

FILED

JUN 27 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 323234

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

LUCIA MUMM and DAVID MUMM,
husband and wife,

Appellants,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Respondent.

APPELLANTS' APPEAL BRIEF

MINNICK • HAYNER, P.S.

TOM SCRIBNER, WSBA#11285
P.O. Box 1757/249 West Alder
Walla Walla, WA 99362
(509) 527-3500
tms@gohighspeed.com

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR 1

 A. The Trial Court Erred In Granting Defendants' Motion For Summary Judgment And Dismissing Plaintiff's Complaint for Damages 1

II. STATEMENT OF THE CASE 1

 A. Factual Background..... 1

 B. Procedural History 4

III. ARGUMENT 6

 A. Standard of Review 6

 B. The Trial Court Erred In Granting Defendants' Motion for Summary Judgment 7

 1. There are genuine issues of material fact regarding whether plaintiff Lucia Mumm has uninsured motorist coverage under her State Farm policy 11

 2. Lucia Mumm made excited utterances to her husband and her doctor shortly after the phantom vehicle accident 14

 3. Lucia Mumm's excited utterances are corroborating evidence of her phantom vehicle accident..... 19

 4. State Farm acted in bad faith when it filed its Motion for Summary Judgment..... 22

IV. CONCLUSION 26

TABLE OF AUTHORITIES

Cases

<i>Callahan v. Walla Walla Housing Auth.</i> , 126 Wn. App. 812, 818, 110 P.3d 782 (2005)	6
<i>Hill v. Sacred Heart Med. Ctr.</i> , 143 Wn. App. 438, 445, 177 P.3d 1152 (2008)	6
<i>Seybold v. Neu</i> , 105 Wn. App. 666, 676, 19 P.3d 1068 (2001)	7
<i>Woodall v. Freeman Sch. Dist.</i> , 136 Wn. App. 622, 628, 146 P.3d 1242 (2006)	7
<i>Mountain Park Homeowners Ass'n v. Tydings</i> , 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)	7,17
<i>Thoma v. C.J. Montag & Sons, Inc.</i> , 54 Wn.2d 20, 26, 337 P.2d 1052 (1959)	7
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 494, 519 P.2d 7 (1974)	7
<i>Gobin v. Allstate Insurance Co.</i> , 54 Wn. App. 269, 773 P.2d 131 (1989)	9
<i>Burmeister v. State Farm Insurance Co.</i> , 92 Wn. Ap. 359, 966 P.2d 921 (1998)	9,10,13,22,23,24,25
<i>Nationwide Ins. v. Williams</i> , 71 Wn. App. 336, 344, 858 P.2d 516 (1933)	10,13,14,17,18,19,20,21
<i>State v. Dixon</i> , 37 Wn. App. 867, 684 P.2d 725 (1984)	15,16
<i>State v. Whyde</i> , 30 Wn. App. 162, 632 P.2d 913 (1981)	16
<i>United States v. Knife</i> , 592 F.2d 472 (8 th Cir. 1979)	16
<i>Dominick v. Christensen</i> , 87 Wn.2d 25, 27, 548 P.2d 541 (1976)	19

Codd v. Stevens Pass, Inc.,
45 Wn. App. 393, 399, 725 P.2d 1008 (1986) 19

STATUTES

CR 56	6
CR 56(c)	6
RCW 48.22.030(8)(a)	8
ER 803(a)(2)	15
RCW 48.22.030	19
RCW 48.22.030(8)	19,20
ER 801-802	21
RAP 18.1	22
CR 11	22,25,26
CR 11(a)	23,25

OTHER AUTHORITIES

Annot., 48 A.L.R. Fed. 451 (1980)	16
5A K. Tegland, Wash. Prac. § 361 (2d ed. 1982)	16
E. Cleary, <i>McCormick on Evidence</i> § 297 (2 ed. 1972)	16
6 J. Wigmore, <i>Evidence</i> § 1649 (rev. 1976)	16
Black's Law Dictionary	19

I.

ASSIGNMENT OF ERROR

A. The Trial Court Erred In Granting Defendants' Motion For Summary Judgment And Dismissing Plaintiffs' Complaint.

1. There are genuine issues of material fact regarding whether plaintiff Lucia Mumm has uninsured motorist coverage under her State Farm policy.

2. Lucia Mumm made excited utterances to her husband and to her doctor shortly after the phantom vehicle accident.

3. Lucia Mumm's excited utterances are corroborating evidence of her phantom vehicle accident.

4. State Farm acted in bad faith when it filed its Motion for Summary Judgment and plaintiffs should be awarded attorney fees.

II.

STATEMENT OF THE CASE

A. Factual Background.

On July 21, 2010, Lucia Mumm was riding her bicycle along a road that crosses the Walla Walla Community College campus in Walla Walla. CP 84. She and a phantom motorist were both traveling in the same direction along the same road. The phantom

motorist overtook and passed Lucia on her left, and then made a right-hand turn immediately in front of Lucia. CP 85. In an effort to avoid impact, Lucia immediately applied her bicycle brakes and quickly turned to the right. This resulted in Lucia falling off her bicycle and suffering physical injury. CP 85. The phantom motorist who caused the accident did not stop. CP 85.

By the time Lucia picked herself up, the phantom motorist had disappeared into the parking lot of Walla Walla Community College. CP 85. Lucia was unable to identify the driver or the car. Lucia continued by bicycle to her then job, which was located approximately ½ mile from where the accident happened. CP 85. When she arrived at her worksite, Lucia was unable to work because of her injuries. She was in considerable pain, shock and was stressed out. She was shaking and crying. CP 85. Her injuries included, but were not limited to, a torn ulnar collateral ligament in her right thumb. CP 94.

Lucia's then employer, Dixie Liening, gave her a ride home. CP 86. Upon arriving at her home, Lucia's husband took her directly to Walla Walla Clinic for treatment of her injuries. CP 86.

Lucia told her employer about the accident. She told her husband about the accident, on the phone, when she initially called

him, and in person when she was brought back to her home shortly after the accident. She told her doctor about the accident when she got to the Walla Walla Clinic. CP 86.

At the time of the accident, Lucia and her husband, David, had insurance with State Farm, under policy no. L211-544-D-10-47E. CP 25, 33. Their policy had UIM coverage. CP 25, 33.

On September 10, 2012, Lucia contacted her local State Farm agent, asked if she had UIM coverage for the subject accident, and asked about making a claim for UIM coverage. CP 59. On September 14, 2012, Lucia was contacted by a State Farm claim representative who requested a recorded statement. That was subsequently taken. CP 33, 36-42.

On April 16, 2013, State Farm sent a letter to Lucia which said, in relevant part:

The insurance contract for which benefits are sought indicates the following applicable policy language:

**UNDERINSURED MOTOR VEHICLE BODILY INJURY
COVERAGE**

Underinsured Motor Vehicle means a land motor vehicle:

2. the owner or driver of which remains unknown and which causes ***bodily injury*** to the ***insured***. If there is no physical contact between that land motor

vehicle and the *insured* or the vehicle the *insured* is *occupying*, then the facts of the accident must be corroborated by competent evidence other than the testimony of the *insured* or any other *person* who has a claim under this coverage or under Underinsured Motor Vehicle Property Damage Coverage.

Unfortunately, there were no witnesses to corroborate your client's version of the phantom vehicle crossing over her [sic] lane of travel. Therefore, we are unable to extend Underinsured Motorist Bodily Injury benefits for this loss. If you have any questions, please contact the undersigned.

CP 65.

This lawsuit followed.

B. Procedural History.

On July 21, 2010, plaintiff Lucia Mumm was injured when she was forced off her bicycle by a phantom motorist. CP 32, 84.

The accident happened at about 8:25 a.m. CP 36.

On July 19, 2013, plaintiffs Lucia Mumm and David Mumm, husband and wife, filed their Complaint. CP 1-9.

On October 22, 2013, State Farm filed its Answer to Complaint and Counterclaim for Declaratory Relief. CP 11-21.

On December 30, 2013, State Farm filed a Motion for Summary Judgment to Dismiss Plaintiffs' Claims and Memorandum in Support Thereof. CP 23-31.

On December 30, 2013, State Farm filed a Declaration of Scott C. Wakefield in support of State Farm's Motion for Summary Judgment, with exhibits attached. CP 32-65.

On January 21, 2014, plaintiffs filed their Memorandum in Opposition to Defendant's Motion for Summary Judgment in Support of Request for Award of Attorney's Fees. CP 66-83.

On January 21, 2014, plaintiffs filed a Declaration of Lucia Mumm. CP 84-87.

On January 21, 2014, plaintiffs filed a Declaration of David Mumm. CP 88-90.

On January 28, 2014, defendant State Farm filed its Reply in Support of its Motion for Summary Judgment to Dismiss Plaintiffs' Claims. CP 95-101.

On February 3, 2014, defendant argued its Motion for Summary Judgment to Dismiss Plaintiffs' Claims.

On February 3, 2014, the Court signed and filed an Order Granting State Farm's Motion for Summary Judgment to Dismiss Plaintiffs' Claims. CP 102-104.

On February 20, 2014, plaintiffs filed their Notice of Appeal to the Court of Appeals, Division III. CP 108-109.

On February 27, 2014, the Court signed and filed a Stipulated Order Dismissing Defendants John Doe and Jane Does 1-10 and ABC Corporation. CP 113-114.

III.

ARGUMENT

A. Standard of Review.

The State Farm *Motion* was filed pursuant to CR 56, which states that such motions “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

This is an appeal from an Order Granting Summary Judgment. In reviewing an Order of Summary Judgment a Court of Appeals engages in the same inquiry as a trial court. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 818, 110 P.3d 782 (2005). A Court of Appeals reviews an Order Granting Summary Judgment de novo. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008).

Summary judgment is appropriate only if the nonmoving party fails to produce sufficient evidence which, if believed, would

support the essential elements of his/her/ their claim. *Id.* *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). The appellate court should consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994); *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. 622, 628, 146 P.3d 1242 (2006). The court must determine whether a genuine issue of material fact exists and must not resolve an existing factual issue. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959); *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. at 628. A material fact is a fact upon which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

B. The Trial Court Erred In Granting Defendants' Motion For Summary Judgment.

The question before this Court has two parts. First, 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? Second, if so, does Lucia Mumm have UIM coverage under her State Farm policy for the phantom vehicle accident? The State Farm argument on this question changed

between when it filed its Motion for Summary Judgment and the hearing on the Motion.

State Farm first argument:

Initially, it was the State Farm position that:

Unfortunately, there were no witnesses to corroborate your . . . version of the phantom vehicle crossing over [your] lane of traffic. Therefore, we are unable to extend Uninsured Motorist Bodily Injury benefits for this loss. If you have any questions, please contact the undersigned.

CP 26, 65.

With regard to the issue of corroborating evidence, in its Motion for Summary Judgment, State Farm either grossly or intentionally misrepresented Washington law regarding an insured's excited utterance being corroborating evidence of a phantom vehicle accident. According to State Farm:

Washington law is clear that in cases where there is no contact between a "phantom" vehicle and a UIM insured, there must be corroborating testimony about the incident by an independent witness who is not an insured with a claim under the UM/UIM coverage.

CP 27.

Initially, it was the State Farm position that the only witness to the July 21, 2010 accident was Lucia Mumm and that she did not satisfy the requirements of either RCW 48.22.030(8)(a) or the applicable State Farm auto policy as a "corroborating witness." CP

30. In support of this argument, State Farm cited the cases of *Gobin v. Allstate Insurance Co.*, 54 Wn. App. 269, 773 P.2d 131 (1989) and *Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 966 P.2d 921 (1998). CP 30.

With regard to the *Burmeister v. State Farm Insurance Co.* case, State Farm argued that that case held for the proposition that an “‘excited utterance’ does not provide corroboration of a phantom vehicle accident when the evidence of the ‘excited utterance’ is provided by the insured.” CP 30. This is an incorrect statement of the law. *Burmeister v. State Farm Insurance Co.* says just the opposite.

[A]n insured’s excited utterances maybe used as corroborative evidence of a phantom vehicle.

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

In response to the State Farm Motion and false legal arguments, Lucia Mumm filed a *Memorandum in Opposition to Defendant’s Motion for Summary Judgment and in Support of Request for Award of Attorney Fees*. CP 66-78. As argued by Lucia in that Memorandum:

In its Memorandum in support of the Motion for Summary Judgment, . . . State Farm cites the case of *Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 36-71, 966 P.2d 921 (1998). According to State Farm, that case

stands for the proposition that: “Excited utterance’ does not provide corroboration of phantom vehicle claim where the evidence of the “excited utterance is provided by the insured.” This is not what *Burmeister v. State Farm Insurance Co.* states or holds. On the contrary, this is what *Burmeister v. State Farm Insurance Co.* says regarding this issue:

In *Nationwide Ins. v. Williams*, 71 Wn. App. 336, 344, 858 P.2d 516 (1933), we held that an 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.

CP 71.

State farm second/changed argument:

Being called out on its false statement of the law, and in response to Lucia’s facts and arguments regarding her excited utterances, State Farm filed a *Reply in Support of Its Motion for Summary Judgment to Dismiss Plaintiffs’ Claims*. CP 95-100. In that Reply, State Farm now argued that:

The statements that Ms. Mumm made to the Walla Walla Clinic’s physicians contained in medical records on the date of the incident are inadmissible “double hearsay” (out of court statements repeated in medical records also made out of court) and are not “excited utterances” under Washington law. State Farm respectfully requests that the court grant its summary judgment motion and dismiss plaintiffs’ claims with prejudice.

CP 96.¹

After making the above argument, State Farm then spent three pages in its Reply arguing that “Lucia Mumm’s Statements To Her Treating Physicians Are Not ‘Excited Utterances’.” CP 97-99. Which argument was all about facts in dispute. That is: when did Lucia make her statements, how badly was she injured when she made them, was she really excited, etc., etc., etc.

1. There are genuine issues of material fact regarding whether plaintiff Lucia Mumm has uninsured motorist coverage under her State Farm policy.

Having conceded that its initial legal argument was a false statement of the law, the issue at the hearing on the State Farm motion for summary judgment became then: Did Lucia Mumm make an excited utterance to her husband or doctor? This is a factual dispute that should not be decided on a motion for summary judgment.

According to the Declaration of David Mumm, Lucia called him after the accident from her place of work. “When Lucia called me she was upset and crying. I could tell, based on her

¹ Scott Wakefield, the State Farm attorney, filed a Declaration with multiple documents attached as exhibits. CP 32-66. Two of those documents, exhibit B, were medical records from Walla Walla Clinic from the day of the subject accident. CP 44-46. State Farm had absolutely no problem filing these medical records and did not believe they were or should be inadmissible as “double-hearsay.”

conversation, that her decision making was impaired. I told her that she should go to the Clinic for medical assistance.” CP 89. When Lucia arrived at their home, according to Mr. Mumm:

Lucia was in considerable pain. I do not remember if I have ever seen her have a more serious injury. Although I am not a medical doctor or trained in medicine, it appeared to me that Lucia was in shock. She was crying and was upset. She was certainly excited, painfully so.

Lucia rambled on that she was riding through the Community College campus. A car passed her and turned sharply in front of her. She said to avoid the car she swerved or turned quickly to the right and fell off her bike.

CP 89.

Mr. Mumm took Lucia from their home directly to Walla Walla Clinic. According to Mr. Mumm, “When we arrived at the Clinic Lucia was still in tears and was shaking. I remember that the Clinic staff wrapped her in a warm blanket while we were waiting for Dr. Scholar to arrive. Dr. Scholar arrived shortly thereafter.” CP 89.

According to the note from Dr. Scholar, Lucia told her that she fell off her bike in an effort to avoid a car. “LUCIA MUMM, 38 year old female, comes in today to be seen for a bike injury she fell avoiding a car and hit the RT thumb that cause her a painful deformity and tenderness on the MP joint.” CP 93.

As discussed above, in its initial memorandum in support of its motion for summary judgment, State Farm cited the case of *Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 966 P.2d 921 (1998). According to State Farm, that case stands for the proposition that an insured's excited utterance does not provide corroboration of a phantom vehicle claim. CP 30. This is not what *Burmeister v. State Farm Insurance Co.* states or holds. On the contrary, this is what *Burmeister v. State Farm Insurance Co.* said regarding this issue:

In *Nationwide Ins. v. Williams*, 71 Wn. App. 336, 344, 858 P.2d 516 (1993), we held that an 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.

In response to the State Farm motion, plaintiffs filed a *Memorandum in Opposition to Defendant's Motion for Summary Judgment*. Attached to that Memorandum was a copy of the *Nationwide Ins. v. Williams* case. CP 79-83.

In *Nationwide Ins. v. Williams*, Mr. Williams, insured by Nationwide, was traveling from his home to Tacoma for an early morning meeting when his pickup truck left the roadway and smashed into a tree. No one other than Mr. Williams witnessed the

accident. By the time help arrived at the accident scene, no other cars were present. 71 Wn. App. at 337-338. Mr. Williams was transported to a hospital. “At the hospital the emergency room doctor diagnosed various injuries, including a fractured nose, contusions, lacerations and neck injuries, and noted in his chart that Williams had been run off the road by another vehicle.” Id.

Approximately five years after the accident, Williams filed a claim against Nationwide Insurance under the UIM portion of his policy. Nationwide moved for summary judgment, arguing that there was no corroborative evidence of how the accident happened. The language in the Nationwide policy, quoted at 71 Wn. App. 338, is almost identical to the State Farm policy language at issue in this case.

The trial court granted summary judgment in favor of Nationwide. On appeal, the Court of Appeals reversed and granted judgment in favor of the insured, allowing the case to go to arbitration.

The same result should follow in this case.

2. Lucia Mumm made excited utterances to her husband and her doctor shortly after the phantom vehicle accident.

Having established that the excited utterance of an insured is or may be corroborating evidence, the question then becomes: Is what Lucia Mumm told her husband and/or Dr. Scholar one hour or less after her accident, CP 90, while she was still stressed and still in pain and shock, an excited utterance?

An excited utterance is “A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2).

Lucia Mumm’s employer at the time of the subject accident was Dixie Lienen. State Farm took a recorded statement from her. A copy of the transcript was attached as an exhibit to the Declaration of Scott Wakefield, the State Farm attorney. CP 61-63. Although Ms. Lienen did not remember what Lucia told her about the cause of the accident, she did remember that when Lucia arrived at the office shortly after the accident: “She was very shaken up by the incident and in - - in shock.” CP 62.

A case discussing excited utterance is *State v. Dixon*, 37 Wn. App. 867, 684 P.2d 725 (1984).

An excited utterance is made an exception to the rule excluding hearsay on the theory that the declarant, being under the stress of excitement caused by the startling event, is much less likely to consciously fabricate. The stress circumstances are believed to operate to temporarily

overcome the ability to reflect and consciously fabricate. The reliability and probable truthfulness of excited utterances distinguish them from ordinary hearsay. *State v. Whyde*, 30 Wn. App. 162, 632 P.2d 913 (1981); *United States v. Knife*, 592 F.2d 472 (8th Cir. 1979); Annot., 48 A.L.R. Fed. 451 (1980); 5A K. Tegland, Wash. Prac. § 361 (2d ed. 1982); E. Cleary, *McCormick on Evidence* § 297 (2d ed. 1972); 6 J. Wigmore, *Evidence* § 1749 (rev. 1976), where the author states:

This circumstantial guarantee here consists in the consideration, already noted (§1747 *supra*), that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be "spontaneous," "natural," "impulsive," "instinctive," "generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate."

State v. Dixon, 37 Wn. App. at 872.

As stated in *State v. Dixon*, "the passage of time between the startling event and the alleged excited utterance is a factor to be considered by a court exercising discretion to admit into evidence an alleged excited utterance." 37 Wn. App. at 873.

In this case, there was approximately one hour between the accident and when Lucia Mumm was seen by and talked to Dr. Scholar at the Walla Walla Clinic. There was less than one hour between the accident and her statement to her husband. Given that she was in pain and shock, was "stressed out," and given that

we are dealing with approximately one hour of time (or less), it is hard to believe that during that time Lucia reviewed the language in the State Farm policy to learn that she needed corroborating evidence and had time and clarity of mind to fabricate a story.

In *Nationwide Insurance v. Williams*, the Court of Appeals had no problem finding that what Mr. Williams said the emergency room doctor “approximately an hour after the accident” was an excited utterance. *Nationwide Insurance v. Williams*, 71 Wn. App. at 340.

We are dealing here, please remember, with a motion for summary judgment. All inferences should be made in favor of Lucia Mumm, the nonmoving party. *Mountain Park Homeowners Ass’n v. Tydings*, 125 Wn.2d at 341. How long after the accident Lucia spoke with her husband and Dr. Scholar, whether she was excited or not, whether she was in stress, what exactly she said, all of these issues are factual and material to the resolution of this case. The Court, in granting the motion for summary judgment, resolved these factual issues in favor of State Farm, contrary to Washington law regarding motions for summary judgment. See Section III A, Standard of Review, *supra*.

That there are genuine issues of material fact regarding the excited utterances made by Lucia Mumm is confirmed by State Farm in its *Reply* in support of its motion for summary judgment, CP 97-99. On these pages, State Farm tries to reconstruct the timeline between when the accident happened, when Lucia Mumm talked to her employer, when Lucia Mumm got home and talked with her husband, and when Lucia Mumm arrived at the Walla Walla Clinic and talked to Dr. Scholar. State Farm also tries to distinguish between Lucia Mumm's injuries and those suffered by Mr. Williams as reported in *Nationwide Insurance v. Williams*, 71 Wn. App. at 338. As argued by State Farm: "There are orders of magnitude and factual differences between Ms. Mumm's situation and the *Williams* case." CP 98. As for what pain or stress or level of excited Lucia was in when she presented at Walla Walla Clinic and was treated by Dr. Scholar, State Farm argues: "While she understandably may have been emotional and in pain due to her injured hand, by 9:55 a.m. Ms. Mumm was simply no longer under 'distress of excitement,' of the incident that had taken place at 8:25 a.m." CP 99.

Says who? The declarations filed by Lucia Mumm, CP 84-87, and David Mumm, CP 88-90, dispute this. Moreover, since we

are dealing here with a motion for summary judgment, the trial court should have made all inferences regarding this factual dispute in favor of Lucia Mumm. That it did not is reversible error.

3. Lucia Mumm’s excited utterances are corroborating evidence of her phantom vehicle accident.

The *Nationwide Insurance v. Williams* case discusses at length the language in the Nationwide policy (which is the same as the language in the State Farm policy applicable in this case). At issue in *Nationwide Insurance v. Williams* and in this case was/is RCW 48.22.030: “Underinsured, hit-and-run, phantom vehicle coverage to be provided - - Purposes - - Definitions - - Exceptions - - Conditions - - Deductibles.” With respect to that statute, the Court of Appeals said:

To determine the meaning of RCW 48.22.030(8) (and the identical language of the insurance policy), we apply rules of statutory construction. Undefined statutory terms must be given their usual and ordinary meaning and courts may not read into a statute meanings which are not there. *Dominick v. Christensen*, 87 Wn.2d 25, 27, 548 P.2d 541 (1976). RCW 48.22.030(8) leaves the term “testimony” undefined. Thus we turn to the dictionary. See *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 399, 725 P.2d 1008 (1986), *review denied*, 107 Wn.2d 1020 (1987). The dictionary defines “testimony” as “Evidence given by a competent witness, under oath or affirmation; as distinguished from evidence derived from writings and other sources.” Black’s Law Dictionary then cites numerous authorities for the proposition that the terms

“testimony” and “evidence” are not synonymous; evidence is the broader term and includes all testimony.

Viewing Mel Williams’s statements in light of this common meaning of the term “testimony”, we see that his out-of-court, unsworn excited utterances are not testimony and thus are not excluded by the insurance policy or the statute. Had the Legislature or Nationwide intended to eliminate the use of *any* statement made by the insured, they would not have chosen the word “testimony”, associated with in-court proceedings. Rather, they could have simply prohibited evidence consisting of “statements” made by the insured.

Nationwide Insurance v. Williams, 71 Wn. App. at 342-43.

The same logic should apply in this case to what Lucia Mumm told her husband and doctor shortly after the accident. She made “statements,” she did not provide “testimony.”

With regard to the issue of “corroborating evidence,” the Court of Appeals in *Nationwide Insurance v. Williams* said the following, which comments are applicable in this case:

The term “corroborating evidence” in the context of RCW 48.22.030(8) means “evidence that tends to strengthen or confirm the testimony of the insured . . .”. *Powell*, 44 Wn. App. at 502. An excited utterance consistent with a driver’s claim that he or she was run off the road would tend to “strengthen or confirm” his or her testimony.

We conclude that it is permissible for the Williamses to meet the threshold burden of presenting competent corroborating evidence of a phantom vehicle claim with Mel Williams’s excited utterances. Such evidence, presented by a witness who heard the excited utterance, is not the

“testimony of the insured” and thus is not excluded by the policy or the statute.

Nationwide Insurance v. Williams, 71 Wn. App. at 343-44.

With regard to what Lucia told her husband and Dr. Scholar, in its *Reply in Support of its Motion for Summary Judgment to Dismiss Plaintiffs’ Claims*, State Farm argued:

Ms. Mumm’s husband, David, does not qualify as an independent witness without a claim by virtue of the fact that he is a named plaintiff in this very lawsuit. He most certainly does have a claim as Ms. Mumm’s spouse and he has asserted it. That leaves only Walla Walla Clinic medical chart notes as a possible source of independent corroboration by a witness with no claim as a result of the incident. Of course, the plaintiff’s out-of-court statements made to physicians and repeated in medical records also made out-of-court, is obvious double hearsay and therefore inadmissible (ER 801; 802) **unless** the statement qualifies under a hearsay exception.

CP 96-97 (emphasis in original).

Mr. Mumm’s declaration reports on statements made to him by his wife. In that regard, his declaration, reporting the excited utterance of his wife, are no different than any other declaration so reporting.

State Farm did not argue at the hearing on its Motion for Summary Judgment that the Court should not consider the chart note from Dr. Scholar. A copy of the chart note was filed as an exhibit to the Declaration of Tom Scribner. CP 93-94. It would

have been the height of hypocrisy for State Farm to oppose consideration of the chart note from Dr. Scholar. State Farm itself filed copies of two Walla Walla Clinic chart notes as an exhibit to the Declaration of Scott Wakefield. CP 44-46. One of the notes filed by State Farm was from a doctor at the Clinic who saw Lucia on the day of the accident after she had already been examined and treated by Dr. Scholar. CP 44-45. Although State Farm had Dr. Scholar's chart note, State Farm did not file or reference Dr. Scholar's note in its Memorandum. Why not? Because State Farm did not want any evidence of an excited utterance to be known or considered by the court.

4. State Farm acted in bad faith when it filed its Motion for Summary Judgment.

When the plaintiffs responded to the State Farm motion for summary judgment, they requested an award of attorney fees. CP 76-78. They renew that request for attorney fees on appeal. RAP 18.1.

State Farm violated CR 11 by filing its motion for summary judgment.

The signature of a party or an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion or legal memorandum, and

that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for an improper purpose (such as to harass or to cause unnecessary delay or needless in the increase of the cost of litigation); and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a).

State Farm's motion for summary judgment was not well grounded in fact. State Farm deliberately did not include or reference facts known to it. Although State Farm filed a copy of a chart note from Dr. Wilwand at Walla Walla Clinic, it did not provide a copy of or reference to Dr. Scholar's note which contains the excited utterance that Lucia Mumm "fell avoiding a car." It can only be assumed that State Farm deliberately did not bring this important document and information to the attention of the Court. Particularly when State Farm knew, or should have known, that Washington law (including *Burmeister v. State Farm* that State Farm cited in its memorandum) holds that an excited utterance of an insured is corroborating evidence of a phantom vehicle.

State Farm's arguments were also not warranted by existing law. In fact, State Farm deliberately misstated Washington law

regarding corroborating evidence, specifically as concerns *Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 366-71 (1998). According to State Farm, *Burmeister v. State Farm Insurance Co.* stands for the proposition that: “Excited utterance’ does not provide corroboration of phantom vehicle where the evidence of the ‘excited utterance’ is provided by the insured.” CP 30. As set forth and argued herein and above, that statement is absolutely contrary to what the Court said in *Burmeister v. State Farm Insurance Co.* The excited utterance of an insured may serve as corroborating evidence of a phantom vehicle claim.

Unless State Farm and its attorney are grossly negligent with respect to their reading and understanding of controlling case law (particularly cases cited by them in their memorandum), it can only be assumed that they intentionally misstated Washington law and, in so doing, filed the motion for summary judgment for an improper purpose.

Last, after Lucia and David Mumm filed their declarations and the note from Dr. Scholar, it was not warranted for State Farm to deny or question them. Particularly since we are dealing with a motion for summary judgment, when all inferences are to be made

in favor of the nonmoving party, State Farm's denial of what David, Lucia and Dr. Scholar said was not made in good faith.

State Farm violated all four elements to be considered with regard to CR 11. The plaintiffs should not have had to incur attorney fees to respond to the motion for summary judgment or file this appeal.

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a).

As stated in *Burmeister v. State Farm*, "When an insured is compelled to assume the burden of legal action to obtain the benefit of her insurance policy, she is entitled to recover attorney's fees." 92 Wn. App. at 371-72.

IV.

CONCLUSION

The excited utterance of an insured may serve as corroboration of a phantom motor vehicle accident. Lucia Mumm made excited utterances to her husband and to her treating

physician. Washington law on this issue is not as initially presented by State Farm. Washington law supports the claim of the plaintiffs for UIM coverage under their State Farm policy. At the very least, there are genuine issues of fact regarding when Lucia said whatever she said and whether what she said was an excited utterance.

It was error for the trial court to grant the State Farm motion for summary judgment. The Order granting the motion should be reversed and this matter sent back to the trial court for further proceedings.

State Farm violated CR 11 when it filed its motion for summary judgment. It misrepresented Washington law regarding the issue of excited utterances serving as corroborating evidence of a phantom vehicle accident. It withheld information from the trial court establishing that Lucia Mumm made an excited utterance to her treating doctor shortly after the subject accident.

Plaintiffs should be awarded attorney fees per CR 11 and on the authority of *Burmeister v. State Farm*.

DATED this 26 day of June, 2014.

MINNICK-HAYNER

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

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of June, 2014, I caused to be served a true and correct copy of **APPELLANT'S BRIEF** by the method indicated below, and addressed to the following:

Scott Wakefield
Todd & Wakefield
2000 Century Square
1501 Fourth Avenue
Seattle, WA 98101

X U.S. Mail, Postage Prepaid



JUDY LIMBURG

Signed this 26 day of June, 2014
at Walla Walla, Walla Walla County, WA