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

EYOB MICHAEL, an individual, Appellant, v. AMERIPRISE AUTO & HOME INSURANCE AGENCY, INC., a foreign corporation, Respondent, HEIDI PAGE and DAMIEAN PAGE, wife and husband, both individually and on behalf of their marital community composed thereof; BETHEL GREGORY-AYERS and JOHN DOE GREGORY-AYERS, wife and husband, both individually and on behalf of their marital community composed thereof, Defendants.	)	No. 67774-8-I UNPUBLISHED OPINION FILED: December 24, 2012

Verellen, J. — This appeal turns on who had the burden of allocating damages between two unrelated accidents for purposes of underinsured motorist (UIM) coverage and personal injury protection (PIP) recovery. The setting is unusual.

Eyob Michael was rear-ended in accidents a year apart. It is undisputed he had no fault in either accident. There is evidence that some of Michael's injuries overlap

and are indivisible. Michael received PIP payments for his medical expenses in both accidents from his own insurer, Ameriprise Auto & Home Insurance Agency, Inc. In his lawsuit against the two at-fault drivers for negligence and against Ameriprise for UIM coverage, Michael settled with each driver for their insurance limits. In the resulting trial against Ameriprise, neither party sought an allocation of damages between the two accidents and the jury found Michael's damages from both accidents totaled an amount that was more than the policy limits he received from the first accident and less than the policy limits he received from the second accident. As a consequence, there is no way to determine whether the at-fault driver from the first accident was underinsured and whether Michael was fully compensated as to that accident.

We conclude that just as the two successive tortfeasors had the burden of allocating damages between the two accidents, the UIM insurer who stands in their shoes had the same burden. Because the trial court erroneously concluded Michael was not due UIM benefits and instead owed reimbursement for all PIP payments already made, we reverse in part.

FACTS

Michael was injured in an October 2007 rear-end collision caused by Heidi Page. In September 2008, his car was struck from behind by Bethel Gregory-Ayers. In each case, Michael was insured under a policy with Ameriprise that provided PIP and UIM coverage.

Michael asserted PIP claims for medical expenses incurred for each accident. Ameriprise paid him $8,412.43 for the 2007 accident and $10,000 for the 2008

accident.

In 2009, Michael filed suit against Page, Gregory-Ayers, and Ameriprise for personal injuries sustained in the two accidents. Michael claimed that the 2008 accident caused new injuries and aggravated preexisting injuries from the 2007 collision.

Before trial, Michael settled with each driver for her liability policy limits. He received $25,000 from Page and $100,000 from Gregory-Ayers.

The only issue at trial was the extent of Michael's injuries for purposes of UIM coverage and PIP setoff. Michael's treating physician Evan Cantini and hand surgeon Sarah Beshlian both testified that he had suffered various injuries, including a wrist injury that required future surgery. Dr. Cantini opined that Michael's neck and wrist injuries were attributable in equal parts to each accident. Dr. Beshlian did not apportion the injuries between the two accidents. Ameriprise's medical expert Sean Ghidella testified that Michael's injuries resolved within eight weeks in each case, and did not require apportionment. Dr. Ghidella did not attribute Michael's wrist problems to either accident.

Neither party proposed jury instructions or verdict forms directing the jury to apportion Michael's damages between the two accidents, and neither objected to the general verdict form submitted to the jury. The jury awarded Michael $2,596.68 in past economic damages, $20,000 in future economic damages, and $50,000 in past and future noneconomic damages.

Because Michael's combined $125,000 settlement exceeded the $72,596.68 jury

verdict, Ameriprise sought a determination that it owed no UIM benefits and was entitled to PIP reimbursement under both claims. The trial court accepted Ameriprise's argument and entered judgment against Michael for PIP reimbursement in the amount of $14,916.21.

The court denied Michael's motion for reconsideration, and Michael appeals.

ANALYSIS

Michael contends the court erred, both in finding that he was not entitled to UIM benefits for the 2007 accident and in finding that he had been fully compensated for that accident such that Ameriprise was entitled to PIP reimbursement.[1] Both assertions are based on the theory that absent a jury allocation of the damages attributable to each accident, it is impossible to determine that Michael was fully compensated for damages arising from the 2007 accident.

The UIM endorsement to Michael's policy 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 payments of judgements [sic] or

[1] Michael acknowledges that his settlement with Gregory-Ayers for more than the amount of the jury's verdict (with the verdict less than her policy limits) defeats his claim for UIM benefits for the 2008 accident, and concedes that the court properly awarded Ameriprise reimbursement for the PIP payments it made under that claim.

settlements.[2]

In the 2007 accident, the only "applicable bodily injury liability" policy belonged to Page, and its $25,000 limits were exhausted when Page and Michael settled. Because the jury's award was greater than $25,000, Michael argues the burden thus shifted to Ameriprise to prove that any damages in excess of Page's policy limits were not attributable to the 2007 accident.[3] Conversely, Ameriprise argues that Michael failed to meet his burden of proving that Page was underinsured.

Generally, to establish coverage under a UIM policy, a claimant must demonstrate that the at-fault motorist is uninsured or underinsured.[4] But when UIM coverage questions arise in a setting involving successive tortfeasors and a no-fault plaintiff, additional considerations come into play.

In Cox v. Spangler, Deborah Cox sustained injuries in a rear-end collision in May 1993.[5] Approximately six months later, she was injured in another rear-end collision caused by Lynn Spangler.[6] Cox sued Spangler for personal injuries sustained in the second accident. At trial, the evidence established that some of Cox's injuries were not capable of apportionment between the two accidents and that other injuries were

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[2] Clerk's Papers at 112 (emphasis added).

[3] Michael relies heavily on Allstate Insurance Co. v. Batacan, 139 Wn.2d 443, 448-49, 986 P.2d 823 (1999), in which our Supreme Court held that the liability policy of one vehicle in a three-car collision does not apply to make an otherwise uninsured second vehicle "insured" for purposes of denying UIM coverage. We find that decision distinguishable on its facts and unhelpful to our analysis.

[4] Dixie Ins. Co. v. Mello, 75 Wn. App. 328, 335, 877 P.2d 740 (1994) (citing 8C John A. Appelman, Insurance Law and Practice § 5087, at 318-20 (1981)).

[5] 141 Wn.2d 431, 434, 5 P.3d 1265 (2000).

[6] Id. at 435.

attributable solely to the second accident.[7] The trial court instructed the jury that if it found that any of Cox's injuries were "indivisible," then Spangler bore the burden of apportioning damages for the injuries.[8] The court entered a substantial jury verdict against Spangler.[9]

Spangler appealed, arguing that the court erroneously instructed the jury to shift the burden to apportion damages. Our Supreme Court concluded the instruction was correct, quoting *Restatement (Second) of Torts* § 433(B)(2) with approval:

> "Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."[10]

This rule is "grounded in the policy that: 'as between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.'"[11] Because Cox established that her injuries were indivisible between the two accidents, the court upheld the judgment against Spangler for damages incurred in both accidents.[12]

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[7] Id. at 437.

[8] Id.

[9] Id. at 438.

[10] Id. at 443-45 (emphasis omitted).

[11] Id. (quoting *Restatement (Second) of Torts* § 433B cmt. d, at 444).

[12] Id. at 446. Contrary to any suggestion by Ameriprise at oral argument that the *Restatement* burden to allocate damages only arises in joint and several liability settings, Cox expressly held the *Restatement* applies to successive tortfeasors where there was no joint and several liability. Id. at 447.

UIM coverage involves strong public policy favoring the full compensation of the insured.[13] An insurer "stands in the shoes" of the underinsured motorist for many purposes and may assert the same defenses that the underinsured motorist could allege against the claimant,[14] including that some damages are properly allocated to another party. In view of these policies and under these circumstances, it follows that the insurer also bears the underinsured motorist's burden to apportion segregable damages.

Here, it is undisputed that Michael was not at fault in either collision, and there is evidence that the injuries from the two accidents overlap. Under Cox and the *Restatement*, each of the at-fault drivers would bear the burden of proving that some of the damages should be allocated to the other. Because Ameriprise stood in their shoes, the burden fell upon it to make this showing. Ameriprise failed to do so. Accordingly, there is no showing that Michael was fully compensated for his injuries from the 2007 collision, and the court erred in concluding that he was not entitled to UIM benefits and PIP payments related to that accident.[15]

Ameriprise argues that the policy's recovery rights provision would entitle it to reimbursement if it paid any UIM benefits for the 2007 accident. That section provides:

> In the event of a payment under this policy, we are entitled to all the rights of recovery that the person or organization to whom the payment was made has against another. . . .
>
> . . . .

[13] Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 245, 961 P.2d 350 (1998).

[14] Romanick v. Aetna Cas. & Sur. Co., 59 Wn. App. 53, 56-57, 795 P.2d 728 (1990).

[15] Contrary to Ameriprise's argument that Michael invited any error, that doctrine does not extend to Ameriprise's failure to satisfy its burden of apportioning damages.

> 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.[16]

Because Michael settled for more than the damages found by the jury, Ameriprise argues he has been fully compensated, he is not entitled to a duplicate recovery, and therefore Ameriprise would be entitled to recover any UIM benefits it might pay. We disagree.

Ameriprise emphasizes that the recovery rights provision entitles it to reimbursement when the insured has been fully compensated for damages by "another party" and that the provision "does not state that the compensation must come solely from the party at fault for specific elements of damage."[17] But neither does the policy say the converse—that the determination of whether Michael was "fully compensated" for injuries caused by Page in 2007 should take into consideration payments Michael received from Gregory-Ayers for the injuries she caused in 2008. Essentially, Ameriprise argues the recovery rights provision allows it to offset the amount of UIM benefits by any amounts Michael has received from any source for any injury. Ameriprise offers no authority for this sweeping proposition, and courts have rejected analogous offset arguments as inconsistent with UIM public policy.[18] Ameriprise's

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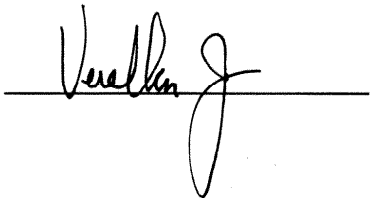
[16] Clerk's Papers at 114.

[17] Br. of Resp't at 19.

[18] See, e.g., Allstate Ins. Co. v. Welch, 45 Wn. App. 740, 740-41, 727 P.2d 268 (1986) (reduction of damages provision that purported to reduce any UIM benefits by the amount the insured received from other sources, including workers compensation, was contrary to the UIM statutory mandate that an injured party "recover those damages which the injured party would have received had the responsible party been insured with liability limits as broad as the injured party's statutorily mandated underinsured motorist coverage limits." Because the contractual setoff for workers' compensation

unsupported argument is not persuasive.

We reverse the court's judgment as it relates to the 2007 accident.[19] We remand for entry of a judgment awarding Michael UIM benefits for the 2007 accident. Under Olympic Steamship Co., Inc. v. Centennial Insurance Co,[20] Michael is also entitled to an award of reasonable attorney fees and costs for prevailing on the coverage question in this appeal, provided he complies with RAP 18.1(d).[21]



WE CONCUR:

benefits restricted the coverage mandated by the UIM statute, it was void as against public policy.); see also Britton v. Safeco Ins. Co. of Am., 104 Wn.2d 518, 707 P.2d 125 (1985) (insurer may not reduce UIM benefits by amount of benefits insured on-duty sheriff received from Washington Law Enforcement Officers and Firefighters Retirement System Act); Schlener v. Allstate Ins. Co., 121 Wn. App. 384, 88 P.3d 993 (2004) (UIM insurers may not enforce provisions allowing the insurer to reduce "damages payable" by collateral payments which third parties, including other insurers, have paid the UIM insured).

[19] Because Michael concedes he has been fully compensated for the 2008 accident and Ameriprise is entitled to recover its $10,000 PIP payments, that portion of the judgment is affirmed.

[20] 117 Wn.2d 37, 811 P.2d 673 (1991).

[21] Michael requests prejudgment interest on any UIM funds owed to him from the date of the verdict to the present and interest on the PIP payments that were erroneously awarded to Ameriprise from the date of an order requiring Michael to hold such funds in trust. Especially because the question of any interest implicates the trial court's order directing that funds be held in trust, the issue of any prejudgment interest may be addressed on remand.

Dwyer, J.

Cox, J.