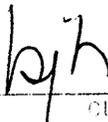


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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FINANCIAL INDEMNITY COMPANY

Petitioner,

v.

KEVIN SHERRY

Respondent.

Appeal from the Court of Appeals, Division II
Of the State of Washington
No. 32946-8

PETITIONER'S SUPPLEMENTAL BRIEF

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I. ASSIGNMENT OF ERROR

1. The Court of Appeals erred in failing to find trial court jurisdiction to offset the award per RCW 7.04.150.
2. The Court of Appeals Division II correctly determined the trial court had jurisdiction under CR 15 to determine declaratory relief sought on Personal Injury Payments (hereinafter "PIP") offset for a Uninsured (hereinafter "UIM") arbitration award for an at-fault Insured.
3. The Court of Appeals Division II erred when it reversed the trial court's order offsetting PIP from a UIM arbitration award for an at-fault Insured.
4. The Court of Appeals Division II erred in determining an at-fault Insured must be fully compensated for even his own negligently caused injuries before an Insurer may offset PIP payments from a UIM arbitration award.
5. Because the Washington State Supreme Court has consistently and repeatedly reaffirmed an Insurer's right to subrogation and an offset of PIP payments from a UIM arbitration award, the Court of Appeals erred in eliminating the Insurer's contractual subrogation rights for contributorily negligent Insureds.

The Supreme Court should reinstate the trial court's authorized declaratory determination that Financial Indemnity Company (hereinafter "Insurer") is entitled to full PIP payment offset of a UIM award for its contributory negligent insureds.

II. THE COURT OF APPEALS ERRED

The Supreme Court has consistently upheld an Insurers' contractual right to subrogate and offset PIP payments from UIM arbitration awards. Under this standard of law, Insurer, Financial Indemnity Company's policy language enables it to offset full PIP payments from an arbitration award fully compensating an at-fault Insured for uninsured tortfeasor fault. Thus, while the Court of Appeals correctly found the trial court had jurisdiction and authority, it erred in reversing the trial court decision enforcing the Insurers contractual right to PIP offset from the UIM Award and remanding for entry of judgment on the full arbitration award without any PIP offset.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Per order of the Supreme Court, whether the trial court had jurisdiction to offset the arbitration award under former RCW 7.04.150 and former statutes referenced in each of RCW 7.04.160 and RCW 7.04.170.

2. Whether the Court of Appeals correctly determined trial court jurisdiction to offset an arbitration award under CR 15.
3. Whether the trial court had jurisdiction to offset the arbitration award under RCW 7.24.010 *et. seq.*
4. Whether an at-fault Insured can and should be fully compensated for even his own negligence before an Insurer's right to subrogated PIP payments from a UIM award.

IV. STATEMENT OF THE CASE

This personal injury case arose from an automobile-pedestrian accident of April 4, 2001 in Tacoma, Washington. (CP 1, 2) The pedestrian insured Kevin Sherry (hereinafter, "Insured") was injured in this event and sought payments under his mother's policy of insurance with Financial Indemnity Company ("Insurer") for alleged PIP medical and income continuation losses and UIM Arbitration. (CP 24, 53-9).

At arbitration, the arbitrator decided the Insured pedestrian was 70% contributorily negligent and issued a net award of \$42,938.38 including full medical expenses sought and general damages. The insurance policy at issue had limits of \$100,000.00.(CP 39, 40, & 7). Subsequently the arbitrator refused to offset the Insurer's PIP payments of \$14,600.00 at the

Insurer's request, citing lack of authority per Price v. Farmers Insurance Company, 133 Wn.2d 490, 494, 946 P.2d 388 (1997).

The parties then agreed to have the trial court decide this contractual and declaratory PIP offset issue per RCW 7.24.010, *et. seq.*, in an action commenced to confirm the arbitration award per former RCW 7.04.150. The parties asked the court to decide the contractual PIP offset issue and enter judgment instead of incurring further expense and/or delay in filing a separate declaratory action. (CP 51, 61, Court of Appeals Brief of Respondent Appendix - Transcript of Court proceedings 2/4/05, p. 3 - Insured, and p.9 - FIC and Petitioners Court of Appeals Reply brief p. 1). The trial court determined there were contractual PIP subrogation rights and entered judgment which offset full Insurer PIP payments from the Arbitration Award. Insured appealed.

The Court of Appeals Division II reversed and Remanded for entry of judgment for the Insured's full Arbitration Award without any PIP offset. Insurer sought Supreme Court review.

V. ARGUMENT

A. THE TRIAL COURT HAD AUTHORITY TO DECIDE DECLARATORY CONTRACTUAL ISSUES AND CONFIRM AND

MODIFY, ALTER OR CORRECT THE ARBITRATION AWARD
BY DEDUCTING PIP OFFSET AND COSTS.

1. **Former RCW 7.04.150.¹ Confirmation of award by court, authorized the trial court to modify, alter or correct the UIM Award.**

Per former RCW 7.04.150, either party could file a superior court action seeking conformation of the arbitration award. And either party thereafter could seek to vacate because the arbitrator imperfectly executed his powers (former RCW 7.04.160)² or

¹ Former RCW 7.04.150 stated:

At any time within one year after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and 7.04.170. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. The validity of an award, otherwise valid, shall not be affected by the fact that no motion is made to confirm it.

² Former RCW 7.04.160 states:

Vacation of award—Rehearing. In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

- (1) Where the award was procured by corruption, fraud or other undue means.
- (2) Where there was evident partiality or corruption in the arbitrators or any of them.
- (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.
- (5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to

modify or correct the award where there was a mistake in law or facts in the award (former RCW 7.04.170)³ and *Carey v. Herrick*, 146 Wash. 283, 263 P. 190 (1928). These three statutes are all read together. These statutes provided the trial court with jurisdiction to offset PIP from the award.

a). The trial court had jurisdiction to vacate the arbitration award per former RCW 7.04.160:

The trial court had authority to vacate the arbitration award because the arbitrator imperfectly executed powers under former RCW 7.04.160(4): “Where the arbitrators exceeded their powers,

arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).
An award shall not be vacated upon any of the grounds set forth under subdivisions (1) and (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.
Where an award is vacated, the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agreement for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court’s order.

³ Former RCW 7.04.170 states:
Modification or correction of award by court. In any of the following cases, the court shall, after notice and hearing, make an order modifying or correcting the award, upon the application of any party to the arbitration:
(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.
(2) Where the arbitrators have awarded upon a matter not submitted to them.
(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy. The order must modify and correct the award, as to affect the intent thereof.

or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.” Here the legal quagmire created in *Price, supra*, left the arbitrator in a position where he “imperfectly” made a decision in the award that cannot be finalized by him for purposes of PIP offset. Then, once the PIP offset dispute arose, only the court could decide the issue and finalize a definite award and judgment. Because of the PIP offset dispute, after the arbitrator made an award, there was no final and definite award without court intervention. So when the arbitrator refused to perfect his decision, the parties sought perfection and finalization of a definite award from the trial court. The trial court had authority to perfect and finalize the award.

In UIM arbitration practice the parties typically agree on offsets of PIP and costs from the award and usually avoid court involvement to confirm awards and enter judgment. In reality, court reductions of UIM awards to judgment are rarely done. It is only in the very rare incident when the offset or costs are not agreed upon by the parties, where the parties need arbitrator and/or court resolution.

b). Former RCW 7.04.170(1) and (3) allow for modification of an Arbitration Award where there is a miscalculation of figures, mistake, or the form is imperfect.

In the case at hand, there is a clear subrogation right of the Insurer to offset that can only arise after award is issued. Therefore, the award from the arbitrator does not have the final correct calculation, is imperfect, and would be a mistake to enter it as a judgment. The trial court, therefore, had authority to modify the Arbitration Award to offset PIP and reduce to a corrected amount. And the Court of Appeals erred in overturning the trial court offset.

2. The parties and RCW 7.24.010, et seq., authorized the trial court to determine declaratory relief and decide contractual PIP offset issues.

Additionally, the parties requested the trial court decide the PIP offset from the arbitration award per RCW 7.24.010, *et seq.*, which authorizes declaratory actions.⁴ Both sides stipulated to

⁴ RCW 7.24.010 states:

Authority of courts to render. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative

amend the petition before the court so the court could determine via declaratory action the contractual PIP offset issue and its effect on the Arbitration award rather than going through additional expense, and delay of filing a separate declaratory action per Price, *supra*.

Obviously, it would have tainted the fairness of the Arbitration tribunal to address PIP payment and limits issues during the arbitration hearing. So, thereafter, when an agreement could not be reached on the PIP offset, the Insurer requested the arbitrator amend the award to offset PIP payments. Arbitrator Cooper advised he had no authority to decide PIP offset per Price, *supra*. Thereafter, the parties simply mutually sought the most expeditious and economical means by amending the Petition/pleadings and empowering the trial court to modify, alter, correct, or perfect the award offset determination or alternatively provide declaratory relief per RCW 7.24.10, *et seq.* Specifically, the parties empowered the trial court to interpret the insurance policy language and apply an offset for PIP payments under Washington law. The parties agreed it was not a matter of if there

or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

should be an offset, but what amount could be offset for PIP payments from the arbitration award.

B. THE PARTIES AMENDMENT OF PLEADINGS PER CR 15(a-d) CONVEYED JURISDICTION UPON THE TRIAL COURT.

The parties had the ability to amend the pleadings per CR 15(b)⁴ as allowed by the trial court and approved by the Court of Appeals. This gave the trial court authority to grant declaratory relief and to alter and confirm the UIM Award. The trial court had general powers and declaratory relief authority to make coverage decisions.

Additionally, Price, *supra*, language at p. 499 (quoting *Sullivan v. Great Am. Ins. Co.*, 23 Wn. App. 242, 246, 594 P.2d 454 (1979)), states:

⁴ CR 15(b) states:

Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The question of coverage is a matter for the court to decide and is not an issue for the arbitration. The issues of liability and injuries and damages are the issues to be arbitrated;

and Price, *supra*, at p. 502 further states:

However, the procedure does not rule out further agreement between the parties to either enlarge the scope of the arbitration or eliminate it altogether.

And when this is read in conjunction with Justice Talmadge's dissenting opinion in Price, *supra*, at p. 503, which was specifically discussed by counsel with the trial court, it is clear the parties hereto followed the only practical guidance by the courts on how to resolve UIM arbitration award PIP offset disputes. The trial court agreed and so ruled.

The parties agreed that to commence a new and separate declaratory action was a totally impractical procedure for confirming arbitration awards, wasted judicial and party resources causes unnecessary delay's, and would likely result in a second judge making a determination on the policy PIP offset before the first judge could confirm the award and the matter could finally reach resolution.

The trial court correctly assumed and exercised jurisdiction at the party's amended Petition request. This Court should agree

the trial court had jurisdiction. And, to the extent this court may still see a need to file a separate declaratory action per *Price* to confirm an arbitration award with PIP disputes, *Price* should be overruled. The courts should not make the resolution of UIM Award PIP offset disputes so impractical, burdensome, time consuming, and wasteful of judicial and party resources. Where a post UIM arbitration PIP dispute arises, the parties should only be one action.

C. THE TRIAL COURT PROPERLY DETERMINED CONTRACTUAL PIP OFFSETS.

1. The Insurer had a contractual right to offset PIP.

The Insurer's insurance policy allows for PIP offset (CP 20). The policy under Part III, Underinsured Motorist Coverage (c), Underinsured Bodily Injury (B), states:

To determine the amounts payable to an insured person under this coverage part we will first credit against the insured persons damages, the following:

- 3 Any amounts paid under other parts of this policy.

And page 5, Part II, Personal Injury Protection, states:

Any amount paid or payable for bodily injury under the Liability or Underinsured Motorist Bodily Injury coverages of this policy shall be deducted from the amount payable under this Part.

The Insured has not contested this contractual right of the Insurer. Subrogation law and public policy have long upheld this right. *Hamm v. State Farm*, 15 Wn.2d 303, 88 P.3d 395 (2003), *Peterson v. Safeco Ins. Co. of Illinois.*, 95 Wn.App. 254, 946 P.2d 632 (1999). Further, there is nothing in the policy limiting amounts or percentages of offset; only the Insured seeks to do that.

2. Insurer Subrogation PIP offset rights cannot depend on an at fault insured being fully compensated.

The Insured relied on and the Court of Appeals erred in deciding that under *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978), the Insured must receive full compensation for all his damages, (even for percentages he caused), before the Insurer can exercise its contractual subrogation rights. This is lunacy, for whenever an Insured has even 1% contributory negligence, he will not be fully compensated and would not be made whole by his award. No Insurer could ever enforce subrogation rights under this logic.

Plain and simple, the at-fault Insured is never made whole and never receives full payment for all losses. This is because he

isn't legally entitled to be made whole. He is contributorily negligent and not entitled to recover for his own negligently caused injuries. His recovery or full compensation comes only from the tortfeasor negligence. It is in the interest of public policy to hold people accountable for their own negligence.

Why should the negligent Insured be fully compensated for damages he caused to himself before subrogation is allowed? The negligent Insured should never receive higher benefits under an insurance policy than the fault free Insured whom our laws and public policy seeks to protect. Without PIP offset for the contributorily negligent Insured, he increases the amount of the arbitration award by the amount of PIP he doesn't have to reimburse. This leaves him better off than the fault free Insured. This results in a windfall and double recovery of medical and wage losses which is abhorred by the courts.

To have such a rule would only encourage all UIM arbitration Insureds to plead contributory negligence so they would not have to set off PIP from the award. Claimants would stipulate or beg the arbitrator for a finding of a small percentage of contributory negligence so they could avoid the PIP offset from the Award.

PIP is an optional coverage for which premiums are based on subrogation reimbursement from tortfeasor insurance or offset if UIM rights. To allow at-fault Insureds to recover without PIP offset, eliminates contractual rights of Insurers they in no way bargained for or negotiated for on insurance policies issued.

Truly, there could not be a worse case for the Supreme Court to pick to give a negligent Insured a windfall or double recovery. And, overrule longstanding support of PIP subrogation rights. For this Insured's best case liability scenario, he simply failed to get out the way of his friends driving car traveling at 35 m.p.h., for 200 plus yards straight at him without slowing while he stood 1 – 2 feet from the curb. And the worst scenario for him was his running at the moving car per independent eyewitnesses, having discussed a "Jack Ass" video on stupid stunts with the driver's mother by his own testimony, jumping on the moving car and his own misjudgment and committing a jackass stupid stunt that caused his injuries. This is not an Insured who garners the sympathy much less one to gain a windfall recovery and eliminate PIP offset from arbitration awards and coverage as we know it.

3. Insurer is entitled to full PIP offsets.

The Insurer should be entitled to offset full PIP payments per Tolson v. Allstate Ins. Co., 108 Wn.App 495, 32 P.2d 289 (2001). If not, the court is again only encouraging any Insured to omit paid losses from the arbitration hearing and then claim there was no award and therefore no offset can be paid for the losses they claimed early on and were paid under PIP. Here, the Insured claimed loss of income continuation because of injuries and sought and received \$4,600 under PIP wage continuation benefits. Then he altered his request to say it was a wage impairment claim. Despite the arbitration award being silent as to any recovery for such, the Insurer should be able to offset the entire amount paid because it was a loss claimed and benefit paid by the Insurer and paid as a result of the 70% negligence of the Insured.

Therefore, the trial court properly considered the Price and Tolson cases to find that the full amount of the PIP payments by the Insurer should be offset from the arbitration award.

The trial court's decision should not now be set aside by the Court of Appeals. To eliminate Insurer PIP offset subrogation rights would be inconsistent with Washington Supreme Court decisions as recent as 2 and 3 years ago in Winters v. State Farm

Insurance Co., 144 Wn.2d 869, 31 P.3d 1164 (2001), upholding the PIP subrogation right of set off from a UIM arbitration award, Peterson and even Price, *supra*, to the extent it affirmed an Insurer's right of PIP offset.

VI. CONCLUSION

Elimination of PIP offsets from UIM arbitration awards would not benefit all Washington drivers with PIP or their insurers. Such a ruling would only raise PIP rates. And with PIP being an optional coverage, more drivers who really need the coverage would reject it because of expense. This works as a hardship on the driving public and would be against public policy and the benefit of having PIP.

The trial court had jurisdiction per the parties request, civil rules, former statutes to modify and perfect awards, and declaratory statutes to expeditiously resolve a slight contractual issue of PIP offset on an arbitration award. The trial court made the proper determination that the full PIP payments by the Insurer should be offset from the at-fault Insured's award. The Court of Appeals Division II erred in setting aside the trial court's correct determination that the Insurer was entitled to a full offset of PIP payments from a UIM arbitration award.

With the Supreme Court having upheld full offset of PIP payments from UIM arbitration awards only two to three years ago in Hamm and Peterson, the Court should similarly rule here. While Hamm involved a fault free claimant, and the present case involves a 70% at-fault claimant, the result should be the same. The trial court's finding for full offset from the Insured's UIM arbitration award for all PIP payments the Insurer made should be upheld and reinstated by this Court.

DATED this 31st day of January, 2007.

Respectfully submitted,



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Indemnity Co.