

CASE NO. A11-1904

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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DONALD MORRIS FERNOW,

*Plaintiff,*

and

COUNTY MUTUAL INSURANCE COMPANY,

*Intervenor/Respondent,*

vs.

MICHAEL DONALD GOULD AND CITY OF ALEXANDRIA,

*Appellants.*

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**APPELLANTS' BRIEF**

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## STATEMENT OF THE LEGAL ISSUES

- I. WHETHER IN A NO-FAULT INDEMNIFICATION ARBITRATION, THE ARBITRATOR EXCEEDED HER AUTHORITY BY DECIDING THE PURELY LEGAL ISSUE OF STATUTORY SNOW AND ICE IMMUNITY, WHICH HAS YET TO BE FULLY AND FINALLY DETERMINED EITHER BY THE DISTRICT COURT OR THIS COURT?

The district court ruled in the negative.

List of apposite cases:

*Berg v. City of St. Paul*, 414 N.W.2d 204, 207 (Minn. App. 1987)  
*Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004)  
*Western National Insurance v. Bruce Thompson et. al.*, 797 N.W.2d 201, 206 (Minn. 2011)

List of apposite statutes:

Minn. Stat. § 65B.53 (1993)  
Minn. Stat. § 572.19, subd. 1(3) (1957)

## STATEMENT OF THE CASE

This case arises from a collision on April 26, 2008 between a City of Alexandria snowplow operated by Appellant Michael Gould (“Appellant”) and a vehicle driven by Plaintiff Donald Fernow (“Plaintiff”). Respondent Country Mutual Insurance Company (“Respondent”) intervened in this lawsuit through a Complaint in Intervention on January 8, 2010. Respondent also submitted the matter to inter-company arbitration for indemnification of Personal Injury Protection (“PIP”) benefits paid on behalf of Plaintiff under the Minnesota No-Fault Act, Minn. Stat. § 65B.53, subd. 1 and 4.<sup>1</sup> Appellants contested the jurisdiction and legal authority of the arbitrator to decide the legal issue of statutory snow and ice immunity. The arbitrator determined she had jurisdiction and on February 2, 2011, ruled as a matter of law that snow and ice immunity did not apply and awarded Respondent indemnification benefits.

On April 5, 2011, Appellants brought a motion to vacate the arbitration award pursuant to Minn. Stat. § 572.19, subd. 1(3). Appellants claimed that the arbitrator, in the

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<sup>1</sup> The City of Alexandria is a self-insured member of self-insurance pool administrated by the League of Minnesota Cities Insurance Trust (LMCIT). Minnesota Statutes § 60A.02 sets forth the definition applicable to insurance in general. “Insurance company” is therein defined as including “every insurer, corporation, business trust, or association engaged in insurance as principal, but for purposes of this subdivision does not include a political subdivision providing self-insurance or establishing a pool under section 471.981, subdivision 3.” Minn. Stat. § 60A.02, subd. 3. In contrast, LMCIT is joint powers entity established under § 471.981, subd. 3 and governed by § 471.59. Therefore, it is not an insurance company as here defined by the legislature. Rather, each member of the self-insurance pool is its own self-insured entity. Similarly, the City of Minneapolis, St. Paul, and Duluth are self-insured entities. Pooled self-insurance available to the City of Alexandria also covers its employees. LMCIT, on the City’s behalf, contested arbitration.

No-Fault indemnification arbitration, exceeded her legal authority by ruling on the issue of snow and ice immunity. Specifically, Appellants claimed that immunity is a legal issue that must be ultimately determined by the district court (and potentially the appellate courts) because immunity is immunity from all claims, including Respondent's claim for indemnification. Further, Appellants claimed that the legal issue of immunity must first be determined by the district court before a claim for No-Fault indemnification even exists. The district court denied Appellants' motion to vacate arbitration award on August 24, 2011. This appeal follows:

### **STATEMENT OF THE FACTS**

#### ***Events of April 26, 2008***

On April 26, 2008, Appellant, an employee of the City of Alexandria operated a snowplow within the course and scope of his employment on Nokomis Street in the City. (*Order and Memorandum, Dec. 8, 2009, pp. 3-4, App. 4-5.*) While plowing snow, Appellant crossed the center line of the street, and partially entered into oncoming traffic. *Id.* A collision occurred between Appellant's snowplow and Plaintiff's oncoming vehicle. (*App. 4.*) Plaintiff sustained injuries as a result of the motor vehicle-snowplow collision. (*App. 4.*)

### ***Procedural Posture and Respondent's Intervention***

On December 31, 2008, Plaintiff commenced in Douglas County District Court, a lawsuit against Appellants for injuries he sustained in the collision.<sup>2</sup> (*Plaintiff's Complaint, App. 17-20.*)

In addition to Plaintiff's lawsuit, on April 16, 2009, Respondent submitted to inter-company arbitration an Application seeking Personal Injury Protection ("PIP") indemnification from Appellants, for benefits paid to Plaintiff under Minn. Stat. § 65B.53**Error! Bookmark not defined.** subd. 1 of the Minnesota No-Fault Act (2009). (*Applicant PIP Form, Apr. 16, 2009, App. 21-24.*) Appellants, who were already involved in the Plaintiff's companion district court case, requested and received an arbitration deferment from Arbitration Forums, Inc.<sup>3</sup> (*Applicant Amended PIP Form, Nov. 4, 2010, p. 2, App. 26.*)

On September 16, 2009, Appellants brought a motion in the district court for summary judgment on the basis of, among other defenses, snow and ice immunity under Minn. Stat. § 466.03, subd. 4.<sup>4</sup> (*Order and Memorandum, Dec. 8, 2009, p. 1, App. 2.*)

On December 8, 2009 the district court denied Appellants' motion in its entirety. (*App. 2*). With respect to snow and ice immunity, the district court found that genuine issues of

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<sup>2</sup> The case file for the district court case is 21-CV-09-776. The same case file number was used in the district court motion to vacate arbitration award.

<sup>3</sup> While not part of the district court motion to vacate arbitration award record, Appellants requested in correspondence deferment while the City's summary judgment motions and possible appeals could commence.

<sup>4</sup> Additionally, Appellants moved for summary judgment based on statutory discretionary immunity pursuant to Minn. Stat. § 466.03, subd. 4, and common law vicarious official immunity.

material fact precluded the court's application of snow and ice immunity at that time.<sup>5</sup> (*App. 13-14.*) Appellants appealed the district court summary judgment decision to this Court on February 3, 2010. This Court affirmed the district court's decision on September 7, 2010 as to statutory discretionary immunity and official immunity.

(*Fernow v. Gould, et al.*, 2010 Minn. App. Unpub. LEXIS 932, *App. 29-31.*)

Specifically, this Court also held that genuine issues of material fact existed regarding the application of snow and ice immunity, and remanded the case back to the district court for a factual determination of those issues before a legal determination of snow and ice immunity could be made. (*App. 31-32.*)

On January 8, 2010, Respondent intervened in the district court suit by a Complaint in Intervention. (*Respondent's Complaint in Intervention, App. 33-36.*) On November 4, 2010, pursuant to Minn. Stat. § 65B.53, Respondent again initiated an inter-company arbitration indemnification proceeding. (*Applicant Amended PIP Form, Nov. 4, 2010, App. 25-26.*) In response, Appellants contested the jurisdiction and legal authority of the arbitrator to decide the legal issue of snow and ice immunity, which has yet to be fully and finally determined by either the district court or this Court. (*Appellants' Amended PIP Form, Nov. 24, 2010, App. 37-43.*) Despite Appellants' argument contesting the arbitrator's authority to decide the immunity issue, on February 2, 2011, an arbitrator with Arbitration Forums, Inc. issued a PIP decision. (*PIP Decision, App. 44-*

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<sup>5</sup> The court also held that neither statutory discretionary immunity, nor common law official immunity applied to the facts of the case.

46.) The arbitrator simply found, without providing any legal analysis nor citing to any case law, that “governmental statutory immunity does not apply to this matter.” (*Id.*)

Appellants brought a Motion to Vacate Arbitration Award pursuant to Minn. Stat. § 572.19, subd. 1(3). Appellants argued that the arbitrator, in the No-Fault indemnification arbitration, exceeded her authority by ruling on the purely legal issue of snow and ice immunity. (*Notice of Motion to Vacate Arbitration Award and Memorandum of Law, App. 47-57.*) On August 24, 2011 the district court denied Appellants’ Motion to Vacate Arbitration Award. (*Order, Aug. 24, 2011, App. 58-62.*) This appeal now follows.

### STANDARD OF REVIEW

Minnesota district and appellate courts determine de novo whether an arbitrator exceeded his or her authority. *In re Klinefelter v. Crum and Forster Ins. Co.*, 675 N.W.2d 330, 333 (Minn. App. 2004) (*citing State v. Berthaiume*, 259 N.W.2d 904, 909 (Minn. 1977)). Whether an issue must be arbitrated raises an issue of subject matter jurisdiction and is a question of law reviewed de novo on appeal.<sup>6</sup> *Illinois Farmers Ins. Co. v. Glass Service Co., Inc.*, 683 N.W.2d 792 (Minn. 2007).

When immunity is raised as a defense, a claimant’s allegations of negligence are legal questions for the court, not factual questions. *Berg v. City of St. Paul*, 414 N.W.2d 204, 207 (Minn. App. 1987) (*citing Gonzalez v. Hollins*, 386 N.W.2d 842, 845 (Minn.

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<sup>6</sup> Lack of subject matter jurisdiction may be raised at any time by the parties or sua sponte by the court, and cannot be waived by the parties. *Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 907 (Minn. 1998) (“It is blackletter law that subject matter jurisdiction may not be waived.”)

App. 1986) and *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633-634 (Minn. 1978)). Immunity provides *immunity from suit*, not just liability on a particular claim. *Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004) (emphasis added). Because immunity provides complete immunity from suit, immunity is effectively lost if the case is erroneously permitted to go to trial. *Anderson v. City of Hopkins*, 393 N.W.2d 363, 364 (Minn. 1986) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2816 (1985)). The very foundation of an immunity's protection typically is grounded in the special status of a defendant. *Sletten v. Ramsey County*, 675 N.W.2d 291, 300 (Minn. 2004). The traditional basis for immunity is that “though the defendant might be a wrongdoer, social values of great importance required that the defendant escape liability.” *Id.*, quoting *Rehn v. Fischley*, 557 N.W.2d 328, 332-33 (Minn. 1997).

## LEGAL ARGUMENT

Minn. Stat. §§ 65B.41 through 65B.71 comprise the Minnesota No-Fault Insurance Act (“Act”) (1978). Minn. Stat. § 65B.42 sets forth the Act’s purpose. Among other objectives, the Act is intended to require “...automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents *without regard to whose fault caused the accident; ...*” Minn. Stat. § 65B.42, subd. 1 (emphasis added). Therefore, the Act attempts to ensure prompt attention to an injured party’s loss without liability analysis.

In addition, another purpose of the Act is to create a system of inter-company arbitration for allocation of costs of insurance benefits between motor vehicle insurers. *Id.* at subd. 4. Specifically, Minn. Stat. § 65B.53 of the Act sets forth indemnity provisions between insurers to accomplish this purpose. The statute states in part the following:

A reparation obligor paying or obligated to pay basic or optional economic loss benefits is entitled to indemnity subject to the limits of the applicable residual liability coverage from a reparation obligor providing residual liability coverage on a commercial vehicle of more than 5,500 pounds curb weight if negligence in the operation, maintenance or use of the commercial vehicle was the direct and proximate cause of the injury for which the basic economic loss benefits were paid or payable to the extent that the insured would have been liable for damages but for the deduction provisions of section § 65B.51, subdivision 1.

Minn. Stat. § 65B.53, subd. 1 (1993). Thus, under certain circumstances, an insurance carrier paying no-fault benefits has a right of indemnity against the driver who negligently caused the injury, provided the vehicle involved in causing the injury is a commercial vehicle that does not meet any exception set forth in the Act. The indemnification provision is unique, since a preponderance of the provisions in the Act explicitly preclude the analysis of liability and negligence. Instead and importantly, negligence, liability, and comparative fault principles of Minn. Stat. § 604.01, only apply to the indemnity proceedings. *Great West Cas. Co. v. State Farm Mut. Auto Ins. Co.*, 590 N.W.2d 675 (Minn. App. 1999). If a right of indemnity exists, it is enforceable through compulsory arbitration between the two insurance carriers. Minn. Stat. § 65B.53, subd. 4; *see also Nat'l Indemnity Co. v. Mut. Service Cas. Co.*, 311 N.W.2d 856 (Minn. 1981).

Minnesota appellate courts have found that No-Fault arbitrators, in the context of interpreting the Act, are limited to deciding questions of fact, leaving the interpretation of law to the courts. *Weaver v. State Farm Ins. Co.*, 609 N.W.2d 878, 882 (Minn. 2000) (citing *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988)). Therefore, arbitrations involving automobile reparations under the Act depart from generally accepted principle that “arbitrators are the final judges of both law and fact.” *Id.* (citing *State, by Sundquist v. Minnesota Teamsters Pub. And Law Enforcement Employees Union Local No. 320*, 316 N.W.2d 542, 544 (Minn. 1982)). For consistency in interpreting the No-Fault Act, Minnesota appellate and trial courts review de novo an arbitrator’s legal determinations necessary for granting relief. *Id.* Nothing in the No-Fault Act or subsequent case law suggests that a district court may *not* rule on other legal issues unrelated to interpretation of the No-Fault Act “as a screening measure to prevent unauthorized arbitration.” *Auto Owners Ins. Co. v. Star Windshield Repair, Inc.*, 743 N.W. 329 (Minn. App. 2008), *rev’d on other grounds* 768 N.W.2d 346 (Minn. 2009) (emphasis added).

The issue involved in the instant case is unique and has not been previously addressed by this Court. This case involves the issue of an arbitrator’s authority to decide the purely legal question of whether snow and ice immunity precludes Respondent’s indemnification claims under the No-Fault Act. Because Minn. Stat. § 65B.53 specifically references negligence and liability for damages, the statutory immunities set forth in Minn. Stat. § 466.03 directly apply to shield cities and other governmental entities from liability, including indemnification claims under the No-Fault Act.

Just as other preliminary legal issues are critical before proceeding to arbitration under the No-Fault Act, such as insurance coverage disputes, the legal issue of whether a City is immune from liability must be determined fully and finally by a court of law before a City and its insurer is compelled into a potentially unauthorized arbitration proceeding under the Act. The courts must initially determine whether a claim for No-Fault indemnity even exists. In other words, when immunity is raised as a defense, the court must determine whether immunity bars the claim for no-fault indemnification. Further, these preliminary determinations must be first made by the courts, not No-Fault arbitrators, for purposes of judicial economy and to prevent conflicting decisions by multiple tribunals, as is the distinct possibility in this case.<sup>7</sup> Therefore, because the arbitrator in this case clearly exceeded her authority under Minn. Stat. § 572.19, subd. 1(3), the district court should be reversed and the arbitration award should be vacated.

**I. STATUTORY SNOW AND ICE IMMUNITY MUST BE DECIDED BY THE COURT TO DETERMINE WHETHER IT PRECLUDES RESPONDENT'S INDEMNITY CLAIM, AND TO PREVENT POTENTIAL UNAUTHORIZED ARBITRATION**

The law is well-settled that when governmental immunity is raised as a defense by a defendant, a claimant's allegations of negligence are legal questions, not factual questions. *Berg v. City of St. Paul*, 414 N.W.2d 204, 207 (Minn. App. 1987) (citing *Gonzalez v. Hollins*, 386 N.W.2d 842, 845 (Minn. App. 1986) and *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633-634 (Minn. 1978)). Immunity provides

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<sup>7</sup> In light of this Court's ruling in the companion case, it is very possible that either the district court or this Court will determine that snow and ice immunity ultimately applies to this case with further development of the factual record.

complete and total *immunity from suit*, not just liability on a particular claim. *Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004) (emphasis added). Because immunity provides immunity from suit, immunity is effectively lost if the case is erroneously permitted to go to trial.<sup>8</sup> *Anderson v. City of Hopkins*, 393 N.W.2d 363, 364 (Minn. 1986) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2816 (1985)). “The very foundation of an immunity’s protection is grounded in the special status of a defendant. The traditional basis for an immunity is that ‘though the defendant might be a wrongdoer, social values of great importance required that the defendant escape liability.’” *Rehn v. Fischley*, 557 N.W.2d at 332-333 (citations omitted).

While the issue of immunity in No-Fault indemnification has not been previously decided by this Court, Minnesota case law establishes that it is appropriate for a party to seek the determination of certain legal issues in district court prior to compelling arbitration. For example, in auto insurance cases involving contract disputes, a district court must resolve coverage disputes in order to protect parties “from the burden of unauthorized arbitration of both the coverage dispute and the merits of the insured's claim.” *U.S. Fid. & Guar. Co. v. Fruchtman*, 263 N.W.2d 66, 71 (Minn.1978).

Generally, a coverage dispute presents a question of law for the courts, not the arbitrators,

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<sup>8</sup> Furthermore, immunity is distinctly different from an affirmative defense. *Sletten*, 675 N.W.2d at 299. First, a party waives an affirmative defense if it is not included in a responsive pleading. *Id.* An immunity is not waived. *Id.* Further and importantly, the application of an immunity typically is a matter of law that is best resolved before the parties engage in lengthy discovery. *Id.* Affirmative defenses are treated differently by the courts because they serve different purposes. *Id.* While an affirmative defense protects the party from liability, immunity protects a party from the entire lawsuit itself. *Id.*

and should be determined by the district court prior to any arbitration on the merits of the claim. *Western National Insurance v. Bruce Thompson et. al.*, 797 N.W.2d 201, 206 (Minn. 2011) (citing *Costello v. Aetna Cas. & Sur. Co.*, 472 N.W.2d 324, 326 (Minn. 1991) (“The court, however, must make a finding of coverage before Costello is entitled to invoke his right to arbitration.”); see also *Johnson v. Am. Fam. Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988) (concluding that an arbitration panel exceeds the scope of its authority when it decides a coverage issue); *Auto Owners*, 743 N.W.2d at 329 (holding that preliminary legal issues in No-Fault arbitration cases, specifically legal issues regarding whether even a claim exists, should be determined prior to arbitration). The distinction between coverage disputes for the court and other types of disputes for the arbitrators is that questions that go “not to the merits of a claim but to whether a claim exists” should be decided by the district court. *Western Nat. Ins.*, 797 N.W.2d at 206 (citing *Myers v. State Farm Mut. Auto. Ins. Co.*, 336 N.W.2d 288, 290-91 (Minn. 1983)) (concluding that the policy definition of an underinsured motor vehicle was valid and did not extend to vehicle in question).

While in this case, insurance coverage or interpretation of the No-Fault Act are not in dispute, the legal question of whether immunity bars a claim must be made by the courts prior to compelling arbitration because if an immunity applies, it completely bars Respondent’s claim for indemnity, resulting in dismissal of the claim. In rejecting Appellant’s motion to vacate, the district court is essentially compelling participation in a potentially unauthorized arbitration. Just like an issue of coverage, whether snow and ice

immunity applies is exactly the type of legal issue that must be judicially determined prior to arbitration.

Moreover, nothing in the statutory framework or case law suggests that a district court may *not* rule on legal issues “as a screening measure to consistently prevent unauthorized arbitration.” *Auto Owners* at 332 (emphasis added). Here, the applicability of immunity is a purely legal issue that must be determined initially by a court of law before any factual determination could or should be made by the arbitrator. The purpose and intent of immunity is to shield governmental entities from liability and preclude unauthorized proceedings. *See Sletten* at 299 (holding immunity is immunity from suit rather than a mere defense to liability, and it is effectively lost if a case is erroneously permitted to go to trial). To require governmental entities to engage in binding arbitration before legal issues of immunity have been conclusively decided in a court of law deprives them of the inherent protection that both the legislature and the courts intended.

## **II. SNOW AND ICE IMMUNITY SHOULD BE FULLY AND FINALLY DETERMINED PRIOR TO NO-FAULT ARBITRATION TO PREVENT CONFLICTING TRIBUNAL DECISIONS AND IN THE INTEREST OF JUDICIAL ECONOMY**

To prevent conflicting tribunal decisions and for judicial consistency, the district court (and potentially this Court) should determine the application of snow and ice immunity prior to mandatory No-Fault Arbitration. The facts and procedural posture, as well as the potential outcome of this case demonstrate the importance of this issue. In their motion for summary judgment, Appellants raised defenses of common law official

immunity, statutory discretionary and statutory snow and ice immunity. The district court and this Court denied the application of official immunity and statutory discretionary immunity. However, the district court found, and this Court affirmed, that genuine issues of material fact need to be resolved before the court can decide the application of snow and ice immunity to Plaintiff's claims. Here, those crucial factual determinations have not yet been made by a fact finder.

Snow and ice immunity applies to “*any claim* based on snow or ice conditions on any highway....” Minn. Stat. § 466.03, subd. 4 (2011) (emphasis added). If snow and ice immunity applies to Plaintiff's negligence claims, it also applies to any indemnification claims by Respondent based on negligence and liability. Failure to vacate an arbitration award, pending the district court's (and potentially this Court's) final determination of whether snow and ice immunity applies could result in the inconsistent result of Plaintiff's claim for recovery being barred by snow and ice immunity, whereas Respondent's subrogation claim arising out of the same accident and injuries is upheld.<sup>9</sup> Therefore, the arbitration award must be vacated and the district court decision reversed.

### **CONCLUSION**

The City of Alexandria and Michael Donald Gould respectfully request that this Court reverse the district court's denial of motion to vacate arbitration award.

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<sup>9</sup> The companion civil case is scheduled for trial in Douglas County District Court in March, 2012.

LEAGUE OF MINNESOTA CITIES

Date: November 21, 2011



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