No. 95827-1

The Supreme Court
State Of Washington

MONICA DIAZ BARRIGA FIGUEROA, AS PARENT AND NATURAL GUARDIAN OF BRAYAN MARTINEZ, A MINOR,

Respondent/Plaintiff,

v.

CONSUELO PRIETO MARISCAL,

Appellant/Defendant.

ANSWER OPPOSING PETITION FOR REVIEW

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SUMMARY OF ARGUMENT

The Court of Appeals properly decided this case on appeal in accordance with prior Washington precedent, and should not be subject to review, because it does not create a conflict with a decision of this Court or the courts of appeal. This case should not be granted review by the Washington Supreme Court, because the Court of Appeals correctly decided that the PIP application was work product and was improperly before the jury at trial, in accordance with prior Washington precedent in *Heidibrink v. Moriwaki* and *Harris v. Drake*. However, if the Court of Appeals decision should be reviewed, the other issues raised on appeal should also be reviewed.

ARGUMENT AS TO WHY NO REVIEW IS NEEDED

A. The Court of Appeals Correctly Decided That a PIP Application Was Work Product, Due to the PIP Application Requirement Being Analogous to the Requirement to Submit to an IME in *Harris v. Drake*, and Analogous to *Heidibrink v. Moriwaki*, Where a Recorded Statement Was Deemed Work Product

In considering whether to grant discretionary review, the Court considers the following factors:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

The precedent set in *Heidibrink v. Moriwaki* and *Harris v. Drake* is clear, and the Court of Appeals applied it correctly to this case on appeal. A personal injury protection (PIP) application is a requirement under insurance contracts, or represented as a requirement, for PIP coverage, and may be deemed work product subject to confidentiality. Courts in the past have deemed documents produced and held by the first-party PIP insurance work product subject to confidentiality. *See Heidibrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985); *see also Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004). In *Heidibrink*, the court reasoned that an insured who is contractually obligated to provide a statement about the injury-causing incident reasonably expects that it will be kept confidential, and taking the statements creates a reasonable expectation that the statements "will not be revealed to the opposing party." *Heidibrink v. Moriwaki*, 104 Wn.2d at 400. The Court reasoned that the best approach was to "look to the specific parties involved and the expectations of those parties," when applying the work product protections

of CR 26(b)(4), and also provided that this protection should comport with the underlying purpose of allowing broad discovery, "while maintaining certain restraints on bad faith, irrelevant and privileged inquiries..." *Id.* at 400. For those reasons, the Court specifically held that "a statement made by an insured to an insurer following an automobile accident is protected from discovery under CR 26(b)([4])." *Heidibrink v. Moriwaki*, 104 Wn.2d at 401. The Court further reasoned that such statements can only be disclosed when there is a showing of "substantial need," and a party merely looking for damaging admissions, especially when the other party is available to testify, does not meet that standard. *See Heidibrink v. Moriwaki*, 104 Wn.2d at 401-02.

The expectation of confidentiality and work product protection applies in cases of liability coverage and personal injury protection coverage. The Court in *Harris v. Drake* extended this same expectation of confidentiality and work product protection from those who are "liability insured" to include those who are "PIP insured," reasoning that it is just as reasonable an expectation for a PIP insured to expect confidentiality as it is for a liability insured to expect confidentiality. *See Harris v. Drake*, 152 Wn.2d 480, 488, 99 P.3d 872 (2004).

Moreover, Ms. Prieto's arguments are self-contradictory; arguing that the PIP application should not be subject to work product privilege,

and then arguing that admission of the PIP application was harmless error because it was cumulative. The Court in *Heidibrink v. Moriwaki* already specifically held that "a statement made by an insured to an insurer following an automobile accident is protected from discovery under CR 26(b)([4])." *Heidibrink v. Moriwaki*, 104 Wn.2d 392, 401, 706 P.2d 212 (1985). Her own argument that the narrative in the PIP application was cumulative undermines her argument that the PIP application should have been admitted, because there was no substantial need as there was already the substantial equivalent of the materials available by other means. The Court notes that several federal cases "interpreting the federal rule [FRCP 26(b)(3)] indicate that the substantial need standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions." *Heidibrink v. Moriwaki*, 104 Wn.2d at 401 (citations omitted). The Court also reasons that "...in general there is no justification for discovery of the statement of a person contained in work product materials when the person is available for deposition." *Heidibrink v. Moriwaki*, 104 Wn.2d at 402. In concurrence, *Harris v. Drake* also provides that "CR 26(b)(4) requires that work product can be obtained only upon a showing of necessity for one's case and an inability to acquire similar material elsewhere." *Harris v. Drake*, 152 Wn.2d at 486 (citations omitted). If Ms. Prieto is right, that the

information in the PIP application was cumulative, then it was error to admit the PIP application into evidence when it was work product.

The Court of Appeals relied on well-established precedent and analyzed the facts of this case. The Court of Appeals analyzed the parties and their expectations in this case in coming to their conclusion. The Court of Appeals reasoned that, because Ms. Diaz had an obligation to fill out a PIP application to get PIP benefits for Brayan, she had a reasonable expectation that her PIP application would be kept confidential. *Diaz v. Mariscal*, ___ Wn. App. ___, 414 P.3d 590, (No. 34671-4-III, p. 11) (Div. 3 2018). The Court of Appeals further reasoned that it "would work an injustice to permit Ms. Prieto to surreptitiously obtain Ms. Diaz's PIP application and use it against Ms. Diaz simply because the two shared the same insurance company." *Id.* They went on to further opine that "the injustice is more pronounced given that the description of the accident in the PIP application was taken from a police officer's speculation, unsupported by any eyewitness, and inconsistent with the physical evidence." *Id.* This is consistent with the Court's opinion in *Heidibrink v. Moriwaki* where it specifically held that "a statement made by an insured to an insurer following an automobile accident is protected from discovery under CR 26(b)([4])." *Heidibrink v. Moriwaki*, 104 Wn.2d 392, 401, 706 P.2d 212 (1985). It is also consistent with the Court's opinion that such

statements can only be disclosed when there is a showing of "substantial need," and a party merely looking for damaging admissions, especially when the other party is available to testify, does not meet that standard. *See id.* at 401-02.

The ruling by the Court of Appeals does not give rise to any of the factors warranting discretionary review under RAP 13.4(b). Therefore, this Court should deny the petition for review.

B. The Court Should Deny the Petition For Review Because the Decision of the Court of Appeals Does Not Raise A Significant Question of Law Under the State or Federal Constitution, Nor Does it Involve An Issue of Substantial Public Interest.

The Court should deny the petition for review because the Court of Appeals ruling that a PIP application should be deemed work product is in accordance with the decisions in *Heidibrink v. Moriwaki* and *Harris v. Drake*, and does not raise a constitutional issue or substantial public interest concern. The Court may grant a petition for review where the decision below raises a significant constitutional question or a question of substantial public interest. RAP 13.4(b)(3-4). A decision may raise a question of substantial public interest where the ruling below has the potential to affect other matters and "invites unnecessary litigation on that point and creates confusion generally." *State v. Watson*, 155 Wn.2d 574,

577, 122 P.3d 903, 904 (2005). Additionally, the Court will not consider facts unsupported by the record in a petition for review. *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 615, n.1, 160 P.3d 31, 33 (2007). There is little, or no, support for review of the Court of Appeals' decision.

ADDITIONAL ISSUES RAISED ON APPEAL, NOT RAISED IN PETITION FOR DISCRETIONARY REVIEW, AND ARGUMENT

After concluding that the trial court had committed reversible error in admitting the PIP application, the Court of Appeals stated that, "given our resolution of this issue, we need not consider Ms. Diaz's other claims of error." *Diaz v. Mariscal*, ___ Wn. App. ___, 414 P.3d 590, (No. 34671-4-III, p. 12) (Div. 3, 2018). In the event that the petition for review is granted, Plaintiff asks that the many other assignments of error made by Plaintiff on appeal also be addressed.

Other issues were not decided on appeal because the Court of Appeals decided that use of the PIP application at trial was sufficient to prevent Plaintiff from having a fair trial. They did not address the insurmountable unfair prejudice presented by the large collection of errors made by the trial court in this case. The Court of Appeals specifically decided that "viewing the evidence as a whole, we believe that the improper admission of the PIP application was prejudicial." *Diaz v. Mariscal*, ___ Wn. App. ___, 414 P.3d 590, (No. 34671-4-III, p. 12) (Div.

3, 2018). They go on to further decide that, "given [their] resolution of this issue, [they] need not consider Ms. Diaz's other claims of error." *Diaz v. Mariscal*, ___ Wn. App. ___, 414 P.3d 590, (No. 34671-4-III, p. 12) (Div. 3, 2018). If this Petition for Review is granted, the other issues raised on appeal should also be reviewed or revisited.

Issue 1

Whether a statement in a first-party Personal Injury Protection (PIP) application, containing multiple levels of hearsay, written by a legal assistant, copied from hearsay contained in a police report, and not made by the injured person, should have been read to the jury and considered an admission under ER 801(d)(2).

Issue 2

Whether narratives in medical records, lacking indication as to the source of the narratives, are hearsay; and

Whether the reading of the narratives within the medical records by defense counsel to the jury at trial was reversible error.

Issue 3

Whether a police report narrative which was not based on a witness's personal knowledge is considered hearsay; and

Whether the reading into the record and referring to an unfounded police report at trial record is reversible error.

Issue 4

Whether a defense expert's reference to speculative scenarios, contrary to the Court's order, was reversible error; and

Whether allowing a defense expert to rely on and reference a police report based on a witness's speculation is reversible error; and

Whether the defense expert's introduction and reference to speculative collision scenarios and reference to the speculative scenario in the police report, against the court's order, unfairly prejudiced Plaintiff at trial.

Issue 5

Whether the cumulative error doctrine applies and warrants reversal when several trial errors combine to deny Plaintiff a fair trial.

CONCLUSION

Plaintiff Monica Diaz Barriga Figueroa respectfully requests that this Court deny Defendant Consuelo Prieto Mariscal's petition for review, as the Court of Appeals decided the case correctly, on the issues of the PIP application being admitted into evidence, based on well-established precedent. To the extent that the Petition for Review is not granted, this case will be remanded to the trial court, and all the remaining issues will be argued again at the trial court level, with an opportunity for the issues

to be decided correctly and without error. This case should not be granted review, and should be remanded back to the trial court for a new trial.

Dated this 2 day of July, 2018.

Respectfully submitted,

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