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10/2/03
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2003 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1190

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1190

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1/27/03

Tape Number	Side A	Side B	Meter #
1	x		0.00-52.5
4	x		0.0-6.8
Committee Clerk Signature	Judith Hammer		

Minutes: **Chairman Keiser** opened the hearing on HB 1190.

Rod Hovland, Chairman of the ND Domestic Insurers Association, appeared in support of this proposed legislation. **(See attached)**

Rep. Ekstrom: Is no fault insurance working? If not, is there any consideration for increasing the penalty for driving while uninsured?

Hovland: No, it is not. In answer to your second question, a fine is cheaper than insurance premiums to those drivers who take the risk of driving while uninsured.

Patrick Ward, Zuger, Kirmis & Smith, appeared in support of HB 1190. He offered proposed amendments as well. **(See attached)**

Rep. Ekstrom: Please explain "unrelated convictions" It seems too broad.

Ward: We didn't want for the particular incident (the basis of the personal injury lawsuit) to be the same incident where the person gets a conviction for driving without insurance. Other legislation to be introduced this session would increase the fine for driving without insurance.

Rep. Thorpe: Please explain the glass/hail total damage language in Section 5.

Ward: The point is to address hidden defects, there is no need for a salvage title for cosmetic damage.

John Olson, ND Trial Lawyers Association, appeared to oppose HB 1190 and was prepared to give oral testimony. However, with the proposed amendments from Ward, he allowed that the Trial Lawyers Ass'n would henceforth hold a neutral position. He introduced Rod Pagel, who elaborated on various aspects of this proposed legislation.

Rod Pagel, Pagel & Weikman Law Firm, appeared to oppose HB 1190 and gave oral testimony.

Chairman Keiser: Are there occasions when someone settles out of court rather than adjudicate?

Pagel: It happens every day.

John Risch, United Transportation Union, appeared and gave oral testimony in opposition to HB 1190. He stated that a salvage title is worth far less than a vehicle without a salvage title.

As no one else was present who wished to testify on HB 1190, the hearing was closed.

Prior to taking up hearings scheduled for the afternoon, **Chairman Keiser** called for committee work on HB 1190.

It was suggested that all of Section 4 be deleted in the proposed amendments because that issue does come up in another bill.

Rep. Tieman moved to adopt the amendments as submitted by Patrick Ward. **(See attached)**

Rep. Johnson seconded the motion. A voice vote carried this motion.

Rep. Klein: What does this amendment do in Sections 1 & 2? If you're going to sue and the attorney takes his 40 or 50 per cent, you don't get what's due you. I don't think we're doing the right thing.

Rep. Ekstrom: I agree with Rep. Klein.

Chairman Keiser: If you're not happy with what your insurance company does, you can sue the other company and your insurance company will subrogate any of the winnings you had to pay for any part they have paid for. What this addresses is this: it is unfair is if the other party is uninsured or under insured and in that scenario you get your portion paid up to the limit, you then must sue your own insurance company to get the rest of your damages. Whatever the outcome, you'll get your attorney fees paid, if you have a good claim

It was decided to delay taking immediate action on HB 1190 so that further information and input can be brought to the committee from those who testified today.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1190

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 2/4/03

Tape Number	Side A	Side B	Meter #
3	x		50.0-end
3		x	0.0-14.5
Committee Clerk Signature	Judith Hanna		

Minutes: **Chairman Keiser** called for committee work on HB 1190.

Rep. Severson led discussion on the amendments proposed by Pat Ward at the initial hearing. The intent is to create a lesser but reasonable cost only if the insured is the prevailing party. Insurance companies prefer the language to remain as is. The second amendment states that "the insured and insurer each bear" be replaced with " the prevailing party's" recovery costs of litigation not to exceed one third of the damages.

Rep. Klein: What is the basic difference between these two options?

Rep. Severson: The first option allows the prevailing party to receive, or their lawyer, reasonable costs, the second option limits it to one third of the damages awarded.

Rep. Klein moved to adopt amendment option 1.

Rep. Ruby seconded the motion.

Rep. Ekstrom: What about the consumer protection issues regarding 75% valuation for hail damage in Section 5? We can wait till this gets over to the Senate to address that iss e.

Rep. Thorpe: There is reaction to this 75% hail damage, it seems excessive. I don't know if it should be a a dollar amount or a percentage. This damaged title issue is tough.

Rep. Kasper: Pat Ward said that the original bill would be the best "vehicle" to reduce the possibility and number of frivolous lawsuits.

Rep. Klein: A damaged title should reflect structural not cosmetic damage.

Rep. Dosch: As far as consumer protection is concerned, it bothers me that a policy holder has to sue his own company in order to get the coverage you've paid for.

Results of a roll call vote to adopt Amendment Option 1 were: 6-8-0. The motion failed.

Rep. Severson moved a **Do Pass As Amended** on the originally proposed amendments.

Rep. Ekstrom seconded the motion.

Results of the roll call vote were: 10-4-0.

Rep. Severson will carry this bill on the floor.

VR 2/6/03

30334.0101
Title.0200

Adopted by the Industry, Business and Labor Committee
February 4, 2003

HOUSE AMENDMENTS TO HOUSE BILL NO. 1190 **IBL 2-6-03**

Page 1, line 1, after the second "to" insert "section"

Page 1, line 3, replace "section" with "sections" and remove ", subsection 1 of section"

Page 1, line 4, remove "32-03.2-02.1," and remove "section"

HOUSE AMENDMENTS TO HB 1190 **IBL 2-6-03**

Page 2, remove lines 6 through 9

Renumber accordingly

Date: 2/4/03
Roll Call Vote #:

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1190

House **Industry, Business & Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Adopt as Amend

Motion Made By Klein Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser		✓	Rep.Boe	✓	
Rep.Severson, Vice-Chair		✓	Rep.Ekstrom		✓
Rep.Dosch		✓	Rep.Thorpe	✓	
Rep. Froseth		✓	Rep. Zaiser		✓
Rep. Johnson		✓			
Rep.Kasper		✓			
Rep. Klein	✓				
Rep. Nottlestad	✓				
Rep. Ruby	✓				
Rep.Tieman	✓				

Total (Yes) 6 No 8

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

amendment failed

Date: 2/4/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1190

House **Industry, Business & Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30334.0101 .0200

Action Taken Do Pass As Amended

Motion Made By Severson Seconded By Ekstrom

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Rep.Boe		✓
Rep.Severson, Vice-Chair	✓		Rep.Ekstrom	✓	
Rep.Dosch		✓	Rep.Thorpe	✓	
Rep. Froseth	✓		Rep. Zaiser	✓	
Rep. Johnson	✓				
Rep.Kasper	✓				
Rep. Klein		✓			
Rep. Nottlestad	✓				
Rep. Ruby		✓			
Rep.Tieman	✓				

Total (Yes) 10 No 4

Absent Ø

Floor Assignment Severson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 6, 2003 3:59 p.m.

Module No: HR-23-1913
Carrier: Severson
Insert LC: 30334.0101 Title: .0200

REPORT OF STANDING COMMITTEE

HB 1190: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1190 was placed on the Sixth order on the calendar.

Page 1, line 1, after the second "to" insert "section"

Page 1, line 3, replace "section" with "sections" and remove ", subsection 1 of section"

Page 1, line 4, remove "32-03.2-02.1," and remove "section"

Page 2, remove lines 6 through 9

Renumber accordingly

2003 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1190

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1190

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 03-18-03

Tape Number	Side A	Side B	Meter #
1	xxx		0-end

Committee Clerk Signature Lisa VanBerkom

Minutes:Chairman Mutch opened the hearing on HB 1190. Senator Espegard was absent.

HB 1190 relates to motor vehicle accidents and salvage certificates of title.

Testimony in support of HB 1190

Pat Ward, Domestic Insurance Companies, introduced the bill. See written testimony.

There were no questions from the committee.

Rob Hovland, North Dakota Domestic Insurers Program, also spoke in support of the bill. See written testimony. There were no questions from the committee.

Testimony in opposition of HB 1190

Charles Edin, attorney in Bismarck, spoke in opposition to the bill. See testimony.

He spoke of a case Hartman v. American Family Mutual Insurance Company.

See attached.

Senator Heitkamp: Isn't Jamie Hartman's age a factor in why she is covered under her mom's insurance?

Robert Bolinske, attorney in Bismarck, also spoke in opposition. He stated that he used to work with Pat Ward and represented insurance companies. He states that the insurance company holds the power and this is not a housekeeping bill.

Paula Grosinger, Trial Lawyers Association, spoke in opposition. Many of these claims amount in less than $5,000. I would say that far and away insurance companies are willing to gamble that claimants won't prevail or even take cases to trial. So that way they can hang on to claim dollars and collect interest. I would like to introduce Rod Pagel.

Rod Pagel, ND Trial Lawyers Association, spoke in opposition. Rule 68 is a civil rule of procedure. That provides for attorney fees to be paid back from the party I won, with a motion to a court. Typical medical expenses and depositions costs add up.

Senator Heitkamp: Rob Hovland said ND is an island in the insurance business, is that a reality?

Pagel: I do not believe so. I am not sure. I know there are other states that research the issue.

Senator Christman: See handout. He was neutral to the bill.

Senator Heitkamp: Rod Pagel, you mention that you are going to get paid either way. If the person who was harmed, will she be less likely to even bring this suit in your opinion?

Pagel: Yes, but it will be hard to find an attorney to cover the case.

Senator Krebsbach: Where are we in relation to other states?

Rob Hovland: All states have U.M. but 32 have opt-out. Eighteen do not have an opt-out option. Eighteen states it is mandatory. We can get you a summary

Hearing closed. No action taken at this time.

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1190

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 03-25-03

Tape Number	Side A	Side B	Meter #
1		xxx	0-200
Committee Clerk Signature			

Minutes:Chairman Mutch opened the discussion on HB 1190. All Senators were present.

HB 1190 relates to motor vehicle accidents and salvage certificates of title.

The committee viewed the amendments proposed by Pat Ward.

Senator Klein moved to adopt the amendments. Senator Krebsbach seconded.

Roll Call Vote: 7 yes. 0 no. 0 absent.

Senator Krebsbach moved a DO PASS AS AMENDED. Senator Klein seconded.

Roll Call Vote: 5 yes. 2 no. 0 absent.

Carrier: Senator Every

30334.0201
Title.0300

Adopted by the Industry, Business and Labor Committee

March 25, 2003

3-25-03

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1190

Page 1, line 10, after "otherwise" insert "or the insurance company is found to have acted in bad faith"

Page 1, line 17, after "otherwise" insert "or the insurance company is found to have acted in bad faith"

Renumber accordingly

Date: 3-25-03
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate 1190 Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Amendments from Sen. Klein

Motion Made By Klein Seconded By Krebsbach

Senators	Yes	No	Senators	Yes	No
Mutch	X				
Klein	X				
Krebsbach	X				
Nothing	X				
Heitkamp	X				
Evert	X				
Espegaard	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 3-26-03
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate 1190 Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass As Amended

Motion Made By Krebsbach Seconded By Klein

Senators	Yes	No	Senators	Yes	No
Mutch	X				
Klein	X				
Krebsbach	X				
Nething		X			
Heitkamp		X			
Every	X				
Espegaard	X				

Total (Yes) 5 No 2

Absent 0

Floor Assignment ~~No carrier yet.~~ Every

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 26, 2003 8:31 a.m.

Module No: SR-54-5769
Carrier: Every
Insert LC: 30334.0201 Title: .0300

REPORT OF STANDING COMMITTEE

HB 1190, as engrossed: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1190 was placed on the Sixth order on the calendar.

Page 1, line 10, after "otherwise" insert "or the insurance company is found to have acted in bad faith"

Page 1, line 17, after "otherwise" insert "or the insurance company is found to have acted in bad faith"

Renumber accordingly

2003 HOUSE INDUSTRY, BUSINESS AND LABOR

CONFERENCE COMMITTEE

HB 1190

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1190

House Industry, Business and Labor Committee

☑ Conference Committee

Hearing Date April 8, 2003

Tape Number	Side A	Side B	Meter #
1	x		31.0-35.7

Committee Clerk Signature Judith Hammer

Minutes: **Conference Committee Chairman Severson** called the meeting to order. All appointed committee members were present: Senators Klein, Mutch & Every and Representatives Severson, Tieman and Thorpe.

Representative Severson stated that the purpose of the conference committee was to come to agreement over the amendments that the Senate added to the bill. He stated that upon further research, the House IBL now understands the intent of those amendments and no longer has any problems with them.

Senator Klein stated that the amendments were drafted by Pat Ward, legal counsel representing North Dakota Domestic Insurance Companies. Some of the testimony presented during the Senate hearings dealt with a case whereby a company had acted in bad faith. These amendments came in to address that issue so that a company acting in bad faith would be liable for the attorneys fees.

Rep. Tieman stated that he understands the insurance industry is on record as supporting the legislation as now proposed.

Rep. Tieman moved that the House accede to the Senate amendments, version .201.

Rep. Thorpe seconded the motion to accede.

A voice vote was unanimous: 6-0.

The conference committee adjourned.

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE) - 420

07398

(Bill Number) HB 1190 (, as (re)engrossed):

Your Conference Committee

For the Senate: 4/8	For the House: 4/8
Sen J Klein P	Rep Severson P
Mutch	Tieman P
Every P	Thorpe P

☒ recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from) the (Senate/House) amendments on (SJ/HJ) page(s) 1142 - 1142

☒ and place HB 1190 on the Seventh order.

☐ , adopt (further) amendments as follows, and place _____ on the Seventh order:

☐ having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: 4/8/03

CARRIER: Severson

LC NO. _____ . _____ of amendment

LC NO. _____ . _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

REPORT OF CONFERENCE COMMITTEE (420)
April 8, 2003 3:36 p.m.

Module No: SR-63-7121

Insert LC: .

REPORT OF CONFERENCE COMMITTEE

HB 1190, as engrossed: Your conference committee (Sens. Klein, Mutch, Every and Reps. Severson, Tieman, Thorpe) recommends that the **HOUSE ACCEDE** to the Senate amendments on HJ pages 1142-1142 and place HB 1190 on the Seventh order.

Engrossed HB 1190 was placed on the Seventh order of business on the calendar.

2003 TESTIMONY

HB 1190

PAT WARD 2/4
Opt 1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1190

Page 1, line 9, replace "and the insurer each bear" with "is entitled to an award of reasonable costs of litigation only if the insured is the prevailing party. Reasonable costs of litigation in a claim for uninsured motorist benefits may not exceed one-third of the total amount of damages."

Page 1, remove line 10

Page 1, line 11, remove "specifically provides otherwise."

Page 1, line 15, replace "and the insurer each" with "is entitled to an award of reasonable costs of litigation only if the insured is the prevailing party. Reasonable costs of litigation in a claim for underinsured motorist benefits may not exceed one-third of the total amount of damages."

Page 1, remove line 16

Page 1, line 17, remove "contract specifically provides otherwise."

Renumber accordingly

Opt 2 2/5

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1190

Page 1, line 9, replace "the insured and the insurer each bear" with "only the prevailing party may recover costs of litigation, not to exceed one-third of the total amount of damages."

Page 1, remove line 10

Page 1, line 11, remove "specifically provides otherwise."

Page 1, line 15, replace "the insured and the insurer each" with "only the prevailing party may recover costs of litigation, not to exceed one-third of the total amount of damages."

Page 1, remove line 16

Page 1, line 17, remove "contract specifically provides otherwise."

Renumber accordingly

TESTIMONY - House Bill 1190

My name is Rob Hovland. I am currently serving as chairman of the North Dakota Domestic Insurers Association, which is comprised of 10 insurance companies that have a home office in North Dakota. The domestic companies affected by this bill are Nodak Mutual, Farmers Union, Dakota Fire, Hartland Mutual, and the company that I work for, Center Mutual.

In 1987, the North Dakota legislature mandated that every personal auto insurance policy, and most commercial auto policies, include uninsured motorist coverage (UM) and underinsured motorist coverage (UIM). UM/UIM coverage applies when a policyholder is injured due to the fault of another driver, but the other driver does not have insurance (uninsured) or does not have enough insurance (underinsured.) It is insurance for your own injuries. In the event that an insurance company pays a policyholder UM/UIM benefits, the insurance company has a right of subrogation against the at-fault driver, meaning the insurer may pursue reimbursement from the at-fault driver. North Dakota is one of 18 states that require UM/UIM without giving the consumer the option of rejecting coverage.

The North Dakota Supreme Court has ruled that if an insurance company contests a UM/UIM claim, the insurance company has an inherent conflict of interest, and to resolve that conflict, must pay the claimant's attorneys' fees. In Fetch vs Quam vs American Hardware Mutual, the Court wrote,

"conflicts of interest will exist when an insurer intervenes in an action between its insured and an uninsured motorist to press all the defenses that the uninsured motorist could present . . . The trial court can defuse these conflicts by requiring the insurer to

furnish independent counsel to represent the insured on the insurers claims and defenses, or by requiring reimbursement of the insured's reasonable attorneys fees for those services."

Paying a litigant's attorneys' fees encourages litigation, discourages settlement, and increases the cost of insurance. There is no incentive to settle claims, particularly the less serious injury claims, and paying a litigant's attorneys' fees basically gives them a free shot at playing jury lottery.

In North Dakota, this is strictly a judicially created concept - nothing in the legislative history even remotely suggests that attorneys' fees where intended to be a part of UM/UIM claims. In fact, allowing attorneys' fees frustrates the purpose of the subrogation aspect of UM/UIM statutes because insurance companies are not allowed to pursue reimbursement of attorneys' fees from the at-fault party.

The vast majority of states do not require an insurance company to pay a litig 's attorneys' fees if the insurance company challenges the amount of the claim. Of the states that do require payment of attorneys' fees, it is usually if the insurance company is denying coverage (not counting Florida, which has a specific statute addressing attorneys' fees).

The effect of passing House Bill 1190 is that UM/UIM claims will be handled the way this legislature originally intended, and North Dakota will be more in line with mainstream America with respect to UM/UIM claims. We urge a Do Pass vote on this Bill.

Testimony of Patrick Ward in Support of HB 1190 in the House Judiciary Committee

My name is Patrick Ward. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies and other property and casualty insurers including State Farm and American Family Insurance in support of HB 1190.

Sections 1 and 2. Attorney fees in Uninsured and Underinsured Motor Vehicle Claims.

Section 26.1-40-15.2 of the North Dakota Century Code provides for uninsured motorist coverage. This is mandatory coverage in North Dakota which motor vehicle liability insurers are required to provide. The federal courts in North Dakota have determined that a judgment against an uninsured motorist conclusively establishes the liability of the insurance company under its underinsured motorist policy even if the company was not a party to the action against the uninsured motorist.

In essence, if an insurance company believes the allegedly negligent but uninsured driver has legitimate defenses and decides to intervene and provide a defense to the uninsured motorist, it steps into the shoes of that motorist and according to the North Dakota Supreme Court is able to assert all defenses

which the uninsured motorist may have been able to raise such as contributory negligence, assumption of risk, failure to mitigate damages and the like.

The North Dakota Supreme Court has implied that an insurance company that decides to intervene in an action and step into the shoes of the tortfeasor may be required to furnish independent counsel to its insured (who is also the plaintiff in the action against the uninsured motorist) or to pay the plaintiff's counsel reasonable attorney's fees.

The court did so in Fetch v. Quam v. American Hardware Mutual, 530 N.W.2d 337 (N.D. 1995). Fetch, an American Hardware insured, made an uninsured motorist claim for damages allegedly caused by Quam. American Hardware attempted to intervene in the case. The North Dakota Supreme Court ruled that American Hardware was within its rights to intervene in the case but wrote:

> Conflicts of interest will exist when an insurer intervenes in an action between its insured and an uninsured motorist to press all the defenses that the uninsured motorist could present. . . . The trial court can defuse these conflicts by requiring the insurer to furnish independent counsel to represent the insured on the insurer's claims and defenses, or by requiring reimbursement of the insured's reasonable attorney's fees for those services. American Hardware's duty to furnish independent counsel to Fetch or

> reimburse Fetch's reasonable attorney's fees . . . arises from its duty to defend its insured against a claim that would reduce or defeat its insured's claim.

This interpretation and result was clearly not the legislature's intent in adopting mandatory uninsured/underinsured motorist coverages. It confuses the insurers duty to defend an insured against liability claims by others with its responsibility to pay claims against uninsured motorists. The legislature originally required this coverage to give an injured party an option of recovering damages in situations where the at fault party did not have enough liability insurance.

Unfortunately, the Supreme Court's interpretation provides a disincentive to settlement and a windfall to plaintiffs in cases against uninsured motorists. It also possibly puts the insurance company at risk for bad faith or other extra contractual damages as a result of its claims handling or failure to settle the uninsured or underinsured claim. It would seriously impair an insurer's ability to defend less severe claims because of the risk of disproportionately high attorney's fees and costs. Requiring an insurer to pay the attorney's fees for both sides in litigation encourages litigation, discourages settlement, and was clearly not the original intent of the legislature. One of the fundamental principles of the American system is that each side pays its own attorneys' fees.

We believe the intent of the legislature can be clarified by adding a new subsection to the uninsured and underinsured statutes which provides that each party shall bear their own attorney's fees incurred, unless the insurance contract specifically provides otherwise. Sections 1 and 2 of HB 1190 would also provide that it is not a conflict of interest or bad faith for an insurer to contest and press defenses that the uninsured or underinsured motorist could press.

To our knowledge, no other state has a similar extension of its law as unfair to the insurance company in the uninsured and underinsured motorist context as this one. In addition, it creates an unfair situation in that a plaintiff who obtains a small recovery of say a few hundred or thousand dollars may nevertheless be awarded thousands of dollars of attorney's fees whereas the same or a similarly damaged plaintiff hit by an adequately insured driver must pay attorney's fees out of his or her settlement.

Section 3. Driving without liability insurance.

Section 26.1-41-20 of the North Dakota Century Code was enacted in 1999 as a modified form of no pay, no play. It provided that in any action against a secured person (a person covered by no fault insurance) to recover damages because of

accidental bodily injury arising out of the ownership or operation of a secured motor vehicle, the secured person would not be assessed damages for non-economic loss (pain and suffering, mental anguish, etc.) for a serious injury in favor of a party who had at least two convictions for driving without insurance and was operating a motor vehicle without insurance at the time of the motor vehicle accident on which the lawsuit is based.

The 1999 Legislation provided that it would sunset on July 31, 2003. Section 3 of HB 1190 is offered to remove the sunset provision from that statute and also to strengthen the statute by lowering the number of prior convictions required from two to one. The statute has had very little use in North Dakota because it is quite unusual that an individual involved in a motor vehicle accident who is driving without insurance is found to have two prior convictions for driving without insurance. The insurance industry believes it would be more appropriate as a deterrent to provide that the no pay, no play statute come into effect if there is one prior conviction unrelated to the motor vehicle accident which is the basis of the lawsuit for personal injuries. . . .The idea is to encourage more people to carry liability insurance to protect others. The problem of uninsured drivers is widespread and growing.

Section 4. Exception to comparative fault statute in small property damage cases.

Section 4 of HB 1190 amends § 32-03.2-02.1 of the Century Code regarding small property damage cases where there is no bodily injury claim. The purpose of the amendment is to clarify that in such accidents when a third party no tat fault can recover from the party primarily at fault if more than two people are involved in the collision and the other criteria are met. This is the same as HB 1263. Section 4 should be deleted from HB 1190.

Section 5. Salvage title.

Section 39-05-20.2 of the North Dakota Century Code provides for when an owner of a motor vehicle damaged in excess of 75% of its retail value is required to forward the title to the Motor Vehicle Department for the issuance of a salvage certificate of title. After the many hail storms in recent years, it has been unclear whether a salvage certificate of title was required in the case of hail damage or glass damage. Section 5 of HB 1190 would clarify that glass damage and hail damage shall be excluded in that determination. The rationale for this is that glass damage and hail damage is open and obvious.

The amendment to the Salvage Title Law would also be consistent with 39-05-17.2 which specifically excludes hail damage and glass damage from the motor vehicle body damage disclosure requirements of that section.

After recent hail storms in North Dakota cities, insurance companies have been inundated with questions about whether vehicles needed to be totaled and a salvage certificate of title issued. At times the processing of these titles by the Motor Vehicle Department has been slow due to sheer volume. There has been confusion between the body damage disclosure statute which excludes hail damage and the salvage certificate statute which is unclear and does no currently address the issue.

Section 5 of HB 1190 is a necessary attempt to clarify for all purposes that hail and glass damage do not require the issuance of a salvage certificate of title or body damage disclosure.

We encourage a Do Pass Recommendation of HB 1190.

P:\PWARD\Legislature 2003\HB 1190 Testimony.doc

1/27/03 Ward

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1190

Page 1, line 3, remove "subsection 1 of section"

Page 1, line 4, remove "32-03.2-02.1,"

Page 2, remove lines 6 through 9

Renumber accordingly

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2003 ND 24

Jamie Hartman, Plaintiff, Appellee and Cross-Appellant

v.

Estate of Anthony J. Miller, deceased, aka Tony J. Miller, deceased, Defendant

and

American Family Mutual Insurance Company, Defendant, Appellant and Cross-Appellee

No. 20020167

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Bruce A. Romanick, Judge.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Opinion of the Court by Sandstrom, Justice.

Charles T. Edin (argued), Charles T. Edin, P.C. Law Office, P.O. Box 2391, Bismarck, N.D. 58502-2391, and Robert V. Bolinske, 515 North 4th Street, Bismarck, N.D. 58501, for plaintiff, appellee and cross-appellant.

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Sandstrom, Justice.

[¶1] American Family Mutual Insurance ("American Family") appeals from a judgment awarding its insured, Jamie Hartman, damages for American Family's bad faith in handling her claim for uninsured motorist coverage. Hartman cross-appeals from a partial summary judgment denying her no-fault benefits for treatment of post-traumatic stress disorder. We hold American Family was not entitled to judgment as a matter of law on Hartman's bad-faith claim, and emotional injuries with physical manifestations are a bodily injury under the insurance policy's no-fault provisions. We affirm in part, reverse in part, and remand for further proceedings.

I

[¶2] Hartman was injured in a single vehicle rollover in November 1998, while riding in a pickup owned and driven by Anthony Miller. Miller's pickup was uninsured, but Hartman was an additional insured under her mother's family car policy with American Family. Hartman and Miller were involved in a relationship when Hartman lived in Dickinson. Hartman ended their relationship in July 1998, after Miller had threatened her. Hartman then moved to Bismarck and lived with her mother. In November 1998, Hartman agreed to meet with Miller. On November 27, 1998, Miller met Hartman after she finished work, and they went to two bars in Bismarck, where they consumed alcoholic beverages. During the evening, Miller became upset and jealous. He subsequently drove himself and Hartman around Bismarck, and he eventually pulled off Highway 83 north of Bismarck and rapidly accelerated his pickup on a gravel road. Miller's pickup began to fishtail and rolled several times, injuring both Miller and Hartman. As a result of the rollover, Miller was charged with reckless endangerment.

[¶3] Miller later died as a result of injuries sustained in an unrelated accident. In July 2000, Hartman sued Miller's estate for negligence and American Family for no-fault benefits to treat post-traumatic stress disorder and for uninsured motorist coverage. Hartman alleged American Family's conduct in refusing to pay benefits and in failing to pay those benefits in a timely manner breached American Family's obligation to act in good faith and to deal fairly with her. American Family answered that post-traumatic stress disorder was not a bodily injury for purposes of no-fault benefits. American Family also claimed the rollover was not an "accident" for purposes of uninsured motorist coverage and it was permitted to raise any defenses available to Miller on the issues of liability and damages. See Fetch v. Quam, 530 N.W.2d 337, 341 (N.D. 1995) (allowing insurer unrestricted intervention to present all claims and defenses that uninsured motorist could have raised).

[¶4] American Family moved for partial summary judgment on Hartman's claim for no-fault benefits to treat post-traumatic stress disorder. Hartman discovered a statement by Miller to a Dickinson law enforcement officer in which Miller said he did not intend to kill Hartman and he would have driven the pickup off a bridge or into a bridge if he had wanted to kill her. Hartman thereafter moved to amend her complaint to allege a separate bad-faith claim that American Family breached its obligation of good faith and fair dealing when, without conducting a reasonable investigation, it denied Hartman's claim for uninsured motorist coverage on the ground the rollover was not an accident. American Family then moved for a "declaratory judgment" determination that the rollover was not an accident.

[¶5] The trial court granted American Family partial summary judgment on Hartman's claim for medical expenses to treat post-traumatic stress disorder, concluding the disorder was not a "bodily injury" under the applicable no-fault law. The court denied American Family's motion for "declaratory judgment," concluding factual issues existed about whether the rollover was an accident. The court also granted Hartman's motion to amend her complaint to allege American Family acted

in bad faith in denying her claim for uninsured motorist coverage without conducting a reasonable investigation.

[¶6] A jury found the rollover was an accident, Miller was 75% at fault and Hartman was 25% at fault for Hartman's damages, and Hartman incurred $2,200 in past economic damages, $2,750 in future economic damages, and $5,000 in past noneconomic damages. The jury also found American Family acted in bad faith in handling Hartman's uninsured motorist claim, and awarded her $20,000 for the bad-faith claim, plus reasonable costs, expenses, and attorney fees. American Family appealed, and Hartman cross-appealed.

[¶7] The trial court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. American Family's appeal and Hartman's cross-appeal are timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 28-27-01.

II

[¶8] American Family argues the trial court abused its discretion in granting Hartman's motion to amend her complaint to allege bad faith. American Family argues discovery of Miller's statement to a Dickinson law enforcement officer did not resolve whether the rollover was an accident. American Family argues coverage was fairly debatable with or without that statement, and it was not bad faith as a matter of law to assert a coverage dispute. American Family argues the bad-faith issue should not have been submitted to the jury.

A

[¶9] Complaints are construed liberally to accomplish substantial justice. Kaler v. Kraemer, 1998 ND 56, ¶ 7, 574 N.W.2d 588. Rule 15(a), N.D.R.Civ.P., permits amendments to pleadings and authorizes a trial court to freely grant amendments when justice requires. A trial court may grant or deny amendments to pleadings under N.D.R.Civ.P. 15(a), and we will not reverse the court's decision absent an abuse of

discretion. Messiha v. State, 1998 ND 149, ¶ 7, 583 N.W.2d 385. A trial court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination. Narum v. Faxx Foods, Inc., 1999 ND 45, ¶ 29, 590 N.W.2d 454.

[¶10] Hartman's initial complaint alleged American Family was responsible for certain no-fault benefits, including medical expenses to treat post-traumatic stress disorder, and Hartman was also entitled to uninsured motorist coverage. Hartman alleged American Family's refusal to pay those benefits in a timely manner constituted a breach of American Family's obligation to act in good faith and to deal fairly with her. Hartman's amended complaint added a separate allegation that American Family failed to conduct a reasonable investigation of her claim. Although American Family asserts Hartman's initial complaint alleged bad faith only for the failure to pay no-fault benefits to treat post-traumatic stress disorder, a liberal construction of that complaint is that her bad-faith claim alleged the failure to pay both no-fault benefits and uninsured motorist coverage in a timely manner. Moreover, in granting Hartman's motion to amend her complaint, the trial court recognized that amendments should be freely given when justice requires. The court said the bad-faith issue was a jury question, because evidence of Miller's statement to the Dickinson law enforcement officer could be considered evidence of a failure to investigate. The court also decided American Family had ample opportunity to prepare for issues raised by the amendment. Under these circumstances, we cannot say the trial court's decision to allow Hartman to amend her complaint was arbitrary, unconscionable, or unreasonable, or was not the product of a rational mental process leading to a reasoned decision. We conclude the court did not abuse its discretion in allowing Hartman to amend her complaint.

B

[¶11] American Family argues the trial court erred in denying its motion for judgment as a matter of law on Hartman's bad-faith claim. In Peterson v. Traill

County, 1999 ND 197, ¶ 7, 601 N.W.2d 268 (citations omitted), we outlined our standard of review of a motion for judgment as a matter of law:

> The standard of review on a motion for judgment as a matter of law under N.D.R.Civ.P. 50 is the same as the standard applied to motions for directed verdict before the rule was modified in 1994. The trial court's decision on a motion brought under N.D.R.Civ.P. 50 to grant or deny judgment as a matter of law is based upon whether the evidence, when viewed in the light most favorable to the party against whom the motion is made, leads to but one conclusion as to the verdict about which there can be no reasonable difference of opinion. In determining whether the evidence is sufficient to create an issue of fact, the trial court must view the evidence in the light most favorable to the non-moving party, and must accept the truth of the evidence presented by the non-moving party and the truth of all reasonable inferences from that evidence. A trial court's decision on a motion for judgment as a matter of law is fully reviewable on appeal.

[¶12] An insurer has a duty to act fairly and in good faith in dealing with its insured, including a duty of fair dealing in paying claims, providing defenses to claims, negotiating settlements, and fulfilling all other contractual obligations. See Fetch v. Quam, 2001 ND 48, ¶ 12, 623 N.W.2d 357; Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 643 (N.D. 1979). The gravamen of the test for bad faith is whether the insurer acts unreasonably in handling an insured's claim. Fetch, at ¶ 12. An insurer acts unreasonably by failing to compensate an insured for a loss covered by a policy, unless the insurer has a proper cause for refusing payment. Id. at ¶ 13. In Fetch, at ¶ 18, we said, as a matter of law, an insurer is not guilty of bad faith for denying a claim if the claim is fairly debatable, or if there is a reasonable basis for denying the claim or delaying payment. Whether an insurer acts in bad faith is ordinarily a question of fact. Id. at ¶ 12; Corwin Chrysler-Plymouth, at 643-44.

[¶13] American Family's policy provided uninsured motorist coverage for compensatory damages for "bodily injury," which Hartman was legally entitled to recover from Miller. The policy required the bodily injury to be caused by an "accident" arising out of the use of the uninsured motor vehicle, but did not define

"accident." American Family argues it was entitled to judgment as a matter of law on Hartman's bad-faith claim because further investigation would not have resolved whether the rollover was an accident. American Family argues that issue remained fairly debatable one week before trial and argues a coverage issue that must be submitted to a jury is fairly debatable as a matter of law.

[¶14] In Wall v. Pennsylvania Life Ins. Co., 274 N.W.2d 208, 216 (N.D. 1979) (quoting Continental Cas. Co. v. Jackson, 400 F.2d 285, 288 (8th Cir. 1968)), when the word accident was not defined in an insurance policy, this Court said:

> "'The word "accident" as used in this case means happening by chance, unexpectedly taking place, not according to the usual course of things.
>
> "'You are instructed in this regard that if the insured does a voluntary act, the natural and usual, and to be expected result of which is to bring injury upon himself, then . . . [an injury] so occurring is not an accident. But if the insured does a voluntary act, without knowledge or reasonable expectation that the result thereof will be to bring injury upon himself . . . then a bodily injury . . . is caused by accident.'"

(Alteration in original.)

[¶15] In Corwin Chrysler-Plymouth, 279 N.W.2d at 644, in the context of a bad-faith claim against an insurer, this Court said an insurer is held to know North Dakota law regarding the interpretation of an insurance contract. The insurer in that case claimed the insurance policy did not cover employee embezzlement because the embezzlement did not occur when the policy was in force. Id. at 641-42. This Court said the policy did not define the time when the loss through employee embezzlement must occur, and the insured was held to know that because the policy was ambiguous and would support one interpretation that supported liability and one that did not, the interpretation that supported liability would be adopted. Id. at 642 (citing Wall, 274 N.W.2d at 215). This Court held the trial court's finding of bad faith was not clearly erroneous, concluding if litigation ensued, the insurer undoubtedly would be liable for the balance of the insured's claim because the insurer had no valid ground to

continue to deny liability after the employee explained she took all but, at most, $500 during the period of coverage. Id. at 644.

[¶16] American Family is held to know North Dakota law regarding the meaning of accident in an insurance policy, and the trial court instructed the jury on that definition. Here, Burleigh County Deputy Robert Benson investigated the rollover and interviewed Miller at the scene of the accident. According to Benson, Miller stated he "had turned the corner, accelerated, kicked her down, and began to fishtail and he lost control of the vehicle." Hartman stated Miller was jealous and upset and talked about death and dying before the rollover, and he intentionally accelerated his pickup and caused it to fishtail. Hartman testified that a few days after the rollover, Miller told her the rollover was an accident and was not done on purpose. According to Burleigh County Deputy Gary Schaffer, Hartman told him that Miller was angry and had intentionally accelerated his pickup and driven wild on purpose. Deputy Schaffer testified that after looking at Deputy Benson's crash report and speaking with Hartman's mother, he had concerns about whether the rollover was intentional and believed Miller "was attempting to seriously hurt or kill either himself or [Hartman], or both." Deputy Schaffer testified that as a result of the rollover, Miller was charged with felony reckless endangerment, which is defined in N.D.C.C. § 12.1-17-03 as creating a substantial risk of serious bodily injury or death to another under circumstances manifesting extreme indifference to the value of human life. Deputy Schaffer also contacted Dickinson Police Officer Charles Rummel after learning that Miller had threatened Hartman in Dickinson in July 1998. Rummel interviewed Miller about the rollover. Miller told Rummel the rollover was not intentional and was an accident. Miller told Rummel that if he had intentionally wanted to harm Hartman, he would have driven the vehicle off a bridge or into a bridge.

[¶17] American Family's in-house counsel raised the accident issue in an internal memo on June 28, 1999, and suggested getting an admission from Miller that he intended to roll the vehicle and to kill or hurt Hartman. American Family has cited

no evidence to show it followed that suggestion. Rather, Sharon Many Horses, an American Family claim adjuster, testified Miller gave American Family a December 1998 statement that he "was just screwing around" when the rollover occurred, and she was "not sure how to answer" a question regarding what evidence American Family had to indicate the rollover was intentional.

[¶18] Hartman's initial complaint alleged her bad-faith claim was based on American Family's refusal to pay benefits in a timely manner. The rollover occurred on November 27, 1998. In July 2000, twenty months after the rollover, Hartman sued American Family for uninsured motorist coverage and for no-fault benefits. Although American Family claimed the rollover was the result of Miller's intentional conduct and was not an accident, American Family did not bring a separate declaratory judgment action during those twenty months to resolve the uncertainty about coverage. See N.D.C.C. § 32-23-06 (authorizing declaratory judgment to decide coverage or duty to defend); Midwest Cas. Ins. Co. v. Whitetail, 1999 ND 133, ¶ 12, 596 N.W.2d 341 (holding factual disputes about coverage may be decided in declaratory judgment action). Many Horses testified that until Hartman's lawyer sent a demand to American Family, it had done "nothing" with the file, and Many Horses testified American Family never denied Hartman's claim.

[¶19] The trial court instructed the jury that American Family's duty to act in good faith in dealing with Hartman included a duty of fair dealing in paying claims, providing defenses to claims, negotiating settlements, and fulfilling its contractual obligations. See Fetch, 2001 ND 48, ¶ 12, 623 N.W.2d 357; Corwin Chrysler-Plymouth, 279 N.W.2d at 643. Whether American Family breached that duty in this case is a question of fact. See Fetch, at ¶ 12; Corwin Chrysler-Plymouth, at 643-44. Although American Family initially may have questioned whether the rollover was an accident, American Family is held to know North Dakota law regarding the meaning of accident in an insurance policy, and its failure to resolve the coverage issue and to require its insured to bring an action twenty months after the rollover is

evidence of bad faith. We conclude American Family was not entitled to judgment as a matter of law on Hartman's bad-faith claim.

C

[¶20] Relying on Whitetail, 1999 ND 133, 596 N.W.2d 341, American Family argues the trial court erred in denying its motion for "declaratory judgment" because there was conflicting evidence about whether the rollover was an accident. American Family's reliance on Whitetail is misplaced. In Whitetail, at ¶ 3, an insurer brought a declaratory judgment action to determine coverage. We concluded there were disputed issues of fact about coverage and duty to defend, and in the context of the declaratory judgment action, we reversed and remanded for a determination of those issues. Id. at ¶¶ 11-15. American Family's motion for "declaratory judgment" in Hartman's action against Miller and her insurer was, in effect, a motion for summary judgment on the issue of whether the rollover was an accident. On this record, American Family was not entitled to summary judgment in its favor on that issue.

III

[¶21] American Family argues the trial court abused its discretion in refusing to offset economic damages awarded to Hartman to the extent of no-fault benefits paid or to be paid by American Family. The jury awarded Hartman $2,200 in past economic damages and $2,750 in future economic damages. American Family claims it paid Hartman $6,940 in no-fault benefits for economic loss for Hartman's past medical bills and sought a setoff from the $4,950 awarded to her for economic damages. American Family argues it has already paid more in no-fault benefits for economic loss than the jury awarded and claims it is entitled to a setoff under N.D.C.C. § 26.1-41-08 against past and future economic loss to the extent American Family has paid or will pay no-fault benefits.

[¶22] Basic no-fault benefits are benefits for economic loss from accidental bodily injury and are limited to $30,000 per person for one accident. N.D.C.C. § 26.1-41-

01(2). Economic loss means medical expenses, rehabilitation expenses, work loss, replacement services loss, survivors' income loss, survivors' replacement services loss, and funeral, cremation, and burial expenses. N.D.C.C. § 26.1-41-01(7). Under N.D.C.C. § 26.1-41-06(1)(a), Hartman was entitled to basic no-fault benefits from American Family.

[¶23] Miller's pickup was not insured, and American Family provided Hartman with uninsured motorist coverage under N.D.C.C. ch. 26.1-40. An insurer's right to reduce damages payable to any insured for uninsured motorist coverage is governed by N.D.C.C. § 26.1-40-15.4(1)(b), which authorizes a reduction for amounts paid or payable for coverage for medical payments and personal injury protection.

[¶24] In denying American Family's request for an offset, the trial court explained there was no double recovery:

> Evidence of past medical expenses were not allowed into evidence at trial. American Family claims because of the no-fault payments made on Hartman's medical expenses, there would be double recovery if the verdict was not offset by the amount paid by American Family for medical expenses. It would be unjust to allow American Family to successfully keep out evidence of medical expenses and allow them to offset any amount awarded by the jury for the expenses presented at trial by Hartman's lost wages. The Court also agrees with Hartman that future economic damages in the amount of $2,750 awarded by the jury . . . cannot be setoff against the amounts paid by American Family under no-fault for past medical expenses. The request of American Family to offset the jury's award of $4,950 for economic damages is denied.

[¶25] Here, the parties do not claim the basic no-fault limit of $30,000 was exhausted. The parties also do not dispute American Family has paid Hartman basic no-fault benefits of $6,940 for past medical expenses. Hartman did not introduce evidence of those past medical expenses at trial, and her evidence of past economic damages was limited to past wage loss. Although Hartman is not entitled to double recovery for economic damages, the trial court's explanation indicates 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.

IV

[¶26] In Hartman's cross-appeal, she argues the trial court erred in dismissing her claim for no-fault benefits for medical expenses to treat post-traumatic stress disorder. Hartman argues post-traumatic stress disorder with physical manifestations is a "bodily injury" under American Family's no-fault personal injury protection endorsement.

[¶27] Under the personal injury protection endorsement, American Family was obligated to pay for medical expenses incurred for "bodily injury." The policy defined bodily injury to mean "bodily injury to or sickness, disease or death of any person."

[¶28] The trial court granted American Family partial summary judgment on Hartman's claim for these no-fault benefits, ruling:

> In determining whether bodily injury includes PTSD I rely on Anderson v. Amco Ins. Co., 541 NW2d 8 (Minn. App. 1995). The definition and coverage for bodily injury, sickness or disease under Anderson case is analogous to North Dakota law and the policy in this case. I find the American [Family] language is not ambiguous and the policy does not cover mental injuries.
>
> The testimony provided by Hartman regarding PTSD and the physical manifestations may relate to the accident, but no evidence related the PTSD to any injury received in the rollover accident. Because the PTSD is not related to any bodily injury received in the accident, it is not covered by the bodily injury language of the policy. I find any PTSD alleged would not be covered under the bodily injury language of the no-fault coverage. I find there is no material issue of fact, and American [Family] is entitled to dismissal of the claim for no-fault benefits as a matter of law.

[¶29] In Anderson, 541 N.W.2d at 9, the Minnesota Court of Appeals considered an insured's claim for no-fault coverage for psychological treatment of panic attacks that

the insured claimed arose out of an automobile accident. The court said although the panic attacks produced some physical effects such as "spells during which she feels her heart is racing, her legs are weak, she feels vertiginous and occasionally nauseous, and occasionally her mouth feels dry," the insured did not seek treatment for those physical effects. Id. at 9 n.1. The court held Minnesota's statutory no-fault provisions did not mandate coverage for treatment of the panic attacks. Id. at 9-10. The court also rejected the insured's argument that the no-fault policy's definition of "bodily harm" should be construed to include "panic attacks," in part because the insured did not allege the panic attacks resulted in physical manifestations. Id. at 10-11.

[¶30] In Trinh v. Allstate Ins. Co., 37 P.3d 1259, 1260 (Wash. Ct. App.), review denied, 53 P.3d 1007 (2002), an insured witnessed the death of her best friend when he was hit by an uninsured drunk driver while helping the insured change her flat tire. The insured was diagnosed with post-traumatic stress disorder and sought coverage under the uninsured motorist provisions of her automobile insurance policy. Id. The insurer claimed post-traumatic stress disorder was not a bodily injury under the insured's uninsured coverage. Id. In Trinh, 37 P.3d at 1262, 1264, the insured alleged the post-traumatic stress disorder was accompanied by physical manifestations, which included weight loss, hair loss, fragile fingernails, loss of sleep, headaches, stomach pains, and muscle aches. The court said:

> While other jurisdictions are divided on this issue, many courts have held that allegations of physically-manifested emotional distress fall within "bodily injury" coverage in the insurance context. A law review article observes that "[e]ven courts that have concluded that nonphysical harm does not constitute bodily injury have held otherwise when the emotional distress produces discernible physical symptoms." And, many jurisdictions that deny "bodily injury" coverage for purely emotional injuries have indicated that there would be coverage if an emotional injury were accompanied by physical manifestations.

Id. at 1262-63 (footnotes omitted).

[¶31] The Washington Court of Appeals relied on policy language that defined "bodily injury" to mean "sickness" or "disease" and on persuasive precedent that construed emotional injuries accompanied by physical manifestations to mean bodily injury. Id. at 1264. The court concluded "bodily injury" includes emotional injuries that are accompanied by physical manifestations, and the insured had raised a genuine issue of material fact about whether she was a victim of chronic post-traumatic stress disorder with physical manifestations. Id.

[¶32] In Muchow v. Lindblad, 435 N.W.2d 918, 921 (N.D. 1989), this Court addressed the bodily harm requirement for a tort claim for negligent infliction of emotional distress and recognized that transitory, non-recurring physical phenomena do not constitute bodily harm, but long and continued physical phenomena may constitute physical illness and bodily harm. Muchow is consistent with the conclusion in Trinh that bodily injury includes emotional injuries accompanied by physical manifestations.

[¶33] Here, American Family's personal injury protection endorsement specifically defined bodily injury to mean "bodily injury to or sickness, disease or death of any person." Under that definition, we agree with the rationale of Trinh that post-traumatic stress disorder with physical manifestations falls within that definition of bodily injury. We conclude the term "bodily injury" within the meaning of American Family's personal injury protection endorsement includes post-traumatic stress disorder accompanied by nontransitory physical manifestations.

[¶34] Here, Hartman presented evidence the rollover was a substantial contributing cause of her post-traumatic stress disorder, and her disorder resulted in physical manifestations including vomiting, weight loss, severe headaches, loss of sleep, night sweats, and nightmares. We conclude summary judgment on this issue was not appropriate. We reverse the partial summary judgment and remand for proceedings consistent with this opinion.

V

[¶35] Hartman argues she is entitled to attorney fees and costs for this appeal and asks this Court to remand to the trial court to award her additional attorney fees and costs for defending this appeal.

[¶36] In Corwin Chrysler-Plymouth, 279 N.W.2d at 643, this Court said an insurer who does not act in good faith in handling an insured's claim may be liable for all damages and detriment proximately caused by the breach, including attorney fees. Here, the jury decided Hartman was entitled to recover reasonable costs and expenses, including reasonable attorney fees, incurred in bringing this action. The trial court awarded her attorney fees through the jury trial, but denied her attorney fees for post-judgment proceedings. Because we remand to the trial court for further proceedings, the trial court may consider this issue on remand.

VI

[¶37] We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

[¶38]

Dan Sanstrom

William A. Neumann

Mary Muehlen Maring

Carol Ronning Kapsner

Gerald W. VandeWalle, C.J.

TESTIMONY - HOUSE BILL 1190

My name is Rob Hovland. I am currently serving as chairman of the North Dakota Domestic Insurers Association. We support House Bill 1190, with respect to requiring each party to pay their own attorneys' fees on uninsured and underinsured motorist claims.

In 1987, the North Dakota legislature mandated that every personal auto insurance policy, and most commercial auto policies, include uninsured motorist coverage (UM) and underinsured motorist coverage (UIM). UM/UIM coverage applies when a policyholder is injured due to the fault of another driver, but the other driver does not have insurance (uninsured) or does not have enough insurance (underinsured.) It is insurance for your own injuries. North Dakota is one of 18 states that require UM/UIM without giving the consumer the option of rejecting coverage.

The North Dakota Supreme Court has ruled that if an insurance company contests a UM/UIM claim, the insurance company has an inherent conflict of interest, and to resolve that conflict, must pay the claimant's attorneys' fees. In Fetch vs Quam vs American Hardware Mutual, the Court wrote,

> "conflicts of interest will exist when an insurer intervenes in an action between its insured and an uninsured motorist to press all the defenses that the uninsured motorist could present . . . The trial court can defuse these conflicts by requiring the insurer to furnish independent counsel to represent the insured on the insurers claims and defenses, or by requiring reimbursement of the insured's reasonable attorneys fees for those services."

Paying a litigant's attorneys' fees encourages litigation, discourages settlement, and increases the cost of insurance. There is no incentive to settle claims, particularly the less serious injury claims, and paying a litigant's attorneys' fees basically gives them

a free shot at playing jury lottery.

To assist the committee in understanding the matter in which UM/UIM claims are currently resolved, we present three scenarios, based on the same accident. The accident scenario is as follows:

> Mary drives her car toward an intersection in which her lane of travel is controlled by a yield sign. She drives through the intersection and collides with a car driven by Joe. Joe's lane of travel is not controlled by a stop sign, but Joe is driving 15 mph over the speed limit.
>
> Joe claims he sustained a whiplash injury, and occasionally experiences neck pain as a result. All of his medical bills and lost wages are covered by PIP (no fault) coverage under his policy. The only issues remaining are the percentage of fault attributable to each person, and the extent of Joe's claims of "pain and suffering."
>
> Joe hires a lawyer to handle his claim.

Scenario #1 – Mary has substantial liability insurance.

> **RESULT:** Mary's insurance company offers to settle Joe's claim for $25,000, but Joe rejects. Joe sues Mary. Mary's insurance company defends the case. Regardless of the outcome of the claim, each side pays their own attorneys' fees.

Scenario #2 – Mary has no liability insurance (uninsured)

> **RESULT:** Joe's insurance company offers him $25,000, which Joe rejects. Joe sues his own insurance company. Regardless of the outcome of the case, Joe's insurance company pays his attorneys' fees, and the attorneys' fees to defend the case.

Scenario #3 – Mary has $25,000 liability insurance. Joe considers pursing a claim beyond the medical expenses/wage loss he receives from PIP benefits, and the $25,000 Mary offers (underinsured motorist claim).

> **RESULT:** Joe receives $25,000 (Mary's liability limits) in addition to his PIP benefits. Joe sues his insurance company. Regardless of the outcome of the case, Joe's insurance company pays his attorneys' fees, and the attorneys' fees to defend the case.

Because attorneys' fees are paid regardless of the outcome, there is no incentive

for a claimant (Joe) to settle reasonably, particularly in the underinsured motorist scenario. Joe already has all of his medical bills and wage loss paid by PIP insurance, and receives an additional $25,000 (Mary's limits). He can pursue a UIM claim and all of his attorneys' fees are paid – even if he loses. As a result, in some UM/UIM cases, the focus of settlement discussions is more about the cost an insurance company will incur if they defend the claim, rather than the degree of injury to the claimant.

In North Dakota, this is strictly a judicially created concept - nothing in the legislative history even remotely suggests that attorneys' fees were intended to be a part of UM/UIM claims. In fact, allowing attorneys' fees frustrates the purpose of the subrogation aspect of UM/UIM statutes because insurance companies are not allowed to pursue reimbursement of attorneys' fees from the at-fault party.

The vast majority of states do not require an insurance company to pay a litigant's attorneys' fees if the insurance company challenges the amount of the claim. Of the states that do require payment of attorneys' fees, it is usually if the insurance company is denying coverage (not counting Florida, which has a specific statute addressing attorneys' fees).

The effect of passing House Bill 1190 is that UM/UIM claims will be handled the way this legislature originally intended, and North Dakota will be in line with mainstream America with respect to UM/UIM claims.

It should be noted that this bill does not affect the award of attorneys' to claimants if an insurance company acts unreasonably in handling a UM/UIM claim. Insurance companies would continue to be liable for attorneys' fees if they act unreasonably ("bad faith") and wrongfully deny UM/UIM benefits. We urge a Do Pass vote on this Bill.

introduce

Testimony of Patrick Ward in Support of HB 1190 in the Senate IBL Committee

My name is Patrick Ward. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies and other property and casualty insurers including State Farm in support of Engrossed HB 1190.

HB 1190 is an insurance housekeeping bill. It relates to attorney fees in uninsured and underinsured motorist claims, driving without liability insurance, and amends the salvage title law to provide that a salvage certificate of title is not required in case of hail damage or glass damage.

Section 1 provides that in an action involving an uninsured motorist claim, each party to the lawsuit shall bear their own attorneys' fees incurred, unless the insurance contract specifically provides otherwise. It also provides that an insurer may pursue defenses that the uninsured motorist could pursue. Section 2 does the same thing for underinsured motorist claims. This bill would put attorney fees in lawsuits involving uninsured and underinsured motorist claims on the same footing as the vast majority of lawsuits involving insured drivers.

Section 3 of the bill relates to driving without liability insurance. The Department of Transportation estimates that about 7 percent of North Dakota drivers are uninsured. Section 26.1-41-20 of the North Dakota Century Code was enacted

in 1999, as a modified form of no pay no play. It provides that in an action against a person covered by no fault insurance to recover damages because of accidental bodily injury, an uninsured driver who has a prior conviction for driving without insurance and was operating a motor vehicle without insurance at the time of the accident on which the lawsuit is based, cannot sue for noneconomic loss which includes pain and suffering, mental anguish, and the like. Medical expenses of the uninsured driver are covered and only noneconomic loss is not covered.

Section 3 of this bill will remove the sunset provision on the 1999 bill and lower from 2 to 1 the number of prior convictions of driving without insurance required to prevent recovery of noneconomic loss.

The final section of the bill relates to North Dakota salvage title law. Under that law, a motor vehicle damaged in excess of 75 percent of its retail value is required to carry a salvage certificate of title. There has been some confusion in recent years because of the many hailstorms as to whether a salvage certificate of title is required in the case of hail damage or glass damage. Because hail and glass damage are open and obvious, this section of the bill will clarify that vehicles with glass damage and hail damage do not require a salvage certificate of title.

Sections 1 and 2. Attorney fees in Uninsured and Underinsured Motor Vehicle Claims.

Sections 1 and 2 simply make clear that each side pays its own attorney fees in an uninsured or underinsured motorist claim. Section 26.1-40-15.2 of the North Dakota Century Code provides for uninsured motorist coverage. This is mandatory coverage in North Dakota which motor vehicle liability insurers are required to provide. The federal courts in North Dakota have determined that a judgment against an uninsured motorist conclusively establishes the liability of the injured persons insurance company under its underinsured motorist policy even if the company was not a party to the action against the uninsured motorist.

However, if an insurance company believes the allegedly negligent but uninsured driver has legitimate defenses it is permitted to intervene and provide a defense to the uninsured motorist. The UM/UIM insurer steps into the shoes of that uninsured motorist and according to the North Dakota Supreme Court is permitted to assert all defenses which the uninsured motorist may have been able to raise such as contributory negligence, assumption of risk, failure to mitigate damages and the like.

Unfortunately, the North Dakota Supreme Court has also implied that an insurance company that decides to intervene in an action and step into the shoes of the tortfeasor may be required to furnish independent counsel to its insured

(who is also the plaintiff in the action against the uninsured motorist) or to pay the plaintiff's counsel's attorney's fees. The court did so in Fetch v. Quam v. American Hardware Mutual, 530 N.W.2d 337 (N.D. 1995).

Unfortunately, the Supreme Court's interpretation provides a disincentive to settlement and a windfall to plaintiffs in cases against uninsured motorists. It also possibly puts the insurance company at risk for bad faith or other extra contractual damages as a result of its claims handling or failure to settle the uninsured or underinsured claim. It impairs an insurer's ability to defend improper or overstated excessive claims because of the risk of disproportionately high attorney's fees and costs. Requiring an insurer to pay the attorney's fees for both sides in litigation encourages litigation, discourages settlement, and was clearly not the original intent of the legislature. One of the fundamental principles of the American system is that each side pays its own attorneys' fees.

We believe the intent of the legislature can be clarified by adding a new subsection to the uninsured and underinsured statutes which provides that each party shall bear their own attorney's fees incurred, unless the insurance contract specifically provides otherwise. Sections 1 and 2 of HB 1190 would also provide as the Supreme Court has allowed that it is not a conflict of interest or bad faith for an insurer to contest and press defenses that the uninsured or underinsured motorist could press.

To our knowledge, no other state has a similar extension of its law as unfair to the insurance company in the uninsured and underinsured motorist context as this one. In addition, it creates an unfair situation in that a plaintiff who obtains a small recovery of say a few hundred or thousand dollars may nevertheless be awarded thousands of dollars of attorney's fees whereas the same or a similarly damaged plaintiff hit by an adequately insured driver must pay attorney's fees out of his or her settlement.

Section 3. Driving without liability insurance.

Section 26.1-41-20 of the North Dakota Century Code was enacted in 1999 as a modified form of no pay, no play. It provided that in any action against a secured person (a person covered by no fault insurance) to recover damages because of accidental bodily injury arising out of the ownership or operation of a secured motor vehicle, the secured person would not be assessed damages for non-economic loss (pain and suffering, mental anguish, etc.) for a serious injury in favor of a party who had at least two convictions for driving without insurance and was operating a motor vehicle without insurance at the time of the motor vehicle accident on which the lawsuit is based. Economic losses such as medical bills are still covered.

The 1999 Legislation provided that it would sunset on July 31, 2003. Section 3 of HB 1190 is offered to remove the sunset provision from that statute and also to

strengthen the statute by lowering the number of prior convictions required from two to one. The statute has had very little use in North Dakota because it is quite unusual that an individual involved in a motor vehicle accident who is driving without insurance is found to have two prior convictions for driving without insurance. The insurance industry believes it would be more appropriate as a deterrent to provide that the no pay, no play statute come into effect if there is one prior conviction unrelated to the motor vehicle accident which is the basis of the lawsuit for personal injuries. . . .The idea is to encourage more people to carry liability insurance to protect others. The problem of uninsured drivers is widespread and growing.

Section 4. Salvage title.

Section 39-05-20.2 of the North Dakota Century Code provides for when an owner of a motor vehicle damaged in excess of 75% of its retail value is required to forward the title to the Motor Vehicle Department for the issuance of a salvage certificate of title. After the many hail storms in recent years, it has been unclear whether a salvage certificate of title was required in the case of hail damage or glass damage. Section 5 of HB 1190 would clarify that glass damage and hail damage shall be excluded in that determination. The rationale for this is that glass damage and hail damage is open and obvious.

The amendment to the Salvage Title Law would also be consistent with 39-05-17.2 which specifically excludes hail damage and glass damage from the motor vehicle body damage disclosure requirements of that section.

After recent hail storms in North Dakota cities, insurance companies have been inundated with questions about whether vehicles needed to be totaled and a salvage certificate of title issued. At times the processing of these titles by the Motor Vehicle Department has been slow due to sheer volume. There has been confusion between the body damage disclosure statute which excludes hail damage and the salvage certificate statute which is unclear and does no currently address the issue.

Section 5 of HB 1190 is a necessary attempt to clarify for all purposes that hail and glass damage do not require the issuance of a salvage certificate of title or body damage disclosure.

We encourage a Do Pass Recommendation of HB 1190.

HB 1190

p1, line 10, after "otherwise", add

"or the insurance company is found to have acted in bad faith."

p1, line 17, after "otherwise," add

"or the insurance company is found to have acted in bad faith,"

proposed amendments by Pat Ward after hearing was closed.

Not Official

Proposed Amendments to Engrossed House Bill No. 1190

Page 1, line 10, after "otherwise", insert "or the insurance company is found to have acted in bad faith"

Page 1, line 17, after "otherwise", insert "or the insurance company is found to have acted in bad faith"

Renumber accordingly

Proposed By Pat Ward

Submitted by Senator Christman - neutral

Document 1 of 1

Source:
Michie's North Dakota Primary Law/North Dakota Century Code/TITLE 39 MOTOR VEHICLES/CHAPTER 39-05 TITLE REGISTRATION/39-05-17.2. Body damage disclosure - Rules - When required - Penalty.

39-05-17.2. Body damage disclosure - Rules - When required - Penalty.

1. The department shall adopt rules relating to the manner and form of disclosing motor vehicle body damage on the certificate of title to a motor vehicle. The rules must provide for a damage disclosure statement from the transferor to the transferee at the time ownership of a motor vehicle is transferred and provide that the department may not transfer the title without the required damage disclosure statement.

2. Motor vehicle body damage disclosure requirements apply only to the transfer of title on motor vehicles of a model year which have been released in the current calendar year and those motor vehicles of a model year which were released in the seven calendar years before the current calendar year. When a motor vehicle has been subject to this disclosure requirement and a motor vehicle of a model year has not been released in the current calendar year or the seven calendar years before the current calendar year, the holder of the certificate of title with the damage disclosure may have the disclosure removed and a new certificate of title issued for a fee of five dollars.

3. As used in this section, "motor vehicle body damage" means a change in the body or structure of a motor vehicle, generally resulting from a vehicular crash or accident, including loss by fire, vandalism, weather, or submersion in water, resulting in damage to the motor vehicle which equals or exceeds the greater of eight thousand dollars or forty percent of the predamage retail value of the motor vehicle as determined by the national automobile dealers association official used car guide. The term does not include body or structural modifications, normal wear and tear, glass damage, hail damage, or items of normal maintenance and repair.

4. A person repairing, replacing parts, or performing body work on a motor vehicle of a model year which was released in the current calendar year or the seven calendar years before the current calendar year shall provide a statement to the owner of the motor vehicle when the motor vehicle has sustained motor vehicle body damage requiring disclosure under this section. The owner shall disclose this damage when ownership of the motor vehicle is transferred. When a vehicle is damaged in excess of seventy-five percent of its retail value as determined by the national automobile dealers association official used car guide, the person repairing, replacing parts, or performing body work on the motor vehicle of a model year which has been released in the current calendar year or the seven calendar years before the current calendar year shall also advise the owner of the motor vehicle that the owner of the vehicle must comply with section 39-05-20.2.

5. The amount of damage to a motor vehicle is determined by adding the retail value of all labor, parts, and material used in repairing the damage. When the retail value of labor has not been determined by a purchase in the ordinary course of business, for example when the labor is performed by the owner of the vehicle, the retail value of the labor is presumed to be the product of the repair time, as provided in a generally accepted autobody repair flat rate manual, multiplied by thirty-five dollars.

6. A person who violates this section or rules adopted pursuant to this section is guilty of a class A misdemeanor.

Source: S.L. 1991, ch. 408, § 1; 1997, ch. 330, § 1; 1999, ch. 330, § 4; 1999, ch. 338, § 1.