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No. 32946-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KEVIN SHERRY,

Appellant,

v.

FINANCIAL INDEMNITY COMPANY,

Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES

Whether the Insured/Claimant is entitled to a reduction in the PIP reimbursement to his insurer based on his proportionate share of fault before the offset for attorneys fees is taken where the same insurer provides PIP and UIM coverage.

II. STATEMENT OF FACTS

Insured/Claimant KEVIN SHERRY was involved in a motor vehicle v. pedestrian accident on April 4, 2001, in Pierce County, Washington. Insured/Claimant suffered physical injuries and incurred \$53,127.92 in medical and surgical expenses for treatment of his injuries. At the time of the subject collision, Insured/Claimant was an insured though an automobile insurance policy issued by Insurer/Respondent FINANCIAL INDEMNITY COMPANY. CP 16-23.

The policy included Underinsured Motorist (UIM) Coverage under which Insurer/Respondent was obligated to pay for damages for bodily injury for which an insured person is legally entitled to recover from an underinsured person. CP 7-14, CP 16-23. The policy also included Personal Injury Protection (PIP) coverage under which Insurer/Respondent was obligated to pay for reasonable and necessary medical expenses up to \$10,000.00 for treatment of injuries caused by the collision, and for lost wages. CP 7-14, CP 16-23. FINANCIAL INDEMNITY COMPANY paid \$14,600.00 to or on behalf of KEVIN SHERRY, \$4,600.00 of which was wage loss. The policy also provided the following provision regarding

resolution of any dispute between the parties as to amounts payable under the
UIM coverage:

If we and an insured person do not agree:

1 Whether that person is legally entitled to recover damages under
this policy: or

2 As to the amount of damages;

either party may make a written demand for arbitration. These parties
shall jointly select a competent and impartial arbitrator. If they cannot
agree within 30 days, either may request that selection be made by a
judge of a court having jurisdiction. The written decision of the
arbitrator shall be binding on each party.

CP 22.

Insured/Claimant made written demand for arbitration on February
12, 2002. CP 24. A UIM Arbitration hearing took place on November 5,
2004, before John Cooper of WAMS. Insurer/Respondent was represented
by attorney Debora A. Dunlap. Each of the parties submitted Prehearing
Statements of Proof to the Arbitrator. Insured/Claimant's Prehearing
Statement included an itemization of his medical expenses totaling
\$53,127.92. By written award dated December 23, 2004, Arbitrator John
Cooper concluded that KEVIN SHERRY had incurred \$53,127.92 in medical
bills as a result of the accident and that those medical bills were reasonable
and necessary. CP 28. Mr. Cooper further concluded that KEVIN SHERRY
had incurred general damages in the amount of \$90,000.00. CP 28. The total
damages were then reduced by the arbitrator's determination of KEVIN
SHERRY'S negligence, 70%, for a total award in favor of KEVIN SHERRY
of \$42,938.38. CP 26, CP 28.

The reimbursement portion of the policy in this case states:

To determine the amounts payable to an insured person under this coverage part, we will first credit against the insured person's damages, the following: . . . 3. Any amounts paid under other Parts of this policy.

CP 20.

Insured/Claimant subsequently applied to Pierce County Superior Court for an order confirming the award pursuant to RCW 7.04.150, and for entry of judgment on the arbitration award. CP 1-29. Insured/Claimant asked for the award of his statutory costs pursuant to RCW 4.84 et seq., and for a reduction of his reimbursement of the PIP payments for reasonable attorneys fees and expenses pursuant to Mahler v. Szucs, 135 Wn.2d 398 (1998); Winters v. State Farm, 144 Wn.2d 869 (2001); Hamm v. State Farm, 151 Wn.2d 303 (2004). CP 3, CP 63-64. Insured/Claimant also asked that any reimbursement be reduced to reflect his share of fault. Judgment was entered by the court on February 4, 2005, in the net amount of \$34,682.30, representing the amount of the arbitration award, less PIP reimbursement in the full amount of \$14,600.00, with credit for a proportionate share of attorneys fees or expenses on the full amount. CP 94-96; Record of Proceedings 20-21.

Insured/Claimant Kevin Sherry timely filed this appeal as a result of the trial court's failure to reduce the PIP reimbursement by his proportionate share of fault. CP 106-109.

III. ARGUMENT

A. **Where an insured is partially at fault, reimbursement of PIP payments should be reduced by his proportionate share of fault.**

An insured is only responsible to reimburse his insurer to the extent that he recovers payment for the same loss:

The general rule is that, while **an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss** from a tortfeasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss. (Emphasis added)

Thiringer v. American Motors Insurance, 91 Wn.2d 215, 219 (1978).

The court in Thiringer goes on to say:

This rule embodies a policy deemed socially desirable in this state, in that it fosters the adequate indemnification of innocent automobile accident victims. See Cammel v. State Farm Mut. Auto. Ins. Co., 86 Wash.2d 264, 543 P.2d 634 (1975). We find nothing in the language of the policy to indicate that the parties agreed that a different principle would apply to this contract. It provides that, if payment under the PIP coverage is made to the insured, the insurer shall be reimbursed to the extent that the insured recovers such damages from a person legally responsible for the injury. It does not provide that, if the insured recovers less than his total damages from such party, the amount recovered shall be allocated first to those losses covered by the PIP endorsement and then to other damages suffered by the insured. **Such a provision, were it included, would be obviously unfair, since the insured pays a premium for the PIP coverage and has a right to expect that the payments promised under this coverage will be available to him if the amount he is able to recover from other sources, after diligent effort, is less than his general damages.**

Thiringer at 194 (Emphasis added).

The Supreme Court makes a distinction between what is expected from third party (in our case, a UIM insurer standing in the shoes of the third party tortfeasor) and first party PIP coverage. The insurer in this case is only entitled to reimbursement to the extent that KEVIN SHERRY would have recovered from the tortfeasor. KEVIN SHERRY'S total damages were determined by the arbitrator as \$143,127.92. After a reduction for comparative fault, the award to KEVIN SHERRY was \$42,938.38. The insurer in this case recovered the entire amount of the PIP payments in this matter, even though KEVIN SHERRY only recovered 30% of the amount of the PIP payments in the UIM arbitration. KEVIN SHERRY, therefore, has not been fully compensated for his loss.

The insurer's recovery should have been reduced by KEVIN SHERRY'S proportionate share of fault, then the insurer's proportionate share of attorneys fees.

The arbitrator in this case determined that KEVIN SHERRY was 70% responsible for the accident. KEVIN SHERRY would, therefore, have been entitled to recover 30% of his special damages from the tortfeasor, including the medical bills and wage loss paid by the insurer: \$14,600.00. Therefore the insurer's reimbursement (before applying Hamm) should have been \$4,380.00: the amount of PIP payments "recovered." In this case, KEVIN SHERRY was found to be 70% liable for the accident. Thus, against a third-party tortfeasor, he would have recovered 30% of the payments made under the PIP portion of his policy from that tortfeasor: \$4,380.00 ($\$14,600 \times 30\%$). In a case where the third-party tortfeasor could satisfy this claim,

KEVIN SHERRY would have recovered \$4,380.00 from the tortfeasor, and would therefore been required to pay his insurer that amount, less the insurer's proportionate share of attorney's fees.

B. If reimbursement of PIP payments is allowed, the insurer must pay a proportionate share of the fees and costs.

As the Winters court concluded: 'The insured should not be worse off simply because he or she purchased two coverages from the same insurer.'

Hamm at 312, citing Winters v. State Farm, 144 Wn.2d 869, 882 (2001).

An insurer's right to reimbursement for PIP payments is subject to the insurer paying a pro rata share of the attorneys fees and litigation expenses incurred by the insured, no matter whether there was a fully insured tortfeasor (Mahler v. Szucs, 135 Wn.2d 398 (1998)), a underinsured tortfeasor (Winters v. State Farm, 144 Wn.2d 869 (2001)), or a completely uninsured tortfeasor (Hamm v. State Farm, 151 Wn.2d 303 (2004)). These three cases establish the right of an injured party to offset PIP reimbursement in all three different scenarios: (1) where settlement funds are obtained from a third party; (2) where settlement funds are from a third party and UIM coverage; and (3) where settlement funds are obtained from UIM coverage alone.

The Hamm analysis is directly on point. The funds in this case came solely from KEVIN SHERRY's UIM coverage because the tortfeasor was uninsured. The Supreme Court, overruling Division One of the Court of Appeals, stated, "When the PIP and UIM carrier is the same . . . an offset against the UIM obligation is an acceptable mechanism to account for the PIP

reimbursement right.” Hamm, 151 Wn.2d at 311 citing Mahler at 436. As stated above, the Supreme Court has expressed a policy of full compensation: “The insured should not be worse off simply because he or she purchased two coverages from the same insurer.” Winters at 882. “An insurance company providing both PIP and UIM coverage to the same insured may receive its PIP reimbursement, after the insured is fully compensated, through the use of an offset against its UIM obligations. An insurance company may not, however, style this offset as a reduction of any amount owed under the UIM coverage, rather than a PIP reimbursement, in order to avoid paying a pro rata share of the insured’s legal expenses.” Hamm at 321-2.

C. The trial court erred in relying on Tolson v. Allstate.

In deciding the motion to enter judgment in this case, the trial court relied on the pre-Hamm case Tolson v. Allstate, 108 Wn.App. 495 (2001). That case, decided by Division One of the Court of Appeals, had a similar result to Hamm v. State Farm, 151 Wn.2d 303 (2004). However, there are appreciable factual differences between Tolson, Hamm, and the present case, even though the language of the insurance policies is virtually interchangeable. In Tolson, the court briefly discussed the reimbursement obligations of Mr. Tolson, stating:

Allstate's policy states that an uninsured motorist award will be reduced by "all amounts paid or payable" under the personal injury protection, automobile medical payments or any similar medical payments.

Tolson at 499.

Importantly, Tolson never claimed a reduction for a proportionate share of attorneys fees, as the plaintiff did in Hamm. See Tolson. Tolson also never requested an offset to the PIP reimbursement for his proportionate share of negligence. See Tolson. Tolson's claim was simply that he was not fully compensated by the arbitration award, because Allstate had apparently overpaid on the PIP portion of the policy, and that no PIP offset should have been allowed. Tolson at 499. The Court of Appeals there simply offset the entire amount of the PIP payments with no consideration of the common fund, proportionate attorneys fees, equity to the insured, comparative fault or full compensation to the insured. Tolson at 499-500.

In Hamm, the reimbursement portion of the policy similarly states:

[a]ny amount paid or payable for damages under the first party benefits coverage [PIP] will not be paid again as damages under this coverage [UIM]. This does not reduce the limits of liability of this coverage.

Hamm v. State Farm, 151 Wn.App 303 (2004) at 325.

Despite the similar policy language, the Supreme Court, in Hamm, allowed an offset for a proportionate share of attorneys fees and costs, in fairness to the insured. Hamm at 326. And in the present case, the reimbursement portion of the policy states,

To determine the amounts payable to an insured person under this coverage part, we will first credit against the insured person's damages, the following: . . . 3. Any amounts paid under other Parts of this policy.

Importantly, both Hamm and Winters discuss the differences in the language of various policies:

Terms like 'setoff,' 'offset,' 'deduction,' or whatever term the court wants to ascribe to this transaction should not obscure what is actually going on here. State Farm is paying the totality of Ms. Hamm's damages — period.

Hamm at 325 citing Winters v. State Farm, 144 Wn.2d 869, 885 (2001).

In the absence of a holding that reduces the PIP reimbursement by the insured's proportionate share of fault, the insured is not made whole, and is penalized for having UIM and PIP insurance from the same carrier, contrary to the holdings in Thiringer and Hamm.

D. The trial court incorrectly calculated the amount of offset.

In this case, the total fees were 1/3 of \$42,938.38: \$14,312.79. Total costs incurred for this litigation were \$4,353.93.

Financial Indemnity's pro rata contribution of attorneys fees, therefore, is:

1. Total PIP payments recovered / total recovery = ratio:
 $\$3,000.00 / \$42,938.38 = .06987$
2. Attorney's Fees + Costs = Total Legal Expenses: \$14,312.79
+ \$4,353.93 = \$18,666.72
3. Legal Expenses x Ratio = \$18,666.72 x .06987 = \$1,304.24.

Thus, the total PIP offset from the award should have been \$3,075.76 (\$4,380.00 recovered, less the Hamm contribution). Thus, the total judgment against the insurer, Financial Indemnity, in this case should have been \$39,972.62 (Arbitration Award of \$42,938.38 less PIP Offset of \$3,075.76, plus costs of \$110.00.).

IV. CONCLUSION

Public policy in Washington provides for full compensation for accident victims, for payment of a proportionate share of expenses for recovery of PIP payments by an insurer, and for an insured to not be punished for purchasing UIM and PIP payments from the same insurer. In order to effect this policies, and in accordance with Washington law, in the event that an insured is partially at fault for an accident, an insurer should only be entitled to reimbursement of the amount that an insured could have recovered from a third party had that tortfeasor actually been insured. In accordance with Washington law, that reimbursement should be reduced under the common fund doctrine as set forth in Mahler, Winters, and Hamm. In this case, judgment should have been entered on behalf of KEVIN SHERRY in the amount of \$39,972.62.

RESPECTFULLY SUBMITTED this ^{23rd} day of August, 2005.

MIDDLETON & ASSOCIATES P.S.

David B. Middleton, WSBA#22485
Attorney for Appellant

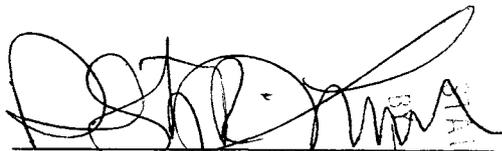
DECLARATION OF SERVICE

I, Destiny R. Lundin, state:

On this 23rd day August, 2005, I caused to be mailed by first class postage to Debora A. Dunlap, 2135 112th Ave NE Ste 100, Bellevue, WA 98004, attorney for Respondent, a copy of the following documents: Appellant's Appeal Brief.

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of August, 2005, at Federal Way, Washington.


DESTINY R. LUNDIN

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