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STATE OF WASHINGTON
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Supreme Court No. _____
Court of Appeals, Division II No. 32946-8

SUPREME COURT OF THE
STATE OF WASHINGTON

FINANCIAL INDEMNITY COMPANY

Petitioner,

v.

KEVIN SHERRY

Respondent.

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SHERIFF'S

PETITION FOR DISCRETIONARY REVIEW
BY THE SUPREME COURT

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A. IDENTITY OF PETITIONER

Financial Indemnity Company, Petitioner (hereinafter referred to as the "Insurer"), asks this Court to accept for review the decision designated in Part B of this Motion. The Petitioner/ Insurer asks the Court to accept review of the Court of Appeals, Division II decision No. 32946-8II filed April 4, 2006.

B. DECISION

The Insurer appeals the Court of Appeals, Division II decision filed April 4, 2006 denying the Insurer any offset for Personal Injury Protection (hereinafter "PIP") payments of \$14,600.00 for medical or wage loss claims from an Uninsured(hereinafter "UM") Arbitration Award in favor of the Insured Kevin Sherry (hereinafter the "Insured"). The Court of Appeals denied offset despite the Insured's award fully compensating him for injuries and damages caused by the uninsured third party tortfeasor. The Court of Appeals held the Insured was not fully compensated for his injuries because he received only a 30% recovery from an auto/pedestrian accident he was 70% contributorily negligent for.

This contradicts the well established and recognized rule discussed in *Thiringer v. American Motors Insurance Co.*,

91 Wn.2d 215, 588 P.2d 191 (1978) that “full compensation...is determined by satisfaction of amounts legally due from available insurance and assets.” The Court of Appeals now creates a new rule allowing insureds to skirt their PIP reimbursement responsibilities even where insurance and assets are available if they have any comparative negligence. Division II now allows even 1% contributory negligent insureds to enjoy PIP benefits without repayment responsibilities while not at fault PIP insureds must reimburse.

C. ISSUES PRESENTED FOR REVIEW

1. Whether an insured is “fully compensated” for PIP/subrogation/offset purposes in UM arbitration from assets and coverages for tortfeasor liability only or if self-inflicted damages must be included. And the next question begged will be does this same rule now apply to Underinsured (UIM) arbitration as well?

2. Whether a negligent UM insured is entitled to pro rata legal expense reduction and if PIP offset applies where insured claims wage/income “common fund” benefits paid under PIP were not asserted at arbitration.

3. Whether Division II's decision denying a UM Insurer any offset from a arbitration award for PIP payments conflicts with

the Supreme Court decisions in *Hamm v. State Farm* and *Safeco v. Woodley* allowing PIP offset in UM/UIM arbitration.

4. Whether the Division II opinion conflicting with Court of Appeals Division I, *TOLSON*, and III, *PETERSON*, allowing full offset for PIP payments from UIM/UM awards should be reconciled by the Supreme Court.

5. Whether upholding and enforcing contracts between Insurers and their insureds relating to PIP coverages, payments and offsets and premiums paid therefore is a matter of substantial public interest that should be determined by the Supreme Court.

6. Whether Division II's decision is against public policy because it creates a conflict between an insured's duty not to alienate an insurer's right of subrogation and a new incentive to argue or acquiesce to a nominal allocation of fault so the insured may escape their duty of subrogation.

7. Whether Division II's decision fostering recovery of at fault motor vehicle accident participants violates *Thiringer* announced public policy favoring adequate indemnification of innocent automobile accident victims and should be reconciled by the Supreme Court.

D. STATEMENT OF THE CASE

1. Facts Relating to Underlying Claim.

Kevin Sherry, the Insured, was involved in an uninsured auto/pedestrian accident April 4, 2001 in Tacoma, Washington. The Insured had auto insurance coverage through Financial Indemnity Company, the Insurer. (CP 5-23) The Insured applied for and received PIP benefits of \$10,000.00 for medical and hospital benefits and \$4,600.00 for income continuation or loss of services benefits under the respective PIP provisions in his policy. (CP 2, 19-20 and 53-51). Insured made a written demand for UIM arbitration under the arbitration provision of the FIC insurance policy. (CP 22, 24) UIM arbitration was conducted. (CP 2, 27-28).

At arbitration, the Insurer argued the Insured was attempting to perform a "Jackass" stunt of jumping on to a moving vehicle as seen on a cable television show called "Jackass", starring Johnny Knoxville. (2/4/05 RP (Appendix) at 12) The arbitrator determined Kevin Sherry had stood in the street with the sun behind him as a car approached from about 200 yards away. A friend had been driving the vehicle. Kevin Sherry attempted to jump on the hood of the car in full view of the vehicle approaching

at 35 mph, but car was not able to stop. (CP 27; 2/4/05 RP at 13 (Appendix)) The arbitrator concluded: "there is no reason he could not have easily avoided any impact by simply stepping out of harm's way." (CP 27)

The arbitrator awarded the Insured damages of \$53,127.92 in medical expenses and \$90,000.00 in general damages. He then reduced those damages by 70% for the Insured's comparative fault. (CP 28) Thus, the arbitrator issued an "Arbitration Decision and Award" in the total amount of \$42,938.38. (CP 26)

The Insurer looked to offset of the \$14,600.00 it paid under PIP from the arbitration award pursuant to its policy language. (CP 20)

The Insured contested this offset because he had "not been made whole". (CP 42) Insured agreed that the Insurer could credit or offset PIP payments but only the \$10,000.00 medical portion of the PIP payment and to be reduced by 70% contributory negligence to \$3,000.00 prior to calculating the pro rata share of legal expenses or reduction for attorney fees and costs per *Mahler*. (CP 42) Insured agreed to a PIP offset of \$1,696.36 that included the pro rata attorney fee reduction of

\$1,303.63 based on a 6.987 percent (\$3,000/ \$42,938.38) share of the full fee. (CP 42) Insured also claimed the \$4,600.00 in wage continuation benefits paid under PIP by the Insurer were not sought or recovered at arbitration. Insurer disagreed, having argued at arbitration unemployment on the date of loss and incapable of holding a job regardless of injuries. (CP 45) The arbitrator's decision did not specify loss of wages, earning capacity recovery. (CP 38-40)

The Insured filed a Petition For Order Confirming Arbitration Award and for Entry of Judgment in Pierce County Superior Court January 14, 2005. (CP 1) *Per Price v. Farmers Insurance Company*, 133 Wn.2d 490, 946 P.2d 388 (1997), the parties agreed that the petition to confirm the arbitration award and motion before the trial judge regarding offset could be handled as a declaratory action and a separate declaratory action did not need to be filed. (RP Appendix at 3 and 9 and 19-20).

The trial court ruled in favor of Insurer FIC that it was entitled to take the entire PIP payment offset of \$14,600.00, (RP at 20) and that *Thiringer v. American Motors Insurance Company*, 91 Wn.2d 215, 588 P.2d 191 (1978) did not apply since "it's not a

case where there is a \$100,000 policy and a \$500,000 injury”.
(RP 20)

The trial court opined “this is a case where the limits are there and the arbitrator reduced the award for contributory negligence and this is a contractual arbitration. The contract says what it says, and I feel bound to follow that.” (RP 20)

The court entered a Judgment in the amount of \$34,682.38 plus a \$110.00 filing fee for a total judgment of \$34,792.38 on February 4, 2005. (2/4/05 RP at 21; CP 94-95) A Notice of Appeal was filed March 4, 2005. (CP 97) A Satisfaction of Judgment was filed February 22, 2005. (CP 104-105). The judge’s decision was on April 25, 2005.

After hearing oral argument, the Court of Appeals Published Opinion was filed on April 4, 2006. This appeal is filed before May 3, 2006.

2. Facts Relating to the Insurance Policy

Very standard Underinsured Motorist Coverage policy language is at issue here. The Insurer’s Washington Family Car Policy, p. 5, Part III, Underinsured Motorist Coverage, Coverage (C) Underinsured Bodily Injury (BI) 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.

And page 5, Part II, Personal Injury Protection, states:

Any amount paid or payable for bodily injury under the Liability or Underinsured Motorist Bodily Injury coverages of this policy shall be deducted from the amount payable under this Part.

(CP 20).

These are valid and enforceable standard offset clauses. *Tolson v. Allstate Ins. Co.*, 108 Wash.App 495, 32 P.2d 289 (2001); *Hamm v. State Farm*, 15 Wn.2d 303, 88 P.3d 395 (2003) presumed to be present in an auto insurance contract per *Winters v. State Farm Insurance Co.*, 144 Wn.2d 869, 31 P.3d 1164 (2001 and governed by equitable remedies and contractually enforceable. *Tolson*.

Clearly the insurer charges certain premiums for PIP coverages the insured elects to have and the insurer and the insured are entitled to rely on the validity of this valid contract language for the insurer to offset any PIP payments made at the insured's request from the UM arbitration award. *Thiringer*, at 220.

**E. ARGUMENT WHY REVIEW SHOULD BE
ACCEPTED --- SPECIFIC GROUNDS**

Under the four grounds for review provided by RAP 13.4(b), the Petitioner/Insurer relies on three. The decision of Division II from which review is sought:

(1) ...is in conflict with the decision of the Supreme Court;

(2) ...is in conflict with another decision of the Court of Appeals; and

(4) ...involves an issue of substantial public interest that should be determined by the Supreme Court.

a) DIVISION II's OPINION IS IN CONFLICT WITH SUPREME COURT DECISIONS IN HAMM AND WOODLEY.

By denying PIP payment offsets from an UIM arbitration award, Division II has departed from two Supreme Court decisions allowing for PIP offsets from UM and UIM awards.

Allowing for PIP offsets from UM and UIM awards, the Supreme Court has repeatedly enforced an insurer's right to offset for PIP payments from UM/UIM arbitration awards. *Hamm v. State Farm*, 151 Wn.2d 303, 88 P.3d 395 (2003), as here,

involved a motor vehicle accident with an uninsured driver. The *Hamm* Court held:

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 UIM coverage, rather than a PIP reimbursement, in order to avoid paying a pro rata share of the insured's legal expenses.

Further, the Court in *Hamm* points out at page 403, *Winters* "clarifies the rule requiring a pro rata sharing of legal expenses is based on equitable principles and not on construction of specific policy language".

Therefore, the equitable sharing rule on cost reduction for an offset is an equitable doctrine creation. The PIP set off, though, is a contractual right between the insured and the insurer to be determined by the four corners of the contract which cannot be suppressed or denied.

Also, the Supreme Court decision in *Safeco v. Woodley* 83 P.3d. 660, 150 Wash.2d 765 (2004) again also involved PIP setoffs, but in the Underinsured (UIM) tortfeasor setting. In *Woodley*, from the \$450,000 arbitration award, Safeco took a \$300,000 offset for the tortfeasor insurance policy limits and PIP

medical payments of \$56,435.25. The Supreme Court determined the Insurer may offset PIP in UIM arbitration but also has to pay its share of pro rata legal expenses as started with the Mahler decision in third party tortfeasor recovery. Therefore, the *Hamm* and *Woodley* Supreme Court decisions in 2003 and 2004 have continued to endorse an Insurer's right to offset PIP payments from UM and UIM arbitration awards, only now requiring reduction in the PIP offset by the insurer for a pro rata sharing of the legal expenses.

It is expected the Insured will argue here that the Division II opinion properly decided the Insured was not fully compensated so the Insurer may not recover subrogated interests or offset PIP and properly relied upon *Thiringer v. American Motors Insurance Company*, 91 Wn.2d 215, 588 P.2d 191 (1978); *Winters v. State Farm Insurance Co.*, 144 Wn.2d 869, 31 P.3d 1164 (2001); and *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).

The Insurer disagrees with the application of *Thiringer*, an innocent victim and a third party coverage situation, to the question of enforceability of first party at fault insurance offset in the case at hand. More importantly, though, the Supreme Court ruling in *Thiringer* is in conflict with the present case decision

because it was not correctly applied. Not only is this case dealing with first party coverage, but in the Insured Sherry was awarded \$42,938.98 on a \$100,000.00 policy. The Insured was therefore made whole or fully compensated by the award because there was ample policy limits to cover such.

Thiringer cannot be twisted to say an at-fault insured is not "fully compensated" or "made whole" for offset purposes until he receives all policy limits, even monies not legally entitled to because of the insured's own negligence. To twist *Thiringer* in this fashion goes contrary to *Thiringer* itself, which refuses to allow double or duplicate recovery, specifically at page 220, where the court stated:

Upon a consideration of the equitable factors involved...guided by the principle that a party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery.

The Insured's recovery of 30% of his medical bills and general damages of \$42,938.98 in the Arbitration Award represented all he was legally entitled to from the UM motorist fault and full compensation. Since the Insurer paid \$14,600.00 of his claims pre-arbitration, it is entitled to full offset. Otherwise, the Arbitration Award is increased to \$57,538.98 or Sherry receives

betterment and double recovery of part of his special damages by the \$14,600.00 PIP payment.

And even to reduce the PIP offset to the percentage of the tortfeasor negligence and not full offset results in payment by the Insurer for the Insured's negligence and double, unjust recovery.

Likewise, in *Weyerhauser v. Commercial Union Insurance Co.*, 142 Wn.2d 654, 672, 15 P.3d 115 (2000), the court found an insured is never entitled to a double recovery just because the insurance carrier voluntarily advanced payment under PIP coverage for his medical bills.

The Division II opinion misconstrued "full compensation", finding 100% of the Insured's damages would be full compensation even though he was 70% at fault for his own damages.

The courts should not strip UM Insurers of PIP offset rights and enable at-fault insureds to receive double recovery on funds they are not even legally entitled to recover all or part of due to their own negligence. At fault UM insureds are clearly fully compensated by recovery of tortfeasor negligence percentage from adequate insurance and readily available assets. To omit the requirement that fully compensated at fault insureds offset all

paid PIP, places them in a better position than not at fault PIP insureds, provides duplicate/ double recovery for funds not due and owing, and eliminates contractual and equitable doctrine subrogation rights of Insurers.

Insurer requests the Division II decision be reversed and the Court hold UM Insurers may offset full PIP payments from arbitration awards where insureds are fully compensated from adequate insurance and assets for insureds' damages caused by the tortfeasor, not the insureds' own negligence or intent.

b) DIVISION II's OPINION IS IN CONFLICT WITH COURT OF APPEAL'S DECISIONS IN DIVISION I TOLSON AND DIVISION III PETERSON.

The Division II opinion at issue eliminates an insurer's PIP offsets for at-fault insureds in UM and arguably UIM arbitrations. This places a negligent insured in a better position of receiving double recovery for medical expenses and wage loss under PIP than an innocent insured. This is unjust enrichment, receipt of monies the at fault insured is not legally entitled to, and it is contrary to Division I, *Tolson v. Allstate*, 108 Wn.App 495, 32 P.3d 289 (2001).

The *Tolson* arbitrator awarded \$3,418.30 in medical specials, \$642.24 in wage loss and \$15,000.00 in general damages, for a total award of \$19,060.54. Allstate had already paid \$8,504.70 in medical payments per PIP provisions. The trial and Court of Appeals courts ruled full offset was allowed. The *Tolson* court explicitly held that Tolson had "failed to demonstrate that he will not be fully compensated. He will receive the full amount of the arbitration award". *Tolson*, 108 Wn.App at 500. The court went on to further state that Tolson was not entitled to a double recovery of medical benefits. He had benefited from his insurer's payments by more than \$5,000.00 than was actually due under the arbitration award and the court stated:

Reimbursing Allstate for its overpayments does not change the fact that Tolson will be fully compensated for the medical specials found attributable to the accident as well as the full amount of general damages.

Here, the Insured Sherry, like Tolson, cannot demonstrate he lacks "full compensation". He is not entitled to 100% compensation on all damages because he was 70% contributorily negligent. His full compensation or what makes him whole is recovery for the 30% tortfeasor responsibility of \$42,938.38 awarded by the arbitrator from ample policy limits of \$100,000.00.

Full compensation is a matter of whether available insurance and assets satisfy the judgment, not whether the negligent insured receives compensation for all damages they inflict on themselves. And from this full recovery award Insurer FIC is entitled to full, not percentage offset PIP payments Sherry claimed, were paid, and for which the Insured has received benefit from for years.

As in *Tolson*, the insurer is entitled to full PIP offset whether or not the same expenses were claimed by the insured or if the PIP payments were awarded by the arbitrator. It should not matter whether Sherry did not preserve common fund or Insurer subrogation rights by arguing for the \$4,600.00 PIP income continuation benefits at arbitration. He received them, benefited from them for years, and claimed a loss of earning capacity at arbitration for at least before and after two knee surgeries when unable to do usual labor work. The Insured cannot pick and choose the common fund PIP paid medicals or wage loss to assert at arbitration so as to avoid offset. Per *Hamm* these are common funds of the Insurer and Insured the Insured must present to protect to the Insurer subrogated interests and his own.

Additionally, in *Peterson v. Safeco Ins. Co. of Illinois*, 95 Wn.App 254, 976 P.2d 632 (1999) the Court of Appeals

Division III also determined that an insurer is entitled to an offset for PIP payments.

With Division I and III having ruled Insurers are entitled to offset PIP payments from UM\UIM arbitration the Supreme Court should reconcile the divided issue and find Insurers are allowed to fully offset PIP payments from full compensation UM\UIM arbitration awards regardless of the insured's fault or claims at arbitration.

c) THERE ARE SUBSTANTIAL PUBLIC INTERESTS THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

Insureds and insurers must have predictability as to whether a contract of insurance between them will be enforceable. If not, PIP coverage is radically changed because subrogation where insurance and assets are available will be obviated. With the Division II opinion, the courts will deny any and all PIP offset for UM and potentially also UIM arbitration awards for an at fault insured since clearly they are not entitled to and never will receive 100% full compensation, but only full recovery for the percentage of tortfeasor's responsibility.

Also under this Division II opinion, effects to the auto/PIP insurance industry will be dramatic. Insurance underwriters and thus insurance companies certainly have to charge different premiums for PIP insurance. Higher premiums, or different premiums, for predictability under PIP coverage certainly affects a substantial public interest and is one that the Court should accept, review, and determine the outcome of.

There is also substantial public interest in avoiding the conflict of interest being imposed upon the Insured by this decision to create and preserve the common fund/subrogation PIP reimbursement or whether to allow any minor percentage of fault, even through failure to mitigate, to avoid subrogation reimbursement.

Finally, there is substantial public interest in maintaining full compensation for innocent motor vehicle accident victims, not at fault parties which needs to be addressed by the Court here.

F. CONCLUSION

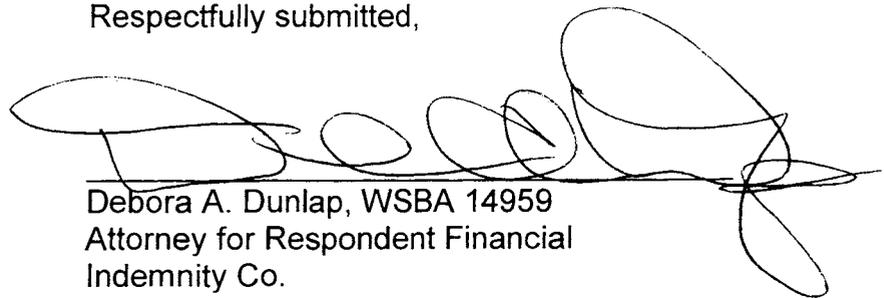
An unjust enrichment and double recovery contrary to Supreme Court and other Court of Appeals Division rulings has resulted from Division II's determination that Insurer FIC may not deduct any PIP payments from a full recovery arbitration award to

its contributorily negligent Insured because the Insured was not fully compensated for 100% of losses he mostly caused.

Inconsistent higher and lateral court rulings, public policy concerns, and unjust outcome necessitate the Supreme Court consider this matter. And the Insurer urges the court to: (1) reverse the Court of Appeals Division II decision; (2) reinstate the trial court judgment; (3) determine the negligent Insured Sherry was fully compensated by the 30% tortfeasor negligence recovery from ample coverage and therefore the Insurer is entitled to full offset of all PIP payments from the Arbitration Award regardless of claims presented by the Insured at arbitration or contributory negligence; and (4) determine "full compensation" or a "compensable injury" is recovery from insurance and readily available assets for only tortfeasor and not Insured negligence.

DATED this 2nd day of May, 2006.

Respectfully submitted,



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Attorney for Respondent Financial
Indemnity Co.

APPENDIX

- A. Court of Appeals, Division II April 4, 2006 Decision

APPENDIX A

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DIVISION II

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STATE OF WASHINGTON

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GULLIFORD, McGAUGHEY
& DUNLAP

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KEVIN SHERRY, a single man,

Appellant,

v.

FINANCIAL INDEMNITY COMPANY, a
foreign insurer,

Respondent.

No. 32946-8-II

PUBLISHED OPINION

BRIDGEWATER, P.J. — Kevin Sherry appeals from a judgment against Sherry's insurance company, Financial Indemnity Company (FIC), under an uninsured motorist (UIM) claim. The trial court deducted \$8,256 from an arbitration award as an offset for money FIC advanced Sherry under a personal injury protection (PIP) clause in the insurance policy. We hold that FIC was not entitled to an offset for PIP payments because Sherry was not fully compensated. We reverse and remand.

Sherry, a pedestrian, was injured when an automobile struck him. The driver of the car was not insured. But Sherry was insured with FIC, and his policy included an UIM clause. In addition, his policy included a PIP clause obligating FIC to pay reasonable and necessary

medical expenses up to \$10,000 and lost wages. And under that policy, he received PIP benefits of \$10,000 for medical expenses and \$4,600 for lost wages.

Exercising his contractual right under his UIM policy, Sherry requested arbitration of the amounts due under his UIM policy for the accident. The arbitrator determined that Sherry's damages were \$53,127.92 in medical costs and \$90,000 in general damages. But the arbitrator found that Sherry was 70 percent at fault for the accident and reduced the award by that amount. Thus, Sherry's final UIM award was for \$42,938.38, which is 30 percent of his total damages.

After the arbitrator's award, the parties could not agree whether Sherry had an obligation to reimburse FIC for the \$14,600 it had already paid him under the PIP clause. Apparently, FIC asked the arbitrator to rule on the matter. The arbitrator determined that he did not have authority to determine the amount of the PIP offset and refused to address the issue.

Meanwhile, Sherry applied to Pierce County Superior Court to confirm the arbitrator's UIM award under former RCW 7.04.150 (2004). FIC objected to Sherry's proposed judgment based, in large part, on whether FIC was entitled to a reimbursement for its PIP payments. Although both parties acknowledged that the superior court did not have jurisdiction under former RCW 7.04.150 to determine the issue, the parties agreed to submit it to the superior court.

Having accepted jurisdiction, the trial court accepted FIC's position and decided that FIC was entitled to an offset for its full PIP payments to Sherry, less attorney fees. Therefore, the superior court deducted \$8,256 (\$14,600 minus the proportionate share of attorney fees) from the arbitration award and entered judgment for Sherry for \$34,682.38. Sherry appealed.

I. Jurisdiction

On appeal, FIC argues that we lack jurisdiction over this appeal. FIC seems to be arguing either (1) that under *Price v. Farmers Insurance Company*, 133 Wn.2d 490, 946 P.2d 388 (1997), the superior court did not have jurisdiction to resolve the issue of the PIP offset or (2) that Sherry waived his right to appeal by agreeing to be bound by the superior court's decision and accepting the money from the trial court's judgment. Sherry contends that FIC agreed to try this matter before the superior court and that he did not waive his right to appeal in agreeing to submit the issue to the superior court or in accepting the money from the judgment. We agree.

On the issue of jurisdiction, *Price* is the controlling authority. In *Price*, the insured, Price, was injured by an uninsured motorist. *Price*, 133 Wn.2d at 493. His insurance policy with Farmers Insurance Company (Farmers) contained a PIP clause and an UIM clause. *Price*, 133 Wn.2d at 493. He took his PIP payments and submitted the amount of damages under the UIM clause to arbitration. *Price*, 133 Wn.2d at 493. After the arbitrator determined the amount of damages, Price sought to have the award confirmed under former RCW 7.04.150. *Price*, 133 Wn.2d at 494. Farmers objected and sought an offset for the PIP payments already advanced. *Price*, 133 Wn.2d at 494-95.

The court held that the superior court lacked jurisdiction under the arbitration statutes to resolve the PIP payment issue. *Price*, 133 Wn.2d at 498, 500. The court then noted that the proper procedure was for the trial court to enter a judgment confirming the award and:

[t]hereafter the parties must either resolve the remaining PIP offset coverage dispute by agreement or commence a separate action under the superior court's general jurisdiction to determine the amount and propriety of the claimed PIP offset and enter the corresponding monetary judgment.

Price, 133 Wn.2d at 502.

The court determined that the propriety of a PIP offset is an insurance coverage issue. *Price*, 133 Wn.2d at 498 n.8. And coverage issues are not subject to arbitration but are properly resolved in declaratory actions. *Price*, 133 Wn.2d at 498 (citing *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 113, 751 P.2d 282 (1988)).

A declaratory judgment is the functional result of the proceedings in this case. Both parties agreed to submit this issue to resolution by the superior court in order to save time and expense. In this context, this agreement was sufficient to give the trial court authority to resolve the issue. CR 15(b) provides that when issues not raised in the pleadings “are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” The rule further indicates that a motion to amend the pleadings to conform to the evidence may be made at any time, including after judgment, and that the court shall freely allow amendment. CR 15(b).

Here, the parties acted as though they had brought a separate declaratory judgment to determine the PIP offset as required by *Price*. They fully litigated the issue, and the trial court rendered judgment. Because this action was resolved under the trial court’s general jurisdiction, as a declaratory judgment, the issue was properly before the trial court. We have jurisdiction over appeals from superior courts. RCW 2.06.030.

FIC’s argument that Sherry somehow waived his right to appeal is similarly flawed. Agreeing to submit a matter to the court does not mean a litigant waives the right to appeal. Otherwise, every plaintiff who filed an action would be barred from an appeal. Nor does

accepting a judgment waive the right to appeal. The rules of appellate procedure specifically provide that:

[a] party may accept the benefits of a trial court decision without losing the right to obtain review of that decision . . . if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision.

RAP 2.5(b)(1)(iii). Here, both parties agree that Sherry is entitled to the \$34,682.38 judgment.

The only issue is whether the superior court should have given Sherry the full arbitrator's award.

Accordingly, Sherry did not waive his right to appeal. RAP 2.5(b)(1)(iii).

II. Offset

Sherry argues that the offset¹ to which FIC is entitled for the PIP payments made before Sherry recovered under his UIM claim should be reduced in proportion to Sherry's fault in the accident. Sherry reasons that if he recovers only 30 percent of his total damages because he was 70 percent at fault, FIC should be reimbursed only 30 percent of its PIP payments. We disagree.

The disagreement here is how to interpret the insurance contracts, a question of law that we review de novo. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990).

Both Sherry and FIC agree that under *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), an insurer like FIC may contract for the right to be reimbursed for payments made under a PIP clause if the insured, Sherry, recovers money from the tortfeasor. The same rule applies even when, as here, the tortfeasor is uninsured because an UIM payment is treated as coming

¹ This is an "offset" rather than a "reimbursement" because FIC is both the PIP insurer and the UIM insurer. An "offset" is the credit an insurer receives under one coverage for payments under another coverage in the same policy. *Winters v. State Farm Mut. Auto Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164, 63 P.3d 764 (2001). The difference in the terms is technical, but both refer to the right of an insurer to be reimbursed for payments already advanced.

from the tortfeasor. *Hamm v. State Farm Mut. Auto Ins. Co.*, 151 Wn.2d 303, 308, 88 P.3d 395 (2004).

But this right to reimbursement is subject to the rule that an insurer may not recover before the insured has been fully compensated. *Winters v. State Farm Mut. Auto Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164, 63 P.3d 764 (2001); *Mahler*, 135 Wn.2d at 416-17. This rule was first announced in *Thiringer v. American Motors Insurance Company*, 91 Wn.2d 215, 588 P.2d 191 (1978), in which the court stated that an insurer may recover “only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.” *Thiringer*, 91 Wn.2d at 219.

Here, the parties agree that Sherry’s UIM policy contained a clause that specifically authorized an offset. The clause provides that:

To determine the amounts payable to an insured person under [UIM coverage], we will first credit against the insured person’s damages, the following:

-
3. Any amounts paid under other Parts of this policy

Clerk’s Papers (CP) at 20. And the PIP policy also provides that “[a]ny amount paid or payable for bodily injury under the Liability or Underinsured Motorist Bodily injury coverages of this policy shall be deducted from the amount payable under this Part.” CP at 20. These provisions, as Sherry concedes, give FIC a contractual right to reimbursement of the amount FIC paid under the PIP part of the policy.²

² We note that it is irrelevant that FIC’s policy had a reimbursement provision in both the PIP policy and the UIM policy. UIM provisions limiting coverage by the amount paid elsewhere are “valid only to the extent they serve as mechanisms to accomplish the PIP right to reimbursement.” *Hamm*, 151 Wn.2d at 311 n.4.

Sherry argues, nonetheless, that this reimbursement should be in proportion to the percentage of damages that he recovered. He relies on language in *Thiringer*, indicating that the general rule is that “an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort-feasor responsible for the damage.” *Thiringer*, 91 Wn.2d at 219. Sherry asserts this language implies that if a he can recover only 30 percent of his total damages, then FIC can be reimbursed for only 30 percent of its PIP payments.

But this argument misstates both contractual obligation under the policy and the rule announced in *Thiringer*. The policy provides that *any* amounts paid under the PIP part of the policy are credited to the UIM payments. Under a plain reading of the policy, FIC would be entitled to a full refund, not 30 percent of its payments.

And the *Thiringer* full compensation rule does not contemplate proportional reimbursement. Instead, the *Thiringer* court indicated that the insurer can recover “only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.” *Thiringer*, 91 Wn.2d at 219. Thus the insurer is not entitled to a reimbursement based on the percentage of recovery but, rather, to a reimbursement of the amount in excess of full compensation.

Later cases support this interpretation. In *Winters*, our Supreme Court quoted at length from the Court of Appeals opinion, including the language that: “Because the PIP insured has not received funds in excess of her total damages . . . the PIP insurer is not entitled to reimbursement at all.” *Winters*, 144 Wn.2d at 880 (quoting *Winters v. State Farm Mut. Auto Ins. Co.*, 99 Wn. App. 602, 613-14, 994 P.2d 881 (2000), *aff’d*, 144 Wn.2d 869 (2001)). The insurer

may, after all, pursue the tortfeasor via classical subrogation to apportion the risk of loss between the insurer and tortfeasor.

After the insured is fully compensated, the insurance contract provisions control the extent of reimbursement. In *Mahler*, the court indicated that an insurer's right to reimbursement is "governed by the general public policy of full compensation of the insured." *Mahler*, 135 Wn.2d at 418. The *Mahler* court specifically determined that:

Provided the insurer recognizes the public policy in Washington of full compensation of insureds and its other duties to insureds by statute, regulation, or common law, the insurer may establish its right to reimbursement and the mechanism for its enforcement by its contract with the insured.

Mahler, 135 Wn.2d at 436.

We reject Sherry's argument that FIC is entitled to only a proportional offset and hold that because Sherry's contract provides that any advances under PIP can be recovered, FIC is entitled to recover whatever benefits remain after Sherry is fully compensated for his loss. Therefore, the proper question is whether Sherry was "fully compensated," thus triggering the FIC's right to reimbursement. *Thiringer*, 91 Wn.2d at 219. And on this, the parties disagree.

Sherry asserts that he is not fully compensated until he receives payment for his total damages as determined by the arbitrator. FIC responds that Sherry was fully compensated when he received the full amount of money to which he was legally entitled; in this case the arbitrator's award. FIC also argues that the rule requiring full compensation before it is entitled to reimbursement does not apply when Sherry was partially at fault for the accident. This is a case of first impression because prior case law addresses the "innocent insured," not an "at-fault" insured.

Neither of the parties presents a compelling answer to how we should interpret the “fully compensated” language from the Supreme Court. Sherry relies on dicta in *Thiringer* stating that a provision allowing an insurer to recover PIP payments if “the insured recovers less than his total damages” from the person legally responsible for the damages would be unfair. *Thiringer*, 91 Wn.2d at 220. But this language does not describe the facts of Sherry’s case. According to the arbitrator, Sherry and the uninsured motorist were both legally responsible for Sherry’s damages. And with the UIM judgment, Sherry received all of the damages for which the uninsured motorist was responsible.

But Sherry’s argument has some merit as a matter of policy. As the court noted in *Thiringer*, the insured pays an additional premium for the PIP coverage and has the right to expect payments under that coverage according to its terms. *Thiringer*, 91 Wn.2d at 220. FIC’s PIP policy was designed to be paid regardless of fault. FIC properly conceded at oral argument that even if Sherry were 100 percent negligent and injured himself, FIC would still have to pay Sherry the full PIP policy limits. It would be an odd result if FIC was entitled to recover the PIP benefits it paid to Sherry if he was only 70 percent at fault for his injury. In effect, Sherry would receive no benefit from the premium he paid for the PIP protection apart from early payment of medical bills, simply because he received a partial recovery under his separate UIM coverage.

FIC, for its part, relies on a Division One case, *Tolson v. Allstate Insurance Company*, 108 Wn. App. 495, 32 P.3d 289 (2001). In *Tolson*, the trial court determined that Allstate was entitled to recover an offset, or to deduct, the full amount of medical payments advanced to Tolson from the Allstate’s UIM payment. *Tolson*, 108 Wn. App. at 499-500. Division One affirmed because Tolson was going to receive the full amount of his arbitration award. *Tolson*,

108 Wn. App. at 500. The court reasoned that Tolson would recover all his medical damages under the arbitrator's award and that refunding the advanced medical payments would not alter that result. *Tolson* 108 Wn. App at 500. He still recovered all of his medical expenses.

But *Tolson* does not resolve the issue of what happens when the insured person is partly at fault and recovers only part of his damages. The *Tolson* court based its rationale on Tolson receiving full compensation for his medical expenses. Here, in contrast, the arbitrator awarded Sherry only 30 percent of his total damages. Unlike in *Tolson*, Sherry will not recover all of his medical damages, and so, under *Tolson's* reasoning, he is not fully compensated.

FIC next turns to *Peterson v. Safeco Insurance Company*, 95 Wn. App. 254, 976 P.2d 632 (1999), a Division Three case. In that case, the insured, Peterson, was injured by an insured motorist who had a Safeco insurance policy with a \$250,000 limit. *Peterson*, 95 Wn. App. at 257. He received \$3,997.64 in PIP benefits. *Peterson*, 95 Wn. App. at 257. Peterson settled with the at-fault motorist's insurance company for \$20,000. *Peterson*, 95 Wn. App. at 259. Peterson then argued that he was not fully compensated and so Safeco was not entitled to a reimbursement for the PIP benefits. *Peterson*, 95 Wn. App. at 260. The court indicated that the full compensation issue does not arise until the tortfeasor's readily accessible assets have been exhausted. *Peterson*, 95 Wn. App. at 260. FIC argues that because Sherry's UIM policy limit was \$100,000, the arbitrator's \$42,938.38 award did not exhaust Sherry's UIM policy limits and, therefore, Sherry cannot raise lack of full compensation to defeat FIC's right to reimbursement.

But *Peterson* also does not resolve the problem at issue here. As a practical matter, Sherry has exhausted all of his available assets. The UIM insurance provision only covers payments that an insured person is legally entitled to recover from the uninsured motorist. After

the arbitrator's award, that amount can be only \$42,938.38. Even after exhausting the only UIM benefits to which he is entitled, Sherry will be around \$100,000 short of his total damages. Thus, *Peterson's* focus on the "available assets" does not resolve the question presented here.

Next, FIC argues that allowing Sherry to retain both his PIP and UIM payments would allow him a double recovery. FIC's argument is persuasive only if we accept FIC's assertion that the PIP benefits duplicate the arbitrator's UIM award.

FIC is correct that double recovery is inappropriate. *Weyerhaeuser v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 672, 15 P.3d 115 (2000). And the insurer has the burden of proving that an insured has received double recovery. *Weyerhaeuser*, 142 Wn.2d at 674-75.

But here, the PIP payments do not duplicate Sherry's UIM award. Sherry's total damages were \$143,127.92, of which \$53,127.92 was for medical expenses and \$90,000 for general damages. The arbitrator reduced Sherry's UIM to \$42,938.38 to account for Sherry's 70 percent fault in the accident. Assuming the arbitrator reduced both medical and general damages by 70 percent, Sherry received \$15,938.38 in medical costs and \$27,000 in general damages under his UIM coverage. Sherry's \$10,000 PIP benefits for medical expenses bring the total medical expenses FIC paid to \$25,938.38, well short of Sherry's total medical expenses of \$53,127.92.

Assuming that lost wages were included in the arbitrator's general damage award, the same analysis applies to the \$4,600 FIC paid for lost wages under the PIP provision. Sherry received \$27,000 of his general damages in the arbitrator's UIM award. Adding the \$4,600 lost wages portion of the PIP benefits, Sherry would have recovered only \$31,600 of his \$90,000 in

general damages. Thus, Sherry's PIP benefits did not duplicate the UIM payments; he was not paid twice for the same injury.

FIC's most compelling argument is that the "full compensation" analysis is altered for an at-fault insured. Br. of Resp't at 15. *Thiringer's* language, the case that first announced the full compensation rule, facially supports FIC's position. In *Thiringer*, the court sought to insure "adequate indemnification of innocent automobile victims." *Thiringer*, 91 Wn.2d at 220. But the court was "guided by the principle that a party suffering *compensable injury* is entitled to be made whole but should not be allowed to duplicate his recovery." *Thiringer*, 91 Wn.2d at 220 (emphasis added). "Compensable" means "[a]ble or entitled to be compensated for." BLACK'S LAW DICTIONARY 301 (8th ed. 2004). The phrase "compensable injury" therefore means an injury for which an insured is entitled to be compensated. We therefore read *Thiringer* to apply the full compensation rule so long as an insured suffers any injury for which he is entitled to be compensated. We must therefore determine what part of Sherry's injury was compensable.

Division One has interpreted the language "compensable injury" to mean that the full compensation rule does not apply to situations in which there is no liable third party. *Cook v. USAA Cas. Ins. Co.*, 121 Wn. App. 844, 848-49, 90 P.3d 1154 (2004). In *Cook*, an insurance carrier settled its subrogation claim with the defendants in a negligence action before the trial concluded. *Cook*, 121 Wn. App. at 846. The jury returned a defense verdict, finding the defendant not negligent. *Cook*, 121 Wn. App. at 846. The plaintiffs then filed a claim against the insurance carrier, arguing that it was not entitled to keep subrogation settlements until the plaintiffs were fully compensated. *Cook*, 121 Wn. App. at 847. The court rejected the plaintiffs'

claim to the subrogation settlements, finding that the prerequisite for applying the full compensation rule was a liable third party. *Cook*, 121 Wn. App. at 849.

But *Cook* is distinguishable. In this case, there is a liable third party, the uninsured motorist who hit Sherry. And the arbitrator found that motorist 30 percent at fault. Therefore, Sherry suffered a compensable injury and is entitled to be made whole under the full compensation rule before FIC is entitled to any offset for PIP payments. Moreover, the *Cook* court did not address PIP benefits that are paid regardless of fault. *Cook* therefore does not resolve the issue of when a partially at-fault insured is fully compensated or whether an insurer is entitled to recover PIP payments from a partially at-fault insured who receives partial compensation under his UIM coverage. We must therefore determine whether FIC's UIM payment, representing the full amount that Sherry could legally recover from the partially at-fault uninsured motorist made Sherry whole for purposes of *Thiringer*.

FIC would have us assume that we should look to tort law concepts to determine what amount Sherry was entitled to recover in order to make him whole. And under our contributory fault negligence regime, he would be entitled to recover for only that part of the injury attributed to the tortfeasor. RCW 4.22.005. But we do not agree that this fault-based concept defines a compensable injury in the context of PIP.

This case turns on contract law, not tort law. FIC contracted with Sherry to provide PIP coverage. We therefore look at the contract to determine what was a compensable injury. In return for a separate PIP premium, FIC agree to pay Sherry for his medical costs and lost wages regardless of fault. Even if Sherry were completely at fault for his injuries, FIC would have to pay the full PIP limits. In other words, because FIC had to compensate Sherry for injuries

caused even by his own negligence, all of Sherry's damages, including those attributable to his 70 percent fault, are "compensable injuries." He therefore would not be "fully compensated" until he receives all of his damages. Having written a policy that promised to pay for Sherry's damages regardless of fault, FIC cannot now use Sherry's fault as a rationale for seeking reimbursement of its no-fault PIP payments.

Thus, in order to see if Sherry was fully compensated, we would add his 30 percent recovery under the UIM coverage *and* the monies paid under the PIP policy. An offset for PIP benefits would then be required only if the combined UIM and PIP payments exceeded Sherry's total damages. Because, in this case, Sherry's total damages would not be exceeded, Sherry did not receive the double recovery that the *Thiringer* court wished to avoid. *Thiringer*, 91 Wn.2d at 220.

In conclusion, PIP payments are not based on fault of the insured; they are payable regardless of the insured's fault,³ and the application of the fault concept appropriate in UIM coverage is not applicable for determining offsets for PIP payments. The rule we announce in interpreting the coverage for "at-fault" insureds is that the insurer cannot offset PIP payments until the insured has been fully compensated for the total damages. Because Sherry was not fully compensated, the trial court erred in its determination that FIC was entitled to an offset and in deducting \$8,256 from Sherry's arbitration award.

We also note that because FIC was not entitled to an offset, it is not required to pay a pro rata share of Sherry's attorney fees and litigation expenses. *Mahler*, 135 Wn.2d at 436.

³ Of course, we are not addressing excludable acts of the insured such as intentional acts such as racing or speed contests.

32946-8-II

Reversed and remanded for entry of judgment for Sherry's full arbitration award.

Bridgewater P.J.

Bridgewater, P.J.

We concur:

Hunt, J.

Hunt, J.

Penoyar, J.

Penoyar, J.