

NO. A12-1213

State of Minnesota
In Court of Appeals

Sharif Haji-Ali,

Appellant,

vs.

Sheelagh F. Russell,

Respondent.

**BRIEF AND ADDENDUM OF
RESPONDENT SHEELAGH F. RUSSELL**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUE

Appellant-tortfeasor seeks a windfall by requesting a collateral source offset for payments made by Respondent's underinsured motorist (UIM) carrier prior to trial in the underlying liability case. The common-law collateral source rule in Minnesota has long provided that a defendant is not entitled to an offset for amounts a plaintiff has received from collateral sources. Minn. Stat. § 548.251 (2010) partially abrogated the common law rule, and provides for an offset of certain, enumerated collateral sources. Section 548.251 does not expressly list UIM benefits as a collateral source, and no Minnesota court has ever found that a defendant-tortfeasor is entitled to an offset for UIM benefits. Does Section 548.251 abrogate the common law rule as to UIM benefits and entitle Appellant to a collateral offset for the UIM benefits Respondent received?

The District Court recognized that Minn. Stat. § 548.251 is ambiguous as to types of automobile accident insurance it governs. It reasoned that prior Minnesota precedent, *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990), defining uninsured motorist (UM) benefits as a collateral source under that statute was not binding because of the distinction between UIM and UM coverage. The Court explained that the scenario presented in this case was more akin to the fact pattern in *Do v. Am. Fam. Mut. Ins.*, 779 N.W.2d 853 (Minn. 2010), where a no-fault insurer sought a collateral source reduction for payments the plaintiff previously received from the tortfeasor's liability insurer. Ultimately, the District Court held that Appellant was not entitled to a collateral source offset.

Apposite Authority:

Minn. Stat. § 548.251 (2010)

Do v. Am. Fam. Mut. Ins., 779 N.W.2d 853 (Minn. 2010)

Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990)

STATEMENT OF FACTS

On March 25, 2010, Appellant ran a red light and crashed into Respondent's car.

(A. 29.) Respondent sustained, among other injuries, a serious foot injury that required surgery to treat. (A. 29.) Her treating physician testified that Respondent will likely require additional surgery in the future. (A. 29.)

Respondent initiated this action on January 4, 2011. (A. 4.) Despite the fact that Appellant's liability obviously exceeded his \$50,000 policy limit, his insurer, Farmers, refused to tender its limits in a timely manner, both prior to and after initiation of the suit. (A. 29 – 30.) Because it was obvious that Respondent's damages exceeded \$50,000, Respondent's UIM insurer, USAA, intervened in this action on April 29, 2011. (A. 29.)

On October 12, 2011, USAA paid Respondent \$50,000 at mediation to limit its risk and resolve the potential UIM claim. (A. 29.) At the time of mediation, Respondent had already incurred \$43,249.66 in past medical damages. (A. 30.) USAA recognized that Respondent's damages were likely to exceed Appellant's \$50,000 policy limits with Farmers, and effectively valued the entirety of Respondent's claims at a minimum of \$140,097.49 (\$40,097.49 no-fault; \$50,000 liability; \$50,000 UIM). (A. 30.) Appellant and Respondent failed to resolve their claims at mediation and proceeded to trial. (A. 30.)

On February 23, 2012, the jury returned a verdict in Respondent's favor, finding Appellant 100% at fault. (A. 24.) The verdict was in the amount of \$102,974.76 (reduced to \$62,877.27 after no-fault benefits were deducted). (Add. 2 – 4.) Thus, the

jury affirmed what has been obvious all along—Respondent’s damages exceed Appellant’s \$50,000 policy limits with Farmers. If Appellant gets his way on appeal, Respondent’s insurer will have paid \$90,097.49 for her injuries, but Appellant (and his insurer) will get off almost scot-free.

ARGUMENT

Appellant and his insurer still refuse to accept responsibility for the serious damage Appellant caused. Appellant asks this Court to extend Minn. Stat. § 548.251, and hold that Appellant is entitled to a collateral source offset in the amount of the UIM benefits Respondent received from USAA. Appellant’s argument fails for several reasons.

First, neither the plain language nor the overarching intent of Minnesota’s collateral source statute, Minn. Stat. § 548.251, supports such an offset. Second, no governing case law supports such an offset. This case is not governed by the Supreme Court’s prior decision as to uninsured motorist (UM) benefits in *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990), nor is that decision instructive, because of the distinction between UM and UIM coverage. Third, Minnesota case law actually augers against such an offset as the Supreme Court has held in a similar context that to the extent a windfall exists, it is better that the injured party receive that windfall rather than the tortfeasor (or its insurer). *See Do. v. Am. Fam. Mut. Ins. Co.*, 779 N.W.2d 853, 857-58 (Minn. 2010). Finally, Appellant’s proposed rule would only encourage unreasonable conduct by liability carriers, and serve as an impediment to the efficient resolution of

automobile accident claims. Accordingly, the District Court's ruling should be affirmed.

I. Minn. Stat. § 548.251 Does Not Apply to UIM Benefits.

- a. The plain text of Minn. Stat. § 548.251 does not classify UIM benefits as a collateral source nor does it exhibit an intent to abrogate the common law rule as to excess insurance coverage.**

Minnesota's common-law collateral source rule allows injured plaintiffs "to recover damages from a tortfeasor even when that award results in a double recovery." *Do.*, 779 N.W.2d at 857-58 (Minn. 2010) (quoting *Hueper v. Goodrich*, 314 N.W.2d 828, 830 (Minn. 1982)). Minn. Stat. § 548.251 only partially abrogated this common-law rule, denying plaintiffs double recovery for specific, enumerated collateral sources. *Do.*, 779 N.W.2d at 857-58 (citations omitted). There is no statutory language providing that the intent of this statute was to wholly abolish the common-law rule. As a result, the common-law rule still applies if the collateral source is not identified in Section 548.251.

In relevant part, Minn. Stat. § 548.251 states as follows:

For purposes of this section, "collateral sources" means payment related to the injury or disability in question made to plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to: . . . (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage. . .

Minn. Stat. § 548.251, subd. 1. At bottom, Appellant argues that Minn. Stat. § 548.251 reversed the common-law rule as to UIM benefits. Minn. Stat. § 548.251, subd. 1 expressly enumerates the types of collateral sources that plaintiffs are no longer entitled to double recovery for under Minnesota law. Nowhere in the plain text of that subdivision, or any other part of the statute, did the legislature expressly state that UIM

benefits are collateral sources for the purposes of Section 548.251.

Additionally, the language of Minnesota Statute § 548.251 does not evidence an intent to provide tortfeasors with collateral source offsets for payments made pursuant to excess insurance coverage. *See Employers Mut. Companies v. Nordstrom*, 495 N.W.2d 855, 865 (Minn. 1993) (noting that UIM is excess insurance). Nowhere in subdivision 1 (where collateral sources are defined), does the statute define collateral sources to include, excess or umbrella coverage. Minn. Stat. § 548.251, subd. 1. Instead, the statute is intended to provide offsets for those benefits that are paid “up to the date of the verdict.” Minn. Stat. § 548.251, subd. 1. Only in extremely rare instances (e.g., an unreasonable liability insurer), would an excess insurer like a UIM insurer ever make a payment prior to a verdict in the underlying liability case, since such excess claims are not ripe until a settlement or verdict is reached on the underlying claim. *See Oganov v. Am. Fam. Ins. Group*, 767 N.W.2d 21, 26 (Minn. 2009) (citation omitted).

Ultimately, there is no clear directive from the legislature abolishing the common-law collateral source rule as to UIM benefits.

b. The “automobile accident insurance” contemplated by Minn. Stat. § 548.251, subd. 1(2) is ambiguous.

Appellant argues Minn. Stat. § 548.251 unambiguously applies to all forms of “automobile accident insurance.” (App. Br. 14-15.) This argument ignores express findings by the Minnesota Supreme Court to the contrary. In *Imlay*, 453 N.W.2d at 334, the Minnesota Supreme Court found that subdivision 1(2) of the collateral source statute “is poorly written, ambiguous, and could conceivably be read as providing for one, two,

three or four different types of collateral source benefits.”

The Minnesota Supreme Court acknowledged this ambiguity more recently in *Do*, 779 N.W.2d at 860. Justice Paul H. Anderson, in his concurring opinion in *Do*, succinctly identified the true confusion created by subdivision 1(2):

I conclude the statute is ambiguous because it is subject to more than one reasonable interpretation—one being that subdivision 1(2) refers to *any* payment related to automobile accident insurance, including a payment under the tortfeasor’s automobile insurance policy, and another being that the language applies only to benefits paid by the plaintiff’s own no-fault insurer, which provides health benefits and income disability coverage.

Id. at 861-62 (P. Anderson, J., concurring). Accordingly, the Court must go beyond the plain language of Minn. Stat. § 548.251 to determine if that statute abrogates the common-law collateral source rule as to UIM benefits.

II. The District Court Properly Distinguished Between UM and UIM Coverage.

No Minnesota court has ever held that Minn. Stat. § 548.251 entitles a tortfeasor to a collateral source offset for UIM benefits provided prior to trial in the underlying liability case. The core of Appellant’s argument is that the Minnesota Supreme Court held in *Imlay*, 453 N.W.2d 326, that the “automobile accident insurance” language of Section 548.251, subd. 1(2) unambiguously applied to UM benefits, and that there is no relevant difference between UM and UIM benefits for the purposes of Section 548.251. The Supreme Court did treat UM benefits paid in *Imlay* as collateral sources pursuant to Minn. Stat. § 548.251. Why the Supreme Court did so is unclear given the Court’s express finding that subdivision 1(2) is ambiguous. *Imlay*, 453 N.W. at 334.

Nevertheless, the District Court properly found that the Supreme Court's holding in *Imlay* is not binding because of the significant difference between UM and UIM coverage. (Add. 3 ¶ 8.)

UM coverage serves "as a substitute liability policy which stands as proxy for that which the uninsured motorist chose not to carry." *McIntosh v. State Farm Mut. Auto. Ins. Co.*, 488 N.W.2d 476, 478 (Minn. 1992) (citation omitted). UIM coverage, on the other hand, has "generally been understood as excess coverage, to be utilized only after the cause of action against the insured tortfeasor has been concluded." *Employers Mut.*, 495 N.W.2d at 865. Put differently, a settlement or adjudication of the action against a tortfeasor is "a condition precedent to bringing a UIM claim." *Oganov*, 767 N.W.2d at 26 (citing *Employers Mut.*, 495 N.W.2d at 858). Therefore, when a UIM claim is settled in advance of the liability case, a "gap" in coverage is created, which does not exist after a UM settlement because of the UM policy's role as a substitute for the tortfeasor's liability policy.

Respondent has never been compensated for her liability claim against Appellant. By settling with USAA, Respondent only settled her potential excess coverage claim against USAA, which was not even ripe at the time of settlement. Respondent's UIM claim is entirely separate and distinct from her liability claim, and, in fact, does not exist without first exhausting the liability claim. USAA's settlement with Respondent was premised on the assumption that Respondent would likely recover more than Appellant's \$50,000 liability policy limits. In fact, USAA must have presumed that Respondent

would ultimately recover more than \$50,000 in UIM benefits, since it was obviously attempting to cap its own risk. Accordingly, this settlement was always intended to be for the amount in excess of Appellant's liability limits, and awarding Respondent the full jury damages would not be duplicative.

This case is similar to the Minnesota Supreme Court's decision in *Do*, 779 N.W.2d 853. In *Do*, the plaintiff resolved her liability claim against the tortfeasor prior to resolving her claim for no-fault benefits against her insurer. *Id.* at 855. The plaintiff settled with the tortfeasor's liability insurer in the amount of \$28,000, and the district court subsequently approved the no-fault insurer's request to have that amount applied as a collateral source offset to plaintiff's claim for no-fault benefits, which the appellate court affirmed. *Id.* at 855-56. The Minnesota Supreme Court reversed the lower courts' decision, reasoning, in part, that "[a] claim for no-fault benefits is separate and distinct from a tort claim against the tortfeasor and the tortfeasor's insurer." *Id.* at 857. The Court recognized that there was no harm to the no-fault insurer by rejecting the offset because "the no-fault insurer paid exactly what it was required to pay. . ." *Id.*

The no-fault/liability distinction recognized by the Minnesota Supreme Court in *Do* is similar to the liability/UIM distinction present in this case. The liability claim is a tort claim against the tortfeasor, whereas the UIM claim is a separate and distinct contract action against the UIM carrier that is not even ripe until the liability claim is exhausted. *Stroop v. Farmers Insurance Exchange*, 764 N.W.2d 384, 386 (Minn. Ct. App. 2009) ("It is undisputed that a UIM action is a contract action governed by the six-year statute of

limitations. . . it is undisputed that the ‘date of settlement or judgment’ is the accrual date for a UIM cause of action.”). Thus, allowing Respondent to resolve her UIM claim against her insurer and obtain a jury verdict absent a collateral offset for the UIM settlement does not result in a double recovery because Respondent is simply resolving two separate and distinct claims—a tort action against Appellant and a contract action with USAA. Further, just like in *Do*, it results in no harm to the Appellant because he will pay “exactly what [he] was required to pay.” *Do*, 779 N.W.2d at 857.

III. Any Windfall Respondent Receives is Acceptable under Minnesota Law.

To the extent the District Court’s ruling results in a windfall to Respondent, it is the type of “risk windfall” that the Minnesota Supreme Court has deemed acceptable:

We recognize that based upon our interpretation of the statute, it is possible that a plaintiff who chooses to pursue his claim serially first against the tortfeasor and then against his own no-fault insurer may receive a windfall. But the plaintiff also takes a risk in pursuing his claims piecemeal that he will receive less than full compensation.

Do, 779 N.W.2d at 860. Like the plaintiff in *Do*, Respondent took the risk that she would receive less than full recovery by first settling her claim with her UIM carrier by settling her UIM claim for \$50,000 of the \$100,000 UIM policy limits. Had the jury come back with a larger verdict, Respondent had no further recourse to collect against her own insurer.

Applying Appellant’s proposed offset would result in a clear and unjustified windfall to his insurer. *See id.* at 864 (P. Anderson, J., concurring) (“If the choice is to give a windfall to one party or another, our precedent informs us that we should read the

collateral source statute in favor of a plaintiff in Do's position.”). All of Respondent's compensation for her injuries has come exclusively from policies for which she paid (i.e., no-fault and UIM). Appellant, who the jury deemed to be 100% at fault, has paid nothing for Respondent's injuries and would ultimately pay very little if this Court adopts his proposed rule.

Also, that Respondent would not have received \$50,000 in UIM benefits as a result of the jury verdict in this case, does not mean that USAA, Respondent's UIM insurer, made a bad deal. The true value of the UIM settlement to USAA is not exclusively tied to the dollar value of the jury verdict. By settling with Respondent, USAA benefitted in several ways: (1) it ceased incurring its own attorneys' fees and costs; (2) opportunity cost - its employees could focus on other matters; and (3) the risk of potentially paying an additional \$50,000 in UIM benefits, plus interest and costs, was eliminated.

The present situation vastly differs from the traditional collateral source scenario where a plaintiff's no-fault benefits are deducted from a jury verdict. In that instance, the no-fault carrier is required to make health and employment benefit payments from the very start. A UIM insurer is under no duty to make payments prior to exhaustion of the liability policy. Thus, if there is a windfall to Respondent, it is the result of the risk assumed by USAA and exists because USAA judged the value of the claim to be worth more than the jury. That was what Respondent and USAA bargained for in the course of resolving their potential contract dispute regarding UIM benefits—USAA risked paying

too much and Respondent risked taking too little.

IV. Case Law from Other Jurisdictions Defining UIM Benefits as “Collateral Sources” is Irrelevant.

Appellant cites a host of cases standing for the proposition that UIM benefits constitute collateral source payments. (App. Mem. at 9 – 10.) A review of those cases overwhelmingly demonstrates that tortfeasors receive no verdict reductions for UIM payments obtained prior to the verdict in the underlying liability case. The question of whether UIM benefits constitute a collateral source in the general sense is irrelevant. Minn. Stat. § 548.251 did not abolish the common-law collateral source rule in its entirety; instead, it only abolished the rule as to specific, enumerated sources.

To the extent the Court looks to outside jurisdictions for guidance, a more appropriate inquiry is how states with similar collateral source statutes treat UIM benefits. For example, Florida’s collateral source statute, enacted the same year as Minnesota’s (1986), has nearly identical language defining automobile accident insurance to be offset post-verdict:

2. Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.

Fla. Stat. § 768.76, subd. 2(2) (1999) (subdivision 2(2) has been the same since 1986).

Under nearly identical statutory language, Florida courts have held that tortfeasors are not entitled to an offset in the underlying liability case for amounts previously recovered

through underinsured motorist coverage. *Wiggins v. Braman Cadillac, Inc.*, 669 So.2d 332, 334 n.3 (Fla. Ct. App. 1996) (recognizing an offset for no-fault benefits but not UIM benefits).

Additionally, cases from other jurisdictions underscore how inequitable it would be to allow an offset for UIM benefits in similar scenarios. *See Schwartz v. Hasty*, 175 S.W.3d 621, 628 (Ken. 2006):

Allowing tortfeasors a credit or setoff for UIM payments would provide an unintended benefit to the tortfeasor and relieve him of some responsibility for his actions, while depriving the injured party/insured of the benefit of his payments of premiums for the insurance.

See also Voge v. Anderson, 512 N.W.2d 749, 752 (Wis. 1994):

We recognize that the results in this case allow the injured party a double recovery. However a contrary conclusion would result in giving the tortfeasor a windfall: the tortfeasor would not have to pay the full amount of damages he would owe even after taking into account the amount of contributory negligence. Since Voge's recovery from American Family stemmed from his own actions of obtaining underinsurance and paying the premium for it, the better result is to allow Voge to recover that Windfall, not Illinois Farmers and Anderson. Any windfall in benefits should inure to the injured party, not to the tortfeasor.

Ultimately, the body of case law overwhelmingly demonstrates that tortfeasors are not permitted—with good reason—to offset UIM payments received by the plaintiff prior to resolution of the underlying liability case.

V. Appellant's Proposed Offset is Contrary to Public Policy.

The settlement between Respondent and USAA promoted the public policy of

efficiently resolving disputes, and allowed both parties to bargain for peace of mind as to that contract claim. Appellant's argument, on the other hand, runs completely contrary to public policy.

Treating UIM payments as collateral sources in this context would encourage liability carriers to be unreasonable in hopes that a plaintiff might first settle their UIM claim; thus, allowing liability carriers and their clients to pursue an undeserved windfall. *See Do*, 779 N.W.2d at 864 (“I am also concerned that the court of appeals’ reading of the collateral source statute will encourage insurers to delay paying no-fault benefits because of the possibility that the tortfeasors may pay some or all of what the no-fault insurer was obligated to pay its injured insureds.”). Such a ruling would invite unreasonable behavior by insurance companies because this scenario is only likely to arise when a defendant’s insurance company unreasonably resists paying its policy limits. *Id.* Why would a UIM carrier pay \$50,000 if it reasonably believed the plaintiff is not entitled to a figure in excess of the tortfeasor’s liability policy limits?

Ultimately, Appellant’s position would likely result in hindering the efficient resolution of lawsuits. If courts were to apply Appellant’s proposed rule, no plaintiff would ever reach a settlement with their UIM carrier prior to resolving the liability suit. That outcome would frustrate the contractual rights of and the freedom to contract between insureds and their UIM insurers. UIM insurers would be forced to either incur the cost of intervening in lawsuits, as was the case here, or would need to wait as long as six years after resolution of liability claims in order to close their books on UIM claims.

Such an outcome would frustrate public policy, and only promote the interests of the unreasonable liability insurer.

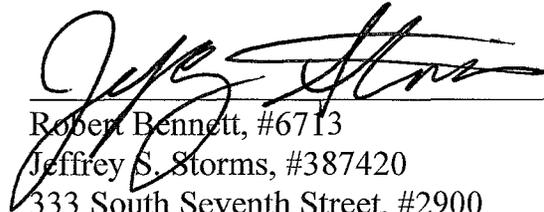
CONCLUSION

Minn. Stat. § 548.251 is an ambiguous statute, and its plain language does not provide a collateral source offset for UIM benefits. Absent a clear directive from the legislature, the Court should not provide tortfeasors in Appellant's position with a windfall. Accordingly, the District Court's April 15, 2012 Order should be affirmed.

Respectfully submitted,

GASKINS BENNETT BIRRELL SCHUPP LLP

Dated: September 10, 2012

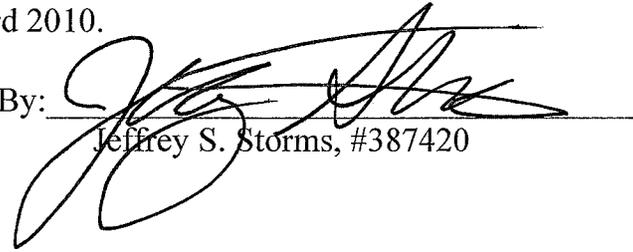


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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. Rule 132.01, for a brief produced using a proportional font. The length of this brief is 4,164 words. This brief was prepared using Microsoft Word 2010.

By: _____

A handwritten signature in black ink, appearing to read 'Jeffrey S. Storms', written over a horizontal line.

Jeffrey S. Storms, #387420