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No.: 67774-8-1

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

ON APPEAL FROM  
KING COUNTY SUPERIOR COURT NO. 10-2-06595-4 SEA

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2012 JAN 19 PM 1:44

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EYOB MICHAEL,

Appellant,

v.

AMERIPRISE AUTO & HOME INSURANCE  
AGENCY, INC.,

Respondent.

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**BRIEF OF APPELLANT**

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i  
**ORIGINAL**

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## I. INTRODUCTION

This case involves the denial of Underinsured Motorist (“UIM”) coverage by an insurer and the insurer’s claim for reimbursement of Personal Injury Protection (“PIP”) payments made to an insured out of the insured’s recoveries from the tortfeasors. Appellant Eyob Michael (“Michael”) appeals the judgment entered against him in favor of the Respondent Ameriprise Auto & Home Insurance (“Ameriprise”) on Ameriprise’s denial of UIM coverage and its claim for PIP reimbursement.

The trial court erred in finding that Ameriprise’s UIM policy did not cover Michael’s losses from a car accident in 2007, insofar as those losses did not exceed the coverage limits available under a liability insurance policy for a different accident that occurred in 2008. Furthermore, the record in this case does not support the trial court’s finding that Michael was “made whole” by his third party recoveries for purposes of PIP reimbursement.

Michael requests that the appeals court reverse the judgment and remand the case for entry of judgment on the verdict in favor of Michael for UIM coverage against Ameriprise and restitution of PIP reimbursement payments.

## **II. ASSIGNMENTS OF ERROR**

### Assignments Of Error

No. 1: The trial court erred in entering the Sept. 2, 2011 Judgment in favor of Ameriprise. CP 1098-1101.

No. 2: The trial court erred in denying Michael's Motion for Reconsideration of the Sept. 2, 2011 Judgment. CP 1102-1106.

### Issues Pertaining To Assignments Of Error

No. 1: Whether the trial court erred in offsetting UIM coverage for a 2007 motor vehicle accident with a liability policy belonging to a tortfeasor who was at-fault for a different accident in 2008? Yes.

No. 2: Whether two tortfeasors, who were each responsible for two different motor vehicle accidents occurring almost one year apart and who both had settled with the plaintiff prior to trial, can be deemed joint and severally liable for purposes of UIM coverage? No.

No. 3: Whether the trial court erred in awarding Ameriprise PIP reimbursement for payments made under a PIP claim for an accident in 2007, by finding that Michael had been "made whole" for the 2007 accident out of his settlement with a tortfeasor responsible for an accident in 2008? Yes.

## **III. STATEMENT OF THE CASE**

### A. Procedural History

This case involves two motor vehicle accidents, two tortfeasors, two PIP claims, and two UIM claims. On October 7, 2007, Michael was rear-ended by Heidi Page ("Page"). On Sept.

22, 2008, Michael was rear-ended by Bethel Gregory-Ayers ("Ayers"). Each accident produced separate as well as overlapping injuries to plaintiff. CP 1-4. Michael made separate PIP and UIM claims with his own insurer, Ameriprise, for each accident. Ameriprise paid out \$8,412.43 in PIP benefits for the 2007 accident and \$10,000.00 in PIP benefits for the 2008 accident. CP 25.

#### B. The Lawsuit and Policy Limit Settlements with the Tortfeasors

On Feb. 10, 2009, Michael initiated a lawsuit against Page, Ayers, and Ameriprise (Michael's UIM insurer) for damages arising out of the 2007 accident and out of the 2008 accident. CP 1109-1114. In April 2011 and prior to trial, plaintiff settled his claims against defendants Page and Ayers for their respective bodily injury policy limits of \$25,000.00 (Page - 2007 accident) and \$100,000.00 (Ayers - 2008 accident) and both parties were dismissed from the lawsuit prior to trial. CP 32.

#### C. Motion to Hold Settlement Proceeds in Trust For PIP Reimbursement

On April 15, 2011, Ameriprise filed a motion requiring Michael to hold in trust a portion of his third party settlement proceeds to satisfy Ameriprise's PIP reimbursement claims for both

accidents, pending the resolution of the UIM claims against Ameriprise. CP 24-43. The relevant Ameriprise policy provision providing for PIP reimbursement states:

When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment.

We shall be entitled to a recovery as stated in this provision only after the person has been fully compensated for damages by another party.

CP 37.

The trial court granted Ameriprise's motion requiring Michael's attorney "to hold in trust out of the settlement proceeds an amount sufficient to reimburse Ameriprise for its PIP payments pending resolution of the damages claim [against Ameriprise]." CP 136-137.

#### D. The Trial

Michael proceeded to trial against Ameriprise on July 25, 2011. Ameriprise stood in the shoes of Page with regard to damages over and above \$25,000 for the 2007 accident up to plaintiff's UIM policy limits, and Ameriprise stood in the shoes of Ayers with regard to damages over and above \$100,000.00 for the

2008 accident up to plaintiff's UIM policy limits. CP 112. The applicable UIM policy provision provided:

We will pay compensatory damages which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle due to:

1. Bodily injury sustained by that person and caused by an accident;

\* \* \* \*

We will pay damages for bodily injury an insured person suffers in a car accident while occupying a private passenger car . . . We will pay under this coverage only after any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

CP 112. For purposes of the UIM claim, Ameriprise agreed that Page was negligent for the 2007 accident and Ayers was negligent for the 2008 accident. CP 944.

1. Sarah Beshlian, MD

Michael's treating hand surgeon, Sarah Beshlian, MD, testified by deposition on July 12, 2011. CP 353. Michael's first saw Dr. Beshlian in January 2009 (after the second accident) upon referral by his treating physician, Evan Cantini, MD. CP 370. Michael reported that he was involved in two rear-ending accidents, both resulting in pain to his right wrist. Id. Dr. Beshlian testified that the mechanism of Michael's wrist injury was the direct force to

his wrist when he was grasping his steering wheel and rear-ended. CP 373-374. In March 2009, Dr. Beshlian performed an endoscopic carpal tunnel release on Michael's right hand/wrist with debridement and excision of the posterior interosseous nerve. CP 364-366. She also recommended future surgery for Michael's right wrist – lunotriquetral ligament reconstruction or lunotriquetral joint fusion – and testified that such surgery would cost \$10,000 to \$20,000. CP 407-408, 419. Dr. Beshlian testified that both the initial accident and the 2008 accident caused the wrist injury and the need for future surgery. CP 409, 420. Dr. Beshlian was not asked to apportion Michael's injuries between the two accidents and offered no testimony in this regard.

## 2. Evan Cantini, MD

Michael's treating physician, Evan Cantini, MD, testified by deposition on July 6, 2011. CP 461. Dr. Cantini first saw Michael in January 2008, after the 2007 accident, but before the 2008 accident. CP 471. Dr. Cantini testified that Michael sustained injuries to his left shoulder, neck and right wrist as a result of the 2007 accident, and that his neck and right wrist injuries were "made worse" by the 2008 accident. CP 494-495. Dr. Cantini apportioned

Michael's neck and right wrist injuries, including his wrist surgery in 2009, to the 2007 and 2008 accidents, stating that each accident was 50% responsible for his injuries. CP 496-497. Dr. Cantini further testified that Michael's neck and right wrist injuries were permanent. CP 501-503.

3. Sean Ghidella, MD

Ameriprise's medical expert, Sean Ghidella, MD, testified by deposition on July 7, 2011. CP 784. Dr. Ghidella testified that Michael sustained cervical strain and musculoskeletal chest pain as a result of the 2007 accident and blunt head trauma with resulting headache and cervical strain as a result of the 2008 accident. CP 798-799. He further testified that Michael's injuries from each accident resolved within 8 weeks of each accident. Id. CP 800. Dr. Ghidella did not attribute any wrist injury to either accident. CP 813. He further testified that Michael's injuries did not require an apportionment. CP 919.

4. Jury Instructions

The Court instructed the jury on Michael's UIM coverage with Ameriprise as follows:

“The underinsured motorist coverage of Eyob Michael’s insurance policy with Ameriprise provides, in part, as follows:

We will pay compensatory damages which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle due to bodily injury sustained by that person and caused by an accident.

Eyob Michael is an insured person under the underinsured motorist coverage of his Ameriprise policy.

The underinsured motorist coverage of Eyob Michael’s automobile insurance policy with Ameriprise also provides, in part, as follows:

Underinsured motor vehicle means a land motor vehicle or trailer:

- a) which has no bodily injury and property damage liability bond in effect at the time of the accident;
- b) which has bodily injury and property damage liability in effect and applicable at the time of the accident, but the limits of that insurance are less than the applicable damages the insured person is legally entitled to recover.

In this case, as the plaintiff’s underinsured motorist insurer, defendant Ameriprise “steps into the shoes” of the underinsured drivers, Heidi Page and Bethel Gregory-Ayers, and is thus liable for any injuries and damages proximately caused to the plaintiff by the negligence of Heidi Page and Bethel Gregory-Ayers.”

CP 946.

The jury submitted a verdict on a general verdict form which awarded plaintiff \$2,596.68 in past economic damages, \$20,000.00

in future economic damages, and \$50,000.00 in past and future non-economic damages. CP 955. The jury did not apportion damages between the two accidents and the two tortfeasors. Neither Ameriprise nor Michael sought an apportionment of damages from the jury. Both parties proposed general verdict forms that did not seek an apportionment of damages between the two accidents. CP 248, 329. Neither party took exception to the general verdict form submitted to the jury by the trial court.

E. Ameriprise's Motion for Judgment on the Verdict

On Aug. 8, 2011, Ameriprise moved for entry of judgment, seeking 1) a determination that Ameriprise owed no UIM coverage to Michael, because it could combine the underlying liability policies from Page (\$25,000 limit) and Ayers (\$100,000 limit) to set-off against the jury's verdict of \$72,596.68 against Ameriprise; 2) a determination that Michael had been "made whole" by his combined settlements with Page and Ayers, so that Ameriprise was entitled to PIP reimbursement under both accident claims; and 3) prevailing costs. CP 970-1002.

Michael opposed the motion for entry of judgment, arguing that Michael had not been "made whole" by the settlements with

Page and Ayers; that Ameriprise had waived its PIP reimbursement claim by failing to assert a counterclaim for such relief; and that Ameriprise's PIP reimbursement was limited to the amount of past economic damages awarded by the jury. CP 1003-1087. Ameriprise replied. CP 1088-1093.

On Sept. 2, 2011, the Court entered judgment against Michael in the amount of \$14,916.12 for full PIP reimbursement (minus fees pursuant to *Mahler, infra*) under both accident claims and for statutory costs, finding that 1) Ameriprise owed no UIM coverage to Michael under either accident, because it could combine the underlying liability policies from Page (\$25,000 limit) and Ayers (\$100,000 limit) to set-off against the jury's verdict of \$72,596.68 against Ameriprise and 2) that Michael had been "made whole" by his combined settlements with Page and Ayers, so that Ameriprise was entitled to PIP reimbursement under both accident claims:

"On August 3, 2011, the jury unanimously returned a verdict awarding \$72,596.68 in damages to the plaintiff. Given the off-sets allowed by Washington law and the applicable insurance policy, the damages awarded are less than the amounts the at-fault drivers' insurers paid plaintiff in settlement and less than the at-fault drivers' applicable bodily injury liability insurance limits. Therefore, plaintiff

recovers nothing under the defendant's UIM coverage. As the prevailing party, Defendant Ameriprise is entitled to its statutory costs of \$3,160.90.

Because the jury found plaintiff's damages are less than the \$125,000 plaintiff received in settlement of his claims against Ms. Page and Ms. Gregory-Ayers, plaintiff was "made whole" by the settlements. Therefore, Ameriprise, under Washington law and the policy language, is entitled to reimbursement of its PIP payments of \$18,412.43, less fees and expenses to plaintiff's attorney of \$6,657.21, for a net reimbursement to Ameriprise of \$11,755.22."

CP 1098-1101.

F. Michael's Motion for Reconsideration on the Entry of Judgment

On Sept. 9, 2011, Michael moved for reconsideration on the entry of judgment against him. CP 1102-1114. He argued that the Court improperly denied UIM coverage from the 2007 accident with Page, who only had \$25,000.00 in liability insurance. *Id.* Because the jury's verdict exceeded Page's liability insurance, Michael argued that he was entitled to UIM coverage for the 2007 accident in the amount of \$47,596.68 (\$72,596.68 verdict minus \$25,000 liability limits under Page's policy, the only "applicable liability policy" for the 2007 accident). *Id.*

Michael further argued that Ameriprise waived any PIP reimbursement rights when it failed to seek an apportionment of

damages for each accident from the jury, that the Court wrongfully and arbitrarily apportioned the verdict in such a way to determine that Michael was “made whole” for the 2007 accident (e.g. if the verdict is apportioned 50% for the 2007 accident and 50% for the 2008 accident, Michael has not been “made whole.” However, if the verdict is apportioned 34% for the 2007 accident and 66% for the 2008 accident, Michael has been “made whole”), and wrongfully awarded Ameriprise PIP reimbursement as a result. *Id.*

The Court requested a response from Ameriprise (CP 1115), and on Sept. 26, 2011, Ameriprise responded to Michael’s motion for reconsideration. CP 1116-1123. Ameriprise argued that Michael waived his right to UIM coverage by not seeking an apportionment of damages from the jury for each accident. Because the verdict was not apportioned, Ameriprise argued that the verdict should be “joint and several” as to Page and Ayers, so that Ayer’s \$100,000 liability policy could be applied to offset any UIM exposure for Page’s liability beyond Page’s \$25,000 liability policy limit. *Id.* Furthermore, Ameriprise argued that Ayer’s \$100,000 liability policy for the 2008 accident could be applied toward Michael’s damages from the 2007 accident with Ayers to

determine whether Michael had been “made whole” for purposes of PIP reimbursement. CP 1116-1123.

Michael replied and argued that joint and several liability did not apply to Page and Ayers. Alternatively, if Michael is deemed to have waived his right to UIM coverage, then Ameriprise has also waived its right to PIP reimbursement because, without an apportionment of the verdict, Ameriprise cannot meet its burden and show that Michael has been “made whole.” CP 1124-1129.

On Sept. 28, 2011, the Court denied Michael’s motion for reconsideration. CP 1130-1132.

#### G. Michael’s Notice of Appeal

On Oct. 12, 2011, Michael filed a Notice of Appeal of the September 2, 2011 Judgment and of the September 28, 2011 Order Denying Michael’s Motion for Reconsideration, and “each and every adverse ruling and determination made.” CP 1133-1142.

Michael has reimbursed Ameriprise without prejudice for both PIP reimbursement claims. CP 1143-1145.

## IV. LEGAL ARGUMENT

### A. Standard of Review

Legal issues of insurance coverage, including issues of offset, setoff, and reimbursement in the UIM and PIP context, are reviewed de novo. *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 488, 986 P.2d 823 (1999); *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 617, 160 P.3d 31 (2007). Here, the trial court's determinations that 1) Michael is entitled to no UIM coverage for the 2007 accident and 2) that Ameriprise is entitled to full PIP reimbursement are subject to de novo review.

Insurance law is replete with considerations of public policy. The strong public policy of protecting the innocent victim of an auto accident from the uninsured motorist is carried over to the underinsured motorist. See *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 208, 643 P.2d 441 (1982) (citing *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 332, 494 P.2d 479 (1972)). In this case, the 2007 accident involves defendant Page who had a \$25,000 liability policy and who Michael asserts is an "underinsured motorist" pursuant to the terms of his

policy with Ameriprise and Washington State law. Ameriprise denies that Page is "underinsured" for purposes of UIM coverage for the 2007 accident.

B. The Trial Court Erred In Offsetting UIM Coverage For The 2007 Motor Vehicle Accident With A Liability Policy Belonging To A Tortfeasor Who Was At-Fault For A Different Accident In 2008

1. Measure of Damages in a UIM Claim

Generally, the measure of damages in a tort action is the amount needed to compensate the claimant for injuries proximately caused by the tortfeasor. *Puget Sound Power & Light Co. v. Strong*, 117 Wn.2d 400, 403, 816 P.2d 716 (1991); *Burr v. Clark*, 30 Wn.2d 149, 157, 190 P.2d 769 (1948). However, the measure of damages in a contract action is the amount needed to give the claimant the benefit of his or her bargain. *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 849, 792 P.2d 142 (1990); *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984); *Platts v. Arney*, 50 Wn.2d 42, 45, 309 P.2d 372 (1957).

Where an insured sues his insurer for benefits allegedly due under his insurance contract, as is the case here, it is a contract action and "the measure of damages is the amount needed to give him the benefit of his bargain" with the insurer. *Barney v. Safeco*

*Ins. Co. of Am.*, 73 Wn.App. 426, 429, 869 P.2d 1093 (1994), *overruled on other grounds by Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 946 P.2d 388 (1997). In this case, Michael is not suing a tortfeasor for damages proximately caused by the tortfeasor. Rather, he is suing his insurer for benefits allegedly due under his insurance contract. Thus, he is bringing a contract action, not a tort action, and the measure of Michael's damages is the amount needed to give him the benefit of his bargain with Ameriprise (as opposed to the amount needed to compensate him for injuries proximately caused by the tortfeasors). *Id.*

Interpretation of an insurance contract is a question of law. The contract is read as a whole, and if its terms have a clear and unambiguous meaning, the Courts will effectuate that meaning. *Barney*, 73 Wn.App. at 429. An ambiguity in an insurance contract exists if the language on its face is fairly susceptible to two different but reasonable interpretations. *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 783-84, 958 P.2d 990 (1998).

Ameriprise's UIM policy endorsement provides:

We will pay compensatory damages which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle due to:

1. Bodily injury sustained by that person and caused by an accident;

\* \* \* \*

We will pay damages for bodily injury an insured person suffers in a car accident while occupying a private passenger car . . . We will pay under this coverage only after any **applicable** bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

CP 112 (emphasis added). The policy specifically provides UIM benefits for injuries arising out of one accident.

Ameriprise assumed at trial that Michael would be entitled to UIM coverage only if his total damages from both accidents exceeded the combined liability policies from Page (\$25,000) and Ayers (\$100,000). In other words, Ameriprise, and apparently the trial court, took the position that Michael is only entitled to UIM coverage if his total damages exceeded \$125,000.00.

However, Michael is entitled to separate UIM coverage for each accident, so that UIM coverage for the 2007 accident exists independently of UIM coverage for the 2008 accident. Under the terms of the policy and pursuant to Washington State law, Michael is entitled to UIM coverage for the 2007 accident if his damages in that accident exceed \$25,000, and Michael is entitled to UIM

coverage for the 2008 accident if his damages in that accident exceed \$100,000. This is the benefit of his bargain. Thus, Ameriprise cannot deny UIM coverage for the 2007 accident, with offsets and set-offs arising out of the 2008 accident. The only liability policy “applicable” to the 2007 accident is Page’s \$25,000 liability policy, and the only liability policy “applicable” to the 2008 accident is Ayers’ \$100,000 liability policy. Otherwise, Michael would have been better off not having UIM coverage for the 2008 accident.

2. Ayers’ Liability Policy For The 2008 Accident Is Not “Applicable” To Deny UIM Coverage For The 2007 Accident.

In *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999), the Supreme Court held that a liability policy of one vehicle cannot be used to make an otherwise uninsured second vehicle “insured” for purposes of denying UIM coverage. *Batacan*, at 448-449. The facts in *Batacan* are similar to this case and involved the wrongful denial of UIM coverage for injuries sustained in a three car accident.

In *Batacan*, the insured (Batacan) sustained injuries when an insured motorist (Cantrill) collided with an uninsured motorist

(Kim), pushing Kim's vehicle into Batacan. *Id.* at 445. Cantrill had a \$300,000 liability policy through Safeco Insurance Company. *Id.* Batacan sued Kim and Cantrill while simultaneously claiming UIM coverage through Allstate by virtue of the fact that Kim was uninsured. *Id.* Batacan and Allstate proceeded to UIM arbitration pursuant to the policy, and Batacan was awarded \$60,000 in total damages. The arbitrators determined that Kim and Cantrill were each 50% responsible for Batacan's total damages. *Id.* at 445-446. Allstate, however, refused to pay anything, claiming that it had the right to offset Cantrill's \$300,000 liability policy against the \$60,000 award, because Cantrill and Kim were joint and severally liable for Batacan's damages, and because Cantrill's limits of liability exceeded the total damages awarded in arbitration. *Id.* Allstate filed a declaratory judgment action seeking judicial determination that it had no obligation to pay UIM benefits in any amount to Batacan. *Id.* Thereafter, Batacan settled with Cantrill for \$54,000. The claim against Kim, however, was not settled. *Id.* at 446.

Basing its decision on the plain language of Allstate's policy (language similar to Ameriprise's policy), the Court rejected Allstate's argument that Cantrill's liability policy was "applicable" to

Kim:

“Under certain circumstances the liability policy of the third vehicle may be a collateral source for recovery to the injured victim; however, **under no circumstances can it be said that the liability policy, which covers the third vehicle, “applies” to make the otherwise uninsured second vehicle “insured.”** In short, Cantrill's liability policy covers or applies to the Cantrill vehicle; it does not cover or apply to the Kim vehicle. The Kim vehicle is still an "underinsured motor vehicle" even if Cantrill's liability insurance is directly or indirectly available for the benefit of the Batacan to compensate damages incurred by the Batacan in an accident where Cantrill and Kim are jointly and severally liable. The Kim vehicle is therefore 'an underinsured motor vehicle' under this policy's definition because it has no insurance which applies to *it*.”

*Batacan*, at 448-449 (emphasis added). In this case, Ameriprise asserts the same arguments Allstate asserted in *Batacan* to deny Michael UIM coverage for the 2007 accident with Page. However, according to *Batacan*, the \$100,000 liability policy covering Ayers can under no circumstances be “applied” to make Page’s underinsured motor vehicle “insured” beyond Page’s \$25,000 liability policy.

Furthermore, Ameriprise may not offset damages caused by Page with payments Michael received from Ayers. Michael settled his claim against Ayers for Ayers’ policy limits of \$100,000.

According to *Batacan*, this amount cannot be used to offset Page's liability:

We also note the limitation of liability clause in paragraph E.2.b., which allows a setoff of actual payments "by or for anyone who is legally responsible," relates to "damages which the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle...." **This, however, does not allow a setoff of Cantrill's payment for the damages she caused against recovery of the damages caused by Kim because Cantrill's payment is "by or for" Cantrill, not Kim.**

*Batacan*, at 453 (emphasis added) (citations to the record omitted). Although *Batacan* settled with Cantrill for \$54,000.00, the Court did not permit Allstate to offset the \$60,000 arbitration award with Cantrill's settlement amount. Amounts recovered from Cantrill were attributable only to Cantrill. The Supreme Court held Allstate liable for \$30,000.00 in UIM damages, the portion of the arbitration award attributable to Kim's negligence. *Id.*

3. Page and Ayers Are Not Joint and Severally Liable For Purposes of UIM Coverage Because They Were Dismissed From the Lawsuit Before Trial

RCW 4.22.070(1)(b)(emphasis added) provides:

(1) . . . The liability of each defendant shall be several only and shall not be joint except:

\* \* \* \*

(b) If the trier of fact determines that the claimant or

party suffering bodily injury or incurring property damages was not at fault, the defendants **against whom judgment is entered** shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

Ameriprise argues, and the trial court apparently agreed, that because the jury's verdict of \$72,596.68 was not apportioned, it should be construed as conferring joint and several liability between Page and Ayers. Therefore, Ameriprise argues that Ayers' \$100,000 liability policy is "applicable" to offset and deny UIM coverage for any damages attributable to Page. However, the Supreme Court in *Batacan* rejected this argument.

In *Batacan*, the Court held that Cantrill and Kim were not joint and severally liable, because joint and several liability requires an actual judgment against both tortfeasors:

Joint and several liability under our statutory scheme is a term of art which requires an actual judgment against both tortfeasors. RCW 4.22.070(1)(b). There is no joint and several liability *under the statute* where there is no judgment against the tortfeasors. Arbitration findings apportioning fault between absent parties is not a judgment against those parties. As we recently held, parties not named in the underlying action "are certainly not defendants against whom judgment was entered" for the purposes of joint and several liability. *Kottler v. State*, 136 Wash.2d 437, 449, 963 P.2d 834 (1998); *id.* at 447 n. 9, 963 P.2d 834 (" [A] person is not liable to the plaintiff at all, much less jointly and severally, if he or she has not been named by the plaintiff."

(quoting *Mailloux v. State Farm Mut. Auto. Ins. Co.*, 76 Wash.App. 507, 513, 887 P.2d 449 (1995)); see also *Anderson v. City of Seattle*, 123 Wash.2d 847, 852, 873 P.2d 489 (1994) (party must be named defendant to be defendant against whom judgment is entered under RCW 4.22.070(1)(b)). **Only where UIM recovery follows an actual judgment taken against both at-fault tortfeasors (and the plaintiff is adjudged without fault) can joint and several liability be a factor.**

*Batacan*, at 449-450 (emphasis added). *Batacan* settled with *Cantrill*, which destroyed any joint and several liability between *Cantrill* and *Kim* under the statute. Similarly, *Michael* settled with *Page* and *Ayers* and both parties were dismissed before the trial against *Amerprise*. Therefore, joint and several liability is not a factor in this case, since no judgment can be taken against *Page* and *Ayers*. Absent joint and several liability, *Page* and *Ayers*' policies apply only to their respective accidents:

We have already described a finding of joint and several liability based on what *might have happened* if an action had been pursued to judgment as " 'a tortured reading' " of the statute. *Gerrard v. Craig*, 122 Wash.2d 288, 296-97 n. 20, 857 P.2d 1033 (1993) (quoting with approval Professor Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L.Rev. 233, 253-54 (1987)). Consistent with the statute's mandate that actual judgment be rendered against both tortfeasors as a condition precedent to joint and several liability, claims for contribution based upon a situation which would otherwise arguably constitute joint and several liability if pursued to judgment also fail absent actual

entry of the joint judgment. *Kottler*, 136 Wash.2d at 447, 963 P.2d 834.

*Batacan*, at 450-451. “[S]ettlement with a tortfeasor prior to arbitration destroys any possibility of joint and several liability for the purpose of UIM coverage. As a prearbitration settlement eliminates the possibility of joint and several liability for UIM purposes, a postarbitration, but prejudgment, settlement does so as well.” *Batacan*, at 452-453.

The *Batacan* Court acknowledged that the situation could have been different if there had been full litigation against all the tortfeasors. It noted that an insurer maybe entitled to combine the total of 2 liability coverages, if there was joint and several liability, which requires a judgment against both tortfeasors. However, since *Batacan* had settled with Cantrill, destroying any joint and several liability between Cantrill and Kim, the Court did not address the issue:

Whether liability coverages may be combined, and then set off, under the language of this policy is a question this court has yet to answer and one we need not answer today because there is no joint and several liability here "pursuant to RCW 4.22.070(1)"--which would require actual judgment against both tortfeasors.

*Batacan*, at 452.

Joint and several liability is unavailable in this case because Michael settled with Page and Ayers before the trial with Ameriprise, so no judgment could be obtained against either tortfeasor. If Ameriprise wanted joint and several liability to apply, it could have “bought out” Michael’s claims against Page and Ayers for their respective policy limits to keep Page and Ayers in the lawsuit, so that judgment could eventually be rendered against them. *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 734, 733 P.2d 213 (1987); *see also Batacan*, at 450. Of course, Ameriprise would have to accept the prospects of success along with the risk of failure against each tortfeasor. *Id.* Ameriprise chose not to take the risk, and Page and Ayers were dismissed along with any prospects of joint and several liability for UIM purposes.

4. Page and Ayers Are Not Joint and Severally Liable For Purposes of UIM Coverage Because They Were Tortfeasors for Different Accidents

Joint and several liability is also not applicable in this case because Page and Ayers are each responsible for different accidents occurring almost a year apart. Under RCW 4.22.070, several liability is the general rule. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992). *See also Yong*

*Tao v. Heng Bin Li*, 140 Wn.App. 825, 166 P.3d 1263 (2007) (As a general rule, Washington has abolished joint and several liability); RCW 4.22.070(1). This is not a case where both tortfeasors were jointly negligent in in the same car accident. Page and Ayers could not be jointly and severally liable for Michael's damages under the statute, because joint and several liability does not apply to two different defendant drivers involved in two separate car accidents almost one year apart:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. . . The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where **both were acting in concert** or when a person was acting as an agent or servant of the party.

RCW 4.22.070(1)(a)(emphasis added).

It would be an error of law to hold Ayers liable for Michael's injuries and bills incurred before the 2008 accident even occurred and as a result of the 2007 accident with Page. Ayers' liability policy for the 2008 accident would never be "available" or "applicable" to cover damages incurred before the 2008 accident.

C. Ameriprise Has The Burden Of Proof on Issues of Offset, Set-off, and Exclusions

In this case, the jury rendered a verdict of \$72,596.68 in damages against Ameriprise. Following the verdict, it is Ameriprise's burden to demonstrate there is a further coverage dispute which would prevent full resolution of all issues at that point. *Price v. Farmers Insurance Company of Washington*, 133 Wn.2d at 501, *See Sherry v. Financial Indem. Co.*, 160 Wn.2d at 619 (An insurer has no right of offset, setoff, or reimbursement without an authorizing contract provision); *See also Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 845 P.2d 334 (1993) ("When the insured makes the prima facie case that there is coverage, the burden is on the insurer to prove that the loss is not covered because of an exclusionary provision in the policy. *Burrier v. Mutual Life Ins. Co. of N.Y.*, 63 Wn.2d 266, 270, 387 P.2d 58 (1963); *PEMCO v. Rash*, 48 Wn.App. 701, 703, 740 P.2d 370 (1987)").

Ameriprise neither sought an apportionment of damages from the jury between the 2007 and 2008 accidents nor took exception to the verdict form at trial, so it has waived any argument

that the verdict against it ought to be apportioned in a manner that denies Michael UIM coverage for the 2007 accident. Whether Ameriprise or Michael proposed the verdict form is irrelevant (although at trial, both parties proposed verdict forms without seeking an apportionment from the jury). Whether Ameriprise's oversight was intentional or unintentional is also irrelevant. The doctrine of waiver typically involves a party's acquiescence to a trial court ruling. *State ex rel LaMon v. Town of Westport*, 73 Wash.2d 255, 261, 438 P.2d 200 (1968) *overruled on other grounds*, *Cole v. Webster*, 103 Wash.2d 280, 288, 692 P.2d 799 (1984). A party may waive its right to challenge a ruling on appeal by failing to object below or by engaging in conduct that invites the ruling. *State v. Sengxay*, 80 Wash.App. 11, 15, 906 P.2d 368 (1995).

Michael obtained a jury verdict against Ameriprise for \$72,596.58. Ameriprise's policy states that, "We will pay under this [UIM] coverage only after any applicable bodily injury liability bonds or policies have been exhausted." CP 112 (emphasis added). Pursuant to the Supreme Court's holding in *Batacan*, only Page's \$25,000 policy is "applicable" to the 2007 accident for purposes of UIM coverage.

“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.’” *Sherry v. Financial Indem. Co.*, 160 Wn.2d at 617. Because the measure of damages is the amount needed to give Michael the benefit of his bargain and because Michael has the benefit of two UIM claims (each existing independently of the other) under his insurance policy, UIM coverage should be assessed separately against the jury’s verdict for each accident. The verdict as applied to the 2008 accident would not entitle Michael to UIM coverage for that accident, because the jury’s verdict of \$72,596.58 is less than Ayers’ liability policy limits of \$100,000.00. However, the verdict as applied to the 2007 accident would entitle Michael to UIM coverage for the 2007 accident, because Page’s liability limit was only \$25,000.00. Ameriprise did not seek an apportionment of the verdict from the jury, so it is unable to meet its burden to show that Michael’s damages from the 2007 accident are satisfied with Page’s liability policy of \$25,000.00.

Because the measure of damages against Ameriprise is the benefit of the bargain (contractual claim) as opposed to the amount

needed to compensate the claimant for injuries proximately caused by a tortfeasor (tort claim), for purposes of the 2007 UIM claim, it makes no difference that Michael received more than the jury's verdict from his settlement with Ayers. As indicated above, Ameriprise may not apply any excess recovery from Ayers' settlement of \$100,000.00 to offset its obligations to provide UIM coverage for Page's liability over and above Page's liability limits of \$25,000.00. Otherwise, Michael would have been better off not having paid for UIM coverage for the 2008 accident.

Washington law recognizes that in settling with a defendant prior to trial, a plaintiff may indeed receive a "windfall" from that defendant, without giving the remaining defendant credit for the money paid; i.e. a "double recovery" is permitted:

"As a policy matter, defendant argues that if there is no reduction from defendant's proportionate share for amounts paid by settling entities, plaintiff may recover more than plaintiff's actual damages, in contravention of policy favoring only one full recovery for plaintiff.

We note, however, first, that a plaintiff suing only one defendant is in the same position. If the plaintiff settles for more than what a trier of fact might ultimately determine total damages are, plaintiff has more than "one full recovery". Similarly, a plaintiff suing only one defendant may receive less than total damages as a result of the settlement, also a possibility under our holding here. While plaintiff has the

possibility of obtaining a seeming windfall, plaintiff also bears the burden of the possibility of less than full recovery. Unlike the law existing before the tort reform act of 1986, under which a solvent jointly and severally liable tortfeasor might be required to bear the burden of insolvency of other tortfeasors, the law now puts a heavier burden on the plaintiff who settles with an entity for an amount less than that entity's share of fault as determined by the trier of fact.

The truth is, very few cases result in plaintiff obtaining exactly one full recovery, no more and no less, regardless of the method of crediting, or offsetting, used.”

*Washburn v. Beatt Equipment Co.*, 120 Wn.2d at 296-297. Even if Michael received a “more than full recovery” from Ayers, that settlement pertains only to Michael’s damages from the 2008 accident, and would only preclude him from UIM coverage for the 2008 accident. The settlement with Ayers has no bearing on and cannot be assessed against Michael’s UIM coverage for the 2007 accident.

For the reasons set forth above, Page and Ayers are not joint and severally liable for Michael’s damages. Page and Ayers are severally liable for purposes of UIM coverage. Therefore, Ayers’ liability policy is not applicable to determine whether Michael is entitled to UIM coverage for the 2007 accident. The jury rendered a verdict of \$72,596.68 against Ameriprise. If Ameriprise

claims that it is not obligated to pay this amount, it has the burden of proof on any offset or set-off. Since Ameriprise did not seek an allocation of fault between Page and Ayers from the jury, the jury's verdict should be applied to each of Michael's UIM claims separately. This is the benefit of Michael's bargain with Ameriprise.

Out of the \$72,596.68 verdict against it, Ameriprise can only prove an offset of \$25,000 (Page's liability policy) for the 2007 accident. Thus, Page is an "underinsured motorist," because the jury's verdict exceeds the amount of Page's liability policy. Michael is entitled to UIM coverage for the 2007 accident and \$47,596.68 in UIM damages (\$72,596.68 - \$25,000). The judgment entered against Michael ought to be reversed and the case should be remanded for entry of judgment on the verdict in favor of Michael against Ameriprise in the amount of \$47,596.68.

D. Even If The Court Were To Apportion The Jury Verdict Pursuant To The Evidence Presented At Trial, Michael Would Still Be Entitled To UIM Coverage For The 2007 Accident.

The jury has already returned its verdict, so we can only speculate as to the apportionment of damages the jury intended, if any. See *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) (Where the trial court had no means of determining

exactly how the jury determined the amount of computation or whether the jury equated witness's income calculations with the leasehold value of the property, the trial court properly found it could not correct the verdict without invading the province of the jury.) As indicated above, there is no joint and several liability in this case. Therefore, in order to find that Michael was not entitled to UIM coverage for the 2007 accident, the Court had to have apportioned the \$72,596.68 jury verdict so that 1/3 or less was attributable to the 2007 and 2/3 or more was attributable to the 2008 accident. Otherwise, even an allocation of 50/50 would have entitled Michael to UIM coverage for the 2007 claim.

Dr. Cantini was the only medical expert to offer an opinion regarding the apportionment of Michael damages between the two accidents.<sup>1</sup> As to Michael's primary and permanent injuries (his neck and right wrist), Dr. Cantini attributed 50% to the 2007

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<sup>1</sup> Dr. Beshlian testified that both accidents caused plaintiff's injuries, but did not provide an apportionment. Defendant's expert testified that Michael's wrist injury was not caused by either accident, and that his injuries from each accident lasted only 8 weeks following each accident, so no apportionment was necessary. However, it can be construed that the defense testimony suggests a 50/50 apportionment of damages, since each accident resulted in the same 8 weeks of injury.

accident and 50% to the 2008 accident. Dr. Cantini also attributed the need for future wrist surgery to both accidents on a 50/50 basis. The jury's verdict included \$20,000 in future economic damages (the amount of the future wrist surgery as testified to by Dr. Beshlian). So clearly, the jury attributed Michael's wrist injury to one or both accidents, contrary to the defense medical opinion that the wrist injury was not caused by either accident.

Even if it was appropriate for the Court to "invade the province of the jury" and determine the jury's intent as to any allocation of damages, substantial evidence supports a 50/50 apportionment of the jury verdict, not a 34/66 apportionment. Thus, Michael would still be entitled to UIM coverage for the 2007 accident, if 50% of the verdict is attributable to the 2007 accident (50% of \$72,596.68 = \$36,298.34 - \$25,000 = \$11,298.34).

Should the Court find that there is substantial evidence to determine the intent of the jury as to the allocation of damages without speculating, the Court should find that the evidence supports a 50/50 apportionment of damages between the two accidents as testified to by Dr. Cantini, as opposed to an arbitrary 34/66 apportionment to justify Ameriprise's denial of UIM coverage

for the 2007 accident. If 50% of the verdict is attributable to the 2007 accident, Page is still an “underinsured motorist,” because 50% of jury’s verdict still exceeds the amount of Page’s liability policy. Michael is entitled to UIM coverage for the 2007 accident and \$11,298.34 in UIM damages as calculated above. Under these circumstances, the judgment entered against Michael ought to be reversed and the case should be remanded for entry of judgment on the verdict in favor of Michael in the amount of \$11,298.34.

E. The Trial Court Erred In Determining that Michael Had Been Made Whole With Regard to the 2007 Motor Vehicle Accident

In claiming that it is entitled to PIP reimbursement, Ameriprise has the burden of proof that Michael has been made whole with regard to the 2007 accident. Because Ameriprise did not seek an apportionment of damages from the jury, it cannot meet its burden with regard to the 2007 PIP reimbursement claim.

1. Washington Law Regarding PIP Reimbursements

The Washington Supreme Court's analysis of PIP coverage has emphasized the limited nature of an insurer's right to pursue reimbursement against its insured who receives PIP benefits and

also recovers from a third-party tortfeasor. See *Mahler v. Szucs*, 135 Wn.2d 398, 411-18, 957 P.2d 632 (1998). When an insurance policy contains a PIP reimbursement provision, the insurer may enforce such provision only after it is clear the insured has been "made whole," i.e. has received full compensation for all tort damages. See *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 219-20, 588 P.2d 191 (1978). An insurer asserting that its insured has been made whole, bears the burden of proving it is true. See *Brown v. Snohomish County Phys. Corp.*, 120 Wn.2d 747, 758-59, 845 P.2d 334 (1993); see also *Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 501-502, 946 P.2d 388 (1997).

The relevant Ameriprise policy provision providing for PIP reimbursement states that:

We shall be entitled to a recovery as stated in this provision only after the person has been fully compensated for damages by another party.

CP 37 (emphasis added).

In this case, Ameriprise cannot meet its burden and show that Michael has been made whole with regard to his damages from the 2007 accident, because it failed to seek an apportionment of damages from the jury. As explained above, if more than 1/3 of

the verdict is attributable to the 2007 accident, Michael has not been made whole. Without an apportionment, Ameriprise can only speculate what the jury intended to apportioned to the 2007 accident. Therefore, Ameriprise cannot meet its burden of proof and has waived its rights to PIP reimbursement for the 2007 claim.

As the Supreme Court held in *Batacan, supra*, there can be no joint and several liability between Page and Ayers. Thus, Ameriprise cannot use Michael's settlement with Ayers to show that Michael has been "made whole" with regard to his damages from the 2007 accident. Michael is afforded two separate PIP coverages for the two accidents, each to be assessed independently. That is the benefit of his bargain in maintaining his PIP coverage with Ameriprise after the 2007 and keeping up his premium payments until and after the 2008 accident.

2. Even If The Court Were To Apportion The Jury Verdict Pursuant To The Evidence Presented At Trial, Michael Has Still Not Been "Made Whole" As To The 2007 Accident.

Ameriprise cannot arbitrarily apportion the verdict in its favor and attribute only 1/3 or less of the verdict to the 2007 accident in order to find that Michael has been "made whole" and justify its PIP

reimbursement claims. First, the evidence doesn't support such an allocation and to speculate as to the allocation the jury intended would "invade the province of the jury." See *Sintra, Inc. v. City of Seattle, supra*. Second, even a 50/50 allocation of the verdict (as the evidence suggests) would mean that Michael has not been "made whole" from his \$25,000 settlement with Page. Indeed, because the trial court ordered Michael to reimburse PIP in full for the 2007 accident, Michael only received \$16,587.57 (\$25,000 - \$8,412.43 PIP reimbursement) for the 2007 accident, an accident that was 50% responsible for his wrist injury, his subsequent wrist surgery, and his need for future wrist surgery according to Dr. Cantini and Dr. Beshlian. To find that Michael has been "made whole" for the 2007 accident with \$16,587.57 is contrary to the evidence and defies all logic and reason. The judgment entered against Michael for PIP reimbursement as to the 2007 PIP claim ought to be reversed and the case should be remanded for entry of judgment on the verdict in favor of Michael in the amount of \$47,596.68 in UIM damages as set forth above.

F. Pursuant To *Batacan, Supra*, Michael Is Entitled To An Award of Attorney Fees

An award of fees is appropriate "in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract . . . ." *Estate of Jordan v. Hartford Co.*, 120 Wn.2d 490, 508, 844 P.2d 403 (1993); See also *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Michael is entitled to attorney fees pursuant to *Batacan, supra*. The issues presented in this case are exactly the same as the issues the Supreme Court addressed in *Batacan, supra*, wherein the Court awarded Batacan *Olympic S.S.* fees for Allstate's wrongful denial of UIM coverage. *Batacan*, at 453.

In *Batacan*, Allstate denied that Kim was an uninsured motorist, because it claimed the right to offset Cantrill's \$300,000 liability policy against the \$60,000 UIM arbitration award, because it claimed that Cantrill and Kim were joint and severally liable for Batacan's damages, and because Cantrill's limits of liability exceeded the total damages awarded in arbitration. *Id.* at 445-446. The Supreme Court rejected all of these arguments, as the Appeals Court should do here, and held that Allstate wrongfully denied UIM coverage by offsetting damages caused by Kim with

Cantrill's liability policy, subjecting Allstate to attorney fees under *Olympic S.S., supra*:

We also note the limitation of liability clause in paragraph E.2.b., which allows a setoff of actual payments "by or for anyone who is legally responsible," relates to "damages which the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle...." This, however, does not allow a setoff of Cantrill's payment for the damages she caused against recovery of the damages caused by Kim because Cantrill's payment is "by or for" Cantrill, not Kim. **Therefore we hold Allstate wrongfully denied coverage for that portion of the UIM arbitration award attributable to Kim (\$30,000).**

### Conclusion

We enforce, as written, the contract of insurance which Allstate has drafted and these parties have executed. The trial court summary judgment is reversed and this case is remanded for further appropriate proceedings consistent with this opinion. **The Batacans shall recover their reasonable attorney fees, having prevailed on the coverage issue. *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wash.2d 37, 811 P.2d 673 (1991); *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash.2d 133, 147, 930 P.2d 288 (1997).**

*Batacan*, at 453 (emphasis added) (citations to the record omitted).

Like Allstate in *Batacan*, Ameriprise denied that Page was an "underinsured motorist" and denied Michael UIM coverage for the 2007 accident, because Ameriprise claimed it could offset Page's liability with Ayers' \$100,000 liability policy, that Page and Ayers' were joint and severally liable for purposes of UIM coverage,

and that Page and Ayers' *combined* limits of liability exceeded the total damages awarded at trial. Under the holding in *Batacan, supra*, and for all the reasons set forth above, Ameriprise wrongfully denied UIM coverage for the 2007 accident and Michael is entitled to attorney fees as a result. See also *Barney v. Safeco Ins. Co. of America*, 73 Wn.App. 426, 869 P.2d 1093 (1994).

G. Michael Is Entitled To Prejudgment Interest Because Ameriprise's Dispute Over the UIM and PIP Proceeds Deprived Michael Of The Use Of Those Funds

Because the sum of UIM coverage in dispute has been liquidated, Ameriprise owes prejudgment interest on any UIM funds owed to Michael from the date of the verdict to the present. Furthermore, because Ameriprise insisted that Michael hold a sufficient portion of his settlement with the tortfeasors in trust for PIP reimbursement after trial, the funds were segregated and withheld from Michael. Following the judgment, Michael reimbursed Ameriprise \$11,755.22 for both PIP claims. Ameriprise should pay interest on any amounts that were wrongfully awarded to Ameriprise on its PIP reimbursement claims from the date of the Order requiring Michael to hold such funds in trust (April 28, 2011 – CP 136-137) to the present.

## CONCLUSION

For the reasons set forth above, Michael urges the Court of Appeals to reverse the judgment and remand the case for entry of judgment on the verdict in favor of Michael for UIM benefits of \$47,596.68, an order requiring Amerprise to pay Michael back for PIP reimbursement it has received for the 2007 accident, prejudgment interest on both the UIM and PIP amounts, and reasonable attorney fees pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999).

Dated this 17<sup>th</sup> day of January, 2012.

Respectfully submitted,

WONG BAUMAN LAW FIRM, PLLC

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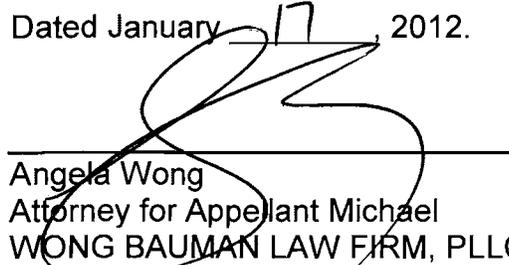
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**CERTIFICATE OF MAILING**

I hereby certify under penalty of perjury under the laws of the state of Washington that on January 17, 2012, the foregoing was mailed via regular mail, postage prepaid, to:

**David M. Jacobi  
WILSON SMITH COCHRAN DICKERSON  
901 Fifth Avenue, Suite 1700  
Seattle, WA 98164-2050**

Dated January 17, 2012.

  
\_\_\_\_\_  
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