FOR PUBLICATION IN WEST'S HAWAIʻI REPORTS AND PACIFIC REPORTER

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

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DAWNA C. ZANE, Plaintiff-Appellee, v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant-Appellant

NO. 27317

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 02-1-1140)

OCTOBER 31, 2006

WATANABE, PRESIDING JUDGE, LIM AND FOLEY, JJ.

OPINION OF THE COURT BY FOLEY, J.

Defendant-Appellant Liberty Mutual Fire Insurance Company (Liberty Mutual) appeals from the Final Judgment entered in favor of Plaintiff-Appellee Dawna C. Zane (Zane) and against Liberty Mutual on April 25, 2005 by the Circuit Court of the First Circuit (circuit court).[1/] In this appeal, Liberty Mutual challenges: (1) the Final Judgment and (2) the circuit court's December 29, 2004 "Order Granting Plaintiff Dawna C. Zane's Motion for Summary Judgment Filed on May 16, 2003 and Denying Defendant Liberty Mutual Fire Insurance Company's Motion for Summary Judgment Filed on May 16, 2003" (Order), in which the court ordered Liberty Mutual to provide full underinsured motorist (underinsured motorist or UIM) coverage benefits to

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[1/] The Honorable Eden Elizabeth Hifo presided.

Zane, without any credit/offset for insurance and self-insurance applicable to alleged joint tortfeasor Defendant DaimlerChrysler Corporation (DaimlerChrysler). In its Order, the circuit court held that

> Liberty Mutual would have been entitled to a credit for joint tortfeasor DaimlerChrysler Corporation, in connection with the underlying accident, but, having consented to the liability settlement with DaimlerChrysler, Liberty Mutual may not now object to that settlement as a basis for denying underinsured motorist benefits, and because of its consent, may not now claim said credit[.]

We conclude the circuit court erred in holding that Liberty Mutual was not entitled to a credit for the amount of Zane's settlement with DaimlerChrysler. The circuit court also erred in concluding that DaimlerChrysler was a joint tortfeasor.

We vacate and remand.

I.

A. Background

On February 10, 2000, Zane was a passenger in a Dodge Neon, driven by Richard Thomas (Thomas), that collided with an Oldsmobile Royale, driven by Sarah Kim (Kim), at the intersection of Kaunaoa Avenue and Kanaina Street in Honolulu. Zane, then 18 years old, was rendered a paraplegic in the collision.

At the time of the accident, Thomas's Dodge Neon was covered by Liberty Mutual's Hawaii Simplified Automobile Owner's Policy (Liberty Mutual Policy). This policy provided both bodily injury liability coverage and UIM benefits, subject to the terms and conditions of the policy and applicable law. Kim's Oldsmobile Royale was insured by State Farm Mutual Automobile Insurance Company (State Farm).

Zane filed suit against Thomas, Kim, and DaimlerChrysler, the manufacturer of the Dodge Neon. In that lawsuit, Liberty Mutual defended Thomas and cross-claimed against DaimlerChrysler. Zane's liability claims against Thomas/Liberty Mutual, Kim/State Farm, and DaimlerChrysler were successfully resolved in mediation with retired circuit court Judge McConnell as mediator.

As a result of the settlements, Zane received the following amounts:

DaimlerChrysler	$ 200,000
Kim	$ 100,000
Thomas	$1,350,000
Total	$1,650,000

Zane also received $40,000 in settlement proceeds under a policy issued to her parents by AIG Hawai'i Insurance Company, Inc. (AIG), increasing the total amount of settlement proceeds Zane received to $1,690,000. Zane subsequently made a UIM claim against Liberty Mutual. Liberty Mutual claimed that no UIM benefits were due because Zane's settlement with DaimlerChrysler did not exhaust all insurance coverage applicable to DaimlerChrysler and that Liberty Mutual was entitled to a credit/offset for the amount of insurance not collected. Zane thereafter brought the underlying declaratory judgment action to compel Liberty Mutual to pay UIM benefits to her.

B. Procedural History

Zane filed her Complaint against Liberty Mutual on May 8, 2002, praying for a declaration of the rights and

obligations of the parties under the Liberty Mutual Policy and a declaration that Liberty Mutual must provide UIM coverage to Zane. Liberty Mutual filed a First Amended Counterclaim for Declaratory Judgment and/or Other Relief on June 28, 2002. Zane and Liberty Mutual filed their respective answers.

In her Complaint, Zane explained that because she "was a passenger in the Neon insured by Liberty Mutual, Zane also qualified for underinsured motorist benefits under the Liberty Mutual policy as Sarah Kim's State Farm policy limits were less than the damages sustained by Zane and therefore [Zane was] an underinsured motorist under the Liberty Mutual policy." Zane also stated that "[a]lthough Liberty Mutual was itself involved in the bodily injury liability lawsuit, Zane nonetheless went through the formality of requesting written permission to settle the liability claims in order to preserve underinsured motorist benefits."

Because Liberty Mutual and State Farm had settled with Zane prior to Zane's settlement with DaimlerChrysler, Liberty Mutual requested information about the terms of the DaimlerChrysler settlement. On December 20, 2001, Liberty Mutual senior claim specialist Colin M. Chang (Chang) asked what amount DaimlerChrysler had contributed to the settlement and was informed that DaimlerChrysler had contributed $200,000. Liberty Mutual thereafter gave its verbal approval of the bodily injury liability settlement and confirmed by letter dated December 20, 2001 that "we [Liberty Mutual] do not object to your client

resolving her bodily injury liability claims against the liable parties."

On or about January 7, 2002, Liberty Mutual requested a copy of the DaimlerChrysler Release from Zane and was advised that the formal settlement agreement had not been finalized.

On May 16, 2003, Zane filed her Motion for Summary Judgment (Zane's Motion for SJ) and Liberty Mutual filed its Motion for Summary Judgment (Liberty Mutual's Motion for SJ). In her motion, Zane argued:

> The fact that Liberty Mutual 1) concedes that Zane asked for consent to settle the liability claim; 2) gave its consent to the settlement; and 3) as a result, agrees that it "may not now object to the liability settlement as a basis for denying UIM benefits," is sufficient to grant summary judgment in favor of Zane.

In its motion, Liberty Mutual argued that Zane was not

> entitled to underinsured motorist insurance [] benefits from Defendant Liberty Mutual because Defendant Liberty Mutual is entitled to a credit for the total limits of any and all bodily injury liability insurance and self-insurance available to satisfy [Zane's] claims arising from February 10, 2000 accident, including amounts foregone in settlement with Daimler-Chrysler Corporation, and the total amount of such limits together with the settlement proceeds previously received by [Zane], exceeds the amount of damages caused by Sarah J. Kim under the circumstances of this case.

On May 27, 2003, Zane and Liberty Mutual filed their respective opposition memoranda. Zane attached the following exhibits to her opposition memorandum:

(1) Exhibit 1: letter from Liberty Mutual to Kawatachi (one of Zane's attorneys), dated January 30, 2002, (a) confirming a telephone conversation on January 25, 2002, in which Kawatachi's office granted Liberty Mutual an extension until February

15, 2002 to respond to Zane's UIM demand and (b) asking for the "release document for Richard Thomas and DaimlerChrysler Corporation."

(2) Exhibit 2: letter dated February 14, 2002 that Zane's attorneys, including Kawatachi, sent to Liberty Mutual, indicating that the DaimlerChrysler release had not been finalized, but that Zane's attorneys would forward a copy of the release once they received it.

(3) Exhibit 3: letter Liberty Mutual sent to Kawatachi, dated February 15, 2002, that stated "[p]lease be advised that after reviewing all of the documents provided to us for [Zane's] underinsured motorist claim, it appears that Sarah Kim was not negligent for the bodily injuries sustained by [Zane]. Therefore, we are unable to make any underinsured motorist settlement offers at this time."

(4) Exhibit 4: letter, dated March 1, 2002, to Liberty Mutual in which Zane requested that the parties discuss the basis for Liberty Mutual's denial of benefits to Zane, asked for a fair reconsideration of the denial, and noted that Kim had admitted her negligence in her August 21, 2001 deposition.

(5) Exhibit 5: March 11, 2002 letter in which Chang advised that the UIM coverage limits provided under the subject policy would be $300,000 per person/$600,000 per occurrence (stacked).[2/]

Liberty Mutual has not disputed that the above correspondence occurred.

In the Affidavit of Keith K. H. Young (Young) attached to Zane's opposition memorandum to Liberty Mutual's Motion for SJ, Young stated:

> AFFIDAVIT OF KEITH K. H. YOUNG
>
> . . . .
>
> KEITH K. H. YOUNG, being first duly sworn on oath, deposes and says as follows:
>
> . . . .
>
> 2. That he was one of the attorneys representing [Zane] in the underlying personal injury action against underinsured motorists Sarah K. Kim and Richard S. Thomas, and DaimlerChrysler Corporation[.]
>
> 3. That he was the partner assigned primary responsibility for prosecution of the product liability claim against DaimlerChrysler.
>
> 4. That discovery and case preparation did not ultimately support a viable product liability claim against DaimlerChrysler Corporation.
>
> 5. That he personally participated in mediation proceedings conducted by retired Circuit Court Judge [] McConnell.
>
> 6. That the mediation resulted in a successful resolution of all claims against both underinsured motorists for payment of their applicable bodily injury liability limits.
>
> 7. The product liability claim against DaimlerChrysler could not be successfully resolved because no viable basis for liability existed. The best that Judge McConnell could accomplish was a mediated settlement consisting of a "nuisance value" payment of $200,000 by

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[2/] Zane finalized her settlement with DaimlerChrysler on March 8, 2002. The dismissal was filed on March 19, 2002.

> DaimlerChrysler which represented an estimate of attorneys' fees, expert witness fees, and expenses of litigation.
>
> 8. That he agreed to recommend, and did recommend to Zane that she accept the result mediated by Judge McConnell because there was no viable product liability claim against DaimlerChrysler and there was no reasonable prospect of recovering more from DaimlerChrysler at trial.
>
> 9. That he spoke to Liberty Mutual adjuster Colin Chang and fully advised Liberty Mutual of the facts of the settlement, circumstances requiring abandonment of the product liability claim for a nuisance value settlement of $200,000 approximating estimated defense costs [and] the reasons that no viable liability claim existed, and requested consent to the liability settlement without prejudicing Zane's right to payment of UIM benefits. The adjuster acknowledged understanding the situation and extended Liberty Mutual's consent to settlement of the liability claims[.]

Liberty Mutual has not disputed these assertions.

Zane and Liberty Mutual filed their respective reply memoranda on May 30, 2003. Liberty Mutual appended to its reply memorandum Chang's Declaration, in which Chang stated:

(1) During a January 8, 2002 telephone conversation with Kawatachi, regarding Zane's UIM claim, he told Kawatachi that the offset discussed in Government Employees Insurance Co. v. Dizol, 176 F. Supp. 2d 1005 (D. Hawai'i 2001), (Dizol II) may be applicable to Zane's claim, and Kawatachi said she would research the case and get back to him.

(2) During a January 17, 2002 telephone conversation with Kawatachi, Kawatachi claimed that Dizol II dealt with jurisdictional, not offset, issues.

(3) After re-reading Dizol II, he called Kawatachi back on January 17, 2002 and told her that it looked as though he and she were reading two

different cases and that he was looking at a November 30, 2001 case.

(5) Kawatachi replied that she was looking at an earlier case, which dealt with jurisdictional issues, and she would look at Dizol II and get back to him.

(6) He did not hear back from Kawatachi or any other counsel for Zane with regard to Dizol II or offset issues before the filing of Zane's Complaint.

In her answering brief, Zane contends there is no documentation that the January 8 telephone conversation between Kawatachi and Chang ever occurred and, furthermore, Liberty Mutual's failure to mention any such conversation in various communications with Zane and pleadings to the circuit court, until it filed its reply memorandum in support of its Motion for SJ, is inconsistent with the claimed conversation.

After a June 4, 2003 hearing on both motions for summary judgment, the circuit court filed the Order, which stated in part:

> The Court having considered the memoranda, affidavits and exhibits of the parties, arguments of counsel, and being fully advised in the premises, finds that Defendant Liberty Mutual would have been entitled to a credit for joint tortfeasor DaimlerChrysler Corporation, in connection with the underlying accident, but, having consented to the liability settlement with DaimlerChrysler, Liberty Mutual may not now object to that settlement as a basis for denying underinsured motorist benefits, and because of its consent, may not now claim said credit and accordingly, the Court grants Plaintiff Zane's Motion for Summary Judgment and denies Defendant Liberty Mutual's Motion for Summary Judgment.

The Order further stated that "[i]ssues relating to the liability of the underinsured motorist Sarah Kim or [Zane's] damages may be submitted to arbitration at the election of either or both Defendant Liberty Mutual and/or [Zane] as provided in the underinsured motorist endorsement." The circuit court filed the Final Judgment on April 25, 2005, and Liberty Mutual timely appealed.

On appeal, Liberty Mutual argues that the circuit court erred as a matter of law in granting summary judgment in favor of Zane and denying summary judgment to Liberty Mutual. The circuit court erred, Liberty Mutual contends, by concluding that because Liberty Mutual had consented to the liability settlement with DaimlerChrysler, Liberty Mutual could not claim a credit/offset[3/] for the difference between the $200,000 in settlement proceeds that DaimlerChrysler had paid Zane and DaimlerChrysler's liability policy limits. Liberty Mutual maintains Zane did not sustain her burden of showing that "(1) Liberty Mutual engaged in an affirmative representation or conduct, (2) [Zane] detrimentally relied upon that affirmative representation or conduct, and (3) such reliance was reasonable."

Liberty Mutual further maintains it is undisputed that the total amount of settlement proceeds awarded to Zane (including contributions from Thomas/Liberty Mutual and Kim/State Farm and amounts received and foregone in settlement with DaimlerChrysler) exceeds the amount of damages caused by Kim and,

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[3/] The parties use the terms credit and offset interchangeably.

therefore, application of the credit/offset would result in Zane's not being entitled to any UIM benefits from Liberty Mutual as a matter of law.

Accordingly, Liberty Mutual contends the circuit court's Order should be reversed and the case remanded with instructions to enter summary judgment in favor of Liberty Mutual.

II.

"We review the circuit court's grant or denial of summary judgment de novo." Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (quoting Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004)). The Hawai'i Supreme Court has often articulated that

> summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Querubin, 107 Hawai'i at 56, 109 P.3d at 697 (quoting Durette, 105 Hawai'i at 501, 100 P.3d at 71).

III.

A. Estoppel

Liberty Mutual argues that the circuit court erred by concluding that because Liberty Mutual had consented to the liability settlement with DaimlerChrysler, Liberty Mutual waived its right to a credit/offset for DaimlerChrysler.

Before addressing this issue, we must first discuss some background regarding UIM coverage and the credit/offset. Hawaii Revised Statutes (HRS) § 431:10C-301(b)(4) and (d) (2005 Repl.) provides now, as it did during the proceedings below, as follows:

> **§431:10C-301 Required motor vehicle policy coverage**
> . . . .
>
> (b) A motor vehicle insurance policy shall include:
> . . . .
>
> (4) Coverage for loss resulting from bodily injury or death suffered by any person legally entitled to recover damages from owners or operators of underinsured motor vehicles. An insurer may offer the underinsured motorist coverage required by this paragraph in the same manner as uninsured motorist coverage[.]
> . . . .
>
> (d) An insurer shall offer the insured the opportunity to purchase uninsured motorist coverage and underinsured motorist coverage by offering the following options with each motor vehicle insurance policy:
>
> (1) The option to stack uninsured motorist coverage and underinsured motorist coverage; and
>
> (2) The option to select uninsured motorist coverage and underinsured motorist coverage, whichever is applicable, up to but not greater than the bodily injury liability coverage limits in the insured's policy.

Hawaii Revised Statutes § 431:10C-103 (2005 Repl.) provides in relevant part:

> **§431:10C-103 Definitions.**
> . . . .
>
> "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use for which sum of the limits of all bodily injury liability insurance coverage and self-insurance applicable at the time of loss is less than the liability for damages imposed by law.

(Emphasis added.)

Liberty Mutual's "Underinsured Motorists Coverage - Hawaii (Stacked)" endorsement (Endorsement) applicable to Zane provided in relevant part:

> **INSURING AGREEMENT**
>
> **A.** We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury**:
>
> **1.** Sustained by an **insured**; and
>
> **2.** Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the **underinsured motor vehicle**.
>
> We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.
> . . . .
>
> **C.** **Underinsured motor vehicle** means a land motor vehicle or trailer of any type to which a bodily injury liability bond of [sic] policy applies at the time of the accident but the amount paid for **bodily injury** under the bond or policy to an **insured** is not enough to pay the full amount the **insured** is legally entitled to recover as damages.
> . . . .
>
> **LIMIT OF LIABILITY**
>
> **A.** Our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of **bodily injury** sustained by any one person in any one accident is the sum of the limits of liability shown in the Schedule or in the Declarations for each person. Subject to this limit for each person, our maximum limit of liability for all damages arising out of **bodily injury** resulting from any one accident is the sum of the limits of liability shown in the Schedule or in the Declarations for each accident.
> . . . .
>
> **B.** Any amounts otherwise payable for damages under this coverage apply over and above all sums:
>
> **1.** Paid because of the **bodily injury** by or on behalf of persons or organizations who may be legally responsible. This includes all sums under Part A[.]
> . . . .

> **ARBITRATION**
>
> **A.** If we and an **insured** do not agree:
>
> **1.** Whether that person is legally entitled to recover damages under this endorsement; or
>
> **2.** As to the amount of damages;
>
> either party may make a written demand for arbitration as provided in Section 431:10C-213, of the Hawaii Motor Vehicle Insurance Law.
>
> **ADDITIONAL DUTY**
>
> Any person seeking coverage under this endorsement must also promptly send us copies of the legal papers if a suit is brought.

(Emphasis in original.)

The Hawai'i Supreme Court wrote in Taylor v. Government Employees Insurance Co., 90 Hawai'i 302, 314, 978 P.2d 740, 752 (1999), that "[b]y settling for less than policy limits, the UIM insured agrees to forego compensation for the difference between the settlement amount and the tortfeasor's liability policy limits." This means that the "UIM carrier will not be responsible for covering that 'gap' as a component of its obligation to compensate its insured for injury and damage exceeding the tortfeasor's policy limits." Id. Additionally, the United States District Court for the District of Hawai'i explained in Dizol II that "a UIM carrier has a statutory right to be contractually liable to indemnify its insured *only* for the amount *in excess* of the tortfeasor's liability coverage." Dizol II, 176 F. Supp. 2d at 1031 (emphasis in original). It is an offset for this "gap," or "amount in excess," in addition to a credit for the $200,000 DaimlerChrysler contributed in settlement

with Zane, which Liberty Mutual contends it is entitled to in the instant case.

Although the circuit court held in the instant case that Liberty Mutual was estopped from asserting its credit/offset[4/] for Zane's settlement with DaimlerChrysler because Liberty Mutual had consented to the DaimlerChrysler settlement, Liberty Mutual maintains that estoppel does not apply in the instant case because Zane did not sustain her burden of showing that "(1) Liberty Mutual engaged in an affirmative representation or conduct, (2) [Zane] detrimentally relied upon that affirmative representation or conduct, and (3) such reliance was reasonable."

Liberty Mutual cites to County of Kaua'i v. Scottsdale Insurance Co., 90 Hawai'i 400, 403 n.1, 978 P.2d 838, 841 n.1 (1999), in support of its argument that it did not "affirmatively" represent anything or act in a way to make Zane believe that Liberty Mutual's credit/offset would not apply. In Scottsdale, the Hawai'i Supreme Court stated that "absent manifest injustice, the party invoking equitable estoppel must show that he or she has detrimentally relied on the representation or conduct of the person sought to be estopped, and that such reliance was reasonable." Id. (internal quotation marks, citations, and emphasis in original omitted).

[4/] The Circuit Court of the First Circuit (circuit court) used the term "credit" in its December 29, 2004 "Order Granting Plaintiff Dawna C. Zane's Motion for Summary Judgment Filed on May 16, 2003 and Denying Defendant Liberty Mutual Fire Insurance Company's Motion for Summary Judgment Filed on May 16, 2003."

Liberty Mutual argues that Zane can point to no affirmative representation or conduct by Liberty Mutual specifically indicating that such a credit/offset would not apply. Nowhere in footnote 1 in Scottsdale or in Scottsdale as a whole does the supreme court indicate that a requirement for estoppel is an "affirmative" representation or conduct, as Liberty Mutual urges. In reality, in the insurance context, neither affirmative representation nor affirmative conduct is required for estoppel to apply. See Moorcroft v. First Ins. Co. of Hawaii, Ltd., 68 Haw. 501, 503-04, 720 P.2d 178, 180 (1986) (an insurer's inaction constituted a waiver of the insurer's rights to invoke a consent-to-sue clause).

Presumably, when the circuit court referred to estoppel in the instant case, the court meant "quasi estoppel." "In Yuen v. London Guar. & Acc. Co. et al., 40 Haw. 213, at pages 229-230 it is . . . laid down that: . . . '[quasi estoppel] is based upon the broad equitable principle which courts recognize, that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.'" Godoy v. County of Hawaii, 44 Haw. 312, 320, 354 P.2d 78, 82 (1960). Furthermore, "the party invoking equitable estoppel must show that he or she has detrimentally relied on the representation or conduct of the person sought to be estopped, *and* that such reliance was reasonable." AIG Hawaiʻi Ins. Co. v. Smith, 78 Hawaiʻi 174, 179,

891 P.2d 261, 266 (1995) (internal quotation marks and citation omitted; emphasis in original).

The following facts are undisputed:

(1) On December 20, 2001, Chang asked what amount DaimlerChrysler had contributed to the settlement and was informed that DaimlerChrysler had contributed $200,000.

(2) Based on this information, Liberty Mutual gave its verbal approval of the bodily injury liability settlement and thereafter confirmed in writing by letter dated December 20, 2001, that "we [Liberty Mutual] do not object to your client resolving her bodily injury liability claims against the liable parties."

Therefore, there is no genuine issue of material fact as to whether Liberty Mutual consented to the settlement.

However, in the instant case, there are genuine issues of material fact regarding (1) whether Zane relied on Liberty Mutual's consent; (2) if Zane relied on Liberty Mutual's consent, whether Zane reasonably understood said consent to mean that Liberty Mutual would not assert its right to a credit/offset; and (3) if Zane relied on Liberty Mutual's consent, whether Zane's reliance was reasonable, given that Liberty Mutual claims it notified Zane of its intention to assert its right to a credit/offset prior to the finalization of Zane's settlement with DaimlerChrysler.

As to whether Zane relied on Liberty Mutual's consent, in her memorandum in support of her Motion for SJ, Zane explained:

> Insurance coverage for DaimlerChrysler is, for all practical purposes, unlimited. Zane would not have accepted a nuisance value settlement if there were any viable claim against DaimlerChrysler, given the catastrophic nature of her injuries. A viable product liability claim in this case would be worth many times more than the available UIM coverage.
>
> The settlement with DaimlerChrysler was for $200,000. The Liberty Mutual UIM coverage is $600,000. If Liberty Mutual was going to object to the amount of the DaimlerChrysler settlement, it should have done so because [Zane] would never have finalized the DaimlerChrysler settlement if it meant losing the $600,000 UIM coverage. That is why Zane requested Liberty Mutual's prior consent to the liability settlement, even though the Liberty Mutual UIM endorsement . . . did not contain a consent-to-settle provision. That is why Liberty Mutual's consent to the settlement was obtained before the settlement was actually finalized.

Regardless, Zane's explanation appears to contradict the statements in Young's Declaration on the merits of a liability claim against DaimlerChrysler. Although Zane explained that she would not have accepted a nuisance value settlement if there had been any viable claim against DaimlerChrysler and she never would have finalized the DaimlerChrysler settlement if it meant losing the $600,000 UIM coverage from Liberty Mutual, Young stated in his Declaration that "discovery and case preparation did not ultimately support a viable product liability claim against DaimlerChrysler" and the "product liability claim against DaimlerChrysler could not be successfully resolved because no viable basis for liability existed."

With regard to whether Zane reasonably took Liberty Mutual's consent to mean that Liberty Mutual waived its right to

a credit/offset, Zane did not claim in her Complaint or at the hearing on the summary judgment motions that she requested consent from Liberty Mutual specifically to ensure that Liberty Mutual would agree to forfeit its right to a credit/offset. In her Complaint, Zane claimed that "[a]lthough Liberty Mutual was itself involved in the bodily injury liability suit, Zane nonetheless went through the formality of requesting written permission to settle the liability claims in order to preserve underinsured motorist benefits." (Emphasis added.) At the summary judgment hearing, Zane explained that she had requested Liberty Mutual's consent to the settlement to ensure she would be able to proceed with the UIM claim afterwards. Further, the Hawai'i Supreme Court in Taylor did not hold that by simply consenting to the insured's settlement with a tortfeasor, the insurer waives its right to assert a claim for a credit/offset.

On the other hand, Zane's statement that she "would never have finalized the DaimlerChrysler settlement if it meant losing the $600,000 UIM coverage" could be construed to mean that Zane would not have settled with DaimlerChrysler had she known that Liberty Mutual planned to assert its right to a credit/offset, which, in turn, would reduce the amount of UIM benefits Liberty Mutual owed Zane to zero since DaimlerChrysler's policy limits were apparently unlimited. This is what the circuit court interpreted the statement to mean, as the court explained at the summary judgment hearing:

> THE COURT: . . . And under page 5, subsection S [of the "Admitted Facts" section of Liberty Mutual's Responsive

> Pretrial Statement], it says Liberty Mutual consented to the liability settlement with DaimlerChrysler and may not now object to that settlement as a basis for denying under-insured [sic] benefits.
>
> . . . .
>
> THE COURT: . . . What could that possibly mean except that everything [Zane's counsel] has argued was the intent when [Zane] approached wanting to make sure they weren't making a settlement that was going to trigger some claim for credit beyond the 200 [thousand dollars]. I don't see what it could possibly mean other than what [Zane's counsel] says it does.

Liberty Mutual argues that any reliance Zane may have had on Liberty Mutual's representations or conduct was unreasonable because Liberty Mutual communicated its intent to assert its credit/offset before the finalization of Zane's DaimlerChrysler settlement. Liberty Mutual refers to Chang's Declaration, wherein Chang stated that he communicated his intent to assert the credit/offset under Dizol II to Kawatachi in a telephone conversation on January 8, 2002 -- well before the finalization of Zane's settlement with DaimlerChrysler.

However, Zane notes that the alleged telephone conversation between Chang and Kawatachi was undocumented and claims that Liberty Mutual's failure to mention a possible offset or credit in various communications with Zane and pleadings to the circuit court following the alleged correspondence suggests that the conversation with Kawatachi, in fact, never transpired.

The circuit court did not address Chang's alleged conversation with Kawatachi in its Order or its Final Judgment. Regardless, there are genuine issues about whether, for example, (1) the conversation occurred; (2) if the conversation did occur, whether it happened prior to the finalization of Zane's

settlement with DaimlerChrysler; and (3) if the conversation occurred prior to the finalization with DaimlerChrysler, whether the conversation actually negated Liberty Mutual's prior consent to the settlement.

Given the above-mentioned genuine issues of material fact, the circuit court erred by granting summary judgment in favor of Zane based on the court's holding that Liberty Mutual was estopped from asserting its right to a credit/offset for amounts foregone to DaimlerChrysler.

B. Liberty Mutual was not entitled to an offset for the difference between Zane's settlement amount with DaimlerChrysler and DaimlerChrysler's liability policy limits.

Although the circuit court erred by granting summary judgment in favor of Zane in the instant case, the error was harmless with respect to Liberty Mutual's contention that it was entitled to an offset for the "gap" referred to in Taylor and Dizol II (the difference between the amount Zane settled with DaimlerChrysler for and the total limits of DaimlerChrysler's liability policy). This is because DaimlerChrysler was not an actual tortfeasor.

The Hawai'i Supreme Court in Taylor explained that "[b]y settling for less than policy limits, the UIM insured agrees to forego compensation for the difference between the settlement amount and the tortfeasor's liability policy limits" and "[t]he UIM carrier will not be responsible for covering that 'gap' as a component of its obligation to compensate its insured

for injury and damage exceeding the tortfeasor's policy limits." Taylor, 90 Hawai'i at 314, 978 P.2d at 752 (emphasis added).

Black's Law Dictionary 1497 (7th ed. 1999) defines "tortfeasor" as "[o]ne who commits a tort; a wrongdoer." In the instant case, Judge McConnell did not find DaimlerChrysler to be liable to Zane or, in other words, a tortfeasor.

Furthermore, HRS § 431:10C-103 defines "underinsured motor vehicle" as "a motor vehicle with respect to the ownership, maintenance, or use for which sum of the limits of all bodily injury liability insurance coverage and self-insurance applicable at the time of loss is less than the liability for damages imposed by law." (Emphasis added). There are no Hawai'i cases on point that construe what is "applicable" insurance within the context of HRS § 431:10C-103.

In her answering brief, Zane analogizes HRS § 431:10C-103 to similar statutes in other states to show that "applicable" means insurance coverage available from actual tortfeasors. For example, the Superior Court of New Jersey, Law Division, Camden County, set forth the applicable part of the New Jersey Statutes Annotated (N.J.S.A.) § 17:28-1.1(e)(1), in Arenson v. American Reliance Insurance Co., 284 N.J. Super. 337, 665 A.2d 394 (N.J. Super. Ct. Law Div. 1994):

> For the purpose of this section, (1) "underinsured motorist coverage" means insurance for damages because of bodily injury and property damage resulting from an accident arising out of the ownership, maintenance or use of an underinsured motor vehicle. Underinsured motorist coverage shall not apply to an uninsured motor vehicle. A motor vehicle is underinsured when the sum of limits of liability under all bodily injury and property damage liability bonds and insurance policies available to a person against whom

> recovery is sought for bodily or property damage is, at the time of the accident, less than the applicable limits for underinsured motorist coverage afforded under the motor vehicle insurance policy held by the person seeking that recovery. A motor vehicle shall not be considered an underinsured motor vehicle under this section unless the limits of all bodily injury liability insurance or bonds applicable at the time of the accident have been exhausted by payment of settlements or judgments. The limits of underinsured motorist coverage available to an injured person shall be reduced by the amount he has recovered under all bodily injury liability insurance or bonds[.]

Id. at 341, 665 A.2d at 396 (emphasis added). In Vassiliu v. Daimler Chrysler Corp., 356 N.J. Super. 447, 813 A.2d 547 (N.J. Super. Ct. App. Div. 2002), the Superior Court of New Jersey, Appellate Division, explained:

> "Available" liability coverage, however, is not without limit. In this respect, we said in Gold v. Aetna Life & Cas. Ins. Co., 233 N.J. Super. 271, 558 A.2d 854 (App. Div. 1989):
>
> > We hold that then the statute, N.J.S.A. 17:28-1.1(e), speaks of "available" insurance coverage, it plainly refers to that of persons who are actual responsible tortfeasors and not that of those who may have been "involved" in the accident without being liable under the law. To rule otherwise would lead to the result that underinsured coverage would be eliminated whenever entirely blameless persons involved in an accident happen to be heavily insured.
>
> Id. at 276, 558 A.2d at 854.

Vassiliu, 356 N.J. Super. at 456-57, 813 A.2d at 553 (brackets omitted). Accord Arenson, 284 N.J. Super. at 342, 665 A.2d at 397.

In Allstate Insurance Co. v. Dejbod, 63 Wash. App. 278, 818 P.2d 608 (1991), the Court of Appeals of Washington held:

> A UIM insurer cannot subtract a liability policy pursuant to RCW [Revised Code of Washington] 48.22.030(1)[5/]

[5/] As the Court of Appeals in Allstate Insurance Co. v. Dejbod, 63 Wash. App. 278, 818 P.2d 608 (1991), explained:

> RCW [Revised Code of Washington] 48.22.030(1) obligates a UIM carrier to pay (1) a claimant's legally recoverable ("applicable") damages or UIM limits, whichever is less, minus

> if the person insured by the liability policy is not liable to the injured claimant. To allow a UIM insurer to subtract a liability policy is to excuse it from paying that part of the injured person's claim that the liability policy should pay. But the liability policy need not pay anything if the liability insured is not liable. Therefore, when a liability insured is not liable, there is nothing that the UIM carrier should be excused from paying due to the existence of that insured's liability policy.
>
> The fact that a liability carrier voluntarily settles with or pays an injured claimant does not, without more, establish that the carrier's insured is liable to the claimant, or that the insured's liability policy is "applicable" to the claimant within the meaning of RCW 48.22.030(1). Settlements and payments are often made for reasons only tangentially related to the liability of the insured, *see* 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* 126, including avoidance of the costs of litigation, and they are not equivalent to an adjudication of liability through litigation or arbitration. Without more, they do not establish the liability of the person on whose behalf payment is made. *Cf. Bordeaux v. Ingersoll Rand Co.*, 71 Wash. 2d 392, 396, 429 P.2d 207 (1967) (elements of res judicata not met by mere payment); *Rains v. State*, 100 Wash. 2d 660, 665, 674 P.2d 165 (1983) (same regarding collateral estoppel); 60 Am. Jur. 2d *Payment*, § 138 (1987) (part payment leaves payor with right to deny liability as to balance).

Id. at 285-86, 818 P.2d at 612.

On this point, we conclude that the reasoning of the New Jersey Superior Court in Gold, which was espoused in Vassiliu and Arenson, and the Washington Court of Appeals in Dejbod is persuasive and applicable to the facts in the instant case. Here, the following facts are undisputed:

(1) Discovery and case preparation did not support a viable product liability claim against DaimlerChrysler.

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(2) "the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident."

Id. at 284, 818 P.2d at 611.

(2) Because no viable basis for liability existed, the product liability claim against DaimlerChrysler could not be successfully resolved.

(3) The best that Judge McConnell could achieve was a mediated settlement for a "nuisance value" payment of $200,000 by DaimlerChrysler, representing an estimate of attorneys' and expert witness fees and expenses of litigation that DaimlerChrysler could avoid through the settlement.

(4) Young recommended to Zane that she accept the mediated settlement because there was no viable product liability claim against DaimlerChrysler and no reasonable prospect of recovering more from DaimlerChrysler at trial.

(5) Young spoke to Chang and fully advised Liberty Mutual of the facts of the settlement and the circumstances requiring abandonment of the product liability claim for a nuisance value settlement of $200,000 (approximating estimated defense costs because no viable liability claim existed), and Young requested consent to the liability settlement without prejudicing Zane's right to payment of UIM benefits.

Furthermore, there is nothing in the record on appeal indicating that DaimlerChrysler was liable to Zane for the accident.

C. Liberty Mutual was entitled to a credit for the amount of the DaimlerChrysler settlement received by Zane.

Liberty Mutual relies on Vassiliu for the proposition that UIM insurers are entitled to a *pro tanto* credit for a claimant's settlement with DaimlerChrysler as a product manufacturer.

In Vassiliu, the credit provision in the insurer's policy provided in part that UIM coverage "shall be reduced by all sums . . . [paid] because of the 'bodily injury' or 'property damage' by or on behalf of persons or organizations who may be legally responsible." Vassiliu, 356 N.J. Super. at 458, 813 A.2d at 554. The superior court held that, although it could not ultimately be shown that DaimlerChrysler was liable on a products liability claim, id. at 451, 813 A.2d at 549, "throughout the course of discovery and up to the point of settlement, [DaimlerChrysler] was thought to be a viable tortfeasor." Id. at 458, 813 A.2d at 554. Since the insurer's credit provision refered to a party who "may" be legally responsible, the superior court held, DaimlerChrysler qualified as a person or organization who "may be [a] legally responsible" party within the meaning of the insurance policy credit provision. Id. The court wrote:

> Unlike the threshold inquiry under *N.J.S.A.* 17:28-1.1e(1), this aspect of the statute, which gives UIM carriers the right to a set-off or *pro tanto* credit for other monies received by an injured plaintiff, does not require that those monies be received from an "actual responsible tortfeasor" and, therefore, does not require either an admission of fault or an adjudication thereof. Neither is it limited to monies received from automobile tortfeasors.

Id. at 457, 813 A.2d at 554.

In the instant case, Liberty Mutual had a provision in its UIM Endorsement similar to the credit provision in Vassiliu. Section B.1. of the Limit of Liability clause provided in part that "[a]ny amounts otherwise payable for damages under this coverage apply over and above all sums . . . [p]aid because of the **bodily injury** by or on behalf of persons or organizations who may be legally responsible." (Underlined emphasis added.)[6/]

Liberty Mutual was entitled to a credit for the amount of the DaimlerChrysler settlement received by Zane.

IV.

The Order filed on December 29, 2004 is reversed, the Final Judgment filed on April 25, 2005 is vacated, and this case is remanded for further proceedings consistent with this opinion.

On the briefs:

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[6/] See Bateman v. Motorists Mut. Ins. Co., 377 Pa. Super. 400, 547 A.2d 428 (1988); In re Arbitration Between Exchange Ins. Co. and Skomski, 224 A.D.2d 948, 637 N.Y.S. 2d 561 (1996); Rodriquez v. Gen. Accident Ins. Co. of America, 808 S.W.2d 379 (Mo. 1991); Waylett v. United Servs. Auto. Ass'n, 224 Neb. 741, 401 N.W.2d 160 (1987); Sparler v. Fireman's Ins. Co. of Newark, N.J., 360 Pa. Super. 597, 521 A.2d 433 (1987); and James v. Michigan Mut. Ins. Co., 18 Ohio St. 3d 386, 481 N.E.2d 272 (1985).