

CASE NO. A08-1315

State of Minnesota
In Court of Appeals

LARRY BENJAMIN JOHNSON,

Appellant,

vs.

BRIAN CLETUS CUMMISKEY AND
MARGARET KATHRYN CUMMISKEY, AND
ILLINOIS FARMERS INSURANCE COMPANY,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

MASCHKA, RIEDY & RIES
Gerald L. Maschka (#68263)
Jorun Groe Meierding (#167423)
201 North Broad Street, Suite 200
P.O. Box 7
Mankato, Minnesota 56002-0007
Telephone: (507) 625-6600

Attorneys for Appellant

GISLASON & HUNTER, LLP
Roger H. Gross (#158823)
Timothy J. Crocker (#338497)
701 Xenia Avenue South
Suite 500
Minneapolis, Minnesota 55416
Telephone: (763) 225-6000

*Attorneys for Respondent
Illinois Farmers Insurance Company*

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).

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case	1
Legal Issue	2
Statement of Facts.....	2
Standard for Review	4
Argument	6
I. UIM coverage issued in conjunction with a Minnesota motorcycle liability insurance policy must comply with the provisions of Minn. Stat. § 65B.49, Subd. 4a.....	6
Conclusion	14
Appendix and Index.....	16

TABLE OF AUTHORITIES

Statutes

1989 Minn. Sess. Law. Serv. 213 (West)	10
Minn. Stat. § 65B.41 – 65B.71	3
Minn. Stat. § 65B.49, Subd. 3a.....	9
Minn. Stat. § 65B.49, Subd. 4a.....	1, 2, 4, 6, 7, 8, 9, 10, 12, 13, 14

Cases

<i>Am. Family Mut. Ins. Co. v. Ryan</i> , 330 N.W.2d 113 (Minn. 1983)	6
<i>American Nat. Property & Cas. Co. v. Loren</i> , 597 N.W.2d 291 (Minn. 1999)	3, 6
<i>Bobich v. Oja</i> , 258 Minn. 287, 104 N.W.2d 19 (1960)	6
<i>Davis v. American Family Mut. Ins. Co.</i> , 521 N.W.2d 366 (Minn. Ct. App. 1994).....	5
<i>Dohney v. Allstate Ins. Co.</i> , 632 N.W.2d 598 (Minn. 2001)	6, 7
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758 (Minn. 1993)	5
<i>Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n</i> , 358 N.W.2d 639 (Minn. 1984)	5
<i>Hertz Corp. v. State Farm Mut. Ins. Co.</i> , 573 N.W.2d 686 (Minn. 1998)	6
<i>Hickman v. SAFECO Ins. Co.</i> , 695 N.W.2d 365 (Minn. 2005)	5
<i>Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.</i> , 433 N.W.2d 82 (Minn. 1988)	4
<i>Johnson v. American Family Mut. Ins. Co.</i> , 426 N.W.2d 419 (Minn. 1988)	11
<i>Johnson v. St. Paul Guardian Ins. Co.</i> , 627 N.W.2d 731 (Minn. Ct. App. 2001).....	11
<i>Jorgensen v. Knutson</i> , 662 N.W.2d 893 (Minn. 2003)	4
<i>Lynch ex rel. Lynch v. American Family Mut. Ins. Co.</i> , 626 N.W.2d 182 (Minn. 2001)	6
<i>Marchio v. Western Nat. Mut. Ins. Co.</i> , 747 N.W.2d 376 (Minn. Ct. App. 2008).....	4, 5

<i>Midwest Family Mut. Ins. Co. v. Bleick</i> , 486 N.W.2d 435 (Minn. Ct. App. 1992).....	2, 8
<i>Mitsch v. American Nat. Property and Cas. Co.</i> , 736 N.W.2d 355 (Minn. Ct. App. 2007), review denied (October 24, 2007)	2, 8, 11, 12, 13
<i>Myers v. State Farm Mut. Auto. Ins. Co.</i> , 336 N.W.2d 288 (Minn.1983)	11
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990)	5

STATEMENT OF THE CASE

Respondent Illinois Farmers Insurance Company (“Respondent”) insured a motorcycle owned by Appellant Larry Johnson (“Appellant”). The policy included \$100,000 in underinsured motorist (“UIM”) coverage. While riding his motorcycle, Appellant was struck and injured by a car driven by Defendant Brian Cummiskey. Appellant settled with Defendants Brian and Margaret Cummiskey for \$34,000 and the Cummiskeys were dismissed from this lawsuit.

Appellant and Respondent agree that the at-fault vehicle was underinsured and that Appellant’s damages exceed \$134,000. Appellant claimed the full \$100,000 in UIM benefits under the policy. However, Respondent has only agreed to pay Appellant \$66,000 in UIM benefits, citing policy Endorsement 1314, which allows Respondent to reduce the amount of benefits to the “lesser of the difference between the limit of UIM coverage and the amount paid to the insured person by any party held to be liable for the accident.” Appellant maintains that, with regard to UIM coverage, the policy must comply with Minn. Stat. § 65B.49, Subd. 4a, which entitles him to receive “the amount of damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at-fault vehicle.”

Respondent moved for summary judgment in Le Sueur County District Court, the Honorable Richard C. Perkins presiding. The trial court granted summary judgment in favor of Respondent and judgment was entered on June 12, 2008. Appellant is appealing from that judgment.

LEGAL ISSUE

I. Whether UIM coverage issued in conjunction with a Minnesota motorcycle liability insurance policy must comply with the provisions of Minn. Stat. § 65B.49, Subd. 4a.

The trial court determined that the UIM coverage issued in conjunction with Appellant's policy did not need to comply with Minn. Stat. § 65B.49, Subd. 4a.

Apposite cases: *Mitsch v. American Nat. Property and Cas. Co.*, 736 N.W.2d 355 (Minn. Ct. App. 2007), review denied (October 24, 2007); *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435 (Minn. Ct. App. 1992).

STATEMENT OF FACTS

Appellant and Respondent have agreed upon the facts relevant to this appeal and those facts are set forth in the joint Stipulation included in the Appendix to this Brief.

(A-3 to A-6.)

Appellant Larry Johnson is a resident of the State of Minnesota. Appellant owns a 2004 Harley-Davidson motorcycle, which he insured with Respondent Illinois Farmers Insurance Company under policy number 13-0167957725 ("Policy"). The Declarations Page for the Policy provides UIM limits in the amount of \$100,000 per person. (A-3, A-4 and A-10.)

At about 10:30 P.M. on July 23, 2005, while operating his motorcycle, Appellant was struck and injured by a 1992 Mercury Grand Marquis driven by Defendant Brian Cummiskey. The accident occurred in Le Sueur County, just east of Cleveland, Minnesota. (A-3.) Appellant's damages exceeded \$134,000. (A-5.)

The Cummiskey car carried \$30,000 in liability insurance coverage. (A-3.) Appellant sued Defendants Brian and Margaret Cummiskey and settled with them for

\$34,000, of which Cummiskeys paid \$4,000 and their liability carrier paid its limit of \$30,000. (A-4.) The parties agree that Defendant Brian Cummiskey was 100% at fault for the accident in question. (A-4.) Defendants Brian and Margaret Cummiskey have been dismissed from this lawsuit. (A-40 to A-41)

Because his damages exceeded \$134,000, and because he had received only \$34,000 in settlement, Appellant claimed the full \$100,000 in UIM benefits from Respondent. (A-4.) Respondent determined that it was obligated to pay Appellant \$66,000 in UIM benefits [\$100,000 minus \$34,000]. (A-4.) In making this determination, Respondent relied on Endorsement 1314 of the Policy, which supersedes the Declarations Page and states that the limits of liability shown in the Declarations Page are subject to certain restrictions. Under those restrictions, Respondent is only obligated to pay “(a) the lesser of the difference between the limit of . . . (underinsured) motorist coverage and the amount paid to the insured person by any party held to be liable for the accident; or (b) the amount of the damages sustained but not recovered.” (A-28.) It is Respondent’s position that, because the Minnesota No Fault Act¹ does not require UIM coverage to be issued in conjunction with a motorcycle liability insurance policy², the parties are free to contract for this coverage, as they did in Endorsement 1314, and that the terms of the Policy apply.

¹ Minnesota Statutes §§ 65B.41 – 65B.71, hereinafter referred to as the “Act.”

² See *American Nat. Property & Cas. Co. v. Loren*, 597 N.W.2d 291, 293 (Minn. 1999) (“The Act mandates UIM coverage for all motor vehicles. For purposes of the Act, motorcycles are not motor vehicles. Therefore, UIM coverage is not mandated for motorcycles” [citations omitted].).

Appellant contends that Minn. Stat. § 65B.49, Subd. 4a (hereinafter “Subdivision 4a”) requires Respondent to pay him the full \$100,000 in UIM benefits set forth in the Declarations Page. For that reason, Appellant commenced action to collect the full \$100,000 of UIM benefits included in the Policy.³

Pursuant to Paragraphs XI, XII, and XIII of the Stipulation, Respondent moved for summary judgment. (A-5.) Appellant opposed the motion, requesting the trial court to reform the Policy to comply with Subdivision 4a and order Respondent to pay the remaining \$34,000 in UIM benefits. The trial court granted summary judgment in favor of Respondent, determining that the Policy must be enforced as written and that Respondent was only obligated to pay Appellant \$66,000. (A-48.) Judgment was entered on June 12, 2008. (A-49.) Appellant appeals from that judgment. (A-52.)

STANDARD FOR REVIEW

Interpretation of insurance policy: This court stated in *Marchio v. Western Nat. Mut. Ins. Co.*, 747 N.W.2d 376 (Minn. Ct. App. 2008): “The application and interpretation of an insurance policy is subject to de novo review. *Jorgensen v. Knutson*, 662 N.W.2d 893, 897 (Minn. 2003). If the facts are undisputed, an appellate court need only review how the district court applied the law in interpreting the policy language. *Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co.*, 433 N.W.2d 82, 84-85 (Minn. 1988).

³ Appellant brought a Stipulation to Amend Complaint before the trial court, to amend his Complaint to add “Farmers Insurance Group” as a defendant, and the trial court so ordered. (A-42 and A-43 to A-45.) However, Farmers Insurance was misidentified, so the parties stipulated to amend the caption to correctly identify Illinois Farmers Insurance Company as the proper defendant. (A-46 to A-47.)

For purposes of contract interpretation, we view the facts in the light most favorable to the non-moving party. *Hickman v. SAFECO Ins. Co.*, 695 N.W.2d 365, 369 (Minn. 2005).” *Marchio*, 747 N.W.2d at 379.

Statutory interpretation: The issue presented in this appeal involves a statutory interpretation, a question of law which this court reviews de novo. *Davis v. American Family Mut. Ins. Co.*, 521 N.W.2d 366, 368 (Minn. Ct. App. 1994), citing *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

Summary judgment: “On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The parties in this case have stipulated to the relevant facts. Appellant does not dispute the trial court’s findings of fact, but disputes that Respondent was entitled to judgment as a matter of law. Based on the facts presented in this case, Appellant should have prevailed and been awarded the full \$100,000 in UIM benefits under the Policy.

ARGUMENT

I. UIM coverage issued in conjunction with a Minnesota motorcycle liability insurance policy must comply with the provisions of Minn. Stat. § 65B.49, Subd. 4a.

A basic precept of insurance contract law is that the extent of the insurer's liability is governed by the contract into which it entered as long as the policy does not omit coverage required by law and does not violate applicable statutes. *Lynch ex rel. Lynch v. American Family Mut. Ins. Co.*, 626 N.W.2d 182, 185 (Minn. 2001), citing *Am. Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983) and *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960). An insurer may not provide less coverage than that required by the [Minnesota No Fault] Act. *American Nat. Property & Cas. Co. v. Loren*, 597 N.W.2d 291, 292 (Minn. 1999), citing *Hertz Corp. v. State Farm Mut. Ins. Co.*, 573 N.W.2d 686, 689-90 (Minn. 1998). Here, the Policy, specifically Endorsement 1314, does not comply with the provisions of Subdivision 4a, because it provides less coverage than the Act requires.

Prior to 1989, a Minnesota UIM carrier's liability to its insured was the lesser of the difference between the UIM limits and the amounts paid by the tortfeasor, or the uncompensated damages. This was known as "limits less paid" UIM coverage and is the same formula incorporated by Respondent in Endorsement 1314. In 1989, the Minnesota Legislature amended the statute and returned to what is commonly called "add-on" UIM coverage, in which the UIM carrier's liability to its insured is the lesser of the difference between the total damages and amounts paid by the tortfeasor, or the UIM limits. This "add-on" formula still applies to all Minnesota UIM coverage. *See Dohney v. Allstate*

Ins. Co., 632 N.W.2d 598, 601-603 (Minn. 2001) for a history of UIM coverage in Minnesota.

Although the Declarations Page of the Policy provides for \$100,000 in UIM coverage, Respondent seeks to limit Appellant's UIM benefit to \$66,000, based on the language of Endorsement 1314. Respondent argues that, because the Act does not require UIM coverage to be issued in conjunction with motorcycle liability insurance policies, the Policy does not omit any required UIM coverage or provide insufficient amounts of UIM coverage. Respondent reasons that, because the Act does not require UIM coverage to be issued with motorcycle liability coverage, the parties are free to contract for this benefit and the contract language, not Subdivision 4a, governs the UIM coverage issued with the Policy.

This analysis is flawed. Just because UIM coverage is not required to be issued in conjunction with motorcycle liability insurance policies does not mean that such coverage, once issued, does not need to comply with the Act. In Minnesota, if UIM coverage is issued along with any liability policy, whether an automobile policy or a motorcycle policy, then Subdivision 4a specifies the insurer's liability, as follows:

"Subd. 4a. 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. . . . However, in no event shall the underinsured motorist carrier have to pay more than the amount of its underinsured motorist limits."

Even though a Minnesota motorcycle owner is not required to purchase UIM coverage when insuring his motorcycle, if he chooses to do so, the insurer is subject to

Subdivision 4a. According to Subdivision 4a, Respondent's maximum liability in this case is not "limits less paid" (\$100,000 UIM limits less \$34,000 paid = \$66,000) as Respondent argues, but rather "add-on coverage" (\$134,000 total damages less \$34,000 paid by tortfeasor = \$100,000). See *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435, 437-438 (Minn. Ct. App. 1992) (legislation amending Minn. Stat. § 65B.49, Subd. 4a was signed into law on May 19, 1989, with effective date of August 1, 1989, and changed UIM coverage from difference of limits coverage to add-on coverage). See also *Mitsch v. American Nat. Property and Cas. Co.*, 736 N.W.2d 355, 358 (Minn. Ct. App. 2007), review denied (October 24, 2007) ("Minnesota law mandates that all UIM coverage issued in the state be "add-on" coverage, as expressed in Minn. Stat. § 65B.49, Subd. 4a. . .").

Neither Subdivision 4a, nor its predecessor (pre-1989), differentiate between UIM coverage issued with a motorcycle policy, UIM coverage issued with an automobile policy, or UIM coverage issued to an individual who owns neither a motorcycle nor an automobile. If the policy is a Minnesota policy, and if it includes UIM coverage, then it must comply with Subdivision 4a and pay the "amount of damages sustained but not recovered" up to the amount of the UIM limit contained in the policy. There is no question that, if Appellant had been driving a car at the time of the accident, and was now claiming UIM coverage from an auto liability insurance policy that provided \$100,000 in UIM benefits, he would be entitled to the full \$100,000 of that UIM coverage. See, e.g., *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d at 437 (UIM insurance carrier was required to provide add-on coverage after its insured died in a motor vehicle accident).

Minnesota Statute § 65B.49, Subd. 3a requires carriers of automobile liability insurance policies to include UIM coverage in the amounts of \$25,000/\$50,000 with those policies, but many insureds opt to purchase higher limits of UIM coverage in conjunction with their automobile liability insurance policies. This additional coverage is optional, not required, coverage. However, Subdivision 4a does not differentiate between required and optional coverage when it comes to the insurer's liability to pay UIM benefits. The insurer's liability is determined by the same add-on formula regardless of whether the insured has purchased the required amount of UIM coverage or additional, optional, coverage.

It is possible for a person who does not even own a vehicle to purchase UIM coverage for protection in the event of injury while walking, riding a bike, riding as a passenger, or driving a vehicle owned by someone else. Such coverage is optional, not required by the Act. Again, Subdivision 4a does not differentiate between this type of optional coverage and required coverage when it comes to the insurer's liability to pay UIM benefits. The insurer is obligated to pay add-on coverage, or the "amount of damages sustained but not recovered."

Likewise, UIM coverage purchased when insuring a motorcycle is optional coverage, not required by the Act. Again, Subdivision 4a does not differentiate between optional coverage for motorcycles and required coverage for other types of motor vehicles when it comes to the insurer's liability to pay UIM benefits. The insurer is obligated to pay add-on coverage: the "amount of damages sustained but not recovered." Appellant's Policy was a Minnesota policy that included \$100,000 in UIM coverage.

Any attempt by Respondent to reduce the amount of UIM coverage it issued Appellant contravenes Subdivision 4a.

In fact, the legislative history of Subdivision 4a indicates that the Minnesota Legislature specifically intended the Subdivision to apply to *all* insurance contracts. Subdivision 4a was most recently amended in 1989, as set forth in Section 2 of Chapter 213 of 1989 Minnesota Session Laws and Resolutions. (A-56.) Section 3 of that same Chapter set out the effective date for the Section, stating as follows:

“Sec. 3. EFFECTIVE DATE. <<+SECTIONS 1 AND 2 ARE EFFECTIVE FOR ALL CONTRACTS ISSUED OR RENEWED ON OR AFTER AUGUST 1, 1989, OR FOR ALL INJURIES OCCURRING ON OR AFTER AUGUST 1, 1989, OR FOR DEATHS OCCURRING AS THE RESULT OF INJURIES SUSTAINED ON OR AFTER AUGUST 1, 1989+>>” (emphasis added). (A-57.)

The language does not say the amendment applies only to UIM coverage sold in conjunction with automobile policies or that its effect is limited to injuries sustained while the insured is driving an automobile. Rather, the language specifies that the amendment applies to *all* contracts and that it is effective for *all* injuries.

The Legislature has not mandated that UIM coverage be issued together with motorcycle liability insurance policies. Neither has the Legislature created categories of UIM coverage. If the Legislature had wanted to differentiate between UIM coverage issued in conjunction with motorcycles policies and UIM coverage issued in conjunction with automobile policies, it would have done so, but the language of Subdivision 4a does not make that distinction.

From a public policy perspective, it makes no sense to create different categories of UIM coverage. UIM coverage is meant to protect a person who is injured, regardless

of whether he is in a car, on a motorcycle, or on foot at the time of the accident. UIM coverage is excess coverage available to a person when the tortfeasor carries inadequate liability insurance. *Johnson v. St. Paul Guardian Ins. Co.*, 627 N.W.2d 731, 732 (Minn. Ct. App. 2001), citing *Johnson v. American Family Mut. Ins. Co.*, 426 N.W.2d 419, 422 (Minn.1988). “[U]nderinsured motorist coverage is first-party coverage and, in that sense, the coverage follows the person not the vehicle.” *Myers v. State Farm Mut. Auto. Ins. Co.*, 336 N.W.2d 288, 291 (Minn.1983).

Appellant Larry Johnson was the victim of an accident that was not his fault and for which the tortfeasor carried inadequate liability insurance to cover Appellant’s damages. Although Appellant had the foresight to purchase \$100,000 of UIM coverage from Respondent, Respondent believes it should be able to reduce Appellant’s UIM benefits simply because Appellant was not required by Minnesota statute to purchase UIM coverage. Furthermore, even though Appellant was operating his motorcycle at the time of the accident, his claim is based on the underinsured status of the *tortfeasor’s automobile*. Appellant should be able to claim full UIM benefits, regardless of what he was driving at the time of the accident, because UIM coverage follows the insured, not the vehicle. Still, Respondent seeks to limit Appellant’s UIM benefits simply because they were purchased in connection with a motorcycle liability policy. To allow this result, as the trial court has done, is not good public policy.

The recent case *Mitsch v. American Nat. Property and Cas. Co.* is helpful in analyzing the present case. In *Mitsch*, Theresa Mitsch (“Theresa”) was a passenger on a motorcycle driven by her husband, Thomas Mitsch (“Thomas”), when a truck driven by

Joseph Frank (“Frank”) invaded their lane of traffic, forcing Thomas to swerve off the road and into the ditch. Theresa suffered significant injuries; both Frank and Thomas were at fault. Theresa settled with Frank’s liability carrier for its limit of \$30,000 and with Thomas’s motorcycle liability carrier for its limit of \$250,000, but because these amounts were not sufficient to compensate her for her injuries, Theresa also claimed UIM benefits from Thomas’s motorcycle carrier, ANPAC, which provided \$250,000 in UIM benefits. ANPAC denied Theresa’s claim, citing the “reducing clause” in the policy, which stated that “UIM 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 made under the Liability Coverage or Personal Injury Protection Coverage of this policy[.]” *Mitsch*, 736 N.W.2d at 357. ANPAC reasoned that Theresa’s claim for UIM benefits would have to be reduced by the already tendered liability limit of \$250,000, and therefore, because UIM benefits were limited to \$250,000, any potential UIM benefit was eliminated. ANPAC also argued that its reducing clause was enforceable because it prevented the impermissible conversion of first-party UIM coverage into third-party liability coverage.

ANPAC prevailed on its summary judgment motion, but this court reversed, concluding that the reducing clause violated Subdivision 4a and was therefore unenforceable. *Id.*, at 363. Specifically, this court found that Theresa was seeking UIM benefits under the ANPAC policy to compensate for injuries caused by Frank’s negligence, not Thomas’s negligence; therefore, conversion was not an issue. This court focused on the primary issue of the case when it stated, “ANPAC is seeking to use

liability payments made by . . . Frank's insurer, on behalf of another underinsured tortfeasor (Frank), to reduce the UIM benefits payable to appellant under the ANPAC policy. This contravenes the statute." *Id.*, at 363.

Respondent is seeking to do the exact same thing in the present case: to use liability payments made by and on behalf of the underinsured tortfeasor to reduce the UIM benefits payable to Appellant under the Policy. Just as in *Mitsch*, this contravenes Subdivision 4a.

Respondent has argued that *Mitsch* does not apply to the present case because the *Mitsch* court did not consider the argument that UIM motorcycle coverage is not required by Minnesota law. The trial court in the present case agreed with Respondent, based its decision on this same premise, and stated in the Memorandum attached to its Order:

"Because UIM coverage is not required under Minnesota law for motorcycle policies, the Policy in this case does not omit coverage required by law. Nor can the Policy violate any other statutes by providing insufficient levels of UIM coverage since the level of UIM coverage required for motorcycles under the Act is zero." (A-51.)

Both Respondent and the trial court have focused on the wrong issue. The issue is not whether UIM coverage is required in connection with motorcycle liability coverage. The parties agree that it is not required. The issue is, once UIM coverage has been procured, whether that coverage must comply with Subdivision 4a and provide add-on coverage. The *Mitsch* court determined that it must and the result should be the same in the present case.

Appellant Larry Johnson was operating his insured motorcycle when he was hit by a tortfeasor who carried inadequate liability insurance. Appellant purchased \$100,000 in

UIM coverage for just such a purpose. He wanted to protect *himself*, not his motorcycle. Now, Respondent wants to reduce the amount of its liability simply because Appellant was not required to purchase UIM coverage. This contravenes Subdivision 4a and the broader public purpose of the Act.

CONCLUSION

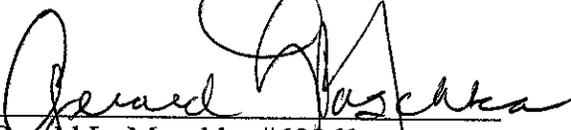
From this analysis of Minn. Stat. § 65B.49, Subd. 4a and applicable case law, it is evident that the trial court erred in granting summary judgment to Respondent in this case. The Policy, including the language of Endorsement 1314, contravenes the statute with regard to underinsured motorist (“UIM”) coverage, because it provides “limits less paid” coverage, which is less coverage than the Minnesota No Fault Act requires. As a result, the trial court should have reformed the Policy to comply with Minn. Stat. § 65B.49, Subd. 4a and ordered Respondent to pay its limit of \$100,000 in UIM benefits to Appellant.

In Minnesota, UIM benefits must be “add-on” coverage, per Minn. Stat. § 65B.49, Subd. 4a. The statute does not distinguish between optional UIM coverage, such as UIM coverage issued in conjunction with a liability policy for a motorcycle, and required UIM coverage, such as UIM coverage issued in conjunction with a liability policy for an automobile. The Minnesota Legislature intended Subdivision 4a to apply to *all* policies and to *all* injuries. Appellant’s damages, as stipulated, are in excess of \$134,000; therefore, because he received only \$34,000 in settlement from the underinsured tortfeasor, Appellant is entitled to the full \$100,000 of UIM benefits included in the Policy.

Appellant Larry Johnson respectfully requests this court to reverse the trial court's decision in this case.

Dated this th 27 day of August, 2008.

Respectfully submitted,



Gerald L. Maschka #68263
Jorun Groe Meierding #167423
MASCHKA, RIEDY & RIES

Attorneys for Appellant
201 North Broad Street
P.O. Box 7
Mankato, MN 56002-0007
Telephone: 507-625-6600