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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 47063-2-II

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

SHERRY KING
Appellant,

v.

STATE FARM MUTUAL INSURANCE COMPANY
Respondent,

DILLION MCCARTEN and "JANE DOE" MCCARTEN,
Respondents.

APPELLANT'S REPLY

Ron Meyers
Matthew Johnson
Tim Friedman
Attorneys for Sherry King

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Olympia, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 27976
WSBA No. 37983

ORIGINAL

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I. INTRODUCTION

Appellant, Sherry King, hereby submits this Reply to Respondent State Farm-1.

II. COUNTERSTATEMENT OF FACTS

In its Response Brief, State Farm-1 admits that Ms. King's statement of the case is accurate.

On the other hand, in its response brief, State Farm-1 is incorrect when it states that Ms. King's complaint included a UIM claim *arising out of the accident with McCarten*. Again, State Farm-1 is attempting to "blend" itself with State Farm-2. It is imperative not to confuse State Farm-1 and State Farm-2.

There is a difference between a UM claim against State Farm-1 on the March 8, 2011 collision due to the tortfeasor being a phantom-driver – in contrast to a UIM claim against State Farm-2 arising out of McCarten being underinsured with respect to the April 20, 2011 collision. Ms. King's Complaint in this action made it clear that State Farm was invoked in the former, **and not the latter**. See *Complaint at CP 2-00000006:18-23; CP 2-00000007:8 – 8:7*.

Alleging indivisibility of injuries and joint and several liability between the phantom driver collision and the McCarten collision is just that,

an allegation of responsibility for damages between McCarten and State Farm-1. Stated otherwise, even had the arbitrator found indivisibility of injuries and joint and several liability, it would only have been between State Farm-1 in the shoes of the March 8, 2011 tortfeasor and McCarten.

The present action did not involve an underinsured motorist claim against State Farm-2 (i.e. a UIM claim against State Farm arising out of the April 20, 2011 collision). State Farm-2 stepped into the shoes of the phantom-driver who caused the March 8, 2011 collision. State Farm-1, who attempted to force a judgment against McCarten in favor of Ms. King regarding the April 20, 2011 collision did *not* step into the shoes of McCarten. State Farm-1's participation in the present action was only pertaining to liability of the phantom-driver.

State Farm-2, on the other hand, would step into the shoes of McCarten. However, the present action was not an underinsured motorist claim against State Farm arising out of the April 20, 2011 collision.

By placing her claim into mandatory arbitration, Ms. King did not place a UIM claim against State Farm-2 into mandatory arbitration, nor did she assert or otherwise claim that her UIM claim against State Farm-2 was subject to mandatory arbitration.

Moreover, the arbitrator did allocate damage between the March 8 and

April 20, 2011 collision - and there was no joint and several liability between State Farm-1 and McCarten.

McCarten only had \$50,000.00 in liability insurance limits. Ms. King was willing to put her claim against McCarten into mandatory arbitration, which would allow her to obtain \$50,000.00. It would make no sense for Ms. King to have to undergo the massive expense and added delay of a jury trial to recover McCarten's liability limits, when she could place her case into inexpensive and expedient mandatory arbitration to recover the same.

III. ARGUMENT

A. Ms. King's appeal is subject to appellate review.

Ms. King's appeal revolves around the *entering* of the judgment and around the order that the judgment had been satisfied – opposed to an attempt to modify or challenge the arbitration award post-arbitration. The caselaw and the purpose of MAR 6.3 does not support State Farm-1's attempt to mold the present appeal into an appeal that “challenges” the arbitration award or “seeks additional damages.” Ms. King has filed a separate response brief in response to State Farm-1's motion to dismiss. That response brief was entitled Brief of Respondent Dillion McCarten and was filed with the Appellate Court on May 12, 2015. For the sake of brevity and judicial economy, Ms. King's Appellant's Response to Respondent State Farm's

Motion to Dismiss is incorporated herein by this reference.

B1. State Farm-1 Lacked standing and capacity to seek a judgment against McCarten in favor of Ms. King.

State Farm-1 cannot dispute that State Farm, as a Defendant arising out of the UM status of the March 8, 2011 collision, has no interest in entry of a judgment for Ms. King against McCarten

State Farm-1 was a defendant in this action, but in its role as the phantom-driver tortfeasor who caused the March 8, 2011 collision (i.e. steps into the shoes of the tortfeasor). State Farm-1 knows this, but yet it continues to make no distinction between State Farm-1 and 2. State Farm-1 has been unable to show how it, State Farm-1, has any interest in or capacity to force a judgment for damages arising out of the April 20, 2011 collision against McCarten.

It bears repeating, that State Farm-1 does not have a distinct and personal interest in a judgment for Ms. King, against McCarten. A UM claim arising out of the March 8, 2011 collision is not the same as a UIM claim arising out of the underinsured status of McCarten regarding the April 20, 2011 collision. State Farm-1 is not State Farm-2. While they share the same name, they are separate in the eyes of the law.

State Farm's policy was invoked in the instant case under its policy of UM coverage relating to the March 8, 2011 collision involving the

phantom driver (State Farm-1) – opposed to a UIM claim arising out of McCarten’s underinsurance on the April 20, 2011 collision (State Farm-2).
CP 2-00000006:18-23; CP 2-00000007:8 – 8:7; CP 2-000000112:1-7; CP 2-00000083:16-17.

Even State Farm-1’s arbitration brief recognized that State Farm’s inclusion in the present lawsuit **was related to its status as the UM carrier regarding the March 8, 2011 collision.** *CP 2-00000006:18-23; CP 2-00000007:8 – 8:7. CP 2-000000112:1-7; CP 2-00000083:16-17.*

RCW 7.06.020(1), pertaining to mandatory arbitration, refers to “all civil actions.” “In addition, “Action” means “judicial proceeding.” Black’s Law Dictionary, at 31 (8th Ed. 2004). *Christensen v. Atl Ritchfield Co.*, 130 Wash.App. 341, 345, 122 P.3d 937, 939 (2005). “The Christensen group joined their claims to benefit from one judicial proceeding – one civil action to be decided by one judge.” *Id.* Unlike the Christensen group in *Christensen v. Atl. Ritchfield Co.*, Ms. King chose not to join a UIM claim against State Farm-2 on the April 20, 2011 collision in the present action.

Not only does State Farm-1, in its capacity in which it was brought into this lawsuit, have no interest in a judgment entered for Ms. King against McCarten – any interest claimed by State Farm would be an expectancy, future or contingent interest concerning the affect that a judgment against

McCarten will have on Ms. King's UIM claim *against State Farm-2, which is yet to be litigated.*

“ . . . a party has standing if it demonstrates “a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.” *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wash. App. 303, 307-08, 901 P.2d 1074 (1995). [emphasis added].

See CP 2-000000081, 21-24; See also, VRP 7:8-9 (where State Farm-1's attorney, regarding Ms. King's UIM claim against State Farm-2 arising out of McCarten's negligence states, “. . . and the reason judgment would be entered is to preclude the UIM claim . . .”).

The arbitrator's award specifically allocated, Ms. King's damages between State Farm-1 and McCarten, and found *no* joint and several liability. CP 2-000000037-43. Accordingly, this highlights the inconsistency in State Farm-1's position. If the only authority for the Superior Court is to enter judgment on the arbitration award, and if the arbitration award allocated damages and deemed liability several only – then State Farm-1 has NO interest in forcing a judgment against McCarten on the arbitration award.

Regardless, State Farm-1 was not seeking judgment against McCarten based on a present interest, or an in interest held by State Farm-1, but rather based on an expectancy that a judgment against McCarten would aid State

Farm-2 in defending Ms. King's UIM claim – a UIM claim for which a lawsuit has yet to be filed.

B2. State Farm-1, in an attempt to benefit State Farm-2, attempts to impugn its insured for using the process of arbitration to recover McCarten's policy limits. State Farm's motion for entry of judgment was bad faith and should never be endorsed by any court.

The primary purpose of mandatory arbitration is to alleviate court congestion and reduce the delay in hearing civil cases. *Twitchell v. Kerrigan*, 175 Wash.App. 454, 465, 306 P.3d 1025, 1030 (2013). "Mandatory arbitration is intended to provide a relatively expedient procedure to resolve claims where the plaintiff is willing to limit the amount claimed." *Id.*, at 465.

Defendant McCarten had \$50,000.00 in liability limits. Ms. King was willing to limit the amount claimed against McCarten to \$50,000.00. Ms. King proceeded to arbitration against McCarten and obtained an award that absorbed his policy limits, plus costs.

It makes no sense for State Farm-2 to escape liability under its UIM policy pertaining to the April 20, 2011 collision, simply because Ms. King elected to place her case against McCarten into mandatory arbitration to obtain an award equal to McCarten's policy limits. "In general, Washington has a strong public policy favoring arbitration." *Evans v. Mercado*, 184 Wash. App. 502, 508, 338 P.3d 285 (2014).

“Accordingly, we “indulge every presumption in favor of arbitration, whether the issue is construction or an arbitration clause or allegation of waiver, delay, or another defense to arbitrability.” *Id. at 508-509.*

Despite the overriding purpose of arbitration and the strong public policy favoring arbitration, State Farm should be estopped from attempting to punish Ms. King for utilizing mandatory arbitration (with a \$50,000.00 damages cap against McCarten) in obtaining McCarten’s \$50,000.00 liability limits. State Farm should not force Ms. King to have to forego the cost-effective and expedient mandatory arbitration process against McCarten and instead engage in a time-consuming and expensive jury trial (to receive the same \$50,000.00 liability limits) just to “preserve” a UIM claim against State Farm-2.

By placing her case into mandatory arbitration, Ms. King did not “limit the amount claimed” against State Farm-2. Rather, she (a) upheld the purpose of mandatory arbitration and (b) obtained the entirety of McCarten’s policy limits.

The Court is reminded of the letter to Ms. King’s counsel dated October 15, 2014 (after State Farm-2 had received Ms. King’s UIM demand for the April, 2011 collision), where counsel for State Farm revealed State its bad-faith motive for seeking judgment for which it had no interest to seek:

State Farm will only agree to a dismissal of this case if you

and your client stipulate that your client is not seeking UIM benefits from State Farm for the McCarten accident.

If you and your client will not so stipulate, then per MAR 6.3, which states that when, as here, there has been no denovo, that the prevailing party “shall present to the court a judgment on the award of arbitration for entry as a final judgment,” State Farm demands that you present the arbitration award for entry as final judgment.

If you and your client stipulate that your client is not seeking UIM damages for the McCarten accident or if judgment is entered on the award, State Farm will not seek reimbursement from your client for amounts paid in PIP.

CP 2-000000110:1-10; CP 2-000000083:16-17. This unfair, deceptive, self-serving back-door conduct is the type of insurance practice that Washington’s Insurance Fair Conduct Act, and State Court do not tolerate. The Court erred in endorsing this wrongful insurance conduct, when it granted State Farm-1’s motion and entered judgment against McCarten – and denied McCarten’s motion to dismiss.

C. The Court erred when it entered judgment against McCarten and denied McCarten’s motion to dismiss.

Generally insurance settlements are vigorously upheld. The law favors the private settlement of disputes and is inclined to view them with finality. *Oregon Mut. Ins. Co. v. Barton*, 109 Wash. App. 405, 414, 36 P.3d 1065, 1069 (2001).

“When the debtor tenders a draft in full payment of a debt, acceptance by the creditor creates a settlement contract binding on both parties. Absent an express reservation of rights, such a settlement constitutes a complete accord

and satisfaction of all claims.” *Id at 413*;internal citation omitted. “The court presumes that a general settlement agreement embraces all existing claims arising from the underlying incident.” *Id at 414*.

The courts will enforce a settlement agreement so long as it was fairly and knowingly made. *id*.

Ms. King settled her claim against McCarten. She signed a release. McCarten has tendered the settlement amount. Ms. King signed a stipulation to dismiss McCarten. McCarten moved the Court for dismissal. Ms. King did not object. Moreover, RCW 4.22.070 does not allow judgment against released parties.

“Settling parties, released parties, and immune parties are not parties against whom judgment is entered and will not be jointly and severally liable under RCW 4.22.070(1)(b).” *Kottler v. State*, 136 Wash.2d 437, 447, 963 P.2d 834 (1998) (citing *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 294, 840 P.2d 860 (1992); *Anderson v. City of Seattle*, 123 Wash.2d 847, 852, 873 P.2d 489 (1994) (A released party “cannot under any reasonable interpretation of RCW 4.22.070(1)(b) be a defendant against whom judgment is entered.”). *Barton v. State, Dep't of Transp.*, 178 Wash. 2d 193, 202, 308 P.3d 597 (2013).

State Farm-1 attempts to invoke CR 41. However, this is misguided. Ms. King is non entering a voluntary non-suit. State Farm-1 relies on *Thomas-Kerr v. Brown*, 114 Wn. App. 544, 59 P.3d 120 (2002) but even that case speaks to whether a party can take a voluntary non-suit after an arbitration. The present case is not a situation where Ms. King is

“withdrawing” her action – and State Farm knows this. To the contrary, Ms. King and McCarten sought finality by way of a signed release and a stipulated order to dismiss. A voluntary non-suit is entirely different than the parties dismissing their claim after having reached a mutually agreeable and enforceable settlement.

D. Attorney’s fees

RAP 14.2 provides in pertinent part that: “A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review . . .” For purposes of this fee rule it is not required to devote a section of the opening brief to a request for fees. State Farm refers to RAP 18.1(b) and argues that Ms. King is not entitled to fees on appeal because she did not request fees in her opening brief. However, RAP 18.1(b) is a supplemental provision, applying specifically to a situation where a law grants a party the right to recover fees or expenses on review. *See RAP 18.1(a)*. This is separate and distinct from the fee provision of RAP 14.2, and should Ms. King prevail on appeal, she is entitled to fees and costs under RAP 14.2. Moreover, in her appellate brief, Ms. King stated:

This Court should also rule as a matter of law that the conduct of State Farm in bringing its motion to have judgment entered for Ms. King against McCarten, in an unveiled attempt to serve State Farm against its insured’s interests in defense of a UIM claim that State Farm knew was not a part of the present case, is a violation of the Insurance Fair Conduct Act

(RCW 48.30), and issue fees and damages under RCW 48.30.015(2) & (3) against State Farm.

V. CONCLUSION

Based on the foregoing, Ms. King respectfully asks this Court to overturn the lower court's ruling, judgment and satisfaction of judgment. This Court should also rule as a matter of law that the conduct of State Farm in brining its motion to have judgment entered for Ms. King against McCarten, in an unveiled attempt to serve State Farm against its insured's interests in defense of a UIM claim that State Farm knew was not a part of the present case, is a violation of the Insurance Fair Conduct Act (RCW 48.30), and issue fees and damages under RCW 48.30.015(2) & (3) against State Farm.

DATED: May 20, 2015.

RON MEYERS & ASSOCIATES PLLC

By: 

Ron Meyers, WSBA No. 13169

Matt Johnson, WSBA No. 27976

Tim Friedman, WSBA No. 37983

Attorneys for Appellants

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DECLARATION OF SERVICE OF APPELLANT'S REPLY

Ron Meyers
Matthew Johnson
Tim Friedman
Attorneys for Sherry King

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Olympia, WA 98516
(360) 459-5600
WSBA No. 13169
WSBA No. 27976
WSBA No. 37983

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

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by ABC Legal Services 950 Broadway Ste 300
 Tacoma, WA 98402

COPIES TO:

Attorneys for Respondent State Farm:

Emmelyn Hart
Greg Worden
Lewis BrisBois Bisgaard & Smith
2101 Fourth Avenue, #700
Seattle, WA 98121
 Via Facsimile: 206.436.2030
 Via Hand Delivery Courtesy of ABC Legal Services
 Via Email: emmelyn.hart@lewisbrisbois.com; gworden@lbbslaw.com

Attorneys for Respondents McCarten:

Adrienne E. Harris
Law Offices of Kenneth R. Searce
1501 Fourth Avenue, Suite 1130
Seattle, WA 98101-3611
 Via Facsimile: 855.827.7902
 Via Hand Delivery Courtesy of ABC Legal Services
 Via Email: aharris@travelers.com

DATED this 20 day of May, 2015, at Olympia, Washington.



Constance Stevenson, Litigation Paralegal