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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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.

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On April 17, 2005, Plaintiff was a passenger in a vehicle which was rear-ended by a vehicle driven by John Joslin, and owned by Norma Joslin.¹ Plaintiff claimed soft tissue neck and back injuries from the accident and treated with various healthcare providers.²

Neither John Joslin nor Norma Joslin had liability insurance, and were uninsured.

Plaintiff had automobile insurance with Progressive which provided both Personal Injury Protection (“PIP”) and uninsured motorist/underinsured motorist (hereinafter referred to as “UM”) coverages.³ The PIP provided monetary compensation for both medical expenses and lost income. Plaintiff made a claim under PIP and Progressive paid a total of \$7,230.28.⁴

The policy also provided for UM coverage with limits of \$25,000.00.⁵ This coverage provides monetary compensation to an insured who is injured in an accident by the negligence of either an uninsured motorist or underinsured motorist.

The policy allows Progressive the right to offset any money paid

¹ CP 72-75. John Joslin was Norma Joslin’s son.

² CP 72-75.

³ CP 34.

⁴ CP 67-68.

⁵ CP 34.

under PIP from any UM award. This provision provides:

“LIMITS OF LIABILITY”

...

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**.⁶

Plaintiff initially sued the Joslins’ and obtained a Default Judgment.⁷ Progressive intervened and successfully moved to set aside the Default Judgment. Plaintiff appealed this decision but the trial court’s decision was upheld by Division II of the Court of Appeals.

Plaintiff dismissed the Joslins’ and proceeded against Progressive on her UM claim.⁸ She placed the case into mandatory arbitration, and an arbitration hearing was held on July 22, 2011. The arbitrator awarded Plaintiff a total of \$27,131.70 consisting of \$7,131.70 in special damages and \$20,000.00 in general damages.⁹

Plaintiff moved to reduce the arbitration award to a \$25,000

⁶ CP 50. “III” refers to Underinsured Motorist Coverage. “II” refers to Personal Injury Protection Coverage.

⁷ CP 3-6.

⁸ CP 9-13.

⁹ CP 14.

judgment without reducing it by any of the PIP payments made by Progressive.¹⁰ In other words, Plaintiff asked the court to enter a judgment for \$25,000, and ignore entirely the \$7,230.28 Progressive paid in PIP. This would result in Progressive paying a total of \$32,230.28, which is \$5,098.58 more than the arbitration award.

Progressive moved the court for an offset, asking the court to reduce the arbitration award (\$27,131.70) by the amount of PIP it had paid (\$7,230.28).¹¹ This would result in Plaintiff receiving \$27,131.70, the amount of the arbitration award, i.e. \$7,230.28 under PIP plus \$19,901.42 under UIM.

The trial court initially denied Progressive's Motion for an offset of the PIP payments.¹² However, the trial court granted Progressive's Motion for Reconsideration and allowed the offset.¹³ Plaintiff has appealed this Order and the Judgment based upon the courts Reconsideration Order.¹⁴

STATEMENT OF ISSUES

Is Progressive entitled to a partial offset for the PIP payments it made when the policy allows for the offset, and Plaintiff has been fully

¹⁰ CP 97- 98.

¹¹ CP 24-29.

¹² CP 95-96.

¹³ CP 111-113.

¹⁴ CP 128-134.

compensated?

ARGUMENT

A. PROGRESSIVE IS ENTITLED TO OFFSET A PORTION OF ITS PIP PAYMENTS FROM THE ARBITRATION AWARD BECAUSE PLAINTIFF HAS BEEN FULLY COMPENSATED

Washington law is crystal clear - an insurer is entitled to offset an UIM award by PIP payments it made so long as a plaintiff is fully compensated. In *Sherry v. Financial Indemnity Company*¹⁵ our Supreme Court enunciated the following principle:

It is well settled in Washington that insureds are not entitled to double recovery, and thus after an insured is 'fully compensated for his loss' an insurer may seek an offset, subrogation or reimbursement for PIP benefits already paid.¹⁶

The rationale underlying this principle is that while the insured is entitled to full compensation, he is not entitled to double recovery. As explained in *Keenan v. Industrial Indemnity Insurance Company*:¹⁷

Previous Washington cases have emphasized that offset or reimbursement clauses in insurance policies may be upheld if necessary to prevent the insured from receiving a double recovery.¹⁸

An insurer can offset PIP payments from an UIM award if the

¹⁵ *Sherry v. Financial Indemnity Company* 160 Wash.2d 611, 618, 160 P.3d 31 (2007).

¹⁶ *Sherry v. Financial Indemnity Company*, *supra* at p 618.

¹⁷ 108 Wash.2d 314, 318, 738 P.2d 270 (1987).

¹⁸ *See also, Sherry v. Financial Indemnity Company*, *supra*; *Taxter v. Safeco*, 44 Wash.App. 121, 721 P.2d 972 (1986).

policy provides for an offset, and the insured has been fully compensated.

As stated by the Supreme Court in *Sherry v Financial Indemnity Company, Supra* at page 619:

An insurer is entitled to an offset, setoff, or reimbursement when both: (1) the contract itself authorizes it and (2) the insured is fully compensated by the relevant ‘applicable measure of damages.’

1. Progressive’s policy entitles it to offset the PIP payments from any UIM payments.

Progressive’s policy contains the following provision allowing it to offset any UIM award by the PIP payments it made:

“LIMITS OF LIABILITY”

...

In determining the amount **we** will pay for **bodily injury** sustained by an **insured person** under this part III [i.e., UM coverage], 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**.
2. Plaintiff received the amount of the arbitration award and was fully compensated.

Progressive is entitled to an offset only after Plaintiff has been

fully compensated for injuries.¹⁹ An insured is “fully compensated” when he has:

...made a complete recovery of the actual losses suffered as a result of the automobile accident as determined by a court or arbitrator.²⁰

In the present case, the Arbitrator awarded Plaintiff \$27,131.70 in damages, and she is “fully compensated” upon receiving this amount. Progressive paid Plaintiff a total of \$27,131.70 consisting of \$7,230.28 paid under PIP and \$19,901.42 paid under UM. Accordingly, Plaintiff has made a complete recovery of her actual losses as a result of the accident, and has been “fully compensated.”

B. PLAINTIFF IS NOT ENTITLED TO DOUBLE RECOVERY.

The policy rationale for allowing the insurer to offset its PIP payments from the UIM award after the Plaintiff has been fully compensated is to prevent double recovery by Plaintiff. This is well explained in *Barney v Safeco Insurance Company of America*:²¹

Clearly, there is ‘public policy’ against ‘double’ recovery. To say this, however, is to say only that recovery should not exceed the applicable measure of damages. Recovery that does not exceed the applicable measure of damages is not ‘double’ recovery. Conversely, recovery that exceeds the applicable measure of damages is ‘double’ recovery. ‘Double’ recovery ‘violates public policy’ because the applicable measure of damages is public policy with

¹⁹ *Sherry v Financial Indemnity Company, supra.*

²⁰ *Sherry v Financial Indemnity Company, supra* at page 614.

²¹ 73 Wash.App. 426, 869 P.2d 1093 (1994).

respect to how much a claimant should recover.

Similarly, in *Keenan v Industrial Indemnity Insurance, supra* at p. 318 the court states:

Previous Washington cases that emphasize the offset or reimbursement clauses in insurance policies may be upheld if necessary to prevent the insured from receiving a double recovery.

The facts in *Keenan* are a good example of this principle. In *Keenan*, the UIM arbitrator awarded Plaintiff \$44,478.00 in damages for injuries in an automobile accident. Industrial Indemnity offset from this award the \$25,000.00 policy limits from the third-party tort feason and the \$9,999.99 Industrial Insurance paid under PIP. Plaintiff objected to the PIP offset and sued, claiming that Industrial Indemnity was not entitled to it. The issue before the court was:

One issue is presented. Namely, may an automobile insurer offset amounts it previously paid its insured as PIP benefits against amounts payable to the insured under the underinsured motorist endorsement, by enforcing a clause in the insurance policy providing for reimbursement of the PIP benefits, where the insured will be fully compensated for all of her damages even with the offset?

The Supreme Court held that Industrial Indemnity was entitled to offset the PIP payments because Plaintiff had been fully compensated and would receive double recovery without the offset. On p. 318 the court states:

As Industrial Indemnity points out, enforcement of the PIP reimbursement is necessary to prevent the Plaintiff from receiving a double recovery.

In the present case, the arbitration award was \$27,131.70. Under Plaintiff's argument, she will receive a total of \$32,230.28, or \$5,098.58 more than the arbitration award. This is an impermissible double recovery.

If the trial court is upheld and Progressive is allowed to partially offset the PIP payments from the arbitration award, then Plaintiff will receive \$27,131.70, the amount of the arbitration award, but no double recovery. This is the correct result.

C. PLAINTIFF IS ATTEMPTING TO BE PLACED IN A BETTER POSITION BY BEING STRUCK BY A UM MOTORIST.

The statutory purpose of UM/UIM is to allow the injured insured to recover the damages he would have received if a third-party tortfeasor had adequate liability insurance.²² However, the injured insured:

...is not entitled to be put in a better position, by virtue of being struck by an underinsured motorist, than she would be had she been struck by a fully insured motorist.²³

In the present case, if a third-party had adequate liability insurance, then he would have been paid the arbitration award of \$27,131.70, and Progressive would be entitled to reimbursement of the \$7,230.28 it paid in

²² *Keenan v Industrial Indemnity Insurance Company, supra* at page 320.

²³ *Keenan v Industrial Indemnity Insurance Company, supra* at page 321.

PIP. Even if the third-party tortfeasor had only \$25,000 in liability insurance, Progressive would be entitled to a partial offset of the amount it paid in PIP (\$7,230.28) and the difference between the arbitration award and the policy limits (\$2,131.70) which is \$5,098.58. Plaintiff is not entitled to \$5,098.58 more than the arbitration award simply because she is dealing with her UM insurer.

1. Plaintiff's hypotheticals do not state the applicable law of offset.

Plaintiff sets forth the following two hypotheticals as proof that she is in a worse position by going through her UM insurer.

Example 1

Assume that Ms. Carbough had PIP coverage with Progressive, but that she had declined any UM or UIM coverage. Assume that Progressive paid her \$7,131.70 in PIP medical payments just as it did here.²⁴ Assume that the tortfeasor maintained liability limits of only \$25,000.00 and that Ms. Carbough was ultimately awarded \$27,131.70 in total damages against the tortfeasor.

Example 2

Assume that Ms. Carbough decline any PIP coverage with Progressive, but that she accepted \$25,000 in UM/UIM coverage. Assume that Ms. Carbough's private health insurer paid her \$7,131.70 in medical payments. Assume that Ms. Carbough was ultimately awarded \$27,131.70 in total damages against Progressive resulting from the fault of an uninsured tortfeasor. Because Ms. Carbough would not be fully compensated when the arbitration award

²⁴ Plaintiff has incorrectly stated the amount of PIP Progressive paid as \$7,131.70. In fact, Progressive paid \$7,230.58. For this hypothetical, Progressive will use the \$7,131.70 figure set forth by Plaintiff.

exceeded the recoverable policy limits, Ms. Carbough's private health insurer would have no right of reimbursement or subrogation for the medical payments it made.

Plaintiff alleges, **without citing any legal authority**, that Progressive (or the private health insurer) would not be entitled to any offset for the PIP medical payments. This contention is simply wrong. In the first example, Progressive would be entitled to a partial reimbursement of its PIP expenses (assuming such right is in the insurance contract) because Plaintiff has been "fully compensated." As stated by the Supreme Court in *Keenan v. Industrial Indemnity, supra* at p. 318:

Previous Washington cases have emphasized that offset or **reimbursement clauses** in insurance policies may be upheld if necessary to prevent the insured from receiving a double recovery. (Emphasis added)

In Example 1, Progressive would be entitled to reimbursement of \$5,000. Similarly, in Example 2, the private health insurer would be entitled to reimbursement under the same principle.

D. THE CASES PLAINTIFF CITES DO NOT SUPPORT HER POSITION.

Plaintiff initially cites four cases²⁵ which she claims supports her contention that Progressive is not entitled to any PIP offset even though she has been fully compensated. The first three cited cases are factually

²⁵ *Keenan v. Industrial Indemnity Insurance Company, supra*; *Fickbohm v. St. Paul Insurance Company*, 63 P.2d 517 (N.M.App. 2002); *Barnes v. Allstate Insurance Company*, 608 S.2d 1045 (La.App. 1992); *Taxter v. Safeco, supra*.

the same - in each case the Arbitration or jury award was less than the UM/UIM limits. In each case, the court allowed the insurer to offset its PIP payments from the award. The policy considerations underlying each decision was that the plaintiff had been fully compensated (i.e., she received the amount of the award), and any additional payment would amount to double recovery.

In the fourth cited case, *Taxter v. Safeco, supra*, the court enunciated the same principle as the first three cases, but remanded the case for determination of the amount of Plaintiff's damages.

Plaintiff cites no case from any jurisdiction where the court has held that an insurer is not entitled to a partial PIP offset after the insured has been fully compensated for his injuries. Moreover, Plaintiff offers no policy reason why this court should ignore completely the principle that she is not entitled to double recovery once she has been fully compensated.

1. Plaintiff misinterprets the *Keenan* decision.

As explained above, the *Keenan* and *Sherry* decisions establish a legal principle that an insurer can recover PIP payments so long as Plaintiff has been fully compensated. Plaintiff ignores this principle and focuses only on the following phrase in *Keenan*:

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.²⁶ (Emphasis added)

Plaintiff mistakenly interprets the words “policy limits” to mean only the UM policy limits. The proper interpretation of “policy limits” is the sum of both the UM policy limits and the amount of PIP paid by the insurer. It is only when the insured's damages exceed those combined limits, that the insured has not been fully compensated.

In the present case, Progressive's UM limits were \$25,000.00, and it paid \$7,230.28 in PIP. Thus, the “policy limits” were \$32,230.28. Progressive was entitled to a PIP offset since the arbitration award was less than this amount.

2. The Mahler line of cases do not apply.

Plaintiff also cites the *Mahler, Winters, Hamm* line of cases²⁷ as authority for her contention that she is entitled to double recovery. These cases do not address this issue. Instead, they address the issue of whether the insurer must pay a pro-rata share of the insured's costs and attorney's fees in obtaining the PIP recovery. This issue is not present in this case, as

²⁶ *Keenan v Industrial Indemnity Insurance Company*, *supra* at page 318, quoting from *Taxter v. Safeco*, 44 Wash. 121, 131, 771 P.2d 972 (1986).

²⁷ *Mahler v. Szucs*, 135 Wash.2d 398, 957 P.2d 632, 966 P.2d 305 (1998); *Winters v. State Farm Mutual Automobile Insurance Company*, 144 Wash.2d 869, 31 P.3d 1164 (2001); *Hamm v. State Farm Mutual Auto Insurance Company*, 151 Wash.2d 303, 88 P.3d 395 (2004); *Matsyuk v. State Farm Fire and Casualty Company*, 173 Wash.2d 643, 272 P.3d 802 (2012).

Progressive has already paid Plaintiff's attorney this money, based upon the trial court's Order and Judgment.

E. PROGRESSIVE IS ENTITLED TO OFFSET PIP PAYMENTS AGAINST THE ARBITRATION AWARD, EVEN IF THE OFFSET INCLUDES A PORTION OF THE GENERAL DAMAGES.

The Arbitrator awarded Plaintiff a total of \$27,131.70 which he broke down to \$20,000 in general damages and \$7,131.70 in special damages. Plaintiff contends that even if Progressive is entitled to an offset, it is limited to only \$7,131.70 (i.e., the amount of special damages the Arbitrator awarded) and not the \$7,230.28 Progressive paid in PIP.

This court has already rejected this argument in *Shrader v. Grange*.²⁸ In *Shrader*, Grange paid a total of \$46,827.50 in PIP benefits.²⁹ Plaintiff collected \$100,000 from the third-party tort feisor and then brought a UIM claim against Grange. The Arbitrators determined that Plaintiff's claim was worth \$145,000, consisting of \$30,000 in special damages and \$115,000 in general damages.

The plaintiff sued Grange, contending that he was entitled to an additional \$15,000 in general damages because the Arbitrator awarded \$115,000 in general damages and he had received only \$100,000. In essence, the plaintiff contended that the PIP payments could only be offset

²⁸ 83 Wash.App. 662, 922 P.2d 818 (1996).

²⁹ Grange paid \$34,960.50 in medical expenses and \$11,867 in lost income.

against the special damages, the same argument that the plaintiff is making in this case.

Division II rejected plaintiff's contention, deciding the issue by construing the terms of the contract. On p. 667-8 the court explains:

Here, Shrader's policy contains offset clauses. The Arbitrator's breakdown of the \$145,000 award into \$30,000 special damages and \$115,000 general damages does not affect Granger's right to offset its PIP payments. The policy stated that the UIM award shall be reduced by all sums paid under PIP. Shrader's contention that Grange owes him an additional \$15,000 in 'general' damages is not well-founded. To grant Shrader's claim would vitiate the insurance contract and punish the company for promptly paying wage loss benefits and medical expenses in good faith pending a final determination of liability.

In the present case, Progressive's policy contains an offset clause allowing it to offset a UIM award by the entire amount of PIP if paid. This clause is valid and should be given its full effect. As in *Shrader*, Progressive is entitled to offset the entire PIP payment from the UIM award.

F. PLAINTIFF IS NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL.

Plaintiff is entitled to recoup attorney's fees only if she is successful in this appeal.³⁰ For the reasons set forth in this brief, the trial court's decision should be upheld and Plaintiff will not be the prevailing

³⁰ *Olympic Steamship Company v. Centennial Insurance Company*, 117 Wash.2d 37, 811 P.2d 673 (1991).

party. Accordingly, she is not entitled to attorney's fees on appeal.

CONCLUSION

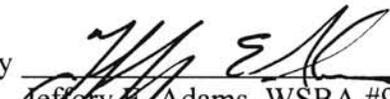
Plaintiff is entitled to be fully compensated for her injuries, but is not entitled to double recovery. Plaintiff was fully compensated when she received \$27,131.70, the amount of the arbitration award. The trial court awarded this amount to Plaintiff when he granted the Motion for Reconsideration and entered a judgment which offset the amount Progressive paid in PIP from the arbitration award.

This court should affirm the trial court, and deny Plaintiff's Motion for Attorney's Fees.

Respectfully submitted, this 12 day of June, 2012.

MURRAY, DUNHAM & MURRAY

By



Jeffrey E. Adams, WSBA #9663
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Oscar Ramos, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the date given below, I caused a true and correct copy of Respondent's Brief to be served upon the following in the manner indicated therein:

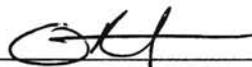
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STATE OF WASHINGTON
BY  DEPUTY

DATED at Seattle, Washington, this 13th day of June, 2012.



Oscar Ramos Jr.