

SUPREME COURT OF WASHINGTON

Liberty Mutual Insurance Co. v. Tripp

144 Wn. 2d 1 (2001) · Decided June 28, 2001

SUMMARY

The Washington Supreme Court considers whether insureds breached a policy provision requiring prompt notice of a tentative settlement with an alleged tortfeasor before seeking underinsured motorist benefits. The court holds that the notice provision is valid, but that failure to provide notice bars or reduces UIM coverage only to the extent the insurer proves actual prejudice. The court remands for determination of damages and prejudice, reverses the ruling requiring reimbursement of medical benefits, and reverses the attorney-fee award.

CASE DETAILS

COURT	Supreme Court of Washington
WRITING FOR THE COURT	Alexander, C.J.; Smith, J.; Madsen, J.; Bridge, J.; Guy, J. Pro Tem.
JURISDICTION	Washington
DECIDED	June 28, 2001
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The parties cross-moved for summary judgment in Liberty Mutual's declaratory judgment action concerning underinsured motorist benefits and reimbursement of personal injury protection benefits. The superior court granted Liberty Mutual summary judgment. The Court of Appeals reversed on the UIM issue, affirmed the PIP reimbursement and bad-faith rulings, and awarded the Tripps proportionate attorney fees. The Washington Supreme Court granted review of both petitions.
STANDARD OF REVIEW	Summary judgment is reviewed de novo under the same inquiry applied by the trial court; facts and reasonable inferences are viewed in the light most favorable to the nonmoving party, and questions of law are reviewed de novo.
PRECEDENTIAL VALUE	Published precedential opinion of the Washington Supreme Court
PARTIES	Liberty Mutual Insurance Co. v. Gordon Tripp, Diane Tripp

TOPICS

uninsured motorist

insurance coverage

subrogation

summary judgment

insurance bad faith

PRACTICE AREAS

insurance

insurance coverage

underinsured motorist insurance

insurance subrogation

civil procedure

QUESTIONS PRESENTED

1. Whether Washington common law independently required the Tripps to notify Liberty Mutual of their tentative settlement with the tortfeasor.
2. Whether the UIM policy's requirement that the insured promptly notify Liberty Mutual of a tentative settlement was valid and enforceable.
3. Whether the Tripps' failure to provide notice automatically waived or destroyed their UIM claim, or instead affected coverage only to the extent Liberty Mutual could prove actual prejudice.
4. Whether Liberty Mutual was entitled to reimbursement of PIP benefits before determining whether the Tripps had been fully compensated.
5. Whether the Tripps were entitled to attorney fees under the Olympic Steamship rule.
6. Whether the Tripps presented a material issue of fact supporting their bad-faith counterclaim.

HOLDINGS

1. A UIM policy may validly require the insured to promptly notify the insurer of a tentative settlement with the tortfeasor and allow the insurer a reasonable time to advance payment equal to the settlement amount.
2. The Tripps failed to provide the notice required by their policy because they did not notify Liberty Mutual of the tentative settlement before accepting payment and executing the release.
3. Failure to notify the UIM insurer of a tentative settlement does not automatically eliminate UIM coverage. The insurer may reduce or avoid its UIM obligation only to the extent it proves actual prejudice caused by the lack of notice.
4. A PIP insurer cannot require reimbursement from its insured until the insured has been fully compensated for the loss.
5. The Tripps were not entitled to attorney fees because their failure to comply with an express policy term precipitated the declaratory action, regardless of whether Liberty Mutual ultimately proved prejudice.
6. The Tripps' bad-faith claim failed because they presented no material issue of fact showing that Liberty Mutual's conduct was unreasonable, frivolous, or untenable.

KEY QUOTATIONS

“an insured’s failure to give its insurer notice of a tentative settlement with a tortfeasor will not reduce a UIM carrier’s obligation to pay UIM benefits to its insured unless the insurer can show that it was prejudiced, and then only to the extent it was prejudiced, by the insured’s actions.” (17)

“a PIP insured cannot be required to reimburse the insurer unless and until the insured is fully compensated.” (21)

“Its act of bringing a declaratory judgment action to determine whether the Tripps were precluded from asserting a UIM claim was, therefore, not a breach of its duty to act in good faith.” (24)

FACTUAL BACKGROUND

Gordon Tripp was injured in an automobile accident and received \$4,599.12 in PIP benefits from Liberty Mutual. The Tripps sued the alleged tortfeasor, Lowell Allison, and on the first day of trial settled for \$35,000 from Allison's insurer without notifying Liberty Mutual or giving it an opportunity to substitute payment and preserve its reimbursement rights. The Tripps then released Allison and Allstate from all claims, including subrogation claims, while their UIM claim and the amount of their total damages remained unresolved.

PROCEDURAL HISTORY

After settling their tort claim without notifying Liberty Mutual, the Tripps were sued by Liberty Mutual for a declaration that they had waived UIM benefits and were required to reimburse PIP payments. The Snohomish County Superior Court granted Liberty Mutual all requested relief. The Court of Appeals reversed the UIM ruling, affirmed the PIP reimbursement and bad-faith rulings, and awarded attorney fees. The Supreme Court affirmed in part, reversed in part, and remanded for arbitration and further prejudice determinations.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The matter is remanded for UIM arbitration to determine the Tripps' total damages. After arbitration, the trial court must determine whether and to what extent Liberty Mutual suffered actual prejudice from the Tripps' failure to provide notice of the tentative settlement, and whether the Tripps were fully compensated for purposes of PIP reimbursement. Liberty Mutual bears the burden of proving prejudice.

CASES CITED

- Johnson v. Farmers Insurance Co. of Washington, 117 Wn.2d 558, 565, 817 P.2d 841 (1991)
- CR 56(c)
- Mountain Park Homeowners Association v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)
- Hamilton v. Farmers Insurance Co., 107 Wn.2d 721, 728, 733-35, 733 P.2d 213 (1987)
- Schmidt v. Clothier, 338 N.W.2d 256, 263 (Minn. 1983)
- Britton v. Safeco Insurance Co. of America, 104 Wn.2d 518, 531, 707 P.2d 125 (1985)
- Greengo v. Public Employees Mutual Insurance Co., 135 Wn.2d 799, 806, 808, 810, 959 P.2d 657 (1998)
- Elovich v. Nationwide Insurance Co., 104 Wn.2d 543, 550, 552-53, 707 P.2d 1319 (1985)
- Tissell v. Liberty Mutual Insurance Co., 115 Wn.2d 107, 113-14, 795 P.2d 126 (1990)
- Dien Tran v. State Farm Fire & Casualty Co., 136 Wn.2d 214, 228-29, 961 P.2d 358 (1998)
- Oregon Automobile Insurance Co. v. Salzberg, 85 Wn.2d 372, 376, 535 P.2d 816 (1975)

- Thiringer v. American Motors Insurance Co., 91 Wn.2d 215, 219, 588 P.2d 191 (1978)
- Brown v. Snohomish County Physicians Corp., 120 Wn.2d 747, 754-55, 845 P.2d 334 (1993)
- Mahler v. Szucs, 135 Wn.2d 398, 418-19, 421 n.11, 424, 957 P.2d 632, 966 P.2d 305 (1998)
- Allstate Insurance Co. v. Batacan, 89 Wn. App. 260, 266, 948 P.2d 1316 (1997)
- Allstate Insurance Co. v. Batacan, 139 Wn.2d 443, 986 P.2d 823 (1999)
- Peterson v. Safeco Insurance Co., 95 Wn. App. 254, 260, 976 P.2d 632 (1999)
- Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 51-53, 811 P.2d 673 (1991)
- Public Utility District No. 1 v. International Insurance Co., 124 Wn.2d 789, 815, 881 P.2d 1020 (1994)
- Kirk v. Mount Airy Insurance Co., 134 Wn.2d 558, 951 P.2d 1124 (1998)
- American Economy Insurance Co. v. Lyford, 94 Wn. App. 347, 354, 971 P.2d 964 (1999)
- Wolf v. League General Insurance Co., 85 Wn. App. 113, 122, 931 P.2d 184 (1997)

OPINION

ALEXANDER, J.

Alexander, C.J. — Gordon Tripp was involved in an automobile accident. He later agreed to accept a payment from the insurer of the person who caused the accident as full settlement of his claim against the tortfeasor. He did not, however, notify his insurer, Liberty Mutual Insurance Company (Liberty), before entering into the settlement agreement as he was required to do by a provision in his insurance contract.

Liberty thereafter filed a declaratory judgment action against Tripp and his wife claiming that, because the Tripps did not notify Liberty of the settlement, they waived their right to recover underinsured motorist benefits from Liberty and were obligated to reimburse Liberty for the medical expense benefits they had previously received.

In a counterclaim, the Tripps asserted that Liberty had acted in bad faith. Both parties moved for summary judgment, and the trial court granted Liberty's motion. On appeal, the Court of Appeals reversed the trial court's determination that the Tripps were not entitled to underinsured motorist coverage under their insurance policy with Liberty, but affirmed the trial court's ruling that Liberty was entitled to reimbursement for the medical benefits it had paid to the Tripps and that the Tripps' bad faith claim was without merit.

It also concluded that the Tripps were entitled to attorney fees proportionally related *6to the underinsured motorist (UIM) issue. We granted Liberty's petition for review as well as the Tripps' cross-petition for review of the trial court's denial of its motion for summary judgment.

We affirm the Court of Appeals in part, agreeing with it that "[t]he UIM aspect of the trial court's ruling" should be reversed, that the trial court properly dismissed the Tripps' bad faith claim, and that remand is necessary to determine the effect, if any, of the Tripps' failure to notify Liberty of the settlement it made with the at-fault driver. Liberty Mut.

Ins. Co. v. Tripp, 95 Wn. App. 245, 253, 974 P.2d 899 (1999). We reverse the Court of Appeals in part, concluding that it erred in holding, on the record before it, that the Tripps should reimburse Liberty for medical expenses Liberty paid to the Tripps.

We also reverse the Court of Appeals' determination that the Tripps should be awarded attorney fees. I. FACTS At all times relevant to this appeal, Gordon and Diane Tripp were insured by Liberty. The Tripps' policy included a UIM endorsement, under which Liberty agreed to compensate the Tripps for up to \$100,000 of "compensatory damages which [the Tripps were] legally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of: 'bodily injury' sustained by [the Tripps] and caused by an accident." Clerk's Papers (CP) at 94.

The policy also provided for personal injury protection (PIP), under which Liberty agreed to pay certain medical benefits to the Tripps in the event they were injured in an automobile accident. The PIP endorsement provided, additionally, that Liberty would have a right of reimbursement from any judgment or settlement the Tripps received from a tortfeasor to the extent of the PIP benefits it had paid to the Tripps.

Finally, the policy provided that Liberty was subrogated to the Tripps' rights to collect damages from a tortfeasor to the extent of the PIP benefits it had paid, and that the Tripps would do nothing to prejudice Liberty's rights to obtain recovery from the tortfeasor. *7In April 1993, Gordon Tripp was involved in an automobile accident. Liberty Mutual paid Tripp \$4,599.12 in PIP benefits.

Ultimately, the Tripps filed a suit for damages in Snohomish County Superior Court against Lowell Allison, the individual who allegedly caused the accident. The Tripps' attorney notified Liberty of the commencement of the suit against Allison. Liberty responded to the notification as follows: "We represent ourselves in this recovery, and do not require any other representation." CP at 41.

On October 6, 1994, the Tripps' attorney wrote to Liberty, stating that he expected Allison's insurance carrier to "tender policy limits" of \$50,000. CP at 43. He also stated that he was "forwarding to [Liberty] copies of all medical records and bills to give [Liberty] the opportunity to buy [the Tripps'] claim pursuant to Hamilton." CP at 43.

Finally, he noted that "[t]he draft settlement will name [Liberty] as a lien holder," and that he expected Liberty "to waive their subrogated interest" in the event the parties settled. CP at 43. The Tripps' attorney thereafter sought arbitration of the Tripps' UIM claim against Liberty.

Although Liberty did engage in some discovery, arbitration was postponed to allow the action against Allison to proceed. The Tripps' attorney agreed to keep Liberty "appraised of developments" regarding the litigation against Allison. CP at 50.

The attorney then requested mediation of the UIM claim along with the claim against Allison. Liberty indicated that it would not agree to mediate the Tripps' UIM claim against it prior to a resolution of the Tripps' suit against Allison.

The Tripps and Allison were unable to settle the lawsuit and the case was scheduled for trial on October 14, 1996. On the first day of trial, "as they were walking into the courtroom," the Tripps and Allison agreed to settle the lawsuit for a \$35,000 payment from Allison's insurer, Allstate Insurance Company. Suppl. Br. of Gordon and Diane Tripp at 5-6. A few days later, without advising Liberty of the settlement, the Tripps signed a document agreeing to "release and forever discharge" Allison and *8Allstate and expressly agreeing to hold them harmless against all claims, "including the subrogated claim of any person or company." CP at 68-69.

Five days after the Tripps signed the release, Allison's counsel contacted counsel for Liberty to request that Liberty waive its claim for PIP reimbursement. Only then did Liberty learn that the Tripps and Allison had agreed to a settlement with Allison. Liberty refused to release its claim for PIP reimbursement. Two days after the conversation between Allison's counsel and Liberty's counsel, the Tripps' counsel forwarded to Liberty's counsel a copy of the "Release and Settlement" and a copy of a proposed "Stipulation and Order of Dismissal." CP at 65.

The order of dismissal was entered in January 1997. Liberty then filed a complaint against the Tripps in Snohomish County Superior Court for a "Declaration of Injunctive Relief and Damages." CP at 124. Asserting that the Tripps destroyed its "UIM subrogation rights" and failed to protect its PIP claim, Liberty sought damages in the amount of the PIP payments that it had made, a declaration that the Tripps had waived any right to claim any UIM benefits, and an injunction prohibiting the Tripps from claiming such benefits.

In their answer, the Tripps denied that they failed to give Liberty notice of their settlement with Allison on the day the settlement was reached. They also asserted nine affirmative defenses and contended in a counterclaim that Liberty had acted in bad faith. Liberty moved for summary judgment, contending that the Tripps waived their right to UIM benefits because they did not notify Liberty of the settlement they reached with Allison and, in addition, were obligated to reimburse it for the PIP benefits it had paid them because the Tripps released Liberty's subrogation claim against the tortfeasor.

The Tripps responded with their own summary judgment motion, contending that Liberty's claims were unfounded, that Liberty acted in bad faith, and that the Tripps were entitled to an award of attorney fees. The Superior Court entered summary judgment in favor of Liberty, granting it *9all of the relief it requested.

The Tripps appealed to Division One of the Court of Appeals, contending that the Superior Court erred in granting Liberty's motion for summary judgment and in denying their counter-motion for

summary judgment.¹ The Court of Appeals affirmed the Superior Court on the PIP reimbursement issue but reversed it on the UIM issue.

In regard to the latter issue, it held that although the Tripps “compromised Liberty Mutual’s potential right of reimbursement for at least an additional \$15,000 and possibly more if the tortfeasor had reachable assets beyond policy limits,” the extent of Liberty’s damages could not be ascertained from the record before it. *Liberty Mut.*, 95 Wn. App. at 253.

It, therefore, remanded the case for UIM arbitration, at which the Tripps will be entitled to recover their damages established at arbitration, to the extent the damages exceed the offset available to Liberty Mutual.

The amount of that offset would ordinarily equal the liability policy limits of the tortfeasor, but here must be increased by \$15,000 due to the Tripps’ failure to give proper and timely notice to Liberty Mutual. *Liberty Mut.*, 95 Wn. App. at 253 (footnote omitted).

In addition, it awarded the Tripps reasonable attorney fees and costs on appeal, proportionate to the UIM issue. *Liberty Mut.*, 95 Wn. App. at 253 (citing *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 51-53, 811 P.2d 673 (1991)).

The Court of Appeals also concluded that the Tripps’ bad faith argument was without merit. *Liberty Mut.*, 95 Wn. App. at 250. Liberty petitioned this court for review, asserting that the Court of Appeals erred in reversing the trial court on the UIM issue and in awarding attorney fees to the Tripps.

The Tripps cross-petitioned for review, contending that the trial *10court should have been reversed in every respect. We granted review of all of the issues raised by both parties. II. STANDARD OF REVIEW We are asked to review the Superior Court’s grant of Liberty’s motion for summary judgment, as well as its denial of the Tripps’ summary judgment motion. When an appeal arises out of an order granting summary judgment, we engage in the same inquiry as the trial court.

Johnson v. Farmers Ins. Co. of Wash., 117 Wn.2d 558, 565, 817 P.2d 841 (1991). Summary judgment is proper only when “there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law.” CR 56(c). “All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo.” *Mountain Park Homeowners Ass’n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994) (citations omitted).

III. LIBERTY’S APPEAL A. UIM Benefits Liberty contends that the Tripps, as UIM insureds, had a duty to give it notice of the tentative settlement they made with the alleged tortfeasor, Allison, and that their failure to do so destroyed their UIM claim against Liberty. Liberty contends that the

Tripps' duty to notify it of the settlement arose both from case law and from language in the policy at issue.

Suppl. Br. of Pet'r Liberty Mutual at 3, 8. The Tripps contend that they were not obliged to give Liberty notice of the settlement because Liberty had "all of the information available to it to protect its interests." Suppl. Br. of Gordon and Diane Tripp at 11. They also claim that Liberty was not prejudiced by any failure on their part to give notice. Id. at 15-16.

We discuss each of these contentions in turn. 1. Did the Tripps have a common law duty to notify Liberty of their settlement? Liberty claims that, under our decision in *Hamilton v. Farmers Insurance Co.*, 107 Wn.2d 721, 733 P.2d 213 *11(1987), UIM insureds have a duty to give their "UIM carrier notice of... tentative settlement" with the tortfeasor and that the failure to do so should "constitute a waiver or destruction of their UIM claim." Suppl.

Br. of Pet'r Liberty Mutual at 2; Pet. for Review at 14. In *Hamilton*, we determined that "[t]he underinsurer can succeed to the rights of its insured against the tortfeasor by (1) paying the underinsurance benefits prior to release of the tortfeasor and (2) substituting a payment to the insured in an amount equal to the tentative settlement." *Hamilton*, 107 Wn.2d at 734.

We went on in *Hamilton* to set forth an extensive quote from an opinion of the Minnesota Supreme Court in *Schmidt v. Clothier*, 338 N.W.2d 256, 263 (Minn. 1983). The quoted language included the following: " 'the underinsurer is entitled to notice of the tentative settlement and an opportunity to protect those potential rights [of reimbursement].'" *Hamilton*, 107 Wn.2d at 733 (quoting *Schmidt*, 338 N.W.2d at 263).

Notwithstanding our reference to the Minnesota court's decision, there is nothing in the *Hamilton* opinion that can be construed as a holding by this Court that UIM insureds always have a duty to notify their UIM insurers that they have reached a settlement with the alleged tortfeasor.² It is apparent that we referred to the Minnesota case primarily as support for our holding that the UIM insurer (1) could substitute its payment to the insured in an amount equal to the tentative settlement, and (2) will have a subrogation right against the tortfeasor only if it has paid UIM benefits before the tortfeasor was released.

On the other hand, our opinion in *Hamilton* is not inconsistent with the view that UIM insureds are bound to give such notice as may be required by provisions in their policy of insurance. *122. Did the Tripps have a contractual duty to notify Liberty of the settlement? Our conclusion that our decision in *Hamilton* did not impose a duty on insureds to notify their insurer of a settlement with the tortfeasor does not resolve the question of whether such a duty existed here.

To fully resolve that issue, we must also look at the language of the insurance policy that the Tripps purchased from Liberty. According to the underinsured motorist endorsement in the policy, the Tripps had the "ADDITIONAL DUT[Y]" to: Promptly notify [Liberty] of a tentative

settlement between the “insured” and the insurer of the “underinsured motor vehicle” and allow [Liberty] a reasonable time to advance payment to that “insured” in an amount equal to the tentative settlement to preserve our rights against the insurer, owner or operator of such “underinsured motor vehicle.” CP at 96.

This policy language must be viewed in light of the principle that UIM insurers cannot diminish the statutorily mandated UIM coverage through language in the insurance policy. *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 531, 707 P.2d 125 (1985).

We must determine, therefore, if the provision requiring the insured to “promptly notify” the insurer of a “tentative settlement” can be said to diminish the UIM coverage that Liberty was obliged to provide to the Tripps. When determining the validity of a contractual duty imposed in the UIM provisions, we must ask whether the imposition of the duty violates (1) the language of the UIM statute, RCW 48.22.030-.040, or (2) the statute’s declared public policy.

Greengo v. Pub. Employees Mut. Ins. Co., 135 Wn.2d 799, 806, 959 P.2d 657 (1998). In resolving the first question, we are to determine whether the notice provision “conflicts with the statute,” not whether the statute expressly allows the provision. *Greengo*, 135 Wn.2d at 808. It is readily apparent to us that the statute does not prohibit an insurer from requiring the insured to give it notice of a tentative settlement.

We also believe it significant that RCW 48.22.040(3) expressly allows UIM insurers a right of reimbursement when their insureds obtain a recovery from a third party. As noted above, we recognized in *Hamilton* that this right includes the right to substitute payment to the insured in the amount of a proposed settlement and subsequently to pursue a recovery against the third party tortfeasor.

Hamilton, 107 Wn.2d at 735. In our view, the buy-out right we recognized in *Hamilton* would be substantially compromised if the UIM insurer did not receive notification from its insured of the insured’s agreement to settle with the alleged tortfeasor. It is reasonable to assume, therefore, that the Legislature anticipated that insurers would require their insureds to give notice of a tentative settlement.

That being the case, we are satisfied that the UIM statute does not prohibit the notice of settlement clause at issue. Whether the notice of settlement provision in the UIM endorsement violates the public policy underlying the UIM statute is a closer question. “[T]he public policy underlying UIM is creation of a second layer of floating protection for the insured.” *Greengo*, 135 Wn.2d at 810; *Elovich v. Nationwide Ins.*

Co., 104 Wn.2d 543, 550, 707 P.2d 1319 (1985). In recognition of that public policy, we have held that so-called “consent to settle” provisions are invalid in the UIM context because these clauses,

which exclude UIM coverage if the insured settles without the insurer's written consent, deny insureds this second layer of protection. *Elovich*, 104 Wn.2d at 553.

Similarly, "family member exclusion" clauses have been invalidated because they deny coverage based on the class of the victim rather than factors related to the insurer's risk. *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 114, 795 P.2d 126 (1990).

In our judgment, a notice of settlement provision may be distinguished from the aforementioned provisions that we have invalidated. A notice of settlement clause, unlike a consent to settle provision, does not interfere with the insured's settlement negotiations with a tortfeasor. Neither does it inhibit the insured from entering any settlement he or she can negotiate with an *14alleged tortfeasor.

A notice of settlement provision also has no relation to the class of victim. See *Tissell*, 115 Wn.2d at 113. In fact, unless breached, a notice of settlement provision has no effect on an insured. In sum, we are satisfied that the notice of settlement clause in the Tripps' policy with Liberty does not offend the language or policy of the UIM statute. It is, therefore, valid.

3. Did the Tripps fail to give Liberty adequate notice of their settlement? Having concluded that the Tripps had a duty under the provisions of their insurance policy to give Liberty notice of their settlement with Allison, the next question becomes this: did the Tripps fulfill that duty?

Although the policy in question is not specific as to how and when notice must be given, referring simply to the insured's obligation to "promptly notify" Liberty of a "tentative settlement" and allow it a "reasonable time to advance payment to that 'insured' in an amount equal to the tentative settlement," we believe it is readily apparent that notice was lacking here.

CP at 96. We reach that determination because it is sensible to conclude that the notice contemplated by the provision is notice that is sufficient to give the UIM carrier time to make an informed decision about whether it will pay the insured or simply acquiesce in the insured's settlement, thereby extinguishing the carrier's subrogation right. Undeniably, the Tripps did not notify Liberty of the settlement they made at the Snohomish County courthouse with Allison and Allison's insurer before accepting payment and signing the "Release and Settlement." Notwithstanding their failure to give Liberty notice of the agreement they reached with Allison, the Tripps argue that: Liberty had all of the information available to it to protect its interests in this matter.

It had full discovery of [the Tripps'] damages, including two medical exams. It knew of the litigation against Allison, Allison's liability insurance limits, the trial date and the negotiations with Allison. *15Suppl. Br. of Gordon and Diane Tripp at 11.

In that regard, they contend that Liberty had “continuing” and “actual” notice of the tentative settlement because its counsel knew of the Tripps’ claim against Allison, and Liberty received the October 6, 1994, letter from the Tripps’ counsel which made reference to Liberty’s “opportunity to buy [the Tripps’ claim] pursuant to Hamilton.” CP at 43. This argument fails.

Although Liberty was aware of the Tripps’ suit against Allison, it did not have the information that it was entitled to receive under its insurance contract with the Tripps: “Prompt[] notification]... of a tentative settlement between the ‘insured’ and the insurer of the ‘underinsured motor vehicle’ ” that “allow [s Liberty] a reasonable time to advance payment to that ‘insured’ in an amount equal to the tentative settlement.” CP at 96.

The fact that Liberty received a letter in October 1994 which mentioned Hamilton cannot be said to be notice of a settlement which took place two years later. While the Tripps’ counsel observed that Liberty could have had a representative at the trial between the Tripps and Allison in order to monitor the case and thereby protect its own interests, its failure to do so does not, in our view, excuse the Tripps obligation to comply with the notice provisions in their insurance policy.

4. What is the proper remedy for the Tripps’ failure to give notice of settlement? The knottiest question before us has to do with the remedy that is available to Liberty for the Tripps’ failure to give the notice required by the insurance contract. Liberty contends that the Tripps should be precluded from seeking any UIM benefits because “[n]o other remedy truly protects the UIM carrier’s subrogation rights” by giving insureds adequate incentive to notify their insurers of settlements.

Suppl. Br. of Pet’r Liberty Mutual at 3. The Tripps suggest that Liberty was not prejudiced by the Tripps’ failure to disclose the settlement and, consequently, their UIM coverage should not be affected. Suppl. Br. of Gordon and Diane Tripp at 11.

As noted above, the Court of Appeals concluded that the Tripps would be entitled to UIM benefits as *16determined at arbitration, less a \$15,000 offset to Liberty. Liberty Mut., 95 Wn. App. at 253. Based on the record before us now, we cannot say that either of these positions hits the mark exactly and maintains a proper balance between the public policy underlying the UIM statute and the reimbursement rights of the insurer that we recognized in Hamilton and which are protected by the notice of settlement provision in the Tripps’ policy with Liberty.

In determining the proper remedy, we are guided by our belief that a notice of settlement provision is somewhat akin to cooperation clauses that are commonly found in liability policies. An insured’s breach of a cooperation clause releases the insurer from its responsibilities only “if the insurer was actually prejudiced by the insured’s breach.” *Dien Tran v. State Farm Fire & Cas.*

Co., 136 Wn.2d 214, 228, 961 P.2d 358 (1998). We believe that the insured’s compliance with a requirement that it give notice of a tentative settlement with an alleged tortfeasor is similar to the

insured's obligation to cooperate with the insurer. That is so because both requirements, the giving of notice and cooperation, are acts entirely within the control of the insured.

Furthermore, the requirement that notice of settlement be given to the insurer, like the requirement to cooperate, does not prejudice the insured's rights under the policy or reduce the insured's recovery. We believe, therefore, that while failure to give notice of settlement is a breach of the policy, it gives rise to a remedy only if the insurer is prejudiced by the lack of notice.

Applying this rationale to the instant case, we conclude that the Tripps' failure to give Liberty notice of its settlement with Allison does not release Liberty from providing UIM coverage to the Tripps (assuming the Tripps' damages trigger UIM coverage) unless and to the extent Liberty can show that it suffered prejudice as a consequence of the failure to receive notice of the settlement.

Although we acknowledge that we held that the insurer in Tran properly denied coverage to Tran based on Tran's failure to cooperate with the insurer, we find that remedy is ill suited to remedy *17the prejudice caused by the Tripps' failure to give notice here.

We say that because a breach of the cooperation clause of the policy, like we saw in Tran, entirely prejudices an insurer's "ability to determine coverage." Tran, 136 Wn.2d at 229. Here, at least on the record before us, the same cannot be said.

In sum, we conclude that an insured's failure to give its insurer notice of a tentative settlement with a tortfeasor will not reduce a UIM carrier's obligation to pay UIM benefits to its insured unless the insurer can show that it was prejudiced, and then only to the extent it was prejudiced, by the insured's actions. While we recognize that UIM insureds should not be allowed to breach a valid notice of settlement clause without consequence, the "floating layer" of coverage must still be provided.

Allowing a violation of the notice of settlement clause to automatically preclude UIM coverage could afford a UIM insurer a windfall and would be inconsistent with the requirement that insureds be provided with that "second layer of floating protection." Greengo, 135 Wn.2d at 810. Furthermore, such a remedy would go well beyond the right it is designed to protect.

In Hamilton, we merely recognized the UIM insurers' rights to step into their insureds' shoes and obtain damages from the tortfeasor. Hamilton, 107 Wn.2d at 734. When an insurer avails itself of this opportunity, it can never recover more than the tortfeasor is able to pay, with any recovery over the amount of the substituted settlement payment applied first to any uncompensated damages of the injured insured.

Id. Consequently, Liberty could realize a windfall if it were allowed to completely deny the Tripps any UIM coverage. Liberty, therefore, should be permitted to escape paying UIM benefits only in amounts equal to the actual prejudice that it suffered on account of the Tripps' breach of the notice

provision in the insurance contract. Recognizing that Liberty can be relieved of its obligation to provide UIM coverage only to the extent it can prove that it was prejudiced by the settlement between the Tripps and Allison's insurer, the next question becomes this: has Liberty been prejudiced by the settlement?

As mentioned above, Liberty argues that it has suffered prejudice while the Tripps argue it has not. Prejudice is an issue of fact and can seldom be established as a matter of law. *Tran*, 136 Wn.2d at 228. The insurer has the burden of proving that it has suffered prejudice from its insured's breach. *Or. Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376, 535 P.2d 816 (1975).

It is incumbent, therefore, on Liberty to show "actual prejudice."³ As indicated above, we disagree with the Court of Appeals' determination that the record supports a conclusion that Liberty has been prejudiced in the amount of \$15,000 by the Tripps' settlement with Allison for \$35,000. An insured may settle for less than the tortfeasor's policy limits and still obtain the benefits of underinsured motorist coverage.

Elovich, 104 Wn.2d at 552. But it is the insured, not the insurer, who absorbs the loss, if any, when settling for less than policy limits. This is so because "the underinsurer always is allowed to credit the full amount of the tortfeasor's liability coverage against the insured's damages." *Hamilton*, 107 Wn.2d at 728. Based on the record before us, we conclude that the degree to which Liberty has been prejudiced, if at all, cannot be determined until the amount of the Tripps' total damages has been determined.

Until their damages have been ascertained, we do not know if Liberty, as the UIM carrier, has any UIM liability to the Tripps.⁴ We cannot, in short, determine at this time whether and to what extent Liberty was prejudiced by the Tripps' failure to notify Liberty of its settlement with Allison's insurer.

After an arbitrator determines the total amount of Tripps' damages, the issue of whether and to what extent Liberty was prejudiced by the settlement with Allison can be determined by the trial court in the instant declaratory action.

The burden of proving the degree to which Liberty was prejudiced, if at all, resides with Liberty. Liberty does not meet its burden to show it was prejudiced by the Tripps' settlement with Allison simply by establishing the amount of its PIP and UIM subrogation claims. It would still have to show that it was prejudiced by the Tripps' breach of their duty to give Liberty notice of the tentative settlement agreement with Allison.

In that regard, Liberty would have to prove that if it had been given notice of the settlement agreement with Allison for \$35,000, it would have protected its PIP and UIM subrogation interests by purchasing the Tripps' claim. This may not be an easy burden for Liberty to meet because it would have to establish that it was willing to pay the amount of the settlement to its insureds and

step into the insureds' shoes.⁵ In sum, without knowing the amount of the Tripps' total damages and ultimately whether Liberty has any UIM liability, we cannot determine whether Liberty has suffered any prejudice as a consequence of the settlement between the Tripps and Allison's insurer.

We, therefore, remand this matter to the trial court to determine, after the arbitrator has fixed the amount of the Tripps' damages, whether and to what extent Liberty has suffered prejudice as a consequence of the Tripps' failure to give it notice of its tentative settlement with Allison. *20B. Attorney Fees Liberty contends that the Court of Appeals erred in awarding the Tripps attorney fees "proportionately related to the UIM issue." Liberty Mut., 95 Wn.

App. at 253. It argues that it would be inequitable to award fees to the Tripps "when they are responsible for creating this situation by destroying Liberty's subrogation rights." Pet. for Review at 19. The Tripps respond that they are entitled to an award of attorney fees because Liberty compelled them to defend this action in order to recover UIM benefits to which they were entitled.

In *Olympic Steamship*, this Court held that when "the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment" under an insurance contract, the insured can recover those costs. *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991).

In later cases, however, we have made it clear that "[w]e cannot authorize the imposition of attorney fees... when an insured has undisputedly failed to comply with express coverage terms, and the noncompliance may extinguish the insurer's liability under the policy." *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 815, 881 P.2d 1020 (1994). Clearly, if Liberty establishes that it was prejudiced by the Tripps' failure to comply with the notice of settlement provision, the Tripps would not be entitled to an award of attorney fees.

We believe the result should be the same even if Liberty fails to establish prejudice because it was the Tripps' failure to comply with express terms of the insurance contract, not Liberty's conduct, that precipitated this action.

The Tripps should, therefore, not be awarded fees and the Court of Appeals erred in concluding otherwise. IV. THE TRIPPS' APPEAL A. Claim for PIP Reimbursement The Tripps argue that the Court of Appeals erred in *21holding that they are required to reimburse Liberty from their settlement with the tortfeasor for the PIP amounts paid to them.

The Tripps' policy with Liberty provided them with up to \$10,000 in "personal injury protection benefits for medical expenses." CP at 88. However, as Liberty points out, their PIP endorsement expressly provides for subrogation and reimbursement with respect to PIP benefits paid by Liberty. Specifically, the Tripps' policy states: In the event of any payment to any person under this coverage... the company shall be entitled to the extent of such payment to the proceeds of any

settlement or judgment that may result from the exercise of any rights of recovery... and the company shall have a lien to the extent of such payment!.]

CP at 90. Liberty successfully argued at the appellate court that, because of this clause, “[t]he Tripps had a contractual obligation to reimburse Liberty Mutual for the PIP amounts it paid them.” Liberty Mut., 95 Wn. App. at 252.

The Tripps and amicus, the Washington State Trial Lawyers Association Foundation, argue that the Court of Appeals erred in reaching the conclusion it did because “[a]n insurer may not... enforce a PIP reimbursement provision against its insured until it has been determined that the insured has made a full recovery” Br. of Amicus at 17.

We agree and hold that, notwithstanding the contractual language cited above, a PIP insured cannot be required to reimburse the insurer unless and until the insured is fully compensated. Case law on this point has been clear since at least 1978: The general rule is that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort-feasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.

Thiringer v. Am. Motors Ins. Co., 91 Wn.2d 215, 219, 588 P.2d 191 (1978); accord Brown v. Snohomish County Physicians Corp., 120 Wn.2d 747, 754-55, 845 P.2d 334 (1993). *22In a recent case, Mahler v. Szucs, 135 Wn.2d 398, 418-19, 957 P.2d 632, 966 P.2d 305 (1998), we interpreted a PIP subrogation clause that was almost identical to the language in the Tripps’ policy.

Citing Mahler, Liberty argues that “a PIP carrier is entitled to subrogation from the proceeds of its insured’s recovery from the tortfeasor.” Suppl. Br. of Pet’r at 17. This argument overlooks the fact that in Mahler we made it clear that a UIM insurer “was not entitled to any recovery of its PIP payments until its insureds had been made whole.” Mahler, 135 Wn.2d at 424.

Moreover, in Mahler we considered only the insurer’s claim for reimbursement because “[n] either [of the insureds] argue [d] they would not be fully compensated were they to reimburse State Farm from the settlement proceeds.” Mahler, 135 Wn.2d at 421 n.11.

In Mahler, we were not required to consider the issue of an undercompensated insured as in the present case. Here, the Tripps contend that they were not fully compensated by the settlement. If that assertion is correct, Liberty is not entitled to any reimbursement. Liberty argues that settlement for less than the tortfeasor’s limits of liability raises a presumption that the insureds have been made whole.

Br. of Pet’r in Answer to Br. of Amicus at 10. Liberty relies on Peterson v. Safeco Insurance Co., 95 Wn. App. 254, 260, 976 P.2d 632 (1999), which, in turn, relied on a decision of the Court of

Appeals in *Allstate Insurance Co. v. Batacan*, 89 Wn. App. 260, 266, 948 P.2d 1316 (1997), for the proposition that an insured who settles is impliedly fully compensated.

However, this court overruled *Batacan*. *Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 986 P.2d 823 (1999). Furthermore, there is no other precedent for the position that settlement for less than the tortfeasor's policy limits somehow raises a presumption of full compensation or otherwise prejudices the insured's PIP benefits.

The Court of Appeals opinions in *Batacan* and *Peterson* also involve only PIP, without a broader UIM claim. Finally, Liberty would not be entitled to PIP reimbursement if the Tripps had recovered Allison's *23 policy limits and all of his reachable personal assets, but were still not fully compensated.

We hold that the Court of Appeals erred in affirming the "PIP aspect of the trial court ruling." *Liberty Mut.*, 95 Wn. App. at 252. Liberty, in our judgment, is not entitled to be reimbursed for its PIP payments until the Tripps receive full compensation.

Because the Tripps total damages have not yet been determined, we do not know if they have been fully compensated. That issue may be determined by the trial court only after the arbitrator has determined the Tripps' damages. B. Bad Faith The Tripps contend, finally, that the "trial court and [Court of Appeals] erred in finding that no bad faith was committed on the part of Liberty Mutual." Tripps' Cross-Pet. for Review at 3-4.

They argue that, at a minimum, the question of whether or not Liberty acted in bad faith in denying them UIM benefits and in seeking reimbursement of PIP benefits is a factual question that can be determined only by the finder of fact at trial. Pursuant to RCW 48.01.030, an insurer is to "be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." An insurer acts in bad faith only when the position it takes is unreasonable, frivolous or untenable.

Kirk v. Mount Airy Ins. Co., 134 Wn.2d 558, 951 P.2d 1124 (1998). Although we agree with the Tripps that the question of whether an insurer unreasonably denies coverage is generally an issue of fact,⁶ no material issue of fact has been raised here that shows that Liberty acted in bad faith. Essentially, the Tripps contend that Liberty "set the Tripps up" by (1) advising them that it would "represent" itself, (2) not availing itself of "numerous" opportunities to "buy out" the Tripps' claim against Allison, (3) failing to "monitor the *24 trial date and have someone present at the critical first day of trial of *Tripp v. Allison*," (4) failing to mediate what it would pay to "buy out" the Tripps' claim against Allison, and (5) suing the Tripps for allegedly not protecting their subrogation interests.

CP at 33-35 (Mem. of Auth., and Attys Aff. in Resp. to Pl.'s Mot. for Summ. J. and in Supp. of Def's' Cross-Mot. for Summ. J. (Bad Faith) and Att'y Fees). Even after viewing the Tripps'

submissions in the light most favorable to them, as we must, we can easily conclude that the trial court and Court of Appeals correctly concluded that the Tripps' bad faith argument lacks merit.

For reasons we have set forth above, we agree with Liberty that it was not unreasonable, frivolous or untenable for it to proceed as it did. Its act of bringing a declaratory judgment action to determine whether the Tripps were precluded from asserting a UIM claim was, therefore, not a breach of its duty to act in good faith.

V. CONCLUSION We conclude that the Court of Appeals properly held that the Tripps' bad faith claim was without merit and that it correctly reversed "[t]he UIM aspect of the trial court's ruling." *Liberty Mut.*, 95 Wn. App. at 253.

We also conclude that it properly remanded for a UIM arbitration to determine the Tripps' amount of total damages. Following that determination, the trial court can determine in the underlying action whether Liberty has in fact suffered any prejudice as a consequence of the Tripps' failure to notify it of the settlement they made with Allison.

We reverse the Court of Appeals insofar as it concluded, on the record before it, that the Tripps must reimburse Liberty for PIP payments they received. We also reverse its award of attorney fees to the Tripps. Smith, Madsen, and Bridge, JJ., and Guy, J. Pro Tern., concur.

The trial court did not explicitly deny the Tripps' motion for summary judgment. The THpps presented the issue to the Court of Appeals, however, apparently concluding that denial of their motion could be implied from the trial court's grant of summary judgment to Liberty.

In *American Economy Insurance Co. v. Lyford*, 94 Wn. App. 347, 354, 971 P.2d 964 (1999), the Court of Appeals held that a UIM insured was not required, under Hamilton, to give written notification to his insurer of a pending settlement when the UIM carrier has actual knowledge of all the information it needed to protect its right of reimbursement. Liberty cites foreign cases to support its argument that the Tripps' failure to protect Liberty's reimbursement rights should result in an automatic waiver of UIM coverage.

Br. of Resp't at 11. Those cases, however, involve a consent to settle provision, which, as we have noted, has no application to UIM coverage. Furthermore, we require a finding of prejudice before vitiating coverage even for a violation of a consent to settle clause in a liability policy. See *Tran*, 136 Wn.2d at 228. Clearly, if the Tripps' damages are determined by the arbitrator to be less than or equal to \$50,000, the Tripps would not be entitled to any UIM award because Allison could not be deemed to have been the operator of an "under-insured motor vehicle." CP at 94.

Liberty would not, in this circumstance, be able to show that it suffered any prejudice as to its UIM liability, but may still be able to show that it was prejudiced by the Tripps' release of its PIP subrogation claim.

In making such a decision, the insurer would have to consider a number of factors, which may include, for example, the costs if litigation ensues, together with the risk that the tortfeasor might be insolvent, and any difficult liability issues. *Wolf v. League Gen. Ins. Co.*, 85 Wn. App. 113, 122, 931 P.2d 184 (1997).

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