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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

AMY HILTNER,

Plaintiff-APPELLANT,

vs.

OWNERS INSURANCE COMPANY,

Defendant – APPELLEE.

Supreme Court No. 2014-0308
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

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

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

[1] By Complaint dated January 26, 2012 venued in the Cass County, North Dakota District Court, Hiltner commenced an action for Under Insured Motorist benefits, pursuant to N.D.C.C. §26.1-40-15.1 ff.

[2] Owners Insurance Company provided Hiltner's Under-Insured coverage in a policy issued to her father.

[3] She had, previously, exhausted the automobile liability limits of the policy of the driver, Samantha Denault.

[4] Owners removed the action to the U.S. District Court for North Dakota.

[5] The case was tried to the Court, the Honorable Ralph R. Erickson, on December 4, 2013.

[6] After receipt of a transcript of the proceedings, the parties submitted written closing arguments on January 21, 2014.

[7] On August 14, 2014, Judge Erickson issued lengthy and exhaustive Findings of Fact, Conclusions of Law. (App. pp. 1-12).

[8] His Order allowed the parties fourteen (14) days in which to stipulate to the amount of No-Fault benefits to be offset and to stipulate or agree as to how the offset was to be calculated.

[9] As noted below, Hiltner and Owners agreed on the No-Fault benefits paid, but differed on calculating the offset.

[10] By N.D.R.App.P. 47 Order on August 29, 2014, Judge Erickson certified the above issue to this Court.

STATEMENT OF THE FACTS

[11] Judge Erickson apportioned the fault as follows:

Driver/Insured Samantha Denault	55%
Passenger Joshua Jeffries	25%
Plaintiff Amy Hiltner	20%

[12] He then awarded Hiltner the following damages:

Past Economic Damages	$101,874.69
Future Economic Damages	$175,000.00
Noneconomic Damages	$ 75,000.00

[13] This dispute involves only the past economic damages awarded by the trial court. The parties' respective positions are shown by the following:

HILTNER'S POSITION:

Past Economic Damage	**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's fault)*	**$39,531.08** *(past economic damages award Hiltner)*

OWNER'S POSITION:

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

ARGUMENT

I. N.D.C.C. § 26.1-40-15.4(1)(b) IS AMBIGUOUS

[14] N.D.C.C. § 26.1-40-15.4(1)(b) provides:

> 1. Any damages payable to or for any insured for underinsured 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.)

[15] Hiltner agrees that N.D.C.C.§32-03.2-02 limits her recovery against Owners to the 55% fault allocated to Denault.

[16] Similarly, she acknowledges that a reduction of her economic award of $101,874.69 by the $30,000 in No-Fault benefits is appropriate.

[17] Hiltner is not seeking to make a double recovery. Rather, Owners urges a construction of § 26.1-40-15.4(1)(b) that would deprive Hiltner of a full recovery and result in it receiving a $13,000 windfall.

[18] In the one case addressing § 26.1-40-15.4(1)(b), this Court affirmed the trial court's refusal to grant American Family's request for an offset.

[19] Justice Sandstrom, writing for the unanimous Court, states:

> "Although Hartman is not entitled to double recovery for economic damages, the trial court's explanation indicates that she has not received a double recovery for economic damages. We are not persuaded the trial court abused its discretion in refusing American Family's request for an offset." *Hartman v. Miller,* 2003 N.D. 24, 656 N.W.2d, 676 (2003 at ¶25, p. 684)

[20] Indeed, the Legislative History of the section supports Hiltner's position. In his testimony to the Conference Committee noted insurance industry lobbyist Tom Smith stated:

> "The best way of understanding this may be through an example. Assume, for the sake of discussion, that an uninsured driver runs into someone and seriously injures them. The injured person, who is insured, receives $30,000 in basic no-fault benefits. It is determined that as a result of the motor vehicle accident, the injured person's total damages are $100,000. The injured person also has available $100,000 in uninsured motorist coverage. The Senate amendment, by deleting the existing language, would allow the injured person to recover the entire $100,000 even though he has already been paid $30,000 in no-fault benefits. This results in duplicate benefits being paid. Subsection 1, if left in the Bill, would require the total damages of $100,000 to be reduced by the $30,000 in no-fault benefits that had been paid. Then the injured person would only be entitled to recover $70,000 in damages for which he has not been paid.
>
> The injured person is actually compensated for his damages. The only purpose of subsection 1 is to avoid a potential duplication for recovery of the same loss."
>
> H.B. 1155, 1993 Sess., "Statement of Conference Committee on Engrossed Bill 1155, p. 5. See N.D.C.C. §§1-02-38(3) and 1-02-39(3), (5), *City of Fargo v. Ness*, 529 N.W.2d 572 (1995).

II. OWNERS RELIANCE ON AND JUDGE ERICKSON'S REFERENCE TO *LeBARON V. HANSON,* 374 N.W.2D 197 (Minn. Ct. App. 1985) ARE MISPLACED.

[21] Minn. Stat. §65B.51(1), *in 1985*, provided that:

> "Deduction of basic economic loss benefits with respect to a *cause of action in negligence* accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by sections 65B.41 to

> 65B.71, there shall be deducted from any *recovery* the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible."
>
> Minn.Stat. §65B.51, subd. 1 (1984) (emphasis added).

[22] "[That section] must be read in conjunction with Minn. Stat. §604.01(5) (1984), which mandates a reduction of *recovery* by the amount of fault attributable to the injured party, prior to any offset for payments previously received." *LeBaron v. Hanson*, 374 N.W.2d, 197, 198, citing cases.

[23] §65B.51(1) refers to "a cause of action in negligence." Hiltner's claim is based on the insurance contract between Owners and her father.

[24] Secondly the value of basic or optional economic loss benefits "…shall be deducted from any *recovery*…"

[25] The Minnesota legislature's choice of "recovery" led to conflicting results and indefensible outcomes.

[26] Recognizing the mischief caused by its unfortunate choice of words, the 1990 legislature amended §65B.51(1) by adding:

> "In any case where the claimant is found to be at fault under Section 604.01, the deduction for basic economic loss benefits must be made *before* the claimant's damages are reduced under Section 604.01(1)."

[27] Contrast "recover" with N.D.C.C. §26.1-40-15.4(1)(b)'s "…Amounts paid or payable."

[28] In *Norman v. Farrow*, 880 So. 2d 557 (2004), the Florida Supreme Court construed Florida Statutes §627.736(3) containing "paid or payable" language (virtually identical to N.D.C.C. §26.1-40-15.4(1)(b) as it related to its comparative fault statute at Florida Statutes §768.8(2).

[29] The *Norman* Court held, at pp. 560-561 that:

> "Reading these statutes in conjunction, we find that pursuant to section 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 noneconomic damages awarded should be added and then the percentage of comparative negligence found by the trier of fact is to be applied to reduce the amount of damages which ***561**561 are recoverable form the tortfeasor. The remainder is the amount of the judgment."

[30] It should be noted that the Florida Supreme Court specifically disapproved the contrary result in *Assi v. Florida Auto Auction of Orlando, Inc.*, 717 So.2d 588 (Fla. 5th DCA, 1998). See also *Hibbard v. McGraw,* 918 So. 2d 967, 973 (Fla., 2005).

[31] It is eminently reasonable to invoke the setoff at the point where Judge Erickson awarded past economic damages of $101,874.69.

[32] Applying the statutory offset thereafter and before the reduction for Hiltner's fault is more appropriate and reasonable than that championed by Owners, and it avoids the injustice of Owners' construction.

CONCLUSION

[33] Upon the foregoing analysis, Hiltner respectfully requests that the Court answer Judge Erickson's certified question "Yes."

Dated: October 10, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance totals 1,379.

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STATE OF MINNESOTA)
) ss
COUNTY OF CLAY)

The undersigned, being first duly sworn, deposes and says that: I am as United States citizen, over 18 years of age, not a party to nor interested in the above-entitled matter, and that on the 7th day of October, 2014 I served a copy of the attached:

Brief of Appellant and Appelant's Appendix

by electronic mail upon counsel at the below:

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Subscribed and sworn to before me this 7th day of October, 2014.

Notary Public

KEITH L. MILLER
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2019

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Brief of Appellant

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