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Is Credit Due?

Courts have yet to decide if the collateral source rule applies to UIM benefits

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When a person is injured in a motor vehicle accident as a result of the negligence of another driver, the injured party obviously has a right to commence a lawsuit against the alleged tortfeasor.

In cases where a tortfeasor allegedly has insufficient liability limits under his or her own insurance policy to fully compensate the injured party and thus is underinsured, the injured party may also pursue underinsured motorists (UIM) benefits under his or her own automobile policy.

Increasingly, as allowed under Pennsylvania law, injured persons are pursuing their underinsured motorist benefits first and then proceeding with a lawsuit against the tortfeasor within the two-year statute of limitations. There are many reasons claimants are pursuing this plan of action, the chief reason apparently being that the UIM case is evaluated and an award entered by three local attorneys consisting of a claimant's arbitrator, a defense arbitrator and a neutral arbitrator. Such arbitration panels are generally more liberal in evaluating cases and granting awards when compared to juries issuing verdicts.

In cases where injured parties pursued and obtained a UIM award prior to proceeding in the lawsuit portion of the case, some insurance carriers providing the liability limits covering the defendant involved in the lawsuit part of the case have asserted that they should be given a "credit" against the jury verdict to the extent of the UIM limits previously received. In other words, the carriers assert that any jury verdict entered in the lawsuit should be molded down by the trial court to the extent of the UIM benefits previously received.

The issue of whether a third-party liability insurance carrier is entitled to such a "credit" or a molding of a jury verdict to the extent of UIM benefits previously received, while discussed by the appellate courts of Pennsylvania, has never been the subject of a specific holding in an appellate court decision. It can be considered an issue of first impression in Pennsylvania appellate courts.

However, there have been some references to the issue in appellate court decisions and, as noted below, some varying decisions on point from various courts of common pleas. An analysis of these appellate and trial court decisions that have addressed the issue presented leads to the conclusion that liability insurance carriers are precluded from obtaining such a "credit" or a molding of the verdict by the collateral source doctrine, which prevents consideration of any insurance benefits previously received, including UIM benefits, in the rendering of a jury verdict.

In an effort to keep the alleged entitlement of such a credit alive, some carriers have cited to the 2002 decision of the Delaware County Court of Common Pleas in the case of *Shankweiler v. Regan*, 60 Pa.D.&C.4th 20 (2002), in which the court essentially held that a jury verdict obtained by a motor vehicle accident plaintiff in his or her lawsuit should be molded down by the amount of any UIM benefits the plaintiff previously received in a prior settlement or UIM arbitration award arising out of the same motor vehicle accident. This decision appears to be an anomaly and is not supported by other appellate or trial court case law.

Touching On the Credit Issue

Although the recent trial court opinions that have addressed the issue have indicated that there are no appellate decisions on point, there certain prior Superior Court decisions that, at the very least, peripherally address the issue. In *Gallagher v. Sheridan*, 665 A.2d 485 (Pa. Super. 1995), the Superior Court rejected an

argument by a defendant that an injured party's recovery under a UIM policy should constitute a satisfaction of a judgment entered against the defendant so as to prevent a windfall or double recovery by the plaintiff.

In *Gallagher*, the plaintiff proceeded to a UIM arbitration first while the third party action was pending. The plaintiff was awarded $110,000 in UIM benefits. When the third party defense carrier then tendered its $15,000 in liability limits, the UIM carrier then paid the remainder of the arbitrator's award, i.e., $95,000. However, the UIM carrier did not waive its subrogation lien with respect to the pending third party lien. The defendant then filed a motion seeking a satisfaction of the judgment against him based upon the third party liability carrier having tendered its payment of its $15,000 policy limits.

In the third party action, the trial court in *Gallagher* denied the defendant's motion and also entered judgment against the defendant in the amount of the arbitration award of $110,000 after ruling that the issue preclusion and/or collateral estoppel prevented a relitigation of the issue of the amount of damages which issue had already been fully litigated and decided in the UIM proceedings and "based on the belief that [the defendant] was not entitled to a credit for the collateral payment made [to the plaintiff] by his under-insured motorist carrier, especially while the latter's subrogation lien remained outstanding." Id. at p. 486 [emphasis added].

The Superior Court in *Gallagher* affirmed this decision of the trial court noting that, to accept the defendant's argument, would essentially make the defendant liable only to the extent his policy limit and not liable for the judgment. Further, an acceptance of the defendant's position would also improperly serve to make the injured party's UIM carrier an insurer of the tortfeasor. Accordingly, under the general rule that cases of doubt involving the interpretation of the Motor Vehicle Financial Responsibility Law are to "be resolved in favor of the insured to afford the greatest possible coverage to the injured claimant," the court declined to allow the tortfeasor to reap the benefits from the injured party's under-insured protection. Id. at p. 487 quoting *Panichelli v. Liberty Mutual Insurance Co.*, 645 A.2d 865, 867 . 3 (Pa. Super. 1994). Accordingly, the trial court decision was affirmed.

Another Superior Court case that peripherally addresses the issue presented is the case of *Kituskie v. Corbman*, 682 A.2d 378 (Pa. Super. 1996). In *Kituskie*, a client brought a legal malpractice action against an attorney and the attorney's firm due to a failure to file a personal injury action within the applicable statute of limitations period. In the meantime, the client had pursued and obtained UIM benefits at an arbitration in the amount of $200,000. A later jury trial in the malpractice action resulted in a verdict in favor of the plaintiff in the amount of $2,300,000. In post-trial motions, the defendant asserted that the jury verdict should be reduced by the amount recovered by the plaintiff in the UIM proceedings so as to prevent a windfall to the plaintiff.

In addressing this issue, the Superior Court held that the defendant waived the issue raised by "fail[ing] to cite to any legal authority in support" of this position. Id. at p. 477. In his concurring opinion, President Judge Joseph Del Sole wrote "I agree with the majority that the arbitration award under the Underinsured Motorists section of the applicable policy does not operate to bar a recovery in excess of the award.

"In the event the trial court, on remand, determines that [the defendant] has sufficient assets to pay the $2,300,000 award, it would be subject to any right of subrogation the underinsured carrier may exercise. It there are no such rights, then the plaintiff, not the defendant, should receive the value of that bargain." Id. at p. 478.

The Trial Courts Speak

Although there was some guidance in prior appellate decisions on the issue presented, the trial court in the *Shankweiler* decision noted above indicated that there were "no legal precedents directly on point" and, in contravention to the guidance provided in the prior appellate decisions, held that jury verdicts should indeed be molded down to reflect UIM benefits previously received. 60 Pa.D.&C.4th at p. 54. In *Shankweiler*, the plaintiff obtained a verdict of $50,300, which was molded down to a verdict of $300 in light of the $50,000 in UIM benefits the plaintiff had previously received for the same accident.

In so ruling, the *Shankweiler* court rejected the plaintiff's argument that the court had violated both the law and the public policy in reducing the jury's award to reflect the pretrial settlement of the UIM claim. The plaintiffs relied upon the collateral source doctrine and argued that since UIM benefits have been held to be first-party benefits, a plaintiff may be able to receive what was tantamount to a double recovery of

damages. Under the collateral source doctrine, the victim of a tort is entitled to all damages necessary to compensate him for the defendant's actions and the defendant should not be permitted to benefit from any collateral benefits received by the plaintiff, including insurance benefits. Relying upon *Johnson v. Beane*, 664 A.2d 96 (Pa. 1995), the *Shankweiler* court dismissed the plaintiff's reliance on the collateral source rule.

The court reasoned, in a fashion that is not exactly clear or logical, that, "in the context of excess motor vehicle insurance coverage, where there are equitable and common-law rights to subrogation, [the insurer's] payment of underinsured motorists benefits to the plaintiffs before their court action proceeded to verdict did not reduce the defendant's liability for damages to make the plaintiff's whole." In the opinion of the *Shankweiler* court, this ability of the carrier to recoup UIM benefits through subrogation, somehow provided a proper basis under the law to mold the verdict. As noted below, later trial court decisions on the same issue presented distinguished the *Johnson* case and reached the opposite decision that jury verdicts should not be mold to reflect prior UIM benefits received.

The defendants in *Shankweiler* prevailed upon that court to accept their argument under the "one satisfaction" rule, which prohibits more than one recovery for injuries claimed from an accident. The *Shankweiler* court agreed with the defendant's position and felt that to allow the plaintiffs to recover both UIM benefits and the jury verdict would result in a duplicate recovery and unjust enrichment to the plaintiff in violation of the "one satisfaction" rule. Id. at p. 53-54. The court went so far as to state that "[i]t goes without saying that such an absurd result [as allowing plaintiffs to recover both UIM benefits and the amount of a jury's verdict on the same claims] could not have been contemplated, and should not be countenanced, in the law." Id. at p. 44-45.

It appears that the *Shankweiler* decision would be viewed by other courts as either an anomaly or as incorrectly decided. There are at least two other published court of common pleas decisions that address the precise issue presented, each of which decisions, in contrast to the *Shankweiler* opinion and without citing the same, held that jury verdicts should not be molded down where a plaintiff has previously received UIM benefits.

In 2003, the Chester County Court of Common Pleas addressed the issue in *Walsh v. DiPietro*, No. 01-CV-02843 (2003)(unpublished). In *Walsh*, the plaintiff proceeded through a jury trial and a verdict was returned in favor of the plaintiff in the amount of $225,000. Thereafter, in post-trial motions, the defendant asserted that he had learned, after the verdict, that the plaintiff had previously received the full available underinsured motorist benefits in the amount of $60,000 from her policy. The defendant argued that the jury verdict should be molded to $165,000 in light of this payment. Plaintiff contended that this payment from a collateral source did not reduce the defendant's obligation to pay.

The *Walsh* court rejected the defendant's argument that the decision in *Johnson*, supra, supported the proposition that the plaintiff's verdict should be molded down to the extent of UIM benefits previously received.

In *Johnson*, a plaintiff sued a defendant driver as a result of a motor vehicle accident. The defendant's insurance carrier would not settle for the policy limits of $25,000 and elected to proceed to trial at which a verdict of $200,000 was entered. The trial court thereafter ordered a remittitur of the verdict, reducing it to $75,000.

Plaintiff had also sought $175,000 from her own underinsured motorist carrier. However, the third party defense carrier eventually paid its policy limits of $25,000 and the plaintiff agreed to settle with the UIM carrier for the remaining $50,000. As part of her agreement to settle with the UIM carrier, the plaintiff signed a release in which she agreed to subrogate the UIM carrier her right to recovery against any other person or party legally liable for the amount of the payment. Plaintiff then commenced a bad faith garnishment action against the third party defense carrier for $50,000.

In the *Johnson* case, the Pennsylvania Supreme Court affirmed the collateral source rule in general, but found that it was inapplicable to the case presented to them for review because the plaintiff subrogated her right to recovery to the UIM carrier. More specifically, there was no blanket ruling made by the *Johnson* Supreme Court, as alleged by the *Shankweiler* court, that UIM benefits are not subjected to the collateral source rule. The *Johnson* Supreme Court wrote:

When the $25,000 policy limit was paid by [the third party carrier], the outstanding judgment of $75,000 was reduced to $50,000. By accepting the $50,000 underinsurance benefits from [the UIM carrier], [plaintiff] did not reduce the *amount* of the tortfeasor's liability. [The tortfeasor] is still liable for $50,000.

The question becomes *to whom* is he liable. Because we are not dealing with a situation where the liability of a tortfeasor is being reduced or extinguished, the collateral source rule does not apply.

Johnson, 664 A.2d at 100 [emphasis in *Johnson*].

After analyzing the *Johnson* decision, the Chester County Court of Common Pleas in *Walsh* distinguished it from its own case. As stated, *Johnson* was a subrogation action wherein the plaintiff agreed to subrogate the UIM carrier to any right of recovery from a third party. The plaintiff in *Johnson* was found to have been made whole when she agreed to accept payments from the third party carrier and the UIM carrier; she herself could not seek additional payment through a bad faith garnishment action against the third party carrier.

In contrast, the plaintiff in *Walsh* had made no such subrogation agreement. In *Walsh*, the plaintiff had not been made whole by the $60,000 payment received from the UIM coverage. The court in *Walsh* stated that the UIM payment had been "paid to [p]laintiff pursuant to her contract of insurance for which she paid premiums; it was not paid on behalf of the [d]efendant." *Walsh* at p. 8. The court went on to state that the defendant remained liable for the $225,000 verdict entered by the jury and that "[t]his is precisely the type of case in which the collateral estoppel rule is applicable," i.e., the liability of the defendant may not be reduced by a payment the plaintiff received from another source, including through insurance benefits. Id.

The application of the collateral source rule to the issue presented appeared again in the other unpublished opinion. In the 2004 decision issued by the Erie County Court of Common Pleas in *Hersick v. Sauter*, (consolidated at 13210-CV-2002)(2004), various plaintiffs were proceeding in a third party lawsuit towards trial after having already accepted UIM settlements from their own automobile carriers. The issue of a "credit" owed to the third party tortfeasors in the amount of the UIM settlements was brought before the court by way of the tortfeasors' Motion in Limine on the credit issue as well as their Motion to File an Amended Answer and New Matter seeking to add a defense that any verdict should be reduced by the amount of UIM benefits received. The court summarily dismissed the Motion in Limine as an improper vehicle in which to bring the issue before the court, but the trial court did address the issue as presented in the Motion to File an Amended Answer and New Matter.

Turning to the issue presented, the *Hersick* court stated, without citing any cases, that "there is only limited appellate guidance." *Hersick* at p. 107. The defendants in *Hersick* cited and apparently relied upon the same skewered reading given to the *Johnson v. Bean* decision as found in the *Shankweiler* opinion.

However, after a thorough review of the *Johnson* decision, the *Hersick* court felt "constrained" to agree with the plaintiff's position that the collateral source rule bars the molding of the verdict under the scenario presented since that rule prohibits the diminution of a tortfeasor's liability on the basis of insurance benefits independently contracted for and received by a plaintiff. *Hersick* at p. 109 citing *Johnson*, 664 A.2d at 100.

Without citing the *Walsh* decision, the *Hersick* distinguished the factual and legal setting of the *Johnson* in the same fashion. More specifically, the *Hersick* court also noted that the court in *Johnson* did not issue a blanket conclusion that a third party defendant was entitled to a credit in the amount of UIM benefits received by the plaintiff; rather, the *Johnson* court concluded that the collateral source rule is not necessarily implicated in cases where a plaintiff, who received full payment of a verdict from a UIM carrier, is precluded from pursuing collection activity in the nature of a bad faith garnishment action against a tortfeasor's liability carrier. *Hersick* at p. 111.

The *Hersick* court also noted that, with the "credit" argument, the defendants were seeking to be relieved of their responsibility for paying the full amount of the plaintiff's damages. *Hersick* at p. 110. The court further reasoned that if the defendants were entitled to have the verdict against them reduced by the amount of underinsurance benefits paid to the plaintiff, the judgment would be for less than the full value of the harm they may have caused. Id. In such cases, there would be no further recourse by the plaintiff or UIM carrier against the defendant that could lead to the defendant's full legal accountability and, therefore, the defendant would have unjustly enjoyed the benefit of the plaintiff's voluntary decision to purchase UIM benefits. Id.

Accordingly, the analysis of the above cases leads to a conclusion that the collateral source rule prevents the granting of a credit, or a molding of the verdict, in third party actions to the extent of UIM limits previously received. It appears that, if directly faced with the issue presented, the appellate courts would follow the reasoning of the *Walsh* and *Hersick* decisions in applying the collateral source rule and denying such a credit. Under such reasoning, the defendant would not be allowed to reap the benefit of any credit for UIM

limits previously received by the plaintiff in an effort to avoid full legal accountability for any jury verdict entered. However, unless and until this open issue is finally put to rest by an appellate court, the insurance carriers remain free to assert the entitlement to such a credit or molding of the verdict and to use such assertions as leverage during settlement discussions.