

FILED: December 19, 2007

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FARMERS INSURANCE COMPANY OF OREGON,

Plaintiff-Respondent,

v.

DAVID L. CONNER,

Defendant-Appellant.

Multnomah County Circuit Court
050201275; A130830

Eric Bloch, Judge.

Argued and submitted March 16, 2007.

Meagan A. Flynn argued the cause and filed the briefs for appellant.

Thomas M. Christ argued the cause for respondent. With him on the brief were Julie A. Smith and Cosgrave Vergeer Kester LLP.

Before Edmonds, Presiding Judge, and Wollheim and Sercombe,* Judges.

WOLLHEIM, J.

Reversed and remanded.

*Sercombe, J., *vice* Riggs, S. J.

WOLLHEIM, J.

Defendant David L. Connor (Connor) appeals a judgment that required him to reimburse plaintiff Farmers Insurance Company of Oregon (Farmers) for personal injury protection (PIP) benefits that Farmers paid to him following an automobile accident. On appeal, Connor argues that the trial court erred in concluding that Farmers is entitled to that reimbursement. For the reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.

Pursuant to ORCP 66, the parties presented this case to the trial court as a submitted controversy and stipulated to the following facts. ⁽¹⁾ Connor was injured when his vehicle was struck by a vehicle driven by Herr, who was insured under a liability policy with bodily injury limits of \$25,000 per person. Connor was insured by Farmers; he had PIP coverage up to \$100,000 and uninsured/underinsured (UM/UIM) motorist coverage of \$50,000 per person. As a result of the collision with Herr, Farmers paid Connor PIP benefits in the amount of \$28,589.20. Connor also recovered \$25,000 from Herr's insurer. Connor then

sought UIM benefits from Farmers, and the parties submitted that claim to binding arbitration. The arbitrator determined that Connor suffered economic damages in the amount of \$30,376.99 and noneconomic damages in the amount of \$60,000.

The parties then disagreed as to whether, based on the arbitrator's determination of damages, Connor was required to reimburse Farmers for the PIP benefits that it had paid. Farmers argued that it was entitled to reimbursement pursuant to ORS 742.544, which provides:

"(1) A provider of personal injury protection benefits shall be reimbursed for personal injury protection payments made on behalf of any person only to the extent that the total amount of benefits paid exceeds the economic damages as defined in ORS 31.710 suffered by that person. As used in this section, 'total amount of benefits' means the amount of money recovered by a person from:

"(a) Applicable underinsured motorist benefits described in ORS 742.502(2);

"(b) Liability insurance coverage available to the person receiving the personal injury protection benefits from other parties to the accident;

"(c) Personal injury protection payments; and

"(d) Any other payments by or on behalf of the party whose fault caused the damages."

According to Farmers, Connor's "total amount of benefits" of \$78,589.20 (\$28,589.20 in PIP benefits, \$25,000 in UIM benefits to which Connor was entitled, and \$25,000 from Herr's insurance) exceeded his economic damages of \$30,376.99 by \$48,212.21. Thus, Farmers argued, it was entitled to be reimbursed for the full amount of PIP benefits, or \$28,589.20, pursuant to ORS 742.544.

In response, Connor made two arguments. First, he argued that ORS 742.544 does not apply where PIP benefits and UIM benefits are provided by the same insurer, as in this case. Instead, he contended, ORS 742.542 applies to that circumstance. That statute provides:

"Payment by a motor vehicle liability insurer of personal injury protection benefits for its own insured shall be applied in reduction of the amount of damages that the insured may be entitled to recover from the insurer under uninsured or underinsured motorist coverage for the same accident but may not be applied in reduction of the uninsured or underinsured motorist coverage policy limits."

ORS 742.542. Alternatively, Connor argued that, if both ORS 742.542 and ORS 742.544 are applicable, they are in conflict. And, in Connor's view, in the event of such a conflict, ORS 742.542 must control because it is the more specific of the two statutes; that is, Farmers should not be permitted to "invoke the reimbursement provision of ORS 742.544 to accomplish the reduction of UM/UIM policy limits that the legislature has specifically prohibited."

The trial court ruled in favor of Farmers, concluding that "both statutes can and must be applied to the circumstances presented." First, the court rejected the argument that ORS 742.544 applies only when PIP and UIM payments are made by different insurers:

"The statute is clear: 'A provider of personal injury benefits shall be reimbursed for [PIP] payments made on behalf of any *person* * * *' ORS 742.544(1) (emphasis added). Nothing in the statute limits this requirement to situations in which the UIM carrier does not pay PIP to its own insured."

(Brackets and ellipses in original). The court then observed that reimbursement under these circumstances does not offend ORS 742.542 because Connor "will still satisfy his UIM policy limit of \$50,000 through payments from Mr. Herr and [Farmers]." Thus, the court ruled that, "[b]ecause total benefits exceed economic damages by more than the amount of PIP paid, ORS 742.544 requires full reimbursement of the PIP payments in the amount of \$28,589.20." The court then entered judgment in favor of Farmers in the amount of \$28,589.20, to be offset by Farmers's obligation to pay \$25,000 in UIM benefits.

On appeal, Connor assigns error to the trial court's conclusion that Farmers is entitled to be reimbursed for PIP benefits. He reiterates his arguments below that "[a] provider of [UIM] coverage may not recover the value of PIP payments to its insured by reduction of its liability for UIM benefits unless the insured is first made whole" and that ORS 742.544 must be viewed "as a floor, guaranteeing to all insureds priority in recovering economic damages but without precluding a more favorable recovery priority for specific insureds." Farmers, meanwhile, contends that there is no conflict between ORS 742.542 and ORS 742.544 and that the trial court applied the two statutes correctly.

While this appeal was pending, we decided a case involving facts very similar to this case. [*Gaucin v. Farmers Ins. Co.*](#), 209 Or App 99, 146 P3d 370 (2006). In *Gaucin*, the insured held an insurance policy with Farmers that provided \$25,000 in PIP coverage and \$50,000 in UM/UIM coverage. 209 Or App at 101. The insured was injured in an automobile accident and incurred at least \$55,484 in economic damages. The other motorist, who was at fault, was underinsured, and the insured sought and received \$25,000 in PIP benefits from Farmers. The insured then settled with the underinsured motorist's insurance carrier for \$25,000, leaving him with at least \$5,484 in uncompensated economic damages and an unspecified amount of noneconomic damages. *Id.* The insured then filed a claim with Farmers for UIM benefits. *Id.*

Farmers then tendered UIM benefits to the insured on the condition that the insured reimburse Farmers for the PIP payment of \$25,000 that it previously made, "asserting that reimbursement was authorized under ORS 742.544(1)." 209 Or App at 101. The insured then sought a declaratory judgment that (1) Farmers was not entitled to PIP reimbursement under ORS 742.544; (2) the effect of PIP payments by Farmers "falls under the statutory set-off scheme set out in ORS 742.542"; and (3) the reimbursement scheme of ORS 742.544 does not apply to the set-off scheme set out in ORS 742.542. 209 Or App at 101-02.

The second and third declarations sought in *Gaucin* presented the trial court with the same legal questions that the trial court answered in this case. In fact, the trial court in *Gaucin* engaged in an exercise nearly identical to the trial court's approach in this case. Initially, the trial court in *Gaucin* applied ORS 742.542 to determine the insured's entitlement to PIP and UIM benefits and "stacked" the UIM benefits and PIP benefits. *Id.* at 102. The court then applied the reimbursement scheme in ORS 742.544 in a way that *negated* the effect of stacking, *i.e.*, required the insured to pay back PIP benefits. *Id.* at n 4. We explained that

"[t]he motive behind this dispute lies in a significant difference between the reduction scheme in ORS 742.542 and the reimbursement scheme in ORS

