

NO. A07-1461

State of Minnesota
In Supreme Court

Dean Do,

Plaintiff/ Appellant,

vs.

American Family Mutual Insurance Company,

Defendant/ Respondent.

APPELLANT'S BRIEF AND APPENDIX

D. Scott Dunham (#249191)
D. SCOTT DUNHAM, P.A.
109 Myrtle Street East
Suite 100
Stillwater, MN 55082
(651) 342-1505

Attorney for Appellant

Tammy M. Reno (#327773)
BROWN & CARLSON, P.A.
5411 Circle Down Avenue
Suite 100
Minneapolis, MN 55416
(763) 591-9950

Attorney for Respondent

Paul D. Peterson (#203919)
Lori L. Barton (#332070)
3040 Woodbury Drive
Woodbury, MN 55129-9617
(651) 738-8539

*Attorneys for the Minnesota
Association for Justice, Amicus*

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

Issues Presented..... 1

Statement of the Case and Facts..... 1

Argument:

I. Standard of Review..... 4

II. In litigation arising from injuries sustained in a motor vehicle accident, a settlement with the tortfeasor’s insurer should not be classified as a collateral source for the purposes of calculating either the net no-fault or net underinsured motorist recoveries. 5

A. The tort settlement is not a collateral source in regard to an underinsured motorist claim..... 6

B. The tort settlement is not a collateral source in regard to a no-fault claim 8

III. The net verdict in the case at hand is reached by first calculating the no-fault recovery and then calculating the underinsured motorist recovery. 9

Conclusion..... 11

TABLE OF AUTHORITIES

Minnesota Decisions:

<u>Austin v. State Farm Mutual Automobile Insurance Company</u> , 486 N.W.2d 457 (Minn. Ct. App. 1992).....	4
<u>Balderrama v. Milbank Mut. Ins. Co.</u> , 324 N.W.2d 356 (Minn. 1982)	8, 9
<u>Behr v. American Family Mutual Ins. Co.</u> , 638 N.W.2d 469 (Minn. 2002)	8
<u>Dean v. American Family Mutual Insurance Company</u> , 535 N.W.2d 342 (Minn. 1995)	6, 7, 8
<u>Doe v. State Board of Medical Examiners</u> , 435 N.W.2d 45 (Minn. 1989)	4
<u>Hibbing Educ. Ass'n. v. Public Employment Relations Board</u> , 369 N.W. 2d 527 (Minn. 1985).....	4
<u>Richards v. Milwaukee Ins. Co.</u> , 518 N.W.2d 26 (Minn. 1994)	8, 9, 10
<u>State by Cooper v. French</u> , 460 N.W.2d 2 (Minn. 1990)	4

Statutes, Rules or Regulations:

Minn. Stat. § 65B.49..... 7

Minn. Stat. § 548.36..... 1, 5, 6

ISSUES PRESENTED

- I. In litigation arising from injuries sustained in a motor vehicle accident, should the Appellant's \$28,000 settlement with the tortfeasor's insurer be classified as a collateral source for the purposes of calculating the net no-fault and underinsured motorist recoveries?**

The trial court held that the \$28,000 settlement with the tortfeasor's insurer is a collateral source when calculating the net no-fault and underinsured motorist recoveries.

The Minnesota Court of Appeals, affirming the trial court in a published opinion, held that the \$28,000 settlement with the tortfeasor's insurer is a collateral source when calculating the net no-fault and underinsured motorist recoveries.

- II. In a single litigated case involving claims for no-fault benefits and underinsured motorist benefits, should the net no-fault recovery be determined first, or is there another method of calculating the different net recoveries?**

The trial court's ruling implies that the no-fault recovery should be calculated first. The trial court's ruling is silent as to how or when the underinsured motorist recovery is calculated.

The Minnesota Court of Appeals first concluded that there would be no recovery pursuant to the underinsured motorist claim and then calculated the amount of the no-fault recovery.

STATEMENT OF THE CASE AND FACTS

Appellant seeks review of a Minnesota Court of Appeals decision, filed July 8, 2008, affirming the trial court's findings regarding the calculation of a net verdict following combined no-fault and underinsured motorist litigation and the application of the collateral source rule, Minn. Stat. § 548.36 (2006). 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.

Appellant Dean Do sustained injuries in a car accident that occurred due to another’s negligence on September 13, 2002. Prior to the litigation of the instant case, Dean Do reached a settlement with the tortfeasor’s insurance company for \$28,000 out of limits of \$30,000. Appellant’s Appdx. A-5. Also prior to trial American Family voluntarily paid \$865.50 in no-fault benefits on behalf of Dean Do¹. *Id.* On April 25, 2006, Dean Do served and filed a Complaint asking for the payment of no-fault benefits and underinsured motorist benefits. *Id.* The case was tried to a jury on March 13, 2007 and March 14, 2007. Appellant’s Appdx. A-6. 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. *Id.*

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. *Id.* In opposition to the motion, Dean Do had asked for the no-fault recovery to be calculated first without any collateral

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

offset or reduction, and that the \$28,000 settlement would only be a factor if there was an underinsured motorist recovery. Appellant's Appdx. A-18. 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). Id. The trial court concluded that the final judgment should be for \$20,550.63 plus the interest applicable to no-fault payments of 15%. Id. Conversely, 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 appealed, seeking a reversal of the application of the collateral source rule.

The Minnesota Court of Appeals considered the matter and filed its published decision on July 8, 2008. Appellant's Appdx. A-4. The Minnesota Court of Appeals first concluded that the Appellant was not "underinsured" by comparing the jury verdict with the sum of the settlement with the tortfeasor and the amount of medical expense coverage available. Appellant's Appdx. A-9. The Court of Appeals then concluded that the amount received by Dean Do from his settlement with the tort-feasor's insurance company was a collateral source in calculating the net verdict in regard to no-fault damages. Appellant's Appdx. A-15.

medical expense benefits.

On August 1, 2008, Do filed a petition for review. Respondent urged the Supreme Court to deny Do's petition. By order dated September 23, 2008, the Supreme Court granted Do's petition. Appellant's Appdx. A-2.

Plaintiff / Appellant Dean Do contends (1) that the Court of Appeals erred in affirming the district court's conclusion 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 claims; and (2) that the Court of Appeals erred in first reaching a conclusion as whether or not the tortfeasor was underinsured and then calculating the net no-fault verdict.

ARGUMENT

I. 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. Hibbing Educ. Ass'n. v. Public Employment Relations Board, 369 N.W. 2d 527, 529 (Minn. 1985). 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).

II. In litigation arising from injuries sustained in a motor vehicle accident, a settlement with the tortfeasor's insurer should not be classified as a collateral source for the purposes of calculating either the net no-fault or net underinsured motorist recoveries.

Appellant contends in the instant appeal that the Court of Appeals erred in affirming the trial court's conclusion that the \$28,000 received from the tortfeasor's insurer was a collateral source. The plain language of the statute supports a conclusion that the settlement is not a collateral source. 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.

Simply put, 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.” Id. (emphasis added). While it is true that the settlement was paid by “automobile insurance”, neither the trial court nor the Court of Appeals explain how the insurance “provides health benefits or income disability coverage.” As will be argued below, Minnesota law is clear that this recovery should not be considered a collateral source – specifically in the context of underinsured motorist and no-fault claims. This is an important issue as the Minnesota Court of Appeals decision departs from established Minnesota law in regard to the calculation of underinsured motorist recoveries and the effect of a tort settlement on subsequent no-fault claims.

A. The tort settlement is not a collateral source in regard to an underinsured motorist claim.

First, this Court has previously held that a liability settlement should never be treated as a collateral source for the purposes of an underinsured motorist claim. Dean v. American Family Mutual Insurance Company, 535 N.W.2d 342 (Minn. 1995). This Court faced a nearly identical situation in Dean 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.

On further appeal, this Court stated clearly that a tortfeasor's liability insurance cannot, by definition, constitute a collateral source. Id. at 345 (emphasis added). In analysis, this Court suggested that this statute is "poorly written, ambiguous, and could conceivably be read as providing for one, two, three or four different types of collateral source benefits." Id. This Court then cited the language of Minn. Stat. § 548.36, subd. 1(2) and then quoted the definition of the collateral source rule from *Black's Law Dictionary* that "[u]nder this rule, if an injured person received compensation for his injuries from *a source wholly independent of the tort-feasor*, the payment should not be deducted from the damages which he would otherwise collect from the tortfeasor". Id. (emphasis in Dean). 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.

In the instant case, the Court of Appeals did not follow the Supreme Court's direction in Dean in analyzing the possible recovery of money following an underinsured

motorist verdict. Rather, the Court of Appeals looked at the total damages awarded by the jury and subtracted the tort settlement and the available no-fault coverage.

Appellant's Appdx. A-9. After concluding that there would be no underinsured motorist recovery the Court of Appeals then went on to conclude that the settlement was a collateral source, and subtracted it from the no-fault verdict. Appellant's Appdx. A-15.

In addition to the departure from Dean, the Court of Appeals failed to use the proper "damages-less-paid" system (as discussed *infra*) for calculating an underinsured motorist recovery as outlined in Richards v. Milwaukee Ins. Co., 518 N.W. 2d 26, (Minn. 1994) and Behr v. American Family Mutual Ins. Co., 638 N.W. 2d 469 (Minn. Ct. App. 2002).

Here, while Appellant recognizes that ultimately there is no underinsured motorist recovery in the case at hand, the proper analysis of the entire case requires the clear understanding that the tort settlement is not a collateral source with respect to the underinsured motorist claim, but is a subtraction.

B. The tort settlement is not a collateral source in regard to a no-fault claim.

Second – and perhaps most important to the case at hand – the \$28,000 settlement is also not a collateral source offset as it pertains to the Appellant's no-fault claim. In Balderrama v. Milbank Mut. Ins. Co., 324 N.W. 2d 355 (Minn. 1982), this Court held that a release of liability claims without an explicit reference to statutory no-fault benefits does not end the insurer's obligation to pay no-fault benefits. Id. at 356. There is no

double recovery when comparing a no-fault verdict with a tort settlement. In other words, under Balderamma, there is no future credit as to future no-fault benefits; there is no offset against future no-fault benefits; and no-fault benefits remain payable and may be pursued in litigation or arbitration. A settlement with a tortfeasor is not duplicative with no-fault benefits paid for by an insured. Id. It follows that a payment in exchange for a release of tort claims with no mention in the release of no-fault claims is not a collateral source.²

Accordingly, Appellant respectfully requests that this Court reverse the Court of Appeals' affirmation of the trial court's holding that the \$28,000 liability settlement should be treated as a collateral source offset.

III. The net verdict in the case at hand is reached by first calculating the no-fault recovery and then calculating the underinsured motorist recovery.

Once collateral source issues have been understood, a calculation of the final verdict may take place. 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

² An example may illustrate this point. If this litigation had involved only a claim for no-fault benefits, there would have been no suggestion that the \$28,000 settlement (with a release that is silent as to releasing no-fault benefits) would be offset from a no-fault verdict. In fact, if such a collateral source was an issue, there would need to be questions on the special verdict form to answer questions regarding "pain and disability" – which are clearly contemplated in a tort settlement but are irrelevant in litigation of no-fault benefits. It follows that the Appellant here should not get a different result at trial because the two causes of action were consolidated.

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. See 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 Minnesota Supreme Court reverse the Court of Appeals' affirmation of the trial court's order 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: 10/22/2008

D. SCOTT DUNHAM, P.A.



By: _____

D. Scott Dunham (#249191)
109 Myrtle Street E., Suite 100
Stillwater, MN 55082
(651) 342-1505

Attorney for Appellant.