn. 181, 187, 207 N.W.2d 348, 352 (1973)).

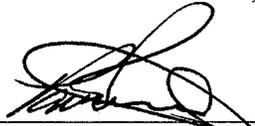
CONCLUSION

The collateral source statute does not apply to subrogation rights asserted by Medicare. Consequently, for the reasons stated in the Respondent's Brief and herein, the trial court's ruling below should be affirmed.

Respectfully submitted,

HARPER & PETERSON, P.L.L.C.

Dated: December 7, 2011

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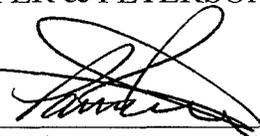
**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing *Amicus Curiae* brief submitted on behalf of the Minnesota Association for Justice conforms to Minn. R. Civ. App. P. 132.01, subd. 3(c)(1) for a brief produced with a proportionally spaced font.

There are 2,426 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 Word 2008 for Mac, Version 12.2.8.

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