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No. 67845-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MATTHEW STAVE and JANE DOE STAVE, and the marital
community composed thereof

Defendants/Appellant,

and

DEBORAH HUTMACHER and PHILIP HUTMACHER, and the marital
community composed thereof;

Defendants,

vs.

CAROL HOWSON,

Plaintiff/Respondent.

2012 JUN 26 PM 2:31

COURT OF APPEALS
STATE OF WASHINGTON


APPELLANT MATTHEW STAVE'S REPLY BRIEF

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INTRODUCTION to REPLY

Howson's response conflates numerous legal concepts, and avoids responding directly to the specific issues raised by Stave in his Opening Brief. As a result, her brief fails to specifically address the ultimate issue raised by both the Assignment of Error and the Commissioner's ruling granting review.

It is the 'civil action' that defines the scope of MAR jurisdiction; not each individual and undefined 'claim' contained within that 'civil action.'

This Reply Brief will address three issues:

- 1) That plaintiff's concession of potential joint liability impacts the analysis of the MAR jurisdiction limit;
- 2) That the term "claim" has been undefined in the context of the MAR statute – and that the "civil action" is the appropriate measure for limiting the MAR award ; and
- 3) That Howson's reliance on Tegland is erroneous and misplaced.

The trial court erroneously ordered that plaintiff Howson may seek up to \$50,000 against each defendant in the same MAR hearing. In doing so, it improperly expanded the jurisdiction of an MAR arbitrator – well beyond the bounds anticipated by the legislature.

REPLY ARGUMENT

Howson Acknowledges That Her Action Includes Joint Assertions Against Both Defendants in Order to Avoid an ‘Empty Chair’ Defense.

Howson argues inconsistently. On one hand, she admits that her treatment overlapped between the two accidents, and that she brought a civil action jointly against Hutmacher and Stave to avoid an empty chair defense. On the other hand, Howson asks the Court to look at her civil action as two separate claims against two separate individuals arising out of two separate incidents. She contends that “*each at-fault driver was a separate proximate cause of her injuries.*”¹ Howson’s suggestion that joint liability is a non-issue ignores her own concession concerning the overlapping medical treatment and the ‘empty chair’ defense.

In fact, the Civil Rules would prevent Howson from bringing actions against Hutmacher and Stave if, as she seeks to assert in her responsive brief, she felt they were truly separate. Consider the direction of CR 20(a):

... All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action....

Unless Howson is willing to concede that she has violated CR 20(a), she must acknowledge that her claims against Hutmacher and Stave are *not* separate.

¹ Howson’s Brief of Respondent at p. 8, ¶IV.B.

These two cases are inseparable. They aren't separate, segregable claims. If they were, Howson would not be concerned about the empty chair; and her joinder of Hutmacher and Stave in one lawsuit would be violative of CR 20(a).

What is a 'Claim?'

There is no question as to the definition of an 'action,' but the word 'claim' has multiple definitions throughout the law. For example, Howson goes on at length offering an analogy to *res judicata*. She attempts to argue that the usage of 'claim' as it applies in *res judicata* is somehow illustrative in this case. It is not.

Then, Howson seeks to define 'claim' by referencing cases that actually define 'occurrences' for purposes of interpreting auto insurance policies. A 'claim' is certainly not the same as an insurance 'occurrence.' Yet even if Howson's argument could be applied by analogy, she accidentally refers to case law that would support Stave's position; not her own.

Specifically, Howson cites the Washington Supreme Court decision in *Greengo v. PEMCO* for the supposed proposition that because there were two separate accidents, there are two separate occurrences (and by Howson's analogy, two separate claims). But *Greengo* actually stands for just the opposite position.

A majority of foreign courts have concluded that the number of occurrences is determined by referring to the cause or causes of the damage (the 'cause' theory), as opposed to the number of individual claims or injuries (the 'effect' theory).' [] Washington follows the

*cause theory.*²

Howson argues that because there are two separate accidents over a year apart, her action against Hutmacher and Stave should be viewed as two separate occurrences (claims). But this would be the application of the ‘effect’ theory.

Instead, *Greengo* holds that the ‘cause’ theory – not the ‘effect’ theory – applies in Washington. In other words, “*the number of occurrences is determined by referring to the cause or causes of the damage.*” By acknowledging that there are overlapping treatments and a need for Howson to avoid an empty chair defense, the ‘cause’ theory suggests that, here, there may be but one actionable occurrence.

Stave’s Opening Brief offered even more alternative definitions of a ‘claim.’ (See Appellant’s Opening Brief at pp. 11-12.)

The fact is that there is no definition of ‘claim’ that necessarily or expressly applies to the MAR statute. Even Howson ultimately concedes this point.³ Howson’s ‘claim’ is the joint ‘civil action’ she has brought against both Hutmacher and Stave.

And for that reason, Howson’s effort to define “claim” for purposes of the MAR statute is academically interesting, but altogether unnecessary. Stave’s

² *Greengo v. PEMCO*, 135 Wn. 2d 799, 813-14, 959 P.2d 657 (1998), citing *Illinois Nat’l Ins. Co. v. Szczepkowitz*, 185 Ill. App. 3d 1091, 542 NE 2d 90, 92, 134 Ill. Dec. 90 (1989); cited in Howson’s Brief of Respondent at p. 11, fn. 3.

³ Howson’s Brief of Respondent at p. 8, ¶IV.B.

Opening Brief at pp. 6-7 identified *Christensen*'s discussion of grammar, definition and legislative intent. These concepts stand for the proposition that the 'civil action' – and not an undefinable 'claim' – is the decisive term for defining the MAR jurisdictional limit. Howson's response brief did not address or challenge Stave's argument in that regard.

Howson's Reliance on Tegland is Erroneous and Misplaced.

Howson places much reliance on quoting Karl Tegland in Washington Practice. But such reliance is erroneous and misplaced because:

a) Tegland acknowledges that "*the word 'claim' is not defined in chapter 7.06 or the MAR.*"

and most importantly –

b) This Court's Commissioner accurately noted that:

*"Howson's reliance [on] Tegland, 15A Wash. Prac. Section 76.3 (2008-09 ed.) does not carry much force because there is little or no analysis, and in Tegland, 4A Wash. Prac., section on MAR 1.2 at 8 (2008), the authors point out that the issues regarding aggregation of claims have not been resolved."*⁴

In essence, Tegland concedes that this is an area that neither the appellate courts nor the legislature have appropriately addressed to date. This, of course, is the reason we find ourselves before this Court on discretionary review.

⁴ Howson v. Stave, Case #67845-1-I; Notation Ruling by Comm'r Mary Neel, March 13, 2012.

CONCLUSION

Relying on grammar, definition, and legislative intent, *Christensen* denotes that it is the ‘civil action’ that limits MAR jurisdiction; not each individual (undefinable) claim within the ‘civil action.’ The slippery slope we would embark upon if each internal claim carried a separate \$50,000 limit would be uncontrollable and create havoc in our judicial system. Moreover, it would be inconsistent with the stated intent of MAR.

Presumably following the requirements of CR 20(a), Howson brought a joint action against Hutmacher and Stave; concerned about the potential of an empty chair had she brought separate lawsuits. In so doing, she acknowledged that these two claims were addressing joint liability/damages. Her efforts to distance herself from that concession in this appeal are unsupportable.

Howson has a choice.

If she truly believes that her claims are separate – that there is no damages overlap – then she needs to separate her claims since they would violate CR 20(a). Then, she can arbitrate each separate action and seek up to \$50,000 from each defendant.

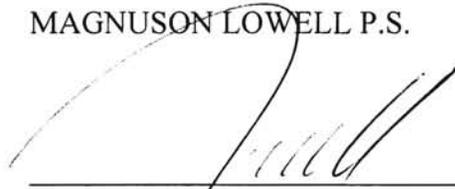
But if she is unwilling to do so, because she insists that she needs to protect herself from an empty chair defense, then she has one claim – one ‘civil action’ – and one MAR jurisdictional limit of \$50,000 for the entire case.

Stave seeks a REVERSAL of the Trial Court's decision expanding the jurisdictional limits of the MAR arbitrator; and a REMAND to the Trial Court with direction that the MAR arbitrator is limited to making an aggregate award of no more than \$50,000 plus statutory fees and statutory costs.

Dated this 25th day of June, 2012.

Respectfully submitted,

MAGNUSON LOWELL P.S.

A handwritten signature in black ink, appearing to read 'R. Lowell', is written over a horizontal line.

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