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SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. 2007 FEB -5 P 2:45
Court of Appeals Div. II No. 32946-8

SUPREME COURT OF THE
STATE OF WASHINGTON

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CIPER

FINANCIAL INDEMNITY COMPANY

Petitioner,

v.

KEVIN SHERRY

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

David H. Middleton
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BRIEF RE JURISDICTION OF COURT TO DETERMINE
OFFSET UNDER FORMER 7.04.150.

I. RELEVANT FACTS

The Court has asked that the parties submit additional briefing regarding the authority of the trial court to offset the arbitration award under former RCW 7.04.150.

This case arises from a UIM arbitration award that was reduced to judgment on February 14, 2005. At the time of Sherry's motion to enter the judgment, the parties agreed to the trial court deciding the issue of offset, even though the holding in Price v. Farmers Ins. Co. of Washington, 133 Wash.2d 490, 501-02, 946 P.2d 388 (1997) indicated that a separate declaratory relief action must be filed.

II. AUTHORITY

- 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.

However, because the filing of a declaratory relief action would only act to prolong this particular 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. The 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*?

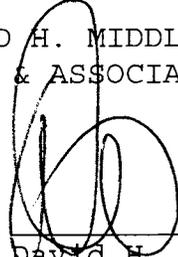
MS. DUNLAP: *Price*, and we seek to avoid that. And again, I reiterate that if you feel you need a supplemental proceeding to have all of the materials in front of you, if his prehearing statement of materials from the plaintiff is not in front of you or you don't like my representation of it, then I 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.

The parties agreed to give jurisdiction to the trial court to avoid prolonging the litigation and without forcing the insurer to incur the expense and time of filing a completely separate action.

DATED this ^{DM}5 day of February, 2007.

DAVID H. MIDDLETON
& ASSOCIATES, P.S.

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a vertical line and a circular flourish.

David H. Middleton, #22485
Attorney for Respondent
Kevin Sherry

DECLARATION OF SERVICE

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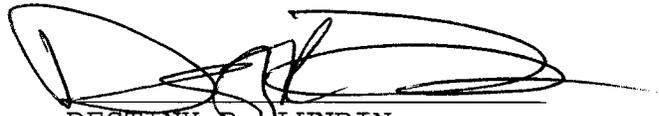
I, Destiny R. Lundin, state:

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On this 5th day February, I caused to be mailed by first class postage to ~~Debra A. Dunlap,~~
325 118th Ave SE Ste 209, Bellevue WA 98005,
attorney for Petitioner, and by facsimile, a copy of the following documents: Respondent's Supplemental 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 5th day of February, 2007, at Federal Way, Washington.



DESTINY R. LUNDIN