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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 345921

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

SHAILA HAYNES,

Appellant,

vs.

STATE FARM FIRE & CASUALTY COMPANY, et al.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The trial court properly dismissed Shayla Haynes' Amended Complaint against State Farm because: (1) Mrs. Haynes is not legally entitled to recover damages on her negligent infliction of emotional distress (NIED) claim; and (2) the parties' disagreement as to whether Mrs. Haynes is legally entitled to recover damages on her NIED claim is not a UIM coverage dispute.

II. RESPONSE TO ASSIGNMENTS OF ERROR ISSUES

Paragraphs 1-2. State Farm disagreed with Mrs. Haynes that she was legally entitled to recover NIED damages from the underinsured (phantom) motorist. Even if Mrs. Haynes was entitled to NIED damages, there was no agreement as to the amount of the damages. Consistent with the State Farm UIM policy language, those disagreements are to be resolved via litigation which includes resolution by summary judgment. These are liability and damage issues pertaining to a claim dispute and not a coverage dispute.

Paragraphs 3-6. The *Colbert* decision is consistent with the *Hegel* decision although *Colbert* involved the additional fact that the plaintiff arrived at the accident scene as a result of a phone call as opposed to arriving unwittingly. The *Colbert* court did not use "bright line" language, but did establish the "unwittingly arrival" requirement in a bystander NIED case as a logical extension of Washington case law.

III. ADDITIONAL SPECIFIC STATEMENT OF THE CASE

Mrs. Haynes learned via a phone call that her husband had been in an accident in which "he went down on his motorcycle." CP 24. As a result of that phone call, Mrs. Haynes had a feeling that her husband's condition was bad. CP 26-27. Immediately after the phone call Mrs. Haynes was driven to the accident scene by her friend. CP 24. Before arriving at the scene Mrs. Haynes was panicked, worried, scared, had a bad feeling, visibly shaken up, in a state of shock and very upset. CP 227. When Mrs. Haynes arrived at the accident scene, Mr. Haynes already had a neck brace on and was strapped to a backboard and the ambulance attendants were trying to get air to him after having cut off his leather jacket and clothes. CP 25. Mrs. Haynes was at the scene for approximately ten minutes before her husband was taken away by ambulance and she was driven separately by her friend to the Seattle hospital. CP 25-26.

State Farm paid Mrs. Haynes the separate \$50,000 per person UIM limit for the wrongful death damages she was legally entitled to recover from the underinsured motorist. CP 16-19.

IV. ARGUMENT

1. An unwittingly arrival is required.

Contrary to Plaintiff's arguments, the requirement that a bystander plaintiff must arrive on the scene unwittingly in order to maintain a cause of action for negligent infliction of emotional

distress is not “nebulous” or “merely dicta.” See, Appellant’s Brief, pages 21-22. In *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008), the court clearly stated that when a bystander plaintiff learns of a close relative’s accident from a third party, the prior knowledge serves as a “buffer against the full impact of observing the accident scene.” *Id.* at 59-60, citing *Mazzagatti v. Everingham*, 512 PA. 266, 279-80, 516 A.2d 672 (1986).

The *Colbert* court held that the unwittingly arrival requirement “comports with our prior case law that limits the cause of action to those who suffer emotional trauma from the shock from personally experiencing the immediate aftermath of an especially horrendous event that is in actuality a continuation of the event.” *Id.* at 60. The court specifically held that this required shock “is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene.” *Id.* at 60 (emphasis added).

In establishing the unwittingly arrival requirement, the *Colbert* court agreed with the *Mazzagatti* court’s reasoning that a plaintiff’s prior knowledge of a relative’s accident before arriving at the scene serves as a buffer against the emotional trauma experienced from the immediate aftermath of an accident. The facts in *Mazzagatti* are very similar to Mrs. Haynes’ facts. Fourteen-year-old Muntaz Mazzagatti was riding her bike when she was struck by a car and fatally injured. Mrs. Mazzagatti received a telephone call immediately after the accident informing her that her daughter had been involved in

the accident. Mrs. Mazzagatti arrived at the scene a few minutes after receiving the telephone call, which the court ruled served as a buffer against the full impact of observing the accident scene. *Id.* at 279.

The *Colbert* decision and its acceptance of the *Mazzagatti* unwittingly arrival reasoning was the basis for the dismissal of a UIM claim for NIED in *Coleman v. American Commerce Ins.*, WD WA 2010 WL 3672345 (2010).¹ The facts in *Coleman* are as follows: Ms. Coleman received a phone call informing her that her daughter Kaila was in a car accident. Ms. Coleman arrived at the scene of the accident about 15 minutes after the phone call. When Ms. Coleman arrived at the scene, police, fire and ambulance responders were already present. When Ms. Coleman first saw Kaila, she was lying on a stretcher and being loaded into an ambulance. Ms. Coleman saw that Kaila had blood on her face. The court held that, "Based on the circumstances, Mrs. Coleman's injuries were not foreseeable as a matter of law."

The *Coleman* decision emphasized the unwittingly arrival requirement established in *Colbert* and its reasoning that, when a relative learns of a loved one's accident from a third party, the

¹ Citation to unpublished opinions from jurisdictions other than Washington State is allowed if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. GR 14.1(b). *Coleman* is a 2010 federal case and is subject to Federal Rule of Appellate Procedure 32.1 which prohibits federal courts from restricting citation to unpublished opinions issued on or after January 1, 2007. Therefore, citation to *Coleman* is permitted despite the fact that it has not been published. *See, Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn.App. 52, 68, 199 P.3d 991, 999 (2008).

prior knowledge serves as a buffer against the full impact of observing the accident scene, particularly in contrast to the relative who contemporaneously observes the tortious conduct with no time in which to brace his or her emotional system. The *Coleman* court, similar to *Colbert*, held that the plaintiff's injuries were not foreseeable as a matter of law and dismissed the UIM claim for NIED damages.

Nearly identical to the facts in *Coleman* are the following facts from Mrs. Haynes' sworn testimony: Mrs. Haynes learned from a phone call between her friends Jennifer Fordham and Nicole Crossett that "there's been an accident, Randy went down on his motorcycle." Mrs. Haynes had her own personal feeling when the phone call was received that Randy's condition was bad because of the sheer fact that he had crashed. Mrs. Haynes arrived at the accident scene within 10-15 minutes after the phone call. When Mrs. Haynes arrived, ambulance attendants and the state patrol were already present. Ambulance attendants were attending to Randy who was lying on the side of the median on a backboard. Randy had a neck brace on and his head was strapped to the backboard. When Mrs. Haynes arrived, Randy was not wearing the helmet he wears when riding his motorcycle and one of his boots was missing, his heavy leather gloves were off, and the ambulance attendants had cut off his leather jacket and cut through all of his clothing to get to his chest. Mrs. Haynes was told that Randy had been moved from where he landed to get him on the backboard where he was when Ms. Haynes first saw him.

CP 230-234.

Another case which cited the *Colbert* decision and which precluded a bystander NIED claim for a relative who did not arrive at the scene unwittingly is *Clifton v. McCammack*, 43 NE.3d 213 (In. 2015). In *Clifton* a father learned from a newscast of a fatal accident along a route driven by his son. Although the newscast did not identify the victim, the father had a very bad feeling the victim was his son and drove to the accident scene. When the father arrived at the scene, his fear that his son was killed in the accident was confirmed. The court dismissed the father's NIED claim against the adverse driver because the father did not arrive at the scene unwittingly even though he did not have actual knowledge until he arrived at the scene that his son was in the accident. The court held that the emotional distress which is compensable must be unmediated, with no period of time during which a bystander can brace him or herself. *Id.* at 222.

Similarly, Mrs. Haynes learned before she arrived at the scene that her husband had been in a bad motorcycle accident. Although Mrs. Haynes was not given any specifics of her husband's condition, she had her own personal feeling that it was bad. Before arriving at the scene Mrs. Haynes was panicked, worried, scared, had a bad feeling, visibly shaken up, in a state of shock and very upset. CP 227. The situation during and immediately after the phone call served as a buffer for Mrs. Haynes against the full impact of what she observed at the scene.

Contrary to the argument at page 22 of Appellant's Brief, State Farm does not contend that any prior notice whatsoever of an accident creates a bright line rule that automatically bars a plaintiff's ability to legally recover NIED damages as a matter of law. Instead, State Farm relies upon the unwittingly arrival requirement and its reasoning established in *Colbert* as the legal basis precluding Mrs. Haynes' recovery for NIED damages given the undisputed facts specific to her case.

2. Claim disagreement is not a coverage dispute.

The applicable State Farm UIM insurance policy complies with Washington's UIM statute requiring UIM insurance to be provided for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles. RCW 48.22.030(2). In compliance with the UIM statute, the State Farm policy states:

We will pay compensatory damages for ***bodily injury*** an ***insured*** is legally entitled to recover from the owner or driver of an ***underinsured motor vehicle***.

CP 13.

In Washington a UIM insured is legally entitled to recover and a UIM insurer required to pay only to the extent that liability could be imposed against the underinsured motorist. *McIllwain v. State Farm*, 133 Wn. App. 439, 446, 136 P.3d 135 (2006). To recover on a UIM claim the insured must be capable of showing that she could obtain a judgment in her favor, i.e., prove the elements of the alleged tort claim including fault and

damages. *Id.* at 447. The lack of fault or inability to show negligence on the part of the alleged underinsured motorist is a legal bar to recovery. *Id.* at 447.

The UIM insurer stands in the shoes of the underinsured motorist to the extent of the UIM policy limits and therefore the UIM insurer is not compelled to pay when the same recovery could not have been obtained from the underinsured motorist. *Dayton v. Farmers*, 124 Wn.2d 277, 281, 876 P.2d 896 (1994). CP 5.

Mrs. Haynes' State Farm policy provides that UIM claim disputes regarding liability or damages are to be decided by litigation. CP 14. The State Farm Deciding Fault and Amount provision is consistent with Washington law that an insured is legally entitled to recover and a UIM insurer required to pay only to the extent that an action against the tortfeasor would have been viable if the tortfeasor had been insured. *McIlwain, supra*, at 446.

For the reasons explained in *Colbert* and the other cases discussed above, Mrs. Haynes would not legally be able to recover NIED damages from the underinsured motorist who caused her husband's death. State Farm stands in the shoes of the underinsured motorist and does not owe UIM payment to Mrs. Haynes for NIED damages which she is not legally entitled to recover from the underinsured motorist. In contrast, State Farm did pay Mrs. Haynes her separate per person \$50,000 UIM limits for the wrongful death damages she was legally entitled to recover from the underinsured motorist. CP 16-19.

Contrary to the argument in Appellant's Brief at page 37, *Matsyuk v. State Farm*, 173 Wn.2d 643, 272 P.3d 802 (2012), does not support Mrs. Haynes' argument that her liability and damages disagreement with State Farm and resolution via litigation involves a coverage dispute for which she is entitled to attorney fees if she prevails pursuant to *Olympic Steamship v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). *Matsyuk* specifically states that although *Olympic Steamship* applies when an insurer contests the meaning of a contract, it does not apply when the insurer "contests other questions as, for example, its liability in tort or the amount of damages it should pay." *Id.* at 660, citing *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, at 606-07, 167 P.3d 1125 (2007).

The disagreement in this case does not involve interpretation of the insurance contract but instead involves questions as to whether Mrs. Haynes can satisfy the elements of an NIED claim necessary to be legally entitled to recover damages from the underinsured motorist.

Dayton, supra, held that *Olympic Steamship* attorney fees are not recoverable in UIM cases involving claim disputes. *Id.* at 280. Although the Farmers policy in that case resolved liability and damage disputes by arbitration rather than litigation, the holding in *Dayton* is applicable in this case, particularly the following reasoning:

In fact, providing attorney fees in a UIM arbitration to determine damages would give the insured *more*

than he or she contracted for. We have often repeated the purpose of the UIM statute is to place the insured in the same position as if the tortfeasor carried liability insurance. *Kenworthy*, 113 Wash.2d at 314, 779 P.2d 257. Thus, the insurance carrier stands in the shoes of the uninsured motorist to the extent of the carrier's UIM policy limits. The injured party is not entitled to be put in a better position by having been struck by an uninsured motorist as opposed to an insured motorist. *Keenan v. Industrial Indem. Ins. Co.*, 108 Wash.2d 314, 321, 738 P.2d 270 (1987). Accordingly, UIM carriers are not compelled to pay when the same recovery could not have been obtained from the uninsured tortfeasor. *Keenan*, 108 Wash.2d at 321, 738 P.2d 270.

When a tortfeasor carries insurance, the claimant insured bears his or her own attorney fees in the arbitration proceeding. *Kenworthy*, 113 Wash.2d at 315, 738 P.2d 270. Thus, when the UIM insurer stands in the shoes of the uninsured tortfeasor, the claimant insured should likewise bear his or her own attorney fees. Recovery of attorney fees in a UIM arbitration constitutes an amount greater than that available from an insured tortfeasor. This is not consistent with the purpose of UIM insurance, or the statutes governing UIM coverage. Unlike the insured in *Olympic Steamship*, Mr. Dayton seeks to compel more than the benefits of purchased coverage.

Id. at 281 (emphasis added).

V. CONCLUSION

The disagreement between State Farm and Mrs. Haynes as to whether she is legally entitled to recover damages from the underinsured motorist is a claim dispute and not a coverage

dispute. Applying the undisputed facts to the controlling Washington law, Mrs. Haynes is unable to satisfy the elements necessary to be legally entitled to recover NIED damages. The trial court Order regarding the respective summary judgment motions should be affirmed.

October 18, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven M. Cronin", written over a horizontal line.

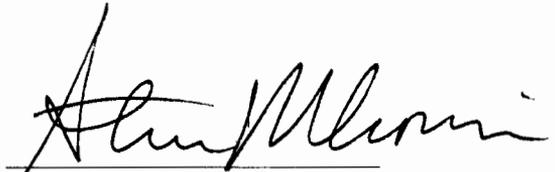
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, I provided a copy of the document to which this certification is attached for delivery to all counsel of record as follows:

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