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No. 84686-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KAREN WEISMANN, *Petitioner*

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, *Respondent*

Consolidated with

OLGA MATSYUK, *Petitioner*

v.

STATE FARM FIRE & CASUALTY, *Respondent*

**RESPONDENT SAFECO INSURANCE COMPANY OF ILLINOIS'
ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON
STATE ASSOCIATION FOR JUSTICE FOUNDATION**

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I. Response to Issues Presented by WSAJF

Washington State Association for Justice Foundation's arguments gloss over the key differences between the facts in *Mahler v. Szucs*¹ and the cases that followed.

First, the Court of Appeals correctly concluded that Safeco was not required to pay a proportionate share of fees and costs when Weismann's actions did not create a common fund for the benefit of Safeco. Instead, all funds paid were created by Kangas through her contract for insurance with Safeco. The proportional sharing rule of *Mahler* and its progeny is predicated on the plaintiff's creation of a common fund for the benefit of the insurer, which is not possible absent the collateral source rule. The Court of Appeals' ruling that pro-rata fee-sharing is not required should be upheld.

Second, Weismann does not dispute that Safeco was entitled to an offset. The only dispute is with respect to the amount of that offset. Given this Court's clear pronouncement in *Mahler* that *Olympic Steamship*² fees are

¹ 135 Wn.2d 398, 957 P.2d 332, 966 P.2d 305 (1998).

² 117 Wn.2d 37, 811 P.2d 673 (1991)

not recoverable in a value dispute, they should not be available in this case.

II. Statement of the Case

Safeco has thoroughly set forth the facts of this case in Respondent Safeco's Answer to Petition for Review and Respondent Safeco's Supplemental Brief per RAP 13.7, which are both on file with the Court. No additional facts are necessary for resolution of the issues raised by Washington State Association for Justice Foundation (WSAJF). The key facts in this matter are as follows:

- Darlene Kangas was insured under a Safeco auto policy issued to her;
- Kangas was involved in an accident where her insured vehicle struck a wheelchair operated by Karen Weismann;
- Safeco extended coverage to Weismann under the Personal Injury Protection (PIP) benefits of Kangas' auto policy, and Weismann recovered PIP benefits from that policy totaling \$9,012.95 for medical bills;
- Weismann also made a claim under the liability portion of Kangas' policy, and entered into a settlement with Safeco settling the claim against Kangas for \$44,521.19 with Safeco taking an offset of the total PIP payments and issuing payment for the difference;

- As part of the agreement, Weismann retained the right to bring suit to determine whether Safeco was required to reduce the PIP offset by a pro-rata share of attorney fees and costs;
- Safeco did not dispute that Weismann was entitled to PIP benefits, and Weismann does not dispute Safeco's right to an offset. Instead, the dispute centers only on the amount of the offset (whether it must be reduced by a proportionate share of fees or not).³

The trial court held that Safeco was required to pay a proportionate share of fees and costs.⁴ The Court of Appeals disagreed and reversed.⁵

III. Argument

*Weismann*⁶ and *Matsyuk v. State Farm Fire & Casualty Company*⁷, like *Young v. Teti*⁸, involve instances where a tortfeasor's insurance policy provided PIP coverage to an injured party who also brought liability claims against the tortfeasor. These consolidated matters do not involve subrogation issues because an insurer does not have

³ CP 73-75; CP 151-52.

⁴ CP 202-06; CP 387-89

⁵ *Weismann v. Safeco Ins. Co. of Ill.*, 157 Wn. App. 168, 236 P.3d 240 (2010).

⁶ 157 Wn. App. 168, 236 P.3d 240 (2010).

⁷ 155 Wn. App. 324, 229 P.3d 893 (2010).

⁸ 104 Wn. App. 721, 16 P.3d 1275 (2001).

subrogation rights against one of its own insureds.⁹ Nor was a common fund created because the collateral source rule did not operate to allow double recovery. The only source of funds is a source created by the tortfeasor. Absent a common fund, there was no benefit to the insurance carrier. Accordingly, these cases are fundamentally different from the situations in *Mahler*¹⁰, *Winters*¹¹, and *Hamm*¹² where the collateral source rule was applicable to allow double recovery thereby creating a common fund from which the PIP carrier benefitted.¹³

⁹ *Mahler v. Szucs*, 135 Wn.2d 398, 419, 957 P.2d 632, 966 P.2d 305 (1998) (stating that, “[n]o right of subrogation can arise in favor of an insurer against its own insured...” (quoting, *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976); and citing 16 GEORGE J. COUCH, INSURANCE § 61:136, at 195-96 (2d ed. 1983)).

¹⁰ *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998).

¹¹ *Winters v. State Farm Mut. Auto. Ins. Co* 144 Wn.2d 869, 31 P.3d 1164 (2002).

¹² *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 88 P.3d 395 (2004).

¹³ See *Hamm*, 151 Wn.2d. at 309-320 (discussing benefit to the insurer in cases of *Mahler* and the fully insured tortfeasor (309-310); *Winters* and the underinsured tortfeasor (310-313); and *Hamm* and the uninsured tortfeasor)

WSAJF ignores these fundamental differences. Its arguments, which are almost identical to those raised by Weismann and Matsyuk, necessarily fail.¹⁴

A. The reasoning of *Mahler* and its progeny necessarily hinge upon the source of the PIP funds.

In *Mahler*, *Winters*, and *Hamm*, this Court held that proportionate fee-sharing is appropriate when a common fund is created that benefits the insurance carrier.¹⁵ *Winters* and *Hamm* also both stand for the proposition that the Court looks at the benefit to the PIP carrier as independent from a UIM carrier, which WSAJF claims should also apply in these consolidated cases.¹⁶ Such a conclusion glosses over a key aspect of those cases. In *Mahler*, *Winters*, and *Hamm*, the PIP funds were from a source **independent** of the tortfeasor.¹⁷

¹⁴ Because of the similar arguments, the majority of WSAJF's arguments have already been addressed in Safeco's Answer to the Petition for Review and its Supplemental Brief.

¹⁵ See, *Mahler*, 135 Wn.2d at 405, 426-27; *Winters*, 144 Wn.2d at 878-83; *Hamm*, 151 Wn.2d at 312-21.

¹⁶ See e.g., *Winters*, 144 Wn.2d at 882; *Hamm*, 151 Wn.2d at 312-13; 319.

¹⁷ *Winters*, 144 Wn.2d at 872-75; 880-81 (setting out the fact that PIP payments came from either the plaintiff's (*Winters*) insurance policy or the policy of someone other than the tortfeasor (*Perkins*) and holding that a common fund is created by recovery of liability proceeds from the tortfeasor and UIM funds, which are treated as if they came from the tortfeasor); and *Hamm*, 151 Wn.2d at 307-08 (setting out that plaintiff, *Hamm* was an insured under both PIP

Here, the PIP payments did not come from an independent source, but from the tortfeasor's Safeco policy. Because Kangas was Safeco's insured, Weismann's litigation against her could not produce a benefit for Safeco. Safeco had no right of subrogation against Kangas.¹⁸ Therefore, as the *Weismann* court correctly held, Safeco was in no better position because of the litigation.¹⁹ Absent this benefit, WSAJF's arguments necessarily fail.

The source of the funds distinction that underlies *Young v. Teti*²⁰, *Matsyuk*, and *Weismann* clearly distinguishes these cases from *Mahler*, *Winters*, and *Hamm* and supports a finding that a common fund was not created. The Courts of

and UIM of a State Farm policy, but noting that UIM funds are treated as if they came from the tortfeasor). *See also, Mahler*, 135 Wn.2d at 405-09 (indicating that plaintiffs, Mahler and Fisher, were insureds under State Farm policies and the tortfeasors were insureds under policies from other carriers).

¹⁸ *See, Mahler*, 135 Wn.2d at 419 (stating that, "[n]o right of subrogation can arise in favor of an insurer against its own insured..." (quoting, *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976); and citing 16 GEORGE J. COUCH, INSURANCE § 61:136, at 195-96 (2d ed. 1983)). This key fact was explicitly recognized by the Courts of Appeals in both *Matsyuk* and *Weismann*. *Matsyuk*, 155 Wn. App. at 333; *Weismann*, 157 Wn. App. at 177.

¹⁹ *Weismann*, 157 Wn. App., at 177-78. *See also, Young v. Teti*, 104 Wn. App. 721, 725-27; 16 P.3d 1275 (2001).

²⁰ 104 Wn. App. 721, 16 P.3d 1275 (2001).

Appeals in *Weismann* and *Matsyuk* correctly ruled that pro-rata sharing was not required.²¹

B. Because the source of the PIP funds was Kangas, the collateral source rule does not apply and the benefit for the funds inures to Kangas. Accordingly, it is not possible for a double recovery to create a common fund necessary to justify fee-sharing.

WSAJF's argument that application of the collateral source rule and proportional fee-sharing issue are separate questions²² is incorrect. In support of its argument, WSAJF asserts that a tortfeasor and her insurer are not entitled to a greater offset than what is provided for under the insurance contract.²³ This argument was not raised in the case below, nor in the Petition for Review. Accordingly, it should not be considered.²⁴

²¹ See, *Weismann*, 157 Wn. App. at 174-78; *Matsyuk*, 155 Wn. App. at 333-35. See also, *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001).

²² Amicus, at p. 15. Further, Weismann does not dispute that Safeco is entitled to an offset. The only issue is whether Safeco must pay pro-rata fees and costs.

²³ See, Amicus, at p. 15 (citing, *Mazlarski v. Bair*, 835 Wn. App. 835, 844, 924 P.2d 409 (1996))

²⁴ See, *Winters*, 144 Wn.2d at 877 n.3 ("Amicus Curiae Washington State Trial Lawyers Association argues that the Nonduplication of Benefits clause is impermissible... State Farm correctly points out that this argument was not raised below and we therefore do not reach this argument."); *State v. King*, 167 Wn.2d 324, 329, 219 P.3d 642 (2009) ("In general, appellate courts will not consider issues raised for the first time on appeal."); RAP 2.5(a).

In fact, the source of the funds involved and the resultant inapplicability of the collateral source rule are key reasons why proportional fee-sharing is inappropriate in this matter.

In general, Washington Courts do not allow a party to make a double recovery for the same injury.²⁵ There is an exception to this rule in the context of tort actions where, by operation of the collateral source rule, a party can recover from a tortfeasor damages that were previously paid by someone else.²⁶ The collateral source rule excludes consideration of payments independent of the tortfeasor.²⁷ However, Washington courts have recognized for 100 years that payments from a fund created by the tortfeasor reduce damages a tortfeasor owes. This is clearly evidenced by the following quote from the 1913 Supreme Court in *Heath v.*

²⁵ See, *Publ. Employees Mut. Ins. Co. v. Kelly*, 60 Wn. App. 610, 618, 805 P.2d 882 (1991) (stating that, "...it is a basic principle of damages—tort and contract—that there shall be no double recovery for the same injury.") (footnote omitted).

²⁶ See e.g., *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804-07, 585 P.2d 1182 (1978).

²⁷ *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998) (citing, *Stone v. City of Seattle*, 64 Wn.2d 166, 172, 391 P.2d 179 (1964).); *Ciminski*, 90 Wn.2d at 804.

Seattle Taxicab Co. affirming a trial court's refusal to give an instruction regarding collateral source payments:

The fact that a person, injured by another's negligence, having accident insurance, for which he has paid, is reimbursed by the insurance company for...expenses caused by the injury cannot preclude him from maintaining an action for these same items against the person causing the injury...The situation here is distinctly different from that found in *Nelson v. Western Steam Navigation Co.*, 52 Wash. 177, 100 Pac. 325. There the plaintiff, claiming to have been injured by the negligence of the steamship company, was held not entitled to recover for his hospital and physician's fees, which were paid from the seamen's fund. That fund is created under a federal law by payments made by the various steamship companies, and is not contributed to by the seamen. It should therefore inure to protect the steamship company from paying again items of expense which have already been paid from the fund, in which the steamship company has a direct and pecuniary interest.²⁸

In other words, the collateral source does not apply to payments made from a fund created by the tortfeasor. Instead, the tortfeasor is given the benefit of these payments by reducing the amount the plaintiff may recover. Just like the seamen's fund discussed by the *Heath* court, the PIP

²⁸ *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 186-87, 131 P. 843 (1913) (ital. added). See also, *Ciminski*, 90 Wn.2d at 806 (acknowledging that the collateral source rule might not apply in cases where the tortfeasor was a member of a narrow class making all payments to a fund out of which damages had been paid, "...and therefore had a 'direct, pecuniary interest' in such fund") (citing, *Heath*, 73 Wash. 177; and *Nelson v. Western Steam Navigation Co.*, 52 Wash. 177, 100 P. 325 (1909)).

insurance benefits in this matter were from funds solely created by Kangas. Thus, Weismann is not entitled to recover again the expenses already paid by the fund created by Kangas.²⁹

Given that the insurance payments were not from a collateral source and Kangas was entitled to an offset, it was not possible for Weismann to recover again what was paid in PIP benefits. This is fatal to WSAJF's arguments because it was not possible for Weismann to have created the common fund necessary for pro-rata fee-sharing.³⁰ Weismann and Matsyuk are only entitled to recover those damages that exceed the PIP payments made on behalf of Kangas and Strenditsky. Since Weismann and Matsyuk cannot obtain

²⁹ See, *Lange v. Raef*, 34 Wn. App. 701, 704-05, 664 P.2d 409 (1983) (finding that the jury could have heard evidence regarding PIP payments from the tortfeasor's insurer and exclude those amounts from its verdict because the collateral source rule did not apply); *Bliss v. City of Newport*, 58 Wn. App. 238, 241 n.2, 792 P.2d 184(1990) (Stating in an unknown insurance context, that, "[t]he collateral source rule does not apply because the source of the collateral payments here is the [defendant's] ... insurer, a fund created by the [defendant]... by its insurance contract."); and *Maziarski v. Bair*, 83 Wn. App. 835, 841 n.8, 924 P.2d 409 (1996) (finding that the collateral source rule did not apply because the payments came from the tortfeasor's PIP coverage, which was a fund created by the tortfeasor).

³⁰ See *Hamm*, 151 Wn.2d. at 309-320 (discussing common fund and benefit to the insurer in cases of *Mahler* and the fully insured tortfeasor (309-310); *Winters* and the underinsured tortfeasor (310-313); and *Hamm* and the uninsured tortfeasor)

judgments against Kangas and Strenditskyy that include the damages they have already been compensated for, there is no reason to pay attorney fees of any kind on damages that cannot be recovered.

C. *Olympic Steamship* fees are inappropriate even if proportionate fee-sharing is required given the clear pronouncement of *Mahler*.

Under Washington law, when an insured is compelled to assume legal action in order to receive the benefit of the insurance contract, she is entitled to attorney's fees.³¹ However, fees pursuant to *Olympic Steamship Company, Inc. v. Centennial Insurance Company*³² are not available in disputes over value.³³

This Court made a clear, reasoned decision in *Mahler v. Szucs*³⁴, concluding that a dispute over whether a

³¹ *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811P.2d 673 (1991). See also, *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 28, 904 P.2d 731 (1995) (reaffirming *Olympic Steamship*).

³² 117 Wn.2d 37, 811P.2d 673 (1991).

³³ *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280-81, 876 P.2d 896 (1994).

³⁴ *Mahler*, 135 Wn.2d at 431-32 (holding that a dispute over pro-rata sharing was a value dispute, not a coverage dispute, and did not warrant an award of attorney's fees) (citing, *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 876 P.2d 896 (1994)).

proportionate share of fees and costs is owed is **not** a coverage dispute subject to *Olympic Steamship*:

In this case, the dispute between Mahler and State Farm is not a coverage dispute, but rather a dispute over the value of State Farm's subrogation interest. Both Mahler and State Farm agree State Farm has a right to be reimbursed for PIP benefits paid to Mahler. The dispute between them boils down to the value of that right of reimbursement. Insofar as the principal focus of this dispute is the value of State Farm's subrogation interest, *Dayton* controls rather than *Olympic S.S./McGreevy*. Mahler is not entitled to fees under this theory.³⁵

WSAJF has asserted that *Safeco Insurance Company v. Woodley*³⁶, which reached the opposite conclusion in a pro-rata sharing case, applies and should control based upon an assertion that *Woodley* overruled *Mahler*. This argument should be rejected.

In *Mahler*, this Court undertook a full analysis of the fees issue, before concluding an award is not appropriate when seeking to determine the amount of a reimbursement right.³⁷ In contrast, there is little analysis in *Woodley* regarding its reasoning for concluding that the matter was more akin to a coverage dispute and there was no recognition that the court had concluded the opposite just a few years

³⁵ *Mahler*, 135 Wn.2d at 432.

³⁶ 150 Wn.2d 765, 773-74, 82 P.3d 660 (2004).

³⁷ *Mahler*, 135 Wn.2d at 430-32.

earlier in *Mahler*.³⁸ While WSAJF correctly cites to *Lunsford v. Saberhagen Holdings, Inc.*³⁹ for the proposition that a later case overrules an earlier case sub silentio when it directly contradicts a prior ruling of law, WSAJF misses key language from that decision that supports the opposite conclusion:

Where we have expressed a clear rule of law as we did in *Robinson*, we will not-and should not-overrule it sub silentio. *Accord State v. Studd*, 137 Wash.2d 533, 548, 973 P.2d 1049 (1999).⁴⁰

Mahler conducted a full analysis of the *Olympic Steamship* fees issue and set forth a clear rule of law that such a dispute was a value dispute. Accordingly, it should not be deemed to have been overruled sub silentio. Safeco respectfully requests that this Court, pursuant to *Mahler*, rule that *Olympic Steamship* fees are inapplicable because the dispute is not one of coverage under the terms of the insurance policy, but rather the value of the offset to be taken for payments already made.

³⁸ *Woodley*, 150 Wn.2d at 773-74.

³⁹ 166 Wn.2d 264, 208 P.3d 1092 (2009).

⁴⁰ *Lunsford*, 166 Wn.2d at 281.

IV. Conclusion

Key distinctions between the holdings in *Young*, *Matsyuk*, and *Weismann* render the proportionate sharing/common fund holdings of the *Mahler* line of cases inapplicable. Unlike the situation in the *Mahler* line, the situation in both *Weismann* and *Matsyuk* involved PIP payments from policies of insurance provided on behalf of the tortfeasor. Because neither Safeco nor State Farm could pursue the tortfeasor for recovery, it was not possible for *Weismann's* or *Matsyuk's* suit to have created a common fund out of which to reimburse the prior PIP payments. Accordingly, the litigation efforts did nothing to benefit Safeco or State Farm.

Because the collateral source rule was not applicable, the insured tortfeasors were entitled to offset the amounts of the PIP payments. This prevented the creation of any common fund because it prevented the double recovery necessary for *Weismann* or *Matsyuk* to recover the previously paid amounts. The Courts of Appeals in *Weismann* and *Matsyuk* correctly ruled that proportionate fee-sharing did not apply under these circumstances. Where the Plaintiff has no

right to recover damages already compensated, there is no reason for fees to be paid, let alone for there to be a proportionate share of unearned fees paid by an insurance carrier.

Even if this Court finds that proportionate fee-sharing was required, an award of *Olympic Steamship* fees is inappropriate as *Mahler* sets forth a clear rule of law regarding disputes over pro-rata sharing and should not be deemed overruled sub silentio.

Respectfully submitted this 16th day of May, 2011.

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