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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ON APPEAL FROM
KING COUNTY SUPERIOR COURT NO. 10-2-06595-4 SEA

EYOB MICHAEL,

Appellant,

v.

AMERIPRISE AUTO & HOME INSURANCE
AGENCY, INC.,

Respondent.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Ameriprise's brief is premised on the assumption that it was Michael's burden to allocate the damages at trial. While Ameriprise apparently concedes that joint and several liability does not apply to the verdict in this case,¹ it now argues that the trial court's decision ought to be affirmed, because Michael "chose" to limit his UIM claim to damages exceeding \$125,000.00 (the combined liability policies from Page and Ayers), when Michael did not seek an apportionment of his damages from the jury.²

However, Ameriprise cites to nothing in the record that suggests that Michael agreed to accept less than what his insurance policy and premium payments afforded: Two separate and independent UIM claims, one claim to cover any judgment exceeding \$25,000.00 that might be entered in favor of Michael against Page and one claim to cover any judgment exceeding \$100,000.00 that might be entered in favor of Michael against Ayers. Furthermore, Ameriprise offers no authority to support its contention that Michael had the burden of apportioning his damages. On the contrary, Washington law is clear that the

¹ Brief of Respondent, p. 17, fn. 11

burden of apportioning Michael's damages between the two accidents was on Ameriprise.

II. LEGAL ARGUMENT

A. Ameriprise Had The Burden of Apportioning Damages

Ameriprise is correct that Michael chose to "present a single damages claim."³ Because the Ameriprise disputed the nature and extent of Michael's injuries caused by each accident, Michael proposed a general verdict form that did not seek to segregate his damages between the two accidents, taking the position that the damages he suffered from both accidents were indivisible. As a result, Michael shifted the burden of proving allocation to Ameriprise. By failing to take exception to the verdict form submitted to the jury and by proposing a verdict form that also did not seek to allocate damages, Ameriprise failed to meet its burden of proving any allocation between the two accidents. Thus, Ameriprise, standing in the shoes of tortfeasor Page for the 2007 accident, became liable for the entire verdict under Washington State law.

² Id., p. 1

³ Respondent's Brief, p. 1.

Washington law is clear that when a fault-free plaintiff suffers harm from successive tortfeasors, the tortfeasors must bear the burden of proving allocation of the damages among themselves:

We therefore hold that once a plaintiff has proved that each successive negligent defendant has caused some damage, the burden of proving allocation of those damages among themselves is upon the defendants; if the jury finds that the harm is indivisible, then the defendants are jointly and severally liable for the entire harm.

Phennah v. Whalen, 28 Wn.App. 19, 28-29, 621 P.2d 1304 (1980) citing to RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965) (“Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor”).

In *Cox v. Spangler*, 141 Wn.2d 431, 445, 5 P.3d 1265 (2000), the Supreme Court held that the burden shifting rule in *Phennah* applies even if there is only one defendant and no joint and several liability:

Spangler also argues that the *Phennah* case is distinguishable because it involved two defendants who were held to be jointly and severally liable for causing

indivisible injuries. Spangler contends, therefore, that the "entire rationale" of Phennah is "missing" from the present controversy. Br. of Appellants at 36. Spangler is correct in noting that, here, there is no joint and several liability, because Spangler is the only defendant against whom judgment has been entered. See *Anderson v. City of Seattle*, 123 Wn.2d 847, 852, 873 P.2d 489 (1994) (holding that two or more defendants are necessary for a finding of joint and several liability). **This observation is, however, irrelevant because Phennah does not make joint and several liability a prerequisite to shifting the burden of apportionment.**

Cox v. Spangler, 141 Wn.2d at 445 (emphasis added). In *Cox*, the plaintiff was involved in two motor vehicle accidents and sustained injuries in both. Cox sued Spangler, the tortfeasor from the second accident. Because Spangler failed to apportion Cox's damages at trial, the Supreme Court upheld a judgment against Spangler for Cox's damages in both accidents. *Cox v. Spangler*, 141 Wn.2d at 444-445.

Like *Cox*, joint and several liability did not exist in this case because Michael had already settled with Page and Ayers before trial. See *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999). However, this did not prevent Michael from shifting the burden of apportionment to Amerprise at trial. Standing in the shoes of tortfeasor Page, Amerprise bore the burden of allocating Michael's damages or be deemed liable for all of his damages.

In addition to case law, the Washington Administrative Code pertaining to THE UNFAIR CLAIMS SETTLEMENT PRACTICES REGULATION also states that the burden of allocating damages rests with insurer. WAC 284-30-330(6) (emphasis added) states:

Specific unfair claims settlement practices defined.

* * * *

(6) If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.

Ameriprise offers no authority to show that the burden of apportionment rested with Michael at trial, aside from the argument that Michael chose to posture his claims in the aggregate.⁴ *However, it is because Michael chose to posture his claims in the aggregate, that shifted the burden of apportionment to Ameriprise.*

B. Because Ameriprise Failed to Apportion Michael's Damages, Michael Would Have Been Legally Entitled To Recover the Entire Verdict from Page

There is no dispute that Michael was fault-free and sustained injuries in both accidents. Even the defense medical expert testified that Michael sustained some degree of injury in each accident. Under these circumstances, Ameriprise had the burden

⁴ Respondent's Brief, p. 1

of allocating the liability for Michael's damages. By agreeing to submit a verdict form to the jury that sought no allocation of damages, Ameriprise failed to meet its burden of proof and is therefore liable for any damages Michael is "**legally entitled to recover**"⁵ from Page for the 2007 accident.

As indicated in Michael's opening brief, it is important to note that this is a contract action on an insurance policy with Ameriprise, not a tort action. Thus, the measure of Michael's damages is the amount needed to give him the benefit of his bargain with Ameriprise, not the amount needed to compensate him for injuries proximately caused by the tortfeasors. The benefit of his bargain is two separate UIM claims, each to be assessed independently following the verdict in this case. Otherwise, he would have been better off not having paid premiums for UIM coverage in the 2008 accident. The Supreme Court has described UIM coverage as providing "additional insurance to cover any judgment that might be entered in favor of the insured against an underinsured motorist." *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 622, 160 P.3d 31 (2007).

⁵ Respondent's Brief, p. 6 (citing to Ameriprise's policy)

Without any segregation of damages, Michael would have been “legally entitled to recover” the entire \$72,569.68 verdict from Page, even though Michael had previously settled with Ayers for “more than full recovery” for Ayers’ liability in the 2008 accident. See *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 296-297, 840 P.2d 860 (1992); See also *Cox v. Spangler*, 141 Wn.2d 431, 444, 5 P.3d 1265 (2000) (“Comment (c) to [RESTATEMENT (SECOND) OF TORTS] § 433B(2) makes it clear that subsection (2) does not depend on the joinder of all actors who caused the indivisible harm to the plaintiff”).

Michael’s \$100,000 settlement with Ayers only precludes him from UIM coverage for the 2008 accident. But the fact that he has no UIM coverage for the 2008 accident should not affect his UIM coverage for the 2007 accident. As discussed extensively in Michael’s opening brief, the settlement with Ayers for the 2008 accident has no bearing on and cannot be assessed against Michael’s UIM coverage for the 2007 accident with Page, which is a separate claim. See *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999). Michael paid separate premiums for separate UIM coverage in each accident. His policy benefits are

not combined or aggregated because he was involved in two accidents. He should not be worse off for having UIM coverage in the 2008 accident with Ayers. If this case involved only UIM coverage for the 2007 accident and if Page had failed to apportion Michael's damages at trial, Page would have been responsible for the entire verdict under *Cox v. Spangler, supra*.

Under the terms of the insurance policy, Michael is entitled to UIM coverage for damages he would have been "legally entitled to recover" from Page. Because there was no apportionment of the damages, Page would have been liable for the entire harm and Michael would have been legally entitled to recover the entire verdict of \$72,569.68 from Page, even having settled with Ayers for \$100,000 prior to trial. Therefore, Michael is entitled to UIM coverage for the 2007 accident in the amount of \$72,569.68, "reduced by all sums paid...**by or on behalf of** [Page]."⁶ Since Page paid Michael \$25,000.00 in settlement before trial, Michael is entitled to \$47,569.68 in UIM coverage for the 2007 accident. Ameriprise may not offset Ayers' payment of \$100,000 to Michael against his recovery of the damages caused by Page, because

⁶ Respondent's Brief, pp. 6-7 (emphasis added)

Ayers' payment is **"by or on behalf of"** Ayers, not Page. See *Batacan*, 139 Wn.2d at 453.

In *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 450, 986 P.2d 823, 827 (1999), the Supreme Court interpreted UIM policy language similar to Amerprise's **"legally entitled to recover"** and payment **"by or on behalf of"** policy language. Batacan was insured by Allstate Ins. Co. and received an UIM arbitration award of \$60,000 in total damages, in which tortfeasor Kim (the uninsured motorist) and tortfeasor Cantrill (an insured motorist) were each found to be 50% liable. Even though Batacan settled with Cantrill for \$54,000, the Supreme Court held that Allstate could not offset Kim's liability with the payment from Cantrill pursuant to its own policy language. Allstate was liable for the full amount the insured would have been "legally entitled to recover" from the uninsured motorist:

Our holding that denial of coverage was improper in this case is compelled by the contract itself which incorporates the statutory standard by requiring Allstate to pay damages the Batacans are **"legally entitled to recover as damages from the owner or driver of an underinsured motor vehicle."** Here, based on this arbitration result, the Batacans would be entitled to recover \$30,000 from Kim [the uninsured motorist] if Kim's liability were several, \$60,000 if it were joint. But Allstate paid nothing.

Allstate Ins. Co. v. Batacan, 139 Wn.2d 443, 450, 986 P.2d 823, 827 (1999) (citation to the record omitted) (emphasis added). In this case, Ameriprise's UIM policy language is almost identical stating, "We will pay compensatory damages which an insured person is **legally entitled to recover from the owner or operator of an underinsured motor vehicle.**"⁷ Therefore, Ameriprise is liable for the full amount Michael would have been "legally entitled to recover" from Page, regardless of what Ayers paid.

The *Batacan* Court also held that the payment "by or for" language in Allstate's policy prevented Allstate from setting off Cantrill's \$54,000 payment against Batacan's UIM recovery for damages caused by Kim:

We also note the limitation of liability clause in paragraph E.2.b., which allows a setoff of actual payments "by or for anyone who is legally responsible," relates to "damages which the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle...." **This, however, does not allow a setoff of Cantrill's payment for the damages she caused against recovery of the damages caused by Kim because Cantrill's payment is "by or for" Cantrill, not Kim.**

Batacan, at 453 (emphasis added) (citations to the record omitted).

Again, Ameriprise's policy language is almost identical, allowing

⁷ Respondent's Brief, p. 6 (emphasis added)

UIM setoff of actual payments “**by or on behalf of the persons or organizations which may be legally liable.**”⁸ Therefore, Ayers’ payments are “by or on behalf of” Ayers, not Page, and cannot be used to offset UIM coverage for Page’s liability.

C. Ameriprise Has The Burden Of Proof on Issues of UIM Offset, Set-off, and Exclusions

Ameriprise argues that Michael has the burden of establishing that Page was underinsured.⁹ However, this burden does not extend to disproving that Ameriprise’s exclusionary provisions apply to Michael. When an insured makes the prima facie case that there is coverage, the burden is on the insurer to prove that the loss is not covered because of an exclusionary provision in the policy. *Burrier v. Mutual Life Ins. Co. of N.Y.*, 63 Wn.2d 266, 270, 387 P.2d 58 (1963); *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 845 P.2d 334 (1993); *PEMCO v. Rash*, 48 Wn.App. 701, 703, 740 P.2d 370 (1987)”; see also *Price v. Farmers Insurance Company of Washington*, 133 Wn.2d 490, 501 (1997) (After arbitration award, it is the insurer’s burden to

⁸ Id. at 7

⁹ Respondent’s Brief, p. 12

demonstrate there is a further coverage dispute which would prevent full resolution of all issues at that point).

As indicated above, Michael obtained a verdict of \$72,596.68 in damages against Ameriprise that he would have been "legally entitled to recover" from Page. Page's liability policy limits were only \$25,000.00. Thus, Michael has made a prima facie case that Page is underinsured and that there is UIM coverage. Here, Ameriprise seeks to exclude coverage for the 2007 accident because a provision in the policy allegedly allows Ameriprise to offset UIM liability for the 2007 accident with settlement funds Michael received from Ayers for the 2008 accident. Thus, the burden rests (again) on Ameriprise to prove that the loss is not covered because of an exclusionary provision in the policy.

D. Ameriprise's "Recovery Rights" Provision Is Inapplicable

Aside from arguing that Michael received a "windfall" from Ayers for the 2008 accident, Ameriprise can cite to no legal authority which would allow it to offset Page's liability with Ayers' settlement. Even the "Recovery Rights" policy provision that Ameriprise relies upon to distinguish its policy from the holding in *Batacan, supra*, and to deny Michael UIM coverage for the 2007

accident is inapplicable. Ameriprise's "Recovery Rights" provision states:

When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment.

We shall be entitled to a recovery as stated in this provision only after the person has been fully compensated for damages by another party.

Respondent's Brief, p. 14. Ameriprise argues that this recovery provision was not addressed in *Batacan, supra*, so the Supreme Court's holding is distinguishable. However, Ameriprise's "Recovery Rights" provision is not unique. Most if not all auto liability insurance policies have a similar recovery provision. See e.g. *Mahler v. Szucs*, 135 Wn.2d 398, 418-419, 957 P.2d 632 (1998); See also *Truong v. Allstate Property and Cas. Ins. Co.*, 151 Wn.App. 195, 211 P.3d 430 (2009).

The reason a recovery provision wasn't addressed in *Batacan, supra*, is not because it didn't exist in Allstate's policy. Instead, it wasn't addressed because the provision was inapplicable to Batacan's UIM claim, since Allstate hadn't "paid" any UIM damages to recover. Similarly, Ameriprise's "Recovery

Rights” provision is inapplicable to Michael’s UIM claims, because Ameriprise hasn’t “paid” any UIM damages.

Under the facts of this case, Ameriprise has only “paid” PIP payments under the policy for the 2007 accident and under the policy for the 2008 accident. So the recovery provision only applies to Ameriprise’s PIP reimbursement claims, not to Michael’s UIM claims. Michael is the one seeking *recovery* under the UIM policy, not vice versa. Further, Michael has complied with the recovery provision as it pertains to his PIP claims, holding in trust from his settlements with Page and Ayers the extent of Ameriprise’s PIP payments and reimbursing Ameriprise for the PIP payments due under each claim as ordered by the trial court. However, Ameriprise has “paid” no UIM damages whatsoever under either the 2007 claim or the 2008 claim, so this recovery provision doesn’t apply to the UIM coverage issue before the Court.¹⁰

¹⁰ A recovery provision is usually asserted in the UIM context when the insured first receives UIM damages from the insurer, and then is able to recover damages from the uninsured motorist. In that case, the insurer may be entitled to reimbursement from the recovery the insured obtains

E. Ameriprise's Exclusionary Provisions Are Strictly Construed

The purpose of insurance is to insure. Insurance policies contain language which grants coverage, along with language which excludes or limits coverage. These different clauses are construed differently. Clauses granting coverage are to be read liberally in favor of providing insurance while exclusionary or limiting clauses are strictly construed:

It has been almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policy holder or beneficiary thereof, whenever possible, and strictly construed against the insurer in order to afford the protection which the insured was endeavoring to secure when he applied for the insurance.

Scales v. Skagit County Medical Bureau, 6 Wn.App. 68, 70, 491 P.2d 1338 (1971); *see also Queen City Farms, Inc. v. Central National Ins. Co. of Omaha*, 126 Wn.2d 50, 74, 882 P.2d 703 (1994) ("Exclusions should be construed strictly against the insurer"). To the extent the policy contains inconsistent or conflicting terms, the conflict must be resolved in favor of the insured. *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413 (1998); *DePhelps v. Safeco Ins. Co. of Am.*, 116

from the uninsured motorist, if it proves that the insured has been fully compensated by that recovery.

Wn.App. 441 (2003). An insured is also entitled to favorable construction of ambiguous policy language – it must be read to provide rather than to deny coverage. *Queen City Farms, supra*, at 86; *Peterson v. Safeco Ins. Co.*, 95 Wn.App. 254 (1999); *Hawaiian Ins. & Guar. Co. v. Federated Am. Ins. Co.*, 13 Wn.App. 7, 20 (1975).

Even if Ameriprise's recovery provision did apply and Ameriprise had paid UIM damages "under this policy"¹¹ for Page's liability, its right of recovery could only be enforced against any recovery received from Page and after Ameriprise has proven that Michael has been "fully compensated" *for Page's liability*. Since Michael only recovered \$25,000 "from another" for Page's liability and since Ayer's \$100,000 payment was "by or on behalf of" Ayers, not Page, Ameriprise may not offset the verdict by more than the \$25,000.00.

Ameriprise asks this Court to broadly construe its policy language to allow reimbursement of UIM damages it pays to Michael for the 2007 accident, if Michael "recovers from another"

¹¹ The amounts paid or payable "under this policy" for the 2007 accident are separate from any amounts paid or payable "under this policy" for the 2008 accident.

for a different accident. In other words, “recovers from another” would mean any recovery by Michael, from anybody, for anything. Such a broad interpretation of the policy violates the holding in *Batacan, supra*, and to the extent that this recovery provision conflicts with Ameriprise’s “**legally entitled to recover**” and payment “**by or on behalf of**” policy language discussed above, the policy is construed in favor of coverage under Washington law.

Ameriprise has the burden of proving any offsets or setoffs against the verdict. Ameriprise’s policy states that, “We will pay under this [UIM] coverage only after any **applicable** bodily injury liability bonds or policies have been exhausted.”¹² Pursuant to Ameriprise’s policy language and the Supreme Court’s holding in *Batacan, supra*, only the \$25,000 policy limits payment from Page is “applicable” to the 2007 accident for purposes of offsetting Ameriprise’s UIM liability for the 2007 accident. Therefore, Ameriprise must provide \$47,569.68 in UIM coverage to Michael for the 2007 accident.

F. Ameriprise Has the Burden of Proving that Michael Was Made Whole On Its PIP Reimbursement “Counterclaim”

Ameriprise is correct that its claim for PIP reimbursement

was construed as a counterclaim by the trial court.¹³ Therefore, there should be no dispute that the burden of proving its counterclaim rests (again) with Ameriprise.

Pursuant to the terms of the insurance policy and Washington law,¹⁴ Ameriprise is not entitled to PIP reimbursement unless Michael has been fully compensated. Ameriprise bears the burden of proving that Michael has been fully compensated for the 2007 motor vehicle accident before it can recoup its payments made under the 2007 PIP claim. As briefed extensively in Michael's opening brief, without an apportionment of damages, Ameriprise cannot prove that Michael has been made whole with regard to the 2007 accident. Michael's damages in the 2007 accident are \$72,596.68, and he only recovered \$25,000.00 from Page.

Ameriprise also argues that its policy "does not state that [full] compensation must come solely from the party at fault for

¹² Respondent's Brief, p. 6 (emphasis added)

¹³ Respondent's Brief, p. 10, fn. 3

¹⁴ See *Thiringer v. American Motors Insurance Company*, 91 Wn.2d 215, 588 P.2d 191 (1978); see also *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007).

specific elements of damage.”¹⁵ What Ameriprise’s policy “does not state” is irrelevant, since any ambiguity in the policy is construed against it.

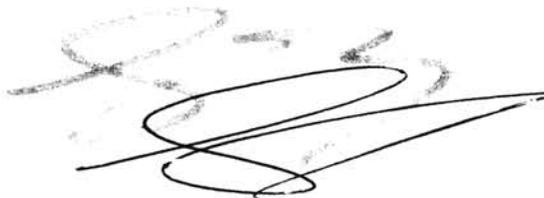
CONCLUSION

In light of the foregoing, Michael requests that the appeals court reverse the judgment entered in favor of Ameriprise and remand the case for entry of judgment on the verdict in favor of Michael for UIM coverage in the amount of \$47,596.68 against Ameriprise and restitution of PIP reimbursement payments. Michael further requests attorney fees under *Allstate Ins. Co. v. Batacan*, 139 Wn.2d at 453.

Dated this 4th day of May, 2012.

Respectfully submitted,

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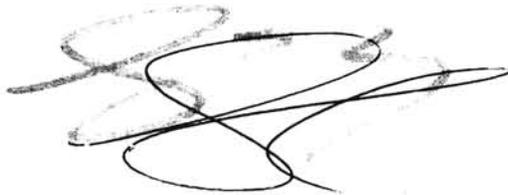
¹⁵ Respondent’s Brief, p. 19.

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the state of Washington that on May 4, 2012, the foregoing was sent via regular mail, postage prepaid, to:

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Dated May 4, 2012.

A handwritten signature in black ink, appearing to be 'Angela Wong', written over a horizontal line.

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