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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 32946-8
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KEVIN SHERRY,

Appellant,

v.

FINANCIAL INDEMNITY COMPANY,

Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	STATEMENT OF FACTS	1
II.	ARGUMENT	2
	A. The trial court had jurisdiction by the agreement of counsel to decide the PIP offset issue	2
	B. Acceptance of benefits does not preclude an appeal	4
	C. Sherry is entitled to be treated as if he purchased PIP and UIM coverage from different insurers ...	4
	D. Sherry was not fully compensated as a result of the trial court's ruling	6

I. STATEMENT OF FACTS

Kevin Sherry's mother purchased UIM and PIP coverage from Financial Indemnity Company. CP 5-23. A UIM arbitration award was issued in favor of Kevin Sherry. CP 26-28. The award found total damages of \$143,127.92, including special damages. CP 26-28 After reduction for 70% comparative fault, the net damages, including special damages, were \$42,938.38. CP 26-28. Financial Indemnity had previously paid \$14,600.00 to or on behalf of Kevin Sherry under his PIP coverage. CP 35-36.

At the time of Kevin Sherry's motion to enter judgment on the arbitration award, the parties agreed to the trial court deciding the PIP offset issue, rather than starting a separate declaratory relief lawsuit. RP 3, lines 11-14; RP 9, lines 11-20; RP 19, lines 16-20 The court decided the offset issue, but failed to reduce the PIP offset for comparative fault, resulting in this appeal. RP 20-21.

Although the insurer's position through the course of this litigation has been that Kevin Sherry was performing a "Jackass"-style stunt at the time of the accident, that was not the holding of the arbitrator. The holding of the arbitrator was that this case was an accident. 70% of the fault for this accident rested on Kevin Sherry and 30% rested on an uninsured motorist. If the trier of fact had found that this was, in fact, an intentional stunt, there would have been no award to Kevin Sherry for the accident. The insurer repeats its "Jackass" theory simply for the purpose of prejudicing the court against Kevin Sherry.

II. ARGUMENT

A. The trial court had jurisdiction by the agreement of counsel to decide the PIP offset issue.

It is true that the court in Price v. Farmers Ins. Co. of Washington, 133 Wash.2d 490, 501-02, 946 P.2d 388 (1997), held that a separate declaratory relief action is necessary to decide PIP offset issues. In a UIM case, where entry of judgment on the award is sought, the trial court is typically bound to simply enter judgment on the arbitration award. See Price, 133 Wash.2d at 496. If the trial court had done so in this case, the judgment entered would have been \$42,938.38: the amount on the face of the arbitration award. The insured's citations to RCW 7.04.160 and RCW 7.04.170 are misleading.

Recognizing that the filing of a declaratory relief action would only act to prolong this case and cause extra expense, plaintiff's counsel requested that the trial court decide the PIP offset issue. CP 61-62; RP 3, lines 11-14. Insurer agreed. RP 9, lines 11-20. Because the court was unclear as to whether the insurer was agreeing to the determination of the PIP offset issue without the necessity of a separate declaratory relief action, Insurer's counsel was questioned by the judge:

THE COURT: Well, are you presenting it for decision or not, Ms. Dunlap?

MS. DUNLAP: Well, let me get to that because some of the explanation – I think we don't need to – you know, I think you've got everything in front of you that you need to decide here, and predominantly I make that argument under the *Tolson* case. . . .

RP 10, lines 2-8.

The trial court continued to be concerned about whether it had jurisdiction to consider the offset issue:

THE COURT: All right. You both agree that this is properly presented to me for a decision. Are you still both in that situation? Because *Hamm* would seem to dictate a separate action, and you both really want to avoid that. Was it *Hamm*?

MS. DUNLAP: *Price*, and we seek to avoid that. And again, I reiterate that if you feel you need a supplemental proceeding to have all of the materials in front of you, if his prehearing statement of materials from the plaintiff is not in front of you or you don't like my representation of it, then I need to have the Court fully informed. But we are in agreement that you should decide this rather than do a different deck [sic] action.

RP 19, lines 16-20.

It was also clear that the agreement not an agreement that there would be no appeal. In fact, the trial judge, once satisfied that he had the agreement of the parties to decide the PIP offset, commented:

THE COURT: All right. Well, I feel prepared to make a decision. I just want to make sure procedurally that if the Court of Appeals gets their hands on it they are wondering what I am doing now.

RP 20, lines 3-6. The agreement to have the trial court decide the issue of PIP offset was not an agreement to waive any appeal from the decision, it was simply an agreement to give jurisdiction to the trial court without forcing the insurer to incur the expense and time of filing a completely separate action.

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B. Acceptance of benefits does not preclude an appeal.

RAP 2.5 states under subsection (b), which is entitled "Acceptance of Benefits":

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only . . . 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 . . .

In this case, the trial court decided that a PIP offset in the amount of \$8,256 should be granted, resulting in a net judgment to Kevin Sherry in the amount of \$34,792.38. CP 94-95. It is no coincidence that this is the amount for the judgment requested by the insurer, plus the cost of a filing fee. CP 51, CP 94. This is the minimum to which Kevin Sherry would be entitled, even if this appeal is not decided in his favor. In this appeal, Kevin Sherry requests a reduction of the offset, pursuant to the holding in Hamm v. State Farm, 151 Wn.2d 303 (2004), which would result in a larger net judgment to him: one that is greater than the benefits of the trial court decision. The insurer has sought no relief in this appeal that would result in a lower amount being awarded to Kevin Sherry. Therefore, the appeal in this case is not precluded by the payment of the judgment amount by the insurer and a satisfaction of judgment by Kevin Sherry.

C. Sherry is entitled to be treated as if he purchased PIP and UIM coverage from different insurers.

"The insured should not be worse off simply because he or she purchased two coverages from the same insurer." Hamm v. State Farm,

151 Wn.2d 303, 315 (2004), quoting Winters v. State Farm Mut. Automobile Ins. Co., 144 Wash.2d 869, 882, 31 P.3d 1164 (2001). Where an insured had purchased PIP and UIM insurance from two different insurers, there would have been a right to subrogation on the part of the PIP carrier, not offset. See Thiringer v. American Motors Insurance, 91 Wn.2d 215, 219 (1978). The PIP carrier would be entitled to reimbursement “to the extent that its insured recovers payment for the same loss” from the responsible party or its insurer. See Thiringer, 91 Wn.2d at 219-20, citing St. Paul Fire and Marine Ins. Co. v. W. P. Rose Supply Co., 19 N.C.App. 302, 198 S.E.2d 482 (1973); Propeck v. Farmers' Mut. Ins. Ass'n, 65 S.W.2d 390 (Tex.Civ.App. 1933); 46 C.J.S. Insurance § 1209 at 155 (1946); 15 Blashfield, Automobile Law and Practice § 484.8 at 196 (rev.1972 & Supp.1977); 6A Appleman, *Supra* at 259; 16 Couch, *Cyclopedia of Insurance Law* § 60:50 (R. Anderson, 2d ed. 1966). Therefore, where an insured's recovery is reduced by that insured's comparative fault, they will only recover the amount proportionate to the tortfeasor's share of liability.

In this case, had there been two different insurers, Kevin Sherry would have recovered \$4,380.00 of the \$14,600.00 paid on his behalf, or the amount to him by the PIP insurer. That \$4,380.00 would be the extent of his recovery of the PIP payments from the tortfeasor or its insurer. That amount would then be subject to a reduction for a proportionate share of attorneys fees and costs, again, because the insured should not be worse off for purchasing the coverages from the same insurer. In this particular

case, the contribution under Hamm (this recalculation is performed due to mathematical errors in the appellant's brief) should be:

1. Total PIP payments recovered / total recovery = ratio:
 $\$4,380.00/42,938.38 = .1020$
2. Attorneys Fees and Costs = Total Legal Expenses:
 $\$14,312.79 + 4,353.93 = \$18,666.72$.
3. Legal Expenses x Ratio = $\$18,666.72 \times .1020 = \$1,904.01$.

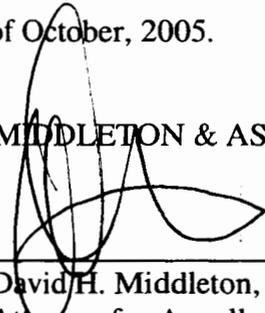
Therefore, the PIP offset should be \$2,475.99 (4,380.00-1,904.01).
Therefore, the judgment in favor of Kevin Sherry should have been \$40,462.99.

D. Sherry was not fully compensated as a result of the trial court's ruling.

The Washington Supreme Court, in Thiringer, states that an insured should not recover less than his total damages, before PIP reimbursement is made. Thiringer, 91 Wn.2d at 194. In this case, the total damages that were owed by the tortfeasor are \$42,938.38. Sherry had a right to expect that the PIP payments would be available to him regardless of whether he recovered the total amount of PIP payments made. Thiringer, 91 Wn.2d at 194. That "net" award was 30% of Kevin Sherry's total damages. As a result, if that amount is reduced by the full \$14,600.00 (less Mahler fees), the reduction invades the damages that constitute full compensation to Kevin Sherry, and should not be allowed.

DATED this 25th day of October, 2005.

MIDDLETON & ASSOCIATES P.S.



David H. Middleton, WSBA#22485
Attorney for Appellant



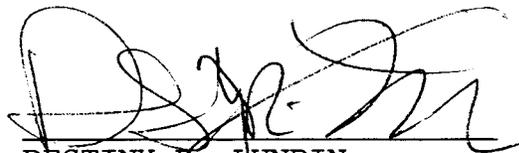
DECLARATION OF SERVICE

I, Destiny R. Lundin, state:

On this 26th day October, 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 Reply 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 26th day of October, 2005, at Federal Way, Washington.


DESTINY R. LUNDIN

