

FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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LIBERTY MUTUAL INSURANCE COMPANY, Plaintiff-Appellant/
Cross-Appellee, v. SENTINEL INSURANCE COMPANY, LTD.
and HARTFORD INSURANCE GROUP, Defendant-Appellee/
Cross-Appellee, ZASHELL LABRADOR and PEMCO MUTUAL
INSURANCE COMPANY, Defendant-Counterclaimant/Appellee/
Cross-Appellant, ELISA TOLFREE, et al., Defendants

NO. 27429

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 01-1-508)

MARCH 31, 2009

RECKTENWALD, C.J., WATANABE, AND FOLEY, JJ.

PARTIAL OPINION OF THE COURT BY WATANABE, J.,
AS TO PARTS I. THROUGH II.B.1.;
PARTIAL OPINION OF THE COURT BY RECKTENWALD, C.J.,
AS TO PARTS II.B.2. AND III.; AND
WATANABE J., DISSENTING AS TO PART II.B.2. AND
DISSENTING IN PART AS TO PART III.

PARTIAL OPINION OF THE COURT BY WATANABE, J.

Plaintiff-Appellant/Cross-Appellee Liberty Mutual Insurance Company (Liberty Mutual) appeals and Defendant-Counterclaimant/Appellee/Cross-Appellant Zashell Labrador (Labrador) cross-appeals from the certified final judgment (Final Judgment) entered by the Circuit Court of the Third Circuit¹ (circuit court) on July 21, 2005. The Final Judgment determined that Liberty Mutual must pay Labrador \$50,000 in underinsured motorist (UIM) benefits for injuries Labrador sustained as a passenger in a car driven by Defendant Elisa Tolfree (Tolfree)

¹ Except as otherwise noted, the Honorable Greg K. Nakamura presided over all proceedings in the underlying action in the circuit court.

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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that allegedly veered off the road to avoid an unidentified truck pulling a trailer (phantom truck).

Tolfree's car was insured under two motor vehicle policies that provided liability and uninsured motorist (UM) coverage. Labrador was insured by her father's policy with Liberty Mutual, which provided stacked UM coverage totaling \$140,000 and stacked UIM coverage totaling \$140,000.

Following an arbitration between Labrador and Liberty Mutual, an arbitration panel determined that Labrador's damages amounted to \$250,000 and that Tolfree was sixty percent at fault and the phantom truck's driver was forty percent at fault for the damages. Labrador reached settlements with Tolfree's insurers for liability and UM benefits and then sought UM and UIM benefits from Liberty Mutual.

Liberty Mutual contends that the circuit court erred when it: (1) held Liberty Mutual liable to Labrador for UIM benefits based on Tolfree's joint-and-several liability for all of Labrador's damages, (2) failed to credit Liberty Mutual with the amounts that Labrador received in UM benefits from Tolfree's insurers in determining that Labrador was underinsured, and (3) awarded attorney's fees to Labrador.

Labrador argues in her cross-appeal that the circuit court erred by failing to: (1) award her prejudgment interest; and (2) invalidate, as against public policy, the "other insurance" clause included in Liberty Mutual's policy.

I. BACKGROUND

On August 5, 1994, Labrador, who was then thirteen years old, was a passenger in a 1990 Subaru Legacy (car) driven by Tolfree when Tolfree veered her car off the roadway and into a utility pole (the accident), allegedly to avoid the phantom truck. Labrador was injured as a result of the accident, underwent four surgeries, and suffered permanent facial scars.

Tolfree's car was insured under a policy with PEMCO Mutual Insurance Company (PEMCO), a Washington state insurer,² which provided \$100,000 in bodily-injury (BI) liability coverage and \$100,000 in UIM coverage. Under PEMCO's policy, an "underinsured motor vehicle" was defined as "one to which no liability insurance policy or bond applies at the time of the accident" and therefore, included UM coverage. PEMCO's policy included the following "other insurance" clauses:

PART II
UNDERINSURED MOTORIST COVERAGES

Other Insurance

If this policy and any other policy providing [UIM] coverage applies to the same loss, the maximum limit of liability under all policies will be the highest limit of liability that applies under any one policy. If other [UIM] coverage applies, we'll pay only our fair share of the loss. That share is our proportion of the total [UIM] insurance that applies to the loss. But any insurance we provide when you or a covered person use a vehicle you don't own will be excess over any other collectible insurance.

POLICY PROVISIONS

Other Insurance--Primary and Excess Insurance

The insurance we provide for any auto described on the "Declarations" or for any replacement or additional auto we insure under this policy is *primary*. That is, it pays even if other insurance applies.

Any insurance provided by this policy for any motor vehicle you don't own is *excess*. That is, it protects you after the limit of primary insurance provided by another policy or loss-protection plan is exhausted or if there's no primary insurance or loss protection for that motor vehicle.

Sometimes, other primary insurance is available for a motor vehicle when our insurance also is primary. Or, other excess insurance is available for a motor vehicle when our insurance is excess. In either case, we'll pay only our fair share of any loss or damage. That share is our proportion of the total liability limit that applies to the loss. This definition of "our fair share" applies to all parts of this policy except "Parts II and III."

(Emphases in original.)

² Tolfree had moved to Hawai'i from the State of Washington shortly before the accident.

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Tolfree's car was also insured under a policy issued by Hartford Insurance Group and Sentinel Insurance Company, Ltd. (H/S), which provided \$100,000 in BI-liability coverage and \$50,000 in UM coverage. The H/S policy included the following "other insurance" provision in both the UM and UIM sections of the policy:

If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.

However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

(Formatting revised.)

Labrador was insured under her father's policy with Liberty Mutual covering four vehicles, which provided BI-liability coverage of \$35,000 for each person, property-damage-liability coverage of \$35,000 for each accident, stacked-UM coverage totaling \$140,000, and stacked-UIM coverage totaling \$140,000. Liberty Mutual's policy included the following "other insurance" provision with respect to UM and UIM coverage:

If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

After the accident, Tolfree failed to disclose her H/S policy to Labrador and PEMCO. Tolfree also failed to tell H/S about the accident. Labrador entered into settlement negotiations with PEMCO, the only liability insurer she was aware of, and on October 30, 1996, her attorney notified Liberty Mutual of Labrador's intention to settle with PEMCO "for general damages only . . . at [BI-liability] policy limits." Labrador's attorney also informed Liberty Mutual of Labrador's intention to pursue a UIM claim against Liberty Mutual:

If it is your or your principal's position that a settlement would jeopardize my client's claim, if any, to underinsurance, then we request that and your principal

promptly notify us of its objection. In that instance we would ask your principal to advance a sum to our client equivalent to that offered by [Tolfree's] insurance company and he [sic] would assign to your principal any interest he [sic] may have to recover from [Tolfree] (but without giving up his [sic] claim to underinsurance).

This UIM letter should be construed as a claim for UIM benefits and as such for tolling the Statute of Limitations under the Hawaii No-fault Law.

We are taking the position that the settlement our client is receiving from [Tolfree's] insurance company is non-duplicative and reimbursement is not required under the statute. We will provide you with a copy of the release and declaration page.

Liberty Mutual neither objected nor consented to the settlement. On November 13, 1996, Labrador settled her claim with PEMCO for \$100,000, the policy limit for BI liability, and executed a general release of all claims against Tolfree.

On August 27, 1997, Liberty Mutual informed Labrador of its discovery that Tolfree had an additional policy with H/S, which was apparently administered in Hawai'i by Pacific Insurance Company. Tolfree had purchased the additional coverage on August 2, 1994 upon her arrival in Hawai'i. Liberty Mutual advised Labrador that in light of Tolfree's overlapping policies with PEMCO and H/S, "we will be able to entertain [a UIM] claim only after the limits of liability under any applicable [BI-]liability bonds or policies have been exhausted by payment of judgments or settlements. Thus, we would suggest that you pursue a [BI] claim through Pacific Insurance at this time."

However, because Labrador had released Tolfree from all liability upon settling with PEMCO for the \$100,000 BI limits, H/S refused to pay BI benefits to Labrador. H/S insisted that it was only obligated under its policy with Tolfree to contribute fifty percent to the settlement paid out by PEMCO.

By a letter dated March 15, 2000, Liberty Mutual rescinded its earlier offer to settle Labrador's UIM claim for \$35,000³ on grounds that Liberty Mutual: (1) was "entitled to a \$200,000 offset (the total available amount of underlying [BI]

³ It is not clear from the record on appeal when Liberty Mutual had made the earlier offer.

limits), prior to exposing" the UIM policy; and (2) felt "that the value of [Labrador's] claim is under \$200,000."

On September 6, 2000, Labrador filed a complaint in the circuit court against Tolfree in Civil No. 00-1-0361, seeking damages caused by Tolfree's negligence and misrepresentation/negligent misrepresentation of her insurance status.

By a letter dated April 24, 2001, Labrador demanded that Liberty Mutual pay her UM, "(instead of [UIM] coverage) under the policy[,]" on grounds that there were two tortfeasors involved in the accident--Tolfree and the unidentified driver of the phantom truck.⁴ Labrador attached a copy of a police report in which Tolfree had stated that the phantom truck caused the accident.

Sometime thereafter, Labrador, Liberty Mutual, and H/S agreed to a private arbitration of Labrador's UM claim, and the arbitration hearing was scheduled for November 28, 2001. Prior to the hearing, Labrador offered to settle with H/S and Liberty Mutual for three-fifths of their respective UM-policy limits. H/S agreed to the settlement and, on November 6, 2001, paid Labrador \$30,000 of its \$50,000 UM policy. In consideration of the settlement amount, Labrador released and discharged H/S from any and all claims for UM and UIM benefits under Tolfree's policy with H/S. On November 9, 2001, Liberty Mutual declined Labrador's settlement offer.⁵

On November 21, 2001, in Civil Case No. 01-1-0508, Liberty Mutual filed the underlying complaint against H/S, PEMCO, Labrador, Tolfree, and various John Doe defendants, seeking

⁴ The record on appeal indicates that Liberty Mutual recorded Tolfree's statement about the accident in July 1997 but did not disclose the statement to Labrador until Tolfree was about to be deposed in 2001. In her statement, Tolfree explained that just prior to the accident, which occurred on a rainy day, she was driving on a straight thoroughfare approaching a curve in the road when she saw a trailer truck which "someone told [her] it's like a papaya truck . . . going around the curve." The truck, according to Tolfree, was "like straddling the line and . . . had a trailer, an empty like flatbed[.]" Tolfree stated that because she thought the truck was "going to run us off or hit us," she "put on the brakes," which "locked because of the conditions[.]" causing Tolfree's car to cross the line and collide with the utility pole on the edge of the curve.

⁵ Liberty Mutual's share, if it had accepted Labrador's offer, would have been \$84,000.

declaratory judgment and other relief to resolve the issues concerning priority of the multiple UM policies.

On November 28, 2001, the scheduled arbitration hearing was held between Labrador and Liberty Mutual. On December 20, 2001, a three-member arbitration panel issued an award for \$250,000 in Labrador's favor and determined that Tolfree and the driver of the phantom truck were sixty and forty percent at fault, respectively, for Labrador's damages. Labrador then requested payment of UM benefits from Liberty Mutual pursuant to the arbitration award.

On January 23, 2002, in Civil Case No. 01-1-0508, Liberty Mutual filed a seven-count, first-amended complaint for declaratory judgment and other relief in the circuit court. In summary, the first-amended complaint sought a judgment declaring that:

- the arbitration award shall be reduced by \$100,000, the amount of settlement proceeds paid to Labrador by PEMCO (Count 1);
- Liberty Mutual possesses a valid right of subrogation against Tolfree, H/S, and/or PEMCO, with respect to any UM insurance benefits paid or to be paid by Liberty Mutual to Labrador in connection with the accident (Count 2);
- Liberty Mutual is entitled to recover from Tolfree, Labrador, H/S, and PEMCO, jointly and severally, any UM benefits paid or to be paid by Liberty Mutual to Labrador in connection with the accident, and, in addition, is entitled to recover compensatory and/or consequential damages against Labrador for her and her attorney's conduct in impairing Liberty Mutual's subrogation rights (Count 3);
- Liberty Mutual's obligation, if any, to pay UM benefits is excess over and above the primary UM insurance limits available under H/S and PEMCO's policies and therefore, Labrador is required to obtain from H/S and PEMCO the UM limits available under their respective policies before Liberty Mutual is obligated to pay any UM amount (Counts 4 and 5);
- Liberty Mutual's obligation, if any, to pay UM benefits to Labrador shall be reduced by the \$30,000 settlement amount with H/S and any other amounts in UM benefits received from H/S or PEMCO (Count 6); and
- Labrador is not entitled to UIM benefits from Liberty Mutual because (1) she waived and/or is estopped from asserting a UIM claim after representing that she would pursue a UM claim instead; (2) she is not legally entitled to recover damages from any

underinsured motorist after having executed a full and unqualified release of claims against Tolfree without any reservation; (3) Liberty Mutual is entitled to a credit for all BI liability insurance applicable to Tolfree's vehicle at the time of the accident and the total amount of such insurance exceeds the amount of damages attributable to Tolfree as determined by the arbitration award; and/or (4) Liberty Mutual's UIM coverage, if any, is excess to the primary UIM coverages applicable to Tolfree's vehicle at the time of the accident and the amount of such primary UIM coverages exceeds the amount of damages attributable to Tolfree (Count 7).

On February 27, 2002, Labrador filed a motion for partial summary judgment (Labrador's 2/27/2002 motion for partial summary judgment) against Liberty Mutual as to all issues keeping Liberty Mutual or the other insurers from paying the confirmed arbitration award. Labrador asserted that, based on the arbitration award, she was entitled to summary judgment because: (1) Liberty Mutual, as the only UIM carrier with no BI-liability coverage on Tolfree's car, was liable for UIM benefits of \$50,000; (2) Tolfree was jointly and severally liable for all of Labrador's damages and was therefore underinsured; (3) Labrador's damages exceeded the available BI-liability coverage of \$200,000, making Tolfree underinsured for \$50,000; (4) Labrador did not waive her UIM claim by sending Liberty Mutual the April 24, 2001 letter demanding payment of UM benefits, instead of UIM benefits; (5) "Liberty Mutual has no right to withhold or delay payment of UM or UIM proceeds based on alleged subrogation rights"; and (6) Liberty Mutual's "other insurance" clause is invalid but, even if valid, should not delay payment by Liberty Mutual, who can pursue the other insurers.

On March 7, 2002, in Special Proceeding Case No. 01-1-0047, the circuit court⁶ entered an order granting Labrador's motion to confirm the arbitration award "to the extent that it relates to the issues of liability and damages recoverable against the [UM] as set forth in [the arbitration award]" but denied Labrador's motion "to the extent that it requests attorneys' fees, costs and/or post-judgment interest[.]" The circuit court also stayed execution of the arbitration award

⁶ The Honorable Ronald Ibarra entered the order.

while the declaratory judgment action was pending. After the arbitration award was issued, Labrador settled her UM claim against the PEMCO policy for \$60,000, and PEMCO then assigned to Labrador its right to any UM claim against Liberty Mutual.

On March 8, 2002, Liberty Mutual filed a cross-motion for summary judgment against Labrador, seeking a declaration that: (1) Labrador is not entitled to UIM benefits from Liberty Mutual in connection with the accident; (2) Liberty Mutual may recover from Labrador any UM benefits paid or to be paid to Labrador by Liberty Mutual in connection with the accident, plus compensatory and/or consequential damages arising from the conduct of Labrador and her attorneys in impairing Liberty Mutual's subrogation interests; (3) any obligation by Liberty Mutual to pay UM benefits is excess over primary UM benefits available under H/S's and PEMCO's policies and, therefore, Labrador is required to obtain \$50,000 and \$100,000 in UM benefits, respectively, from H/S and PEMCO before Liberty Mutual is obligated to pay any UM amounts; and (4) any obligation by Liberty Mutual to pay UM benefits to Labrador shall be reduced by \$30,000 and/or any UM amounts received from H/S and/or PEMCO.

On March 20, 2002, H/S filed a joinder in Labrador's 2/27/2002 motion for partial summary judgment. H/S argued that Liberty Mutual's subrogation rights, if any, against H/S were barred by Labrador's release and discharge of Tolfree and Labrador's settlement with H/S of her UM and UIM claims.

On April 11, 2002, PEMCO filed its answer to Liberty Mutual's first amended complaint, counterclaim against Liberty Mutual, and cross-claim against H/S. In its counterclaim, PEMCO alleged, in relevant part, as follows:

4. [UM] coverage is considered to be coverage personal to its insured which follows the insured's person.

5. That portion of the OTHER INSURANCE provision of [Liberty Mutual] UM coverage in the above-referenced policy states that "however, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance" is void as against Hawaii's public policy governing UM coverage or is otherwise unenforceable.

6. Said OTHER INSURANCE provision of [Liberty Mutual's] UM coverage in the above-referenced policy states

that "if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability leave to the total of all applicable limits."

7. [Labrador] is entitled to collect from [Liberty Mutual] the amount determined by the UM arbitration between [Labrador] and [Liberty Mutual] to be the damages [Labrador] suffered as a result of an uninsured motorist (\$100,000) subject to an offset of any [UM] coverage already received (\$30,000) or otherwise available (\$50,000) and subject to its right to recover a portion of the remaining amount from the other carriers providing [UM] coverage to [Labrador] for damages she suffered from the subject accident.

8. [Liberty Mutual] is responsible for \$140,000 ([Liberty Mutual's] UM coverage amount) over \$290,000 (the total of all the carrier's [sic] UM coverage) up to the limits of its policy of any properly determined value of any UM claim made by [Labrador] arising out of the subject accident.

9. [PEMCO] is not bound by the outcome of the UM arbitration between [Labrador] and [Liberty Mutual].

(Brackets omitted.)

In its cross-claim against H/S, PEMCO alleged that it was entitled to an award of fifty percent of the payments it had made to or on behalf of Tolfree and Labrador as a result of the accident, plus attorney's fees and costs.

On April 18, 2002, PEMCO filed its memorandum regarding Labrador's 2/27/2002 motion for partial summary judgment. PEMCO noted that its policy with Tolfree was issued in the State of Washington by a Washington insurer to cover a car that was then in Washington. Therefore, PEMCO stated, Washington insurance laws define the rights of PEMCO and any person claiming UIM benefits under PEMCO's policy. PEMCO observed that pursuant to PEMCO's UIM policy, as well as the Washington case of Millers Casualty Insurance Co. of Texas v. Briggs, 665 P.2d 891 (Wash. 1983), cited with approval by the Hawai'i Supreme Court in Kang v. State Farm Mutual Automobile Insurance Co., 72 Haw. 251, 815 P.2d 1020 (1991), Labrador would not be able to collect both liability and UIM benefits under PEMCO's policy. Noting that Labrador had \$140,000 in stacked-UIM coverage for four vehicles under her father's policy with Liberty Mutual, for which her family had paid premiums, PEMCO argued that there was ample UIM insurance for Labrador to fully recover her damages under Liberty Mutual's policy, subject to any credits allowed to Liberty Mutual

pursuant to the Hawai'i Supreme Court's decision in Taylor v. Government Employees Insurance Co., 90 Hawai'i 302, 978 P.2d 740 (1999). PEMCO further argued that there is no law in Hawai'i requiring that available UM coverage be exhausted before a claim for UIM coverage can be made, and because the Hawai'i Supreme Court has held that UM insurance provides personal coverage, Liberty Mutual should not be allowed to provide that its UM liability is excess to other collectible insurance.

On June 25, 2002, Labrador filed a cross-claim against PEMCO, alleging, in relevant part, that: (1) prior to May 25, 2001, Labrador's counsel had inquired of PEMCO as to UM coverage, but PEMCO denied UM coverage; (2) as a result, Labrador pursued a claim with Liberty Mutual, which had undisputed UM coverage; (3) Liberty Mutual then commenced arbitration, and although PEMCO was notified of the arbitration hearing, PEMCO did not submit to the arbitration process; (4) after obtaining the arbitration award, Liberty Mutual filed the instant declaratory action and obtained a court order to the effect that Liberty Mutual's coverage was not primary and, therefore, PEMCO's coverage was primary; (5) as a result, Liberty Mutual has refused payment of UM benefits; (6) PEMCO has failed to pay UM benefits, claiming that the arbitration award was not binding on it and that Labrador must pursue yet another UM arbitration pursuant to PEMCO's policy provisions; (7) Labrador relied, to her detriment, on PEMCO's denial of coverage in proceeding against Liberty Mutual; (8) PEMCO'S wrongful or mistaken denial of coverage constitutes a waiver of PEMCO's right to arbitrate, in another arbitration, the issue of damages caused by the uninsured driver of the phantom truck; (9) PEMCO is responsible for UM benefits up to an amount that will make Labrador whole pursuant to the arbitration award; and (10) PEMCO, because of its denial of coverage, is responsible for attorney's fees and costs incurred by Labrador. Labrador asked the circuit court to declare PEMCO responsible for UM benefits "of \$100,000, constituting benefits awarded by the arbitrators (\$250,000) minus any amounts already paid (\$130,000), and taking into account policy limits of

\$100,000[,] as well as attorney's fees, costs, prejudgment interest, and other appropriate relief.

On August 27, 2002, Labrador filed a motion to amend her answer to include an omitted counterclaim for bad faith against Liberty Mutual.⁷

On October 3, 2002, Liberty Mutual filed a motion for summary judgment against Labrador, seeking a judicial determination that Labrador was not entitled to UIM benefits from Liberty Mutual "[b]ecause joint and several liability does not apply to contractual UM and UIM claims, and because the \$150,000 in damages attributable to [Tolfree's] negligence is less than her \$200,000 liability limits[.]"

On October 3, 2002, Labrador filed a second motion for partial summary judgment against Liberty Mutual (Labrador's 10/3/2002 motion for partial summary judgment) on the limited issue of whether payment by Liberty Mutual of \$50,000 in UIM benefits would constitute double recovery by Labrador. Labrador argued that contrary to Liberty Mutual's claim, Liberty Mutual was not entitled to a credit for the total of UM settlements obtained (\$90,000) and BI-liability coverage (\$200,000).

On October 14, 2002, the circuit court entered an order granting Labrador's motion to amend her answer to include the counterclaim for bad faith. Labrador filed her first amended answer and counterclaim on October 24, 2002.

On October 30, 2002, Labrador filed a motion seeking an award of attorney's fees and costs against Liberty Mutual pursuant to Hawaii Revised Statutes (HRS) § 431:10-242 (2005).⁸

⁷ Labrador had apparently filed a bad-faith claim against Liberty Mutual on June 10, 2002, but the circuit court, the Honorable Riki May Amano presiding, dismissed the claim on grounds that it was a compulsory counter-claim to the declaratory judgment action.

⁸ HRS § 431:10-242 provides currently, as it did during all relevant proceedings below, as follows:

Policyholder and other suits against insurer. Where an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder, the beneficiary under a policy, or the person who has acquired the rights of the policyholder or beneficiary under the policy shall be awarded reasonable

(continued...)

On December 4, 2002, the circuit court entered its findings of fact, conclusions of law, and order granting Labrador's 10/3/2002 motion for partial summary judgment and denying Liberty Mutual's October 3, 2002 motion for summary judgment (December 4, 2002 Order). In the December 4, 2002 Order, the circuit court entered six findings of fact regarding the insurance coverage applicable to Labrador's claim and the arbitration held to apportion liability between Tolfree and the driver of the phantom truck. The circuit court also entered the following conclusions of law:

1. It is undisputed that both UM coverage and UIM coverage are not available for the unidentified driver's vehicle. However, the analysis in this case requires determining the amount of damages payable to Labrador arising from the tort liability of the unidentified driver for the purpose of UM coverage and determining the amount of damages payable to Labrador arising from Tolfree's tort liability for the purpose of UIM coverage. In other words, Labrador is not asking for both UM and UIM coverage arising from the operation of the same vehicle. Therefore Labrador is entitled to make both a claim for UM and UIM benefits under the Liberty Mutual policy.

2. There is no dispute that the applicable credit to be applied against the damages payable for Tolfree's tort liability for UIM coverage is \$200,000. The credit is measured by the \$100,000 liability coverage limits available under each of the PEMCO policy and [H/S] policy or [sic] a total of \$200,000.

3. Under the terms of the Liberty Mutual policy[,]

Underinsured motor vehicle means a land motor vehicle or trailer of any type to which a bodily injury liability bond or 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.

Under the HRS § 431:10C-103[,]

"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.

⁸(...continued)

attorney's fees and the costs of suit, in addition to the benefits under the policy.

The question is what is the full amount Labrador is entitled to recover as damages from Tolfree or what is Tolfree's liability to Labrador for damages imposed by law.

One method of calculating the amount of damages payable by Tolfree would be to consider only the tort liability of Tolfree.

Another method of calculating damages would be to consider the tort liability of Tolfree and the unidentified driver. However, as this Court has previously ruled, the concept of joint and several liability applies as to Labrador's claim for damages against Tolfree and the unidentified driver. Cf. *Karasawa v. TIG Ins. Co.*, 88 Hawaii [Hawai'i] 77 (App. 1998). As such, based upon the arbitration award and the stipulation of Liberty Mutual and Labrador that the arbitration award applies to Labrador's UIM claim against Liberty Mutual, Labrador is entitled to recover damages against [T]olfree in the amount of \$250,000 and Tolfree's liability for damages imposed by law is \$250,000.

4. Labrador agrees that the amount of the credit in calculating the UIM benefits payable by Liberty Mutual to Labrador is \$200,000. Liberty Mutual agrees that if it receives this \$200,000 credit, then it has no right of subrogation.

Therefore, the amount of UIM benefits payable by Liberty Mutual is calculated by reducing the Tolfree's [sic] liability for damages of \$250,000 by the \$200,000 credit. Based upon the foregoing, as a matter of law, Labrador is entitled to \$50,000 in UIM benefits from Liberty Mutual.

5. It is possible to apply a similar analysis to the UM claim. Based upon this analysis, it may be argued that Labrador is entitled to UM benefits totaling \$250,000. However, the concept of full but not duplicate recovery applies to limit Labrador's recovery. *AIG Hawaii Ins. Co. v. Rutledge*, 87 Haw. 337, 346, 955 P.2d 1069 (App. 1998).

6. In this case, based upon the arbitration award, Labrador's full recovery of damages is \$250,000. Based upon the amounts of insurance benefit paid and payable, Labrador's total recovery is \$240,000, calculated as follows:

PEMCO liability coverage payment	100,000
[H/S] UM benefit payment	30,000
PEMCO UM benefit payment	60,000
Liberty Mutual UIM benefit payment	<u>50,000</u>
TOTAL	240,000

Therefore, the UIM benefit payable by Liberty Mutual to Labrador does not result in a duplicate recovery.

In its December 4, 2002 Order, the circuit court also ordered:

Furthermore, since Liberty Mutual has abandoned its other defenses to payment of UIM coverage, agreeing that waiver, release, and prejudice defenses are no longer an issue, there are no other declaratory judgment issues relating to payment of the \$50,000 UIM benefits. Therefore, [Labrador] is entitled to use this order to obtain a lifting

of the stay of proceedings to confirm the arbitration award in S.P. No. 01-1-0047 as to her \$50,000 UIM claim.

On March 17, 2003, the circuit court entered an order that denied Labrador's 2/27/2002 motion for partial summary judgment against Liberty Mutual and granted in part and denied in part Liberty Mutual's March 8, 2003 cross-motion for summary judgment. In denying Labrador's 2/27/2002 motion for partial summary judgment, the order stated, in relevant part, as follows:

Pursuant to the Motion, Labrador seeks a determination that Liberty Mutual has the obligation to pay her \$50,000 in [UIM] benefits. Labrador argues that, pursuant to [a UIM] benefit arbitration, her damages total \$250,000. The total amount of liability coverage available at the time of the accident was \$200,000 for [Tolfree]. Therefore, Labrador asserts that she is entitled to \$50,000 in UIM benefits from Liberty Mutual measured by the damages totaling \$250,000 less the amount of liability coverage available at the time of the accident of \$200,000.

Pursuant to the Arbitration Award in the UM benefit arbitration, Labrador may recover up to \$100,000 in UM benefits arising from the liability of the unknown tortfeasor. Labrador has already received \$100,000 in liability coverage benefits paid on behalf of Tolfree from [PEMCO]. Since Labrador is conceding that at most she is seeking a total of \$250,000 in insurance benefits from all sources, she has a potential claim for UIM benefits in the amount of \$50,000 from Liberty Mutual.

However, Tolfree had an additional liability insurance policy from [H/S] which provided \$100,000 in coverage. Labrador did not receive any liability insurance benefits from [H/S]. Apparently, [H/S] has asserted that it has no obligation to pay liability insurance benefits to Labrador because Labrador released Tolfree under a release Labrador gave to Tolfree and PEMCO. Liberty Mutual has asserted that it has been prejudiced by the release of Tolfree because it cannot exercise a right of subrogation against [H/S] if Liberty Mutual pays UIM benefits to Labrador. Labrador contends that Liberty Mutual impliedly consented to the settlement between herself and PEMCO.

Genuine issues of material fact exist at least as to the following: (1) whether Liberty Mutual consented to the settlement between Labrador and PEMCO, and (2) whether Liberty Mutual has been prejudiced as a result of the settlement with PEMCO, or more precisely, because of language of the release given by Labrador to Tolfree.

As to that part of Liberty Mutual's March 8, 2003 cross-motion for summary judgment that Liberty Mutual was not obligated to pay Labrador UIM benefits, the circuit court's order stated, in pertinent part:

Genuine issues of material fact exist as to whether Labrador waived her UIM claim by pursuing the UM claim.

. . . .

Liberty Mutual cites *Martin v. Illinois Farmers Insurance*, 742 N.E.2D 848 (Ill. App. 1 Dist. 2000) for the proposition that since Labrador released Tolfree, Labrador is not entitled to recover damages from Tolfree. Further, since Labrador's entitlement to recover damages is a prerequisite to UIM coverage, such coverage is not available.

Martin v. Illinois Farmers Insurance does not stand for this proposition. The case stands for the proposition that a release can be so broadly drafted that it can be construed to encompass the release of a UIM claim. *Id.*, 742 N.E.2d at 855-56. In this case, the release states that it applies to "Elisa and John Tolfree and PEMCO Mutual Insurance." Therefore, there are at least genuine issues of material fact as to whether the release was intended to release a UIM claim against Liberty Mutual.

. . . .

Under the terms of the Liberty Mutual policy[,]

Underinsured motor vehicle means a land motor vehicle or trailer of any type to which a bodily injury liability bond or 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.

Under the HRS §431:10C-103[,]

"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.

The question is what is the full amount Labrador is entitled to recover as damages from Tolfree or what is Tolfree's liability to Labrador for damages.

Liberty Mutual argues, based upon the UM arbitration results, that Tolfree's liability to Labrador for damages is \$150,000. This is based upon the Arbitrator's Award which places Labrador's damages at \$250,000 and Tolfree's share of liability at 60%. Continuing on with its argument, Liberty Mutual then asserts that Tolfree had a total of \$200,000 in liability coverage available. Since the liability coverage was greater than Tolfree's liability to Labrador for damages, Labrador is not entitled to UIM benefits from Liberty Mutual.

However, the doctrine of joint and several liability applies. Therefore, Tolfree is jointly and severally liable for the \$250,000 in damages. More to the point, Tolfree is liable to Labrador for damages in the amount of \$250,000 and Labrador is entitled to receive from Tolfree damages in the amount of \$250,000.

As such, Liberty Mutual cannot escape payment of UIM benefits on the ground that Tolfree is severally liable for only \$150,000 in damages payable to Labrador.

Liberty Mutual contends that its right of subrogation has been prejudiced by Labrador's settlement with Tolfree. However[,]

[t]here is now a significant body of judicial precedents for the proposition that in order to justify foreclosing an insured's right to indemnification from an otherwise applicable [UIM] coverage, an insurer must show that it was prejudiced by the settlement of the tort claim. Moreover, based on judicial precedents in analogous situations involving the judicially imposed requirement, some courts will probably require an insured to show that the settlement resulted in substantial prejudice.

A. Widiss, Uninsured and Underinsured Motorist Insurance, Rev. 2nd ed. (1999), § 43.5.

Genuine issues of material fact exist as to whether Liberty Mutual's right of subrogation has been prejudiced by Labrador's settlement with Tolfree.

Regarding the part of Liberty Mutual's cross-motion that sought summary judgment that Liberty Mutual's UM policy was excess to H/S's UM policy, the circuit court concluded, after reviewing the "other insurance" provisions in Liberty Mutual's and H/S's respective policies, that H/S's policy "was primary in regard to UM benefits payable to Labrador and Liberty Mutual's policy provides excess coverage."

Also on March 17, 2003, the circuit court entered an order awarding Labrador \$6,705 in attorney's fees but denying Labrador any prejudgment interest.

On November 30, 2004, the circuit court entered an order granting in part and denying in part Liberty Mutual's motion for leave to file an interlocutory appeal.

On July 21, 2005, the circuit court entered Final Judgment pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rules 54(b) (2000) and 58 (1990) in favor of Labrador and against Liberty Mutual, in accordance with the various orders discussed above. The Final Judgment determined that Liberty Mutual was obligated to pay Labrador \$50,000 in UIM benefits and \$6,705 in attorney's fees. Liberty Mutual filed its notice of appeal from

the Final Judgment on August 1, 2005. Labrador filed her notice of cross-appeal on August 15, 2005.

II. DISCUSSION

A. Liberty Mutual's Appeal

1. Whether Labrador's UIM Insurance Covered Tolfree's Joint-and-Several-Tort Liability for All Damages Incurred by Labrador

Liberty Mutual contends that joint-and-several liability, as defined in HRS §§ 663-10.9 (1993)⁹ and 663-11

⁹ At the time the accident occurred, HRS § 663-10.9 provided, in relevant part, as follows:

Abolition of joint and several liability; exceptions.
... Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

- (1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons.
- (2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:
 - (A) Intentional torts;
 - (B) Torts relating to environmental pollution;
 - (C) Toxic and asbestos-related torts;
 - (D) Torts relating to aircraft accidents;
 - (E) Strict and products liability torts; or
 - (F) Torts relating to motor vehicle accidents except as provided in paragraph (4).
- (3) For the recovery of noneconomic damages in actions, other than those enumerated in paragraph (2), involving injury or death to persons against those tortfeasors whose individual degree of negligence is found to be twenty-five per cent or more under section 663-31. Where a tortfeasor's degree of negligence is less than twenty-five per cent, then the amount recoverable against that tortfeasor for noneconomic damages shall be in direct proportion to the degree of negligence assigned.
- (4) For recovery of noneconomic damages in motor vehicle accidents involving tort actions

(continued...)

(1993),¹⁰ is a tort concept which does not apply to contractual UM and UIM claims. Liberty Mutual points out that \$150,000 in UM coverage was available under PEMCO's and H/S's policies to compensate Labrador for the forty-percent share of the damages (\$100,000) caused by the uninsured driver of the phantom truck. Additionally, there was \$200,000 in liability coverage available under PEMCO's and H/S's policies, an amount sufficient to cover Tolfree's sixty-percent share of the damages (\$150,000). Therefore, Liberty Mutual argues, Tolfree was not "underinsured" and Labrador was not entitled to claim UIM benefits under her father's policy.

For the following reasons, we disagree with Liberty Mutual.

a.

Although claims against UM and UIM policies are contractual in nature, the policies must provide the coverage required by statute. See Walton v. State Farm Mut. Auto Ins. Co., 55 Haw. 326, 328, 518 P.2d 1399, 1401 (1974) (holding that the insurance commissioner has "no authority to approve any policy provisions that are in contravention of any part of the Hawaii Insurance Law"); Sol v. AIG Hawai'i Ins. Co., 76 Hawai'i 304, 307, 875 P.2d 921, 924 (1994) (holding that it was

⁹(...continued)

relating to the maintenance and design of highways including actions involving guardrails, utility poles, street and directional signs, and any other highway-related device upon a showing that the affected joint tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based. In actions in which the affected joint tortfeasor has not been shown to have had such reasonable prior notice, the recovery of noneconomic damages shall be as provided in paragraph (3).

(Emphases added.)

¹⁰ HRS § 663-11 provides:

Joint tortfeasors defined. For the purpose of this part the term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

unnecessary to interpret vague and unambiguous terms of an insurance contract because to the extent that the contract terms conflicted with statutory language, "the statute must take precedence over the terms of the contract"); Nat'l Union Fire Ins. Co. v. Ferreira, 71 Haw. 341, 344, 790 P.2d 910, 912 (1990) (holding that "[i]nsurance policies are governed by statutory requirements in force and effect at the time such policies are written" and "[s]uch provisions are read into each policy issued thereunder, and become a part of the contract with full binding effect upon each party") (internal quotation marks omitted).

At the time the accident occurred, HRS § 431:10C-301(b) (1993)¹¹ provided, in relevant part, as follows:

Required motor vehicle policy coverage. . . .

(b) A motor vehicle insurance policy shall include:

. . . .

(3) With respect to any motor vehicle registered or principally garaged in this State, liability coverage provided therein or supplemental thereto, in limits for bodily injury or death set forth in paragraph (1), under provisions filed with and approved by the commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; provided, however, that the coverage required under this paragraph shall not be applicable where any named insured in the policy shall reject the coverage in writing; and

(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; provided that the offer of both shall:

(A) Be conspicuously displayed so as to be readily noticeable by the insured;

(B) Set forth the premium for the coverage adjacent to the offer in a manner that the

¹¹ The language of HRS § 431:10C-301(b) (3) and (4) is essentially unchanged in the current codification of the statute, except that in the current subsection (b) (3), the word "however" is omitted after the word "provided," following the first semicolon.

premium is clearly identifiable with the offer and may be easily subtracted from the total premium to determine the premium payment due in the event the insured elects not to purchase the option; and

- (C) Provide for written rejection of the coverage by requiring the insured to affix the insured's signature in a location adjacent to or directly below the offer.

(Emphases added.) Additionally, HRS § 431:10C-103 (1993) defined the terms "[u]ninsured motor vehicle"¹² and "[u]nderinsured motor vehicle,"¹³ in relevant part, as follows:

Definitions. As used in [Article 10C relating to motor vehicle insurance]:

. . . .

- (22) 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.
- (23) Uninsured motor vehicle means any of the following:
 - (A) A motor vehicle for which there is no bodily injury liability insurance or self-insurance applicable at the time of the accident; or
 - (B) An unidentified motor vehicle that causes an accident resulting in injury provided the accident is reported to the police or proper governmental authority, and claimant notifies the claimant's insurer within thirty days or as soon as practicable thereafter, that the claimant or the claimant's legal representative has a legal action arising out of the accident.

(Emphasis added.)

¹² HRS § 431:10C-103 (2005) currently provides:

"Uninsured motor vehicle" means any of the following:

- (1) A motor vehicle for which there is no bodily injury liability insurance or self-insurance applicable at the time of the accident; or
- (2) An unidentified motor vehicle that causes an accident resulting in injury; provided the accident is reported to the police or proper governmental authority within thirty days or as soon as practicable thereafter.

¹³ The current definition of "underinsured motor vehicle" is essentially unchanged, except that in HRS § 431:10C-103 (2005), a comma was added after the word "maintenance[.]"

Under the clear and unambiguous language of the statutes governing UM and UIM insurance, therefore, UM and UIM policies must provide coverage for damages which an insured thereunder is "legally entitled to recover" from the owner or operator of an uninsured or underinsured vehicle, respectively, because of bodily injury or death. A prerequisite to a claim for UIM benefits "is the existence of 'bodily injury liability insurance coverage,' which is 'less than the liability for damages imposed by law'" on the owner or operator of the vehicle. *Ferreira*, 71 Haw. at 345, 790 P.2d at 913 (emphasis added) (brackets omitted).

The statutes governing UM and UIM insurance do not define what damages an insured "is legally entitled to recover" from the owner or operator of an uninsured or underinsured vehicle or what constitutes a vehicle owner or operator's "liability for damages imposed by law." However, HRS § 1-14 (1993) instructs that "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." Additionally, HRS § 1-16 (1993) provides that "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."

In motor vehicle accident cases such as the one giving rise to this appeal, HRS § 663-10.9(2)(F) imposes joint and several liability for "economic and noneconomic damages against joint tortfeasors in actions involving . . . [t]orts relating to motor vehicle accidents except as provided in paragraph (4) [,]"¹⁴ which paragraph is not applicable to the facts of this case. Pursuant to HRS § 663-11, the term "joint tortfeasors" is defined as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." "In this

¹⁴ See footnote 8 for text of paragraph (4) of HRS § 663-10.9.

connection, 'liable' means 'subject to suit' or 'liable in a court of law or equity.'" Gump v. Walmart Stores, Inc., 93 Hawai'i 428, 446, 5 P.3d 418, 436 (App. 1999) (citing Tamashiro v. De Gama, 51 Haw. 74, 75, 450 P.2d 998, 1000 (1969)), overruled on other grounds, 93 Hawai'i 417, 5 P.3d 407 (2000).

Under the principle of joint and several liability,

either or any of the wrongdoers may be held liable for the whole of the damages resulting from their tortious acts. Consequently, where successive impacts by or collisions with different negligently operated vehicles contributed to, or combined to cause, the aggregate harm suffered, the plaintiff can recover the full amount of his [or her] damages from either one or all of the tortfeasors.

74 Am. Jur. 2d Torts § 66 (2001). See also Karasawa v. TIG Ins. Co., 88 Hawai'i 77, 81, 961 P.2d 1171, 1175 (App. 1998) (holding that joint tortfeasors "are jointly and severally liable for the injury they caused to an injured party, HRS § 663-10.9, and the injured party is entitled to collect his or her entire damages from either tortfeasor").

Construing the language of the statutes governing UM and UIM insurance according to their plain and commonly understood meaning and *in pari materia* with the statutes imposing joint and several liability in motor-vehicle-accident cases, it is clear that UM and UIM policies must provide coverage for all damages which an insured is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle, which necessarily encompasses damages for which the owner or operator of an uninsured or underinsured motor vehicle is jointly and severally liable pursuant to HRS §§ 663-10.9 and 663-11.

Liberty Mutual has not challenged on appeal the circuit court's determination that an arbitration panel awarded Labrador damages of \$250,000 and apportioned liability "60% against Tolfree and 40% against the unidentified driver." Pursuant to HRS §§ 663-10.9 and 663-11, Labrador was legally entitled to recover all of her damages from Tolfree, and to the extent that Labrador's damages exceeded Tolfree's BI-liability coverage limits, Labrador was entitled to recover UM and UIM benefits under her father's Liberty Mutual policy.

b.

Liberty Mutual's policy stated, with respect to UM coverage, in pertinent part, as follows:

PART C -- UNINSURED MOTORIST'S COVERAGE

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INSURING AGREEMENT

We will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of [BI]:

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 uninsured motor vehicle.

Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

Insured as used in this Part means:

1. You or any family member.
2. Any other person occupying your covered auto.
3. Any person for damages that person is entitled to recover because of [BI] to which this coverage applies sustained by a person described in 1. or 2. above.

Uninsured motor vehicle means a land motor vehicle or trailer of any type:

1. To which no [BI-]liability bond or policy applies at the time of the accident.
2. To which a [BI-]liability bond or policy applies at the time of the accident. In this case its limit for [BI] liability must be less than the minimum limit for [BI] liability specified by the financial responsibility law of Hawaii.
3. Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits or which causes an accident resulting in [BI] injury without hitting:
 - a. you or any family member.
 - b. a vehicle which you or any family member are occupying; or
 - c. your covered auto.

.

OTHER INSURANCE

If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

(Underscored emphasis added.)

Liberty Mutual's policy included similar provisions for UIM coverage:

INSURING AGREEMENT

We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of [BI]:

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 [BI] liability bonds or policies have been exhausted by payment of judgments or settlements.

Insured as used in this endorsement means:

1. You or any **family member**.
2. Any other person **occupying your covered auto**.
3. Any person for damages that person is entitled to recover because of [BI] to which this coverage applies sustained by a person described in 1. or 2. above.

Underinsured motor vehicle means a land motor vehicle or trailer of any type to which a [BI]-liability bond or policy applies at the time of the accident but the amount paid for [BI] 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.

(Underscored emphases added.)

Under the clear and unambiguous terms of Labrador's policy with Liberty Mutual, which tracks the Hawai'i statutes regulating UM and UIM coverage, Liberty Mutual agreed to pay UM and UIM benefits for "damages which an **insured** is legally entitled to recover from the owner or operator of" an uninsured or underinsured motor vehicle "because of [BI] . . . [s]ustained

by an **insured**[.]" As a member of her father's household, Labrador was clearly an "insured" under the Liberty Mutual policy. Pursuant to the joint-and-several-liability statute, Labrador was also legally entitled to recover all her damages from Tolfree, the known tortfeasor.

Therefore, under Liberty Mutual's UM and UIM policy, Labrador was entitled to recover UM and UIM benefits.

c.

Liberty Mutual cites Illinois Farmers Insurance Co. v. Hall, 844 N.E.2d 973 (Ill. Ct. App. 2006), in support of its position that joint-and-several liability applies only to actions in tort and not to contractual actions for UM and UIM benefits. However, the ruling in Hall, which related to a UM policy, appears to be *dictum*.¹⁵ Moreover, the ruling was made without any discussion of the statutory requirements in Illinois for UM liability. The Hall decision is therefore not persuasive authority.

We are aware that other courts have concluded that statutes apportioning liability for tort purposes are not applicable to UM and UIM claims. See, e.g., Kentucky Farm Bureau Mut. Ins. Co. v. Ryan, 177 S.W.3d 797, 800 (Ky. 2005); Lahr v. Am. Family Mut. Ins. Co., 551 N.W.2d 732, 734 (Minn. Ct. App. 1996). However, both Ryan and Lahr are distinguishable.

In Ryan, Lawrence and Mildred Kruer (the Kruers) were instantly killed when their car was struck by an oncoming car that veered into the Kruers' lane to avoid an unidentified

¹⁵ The automobile policy at issue in Hall limited UM liability coverage to \$250,000 per person per accident and \$500,000 per occurrence. 844 N.E.2d at 975. The automobile insurer paid the \$250,000-per-person liability limit to Arrid Hall (Hall), who was injured when a vehicle driven by an unidentified driver struck another vehicle, which then struck Hall and two other pedestrians. Id. at 974-75. Members of Hall's family sought loss-of-consortium damages under the policy and claimed that the \$500,000-per-occurrence limit applied to each of the tortfeasors because more than one claimant existed. Id. at 974. They also claimed that they were entitled to receive up to \$500,000, regardless of the value of their individual claims. Id. The Illinois Appellate Court held that under the unambiguous language of the policy, the per-person liability limit applied to "all damages" which expressly included "all the consequential damages sustained by other persons, such as * * * loss of society." Id. at 977. Therefore, the derivative loss-of-consortium claims by Hall's family members were included in the \$250,000-per-person limit of liability as to Hall. Id. at 979.

motorcyclist. 177 S.W.3d at 799. The Kruers' estate settled with the insurer of the driver of the oncoming car for BI-liability-policy limits and then filed a lawsuit for UIM coverage against the Kruers' own insurance policy. Id. The Kruers' insurer filed a third-party complaint against the unknown motorcyclist, and, pursuant to the trial court's instruction, the jury allocated fault between the oncoming driver and the unknown motorcyclist at fifty percent each. Id. The Kentucky Supreme Court noted that while no requirement exists in Kentucky that an unknown tortfeasor be named and/or served as a party in an action, under Kentucky's comparative-fault statute, a UIM insurer is liable to its insured only for damages exceeding the liability limits of the tortfeasor alleged to be underinsured. Id. at 801.

In Lahr, the injured passenger in a multi-vehicle accident pursued UIM benefits under the driver's policy, based on the other vehicle involved in the accident being underinsured. 551 N.W.2d at 732-33. The driver's insurer had already paid the injured passenger the BI-liability limits under the driver's policy. Id. at 733. Lahr therefore involved a claim for third-party insurance benefits, not a claim for first-party insurance benefits against the passenger's own insurer. In a similar factual situation, the Hawai'i Supreme Court held that dual recovery of BI-liability and UIM benefits from a single policy is not allowed because allowing such recovery would, in effect, transform UIM coverage into BI-liability coverage and "create a duplication of liability benefits." Kang, 72 Haw. at 256, 815 P.2d at 1022.

d.

In Taylor v. Government Employees Insurance Co., the Hawai'i Supreme Court held that our UIM statute "is a remedial statute that must be liberally construed in order to accomplish the purpose for which it was enacted." (Brackets and internal quotation marks omitted.) The supreme court noted that when the legislature enacted into law the bill that "mandated that UIM coverage be included in all no-fault auto insurance policies sold in Hawai'i unless the insured rejected such coverage in

writing[,]" the House Committee on Consumer Protection and Commerce reported that the purpose of the bill was as follows:

The purpose of this bill is to require insurers to offer coverage for underinsured motor vehicles in motor vehicle insurance policies. Underinsured motorist coverage would then be treated in the same manner that uninsured motorist coverage is presently treated, i.e., to provide protection, through voluntary insurance, for persons who are injured by underinsured motorists whose liability policies are inadequate to pay for personal injuries caused by motor vehicle accidents.

Taylor, 90 Hawai'i at 308, 978 P.2d at 746 (quoting H. Stand. Comm. Rep. No. 1150-88, in 1988 House Journal, at 1248) (brackets omitted).

In this case, the record is undisputed that the total limits of Tolfree's BI-liability policies were inadequate to pay for all of the damages sustained by Labrador as a result of the accident. Furthermore, Labrador never sought to recover insurance benefits greater than her total damages, as determined by the arbitration panel.

The circuit court did not err in concluding that Liberty Mutual was liable under its contract to pay UIM benefits of \$50,000 to Labrador.

2. Whether Liberty Mutual Was Entitled to a Credit for the Total Amount of PEMCO's and H/S's UM-Policy Limits or the Total Amount of UM Payments Made to Labrador in Determining Liberty Mutual's UIM Obligation

In Taylor, the Hawai'i Supreme Court held that where an insured under a UIM policy settles for less than the tortfeasor's BI-liability limits,

the UIM insured agrees to forego compensation for the difference between the settlement amount and the tortfeasor's liability policy limits. 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 limits.

Id. at 314, 978 P.2d at 752.

In this case, Labrador was determined to have sustained \$250,000 in damages. Although Tolfree had a total of \$200,000 in BI-liability coverage from PEMCO and H/S, Labrador settled with Tolfree for only \$100,000 in BI-liability benefits. In

accordance with Taylor, the circuit court, in calculating Liberty Mutual's liability for UIM benefits, credited Liberty Mutual with the full \$200,000 BI limit of Tolfree's policies.

Liberty Mutual maintains that in determining whether Tolfree was "underinsured," the circuit court erred in failing to also credit Liberty Mutual with either the UM limits under the PEMCO and H/S policies, totaling \$150,000, or the UM settlement payments made by PEMCO and H/S, totaling \$90,000.

Liberty Mutual is incorrect.

The relevant portion of our UIM statute, HRS § 431:10C-301, provides:

Required motor vehicle policy coverage. . . .

(b) A motor vehicle insurance policy shall include:

. . . .

(3) With respect to any motor vehicle registered or principally garaged in this State, liability coverage . . . in limits for bodily injury or death set forth in paragraph (1), . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; . . . and

(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.

At the time the accident occurred, "underinsured motor vehicle" was defined 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 . . . applicable at the time of loss is less than the liability for damages imposed by law.

HRS § 431:10C-103 (emphasis added).

The statutory language is clear. To obtain UIM coverage in Hawai'i, the liability for damages must exceed the total amount of BI-liability limits applicable at the time of the loss. The policy limits for UM coverage and UM payments or settlements are not part of this analysis.

Accordingly, the circuit court correctly determined that the \$250,000 in joint and several "damages imposed by law"

against Tolfree exceeded the \$200,000 in cumulative limits of Tolfree's BI-liability policies with PEMCO and H/S. Therefore, Tolfree met the statutory definition of a UIM, and Liberty Mutual was obligated to pay Labrador UIM benefits to compensate her for the \$50,000 difference.

3. Whether the Circuit Court Properly Awarded Attorney's Fees to Labrador

Liberty Mutual contends that if it prevails on appeal, Labrador would not be the prevailing party, and, therefore, the circuit court's order awarding Labrador \$6,705 in attorney's fees must be reversed. In light of our disposition of this appeal, this contention has no merit.

HRS § 431:10-242 provides currently, as it did when the accident occurred, as follows:

Policyholder and other suits against insurer. Where an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder, the beneficiary under a policy, or the person who has acquired the rights of the policyholder or beneficiary under the policy shall be awarded reasonable attorney's fees and the costs of the suit, in addition to the benefits under the policy.

(Emphasis added.) The plain language of HRS § 431:10-242 mandates an award of attorney's fees to "the policyholder, the beneficiary under a policy, or the person who has acquired the rights of the policyholder or beneficiary under the policy" whenever an insurer unsuccessfully contests its liability under a policy. Inasmuch as Liberty Mutual was not successful in contesting its liability to Labrador for UIM benefits, the plain language of HRS § 431:10-242 required that Labrador be awarded her attorney's fees.

Liberty Mutual points out that there were two disputed issues before the circuit court: (1) Labrador's entitlement to UM benefits, and (2) Labrador's entitlement to UIM benefits. Liberty Mutual argues that while Labrador may have prevailed on her UIM claim, the circuit court agreed with Liberty Mutual that it was not obligated to pay Labrador any UM benefits because its UM coverage was excess to PEMCO's and H/S's UM coverage.

Therefore, Liberty Mutual argues, "fees should have been awarded to both parties, or no fees should have been awarded at all." This argument also fails.

"Generally, under the American Rule, each party is responsible for paying his or her own litigation expenses." DFS Group L.P. v. Paiea Props., 110 Hawai'i 217, 219, 131 P.3d 500, 502 (2006) (citation and internal quotation marks omitted). Consequently, "[n]o attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation, or agreement." Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 58 Haw. 606, 618, 575 P.2d 869, 878 (1978). Liberty Mutual has not directed us to any statute, stipulation, or agreement that authorized an award of attorney's fees to Liberty Mutual.

B. Labrador's Appeal

1. The Circuit Court Did Not Abuse Its Discretion in Denying Prejudgment Interest to Labrador.

Labrador argues that the circuit court abused its discretion in denying her prejudgment interest because the amount of UIM benefits was "liquidated" prior to Liberty Mutual filing the underlying declaratory judgment action, Liberty Mutual disputed coverage on multiple issues but abandoned or lost on all of them, and "[t]he very least the courts can do to try to encourage timely payment by eager-to-deny and delay insurers is to take away the insurers' ill-gotten gains - the insurers' profit from the use of the money awarded by the arbitrators pending a declaratory judgment action."

"Prejudgment interest, where appropriate, is awardable under HRS § 636-16 [(1993)¹⁶] in the discretion of the court." Page v. Domino's Pizza, Inc., 80 Hawai'i 204, 208, 908 P.2d 552,

¹⁶ HRS § 636-16 provides:

Awarding interest. In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred.

556 (App. 1995) (footnote added) (internal quotation marks omitted). The "well-established" purpose of the statute is to

allow the court to designate the commencement date of interest in order to correct injustice when a judgment is delayed for a long period of time for any reason, including litigation delays. Another acknowledged purpose of HRS § 636-16 is to discourage recalcitrance and unwarranted delays in cases which should be more speedily resolved. A trial court's denial of prejudgment interest is usually affirmed if the party requesting the award is found to have caused the delay, or if there is no showing that the non-moving party's conduct unduly delayed the proceedings of the case.

Id. at 209, 908 P.2d at 557 (citations, brackets, and ellipses omitted).¹⁷

In spite of the lengthy litigation, the circuit court denied prejudgment interest to Labrador. The circuit court did, however, allow Labrador to file a counterclaim against Liberty Mutual for bad faith, which is still pending. Under the circumstances, we cannot conclude that the circuit court's denial of prejudgment interest to Labrador exceeded the bounds of reason or disregarded the rules and principles of law.

Man E. Keenan

Corinne K. Q. Watanabe

Charles R. Foley

¹⁷ The Intermediate Court of Appeals in Page relied on the legislative history of HRS § 636-16 in gleaning its purpose:

Your committee understands that at the present time interest is generally awarded commencing on the day the judgment is rendered. Where the issuance of a judgment is greatly delayed for any reason, such fixed commencement date can result in substantial injustice. Allowing the trial judge to designate the commencement date will permit more equitable results. Also, it is expected that party litigants will give serious regard to this discretion on the part of the trial judge so that those who may have had an unfair leverage by the arbitrariness of the prior rule will arrive at the realization that recalcitrance or unwarranted delays in cases which should be more speedily resolved will not enhance their position or assure them of a favorable award.

Page, 80 Hawai'i at 209 n.5, 908 P.2d at 557 n.5 (quoting S. Conf. Comm. Rep. No. 67, in 1979 Senate Journal, at 984) (formatting modified).