

NO. A06-1626

State of Minnesota
In Court of Appeals

Theresa Mary Mitsch,

Appellant,

vs.

American National Property and Casualty Company,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

Is a reducing clause enforceable in the context of a multi-vehicle accident in which the “underinsured” tortfeasor triggering the payment of UIM benefits was not the same tortfeasor for whose negligence the UIM insurer paid its liability policy limits?

STATEMENT OF THE CASE AND FACTS

The facts pertinent to resolution of the issue on appeal are not in dispute. On September 23, 2003 Theresa Mitsch was a passenger on a motorcycle owned and driven by her husband, Thomas Mitsch. Mr. Mitsch insured the motorcycle with ANPAC under a policy that provided \$250,000 per person liability limits and \$250,000 per person underinsured motorist (UIM) limits.¹ Thomas Mitsch was traveling too fast in a construction zone with limited visibility. Joseph Frank, driving a pick-up truck, was in the wrong traffic lane headed towards the motorcycle. Mr. Mitsch was forced to make a sharp turn into a ditch to avoid a head-on collision. Theresa Mitsch was thrown off the motorcycle. She suffered severe injuries.

Theresa Mitsch brought claims against both Frank and her husband. She settled her liability claim against Frank for \$30,000, his Austin Mutual Insurance Company’s liability policy limits. She settled her liability claim against her husband Thomas Mitsch for \$250,000, the ANPAC policy’s liability limits. The accident was caused by the negligence of both Thomas Mitsch and Joseph Frank.

Theresa Mitsch remains undercompensated. After settling both liability claims for their respective policy limits, she sought UIM

¹ App-22.

benefits from ANPAC. When ANPAC denied her claim, Ms. Mitsch began this lawsuit. The underlying facts not being in dispute, ANPAC brought a motion for summary judgment on two legal grounds. First, ANPAC argued that its UIM policy contains a valid and enforceable reducing clause. Since ANPAC paid its \$250,000 liability limits for the negligence of its insured, Thomas Mitsch, enforcement of the reducing eliminates the UIM coverage. Second, ANPAC argued that Ms. Mitsch's UIM claim is precluded by the "owned vehicle" exclusion in the policy's definition of underinsured motor vehicle.

On July 5, 2006 Judge Edward Lynch of Dakota County District court issued an order granting ANPAC's summary judgment motion.² Judge Lynch concluded that the "owned vehicle" exclusion does not apply, but held the reducing clause to be enforceable "as applied to the facts of this case."³ Judgment of dismissal was entered on July 5, 2006.⁴ Theresa Mitsch appealed in a timely fashion, challenging the trial court's determination that the reducing clause is enforceable.⁵

² App-11.

³ App-11.

⁴ App-11.

⁵ App-15.

ARGUMENT

ANPAC'S REDUCING CLAUSE VIOLATES MINNESOTA LAW GOVERNING UNDERINSURED MOTORIST COVERAGE AND IS UNENFORCEABLE.

Any provision in an insurance policy that is contrary to statutory provisions or requirements is ineffective.⁶ The ANPAC UIM omnibus clause provides:

We will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an . . . **underinsured motor vehicle**.⁷

Theresa Mitsch, as the spouse of named insured Thomas Mitsch, is an insured person under the policy. She suffered bodily injury in the accident. The policy goes on to define an underinsured motor vehicle as:

a **motor vehicle** to which a **bodily injury** liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the **insured person** for his or her actual damages.⁸

The truck driven by Joseph Frank is an underinsured motor vehicle under this definition. The Frank vehicle was insured by Austin Mutual Insurance Company with \$30,000 liability insurance coverage.

⁶ *Lynch v. American Family Mut. Ins. Co.*, 626 N.W.2d 182, 185 (Minn. 2001); *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960).

⁷ ANPAC policy at 8, App-33.

⁸ ANPAC policy at 9, App-34.

That amount is grossly inadequate to compensate Theresa Mitsch for the injuries she suffered in the accident.

The trial court held that the reducing clause contained in the "Limits of Liability" section of the ANPAC policy is valid and enforceable "as applied to the facts of this case." The pertinent policy language provides:

Amounts payable will be reduced by

(1) a payment made by the owner or operator of the . . . underinsured motor vehicle, or organization which may be legally liable; (and)

(2) a payment under the Liability Coverage or Personal Injury Protection Coverage of this policy.⁹

If enforceable, this provision eliminates the entire \$250,000 UIM policy limit otherwise available to Theresa Mitsch, since she has received \$30,000 from Austin Mutual for the negligence of Frank, the operator of the underinsured motor vehicle, and \$250,000 from the liability portion of the ANPAC policy for the negligence of Thomas Mitsch. The trial court erred, however, in concluding that the reducing clause is valid under the circumstances present in this case.

Minnesota law regulates underinsured motorist coverage in the Minnesota No Fault Act.¹⁰ On the date of the accident Minnesota law mandated that all underinsured motorist coverage issued in Minnesota be "add-on" coverage available when any one vehicle in a multi-vehicle accident is underinsured:

⁹ ANPAC policy at 10, App-35.

¹⁰ Minn. Stat. §§ 65B.41 - .71.

Liability on underinsured motor vehicles. With respect to underinsured motorist coverage, the maximum liability of an insurer is the amount of damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at fault vehicle. If a person is injured by two or more vehicles, underinsured motorist coverage is payable whenever any one of those vehicles meets the definition of underinsured motor vehicle in section 65B.43, subdivision 17. However, in no event shall the underinsured motorist carrier have to pay more than the amount of its underinsured motorist limits.¹¹

This provision, adopted by the Minnesota legislature in 1989, returned underinsured motorist coverage in Minnesota to “add-on” coverage after a four-year period in which it had been “limits less paid.”¹² The reducing clause in the ANPAC policy is prohibited by the requirements of Section 65B.49, subdivision 4a, which mandates that any underinsured motorist coverage written in a Minnesota policy be “add-on” coverage.

The trial court upheld the enforceability of ANPAC’s reducing clause, noting that “reducing clauses have been upheld as consistent with established case law that prevents converting first party UIM coverage into additional third party liability coverage.”¹³ The court, citing to *Jensen v. United Fire and Casualty Company*,¹⁴ concluded

¹¹ Minn. Stat. § 65B.49, subd. 4a.

¹² *See, Neuman v. State Farm Mut. Auto. Ins.*, 492 N.W.2d 530, 532-33 (Minn. 1992) (explaining distinction between “difference of limits” and “add-on” coverage); 1989 Minn. Laws ch. 213, § 2; 1989 Minn. Laws ch. 356, § 20.

¹³ App-13.

¹⁴ 524 N.W.2d 536 (Minn. App. 1994).

that “as long as [ANPAC] is not attempting to reduce its UIM benefits based upon liability payments made by another tortfeasor or pursuant to insurance coverage on another vehicle, the fact that there is another tortfeasor and another underinsured vehicle, does not affect the validity of the reducing clause in the insurance contract.”¹⁵ This rationale misconstrues the term “coverage conversion” and ignores the statutory language mandating add-on UIM coverage.

The term “coverage conversion” refers to the “conversion” of relatively inexpensive first-party UIM coverage to more expensive third-party liability coverage.¹⁶ Theresa Mitsch is not seeking to convert UIM coverage into a second layer of liability coverage. She is not seeking ANPAC’s UIM benefits to cover the negligence of ANPAC’s insured, Thomas Mitsch. Rather, she is seeking ANPAC’s UIM coverage to cover the negligence of Frank, a tortfeasor totally unrelated to her, to named insured Thomas Mitsch, or to the ANPAC policy. Frank is an underinsured motorist, and application of the ANPAC policy’s UIM limits to Frank’s negligence is not conversion. It is add-on UIM coverage.

To understand the trial court’s error it is helpful to examine the *Jensen* opinion and the context in which it was written. In *Jensen* the plaintiff was a 12 year-old passenger in a pickup truck driven by her

¹⁵ App-13.

¹⁶ See, e.g., *Kelly v. State Farm Mut. Auto. Ins. Co.*, 666 N.W.2d 328, 331 (Minn. 2003); *Lynch v. American Family Mut. Ins. Co.*, 626 N.W.2d 182, 186, 188 (Minn. 2001).

sixteen year-old sister. A family friend owned the truck. The truck was involved in a single vehicle accident due to the driver sister's negligence. Both the plaintiff and her sister, the driver, lived with their father. The plaintiff brought a negligence claim against her sister, the only tortfeasor. She first collected the \$100,000 liability limit from the insurance policy issued by State Farm Mutual Automobile Insurance Company to the owner of the involved pickup truck. Next she recovered the \$100,000 liability limit on a policy issued by Farmers Union Insurance Company to the girls' father for his family-owned vehicles. The Farmers Union policy provided liability coverage to the sister because she was a member of her father's household. The plaintiff, still not fully compensated, then sought UIM coverage from Farmers Union under the same policy. The Farmers Union policy included a reducing clause similar to the reducing clause present in this case. Farmers Union argued that the reducing clause should be enforced in order to prevent "conversion" of inexpensive UIM coverage into additional liability coverage. The *Jensen* plaintiff argued that after the 1989 amendments to the No Fault Act, reducing clauses in UIM policies violate the "add-on" nature of UIM coverage as required by the No Fault Act. This court permitted the application of the reducing clause under the *Jensen* facts because the reducing clause prevented the conversion of the \$100,000 UIM limits into additional liability insurance for the insured tortfeasor (the sister driver) under the Farmers Union policy. ¹⁷ Having already made a \$100,000 liability payment for the insured sister's fault, Farmers

¹⁷ *Jensen*, 524 N.W.2d at 538.

Union was not required to “convert” its UIM coverage into additional liability coverage for the fault of the same insured tortfeasor. Because the reducing clause did nothing more than prevent this “conversion”, it was enforceable. Under those circumstances the *Jensen* court felt that the 1989 amendments mandating all UIM coverage in Minnesota to be “add-on” coverage were irrelevant.¹⁸

The focal point of the issue, then, is the prevention of conversion. Absent conversion, a reducing clause is unenforceable. A reducing clause is impermissible in a two tortfeasor situation in which the UIM coverage is to supplement the inadequate liability coverage of a tortfeasor who is entirely separate from and unrelated to the involved insurance policy. In this situation a reducing clause is at odds with the very nature of UIM coverage as defined by statute:

If a person is injured by two or more vehicles, underinsured motorist coverage is payable whenever any one of those vehicles meets the definition of underinsured motor vehicle in section 65B.43, subdivision 17.¹⁹

The Minnesota Supreme Court described coverage “conversion” in detail in *Lynch v. American Family Mutual Insurance Company*.²⁰ After walking through the history of the coverage conversion cases, the *Lynch* court based its definition of conversion on the conceptual difference between third party (liability) insurance and first party

¹⁸ *Id.* at 539.

¹⁹ Minn. Stat. § 65B.49, subd. 4a (emphasis added).

²⁰ 626 N.W.2d 182 (Minn. 2001).

(UIM) insurance.²¹ In *Lynch* there was one tortfeasor covered by two liability insurance policies: one on the vehicle and one on the driver, who had borrowed the vehicle from a neighbor. Despite the fact that two different insurance policies had paid their liability limits for the negligence of the sole tortfeasor, the focus of the conversion analysis was on the use for which the UIM coverage was sought. Where a plaintiff who is an insured under the UIM policy at issue seeks to recover UIM benefits from a policy that has already paid its liability benefits *for the same negligent act*, that person is seeking to convert first party UIM coverage into third party liability insurance.²² The *Lynch* court's analysis focuses on the purpose of the liability payment made by a particular policy to determine if conversion has occurred. Whose negligence is the payment intended to cover? If a policy's purported UIM payment is intended to cover damages caused by the negligence of a tortfeasor who is an insured under that policy and for whom that policy has already paid liability benefits, then the contemplated use of the UIM benefits is conversion. If that policy's purported UIM payment is to be made to cover damages caused by the negligent act of a *different* tortfeasor – one who is *not* an insured under that policy and for whom that policy's liability benefits have *not* been paid – then the contemplated use of the UIM benefits is appropriate. This is not conversion.

²¹ *Lynch*, 626 N.W.2d at 188; See also *Kelly*, 666 N.W.2d at 331.

²² *Lynch*, 626 N.W.2d at 188.

The trial court's error apparently stems from a phrase in the *Jensen* decision that, in the context of the *Jensen* facts, was a harmless misstatement of the proper focus in a conversion analysis. The trial court found significant the *Jensen* court's conclusion that a reducing clause was enforceable because of "the relevant policy's explicit language that excludes recovery when there has been a previous liability payment *under that same policy*."²³ *Jensen* involved a single tortfeasor and a single insurance policy, thus the emphasized language was superficially accurate in that context. The quoted language is inaccurate, however, in the context of a multiple tortfeasor accident. To the degree that the focus of the *Jensen* conversion analysis is on the number of insurance policies rather than on the use to which the UIM benefits are to be put, the Minnesota Supreme Court disapproved that analysis in *Lynch*.

If Theresa Mitsch was attempting to recover UIM benefits from ANPAC for the negligence of its named insured, Thomas Mitsch, she would be attempting to convert UIM coverage into additional liability coverage for Thomas Lynch's negligence. Under that scenario *Jensen* would be controlling precedent. That would be "conversion", since she would be attempting to add ANPAC's UIM policy limits to the liability limits it has already paid for Thomas Mitsch's (its insured's) negligence – the "conversion" of UIM coverage to additional liability coverage. That is not, however, the scenario present in this case. Theresa Mitsch is attempting to compel the payment of UIM coverage for uncompensated damage caused by a tortfeasor unrelated to

²³ App-13.

ANPAC, ANPAC's payment of its liability limits, or to Theresa Mitsch. This is not "conversion." It is an attempt to collect add-on UIM coverage.

The circumstances of this case are those contemplated by the multiple tortfeasor scenario described in Section 65B.49, subdivision 4a. Theresa Mitsch was injured by two vehicles, Thomas Mitsch's motorcycle and Frank's pick-up truck. One of those vehicles, Frank's pick-up truck, is underinsured within the meaning of Section 65B.43, subdivision 17. Frank's insurer paid its \$30,000 liability limits to compensate Theresa Mitsch for his negligence. ANPAC had no role in that payment. ANPAC's payment for the liability of its insured, Thomas Mitsch, is completely irrelevant and tangential to whether Frank is underinsured, and to whether ANPAC is obligated to pay UIM benefits for Frank's negligence. When the trial court allowed ANPAC's reducing clause to be enforced in this case, it did so in violation of Section 65B.49, subdivision 4a. "An insurer's liability is determined by the insurance contract as long as the insurance contract does not omit coverage required by law or violate applicable statutes."²⁴ The reducing clause in ANPAC's insurance policy violates Section 65B.49, subdivision 4a's definition of underinsured motorist coverage. It is therefore unenforceable.

²⁴ *Kelly v. State Farm Mut. Auto. Ins. Co.*, 666 N.W.2d 328, 331 (Minn. 2003).

The trial court also referred to an unpublished opinion by this court, *Engle v. Fischer*.²⁵ *Engle*, however, is not precedent. Further, when *Engle* adopted and applied a portion of the *Jensen* holding, it did so without conducting the analysis necessary to determine whether application of that holding to the *Engle* facts was appropriate. It is not.

The *Engle* court applied the *Jensen* result – enforcement of a reducing clause despite the statutory mandate that UIM coverage be “add-on” – to a set of facts significantly different than the facts in *Jensen*. Unlike the accident in *Jensen*, the accident in *Engle* was a two-vehicle accident. Ms. Engle, the plaintiff, was a passenger in a vehicle driven by Bradley Thompson. The Thompson vehicle collided with a vehicle driven by Dorothy Fischer. Ms. Engle brought negligence claims against both potential tortfeasors. She settled her claims against Fischer for \$100,000, the liability limits on the insurance policy covering the Fischer car. She settled her claims against Thompson, her host driver, for \$70,000 of the \$100,000 liability limits of the policy issued by Continental Insurance Company to cover the Thompson car. Ms. Engle then brought a UIM claim against Continental.

The UIM claim went to trial, and the jury returned a verdict finding Fischer to be 100% at fault for causing the accident – the sole tortfeasor. Continental, relying on a reducing clause in its policy, sought to subtract the \$70,000 liability money it had paid to Ms.

²⁵ 2003 WL 174541 (Minn. App. 2003). A copy of this unpublished opinion is contained in the Appendix at App-17.

Engle for Mr. Thompson's negligence. A panel of this court, citing *Jensen*, permitted the deduction based on a reducing clause in the Continental policy. Under the *Engle* facts, however, enforcement of the reducing clause was error. Continental's liability payment was made on behalf of its insured, Thompson, who was ultimately found by the jury to have no fault for the accident. The only tortfeasor was Fischer, who by definition was the underinsured motorist and was not an insured under the Continental policy. Continental's liability payment had not been made to cover Fisher's potential liability. Fisher was the *other* tortfeasor referred to in *Jensen*, the tortfeasor who is not an insured under the policy at issue and is the underinsured motorist. Fisher was the *other* tortfeasor that the "add-on" UIM coverage mandated in Section 65B.49, subdivision 4a is designed to cover. The plaintiff in *Engle* was seeking first-party UIM coverage for the fault of an unrelated, third-party underinsured tortfeasor. This is not the conversion of first-party UIM coverage to third-party liability coverage as that analysis is required under *Lynch*. The "add-on" mandate contained in Minnesota Statutes Section 65B.49, subdivision 4a was not only relevant but should have been applied to preclude the enforcement of the reducing clause in *Engle*. Whether Continental was entitled to a reduction of the verdict by application of the collateral source statute or on some other grounds is a separate, unrelated issue.

CONCLUSION

This UIM case is premised on the allegation that Joseph Frank is the underinsured motorist. ANPAC has paid nothing for Frank's liability. Per the mandate of Section 65B.49, subdivision 4a, "[i]f a

person is injured by two or more vehicles, underinsured motorist coverage is payable whenever any one of those vehicles meets the definition of underinsured motor vehicle in section 65B.43, subdivision 17.”²⁶ Section 65B.43, subdivision 17 defines “underinsured motor vehicle” as “a motor vehicle or motorcycle to which a bodily injury liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages.”²⁷ The Frank vehicle is an underinsured motor vehicle per statutory definition. Absent conversion, which does not exist here, a reducing clause such as the one present in the ANPAC policy is unenforceable under Minnesota law. The trial court’s judgment of dismissal based on enforcement of the reducing clause in ANPAC’s policy should be reversed, and the case should be remanded to the trial court with instructions that the reducing clause is unenforceable as a matter of law, that ANPAC’s policy provides Theresa Mitsch with up to \$250,000 of UIM coverage, and for a trial to determine the amount of UIM benefits owed.

²⁶ Minn. Stat. § 65B.49, subd. 4a (emphasis added).

²⁷ Minn. Stat. § 65B.43, subd. 17.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,609 words. This brief was prepared using Microsoft Word 2000.

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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).