

A08-806

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**State of Minnesota
In Supreme Court**

David Swanson,

Plaintiff/Respondent,

v.

Rebecca Brewster and Christopher Brewster,

Defendants/Petitioners.

**BRIEF AND APPENDIX OF PETITIONERS
REBECCA BREWSTER AND
CHRISTOPHER BREWSTER**

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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 THE ISSUE

MINN. STAT. § 548.36 (CURRENTLY RENUMBERED AS § 548.251) GOVERNS THE DETERMINATION OF THE COLLATERAL SOURCE OFFSET CALCULATION FOR MEDICAL EXPENSES FOLLOWING AN AWARD OF PERSONAL INJURY DAMAGES AGAINST A DEFENDANT. ARE MEDICAL EXPENSES CHARGED BUT WRITTEN OFF BY THE PLAINTIFF'S MEDICAL PROVIDERS PURSUANT TO THEIR CONTRACTUAL AGREEMENTS WITH THE PLAINTIFF'S MEDICAL INSURER TO BE DEDUCTED FROM A DAMAGE AWARD UNDER MINNESOTA'S COLLATERAL SOURCE OFFSET STATUTE?

Minn. Stat. § 645.08(1).

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Goble v. Frohman, 901 So. 2d 830 (Fla. 2005).

STATEMENT OF THE CASE AND FACTS

Appellants Rebecca Brewster and Christopher Brewster (collectively the Brewsters) challenge the lower courts' determination of the amount of the collateral source offset for past medical expenses following a jury's award of damages to Respondent/Plaintiff David Swanson (Swanson). The Brewsters assert that pursuant to Minnesota's collateral source offset statute, Minn. Stat. § 548.36,¹ they are entitled to a full offset of all medical expenses awarded to Swanson, less the amounts paid by Swanson for health insurance premiums and deductibles. The material facts are as follows.

A. Rebecca Brewster and David Swanson Were Involved in a Motor Vehicle/Motorcycle Accident on October 18, 2005.

On October 18, 2005, a motor vehicle operated by Rebecca Brewster and owned by Christopher Brewster collided with a motorcycle operated by Swanson. (A. 21). A motorcycle accident falls outside the coverage of Minnesota's No-Fault Act. Minn. Stat. § 65B.46, subd. 3. Swanson's medical expenses incurred as a result of the motorcycle accident were paid by HealthPartners, Swanson's health insurer. (A. 41, 43).

B. HealthPartners Resolved All of Swanson's Medical Expenses by Payment of \$17,643.76.

Before this lawsuit was commenced by Swanson against the Brewsters, on March 1, 2006, HealthPartners provided the Brewsters, through their auto insurer State Farm, with notice of its subrogation rights in the amount of \$11,215.48. (A. 32). At the

¹ Minn. Stat. § 548.36 has since been renumbered and is currently at Minn. Stat. § 548.251. (A. 15) (Compare A. 11 with A. 17). For ease of reference and because the lower courts both used Minn. Stat. § 548.36, Brewster will continue to do so before this Court.

time of HealthPartners' subrogation notice, HealthPartners had fully resolved Swanson's medical care provider "billed" charges of \$39,074.70 for his October 18, 2005 motorcycle accident by payment to those providers of \$11,215.48.² (A. 33; *see also* A. 43).

After receiving that subrogation notice and prior to Swanson filing this lawsuit, State Farm Mutual Automobile Insurance Company, the Brewsters' auto carrier, on behalf of the Brewsters, entered into a release and assignment agreement with HealthPartners. (A. 34). Under the terms of that agreement, HealthPartners agreed to release all subrogation claims that it now had or might have in the future for benefits paid on behalf of Swanson as against the Brewsters and their insurer in return for payment of \$10,500. The agreement assigned to State Farm the "full benefit" of any collateral source offset. (A. 34).

In October 2006, approximately one year after the accident, Swanson underwent a second surgical procedure and incurred additional hospital and physical therapy expenses.

² HealthPartners, Inc. is Regions Hospital's parent corporation and has a third-party payor contractual affiliation with Regions. Martin v. Regions Hospital, 2004 WL 885762 at *1 (Minn. Ct. App. 2004). (A. 93). Swanson's medical care following this accident was at Regions. (A. 43). While there are different health care provider reimbursement arrangements in the marketplace, as a general proposition, the payors negotiate discounts from the medical providers' stated fees. In capitated plans, they have capped expenditures for services. So, for example, while the bills received by plaintiff will show the physician's charge for \$5,000 (the billed charges), the physician, through the contractual arrangement with the health care insurer, accepts some percentage of the billed charge and by contract the physician is prohibited from recovering the balance from the plaintiff. Beard, "The Impact of Changes in Health Care Provider Reimbursement Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits," 21 Am. J. Trial Advoc. 453, 455 (Spring 1998).

As a result of the second surgery, Swanson incurred billed charges of over \$12,000 in additional medical expenses. (A. 43, 54).

In total, Swanson's "billed" medical expenses were \$62,259.93. HealthPartners resolved all of the medical provider "billed" charges of \$62,259.30 by a payment of \$17,643.76 and with Swanson co-pays of \$1,169.80. (A. 43).

C. Swanson Brought Suit Against the Brewsters and the Jury Awarded \$62,259.30 for Past Medical Expenses.

Swanson initiated this lawsuit against the Brewsters on January 23, 2007. (A. 21). Prior to trial, the Brewsters served and filed a Minn. R. Civ. P. 68 Offer of Judgment in the amount of \$87,606.00. (A. 36). The amount of the Offer of Judgment included "all medical liens, and all medical bills paid by Defendants and their insurers on behalf of Plaintiff, but excluded Plaintiff's costs and disbursements to date." (Id.)

This case proceeded to trial. The only issue for the jury was the amount of Swanson's damages directly caused by the October 18, 2005 accident. (A. 38).

On November 30, 2007, the jury returned its verdict awarding Swanson damages of \$38,000.00 for past pain and suffering, \$4,230.00 for past wage loss, \$62,259.30 for past medical expenses, and \$30,300.00 for future pain and suffering. (A. 38-39).³ The Brewsters then moved, pursuant to Minn. Stat. § 548.36, for a determination of collateral source offset for past medical expenses for the purposes of entering judgment on the jury's verdict after the appropriate reduction of collateral sources. (A. 27).

³ The jury awarded Swanson \$0.63 less than the billed charges. (A. 38-39).

D. Brewsters Sought a Collateral Source Offset for the Amount of Medical Expenses Discharged by HealthPartners' Payment.

Minn. Stat. § 548.36 governs the collateral source offset calculation. Collateral sources are defined as “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 . . . (2) health, accident and sickness, . . . liability insurance that provides health benefits or income disability coverage” Minn. Stat. § 548.36, subd. 1. (A. 17).

Minn. Stat. § 548.36, subd. 5, mandates that the jury is not to be informed of the existence of collateral sources or any future benefits which may or may not be payable to the plaintiff. (A. 18.) Instead, pursuant to Minn. Stat. § 548.36, subd. 2, when the damages awarded include an award to compensate the plaintiff for losses available to the date of verdict by collateral sources, the defendant may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. (A. 17).

The statute provides that the parties are to submit written evidence of, and the court is to determine:

(1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted; and

(2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff’s immediate family for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.

Minn. Stat. § 548.36, subd. 2. (A. 17).

Subdivision 3 of Minn. Stat. § 548.36 then sets forth the duties of the court:

(a) The court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2).

(A. 17).

Subdivision 2, clause (2) amounts are the “amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff . . . for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.” (Id.)

As stated previously, the Brewsters’ auto insurer obtained an assignment of HealthPartners’ subrogation rights for the purpose of releasing any subrogation claim in order that the Brewsters could obtain the full benefit of any collateral source offset and so that no subrogation claim would exist against Swanson. Because there is no subrogation issue, the Brewsters asserted entitlement to the full collateral offset as set forth in Minn. Stat. § 548.36, subd. 2(1). The Brewsters contend they are entitled to the full offset of the jury’s award of medical expenses – \$62,259.30 – less the proof of payment by Swanson for insurance premiums and co-pays.

E. The Trial Court Limits the Collateral Source Offset to \$13,073.12.

The trial court, the Honorable Kevin Burke, by Order dated April 10, 2008, rejected the Brewsters’ assertion of claimed entitlement to the collateral source offset. In so ruling, the trial court states that on the facts before the court, “there is no case law on this, and the legislature has not directly addressed this significant policy issue.” (A. 13).

The trial court ruled that the Brewsters were only allowed to take a collateral source offset of \$17,643.76, which is the amount of the final subrogation claim of HealthPartners. (A. 14). This offset was then reduced by Swanson's payment for insurance premiums in the two-year period prior to this claim in the amount of \$4,570.64, resulting in a net collateral source offset of \$13,073.12 from the jury's medical expense award of \$62,259.30. (*Id.*) Therefore, for the past medical expense portion of the jury verdict, Swanson was entitled to \$49,186.18. (*Id.*)

F. The Court of Appeals Affirms the Trial Court's Determination of Collateral Source Offset.

The Brewsters appealed, arguing that under the collateral source offset statute they were entitled also to an offset from the verdict of the amounts discharged by the medical providers pursuant to the agreement with Swanson's health care insurer. (A. 2).

The Court of Appeals affirmed the trial court's decision. The Court of Appeals did so based on its earlier published decision in Foust v. McFarland, 698 N.W.2d 24 (Minn. Ct. App. 2005), *rev denied*, and Tezak v. Bachke, 698 N.W.2d 37 (Minn. Ct. App. 2005), *rev. denied*, which had determined such writeoffs are not subject to deduction under the collateral source offset statute. (A. 5-8, 10).

The Brewsters petitioned for further review, which was granted by this Court on May 19, 2009.

ARGUMENT

UNDER MINNESOTA'S COLLATERAL SOURCE OFFSET STATUTE, THE BREWSTERS ARE ENTITLED TO AN OFFSET OF SWANSON'S PAST MEDICAL EXPENSES, WHICH INCLUDES AMOUNTS THE MEDICAL PROVIDERS WROTE OFF PURSUANT TO THEIR CONTRACTS WITH SWANSON'S MEDICAL INSURER.

A. Standard of Review.

The sole issue before this Court is whether the collateral source offset statute entitles the Brewsters to an offset of the medical expenses Swanson's medical providers wrote off pursuant to their contracts with HealthPartners, Swanson's medical insurer. Statutory construction and the application of statutes to undisputed facts present questions of law, which this Court reviews *de novo*. Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998); O'Malley v. Ulland Bros., 549 N.W.2d 889, 892 (Minn. 1996).

B. The Common Law Calculation of Damages Recoverable From a Tortfeasor Was Changed With the 1986 Enactment of Minn. Stat. § 548.36.

At common law, a defendant tortfeasor was prohibited from obtaining a setoff for collateral source benefits, which is compensation from a source independent of the defendant tortfeasor. Hueper v. Goodrich, 314 N.W.2d 828, 830 (Minn. 1982); Restatement (Second) of Torts § 920A. As this Court explained:

The benefit conferred on the injured person from the collateral source is not credited against the tortfeasor's liability, although it may partially or completely reimburse the plaintiff for his injuries.

314 N.W.2d at 830, citing Restatement (Second) of Torts § 920A.

The common law collateral source rule had applied “where the plaintiff has received insurance proceeds, employment benefits, gifts of money or medical services, welfare benefits or tax advantages.” Id. According to the common law rule, a plaintiff is not only entitled to the benefits received from a “collateral” source but also benefits from the defendant who caused the injury. Id.

Even before the 1980s era of tort reform legislation and concern over the insurance crisis, scholars had leveled much criticism at the collateral source rule. *See Hueper*, 314 N.W.2d at 831 (Simonett, J. dissenting in part), citing and noting that collateral source rule’s “continued extensive use today has been criticized by most neutral commentators.” Much of the criticism focused on the double recovery aspect of the rule: that the plaintiff receives compensation for a loss he did not suffer. Chandler, 3 Handling Motor Vehicle Accident Cases 2d § 15:3 (2008). “The concern was not so much for the defendant, or the insurance company that provides the collateral source, but for the overall effect on the legal system and insurance premiums.” Id.

As an example, where the only damages the plaintiff suffered are those in which a collateral source had reimbursed the plaintiff, the rule encouraged the plaintiff to litigate rather than accept the payment already received. Id. With that litigation came the legal costs, use of judicial resources, etc. Id. By the 1980s, it was being argued by the insurance industry that this double recovery aspect of the common law collateral source rule was contributing to the liability insurance crisis. Id., citing Report of the Tort Policy

Working Group on the Causes, Extent and Policy Implications of the Court Crisis in Insurance Availability and Affordability (Feb. 1986).

By the 1980s, the social and economic setting had changed substantially since the collateral source rule first appeared. In 1986, as part of Minnesota's tort reform, the Minnesota Legislature enacted Minn. Stat. § 548.36. By its enactment of Minn. Stat. § 548.36, the Minnesota Legislature abrogated the common law collateral source rule. Imlay v. City of Lake Crystal, 453 N.W.2d 326, 331 (Minn. 1990). As this Court declared, "section 548.36, the collateral source statute, alters the old common law measurement of the damages recoverable from a tortfeasor." Western Nat'l Mut. Ins. Co. v. Casper, 549 N.W.2d 914, 916-17 (Minn. 1996). It is the interpretation and application of that statute which is at issue in this case.

C. Applying the Plain and Ordinary Meaning to the Words Used in Minn. Stat. § 548.36, the Brewsters Are Entitled to a Collateral Source Offset of \$57,788.86.

When interpreting Minn. Stat. § 548.36, this Court must "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. In doing so, the Court first determines whether the statute's language, on its face, is ambiguous. Am. Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001). A statute's language is ambiguous only when its language is subject to more than one reasonable interpretation. Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999). This Court construes words and phrases according to their plain and ordinary meaning. Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608 (Minn. 1980); *see also* Minn. Stat. § 645.08(1)

(providing that words are construed according to their common usage). And this Court must consider the statute as a whole and interpret it so as to give effect to all of its provisions. “No word, phrase or sentence should be deemed superfluous, void or insignificant.” Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000).

Minn. Stat. § 548.36, subd. 1 defines collateral sources as “payments related to the injury or disability.” It also states that the “court shall reduce the award by the amounts determined under subdivision 2, clause (1).” The amounts under subdivision 2, clause (1) are “amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses”

1. The amount written off or discharged is a payment.

The undisputed fact is through the discounts negotiated by HealthPartners, HealthPartners paid \$17,643.76 to discharge Swanson’s billed medical expenses of \$62,259.30. It is the Brewsters’ position that the amount written off or discharged is a “payment” within the plain and ordinary meaning of that term and therefore is to be factored into the collateral source offset.

The Florida Supreme Court has interpreted its collateral source statute with virtually identical language to so hold. The Florida statute defines collateral sources to mean “any payments made to the claimant or made on the claimant’s behalf, by or pursuant to: . . . 2. Any health, sickness or income disability insurance” Fla. Stat. § 768.76, subd. (2). The Florida Supreme Court, turning to the plain and ordinary meaning of “payment” and “pay,” concluded that it includes the concept of discharge of a

debt. Goble v. Frohman, 901 So. 2d 830, 833 (Fla. 2005), quoting Merriam-Webster's Collegiate Dictionary 851 (10th ed., 1993) (“to discharge a debt or obligation”); and Webster's Third New International Dictionary 1659 (1981) (“discharge of a debt or obligation”).

That definition of payment is in accord with that assigned by the Minnesota Court of Appeals in another context. In Raddatz v. Gustafson Fin. Group Ltd. of St. Paul, 1993 WL 515806 at *2 (Minn. Ct. App. 1993) (A. 91), the Court of Appeals turned to Black's Law Dictionary 5th edition's definition and held the term “payment” means “the performance of a duty . . . or discharge of a debt . . . where the money or other valuable thing is tendered and accepted as extinguishing the debt or obligation in whole or in part.” Black's Law Dictionary presently defines payment as “1. Performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation. 2. The money or other valuable thing so delivered in satisfaction of an obligation.” Black's Law Dictionary 1165 (8th ed. 2004).

The definition utilized by the Court of Appeals in Raddatz is in accord with the common and ordinary meaning of that term, as other jurisdictions have concluded. *See, e.g., Lawson v. Kentucky Retirement Systems*, ___ S.W.3d ___, 2009 WL 1440744 at *2 (Ky. 2009) (“The term ‘payment’ is defined as ‘[a] discharge in money or its equivalent of an obligation or debt owing by one person to another, and is made by debtor's delivery to creditor of money or some other valuable thing, and creditor's receipt thereof, for purposes of extinguishing the debt,’” quoting Black's Law Dictionary 1129 (6th ed. 1990)

(emphasis omitted)); Bryant v. Ohio Cas. Ins. Co., 876 A.2d 844, 846 (N.J. Super. 2005) (interpreting the phrase “payment of benefits” by adopting the definition of the term “payment” found in Webster’s Third New International Dictionary which includes not only “the act of paying or giving compensation” but also “the discharge of a debt or an obligation”); Busser v. United States, 130 F.2d 537, 538 (3d Cir. 1942), *reh’g denied* (“The common use of the term payment, found in both laymen’s language as given in the dictionary and lawyers’ language as used in judicial opinions, explains it is something given to discharge a debt or obligation.”); Parker v. Artery, 889 P.2d 520, 527 (Wyo. 1995) (“‘Paid’ is the past participle of ‘pay.’ The plain meaning of ‘pay’ includes the discharge of a debt by tender of payment due.”); In re Delta Air Lines, Inc., 381 B.R. 57, 68 (Bankr. S.D.N.Y. 2008) (reviewing multiple dictionaries and concluding that in every dictionary the court found the word “pay” defined in words or substance as the satisfaction of a debt by money or property sufficient in fact or law to discharge the obligation).

Applying the plain and ordinary meaning of the word “payment” to the undisputed facts of record, the Brewsters are entitled to a collateral offset of \$62,259.30 less the amount paid by Swanson for insurance payments and co-pays. Although Swanson was billed \$62,259.93 for his medical services, because of his health care insurer’s agreements with medical service providers, any purported obligation by Swanson to pay the billed amount was discharged by HealthPartners’ payment of \$17,643.76. Whatever one calls the gap between the billed amount and \$17,643.76, that gap was forgiven, written off and

discharged by HealthPartners. This constitutes a “payment” within the plain and ordinary meaning of the term. Thus, the amount of collateral sources that has been paid for the benefit of Swanson is not merely the contractually agreed price between HealthPartners and the medical providers but the full amount discharged thereby. HealthPartners’ payment discharged any and all obligation to Swanson’s health care providers. Nobody, including Swanson, will ever be liable to pay any additional amount for his medical care.

2. Statute also provides offset for collateral sources otherwise available to the plaintiff as a result of losses.

Moreover, by the statute’s express terms the court is to determine “amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses.” Minn. Stat. § 548.36, subd. 2(1). Even if the Court were to narrowly construe payment to mean only a tender of cash, the statute contemplates a setoff not only for the amount of such payment but also for amounts “otherwise available to the plaintiff as a result of losses.” To permit a setoff only in the amount of the cash tender would improperly render the phrase “otherwise available” without any effect, a result prohibited by Minn. Stat. § 645.16 (“Every law shall be construed, if possible to give effect to all its provisions.”).

HealthPartners’ arrangements with medical care providers which resulted in a discharge of the billed charges above the amount paid by HealthPartners are as much a benefit to Swanson as HealthPartners’ actual remittance of \$17,643.76 to satisfy the charges of Swanson’s medical bills. As the Florida Supreme Court held in Goble, 901 So. 2d at 833, such contractual discounts constitute “amounts which have been paid for

the benefit of the claimant, or which are otherwise available to the claimant from a collateral source.” Likewise, under Minn. Stat. § 548.36, the amount of the contractual discharge is an amount that is to be part of the collateral source setoff against an award of compensatory damages.

D. The Court Must Analyze the Statutory Language in Resolving This Issue, Which The Court of Appeals Did Not Do in Its Published Opinions.

Before the Court of Appeals, the Brewsters acknowledged the Court of Appeals’ published decisions in Foust v. McFarland, 698 N.W.2d 24 (Minn. Ct. App. 2005), *rev denied*, and Tezak v. Bachke, 698 N.W.2d 37 (Minn. Ct. App. 2005), although neither decision was cited by the trial court in this case. (A. 8, 11). Ultimately, the Court of Appeals affirmed the lower court based on its earlier decisions in Tezak and Foust. (A. 8, 10). In neither case did the Court of Appeals apply the collateral source offset statute as written.

1. Foust v. McFarland decision is not in accord with terms or purposes of collateral source offset statute.

a. Court of Appeals utilized Stout to determine collateral source offset.

In Foust, the jury returned a verdict in the amount of \$11,310,464.64 for the plaintiffs/respondents Jeffrey and Linda Foust. After apportionment for comparative fault, judgment was entered for the Fousts in the amount of \$9,048,371.71. Following judgment, the parties stipulated to an award of \$135,464.64 in past medical expenses. The parties then agreed to a \$20,000 setoff and another setoff for Blue Cross’ \$42,983.37 payment. The defendants/appellants requested an additional setoff of \$72,481.27 for the

amounts billed by medical providers for the plaintiff's care but which were discounted pursuant to the agreement between the plaintiff's medical care providers and his insurance company. 698 N.W.2d at 29. Such a reduction was denied by the trial court, who relied on this Court's decision in Stout v. AMCO Ins. Co., 645 N.W.2d 108 (Minn. 2002), in making its determination. 698 N.W.2d at 35.

The Court of Appeals, while quoting the language of the collateral source statute, did not analyze or apply its terms as written. It instead also turned to this Court's decision in Stout, even though the Court of Appeals admits Stout involves the application of Minnesota's no-fault statute, Minn. Stat. § 65B.61, and not the interpretation of Minnesota's collateral source offset statute. 698 N.W.2d at 36. The Court of Appeals nonetheless concludes that this Court in Stout "considered a nearly identical argument" and had held a no-fault insurer may not "attempt[] to reduce its obligation to provide basic economic loss benefits on the ground that another source of benefits has stepped in and decreased the amount of the injured person's medical bills – whether by paying them, obtaining discounts, or some other means." Id., quoting Stout, 645 N.W.2d at 114.

The Court of Appeals further finds "the purpose behind both [the no-fault statutes and collateral source offset statutes] to have similarities." Id. The Court of Appeals concludes that appellants were entitled to the agreed-upon setoffs, but as to the \$72,481.27, the Court of Appeals states "[t]hat amount was never paid, but rather represents an amount which the medical insurance providers billed Foust but did not attempt to collect pursuant to Foust's employer's medical plan." Id.

Judge Minge, in dissent, asserted the majority's reliance on Stout was misplaced. 698 N.W.2d at 36. The Brewsters agree. Since both the purpose and terms of the No-Fault Act are not the same as the purpose and terms of the collateral source offset statute, Stout is not relevant.

b. Court of Appeals' reliance on Stout is misplaced.

The statutory language at issue in Stout, 645 N.W.2d at 112, was Minn. Stat. § 65B.46, subd. 1, which states “[i]f the accident causing injury occurs in this state, every person suffering loss from injury arising out of maintenance or use of a motor vehicle . . . has a right to basic economic loss benefits.” The narrow legal issue presented in Stout was whether the discounts obtained by Stout's health insurer are to be included in the amount of Stout's loss.

Stout, an uninsured pedestrian, sued the insurer of an automobile which hit him and pinned him to a metal guardrail, injuring his knees. Stout incurred medical bills in the amount of \$25,638.73 and later applied for and received Medical Assistance benefits from the Department of Human Services in the form of Medicaid and MinnesotaCare. The Department obtained a discount so that the amount paid for medical services was only \$12,471.44. The no-fault insurer argued that its payments should be limited to the discounted amount actually paid rather than the full amount incurred. The lower courts disagreed and this Court affirmed.

To decide this issue, this Court acknowledged it must interpret and apply the relevant provisions of the No-Fault Act. The No-Fault Act was silent as to whether the

amount of loss suffered by an injured person excludes the discounts that health insurers are able to provide from medical service providers. This Court stated that since such discounts have been common, this area would benefit from the Legislature's attention. However, in the meantime, it was for the Court to "decide the issue based on the provisions of the [No-Fault] Act that set forth the nature of basic economic loss benefits and described the concept of loss." Id. at 112.

The term "loss" is a defined term under Minnesota's no-fault statute in Minn. Stat. § 65B.43, subd. 7 and as stated in Minn. Stat. § 65B.54, subd. 1. The No-Fault Act defines the term "loss" as "economic detriment resulting from the accident causing the injury, consisting only of," among other things, "medical expense." Minn. Stat. § 65B.43, subd. 7. The No-Fault Act further provides that "loss accrues not when injury occurs, but as . . . medical . . . expense is incurred." Minn. Stat. § 65B.51, subd. 1. Focusing on the word "incurred," this Court held on the "narrow legal issue presented" that discounts obtained by plaintiff's health insurer are included in the amount of loss. Id. at 112-113.

In Stout, this Court also turned to a pre-no-fault case – Collins v. Farmers Ins. Exch., 271 Minn. 239, 135 N.W.2d 503 (1965), which had interpreted the auto insurance policy language "reasonable [medical] expenses actually incurred." Id. at 507. This Court in Collins had held, in the context before it, that "incur" is "to become liable for" as distinguished from actually "pay for." Id. Accordingly, this Court held a similar definition should be applied to Minn. Stat. § 65B.54, subd. 1, which provides that "[l]oss

accrues not when injury occurs, but as . . . medical . . . expense is incurred.” This language is not at issue in the collateral source offset statute.

Further, under the No-Fault Act, a no-fault insurer has a duty to provide basic economic loss benefits “to reimburse an injured person’s loss even when the injured person is entitled to compensation for the same loss from a different source.” Stout, 645 N.W.2d at 112; Minn. Stat. § 65B.61, subd. 1 & 3. Reducing Stout’s loss on the basis of discounts obtained by his health insurer was found to be inconsistent with Minnesota’s No-Fault Act’s designation of basic economic loss benefits as the primary source of benefits for those injured in an automobile accident. It was also violative of the No-Fault Act’s express prohibition of coordinating basic economic loss benefits with benefits provided by any other legal entity. In other words, a no-fault insurer has a duty to provide basic economic loss benefits to reimburse an injured person’s loss even when the injured person is entitled to compensation for the same loss from a different source. Id. The Court concluded that the same was true in Van Tassel v. Horace Mann Mut. Ins. Co., which held that “medical insurance may not be used to dilute the statutorily mandated underinsured-motorist coverage.” 296 Minn. 181, 207 N.W.2d 348, 353-54 (1973).

In looking at Minnesota’s No-Fault Act, this Court in Stout also held a windfall was only created because of the no-fault carrier’s delay in paying no-fault benefits, which benefits are primary. 645 N.W.2d at 114. The No-Fault Act requires prompt payment of benefits to those injured in automobile accidents. Insurers should have no incentive to delay payment of meritorious claims in the hope the injured person’s health insurer will

step in and pay his or her medical bills at its discounted rate. This Court recognized that its ruling provided a windfall to the injured pedestrian. However, this Court concluded that it was better that the pedestrian should receive the windfall than that the insurer should.

c. Court of Appeals did not analyze Foust by applying the terms and purpose of collateral source offset statute.

Neither the language nor the purpose of Minnesota's No-Fault Act is at issue when analyzing the application of the collateral source offset statute. It is the Brewsters' position that, contrary to the Court of Appeals' decision in Foust, any obligation by the plaintiffs to pay \$72,481.27 in Foust was discharged as a feature of the health plan to which the plaintiff subscribed. Ultimately, the Court of Appeals in Foust did not address why such contractual discounts or writeoffs do not constitute "amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses," which was the issue before the court pursuant to the language of Minn. Stat. § 548.36, subd. 2(1).

2. Tezak v. Bachke, 698 N.W.2d 37 (Minn. Ct. App. 2005), is not in accord with terms or purpose of collateral source offset statute.

In Tezak, Tezak initiated a lawsuit against the driver of the auto who struck him, but Tezak died of causes unrelated to the accident before the lawsuit was completed. The lawsuit was dismissed. 698 N.W.2d at 39. Although Tezak's medical expenses as a result of the accident were in excess of \$100,000, his health insurer settled all of them for \$32,000. Id. The trustee for the heirs and next-of-kin of Tezak purchased the health

insurer's subrogation rights and initiated this action against the driver under Minn. Stat. § 573.02 for special damages, including the \$100,000 of medical expenses that had been billed. The defendant driver sought to limit the claim to \$32,000, which was the settlement amount. Id.

Tezak ultimately rested on the Court of Appeals' interpretation of and analysis of Minn. Stat. § 573.02. The Court of Appeals again turned to Minn. Stat. § 65B.46, subd. 1, Stout and Collins. Id. at 40. The Court of Appeals also, again, recognized that "Stout and Collins are distinguishable from the case before us," but found the cases "instructive." Id. In resolving this issue, the Court of Appeals concluded that "resolution of this issue turns on whether the collateral-source statute or the common-law collateral-source rule applies to the difference between the amount billed and the amount for which the bills were settled." Id. at 41.

The Court of Appeals agreed that the collateral source offset statute applied to the \$32,000, but since the plaintiff had purchased the health care subrogation right, the \$32,000 could not be set off from the recovery. Id. at 42. It was in that context that the Court of Appeals concluded the collateral source offset statute did not apply to the \$68,000 (\$100,000 billed medical expenses - \$32,000 settlement amount/subrogation interest), stating "the gap between the bills and the settlement was not a payment made to anyone and therefore is not a collateral source as defined by the statute." Id. at 41. The Court of Appeals then concluded that "[u]nder the common law collateral source rule, the respondent was entitled to recover the full amount of medical expenses billed." Id. at 42.

Under the Court of Appeals' reasoning in Tezak, the writeoff is not a collateral source under the statute but simultaneously is a collateral source under the common law collateral source rule which Minn. Stat. § 548.36 was enacted to abrogate. The Court of Appeals cannot have it both ways. Notably, the Court of Appeals again did not offer a definition of "payment." Id.

With due respect to the Court of Appeals, when this Court has applied Minn. Stat. § 548.36 it has done so based on its statutory language and not the language of Minnesota's No-Fault Act. Heine v. Simon, 702 N.W.2d 752, 764-67 (Minn. 2005). Likewise, when this Court has decided a case under the No-Fault Act, it looks to its statutory language and not that of the collateral source offset statute. Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7, 13 (Minn. 2000). Based on the language of the collateral source offset statute, as applied to the facts of record, the Brewsters are also entitled to an offset for the full amount discharged by HealthPartners' payment.

E. If Minn. Stat. § 548.36 Is Ambiguous, Legislative Intent Supports the Brewsters' Construction of the Statute.

If this Court concludes that the collateral source offset statute is ambiguous, that is, when it is reasonably susceptible to more than one interpretation, the Court must determine the probable legislative intent and construe the statute in a manner consistent with that intent. Wynkoop v. Carpenter, 574 N.W.2d 422, 425 (Minn. 1998). In determining legislative intent, the Court may consider the need for the law; the circumstances of its enactment; the purpose of the statute; the prior law, if any; the

consequences of an interpretation; the legislative history; and administrative interpretations of the law. Minn. Stat. § 645.16.

Minn. Stat. § 548.36 was enacted in 1986 as part of the widespread public demand for tort reform. Spevacek, “Tort Reform in Minnesota – The Impact of the 1986 Legislative Enactments on General Civil Litigation,” 10 Hamline L. Rev. 461 (1987).⁴

The common law collateral source rule has been recognized to be both a rule of damages and a rule of evidence. 22 Am. Jur. 2d Damages § 763 (2009); Maxwell, “The Collateral Source Rule in the American Law of Damages,” 46 Minn. L. Rev. 669, 675 (1962); Flynn, “Private Medical Insurance and the Collateral Source Rule: A Good Bet?” 22 U. Tol. L. Rev. 39 (1990). As to damage calculations, the rule prohibited the tortfeasor from reducing the tort judgment by the amount of money received by an injured party from other sources. Note, “Lambert v. Wensch: Another Step Toward Abrogation of the Collateral Source Rule in Wisconsin,” 1988 Wis. L. Rev. 857, 861 (1988). As to evidence, it barred the submission of evidence that the injured plaintiff received payment for any part of his damages, including medical expenses, from other sources. Id. The term “other sources” means collateral source benefits and includes payments for medical insurance policies purchased by the injured party or a third party. Restatement (Second) of Torts § 920A, comment c.

⁴ In fact, 23 state legislatures passed some form of tort reform in 1986. Phillips, “Future Implications of the National Tort Reform Movement: Tort Reform and Insurance Crisis in the Second Half of 1986,” 22 Gonz. L. Rev. 277, 285 (1986-87).

The Minnesota Legislature's intent in enacting Minn. Stat. § 548.36 was to abolish the common law "collateral source rule." *See* House Research Bill Summary H.F. 1776 Government Liability & General Civil Liability & Damages ("Sec. 13 Abolishing Collateral Source Rule. Adds section 548.36") (A. 100); Summary of Conference Committee Report for H.F. No. 1950 Omnibus Insurance and Tort Reform Bill ("Section 79 abolishes the 'collateral source rule'") (A. 116).

Prior to the 1986 enactment, debate over the merits of the collateral source rule had raged for years. The common law collateral source rule was widely criticized. *See, e.g., Hueper*, 314 N.W.2d at 831 (Simonett, J. dissenting in part). The common law rule permitted recovery even though there was no loss by sanctioning a double recovery for an injured, insured party. The rule conflicted with the compensating function of tort law. The common law collateral source rule required a tortfeasor to pay the judgment even though the plaintiff has been compensated for the injuries suffered. Thus, double recovery is possible and the plaintiff can be put in a better position than before the tort occurred. Note, "Unreason in the Law of Damages: The Collateral Source Rule," 77 *Harv. L. Rev.* 741 (1964).

To allow a plaintiff to recover from a tortfeasor for injuries fully compensated by insurance coverage, the plaintiff is paid twice for a single harm. By refusing to reduce the plaintiff's recovery by the amount of collateral source benefits paid meant that the plaintiff's recovery exceeded the actual out-of-pocket loss. Ghiardi, "The Collateral Source Rule: Multiple Recovery in Personal Injury Actions," 535 *Ins. L.J.* 457, 460-61

(1967). The underlying premise of the argument against the collateral source rule was “that the [collateral source] Rule wrongfully permits an injured party to receive a windfall recovery by awarding court-sanctioned compensation for tort damages not actually sustained.” 22 U. Tol. L. Rev. at 45.

One of the most widely accepted arguments for the collateral source rule was that a wrongdoer should pay the full amount of damages he causes. 77 Harv. L. Rev. at 748. When a tortfeasor suggested that the rule may result in a windfall, the common refrain of the courts had been: “If there must be a windfall certainly it is more just that the injured person should profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.” Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958); *see, e.g.*, Hueper, 314 N.W.2d at 830. But this justification, it was argued, missed the point. A compensatory system should make the plaintiff whole, not punish the defendant. 314 N.W.2d at 832-33 (Simonett, J. dissenting in part). Because most tortfeasors are insured, damage awards are usually paid by an insurer. Thus, the deterrent impact of exposure for medical expenses is lost on most defendants. 77 Harv. L. Rev. at 750.

In enacting the 1986 Tort Reform Act, the Minnesota Legislature sought to reduce escalating damage awards, curb increasing insurance costs and end a crisis in the liability insurance industry. The Court of Appeals’ interpretation of the collateral source offset statute is contrary to the express legislative intent to control tort damage awards and avert escalating insurance costs.

As stated previously, the Legislature's purpose in the enactment of Minn. Stat. § 548.36 was to abrogate the common law. The Legislature recognized that if the plaintiff has medical insurance that pays his hospital expenses, under the common law collateral source rule he nonetheless recovers those expenses from the tortfeasor who caused his hospitalization, resulting in a double recovery. The Legislature, however, also recognized that there may be circumstances where the collateral source is subrogated to the rights of the plaintiff to recover any sums paid by the plaintiff by that source as a result of the defendant's tort. The Legislature, by its enactment, made sure that in determining the amount of collateral sources that have been paid or are otherwise available to the plaintiff it does not include those collateral source benefits that must be repaid by the plaintiff because of subrogation. Minn. Stat. § 548.36, subd. 2(1). (A. 17).

The bottom line is, by operation of the collateral source offset statute, there was to be no windfall to the plaintiff. Based on the lower court's ruling in this case, Swanson does get a windfall. The Court of Appeals in this case even acknowledges, quoting Goble v. Frohman, 848 So. 2d 406, 410 (Fla. Ct. App. 2003), the Florida Court of Appeals "expressed concern that permitting a plaintiff to recover damages for medical expenses for which she will never be held responsible 'completely undermines the purpose of the [collateral source] Act by requiring insurers to pay damages based on a billing fiction, especially when the insurers will be sure to pass the costs for these phantom damages onto Floridians.'" (A. 9). That same concern exists here and was earlier expressed by Judge Minge by his dissent in part in Foust, where he states "this Court should not add to

the surreal world of healthcare billing by giving the discounted portion of a bill asset status.” 698 N.W.2d at 36.

As the Minnesota Legislature obviously recognized in 1986, the reality is that most defendants in litigation are insured; therefore, the insurer pays the additional amounts, not the tortfeasor. The increased cost of providing “compensation” for phantom damages is borne by Minnesota citizens and businesses through increased insurance costs. *See* 535 Ins. L.J. at 459. These are precisely the concerns the Minnesota Legislature addressed by its enactment of the 1986 tort reform and more particularly Minn. Stat. § 548.36.

The Court of Appeals’ interpretation and construction of the collateral source offset is contrary to that legislative intent. Most telling, at the end of its decision, the Court of Appeals states, “[W]e also recognize the public policy the common-law collateral-source rule advances.” (A. 9). But with the enactment of Minn. Stat. § 548.36, public policy in this area has been determined by the Legislature. Mattson v. Flynn, 216 Minn. 354, 13 N.W.2d 11, 16 (1944). The Legislature chose in 1986 to abrogate the common law collateral source rule.

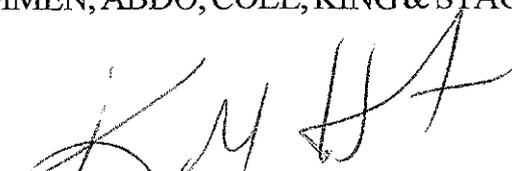
In summary, the net effect of affirming the Court of Appeals would be to sanction precisely what the Legislature sought to prevent by its enactment of the collateral source offset statute. The Brewsters respectfully request that the lower courts be reversed.

CONCLUSION

Appellants respectfully request that the lower courts' determination of collateral source offset be reversed and that the Court hold that Appellants are entitled to a collateral offset of \$62,259.30 less Swanson's payment for insurance premiums and co-pays.

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Dated: June 17, 2009

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,115 words. This brief was prepared using Word Perfect 12.

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