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DIVISION III
STATE OF WASHINGTON
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NO. 323234-III

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

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

vs.

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
a foreign corporation,
Respondent.**

**BRIEF OF RESPONDENT
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

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I. INTRODUCTION

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”? The superior court explained its ruling:

The Court simply needs to make a determination whether Plaintiffs’ evidence as submitted supports their claim of an excited utterance. Here, the only available facts are that the statement was made at the emergency room an hour or so after Ms. Mumm’s fall from her bike and that she was injured and in pain. The problem is that these facts do not by themselves demonstrate that the statement in Dr. Scholar’s medical note was the product of an excited utterance.

* * *

The only evidence of an excited utterance is the one-sentence notation by Dr. Scholar: “Seen for a bike injury she fell avoiding a car hit the RT thumb. . . .” The medical record is simply attached to counsel’s declaration; it is not signed or otherwise authenticated by the drafter. Even overlooking that problem, it is unaccompanied by any description of the circumstances of the information or, for that matter, the source of the information. If anything, the facts are weaker than in *Burmeister* [*v. State Farm Insurance Co.*, 92 Wn. App. 359, 966 P.2d 921 (1998)] for excited utterance. There is no testimony that any statement was spontaneous or instinctive. At argument, Plaintiffs’ counsel conceded that no declaration was forthcoming from Dr. Scholar because the doctor had no recollection to share. Simply put, the analogous facts in *Burmeister* that were inadequate to meet the foundational requirements for an excited utterance and to defeat a

summary judgment motion are similarly inadequate to defeat summary judgment here.

CP 122-124. The superior court's ruling was reasonable and therefore not an abuse of discretion. The chart note is not an excited utterance that corroborates appellants' phantom vehicle uninsured/underinsured ("UIM") motorist coverage claim. Her statements to her husband cannot corroborate her phantom vehicle UIM claim because he is also a claimant. Without corroborating testimony, appellants are not entitled to UIM phantom vehicle coverage under the State Farm policy or RCW 48.22.030(8), the enabling statute for UIM phantom vehicle coverage.

II. STATEMENT OF CASE

A. INTRODUCTION AND NATURE OF THE CASE

This is a claim for UIM motorist bodily injury benefits arising from personal injuries the appellant sustained in a bicycle-motor vehicle incident that allegedly occurred on July 21, 2010, at approximately 8:25 a.m. in Walla Walla, at or near the Walla Walla Community College campus. According to appellant Lucia Mumm, she was riding her bicycle to work. She had come off a multi-use path and was riding on a street near the Walla Walla Community College campus. She was riding near the right curb. An unknown car began to pass her on her left.

As the car passed, it turned to its right directly in front of Ms. Mumm's bicycle to enter a curb cut into a parking area on the community college campus. To avoid impact, Ms. Mumm turned her bicycle hard to her right and applied the brakes. She did not make contact with the car, but she went down hard and sustained injuries to her right hand (thumb) and wrist. The driver of the car did not stop and entered the parking lot. CP 36-42.

After she fell off her bike, she went to work and called her boss (Dixie Liening). In her recitation of the facts, Ms. Mumm claims, without citation to the record, that she "told her employer about the accident" (Appellant's brief p. 2) but in her declaration she does not say that she told Ms. Liening anything about the accident (CP 85-87) and Ms. Liening, when interviewed as part of State Farm's investigation of Ms. Mumm's claim, could not remember anything that Ms. Mumm told her. CP 61-63.

Ms. Liening put Ms. Mumm's bike in her car and drove her home, where she met her husband, appellant David Mumm. Mr. Mumm gave her a ride to the Walla Walla Clinic. CP 36-42. The Walla Walla Clinic chart note documenting the clinical visit of Ms. Mumm shows that she was seen by Michael Wilwand, D.O. at 9:55 a.m. CP 45. Dr.

Wilwand's chart note says nothing about appellant being agitated or still distraught about the incident that occurred one and a half hours earlier that day. *Id.* She was treated by Dr. Luisa Scholar at approximately 10:00 a.m. to 10:23 a.m. (Dr. Scholar's electronic signature on her chart notes is time-stamped 10:23 a.m.). CP 93-94. Appellants rely mainly on Dr. Scholar's chart notes as evidence of an excited utterance. Dr. Scholar wrote, "LUCIA MUMM, 38 year old female, comes in today to be seen for a bike injury she fell avoiding a car" CP 93. Ms. Mumm was diagnosed with an injured MCP joint and ulnar collateral ligament rupture. CP 44-46; 61-63; 93-94.

B. APPELLANT'S CLAIM FOR UNINSURED MOTORIST BENEFITS WITH STATE FARM

Ms. Mumm was insured by State Farm automobile policy No. L211-544-D10-47E on the date of the incident, and it provided uninsured/underinsured motorist bodily injury benefits in the amount of \$100,000 per person / \$300,000 per accident. CP 48-57. Unfortunately, Ms. Mumm failed to report the July 21, 2010 incident to State Farm for over two years. It was not until September 2012, when State Farm received a letter of representation from Ms. Mumm's current counsel,

Tom Scribner, that it learned of the incident with the “phantom” motor vehicle. CP 59.

State Farm began its investigation after receiving Mr. Scribner’s letter. With her lawyer’s permission and participation, State Farm took a recorded statement from Ms. Mumm (CP 36-42) and it also took a statement from Ms. Mumm’s boss at the time of the accident, Ms. Liening, whose recollection of the event was hazy at best (CP 61-63). Ms. Liening was only able to recall that Ms. Mumm was in an accident while riding her bike. Ms. Liening could not recall any statements made by Ms. Mumm and, when pressed, admitted that she “honestly [did] not know” how the incident happened. CP 62.

After taking these recorded statements and conducting further research, State Farm Claim Representative Terri Long wrote a letter to Ms. Mumm’s lawyer, Mr. Scribner, dated April 16, 2013, which states in pertinent part:

We have completed our review of the claim submitted by your client seeking Uninsured Motorist Bodily Injury benefits under policy number L211-544-47E.

The insurance contract for which benefits are sought includes 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 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 lane of travel. Therefore, we are unable to extend Uninsured Motorist Bodily Injury benefits for this loss. If you have any questions, please contact the undersigned.

CP 65.

C. APPELLANTS' LAWSUIT AND STATE FARM'S CLAIM FOR DECLARATORY RELIEF

Appellants sued State Farm for negligence, breach of contract, bad faith, violation of the Consumer Protection Act, and violation of RCW 48.30.015 (Insurance Fair Conduct Act). CP 1-9. State Farm filed an answer and counterclaim for declaratory relief requesting that the

court enter “a declaration that there is no UM/UIM coverage for appellant Lucia Mumm’s phantom vehicle claim under State Farm auto Policy No. L211-544-47E for the July 21, 2010 bicycle accident.” CP 20.

State Farm moved for summary judgment to dismiss appellants’ claims and grant State Farm’s requested declaratory relief. CP 23-31. The court granted State Farm’s motion. In addition to dismissing appellants’ claims, the court also ruled:

There is no coverage under State Farm policy No. L211-544-D10-47E for plaintiff Lucia Mumm’s uninsured motorist claim arising from the bicycle-phantom motor vehicle accident of July 21, 2010.

CP 103.

Appellants moved for reconsideration, which the superior court denied in a letter-ruling (quoted above) that explained that appellants failed to “demonstrate that the statement in Dr. Scholar’s medical note was the product of an excited utterance.” CP 122.

III. SUMMARY OF ARGUMENT

The superior court did not abuse its discretion by ruling that there was insufficient evidence of an excited utterance that corroborated appellants’ phantom vehicle claim under State Farm auto Policy No.

L211-544-47E for the July 21, 2010 bicycle accident. Appellant Lucia Mumm's statements to her husband, appellant David Mumm, do not qualify as corroborating evidence under her State Farm policy or RCW 48.22.030(8) because Mr. Mumm is also a claimant. As a matter of law, plaintiffs do not have a claim for UM coverage under their State Farm policy. CR 11 sanctions are not warranted.

IV. ARGUMENT

A. STANDARD OF REVIEW

In a dispute concerning insurance coverage, such as this one, the question of whether a particular claim is covered by an unambiguous insurance policy is a question of law to be determined by the court. *See, Weyerhaeuser Co. v. Aetna Casualty & Surety Co.*, 123 Wn.2d 891, 897, 874 P.2d (1994); *National General Insurance Co. v. Sherouse*, 76 Wn. App. 159, 162, 882 P.2d 1207, *review denied*, 126 Wn.2d 1009 (1995); *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 515-16, 108 P.3d 1273 (2005).

The Court of Appeals reviews a superior court's ruling on the "excited utterance" evidentiary issue for an abuse of discretion. *State v. Ohlson*, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). The Court of Appeals

should not reverse the superior court unless it concludes that no reasonable judge would have made the same ruling. *Id.*

B. RCW 48.22.030(8) REQUIRES THAT THERE BE AN INDEPENDENT WITNESS TO SUPPORT ANY CLAIM FOR UNINSURED MOTORIST BODILY INJURY BENEFITS WHERE THE CLAIM ARISES FROM A NON-CONTACT INCIDENT INVOLVING A “PHANTOM” MOTOR VEHICLE

The enabling statute for uninsured (“UM”) and underinsured (“UIM”) motorist insurance coverage in Washington is RCW 48.22.030. This statute, enacted in 1980, mandates that all auto insurers doing business in Washington offer UM/UIM coverage to policyholders and provides a method by which policyholders can decline UM/UIM coverage. T. Harris, *Washington Insurance Law*, § 33.01, *et seq.* (3rd ed., 2010). The statute also establishes standards concerning the scope of the coverage in this state. In section 8, the statute establishes evidentiary standards and requirements necessary to maintain a UM claim, where the at-fault uninsured motorist cannot be identified and where there is no actual physical contact between the at-fault motorist’s vehicle and the injured UM-insured or the injured UM-insured’s vehicle—the so-called “phantom vehicle” situation. That portion of the UIM statute states that the facts of the accident must be corroborated by evidence *other than* the testimony of the insured or another person who has a claim:

- (8) For the purposes of this chapter, a “phantom vehicle” shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:
- (a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and
 - (b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

RCW 48.22.030(8)(a) and (b).

C. THE STATE FARM POLICY IN FORCE ON JULY 21, 2010 INCORPORATES THE STANDARDS FOR MAINTAINING A UM CLAIM EMBODIED IN RCW 48.22.030(8)

Washington courts have ruled that an auto policy must specifically contain the independent corroboration requirement set forth in RCW 48.22.030(8) for any claim arising from an incident with a “phantom vehicle” in order to enforce that statutory requirement. *See, Liljestrand v. State Farm Ins. Co.*, 47 Wn. App. 283, 290, 734 P.2d 945, review denied, 108 Wn.2d 1017 (1987). The State Farm policy applicable to the July 21, 2010 “phantom vehicle” incident involving Ms. Mumm does so, and states in pertinent part:

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 testimony of the *insured* or any other *person* who has a claim under this coverage or under Underinsured Motor Vehicle Property Damage Coverage.

CP 53 (emphasis in original). This provision incorporates the requirements of RCW 48.22.030(8)(a)—i.e., it mandates that there be a corroborating witness to testify as to the facts of the accident besides the insured or any other person who has a UM claim arising from the same accident, where there is no physical contact between the uninsured motor vehicle and the insured or the vehicle the insured is occupying.

D. THERE IS NO COVERAGE UNDER STATE FARM’S POLICY FOR PLAINTIFFS’ PHANTOM VEHICLE/UM CLAIM

There is no ambiguity in the State Farm auto insurance policy that applies to appellants’ claim, nor in the UM/UIM enabling statute, RCW 48.22.030(8). Both the insurance policy and the statute require that there be an independent witness (who does not have a UM/UIM claim) who can verify the facts of an accident involving an unidentified driver or “phantom” vehicle, where there is no contact between the

insured (or the insured's vehicle) and the "phantom" vehicle. Ms. Mumm admits that there was no impact between herself or her bicycle and the unidentified vehicle involved in the July 21, 2010 incident. There is no witness who can corroborate the accident. In this situation, the unambiguous policy terms control and so there is no coverage for plaintiffs' UM claim under State Farm policy no. L211-544-D10-47E as a matter of law unless plaintiffs provide the kind of independent corroborating evidence required by the policy and RCW 48.22.030(8)(a).

E. MS. MUMM CANNOT CORROBORATE THE FACTS OF THE INCIDENT

Ms. Mumm is the only witness to the July 21, 2010 incident. She 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. *See, Gobin v. Allstate Insurance Co.*, 54 Wn. App. 269, 271-72, 773 P.2d 131 (1989) (corroborating testimony from a person other than the insured or other person having a potential UM claim must be provided to establish a UM claim involving a "phantom vehicle"). *Accord, Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 366-71, 966 P.2d 921 (1998) ("excited utterance" does not

provide corroboration of phantom vehicle claim where the evidence of the “excited utterance” is provided by the insured).

F. MR. MUMM CANNOT CORROBORATE THE FACTS OF THE INCIDENT

Mr. Mumm does not qualify as an independent witness without a claim because he is a named plaintiff in this lawsuit. He has a UM claim as Ms. Mumm’s spouse and he has asserted it. *See, Gobin v. Allstate, supra* at 271-72.

G. THE MEDICAL NOTES ARE NOT AN “EXCITED UTTERANCE”

“A party cannot rely on inadmissible hearsay in response to a summary judgment motion.” *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 309, 151 P.3d 201 (2006). “Preliminary questions concerning the . . . the admissibility of evidence shall be determined by the court.” ER 104(a). The superior court decided that under ER 803(a), there was insufficient evidence of Ms. Mumm making an “excited utterance” about her injuries being caused by a phantom vehicle. CP 102-104 and CP 122-124. This Court reviews that decision under the abuse of discretion standard:

This court reviews for abuse of discretion a trial court's decision to admit a hearsay statement as an excited utterance. *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). We will not reverse the trial court's

decision “unless we believe that no reasonable judge would have made the same ruling.” *Woods*, 143 Wn.2d at 595–96, 23 P.3d 1046.

State v. Ohlson, 162 Wn.2d at 7-8. Appellant argues that whether or not Ms. Mumm made an excited utterance is a factual issue that the jury should decide or that the superior court should have decided in the light most favorable to appellants. *See* Appellants’ Brief p. 11 (“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.”) But the admissibility of the statement in the medical records—i.e., whether it qualified as an excited utterance—was for the court to decide. ER 104(a).

Appellants also mischaracterize Washington case law interpreting this hearsay exception in the context of UIM / phantom vehicle cases. Whether Ms. Mumm was emotional or in pain when she saw the Walla Walla Clinic physicians is beside the point because “a state of nervousness or anxiety following an accident does not alone ensure the spontaneity or reliability of a self-serving statement.” *Burmeister*, 92 Wn. App. at 370. To admit an otherwise hearsay statement under the “excited utterance” exception, the court must determine whether the declarant (in this case Ms. Mumm) was still “under the stress of

excitement caused by the event or condition” (ER 803(a)(2)) about an hour and a half to two hours after the incident, when she was seen at the Walla Walla Clinic.

The passage of time after the event was considerable, by Ms. Mumm’s own admission. After she fell off her bike at about 8:25 a.m., she went to work and called her boss, Ms. Liening, who then put Ms. Mumm’s bike in her car and drove her home to her husband David Mumm. Ms. Mumm told Mr. Mumm about the incident. Then Mr. Mumm gave her a ride to the Walla Walla Clinic. The Walla Walla Clinic chart note documenting the clinical visit of Ms. Mumm notes that she was seen by Michael Wilwand, D.O. at 9:55 a.m. CP 45. 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. Dr. Scholar’s chart note says nothing about Ms. Mumm being agitated or still distraught about the incident that occurred two hours earlier that day. *Id.* Dr. Scholar’s note does not even state who provided the information about Ms. Mumm falling to avoid a car, a point noted by the superior court in its letter-ruling denying appellants’ motion for reconsideration. CP 122-124.

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 the admission of the statement in the medical records as an "excited utterance." These factors alone distinguish this case from *Nationwide Insurance v. Williams*, 71 Wn. App. 336, 858 P.2d 516 (1993), cited by appellants. In *Williams*, the driver made the "excited utterances" literally minutes after being run off the road by an unidentified ("phantom") vehicle. Two neighbors who lived near the accident scene found the UIM claimant (Williams) still in his vehicle, "bleeding," "drifting in and out of consciousness" and moaning. The neighbor witnesses submitted declarations stating that when they found Williams, he "moaned" that he had been "run off the road by another vehicle." *Id.* at 338.¹

There are orders of magnitude in the factual differences between Ms. Mumm's situation and the *Williams* case. Ms. Mumm made no statements at the scene (at least that any known witness heard). Once she

¹ Plaintiff argues that in *Williams*, the Court of Appeals relied on Mr. Williams' statements to the emergency room doctor (Appellants' brief p. 17), but the Court did not. It relied on the statements from Mr. Williams' neighbors who had heard Mr. Williams' excited utterances minutes after the accident: "Here, through the affidavits of [neighbors] White and Brown, Williams has placed before the trial court evidence of his excited utterances." *Williams*, 71 Wn. App. at 341.

got to work, Ms. Mumm says she told her boss, Ms. Liening, that she had fallen from her bike. But two years later, Ms. Liening could not remember anything about how the fall occurred or whether Ms. Mumm was trying to avoid a car. CP 61-63. Ms. Mumm did not make any statement to a witness with no claim until she was seen at the Walla Walla Clinic by Michael Wilwand, D.O. at 9:55 a.m., an hour and a half after the incident. In the meantime, she had gotten a ride home, and spoken to her husband who drove her to the Walla Walla Clinic, where she was admitted, examined, treated, and released. 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 “the stress of excitement,” of the incident that had taken place at 8:25 a.m. Unlike the declarant in *Williams*, she was not lying on the ground at the scene, moaning or “drifting in and out of consciousness” within minutes of the fall when her statement about what had occurred was documented or heard by an independent witness. *Williams* does not compel the admission of the Walla Walla Clinic medical records as corroboration of the incident facts as an “excited utterance” under ER 803(a)(2), because there are no declarations from either of the physicians who treated Ms. Mumm at the Walla Walla Clinic on July 21, 2010, establishing that she

was still under the influence of the stress of the incident when she made statements about how it happened.

In *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 362, 966 P.2d 921, 923 (1998), claimant Diane Burmeister told a police officer who spoke with her in the ambulance after the accident that she had swerved to avoid a phantom vehicle. The Court of Appeals summarized Ms. Burmeister's excited utterance argument:

Burmeister did not submit affidavits from the police officer, the paramedics, or the emergency room workers to show that she was still under the influence of the accident at the time the statement was made. Instead, she argues that her medical evidence establishes that her statement was made spontaneously: (1) she made her statement to the officer while in the back of the ambulance; (2) she complained of head, neck, and back injuries and was strapped to a backboard; (3) she slipped in and out of consciousness; and (4) her blood pressure readings were 165/96 in the ambulance and then dropped to 126/72 when she was treated in the emergency room.

Burmeister, 92 Wn. App. at 369. The Court of Appeals held that this did not qualify as an excited utterance:

Here, the officer's report does not reveal Burmeister's demeanor or the seriousness of her injuries. The emergency reports indicate that she complained of a head, neck, and back injuries but do not tell us the severity of these injuries or whether she was in a state of excitement from those injuries at the time the statement was made.

Burmeister, 92 Wn. App. at 370. As the superior court explained, in this case the “facts are weaker than in *Burmeister* for excited utterance” because “[t]here is no testimony that any statement was spontaneous or instinctive.” CP 123.

H. CR 11 SANCTIONS ARE NOT WARRANTED

As they did in their summary judgment opposition (CP 66-83), appellants continue to request CR 11 sanctions. State Farm’s arguments are not only unworthy of sanctions, they are a correct interpretation of the law that the superior court agreed with.

V. CONCLUSION

Under the State Farm policy and the UIM enabling statute, in order for appellants to have a UIM phantom vehicle claim, there must be corroborating evidence other than testimony of the insured or another person making a claim. Appellants’ testimony cannot be corroborating evidence. The superior court ruled that Dr. Scholar’s statement in the medical notes was not an excited utterance, and that ruling was not an

abuse of discretion. The Court of Appeals should affirm the superior court's order in all respects.

DATED this 26th day of August, 2014.

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