

NO. A11-1904

State of Minnesota
In Court of Appeals

DONALD MORRIS FERNOW,

Plaintiff,

and

COUNTY MUTUAL INSURANCE COMPANY,

Intervenor/ Respondent,

vs.

MICHAEL DONALD GOULD AND
CITY OF ALEXANDRIA,

Appellants.

**AMICI CURIAE BRIEF OF ASSOCIATION OF MINNESOTA COUNTIES
AND MINNESOTA ASSOCIATION OF TOWNSHIPS**

Rylee J. Retzer (#0313166)
John E. Hennen (#155226)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1239

Attorneys for Appellants

Leon R. Bissonette (#8497)
Kathleen M. Loucks (#298050)
HELLMUTH & JOHNSON
8050 West 78th Street
Edina, MN 55439
(952) 941-4005

Attorneys for Plaintiff

Michelle D. Hurley (#328157)
Steven L. Theesfeld (#216860)
YOST & BAILL, LLP
2050 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 338-6000

Attorneys for Intervenor-Respondent

Paul D. Reuvers (#217700)
Susan M. Tindal (#330875)
IVERSON REUVERS
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200

*Attorneys for Amici Curiae the Association of
Minnesota Counties and Minnesota Association of
Townships*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF AMICI CURIAE	1
STATEMENT OF LEGAL ISSUE	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
STANDARD OF REVIEW	3
LEGAL ARGUMENT	3
A NO-FAULT ARBITRATOR EXCEEDS HER AUTHORITY WHEN SHE DETERMINES THE LEGAL QUESTION OF GOVERNMENTAL IMMUNITY	3
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Minn. R. Civ. App. P. 129.03	1
Minn. Stat. §§ 65B.41-65B.71	3
Minn. Stat. § 65B.43, subd. 12	3
Minn. Stat. § 65.53, subd. 4	3
Minn. Stat. § 65B.53	3
Minn. Stat. § 375.163	1
Minn. Stat. § 572.12(b)	5
Minn. Stat. § 572.19	6
<i>Anderson v. Anoka Hennepin Indep. Sch. Dist. 11</i> , 678 N.W.2d 651 (Minn. 2004)	4
<i>Anderson v. City of Hopkins</i> , 393 N.W.2d 363 (Minn. 1986)	4
<i>Costello v. Aetna Cas. & Sur. Co.</i> , 472 N.W.2d 324 (Minn. 1991)	5
<i>Fedie v. Mid-Century Ins. Co.</i> , 631 N.W.2d 815 (Minn. App. 2001)	4, 5
<i>Johnson v. American Family Mut. Ins. Co.</i> , 426 N.W.2d 419 (Minn. 1988)	5, 6
<i>Klinefelter v. Crum & Forster Ins. Co.</i> , 675 N.W.2d 330 (Minn. App. 2004)	3
<i>McGowan v. Our Savior’s Lutheran Church</i> , 527 N.W.2d 830 (Minn. 1995)	4
<i>Minder v. Anoka County</i> , 677 N.W.2d 479 (Minn. App. 2004)	4
<i>Mitchell v. Forsyth</i> , 105 S.Ct. 2806 (1985)	4
<i>Myers v. State Farm Mut. Auto. Ins. Co.</i> , 336 N.W.2d 288 (Minn. 1983)	4
<i>Sletten v. Ramsey County</i> , 675 N.W.2d 291 (Minn. 2004)	4
<i>Weaver v. State Farm Ins. Companies</i> , 609 N.W.2d 878 (Minn. 2000)	5
<i>Wiederholt v. City of Minneapolis</i> , 581 N.W.2d 312 (Minn. 1998)	5

STATEMENT OF AMICI CURIAE

The Association of Minnesota Counties (“AMC”) and the Minnesota Association of Townships (“MAT”) (collectively the “Governmental Associations”) submit this amicus brief to discuss whether a no-fault arbitrator has jurisdiction to resolve immunity issues and the significant impact the resolution of this issue will have on government entities statewide.

AMC is a voluntary association of the 87 counties in the State of Minnesota organized pursuant to Minn. Stat. § 375.163. MAT is a non-profit organization representing 1,782 of Minnesota’s 1,785 organized townships. The missions of AMC and MAT are to provide their respective members with support so they may effectively perform the duties and responsibilities delegated to them by law. AMC and MAT represent the common interests of their respective members before judicial courts and other governmental bodies.¹

The Governmental Associations have a public interest in this appeal as representatives of thousands of governmental entities throughout the state that operate commercial vehicles, where immunity issues are now potentially subject to arbitration under the No-Fault Act. Immunities protect municipalities not only from liability but, more importantly, from suit itself. The district court’s decision negates this concept. Both the United States Supreme Court and the Minnesota Supreme Court have

¹ This brief was not authored in whole or in part by counsel for any party to this appeal. No other person or entity made a monetary contribution to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

recognized the importance of governmental immunities by allowing interlocutory review of such decisions, reasoning the defense is effectively lost if a matter is erroneously allowed to be litigated. If an arbitrator is allowed to make immunity determinations, it will effectively strip a municipality of the ability to seek immediate review of any adverse immunity determination, eviscerating the purpose of immunity. The problem is compounded by the distinct possibility a municipality may be subject to inconsistent immunity determinations, as illustrated by this particular matter. Under the circumstances, the Governmental Associations have united to urge this Court to preserve a municipality's entitlement to immunity from suit.

STATEMENT OF LEGAL ISSUE

This appeal involves the question of whether a no-fault arbitrator exceeded her authority in resolving the applicability of immunity in the context of a no-fault indemnification arbitration.

STATEMENT OF THE CASE

The Governmental Associations adopt the Statement of the Case in Appellants' Brief. The Court granted the Governmental Associations' request to participate as amici by Order dated November 22, 2011.

STATEMENT OF FACTS

The amici position concerns a legal issue that is not fact-dependent. To the extent facts are relevant to the consideration of this legal issue, the Governmental Associations adopt the Statement of Facts in Appellants' Brief.

STANDARD OF REVIEW

This Court reviews de novo the issue of whether an arbitrator exceeded her authority. *Klinefelter v. Crum & Forster Ins. Co.*, 675 N.W.2d 330, 333 (Minn. App. 2004).

LEGAL ARGUMENT

A NO-FAULT ARBITRATOR EXCEEDS HER AUTHORITY WHEN SHE DETERMINES THE LEGAL QUESTION OF GOVERNMENTAL IMMUNITY.

A. Background.

Minn. Stat. §§ 65B.41-65B.71 is known as the Minnesota No-Fault Automobile Insurance Act (“No-Fault Act”). Under the No-Fault Act, if an automobile accident involves a commercial vehicle, an insurer can seek statutory indemnification or contribution under Minn. Stat § 65B.53. A commercial vehicle is defined as:

- (a) any motor vehicle used as a common carrier,
- (b) any motor vehicle, other than a passenger vehicle defined in section 168.002, subdivision 24, which has a curb weight in excess of 5,500 pounds apart from cargo capacity, or
- (c) any motor vehicle while used in the for-hire transportation of property.

Minn. Stat § 65B.43, subd. 12. Countless municipal vehicles, including snowplows, are considered commercial vehicles under this provision, which may subject municipalities to arbitration under Minn. Stat. § 65.53, subd. 4. While governmental immunity may bar many of these claims, this immunity is effectively lost if a no-fault arbitrator has jurisdiction to rule on the legal question of immunity.

B. Allowing a no-fault arbitrator to decide immunity issues undermines the underlying purpose of immunity.

The purpose of immunity is to “protect[] public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties.” *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004) (citations omitted). Immunity provides immunity from suit, not just from liability. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004).

The denial of a summary judgment motion based on immunity from suit is a final judgment or order for purposes of appealability because the immunity is an *immunity from suit* rather than a mere defense and the immunity is effectively lost if a 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*, 105 S.Ct. 2806, at 2815-17 (1985)); see *Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004) (discussing statutory immunity).

In *Mitchell*, the United States Supreme Court concluded an order denying summary judgment is appealable if the issue “falls within ‘that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.’” *McGowan v. Our Savior’s Lutheran Church*, 527 N.W.2d 830, 832 (Minn. 1995) (citing *Mitchell*, 105 S.Ct. at 2814.) If a municipality is subjected to a no-fault arbitration, without regard to whether or not immunity applies, the essential function of immunity is lost. See *Fedie v.*

Mid-Century Ins. Co., 631 N.W.2d 815, 820 (Minn. App. 2001) (Appellant engaged in same preparation for arbitration as for trial); *see also* Minn. Stat. § 572.12(b) (allowing parties to present evidence and cross-examine witnesses at arbitration hearings). Under the circumstances, this Court should clarify immunity issues should be resolved solely by the Court and not in an arbitration proceeding.

C. An arbitrator in no-fault arbitration does not have jurisdiction to decide questions of law and if the district court’s decision is upheld, it will have broad ramifications on municipalities.

Here, the no-fault arbitrator succinctly, without any analysis or citation to authority, denied the applicability of snow and ice immunity. The applicability of immunity, however, is a question of law. *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). No-fault arbitrators are limited to deciding questions of fact, leaving the interpretation of law to the courts. *Weaver v. State Farm Ins. Companies*, 609 N.W.2d 878, 882 (Minn. 2000) (citing *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988)). The limitation on the final authority of arbitrators is based on the perceived need for consistency in interpretation of the No-Fault Act. *Id.* The district court in denying Appellants’ Motion to Vacate failed to recognize just as coverage issues are legal questions, immunity is a legal question whether a claim exists. It should be decided by a court of law, not an arbitrator.

A coverage dispute presents a question of law for the courts, not the arbitrators, and should be determined by the district court prior to any arbitration on the merits of the claim. *See 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.*, 426 N.W.2d at 421 (concluding that an arbitration panel exceeds the scope of its authority when it decides a coverage issue).

The distinction between coverage disputes for the court and other types of disputes for arbitrators is questions that go “not to the merits of a claim but to whether a claim exists,” should be decided by the district court. *Myers v. State Farm Mut. Auto. Ins. Co.*, 336 N.W.2d 288, 290–91 (Minn. 1983). Similarly, immunity is a question of law and determines whether a claim exists. Therefore, the legal question of immunity must be made by the courts prior to arbitration.

Furthermore, the law greatly limits the scope of review of an arbitrator’s decision harming municipalities’ immediate right to appeal immunity determinations. A party may move to vacate an arbitration award for very limited reasons set forth in Minn. Stat. § 572.19. That the relief was such it could not be granted by a court of law, is not grounds for vacating the award. See Minn. Stat. § 572.19. Therefore, an arbitrator making immunity determinations effectively strips government entities of the ability to appeal an adverse legal determination. This has broad ramifications on municipalities. Governmental immunity issues involve well-developed and fact specific determinations. Allowing arbitrators who may have little experience with immunity could potentially lead to conflicting tribunal immunity decisions. At a time when taxpayer dollars are stretched to their limits, this will needlessly force municipalities to bear the expense associated with proceeding to arbitration, even when immunity should apply. The Court should reaffirm municipalities’ entitlement to immunity from suit and hold a no-fault arbitrator exceeds her authority when delving into the legal framework of immunity.

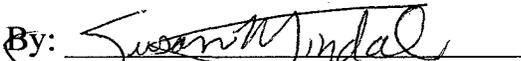
CONCLUSION

The resolution of this appeal will have a significant, statewide effect on municipalities since they have countless commercial vehicles as defined by the No-Fault Act. A no-fault arbitrator exceeds her authority when reaching immunity issues in an arbitration proceeding. Accordingly, the Governmental Associations respectfully request this Court reverse the district court's denial of the Motion to Vacate the Arbitration Award because the arbitrator did not have jurisdiction to decide the legal question of immunity.

Respectfully submitted,

IVERSON REUVERS

Dated: December 2, 2011

By: 

Paul D. Reuvers, #217700

Susan M. Tindal, #330875

9321 Ensign Avenue South

Bloomington, MN 55438

(952) 548-7200

*Attorneys for the Association of Minnesota
Counties and Minnesota Association of
Townships*