

NO. A07-1461

State of Minnesota
In Court of Appeals

Dean Do,

Plaintiff/ Appellant,

vs.

American Family Mutual Insurance Company,

Defendant/ Respondent.

APPELLANT'S BRIEF AND APPENDIX

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

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STATEMENT OF FACTS

The case at hand involves an action by Plaintiff / Appellant Dean Do to recover benefits under his no-fault and underinsured motorist coverages with Defendant / Respondent American Family Mutual Insurance Company (hereinafter “American Family”). The facts of this case through the jury’s completion of the special verdict form are not in dispute. The specific focus of this appeal relates to the district court’s post-verdict application of Minn. Stat. § 548.36 – the collateral source statute.

Prior to the litigation of this case, Dean Do reached a settlement with the tortfeasor’s insurance company for \$28,000 out of limits of \$30,000. (Findings of Fact, Conclusions of Law, and Order and Judgment at ¶ 5, hereinafter “Findings of Fact”). Also prior to trial American Family voluntarily paid \$865.50 in no-fault benefits on behalf of Dean Do¹. On April 25, 2006, Dean Do filed a Complaint asking for the payment of no-fault benefits and underinsured motorist benefits. (Findings of Fact, ¶ 4). The case was tried to a jury on March 13, 2007 and March 14, 2007. After deliberations, the jury that heard the case at hand returned a special verdict form and awarded damages consisting of \$3,159.00 for past medical expenses for diagnostic testing / scans; \$36,257.13 for past medical expenses exclusive of diagnostic testing / scans; \$5,000.00 for past pain and disability; and \$5,000.00 for future pain and disability (Findings of Fact, ¶ 2).

¹ Plaintiff had no-fault coverage with American Family providing for \$30,000 in

American Family filed a notice of Motion and Motion for Collateral Source Offset asking the district court to reduce the jury verdict bases upon payments that the Plaintiff already received – including the \$28,000 settlement. (Findings of Fact, ¶ 9). In opposition to the motion, Dean Do had asked for the no-fault recovery to be calculated first without any collateral offset or reduction, and that the \$28,000 settlement would only be a factor if there was an underinsured motorist recovery. (See Findings of Fact, Conclusions of Law, and Order and Judgment at ¶ 2, hereinafter “Conclusions of Law”). Following the motion hearing, the district court calculated the net judgment to be the total damages awarded by the jury (\$49,416.13) less the amounts received from the tortfeasor’s insurance company settlement (\$28,000.00) and less the amount of no-fault benefits already paid by American Family (\$865.50). (Conclusions of Law at ¶ 3). The district court concluded that the final judgment should be for \$20,550.63 plus the interest applicable to no-fault payments of 15%. *Id.* Application of the calculations that Plaintiff had suggested would have resulted in a final judgment of \$29,134.50 plus the interest applicable to no-fault payments of 15%. Plaintiff Dean Do filed this appeal seeking a reversal of the application of the collateral source rule. (See Notice of Appeal to Court of Appeals).

ARGUMENT

Plaintiff / Appellant Dean Do contends (1) that the district court wrongly concluded

medical expense benefits.

that Dean Do's \$28,000 settlement with the tortfeasor's insurer constituted a collateral source in regard to the instant no-fault and underinsured motorist claim; and (2) that the district court wrongly concluded that \$28,000 should be subtracted from the verdict in computing the net no-fault damages.

A. STANDARD OF REVIEW

In reviewing an appeal regarding a case where there is not dispute of facts, a de novo standard of review is applied to determine whether the lower courts erred in their application of the law. State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990). Further, as this case involves the construction, interpretation and application of Minn. Stat. § 548.36 (the collateral source rule) this case is subject to de novo review on appeal.

Austin v. State Farm Mutual Automobile Insurance Company, 486 N.W. 2d 457, 459 (Minn. Ct. App. 1992) *citing* Doe v. State Board Of Medical Examiners, 435 N.W. 2d 45, 48 (Minn. 1989).

B. DEAN DO'S \$28,000 SETTLEMENT WITH THE TORTFEASOR'S INSURER IS NOT A COLLATERAL SOURCE FOR THE PURPOSE OF CALCULATING THE NET NO-FAULT AND UNDERINSURED MOTORIST RECOVERIES IN THE CASE AT HAND.

Appellant's contention in the instant appeal is that the district court erred in concluding that the \$28,000 received from the tortfeasor's insurer was a collateral source. Treating the \$28,000 as a collateral source results in a net no-fault recovery of less than what Plaintiff would properly be entitled. As Minnesota law is clear is clear that a settlement from a tortfeasor's insurance company is not a collateral source, Appellant

respectfully asks that the district court's order be reversed.

Minn. Stat. § 548.36 provides the definition of collateral source as follows:

"collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

- (1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
- (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;
- (3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or
- (4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

At issue here is whether the \$28,000 settlement fits within the statutory definition of collateral source. The tortfeasor's insurance company is not "health, accident and sickness, or automobile insurance or liability insurance that provides health benefits or income disability coverage."

The Minnesota Supreme Court faced a nearly identical situation in Dean v. American Family Mutual Insurance Company, 535 N.W.2d 342 (Minn. 1995) in trying to determine the status of a tortfeasor's insurance settlement. In Dean, the Plaintiff had reached a \$100,000 settlement with an underinsured tortfeasor prior to asserting a claim

against for underinsured motorist benefits. Id. at 343. The Dean jury returned a verdict of \$353,646 in total damages, with the Plaintiff being assigned 10% comparative fault. Id. The Dean trial court needed to make a determination of the nature of the \$100,000 payment as the collateral source statute requires that collateral sources be subtracted before a reduction for collateral source. Id. at 344. The Dean trial court ended up treating the \$100,000 as a collateral source and subtracted that amount before the reduction for fault. Id. at 343. The Court of Appeals affirmed. Id.

The Minnesota Supreme Court stated clearly that a tortfeasor's liability insurance cannot, by definition, constitute a collateral source. Id. at 345 (emphasis added). The Court cited the language of Minn. Stat. § 548.36, subd. 1(2) as well as secondary sources such as *Black's Law Dictionary* in justifying its conclusion that the collateral source statute should not be applied in the situation at issue. Id. It should be noted that the \$100,000 was still used in calculating the plaintiff's net damages, but as a subtraction under the underinsured motorist provision of the No-Fault Act. In Dean, the Minnesota Supreme Court concluded that the final judgment should be calculated by first allowing the fault reduction and then subtracting the \$100,000 pursuant to Minn. Stat. § 65B.49, subd. 4a (1994). Dean, 535 N.W.2d at 345.

Minnesota law is clear that the \$28,000 settlement is not a collateral source. As argued below, the relevance of the \$28,000 is seen only in the damages-less-paid system for calculating a UIM recovery as outlined in Behr v. American Family Mutual Ins. Co.,

638 N.W. 2d 469 (Minn. Ct. App. 2002) and Richards v. Milwaukee Ins. Co., 518 N.W. 2d 26, (Minn. 1994). Accordingly, Appellant respectfully requests that the district court's conclusion that the \$28,000 settlement is a collateral source be reversed.

C. THE NET VERDICT IN THE CASE AT HAND IS REACHED BY FIRST CALCULATING THE NO-FAULT RECOVERY AND THEN CALCULATING THE UNDERINSURED MOTORIST RECOVERY.

In order to calculate the net verdict in the instant case, a multi-step approach must be taken. First, Minnesota law is clear that the no-fault offset should be applied before determining whether the tortfeasor is underinsured. Richards, 518 N.W. 2d at 28. Accordingly, the final no-fault recovery must be calculated first, before the analysis regarding whether there has been a successful underinsured motorist claim.

In the case at hand, the jury awarded past medical expenses, which are compensable under Mr. Do's no-fault coverage. In fact, the jury awarded \$39,416.13 in past medical expenses – a number in excess of Mr. Do's available coverage. American Family correctly contended to the district court that \$865.50 had previously been paid. As Mr. Do had limits of \$30,000 for medical expenses, he was entitled to receive \$29,134.50 for his no-fault recovery from American Family Mutual Insurance Company. The receipt of \$28,000 from the tortfeasor's insurer is irrelevant in the computation of the no-fault award.

The second step in analysis of the plaintiff / appellant's claims is a determination whether or not the tortfeasor is underinsured. (See id.) The no-fault set-off in this case

would be \$30,000 (no-fault benefits voluntarily paid + no-fault recovery), making the net verdict \$19,416.13. Because the net verdict is less than the tortfeasor's liability limits (\$30,000), the tortfeasor is not underinsured. (See *id.*) Accordingly, Plaintiff concedes that he receives nothing in his underinsured claim against Defendant.

American Family had asked the district court for the \$28,000 to be subtracted from the jury's no-fault verdict – arguing that to do otherwise would result in a double recovery. There has been no double recovery in this case, as Plaintiff's only recovery from the jury trial was for no-fault benefits following his settlement with the tortfeasor's insurer. Minnesota Courts have held that it is not a double recovery to claim basic economic loss benefits after settlement of a common law liability claim. Balderrama v. Milbank Mut. Ins. Co., 324 N.W. 2d 356 (Minn. 1982). The fact that Plaintiff's underinsured motorist claim was unsuccessful does not mandate a reduction in the no-fault verdict.

Following the simple analysis above, Dean Do's net recovery pursuant to the Verdict Form should be \$29,134.50 plus interest and costs.

CONCLUSION

For the foregoing reasons, Dean Do respectfully requests that the court of appeals reverse the district court's conclusion that the \$28,000 settlement with the tortfeasor's insurer is a collateral source and asks for a finding that Dean Do's net recovery should be \$29,134.50 plus interest and costs.

Respectfully submitted,

Dated:

D. SCOTT DUNHAM, P.A.

A handwritten signature in black ink, appearing to read "D. Scott Dunham", written over a horizontal line.

By: _____

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