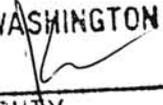


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 42780-0-II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

KARYN CARBAUGH, an individual, Appellant,

v.

JOHN N. JOSLIN and "JANE DOE" JOSLIN, husband and wife and the
marital community comprised thereof;
NORMA O. JOSLIN and "JOHN DOE" JOSLIN, wife and husband and
the marital community comprised thereof, Respondents;
and PROGRESSIVE NORTHWEST INSURANCE COMPANY,
Respondent Intervenor.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering its October 7, 2011, order granting Progressive Insurance Company's motion for reconsideration, thereby allowing Progressive an offset for personal injury protection (PIP) payments it had previously made, despite the fact that Ms. Carbaugh's award of damages in Mandatory Arbitration under her uninsured motorist (UM) insurance coverage exceeded her UM policy limits, thereby making it impossible for her to be fully compensated from her UM insurer for all of the damages she was awarded. CP 111-113.

2. The trial court erred in entering its October 7, 2011, Judgment in the principal amount of \$19,901.42, after applying a PIP offset, that resulted in Ms. Carbaugh receiving less than the \$20,000 in general damages she was awarded in Mandatory Arbitration. CP 114-115; CP 14-15.

3. Based on the trial court's error in granting Progressive's motion for reconsideration, the trial court also erred in refusing to grant Ms. Carbaugh an award of her attorney's fees incurred in attempting to obtain the full benefits of her UM insurance coverage.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. On July 28, 2011, Karyn Carbaugh was awarded \$27,131.70 in Mandatory Arbitration for her personal injury claim against her uninsured motorist (UM) insurer, Progressive Insurance Company (Progressive), resulting from a rear-end collision caused by an uninsured driver. CP 14-15. However, Ms. Carbaugh maintained only \$25,000 of uninsured motorist insurance coverage. CP 34. That meant that Ms. Carbaugh could not be fully compensated because her arbitration award exceeded her available UM benefits. The trial court initially denied Progressive any offset for PIP payments it made and ruled that judgment should be entered on the Mandatory Arbitration award for Ms. Carbaugh's insurance policy limits of \$25,000 against Progressive. CP 95-96; September 16, 2011 hearing at RP 17. Progressive then moved for reconsideration. CP 99-103. Did the trial court err in granting Progressive's motion for reconsideration, finding that Progressive was entitled to an offset for PIP payments it had previously made, despite the fact that Ms. Carbaugh could never recover all of her damages from her UM policy, leaving Ms. Carbaugh worse off than had she been struck by a driver with \$25,000 liability insurance limits, and worse off had she purchased PIP and UM

coverages from separate insurers?

2. Progressive's motion for reconsideration sought an offset of \$7230.28 in PIP payments it claimed it made, despite the fact that the arbitrator awarded only \$7131.70 in medical special damages, and \$20,000 in general damages. CP 25; CP 14-15. The trial court's order granting Progressive's motion for reconsideration and subsequent judgment left Ms. Carbaugh with a judgment in the principal amount of only \$19,901.42 which is less than the amount of general damages alone that she was awarded. CP 114-115. Did the trial court err in allowing Progressive a PIP offset and entering judgment against Progressive for less than the award of Ms. Carbaugh's general damages?

3. Whether Ms. Carbaugh should be awarded her attorney's fees and costs incurred on appeal under the holding of Safeco Ins. Co. v. Woodley, 150 Wn.2d 765, 774, 82 P.3d 660 (2004), when Ms. Carbaugh has been forced to litigate over her entitlement to her full UM benefits?

B. STATEMENT OF THE CASE

This case arose from injuries Ms. Carbaugh received on April 17, 2005, as she was traveling as a passenger in a car being driven by Kevin

Watkins. CP 4. While stopped at a stop light on SR 410 in Bonney Lake, the car was struck from the rear by a car driven by defendant John Joslin.

Id. Ms. Carbaugh later presented a claim for her injuries to her own automobile insurer, Progressive Northwest Insurance Company (hereinafter “Progressive”). CP 31. Ms. Carbaugh’s automobile policy provided Personal Injury Protection (PIP) coverage for the payment of her medical bills, as well as uninsured motorist (UM) coverage. CP 34. Her UM coverage allows her to recover from her UM insurer for all of the damages she would have been able to recover from the tortfeasor if the tortfeasor had been insured, up to her policy limits of \$25,000. CP 47.

Ms. Carbaugh’s UM provision provides as follows:

**INSURING AGREEMENT– UNDERINSURED
MOTORIST BODILY INJURY COVERAGE**

Subject to the Limits of Liability, if **you** pay the premium for Underinsured Motorist Coverage, **we** will pay for damages, other than punitive or exemplary damages, which an **insured person** is legally entitled to recover from the **owner** or operator of an underinsured motor vehicle because of **bodily injury**: 1. sustained by an **insured person**....

Id. (emphasis in original).

Ms. Carbaugh initially filed suit against the tortfeasors, the Joslins.

CP 3-6. Progressive intervened in the lawsuit. CP 7-8. The parties stipulated that the uninsured Joslins could be dismissed from the action and that Ms. Carbaugh could proceed with her personal injury claims directly against Progressive as her UM insurer. CP 9-13.

Ms. Carbaugh's claims proceeded to Mandatory Arbitration. On July 28, 2011, Ms. Carbaugh was awarded \$27,131.70 in general and special damages against Progressive, an amount exceeding her \$25,000 UM coverage. CP 14-15.

On September 7, 2011, Ms. Carbaugh filed a motion for entry of judgment on the \$27,131.70 mandatory arbitration award. CP 18-23. In that motion, Ms. Carbaugh sought entry of judgment against Progressive in the amount of her uninsured motorist (UM) limits of \$25,000, plus an award of her statutory costs of \$876.51. Id. The next day, Progressive filed a motion, seeking an offset from its UM limits for payments it had made on Ms. Carbaugh's behalf under a separate portion of its policy providing PIP benefits, despite the fact that Ms. Carbaugh's UM award exceeded her UM limits. CP 24-29.

The insurance provision relied upon by Progressive for its claimed right of offset states as follows:

In determining the amount we will pay for **bodily injury** sustained by an **insured person** under this Part III, the amount of **bodily injury** damages which an **insured person** is entitled to recover under this Part III shall be reduced by the sum of:

...

3. any sums paid under Part II– Personal Injury Protection Coverage due to **bodily injury** to the **insured person**.

CP 50.

On September 16, 2011, the trial court denied Progressive’s motion for a PIP offset, CP 95-96, and ruled that Ms. Carbaugh should present a judgment for \$25,000 plus her statutory costs. September 16, 2011, hearing at RP 17.

Progressive then filed a motion for reconsideration of the trial court’s denial of a PIP offset. CP 99-103. Ms. Carbaugh responded to that motion, citing the court to both Washington State and out of state cases holding that a PIP offset from a UM award was not allowed unless the damages awarded were less than the injured party’s UM limits, CP 117-121. Ms. Carbaugh further responded that she should be awarded her attorney’s fees under the holding of Safeco v. Woodley, 150 Wn.2d 765, 773-774, 82 P.3d 660 (2004), for now having to litigate over whether she was entitled to her full UM benefits from Progressive. CP 120-121.

Progressive's motion for reconsideration was argued on September 30, 2011. See September 30, 2011, hearing, RP 1-15. At the conclusion of oral argument, the trial court took Progressive's motion for reconsideration under advisement. Id. at RP 14, lines 13-17. On October 7, 2011, the trial court ruled that Progressive was entitled to a PIP offset, stating as follows:

THE COURT: All right. I'm ready to give you my decision in this case. I want to thank you both for your arguments, both at the initial hearing and at the reconsideration hearing.

So, Ms. Carbaugh, in order to make her whole, she should receive \$27,131. The most she can receive on the UIM coverage is \$25,000. That means her PIP has to contribute \$2,131 to make her whole. She received from PIP \$7,230.28. Backing out the \$2,131 to make her whole leaves a reimbursement on the PIP of \$5,099 and 28 cents, less the Hamm calculation. So, I didn't do the Hamm calculation, so you have to do the Hamm calculation, so that's going to drop that \$5,099.28 even lower. Does that all make sense to you folks?

See October 7, 2011, Report of Proceedings at RP 1, lines 11-25. The Court then issued an order, granting reconsideration, CP 111-113, and entered a judgment against Progressive in the principal amount of \$19,901.42, CP 114-115, which was less than the \$20,000 in general

damages Ms. Carbaugh was awarded in Mandatory Arbitration.¹ RP 14-15. This appeal followed.

C. ARGUMENT

1. Standard of Review

Interpretation of an insurance policy is a question of law that is reviewed de novo. McIllwain v. State Farm Mut. Auto. Ins. Co., 133 Wn. App. 439, 443, 136 P.3d 135 (2006). In the present case, no material facts are in dispute. Only questions of law remain at issue.

2. **An offset against an uninsured motorist (UM) award of damages is not allowed for personal injury protection (PIP) payments previously made by the same insurer when the injured party's total damages are more than the UM policy limits.**

In the case of Taxter v. Safeco Ins. Co. of America, 44 Wn. App. 121, 721 P.2d 972 (1986), the Court of Appeals analyzed whether a UIM insurer was entitled to an offset under the UIM coverage for medical payments it had previously made under PIP coverage. In that case, the

1 The fact that the Court's ruling left Ms. Carbaugh with a principal judgment in an amount less than her general damages alone was pointed out to the Court as follows ". . .I just want to point out for the record, just so we're clear, that the damages Miss Carbaugh was awarded was for \$20,000 in this case and the proposed finding is 19,901, which is less than the amount of the award for general damages. And the PIP offset they have requested in this case does not make her whole." October 7, 2011, hearing at RP 5, lines 9-15.

UIM policy specifically authorized an offset. Id. at 130. In analyzing this question as one of “first impression,” the Court of Appeals turned to the Washington State Supreme Court decision in Thiringer v. American Motors Ins. Co., 91 Wash.2d 215, 588 P.2d 191 (1978), which held that when an insured has recovered less than his total damages, the insurer was not entitled to the PIP offset. Id. at 131. The Taxter court also noted that the Thiringer reasoning that the public policy of Washington State which prevents a less than “make whole” recovery under the uninsured motorist statute is in accord with 12A G. Couch, Insurance § 45.652, at 213 (rev. ed. 1981), wherein it was stated that “deductions of payments under medical coverages, whether included in the automobile policy or otherwise, are normally not allowed unless the loss is less than the policy limits.” Id.

In light of the authorities it considered, the Taxter court held that a PIP setoff against underinsured motorist coverage is valid only when the extent of the insured's damages are less than his policy limits. Id. However, because the record on appeal was silent as to the extent of Mr. Taxter’s damages, the matter was remanded to the trial court. Id.

In the year following the Taxter decision, our Supreme Court

announced its decision in Keenan v. Industrial Indem. Ins. Co., 108 Wn.2d 314, 318-319, 738 P.2d 270 (1987) (overruled on other grounds by Price v. Farmers Insurance Company of Washington, 133 Wn.2d 490, 946 P.2d 388 (1997)), directly adopting the holding of Taxter, stating as follows:

We conclude that a PIP setoff against underinsured motorist coverage is valid only when the extent of the insured's damages are less than his policy limits. Where the insured's damages exceed those limits, public policy dictates against any PIP offset.

(Italics in original) (Keenan 108 Wn.2d at 318-319 (quoting from Taxter v. Safeco Ins. Co. of America, 44 Wn. App. 121, 131, 721 P.2d 972 (1986))).

In Keenan, unlike the case at bar, there were ample UIM limits to allow the insured to make a full recovery of all of the insured's special and general damages under the UIM policy. There, the tortfeasor maintained liability insurance limits of \$25,000 and Ms. Keenan maintained UIM insurance limits of \$35,000, for a total of \$60,000 in coverage. Id. at 316. After Ms. Keenan recovered the tortfeasor's insurance policy limits of \$25,000, Ms. Keenan's total damages were adjudicated to be \$44,479.28, which was well within the available combined liability and UIM insurance coverage. Thus, a PIP offset from the amounts payable under the UIM coverage was allowed.

In 2002, the Keenan decision and its holding was directly adopted

by the New Mexico Court of Appeals in Fickbohm v. St. Paul Ins. Co. 133 N.M. 414, 63 P.3d 517 (N.M.App. 2002). In Fickbohm, the issue before the Court was whether an insurer was entitled to PIP offsets from both uninsured and underinsured motorist benefits payable to two plaintiffs. Fickbohm 63 P.3d at 518. There, the New Mexico Court noted that while there were no New Mexico decisions on point, the Washington State Supreme Court decision in Keenan was the better reasoned of the foreign decisions. Id. at 523. There, the Fickbohm court specifically held “Whenever insureds have UM/UIM coverage less than the amount of their damages, the [medpay/PIP] offset cannot be enforced.” Id. at 522.

Like the injured party in the Washington case of Keenan, the injured parties in the New Mexico case Fickbohm had UM/UIM coverage limits in excess of their total damages. Id. at 518-519. Therefore, an offset was allowed against the UM/UIM awards for medpay payments made by the insurer. Id. at 522.

This exact same holding, that PIP offsets are not allowed when an insured’s damages exceed her UM/UIM limits, was announced in the case of Barnes v. Allstate Ins. Co., 608 So.2d 1045, 1047 (La.App.1992)² as

² In Hamilton v. Farmers Ins. Co., 107 Wn.2d 721, 729-730, 733 P.2d 213 (1987), our Supreme Court stated that it has found it appropriate to look to Louisiana law in interpreting Washington’s underinsured motorist statute.

follows:

Furthermore, it is a well settled rule that where a plaintiff's total damages do not exceed the UM policy limits and the language of the policy allows it, the UM carrier is entitled to a credit for any amount which it has paid to the plaintiff under the medical payments coverage. White v. Patterson, 409 So.2d 290, 294 (La.App. 1st Cir.1981), writ denied, 412 So.2d 1110 (La.1982); Webb v. Goodley, 512 So.2d 527, 531 (La.App. 3d Cir.1987); Taylor v. State Farm Mutual Automobile Insurance Company, 237 So.2d 690, 693 (La.App. 4th Cir.1970).

The Louisiana decision in Barnes v. Allstate was later quoted with approval in Barney v. Safeco Ins. Co. of America, 73 Wn. App. 426, 869 P.2d 1093 (1994), *overruled on other grounds*, Price v. Farmers Insurance Company of Washington, 133 Wn.2d 490, 946 P.2d 388 (1997) (“**where a plaintiff's total damages do not exceed the UM policy limits . . . the UM carrier is entitled to a credit for any amount which it has paid to the plaintiff under the medical payments coverage**” (Emphasis added)).

Accordingly, under the holdings of Taxter, Keenan, Fickbohm, and Barnes, because Ms. Carbaugh's damages of \$27,131.09 exceed her UM limits of \$25,000, Progressive is not entitled to any setoff for PIP payments it previously made. The trial court's order granting

Progressive's motion for reconsideration should be reversed, and judgment should be entered against Progressive for the balance of Ms. Carbaugh's \$25,000 UM insurance policy limits.

3. **Other Washington State Supreme Court authority is clear that neither PIP offsets nor PIP reimbursements are allowed unless and until the injured party recovers the total amount of her damages from another source, such as her UM carrier.**

Beginning with the case of Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998), our Supreme Court developed a line of jurisprudence, holding that when a PIP insured makes a recovery of her total damages from another source, including medical payments, the PIP insurer is entitled to reimbursement for medical payments it made.³ In Mahler, the PIP insured had reached a settlement with the at-fault tortfeasor for of the injured party's damages. Id. 135 Wn.2d at 406.

Three years later, in Winters v. State Farm Mutual Automobile Insurance Co., 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001), in a ruling consistent with the Mahler decision, our Supreme Court held that if an insured makes a full recovery of all her damages from a combination of

3

Mahler and its progeny further hold that in order for the PIP insurance carrier to receive either a reimbursement or offset for PIP payments it made, it must pay a pro-rata share of the injured party's attorney's fees and costs in obtaining the recovery of PIP payments.

proceeds from the tortfeasor's insurance and the insured's UIM coverage, then the PIP carrier is entitled to reimbursement. However, the Winters Court stated that "the insurer may not recover before the PIP insured has been fully compensated." Id. at 881.

Three years later, in the case of Hamm v. State Farm Mut. Auto. Ins. Co., 151 Wn.2d 303, 309, 88 P.3d 395 (2004), our Supreme Court made it clear that it is only when an insured recovers the total amount of her damages *from a source other than the PIP carrier* that the PIP carrier may seek reimbursement. There, the Court stated as follows:

If the insured subsequently recovers the total amount of her damages from another source (the tortfeasor, her UIM carrier, or both), the PIP coverage becomes redundant. Therefore, when the insured receives full recovery, the PIP carrier may seek reimbursement from its insured for the PIP benefits it previously paid. See Winters, 144 Wn.2d at 876, 31 P.3d 1164 ("the insured must be fully compensated before the insurer may recoup benefits paid").

Id. at 309 (emphasis added).

Three years after its decision in Hamm, our Supreme Court announced its decision in Sherry v. Financial Indemnity Co., 160 Wn.2d 611, 160 P.3d 31(2007), a case dealing with whether a PIP insurer was entitled to an offset for medical payments it following a UM award when

the insured was comparatively at fault, and therefore, would never recover all of his actual damages. There, the Court stated as follows:

This court has never limited full recovery to the amount recoverable under UIM coverage. Rather, our opinions suggest insureds are not fully compensated until they have recovered all of their damages as a result of a motor vehicle accident. See, e.g., Thiringer, 91 Wn.2d at 219, 588 P.2d 191; see also Hamm, 151 Wn.2d at 309, 88 P.3d 395; Woodley, 150 Wn.2d at 770, 82 P.3d 660; Winters, 144 Wn.2d at 876, 31 P.3d 1164; Mahler, 135 Wn.2d at 407, 957 P.2d 632. Double recovery, a prerequisite for the insurer's offset rights, cannot occur unless an insured has first been fully compensated for the loss.

Sherry, 160 Wn.2d. at 621-622.

Moreover, in clarifying when an insured is “fully compensated”, the Sherry Court stated as follows: “insureds are fully compensated when they have made a complete recovery of the actual losses suffered as a result of an automobile accident as determined by a court or arbitrator.” Id. at 614.

Finally, in the 2012 decision in Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 272 P.3d 802 (2012), our Supreme Court again reiterated the rule that “[r]eimbursement is appropriate so long as the injured party is made whole before any right to reimbursement is fulfilled.” Matsyuk, 173 Wn.2d at ___, 272 P.3d 805.

Under the holdings of Winters, Hamm, Sherry, and Matsyuk, before Progressive may take any PIP offset from the UM award, it must first establish that Ms. Carbaugh has been “fully compensated” by that UM award, meaning that she has recovered from that UM policy her actual losses suffered as a result of the automobile accident as determined the arbitrator. As stated above, the arbitrator ruled that Ms. Carbaugh’s actual damages resulting from the car crash with the uninsured tortfeasor were \$27,131.70. CP 14-15. However, Ms. Carbaugh maintained only \$25,000 in UM coverage with Progressive. CP 34. Thus, even if Progressive paid Ms. Carbaugh the full \$25,000 UM limits, Ms. Carbaugh would never receive full compensation from her UM insurer for the \$27,131.70 she suffered in damages. Consequently, because Ms. Carbaugh could never recover the total amount of her damages, Ms. Carbaugh has not been fully compensated by the arbitrator’s award, which is a condition precedent to Progressive’s right to any offset.

Thus, the trial court erred in granting Progressive’s motion for reconsideration and allowing Progressive a PIP offset from the UM award.

4. **Because a UM insurer stands in the shoes of the tortfeasor, and because public policy forbids that an insured should be made worse off simply because she purchases UM and PIP coverages from the same**

insurer, Progressive is not entitled to PIP offset.

Our Supreme Court has clearly stated that the purpose of uninsured/ underinsured motorist coverage is to allow "an injured party to recover those damages which the injured party would have received had the responsible party been insured with liability limits as broad as the injured party's statutorily mandated underinsured motorist coverage limits." Blackburn v. Safeco Ins. Co., 115 Wn.2d 82, 87, 794 P.2d 1259(1990)(quoting Hamilton v. Farmers Ins. Co., 107 Wn.2d 721, 727, 733 P.2d 213 (1987) (quoting Britton v. Safeco Ins. Co., 104 Wn.2d 518, 531, 707 P.2d 125 (1985)). Thus, an insurer providing UM or UIM coverage is said to "step into the shoes" of a negligent third party to pay the insured the amount, up to policy limits, by which the damage caused to the insured by the negligent third party exceeds the third party's liability coverage, if any. Greengo v. Public Employees Mut. Ins. Co., 135 Wn.2d 799, 804, 959 P.2d 657 (1998).

In the case at bar, Ms. Carbaugh maintained UM coverage in the amount of \$25,000. CP 34. Accordingly, under the holding of Blackburn, Greengo, and the stated purpose of UM/UIM coverage, Ms. Carbaugh was entitled to recover the same amount of damages under her UM policy

that Ms. Carbaugh would have been able to recover had the uninsured tortfeasor carried liability limits of \$25,000.

Washington law is clear that an insured should not be made worse off just because she purchased separate coverages, such as PIP and UIM, from the same insurer. Sherry v. Financial Indem. Co., 160 Wash.2d 611, 625, 160 P.3d 31 (2007), See also Hamm, supra, 151 Wn.2d at 317-318 (“We ... reaffirm Winters' holding that an insured should not be worse off simply because she purchased two coverages from the same insurer.”). By allowing Progressive to take a PIP offset from the UM award that exceeded the UM policy limits, Ms. Carbaugh has been made worse off by purchasing both PIP and UM insurance from the same company.

The following hypothetical examples explain why Progressive is not entitled to any offset:

Example One

Assume that Ms. Carbaugh had PIP coverage with Progressive, but that she had declined any UM or UIM coverage. Assume that Progressive paid her \$7131.70 in PIP medical payments just as it did here. Assume that the tortfeasor maintained liability limits of only \$25,000, and that Ms. Carbaugh was ultimately awarded \$27,131.70 in total damages against the tortfeasor. Because Ms. Carbaugh would not be fully compensated when the arbitration award exceeded the recoverable policy limits, Progressive would have no right of reimbursement or subrogation for the PIP payments it made.

Example Two

Assume that Ms. Carbaugh declined any PIP coverage with Progressive, but that she accepted \$25,000 in UM /UIM coverage. Assume that Ms. Carbaugh's private health insurer paid her \$7131.70 in medical payments. Assume that Ms. Carbaugh was ultimately awarded \$27,131.70 in total damages against Progressive resulting from the fault of an uninsured tortfeasor. Because Ms. Carbaugh would not be fully compensated when the arbitration award exceeded the recoverable policy limits, Ms. Carbaugh's private health insurer would have no right of reimbursement or subrogation for the medical payments it made.

In short, under the trial court's ruling allowing a PIP offset under these facts, Ms. Carbaugh has been made worse off, in violation of the rule announced in Sherry, supra, Hamm, supra and Winters, supra, by having purchased both PIP and UM coverages from Progressive, instead of from separate insurance companies. Thus, the trial court's order should be reversed, and Ms. Carbaugh should be awarded the balance of her \$25,000 UM policy.

5. **Although Ms. Carbaugh disputes any right to a PIP offset under the facts of this case, even if an offset were allowed, Progressive had no right to obtain a PIP offset that invaded Ms. Carbaugh's award of general damages.**

Following Mandatory Arbitration, Ms. Carbaugh was awarded \$7131.70 in medical special damages, and \$20,000 in general damages for a total award of \$27,131.70. CP 14-15. The trial court's order granting Progressive's motion for reconsideration and subsequent judgment left Ms. Carbaugh with a judgment in the principal amount of only \$19,901.42 which is less than the amount of general damages alone that she was awarded. CP 114-115.

Under longstanding Washington case law, an insurer is not entitled to any reimbursement unless and until the insured is fully compensated for his loss. Thiringer v. Am. Motors Ins. Co., 91 Wn.2d 215, 219, 588 P.2d 191 (1978). There is no dispute in this case that Ms. Carbaugh suffered \$20,000 in general damages. There also cannot be any dispute that Progressive has not fully paid Ms. Carbaugh for that \$20,000 in general damages. Nonetheless, Progressive sought and obtained a PIP offset that resulted in Ms. Carbaugh being awarded a judgment for less than the amount of her general damages.

Consequently, the trial court erred in granting Progressive a PIP offset that resulted in Ms. Carbaugh receiving a judgment for only \$19,901.42 out of her \$20,000 in general damages she was awarded.

6. **The Court should award Ms. Carbaugh her attorney fees and costs on appeal, and in responding to Progressive's Motion for Reconsideration, that were necessary for Ms. Carbaugh to obtain the full benefit of her insurance.**

It is well settled that an insured who engages in litigation to obtain her insurance policy benefits is entitled to reasonable attorney fees and costs if that litigation is successful. Olympic Steamship Co. v. Centennial Insurance Co., 117 Wash.2d 37, 54, 811 P.2d 673 (1991). While attorney's fees are not available to an insured in cases involving a dispute over the extent of the insured's damages or factual questions of liability, they are available for "vindication of policy provisions to which the insured is entitled." Safeco Ins. Co. v. Woodley, 150 Wn.2d 765, 773-774, 82 P.3d 660 (2004). Attorneys fees are available to insureds as a disincentive to insurers who withhold benefits, because without an insured's ability to recover attorney's fees against her insurer, the "insurer would have little economic incentive to provide coverage without a fight because the most the insurer would be required to pay if it lost the legal battle is what it should have paid in the first place." Matsyuk, supra, 173 Wn.2d at __, 272 P.3d at 811.

In discussing the circumstances when attorney's fees may be awarded, the Court in Safeco v. Woodley noted that the case before it "does not involve a dispute over the extent of Woodley's damages or factual questions regarding liability. Instead, it involves Woodley's right to receive the full benefit of her PIP and UIM coverages, which includes, under Winters, a pro rata share of the legal expenses she incurred in creating the common fund from which her PIP carrier received reimbursement." Id. at 744. There the Court stated that if it adopted Safeco's position, the plaintiff would not receive the full benefit of her coverage. Id. Thus, our Supreme Court unanimously held that "this case appears "more akin to a dispute over the vindication of policy provisions to which the insured is entitled (for which fees may be awarded) than a dispute over the amount of coverage (for which fees are not available)" and granted the plaintiff's request for reasonable attorney's fees.

In the case at bar, like the case of Safeco v. Woodley, there is no dispute over the extent of Ms. Carbaugh's damages or any factual questions regarding liability. Here, at the trial court level, Progressive filed a motion to deny Ms. Carbaugh the full benefits of her UM coverage, despite the fact that her total damages awarded in Mandatory Arbitration

exceeded her UM limit with Progressive. Ms. Carbaugh was forced to respond to that motion in an effort to obtain her UM benefits. Now, Ms. Carbaugh has been forced to file the present appeal in order to obtain her full UM benefits. In the event Ms. Carbaugh prevails on appeal, the Court should award Ms. Carbaugh her attorneys fees and costs expended at the trial court level and on appeal.

D. CONCLUSION

Based on the foregoing argument, Ms. Carbaugh requests that the court reverse the trial court's order granting reconsideration, order that Progressive pay Ms. Carbaugh the balance of her \$25,000 UM policy, and award Ms. Carbaugh her attorney's fees and costs incurred in opposing Progressive's Motion for Reconsideration at the trial court level, as well as her attorney's fees and costs incurred on appeal.

DATED this 14th day of May, 2012.

**THE LAW OFFICES OF
WATSON & GALLAGHER, P.S.**


Thomas F. Gallagher, #24199
Attorney for Appellant
Karyn Carbaugh

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**COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON**

KARYN A. CARBAUGH, an
individual,

Appellant,

v.

JOHN N. JOSLIN and "JANE DOE"
JOSLIN, husband and wife and the marital
community comprised thereof; NORMA O.
JOSLIN and "JOHN DOE" JOSLIN, wife
and husband and the marital community
comprised thereof;

Respondents.

and

PROGRESSIVE NORTHWEST
INSURANCE COMPANY,

Respondent Intervenor,

NO. 42780-0-II

DECLARATION OF MAILING

Marie Ekstrand hereby declares and states as follows:

On May 14, 2012, I deposited a copy of the Appellant's Opening Brief, in the United States Mail, postage prepaid, addressed to the following recipients:

Attorney for Respondent Intervenor, Progressive Northwestern Insurance Company:

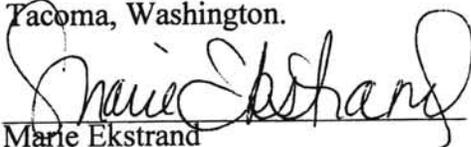
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of May, 2012, at Tacoma, Washington.


Marie Ekstrand