82-1330

State of Minnesota
In Supreme Court

BRIAN P. SHORT, as Trustee in Bankruptcy for Gerald D. Kearney,

Respondent,

vs.

DAIRYLAND INSURANCE COMPANY,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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The trial court held: In the affirmative.

2. After suit was filed against Kearney, did Dairyland act in bad faith towards him when it again, without Kearney's knowledge, tried to negotiate a discount from the widow and children's offer to settle for Kearney's $25,000.00 limits and again refused to accept this settlement offer?

The trial court held: In the affirmative.

3. Because all of the material facts in this case are taken right from Dairyland's own records and admissions of its employees, did the trial court properly find that these material facts are undisputed and that summary judgment should be granted to plaintiff?

The trial court held: In the affirmative.

STATEMENT OF THE CASE

This is an action to recover the damages defendant/appellant Dairyland Insurance Company (Dairyland) caused to its insured, Mr. Gerald D. Kearney, by its "bad faith" refusal to settle a wrongful death claim against him. After completing its investigation, Dairyland determined that Kearney's drunken

driving killed Donald L. Morin, a husband and father of five minor children. For almost 16 months, Mr. Morin's widow and children were willing to settle their claim against Kearney for his policy limits of liability coverage, $25,000.00. However, because of Dairyland's repeated failure to timely notify Kearney of the Morin's offer to settle for his policy limits, because Dairyland repeatedly tried to negoitiate a "discount" off of these policy limits, and because Dairyland repeatedly refused to timely accept the Morins' offer, a jury verdict was ultimately rendered against Kearney for $745,000.00. (Morin v. Kearney, Henn. Co. Dist. Ct. File No. 729918). Kearney was forced into bankruptcy by this tremendous excess judgment, and immediately after his appointed trustee in bankruptcy, Respondent Brian P. Short[1], (hereinafter referred to as "plaintiff") received approval from the Bankruptcy Court on February 21, 1979, this action was commenced in Hennepin County District Court, Fourth Judicial District.

This matter was originally set for trial the week of March 8, 1982, but was continued until the week of April 26, 1982. When this case was not reached for trial that week, and Dairyland refused to consent to resetting trial during the last available weeks for trial in Hennepin County, plaintiff moved for and was granted an Order setting trial the week of June 8, 1982.

On May 19, 1982, Dairyland served plaintiff with a motion for summary judgment, scheduled to be heard on Wednesday, June 2, 1982, less than a week before trial was scheduled to commence. On May

[1]The Honorable Brian P. Short, now United States Magistrate, was a practicing attorney when appointed by the Bankruptcy Court.

27, 1982, plaintiff served Dairyland with his cross-motion for summary judgment. These cross-motions were heard by Chief Judge Harold Kalina on June 3, 1982, who ruled from the bench that with trial scheduled only a few days hence, both motions were untimely.

On Thursday, June 10, 1982, this matter was called for trial before Judge Jonathan Lebedoff.[2] Plaintiff had brought two witnesses in from out of state to testify at trial, and with jury selection scheduled to start at 2 p.m., counsel for the parties met in Judge Lebedoff's chambers at approximately 11 a.m. to discuss the matter. Judge Lebedoff stated that he had not had a "bad faith" case before,and inquired of counsel what fact issues were to be presented to the jury. Counsel for Dairyland, Mr. Dale Larson, responded first and represented to the court that he didn't believe there were any fact issues for the jury. Mr. Robert M. Austin, counsel for plaintiff, spoke next and stated he agreed with Mr. Larson. Judge Lebedoff then inquired why a trial was being held if there were no fact issues for the jury. Counsel informed the Court that they had previously filed cross-motions for summary judgment which were denied by Chief Judge Kalina only because untimely. Counsel further informed the Court that each thought the matter could be completely resolved on the parties' cross motions and since only issues of law were disputed, no jury trial was needed. (Affidavits of Richard G. Hunegs, Robert M. Austin, and Michael L. Weiner, A 38-49).[3] The parties then renewed their cross-motions for summary judgment, and the trial court took both under advisement with the understanding that if

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[2]This matter was originally called for trial before Judge William S. Posten, but Dairyland filed an Affidavit of Prejudice against Judge Posten, and the matter was then referred to Judge Lebedoff.

[3]"A" refers to Respondent's Appendix, attached hereto.

the court found genuine issues of material fact which prevented it from granting either party's motion, trial would be held sometime in July, 1982. (Transcript of Proceedings in Judge Lebedoff's Chambers, June 10, 1982).

On July 13, 1982, Judge Lebedoff granted plaintiff's motion for summary judgment[4] in the amount of the excess judgment against Mr. Kearney, $720,000.00, plus interest at the judgment rate,[5] and denied Dairyland's motion for summary judgment. (App. A-13-23[6]) Judgment was entered on this Order on August 9, 1982. (App. A-24) On September 16, 1982, over two months after the filing of Judge Lebedoff's Order, Dairyland petitioned the trial court for a rehearing on the parties' cross-motions and an order vacating the court's order of July 13, 1982, the primary thrust of this petition being that genuine issues of material fact prohibited the granting of summary judgment for plaintiff. (App. A-25) Judge Lebedoff denied Dairyland's motion on September 20, 1982, (App. A-26) and Dairyland's appeal followed. (App. A-27).

STATEMENT OF FACTS

The essential facts in this matter are remarkably simple. Dairyland's insured, Kearney, was driving drunk and hadn't taken his anti-blackout medication, crossed the center line, and killed another driver. Dairyland investigated, justly concluded Kearney

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[4]Although plaintiff's motion was for partial summary judgment, Judge Lebedoff indicated in a letter to the parties dated July 19, 1982, that he intended his ruling to be a final and complete disposition of all aspects of the matter. (A 55).

[5]Compensatory damages in bad faith actions are fixed, as a matter of law, at the amount of the excess verdict, plus judgment interest. Strand v. Travelers Insurance Company, 300 Minn. 311, 219 N.W.2d 622 (1974), Continental Casualty Co. v. Reserve Insurance Co., 307 Minn. 5, 238 N.W.2d 862, 864 (1976).

[6]App. A. refers to appellant's appendix.

was liable for damages far exceeding his $25,000.00 policy limits, and gave its claim adjuster authority to pay the full $25,000.00. However, instead of accepting the claimants' outstanding offer to settle for Keaney's policy limits, Dairyland instead, both before and after these claimants filed suit against Kearney, tried to negotiate discounts off of these policy limits and refused to accept this offer, all without informing Kearney either of the claimants' offer or the actions they were taking on his behalf. This case is just that simple.

However, Dairyland takes the position on appeal, contrary to the position it took before the trial court, that there are genuine issues of material fact precluding summary judgment for plaintiff. Dairyland also raises on appeal a defense that it never urged before the trial court, and additionally, has seriously misstated some of the crucial undisputed facts in the record. It is, therefore, necessary to examine the details of the crucial events and conversations that transpired. In the arguments which follow, plaintiff will present these facts and most important, plaintiff will show that all of these essential facts supporting Judge Lebedoff's Order come from Dairyland's own documents or admissions.

Since the precise details of this case will follow, a brief overview will suffice here. The underlying wrongful death action from which this matter arises was a case of unquestionable liability and tremendous damages. On February 23, 1976, Gerald D. Kearney, who was driving west on Highway 55 near Medina, Minnesota, was not only drunk (with a .11 BAC), but additionally, had not taken his anti-blackout medication. Kearney's car crossed

the center line of this undivided highway and collided head-on with a car driven by Donald L. Morin. Kearney, although seriously injured, survived the accident, but Mr. Morin, the sole occupant of his car, was killed instantly. Left surviving Mr. Morin were his widow, Darlene J. Morin, and five minor children. Mr. Morin, the breadwinner of his family, had earned almost $29,000.00 in the year before his death. The facts of this accident, and the damages Kearney caused, have never been disputed by Dairyland, nor has Dairyland ever claimed that Mr. Morin was the slightest bit at fault.

Even when Dairyland first learned on March 1, 1976, of its insured's accident, all available information pointed to Kearney's drunken driving as the sole cause. Dairyland spent the month of March, 1976, investigating the accident, ultimately concluding on March 30 that Kearney was totally responsible for the death of Mr. Morin. Dairyland further determined that the damages Mr. Kearney caused to Mr. Morin's widow and children vastly exceeded his $25,000.00 of automobile liability coverage, and Dairyland's adjuster was given full authority to pay Kearney's limits to the Morins.

Dairyland had been aware since early March that the Morins wanted to settle their claim against Kearney for his $25,000.00 policy limits and on March 24, after the Morins retained counsel, their attorneys offered to settle for these limits. However, on March 31, after Dairyland completed its investigation and determined the entire amount was owing to the Morins, Dairyland twice tried to negotiate a discount off of Kearney's limits and refused to accept the Morin's offer. Even more appalling, Dairyland never

informed Kearney of the Morin's offer and its response.

When Dairyland wouldn't accept the Morin's $25,000.00 offer, the Morins immediately filed suit against Kearney. Even after filing suit, the Morins were still willing to accept Kearney's policy limits in full settlement of their claim (an offer which remained open for another 15 months), but Dairyland again tried to negotiate a discount off of these limits. On April 12, 1976, shortly after suit was commenced, Dairyland used a purported subrogation interest of State Farm Insurance Company, the Morins' no-fault insurer, as a club, and told the Morins that State Farm would have to be listed as a payee on Dairyland's $25,000.00 check, because it had a $10,000 or $20,000 subrogation interest. However, if the Morins would take $24,000.00, Dairyland said it would leave State Farm off the check.

Dairyland finally offered the Morins the full $25,000.00 limits on October 11, 1978, just weeks before trial, but the Morins' offer to settle had long since expired. Trial commenced in the Morins' action on October 27, 1978, before the Honorable A. Paul Lommen. By now, the Morins had amended their ad damnum clause to one million dollars in compensatory damages. Immediately prior to trial, the Morins' attorney offered to settle their claim against Kearney for $250,000.00, paid by Kearney or by Dairyland, which was rejected by Kearney's attorney. On November 1, 1978, after Judge Lommen directed a verdict against Kearney on liability, the jury returned its verdict against Kearney on the issue of damages, finding him liable to the Morins for $745,000.00 in compensatory damages. Dairyland never even bothered to appeal this verdict on behalf of Kearney.

Kearney was forced into bankruptcy by this tremendous excess judgment, and was represented in his bankruptcy proceedings by the very same attorney hired by Dairyland to defend him in the Morins' action. On February 21, 1979, the Honorable Jacob Dim, Judge of Bankruptcy Court, authorized Brian P. Short as Kearney's trustee in Bankruptcy to institute the present bad faith action against Dairyland[7], and to retain the law firm of DeParcq, Anderson, Perl, Hunegs & Rudquist, P.A. (who represented the Morins) to represent him in this suit.[8]

ARGUMENT

Introduction

The critical question of whether the existence of material fact issues precludes the complete resolution of a case on cross motions for summary judgment cannot be argued in the abstract. Only when the disputed fact issues are material will summary judgment be precluded, and the factual dispute is only material when its resolution will affect the outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, (Minn. 1978). Thus, where a factual dispute is genuine, a court must take the next step of correlating the facts relied upon by the parties to the applicable law to determine whether the resolution of this factual dispute will affect the outcome of the case. If the issue's resolution has no affect, then it simply has no bearing on whether summary judgment should be granted.

The task of determining the applicable law here is relatively

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[7]United States District Court, District of Minnesota Bankruptcy No. 3-78-1567(D).

[8]The DeParcq Firm later associated with Robert M. Austin, and the law firm of Austin, Roth and Associates, in the event that Dairyland objected to the DeParcq Firm's representation of plaintiff at trial due to the possible testimony of DeParcq attorneys or employees.

easy, as this Court has repeatedly enunciated the duties an insurance company owes to its insured. Dairyland provided Kearney with automobile liability insurance, but under the terms of their contract, Dairyland retained exclusive control over the decision to settle a third-party claim against Kearney. Because of the obvious conflict between Dairyland's interest in paying as little as possible on a claim against Kearney, and Kearney's own interest in protection from personal exposure beyond the limits of his insurance coverage, Dairyland owed a fiduciary duty to Kearney to represent his best interests, i.e. to act in good faith towards him. Dairyland's duty of good faith and fair dealing towards Kearney under Minnesota law required it to meet each and every one of the following obligations:

1. Dairyland had the duty to evaluate its theory of defense in terms of the reasonable expectation that the defense would prevail, and the amount of the verdict if it did not. Settlement offers must have been viewed in light of these expectations, with equal consideration being given to the financial exposure of both Dairyland and Kearney.

2. In determining whether to settle the case or proceed with it, Dairyland must in good faith have viewed the situation as if there were no policy limits applicable to the Morins' claim against Kearney.

3. Dairyland had the duty to communicate all of the Morins' settlement offers to Kearney.

4. Dairyland had the duty to actively pursue settlement with the Morins within Kearney's policy limits.

5. Dairyland had the duty to notify Kearney when a claim was made against him that exceeded his policy limits; Dairyland must have explained to Kearney the consequences of a verdict in excess of his insurance coverage; Dairyland must have suggested to Kearney that he retain a private attorney to

represent him in respect to the excess claim; and Dairyland must have explained to Kearney the conflict between Dairyland's interest and Kearney's own interest.

6. After it concluded its investigation, Dairyland had an absolute duty to accept the Morins' offer to settle for Kearney's policy limits, because it knew that Kearney was undisputably liable for the accident and the Morins' damages vastly exceeded these policy limits.

The breach of any one of the above duties renders Dairyland liable to Kearney for the entire amount of an excess verdict against him. Lange v. Fidelity & Casualty Co. of New York, 290 Minn. 61, 185 N.W.2d 881 (1971), Strand v. Travelers Insurance Company, 300 Minn. 311, 219 N.W.2d 622 (1974), Continental Casualty Co. v. Reserve Insurance Co., 307 Minn. 5, 238 N.W.2d 362 (1976), Peterson v. American Family Mutual Insurance Co., 280 Minn. 482, 160 N.W.2d 541 (1968), Boerger v. American General Insurance Co., 257 Minn. 72, 100 N.W.2d 133 (1959), Larson v. Anchor Casualty Co., 249 Minn. 339, 82 N.W.2d 376 (1957). See also, Moutsonolos v. American Mutual Insurance Co. of Boston, 607 F.2d 1185 (7th Cir. 1979) (applying Wisconsin law).

I. BEFORE SUIT WAS FILED AGAINST APPELLANT DAIRYLAND INSURANCE COMPANY'S INSURED, GERALD D. KEARNEY, DAIRYLAND ACTED IN BAD FAITH TOWARDS KEARNEY WHEN IT TRIED TO NEGOTIATE A "DISCOUNT" OFF OF A WIDOW AND HER CHILDREN'S OFFER TO SETTLE FOR KEARNEY'S $25,000.00 POLICY LIMITS AND REFUSED TO ACCEPT THESE CLAIMANTS' OFFER, ALL WITHOUT THE KNOWLEDGE OF KEARNEY, EVEN THOUGH DAIRYLAND HAD ALREADY CONCLUSIVELY DETERMINED THAT KEARNEY'S DRUNKEN DRIVING KILLED THEIR INNOCENT HUSBAND AND FATHER AND CAUSED DAMAGES FAR EXCEEDING HIS POLICY LIMITS.

Dairyland first learned of Kearney's automobile accident of February 23, 1976, when his "step-father", Kenneth M. Sipe[9], called to report it on March 1, 1976. Dairyland's written "telephone report" of thi

[9]Mr. Sipe married Kearney's natural mother, and although he never adopted Kearney, he was considered by Kearney and himself to be his step-father. (Sipe, Dep. 3-4).

conversation (A-1) indicates that Kearney crossed the center line and struck another car head-on, the police suspected him of drunken driving, and that the other driver, Donald Morin, died at the scene.

The next day, March 2, 1976, Dairyland's claims manager, Wilson S. Graham, assigned Kearney's file to one of Dairyland's claims examiners, Ms. Linda Lunzer, (Graham Dep. 35) who kept a "log" of her investigation and handling of Kearney's file. (The pertinent portions of this log are attached A-2 to 16). On this first day she had Kearney's file, Lunzer retained Town and Country Adjusting Service, an independent claims service, to investigate the accident scene and interview the police officers involved. She learned from talking with the Medina Police Chief that criminal negligence charges were likely to be filed against Kearney; Lunzer also learned from Charles Engdahl, an adjuster at Mr. Morin's insurance company, State Farm Insurance Company, that Mr. Morin had left a wife and four or five minor children, and that he was a truck driver. Lunzer also tried a number of times, without success, to reach Mrs. Morin by telephone, and instructed Town and Country's investigator, James D. Morris, to make personal contact. (Lunzer Log 3/2/76, A-2 to 4; Lunzer Dep. 26-29, 37-39) That same day, Dairyland established a reserve of $25,000.00 on Kearney's file, the policy limits of his liability coverage. (Graham Dep. 35-40).

The next day, March 3, 1976, Lunzer learned from Town and Country that Mr. Morin had five minor children, and that the Minnesota State Patrol had told Mrs. Morin that her husband was not at fault. Also, pursuant to Lunzer's direction, Morris from Town and Country contacted Mrs. Morin, and learned that the

Morins wanted to settle their claim against Mr. Kearney. Lunzer's Log from March 3, 1976, reads in pertinent part:

> Morris called. Made personal contact. Mrs. was at scene right after acc. says both veh. in Ebd lane. (Insd W, Clmt E). there are 5 children ages 16 to 11. Brother of Clmt. was there and wants to settle. Wants certified copy of pol. before he will do so due to our limits. (A-5).

Morris' written "Adjuster's First Report" to Lunzer dated March 5, 1976, (A-17) states that he has the Morins "under control" and that they want to settle after Dairyland has confirmed that Kearney has only $25,000.00 of coverage. (See also Morris Dep. 8)

On March 4, Lunzer discussed Kearney's case with her supervisor, Graham, who instructed her to "try to settle" the Morins' claim against Kearney. (Lunzer Log 3/4/76, A 5) Lunzer knew by this time that "unless additional investigation turned up something new," Kearney was responsible for Mr. Morin's death, and his survivors' damages well exceeded Kearney's $25,000.00 policy limits. (Lunzer Dep. 44-45). However, before concluding the settlement, Lunzer wanted to confirm the facts of the accident with the highway patrolmen and possibly interview Kearney, who was still in the hospital. (Lunzer Dep. 42).

On the following day, March 5, Lunzer learned from Town and Country that the police report was "very unfavorable" to Kearney. (Lunzer Log 3/5/76, A-7) A few days later, March 8, she received statements of a witness and one of the investigating officers, and a copy of the police report, all of which "show insd over center line." Graham also told Lunzer on the 8th to obtain Kearney's statement before settling. (Lunzer Log 3/8/76, A-7 to 8) The next day, March 9, Lunzer learned from Kearney's

wife that he couldn't recall the accident. (Lunzer Log 3/9/76, A-8)

On March 17, 1976, Mrs. Morin retained the law firm of DeParcq, Anderson, Perl & Hunegs[10] to handle her claim both against Kearney and against the Medina Ballroom, which had served liquor to Kearney. Aware that Kearney had only the minimum automobile liability coverage required by Minnesota law, $25,000.00, the DeParcq firm took the Morins' case primarily because of the potential dram shop claim against the Medina Ballroom. Because the Morins' claim against Kearney seemed so clear cut, and they expected Dairyland to simply pay the limits of Kearney's policy to the Morins, the DeParcq firm added handwritten language to the standard retainer agreement signed by Mrs. Morin which provided that the DeParcq law firm wouldn't charge any legal fees in obtaining Dairyland's $25,000.00 policy if they didn't have to become "technically involved." (Richard M. Theno Dep. 16-22, 33-35, Theno Dep. exhibit no. 1) The next day, March 18, the DeParcq firm's investigator, Richard M. Theno, wrote Dairyland to inform it of the DeParcq firm's representation. (Theno Dep. Exhibit No. 2) On the following Monday, March 22, 1976, Lunzer received Theno's retainer letter. (Lunzer Log 3/22/76, A-10)

On March 24, Morris from Town and Country was finally able to speak to Kearney in the hospital, and he relayed on to Lunzer that Kearney recalled nothing about the accident. Later that day, Lunzer called Theno at the DeParcq firm, who informed Lunzer that the Morins' were offering to settle their claim against Kearney for $25,000.00, the limits of his coverage. Lunzer's notes read:

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[10]Now DeParcq, Anderson, Perl, Hunegs & Rudquist, P.A.

> Called Theno--he wants $25,000.00 now told him I need to interview officers first. Discussed subro. problems if he sues--He's aware of them but feels that we just ought to pay this. (Lunzer Log 3/24/76, A-10,11) (emphasis added)

Lunzer was thus aware that Theno wanted Kearney's limits paid immediately, and she also knew that Mrs. Morin had five children, didn't work, and that Mr. Morin had been the breadwinner for the family. (Lunzer Dep. 63-64) However, at the time of this offer, Dairyland hadn't yet completed its investigation (Lunzer Dep. 67; Theno Dep. 43) In this conversation, Lunzer also first raised the threat of a subrogation claim by State Farm, the Morins' no-fault insurer, if the Morins filed suit.

In the next few days after Theno's March 24th offer to settle for Kearney's policy limits, Lunzer spoke to Kearney on three separate occasions. By now, Kearney had sufficiently recovered to discuss what little he recalled of the accident with Lunzer. Lunzer spoke with Kearney by telephone on March 24 (after Theno's call), March 25, and March 29, learning that Kearney didn't take his anti-blackout medication before the accident, and that he only recalled having one drink. (Lunzer Log 3/24/76, 3/25/76, 3/29/76, A-11,12) More significant than what Lunzer learned from Kearney in these three telephone conversations is what Kearney wasn't told by Lunzer. Lunzer didn't even mention the Morins' offer, much less inform Kearney of the consequences of an excess judgment if this offer was rejected. (Lunzer Dep. 102-103)

Finally, on March 30, a full month after it had first learned that Kearney was drunk and crossed the center line, Dairyland concluded its investigation. By now, it not only had statements from all of the police officers and Kearney, but additionally, had learned that Kearney had been charged with

criminal negligence as a result of his blood alcohol reading. Graham authorized and expected Lunzer to pay Kearney's "full $25,000.00" to the Morins (Graham Dep. 45-46), and Lunzer's Log reads: "no need to do any addl investigation--ok to settle now & tell insd to get attorney [for his criminal negligence charge]." (Lunzer Log 3/30/76, A-12)

Lunzer now, of course, had the authority to accept the Morins' settlement offer, but she didn't call Kearney to inform him of this offer, and the fact that he could be protected against any personal liability. She did call Kearney's "step-father," Mr. Sipe, who had been helping out with Kearney's affairs, but also failed to tell him of the Morins' outstanding offer. Also, contrary to Dairyland's gross misrepresentation that Lunzer informed Sipe of Kearney's "potential excess liability" (Appellant's Brief p. 43) (emphasis added), Lunzer's Log states only that she "explained abt liab & that we are going to try & settle." (A-13) Nothing in Lunzer's deposition or Sipe's deposition speaks to a discussion about excess liability, and Sipe had in fact thought that Dairyland was simply going to pay its $25,000.00 limits. (Lunzer dep. 74, Sipe Dep. 8-9, 11-13, 23, 44-45)

The following day, March 31, 1976, two critical conversations took place. In the first, Lunzer called Theno, and her full notes of this conversation read:

> Called Theno-asked what he'd take to settle this-says he'll have to talk to Perl, he's not atty-says Morin's blood alcohol was 0. He is aware of no wit named Rick, but would like names of anyone who drank with insd if we get them. He'll have Perl call. (Lunzer Log 3/31/76, A-13)

Lest there be any doubt that in this conversation, Lunzer tried to negotiate a discount off of Kearney's policy limits,

Lunzer's deposition testimony about this conversation reads:

> Q. And when when you put in a call to Mr. Theno you tried to settle the case for less than the policy limits, correct?
>
> A. Yes. (Lunzer Dep. 75) (emphasis added)

Theno's testimony about this March 31 converstaion with Lunzer corresponds with hers, and he additionally testified that the discount she tried to obtain on Kearney's policy was $1,500.00.

At this point, it is crucial to point out that Dairyland's statement of facts is blatantly in error when it alleges that the purpose of this discount was to "reserve $1,500.00 of the policy proceeds due to State Farm's subrogation claim." (Appellant's Brief p. 4). This is a totally new excuse for Lunzer's conduct, because Dairyland never claimed in the trial court that State Farm's alleged subrogation claim, which it claimed as a justification for its post-suit conduct, had any application before the Morins filed suit against Kearney. This is not only a completely new allegation, but additionally, it is flatly contrary to Theno's testimony that Lunzer didn't tell him why she needed a reduction of $1,500.00. (Theno Dep. 47)

Immediately following this conversation between Lunzer and Theno, Norman Perl, the senior partner at the DeParcq Law Firm and the attorney handling the Morins' claim, got on the phone with Lunzer. Even though Lunzer had full authority from Graham

to accept the Morins' offer of $25,000.00,[11] her own notes show that she made a counter-offer of less than the limits of Kearney's policy, that Perl wouldn't accept anything less, and informed Lunzer she was risking a bad faith claim against Dairyland by her conduct:

> Perl called--says he can't and won't take any less than limits on this case & brought up bad faith. Told him I'd see what I could do. (Lunzer Log 3/31/76, A-14)[12]

Because Lunzer wouldn't pay Kearney's policy limits to the Morins even though Dairyland had completed its investiation and given Lunzer authority for the full $25,000.00, Perl was left with no alternative but to commence an action against Kearney, which was done on April 2, 1976. (Lunzer Log 4/2/76, A-14)

A, Dairyland's Pre-suit Subrogation Defense

Before discussing how these facts from Dairyland's own records and admissions demonstrate its repeated acts of bad faith towards Kearney, it is critical to point out that Dairyland, in its brief,

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[11] As noted by the trial court (App. A-17) Perl testified that Lunzer told him that she did have authority at this time to settle for Kearney's policy limits. (Perl Dep. 36) Lunzer agrees that she had full authority at this time to accept the Morins' offer (Lunzer Dep. 77). For some inexplicable reason, Dairyland incorrectly states at page 22 of its brief that Perl testified Lunzer informed him that she did not have authority to settle.

[12] Perl's deposition testimony, while not necessary for this court's decision as Lunzer's log contains all the essential facts, is completely consistent with Dairyland's notes, and fleshes out the discussion. Perl testified that Lunzer said "Dairyland just doesn't pay the full policies unless we have to. We always get some kind of a discount. I said this is one case, Linda, that you are not entitled to a discount, and you won't get a discount, and I will never give you a discount." (Perl Dep. 34)

has raised a defense regarding its pre-suit conduct that it previously raised only with regard to its post-suit conduct. In all of its various memoranda supporting its motion for summary judgment and opposing plaintiff's, Dairyland never claimed that an alleged subrogation interest of State Farm, the Morins' no-fault carrier, played any part in its pre-suit actions. Instead Dairyland raised this defense only to attempt to justify its conduct once the Morins commenced their action against Kearney.[13] Moreover, it is unquestionable that Dairyland's subrogation defense applies only to the post-suit time period, because it is the very act of commencing a lawsuit that was alleged to give rise to State Farm's subrogation interest under the then applicable no-fault law, Minn. Stat. §65B.53, Subd. 2 (1974). State Farm did indeed, in a letter dated March 5, 1976, (A-54) advise Dairyland of its intent to assert a subrogation interest against Dairyland for $1,000.00 but only for the property damage to Donald Morin's car. This subrogation interest applied only to the property damage provisions of Kearney's policy, not his $25,000.00 liability coverage, and more important, had nothing to do with whether a subrogation interest was triggered in Kearney's liability policy under Minnesota's no-fault law by virtue of a lawsuit being commenced against him. Dairyland's own records clearly show the absence of any pre-suit subrogation considerations, because on

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[13] Memorandum in Support of Defendant's Motion for Summary Judgment, p. 7-11; Response to Plaintiff's Pretrial Motion for Summary Judgment, p. 3-5; Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, p. 3-5; Memorandum in Support of Defendant's Petition to Vacate, p. 2-4.

March 30, Graham authorized Lunzer to pay the Morins the full $25,000.00 of Kearney's policy. (Graham Dep. 44-45).

Yet, throughout its brief, Dairyland implicitly and explicitly attempts to apply its subrogation excuse to its pre-suit conduct. For example, Dairyland states that Theno testified, with respect to his March 31, 1976, conversation with Lunzer, that Lunzer "allegedly responded by stating that she needed to reserve $1,500.00 of the policy proceeds due to State Farm's subrogation claim," citing to page 44 of Theno's deposition in support. (Appellant's Brief p. 4) An examination of Theno's deposition at page 44 reveals no such reference to State Farm's subrogation interest, and in fact Theno testifies at page 47 that Lunzer didn't tell him why she needed a reduction of $1,500.00. At pages 16 and 17, and again at page 27, Dairyland once more implies that a State Farm subrogation claim prevented it from paying Kearney's full policy limits to the Morins before they commenced their suit against Kearney. At page 29, Dairyland makes this claim explicit:

> State Farm's assertion of its subrogation interest clearly made the plaintiff's demand of March 31, 1976, impossible to accept unless Dairyland was willing to prejudice the interest of its insured.

Finally, at various other places in its brief, Dairyland indiscriminately applies its subrogation claim to its pre and post-suit conduct. (Appellant's Brief, p. 36, 38, 46, 49)

Dairyland's attempt to argue on appeal that is subrogation excuse applies to its pre-suit conduct is not only inexplicable,

but is entirely inexcusable. Dairyland attempts to mislead this Court not only on the facts in the record (e.g. Theno's deposition testimony), but additionally on the applicable law, by raising a new, nonexistent defense to its pre-suit conduct. Simply put, State Farm never had, and never claimed, any subrogation interest prior to the initiation of the Morins' lawsuit. Dairyland's allegations to the contrary are wrong.

B. Dairyland's Attempt to Negotiate a Discount

Turning to the pre-suit defenses Dairyland raised in the trial court, and also raises here, Dairyland first claims, in essence, that it had no duty to immediately settle the Morins' claim, but rather, had a right to attempt to minimize its liability. Or, as Dairyland put it to the trial court, it was entitled "to explore the possibility of settlement for less than its limits of liability."[14] This statement, which might be better characterized as a "it doesn't hurt to try" defense, demonstrates a failure to grasp the fundamentals of an insurance company's duties under Minnesota law. Dairyland claims there is no authority for the proposition that "an insurer acts in bad faith for attempting to settle a claim for less than its limits of liability," (Appellant's Brief, p. 27). To the contrary, where liability is certain and damages vastly exceed the policy limits, this act of negotiating is in fact the very guts of a bad faith case under Minnesota law.

The starting point in examining an insurance company's attempt to negotiate a "discount" is elementary contract law.

[14]Memorandum in Support of Defendant's Motion for Summary Judgment, p. 12.

A counteroffer terminates an offer. New England Mutual Life Insurance Co. v. Mannheimer Realty Co., 188 Minn. 511, 247 N.W. 803 (1933), Restatement (Second) of Contracts, Section 38, 39(2) (1981). Thus, when Lunzer offered less than the policy limits to both Theno and Perl on March 31, she rejected and terminated their offer to settle for Kearney's policy limits. While in this case, the Morins were willing to accept $25,000.00 from Dairyland for another 15 months, the very act of trying to negotiate a discount runs the risk of terminating an offer that might never be renewed.

More significantly, under the facts of this case, Dairyland's attempt to twice negotiate a discount on March 31, flaunted the various duties it owed Kearney. With all evidence showing that Kearney was drunk, that he blacked out, and that he crossed the center line into Donald Morin's lane, Dairyland never had a plausible theory of defense, as further demonstrated by the directed verdict against Kearney on the issue of liability. As noted by the trial court in its memorandum, while it is often difficult to accurately evaluate a possible jury award, "it is inconceivable that Dairyland could believe that any jury would award less than $25,000.00 to the widow and five children of a 40-year-old breadwinner earning $30,000.00 annually who was struck and killed by someone who had crossed the center line and who had been driving under the influence of alcohol." (App. A-21)

Keeping in mind that after Dairyland evaluated Kearney's defenses (or lack thereof) and his potential monetary liability,

it had the legal obligation to view the Morins' offer as if Kearney's policy had no limits, is it possible to believe that Dairyland thought a jury might award $23,500.00, but not $25,000.00? To put it another way, if, under the facts of this case, Kearney had a $1,000,000.00 policy, would Dairyland try to negotiate $1,500.00 off from a $25,000.00 offer to settle? Hardly. Dairyland would instead beat down the Morins' door in an attempt to accept their offer. As a matter of law, Dairyland must be held to have viewed the situation here with only one thing in mind--Kearney's $25,000.00 policy limits. This is a simple and obvious act of bad faith towards Kearney. Continental Casualty Co. v. Reserve Insurance Co., 307 Minn. 5, 238 N.W.2d 862, 865 (1976).

Closely related to Dairyland's focus upon Kearney's policy limits is its wholesale disregard of Kearney's financial exposure, a separate element of bad faith. Continental Casualty Co., supra. Dairyland obviously was concerned only with saving a few pennies off of its minimum policy limits, while Kearney was exposed to financial ruin, as the jury's verdict of $745,000.00 against him ultimately proved. As a matter of law, Dairyland must be held to have acted in bad faith when it tried to negotiate this discount, because it was concerned only with its own financial exposure, not with Kearney's.

As yet another separate element of bad faith, Lunzer's Log and her deposition testimony are conclusive admissions that she failed to timely notify Kearney of the Morins' offer to settle for his policy limits. Dairyland knew as early as March 3, 1976, that the Morins wanted to settle their claim against Kearney for his

policy limits. (Lunzer Log 3/3/76, A-5, Morris Dep. 7-3) Even giving Dairyland the benefit of the doubt, and viewing Theno's conversation with Lunzer on March 24, as the first offer to settle for Kearney's policy limits, a full week went by between this offer and Lunzer's March 31, conversation with Theno and Perl.[15] On March 24, after learning from Theno that "he wants $25000 now," (emphasis added) Lunzer called Kearney and discussed wage loss information. The next day, Kearney called Lunzer back, and informed her that he has a blackout disorder, and didn't take his medication before the accident. On March 29, Lunzer once again contacted Kearney and discussed his drinking before the accident. Totally absent from the notes in Lunzer's Log of these conversations is any reference to the Morins' offer of March 24, (A-11, 12) and Lunzer confirms in her deposition that she didn't notify Kearney of his potential excess exposure until she sent Dairyland's "excess claim" letter to him on April 16, 1976. (Lunzer Dep. 102-103) Even in this excess claim letter (A-25), Dairyland doesn't mention the Morins' March 24, or March 31, offers, and only by way of Perl's letter to Dairyland of April 14 (which he instructed Dairyland to forward on to Kearney) was Kearney able to learn of the Morins' offer. (A-19, 20) Under the governing legal principles, "an important question is whether the insurer informed the insured of all proceedings, including communication of settlement offers," New Amsterdam Casualty Co. v. Lundquist,

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[15] Dairyland's contention at p. 19 of its brief that it is disputable whether this March 24th offer was a "valid" offer is too ridiculous to even merit discussion.

293 Minn. 274, 286-87, 198 N.W.2d 543, 551 (1972) (emphasis added). Here, without this information, Kearney couldn't "take whatever course may be necessary for the protection of his own interest in the event [Dairyland] should reject the offer." Larson v. Anchor Casualty Co., 249 Minn. 339, 352, 82 N.W.2d 376, 384 (1957).

It is bad enough that Dairyland didn't notify Kearney of the Morins' offer, but it is outrageous that they never told him about their attempt to negotiate a discount. Dairyland's allegation that it informed Sipe of Kearney's "potential excess liability" [16] (emphasis added) is spurious, as nothing in the record speaks to a discussion about excess liability, and moreover, Lunzer admits never telling Sipe about her attempt to discount Kearney's limits. (Lunzer Dep. 74, 102-103).

Dairyland cites Linscott v. State Farm Mutual Automobile Insurance Company, 368 A.2d 1161 (Maine 1977) for the proposition that Dairyland had a right to negotiate with the Morins for a discount off of Kearney's limits, but even a cursory examination of Linscott shows that it has nothing to do with an insurance company's duty to act in good faith towards its insured. The plaintiff in Linscott was the third party victim of the insured's negligence, who brought an action directly against the insurance company. This plaintiff "explicitly disavowed reliance on the 'duty of good faith and fair dealing' owed by an insurer to its insured,"

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[16] Appellant's Brief p. 43.

368 A.2d at 1163, and additionally, this case was settled within the policy limits. Dairyland has taken a totally irrelevant case and language entirely out of context, and cites it as sole support for a proposition that is indefensible.

Finally, although it isn't essential to the finding that Dairyland acted in bad faith by trying to negotiate a discount, it is interesting to see how Dairyland used the threat of State Farm's subrogation interest in its attempt at a discount. As will be discussed more fully in the following section on Dairyland's post-suit actions, Minnesota's No-Fault Statute, as originally enacted, appeared to give rise to a subrogation interest on the part of a no-fault insurer if its insured commenced a lawsuit against the tortfeasor. While it was always highly questionable whether this would be the case if the insured hadn't been fully compensated, see Milbank Mutual Insurance Co. v. Kluver, 302 Minn. 310, 225 N.W.2d 230 (1974) (uninsured motorist claim), the effect of a valid subrogation claim by the Morins' no-fault insurer would have been devastating. If State Farm really had a subrogation interest in Kearney's $25,000.00 liability policy to the extent of the $10,000.00 or $20,000.00 owing to the Morins in no-fault survivor's benefits, the Morins' total recovery from Dairyland would be only $15,000 or $5,000, the rest being owed to State Farm. Hence, once Dairyland demanded a discount, the alternatives available to the Morins were two. The Morins could either accept this discount and not risk having their $10,000.00 or

$20,000.00 in survivor's benefits eaten up on a subrogation claim by State Farm, or commence a lawsuit and go to trial to collect the amount Dairyland was trying to discount at the risk, however slight, of triggering this subrogation claim. With the potential effect of a valid subrogation interest in mind, Lunzer's notes on her March 24, conversation with Theno are highly instructive. Immediately after noting Theno's offer for "25000 now," Lunzer brought up the potential subrogation claim by the Morins' no-fault carrier:

> Discuss subro. problems if he sues--He's aware of them but feels that we just ought to pay this. (Lunzer Log 3/24/76, A-10, 11, Lunzer Dep. 68-69)

Only one inference is permissible from Lunzer's Log, namely that she brought up this potential subrogation interest of State Farm as leverage (or a club, if you will) to force the Morins to accept the discount she would later propose. The most telling evidence that Dairyland all along sought to use State Farm's subrogation interest as leverage is found in its actions once suit was commenced. As is discussed more fully, infra at p.34-37, Dairyland on April 12, 1976, offered to pay the Morins $25,000.00, but only if State Farm was also listed as a payee on the check. But, if the Morins would take $24,000.00, Dairyland would leave State Farm off the check. It is impossible to characterize Dairyland's use of State Farm's alleged subrogation claim as anything other than a blatant attempt to bludgeon the Morins into accepting a lesser settlement, a tactic which ultimately led to the financial ruin of Kearney.

C. Dairyland's Refusal to Accept the Morins' Offer

As its second pre-suit defense, Dairyland claims that the Morins' offer to settle was unreasonable because it didn't give Dairyland a reasonable time to respond. The pertinent question to Dairyland is, why did it need more time to consider the Morins' offer? It is undisputed that by March 31, 1976, Dairyland had completed its investigation and given Lunzer full authority to pay the limits of Kearney's liability policy to the Morins. Lunzer concedes that when she spoke with Perl on March 31:

> Q: You already had full authority to settle for the full policy limits of $25,000.00, didn't you?
>
> A: Yes.
>
> Q: When you talked to him at that moment you could have settled the case for $25,000.00, couldn't you?
>
> A: Yes.
>
> (Lunzer Dep. 77)

Yet, she didn't accept Perl's offer. Try as she might, Lunzer just can't explain away her refusal.

> Q: On March 31st you did not make an offer to settle that claim for $25,000.00, did you?
>
> A: Not in those words.
>
> Q: Not in any words, did you?
>
> A: No. I told him I would check with the manager and call him back.
>
> Q: On March 31st, therefore, you did not make an offer nor accept his demand to settle this claim for $25,000.00, is that correct?
>
> A: That is correct, but I believe we had an agreement that if I could get $25,000.00 the claim would be settled.

Q: And where on March 31st is that you said that?

A: It is not in the notes.

(Lunzer Dep. 106) (emphasis added)

Lunzer, of course, had no need to "get" $25,000.00 from Graham, her manager, because he had already told her to go ahead and pay it. (Graham Dep. 45-46) Graham himself couldn't understand why Lunzer didn't accept the Morins' offer on March 31, testifying, "she may have had some reason. Maybe she had forgotten she had the authority . . ." (Graham Dep. 79)

Regardless of why, the crucial fact is that Lunzer didn't accept the Morins' offer on March 31. Dairyland has never disputed that Lunzer was acting within the scope of her employment throughout these negotiations, and in fact, at the pre-hearing conference held before Justice Peterson on this appeal, Dairyland explicitly conceded that Lunzer's actions were within the scope of her employment. Lunzer's actions are therefore binding upon Dairyland, which must bear the burden of her bad faith conduct. In its attempt to further delay this matter by having it remanded for trial, Dairyland claims that Lunzer's testimony raises a fact issue whether she really rejected the Morins' offer. This position, first of all, totally fails to take into account elementary contract law under which Lunzer's counteroffers to both Theno and Perl on March 31, operated as a rejection of the Morins' offer as a matter of law. New England Mutual Insurance Co. v. Mannheimer Realty Co., 188 Minn. 511, 247 N.W. 803 (1933). The second, and more significant,

flaw in Dairyland's argument is that it doesn't matter whether Lunzer explicitly rejected the Morins' offer. We know she didn't accept it, and under these aggravated circumstances, she had no valid reason for not accepting it immediately. Taking into account all of the factors used in evaluating an insurer's conduct (i.e. theories of defense, potential damages, Kearney's financial exposure, and viewing the case as if there were no policy limits) Dairyland had not only the opportunity, but also the obligation, to protect Kearney from any exposure in excess of his policy limits. Dairyland had the duty to bring this matter to a full and final resolution on March 31, 1976. But, as we know, Lunzer chose to do otherwise, for which Dairyland must now bear the consequences.

In a case involving remarkably similar facts, the Fourth Circuit Court of Appeals affirmed a finding of bad faith where an insurance company failed to immediately accept an offer of settlement within the policy limits after it had determined that liability was clear and damages exceeded the policy limits. Andrews v. Central Surety Insurance Co., 271 F.Supp. 814 (D.S.C. 1967) (applying South Carolina law), aff'd per curiam, 391 F.2d 935 (4th Cir. 1968). Exactly as in the instant case, a drunk driver crossed the center-line of a highway and ran head-on into another vehicle, killing the innocent driver. The applicable insurance policy had $10,000.00 limits, and the attorney for the decedent's estate offered to settle with the insurance company for $9,950.00. The insurance company, trying to save itself $100.00, made a counteroffer of $9,850.00. The attorney again

demanded $9,950.00, and gave a deadline for the insurance company to answer. This deadline was extended twice, but in each instance, the offer was refused by the insurance company. Exactly as happened here, the attorney told the insurance company that if his offer was rejected, he would immediately commence suit. When his offer was in fact rejected, the attorney made good on his word, and commenced his lawsuit. The next day, the insurance company offered $9,850.00, the same amount it had earlier offered, which was rejected. Two days later, the insurance company offered the amount originally demanded, $9,950.00, but this was rejected as well. A couple of weeks later, the insurance company offered its entire policy limits of $10,000.00, which was refused. The case proceeded to trial, and the jury returned a verdict totalling $144,000.00 against the defendant. In the subsequent bad faith action against the insurance company, the South Carolina District Court found the insurance company liable for the full extent of the excess judgment against its insured.

> The exaggerated circumstances surrounding the collision in this case leave no room for doubt that the negligence, recklessness, willfulness and wantoness of defendant's insured was the sole proximate cause of the collision and the resulting death of Green, and such circumstances demanded an immediate settlement to protect [the insured's] interest. Such facts and circumstances were forcefully brought to defendant's attention at a time when it had full opportunity to compromise and settle all claims against plaintiff within its policy limits. It surely knew, or reasonably should have known, that its failure to settle would most probably result in excess judgments against its insured. Its unwarranted attempt to 'save something' out of its coverage and its inexcusable failure to settle violated its contractual duties and obligations to plaintiff.

> The court can only conclude that such irresponsible or selfish action on defendant's part amounted not only to negligence, but also to bad faith. 271 F.Supp. at 820-21 (emphasis added)

In contrast to Andrews, the cases relied upon by Dairyland have absolutely no application to the actual circumstances presented to Lunzer on March 31. Dairyland relies primarily upon Smiley v. Manchester Insurance and Indemnity Co. of St. Louis, 71 Ill.2d 306, 375 N.E.2d 118 (1978), which isn't even a bad faith case. Smiley involved a malpractice action by an insurance company against the attorney it had retained to defend its insured in an action arising out of an automobile accident. The insurance company had given this attorney full authority to meet the plaintiff's demand for the policy limits, but he refused the plaintiff's offer, and the jury returned an excess judgment against the insured. The bad faith action subsequently brought against the insurance company was resolved by summary judgment in favor of the insured and was affirmed on appeal. Smiley v. Manchester Insurance and Indemnity Co., 13 Ill. App.2d 809, 301 N.E.2d 19 (1973). In this malpractice action, the insurance company sought to recover from the attorney the excess judgment for which it had been already found liable. As one of his defenses, this attorney claimed that the insurance company had known early on of the likelihood of liability and damages exceeding the policy limits, and that the insurance company was, therefore, contributorily negligent "in failing to settle the claims at an early stage." 375 N.E.2d at 123. The

court rejected this argument, stating, in the language seized upon by Dairyland:

> The mere fact that an insurer makes a preliminary evaluation of liability based on an adjuster's investigation does not mandate immediate settlement of the claims. Id. at 123 (emphasis added)

It is most interesting to examine the language Dairyland quoted from Smiley in its brief at page 29. Dairyland quoted the above language and most of the remainder of the paragraph, but for some reason, chose to omit, right in the middle of the paragraph, the following two sentences:

> The evidence shows that one eyewitness was not located until December, 1967. In fact, depositions were not taken of the two claimants until June, 1968. Id. at 123.

Under the particular facts in Smiley, the evaluation of liability was only preliminary, and more investigation was needed before the insurance company could conclusively "ascertain the possibility of success at trial" and the damages its insured might be exposed to. 375 N.E.2d at 123.

Here, Lunzer was told by her supervisor not to investigate further, and simply to pay the money to the Morins. Dairyland's misplaced reliance on Smiley, and more particularly its deliberate omission of the critical language distinguishing Smiley from the instant facts, is but a further attempt by Dairyland to distort the applicable law.

Dairyland also relies on Knobloch v. Royal Globe Insurance Co., 38 N.Y.2d 471, 344 N.E.2d 364 (1976), but plaintiff cannot

fathom why, as the court in this case reversed the lower appellate court and reinstated a bad faith judgment against the insurance company. Knobloch also supports the principle that an insurance company's tender of its full policy limits after the claimant's offer has terminated does not operate "without more to exonerate a carrier from pre-existing liability for bad-faith failure to settle within policy limits." The court further pointed out that "[c]ounsel for the insurance company invites our attention to no case which has ever so held, in our jurisdiction or elsewhere." 344 N.E.2d at 368. However, exactly as it did with Smiley, Dairyland seizes upon language that supports its defense only if the context of the statement and the rest of the decision are ignored. Contrary to Dairyland's misrepresentation of Knobloch's holding, the opportunity that the insurance company had to settle the case within its policy limits, under facts showing the limits should have been paid, was critical to the court's ultimate conclusion that the insurance company did indeed act in bad faith.

Finally, defendant's reliance on DeLuane v. Liberty Mutual Insurance Co., 314 So.2d 601 (Fla. App. 1975), cert. denied, 330 So.2d 16 (1976) again ignores the facts of the case, because in DeLuane, the plaintiff's demand expired before the insurance company had a reasonable time to investigate the case and make an intelligent decision whether to pay its insured's policy limits; this is not true here. It should also be noted that the insurance company in DeLuane "proceeded with all due haste to determine

and evaluate their position, and they almost made plaintiff's unreasonable deadline;" and when they agreed to pay their insured's limits on the Monday following the Friday expiration of the offer, the plaintiff's attorney refused it. Here, we know that the Morins kept their $25,000.00 offer open for another 15 months.

There is only one reason why Lunzer wouldn't accept the $25,000.00 offer of the Morins on March 31--she wanted to save Dairyland a few dollars, never mind the devastating consequences to Kearney. Dairyland totally abandoned each and every one of its obligations to Kearney, and as a consequence, a $720,000.00 excess judgment was rendered against him.

II. AFTER SUIT WAS FILED AGAINST KEARNEY, DAIRYLAND ACTED IN BAD FAITH TOWARDS HIM WHEN IT AGAIN, WITHOUT HIS KNOWLEDGE, TRIED TO NEGOTIATE A DISCOUNT FROM THE WIDOW AND CHILDREN'S OFFER TO SETTLE FOR HIS $25,000.00 LIMITS AND AGAIN REFUSED TO ACCEPT THIS SETTLEMENT OFFER.

Because Perl had no alternative after Lunzer refused to pay Kearney's policy limits on March 31, he commenced a wrongful death action against Kearney on April 2, 1976, for $500,000.00 in compensatory damages. (Lunzer Log 4/2/76, A-14). However, Perl was still willing to accept Kearney's $25,000.00 limits in full settlement of the Morins' claim, an offer which in fact remained open for almost 15 more months. On April 6, Lunzer reached Perl by telephone, and he again stated his willingness to settle for $25,000.00. At this point, Lunzer renewed the

specter of State Farm's subrogation interest that she had first brought up with Theno back on March 24th. Lunzer told Perl that if she filed an Answer, State Farm, the Morins' no-fault insurer, would have to be listed as a payee on Dairyland's check because it had a subrogation interest in the survivor's benefits and funeral expenses it owed to the Morins, by virtue of suit being commenced against Kearney. Perl responded that he would think about it and call her back. Lunzer then discussed the matter with Graham, who told her not to pay the $25,000.00 unless State Farm was listed as a payee on the check. (Lunzer Log 4/6/76, A-14; Lunzer Dep. 79-80)

State Farm's minimum obligation to the Morins for suvivor's benefits under Minnesota's no-fault statute, Minn. Stat. §65B 44, Subd. 1(b), was $10,000.00, and State Farm ultimately paid a total of $20,000.00 when the Morins "stacked" coverage on a second vehicle they owned.[17] Keeping in mind that if State Farm indeed had a subrogation interest, it had to equal at least $10,000.00 and perhaps $20,000.00, Lunzer's conversation with Perl on April 12, 1976, is also critical. With Graham's approval (Graham Dep. 53-55), Lunzer again tried to settle the Morins' claim for less than Kearney's policy limits. If the Morins still insisted on Kearney's full policy limits of $25,000.00, Dairyland would list State Farm as a payee on the check. However, if the Morins would take $24,000.00, they could have a check without State Farm listed as a payee.

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[17] State Farm paid this additional $10,000.00 in survivor's benefits in July, 1978, after this Court decided Wasche v. Milbank Mutual Ins. Co., 268 N.W.2d 913 (Minn. 1978).

> Called Perl-he hasn't decided what to do-told him that if he dismisses this I'll send him 24000 w/o SF on check. He refused-says to send 25000 & he'll dismiss suit against insd or file answer & he'll go after us for bad faith. (Lunzer Log 4/12/76, A-15) (emphasis added)

After speaking with Perl, Lunzer again conferred with Graham, who once more told her not to pay $25,000.00 without listing State Farm as a payee. She then called Perl back, and her log reflects Perl saying that he would send a dismissal and a court approved distribution upon receipt of a draft from Dairyland. Dairyland seizes on this language in Lunzer's log (A-15) and Lunzer's letter to Perl of April 13, 1976, (A-18) as supporting its claim that Perl agreed to accept $25,000.00 in settlement of this claim "on the condition that State Farm be identified as a co-payee on the draft." (Appellant's Brief, p. 6) However, this language in Lunzer's Log does not remotely support any such agreement, and Dairyland also conveniently ignores Perl's immediate response to Lunzer's April 13th letter which cleared up any mistaken notion by Lunzer that Perl had ever agreed to such a settlement. Perl immediately called Lunzer on April 14th when he received her April 13th letter and told her, according to her own notes, "put in Answer or send check w/o SF on it." (Lunzer Log 4/14/76, A-15) Perl followed up this telephone call with a letter dated the same day, where he reviewed the conversations that had taken place both before and after he had commenced the Morins' suit against Kearney, and that he viewed Dairyland's actions as merely "trying to save a few pennies for your insurance company in a case where obviously the damages would well exceed the coverage." (A-19, 20) Dairyland never

responded to Perl's April 14th letter. (Lunzer Dep. 92-93; Graham Dep. 76-77)

On April 16, 1976, Lunzer forwarded a copy of Perl's April 14th letter to Kearney, as Perl requested, (A-24) and also wrote an "excess claim" letter to Kearney, (A-25) which doesn't even hint at the negotiations that transpired both before and after suit was commenced. Lunzer also admits that at no time prior to April 16th did she inform Kearney, his wife, or Sipe the offers of settlement made by the Morins, Dairyland's attempts to pay less than Kearney's policy limits both before and after suit was filed, and Kearney's possible exposure to an excess judgment if these attempts to pay less than the policy limits failed. (Lunzer Dep. 103-104)

The Morins' offer to settle for $25,000.00 without State Farm listed as a payee stayed open for over 14 more months. On June 17, 1977, Mr. J. Michael Egan, another attorney in Perl's office, wrote to Alan G. Christoffersen, the attorney hired by Dairyland to represent Kearney. (A-21, 22) Egan notified Christoffersen that the Morins' offer to accept $25,000.00 without State Farm on the check was still open, but would expire on June 31, 1977, after which it would be permanently withdrawn, and that Mr. Kearney would be pursued personally for satisfaction of any verdict in excess of the policy limits. Dairyland chose to not even respond to this letter.

On December 1, 1977, well after the Morins' $25,000.00 offer expired, and some 21 months after the Morins had first notified Dairyland that they wished to settle for Kearney's limits, Dairyland

attempted to deposit Kearney's policy limits into court. The Morins objected, citing Dairyland's bad faith, and Judge Donald J. Barbeau denied Dairyland's motion. Dairyland's appeal of Judge Barbeau's Order to the Minnesota Supreme Court was dismissed on April 17, 1978.

As the trial date in the Morins' suit approached, Dairyland's internal correspondence evidences a growing concern over its "bad faith" exposure. In a letter written from Terry Lee, a corporate claims employee in Dairyland's home office, to Gordon David, who took over the handling of Kearney's file after Lunzer left in the summer of 1977, Lee expressed his concern about the "distinct possibility" that a jury could find that Dairyland acted in bad faith. Mr. Lee suggests hiring a "top notch trial atty" to handle the bad faith claim it expected to be made after the almost certain excess judgment was rendered against Kearney. Mr. Lee further writes:

> We also recommend that we find out exactly how Linda Lunzer and Wilson Graham will testify and pinpoint inconsistencies in their versions (if any) and in the version relayed by the plaintiff atty.
>
> Another thing which may be helpful is to sit down with insd and his atty and explain exactly what happened, what alleged, what the law is, how we evaluated the case and what we intend to do. Lets be sure our insd knows of and understands all that transpires. Keep in mind that without an assignment from our insured, its probable that the plaintiff has no cause of action against [Dairyland]. We need to do what we can not only to protect the insd but to seek his help in protecting ourselves. Lets find out the state of the insd's assets and his feelings about us and this case . . . (A-36, 37)

The "top notch" trial attorney Dairyland retained on this potential bad faith claim was Mr. O. C. Adamson, of Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennen, Minneapolis, Minnesota. Although State Farm had not changed its position and still claimed a right of subrogation against Kearney's policy, and although Dairyland hasn't pointed out any other change in circumstance (except, of course, its own mounting fear of a bad faith claim), Dairyland on October 11, 1978, finally offered the Morins $25,000.00 with, as Mr. Adamson put it, "no strings attached." (Egan Dep. Exhibit No. 10) Inasmuch as the Morins' offer to accept $25,000.00 had long since terminated, this offer was refused. The case proceeded to trial where the $745,000.00 jury verdict was rendered against Kearney.

As discussed earlier, Dairyland has all along applied its subrogation defense only to its post-trial actions. Indeed, the very act which supposedly gave rise to this subrogation claim, namely the Morins' commencement of their lawsuit against Kearney on April 2, makes it impossible for this subrogation defense to apply to the pre-suit period. The critical language of Minn. Stat. §65B.53, Subd. 2 that Dairyland relies upon provided, in pertinent part, that a no-fault insurer "shall be subrogated to the extent of benefits paid or payable to any cause of action to recover damages for economic loss . . ." This subdivision was deleted from the No-Fault Act on March 26, 1976,[18]

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[18]Act of March 25, 1976, Ch. 79, 1976 Minn. Laws 201. Ch. 79, Sect. 3 provides that "this Act is effective the day following final enactment (March 25, 1976) and applies to accidents occurring on and after its effective date."

and was replaced by two new subdivisions, Subd. 2 and 3,[19] both of which include language that precludes subrogation if the insured has not been fully compensated for his or her loss.

This language added to Minn. Stat. 65B.53, Subd. 2 and 3, making a no-fault insurer's subrogation rights, among other things, conditional on the requirement that the insured be first fully compensated, was by no means a new or novel idea, as this Court had enunciated this very principle two years earlier in the context of an uninsured motorist claim. Milbank Mutual Insurance Co. v. Kluver, 302 Minn. 310, 225 N.W.2d 230 (1974). Hence, in early April, 1976, Dairyland had the benefit of seeing the no-fault law just recently amended to explicitly provide that a no-fault insurer had no subrogation rights until the insured was fully compensated, and additionally, the benefit of this court's holding and reasoning in Kluver. Although this precise issue wasn't conclusively determined until 1980, when this Court decided Pfeffer v. State Automobile and

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[19] Minn. Stat. 65B.53, Subd. 2 and 3 (1983) read:
Subd. 2. A reparation obligor paying or obligated to pay basic or optional economic loss benefits is subrogated to the claim for the recovery of damages for economic loss that the person to whom the basic or optional economic loss benefits were paid or payable has against another person whose negligence in another state was the direct and proximate cause of the injury for which the basic economic loss benefits were paid or payable. This right of subrogation exists only to the extent that basic economic loss benefits are paid or payable and only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the same loss.

Subd. 3. A reparation obligor paying or obligated to pay basic economic loss benefits is subrogated to a claim based on an intentional tort, strict or statutory liability, or negligence other than negligence in the maintenance, use, or operation of a motor vehicle. This right of subrogation exists only to the extent that basic economic loss benefits are paid or payable and only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the same loss.

Casualty Underwriters Insurance Co., 292 N.W.2d 743 (Minn. 1980), where this Court confirmed that the Kluver principle applied to no-fault insurers, the law as it existed in early April, 1976, unquestionably raised severe doubts about the validity of any subrogation claim by State Farm. With this background in mind, Dairyland's actions must be closely examined.

As of April, 1976, both Lunzer and Graham were fully aware that State Farm's subrogation claim would be for more than $10,000.00. (Lunzer Dep. 87, Graham Dep. 54) Yet, as confirmed by Lunzer's Log (A-15), Lunzer's testimony (Lunzer Dep. 83-84), and Graham's testimony (Graham Dep. 53-55), Lunzer told Perl that if the Morins wanted Kearney's full $25,000.00 limits, Dairyland would list State Farm as an additional payee on the check, and the Morins would have to fight it out with State Farm over its alleged subrogation interest, or Dairyland would pay the Morins $24,000.00 and leave State Farm's name off the check.

The next logical question is, why did Dairyland withhold $1,000.00 when it knew that State Farm's subrogation claim, if valid, was far greater? According to Graham, he arrived at this figure by guessing the worth of the Morins' claim, guessing how much State Farm would pay in no-fault benefits, and then pro-rating State Farm's subrogation claim, even though he had no legal authority that State Farm's subrogation interest would

be pro-rated. (Graham Dep. 53-55). It is impossible to believe that Graham really intended to protect Kearney from a valid subrogation claim by withholding this $1,000.00, because he hadn't even spoken to State Farm when arriving at this $1,000.00 figure, nor did he have any idea if State Farm would even accept $1,000.00 in full settlement of their subrogation interest. (Graham Dep. 64) Also noteworthy is the absence of any explanation of this rationale in Lunzer's log.

Alan G. Christoffersen, the attorney hired by Dairyalnd to defend Kearney in the Morins' action, had his own idea about why Lunzer offered the Morins only $24,000.00 on April 12. On December 2, 1977, he wrote Dairyland to inform it about the progress of their motion to pay Kearney's policy limits into court. It will be remembered that by now, the Morins' $25,000.00 offer had terminated, and the Morins objected to Dairyland's attempt to pay these limits into court. Christoffersen pointed out in this letter:

> The unfortunate thing as far as settleent [sic] negotiations are concerned is that Linda [Lunzer] offered to pay $24,000.00 and leave State Farm's name off the check. (A-31)

Five days later, on December 7, 1977, Christoffersen again wrote Dairyland (A-32) and informed it that Judge Barbeau had denied Dairyland's motion to pay its limits into court. Christoffersen's explanation of Judge Barbeau's decision is highly instructive:

> I feel that he was probably persuaded to deny my motion because Linda offered $24,000.00 in settlement when she could have settled it for $25,000.00. If she would have been able to leave State Farm's name off from a $24,000.00 Draft, she could just have easily have left it off from a $25,000.00 Draft. (emphasis added)

After the jury found Kearney liable to the Morins for $745,000.00, and a bad faith action against Dairyland was now a certainty, Christoffersen wrote to O. C. Adamson, the attorney Dairyland hired with respect to its bad faith exposure, and offered his explanation of how Lunzer's $24,000.00 offer was arrived at:

> I have been considering what explanation could be given for the claim representative, Linda Lunzer, offered to pay $24,000.00 to the plaintiffs [sic] attorney and refusing to pay the additional $1,000 of the policy limits. I understand that the reason for refusing to pay the additional $1,000 was because State Farm Mutual Insurance Company had paid $1,000 for funeral expenses under their no-fault coverage. At the time of this accident they would have had a subrogation claim for the funeral expenses having priority over the other claim of the dependents. (emphasis added) (A-34, 35)

That same day, Christoffersen wrote to Dairyland, stating that he believed his explanation in the letter he sent to O. C. Adamson was "correct," and "if the case for over the policy limits is to be won by Dairyland, I feel that it is necessary to show why such an offer was made." (A-33)

Mr. Christoffersen was wrong--Dairyland's post-hoc excuses it attempted to concoct to justify their bad faith is not important to the decision of this case. Christoffersen's statement is, however, an admission that Dairyland had acted in bad faith. One thing is certain. State Farm's alleged subrogation interest had nothing to do with this $24,000.00 offer because on October 11, 1978, without any change in circumstances or the law affecting State Farm's alleged subrogation rights, Dairyland offered the Morins $25,000.00, "no strings attached."[20] Or, as the trial court put it, "If

[20] O. C. Adamson letter to Perl, Egan Dep. Exhibit No. 10.

Dairyland felt they could make the offer in October of 1978, why could they not have made the offer in 1976? Dairyland has not advanced any rationale for this change in position." (App. A-23)

Although Dairyland's rationale behind this change in position is unstated, it doesn't seem difficult to figure out. This offer was made only weeks after Terry Lee of Dairyland's home office wrote to Gordon Davis, and suggested hiring a "top notch" attorney who "may also have some suggestions on how we can best protect ourselves." (A-36) Even at this late date, just weeks before the commencement of the Morins' trial against Kearney, it is obvious that Dairyland is still only concerned with its own interest, and not Kearney's. This "no strings attached" offer was obviously Dairyland's attempt to "protect ourselves" from excess exposure, and once again, it is obvious whose financial exposure is paramount to Dairyland.

Dairyland's April 12, offer of $24,000.00 is egregious enough but is made all the worse by Dairyland's complete failure to inform Kearney what it was doing. By now, Kearney had been sued for $500,000.00 in compensatory damages, and yet, Dairyland still had not informed him, his wife, or Sipe, of the Morins' still open $25,000.00 offer. (Lunzer Dep. 102-103) Had Dairyland informed Kearney of this offer, and both its refusal to pay his policy limits without listing State Farm on the check and its counter-offer of $24,000.00 without State Farm, Kearney would have been able to "take whatever course may be necessary for the protection of his own interest" if Dairyland's position wasn't acceptable

to the Morins. Larson v. Anchor Casualty Co., 249 Minn. 339, 82 N.W.2d 376, 384 (1957). For example, Kearney could have consulted with his own attorney, who would have pointed out the serious doubts about the validity of State Farm's subrogation claim. Or, had Kearney known that the Morins wanted $25,000.00 but his insurance company would only pay them $24,000.00, Kearney might have been able to come up with the $1,000.00 himself. However, Kearney never had either opportunity, because he had no idea of the actions Dairyland was taking, obstensibly on his behalf. Even when Dairyland finally sent its "excess claim" letter to Kearney on April 16, 1976, after Perl told Dairyland to either pay Kearney's limits or put in an Answer, this letter doesn't contain a hint of what had actually transpired. (A-25) Even in all the rest of the correspondence Dairyland directed to Kearney (A-26, 30), Dairyland never informed Kearney of its pre-suit actions, or its refusal to pay his limits because of State Farm's subrogation claim. When the Morins on June 17, 1977, gave a final deadline of June 31, 1977, for their $25,000.00 offer, Christoffersen still never advised Kearney in the manner in which he was obligated to do under Minnesota law, i.e. "in the manner in which the insured would be advised if he consulted a private counsel," Lange v. Fidelity and Casualty Company of New York, 290 Minn. 61, 185 N.W.2d 881, 886 (1971), but instead, Christoffersen tells Kearney only that he was "discussing this matter with Dairyland Insurance Company," and that he would be "pleased to discuss it with you at your convenience." (A-27) Had Kearney been properly advised as if he had consulted private counsel, he

would have been advised by Christoffersen that State Farm's subrogation claim was not only highly suspect, but even if it existed, was far less than his potential exposure to the Morins. In addition, Kearney should have been advised that suit had been filed only because of Dairyland's pre-suit demand for a discount and its refusal to accept the Morins' offer, and that if a subrogation interest indeed existed, it should have been Dairyland's problem, not his own. Had Kearney been properly advised by an attorney without divided loyalties, he would have received this advice, but it is undisputed that he did not.

Ultimately, then, Dairyland's April 12, 1976, offer of $24,000.00 is seen for what it really was, yet another attempt to club Donald Morin's widow and children into accepting less than the full limits of Kearney's meager $25,000.00 policy to which they were entitled. Once again, Dairyland totally ignored each and every one of the duties it owed Kearney, merely so it could fatten its own coffers by a few dollars at the expense of a widow and five children.

III. BECAUSE ALL OF THE MATERIAL FACTS IN THIS CASE ARE TAKEN RIGHT FROM DAIRYLAND'S OWN RECORDS AND ADMISSIONS OF ITS EMPLOYEES, THE TRIAL COURT PROPERLY FOUND THAT THESE MATERIAL FACTS ARE UNDISPUTED AND THAT SUMMARY JUDGMENT SHOULD BE GRANTED TO PLAINTIFF

It should be obvious by now that all pertinent references to the record in this case are either to Dairyland's own documents and correspondence or the testimony of its own employees. The

factual disputes of which Dairyland so heatedly complains are, in reality, much ado about nothing. The trial court recognized that the material facts in this case are contained in Dairyland's own records and admissions, and additionally, are completely consistent with the testimony of Perl and Theno. As these facts are undisputed, and plaintiff is entitled to judgment as a matter of law under these facts, the trial court properly granted plaintiff summary judgment.

However, plaintiff cannot let go without comment Dairyland's present position that fact questions preclude summary judgment, particularly because of the procedural history of this case that led to its present posture. After twice being continued, this matter was finally called for trial on Thursday, June 10, 1982, the last or next to last day of the Hennepin County 1981-82 trial term. Just hours away from the start of jury selection, and with testimony scheduled to start the next morning, counsel for the parties were discussing the nature of the case with Judge Lebedoff. When Judge Lebedoff stated he had never had a "bad faith" case before, and inquired what issues would be presented to the jury, Dairyland's counsel, Mr. Dale Larson, represented to the trial court that Dairyland didn't think there were any issues of fact for the jury. As plaintiff all along had thought that this matter could be resolved solely on the records of Dairyland and the deposition testimony of its employees, plaintiff's counsel readily agreed, and the matter was submitted to the trial court on the parties' previously filed cross motions for summary judgment, which had been denied as untimely by Chief Judge Kalina

exactly one week earlier. Upon considering the parties' motions, Judge Lebedoff also agreed that there were no fact issues necessitating a jury trial, and granted plaintiff's motion for summary judgment.

Having seen what Judge Lebedoff thought of its defenses, Dairyland has undergone a remarkable change of heart. Dairyland now claims that the trial denied Dairyland "its day in court"[21] because there really were fact issues to submit to the jury. Dairyland further urges that this matter be remanded to the trial court for the trial which would have been held back on June 10, 1982, but for the representation of Dairyland that no fact issues existed for the jury.

In the Affidavit submitted to the trial court by Mr. Dale Larson in support of Dairyland's petition for a rehearing of Judge Lebedoff's Order (A-50 to 53), Mr. Larson does not deny that he made the statement to the trial court that there were no fact issues for the jury. Rather, Mr. Larson claims, in essence, that that's not what he meant. (A 51-52, Paragraph 4) Mr. Larson further alleges that he told the trial court that Dairyland's motion for summary judgment could be granted, but plaintiff's couldn't, because plaintiff's was premised upon "disputed and vigorously contested genuine material issues of fact." (A-52, Paragraph 5) In other words, Mr. Larson claims that after trial had finally commenced and plaintiff's witnesses had been brought in from out of state, plaintiff agreed to submit the matter on cross motions for summary judgment that couldn't be ruled on in

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[21] Appellant's Brief p. 15.

his favor, and that the learned trial court accepted the parties' cross motions on this basis. If indeed genuine fact issues had to be resolved to completely decide this matter one way or the other, the means to do so existed right then and there in Judge Lebedoff's courtroom. A jury was about to be selected, but the trial court was told by counsel for both parties that this wasn't necessary. Dairyland wasn't denied its day in court, but rather, it chose a strategy which it now obviously regrets.

Plaintiff recognizes that even where all counsel agree that there are no material fact issues, it is ultimately for the court to determine whether material fact issues exist. See generally, Brenner v. Nordby, 306 N.W.2d 126 (Minn. 1981), 10A Wright and Miller, Federal Practice and Procedure §2720 (1983). To put it another way, just because Mr. Larson stated there were no fact issues for the jury (to which plaintiff agreed), the trial court was not relieved of its obligation to determine whether material fact issues exist.

The true significance of Mr. Larson's representation is that it demonstrates how Dairyland has tried to have it both ways in this case. Plaintiff (and the trial court) relied on Dairyland's representation that no fact issues existed for a jury, without ever imagining that Dairyland would come back after an adverse decision and claim that the jury trial should have been held. Had plaintiff thought for a moment that Dairyland would completely change its position and demand an jury trial, plaintiff would never have renewed his motion for summary judgment. Rather, plaintiff would have insisted on going to the jury with his case,

so that Dairyland couldn't further delay this matter by appealing on the basis that summary judgment was inappropriate, exactly as it has done here. When Dairyland's present position is scrutinized in light of its representation to the trial court, it seems readily apparent that Dairyland is merely trying to further delay its day of reckoning, when it must finally account for its bad faith conduct.

CONCLUSION

It is difficult to think of a more compelling case than this for the imposition of bad faith liability. Wrongful death liability will never be more clear cut than it was in this case, with all evidence conclusively showing that Kearney was drunk, blacked out, and crossed the center line, killing an innocent driver. It is also impossible to imagine a more clear-cut case of liability which exceeded policy limits, what with the death of the breadwinner of a family of five children, who had earned some $29,000.00 in the year before he died. And, finally, it is difficult to imagine a case where an insurance company could breach more of the duties it owed its insured than Dairyland breached here. Dairyland was, is, and always will be, free to attempt to negotiate discounts on policies that it has conclusively determined are owed in full. But, if it chooses to do so, Dairyland, and not its insured, bears the entire risk of an excess verdict. Where, as here, Dairyland repeatedly refused to accept offers to settle for its insured's policy limits in the hopes of saving a few dollars, Dairyland, in effect, writes a

brand new policy for its insured, to the full extent of any excess judgment against him.

When Dairyland's sham defenses, misstatements of law, and distortions in the record are disregarded, the determinative question for this Court is really quite simple--did Dairyland have any conceivable motive in mind besides its own financial interest when it tried to negotiate a discount and wouldn't accept the Morins' offer on March 31, 1976, and when it tried again to save $1,000.00 on April 12, 1976, all without informing its insured? Plaintiff respectfully submits that the answer to this question is self-evident, and that the trial court properly granted plaintiff's motion for summary judgment. Plaintiff, therefore, respectfully requests that this Court affirm the trial court's Order of July 13, 1982, and the judgment entered in favor of plaintiff.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF/RESPONDENT

APPENDIX

A-1

CLAIMS — TELEPHONE REPORT

[illegible] the insured that the other driver was killed at the scene of the accident.

PERSON CALLING: [illegible] Sipe — RECEIVED: [illegible]

CALLING FROM: — DATE: 3-1-76 — TIME: 10:15

INSURED: Gerald Kearney — ADDRESS: 25 Valley Haven Park, Shakopee

POLICY NUMBER: 21-0374366 — COVERAGE: — HOME PHONE: no phone — WORK PHONE: Linton Industries

DATE OF LOSS: 2-23-76 — TIME: 7:30 p.m. — LOCATION: Hwy 55 - Medina, Mn

CAR INVOLVED: [illegible] convertible (not sure) — DAMAGE: ? — OWNER: Gerald Kearney — WHERE LOCATED: Loretto, Mn Garage 479-1160 Altriech Towing

PASSENGERS: (NAME) (ADDRESS) (PHONE) (INJURY) (AGE) (PARENTS NAME IF MINOR)

DRIVER: Gerald Kearney — AGE: 31 — ADDRESS: — HOME PHONE: — WORK PHONE:

no

Intensive Care — North Memorial Hosp. Robinsdale, Mn. — (Dr. Wayda — Oakdale Medical 588-0734, Robbinsdale 92[illegible])

[illegible] Ritterup 588-0616 — this nurse is the only one who will talk to you about this accident

Jaw is wired, spleen was removed, repair liver, leg was operated on — punctured lung.

OTHER CAR: [illegible] — DAMAGE: ? Maverick — WHERE LOCATED: Same garage as insured.

OWNER: Donald L. Morin — ADDRESS: 6721 Willow Drive, Medina, Mn

INSURED WITH: ? — COVERAGES PROVIDED:

PASSENGERS: (NAME) (ADDRESS) (PHONE) (INJURY) (AGE) (PARENTS NAME IF [MINOR])

1. DRIVER: Donald Morin — AGE: 40 — ADDRESS: — HOME PHONE: 478-[illegible] — WORK PHONE:

2. no

3.

4.

5.

Died at the scene of the accident.

WHAT HAPPENED: Ins. was heading West on State 55. Clmt was coming out of the gas station crossed over West [illegible] lane on 55 to head East. (~~Clmt~~ Ins. was over the [illegible] line police said.)

Stepfather had no more info.

POLICE: Medina Police — State Hwy. Patrol — TICKETS: —no — WHAT FOR:

WITNESS: Rick works at — next to Dairy Queen filling station — ADDRESS: Medina, Mn — HOME PHONE: — WORK PHONE:

ADDRESS: — HOME PHONE: — WORK PHONE:

ACTION TAKEN:

original reads below, "Police said Gerald was DWI"

O-C-V (1967) — USE REVERSE SIDE FOR ADDITIONAL COMMENTS

[illegible] DWI)

A-2

FILE STATUS

CLAIM # 99638

FACTS 2/23/76 Clmt leaving gas station, entering Hwy 55. Insd over center line? hit him.

DATE	ACTION TAKEN
3/2/76	date ok Cook
	Called Medina police - will not call.
	Insd step father called - abt car. He believes it is 68 Chev - wants to dispose of it. Told him will get appraisal + then call back. He says other veh is maverick + was junked. Tow 35 + storage 2 per day. Wants to get personal effects out of car
	Called insd wife - says car is 68 Chev. Has cannot recall much abt acc when she talks to him. Says he had gone to union meeting at 4 PM. She doesn't know if or where he stopped for a drink, couldn't give me name of anyone at work who might know. Insd has 2 children + wife pregnant.
	called clmt res - NA
	Called garage they have both cars + will hold til we get photos. other co is 54. + told them.
	Assigned Jm to appraise insd veh + photo clmts.

LC-17 (7-69)

A-3

FILE STATUS

CLAIM # 99638

FAC 2/23/76

#2

DATE	ACTION TAKEN
3/2/76	Medina Police Chief Hoover called. Investigating officers are Lafond - Medina, Dale Jones Sheriffs Office & Williams from Plymouth. There have been no charges yet, but he believes there will be criminal neg charges filed. Local gas station is Equad Station.
	Current find # for station
	Called S.T. - will call back.
	Assigned T+C for interview on 5/5 of all 3 officers + diagram, photos of scene & mot 5/5 if he can find mot. May be prob with interview since there are charges pending.
	Called owner of Dairy queen - N A
	S.T called Edina office Handling 23-5482-669 Chuck Engdahl. Says facts are that mod crossed center line + hit cmt head on. Cmt has wife + 4, maybe 5 kids. ages 10-16. He has talked to her att not getting atty until they at least found out who insured Teamsters Wife should be at home. Believes is member of teamsters union - truck driver. No under mod cov.
	Called C mt. trouble on line - reported it to

A-4

FILE STATUS

CLAIM # 99638

FAC 2/23/76
#3

DATE	ACTION TAKEN
3/2/76	Called Morris - left message
	Called clmt agt. - Explained we have Cov etc.
	(Leo Schwartz 545-6029) Will give my name +
	# to Clmt if she calls. Believes clmt had 4 kids,
	wife not employed - John Morris from Virginia
	is in town + handling a few things
	Called clmt PM - # still out of order -
	will have Morris make personal contact - He's
	calling back today.
	Sent Reins rept.
3/3/76	Recd appraisal - garage agreed to chg
	no storage if they can tow veh out this
	wk - is no salv value.
	Called step father - He agreed to 500 - ded.
	Will send title. Will also give Garage perm
	to tow veh out today. Sending tow bill
	Clmt veh at Ruff auto parts.

C-17 (7-69)

A-5 **FILE STATUS**

CLAIM # 99638

FAC 2/23/76

#4

DATE	ACTION TAKEN
3/3/76	Called clmt - # chgd to unpublished #. Called Ruff auto Parts. veh is red + he still has it - will hold it. but cant take photo for me.
	Morris called. made personal contact. Mrs. was at scene right after acc. Says both veh in Ebd lane. (Insd W, clmt E). there are 5 children ages 16 to 11. Brother of clmt was there + wants to settle. Wants certified copy of pol before he will do so due to our limits. Morris talked to Hwy patrol + officer gave same facts but no interview as there is grand jury hearing next wk. Is a wit but he can't get name til after hearing or interview officers. Patrol told clmt wife his not at fault. He has asked ST for copy of police rept + should have it 3/4. Is no recd (wit) at any of the gas stations in area.
3/4/76	disc. with WH - will wait until investigation complete + then send copy of pol + try to settle. find out if we need court approval for childrens settlement.

O-C-17 (7-69)

4

A-6

FILE STATUS

CLAIM # 99638

FAC 2/23/76
#5

DATE	ACTION TAKEN
3/4/76	Called ~~[illegible]~~ Hosp - insd out of ICU In 708 Bed 2.
	Recd card from T+C
	Called Am Genl - they will get photo of clmt + veh + will wait til they can pro rate it.
	Advised Mauro to get insd S/S + that will wait on settling until we have facts. He should have PR today + will try for insd S/S. Says Mrs Mann knows he has to do some investig. before he can make offer + she might want to wait until after grand jury hearing.
	Called Kline - says it would be best to have trustee apptd for children + have judge approve settlement. Would be too dangerous to just take a release.
3/5/76	Recd license check - is for a 69 Chev.
	Called for pol. - out but on recall list.
	Called Larson (owner) - their car is 69 Chev + they still own it
	must be prob with license # - wait for PR.

A-7 **FILE STATUS**

CLAIM # 99638

FAC 2/23/76

#6

DATE	ACTION TAKEN
3/5/76	Morris called - insd having surg today but may be able to see him mon. PR very un favorable. Has appt with 1 cop + wit today + will mail today. Someone needs to call Mrs Morris re status. Advised I would.
	Called Morris - not in.
	Reached Mrs. Morris + explained that we need to do investigation but should have something by next wed or thurs. She says to call her then as she'd like to set up meeting + include her attorney. Says she doesn't want to give us her atty name when I asked for it as she doesnt want to give out any info now. Would like us to call her as soon as we can.
3/8/76	Recd wit S/S + 1 officers S/S. + PR. all show insd over center line
	Recd tow bill - paid.
	Morris called. Hosp still won't let him into see insd. Advised I had talked to clmt. Wit felt he could have seen insd headlites, had there

O-C-17 (7-69)

A-8

FILE STATUS

CLAIM # 99638.

FAC · 2/23/76
#1

DATE	ACTION TAKEN
	Contd
	been any. Insd not passing or anything
	as far as he could tell. Is a slight crest of
	hill before impact at - going Ebd.
	Disc with WG - we need insd S/S before we do
	anything.
3/9/76	Recd note from Wally & S7 sicbro letter.
	Insd wife called. Says he can barely talk & recall
	nothing of acc. per her conversations with him
3/10/76	Recd title & Tow bill.
	Paid call & mailed title
3/11/76	Recd 60's & NY 36.
	sent NY 37 & 38
3/12/76	Called Mrs Morin & advised we haven't been
	able to talk to insd yet & will call her
	as soon as we can. She seemed to understand,
	asked abt his condition & # of children etc. Am
	to call her as soon as we can
3/15/76	Resent NY 37 to 400 Shelard Plaza S.
	Mpls 55426

A-9 **FILE STATUS**

CLAIM # 99638

FAC 2/23/76
#8

DATE	ACTION TAKEN
3/17/76	Recd photos of clmt veh
~~3/~~	
3/18/76	Supv Called + req copy of PR + alcohol test info. Says insd under trt for seizures - Dr is R.D. Tisdutka 448-2050 in Chaska. Was to take Rx 3 in am + 4 in pm + admits he did not take Rx in am only. Union meeting was at Medina Ballroom. He still ~~sent PR~~. insists there is wit named Rick who worked at gas station near DQ - had filled clmt tank just prior to acc. Told him we've found no Rick. Insd does not recall acc. Sent PR
	Supv called - says he's heard rumors that a Don DesLauriers (Hamel?) has told people that insd had passed him going really fast. Also his sister's son heard from this unfound wit Rick that he filled clmt gas tank + clmt says he was late for appt for tapes & flew out of station leaving skid marks. If he gets any more info will call. Gas station is the one next to Alice's Cafe
	Checked pol. no disability listed + veh is a convert per serial #

O-C-17 (7-69)

FILE STATUS

A-10

CLAIM # 99638

FAC 2/23/76
#9

DATE	ACTION TAKEN
3/19/76	Wrote Dr. for info
3/19/76	Called Mrs Mann - says she's insured DeLange firm + we should contact them.
3/22/76	Rec'd Return. Talked to Mavis - will get insd S/S Tues or Thurs depending on Mrs. schedule. Officers going to GF 3/23 so he will get their S/S on Wed.
	Called Hend - not in.
3/23/76	Called Hend. not in.
3/24/76	Mavis called - Insd recalls nothing after getting in cab to leave union meeting. Says he had 1 scotch + water to drink all evening. Does not recall acc. Mavis says wife in bad financial status - H had to pick her up + take her to hosp with him as was only way hosp would let him in.
	Dr Nemanich called + rec'd no fault form - sent.
X	Called Hend - he wants 25000 now. Told him I had to investigate. Discussed

C-17 (7-69)

A-11 **FILE STATUS**

CLAIM # 99638

FAC 3/23/76
#4

DATE	ACTION TAKEN
	Contd.
	subro provs if he sues - Hes aware of them but feels we just ought to pay this.
	Called Litton - Verified that insd is employed there - would only say that 4.71 is ~~Atty~~ hourly wage for nite shift differential - wouldnt verify that he makes that much.
	Called insd. he works day shift - Explained I have to wait for wage loss form since I cant verify hrly. wages.
3/25/76	Insd called - ~~[illegible]~~ wanted to know if we knew he blacks out. Says he didn't take Rx on day of acc + did black out. disorder is caused by tumor which he already had removed. Says Rx was dilantin phenobarb.. Look at his deposition!
3/26/76	Recd Insd S/S. + Dr rept.
3/27/76	Recd one officers S/S.
3/29/76	Theno called - re dram shop issue. He wants to get S/S from insd + wants us to cooperate. He knows alcohol level over .10
	Contd.

O-C-17 (7-69)

A-12 **FILE STATUS**

CLAIM # 99638

AC: 2/23/70
#10

DATE	ACTION TAKEN
	Contd.
	Told him we're not adverse to cooperating, but want to complete our investigation & will call him back this wk. after talk to mgr.
	Called insd - Told him that his blood alcohol could not have been reached with 1 drink - we need to know how much he had. Insists he went to meeting alone. Says he only bought 1 drink from bartender. Gave me 4 names of guys who might give us more info - Mike Donnell, Dick Shaw, Henry Larson, Bob Cardenal - Has no home add, but all work at Kenwin Lane Paint
	Called Donnelly, didn't answer page Larson didn't either
3/30/70	Rec'd Officers S/S - insd headlites on - no skids - insd was charged with criminal neg. Rec'd 4-7-70
	Called Donnelly - No one answered page Called home # for cardenal - wrong one. Called Des Lauriers - n/a
4/1/70	Reviewed with WG - No need to do any addl investigation - OK to settle now - tell insd to get attn.

O-C-17 (7-69)

A-13 **FILE STATUS**

CLAIM # 99638

FAC 2/23/76

#11

DATE	ACTION TAKEN
3/30/76	Called Sipe & explained abt leab & what we are going to try & settle. He's already checking into public defender for insd
	Called Thero - not in
	Called Litton - Donnelly leaves at 3:30
3/31/76	Called Donnelly - left message
	Donnelly called - says he sat with insd after union meeting - not during. Says after meeting insd had abt 3 drinks during 1 1/2 hr period - They were buying rounds - each bought only 1 says Bob Cardinal was with them. Says insd did not appear intoxicated when he left. "Looked ok" to Donnelly.
3/31/76	Called Thero - asked what he'd take to settle this - says he'll have to talk to Perlas he's not an atty - says Morris blood alcohol was 0. He is aware of no unit named Rick, but would like names of anyone who drank with insd if we get them. He'll have Bud call.

U-C-17 (7-69)

A-14

FILE STATUS

CLAIM # 99638

FAC 2/23/76
#12

DATE	ACTION TAKEN
3/31/76	Perl called - says he can't + won't take any less than limits on this case + brought up bad faith. Told him I'd see what I could do.
4/1/76	Recd inquiry from Morris on dram investigation. Called Perl - left message for Estate + guardian info.
4/2/76	Recd N438 + issued check. for 6 wks 2/24 to 4/5. Insd wife called - She recd S+C today - Told her to send it in to us.
	Called Perl - not in.
4/5/76	Recd S+C
	Called Perl - out of town today. so is Theno
4/6/76	Called Perl - told him we was ready to send check prior to suit. He wants to take insd's depo. Told him if I file answer I have to put ST on check for subro. Says he'll think abt it + call me back
	disc with W.G. - we will not pay 25000 now unless we put ST on check

A-15 **FILE STATUS**

CLAIM # 99638

FAC 3/23/76
#13

DATE	ACTION TAKEN
4/9/76	Recd bill from Morris.
	Called Reel - left message
4/12/76	Called Reel - he hasn't decided what to do -
	Told him if he dismisses this we'll send him 24000
	w/o 57 on check - He refused - says to send
	25000 & he'll dismiss suit against insd, or file
	answer & will go after us for bad faith.
	Disc with WH pay the 25,000 with 57 on check
	+ req dismissal & covenant. Need Court approval
	Called Reel - he will send dismissal + approval
	of distribution of settlement of death claim
	upon receipt of draft
	Called Kline - says we should get order
	of distribution before issuing checks on this
	claim - wrote Reel.
4/14/76	Reel called - says to put an answer or send
	check w/o 57 on it.
	Disc with WG. ask 57 if they'll send letter
	advising no subro. If not bill declaratory

O-C-17 (7-69)

A-16 **FILE STATUS**

CLAIM # 99638

ACT 2/23/76

#14

DATE	ACTION TAKEN
4/14/76	Donahue from SY called. Told him of suit - he feels he now has pulled + will recover all he paid. Says if we issue check w/o their name they will sue us.
	disc with TD G + referred to Al for answer.
	Recd hosp bill - room is semi private - Paid.
4/16/76	Recd letter from Perl sent copy to insd per his request.
	Called Al - not in today.
4/19/76	Called Al left message
	GAB called - they represent Indiana Ballroom - Would like copy of PR. Sent.
	Sent N438 + disability slip.
4/20/76	Brian Solem from Als office called - Explained our prob. He'll file answer for time being + ask Al if they can bring SY into suit. He believes they can

D-C-17 (7-69)

ADJUSTER'S FIRST REPORT 32060

INSTRUCTIONS

1. SEND ORIGINAL ONLY
2. DUE 10 DAYS
3. USE ONLY 1 FORM
4. ATTACH SEPARATE TYPED SHEET IF MORE CLAIMANTS

A-17

FROM Town & Country Claims

TO

DAIRYLAND INSURANCE CO.

INSURED: Gerald Kearney CLAIM NO. 99638

ADDRESS:

DATE OF LOSS: 2-23-76 LOCATION _____

FACTS: (STATE BRIEFLY) _____

COVERAGE QUESTION: _____ YES _____ NO; IF YES, EXPLAIN BRIEFLY _____

INJURIES

NAME	AGE	STATUS (DRIVER, INS'D — CLM'T PASS, PEDES.)	NATURE OF INJURY

INS STILL CAN'T TALK. UNDERGOING SURGERY 3-5-76
2 OFFICERS WANT TO WAIT TILL AFTER TAKING CASE
TO GRAND JURY TO BE INTERVIEWED.
PHOTOS ACCIDENT SCENE TAKEN.
CLM'TS UNDER CONTROL, AND WANT TO SETTLE,
WANT TO SEE COPY OF POLICE RPT.

OTHER CLAIMS: COLLISION _____ Amt. PD _____ Amt.

OTHER CAR INSURED? _____ YES _____ NO; IF YES, GIVE NAME, ADDRESS AND NAME OF ADJUSTER HANDLING

ACTION TAKEN:

POLICE REPORT — DIAGRAM

ENCLOSURES: STAT WITNESS JOHNSON, STAT OFFICER WILLIAMS

SIGNED: James Morris DATE 3-5-76

O-C-45

Dairyland Insurance Group

EXECUTIVE OFFICES 1625 N. Segoe Road • P.O. Box 5220 • Madison, Wisconsin 53705 • Phone: 608-238-5671

DAIRYLAND INSURANCE COMPANY

(St. Paul Regional Office Serving : Iowa , Minnesota , North Dakota , and South Dakota)

155 Aurora Ave. • P.O. Box 3506 • St. Paul, Minnesota 55165 • Phone: (612) 224-3751

April 13, 1976

Norman Perl
565 Pillsbury Bldg.
Minneapolis, Minnesota 55402

RE: Our File #: 21-99638-9
Our Insured: Gerald Kearney
Your Client: Darlene Morin

Dear Mr. Perl:

This letter will confirm our telephone conversation of April 12, 1976.

At that time we agreed to offer $25,000.00 in settlement of the claim of Darlene Morin and the minor children involved, in this case. Since the claim has been sued, it will be necessary that we include the name of State Farm Insurance on the draft.

In return, you have agreed to file a dismissal of the lawsuit against our insured, and to provide us with the Order of Distribution from the Judge on on the death settlement. I am also enclosing the convenant not to sue which we require your client to sign for our insured.

As soon as the Order of Distribution is received, we will issue our check accordingly. Thank you for your cooperation.

Yours very truly,

Linda Lunzer
Claims Examiner

LL:rgs
encl.

P.S. I assume I need not file an answer. If you disagree, please let me know immediately.

COPY

LAW OFFICES

DE PARCO, ANDERSON, PERL & HUNEGS

565 PILLSBURY BUILDING
608 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55402
AREA CODE 612-339-4511

WILLIAM H. DE PARCO
JEROME T. ANDERSON (1924-1972)
NORMAN PERL
RICHARD G. HUNEGS

RALPH E. KOENIG
STEPHEN S. ECKMAN
F. DEAN LAWSON
PAUL A. STRANDNESS
J. MICHAEL EGAN

April 14, 1976

Ms. Linda Lunzer, Claims Examiner
Dairyland Insurance Group
P. O. Box 3506
St. Paul, MN 55165

Re: Your File No. 21-99638-9
Your Insured: Gerald Kearney
Our Client: Darlene Morin

Dear Ms. Lunzer:

So that the record is clear on what has taken place in regard to the settlement discussions with our office and you, I am writing this letter to confirm our conversation with you this morning that you forthwith interpose an Answer to our Complaint.

My investigator and myself had repeated conversations with you wherein we demanded the settlement from your insurance company in the amount of $25,000.00. We indicated to you that this was clear cut liability on the part of your insured, having killed the principal breadwinner, leaving surviving a wife and five minor children. Nevertheless, Dairyland wanted to negotiate and get discounts, and we refused to accept anything less than $25,000.00. Therefore, we felt it was necessary to commence a lawsuit because you were not acting in good faith to protect your insured.

Immediately after the Summons and Complaint was served on your client, Gerald Kearney, you then called and stated you would pay the $25,000.00 but now would have to include the name of State Farm Insurance Company on the draft because they had paid some funeral expenses. I then told you if you would send the $25,000.00, we would dismiss the lawsuit against your insured. You then stated you would pay $24,000.00 and leave State Farm's name off the draft, again indicating that you really are not concerned about Mr. Kearney, but merely are

trying to save a few pennies for your insurance company in a case where obviously the damages would well exceed the coverage.

We are going to take whatever steps are necessary to enforce full collection of whatever damages are awarded against your insured, Mr. Kearney, and Dairyland Insurance Company, and any other parties who may be responsible.

I am sending a copy of this letter to you and request that you forward the copy to Mr. Kearney so that he is aware of what action you have taken in regard to this claim against him.

Please govern yourself accordingly.

Yours very truly,

Norman Perl

NP/mq

LAW OFFICES

DEPARCQ, ANDERSON, PERL, HUNEGS & RUDQUIST

WILLIAM H. DEPARCQ
JEROME T. ANDERSON (1924-1972)
NORMAN PERL
RICHARD G. HUNEGS
RALPH E. KOENIG
STEPHEN S. ECKMAN

565 PILLSBURY BUILDING
608 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55402
AREA CODE 612-339-4511
MCI 3

DONALD L. RUDQUIST
F. DEAN LAWSON
PAUL A. STRANDNESS
J. MICHAEL EGAN
PHILIP B. LUSH

June 17, 1977

Mr. Allen G. Christoffersen
Attorney at Law
1209 Geneva Avenue North
St. Paul, MN 55119

Re: Our File: 5962
Your File: 5488
Morin, et al vs. Kearney, et al

Dear Mr. Christoffersen:

I am in receipt of your Offer of Judgment and letter dated March 2, 1977. In the letter you state, "the said offer of judgment is contingent upon a Release by State Farm Insurance Company of their subrogated interest." Therefore your offer of judgment to my client is something less than your policy limits and not acceptable.

This is to notify you that we are willing to accept your draft made out to my client and myself as her attorney, in the amount of $25,000, the full amount of the policy, in exchange for a Pierrenger Release of any and all claims that my client has against Mr. Kearney. This offer to settle is conditioned upon State Farm Insurance Company's not being included on the draft and with the understanding that this will result in less than full compensation for the damages my client has sustained. State Farm Insurance Company is not a party to this action. According to the holding in Milbank Mutual Insurance Company v. Kluver, a copy of which is included for your convenience, State Farm Insurance Company has no subrogation interest unless my client has been fully compensated.

This is a case of clear cut liability on the part of your insured which resulted in the death of a principal breadwinner leaving a surviving spouse and five minor children. The potential damages conservatively exceed by ten times the amount of insurance coverage available. In light of our offer to settle within the policy limits, your insistence on protecting the claimed interest of another insurance company represents, in our opinion, bad faith in your representation of your insured.

Our offer will remain open for 14 days at which time it will be withdrawn. If this offer to settle is not accepted and it is necessary to go to trial, it is likely that the verdict will far exceed the coverage that exists. If we do receive a verdict in excess of the amount of the policy, we will have to pursue your insured personally for satisfaction on the verdict received.

I am forwarding two additional copies of this letter, one for the insurance company and one for Mr. Kearney. Let me hear from you as soon as possible.

Very truly yours,

J. Michael Egan

JME:lw
Enclosures

DAIRYLAND INSURANCE COMPANY
155 Aurora Avenue P.O. Box 3506 St. Paul, Minnesota 55165

MEMORANDUM

Gerald Keamney
85 Valley Haven Park
Shakopee, MN

File #: 21-99638-9
Date of Loss: 2-23-75

Date 3-4-76

PLEASE FILL IN YOUR DRIVERS LICENSE # & DATE OF BIRTH ON BOTH COPIES OF POLICE AUTHORIZATIONS. SIGN YOUR NAME TO BOTH COPIES AND SUBMIT BOTH COPIES IN FIVE DAYS. THANK YOU.

Linda Lunzer
Claims Examiner

LL:cj

Dairyland Insurance Group

Home Offices 555 N. Sequoit Road • P.O. Box 5220 • Madison, Wisconsin 53705 • Phone 608

155 Aurora Ave. • P.O. Box 3506 • St. Paul, Minnesota 55165 • (612) 224-3751

MESSAGE

COMPANY: [illegible] Park
[illegible], Minn. 55319

DATE: 4/16/76

FROM: L Lange

REF: 21-996638 [illegible] 2/23/76

D [illegible] Means

[illegible] of the other Ins [illegible] we [illegible] you [illegible] attorney [illegible] you [illegible] questions [illegible]

Linda Lange

DATE:

REPLY:

SEND WHITE AND GREEN COPIES WITH CARBON INTACT. WHITE COPY IS RETURNED WITH REPLY

KEEP THIS COPY

Dairyland Insurance Group

EXECUTIVE OFFICES: 1225 N. Sprgn Road • P.O. Box 8220 • Madison, Wisconsin 53708 • Phone: 608-238-5671

DAIRYLAND INSURANCE COMPANY

(St. Paul Regional Office Serving : Iowa , Minnesota , North Dakota , and South Dakota)

155 Aurora Ave. • P.O. Box 3506 • St. Paul, Minnesota 55165 • Phone: (612) 224-3751

April 16, 1976

Gerald D. Kearney
25 Valley Haven Park
Shakopee, Minnesota 55379

CERTIFIED LETTER
RETURN RECEIPT
REQUESTED

RE: Claim #: 21-99638-9
Date of Loss: 2-23-76

Dear Mr. Kearney:

We acknowledge receipt of the suit papers served upon you on April 2, 1976 in the action for personal injuries begun by Darlene Morin.

This matter has been turned over to Attorney Allen G. Christoffersen located at 1209 Geneva Avenue North, St. Paul, Minnesota for handling.

As you know, this suit has been commenced requesting damages in the total sum of $500,000. This does not mean that they will make recovery in such an amount, but because of this demand, there is a possibility that you may be held liable for an amount in excess of the policy of insurance covering this accident. This policy provides coverage in the amount of $25,000.00 for each person injured in a single accident and in the amount of $50,000.00 for all personal injuries resulting from a single accident.

For these reasons, you should feel free to employ counsel at your expense to protect you for your interests in excess of the coverage provided. Attorney Christoffersen will undoubtedly be contacting you in the near future to consult further with you with reference to the manner in which the accident occurred and the signing of necessary documents, in defense of this lawsuit. We, therefore, request that should you change your address, either temporarily or permanently, that you notify either Attorney Christoffersen or this office.

Very truly yours,

Linda Lunzer
Claims Examiner

cc: Allen G. Christoffersen, Attorney

LL:rgs

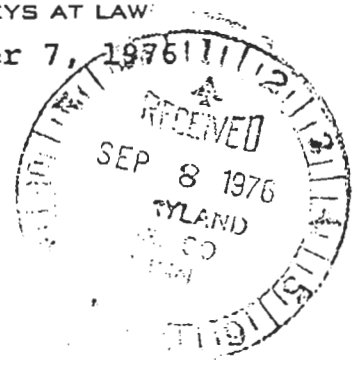
A-26

ALLEN G. CHRISTOFFERSEN
ATTORNEYS AT LAW

1209 GENEVA AVENUE NO.
AKA/CENTURY AVENUE
ST. PAUL, MINN. 55119
PHONE 739-3300

ALLEN G. CHRISTOFFERSEN
ASSOCIATE
BRIAN L. SOLEM

September 7, 1976



Mr. Gerald D. Kearney
Lot #25
Valley Haven Trailer Park
Shakopee, Minnesota

Re: My File #C-5488
Darlene J. Morin, as Trustee for the Next of Kin of Donald D. Morin, Decedent, et al vs. Gerald D. Kearney & Medina Recreation, Inc.

Dear Mr. Kearney:

This is to advise you that the Attorney for the Plaintiff in the above captioned matter has set your Deposition for September 21, 1976 at 10:00 A.M. in his Office at 565 Pillsbury Building, Minneapolis, Minnesota. It will be necessary for you to be present for the taking of the Deposition. By taking a Deposition, I mean that the Attorney for the Plaintiff will question you regardi the drinking that you had done prior to the accident. He will also question you regarding the facts of the accident. Under the Rules of Civil Procedure for the District Courts of Minnesota, the Plaintiff's Attorney has the right to take your Deposition.

I would like to discuss the accident with you prior to the taking of your Deposition. We would be able to go over the facts of the accident, your drinking activities prior to the accident etc. I would also be able to advise you in greater detail regarding the taking of your Deposition.

Sometime prior to the date of the Deposition, I will telephone you to make arrangements to meet with you to discuss the case.

Yours truly,

A. G. Christoffersen

AGC/jrg

cc: Dairyland Insurance Company
Your File #21-99638-9
FOR YOUR INFORMATION

COPY

ALLEN G. CHRISTOFFERSEN
ATTORNEY AT LAW

TELEPHONE 739-3300
AREA CODE 612

1209 GENEVA AVENUE NORTH
(ALSO KNOWN AS CENTURY AVE. AND #120)
SAINT PAUL, MINNESOTA 55119

IN ASSOCIATION WITH
BRIAN L. SOLEM

June 20, 1977

Mr. Gerald D. Kearney
Lot #25
Valley Haven Trailer Park
Shakopee, Minnesota

Re: My File #5488
Darlene J. Morin, as Trustee for the Heir and Next of Kin of Donald Morin, Decedent et al vs. Gerald D. Kearney and Medina Recreation, Inc.

Dear Mr. Kearney:

I am enclosing for your information a copy of a letter that I have just received from Attorney J. Michael Egan, who represent the Plaintiff. I am in the process of discussing this matter with Dairyland Insurance Company. I will be pleased to discuss it with you at your convenience.

Yours truly,

A. G. Christoffersen

AGC/jrg
Enclosure

cc: Dairyland Insurance Company
File #21-99638-9
FOR YOUR INFORMATION

Dairyland Insurance

October 20, 1978

Mr. Gerald Kearney
1291 East Maynard Drive
St. Paul, MN 55116

CERTIFIED LETTER
RETURN RECEIPT
REQUESTED

RE: Our file #: 21-99638-12
Insured: - erald Kearney
Date of loss: 2-23-76

Dear Mr. Kearney:

You were previously advised that a law suit had been started against you for $500,000.00 damages for the death of Donald Morin.

Since the first law suit was started the law suit was amended asking for $1,000,000.00 for the death of Donald Morin, and $50,000.00 for punitive damages. The request for $1,000,000.00 is against you and Medina Recreation. The punitive damages request is against you alone.

As you have previously been advised this suit requests damages in the total sum of $1,050,00. This does not mean that the plaintiff will make recovery in such amount, but because of this demand, however, any recovery against you above your policy limit of $25,000.00 is your personal responsibility. For this reason you should feel free to employ your own attorney at your own expense to protect your interest in excess of your $25,000.00 policy limit provided by your Dairyland Insurance policy.

The law suit claims "Compensatory" damages of $1,000,000.00 and "Punitive" or "Exemplary" damages of $50,000.00. Compensatory damages are intended to pay the plaintiff for damages allegedly resulting from the death of Donald Morin. "Punitive" or "Exemplary" damages are intended as a penalty because of alleged reckless and wanton conduct on your behalf.

You are advised that your insurance protection goes only to the claim of compensatory damages. You have no insurance protection against punitive or exemplary damages, and are free to employ your own attorney at your own expense to defend you on this part of the plaintiffs claim.

You have previously been personally advised by Mr. Allen Christoffersen of our problems in trying to negotiate a settlement with attorneys representing the plaintiff.

State Farm Insurance Company has put Dairyland on notice of a subrogated interest of No-fault benefits paid to the plaintiff of first $10,000.00 and later $20,000.00.

In order to secure a release from both State Farm and the plaintiff we offered the policy limits of $25,000.00 with both the plaintiff and State Farm on the check. This was initially agreed to by Mr. Perl, the Plaintiff's attorney, and he requested the check be sent. The Examiner requested the order of distribution be sent first, Mr. Perl then demanded the $25,000.00 without State Farm on the check. The Examiner offered $24,000.00 for the plaintiff's interest. Mr. Perl insisted on payment of full $25,000.00 and sent a letter giving his version of the negotiation. A copy of that letter was mailed to you.

We again offered $25,000.00 to the plaintiff naming them and State Farm, and the plaintiff has refused to settle.

An offer of judgement was filed with the court for $25,000.00, and we also tried to pay the $25,000.00 in to the court. The plaintiff has refused to accept the $25,000.00 requesting a release from them and State Farm. The court refused to allow us to pay the $25,000.00 to the court. We appealed this refusal by the court to the Minnesota Supreme Court and the Minnesota Supreme Court declined to help us force the court to accept payment.

In our negotiations we have tried to secure a settlement with the plaintiff, and with State Farm, both of whom have potential claims. Alternately we have offered to pay the plaintiff $25,000.00 without State Farm on the check but they have declined this offer.

The plaintiff has suggested that they might be willing to settle for something more than your $25,000.00 policy limit. If you or your attorney wish to enter into direct negotiations with the plaintiff whereby you would agree to pay some sum of money to the plaintiff, over and above your policy limits, you are, of course, free to do so. Our $25,000.00 is available to you at all times in this respect.

As we have stated above you should feel free to employ your own attorney, and Mr. Christoffersen will work with him in the negotiation and defense of this law suit.

If you have any questions regarding the above, please feel free to call me, or Mr. Christoffersen to discuss it.

Yours truly,

Gordon Davis
Senior Examiner

GD/lam

January 24, 1979

Mr. Gerald D. Kearney
1291 E. Maynard Drive
St. Paul, Minn. 55116

Re: My File #5864-Bankruptcy Proceedings
My File #5488-Morin vs. Kearney

Dear Gerald:

As I advised you on the telephone, the Bankruptcy matter has been reset for a Hearing on February 12, 1979 at 10:00 A.M. It will be necessary for you to be present for the Hearing. I will contact you sometime prior to the Hearing to remind you of it.

On File #5488 I am enclosing a copy of a letter dated January 17, 1979 that I received from Attorney Egan, who represents the Morins. I am also enclosing acopy of the Assignment that he mentions in the letter. I would like to have you give thought to the suggestion made in his letter and to the Assignment that he forwarded to me. I would have no objections if you were agreeable to assigning your interest against Dairyland Insurance Company over to the Morins. We should, however, discuss the matter before you make any decision, since assigning the interest over would also involve your Bankruptcy proceeding.

You might wish to drop the Bankruptcy proceeding, or you might desire to proceed with the Bankruptcy and make an assignment of your interest against Dairyland to the Trustee in Bankruptcy and to the Morins.

I suggest that you telephone me and make arrangements to come in and see me regrding the matter.

Yours truly,

A. G. Christoffersen

AGC/jrg
Enclosures

ALLEN G. CHRISTOFFERSEN
ATTORNEY AT LAW

TELEPHONE 739-3300
AREA CODE 612

1209 GENEVA AVENUE NORTH
(ALSO KNOWN AS CENTURY AVE. AND #120)
SAINT PAUL, MINNESOTA 55119

IN ASSOCIATION WITH
BRIAN L. SOLEM

December 2, 1977

Dairyland Insurance Company
P.O. Box #3506 - 155 Aurora Avenue
St. Paul, Minnesota 55165

Attention: Mr. Gordon L. Davis

Re: Your File #21-99638-9
My File #5488
Your Insured: Gerald D. Kearney
Date of Loss: 2/23/76

Dear Gordy:

My Motion on the above matter was heard by Judge Barbeau on December 1, 1977. Just before arguing the Motion I received the enclosed Affidavit and proposed Order from one of the Attorneys from Perl's Office.

The information contained in the Affidavit was new to me as I had no exact information regarding Linda Lunzer's negotiations with Norm Perl. He certainly makes the settlement negotiations sound a lot stronger in his Affidavit than appears in Linda's notes that she made at the time of the negogitations with Perl. The unfortunate thing as far as settleent negotiations are concerned is that Linda offered to pay $24,000.00 and leave State Farm's name off the check. I did, however, introduce into evidence a copy of Linda's letter of April 13, 1976. It will be appreciated if you will furnish me with another copy of it.

Based upon the Affidavit of Attorney Perl, it is difficult to have any opinion as to what Judge Barbeau will do as far as our Motion is concerned. The Attorney from Perl's Office indicated that they didn't wish to take $25,000.00 at this time since they felt they had a million dollar case against your Assured and that Dairyland will be responsible for the full amount.

I will keep you fully advised.

Yours truly,

A. G. Christoffersen

A. G. Christoffersen

AGC/jrg
Enclosures

(P.S.) I also brought out to the Court that I had made of offer of Judgment in the sum of $25,000.00 several months ago.

AGC

ALLEN G. CHRISTOFFERSEN
ATTORNEY AT LAW

TELEPHONE 739-3300
AREA CODE 612

1209 GENEVA AVENUE NORTH
(ALSO KNOWN AS CENTURY AVE. AND #120)
SAINT PAUL, MINNESOTA 55119

IN ASSOCIATION WITH
BRIAN L. SOLEM

December 7, 1977

Dairyland Insurance Company
P.O. Box #3506 - 155 Aurora Avenue
St. Paul, Minnesota 55165

Attention: Mr. Gordon L. Davis

Re: Your File #21-99638-9
My File #5488
Your Insured: Gerald D. Kearney
Date of Loss: 2/23/76

Dear Gordy:

On the above matter I am enclosing a copy of the Order of Judge Barbeau. You will note that he denied my Motion for an Order Allowing us to pay the $25,000.00 into Court. I feel that h was probably pursuaded to deny my Motion because Linda offered $24,000.00 in settlement when she could have settled it for $25,000.00. If she would have been able to leave State Farm's name off from a $24,000.00 Draft, she could just as easily have left it off from a $25,000.00 Draft.

I will keep you advised regarding all further developments.

Yours truly,

A. G. Christoffersen

A. G. Christoffersen

AGC/jrg
Enclosure

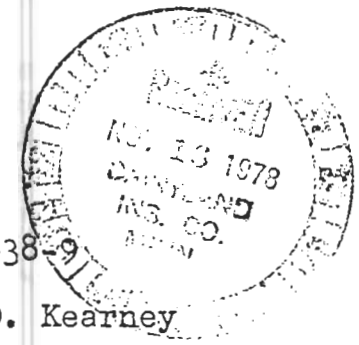
ALLEN G. CHRISTOFFERSEN
ATTORNEY AT LAW

TELEPHONE 739-3300
AREA CODE 612

1209 GENEVA AVENUE NORTH
(ALSO KNOWN AS CENTURY AVE. AND #120)
SAINT PAUL, MINNESOTA 55119

IN ASSOCIATION WITH
BRIAN L. SOLEM

November 14, 1978



Dairyland Insurance Company
P.O. Box #3506 - 155 Aurora Ave.
St. Paul, Minn. 55165

Attn: Mr. Gordon L. Davis

Re: Your File #21-99638-9
My File #5488
Insured: Gerald D. Kearney
D/Loss: 2/23/76

Dear Gordy:

I am enclosing a copy of a letter that I have just written to Attorney Adamson along with a copy of the Notice of Motion & Motion. You will note that I have moved for a new Trial on the question of damages only or in the alternative for a remittitur.

I believe the explanation for Linda offering $24,000 without naming State Farm on the Draft is correct as I have set forth in the letter to Attorney Adamson. If the case for over the policy limits is to be won by Dairyland, I feel that it is necessary to show why such an offer was made. It would appear that there is certainly an obligation on the part of Dairyland to endeavor to protect your Insured from the subrogation claim of State Farm, particularly the funeral expenses, as well as protecting him from the claim of the widow and children.

The Defendant's Step-Father telephoned me and asked if I could put the Defendant through Bankruptcy as he owes some rather substantial debts in addition to the Judgment on this case. I will discuss this with you.

As far as appealing to the Supreme Court is concerned, if my Motion is denied my thinking at the present time is to the effect that the Supreme Court of Minnesota will give us no relie on the question of damages only since there was considerable evidence to support the finding of damages by the jury.

I am enclosing a copy of a letter dated November 9, 1978 that I received from Attorney Hunegs along with the Taxation of Costs. I am also enclosing a copy of the Notice of Filing Order and a copy of the Order for the Judgment. I will appear on November 16, 1978 to contest the amount of costs and disbursemenets which have been taxed. I believe the only valid objection we would have would be to the effect of the charge to Dr. Karl Egge in the sum of $710.00. You will be kept advised.

Yours truly,

A. G. Christoffersen

A. G. Christoffersen

SGC/jrg
Enclosures

A-34

ALLEN G. CHRISTOFFERSEN
ATTORNEY AT LAW

TELEPHONE 739-3300
AREA CODE 612

1209 GENEVA AVENUE NORTH
(ALSO KNOWN AS CENTURY AVE. AND #120)
SAINT PAUL, MINNESOTA 55119

IN ASSOCIATION WITH
BRIAN L. SOLEM

November 14, 1978

Meagher, Geer, Markham, Anderson, Adamson,
Flaskamp & Brennan
Attorneys at Law
2250 IDS Center-80 S. 8th Street
Minneapolis, Minn. 55402

Attn: Mr. O. C. Adamson, II.

Re: Your File #L-36228
My File #5488
Dairyland Insurance Company File #21-99638-9 Ins: Gerald D. Kearney
D/Loss: 2/23/76

Dear Mr. Adamson:

I am enclosing a copy of the Notice of Motion & Motion that I have made on the above matter for a New Trial on the question of damages only. Judge A. Paul Lommen directed a verdict in favor of the Plaintiff and against the Defendant on the question of liability. Based upon the testimony that was adduced at the Trial, there was no question raised for consideration of the jury as to whether or not the Decedent was negligent and no evidence was adduced to show that the Defendant was not negligent.

The Defendant had absolutely no memory regarding the occurrence of the accident. The last thing that he remembered was leaving the parking lot of the Medina Ballroom. Four Police Officers were called all of whom testified that the accident occurred on the Decedent's half of the road with the Defendant's car being completely on the wrong side of the road except for a portion of the right rear end of the said vehicle. The collision was almost head-on. Two members of the family of the Decedent also testified regarding the positions of the vehicles following the accident. There was evidence to the effect that the Defendant had been drinking prior to the accident and that his blood alcohol content was .11%.

The verdict was in the sum of $745,000.00. The Decedent was employed as a driver salesman for the Old Dutch Potatoe Chip Company with earnings of $25,000.00 per year. In addition he earned between $5,000 and $10,000 per year on farming operations. He was an excellent provider for the family and, of course, was the best Father the world has ever produced. He had absolutely no fault known to mankind.

The Attorney for the Plaintiffs produced an economist, Professor Karl Egge of McAllister College, who had excellent qualifications. He made a veryk good witness for the Plaintiffs. He used what would be considered conservative figures in arriving at a loss of income for the family in the sum of $422,000.00.

Mr. O. C. Adamson, II.
Your File #L36228
Gerald D. Kearney
My File #5488

Nov. 14, 1978
Page 2

The said loss of income was only from the Father's employment by the Old Dutch Potato Chip Company. It did not include any other loss of income. The jury verdict was by 5 out 6 jurors.

FUNERAL EXPENSE $1250

I have been considering what explanation could be given for the Claim Representative, Linda Lunzer offering to pay $24,000.00 to the Plaintiffs Attorney and refusing to pay the additional $1,000.00 of the policy limits. I understand that the reason for refusing to pay the additional $1,000 was because State Farm Mutual Insurance Company had paid $1,000 for funeral expenses under their No-Fault Coverage. At the time of this accident they would have had a subrogation claim for the funeral expenses with the claim for funeral expenses having priority over the other claims of the dependents.

I suggest that you and I get together with Linda Lunzer and go over the entire file.

Yours truly,

A. G. Christoffersen

AGC/jrg
Enclosure

Blind cc: Dairyland Ins. Co.
File #21-99638-9
FOR YOUR INFORMATION

FI(MEMO

A-36

SENTRY INSURANC

Looking out for policyholders is our first consideration

(1) DIC claim — St. Paul

(2) Attn: Gordon Davis

CM Corp Claim Terry Lee

IECT Kearney 81 - 99638

DATE 9/18/78

ACCT./POL. NO.

INSD ☐

Gordon,

After reviewing this case in some detail we are concerned about the possibility of extra contract liab. This concern is based on the high damage exposure involved and the prospects of facing a jury who is not familiar with claim practices and a court system which has little sympathy for insurance companies. The handling of the negotiations on this file in our opinion do not amount to bad faith; but there is a distinct possibility that a jury may not share this opinion.

In order to protect ourselves against the claim we expect to be made, we suggest that a top notch trial atty be retained at this time. This atty can represent DIC exclusively, he can review the file in detail and give us an opinion based on his knowledge (and research) of Minn law. He may also have some suggestions on how we can best protect ourselves. If he foresees trouble, I think we should place a dollar value on excess portion of the case and make a serious attempt to settle all exposures before we get a judgment against insd.

We also recommend that we find out exactly how Linda Lunsen and Wilson Graham will testify

(1) _____

(2) _____

FROM _____

SUBJECT _____

SENTRY INSURANCE
Looking out for policyholders is our first consideration

DATE	ACCT./POL. NO.

INSD. ☐

(2)

and pinpoint inconsistencies in their version (if any) and in the version relayed by the plaintiff atty.

Another thing which may be helpful is to sit down with insd and his atty and explain exactly what happened, what's alleged, what the law is, how we evaluate the case and what we intend to do. Lets be sure our insd knows and understands all that transpires. Keep in mind that without an assignment from our insured, it's probable that the plaintiff has no cause of action against DIC. We need to do what we can not only to protect the insd but to seek his help in protecting ourselves. Lets find out the state of the insds assets and his feelings about us and this case.

We've had good luck w. atty Cole of Lemmon (sp?) and Cole and heard good things about David Fitzgerald of Riley, Bennett, Egan....

Presently atty Christofferson represents our insured interest and since there may be a conflict now or in the future, he probably would be agreeable to turning over the DIC portion to another atty.

Pls let me know who you choose and how he looks at this case.

2-18

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Brian P. Short, as trustee in bankruptcy for Gerald D. Kearney,

Plaintiff,

v.

Dairyland Insurance Company,

Defendant.

AFFIDAVIT OF RICHARD G. HUNEGS

File No. 758127

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

RICHARD G. HUNEGS, being first duly sworn, deposes and states as follows:

1. That he is an attorney duly licensed to practice in the State of Minnesota and is one of the attorneys for the plaintiff above-named.

2. The above-entitled matter was originally scheduled for trial the week of March 8, 1982. Plaintiff's counsel acceded to defendant Dairyland Insurance Company's (Dairyland) request that the trial be rescheduled at a later date in order that Dairyland's counsel could have more time to prepare for trial. Trial was then reset for the week of April 26, 1982, but the matter was not reached that week. When Dairyland's counsel refused to give their approval to resetting trial during either the week of June 1st, or June 8th, 1982, (the last two weeks of civil jury trials until the fall of 1982), plaintiff, by counsel, brought on a motion before Chief Judge Harold Kalina for an order setting trial the week of June 8, 1982. This motion was heard and granted by Judge Kalina on May 11, 1982.

3. On May 19, 1982, Dairyland served plaintiff with a motion for summary judgment, and scheduled the motion for a special term hearing on June 2, 1982, less than week before the trial in this matter was scheduled to commence. Since a trial date had already

been set, Dairyland's motion could only be heard by Chief Judge Kalina, and plaintiff rescheduled Dairyland's motion for June 3, 1982. On May 27, 1982, plaintiff served Dairyland with a motion for summary judgment on the issue of Dairyland's liability, and partial summary judgment on the issue of damages.

4. The parties cross-motions for summary judgment were heard by Chief Judge Kalina on June 3, 1982. Terrence R. Joy, Esq., appeared on behalf of Dairyland, and affiant, Michael L. Weiner, Esq., and Robert M. Austin, Esq., appeared on behalf of plaintiff. In his oral argument, Mr. Joy stated to the court that there were no genuine issues as to any material facts, and the matter could appropriately be decided on the parties cross-motions. At the conclusion of oral arguments, Judge Kalina ruled from the bench and denied both motions, solely on the basis that they were untimely as trial was scheduled the following week.

5. On June 10, 1982, this matter was called out for trial before the Honorable Jonathan Lebedoff. Judge Lebedoff called counsel for the parties into his chambers for a pre-trial conference, and in attendence were Terrence R. Joy, Esq., and Dale I. Larson, Esq., on behalf of Dairyland, and affiant, Michael L. Weiner, Esq., and Robert M. Austin, Esq., on behalf of plaintiff. Also in attendance was Judge Lebedoff's law clerk.

6. Judge Lebedoff stated to counsel for the parties that he had never presided over a "bad faith" case before, and asked counsel for the parties what issues would be presented to the jury. Mr. Larson, Dairyland's lead-counsel, was the first to respond to Judge Lebedoff's inquiry, and he stated, "Frankly, Judge, we don't think that there are any issues of fact for the jury in this case." Mr. Austin spoke up next, and told Judge Lebedoff that he agreed with Mr. Larson's statement that there were no disputed issues of fact for the jury to decide. Judge Lebedoff then asked why they were about to go to trial if there were no disputed fact issues for the jury. Mr. Larson and Mr. Austin then informed Judge Lebedoff that each party had in fact moved for summary judgment

on the basis that there were no genuine issues as to any material facts. They also told Judge Lebedoff that the sole reason given by Judge Kalina when he denied both parties motions from the bench on June 3, 1982, was that the motions were untimely.

7. Judge Lebedoff, Mr. Larson, and Mr. Austin conversed further on whether the matter was indeed appropriate for summary judgment, i.e. whether the parties in fact were in agreement that there were no genuine issues as to any material facts. Mr. Larson stated that Dairyland did not dispute the facts as presented by the parties in their respective summary judgment motion papers, but rather, that it was entitled to judgment as a matter of law under these facts. Mr. Larson then suggested that since the parties had already submitted their motions for summary judgment, that they simply renew their motions, to be decided by Judge Lebedoff. Mr. Austin told Judge Lebedoff that he agreed with Mr. Larson's suggestion, and that this would be an appropriate way to decide the case. Judge Lebedoff then called in the court reporter, and put on the record the parties agreement that there were no genuine issues as to any material facts, and the matter could appropriately be decided on the parties renewed motions for summary judgment.

8. Prior to the point in this June 10 pre-trial conference before Judge Lebedoff where Mr. Larson first suggested that there were no fact issues for the jury, Judge Lebedoff had already made clear his intent to get trial underway promptly. Judge Lebedoff told the parties that jury selection would begin immediately after the lunch hour that day, and testimony would start the next morning. The parties had given Judge Lebedoff their list of witnesses, and included in plaintiff's list were two witnesses who had traveled from out-of-state for the purpose of testifying at trial. Mrs. Darlene J. Morin, the widow of Donald L. Morin, flew in from her home in Vancouver, Washington, and Richard M. Theno took time away from his job, and came in from his home in Indiana. Mr. Larson was aware that these witnesses lived out-of-state, and had come in in anticipation of testifying at trial. With full knowledge that plaintiff had all of its witnesses, including its out-of-state

witnesses, on standby, with the knowledge that its own witnesses were on standby for trial, and with jury selection only minutes away, Mr. Larson represented to the court that there were no genuine issues of material fact, and that rather than selecting a jury and going to trial, the court should decide the case on the undisputed facts. This representation of Mr. Larson is, of course, wholly contrary to the representation Dairyland now makes in its most recent "petition" for rehearing and vacation, where it contends "that there are genuine material issues of fact . . ." (Dairyland's memorandum p. 1)

FURTHER affiant saith not, except that this affidavit is made in opposition to Dairyland's petition for a rehearing and a vacation of this courts' order of July 13, 1982.

Richard G. Humegs

Subscribed and sworn to before me
this 15 day of September, 1982.

Robbi J. Zalasky
Notary Public

ROBBI J. ZALASKY
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires July 27, 1989

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Brian P. Short, as trustee in bankruptcy for Gerald D. Kearney,

Plaintiff,

v.

Dairyland Insurance Company,

Defendant.

AFFIDAVIT OF ROBERT M. AUSTIN

File No. 758127

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

ROBERT M. AUSTIN, being first duly sworn, deposes and states as follows:

1. That he is an attorney duly licensed to practice in the State of Minnesota and is one of the attorneys for the plaintiff above-named.

2. The above-entitled matter was originally scheduled for trial the week of March 8, 1982. Plaintiff's counsel acceded to defendant Dairyland Insurance Company's (Dairyland) request that the trial be rescheduled at a later date in order that Dairyland's counsel could have more time to prepare for trial. Trial was then reset for the week of April 26, 1982, but the matter was not reached that week. When Dairyland's counsel refused to give their approval to resetting trial during either the week of June 1st, or June 8th, 1982, (the last two weeks of civil jury trials until the fall of 1982), plaintiff, by counsel, brought on a motion before Chief Judge Harold Kalina for an order setting trial the week of June 8, 1982. This motion was heard and granted by Judge Kalina on May 11, 1982.

3. On May 19, 1982, Dairyland served plaintiff with a motion for summary judgment, and scheduled the motion for a special term hearing on June 2, 1982, less than week before the trial in this matter was scheduled to commence. Since a trial date had already

been set, Dairyland's motion could only be heard by Chief Judge Kalina, and plaintiff rescheduled Dairyland's motion for June 3, 1982. On May 27, 1982, plaintiff served Dairyland with a motion for summary judgment on the issue of Dairyland's liability, and partial summary judgment on the issue of damages.

4. The parties cross-motions for summary judgment were heard by Chief Judge Kalina on June 3, 1982. Terrence R. Joy, Esq., appeared on behalf of Dairyland, and affiant, Richard G. Hunegs, Esq., and Michael L. Weiner, Esq., appeared on behalf of plaintiff. In his oral argument, Mr. Joy stated to the court that there were no genuine issues as to any material facts, and the matter could appropriately be decided on the parties cross-motions. At the conclusion of oral arguments, Judge Kalina ruled from the bench and denied both motions, solely on the basis that they were untimely as trial was scheduled the following week.

5. On June 10, 1982, this matter was called out for trial before the Honorable Jonathan Lebedoff. Judge Lebedoff called counsel for the parties into his chambers for a pre-trial conference, and in attendence were Terrence R. Joy, Esq., and Dale I. Larson, Esq., on behalf of Dairyland, and affiant, Richard G. Hunegs. Esq., and Michael L. Weiner, Esq., on behalf of plaintiff. Also in attendance was Judge Lebedoff's law clerk.

6. Judge Lebedoff stated to counsel for the parties that he had never presided over a "bad faith" case before, and asked counsel for the parties what issues would be presented to the jury. Mr. Larson, Dairyland's lead-counsel, was the first to respond to Judge Lebedoff's inquiry, and he stated, "Frankly, Judge, we don't think that there are any issues of fact for the jury in this case." Affiant spoke up next, and told Judge Lebedoff that he agreed with Mr. Larson's statement that there were no disputed issues of fact for the jury to decide. Judge Lebedoff then asked why they were about to go to trial if there were no disputed fact issues for the jury. Mr. Larson and affiant then informed Judge Lebedoff that each party had in fact moved for summary judgment

on the basis that there were no genuine issues as to any material facts. They also told Judge Lebedoff that the sole reason given by Judge Kalina when he denied both parties motions from the bench on June 3, 1982, was that the motions were untimely.

7. Judge Lebedoff, Mr. Larson, and affiant conversed further on whether the matter was indeed appropriate for summary judgment, i.e. whether the parties in fact were in agreement that there were no genuine issues as to any material facts. Mr. Larson stated that Dairyland did not dispute the facts as presented by the parties in their respective summary judgment motion papers, but rather, that it was entitled to judgment as a matter of law under these facts. Mr. Larson then suggested that since the parties had already submitted their motions for summary judgment, that they simply renew their motions, to be decided by Judge Lebedoff. Mr. Austin told Judge Lebedoff that he agreed with Mr. Larson's suggestion, and that this would be an appropriate way to decide the case. Judge Lebedoff then called in the court reporter, and put on the record the parties agreement that there were no genuine issues as to any material facts, and the matter could appropriately be decided on the parties renewed motions for summary judgment.

8. Prior to the point in this June 10 pre-trial conference before Judge Lebedoff where Mr. Larson first suggested that there were no fact issues for the jury, Judge Lebedoff had already made clear his intent to get trial underway promptly. Judge Lebedoff told the parties that jury selection would begin immediately after the lunch hour that day, and testimony would start the next morning. The parties had given Judge Lebedoff their list of witnesses, and included in plaintiff's list were two witnesses who had traveled from out-of-state for the purpose of testifying at trial. Mrs. Darlene J. Morin, the widow of Donald L. Morin, flew in from her home in Vancouver, Washington, and Richard M. Theno took time away from his job, and came in from his home in Indiana. Mr. Larson was aware that these witnesses lived out-of-state, and had come in in anticipation of testifying at trial. With full knowledge that plaintiff had all of its witnesses, including its out-of-state

that plaintiff had all of its witnesses, including its out-of-state witnesses, on standby, with the knowledge that its own witnesses were on standby for trial, and with jury selection only minutes away, Mr. Larson represented to the court that there were no genuine issues of material fact, and that rather than selecting a jury and going to trial, the court should decide the case on the undisputed facts. This representation of Mr. Larson is, of course, wholly contrary to the representation Dairyland now makes in its most recent "petition" for rehearing and vacation, where it contends "that there are genuine material issues of fact . . ." (Dairyland's memorandum p. 1)

FURTHER affiant saith not, except that this affidavit is made in opposition to Dairyland's petition for a rehearing and a vacation of this courts' order of July 13, 1982.

Robert M. Austin

Subscribed and sworn to before me
this 15 day of September, 1982.

Robbi J. Zalasky
Notary Public

ROBBI J. ZALASKY
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires July 27, 198[illegible]

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Brian P. Short, as trustee in bankruptcy for Gerald D. Kearney,

Plaintiff,

v.

Dairyland Insurance Company,

Defendant.

AFFIDAVIT OF MICHAEL L. WEINER

File No. 758127

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

MICHAEL L. WEINER, being first duly sworn, deposes and states as follows:

1. That he is an attorney duly licensed to practice in the State of Minnesota and is one of the attorneys for the plaintiff above-named.

2. The above-entitled matter was originally scheduled for trial the week of March 8, 1982. Plaintiff's counsel acceded to defendant Dairyland Insurance Company's (Dairyland) request that the trial be rescheduled at a later date in order that Dairyland's counsel could have more time to prepare for trial. Trial was then reset for the week of April 26, 1982, but the matter was not reached that week. When Dairyland's counsel refused to give their approval to resetting trial during either the week of June 1st, or June 8th, 1982, (the last two weeks of civil jury trials until the fall of 1982), plaintiff, by counsel, brought on a motion before Chief Judge Harold Kalina for an order setting trial the week of June 8, 1982. This motion was heard and granted by Judge Kalina on May 11, 1982.

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been set, Dairyland's motion could only be heard by Chief Judge Kalina, and plaintiff rescheduled Dairyland's motion for June 3, 1982. On May 27, 1982, plaintiff served Dairyland with a motion for summary judgment on the issue of Dairyland's liability, and partial summary judgment on the issue of damages.

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on the basis that there were no genuine issues as to any material facts. They also told Judge Lebedoff that the sole reason given by Judge Kalina when he denied both parties motions from the bench on June 3, 1982, was that the motions were untimely.

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witnesses, on standby, with the knowledge that its own witnesses were on standby for trial, and with jury selection only minutes away, Mr. Larson represented to the court that there were no genuine issues of material fact, and that rather than selecting a jury and going to trial, the court should decide the case on the undisputed facts. This representation of Mr. Larson is, of course, wholly contrary to the representation Dairyland now makes in its most recent "petition" for rehearing and vacation, where it contends "that there are genuine material issues of fact . . ." (Dairyland's memorandum p. 1)

FURTHER affiant saith not, except that this affidavit is made in opposition to Dairyland's petition for a rehearing and a vacation of this courts' order of July 13, 1982.

Michael L. Weiner

Subscribed and sworn to before me
this 15 day of September, 1982.

Notary Public

ROBBI J. ZALASKY
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires July 27, 1989

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Brian P. Short, as trustee in bankruptcy for Gerald D. Kearney,

Plaintiff,

v.

Dairyland Insurance Company,

Defendant.

AFFIDAVIT OF DALE I. LARSON

File No. 758127

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

DALE I. LARSON, being first duly sworn, deposes and states as follows:

1. That he is an attorney duly licensed to practice in the State of Minnesota and is one of the attorneys for the defendant.

2. Rescheduling of the trial in this matter from March 8, 1982, was based on the concurrence of both parties due to scheduling problems of counsel on both sides and the fact that Mrs. Morin had not yet been deposed, as agreed to by plaintiffs, and plaintiffs had just designated a new expert witness.

3. Mr. Terry Joy, also a partner in the firm of Robins, Zelle, Larson & Kaplan, is out of the office but your affiant has spoken with him by telephone and, according to Mr. Joy, during the arguments before Judge Kalina on June 3, 1982, Mr. Joy advised the Court that the testimony of plaintiffs' witnesses was vigorously disputed by defendant, that plaintiffs had not properly assumed the facts asserted by defendant in making their Motion and that innumerable issues of material fact would prevent plaintiffs' Motion for Summary Judgment.

Defendant's repeated and continued dispute to the testimony asserted by plaintiffs is contained in the briefs and supplementary briefs on file with the Court and continues to date. In presenting and preparing defendant's Motion for Summary Judgment, Mr. Joy properly advised the Court that, solely for the purposes of the defendant's Motion and in accordance with the Minnesota Rules of Civil Procedure, that Motion assumed the facts asserted by plaintiffs to be true and the law nevertheless required summary judgment in defendant's favor. At no time did Mr. Joy state or imply that there was no material issue of fact concerning plaintiffs' Cross-Motion. To the contrary, Mr. Joy made it very clear to the Court, as aforesaid, that the plaintiffs premised their Cross-Motion upon vigorously disputed testimony and failed to comply with the rules of evidentiary evaluation required by the rules and law pertaining to motions for summary judgment.

4. On June 10, 1982, Judge Lebedoff advised the parties that he was uncertain both as to what issues should be submitted to a jury in this type of case and how those issues should be framed for a jury. Your affiant advised the Court of defendant's Motion for Summary Judgment and his belief that defendant, even assuming the facts and conclusions urged by plaintiffs for purposes of the Motion, was entitled to judgment as a matter of law. Your affiant urged the Court to consider defendant's Motion. Plaintiffs' counsel urged consideration of its Cross-Motion and both parties concurred that the Court should consider both Motions before proceeding to trial; all on the implicit and explicit premise that all evidentiary and legal rules pertaining to motions for summary judgment applied to the Court's obligation and duty. Accordingly, the Court advised the parties that it would consider the Motions, presumably viewing each in an evidentiary light most favorable to the opposing party, and set the case

for trial in July if genuine issues of fact prevented either Motion from resolving the case.

5. During argument upon the Motions your affiant stated and argued that no material issue of fact would prevent the Court from granting defendant's Motion for Summary Judgment and that plaintiffs' Cross-Motion was incapable of being granted because it was premised upon disputed and vigorously contested genuine material issues of fact, all as a result of plaintiffs' failing to cast their Cross-Motion in a light most favorable to the factual and evidentiary assertions of the defendant. Your affiant states and believes that plaintiffs' Cross-Motion and briefs in support thereof relied almost solely upon the testimony and opinions of Mr. Perl whose veracity, credibility and accuracy are vigorously denied and disputed by defendant. Similarly, the Court's Order, in your affiant's opinion, erroneously relies upon such vigorously contested testimony and allegations by Mr. Perl and law that was inapplicable at the time of negotiations in this case.

6. In fact, Linda Lunzer will testify, consistent with her deposition, that:

A. She made no attempt to discount or reduce Dairyland's policy obligation and, instead, made every attempt to settle <u>both</u> the claims of plaintiffs and its insurer through the total policy limits; even to the extent of exposing Dairyland (and not its insured) to excess claims by State Farm;

B. Mr. Perl renigged on his agreement to settle the case with Dairyland; and

C. She made every effort to avoid the demands of State Farm and plaintiffs made no effort whatsoever.

It is Dairyland's contention that plaintiffs' counsel did not want to settle the case for policy limits and desired to create an excess case by renigging on settlement, failing to return Linda Lunzer's phone calls, and instituting suit prior to the expiration of a reasonable demand and to obtain discovery for evaluation of a dramshop case.

Further your affiant saith not.

Dale T. Larson

Subscribed and sworn to before me this 17th day of September, 1982.

Notary Public

MARY A. EAKINS
NOTARY PUBLIC — MINNESOTA
HENNEPIN COUNTY
My Commission Expires Dec. 8, 1984

A-54

State Farm Mutual Automobile Insurance Company

State Farm Insurance Claim Office
7500 France Avenue, South
Edina, Minnesota 55435
Phone: 920-6500

March 5, 1976

The Town & Country Adjusting Service
4660 West 77th Street
Edina, MN 55435

ATTENTION Jim Morris

RE: Your Insured: Gerald Kearney
Your Principle: Dairyland Ins. Co.
Their File No: 21-99638
Our Insured: L. Donald Moran
Our Claim #: 23 5482 669
Date of Loss 2/23/76

Dear Mr. Morris:

This letter will put you on notice of our intent to subrogate in regard to this matter. I have concluded a settlement with the widow of our insured for a total of $1,000. This company's interest, of course, would be $950 but we are looking to you for a total of $1,000 which does include the insured's $50 deductible. In addition to that, I had to spend $20 to dispose of our insured's automobile which was totally demolished as a result of this accident and brought no salvage value.

I am passing on to you drafts made payable to Mrs. Darlene Morin for $950 and a draft I issued to the Loretto Towing Company for $20 to dispose of the salvage.

Once you have had an opportunity to investigate this matter, I trust you will conclude with me that the responsibility for this accident rested entirely with your insured.

May I hear from you at your earliest convenience?

Very truly yours,

Charles Engdahl
Claim Representative

CE/ATdd

Enc: Photocopies of Drafts made payable to Mrs. Darlene Morin - $950
and one to Loretto Towing Co. for $20.

STATE OF MINNESOTA
DISTRICT COURT OF MINNESOTA
FOURTH JUDICIAL DISTRICT

CHAMBERS OF
JUDGE JONATHAN LEBEDOFF
COURTS TOWER
GOVERNMENT CENTER
MINNEAPOLIS, MINN. 55487

July 19, 1982

RMG

L-3573

Dale Larson, Esq.
33 South Fifth Street
Minneapolis, Minnesota 55402

Robert Austin, Esq.
600 Minnesota Federal Building
Minneapolis, Minnesota 55402

Re: Brian P. Short v. Dairyland Insurance Company
DC File 758,127

Gentlemen:

This will confirm the ex parte telephone conversation that the Court had with Mr. Larson on Friday afternoon of last week. Mr. Larson called to get my input into whether I considered the summary judgment order in this case to be final. I advised him that in my opinion it was final considering that we had cross-motions for summary judgment. He then requested that there be a stay in the entry of that order for purposes of appeal.

I indicated to Mr. Larson that I would send out a letter to that effect on today's date. This letter shall serve as the Court's order staying entry of the above referenced order for 20 days from the date of this letter.

As I dictate this, the thought comes to mind that there may well be some problems with staying entry of an order for summary judgment. However, to the extent that this Court has the authority under the Rules to stay entry, we again do so for 20 days from the date of this letter.

Very truly yours,

Jack Rubey

ca