

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Panayiota COOKSLEY,
Plaintiff-Appellant,

v.

Lauree LOFLAND,
Defendant-Respondent.

Multnomah County Circuit Court
14CV06526; A161658

Michael A. Greenlick, Judge.

Argued and submitted May 25, 2017.

Willard E. Merkel argued the cause for appellant. With him on the briefs was Merkel & Associates.

Thomas M. Christ argued the cause for respondent. With him on the brief was Cosgrave Vergeer Kester LLP.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

TOOKEY, J.

Affirmed.

TOOKEY, J.

In this case, a judgment was entered against defendant for personal injuries that plaintiff sustained in an automobile accident. After the judgment was entered, defendant filed a motion for partial satisfaction of the judgment, pursuant to ORS 31.555, in which she sought to reduce the amount of the judgment by the amount that her insurance carrier had previously provided to plaintiff in personal-injury-protection (PIP) benefits. The trial court granted defendant's motion for partial satisfaction of the judgment, and plaintiff appeals, assigning error to that ruling. For the reasons that follow, we affirm.

Plaintiff filed an action against defendant for personal injuries sustained in an automobile accident. Following the accident, plaintiff received \$15,000 in PIP benefits from plaintiff's insurer, Progressive Universal Insurance Company (Progressive). Subsequently, pursuant to ORS 742.534,¹ defendant's insurer, Farmers Insurance Company of Oregon (Farmers), reimbursed Progressive for the \$15,000 in PIP benefits that Progressive had paid plaintiff.

Plaintiff and defendant submitted proposed verdict forms to the trial court. Plaintiff's proposed verdict form asked the jury to determine whether defendant was at fault in causing the automobile accident and whether defendant's negligence caused plaintiff's injuries; plaintiff's proposed verdict form then asked the jury to determine separately plaintiff's economic and noneconomic damages. On the morning of trial, the trial court permitted defendant to amend her answer to admit liability; as a result, the only issue for the jury to decide was the amount of plaintiff's damages. The trial court submitted a verdict form asking the jury to determine separately the amount of plaintiff's economic and

¹ ORS 742.534(1) provides, in part:

"[E]very authorized motor vehicle liability insurer whose insured is or would be held legally liable for damages for injuries sustained in a motor vehicle accident by a person for whom personal injury protection benefits have been furnished by another such insurer *** shall reimburse such other insurer for the benefits it has so furnished if it has requested such reimbursement[.]"

noneconomic damages.² The jury awarded plaintiff \$50,000 in economic damages and \$50,000 in noneconomic damages.

After a general judgment was entered on the verdict, defendant moved under ORS 31.555(2) for partial satisfaction of the judgment in the amount of \$15,000—the amount that Farmers had previously reimbursed Progressive in PIP benefits. The trial court granted defendant’s motion, explaining that, because the verdict form did not segregate damages into “past or future categories” and “simply asked the jury to determine economic damages and noneconomic damages,” the court could not determine whether the economic damages awarded to plaintiff “overlapped” with the PIP reimbursement payment. The trial court further explained that plaintiff’s proposed verdict form would not have cured that ambiguity because plaintiff had also proposed a nonsegregated verdict form. The court then entered a corrected judgment reflecting defendant’s partial satisfaction of the judgment.

On appeal, plaintiff argues that the trial court erred in granting defendant’s motion for partial satisfaction under ORS 31.555. First, plaintiff argues that ORCP 19 B³ “requires a defendant who has made an advance payment toward damages that [a] plaintiff is seeking to recover at trial to plead as an affirmative defense and prove at trial that such a payment has been made.” Second, plaintiff argues that ORS 31.555 is inapplicable because “defendant was responsible for the use of an unsegregated verdict form [that created] an ambiguity by which it cannot be determined whether damages awarded overlapped with PIP benefits.” In response, defendant argues that the trial court

² We note that plaintiff contends that the trial court used defendant’s proposed verdict form. Defendant contends that the trial court used its own verdict form.

³ ORCP 19 B directs a party to raise certain affirmative defenses in its responsive pleading. Specifically, ORCP 19 B directs a party to assert the following affirmative defenses:

“accord and satisfaction; arbitration and award; assumption of risk; claim preclusion; comparative or contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; issue preclusion; laches; license; payment; release; statute of frauds; statute of limitations; unconstitutionality; waiver; and any other matter constituting an avoidance or affirmative defense.”

did not err in granting her motion for partial satisfaction of the judgment, because defendant was entitled to that relief under ORS 31.555(2).

Reviewing for legal error, *Wade v. Mahler*, 167 Or App 350, 352, 1 P3d 485, *rev den*, 331 Or 334 (2000), we conclude that the trial court did not err in granting defendant's motion for partial satisfaction of the judgment. We first reject without discussion plaintiff's assertion that defendant was required to raise partial satisfaction *vis-à-vis* the PIP reimbursement as an affirmative defense under ORCP 19 B.

We turn to plaintiff's second argument—that ORS 31.555 is inapplicable because defendant was responsible for the nonsegregated verdict form that created the ambiguity in determining whether the jury's award of damages overlapped with PIP benefits. ORS 31.555(2) provides, in pertinent part:

“If a judgment is entered against a party who is insured under a policy of liability insurance against such judgment and in favor of a party who has received benefits that have been the basis for a reimbursement payment by such insurer under ORS 742.534, the amount of the judgment shall be reduced by reason of such benefits ***.”

We have previously explained that the legislative purpose behind ORS 31.555(2) is to “prevent the injured party from receiving payments from the PIP insurer and the negligent party's insurer that together would be greater than the injured party's proven damages.” *Wade*, 167 Or App at 356 (internal quotation marks and brackets omitted). That is, the purpose of the statute is to prevent a party from receiving a “double recovery.” *Dougherty v. Gelco Express*, 79 Or App 490, 496, 719 P2d 906 (1986).

Whether a trial court is required to reduce a judgment by the amount of reimbursed PIP benefits turns on whether the verdict form demonstrates that the jury “did or did not include an adjustment of PIP benefits.” *Wade*, 167 Or App at 356. When the “plaintiff submits a verdict form from which the jury cannot tell whether the damages award includes losses subject to PIP benefits, the court *must*

reduce the damages award by reason of the PIP benefits.” *Id.* (emphasis added). Furthermore, where the trial court cannot “determine from the verdict form that the jury did or did not include an adjustment of PIP benefits, it would be mere speculation to draw any conclusions about how the jury actually calculated the plaintiff’s damages” and, in that instance, the court cannot “refuse to reduce the judgment by the amount of PIP benefits received based on speculation about the basis of a jury’s award of damages.” *Id.* (quoting *Mitchell v. Harris*, 123 Or App 424, 430-31, 859 P2d 1196 (1993)). In any event, a trial court does not err in reducing a judgment by reason of the PIP reimbursement where the plaintiff fails to establish that the use of her proposed verdict form “would have eliminated any speculation on the part of the trial court.” *Id.* at 357. Conversely, “when there is no question that the verdict did not award damages for injuries subject to PIP benefits, the defendant is not entitled to a reduction of the judgment.” *Id.* at 356.

In this case, we conclude that the trial court did not err in granting defendant’s motion for partial satisfaction of the judgment. Plaintiff’s proposed verdict form did not segregate the award of economic damages into categories that would allow the jury to adjust its award of damages to reflect the \$15,000 PIP reimbursement that plaintiff had already received. Rather, as noted, plaintiff’s proposed verdict form asked the jury to consider whether defendant was liable for plaintiff’s injuries and to determine plaintiff’s economic and noneconomic damages. Because defendant ultimately admitted liability, the trial court submitted to the jury a verdict form asking for a determination of the amount of plaintiff’s economic and noneconomic damages. After a general judgment was entered, defendant moved for partial satisfaction of the judgment pursuant to ORS 31.555(2), and the trial court granted that motion, explaining that, because the verdict form did not segregate economic damages into past and future categories, the court could not determine whether the jury’s award of economic damages overlapped with the PIP reimbursement. Because the verdict form did not indicate whether the jury considered the PIP reimbursement in awarding damages, and because plaintiff’s proposed verdict form, had it been used, would not have eliminated that

resulting ambiguity, the trial court did not err in granting defendant's motion for partial satisfaction of the judgment.

Affirmed.