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NOVEMBER 24, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Amy Hiltner, Plaintiff/Appellant v. Owners Insurance Company, Defendant/Appellee.	)	Supreme Court No.: 20140308

BRIEF OF APPELLEE OWNERS INSURANCE COMPANY

United States District Court No.: 3:12-cv-00013

Certified Question from United States District Court
Dated August 29, 2014

United States District Court for the District of North Dakota
Southeastern Division
The Honorable Ralph R. Erickson

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STATEMENT OF THE ISSUE:

¶1. WHETHER THE COURT SHOULD DEDUCT NO-FAULT BENEFITS FROM THE AWARD OF PAST ECONOMIC DAMAGES BEFORE REDUCTION FOR THE PERCENTAGE OF FAULT ATTRIBUTABLE TO PLAINTIFF AND OTHER PARTIES FOR WHOSE CONDUCT THE DEFENDANT IS NOT RESPONSIBLE.

STATEMENT OF THE CASE:

¶2. By complaint dated January 26, 2012, venued in Cass county, North Dakota, District Court, appellant (Hiltner) commenced an action for underinsured motorist (UIM) benefits, pursuant to N.D.C.C. § 26.1-40-15.1, *et. seq*.

¶3. Owners Insurance Company (Owners) provided Hiltner's UIM coverage in a policy issued to her father on a vehicle or vehicles not involved in the accident at issue in this case.

¶4. Hiltner had, previously, received the automobile liability insurance policy limits of the motor vehicle liability insurance policy covering the vehicle driven by Samantha Denault (Denault) in the accident involved in this action.

¶5. Owners removed this action from Cass County, North Dakota, District Court to the United States District Court, District of North Dakota, Southeastern Division.

¶6. This case was tried to the court, the Honorable Ralph R. Erickson, District Judge presiding, on December 4, 2013.

¶7. After receipt of a transcript of the trial proceedings, the parties, by their counsel, submitted written closing arguments on January 21, 2014.

¶8. On August 12, 2014, Judge Erickson issued the Court's Findings of Fact, Conclusions of Law and Order for Judgment. (Hiltner App. Pgs. 1-12).

¶9. Judge Erickson's Order for Judgment allowed the parties fourteen (14) days in which to either reach a stipulation regarding offset of the no-fault benefits paid to Hiltner for the accident or, if a stipulation could not be reached, each side was to file a brief and supporting documentation within fourteen (14) days of the date of the Court's order (August 12, 2014) in support of the parties respective positions on the offset and how it was to be formulated and calculated. (Hiltner App. P. 12).

¶10. Hiltner and Owners have agreed that Hiltner was paid $30,000.00 in medical expense no-fault benefits by the no-fault insurer of the Denault vehicle, for the subject accident, but differ and cannot agree on the method of calculating the no-fault offset in relation to the offset of the past economic damages for the percentage of fault attributable to Hiltner and other parties for whose conduct Owners is not responsible under its UIM coverage.

¶11. Pursuant to N.D.R.App.P. 47, on August 29, 2014, Judge Erickson certified the above stated issue to this Court.

STATEMENT OF THE FACTS:

¶12. Following trial, Judge Erickson apportioned the fault for Hiltner's injuries and damages from the May 8, 2010, motor vehicle accident, as follows:

Driver of the underinsured vehicle, Samantha Denault	55%
Passenger in the Denault vehicle, Joshua Jeffries	25%
Plaintiff, Amy Hiltner	20%

Judge Erickson then determined that Hiltner sustained the following damages from the accident:

Past Economic Damages	$101,874.69
Future Economic Damages	$175,000.00
Non-Economic Damages	$ 75,000.00

¶13. The issue certified to this Court by Judge Erickson involves only the past economic damages of Hiltner determined by Judge Erickson and how, and in what manner, those damages should be reduced or offset by the no-fault benefits previously paid to Hiltner by the no-fault insurer of the Denault vehicle, as well as by the comparative fault of Hiltner and the fault of Joshua Jeffries for Hiltner's injuries, which Owners is not responsible for. Other issues, including other offsets and reductions pertaining to Judge Erickson's other damages awards to Hiltner, have not been certified to and are not before this Court at this time. Such issues will be addressed to Judge Erickson via post judgment motions, after the certified issue is resolved by this Court.

¶14. The parties' respective positions regarding the method of offsets of the past economic damages award are shown by the following:

HILTNER'S POSITION

Past Economic Damages	Less	Subtotal	Multiply By	Net Total
$101,874.69	$30,000.00 (*No-Fault medical expenses paid to Hiltner*)	$71,874.69	55% (*Samantha Denault Fault*)	$39,531.08 (*past economic damages award to Hiltner*)

OWNERS' POSITION

Past Economic Damages	Multiply by	Subtotal	Less	Net Total
$101,874.69	55% (*Samantha Denault Fault*)	$56,031.08	$30,000.00 (*No-Fault medical expenses paid to Hiltner*)	$26,031.08 (*past economic damages award to Hiltner*)

STANDARD OF REVIEW:

¶15. The issue certified by the United States District Court to this Court is a question of law and therefore, the standard of review by this Court of the certified question of law should be *de novo*.

I. ARGUMENT

¶16. This Court should agree with the United States District Court and offset or reduce the past economic damages of Hiltner in this case first by the comparative fault of Hiltner and the fault of Jeffries (for whose collective fault Owners is not liable) before further deducting and offsetting that past economic damages award further by the $30,000.00 in no-fault benefits already paid to Hiltner by her no-fault insurer for this accident.

¶17. North Dakota Century Code § 26.1-40-15.4, provides, in pertinent part:

> 1. Any damages payable to or for any insured for uninsured or underinsured motorist coverage must be reduced by:
>
> ***
>
> (b) Amounts paid or payable under any valid and collectible motor vehicle medical payments, personal injury protection insurance, or similar motor vehicle coverages. (*Emphasis added*).

¶18. The statutory language is clear and plain on its face. Any damages payable to or for underinsured motorist coverage must be reduced by amounts paid or payable under any valid and collectible personal injury protection insurance. Hiltner's contention that N.D.C.C. § 26.1-40-15.4(1) is ambiguous is without merit. Under the statute, any paid or payable personal injury protection benefits must be reduced from any "damages payable" to Hiltner for UIM benefits. Any "damages payable" to Hiltner in this case would only be those damages that Hiltner is entitled to recover from Owners for UIM benefits from the accident in this case. See, N.D.C.C. § 26.1-40-15.3(1) providing what UIM benefits are intended to cover and pay for.

¶19. North Dakota's comparative fault statute reads as follows:

> 32-03.2-02. **Modified comparative fault**. Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering.

> This court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable for only the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect. (*Emphasis added*).
>
> N.D.C.C. § 32-03.2-02

¶20. The significance of the language used by the Legislature in § 32-03.2-02 is that the statute refers to "any damages allowed" must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The comparative fault statute does not refer to "damages payable" but rather, "damages allowed." Damages allowed necessarily include any and all damages awarded by the jury or fact finder. To the contrary, damages payable necessarily refers to that amount of damages that the plaintiff is entitled to recover from Owners for UIM benefits in this case. The total damages allowed under the modified comparative fault statute must be reduced by Hiltner's comparative fault (and that of Jeffries), before that figure becomes damages that are payable to Hiltner for UIM benefits. By the plain language of the statute, only those damages

payable to Hiltner by Owners in this case, for UIM benefits, must be reduced by the prior no-fault payment to Hiltner.

¶21. In other words, what damages are payable by Owners for UIM benefits can only be determined once the total (gross) damages of Hiltner are first reduced by the percentage of comparative fault of Hiltner and the fault of the vehicle passenger, Jeffries, as it is undisputed that Owners is not and cannot be liable for any damages attributable to those percentages of fault under its UIM coverage for Hiltner. As a point of fact, Hiltner does not claim that Owners is liable to pay her for any damages for UIM benefits that Hiltner's own fault caused and further agrees that Owners cannot be held liable for any damages sustained by Hiltner due to the fault of Jeffries, the front seat passenger in the vehicle driven by Denault. (See, Hiltner's position regarding offsets, at ¶ 14, *supra.*)

¶22. Accordingly, it is Owners position that before it can be determined what the potential responsibility of Owners is, to Hiltner, for payment of UIM benefits, the "damages payable" for UIM benefits must be determined. N.D.C.C. § 26.1-40-15.4(1). Again, the "damages payable" by Owners for UIM benefits to Hiltner cannot include damages attributable to the percentages of fault of Hiltner and Jeffries for Hiltner's injuries from this accident, as Owners clearly is not liable for those damages under its UIM coverage, and Hiltner does not contend that it is.

¶23. Accordingly, before the "damages payable" for UIM benefits by Owners to Hiltner can be determined, it is only logical and rational, and is in fact required under N.D.C.C. § 26.1-40-15.4(1), that the comparative fault of Hiltner

and the fault of Jeffries, for Hiltner's injuries from this accident, must first be deducted from the past economic damages award. Then, as N.D.C.C. § 26.1-40-15.4(1) clearly provides, those "damages payable" are to be reduced by the amount paid or payable to Hiltner under personal injury protection insurance.

¶24. Therefore, Owners submits that under the clear wording and language of N.D.C.C. § 26.1-40-15.4(1), the offset formula and method espoused by Owners, i.e., that the past economic damages award is to be first offset by the fault of Hiltner and Jeffries and then that subtotal is reduced/offset by the no-fault benefits paid to Hiltner, is the formula or method of offset clearly contemplated and required by the statute, N.D.C.C. § 26.1-40-15.4(1). This was the method that District Judge Erickson believes is the proper method, as well. (Owners App. P.3).

¶25. Neither § 32-03.2-02 nor § 26.1-40-15.4(1) are ambiguous. When read together they clearly indicate and provide that the Court must reduce the past economic loss damages of Hiltner by the amount of comparative fault attributable to her and Joshua Jeffries before deducting the $30,000.00 in no-fault benefits paid to Hiltner.

¶26. As N.D.C.C. § 1-02-05 provides, when the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. Hiltner and Amicus argue for the latter interpretation of N.D.C.C. § 26.1-40-15.4(1). Owners submits that the clear language of that offset statute governs and should be applied as requested by Owners herein.

¶27. Hiltner and Amicus both criticize reliance by Judge Erickson on the Minnesota Court of Appeals decision in LeBaron v. Hanson, 374 N.W.2d 197 (Minn. App. 1985), and argue that that reliance is misplaced. (Hiltner Brief, ¶¶ 21 through 27, inclusive; Amicus Brief, ¶¶ 27-31, inclusive.) Admittedly, LeBaron did involve a version of the Minnesota No-Fault statute pertaining to deduction of basic economic loss benefits, that was amended after the LeBaron decision and which amendment provided that the deduction for basic economic loss benefits must be made before a claimant's damages are reduced under the Minnesota Comparative Fault statute, M.S.A. § 604.01. LeBaron at 198.

¶28. However, it is Owners' position that LeBaron does not apply to the issue certified to this Court and has no precedential value as respects the issue before this Court. The issue certified by the United States District Court to this Court is a question of law and therefore, the standard of this Court's review is *de novo*.

¶29. LeBaron involved the interplay between a portion of the Minnesota no-fault law pertaining to offset of basic economic loss benefits from recovery and the Minnesota Comparative Fault statute. LeBaron at 198. The issue, however, certified to this Court involves North Dakota law and the interplay between the North Dakota modified Comparative Fault statute (N.D.C.C. § 32-03.2-02) and certain provisions in the underinsured motorist insurance laws of North Dakota, contained in N.D.C.C. Chapter 26.1-40, *et. seq*. The present issue before this Court is governed by North Dakota law inasmuch as Hiltner's accident occurred in

North Dakota and the insurance policy of Owners against which Hiltner claims UIM benefits was issued to a North Dakota resident in North Dakota. Accordingly, because LeBaron involved the law of a different state than involved in this present issue, LeBaron is simply not applicable to the issue before this Court.

¶30. Additionally, the No-Fault statute and Comparative Fault statute involved in LeBaron are worded differently than the UIM statute (containing the no-fault benefit deduction) and the modified comparative fault statutes of North Dakota involved in the present case. For that reason, LeBaron simply has no applicability to the issue before this Court. LeBaron, at 198.

¶31. Moreover, LeBaron involved an action by an injured plaintiff against an individual tortfeasor. LeBaron at 197. The present action before this Court involves a claim by Hiltner against Owners for underinsured motorist coverage benefits. Neither an underinsured motorist claim or Minnesota underinsured motorist statutory provisions were involved in LeBaron. *Id.* For these additional reasons, LeBaron simply has no application or precedential authority in the present action.

¶32. As indicated above, LeBaron did not involve the offsetting or deduction of no-fault benefits paid from damages payable under UIM coverage, which is the issue involved in this present action. LeBaron at 198.

¶33. Moreover, even though the Minnesota No-Fault statute, namely Section 65B.51, subd. 1, providing for a deduction or offset of recovery by no-

fault economic loss benefits paid was amended after LeBaron to provide that the no-fault benefit loss deduction must be made before the comparative fault offset/deduction, the fact that LeBaron may or may not be decided differently today has no value or application to the present issue. As argued extensively herein, it is Owners' position that by virtue of the clear language and wording of N.D.C.C. § 26.1-40-15.4(1), the UIM statute that applies in this case, the comparative fault of Hiltner and the fault of Jeffries must be deducted or offset from the "damages payable" by Owners under UIM before Hiltner's no-fault benefit payments are reduced, as that is clearly the order contemplated and mandated by the statute, N.D.C.C. § 26.1-40-15.4(1). LeBaron involved Minnesota statutes which may contain different offset formulas or procedures than involved in the present case. However, those statutes do not affect or apply to the present issue before this Court. Therefore, LeBaron simply has no application to the present case and the issue before this Court.

¶34. Therefore, and with all due respect to United States District Judge Erickson, the reliance by Judge Erickson on LeBaron, as well as the discussion of that decision by Hiltner and Amicus, is not relevant to nor does it govern or apply to the certified issue before this Court.

¶35. Hiltner then directs the Court's attention to the Florida Supreme Court case of Norman v. Farrow, 880 S.2d 557 (Fl. 2004), construing Florida's no-fault offset statute as it related to Florida's comparative fault statute. Hiltner brief, ¶¶ 28 and 29. Hiltner contends that the "paid or payable language" in the Florida

offset statute is virtually identical to North Dakota's no-fault offset statute found at 26.1-40-15.4(1) . Hiltner Brief, ¶ 28. Hiltner's argument is entirely misplaced.

¶36. The language in Florida's no-fault offset statute is not virtually identical to North Dakota's no-fault offset statute. While the two statutes do in fact contain the phrase "paid or payable" Florida's no-fault offset statute further provides:

> The plaintiff may prove all of his or her special damages notwithstanding this limitation, but if special damages are introduced in evidence, the trier-of-fact, whether judge or jury, shall not award damages for personal injury protection benefits paid or payable. In all cases in which a jury is required to fix damages, the Court shall instruct the jury that the plaintiff shall not recover such special damages for personal injury protection benefits paid or payable.
>
> Norman v. Farrow, 880 S.2d 557, 560 (Fla. 2004).

¶37. Nowhere in North Dakota's no-fault offset statute is there any similar language to that of the Florida statute. Contrary to Hiltner's argument, the Florida Supreme Court's decision in Norman is completely distinguishable from the North Dakota no-fault offset and comparative fault statutes applicable to this case.

¶38. First, the Florida no-fault offset statute specifically provides that the jury or fact finder shall not award damages for personal injury protection benefits paid or payable. In fact, the jury is specifically instructed to not award damages for personal injury protection benefits paid or payable. That is not the case in North Dakota. The offsets for comparative fault and no-fault benefits paid in North Dakota are handled post-verdict without the jury doing either. The fact that

in Florida the jury is specifically instructed to not award damages for personal injury protection benefits paid specifically compels a finding that the no-fault reduction must come before the comparative fault reduction. We do not have that law or system in North Dakota. As stated above, N.D.C.C. § 26.1-40-15.4(1) provides for the exact opposite offset method from that of Florida.

¶39. In fact, in Norman, when the Florida Supreme Court interpreted Florida's no-fault statute in conjunction with its comparative fault statute, the Florida Supreme Court held:

> Reading these statutes in conjunction, we find that pursuant to § 627.736(3), which bars all recovery of damages paid or payable by PIP benefits, the amount for which PIP benefits have been paid or payable is to be deducted by the trier of fact from the amount awarded as economic damages in the verdict. Those amounts are not recoverable. Following that deduction, the non-economic damages awarded should be added and then a percentage of comparative negligence found by the trier of fact needs to be applied to reduce the amount of damages which are recoverable from the tortfeasor.
>
> 880 S.2d at 560.

¶40. Contrary to Florida, North Dakota's no-fault offset statute does not require the jury to first reduce the verdict by no-fault benefits already paid or payable. As stated, the North Dakota statute requires the opposite result, i.e., that no-fault benefits be deducted after damages payable by UIM coverage are determined, which can only be determined by first offsetting/reducing the damages by the fault of Hiltner and Jeffries in this case.

¶41. As argued above, the past economic damages sustained by Hiltner must first be reduced by the amount of comparative fault attributable to the person recovering (Hiltner) and then other persons for whom Owners is not responsible (Jeffries), in order to arrive at the potential damages payable by the UIM insurer, Owners, after which the personal injury or no-fault benefits must then be offset. N.D.C.C. § 32-03.2-02 and 26.1-40-15.4(1).

¶42. Hiltner's reliance on the Florida Supreme Court's decision in Norman is misplaced. The statutory schemes in Florida and North Dakota are vastly different, and, in fact, completely opposite from each other.

II. THE ARGUMENTS ADVANCED BY THE AMICUS CURIAE ARE MISPLACED.

¶43. The Amicus Curiae, North Dakota Association for Justice, (Amicus), has filed a brief in support of Hiltner's position with respect to whether the reduction for no-fault benefits paid should come before or after the offset for comparative and other fault. The Amicus brief goes on at length arguing that the Court should harmonize the No-Fault Act and the Comparative Fault Statute to further their respective public policy interests. Amicus brief, ¶¶ 2-12. In a confusing and somewhat convoluted manner, Amicus then interjects into the argument the secured person exemption set forth in the No-Fault Act which really only convolutes a rather simple reading of the plain language of the above North Dakota's Comparative Fault and No-Fault Offset Statutes. As set forth above, the language of 26.1-40-15.4(1) and 32-03.2-02 when in read in conjunction with each

other do not thwart the public policy of either the No-Fault Act or the Comparative Fault Act. Rather, our modified Comparative Fault Statute clearly provides that "any damages allowed" must be diminished in proportion to the amount of contributing fault attributable to the person recovering. N.D.C.C. § 32-03.2-02. The No-Fault Reduction Statute provides that "any damages payable" for underinsured motorist coverage must be reduced by the no-fault benefits paid. N.D.C.C. § 26.1-40-15.4(1). There is absolutely nothing in either statute that provides any consideration for the secured person exemption when calculating the damages Hiltner is entitled to recover in this case. The no-fault reduction mandated by N.D.C.C. § 26.1-40-15.4(1), is clearly to prevent a double recovery by Hiltner of economic loss damages when she has already been paid for some of those same losses/damages by her no-fault insurance as is the case here.

¶44. Owners does not dispute that the public policy of the North Dakota No-Fault Act (Chapter 26.1-41, *et. seq.*, N.D.C.C.) is to provide adequate compensation for victims of motor vehicle accidents. (Amicus Brief, ¶3). Owners, likewise, does not dispute that the purpose of the Comparative Fault Statute is to replace joint and several liability with several allocation of damages and responsibility among those who commit torts in proportion to the fault of those who contributed to an injury. (Amicus Brief, ¶8).

¶45. Finally, Owners does not dispute that the Comparative Fault Statute and No-Fault Offset Statute need to be read in harmony. However, Amicus's attempt at harmonizing the two statutes is nothing more than a red herring

intended to divert the Court's attention away from the plain and unambiguous reading of the Comparative Fault and No-Fault Offset Statutes.

¶46. Amicus directs this Court's attention to several "examples" which Amicus claims "articulate this interplaying and explain why Courts must first apply the specific no-fault deduction for applying the general Comparative Fault Statute reduction." (Amicus Brief, ¶ 12).

¶47. Amicus first contends that reducing economic damages by comparative fault prior to deducting no-fault benefits from economic damages leads to absurd, illogical, and unworkable results . . ." (Amicus Brief, ¶. 12) Amicus then attempts to illustrate how a reduction for comparative fault prior to the deduction of no-fault benefits leads to an absurd result. (See Figure 1. Amicus Brief, ¶12).

¶48. First and foremost, it is not clear how the Amicus came up with a "negative liability" as is purportedly illustrated in Figure 1, (Amicus ¶12) of its brief. The problem with Amicus's argument contesting the reduction for comparative fault prior to reduction of no-fault benefits, as set forth in Figure 1 of its brief, is that the North Dakota Modified Comparative Fault Statute, N.D.C.C. § 32-03.2-02, specifically requires that damages awarded be reduced by the comparative fault before the no-fault offset as set forth in Figure 1, (Amicus ¶12). In other words, if a plaintiff is awarded $35,000.00 in damages and plaintiff is found to be 20% at fault, plaintiff is only entitled to 80% of the $35,000.00 awarded. By no means does this result in a negative liability for a defendant who

is 80% at fault. The 80% liable defendant pays damages based on his percentage share of liability. N.D.C.C. § 32-03.2-03. A plaintiff would not owe the defendant money in that scenario as Amicus suggests. Rather, a judgment of no damages would simply be entered. That happens frequently. Amicus's calculations in Figure 1 are clearly flawed.

¶49. Amicus's calculations in Figure 2 of its brief (Amicus Brief, ¶15) are likewise flawed. Figure 2 does not "articulate" the proper statutory construction calculating the judgment to be entered in this case. (Amicus Brief, ¶15). Per N.D.C.C. § 26.1-40-15.4(1), Hiltner is not entitled to an offset of no-fault benefits paid prior to a reduction for comparative fault. Such a calculation advanced by Amicus undeniably would result in a windfall recovery for Hiltner for a portion of economic loss damages she has already been paid by her no-fault insurer. Rather, Owners is entitled to, first, a reduction of Hiltner's 20% fault and Jeffries' 25% fault then followed by the no-fault benefit paid reduction. That is expressly what reading the two statutes together results in. That is the clear and precise formula provided in N.D.C.C. § 26.1-40-15.4(1), the specific statute involved in this dispute. See, N.D.C.C. § 1-07-07.

¶50. Amicus's argument at ¶ 17 of its brief and the calculation in Figure 3 (Amicus Brief, ¶ 17) is also flawed. Amicus's argument relies entirely on the fact that both defendants are secured persons, "that there is no dispute that the plaintiff can only recover $70,000.00 in economic damages because both defendants are secured persons." (Amicus Brief, ¶17).

¶51. What Amicus's argument fails to consider is that Hiltner can never recover from the passenger, Joshua Jeffries, in this case because Hiltner never sued Jeffries, nor named Jeffries as a defendant. Rather, the fault of Jeffries is apportioned and deducted as respects Owners, pursuant to N.D.C.C. § 32-03.2-02, which reduces the amount Owners is obligated to pay, as the responsibility of Owners in this case is several only, and not joint. Owners' liability is based strictly upon the fault of Denault (the driver of the underinsured vehicle) and cannot be based upon any separate causal fault of Jeffries. In fact, Hiltner does not contend that Owners should be liable for payment of UIM benefits to her based upon any fault of Jeffries. See, Hiltner's Position", ¶ 14, *supra*.

¶52. Only after the "damages allowed" (N.D.C.C. § 32-03.2-02), are reduced by the fault attributable to both Hiltner and Jeffries, do we arrive at the amount of the "damages payable" (by Owners under UIM coverage), which, as stated above, must then be further reduced by no-fault benefits paid to Hiltner, pursuant to the plain and unambiguous language of N.D.C.C. § 26.1-40-15.4.

¶53. Again, Amicus's argument in its convoluted figures are entirely misplaced and without merit. The issue now before this Court involves only the interplay of North Dakota's Modified Comparative Fault Statute found at § 32-03.2-02 and North Dakota's No-Fault Offset Statute for UIM coverage found at § 26.1-40-15.4(1). Amicus's 15-page brief is, again, nothing more than a red herring attempting to confuse and divert this Court's attention from a plain and simple reading of the clear and unambiguous North Dakota's statutes involved in

this case, and how the two are easily construed together to achieve the fair and just result intended by the Legislature.

¶54. Finally, Amicus argues that "the majority of other no-fault jurisdictions have already answered 'yes' to the certified question." (Amicus Brief, ¶23). Amicus then directs this Court's attention to Hickenbottom v. Schmidt, 626 P.2d 726. (Colo. Ct. App. 1981), Norman v. Farrow, 880 So. 2d 557 (Fla. 2004), and Weite v. Momohara, 240 P.3d 899 (Haw. Ct. App. 2010).

¶55. As noted above, Norman v. Farrow is clearly distinguishable from the present case because the statutory language before the Court in Norman is not similar to (and, in fact, opposite from) the statutory language at issue in the North Dakota Comparative Fault and No-Fault Offset Statutes cited above. Likewise, the statute relied upon in Hickenbottom was repealed by the Colorado Legislature in 1997, long before the accident in the present case occurred. In Weite, the Hawaii Court of Appeals held that the reduction for the covered loss deductible was to be done before the apportionment of fault because the statute at issue in Weite mandated that the "award shall be reduced by . . . the amount of PIP benefits." The Hawaii statute does *not* state that the award should be reduced after apportionment by the amount of PIP benefits. The CLD's ("covered loss deductibles", i.e., similar to no-fault) are to be deducted from the total damages awarded by the trier of fact prior to the apportionment of damages. Weite, 240 P.3d at 923. In the present case, the language of North Dakota's Comparative Fault Statute and the UIM No-Fault Offset Statute read entirely different than the

statute at issue in Weite. North Dakota's modified Comparative Fault Statute specifically provides for the deduction of comparative fault of the plaintiff and the fault of others from any damages assessed or found against the party sued in the action. Those damages, after the deduction for a plaintiff's comparative fault and the fault of others, are the "damages payable" by UIM, which are then reduced by no-fault benefits paid as set forth and mandated in § 26.1-40-15.4(1), in order to prevent a double recovery to that extent. Amicus's reliance on the "majority of other jurisdictions" is in error and without merit. There is no such majority positon interpreting a statute similar to the North Dakota no-fault offset statute, N.D.C.C. § 26.1-40-15.4(1).

CONCLUSION

¶56. Based upon the foregoing argument and authority, Owners respectfully submits that this Court should answer "no" to the certified question presented to it by the United States District Court, for the District of North Dakota, the Honorable Ralph R. Erickson, District Judge presiding, so that the past economic loss damages found by the District Court in this case are first reduced by the comparative fault of Hiltner and the fault of Jeffries, neither of which, indisputably, Owners pays for. Offsetting the past economic damages award first by the fault of Hiltner and Jeffries (for which Owners is not liable) would then result in the "damages payable" by Owners under its UIM coverage which Hiltner would be potentially entitled to recover from Owners based upon the fault of the underinsured driver, Denault, which is all Owners is potentially liable for

regarding its UIM coverage. N.D.C.C. § 26.1-40-15.3. That figure, then, provides the ceiling amount of the "damages payable" by Owners. Thus, it is entirely proper, and in fact mandatory under N.D.C.C. § 26.1-40-15.4(1), that that net amount of "damages payable" then be offset and reduced by the $30,000.00 no fault benefits paid to Hiltner by her no-fault insurer, in order to prevent a double recovery by Hiltner to that extent.

¶57. Only by applying the percentage of fault and no-fault benefits paid offsets, in the order and fashion urged by Owners, is the plain and unambiguous language of N.D.C.C. § 26.1-40-15.4(1) complied with. To do otherwise, as urged by Hiltner and Amicus, would be to disregard the clear and unambiguous language of N.D.C.C. § 26.1-40-15.4(1), which a Court cannot do under the pretext or guise of pursuing the spirit of the statute. See, N.D.C.C. § 1-02-05.

¶58. Accordingly, Owners respectfully requests that this Court answer the certified question of law "no" and that this Court hold and determine that the past economic damages in this case be first reduced or deducted by the comparative fault of Hiltner and the fault of the passenger, Jeffries, before reducing or deducting that net amount further by the no-fault benefits paid to Hiltner. This is the position and formula advanced and urged by Owners in this case, and which the United States District Court agrees is the appropriate method of applying the offsets.

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Respectfully submitted this 21st day of November, 2014.

/s/ Michael J. Morley

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