

NO. A11-1904

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State of Minnesota  
**In Court of Appeals**

Donald Morris Fernow,

*Plaintiff,*

and

Country Mutual Insurance Company,

*Intervenor/Respondent,*

vs.

Michael Donald Gould and City of Alexandria,

*Appellants.*

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**INTERVENOR/RESPONDENT'S BRIEF**

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## ARGUMENT

### **I. THE TRIAL COURT DID NOT ERR IN CONFIRMING THE ARBITRATION AWARD.**

Appellants misstate the appropriate standard of review for this appeal. De novo review is appropriate where an arbitrator has determined a legal issue related to the No-Fault Act. *Gilder v. Auto-Owners Insurance Co.* 659 N.W.2d 804 (Minn. Ct. App. 2003) review denied (Minn. June 25, 2003). As explained below, that did not take place here.

An arbitrator's award rests merely on findings of fact, those findings of fact are final, and courts may only vacate the award if there is proof that the arbitrator exceeded his or her authority. Minn.Stat. § 572.19, subd. 1(3) (2004); *Karels v. State Farm Ins. Co.*, 617 N.W.2d 432, 434 (Minn.App.2000).

Moreover, an appeal from an arbitration decision is subject to limited review and the reviewing court must exercise "[e]very reasonable presumption" in favor of the arbitration award's finality and validity. *State, Office of the State Auditor v. Minn. Ass'n of Prof'l Employees*, 504 N.W.2d 751, 754 (Minn.1993) (citation omitted). An arbitration award cannot be vacated simply because the court disagrees with the arbitrator's decision on the merits. *AFSCME Council 96 v. Arrowhead Regional Corrections Bd.*, 356 N.W.2d 295, 299-300 (Minn.1984). "Only where the arbitrators have clearly exceeded their powers must a court vacate an award." *National Indem. Co. v. Farm Bureau Mut. Ins. Co.*, 348 N.W.2d 748, 750 (Minn.1984) (citations omitted).

Appellants argue that the Arbitrator in this matter exceeded her authority by rendering a decision on the "the purely legal question of whether snow and ice

preclud[ed] Respondent's indemnification claims under the No-Fault Act .<sup>1</sup>" (A.B. 9)<sup>2</sup>  
This is misleading. The doctrine of Snow and Ice Immunity would not preclude  
Respondent's indemnification claims under the No-Fault Act. Rather, the doctrine of  
Snow and Ice Immunity would preclude tort liability. If there is no tort liability for any  
reason, then there is no indemnification available under the No-Fault Act. This distinction  
is important for two reasons.

First, there is no evidence in the record that the Arbitrator decided as a matter of  
law that the Doctrine of Snow and Ice Immunity was inapplicable to a No-Fault Act  
indemnification claim. Rather, the Arbitrator reviewed the evidence and ostensibly made  
a factual determination that neither snow nor ice played a role in the accident, and thus  
tort liability was not precluded. As set forth below, this is within the Arbitrator's authority  
to do, even if a district court or a jury might reach a different factual finding.

Second, even if the Arbitrator did not simply make a factual determination but also  
decided a legal issue, as set forth below, she was authorized to do so and could render a  
decision as to the application of tort immunity in this context.

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<sup>1</sup>Appellants' argument is echoed by the Amici Curiae Brief of the Association of  
Minnesota Counties and Minnesota Association of Townships. No new or additional  
argument is offered beyond what Appellant offers, thus this Brief responds to the Amici  
Curiae Brief as well. Curiously, the Association expresses great interest in this appeal and  
warns of "broad ramifications" if this Court affirms the Trial Court. Yet, the No-Fault  
Arbitration Act has existed in this state since 1975 and arbitrations involving government  
vehicles have been numerous since that date. Given the Associations' compliance with  
the act since 1975, it is difficult to believe that now it suddenly believe that broad  
ramifications will follow if this matter is affirmed, especially in light of the wholesale  
duplication of Appellants' argument.

<sup>2</sup>References to pages of Appellants' Brief will be identified as, (A. B. \_\_\_)  
References to pages of Appellants' Appendix will be identified as, (A.A. \_\_\_)

Accordingly, the Trial Court's decision confirming the arbitration award must be affirmed.

**1. The Arbitrator Did not Decide a Legal Issue. Instead She Acted Within Her Authority to Make a Factual Determination, Separate From The District Court's Determination.**

Appellants stress that the district court found, and this court affirmed, that there were genuine issues of fact regarding the application of snow and ice immunity in the current case. (A.B. 14). Indeed, this Court pointed to evidence which showed that neither snow nor ice played a role in the accident. (A.A. p. 31). Appellants concede that this factual issue must be resolved by a fact finder, but object to the Arbitrator's resolution and suggest that the interests of judicial economy<sup>3</sup> demand that only the District Court make such determination. (A.B. 13).

Yet, the Minnesota Supreme Court has previously held that an Arbitrator not only has the authority to make such factual determinations, but can do so regardless of how a district court might or has determined such facts.

In *National Indemnity Co. Supra.*, 348 N.W.2d at 751, the Supreme Court considered how a liability finding in a prior district court action would impact a No-Fault arbitration claim. In that case, Farm Bureau applied for arbitration wherein sought to recover basic economic loss benefits (No-Fault Benefits) paid to its insured whose car had been struck by a vehicle owned by National's insured. In a prior civil suit the jury found liability but no damages because the plaintiff's injuries had occurred before and

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<sup>3</sup>Judicial economy is also one of the obvious purposes of the No-Fault Arbitration Act.

after the collision. The Supreme Court rejected National's argument that the finding of no damages in the district court action should be binding on the Arbitrator. It reasoned:

The purpose and history of the no-fault indemnity provision support the conclusion that the arbitration at issue here should be treated like private arbitration actions. As with private arbitration, no-fault arbitration was intended as a recourse totally separate from resort to the courts. As Professor Steenson explains: "The right of indemnity in the Minnesota Act exists independently of the insured's tort action for damage." M. Steenson, *Minnesota No-Fault Automobile Insurance* 170 (1982). The reasons for this distinction are as follows:

This use of arbitration is seen as an efficient, quick, and relatively inexpensive method of adjudicating indemnity claims. It removes such claims from an already overcrowded court system and the vagaries of a fair but probably unqualified jury. The setting instead is one where the participants are professionals in the field and fault can be determined strictly on the merits. Under such a system there need be no concern that a severely injured party will go uncompensated, for compensation has already taken place. Neither should there be any fear that a slightly injured party will be overcompensated. The dispute is between two insurance companies in an arbitration proceeding which is charged with the task of determining which insurer should bear a loss already fixed in amount. Note, *Subrogation and Indemnity Rights Under the Minnesota No-Fault Automobile Insurance Act*, 4 Wm. Mitchell L.Rev. 119, 141 (1978).

The legislative history of the indemnity provision reveals an intent to insulate the arbitration process from judicial interference.

(Id.) The Minnesota Supreme Court also expressed concern that a contrary holding would encourage litigants to stall the arbitration process by forum shopping to a district court.

(Id. At 752).

Here, even Appellants admit that the Arbitrator had authority to make factual determinations. (A.B. 9). Thus, the Arbitrator could find whether snow or ice played a role in the accident. Under the above authority, she could make such factual determination separate and apart from how a district court might decide the issue.

Further, the Minnesota Supreme Court in *Weaver v. State Farm Ins. Cos.*, 609 N.W.2d 878 (Minn. 2000) held that an Arbitrator could take such factual findings and apply the law to such findings, because it is within the Arbitrator's authority to decide mixed questions of fact and law.

*Weaver* involved three cases where claimants refused to attend independent medical examinations. The parties agreed that the result of such refusal raised issues involving both law and fact. The parties proposed separating such issues and having the legal issues decided by a district court. This was rejected:

Arbitration is particularly appropriate where a speedy, informal and relatively inexpensive procedure for resolving controversies is needed. See *Layne-Minnesota Co. v. Regents of Univ. of Minn.*, 266 Minn. 284, 287, 123 N.W.2d 371, 374 (1963). Reliance on an arbitrator for resolving disputes about an IME is therefore consistent with the goals of the No-Fault Act, which include speeding the administration of justice, requiring medical examination and disclosure, and ensuring prompt payment. See Minn.Stat. § 65B.42 (1998). The arbitrator's determination of reasonableness of the request for and refusal of the IME and the attendant consequences also fits within the other duties of the no-fault arbitrator this court has promulgated, such as the authority to permit any discovery allowable under the Rules of Civil Procedure, and to extend time limits for the completion of physical examinations. See Rule 12, Rules of Procedure for No-Fault Arbitration. In contrast, State Farm's urged severance of legal and factual issues between court and arbitrator would interfere with the goal of speeding the administration of justice. As litigants dispute the obligations under the act, it makes little sense to require them to shuttle back and forth between the arbitrator making factual determinations and the court deciding legal questions. Rather, the arbitrator can determine the facts and apply the law to those facts subject to de novo review by the district court.

*Weaver Supra.*, 609 N.W.2d at 884. The *Weaver* Court recognized that in order to award any relief an Arbitrator must apply law to the facts as they have found.

Here, the Arbitrator obviously found insufficient evidence to support the assertion

that ice or snow played any role in the accident.<sup>4</sup> Accordingly, there could be no snow and ice immunity from tort liability for the accident. This decision was not one of “pure law” as Appellants suggest (A.B. 9) Rather, it was one of fact and application of the law thereto. Under the rule set forth in *Weaver* the Arbitrator did not exceed her authority in awarding relief.

**2. Even if the Arbitrator Had Decided A Legal Issue, She had Authority To Do So.**

Appellants cite a series of outdated cases addressing an Arbitrator’s authority to determine issues of law related to the No-Fault Act and attempt to extend their holdings to support an argument that an Arbitrator can never decide *any* issue of law. (A.B. 10-12). This tactic fails for two reasons.

First, as the Trial Court pointed out, Appellants misstate the holdings of the cases they rely upon to make them appear to cover all legal issues when they really only address legal issues related to the No-Fault Act. For example, Appellants cite both *Weaver Supra.*, and *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 421 (Minn. 1988). The Trial Court explained that neither case bars an Arbitrator from deciding a general issue of law and both limit their holdings to issues of law related solely to the No-Fault Act:

LMCIT’s main argument relies on the language of multiple cases which, if read without context would be persuasive. *Weaver* states that “no-fault arbitrators are limited to deciding questions of fact, leaving the

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<sup>4</sup>The Officer responding to the accident testified that the accident happened on a clear day and that there was no precipitation at the time of the collision. (A.A. 31) A Witness traveling right behind the snowplow testified that the street was “wet” but “clean.” (Id.)

interpretation of law to the courts.” 609 N.W.2d at 882. Without more, this language would clearly support LMCIT’s contention. This sentence however, is followed closely by another, which states that this limitation on authority is “based on the perceived need for consistency in interpretation of the No-Fault Act.” *Id.* Likewise, in *Johnson v. American Family*, the issue was specific to one of coverage, and the court held that the arbitrators may not interpret the no-fault statute. 426 N.W.2d 419, 421 (Minn. 1988). As acknowledged by counsel at the hearing, there have been no published, on-point cases dealing with the interpretation of legal issues beyond the No-Fault Act.

(A.A. 60-61)

Second, more recent authority from this Court in *Gilder, Supra.*, held that an Arbitrator can decide a legal issue, even one related to the No-Fault Act, as long as such decision is subject to de novo review:

[W]hen called upon to grant relief, an arbitrator need not refrain from deciding a question simply because it is a legal question. But an arbitrator's decision on a legal question is subject to de novo review by the district court.

*Gilder Supra.*, 659 N.W.2d at 807.

What Appellants’ argument really boils down to, is a request for this Court to carve out an exception to the *Gilder* rule, for any legal issues involving immunity or indeed, for all legal issues. Not only would granting such a request circumvent the traditional role of the Legislature to craft such exceptions, but it would defeat the goals of judicial economy and rapid resolution which prompted the Legislature to adopt the current No-Fault Arbitration system.

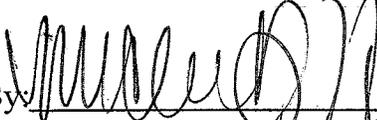
Accordingly, even if the Arbitrator in the current action had decided an issue of law in rendering her decision, she was within her Authority to do so, and the Trial Court’s confirmation of her award should be affirmed.

**CONCLUSION**

The Trial Court correctly confirmed the arbitration award. The arbitrator's award rests solely on the determination that no facts supported a claim of immunity from tort liability. The Arbitrator not only had the authority to make such a factual determination, but she also had the authority to apply the law to the facts and conclude that an award was justified. Because the Arbitrator did not exceed her authority, the Trial Court's confirmation of the award, but be affirmed.

Dated 12/19/11

YOST & BAILL, LLP

By 

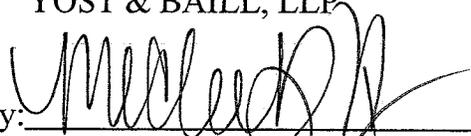
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CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds 1 and 3, for a brief produced with a proportional font. The length of this brief is 2625 words. This brief was prepared using WordPerfect 10.

Dated 12/19/11

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