

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF THE CASE.....	1
III.	ARGUMENT.....	9
	A. The Court Lacks Jurisdiction Because of Sherry's Acceptance of the Judgment and Execution of a Satisfaction of Judgment.....	9
	B. Sherry is Not Entitled to a Double Recovery of His Medical Expenses and Lost Income Benefits	12
	C. Sherry Was a Fully Compensated At-Fault Insured and Is Not Entitled to a Reduction in FIC's PIP Offset.....	15
IV.	CONCLUSION.....	19

TABLE OF CASES

<u>Hamm v. State Farm,</u> 15 Wn.2d 303, 88 P.3d 395 (2003)	5, 16
<u>Thiringer v. American Motors Insurance Co.,</u> 91 Wn.2d 215, 588 P.2d 191 (1978).....	6, 7, 8, 12, 15, 18
<u>Tolson v. Allstate Ins. Co.,</u> 108 Wash.App 495, 32 P.2d 289 (2001).....	8, 13, 14, 15
<u>Price v. Farmers Insurance Company,</u> 133 Wn.2d 490, 494, 946 P.2d 388 (1997..).....	6, 10, 11
<u>Boyd v. Davis,</u> 75 Wash.App 23, 25-26, 876 P.2d 478 (1994) aff'd 127 Wn.2d 256, 897 P.2d 1239 (1995).....	12
<u>Silver v. State Farm Mutual Automobile Insurance. Co.,</u> 96 Wn.App 31, 978 P.2d 518 (1999).....	12
<u>Weyerhauser v. Commercial Union Insurance Co.,</u> 142 Wn.2d 654, 672, 15 P.3d 115 (2000).....	12
<u>Safeco Insurance v. Woodley,</u> 150 Wn.2d 765, 82 P.3d 660 (2004).....	16
<u>Winters v. State Farm Insurance Co.,</u> 144 Wn.2d 869, 31 P.3d 1164 (2001).....	16, 17
<u>Christman v. General Constr. Co.,</u> 2 Wash.App 364, 467 P.2d 867, review denied, 78 Wn.2d 994 (1970).....	17
<u>Peterson v. Safeco Ins. Co. of Illinois,</u> 95 Wash.App 254, 976 P.2d 632 (1999).....	18, 19
<u>Mahler v. Szucs,</u> 135 Wn.2d 398, 957 P.2d 632.....	8, 15

I. ASSIGNMENTS OF ERROR

Assignment of Error

Whether the trial court erred on 2/4/2005 when it entered the Judgment Summary Reducing an Underinsured Motorist [UIM] Arbitration Award to Judgment that included a full Personal Injury Protection [PIP] Offset of \$8,256.

Issue Pertaining to Assignment of Error

Whether, a UIM and PIP coverage, the insurer is entitled to a full PIP offset less its pro rata share of attorney fees and costs where the 70% at fault insured was fully compensated for his 30% share of damages through his UIM coverage.

II. STATEMENT OF THE CASE

Statement of Facts

This case arises out of an auto-pedestrian accident that occurred on April 4, 2001 in Tacoma, Washington. The Appellant here, Kevin Sherry, was attempting to perform something called a "jackass" stunt that he had seen on a cable television show called "Jackass", starring Johnny Knoxville. 2/4/05 RP (Appendix) at 12. According to the arbitrator who conducted the UIM hearing and decided the claim, Sherry stood on the street with the sun behind him as a car approached from about 200 yards away. A friend was

driving the vehicle. Sherry attempted to jump onto the hood of the car in full view of the vehicle approaching at 35 miles per hour but the car was not able to stop. CP 27; 2/4/05 RP at 13 (Appendix). As the arbitrator concluded, "there is no reason he could not have easily avoided any impact by simply stepping out of harm's way." CP 27. The driver of the car was not insured. Sherry suffered serious injuries that required surgery. CP 1-2.

Sherry was insured through Financial Indemnity Company ["FIC"], policy number 8525066. CP 5-23. He applied for and received PIP benefits of \$10,000 for medical benefits and \$4,600 for income continuation benefits through the respective PIP provisions in his policy. CP 2, 19-20 (up to \$10,000 in "medical and hospital benefits" and up to \$10,000 for "income continuation benefits"). On February 12, 2002, Sherry made a written demand for UIM arbitration under the arbitration provisions of his FIC policy. CP 22 (arbitration permitted where parties do not agree on amount of damages under UIM coverage), 24 (Notice of Intent to Arbitrate).

Sherry incurred a total of \$53,127.92 in medical expenses. CP 28. He did not work after the accident and at arbitration claimed that he had a lost earning capacity based on a job that would have earned him \$10.00 per hour. 2/4/05 RP at 11.

The UIM Arbitration was conducted on November 5, 2004 by John Cooper of the Washington Arbitration and Mediation Service. CP 2, 27-28. The arbitrator found Sherry 70% at fault for his own injuries, stating that he must “bear the lion’s share of the fault.” CP 27-28. He awarded the full amount of Sherry’s \$53,127.92 in medical specials and \$90,000 in general damages, reduced by 70% for Sherry’s comparative fault. CP 28. On December 23, 2004, Mr. Cooper issued an “Arbitration Decision & Award” in the total amount of “\$42,938.38, inclusive of all special damages and after reduction for 70% comparative fault.” CP 26.

Sherry’s insurance policy clearly stated in the “Underinsured Motorist Coverage” section that FIC would “first credit against the insured person’s damages [a]ny amounts paid under other Parts of this policy.” CP 20. However, on January 10, 2005, David Middleton, Sherry’s attorney, wrote to FIC’s attorney to notify her that he would be contesting the extent of FIC’s subrogation interest because “Kevin Sherry has not been made whole.” CP 42. He agreed to a limited offset for only the \$10,000 medical portion of the PIP payout (since allegedly Sherry did not recover for wage loss). He reduced the offset by 70% (to \$3,000) prior to calculating the pro rata share reduction for attorneys’ fees. CP 42. He agreed to a

PIP offset of \$1,696.36 that included a pro rata attorney fee reduction of \$1,303.63 based on a 6.987% ($\$3,000/\$42,938.38$) share of the full fee. CP 42.

Statement of Procedure

On January 14, 2005, Sherry petitioned the Pierce County Superior Court for an Order Confirming the Arbitration Award and for Entry of Judgment pursuant to the provisions of RCW 7.04.150. CP1-3, 29 [RCW 7.04.150]. Sherry asked for an order in the full amount of the UIM Arbitration Award, \$42,938.38, less costs allowed under RCW 7.04.190 and RCW 4.84, et.seq. CP 3-4. On January 19, 2005, Sherry filed a Notice of Presentation to set the hearing date for entering the order and the judgment on January 28, 2005. CP 32-33.

On January 25, 2005, the undersigned attorney for FIC wrote to arbitrator John Cooper to request that he decide the amount of the PIP offset to be deducted from his original award. CP 45-57. FIC would not agree to reduce the PIP amount by the \$4,600 lost earnings. CP 45. FIC asked Mr. Cooper to calculate the offset as \$8,256.00, the full amount of the PIP payout (\$14,600) less the pro rata attorney fee reduction of \$6,344.00 based on a 34% ($\$14,600/\$43,938.38$) share. CP 45.

On January 26, 2005, FIC also filed an objection with the trial court to Sherry's proposed offset. CP 48-52. FIC argued that because Sherry was an at-fault insured, FIC was entitled to an offset (pursuant to the explicit terms of his contract) for all of the amounts it paid for Sherry's medical specials and wage loss. CP 50. It urged the court to reduce the arbitrator's award by the amount of \$8,256 to reflect the PIP offset and that the judgment should therefore be \$34,682.38. CP 51.

After rescheduling the presentation of the judgment to February 4, 2005 to give the arbitrator an opportunity to respond, Sherry submitted a reply to FIC's objection to the amount of the judgment. CP 60-65. Sherry waived any objection to the court's determining the PIP offset amount in the judgment proceeding rather than bringing a separate action to determine the disputed PIP amount. CP 61-62. Sherry again argued that he was entitled to a 70% reduction in the PIP amount that he claimed could only include the \$10,000 paid out for medical specials. CP 64. He asserted that he was not "fully compensated" as required under Hamm v. State Farm, 151 Wn.2d 303, 88 P.3d 395 (2003). Because he was allegedly not "fully compensated," Sherry argued

that he was entitled to a reduction in the PIP offset equal to his comparative fault. CP 64.

On February 3, 2005, arbitrator Cooper declined to render a decision on the amount of the PIP offset, stating that his jurisdiction was limited to determining liability and damages. 2/4/05 RP (Appendix) at 3. Mr. Cooper stated that he also believed that the court similarly had no jurisdiction under RCW 7.04.150 unless a separate declaratory judgment action was brought to decide the offset question under Price v. Farmers Insurance Co., 133 Wn.2d 490, 946 P.2d 388 (1997) (parties' dispute over PIP offset must be decided by agreement or under action separate from proceeding to confirm arbitration award brought under RCW 7.04.150 and RCW 7.04.190). Id at 3, 9.

A hearing was held on February 4, 2005. 2/4/05 RP (Appendix). The parties agreed to have the court determine the PIP offset dispute. Id at 3, 19-20 (the parties agree to the court's jurisdiction to decide the matter to avoid a supplemental proceeding under Price).

Sherry's attorney argued that because he did not "receive his full damages" he was not "fully compensated" under Thiringer v. American Motors Insurance Co., 91 Wn.2d 215, 588 P.2d 191

(1978). 2/4/05 RP at 3-4. He agreed with the court, however, that his "full damages" were \$142,000 decreased by 70% for contributory negligence. Id at 4. He argued that "full compensation" under Thiringer "means his damages reduced by his comparative fault." Id at 5, 17 ("what makes him whole is making sure that any reimbursement has the same application of comparative fault as awarded"). He argued that because Sherry only recovered 30% of his medical specials, the PIP offset should be limited by that percentage as well. Id at 6.

Debora Dunlap argued on behalf of FIC that Sherry "has had his full recovery." 2/4/05 RP at 10. The policy limits of his UIM coverage are clearly \$100,000. Id.; CP 11. Sherry recovered over \$42,000, an amount that is clearly "fully compensated" under the terms of his UIM coverage limits. 2/4/05 at 10-11. She also argued that under the clear terms of the policy, FIC was entitled to reimbursement not only for medical expenses but also for the \$4,600 wage loss paid out for a year and a half on the understanding that Sherry was earning \$10.00 per hour and was not being paid. Id at 11. Sherry argued for wage loss at the arbitration but the arbitrator did not specify awarding such. Id at 12. However, the PIP reimbursement portion of the policy is clearly

valid and that Sherry did not explicitly recover wage loss has no bearing on whether FIC is entitled to reimbursement of the entire \$14,600 PIP offset. Id. She argued that FIC was entitled to its full offset amount under Tolson v. Allstate Ins. Co., 108 Wash.App. 495, 32 P.2d 289 (2001) (insurer entitled to full PIP offset where insured was “fully compensated” after receiving the full amount of the arbitration award and where he received the benefit of more PIP payments than what was due under the award). She also pointed out that the entire Mahler line of cases was based on the premises that only a “not-at-fault PIP insured” is entitled to “full recovery.” 2/4/05 RP at 16.

The trial court ruled in favor of FIC that it was entitled to take the entire offset of \$14,600. 2/4/05 RP at 20. He ruled that Thiringer did not apply to the facts presented since “it’s not a case where there is a \$100,000 policy and a \$500,000 injury.” Id. He ruled:

This is a case where the limits are there and the arbitrator reduced the award for contributory negligence, and this is a contractual arbitration. The contract says what it says, and I feel bound to follow that.

Id. The court entered a Judgment in the amount of \$34,682.38 plus a \$110.00 filing fee, for a total judgment of \$34,792.38. 2/4/05 RP at 21; CP 94-95. The Notice of Appeal was timely filed on March 4, 2005. CP 97. A satisfaction of judgment was filed on February 22, 2005. CP 104-105.

III. ARGUMENT

A. **The Court Lacks Jurisdiction Because of Sherry's Acceptance of the Judgment and Execution of a Satisfaction of Judgment.**

Sherry Agreed to Be Bound by the Trial Court's Ruling on the PIP Offset and Cannot Now Complain That He is Entitled to a Change in an Amount That He Explicitly Agreed To and Accepted.

The judgment that is appealed from in this case was rendered as a confirmation of a UIM arbitration award under RCW 7.04.150. That statute states in pertinent part:

At any time within one year after the award is made ... 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 (emphasis added).

Neither RCW 7.04.160 (limited grounds for vacating arbitrator's award) nor RCW 7.04.170 (limited grounds for modifying or correcting arbitrator's award) apply to a situation that solely

involves a dispute over the amount of a PIP offset. Price v. Farmers Insurance Co., 133 Wn.2d 490, 494, 946 P.2d 388 (1997). Therefore, the trial court in this situation was bound to enter the award as it was presented by the express terms of the statute.

The Washington Supreme Court has expressly held that a trial court entering a judgment under RCW 7.04.150 has no jurisdiction to decide a dispute between the parties over the amount of a PIP offset. Price, 133 Wn.2d at 498 (coverage questions are beyond the jurisdiction of the superior court to determine since they were not submitted to the arbitrator for disposition). It held that the court “exercises a mere ministerial duty to reduce the award to judgment.” Id.

To resolve a PIP offset dispute, the Price court held that:

...the parties must either resolve the remaining PIP offset coverage dispute by agreement or commence a separate action under the superior court’s general jurisdiction to determine the amount and propriety of the claimed PIP offset and enter the corresponding monetary judgment.

Price, 133 Wn.2d at 502. In this case, FIC attempted to convince the arbitrator to resolve the PIP offset dispute, but he refused to do so. Pending entry of the judgment, Sherry explicitly asked the court to resolve the PIP offset dispute and FIC explicitly agreed to have

the court resolve the question rather than going to the expense of filing a separate declaratory judgment action. 2/4/05 RP (Appendix) at 19-20 ("we are in agreement that you should decide this rather than do a different deck[sic] action").

The parties agreed to have the trial court decide the PIP offset dispute even though that court had no jurisdiction to do so. In its Reply Brief filed to the trial court, Sherry explicitly agreed to be bound by the trial court's ruling:

Claimant recognizes that this Price holding would require a second superior court action, and for that reason waives any objection to the court going behind the arbitrator's award in this case to determine the amount and propriety of the claimed PIP offset (emphasis added). CP 61-62.

Significantly, Sherry agreed to accept the amount of the judgment that was entered and did in fact receive the amount agreed to in settlement. CP 98-99 (Application to Disburse Funds) and 104-105 (Satisfaction of Judgment). He cannot now complain about the amount that was awarded without filing a separate declaratory judgment action under the Supreme Court's ruling in Price. This appeal can be dismissed for lack of jurisdiction alone.

Should this court decide to determine this dispute, it must accept the face of the arbitration award as Sherry's "total damages." Boyd v. Davis, 75 Wash. App. 23, 25-26, 876 P.2d 478 (1994), *aff'd*, 127 Wn.2d 256, 897 P.2d 1239 (1995). Its review is limited to determining whether the trial court erred in reducing the award by the disputed amount. Silver v. State Farm Mutual Automobile Insurance Co., 96 Wash.App. 31, 978 P.2d 518 (1999)

B. Sherry is Not Entitled to a Double Recovery of His Medical Expenses and Lost Income Benefits

The law of damages prohibits multiple or double recovery. Weyerhauser v. Commercial Union Insurance Co., 142 Wn.2d 654, 672, 15 P.3d 115 (2000). Under no circumstances is an insured entitled to double recovery because his insurance company voluntarily advanced payment for his medical bills. That is the antithesis of justice. This is especially true in an insurance subrogation or offset case which is to be resolved "upon a considerable of the equitable factors involved, guided by the principle that a party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery." Thiringer v. American Motors Insurance Co., 91 Wn.2d 215, 220, 588 P.2d 191 (1978).

The court of appeals decision in a similar case is the basis for the outcome in this one. Tolson v. Allstate, 108 Wash.App. 495, 32 P.3d 289 (2001). In Tolson, an injured insured sought an arbitrator's award under the UIM provisions of his policy. His insurer, Allstate, paid out \$8,504.70 in medical payments under his policy's PIP provisions. The arbitrator awarded \$3,418.30 in medical specials, \$642.24 in wage loss and \$15,000 in general damages, for a total award of \$19,060.54. Tolson, 108 Wash.App. at 497.

The parties submitted the issue of the PIP offset to the trial court, as the parties have agreed to do here. Tolson, 108 Wash.App. at 499. The trial court ruled, as the trial court similarly ruled here, that Allstate was entitled to an offset of \$8,504.70 equal to the entire amount of the payments paid out under the PIP provision of Tolson's policy. Id. The contract language allowing for the offset (identical to the language at issue here) in Tolson was held to be "valid and enforceable." Id.

Tolson argued, as Sherry argues here, that a full offset is "permissible only when the offset leaves the insured fully compensated." Tolson, 108 Wash.App. at 499-500. The Tolson court explicitly held, as the trial court did here, that Tolson

... has failed to demonstrate that he will not be fully compensated. He will receive the full amount of the arbitration award.

Tolson, 108 Wash.App. at 500. The Tolson court went further, however, to say that Tolson was not entitled to a double recovery of his medical benefits: He benefited from his insurer's payments by nearly \$5,000 more than what was actually due under the arbitration award. The court further stated:

Reimbursing Allstate for its overpayment does not change the fact that Tolson will be fully compensated for the medical specials found to be attributable to the accident, as well as the full amount of general damages.

Id. The Tolson court concluded that the trial court properly allowed the insurer to offset the entire amount of PIP payments previously paid.

As in Tolson, the trial court also properly allowed FIC to an offset equal to the entire amount of its PIP payments. No reduction for comparative fault is anticipated or addressed in the contract's language concerning amounts to be credited to the UIM award. Here, as in Tolson, even if the arbitrator did not make an award for wage loss (as the arbitrator in Tolson reduced the medical specials by \$5,000), Sherry received the benefit of the lost income payments

by \$4,600. As in that case, Sherry will be “fully compensated” to the amount of his arbitration award. This court can uphold the trial court’s decision as to the offset on the basis of the holding in Tolson alone.

C. Sherry Was a Fully Compensated At-Fault Insured and Is Not Entitled to a Reduction in FIC’s PIP Offset.

The basic premise of the PIP offset laws was established in Washington in Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998). What was clearly established in Mahler is that an insured must be made whole in a trial or in an arbitration proceeding against either the tortfeasor or his own carrier before any kind of subrogation or offset is permitted. Mahler, 135 Wn.2d at 417.

This “rule of full compensation” is actually derived from a Supreme Court ruling twenty years earlier. Thiringer v. American Motors Insurance Company, 91 Wn.2d 215, 219, 588 P.2d 191 (1978), cited in Mahler at 417. As stated in Thiringer and as quoted in Mahler, the policy behind the rule is:

This rule embodies a policy deemed social desirable in this state, in that it fosters the adequate indemnification of **innocent accident victims**.

Mahler, 135 Wn.2d at 417 (emphasis added), quoting from Thiringer, 91 Wn.2d at 220. The “general public policy of full

compensation of the insured” is tempered by the principle that “the insured ... may not knowingly prejudice the right of the insurer to be reimbursed.” Mahler, 135 Wn.2d at 418. It is a rule that is also derived from equitable principles. Mahler, 135 Wn.2d at 411 (“subrogation is an equitable doctrine the essential purpose of which is to provide for a proper allocation of payment responsibility”) and 417 (insurer’s rights to reimbursement created in both contract and equity).

In three cases decided since Mahler, Washington courts have addressed the “rule of full compensation” as applied to an insurer’s subrogation or offset interest **only** in the context of a no-fault or innocent insured. Hamm v. State Farm, 151 Wn.2d 303, 88 P.3d 395 (2004) (no-fault driver injured by an uninsured motorist); Safeco Insurance v. Woodley, 150 Wn.2d 765, 82 P.3d 660 (2004) (no-fault driver injured by an underinsured motorist); Winters v. State Farm Insurance Co., 144 Wn.2d 869, 31 P.3d 1164 (2001) (“fault-free insured” was hit head-on by an underinsured driver and then rear-ended by an uninsured driver).

None of the above cases addressed the situation that is presented here, where the injured insured has been declared to be

responsible for the “lion’s share” of the fault in a UIM claim. In the Court of Appeals ruling in Winters, the court stated:

Nothing in this opinion considers or addresses the at-fault PIP insured. Moreover, we assume throughout our opinion that the applicable insurance policy provides, in one form or another, for reimbursing PIP payments by deducting such payments from a UIM award.

Winters v. State Farm, 99 Wash.App. 602, 613 n.31, 994 P.2d 881 (2000). Therefore, since the “rule of full compensation” is governed by equitable principles, to be entitled to a reduction of an offset, the insured must not be at fault. Christman v. General Constr. Co., 2 Wash. App. 364, 467 P.2d 867, review denied, 78 Wn.2d 994 (1970) (equitable remedies are available only to innocent parties). That is not the situation here. Winters, 144 Wn.2d at 875 (full compensation rule based on “long established equitable principles”).

In addition, none of the cases cited above actually define what “full compensation” means in this context since of course none of them addressed a situation involving a 70% at fault insured. It is, however, clear from the language of the cases that the purpose of the “rule of full compensation” is to restore the no-

fault insured "to his or her pre-accident position." Thiringer, 91 Wn.2d at 219.

Finally, at least analogous one case has made it clear that the question of whether an insured has not been "fully compensated" does not arise at all until the assets, or at least those assets readily accessible through a liability policy, have been exhausted. Peterson v. Safeco Ins. Co. of Illinois, 95 Wash.App. 254, 976 P.2d 632 (1999).

In Peterson, an injured plaintiff settled with a tortfeasor's carrier for \$20,000 where the carrier had \$250,000 policy limits with which to settle. The tortfeasor's carrier also paid out an additional \$3,997.64, the exact amount of medical expenses paid out under his PIP coverage. Peterson claimed that he was not "fully compensated" because it was necessary for him to pay his attorney fee out of the \$23,997.64 settlement. He claimed that he was therefore not required to reimburse his PIP insurer for the medical expenses paid. He based this argument, as Sherry does here, on language found in Thiringer. Peterson, 95 Wash.App. at 260. The court rejected this argument and pointed out that, unlike Thiringer, Peterson had not exhausted all of the policy limits potentially available to pay for his damages. Therefore, since the assets of

the tortfeasor's carrier had not been exhausted, Peterson was "fully compensated" and his PIP carrier was entitled to a full reimbursement of its payout for his medical expenses. Peterson, 95 Wash.App. at 264-265 (reversing trial court's denial of insurer's right to recover PIP payments).

In this case, Sherry had \$100,000 in UIM coverage. His total award at arbitration (before FIC's offset) was \$42,938.38. Sherry was clearly "full compensated" as that term is defined under Washington law. There is no question that his UIM coverage is sufficient to pay for the total award. This is completely different from cases where there are insufficient assets, insurance or otherwise, to "fully compensate" a no-fault injured person. As the trial court said in its oral ruling, "It's not a case where there is a \$100,000 policy and \$500,000 injury." 2/4/05 RP at 20.

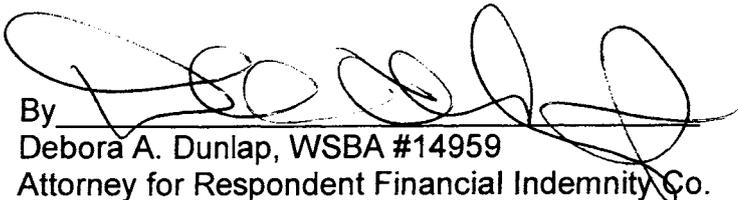
IV. CONCLUSION

Mr. Sherry has for years had the benefit of the \$14,600 in PIP payments that were paid on his behalf by Financial Indemnity Company in the summer of 2001. FIC made these payments regardless of fault. Had he not had that coverage and had only pursued the tortfeasor, he would have had no such benefits. The arbitrator's decision awarded the full amount of the medical

expenses and the trial court affirmed that award, as it was required to do under RCW 7.04.150. Sherry's original PIP wage payments of \$4,600 were made to allow him to continue a minimal level of income while he recovered from his injuries. Under the Arbitrator's Award the lost income was either included in the general and special damages or Sherry was not entitled to such. Either way the wage payments should be a full offset. That Kevin Sherry was determined to have contributed to the "lion's share" of the accident has no bearing on the amount of the offset that FIC is entitled to under his policy. Sherry was "fully compensated" and the trial court correctly ruled that FIC was entitled to its full offset under the terms of the contract. The trial court's award should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of September, 2005.

GULLIFORD, McGAUGHEY & DUNLAP, PLLC

By 
Debora A. Dunlap, WSBA #14959
Attorney for Respondent Financial Indemnity Co.

APPENDIX

Transcript of Court Proceedings 2/4/05

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

KEVIN SHERRY, a single man,)
Appellant,)
vs.) No. 05-2-04126-4
FINANCIAL INDEMNITY COMPANY,) COA 32946-8-II
a foreign insurer,)
Respondent.)

COPY

VERBATIM REPORT OF COURT PROCEEDINGS

BE IT REMEMBERED that on the 4th day of February, 2005, the following proceedings were held before Pro Tem Judge Fredrick Hayes in the Superior Court of the State of Washington, in and for the County of Pierce.

The Appellant was represented by his attorney, DAVE MIDDLETON, 533 South 336th Street, Suite A, Federal Way, Washington 98003.

The Respondent was represented by their attorney, DEBORAH DUNLAP, 2135-112th Avenue NE, Suite 100, Bellevue, Washington 98004.

WHEREUPON, the following court proceedings were had, to wit:



Reported By:
Jami R. Jacobsen, CCR#2179

1 COURT PROCEEDINGS

2 *****

3
4 THE COURT: Sherry versus Financial Indemnity.5 Good morning. I have reviewed the working papers, but
6 if there is anything in the file that is not included in the
7 working papers, please let me know, and I'll do that as well;
8 otherwise I'm ready to go.

9 MR. MIDDLETON: I don't think there is, Your Honor.

10 There should be a -- I'm Dave Middleton. I'm here for
11 Mr. Sherry. There should be a petition from me as well as a
12 reply to Ms. Dunlap's response, and --

13 THE COURT: There is a reply.

14 MR. MIDDLETON: Okay.

15 THE COURT: The reply got here February 1st. So this
16 is your motion, I believe, Ms. Dunlap?

17 MS. DUNLAP: No. It is his motion.

18 THE COURT: That is right. Okay.

19 MR. MIDDLETON: Your Honor, I filed a petition to enter
20 judgment on the arbitration award, and this is really an offset
21 issue at this point. There is no dispute as to the amount of
22 the award and the fact that it doesn't discuss PIP
23 reimbursement.24 Ms. Dunlap, between the time that this was set for
25 hearing -- this was actually set for a hearing last Friday, and

1 we continued it based on her schedule and sent the matter to
2 the arbitrator, and the arbitrator said, "Under *Price* and under
3 *Silvers versus State Farm* I don't have the authority to
4 determine the offset, the PIP reimbursement. That is something
5 for the Court to do."

6 THE COURT: He has said that?

7 MR. MIDDLETON: He has said that, and unfortunately the
8 letter isn't in my notebook, but he faxed a letter on wednesday
9 indicating that this is -- that he doesn't believe he has the
10 authority to make the decision on offset.

11 Now, under *Price*, theoretically there is supposed to be
12 a declaratory relief action separate from the petition. I'm
13 trying to -- I'm hoping that we can avoid that just by giving
14 you the opportunity, Your Honor, to determine the offset. And
15 the offset itself is -- it's a *Thiringer* and *Mahler* and *Hamm*
16 issue. The arbitration award in this case set out the damages
17 for Mr. Sherry at \$90,000 for general damages, and \$52,000 and
18 change -- right around that number -- for specials, a total of
19 \$142,000. Mr. Sherry was found to be 70 percent at fault in
20 this motor vehicle versus pedestrian accident.

21 In the award, there is no discussion -- and we didn't
22 present any evidence regarding lost wages. The PIP itself paid
23 \$10,000 for medical bills, and \$4,600 for lost wages, but the
24 first question we need to ask ourselves is: Was Kevin Sherry
25 -- or is Kevin Sherry fully compensated by the \$42,000? And I

1 -- the way I read *Thiringer*, what it says is that -- it says
2 that he has a right to expect payments promised under the PIP
3 coverage -- it's a different coverage besides the UIM -- and
4 until he receives his full damages, he isn't fully compensated.
5 So I think that under *Thiringer* you can decide here today that
6 there is no offset.

7 THE COURT: What are his full damages?

8 MR. MIDDLETON: His full damages are \$142,000.

9 THE COURT: But the arbitrator decreased the general
10 damages -- or decreased the whole works by 70 percent?

11 MR. MIDDLETON: By 70 percent.

12 THE COURT: So then the issue is, what are the full
13 damages. I know what -- I would say the same thing if I were
14 you, but isn't there an argument to be made that damages are
15 the award minus the offset -- or the -- I won't use that word
16 -- minus the deduction for contributory negligence?

17 MR. MIDDLETON: Absolutely. So that the analysis
18 simply doesn't stop with, he wasn't fully compensated under
19 *Thiringer*. It's kind of interesting because I was at a Whistle
20 Insurance Law seminar a week ago -- or I guess it was two weeks
21 ago now -- and I, based on this issue, had -- well, there has
22 been an ongoing debate among the Whistle Eagles about what his
23 full compensation was under *Thiringer*, and you know, I think
24 there is an argument both ways.

25 But I think as we sit here today, Kevin Sherry had a

1 severe injury, and he -- his damages were established at
2 \$142,000. So I think there is an argument that he isn't fully
3 compensated.

4 THE COURT: Isn't *Thiringer* -- I don't recall the
5 language -- but isn't the theory that the insured -- excuse me
6 -- the insurance company is only entitled to recover at the
7 same rate that the insured is entitled to recover?

8 MR. MIDDLETON: Well, I think that if you find -- that
9 is the next step. If you find that Mr. Sherry was fully
10 compensated -- that is, when *Thiringer* talks about full
11 compensation, it means his damages reduced by his comparative
12 fall -- then the next step is to say, okay, what is, then --
13 what is the insurer entitled to get back?

14 THE COURT: Right.

15 MR. MIDDLETON: And what *Thiringer* says -- the general
16 rule is that, "while an insurer is entitled to be reimbursed to
17 the extent that its insured recovers payment for the same loss"
18 -- I have misread that. The general rule is that, "while an
19 insured is entitled to be reimbursed to the extent that its
20 insured recovers payment for the same loss from a tort-feasor
21 responsible for the damage, it can only recover the excess over
22 full compensation."

23 So the insurer is entitled to recover to the extent
24 that that tort-feasor recovers. So the first part of that
25 analysis is to the extent of how does that limit the

1 reimbursement? well, first we didn't ask for -- we weren't
2 awarded any wage loss, so they don't get reimbursement on the
3 \$46,000.

4 The second part is, what do they get reimbursement for?
5 They only paid \$10,000 for medical specials. Now, by the same
6 question that you are giving me on the first part of *Thiringer*,
7 was there full compensation, I think we apply that to the
8 second part; and that is, did we get back \$10,000? Absolutely
9 not. What we got back was 30 percent of that \$10,000 or
10 \$3,000. So the total reimbursement amount would be \$3,000.
11 But now we have *Hamm*, which was decided this year, which says
12 that, "Hey, just because an insured buys UIM coverage and PIP
13 coverage from the same insurer, that doesn't mean that we
14 ignore *Mahler*. We have to apply the *Mahler* calculation to the
15 PIP reimbursement for the same carrier."

16 So if you -- I went ahead and calculated on that \$3,000
17 how much the insurer is on the hook for as far as contributing
18 to the attorney's fees, which was \$1,304.24, and so as a result
19 the reimbursement out of that \$3,000 is \$1,695.76, which
20 reduces the total judgment or the total award down to
21 \$41,242.62, which reflects several things. It reflects the
22 fact that we didn't recover the lost wages in the UIM setting.
23 It reflects that out of the \$10,000 of medical bills that
24 Financial Indemnity has already paid, that they only get back
25 30 percent of that because our guy was 30 percent at fault.

1 And now this is a -- I hesitate to use the word "fair
2 result," but this is a fair result because what Ms. Dunlap has
3 said in her response is, "Hey, we don't want to have a double
4 recovery." well, there isn't a double recovery here. They are
5 getting back exactly what was awarded by the arbitrator. Is
6 that fair? well, they have already started a subrogation
7 action against the tort-feasor to recover the monies that were
8 paid. They have every ability to go sue her and get back their
9 wage loss and get back whatever they paid out under these
10 policies. Thank you.

11 THE COURT: Let me do a little detail stuff here.
12 Ms. Dunlap objects to an item on your -- I guess in your costs.
13 You asked for a Dr. Franceschina's bill?

14 MR. MIDDLETON: \$194 visit, yeah. And in my
15 supplemental declaration regarding the costs, that was a visit
16 that I -- one thing that has happened here is --

17 THE COURT: Was that awarded by the arbitrator?

18 MR. MIDDLETON: No. No costs have been awarded at all
19 by the arbitrator in this matter.

20 THE COURT: well, this wouldn't be part of your
21 medicals that you are asking for?

22 MR. MIDDLETON: No. It wasn't a medical. It wasn't
23 for treatment. I sent Mr. Sherry back to Dr. Franceschina
24 immediately before Dr. Franceschina's preservation deposition
25 so that Dr. Franceschina would know what condition he was

1 currently in at the time of his deposition. It was a
2 litigation expense.

3 THE COURT: I see. Thank you.

4 Okay, Ms. Dunlap. Good morning.

5 MS. DUNLAP: Thank you, Your Honor. Just one note on
6 that while we're talking about Franceschina. If you are
7 referring your client, the injured party, to his chief treating
8 physician because he hasn't seen her for a couple of years for
9 an evaluation, checking him over, figuring out where he's at
10 and talking to him about his present condition before a
11 perpetuation deposition, we're after treatment. We're not just
12 after litigation. That should have been submitted at
13 arbitration, I would say.

14 Now, as to this matter being before the judge, clearly
15 *Price* has set forth a very unique anomaly for insurance law in
16 this particular application.

17 THE COURT: *Price* is the Farmers case?

18 MS. DUNLAP: *Price* --

19 MR. MIDDLETON: Price versus Farmers, Your Honor.

20 MS. DUNLAP: Yeah, Price versus Farmers and Silvers
21 versus State Farm, both of those cases go to UIM arbitration.
22 The UIM arbitrator, of course, cannot be presented with any
23 policy limits information. That would be clearly inappropriate
24 and bias the whole proceeding. So you can't argue about what
25 your PIP is and how much offset you won at the arbitration

1 hearing. And then now *Price* says, "Hey, you can't even go back
2 afterwards and address the issue with the arbitrator unless you
3 are going to stipulate to it." Apparently we have no
4 stipulation here.

5 So the arbitrator rightfully decided -- sent a letter
6 yesterday or the day before -- under *Price* saying, "I can't do
7 anything. You know, what your option is is you have to file a
8 deck action." So what we are left with is this Court -- unless
9 under *Price* this Court has no jurisdiction whatsoever to decide
10 the offset.

11 So what Mr. Middleton says, "well, you know let's
12 expedite the process because in *Price*, Tolnage (phonetic) makes
13 an excellent point by saying in his descent, "what the heck are
14 we talking about? why would we require a whole subsequent
15 proceeding? This is ridiculous."

16 So we're in the mind of that as well, as long as the
17 Judge feels that there is adequate record here. Because to
18 file a deck action and go through some other proceedings, it
19 would be much more involved, much more costly, and the parties
20 are not interested in that, but much more involved.

21 So while Financial Indemnity Company will agree to have
22 the offset issue presented here and decided in this, rather
23 than as opposed to a subsequent declaratory action with a
24 potential right to a jury, the caveat is we want to make sure
25 that you have everything in front of you, so that is the unique

1 anomaly of why we're in here.

2 THE COURT: Well, are you presenting it for a decision
3 or not, Ms. Dunlap?

4 MS. DUNLAP: Well, let me get to that because some of
5 the explanation -- I think we don't need to -- you know, I
6 think you've got everything in front of you that you need to
7 decide here, and predominantly I make that argument under the
8 *Tolson* case. But what we're arguing about here is the issue of
9 the offsets and how we get to this scenario of whether there
10 should have been any reimbursement for the wage loss. You
11 didn't get the wage loss. You know, how do you get the
12 calculations that you do.

13 So getting to go the *Thiringer* argument, that is a red
14 hearing. That is an argument that attorneys will make and try
15 not to make a red face because *Thiringer* clearly does not apply
16 here. That is not the case that we're looking at to apply the
17 standard.

18 Clearly Mr. Sherry has had his full recovery. He's
19 bound by the terms and conditions of the policy. Exhibit A of
20 the plaintiffs initial materials, the petition before the
21 court, spells out very clearly that the policy limits are
22 \$100,000. You make a recovery of \$42,000 -- I mean, even as
23 attorneys who are terrible at math -- me in particular -- we
24 can figure out that that is full compensation; 42 into 100.

25 Exhibit A of the policy, part three, involves the UIM

1 coverage, and under the terms of the policy that he must abide
2 by are the terms that Financial Indemnity Company will pay
3 bodily injury caused by the accident. And then just under
4 there it says, "To determine amounts payable" -- what would be
5 payable under this UIM action would be they will first credit
6 the insured person's damages the following, and then Item 3 is:
7 "Any amounts paid under parts of this policy."

8 "So before you get to your \$42,000, Mr. Sherry, you
9 have to address our \$14,600 that we paid under the PIP portion
10 of the policy pursuant to your application for PIP medical
11 benefits paid at full policy limits of \$10,000 per your
12 attorney's submission of wage loss, not just to the carrier
13 directly under PIP securing \$46,000 in wage loss per
14 documentation showing he was making \$10 an hour at the time,
15 not just because your interrogatory answers again regurgitated
16 and asserted the same wage loss of \$31,000, but you also
17 presented that, Mr. Sherry, at the arbitration hearing in your
18 prehearing statement of proof," which should be in my
19 materials, but your materials look a little slight, so I'm
20 wondering if they are there.

21 Anyway, Mr. Sherry argued all the way through to
22 arbitration in his prehearing statement and attachments that
23 there was a wage loss; that for a year and a half of wage loss
24 at \$10 an hour he argued before the arbitrator this situation.
25 So the arbitrator, of course, heard on cross-examination, which

1 you are not privy to -- but the arguments that were presented
2 were, "well, Mr. Sherry, you can't seem to hold a job before
3 this accident or after this accident. You are still not
4 looking for a job. You're sitting at home watching TV all of
5 time at 23 years old." well, the arbitrator obviously bought
6 the defense's argument and awarded no wage loss because this
7 guy doesn't even try to go get a job.

8 So they are saying, "well, if I don't present it,
9 Judge, to the UIM arbitrator, then they don't get an offset."
10 well, that is lunacy. That standard doesn't apply here, and
11 the valid portion of the contract when we get an offset is well
12 established in case law, such as Tolson versus Allstate, as
13 cited in my materials, and Kenan (phonetic) versus Industrial
14 Indemnity and Shrader versus Grange. That is a valid portion
15 of the policy, and we get an offset.

16 Now, as to the amount of the offset, Plaintiff says
17 \$3,000. well, that is because what you are recovering under
18 the tort -- from the tort-feasor is the same pot of money.
19 This is PIP and UIM with Financial Indemnity Company, and we
20 are dealing with an automobile/pedestrian accident that is
21 outlined in the materials and well established by the Johnny
22 Knoxville jackass videotape attempt. That was the whole
23 defense here. And this kid is jumping onto a hood of a car
24 while it's moving. His friends are driving. His friends don't
25 come and testify; yet we have an action against his friends for

1 subrogation. We'll never see one dime out of that. These
2 young kids have no jobs and move from town to town.

3 So that is the gist of this case. Now, the arbitrator
4 reaches his decision. You can see it's outlined in his opinion
5 pretty much giving him every benefit of the doubt. Mr. Sherry
6 is 70 percent responsible for his own actions. He reaches that
7 conclusion because Mr. Sherry says, "I'm standing in the
8 roadway. For 200 yards I see this car approaching at 35 miles
9 an hour and not slowing, but I don't even step out of the way.
10 I'm only two feet off the curb, but I don't even step out of
11 the way." That is the factual scenario that goes behind --

12 MR. MIDDLETON: Liability has already been determined,
13 Your Honor.

14 THE COURT: Mr. Middleton, let her finish. I will give
15 you a chance to respond.

16 MS. DUNLAP: So under this scenario there is no wage
17 loss determined for a good reason by the arbitrator, and he
18 finds full medical expenses. "Okay. You had this surgery.
19 You get full medical expenses." So there is absolutely no
20 reason why Financial Indemnity Company doesn't get an offset of
21 \$14,600 that it paid.

22 *To1son* says very clearly, "We acknowledge that Allstate
23 made an extra payment by about \$5,000 more than was awarded by
24 the arbitrator, but Allstate gets to offset that entire
25 amount." Well, *To1son* decided in 2001 that -- if you are

1 looking at *Thiringer* that is decided in 1978. So *Tolson* is
2 thinking of *Mahler*, and it's pre *Hamm*, but clearly we're
3 dealing with the same line of cases. Does the insurer get an
4 offset? If so, how much?

5 So *Tolson* says, "You make the payments." In a UIM
6 arbitration matter you make the payments under PIP. You get
7 the offset whether or not it's allowable or not. You applied
8 for it. You received benefits. There is benefits received by
9 having these medical bills paid years ago. There is benefits
10 of him being a recipient of \$4,600 in wage loss. He gets the
11 benefit. Financial Indemnity Company gets to do the offset.
12 And if you don't, what you are doing is you are adding \$14,000
13 to the arbitration award of \$42,938.38 so that he comes out
14 with an arbitration result of fifty-seven-some thousand
15 dollars. Is that betterment? Absolutely it's betterment.

16 Financial Indemnity Company gets the entire offset of
17 \$14,600, which running through the calculations, we really
18 don't have a dispute here on the attorney's fees issue and what
19 the little calculations come out to. It's a matter of the net
20 whether Financial Indemnity Company, after those calculations,
21 get to offset \$8,256, and not \$1,696.36 proposed by the
22 claimants in this matter. And I think very clearly *Tolson* is
23 the case that gives you and mandates this appealable issue to
24 be decided in favor of Financial Indemnity Company here. Thank
25 you.

1 THE COURT: Ms. Dunlap, a couple of questions. The
2 arbitrator found that 30 percent of the medicals were as a
3 result of the tort-feasor's conduct. Fair enough?

4 MS. DUNLAP: Uh-huh.

5 THE COURT: So what is the legal position of Financial
6 Indemnity visa vie these two parties, the tort-feasor and
7 Mr. Sherry, the plaintiff or claimant; whatever you want to
8 call them.

9 MS. DUNLAP: Well, I see your position, and Financial
10 Indemnity Company stands in the shoes of the tort-feasor
11 because it is a UIM insurer. But what the problem is is that
12 Mahler versus Szucs, Woodly, and State Farm versus Hamm, all of
13 those cases very succinctly -- and *Winters* even points out in a
14 footnote, "When you are talking about a reimbursement of an
15 offset, you are talking about a not-at-fault insured." That is
16 not this insured. This insured was heavily at fault.

17 So if you are looking at those cases for what your
18 offset should be, there is no case law. Then that says you
19 even get that percentage of offset under *Mahler*. You are an
20 at-fault insured. You're trying to recover against your own
21 insurance company. I say it's truly a gray area, and I am not
22 going to say that they're not entitled to any *Mahler* fees. I
23 think for purposes of this argument you get your *Mahler*, but we
24 get our full offset.

25 THE COURT: The attorney's fees and costs, that is what

1 you are talking about?

2 MS. DUNLAP: Case law is very clear how they spell out
3 not-at-fault PIP insured. They want to make sure fault-free
4 plaintiffs make a full recovery, and absolutely that is not
5 this case.

6 Anyway, that gets to be a side. I say under *Tolson* you
7 don't have any latitude to reduce that \$14,600 because *Tolson*
8 says, "You paid it. You get it as an offset." And very
9 clearly it's a betterment if you don't. He is getting more
10 than the arbitrator is awarding here if there is no full
11 offset.

12 MR. MIDDLETON: Well, first of all, to deal with this
13 idea that we ask -- somehow asked for wage loss in the
14 arbitration, we did not. We made an argument regarding lost
15 earnings capacity as a general damage claim. We did not make a
16 wage-loss claim. No wage losses were addressed in the
17 arbitrators letter because no wage loss was claimed, so we did
18 not recover the \$4,600.

19 Any discussion of subrogation or reimbursement in
20 *Thiringer*, in *Hamm*, it's discussed to the extent that they
21 recover. Does the fact that someone has comparative fault mean
22 that all of that goes out the window and Financial Indemnity
23 gets their \$14,600 first? And I think the answer to that we
24 can find in *Hamm*. Actually it's in *Thiringer* because *Thiringer*
25 talks about -- *Thiringer* actually talks about a provision that

1 is very consistent with the one here, and that is, they're
2 going to -- the insurance company gets to reduce the UIM award
3 by the amount that it already paid out. And *Thiringer* says,
4 "No. We don't apply dollars first to the PIP reimbursement and
5 then to your general damages." What it says is as a public
6 policy we want to make that person whole first, and secondly
7 make the insurance company whole.

8 I actually quoted *Thiringer* at page 3 on my -- in my
9 brief, and the second part of it says it does not provide that.
10 "If the insured recovers less than its total damages from such
11 party, the amount recovered shall be allocated first to those
12 losses covered by the PIP endorsement, then to other damages
13 suffered by the insured. Such a provision, if it were
14 included" -- which is what they're arguing here -- "would be
15 obviously unfair since the insured pays a premium for the PIP
16 coverage and has a right to expect that the payments promised
17 under this coverage will be available to him if the amount he
18 is able to recover from other sources after diligent effort is
19 less than his general damages."

20 So the policy is, "We want to make this guy whole
21 first." Well, what makes him whole? What makes him whole is
22 making sure that any reimbursement has the same application of
23 comparative fault as awarded. So what the insurer wants is its
24 own double recovery here. They're entitled to be reimbursed to
25 the extent that we recovered it, and what we recovered was 30

1 percent of the damages -- 30 percent of the medical damages.

2 It seems to me that Ms. Dunlap is making an argument
3 that -- once again going back to this idea that the money comes
4 off the front of the UIM award, well *Hamm* actually addressed it
5 and said, "An insurance company providing both PIP and UIM
6 coverage to the same insured may receive its PIP reimbursement
7 after the insured is fully compensated through the use of an
8 offset against his UIM obligations."

9 And here is where they address this particular point.
10 "An insurance company may not, however, style this offset as a
11 reduction of any amount owed under the UIM coverage, rather
12 than a PIP reimbursement, in order to avoid paying a pro rata
13 share of the insured's legal expenses."

14 These cases all insist that an insured be treated
15 fairly. A recitation of the facts of this case is completely
16 unnecessary and is calculated to prejudice you against
17 Mr. Sherry. That matter has already been determined. He was
18 70 percent at fault for the accident. Judge, we want you to do
19 what is right; and that is, give us an offset for the amount
20 that we recovered, less comparative fault, less attorney's
21 fees.

22 MS. DUNLAP: I just have one final point if I can
23 address what was raised by Mr. Middleton.

24 THE COURT: Go ahead.

25 MS. DUNLAP: First of all, the citation that he just

1 read from *Hamm* is not applicable here because Financial
2 Indemnity Company does not seek to avoid any offset. And
3 secondly, the UIM proceedings clearly did ask for -- although
4 not awarded as a wage loss, but the coverage doesn't say wage
5 loss. It's a wage continuation or wage remuneration benefits.
6 He was unable to work after the accident as he could before the
7 accident. "An injured person may recover a reasonable value of
8 time earnings earning capacity."

9 Then they went on in their prehearing statement to say,
10 "Mr. Sherry will testify that a fair rate of pay for him would
11 have been \$10 an hour. He was completely unable to work as a
12 laborer for one and a half years after the accident." He very
13 clearly did ask the arbitrator for wage loss. Because it was
14 not awarded here, again it goes back to *Tolson*. I think the
15 Court is mandated under *Tolson* to do a full offset. Thank you.

16 THE COURT: All right. You both agree that this is
17 properly presented to me for a decision. Are you still both in
18 that situation? Because *Hamm* would seem to dictate a separate
19 action, and you both really want to avoid that. Was it *Hamm*?

20 MS. DUNLAP: *Price*, and we seek to avoid that. And
21 again, I reiterate that if you feel you need a supplemental
22 proceeding to have all of the materials in front of you, if his
23 prehearing statement of materials from the plaintiff is not in
24 front of you or you don't like my representation of it, then I
25 need to have the Court fully informed. But we are in agreement

1 that you should decide this rather than do a different deck
2 action.

3 THE COURT: All right. Well, I feel prepared to make a
4 decision. I just want to make sure procedurally that if the
5 Court of Appeals gets their hands on it they are wondering what
6 I'm doing now.

7 Well, as to the *Mahler* issue, it sounds like there
8 really isn't an issue there, and I will include Dr.
9 Franceschina's expense in there.

10 As to the other issues concerning the offset, the
11 medical and the wage loss, I am going to agree with the insurer
12 here. I do not like this result. And I just don't -- you read
13 all of these cases, and I just don't see any other solution. I
14 think *Thiringer* -- this is not a *Thiringer* situation. It's not
15 a case where there is a \$100,000 policy and \$500,000 injury.
16 This is a case where the limits are there and the arbitrator
17 reduced the award for contributory negligence, and this is a
18 contractual arbitration. The contract says what it says, and I
19 feel bound to follow that.

20 As I say, Mr. Middleton, I don't like it, but I feel
21 that is what I have to do. So I agree with Ms. Dunlap on the
22 offset issues, except as to *Mahler*, and attorney's fees and
23 costs the insurer will pay its proportion, which I think you
24 have agreed on the amounts, as I understand.

25 MR. MIDDLETON: You're holding, therefore, Your Honor,

1 that there is no reduction of the \$14,600?

2 THE COURT: That is exactly what I am holding. That is
3 a better way of saying it. I will be here one day next week,
4 and then I will be here on the 15th and possibly the 14th.

5 MS. DUNLAP: I heard.

6 THE COURT: All right. Otherwise they can get ahold of
7 me.

8 MR. MIDDLETON: I have a judgment, Your Honor. Can we
9 simply fill in Ms. Dunlap's numbers?

10 THE COURT: If you want to do that. I'll take a short
11 break, and you can work it out, if you can.

12 MS. DUNLAP: Sure.

13 THE COURT: Okay. Thank you both.

14 MR. MIDDLETON: Thank you, Your Honor.

15 (End of Court Proceedings.)
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

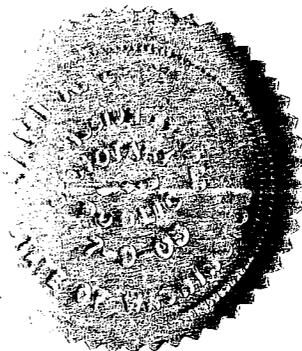
STATE OF WASHINGTON)
) ss
COUNTY OF KITSAP)

I, the undersigned officer of the Court, under my commission as a Notary Public in and for the State of Washington, hereby certify that the foregoing court proceeding was transcribed by me and thereafter under my direction;

That the transcript of the court proceeding is a full, true and correct transcript of the testimony, including objections, motions, and exceptions of counsel made and taken at the time of the foregoing examination and done to the best of my ability;

That I am neither attorney for, nor a relative or employee of any of the parties to the action; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS HEREOF, I have hereunto set my hand and seal this 25th day of April, 2005.



[Handwritten Signature]

NOTARY in and for the State of Washington, residing in Poulsbo.

FILED
COURT OF APPEALS
DIVISION II

05 SEP 23 PM 1:38

STATE OF WASHINGTON

BY _____
DEPUTY

No.: 32946-8

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

KEVIN SHERRY,

Appellant,

v.

FINANCIAL INDEMNITY COMPANY

Respondent.

DECLARATION OF SERVICE

Debora A. Dunlap, WSBA 14959
GULLIFORD, MCGAUGHEY & DUNLAP, PLLC
Attorneys for Respondent.

2135 112th Ave NE, Suite 100
Bellevue, WA 98004
Telephone: (425) 462-4000
Facsimile: (425) 637-9638

I, Kathren Manley, hereby declare under penalty of perjury and in accordance with the laws of the State of Washington as follows:

I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen, not a party to the within cause;

1. I am employed by the firm of Gulliford, McGaughey & Dunlap, PLLC. My business and mailing address is 2135 112th Ave NE, Suite 100, Bellevue, WA 98004.

2. On September 23, 2005, I caused to be served copies of the Brief of Respondent and this Declaration of Service on the following individuals via legal messenger:

David H. Middleton
David H. Middleton & Associates
533 S. 336th Street, Suite A
Federal Way, WA 98003
Attorneys for Appellant

Court of Appeals, Division II
State of Washington

DATED this 23rd day of September, 2005, at Bellevue, Washington.


Kathren Manley

