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No. 71390-6-1

IN THE WASHINGTON STATE COURT OF APPEALS

DIVISION I

JULIA EVANS; and MARY EVANS AND JEFFREY EVANS,

Petitioner,

vs.

METROPOLITAN CASUALTY INSURANCE COMPANY,

Respondent.

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BRIEF OF RESPONDENT

Dawna J. Campbell, WSBA #27335
Kimberly Reppart, WSBA #30643
Fallon & McKinley, PLLC
1111 Third Avenue, Suite 2400
Seattle, Washington 98101
(206) 682-7580

Attorneys for Respondents

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I. INTRODUCTION

Only cases in which no party asserts a claim exceeding the \$50,000 jurisdictional limits are subject to mandatory arbitration (“MAR”) under RCW 7.06.020. Appellants seek to evade those limits by redefining their Underinsured Motorist “claims” as the sum remaining *after* all potential set-offs are applied against an award. To achieve this they must inform the arbitrator of their acceptance of the tortfeasor’s underlying policy limits, the amount of those limits and their intent to seek up to \$50,000 *in addition* to that sum (and PIP benefits already received) at the outset of arbitration.

Appellants’ position is contrary to Washington law, the rules of evidence, and the MAR \$50,000 jurisdictional limit pursuant to SCLMAR 1.2 and RCW 7.06.020. Snohomish County Superior Court Judge Joseph Wilson correctly determined Petitioners’ claims exceed the \$50,000 jurisdictional limit and are not subject to mandatory arbitration. That decision should be affirmed.

II. ASSIGNMENTS OF ERROR

Respondent Metropolitan Casualty Insurance Company (“Metlife”) does not assign error to the trial court’s Orders dated October 30, 2013 and December 4, 2013.

III. STATEMENT OF THE CASE

A. BACKGROUND FACTS

Appellant Julia Evans claims personal injuries arising out of two separate motor vehicle accidents. According to Appellants,

On or about December 7, 2006, a collision occurred on 172nd St. N.E. and 51st Ave. N.E. in Arlington, Snohomish County, Washington. Plaintiff Julia Evans was a passenger in a vehicle being driven by Robert St. Jean traveling westbound on 172nd St. N.E. Defendant Charity Edwards rear ended the vehicle in front of her and pushed that vehicle into the pickup truck being driven by Robert St. Jean.

CP 88. Metlife provided insurance, including underinsured motorist ("UIM") coverage, to Mr. St. Jean and his passengers under policy no. 596-64-6573-0. *Id. at para. 3.*¹ Ms. Evans was subsequently injured as a passenger in a single-car collision that took place on November 28, 2012, involving a vehicle driven by Kathia Mercado. *Id. at para. 15.*

Appellants settled Julia Evans' personal injury claims against Charity Edwards for her liability policy limits of \$25,000. Appellants subsequently brought UIM claims against Metlife and Safeco, arguing the value of Ms. Evans' claim against Edwards exceeded \$25,000. Metlife disputes this assertion. CP 85. Appellants sued Charity Edwards, Kathia Mercado, and Metlife and Safeco in

Snohomish County Superior Court. CP 87-90. On September 12, 2013, Appellants filed a Note of Trial Setting and Initial Statement of Arbitrability, indicating their case is subject to mandatory arbitration because “[t]he sole relief sought is a money judgment and involves no claim in excess of \$50,000 exclusive of any attorney fees, interest and costs” pursuant to SCMLAR 1.2 and RCW 7.06.020. CP 92-94.

MetLife initially agreed to arbitration, understanding the maximum award of \$50,000 would be subject to all applicable set offs, including but not limited to the \$25,000 paid by Ms. Edward’s liability insurer. CP 96. Appellants subsequently informed Metlife they intended to (1) notify the arbitrator of the prior \$25,000 settlement, and (2) seek an arbitration award against the UIM carriers for claims related to the first accident for \$50,000 *in addition* to the set off for the \$25,000 settlement and PIP payments received. CP 98-99.

B. PROCEDURAL HISTORY

On September 12, 2013, Appellants filed a Note of Trial Setting and Initial Statement of Arbitrability, indicating their case was subject to mandatory arbitration. CP 92-94. Metlife filed a motion

¹ Petitioner Evans also had underinsured motorist coverage through her parents’ policy with Insurance Company of America (“Safeco”), policy no. H1686714.

requesting leave to file a response to Appellants' Initial Statement of Arbitrability. CP 100-107. The Court heard this and Metlife's subsequent Motion Contesting Appellants' Initial Statement of Arbitrability on October 30, 2013. CP 15-17; 81-83. Metlife's motions were granted. *Id.* Appellants' Motion for Reconsideration was denied on December 4, 2013. CP 8. Appellants subsequently moved for Discretionary Review, which was accepted on February 20, 2014, via Order linking the case with a similar matter already on appeal: *Lind v. State Farm*, No. 70162-2-1.²

IV. ARGUMENT

A. THE STANDARD OF REVIEW IS DE NOVO

Questions of statutory interpretation are questions of law that are reviewed de novo. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, 850 (2007). A trial court's interpretation and application of mandatory arbitration rules is also reviewed de novo. *Twitchell v. Kerrigan*, 175 An.App. 454, 461, 306 P.3d 1025 (2013) ("We review a court's application of the mandatory arbitration rules de novo."); *Wiley v. Rehak*, 143 Wash.2d 339, 343, 20 P.3d 404 (2001) (court rules are interpreted as though they were drafted by the legislature, and the Court construes these rules consistent with

² Metlife adopts and incorporates the argument and authority submitted by

their purpose), and *Malted Mousse, Inc. v. Steinmetz*, 150 Wash. 2d 518, 525, 79 P.3d 1154, 1157-58 (2003) (review of the application of a court rule or law to facts is de novo); see also *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879, 886 (2008).

B. THE TRIAL COURT CORRECTLY DETERMINED APPELLANTS' CLAIM EXCEEDED THE MAR JURISDICTIONAL LIMIT

1. Appellants' cannot avoid the MAR \$50,000 jurisdictional limit by redefining Evans' UIM claim in derogation of RCW 48.22.030.

Appellants concede they will ask the arbitrator to value Julia Evans' UIM claim "up to \$75,000." CP 98-99. They plan to inform the arbitrator of their acceptance of Charity Edwards' \$25,000 policy limits at the outset, with the intention that the arbitrator to consider this an offset and enter an award within the \$50,000 "remainder." *Id.* The "remainder," Appellants argue, comprises Ms. Evans "claim" for the purpose of mandatory arbitration.

Appellants' position taints the arbitrator and prejudices Metlife by presupposing that Ms. Evans' UIM claim is worth more than \$25,000 in the first place. Plaintiff's position is also flatly contrary to

Respondent State Farm's brief in the *Lind* matter as if fully stated herein.

Washington law.

An insurance policy is a contract. RCW 48.01.040. "Washington Courts apply contract law to interpret the insurance policy, mindful that the insured's right to underinsured motorist benefits hinges on the existence of a tort cause of action against the underinsured motorist." *McIlwain v. State Farm Mut. Auto. Ins. Co.*, 133 Wn.App. 439, 445, 136 P.3d 135 (2006), citing *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 783-85, 958 P.2d 990 (1998); *Keenan v. Indus. Indem. Ins. Co. of N.W.*, 108 Wn.2d 314, 321, 738 P.2d 270 (1987). The relationship of the UIM insurer and insured is contractual, but the obligation to offer UIM coverage is *statutory*. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 245, 961 P.2d 350 (1998).

RCW 48.22.030(2) mandates UIM coverage for persons "who are legally entitled to recover damages from owners or operators of underinsured motor vehicles." *Allstate Ins. Co. v. Dejbod*, 63 Wn. App. 278, 283, 818 P.2d 608 (1991). RCW 48.22.030(1) defines "underinsured motor vehicles" as vehicles covered by insurance policy limits that are "less than the applicable damages which the covered person is **legally entitled to recover.**" *Id.* at 284. UIM insurance is secondary to such liability insurance. *Dejbod*, 63 Wn.

App. at 284. It provides a second layer of excess coverage that “floats” on top of recovery from other sources for the injured party. *Fisher*, 136 Wn. 2d at 244. “The intent is that UIM insurance supplement but not supplant liability insurance.” *Dejbod*, 63 Wn. App. at 284.

This is why an “underinsurer always is allowed to credit the full amount of the tortfeasor’s liability coverage against the insured’s damages.” *Hamilton v. Farmers Ins. Co. of Wash.*, 107 Wn. 2d 721, 728, 733 P.2d 213 (1987).

...the relationship between a UIM insurer and its insured “is by nature adversarial and at arm's length.” *Fisher v. Allstate Ins. Co.*, 136 Wash.2d 240, 249, 961 P.2d 350 (1998). UIM insurance provides an excess layer of coverage that is designed to provide full compensation for all amounts that a claimant is legally entitled to where the tortfeasor is underinsured. *Allstate Ins. Co. v. Dejbod*, 63 Wash.App. 278, 281, 818 P.2d 608 (1991). “Legally entitled to” is the operative phrase, as a UIM insurer “stands in the shoes” of the tortfeasor, and **its liability to the insured is identical to the underinsured tortfeasor's**, up to the UIM policy limits. *Dayton v. Farmers Ins. Group*, 124 Wash.2d 277, 281, 876 P.2d 896 (1994); see also *Dejbod*, 63 Wash.App. at 281-82, 818 P.2d 608. Stated otherwise, **UIM insurers are allowed to assert liability defenses available to the tortfeasor** because UIM insurance is designed to

place the insured in the same position as if the tortfeasor carried liability insurance.... The injured party is not entitled to be put in a better position by having been struck by an uninsured motorist as opposed to an insured motorist.

Dayton, 124 Wash.2d at 281, 876 P.2d 896.

Ellwein v. Hartford Accident and Indemnity, Co., 142 Wn.2d 766, 789-90, 15 P.3d 640 (2001), overruled on other grounds in *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 482, 78 P.3d 1274 (2003) (emphasis added).

Ms. Evans concedes that to recover on her UIM claim, she must establish that the total damages she is entitled to recover against Charity Edwards for injuries sustained in the 2006 accident exceed the \$25,000 she accepted from Ms. Edwards's liability insurer. Metlife "stands in the shoes" of Ms. Edwards because its liability to Ms. Evans is identical to Ms. Edwards', up to the UIM policy limits. *Ellwein*, 142 Wn.2d at 789-90. Only **after** this amount is determined does RCW 48.22.030(1) obligate Metlife to pay (1) Ms. Evans' legally recoverable damages or UIM limits, whichever is less, **minus** (2) the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable Ms. Evans after an accident. *Dejbod*, 63 Wn. App at 284.

Ms. Evans' "claim" is *statutorily* defined as the total of amount of damages she is "legally recoverable" against the tortfeasor. This is the value of the "claim" that must be determined by the arbitrator, as the trial court correctly recognized by denying Appellants'

submission of the case to mandatory arbitration.

2. Mandatory Arbitration is not the appropriate forum for adjudication of Appellants' claim.

Pursuant to RCW 7.06.020:

All civil actions, except for appeals from municipal or district courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of fifteen thousand dollars, or if approved by the superior court of a county by two-thirds or greater vote of the judges thereof, up to fifty thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration.

RCW 7.06.020(1). Snohomish County Local Mandatory Arbitration Rule (SCLMAR) 1.2 states “[p]ursuant to the authority granted by statute, a claim is subject to mandatory arbitration **only if it does not exceed fifty thousand dollars (\$50,000)**, exclusive of attorney fees, interest and costs.”³

Appellants argue Ms. Evans’ “total damage range” is up to \$75,000. They claim they can avoid the statutory mechanics of UIM law by asking the arbitrator to slice off \$25,000 worth of damages at the get-go as if it doesn’t exist. There is no authority permitting the arbitrator to adjudicate the claim **on the presumption** that it **must**

³ Appellants waived claims for any amounts in excess of \$50,000 when they filed the Initial Statement of Arbitrability by conceding they were not asserting a claim in excess of this amount. “A waiver is the intentional and voluntary relinquishment of a known right.... It may result from an express agreement.” *Rhodes v. Gould*, 19

be worth at least \$25,000 or more. Allowing the arbitration to thus proceed does not allow Metlife to “stand in the shoes” of the tortfeasor, conduct appropriate discovery, or pursue all available defenses. If the arbitrator determines Ms. Evans’ applicable damages against tortfeasor Edwards totals the jurisdictional limits of \$50,000, MetLife (and/or Safeco) should be required pay this amount *less all applicable set offs*. RCW 48.22.030(1).

Appellants argue that Metlife’s position would “bar MAR for the majority of UIM claims,” implying that UIM claimants’ rights are somehow abused because of the unavailability of the forum. Nothing, however, prevents the Appellants or similarly situated UIM claimants from pursuing claims for damages exceeding \$50,000 before the trial court, the correct tribunal to consider substantial or sizable actions involving damages exceeding the MAR cap.

3. *Mercier v. GEICO Indem. Co.* allows an arbitrator to offset underlying liability limits only after determining the value of a claim not exceeding \$50,000.

Appellants rely on *Mercier v. GEICO Indem. Co.* 139 Wn. App. 891, 903, 165 P.3d 375 (2007), abrogated on other grounds by *Little v. King*, 147 Wn. App. 883, 888, 198 P.3d 525 (2008), for the proposition that the arbitrator has the authority to deduct the amount

Wn. App. 437, 441, 576 P.2d 914 (1978). The Statement of Arbitrability is such an intentional and express agreement.

of third party coverage (\$25,000) and duplicate medical expenses paid under PIP to “arrive at the amount of the claim upon which judgment is to be entered, and in no event greater than \$50,000.” *Appellants’ Motion for Discretionary Review at pp. 7-8.*

Appellants misapply *Mercier* and do not address the key issue distinguishing *Mercier* from this case. The claimant in *Mercier* was injured in a rear end accident. The other driver had liability insurance with limits of \$25,000. *Mercier* had a policy with GEICO with \$100,000 per person in UIM coverage and \$10,000 in personal injury protection (PIP). *Mercier* accepted the tortfeasor’s \$25,000 policy limits and \$10,000 in PIP payments, and sued GEICO. GEICO argued at arbitration that it was entitled to offset the damages awarded by amount of insurance benefits already received by *Mercier*. The arbitrator decided he lacked authority to decide that issue and referred the matter to the superior court. Following arbitration, the arbitrator awarded **\$36,000 in total damages**. *Mercier*, 139 Wn. App. at 897.

In moving for entry of judgment, *Mercier* proposed judgment for \$36,000, while GEICO proposed judgment of \$1,000. The trial court applied the offset and entered judgment for \$1,000, and *Mercier* appealed. The Court of Appeals determined that while

nothing in the mandatory arbitration rules prevented the arbitrator from resolving “all issues in the case,” including offset, the trial court **did not improperly amend the award when it applied the offset.** *Mercier*, 139 Wn.App. at 899. In other words, the Court properly treated the entire \$36,000 arbitration award as the total of *Mercier*’s “claim,” and applied the offset accordingly, entering judgment for \$1,000.

A potential arbitrator in this case also has authority to rule on the offset issue—**after** determining the total value of Ms. Evans’ claim not exceeding \$50,000. To complete the partial quote submitted by Appellants in their Motion for Discretionary Review:

Here, [the arbitrator] could have decided the coverage issues **after determining collision damages**—just as the superior court would have done if the lawsuit had not gone to mandatory arbitration. We see nothing in RCW 7.06 or the rules that would have prevented the arbitrator from reading the contract, admitting evidence of insurance limits, giving GEICO appropriate credit for the payments *Mercier* had already received, and coming up with a **net award** upon which the superior court could have entered judgment without further ado.

Mercier, 139 Wn. App. at 901 (emphasis added). *Mercier* stands for the proposition that **after** damages are determined the arbitrator **may then** consider insurance and offset. *Mercier* does *not* stand for the proposition that the arbitrator can restrict Appellants’ claim to the “net” award at the outset, and certainly not by disclosing insurance

information prior to adjudicating the value of the claim.

4. Appellants' position prejudices Metlife.

Metlife is entitled to assert all rights and defenses of the tortfeasor, including rights and defenses established under the rules of evidence. ER 411 prevents Appellants from injecting insurance into the arbitration before damages are determined. Washington cases are unequivocal: the fact that the tortfeasor carries liability insurance is entirely immaterial on the main issues of causation and damages, and it is reversible error for a claimant to introduce insurance to the factfinder. See, e.g. *Williams v. Hofer*, 30 Wn.2d 253, 265, 191 P.2d 306 (1948). *Goodwin v. Bacon*, 127 Wn.2d 50, 55, 896 P.2d 673 (1995) (evidence regarding availability of insurance is inadmissible on the issue of negligence); *Kappelman v. Lutz*, 141 Wn.App. 580, 590, 170 P.3d 1189 (2007) (“[T]he fact that a defendant in a personal injury case carries liability insurance is not material to the questions of negligence and damages.”), *aff'd*, 167 Wn.2d 1, 217 P.3d 286 (2009); *Lopez–Stayer v. Pitts*, 122 Wn.App. 45, 51 n. 5, 93 P.3d 904 (2004) (“ER 411 restricts evidence of a defendant’s insurance coverage or the lack of such coverage.”)

ER 411 bars both direct and indirect evidence of insurance. There is no authority or present in Washington permitting Appellants

to inform the arbitrator of the \$25,000 policy limits received at the outset of litigation, introducing both insurance and the prejudicial notion that the claim “must be” worth more.⁴ Indeed, the tortfeasor’s insurer could have offered its policy limits for a number of reasons that have *nothing* to do with the value of Appellants’ claim, including the cost and risk of defense. The arbitrator should not be so tainted. He or she should consider insurance when determining offsets-*after* determining the value of the claim and awarding damages.⁵

5. Sound policy concerns caution against Appellants’ argument.

Appellants’ position runs afoul of sound policy and statutory principles underpinning Washington’s mandatory arbitration system:

Mandatory arbitration, a statutory system, was designed to take relatively small and simple cases off the superior court’s docket and resolve them quickly and inexpensively.

Mercier, 139 Wn. App. at 899. Permitting UIM claimants to restrict

4 Appellants’ theory produces a cavalcade of conundrums. For example, if a claimant accept less than the underlying policy limits but still proceeds with a UIM claim, would the claimant be permitted to inform an arbitrator of the \$100,000 underlying limits, or would the carrier be allowed to tell the arbitrator that the claimant accepted only \$90,000? Neither disclosure has anything to do with a fair and impartial evaluation of the case after consideration of the relevant evidence bearing on causation and damages.

5 Appellants reference the Washington State Bar Association’s comments in its Alternative Resolution Deskbook, that in cases of comparative negligence where the plaintiff concedes 50% fault, plaintiff may proceed in MAR up to the percentage fault of the defendant. §2.3(1)(b)(I). The comparative negligence statute is completely dissimilar to the UIM statute, and the deskbook analysis does not consider the risk of tainting the arbitrator’s evaluation by injecting the presumption that the value of the claim “must be worth more” than the underlying liability limits-a

their “claim” to what might be available to them *after* applicable offsets promotes the opposite and undermines our legislators’ intent. For example, Appellants’ position allows a badly injured claimant to accept \$1 million from a tortfeasor’s liability carrier only to turn around and assert a MAR claim for an additional \$50,000 from her UIM carrier. The arbitrator would then be forced to adjudicate a complex injury claim worth over \$1 million, a result neither anticipated nor encouraged by the legislature.

V. CONCLUSION

Appellant Evans’ damages are defined by the scope of her tort claim against the allegedly underinsured motorist, Charity Edwards. The arbitrator’s first step is to determine the extent of Ms. Evans’ claim against Charity Edwards, which cannot exceed the MAR jurisdictional limits. Only then may the arbitrator consider UIM coverage issues and applicable set offs. Appellants can submit Ms. Evans’ claim against Metlife to mandatory arbitration, but she must limit her damages to \$50,000. If Appellants believe Ms. Evans’ damages exceed \$50,000, the trial court is available to adjudicate her claim.

result ER 411 is designed to prevent.

RESPECTFULLY SUBMITTED this 1st day of May, 2014.

FALLON & MCKINLEY

By:  _____

Dawna J. Campbell, WSBA #27335
Kimberly Reppart, WSBA #30643
Attorneys for Respondents
1111 Third Avenue, Suite 2400
Seattle, Washington 98101
(206) 682-7580

DECLARATION OF SERVICE

I, Brooke Schneider, declare that on the day and date indicated below, I caused to be served the foregoing original and copies of Brief of Respondent and this accompanying Declaration of Service on the individuals listed and indicated below:

Clerk of the Court
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101

- via U.S. Mail
- via Facsimile
- via E-Mail
- via other method of delivery:
hand delivery

David Kohles
David A. Kohles, Inc. P.S.
26231 72nd Avenue N.W.,
Suite 202
Stanwood, WA 98292

- via U.S. Mail
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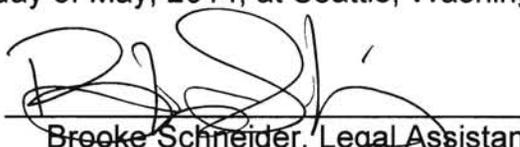
Marie Dolack
Law Offices of Kelley J.
Sweeney
1191 2nd Ave Ste 500
Seattle, WA 98101-2990

- via U.S. Mail
- via Facsimile
- via E-Mail
- via other method of delivery:
hand delivery

Amy S. Rosario
Drazkowski & Fucetola
19909 120th Ave NE
Suite 201
Bothell, WA 98011

- via U.S. Mail
- via Facsimile
- via E-Mail
- via other method of delivery:
FedEx

Dated this 22nd day of May, 2014, at Seattle, Washington.

By: 
Brooke Schneider, Legal Assistant
Fallon & McKinley, PLLC

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