

CASE NO. A11-1904

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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DONALD MORRIS FERNOW,

*Plaintiff,*

and

COUNTY MUTUAL INSURANCE COMPANY,

*Intervenor/Respondent,*

vs.

MICHAEL DONALD GOULD AND CITY OF ALEXANDRIA,

*Appellants.*

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APPELLANTS' REPLY BRIEF

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## INTRODUCTION

The arbitrator exceeded her authority when deciding the legal issue of statutory snow and ice immunity in the No-Fault indemnification arbitration. Application of immunity is a legal issue for the district court to decide. Further, it must be decided prior to arbitration to determine whether Respondent's No-Fault claim even exists before an arbitrator may rule on the merits of the claim. Appellants agree that the issue of immunity is a legal issue to be reviewed de novo, but this Court should find first and foremost that the issue of immunity is outside of the authority of the arbitrator and vested solely with the district court. Therefore, the City of Alexandria and Michael Donald Gould respectfully request that this Court reverse the district court's denial of motion to vacate arbitration award.

## LEGAL ARGUMENT

### I. THE ARBITRATOR MADE A LEGAL DETERMINATION BY DECIDING THAT SNOW AND ICE IMMUNITY DID NOT APPLY TO RESPONDENT'S CLAIM FOR NO-FAULT INDEMNIFICATION.

Respondent claims that the arbitrator did not decide as a matter of law whether snow and ice immunity applies to its No-Fault Act indemnification claim. Instead, Respondent contends that the arbitrator made a “factual determination” on the application of snow and ice immunity.<sup>1</sup> Respondent mischaracterizes the issue of immunity. When immunity is raised as a defense, a claimant’s allegations of negligence are legal questions for the court, not factual questions. *Berg v. City of St. Paul*, 414 N.W.2d 204, 207 (Minn. App. 1987) (citing *Gonzalez v. Hollins*, 386 N.W.2d 842, 845 (Minn. App. 1986) and *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633-634 (Minn. 1978)). Appellants raised the legal defense of snow and ice immunity to shield it from Respondent’s liability claims in arbitration.<sup>2</sup> By deciding whether or not snow and ice immunity applied to Respondent’s No-Fault indemnification claim, the arbitrator clearly determined a legal question.

Citing to *National Indemnity Company v. Farm Bureau Mutual Insurance Company*, 348 N.W.2d 748, 750 (Minn. 1984), Respondent further argues that factual determinations are within the authority of the arbitrator, regardless of a factual finding by

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<sup>1</sup> The arbitrator in her decision concluded that “governmental statutory immunity does not apply to this matter.” *App.* 45. Respondent claims that the arbitrator found that neither snow nor ice played a role in the accident. There is no reasoning or analysis as to how the arbitrator reached this legal conclusion.

<sup>2</sup> Negligence, liability, and comparative fault principles of Minn. Stat. § 604.01, apply to No-Fault indemnity proceedings. See *Great West Cas. Co. v. State Farm Mut. Auto Ins. Co.*, 590 N.W.2d 675 (Minn. App. 1999).

a district court or jury. Appellants do not dispute that in automobile accident arbitration where immunity is not raised, the matter would be properly before an arbitrator to review the facts and determine fault issues.<sup>3</sup> *National Indemnity* is such a case: The court acknowledged that arbitration is appropriate for No-Fault indemnification proceedings, where arbitrators may apply their professional experience and expertise on fault and damages, and “fault can be determined strictly on the merits.” *National Indem. Co.*, 348 N.W.2d at 751. However, the facts in *National Indemnity* are not the same as the facts here. *National Indemnity* involved the issue of whether an arbitrator, as fact finder, was bound by the factual determinations of a jury regarding damages. Here, the case involves a specific legal question of whether an arbitrator has exceeded her authority in determining the legal issue of immunity. A fact finder never determines immunity’s application because it is a legal question determined by the district court. The district court must determine whether immunity shields a governmental entity from liability prior

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<sup>3</sup> In response to the Amici Curiae Brief of the Association of Minnesota Counties and Minnesota Association of Townships, Respondent claims that no broad statewide ramifications will impact Minnesota’s municipalities if this matter is affirmed. Respondent states that municipalities have adhered to the No-Fault Act since the Act’s inception. Amici Curiae, like Appellants, do not object to a separate forum of arbitration when the issue of immunity is not raised and fault must be determined. Governmental entities have been subjected to arbitrations on this basis in the past. However, the application of immunity in a No-Fault indemnification arbitration is unique and has not been previously addressed by this court. Amici Curiae, like Appellants object to arbitrators deciding the issue of immunity for, among other reasons, it may subject a municipality to an unauthorized arbitration proceeding when immunity should apply, causing financial hardship to resource-deprived municipalities.

to any determination of fault on the merits by any fact finder.<sup>4</sup> Prior to the arbitrator's determination of fault, the district court must decide the legal issue of immunity.

Further, Respondent also cites to *Weaver v. State Farm Ins. Cos.*, to support its argument that arbitrators are able to answer mixed questions of fact and law. 609 N.W.2d 878 (Minn. 2000). However, snow and ice immunity is not a mixed question of fact and law. Immunity is immunity from suit, not just a particular claim. *Rehn v. Fischley*, 557 N.W.2d 328, 332-33 (Minn. 1997). It is a legal issue that is to be determined by a court before any liability analysis or finding of fault by a fact finder. Moreover, the speedy administration of justice cited by Respondent and discussed in *Weaver* is ensured through determination of the legal issue of immunity by the court prior to arbitration. The court states in *Weaver*, "...As litigants dispute the obligations under the act, it makes little sense to require them to shuttle back and forth between the arbitrator making factual determinations and the court deciding legal questions..." *Weaver*, 609 N.W.2d at 884. However, when immunity is determined preliminarily by the court, no "shuttling" takes place because the district court would decide the key preliminary issue, and interlocutory review is available for a speedy and final ruling.<sup>5</sup>

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<sup>4</sup> In *National Indemnity*, the court notes that arbitrators have professional experience in fault determination. *National Indemnity*, 348 N.W.2d at 751. Further, the court notes that arguably, arbitrators have superior expertise in damages analysis. *Id.* at 752. The law of governmental immunity is well-established in Minnesota courts. Apart from being the proper jurisdiction to decide the issue, the district court has the expertise and experience in addressing these immunity issues. Further, for consistency in this established and developed area of law, the district court should decide the legal issue of immunity, not an arbitrator.

<sup>5</sup> In its responsive brief to Appellants, Respondent dismisses the broad ramifications cited by Amici Curiae. However, as Amici Curiae also emphasizes, if an arbitrator makes a

Notably, only if Respondent's arguments prevail will the shuttling occur, as the parties move between arbitration, and the courts.

**II. THE ARBITRATOR EXCEEDED HER AUTHORITY BECAUSE THE ISSUE OF SNOW AND ICE IMMUNITY IS A LEGAL ISSUE THAT MUST BE DECIDED BY THE DISTRICT COURT.**

Respondent alleges that even if the arbitrator decided a legal issue, she had authority to do so under Minnesota law. Citing to *Gilder v. Auto-Owners Ins. Co.*, 659 N.W.2d 804 (Minn. App. 2003) *rev denied* (Minn. June 25, 2003), Respondent argues that an arbitrator may decide any legal issue as long as the decision is subject to de novo review. However, Respondent's argument does not solve the issue of subjecting Appellants to a possibly unauthorized arbitration. If a government has no tort liability because it is immune from an indemnification claim but arbitration proceeds, the arbitration is unauthorized and the immunity is effectively a hollow protection. Immunity provides complete and total *immunity from suit*, not just liability on a particular claim. *Minder v. Anoka County*, 677 N.W.2d 479, 483 (Minn. App. 2004) (emphasis added). Immunity is effectively lost if a case is erroneously permitted to go to trial. *Id.*

Further and importantly, the issue of snow and ice immunity is a legal issue that must be decided prior to being subject to a potentially unauthorized arbitration.

Respondents fail to directly acknowledge or address this key argument. Minnesota courts

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legal finding that immunity does not apply, the entity has no right to immediate interlocutory appeal. Under Minn. Stat. § 572.19, a party may move to vacate an arbitration award for very limited reasons. The fact that relief is such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award. Minn. Stat. § 572.19. Therefore, the right of interlocutory appeal of an adverse legal determination is effectively stripped. Preliminary determination of the legal issue at the district court level of immunity ensures the interlocutory right of appeal.

have consistently held that certain preliminary legal issues, such as issues of insurance coverage in automobile accidents are appropriate for the court, not an arbitrator to decide. *Western National Insurance v. Bruce Thompson et al.*, 797 N.W.2d 201, 206 (Minn. 2011) (a coverage dispute presents a question of law for the courts, not the arbitrators, and should be determined by the district court prior to any arbitration on the merits of the claim). The distinction between coverage disputes for the court and other types of disputes for the arbitrators is that questions that go “not to the merits of a claim but to whether a claim exists” should be decided by the district court. *Western Nat. Ins.*, 797 N.W.2d at 206 (citing *Myers v. State Farm Mut. Auto. Ins. Co.*, 336 N.W.2d 288, 290-91 (Minn. 1983)). As with immunity, in insurance coverage disputes, the purpose of preliminary review of the legal issue is to protect the defendant “from the burden of unauthorized arbitration of both the coverage dispute and merits of the insured’s claim.” *U.S. Fid. & Guar. Co. v. Fructman*, 263 N.W.2d 66, 71 (Minn. 1978).

Appellants agree that the issue of immunity is a legal issue to be reviewed de novo, but this Court should find first and foremost that the issue of immunity is outside of the authority of the arbitrator and vested solely with the district court. If immunity applies to a Respondent’s liability claims, it completely bars Respondent’s claim for indemnity. If immunity applies, no claim for No-Fault indemnification exists, and there is no need to review the merits of the claim by an arbitrator.<sup>6</sup> Therefore, the application of immunity must be made by the court prior to arbitration.

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<sup>6</sup> Moreover, the Minnesota Supreme Court has stated that nothing in the statutory framework or case law suggests that a district court may *not* rule on legal issues “as a

## CONCLUSION

The arbitrator exceeded her authority by deciding the legal issue of snow and ice immunity, a legal issue that must be preliminarily decided by the district court. The City of Alexandria and Michael Donald Gould therefore respectfully request that this Court reverse the district court's denial of motion to vacate arbitration award.

LEAGUE OF MINNESOTA CITIES

Date: December 30, 2011

  
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screening measure to consistently prevent unauthorized arbitration.” *Auto Owners Ins. Co. v. Star Windshield Repair, Inc.*, 743 N.W.2d 329, 332 (Minn. App. 2008), *rev'd on other grounds* 768 N.W.2d 346 (Minn. 2009) (emphasis added).