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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 323234

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**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON**

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**LUCIA MUMM and DAVID MUMM,  
husband and wife,**

**Appellants,**

**vs.**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY,**

**Respondent.**

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**APPELLANTS' REPLY BRIEF**

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## **I. INTRODUCTION/PLEA**

If this Court affirms the trial court's Order granting the State Farm Motion for Summary Judgment to throw Lucia Mumm out of court, please do so for a reason other than argued by State Farm. State Farm has not been honest in its arguments to the trial court or this Court. It would be a real downer for Ms. Mumm to be denied her claim based on State Farm's misrepresentations.

State Farm misrepresented the law with respect to whether an insured may offer corroborating evidence of a phantom vehicle accident. State Farm misrepresented the law with regard to the standard of review before this Court. State Farm misrepresented facts concerning what doctor Lucia Mumm first spoke with following her accident and how long after the accident she made her excited utterance to Dr. Scholar.

On these three points (two of law and one of fact), State Farm has grossly misrepresented Washington law and the facts of this accident. This Court should not be taken in by those misrepresentations.

## **II. ISSUES**

In its Brief, State Farm argues that: "The issue in this appeal is: did the superior court abuse its discretion by ruling that the

statement in the medical notes about Ms. Mumm falling off her bike to avoid a vehicle, did not qualify as an 'excited utterance'?" Respondent's Brief, page 1.

This is an appeal from an Order on a motion for summary judgment. The standard of review is de novo, not abuse of discretion. The issue before this Court has two parts:

1. Is what Lucia Mumm said to her husband and/or doctor shortly after the accident an excited utterance that is corroborating evidence of her phantom vehicle accident?

2. If Lucia Mumm made an excited utterance, does she have UIM coverage under her State Farm policy for the phantom vehicle accident?

### **III. STANDARD OF REVIEW**

This is an appeal from an Order on a motion for summary judgment. The standard of review is "de novo." It is not "abuse of discretion."

We review a trial court's order granting summary judgment de novo. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). "We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that part's favor." *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loeffelholz*, 175

Wn.2d at 271. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 579, 998 P.2d 305 (2000).

*Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 864-865 (2014).

In support of its argument that the standard of review is "abuse of discretion," State Farm cites *State v. Ohlson*, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). Granted, that case, as does this case, deals with an excited utterance. And, granted, that case states: "This court reviews for abuse of discretion a trial court's decision to admit a hearsay statement as an excited utterance." *State v. Ohlson*, 162 Wn.2d 7-8. But *State v. Ohlson* was a case tried to verdict. That is, the trial court saw and heard witnesses and then ruled on the admission of a hearsay statement as an excited utterance. In this case, we have not had a trial. The trial court has not seen and heard the witnesses. The trial court does not have all of the information necessary to decide whether to admit a hearsay statement as an excited utterance. If the *Mumm v. State Farm* case is tried, Lucia Mumm will have Dr. Scholar testify regarding what she told Dr. Scholar and her emotional state at the time.

Lucia and her husband will testify about her injuries and her state of mind and emotion when she spoke with Dr. Scholar.

But we are not at that point at this time. This is an appeal from a motion for summary judgment. There are no hearsay statements as an excited utterance issues before this Court. First, this case was not tried to verdict. All of the evidence regarding this issue was not before the trial court. Second, State Farm did not move to exclude the medical record from Dr. Scholar. That is, State Farm did not challenge the medical record as hearsay.<sup>1</sup> Third, all inferences regarding what Lucia said to her husband and to Dr. Scholar are to be made in her favor.

In *State v. Ohlson*, a criminal case involving second degree assault, the Court of Appeals said:

ER 803(a)(2) provides that a statement is not excluded as hearsay if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The excited utterance exception does not require a showing that the declarant is unavailable as a witness. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). This court has recognized that the proponent of excited utterance evidence must satisfy three "closely connected requirements" that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition,

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<sup>1</sup> As argued by Ms. Mumm in her Brief, it would be the height of hypocrisy for State Farm to challenge Dr. Scholar's record from the Walla Walla Clinic when State Farm itself filed not one but two records from the Walla Walla Clinic with the Court in support of its Motion for Summary Judgment.

and (3) the statement related to the startling event or condition. *Woods*, 143 Wn.2d at 597; *Chapin*, 118 Wn.2d at 686. Ohlson contends that the evidence was insufficient to establish the first and second requirements of the excited utterance exception.

162 Wn.2d at 8.

In *State v. Ohlson*, defendant Ohlson argued that the trial court erred when it admitted as excited utterances a witness out-of-court statement to a police officer. He argued “that the evidence was insufficient to establish that [the witness] received a startling event and spoke under the stress of excitement of that event, two of the requirements of ER 803(a)(2), the excited utterance exception.” 162 Wn.2d at 7. Defendant Ohlson argued, with respect to the three “closely connected requirements,” that the evidence presented at trial did not meet the requirements. In its analysis, the Court of Appeals discussed the specific facts and testimony offered at trial regarding the witness statement. Based on all of the testimony and evidence presented, the Court of Appeals found that the “trial court did not abuse its discretion when it admitted [the witness’s] out-of-court statements as excited utterances.” 162 Wn.2d at 9.

In this case, there has not been a trial. The trial court did not hear testimony from Lucia Mumm, David Mumm, or Dr. Scholar.

The trial court did not consider the three “closely connected requirements” that must be met for an out-of-court statement to be admissible as an excited utterance. It is or would be improper for this Court, dealing with an appeal from an Order granting a motion for summary judgment, to utilize the abuse of discretion standard argued by State Farm.

#### **IV. ARGUMENT**

##### **1. Excited Utterance: As corroborating evidence.**

State Farm’s first misstatement of the law, argued to the trial court and repeated in its Brief, is that Lucia Mumm “does not satisfy the requirements of either RCW 48.22.030(8)(a) or the applicable State Farm auto policy as a ‘corroborating witness,’ because she is an insured under the State Farm policy and has a claim arising from the incident.” State Farm Brief, page 12. In support of this misstatement of law, State Farm cites two cases: (1) *Gobin v. Allstate Insurance Co.*, 54 Wn. App. 269, 271-272, 773 P.2d 131 (1989) and (2) *Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 366-71, 966 P.2d 921 (1998).

With respect to *Burmeister v. State Farm Insurance Co.*, in its Brief State Farm says that *Burmeister* stands for the proposition that an “excited utterance” does not provide corroboration of

phantom vehicle claim where the evidence of the “excited utterance” is provided by the insured. State Farm Brief, pages 12-13. This is an absolutely incorrect statement of *Burmeister v. State Farm Insurance Co.* As stated in *Burmeister v. State Farm Insurance Co.*:

[A]n insured's excited utterances may be used as corroborative evidence of a phantom vehicle.

*Burmeister v. State Farm Insurance Co.*, 92 Wn. App. at 369.

As for State Farm's reliance on *Gobin v. Allstate Insurance Co.*, that case predates *Burmeister v. State Farm*, and does not involve an excited utterance as corroborating evidence. In *Gobin v. Allstate Insurance*, which involved a phantom vehicle accident, the insured “attempted to use one of her passengers as a corroborating witness.” *Gobin v. Allstate Insurance Co.*, 54 Wn. App. at 271. Because the passenger had a claim for injuries as a result of the subject accident, the trial court, affirmed by the Court of Appeals, held that, per the language in the Allstate policy, the passenger, who was also a UIM claimant, could not offer corroborating evidence. *Gobin v. Allstate Insurance Co.*, 54 Wn. App. at 271-272.

*Gobin v. Allstate Insurance Co.*, has absolutely nothing to do with an excited utterance; even if it did, *Burmeister v. State Farm Insurance Co.*, decided nine years later, clearly states that an insured's excited utterance may be corroborating evidence of a phantom vehicle accident.

State Farm flat-out misread and misstated Washington law on the issue of an insured's excited utterance being corroborating evidence.

## **2. Excited Utterance: What is it?**

An excited utterance is "A statement related to a startling event or condition made while the declarant was under distress of excitement caused by the event or condition." ER 803(a)(2). Concerning which definition, see Appellants' Brief, pages 15-16.

Being knocked off your bike, suffering an injury and being taken to a medical clinic in pain and shock is, making all inferences in favor of Lucia Mumm, the nonmoving party, a "startling event or condition."

On this point, and if *State v. Ohlson*, cited by State Farm, is applicable, the three "closely connected requirements" from that case are satisfied. First, being knocked off your bike and seriously injured is a startling event. Second, Lucia Mumm told her husband

and Dr. Scholar about the accident while under the stress of excitement of the startling event. Third, her statements, to her husband and doctor, related to the startling event.

Which takes us to the next issue/argument:

**3. Excited Utterance: Did Lucia Mumm make one?**

On this point, State Farm misstates or misrepresents the facts and the chronology immediately after the accident. State Farm argues that Lucia Mumm was first seen at Walla Walla Clinic by Dr. Wilwand "at 9:55 a.m." State Farm Brief, page 15.

According to State Farm:

That is an hour and a half after the time of the incident, which Ms. Mumm placed at about 8:25 a.m. CP 36-42. It was not until almost two hours after the incident that Dr. Scholar wrote that she "fell avoiding a car." CP 93.

State Farm Brief, pg. 15.

When Dr. Scholar "wrote" or dictated her note is not the issue. The issue is (1) which doctor, Dr. Scholar or Dr. Wilwand, first saw Lucia Mumm, (2) when, relative to the accident, did that doctor see Lucia Mumm, and (3) what was Lucia Mumm's mental and emotional state at that time?

As stated by Lucia Mumm in her Declaration: "When I arrived at the Clinic I was crying and shaking. Dr. Scholar was able

to see me almost immediately on my arrival. . . . Dr. Scholar saw me for only a short period of time and then, given my injury, referred me to an orthopedic surgeon. I was then seen by Dr. Wilwand.” Declaration of Lucia Mumm, pg. 3, ¶ 14. CP 86.

As explained by Lucia Mumm to the trial court, the times listed on the records from Drs. Scholar and Wilwand appear in the “Signatures” section of the note. It is unknown, and was not clarified at the hearing on the motion for summary judgment, if those times are when the doctors dictated the notes, when the notes were typed, when they signed the notes, or some other time. What is not in dispute is that Lucia Mumm first saw Dr. Scholar and was referred by her to Dr. Wilwand.

Although State Farm wants this Court to think that Lucia Mumm was first seen by Dr. Wilwand (and she said nothing about how the accident happened) and only later by Dr. Scholar, this chronology is flat-out wrong and is contradicted by the Walla Walla Clinic note that State Farm offered into evidence in support of its motion for summary judgment. CP 44. This note is from Dr. Wilwand (showing a 9:55 a.m. signature time) and states: “38 year old female with right thumb injury sent to me by Dr. Scholar.” CP 44.

Once again, State Farm has played fast and loose with the facts and its argument. Lucia Mumm was transported to Walla Walla Clinic by her husband shortly after the accident and almost immediately on arrival was seen by Dr. Scholar. While in pain and while crying and shaking, Lucia Mumm told Dr. Scholar that “she fell avoiding a car.” This is corroborating evidence satisfying the requirement of RCW 48.22.030(8) as clarified by Washington case law. *Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 369, 966 P.2d 921 (1998).

**4. Excited Utterance: What Lucia Mumm told Dr. Scholar was such.**

Remember, this was a motion for summary judgment. The evidence is to be reviewed in “the light most favorable to the nonmoving party” and must “draw all reasonable inferences in that party’s favor.” *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.2d 860 (2013). A summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. at 864. With regard to whether there are genuine issues of material fact, the standard of review on a motion for summary judgment is that a summary judgment may

be granted “if reasonable minds could reach only one conclusion on an issue of fact.” *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. at 865.

In response to the State Farm Motion for Summary Judgment, Lucia Mumm filed a (1) Memorandum in Opposition, CP 66-83, (2) a Declaration of Lucia Mumm, CP 84-87, (2) a Declaration of David Mumm, CP 88-90, and (3) a Declaration of Tom Scribner, CP 91-94. Attached to the Declaration of Tom Scribner, as Exhibit 1, was the Walla Walla Clinic note from Dr. Scholar.

In response to the Memorandum and Declarations in Opposition to the Motion for Summary Judgment, State Farm filed a Reply. CP 95-100. In that Reply, State Farm never argued that Dr. Scholar’s note was hearsay or should be excluded. On the contrary, State Farm spent most of its Reply arguing that “Lucia Mumm’s Statements To Her Treating Physicians Are Not ‘Excited Utterances’.” The entire State Farm argument was factual and an attempt to distinguish the Mumm case from the case of *Nationwide Insurance v. Williams*, 71 Wn. App. 336, 858 P.2d 516 (1993) (cited by Lucia Mumm in opposition to the motion for summary judgment). As argued by State Farm: “The temporal and geographic

separation from the scene of the incident and Ms. Mumm's arrival, admission and examination at the Walla Walla Clinic, precludes [sic] the admission of Ms. Mumm's statements in the medical records as 'excited utterances.'" CP 98, and Respondent's Brief, page 16. How long after the accident Lucia Mumm arrived at the Clinic, the extent of her injuries, what pain she was experiencing, all of these are factual issues bearing on the question of whether she made an excited utterance. These are issues that should not have been decided on a motion for summary judgment.

In its Brief, State Farm spent seven pages arguing that "The Medical Notes Are Not An 'Excited Utterance.'" State Farm Brief, pgs. 13-19. Most of those pages contain factual arguments regarding such things as how long after the accident did Lucia talk with Dr. Scholar, what was her state of mind when she spoke with Dr. Scholar, was she agitated or still distraught when she spoke with Dr. Scholar, how seriously was she injured, and on and on. All of which confirm that we are dealing with factual issues that should not have been decided on a motion for summary judgment. Clearly, reasonable minds could reach different conclusions regarding whether Lucia Mumm made an excited utterance to her husband and/or Dr. Scholar. As such, in the context of a motion for

summary judgment, there are genuine issues of material fact and the Order on Motion for Summary Judgment was not appropriate.

#### **V. CR 11 SANCTIONS ARE WARRANTED**

Lucia Mumm has requested an award of attorney fees on the authority of CR 11 and RAP 18.1. In response to that request, State Farm says that its “arguments are not only unworthy of sanctions, they are correct interpretations of the law that the superior court agreed with.” Respondent’s Brief, page 19. Not true.

State Farm misstated Washington law with respect to an excited utterance of an insured being corroborating evidence of a phantom vehicle. Being called out on that misstatement of the law, State Farm then argued that what Lucia Mumm told her husband and Dr. Scholar was not an excited utterance. This is a factual, not a legal, argument. State Farm at no time moved to exclude the record from Dr. Scholar.

State Farm misstated the standard of review. It is not “abuse of discretion,” it is “de novo.”

State Farm misstated the chronology of medical treatment received by Lucia Mumm. They claim that she first saw Dr. Wilwand and sometime later Dr. Scholar. This is not supported by

the medical records or by the Declaration of Lucia Mumm. CP 84-87.

State Farm has not acted in good faith. It has misstated the law and deliberately tried to misconstrue the facts. An award of attorney fees is appropriate and requested.

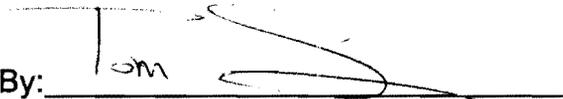
#### **VI. CONCLUSION**

Washington law is very clear: the excited utterance of an insured may serve as corroborating evidence of a phantom vehicle accident. The issue before the court on the motion for summary judgment and before this Court on appeal is: was what Lucia Mumm said to Dr. Scholar an excited utterance? This is a factual issue that should not be decided on a motion for summary judgment. All inferences should have been made in favor of Lucia Mumm, they were not. Reasonable minds may disagree on whether what Lucia Mumm said was an excited utterance. As such, this Court should reverse the trial court and remand this case for further proceedings.

Since State Farm has not acted in good faith and has violated CR 11, attorney fees should be awarded.

DATED this 24 day of September, 2014.

MINNICK-HAYNER

By:   
Tom Scribner, WSBA #11285  
Of Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24 day of September, 2014, I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF** by the method indicated below, and addressed to the following:

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JUDY LIMBURG

Signed this 24 day of September, 2014  
at Walla Walla, Walla Walla County, WA