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(Court of Appeals No. 82554-2,  
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IN THE SUPREME COURT FOR THE STATE OF  
WASHINGTON

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STAN SCHIFF, M.D., PH.D.,

*Respondent,*

v.

LIBERTY MUTUAL FIRE INSURANCE CO., LIBERTY  
MUTUAL INSURANCE COMPANY,

*Petitioners.*

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AMICUS CURIAE MEMORANDUM OF  
MITCHELL INTERNATIONAL, INC.

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# TABLE OF CONTENTS

	<b>Page</b>
TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED .....	ii
IDENTITY AND INTEREST OF AMICUS.....	1
STATEMENT OF THE CASE .....	3
ARGUMENT .....	3
1. THE FRAMEWORK IS UNWORKABLE BECAUSE IT DEPENDS ON INFORMATION THAT GENERALLY IS NOT PUBLICLY AVAILABLE OR VERIFIABLE.....	3
2. THE FRAMEWORK FACTORS ARE IRRELEVANT TO THE BILL REVIEW PROCESS. ....	5
3. THE FRAMEWORK WOULD HARM POLICYHOLDERS.....	8
4. THE FRAMEWORK WOULD HARM MEDICAL PROVIDERS. ....	9
CONCLUSION .....	10

**TABLE OF CASES, STATUTES,  
AND OTHER AUTHORITIES CITED**

**Page(s)**

**State Cases**

*Folweiler Chiropractic, PS v. Am. Fam. Ins. Co.*,  
5 Wn. App. 2d 829, 429 P.3d 813 (2018) ..... 4

**Rules**

RAP 13.4(b)..... 1  
RAP 18.17 ..... 11

## **I. INTRODUCTION**

Mitchell International, Inc. (“Mitchell”) respectfully submits this Amicus Curiae Memorandum in support of the Petition for Review (the “Liberty Petition”) filed by Liberty Mutual Fire Insurance Co. and Liberty Mutual Insurance Company (collectively, “Liberty”).

The Liberty Petition involves an issue of substantial public interest that should be determined by the Supreme Court. *See* RAP 13.4(b). Specifically, the framework set out in the Court of Appeal’s underlying opinion for reviewing Personal Injury Protection (“PIP”) and Medical Payment (“MedPay”) claims (the “Framework”) is unworkable and would negatively affect both policyholders and medical providers.

## **II. IDENTITY AND INTEREST OF AMICUS**

The Liberty Petition concerns Liberty’s use of bill-review practices in connection with PIP and MedPay claims. Liberty’s bill-review practices include the use of Mitchell’s software tool, which is designed to assist insurers like Liberty (and many of the

nation's property casualty insurers nationwide) in the timely and cost-effective analysis of whether the amounts charged by medical providers were reasonable.

Mitchell has assisted a broad range of auto insurers with processing PIP and MedPay claims for more than 25 years. Over the past five years, approximately 75 insurers have used Mitchell bill review software, including more than 30 in Washington. In Washington alone, over the past five years insurers have used Mitchell bill review software to review approximately 250,000 PIP and MedPay claims covering 2.5 million bills for 9.3 million procedures.

Mitchell is submitting this Amicus Brief on its own behalf because Division I's opinion below (the "Underlying Opinion") implicates the use of Mitchell's software and would negatively and significantly affect not only the efforts by insurers in Washington who are processing PIP and MedPay claims, but also the interests of medical providers whose charges are at issue, and the policyholders with PIP and MedPay benefits.

### **III. ISSUE TO BE ADDRESSED BY AMICUS**

1. Whether the Framework set out in the Underlying Opinion for reviewing PIP and MedPay claims is unworkable and would negatively affect both policyholders and medical providers in Washington?

### **IV. STATEMENT OF THE CASE**

Mitchell adopts the Statement of the Case set forth in Liberty's Petition for Review.

### **V. ARGUMENT**

#### **1. The Framework Is Unworkable Because It Depends on Information that Generally Is Not Publicly Available or Verifiable.**

Under the Framework, insurers would be required to “independently evaluate the identity, background, credentials, or experience or any personal characteristics of the individual provider” who provided medical services to assess the reasonableness of medical bills. Underlying Opinion at 11, *citing Folweiler Chiropractic, PS v. Am. Fam. Ins. Co.*, 5 Wn. App. 2d 829, 838, 429 P.3d 813 (2018). This Framework is

unworkable because this information generally is neither publicly available nor verifiable.

As an initial matter, the “background, credentials, or experience or any personal characteristics of the individual provider” are not provided to insurers or to Mitchell, and often are not even publicly available. A bill often does not specify which medical provider (for example, a doctor, chiropractor, physician’s assistant, or nurse) provided the service at issue. But even if the bill did so, there is no reasonable way for an insurer or Mitchell to evaluate the “background, credentials, or experience or any personal characteristics of the individual provider” based on publicly available information.

Plaintiff Stan Schiff provides a good example. A Google search of “‘Stan Schiff’ and ‘MD’ and ‘Washington’” turns up several sites purporting to provide portions of Dr. Schiff’s background. No site appears to be operated by Dr. Schiff, and it is impossible to tell which (if any) of the sites accurately sets out Dr. Schiff’s “background, credentials, or experience or ...

personal characteristics.” The bill reviewer would be forced into one of two untenable positions: Assume that the publicly available information is accurate and use that information to apply the Framework factors;<sup>1</sup> or forego the bill review process altogether.

The problem is compounded if the person providing the service was not a doctor or chiropractor, but rather a nurse or physician’s assistant. If the treating provider’s name appears on the bill at all, it is even less likely that the insurer or Mitchell could identify or verify the “background, credentials, or experience or ... personal characteristics” from publicly available information such that these factors could be taken into account.

## **2. The Framework Factors Are Irrelevant to the Bill Review Process.**

Even if the Framework information were publicly available and verifiable (which it is not), the factors are not

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<sup>1</sup> One can only imagine the claims that might arise from the unintentional use of inaccurate information.



relevant to determining whether a particular billed charge is reasonable.

An insurer using Mitchell's software to review bills for typical procedures submitted as part of PIP or MedPay claims is able to instantaneously determine whether the fee charged is within the 80<sup>th</sup> percentile of fees in the specified geographic area (typically 1-4 zip codes in Washington). This analysis is based on thousands of data points accumulated in the FAIR Health database (which, notably, is not challenged by any expert testimony or other evidence offered by Dr. Schiff). If the fee is within the 80<sup>th</sup> percentile, it is not reduced.<sup>2</sup> If the fee exceeds the 80<sup>th</sup> percentile, it is reduced to the 80<sup>th</sup> percentile, which is deemed by Liberty to be a reasonable charge for the geographic area at issue.

The Framework factors are not relevant to the reasonableness analysis. The bills at issue are typical for

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<sup>2</sup> All but two of Plaintiff's bills were paid in full.

treatments like spinal manipulation, physical therapy, and office visits. These treatments are not unusual or difficult to perform, and many patients have the same treatments performed multiple times during the course of their treatment.

Based on decades of experience in analyzing the reasonableness of millions of bills, there is no evidence (and Mitchell sees none in the record here) that the “background, credentials, or experience or ... personal characteristics” of the provider impacts the reasonableness of the costs for routine treatments like this. Stated simply, where the provider received her training, or how many years she has been providing the treatment at issue, does not impact the fee that she should be paid for her services. Or, put more directly, the Framework factors are irrelevant to the reasonableness of the fees paid for the routine services typically covered under PIP and MedPay coverage.

### **3. The Framework Would Harm Policyholders.**

The likely result of the Framework being affirmed by this Court is that insurers will not be able to review the reasonableness of fees because (as set forth in Section 1 above) the information required to conduct the analysis specified by the Underlying Opinion is neither publicly available nor verifiable. The resulting impact on policyholders would be profound, in two ways.

First, the coverage limits typically available under PIP or MedPay coverage is \$10,000. If insurers cannot effectively review and reduce unreasonable bills, the policy limits will be eroded more quickly than they would be if bills were reduced to what is within the 80<sup>th</sup> percentile for the relevant geography. Once the coverage limits are eroded, the policyholder would face the choice of ending treatment, or potentially paying the treatment above the limits out of pocket. By contrast, the Mitchell software allows the insurer to safeguard the interests of the policyholder by not allowing outlier treaters to unnecessarily

and prematurely erode coverage limits with overpriced treatments.

The second, longer-term result of depriving insurers of the ability to effectively review bills is that it would incentivize providers who currently are within the 80<sup>th</sup> percentile and have their bills approved in full to raise their costs, even if those costs are not reasonable, because they know that the bill will be paid by PIP or MedPay insurers who are unable to conduct the review required by the Framework.

#### **4. The Framework Would Harm Medical Providers.**

Even if insurers were able to obtain publicly available and verifiable information about the “background, credentials, or experience or ... personal characteristics” the provider, analyzing these factors would significantly delay payment for treatments under PIP or MedPay coverage.

Currently, insurers who use Mitchell’s software are able to comply with the WAC’s requirements governing the timeliness of payments to providers in Washington who submit

PIP or MedPay bills . That is based in large part on the fact that review by the Mitchell software is virtually instantaneous; within a matter of seconds Mitchell is able to provide through its bill review tool data on provider charges that are within the 80<sup>th</sup> percentile. Taking the Framework factors into account would dramatically slow down this process as (at least under the current system) bill review would require time-intensive gathering and review of information that (as set forth in Section 2) has no actual bearing on the reasonableness of the fee being paid.

### **CONCLUSION**

For these reasons, as well as those articulated in Liberty's Petition for Review, Mitchell urges this Court to accept the Petition for Review.

*This document contains 1,502 words, excluding parts of the document exempted from the word count by RAP 18.17.*

DATED this 27th day of February, 2023

Respectfully submitted,

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED at Seattle, Washington, this 27th day of  
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/s/Trang La \_\_\_\_\_  
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