

NO. A07-1461

State of Minnesota
In Court of Appeals

Dean Do,

Plaintiff/ Appellant,

vs.

American Family Mutual Insurance Company,

Defendant/ Respondent.

RESPONDENT'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

Respondent adopts the facts set forth in Appellant's Brief and adds the following additional facts. When Respondent brought its Motion for Collateral Source Offset and Amended Findings following trial, it argued that the jury verdict should be reduced by the \$28,000.00 liability settlement Appellant reached with the tortfeasor based on the contract of insurance between Respondent and Appellant, not because Respondent thought that the \$28,000.00 settlement payment constituted a "collateral source" as that term is defined in Minn. Stat. § 548.36. (See Memorandum of Law in Support of Motion for Collateral Source Offset and Amended Findings, Respondent's Appdx. A-12.) The insurance contract in effect at the time of this motor vehicle accident provided that Respondent would "pay compensatory damages for bodily injury to an insured person who is legally entitled to recover from the owner or operator of an underinsured motor vehicle." (See Insurance Policy, Respondent's Appdx. A-23.) Respondent argued that the \$28,000.00 liability settlement must be deducted from the jury verdict in order to determine whether Appellant was entitled to underinsured motorist benefits under his policy and to prevent a double recovery. (Memorandum of Law in Support of Motion for Collateral Source Offset and Amended Findings, Respondent's Appdx. A-12 – A14.)

ARGUMENT

Respondent contends that the district court (1) properly concluded that Appellant's \$28,000.00 settlement with the tortfeasor's insurer constituted a collateral source in regard to the instant no-fault and underinsured motorist claim; and (2) properly concluded

the \$28,000.00 liability settlement should be subtracted from the gross verdict in computing Appellant's net damage award so as to prohibit Appellant from receiving a double recovery.

A. APPELLANT'S \$28,000.00 SETTLEMENT WITH THE TORTFEASOR'S INSURER IS A COLLATERAL SOURCE THAT MUST BE OFFSET FOR PURPOSES OF CALCULATING THE NET VERDICT IN THIS CASE.

At issue in this appeal is simply whether Appellant's \$28,000.00 settlement with the tortfeasor should be offset from the gross verdict to reach the net verdict. Respondent contends that the liability settlement must be offset. If it is not, Appellant will receive an impermissible double recovery. Although the district court reached the right result, the district court's reasoning was not based on arguments made by Respondent, but was made based on the district court's conclusion that the \$28,000.00 liability settlement constituted a collateral source as that term is defined in Minn. Stat. § 548.36, subd. 1(2) (2000). Regardless, based on either Respondent's or the district court's reasoning, the district court properly concluded that the \$28,000.00 payment must be offset against the gross verdict in reaching the net verdict.

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.

Minn. Stat. § 548.36 (2000).

The district court concluded that the tortfeasor's automobile accident insurance paid Appellant \$28,000.00 for the injuries he sustained in the accident. Under the statute, the district court determined that was a payment made to Appellant pursuant to automobile accident insurance that provides health benefits. Id., subd. 1(2). Therefore, the \$28,000.00 was a collateral source and must be offset against the jury award. (See Appellant's Appdx. A2-A3).

Appellant argues the district court erred in making that conclusion, because he believes the court in Dean v. American Family Mut. Ins. Co., 535 N.W.2d 342 (Minn. 1995), held that "a tortfeasor's liability insurance cannot, by definition constitute a collateral source." (Appellant's Brief, p. 5.) However, Appellant misstates the holding in that case.

In Dean, the Minnesota Supreme Court specifically stated from the outset of its decision that the only issue it had to address was whether "an automobile accident

liability insurance payment from an underinsured tortfeasor triggers the collateral source rule in a claim for underinsured motorist benefits when the claimant is partially at fault.” Id. at 343. The court had to decide whether that plaintiff’s percentage of fault should be subtracted from the gross verdict before or after the liability settlement payment was deducted. Id. at 344. If the court subtracted the liability settlement payment before subtracting the plaintiff’s comparative fault, the plaintiff would have received \$10,000.00 more than his actual damages. Id. The court determined that neither the language of the collateral source offset statute nor the underlying justifications for applying the collateral source offset statute warranted application in that case. Id. 345. In this case, there is no reason to analyze the specific provisions of Minn. Stat. § 548.36 addressed in Dean, because this case does not involve a reduction for fault on the part of Appellant.

While the court addressed the collateral source rule and the fact the legislature has not yet clarified exactly what constitutes a collateral source, the holding in Dean narrowly addressed the facts specific to that case. See id. Regardless of whether the court in Dean applied certain provisions of the collateral source rule, it is clear from that decision that the court reduced the verdict by the \$100,000.00 liability insurance payment in reaching the net verdict. See id. at 344.

Alternatively, even if the Court finds the district court improperly interpreted Minn. Stat. § 548.36 in determining that the liability settlement was a collateral source as defined under Minn. Stat. § 548.36, the insurance contract entered into between Respondent and Appellant requires that the \$28,000.00 liability settlement be offset in

calculating whether Appellant is entitled to an underinsured motorist recovery under the policy. The policy provided that Respondent would “pay compensatory damages for bodily injury to an insured person who is legally entitled to recover from the owner or operator of an underinsured motor vehicle.” (See Insurance Policy, Respondent’s Appdx. A-23.) The definition of an “underinsured motor vehicle” is contained in Minn. Stat. § 65B.43. It specifically provides that an “underinsured motor vehicle” means “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.” Minn. Stat. § 65B.43 (2005)(emphasis added).

The operation of underinsured motorist benefits in Minnesota is outlined in Behr v. American Family Mutual Ins. Co., 638 N.W.2d 469 (Minn. Ct. App. 2002). As outlined in Behr, Minnesota has employed a “damages-less-paid” system since 1989. The court held, “to calculate whether a motor vehicle is underinsured and an insured is entitled to underinsured motorist (UIM) benefits under a damages-less-paid system, a tort-feasor’s damages payment is subtracted from the insured’s total damages.” Behr at 473-74. It has been held that:

UIM [underinsured motorist coverage] is a tort based coverage designed to provide a supplemental source of recovery only when the damages that the insured is legally entitled to recover from the tortfeasor exceed the tortfeasor’s liability insurance limits. The tort judgment established exclusively the damages to which the claimant is legally entitled, and if these damages exceed the tortfeasor’s liability insurance limits, the excess is payable by the underinsurance carrier to the extent of its coverage. . . .

Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn. 1994)(*citing* Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 858-59 (Minn. 1993))(emphasis added). Collateral source offsets are intended to prevent double-recovery. See Minn. Stat. § 65B.51, subd. 1; Minn. Stat. §548.36, subd. 2; Wertish v. Salvhus, 558 N.W.2d 258 (Minn. 1997); Dean v. American Family Mut. Ins. Co., 535 N.W.2d 342, 344 (Minn. 1995).

Appellant accepted \$28,000.00 in settlement of his claim against the tortfeasor. In determining whether he is entitled to underinsured motorist benefits, the jury award must be further reduced by the \$28,000.00 settlement amount. The case law is clear that the amount paid in settlement of the claim against the tortfeasor must be deducted to determine entitlement to underinsured motorist benefits. The jury verdict in this case totaled \$49,416.13. With the offset for the \$865.50 of no-fault benefits paid before trial and with the reduction for the \$28,000.00 Appellant received from the underinsured driver, the net verdict should be \$20,550.63.

If the \$28,000.00 settlement amount is not subtracted from the jury's award, Appellant will be receiving a double recovery. Again, the tort award is what constitutes Appellant's amount of total damages. Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn. 1994)(*citing* Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 858-59 (Minn. 1993)). The jury in the instant case awarded a total verdict of \$49,416.13. If the Court were to calculate Appellant's award in the manner he is asking for, Appellant would get the \$28,000.00 from the tortfeasor's insurer, plus \$29,134.50 in no-fault

benefits from Respondent. That would mean Appellant would receive \$58,000.00 in a case where the jury decided he was only entitled to \$49,416.13. That is not permissible under the law and is a clear demonstration of why it is necessary to offset the \$28,000.00 settlement amount. Not only is it required to determine entitlement to underinsured motorist benefits, but it is also required to prevent double recoveries such as the one Appellant is now trying to receive.

Here, Appellant has been fully compensated in tort. To give him the additional benefits he is requesting would result in a double recovery. The maximum amount Appellant is entitled to is \$20,550.63 (the amount of damages he was not compensated for by both his no-fault carrier and the tortfeasor's liability insurer). Anything above that amount would be an impermissible double recovery.

B. THE JURY'S AWARD CANNOT CONSTITUTE A COLLATERAL SOURCE FOR PURPOSES OF DETERMINING WHETHER APPELLANT IS ENTITLED TO A RECOVERY UNDER HIS UNDERINSURED MOTORIST POLICY.

Under Minnesota law, the jury's award is not a collateral source that is used in determining Appellant's net verdict. The only way to properly calculate the net verdict in this case is to offset collateral source payments that were made before trial. There is nothing in the statute or in case law cited by Appellant that provides authority to support his argument that certain damages awarded as part of the verdict in a joint no-fault/underinsured motorist case must be offset after trial to determine whether he recovers under his no-fault claim, his underinsured motorist claim, or both. This appears

to be a case of first impression in the Minnesota appellate courts.

Appellant correctly states that in order to calculate the net verdict in this case, a multi-step approach must be taken. Under Minn. Stat. §§ 548.36 and 65B.51, no-fault payments made up until the time of trial shall be deducted from a jury award to reach the net verdict. The collateral source offset statute specifically states that "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. . . ." Minn. Stat. § 548.36, subd. (2000) (emphasis added). Minn. Stat. § 65B.51 provides that, in claims for recovery due to negligence arising out of a motor vehicle accident, the court shall deduct from any recovery the value of basic economic loss benefits paid or payable by the no-fault carrier. Minn. Stat. § 65B.51 (2005). Appellant claims that Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn. 1994) stands for the proposition that the medical expenses awarded by the jury as part of the verdict are included in the no-fault payments that must be offset before determining whether the tortfeasor is underinsured. The jury awarded Appellant \$39,416.13 in past medical expenses. (Appellant's Appdx. A-3.) Appellant's no-fault policy limit was \$30,000.00, and up to the time of trial, Respondent paid \$865.50 in no-fault benefits to Appellant. Id. Appellant argues that because he was awarded \$39,416.13 in past medical expenses, he is entitled to a no-fault award of his remaining no-fault policy limits, or \$29,134.50.

Appellant further argues that the second step in the analysis of his claim is a determination of whether or not the tortfeasor is underinsured. Appellant believes

Richards holds that the no-fault offset in this case would be \$30,000.00 (no-fault benefits voluntarily paid, plus the no-fault recovery as part of the verdict), making the net verdict \$19,416.13. Appellant concedes that he is not entitled to recover anything in his underinsured motorist claim, because, based on his argument, the net verdict is less than the tortfeasor's liability limits of \$30,000.00.

Richards is distinguishable from the present case. In Richards, the plaintiff settled his claim against the tortfeasor for \$20,000.00 out of his \$30,000.00 liability limits. Id. at 27. He then brought an underinsured motorist claim against his insurance carrier. Id. Before trial, his insurer paid him some no-fault benefits, but some of his medical bills were in dispute. Rather than arbitrate that amount, the parties presented the no-fault claim to the jury along with the underinsured motorist claim. Id. The jury awarded him \$34,690.50 in total damages, which included his entire past medical claim. That resulted in uncompensated medical in the amount of \$1,367.14 (after what was previously paid in no-fault benefits was offset). The plaintiff's insurer paid the uncompensated medical in full after the verdict. Id. Once that amount was paid, the trial court determined that the plaintiff was not underinsured because his total "actual damages" were \$29,890.00 and did not exceed the \$30,000.00 liability limit of the tortfeasor's coverage. Id.

Ultimately, the Minnesota Supreme Court determined that it did not matter if the no-fault payments actually made by the plaintiff's insurer happened before or after the verdict because the result would have been the same. Id. The court went on to state that, in that case, "the amount of no-fault benefits received by Richards reduced the tort

liability of the negligent party below the limits of the bodily injury coverage; therefore, there is no UIM coverage.” Id. (emphasis added).

It must be pointed out again that underinsured motorist benefits are designed to provide a supplemental source of recovery only when the damages the insured person is legally entitled to recover from the tortfeasor exceed the tortfeasor’s liability limits. Id. at 28. To prevent a double recovery, the no-fault offset provision set forth in Minn. Stat. § 65B.51 was enacted. Id. The possibility of double recovery is avoided if the insured recovers from the tortfeasor only amounts not compensated by basic economic loss benefits. Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 614 (Minn. 1988). The purpose is to “prevent the tortfeasor having to pay for damages paid or payable by the no-fault carrier.” Richards, 518 N.W.2d at 28.

One of the key differences between Richards and this case is that Respondent has not paid Appellant any no-fault benefits after the verdict was rendered. All that Respondent has paid is \$865.50 in no-fault benefits on Appellant’s behalf. That is the only no-fault offset that should be deducted from the verdict. While it makes sense to have the no-fault benefits that have been paid offset from the verdict, Appellant does not cite any authority that supports his position that damages awardable in a jury verdict should be offset when no payment has been made.

The purpose of the collateral offset statute is not served by offsetting an alleged no-fault award that was made as part of this verdict and that has not been paid by Respondent. In fact, the opposite is true. If the \$29,134.50 is offset, Appellant is

receiving exactly what the collateral offset statute was intended to prohibit, namely a double recovery.

Appellant argues it is not a double recovery to claim basic economic loss benefits after settlement of a common law liability claim. He bases that argument on Balderrama v. Millbank Mut. Ins. Co., 324 N.W.2d 356 (Minn. 1982). Appellant misstates the holding in Balderrama. In Balderrama, the court held that it is permissible to seek no-fault benefits after settlement of a common law liability claim. Id. at 356. The holding does not address the issue of double recoveries. That decision focused on whether the plaintiff in that case was entitled to no-fault benefits under the policy of the driver who hit him, because he himself was not insured. The court ultimately held the plaintiff was not entitled to no-fault benefits under that policy, so the decision did not address damages. See id. at 356-58. Appellant's reliance on Balderrama to support his position that he will not be receiving a double recovery in this case is obviously misplaced.

The primary question is what amount of money Respondent needs to pay its insured to make sure he is fully compensated. The proper amount can only be calculated if the \$28,000.00 settlement and the \$865.00 no-fault payment are deducted from the jury verdict to reach the net verdict amount. That amount is \$20,550.63.

Again, under Minnesota law, the tort judgment exclusively establishes the damages to which the claimant is legally entitled, and if those damages exceed the tortfeasor's liability insurance limits, the excess is payable by the underinsurance carrier to the extent of its coverage. Richards v. Milwaukee Ins. Co., 518 N.W.2d 26, 28 (Minn.

1994)(citing Employers Mut. Cos. v. Nordstrom, 495 N.W.2d 855, 858-59 (Minn. 1993))(emphasis added). Here, the jury determined Appellant's damages were \$49,416.13, and that award included pain and disability. (Appellant's Appdx. A-3.) Claims for pain and disability are undisputedly tort damages that are not compensable as basic economic loss benefits under the No-Fault Act. See Minn. Stat. § 65B.44 (2005).

Appellant decided how he wanted to pursue his damages. He chose to pursue both his no-fault claim and underinsured motorist claim in the same lawsuit. It is that choice that has created the issues presented on appeal. Because he chose to pursue it this way, he has no choice but to be bound by the amount and type of damages to which the jury decided he was entitled. There is no way to avoid offsetting the \$28,000.00 liability settlement when reaching the net verdict in this case. It is simple. The jury determined he was entitled to a maximum damage award of \$49,416.13. Appellant could have pursued the no-fault claim in arbitration or could have tried the no-fault claim separately from the underinsured motorist claim so as to avoid being bound by a tort judgment. He did not. Therefore, he cannot now claim he is entitled to more damages than the jury determined he should be awarded. If the Court does what Appellant is asking it to do, Appellant will receive \$58,000.00 in a case in which the jury determined he was only damaged in the amount of \$49,416.13.

CONCLUSION

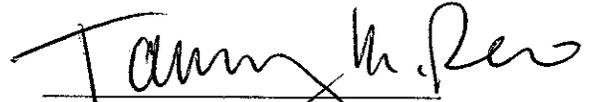
For the foregoing reasons, Respondent respectfully requests that the Court of Appeals affirm the district court's conclusion that the \$28,000.00 settlement with the

tortfeasor's insurer is a collateral source that must be offset in reaching the net verdict and that Appellant's net recovery should be \$20,550.63, plus interest and costs.

Respectfully submitted,

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Dated: Sept. 26, 2007



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