

NO. A05-709⁴

State of Minnesota
In Supreme Court

ZURICH AMERICAN INSURANCE COMPANY,
Respondent,

vs.

DONALD A. BJELLAND,
Appellant.

**APPELLANT DONALD A. BJELLAND'S
BRIEF AND APPENDIX**

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ISSUE PRESENTED

- I. **Were the 2000 Amendments to the Workers' Compensation Act, Which Clarify That a Subrogated Employer May Recover Benefits Payable to an Injured Employee "Regardless of Whether Such Benefits Are Recoverable by the Employee or the Employee's Dependents at Common Law or by Statute," Intended to Grant the Employer an Absolute Right to Recover from an Alleged Tortfeasor, Dollar-For-Dollar, the Full Amount of Workers' Compensation Benefits Payable on Behalf of an Employee, or Does the Employer Still Retain the Burden of Proving the Nature and Extent of the Employee's Injury and Damages Reasonably Flowing Therefrom?**

The trial court held that traditional tort notions requiring any plaintiff to prove damages still apply and, accordingly, the amendments would not automatically set the measure of damages as the amount paid and payable under the Workers' Compensation Act.

The Court of Appeals, reversing the trial court, held that the measure of recovery in a workers' compensation subrogation action is the full amount of benefits paid and payable.

Minnesota Statutes section 176.061.

M.W. Ettinger Transfer & Leasing Co. v. Schaper Mfg., Inc., 494 N.W.2d 29 (Minn. 1992).

Tyroll v. Private Label Chemicals, Inc., 505 N.W.2d 54 (Minn. 1993).

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Naig v. Bloomington Sanitation, 258 N.W.2d 81 (Minn. 1977).

STATEMENT OF THE CASE

Appellant seeks review of a Minnesota Court of Appeals decision, filed December 28, 2004, reversing the trial court's findings regarding the effect of certain amendments to the Minnesota Workers' Compensation Act and remanding the matter for an entry of judgment

consistent with its opinion. The underlying litigation is a subrogation action in which Respondent, Zurich American Insurance Company, seeks to recover from Appellant, Donald Bjelland, \$104,319 in workers' compensation dependency benefits it paid to Angeline Bodeker following the work-related death of her husband, Eugene. Bjelland denied liability for the automobile accident that resulted in Bodeker's death and demanded a jury trial for the determination of liability and damages, including a determination as to the amount of loss, if any, Angeline Bodeker sustained based upon the nature of the relationship between the Bodekers and the support expected to be provided by Mr. Bodeker. Zurich, on the other hand, claimed it was entitled to recover all dependency benefits paid to Mrs. Bodeker regardless of Mr. Bodeker's actual contributions to support his spouse, regardless of his shorter life and work-life expectancies, and regardless of Mrs. Bodeker's life expectancy.

The parties brought cross-motions for summary judgment that were heard by the Honorable Timothy R. Bloomquist, Judge of District Court, Tenth Judicial District. In an Order filed December 3, 2003, Judge Bloomquist granted Bjelland's motion and denied Zurich's cross-motion. The trial court rejected Zurich's argument that certain amendments to Minnesota Statutes section 176.061, enacted in 2000, automatically set the measure of damages as the amount paid and payable under the Workers' Compensation Act, holding that traditional tort notions requiring any plaintiff to prove damages still apply. App. 16-17.

In order to facilitate the entry of a final judgment, the parties then stipulated that, if tried to a jury, the jury would find fair and reasonable wrongful death damages for medical expenses, funeral expenses and loss of financial support to Angeline Bodeker in the amount

of \$48,336.05. App. 19. The parties also stipulated that a judgment in that amount could be entered against Bjelland. App. 20. The Stipulation was adopted by the trial court in its Findings of Fact, Conclusions of Law and Order, dated March 24, 2004, and a final judgment was entered that day pursuant to the Order. App. 22.

The Court of Appeals, in a published decision released on December 28, 2004,¹ reversed the trial court and ordered the case remanded. Although it initially stated that the tortfeasor in a workers' compensation subrogation action has the right to a jury trial on both damages and liability, and the insurer-subrogee is not automatically entitled to the full recovery of benefits paid and payable without first proving damages and liability (*see Slip Op. at App. 2*), the Court of Appeals ultimately held that the measure of recovery in a workers' compensation subrogation action is the full amount of benefits paid and payable to the employee notwithstanding a jury finding a lesser amount of damages and that Zurich was, therefore, entitled to recover the full \$104,319 paid to Mrs. Bodeker. App. 10.

STATEMENT OF FACTS

Eugene Bodeker was in the course and scope of his employment with Associated Milk Producers, Inc. ("AMPI") when he was involved in an automobile accident with Appellant Donald Bjelland. App. 11, 19. Bodeker died as a result of his injuries. App. 62. Zurich American Insurance Company, the workers' compensation insurer for AMPI, paid \$104,319

¹ *Zurich American Insurance Co. v. Bjelland*, 690 N.W.2d 352 (Minn. App. 2004).

in workers' compensation benefits on behalf of Mr. Bodeker, including \$8,255.83 in funeral expenses, \$3,680.22 in medical expenses, and dependency benefits in the amount of \$92,382.95 paid to Mr. Bodeker's widow, Angeline Bodeker. App. 20. The parties have stipulated that the amounts paid by Zurich represent the fair and reasonable value of workers' compensation benefits paid and payable under the Minnesota Workers' Compensation Act. *Id.* But they have also stipulated that if the case were tried to a jury, the jury would find the fair and reasonable damages for medical expenses, funeral expenses and lost financial support to Angeline Bodeker to be significantly less – \$48,336.05 – in light of Mr. and Mrs. Bodeker's age and ongoing health issues, and Mr. Bodeker's semi-retired status. App. 19.

Bodeker's spouse and next-of-kin entered into a *Naig*-type settlement agreement with Bjelland.² Following the settlement, Zurich commenced this lawsuit against Bjelland seeking to recover the workers' compensation benefits it paid as a result of Bodeker's death. App. 56-59. Although Bjelland initially denied liability for the accident (App. 62), the parties ultimately stipulated that, if tried to a jury, the jury would find Bjelland to be negligent and that such negligence was a direct cause of the accident. App. 19. In light of the parties' stipulation regarding liability and the jury measure of damages, this case presents no factual issues.

² This type of settlement agreement arises from the case of *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977).

ARGUMENT

I. Standard of Review.

On appeal from a grant of summary judgment, the reviewing court must determine whether there are genuine issues of material fact presented by the parties and whether the trial court erred in its application of the law. *Offerdahl v. University of Minnesota Hospitals & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). In this case, the parties stipulated to all disputed facts, with the sole issue being the proper interpretation of Minnesota Statutes section 176.061. Statutory interpretation presents a question of law subject to *de novo* review. *Hibbing Educ. Ass'n. v. Public Employment Relations Board*, 369 N.W.2d 527, 529 (Minn. 1985).

II. The 2000 Amendments to the Workers' Compensation Act, Did Not Change the Fundamental Nature of the Employer's Subrogation Claim. Accordingly, the Employer Should Still Be Required to Prove the Nature and Extent of the Damages, With the Appropriate Measure of Damages Being the Amount Awarded by the Jury.

This appeal concerns the appropriate measure of damages in a workers' compensation subrogation action brought pursuant to Minnesota Statutes section 176.061. Specifically, at issue in this case is whether the 2000 amendments to the Workers' Compensation Act, which clarify that a subrogated employer may recover benefits payable to an injured employee "regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute," were intended to set the measure of recovery at the full amount of workers' compensation benefits paid or payable on behalf of an employee, or whether the jury measure of damages would still apply such that the employer still retains

the burden of proving the nature and extent of the employee's injury and the damages reasonably flowing therefrom. The trial court recognized that the employer's right against a third-party tortfeasor is a subrogation right and that the 2000 amendments did not change the fundamental subrogor/subrogee relationship between the employee and employer. Its conclusion that an employer stepping into the shoes of an injured party must prove the nature and extent of the damages, and that nothing in either the language of the 2000 amendments or the legislative history indicates an intent on the part of the Legislature to alter this traditional tort notion, correctly applied the law and maintained the fair balance between the rights of employees, employers and tortfeasors that both the Legislature and the courts have for decades strived to maintain.

The Court of Appeals' conclusion, that the 2000 amendments "redefined the measure of recovery in workers' compensation subrogation actions as the full amount of benefits paid and payable to the employee," does away with the jury measure of damages and effectively overrules the *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54 (Minn. 1993) and *M.W. Ettinger Transfer & Leasing Co. v. Schaper Mfg., Inc.*, 494 N.W.2d 29 (Minn. 1992) line of cases decided by this Court in the early 1990's. This radical departure from existing law appears based on little more than a general "presumption" that statutory amendments are intended to effect a change in the law. See Slip Op. at App. 8. The Court of Appeals' interpretation of the statute, however, is neither supported by the amendments' legislative history -- a history that reflects no debate and an intent to merely codify and clarify existing law -- nor by the language of the amendments themselves.

A. An Employer is Required to Prove the Nature and Extent of the Employee's Injuries Because Its Right to Recover Benefits From a Third-Party Tortfeasor is a Subrogation Right.

In order to provide the Court with a context for the present dispute, it is helpful to again explain the interplay between the Minnesota Workers' Compensation Act and the common law tort system. Minnesota Statutes section 176.061 addresses third-party liability and is the starting point for any analysis regarding the respective rights of the employer, its employee and a negligent third-party tortfeasor. Subdivision 5 of the statute gives the employer an automatic right of subrogation for benefits paid when an employee's injury occurs under circumstances that create a legal liability for damages on the part of a party other than the employer:

. . . If the injured employee . . . receives benefits from the employer or the special compensation fund or institutes proceedings to recover benefits or accepts from the employer or the special compensation fund any payment on account of the benefits, the employer or the special compensation fund is subrogated to the rights of the employee . . . or has a right of indemnity against a third party regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute. . . .

Minn. Stat. § 176.061, subd. 5(a).³ Thus, upon the payment of benefits, Zurich, as insurer for AMPI, became subrogated by law to Bodeker's rights against Bjelland, the third-party tortfeasor.

³ Subdivisions 3, 7 and 10 of section 176.061 also address subrogation and further give the employer certain rights of indemnity, although the Minnesota Supreme Court previously has noted that this right of indemnity differs from traditional notions of indemnity and is essentially subrogation. *See, e.g., Allstate Ins. Co. v. Eagle-Picher Industries, Inc.*, 410 N.W.2d 324, 327-28 (Minn. 1987).

Section 176.061 also prescribes the manner in which any recovery from the at-fault third party is to be distributed between the employee and subrogated employer. Specifically, “[t]he proceeds of the action or settlement of the action **shall** be paid in accordance with subdivision 6.” Minn. Stat. § 176.061, subd. 5(a). Subdivision 6, in turn, states:

Subd. 6. Costs, attorney fees, expenses. The proceeds of **all** actions for damages or of a settlement of an action under this section, except for damages received under subdivision 5, clause (b) received by the injured employee . . . , as provided by subdivision 5, **shall** be divided as follows:

(a) After deducting the reasonable cost of collection, including but not limited to attorney fees and burial expense in excess of the statutory liability, then

(b) One-third of the remainder shall in any event be paid to the injured employee or the employee’s dependents, without being subject to any right of subrogation.

(c) Out of the balance remaining, the employer or the special compensation fund shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the employee or the employee’s dependents by the employer or special compensation fund, less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or dependents from the other party multiplied by all benefits paid by the employer or the special compensation fund to the employee or the employee’s dependents.

(d) Any balance remaining shall be paid to the employee or the employee’s dependents, and shall be a credit to the employer or the special compensation fund for any benefits which the employer or the special compensation fund is obligated to pay, but has not paid, and for any benefits that the employer or the special compensation fund is obligated to make in the future. . . .

Minn. Stat. § 176.061, subd. 6 (emphasis added). In short, section 176.061 “presents a comprehensive plan for asserting the claims of both employer and employee against third

parties and for distributing any sums recovered.” *Conwed Corp. v. Union Carbide Chemicals and Plastics Co., Inc.*, 634 N.W.2d 401, 412 (Minn. 2001) (quoting *Allstate Ins. Co. v. Eagle-Picher Industries, Inc.*, 410 N.W.2d 324, 327 (Minn. 1987)). Included in that “comprehensive plan” is a statutory formula that, on its face, is mandatory – proceeds of all actions for damages **shall** be distributed in the manner prescribed by the statute. Minn. Stat. § 176.061, subd. 5, 6.

Notwithstanding the mandatory language of the statutory distribution scheme, this Court has recognized that an employee (or the employee’s dependents) with a tort action against a third-party tortfeasor, has a number of additional options beyond litigating or settling the entire claim and then subjecting the recovery to the subdivision 6 formula. Included among these options is a right to settle with the tortfeasor for all items of tort damage not covered by the Workers’ Compensation Act. *See Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977). A *Naig* settlement is valid if: a) the employer is given notice of the settlement negotiations, b) the settlement is limited to damages that are not cognizable under the Workers’ Compensation Act and are, therefore, not subject to subrogation by the employer, and c) the employer’s right to maintain an independent action to the full extent of its subrogated claims against the third party are reserved. *Rascop v. Nationwide Carriers*, 281 N.W.2d 170, 173 (Minn. 1979). *Naig*-type settlements avoid application of the statutory distribution formula because the compensation carrier’s subrogation claim against the third-party tortfeasor is preserved. *Id.* *See also Folstad v.*

Eder, 467 N.W.2d 608, 611 (Minn. 1991). It was pursuant to a *Naig* settlement that the claims Bodeker's heirs and next-of-kin asserted against Bjelland were resolved.

Following a *Naig* settlement, the employer's or compensation carrier's claim against the third-party tortfeasor remains a subrogation claim to be tried before a jury as much like an ordinary personal injury tort action as possible. *Folstad*, 467 N.W.2d at 611 and 613, n.4. Thus, in *M.W. Ettinger Transfer & Leasing Co. v. Schaper Mfg., Inc.*, 494 N.W.2d 29 (Minn. 1992), this Court held that because the employer derives its cause of action against the third-party tortfeasor by virtue of the claim that the employee had against that third person before the *Naig* settlement, the employer who was subrogated to its employee's right to bring a common law negligence action must prove the nature and extent of damages, just as the employee would have had to prove damages but for the settlement. *Id.* at 33. Citing constitutional concerns, in particular the possibility of a due process challenge, the *Ettinger* court expressly rejected the argument that a subrogated employer is entitled to recover the full amount of compensation benefits paid without having to prove the nature and extent of the employee's, or dependent's, injury. *Id.*

Likewise, in *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54 (Minn. 1993), the Minnesota Supreme Court held that, following a *Naig* settlement, the third-party tortfeasor is entitled to defend against the employer's subrogation action as it would any tort cause of action, because that is what the tortfeasor is faced with – a tort claim, not a workers' compensation claim. *Id.* at 60. Accordingly, the tortfeasor is entitled to a jury trial on causation and damages, with judgment entered against the defendant for the amount of the

workers' compensation benefits paid and payable, **or such part thereof as the jury's award of damages will cover.** *Id.* at 56, 61. As in *Ettinger*, the *Tyroll* court rejected the employer's claim that the full amount of benefits paid and payable should be the sole measure of damages, reasoning that although this approach has the advantage of simplicity, it confuses the causation issues involved. *Id.* at 60.

B. The 2000 Amendments to the Workers' Compensation Act Did Not Change the Nature of the Employer's Right to Recover From a Third Party, Which Remains a Subrogation Right.

As the Court is aware, in 2000 the Minnesota Legislature amended the Workers' Compensation Act, including portions of section 176.061 governing third party liability. Repeatedly described as a "clarification and codification of existing law," (App. 24, 32, 36) the primary focus of the amendments to section 176.061 was the codification of *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977), in which this Court held that a third-party tortfeasor has a right of contribution against an at-fault employer to the extent of the workers' compensation benefits paid and the present value of workers' compensation benefits payable. *Id.* See also App. 53-54 (Rationale Presented to Workers' Compensation Advisory Council). The *Lambertson* contribution right is now a statutory right set forth in subdivision 11 of section 176.061, with the added clarification that the employer's liability is not to exceed the net amount of its subrogation recovery under the statutory formula. See Minn. Stat. § 176.061, subd. 11. Another primary thrust of the amendments was to codify a practice commonly referred to as a "waive and walk" by which an employer is permitted to eliminate its *Lambertson* exposure by waiving its subrogation rights. App. 24, 32, 36, 54.

See also Minn. Stat. § 176.061, subd. 11. Finally, with respect to the employer's subrogation and indemnity rights, the Legislature inserted the words "regardless of whether such benefits [compensation] are recoverable by the employee or the employee's dependents at common law or by statute" into various subdivisions of the statute. *Id.*

Zurich argued, and the Court of Appeals essentially agreed, that the addition of the "regardless language" in four locations in the statute must be interpreted as an abrogation of *Ettinger* and *Tyroll*. Although initially indicating, in its syllabus, that the employer is not automatically entitled to the full recovery of benefits paid and payable without first proving damages and liability (App. 2), the Court of Appeals ultimately concluded that the 2000 amendments supplanted the jury measure of damages by "redefining" the measure of damages as the full amount of the benefits paid and payable to the employee. App. 10. In other words, the Court of Appeals, in the first part of its decision, held that the employer was still required to prove the nature and extent of the employee's damages and that the tortfeasor was entitled to have these issues decided by a jury, but it ultimately denied Bjelland this right to a jury trial when, in the second part of its decision, it held that the measure of recovery is the amount of the benefits paid by the employer. The Court of Appeals' conclusion that the jury's measure of damages no longer applies simply is not supported by the language of the statutory amendments or their legislative history.

The Court of Appeals' conclusion is in error because the Minnesota Legislature, in clarifying that an employer is entitled to recover benefits paid or payable "regardless of whether such benefits or compensation are recoverable by the employee or the employee's

dependents at common law or by statute,” did not change the fundamental nature of the employer’s claims. Significantly, the Legislature, in enacting the 2000 amendments, did not delete any portion of section 176.061. The statute still refers to the employer’s rights as rights of subrogation and/or quasi-indemnity.⁴ See Minn. Stat. § 176.061, subd. 3, 5(a), 7, 10. The same procedures for asserting the subrogation rights that were present in the statute prior to 2000 remain in the statute today. And the distribution formula in subdivision 6 is unchanged. Accordingly, had there been no *Naig* settlement in this case, Bodeker’s widow would have proceeded with her tort action against Bjelland and would have been required to prove the nature and extent of her injuries, with any damages awarded then being run through the statutory distribution formula. Nothing in the language of the 2000 amendments supports a conclusion, or even suggests that this burden of proving liability and damages has changed or that the burden changes once the employee settles on a *Naig* basis. And, indeed, Zurich has never offered any explanation as to why the jury’s measure of damages applicable when all parties remain in the case would cease to apply after there has been a partial settlement.

Following the 2000 amendments, the employer’s rights remain grounded in subrogation. The only thing the amendments did was clarify that the subrogation claim

⁴ Again, the Minnesota Supreme Court has described the indemnity right conferred by section 176.061 as something other than a traditional indemnity. See *Allstate Ins. Co. v. Eagle-Picher Industries, Inc.*, 410 N.W.2d at 327-28. For instance, despite subdivision 7 giving the employer a separate cause of action for the recovery of medical expenses and “other compensation paid,” the employer’s recovery under subdivision 7 is still subject to the subdivision 6 distribution formula. See *Conwed*, 634 N.W.2d at 407-08.

includes all benefits or compensation paid or payable by the employer, including benefits that ordinarily might not be a recoverable element of damages in tort. One example of such a benefit is the sole example offered by the amendments' author to the Department of Labor and Industry's Workers' Compensation Advisory Council. *See* App. 54-55. Specifically, describing *Tyroll* and *Ettinger* as only granting the employer a right to share in the worker's common law negligence action, the Bill's author went on to highlight the following problem:

Under the reasoning of these supreme court decisions, some payments are not recoverable, such as a payment required under the Workers' Compensation Act for supplementary benefits, which are purely a statutory creation of supplemental wages to bring a low-wage earner who is injured up to a state average minimum wage. Thus, since this statutorily-created wage supplement could never be recoverable at common law, a completely innocent employer cannot recover it from the fully-at-fault third party. Clearly, this was not the intent of the Legislature when it created an all-encompassing statutory right for the employer and the Special Compensation Fund.

Id. Other examples of benefits for which there are no clear tort equivalents, common law or statutory, are permanent partial disability payments, vocational rehabilitation and retraining. These are all benefits a tortfeasor previously might have argued an employer could not recover because the employee to whom the employer is subrogated could not recover these damages in tort. The 2000 amendments further helped to clarify and codify decisional law that had interpreted the indemnity provisions as permitting the employer to maintain a cause of action and recover medical expenses and wage loss benefits paid in lieu of no-fault benefits even though the No-Fault Act prevents the employee from recovering such expenses, and even though the employee's failure to meet tort thresholds might prevent the employee

from pursuing, and recovering on, his own cause of action. *See, e.g., Conwed*, 634 N.W.2d at 411 (explaining the overall intent of section 176.061, subd. 7).

Contrary to the Court of Appeals' belief, Bjelland never conceded that the 2000 amendments intended to overrule *Ettinger* and *Tyroll's* requirement that the employer prove the nature and extent of the employee's, or dependent's, injury; and the quote attributed to Bjelland at page 8 of the Opinion is taken out of context. Bjelland was merely responding to Zurich's argument that the amendments would be a nullity if not interpreted as overruling *Ettinger* and *Tyroll*. Zurich, in its brief to the Court of Appeals, attempted to support its argument by pointing to the *Tyroll* court's finding that retraining expenses under the Workers' Compensation Act are recoverable by the employer even though there is no comparable item of common law damages. While it is true that the *Tyroll* court did note, albeit in a footnote, that such expenses were recoverable despite the absence of a common law equivalent because they were related to restoration of earning capacity, it did so in the context of noting that the overlap between compensation benefits and common law damages was not exact. *Tyroll*, 505 N.W.2d 61, n.8. The *Tyroll* court, however, also expressly held, in the main body of the opinion, that the employer's subrogation action "should be limited to recovery of common law damages for past and future wage loss, loss of earning capacity, and similar items of damages, if any." *Tyroll*, 505 N.W.2d at 60. Bjelland agreed that the 2000 amendments arguably overruled *Tyroll's* limitation on the employer's recovery to those types of common law damages only. But he never conceded that the jury measure of damages would cease to apply. Rather, Bjelland maintained the amendments merely codified

what the courts had been doing all along, which was to permit recovery, as noted in *Tyroll*, of certain categories of benefits provided by statute that the employee herself might not have been able to recover otherwise, because they were not an **element** of damages available under the common law. This is, of course, consistent with what the Legislature and the Workers' Compensation Advisory Council were told, which was that the amendments were intended to be a clarification and codification of existing law.⁵

The Court of Appeals' decision was based, at least in part, on the Court's acceptance of the "general proposition" that "statutory amendments are presumed to be intended to effect a change in the law." See Slip Op. at App. 8. This general presumption, however, is not absolute. See, e.g., *Brotherhood of Railway and Steamship Clerks v. State by Balfour*, 303 Minn. 178, 195, 229 N.W.2d 3, 13 (1975) (noting presumption but concluding language of amendatory statute was drafted to clarify rather than enlarge broad powers). And given the legislative record placed before the lower courts, and now this Court, any conclusion that the Legislature intended the amendments to overrule *Ettinger's* and *Tyroll's* requirement that an employer seeking to recover from a tortfeasor must prove the nature and extent of the employee's damages is wholly unsupported. Neither the bill that added the language, nor the legislative history, mentions *Ettinger* or *Tyroll* by name, refers to the *Tyroll* line of cases,

⁵ The Court of Appeals concluded that the language added by the amendments was unambiguous and its intent "unmistakable." Slip Op. at App. 8. But given the context in which the bill was presented and what the Legislature was told at that time, Appellant's interpretation of the language and the Legislature's intent certainly is as reasonable as the Court of Appeals' interpretation that the amendments were intended to "redefine the measure of damages."

generally, or suggests an intention to address the effects of *Tyroll* and to overrule it. If the intent were to overrule *Ettinger* and *Tyroll*, then certainly there would have been some discussion of those cases somewhere in the legislative history, and the bill could hardly have been described as a clarification and codification of existing law. Indeed, in presenting the proposed bill to the Workers' Compensation Advisory Council and the Minnesota Trial Lawyer's Association, its author noted that the amendment was merely intended to clarify, and not to wipe out all interpretive decisions. App. 55. The legislative record reflects that there was absolutely no discussion, much less debate, regarding the amendments to section 176.061, although there was debate, discussion and further amendments with respect to other proposed changes to the Act. App. 24-51. Yet surely there would have been some outcry, indeed a spirited and contentious debate, if the intent in adding the "regardless" language was to relieve the employer of its burden of proof and deny the tortfeasor its right to have a jury determine the measure of damages. The ease with which the "clarification" amendments were passed significantly undercuts any argument that the amendments were intended to overrule *Ettinger* and *Tyroll*.

The absence of any debate in the Legislature makes the Court of Appeals' interpretation of the 2000 amendments particularly troubling. This Court has long recognized that unlike the *quid pro quo* that exists between the employer and the employee in the workers compensation arena, the tortfeasor is a stranger and, being neither a participant in nor a contributor to the workers' compensation system, derives no benefit from the system. *See, e.g., Eagle-Picher*, 410 N.W.2d at 328 (describing rights as "incidents of employment

relationship”). As a result, constitutional due process concerns arise whenever attempts are made to shift the employer’s obligations to a third party in a way that would deny the tortfeasor its right to require the employer, or employee, to prove the extent of damages. *See Ettinger*, 494 N.W.2d at 29. This very same constitutional concern cited by the Minnesota Supreme Court as additional support for its holding in *Ettinger* is no less of a concern in this case. The Court of Appeals has interpreted the 2000 amendments in a way that would forever deny third-party tortfeasors their right to defend the claims against them the same way they would defend against any other tort action, by submitting both liability and damages to a jury and having the jury determine the measure of damages. Such an interpretation indeed violates due process and simply cannot have been intended by the Legislature when it passed the amendments to section 176.061 with no debate whatsoever.

Apparently, the Court of Appeals was also swayed by Zurich’s policy-based argument, and that of the amicus curiae, that the cost of workers’ compensation benefits should be borne by culpable tortfeasors rather than “innocent” employers. Slip Op. at App. 9. Although this may seem a laudable goal, it simply overlooks the reality that the workers’ compensation scheme, including its third-party liability provisions, are not concerned with ensuring that those responsible for an employee’s injury absorb their full share of the fault. The employer pays benefits regardless of fault, but as part of the *quid pro quo*, receives certain benefits in return. Chief among them are the exclusivity provisions that immunize the employer from tort actions by the employee and the guarantee, also codified in the 2000 amendments, that the employer’s contribution liability in tort **will never** be more

than the employer's net subrogation recovery. See Minn. Stat. §§ 176.031; 176.061, subd. 11. See also *Lambertson, supra*. And, as part of the *quid pro quo*, the tortfeasor remains solely responsible for damages not compensable under the Workers' Compensation Act (e.g. pain and suffering, emotional distress, loss of consortium and wage loss in excess of benefits paid) no matter how culpable the employer also might be. Thus, although the "comprehensive plan" attempts to balance the rights of the employee, the employer and the tortfeasor, the balance is not, has never been, and never will be, a perfect one.

Assuming, however, that the Legislature had public policy in mind when it adopted the 2000 amendments, the trial court's interpretation of section 176.061 did no disservice to this supposed legislative objective as it fully recognized that the employer does indeed have recourse against the tortfeasor. But the tortfeasor's obligation to "absorb the cost" of workers' compensation benefits paid by the employer remains subject to the tortfeasor's right to put the employee, dependent or employer to their proof of liability and damages.

Moreover, neither Zurich nor the Court of Appeals ever explained why the balance between the employer's right to recover workers' compensation benefits and the tortfeasor's right to defend against the subrogation action as it would any tort cause of action somehow changes depending on whether the employee's claims remain in the case. Again, had their been no *Naig* settlement, the case would have been tried like any other tort cause of action. The jury would have determined the amount of Mrs. Bodeker's damages and Zurich would have taken its statutory share of the recovery, not the full amount of workers' compensation benefits paid and payable.

Finally, this Court, in *Conwed, supra*, expressed its disapproval of statutory interpretation that undermines the “comprehensive plan” in section 176.061. *Conwed*, 634 N.W.2d at 412. Yet the Court of Appeals’ interpretation not only upsets the balancing of rights that the third-party liability provisions of the Workers’ Compensation Act were designed to preserve, but does so to the injured employee’s detriment. The settlement of disputes to minimize litigation is highly favored in Minnesota. *Johnson v. St. Paul Ins. Co.*, 305 N.W.2d 571, 573 (Minn. 1981). Under the Court of Appeals ruling, however, there would be little incentive on the part of the tortfeasor to promptly resolve the employee’s claims by settling on a *Naig* basis. After all, what tortfeasor would pay money for the privilege of both giving up its right to a jury determination of damages and, in this case, automatically increasing the amount of damages for which it might be liable?

CONCLUSION

The Court of Appeals erred in its holding that the 2000 amendments to section 176.061 automatically set the level of damages recoverable as the amount of benefits paid and payable, thereby relieving a subrogated employer of its burden of proof and denying the tortfeasor its right to a jury trial to question the true extent of the damages claimed. Nothing in the language of the amendments suggests an intent on the part of the Legislature to overrule the *Ettinger* and *Tyroll* line of cases, and such an intent certainly is not borne out by the characterization of the amendments in the legislative record as merely clarifying and codifying existing law. The interpretation adopted by the Court of Appeals does not reflect a clarification or codification of the law, but is instead a radical departure from what was, at

the time of the amendments, over seven years of supreme court precedent. That such a departure – the overruling of an entire line of supreme court cases, the deprivation of a jury determination of damages, and the abrogation of the basic subrogation principle that a subrogee bears the same burdens of proof as the party to whom it is subrogated – could occur without any legislative debate, discussion or even mention of these issues is simply too implausible to be believed. Appellant, Donald Bjelland, respectfully requests that the decision of the Court of Appeals be reversed, and the trial court’s judgment reinstated.

Respectfully submitted,

COUSINEAU, McGUIRE & ANDERSON,
CHARTERED

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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) (with amendments effective July 1, 2007).