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SIGNIFICANT MINNESOTA SUPREME COURT OPINIONS ISSUED AUGUST 18, 2005

CIVIL JURY INSTRUCTION 91.40 REJECTED IN TWO CASES

On August 18, 2005, the Minnesota Supreme Court issued two decisions rejecting Civil Jury Instruction 91.40, which instructs juries to find a defendant liable for all of plaintiff's damages when the jury is unable to apportion the plaintiff's injuries between the injuries caused by the defendant and plaintiff's preexisting injuries. As held in previous Minnesota Appellate Court decisions, 91.40 misstates Minnesota law, because it shifts the burden of proving plaintiff's injuries to the defendant.

In Rowe v. Munye, ___ N.W.2d ___ (File A03-465), Rowe was injured in an automobile accident. Evidence confirmed she suffered from preexisting degenerative joint disease, requiring continued care. The trial court instructed the jury pursuant to 91.40, which contained the sentence: "If you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then [defendant] is liable for all of the damages." The Court of Appeals reversed the jury's award of \$24,500, because the instruction improperly shifted the burden to the defendant to prove what damages are actually related to the defendant's negligence.

The Supreme Court confirmed it is plaintiff's burden to prove, with reasonable certainty, the nature and probable duration of the damages caused by the defendant. If the plaintiff suffers from preexisting injuries, a defendant is only responsible for the damage he or she caused over and above the consequences that would have occurred from the preexisting injury if the accident had not occurred. Instead of using CIVJIG 91.40 from the fourth edition of the Civil Jury Instructions, the Court indicated trial courts should use the aggravation instruction (CIVJIG 163) from the third edition, which does not provide any rule on apportionment, so the burden properly remains on the plaintiff.

The only situation in which shifting the plaintiff's burden is allowed, arises when a single injury is caused by two or more defendants ("single indivisible injury"). When the tortious conduct of two or more actors has combined to bring about harm to a plaintiff, and one or more of the actors seeks to limit his or her liability by claiming that the harm is capable of apportionment, the burden of proving the apportionment falls on the defendants. In cases such as Rowe, when there is only one defendant, the burden remains on Plaintiff to prove to what extent the damages are attributable to the defendant.

On August 18, 2005, the Minnesota Supreme Court also issued a decision in Heine v. Simon, ___ N.W.2d ___ (File: A03-710) regarding the use of CIVJIG 91.40. The Minnesota Supreme Court held the district court did not abuse its discretion by refusing to use CIVJIG 91.40 in a case where the plaintiff was involved in two motor vehicle accidents in the span of five months. The Court reaffirmed it is plaintiff's burden to

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prove damages attributable to the defendant. Further, this case did not fall under the single indivisible injury exception, because the two accidents did not occur close enough in time.

EXPOSURE TO INSUREDS OF INSOLVENT INSURANCE COMPANIES

In Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., ___ N.W.2d ___ (File A04-2439), the Minnesota Supreme Court answered a question of law certified by the United States District Court for the District of Minnesota, by holding a party insured by an insolvent insurance company may be liable to the claimant for any portion of the claim over and above the \$300,000 statutory maximum available under the Minnesota Insurance Guaranty Association, up to the limits of the policy.

Goodyear purchased a conveyance system from Dynamic Air and then sued Dynamic Air Court for damages when the system malfunctioned. Goodyear claimed it sustained \$2,000,000 in damages. Dynamic had insurance coverage from Reliance Insurance Company totaling \$7,000,000. Shortly after Goodyear filed suit, Reliance became insolvent. Pursuant to Minn. Stat. § 60C the Minnesota Insurance Guaranty Association (MIGA) took over the handling of the claim. However, the statutory maximum payout by MIGA is \$300,000. Dynamic offered the MIGA limits and sought to dismiss the rest of the case. Goodyear objected, claiming it had the ability to seek additional compensation directly from Dynamic. The issue of potential exposure over and above the statutory maximum limits of §60C was certified to the Minnesota Supreme Court by the United States District Court, District of Minnesota.

The Supreme Court confirmed at common law, the at fault party bears the risk of loss arising from his or her actions. An insurance policy essentially shifts that risk from the actor to the insurance company. When an insurance company becomes insolvent, the outstanding policies are effectively terminated, and the risk of loss is shifted back to the insured. The protection of the MIGA may fall short of the intended policy coverage, but there is nothing preventing the insured from making a claim against the assets, if any, of the insolvent insurer.

If you have any questions about these recent decisions, please contact any of the litigation attorneys at Johnson & Condon at the number listed below, or through our website at www.johnson-condon.com.

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