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No. 39323-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KAREN WEISMANN, *Petitioner,*

vs.

SAFECO INSURANCE CO. OF ILLINOIS, *Respondent*

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Karen Weismann, Plaintiff in the trial court and respondent in the Court of Appeals, seeks review.

II. COURT OF APPEALS DECISION

Ms. Weismann seeks review of a published decision (__ P.3d __, 2010WL 2961615, Div. 2 (2010)) of the Court of Appeals, Division II, filed on July 29, 2010 (copy attached as Appendix A). This Petition is filed within 30 days after the Court of Appeals opinion was filed.

III. ISSUES PRESENTED FOR REVIEW

A. When a person injured in an automobile collision is an insured under a personal injury protection (PIP) policy belonging to the tortfeasor, and the injured person also recovers monies from the tortfeasor's liability policy, has the injured/insured person created a common fund for the benefit of the PIP insurer, thus requiring the PIP insurer to reduce the amount of its right of reimbursement to account for its proportionate share of the injured/insured's expenses in creating the common fund?

B. Should said insured be entitled to attorney's fees on appeal if she prevails?

IV. STATEMENT OF THE CASE

On July 22, 2005, a vehicle covered under Darlene Kangas' Safeco auto policy, being driven by Ms. Kangas, struck a motorized wheelchair

being operated by Karen Weismann. Clerk's Papers (CP) at Pg. 73, #1. Ms. Weismann was injured in the collision. CP at 73, #3.

Following the collision, Ms. Weismann received PIP insurance benefits under the Ms. Kangas' policy in the amount of $9,012.95. CP at 73, #4. Ms. Weismann is an "insured" by definition under the PIP coverage provision of the insurance contract issued to Ms. Kangas because she was a pedestrian struck by Ms. Kangas' covered auto. CP at 74, #5. Ms. Weismann was also a claimant under the liability portion of Ms. Kangas' policy. CP at 74, #6.

During ongoing settlement negotiations between Ms. Weismann and Safeco, Safeco advised Ms. Weismann's counsel that the amount Safeco would pay Ms. Weismann in settlement of her claim against Ms. Kangas would be offset by $9,012.95, the entire amount of PIP benefits received by Ms. Weismann, without reduction of the offset by Safeco's proportionate share of Ms. Weismann's attorney fees and costs. CP at 74, #7. Safeco alleged that no reduction was required under Washington law, relying specifically on *Young v. Teti*, 104 Wn.App 721, 16 P.3d 1275 (2001). CP at 74, #7. Subsequently, Ms. Weismann and Safeco entered into an agreement to settle Ms. Weismann's claim against Ms. Kangas for $44,521.19, with Safeco taking an offset of the entire PIP amount, $9,012.95, and paying Ms. Weismann and her attorney the difference,

$35,508.24. CP at 74, #8. The agreement reserved Ms. Weismann's right to bring an action against Safeco to determine whether Safeco is required to reduce its offsets for PIP payments by a proportionate share of attorney fees and costs and for other remedies. CP at 75, #11.

On May 30, 2008, Ms. Weismann mailed to Safeco and to the Office of the Insurance Commissioner a Notice of Insurance Fair Conduct Act (IFCA) Violation. CP at 74, #9. On June 3, 2008, Safeco's claims analyst wrote to Ms. Weismann's attorney in response to the May 30, 2008, letter, stating that *Young v. Teti* appeared to be the controlling law in Washington. CP at 74, #10. Ms. Weismann continues to assert that *Young v. Teti* has been impliedly over ruled by subsequent cases, specifically *Hamm v. State Farm Insurance Company,* 151 Wn.2d 303, 88 P.2d 395 (2004). CP at 74-75, #10. Safeco reaffirmed its prior rejection of Ms. Weismann's request for a reduction of the PIP offset. Ms. Weismann subsequently filed suit against Safeco based upon IFCA and other causes of action. CP at 75, #10.

Ms. Weismann moved for summary judgment, asking the superior court to rule that *Young* had been impliedly overruled by the line of cases expanding on *Mahler v. Szucs,* 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998), including *Winters v. State Farm,* 144 Wn2d 869, 31 P.3d 1164, 63 P.3d 764 (2001), and *Hamm v. State Farm*, 151 Wn.2d 303, 88

P.2d 395 (2004). CP at 12-13, 15-25. Safeco also moved for summary judgment, asking the court to affirm that *Young* governed, and for dismissal of all of Ms. Weismann's claims. CP at 76-89. The superior court ruled that, given the analysis the Supreme Court had adopted in the subsequent cases, *Young* was no longer good law. CP at 202-06. The superior court granted Ms. Weismann's motions and ordered Safeco to pay Ms. Weismann 1/3 of the PIP offset amount. CP at 388-89. The court denied Safeco's motions. CP at 388-89.

Ms. Weismann then moved for an award of attorney fees under *Olympic Steamship Co. v. Centennial Ins. Co.,* 117 Wn.2d 37811 P.2d 673 (1991), on the basis that, consistent with *Safeco v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004), the dispute between Ms. Weismann and Safeco over the *Young* issue was more akin to a dispute over access to the full benefits of the PIP policy (for which *Olympic Steamship* fees were available), rather than simply a dispute over the value of the claim (for which such fees were not available). CP at 223-29. The superior court granted the motion and awarded fees to Ms. Weismann. CP at 388-89.

Safeco asked the superior court for an order staying the proceedings pending the outcome of an appeal in a King County case[1] also involving the continued viability of *Young*, a case in which the superior court had ruled that *Young* still governed. CP at 231-42. The superior court denied Safeco's request for a stay, and Safeco appealed the rulings against it. CP at 389, 400-01.

In a decision filed July 29, 2010, the Court of Appeals, Division II, reversed the superior court, finding *Young v. Teti* was still good law, and that the critical distinction between the present situation and *Hamm v. State Farm* was that "the tortfeasor's insurance company paid PIP benefit and a liability award." The Court of Appeals ordered that Safeco be granted summary judgment, and consequently that Ms. Weismann not be awarded attorney fees on appeal. See Appendix A.

V. WHY THE COURT SHOULD ACCEPT REVIEW

A. The Court should accept review under RAP 13.4(b)(1) because the decision of the Court of Appeals is in conflict with decisions of the Supreme Court, including *Hamm v. State Farm*.

The Court should accept review because the Court of Appeals decision is at odds with Washington law regarding what constitutes

[1] The disposition of which can be found in *Matsyuk v. State Farm*, 155 Wn. App. 324, 229 P.3d 893 (Div. I, 2010).

creation of a "common fund", embodied in Supreme Court cases like *Hamm v. State Farm*, 151 Wn.2d 303, 88 P.2d 395 (2004). To understand how the Court of Appeals decision conflicts with Supreme Court cases, one must understand the case the Court of Appeals primarily relied on in ruling in Safeco's favor.

Safeco relied on *Young v. Teti*, 104 Wn.App. 721, 723, 16 P.3d 1275 (2001), as authority for its argument that because Safeco is both liability carrier and PIP carrier, Ms. Weismann's efforts to recover on the liability portion of the policy did not create a common fund for Safeco's benefit as PIP carrier. Teti caused an automobile accident which injured Young, Teti's passenger. Teti's insurer, Allstate, paid Young PIP benefits under Teti's policy. *Id.* Young also sued Teti for negligence. *Id.* A jury awarded Young $20,000, and Teti moved to offset the jury award by the full amount of Allstate's earlier PIP payment to Young; Young argued that she was entitled to deduct from the offset her attorney fees and costs under *Mahler v. Szucs*.[2] The trial court agreed. *Young*, 104 Wn.App. at 723, 16 P.3d 1275.

In its decision on appeal, the Court of Appeals in *Young* explained the basis for a PIP insurer's obligation to share in the expenses of an

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[2] 135 Wn.2d 398, 957 P.2d 632, *amended by* 966 P.2d 305 (1998)

insured's recovery against a tortfeasor by citing to *Mahler*. In *Mahler*, the Washington Supreme Court found the insurers' promise to share in their insureds' recovery expenses consistent with "the common fund doctrine, which, as an exception to the American Rule on fees in civil cases, applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves." *Young*, 104 Wn.App. at 724-25, 16 P.3d 1275, citing *Mahler,* 135 Wash.2d at 426-27, 957 P.2d 632. The reasoning was that: (1) the insureds' litigation had generated a fund of money paid by the tortfeasors (i.e., settlement proceeds); (2) this fund would compensate both the insureds for their damages and their insurers for their previous PIP payments; and (3) because both insured and insurer benefited, each was obligated to pay a pro rata share of fees and costs incurred to generate the funds. *Id.*

However, the *Young* court noted that the situation in the case before it was different than in *Mahler*, in that Young had received PIP payments *from the tortfeasor's insurer*. *Young*, 104 Wn.App. at 725, 16 P.3d 1275. Thus, when Young sued the tortfeasor and recovered, she "did not create a fund to benefit, or to reimburse, anyone other than herself." *Id.* Because Young's litigation allegedly did not "benefit" Allstate, *Mahler* did not apply, and Allstate was not required to share in Young's litigation costs. *Id.*

Two Supreme Court cases following *Mahler* (and *Young*) expanded the definition of the common fund and conflict with the court of Appeals decision in this case (which relies on *Young*): *Winters v. State Farm Mutual Automobile Insurance Company* and *Hamm v. State Farm Mutual Automobile Insurance Company.*

The issue presented in *Winters*, 144 Wn.2d 869, 875, 880, 31 P.3d 1164, was whether a PIP insurer must pay a pro rata share of its insured's attorney fees when the PIP insured creates a common fund from liability insurance payments *and* UIM benefits. The court held that the PIP insurer must do so. *Id.* at 880, 31 P.3d 1164. In that situation, the insured secured the proceeds from the at-fault driver's insurer and then recovered from his or her respective UIM carrier; these pooled funds became the common fund from which the PIP insurer was able to recoup payments it had made. *Id.* The result provided uniformity among insurers. *Id.*

Winters' insurer, State Farm, contended that the "American rule" (that generally, each party must bear his or her own legal expenses) prohibited such a result. *Id.* at 882, 31 P.3d 1164. But the court stated that the question of whether or not the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering PIP benefits from an UIM insurer was totally different. *Id. The insured should not have been worse off simply because he or she purchased two coverages* (PIP and

UIM) *from the same insurer*. *Id.* (emphasis added). Winters was forced to hire attorneys to pursue claims against the party at fault and the UIM carrier, incurring substantial litigation costs to create a common fund for the benefit of the PIP carrier. *Id.* at 882-83, 31 P.3d 1164. Winters would not have been fully compensated if forced to bear the entire litigation costs of the common fund, costs that should have been shared by the insurer. *Id.* at 883, 31 P.3d 1164.

In *Hamm*, 151 Wash.2d 303, 307, 88 P.3d 395, the issue was whether the pro rata sharing rules for legal expenses articulated in *Mahler* (recovery from a *fully* insured tortfeasor) and in *Winters* (combined recovery from an *underinsured* tortfeasor and a UIM carrier) applied when the tortfeasor was *uninsured*, and the insured recovered only from a UIM carrier.

The *Hamm* court explained the equitable sharing rule as follows:

> This equitable sharing rule is based on the common fund doctrine, which, as an exception to the American Rule on fees in civil cases, applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves. [*Mahler* at 426-27, 957 P.2d 632. The "common fund" in *Mahler* consisted of the recovery the insured obtained from the tortfeasor only. From this fund, the insured was compensated and the PIP carrier was reimbursed. Because the PIP carrier reimbursed itself from a fund that the

> insured created, the PIP carrier was obligated to pay a pro rata share of the legal expenses incurred by the insured to create the fund. *Id.* at 436, 957 P.2d 632.

Hamm, 151 Wash.2d at 310, 88 P.3d 395.

The court went on to say that *Winters* had clarified that the pro rata sharing rule articulated in *Mahler* was based on equitable principles, not specific policy language, and applied to PIP reimbursements from UIM recoveries as well as from tortfeasor recoveries. *Hamm*, 151 Wash.2d at 310-11, 88 P.3d 395. In cases like *Winters,* where PIP coverage and UIM coverage were provided by the same carrier, the reimbursement to the PIP carrier typically came in the form of an offset applied to the UIM obligation. *Id.* at 311, 88 P.3d 395. Even though the offset *appeared* to result in a reduction of the UIM obligation, the court clarified that when the PIP and UIM carrier were the same, an offset against the UIM obligation was an acceptable mechanism to account for the PIP reimbursement rights. *Id.*, citing *Mahler,* 135 Wash.2d at 436, 957 P.2d 632 ("Provided the insurer recognizes the public policy in Washington of full compensation of insureds and its other duties to insureds by statute, regulation, or common law, the insurer may establish its right to reimbursement and the mechanism for its enforcement by its contract with the insured").

An insurance carrier that provided both UIM and PIP benefits was not required to pay a pro rata share of legal expenses *as UIM carrier* in order to take a UIM setoff, but was required to pay a pro rata share of legal expenses *as PIP carrier* in order to take a PIP offset pursuant to *Mahler* and *Winters*. *Hamm*, 151 Wash.2d at 311-12, 88 P.3d 395 (emphasis added). *The fact that an insurance company providing both PIP and UIM coverage chose to use an offset from its UIM obligations to account for its PIP reimbursement did not relieve the carrier of its burdens under Mahler and Winters. Id.* at 312, 88 P.3d 395 (emphasis added). The insured should not be worse off simply because he or she purchased two coverages from the same insurer. *Id.*, citing *Winters*, 144 Wn.2d at 882, 31 P.3d 1164.

The court's ultimate holding was that the equitable principle requiring a PIP carrier to share pro rata in the legal expenses of its insured in order to obtain reimbursement of PIP benefits did indeed apply when the insured recovered only from her UIM carrier. *Hamm*, 151 Wash.2d at 312, 88 P.3d 395.

In discussing the error of the Court of Appeals in the decision below, the *Hamm* court stated:

> In its order on remand, the Court of Appeals concludes that "Hamm's *UIM* carrier received no benefit." *Hamm,* 115 Wn.App.

> at 777, 60 P.3d 640. Focusing on State Farm's capacity as UIM carrier, the Court of Appeals decided that Hamm is not entitled to reimbursement from her UIM carrier for the legal expenses she incurred to create the UIM arbitration award. *Id.* at 778, 60 P.3d 640. In doing so, the Court of Appeals applied the rule for UIM carrier setoffs from *Dayton* rather than the rule for PIP carrier offsets from *Mahler* and *Winters*. The Court of Appeals' conclusions with respect to State Farm's obligations in its capacity as UIM carrier may be correct. As in *Winters,* however, "[t]he question presented here is totally different: whether or not the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering PIP benefits from an UIM insurer." *Winters,* 144 Wn.2d at 882, 31 P.3d 1164.

Hamm, 151 Wash.2d at 312-13, 88 P.3d 395. **The court emphasized that the dissent had also erred in failing to distinguish between State Farm's separate roles as PIP and UIM carrier.** *Id.* at 313, 88 P.3d 395. See also *Smith v. Arnold*, 127 Wn. App 98, 110, 110 P.3d 257 (Div. 2, 2005) ("[A]ction taken between an insurer and an insured under a PIP policy is distinct from tort litigation between the insured and a third party tortfeasor"; where PIP and liability insurer were the same, insurer in its liability role did not get to benefit from action taken in its PIP role).

The court observed that by applying the facts of the case and comparing the position of separate PIP and UIM carriers to State Farm's combined position as PIP and UIM carrier, it was clear that State Farm

would not be prejudiced by an application of *Mahler* and *Winters*; rather, not following *Mahler* and *Winters* would provide State Farm with a windfall when compared with separate carriers and would put Hamm in a worse position than if she had been covered by separate carriers. *Hamm*, 151 Wash.2d at 316, 88 P.3d 395. The Court of Appeals' decision in *Hamm*, later overturned by the Supreme Court, directly conflicted with *Winters'* holding that the insured should not be worse off simply because he or she purchased two coverages from the same insurer. *Id.*, citing *Winters,* 144 Wash.2d at 882, 31 P.3d 1164.

The issue presented in *Hamm* did not depend on State Farm's role as UIM carrier, but rather on whether or not the PIP carrier should pay a pro rata share of legal expenses for its insured in recovering PIP benefits from an UIM insurer. *Hamm*, 151 Wash.2d at 317, 88 P.3d 395, citing *Winters,* 144 Wn.2d at 882, 31 P.3d 1164. As to State Farm's argument that Hamm could not create a common fund for the benefit of State Farm as her UIM carrier because State Farm, as such, was the adverse party to the UIM proceedings, the court stated that the argument failed because *the common fund benefited State Farm in its capacity as PIP carrier*, not as UIM carrier, and PIP carriers are not adverse parties in UIM proceedings. *Id.* at 319, 88 P.3d 395 (emphasis added).

When the development of the case law subsequent to *Young* is examined, it becomes apparent that *Young* is outdated and in conflict with the new cases, having been decided prior to major clarifications and refinements in the law of PIP reimbursement being handed down from the Supreme Court. The Court of Appeals erred in following it. The logic behind the expanded definition of "common fund", embodied by our Supreme Court's decisions in *Winters* and *Hamm*, is antithetical to the holding in *Young*. Insurers are now to be examined in their separate capacities as PIP and "other" carriers based upon the particular coverage at issue. See *Hamm*, 151 Wash.2d at 311-12, 88 P.3d 395. Insureds are not to be made worse off simply because two coverages written by the same insurer apply in different ways to compensate the insured for an injury. See *Id.* at 312, 88 P.3d 395, citing *Winters*, 144 Wn.2d at 882, 31 P.3d 1164. That the Supreme Court did not utter the name of *Young* in subsequent decisions does not mean that *Young* is still good law when its foundational principles have been rejected. *Young*'s reasoning has been superseded, and its holding impliedly overruled.

The decision by the Court of Appeals in this case is in conflict with Supreme Court decisions because **there is no principled distinction between the present case and *Hamm*.** Here, Ms. Weismann was covered

as an insured under Darlene Kangas' PIP policy.[3] Ms. Weismann hired an attorney and incurred costs in order to recover her damages from Ms. Kangas' liability insurer, Safeco, and Safeco reduced its liability payment to Ms. Weismann by the amount of the PIP benefits it had previously paid her. The fact that the insurer cutting the check here is acting in its capacity as liability carrier, and the insurer cutting the check in *Hamm* was acting in its capacity as UIM carrier, simply does not matter. This is because both insurers are in the same position, providing the coverage that ends up being ultimately responsible for Plaintiff's damages[4], *as well as* PIP coverage.

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[3] **Safeco agrees that Ms. Weismann is an "insured" under the policy issued to Kangas**, see CP at 74. RCW 48.22.005(5)(b)(ii) also specifically identifies pedestrians struck by automobiles as insureds. The fact that Ms. Weismann obtained her status as an insured because she was a pedestrian struck by Ms. Kangas is of no consequence. The cases do not distinguish between insureds based upon whether the insured was the person to whom the policy was issued, a relative of the named insured, a permissive user of the insured's vehicle, a passenger, or a pedestrian, or whether the insured was the one who paid the premiums. In fact, the PIP insured in *Perkins v. State Farm*, the companion case to *Winters*, was a permissive user of the named insured's vehicle, and as a borrower of the car almost assuredly did not pay the insurance premiums on it. See *Winters*, 144 Wn.2d at 874, 31 P.3d 1164. All that matters is that Ms. Weismann, by the terms of the policy, was an "insured" under the PIP portion of the coverage.

[4] Here, the coverage was Ms. Kangas' liability coverage. Although in *Hamm* it was the plaintiff's UIM coverage, it is conceptually the same since a UIM insurer steps into the shoes of the defendant.

The folly of Safeco's position, and the Court of Appeals' decision, is its failure to recognize that *Hamm* brought with it a new understanding of what it means for a PIP insurer to benefit from the creation of a common fund. That new understanding emphasizes that Safeco acts in different capacities as PIP carrier and liability carrier, and that the benefit of the common fund created by Ms. Weismann's efforts is to be analyzed from the perspective of Safeco *in its capacity as PIP carrier*. See *Hamm*, 151 Wash.2d at 312-13, 317, 319, 88 P.3d 395. In its PIP capacity, Safeco benefits because it is being given credit for the PIP payments it made.

The fact that no actual transfer of funds will occur to Safeco's PIP department (thereby *directly* benefiting the PIP) is of no consequence. As discussed *supra*, *Hamm* clearly states that an insurer may take an offset in its capacity as UIM carrier to account for the reimbursement due to it in its capacity as PIP carrier. The same accounting mechanism is at work in this situation. Safeco in its capacity as liability carrier settled the case for $44,521.19, then wrote Ms. Weismann a check for only $35,508.24 to account for the $9,012.95 in PIP benefits it had already paid. Safeco in its capacity as PIP carrier benefits from the offset taken in its capacity as liability carrier in the same way the insurer in *Hamm* benefitted in its PIP capacity when it took an offset in its UIM capacity.

Additionally, were Safeco not required to reduce its offset to account for its share of fees and costs, a fundamental principle of both *Winters* and *Hamm* would be violated. Namely, Ms. Weismann would be made worse off than if she had been covered by PIP and liability coverages provided by separate insurers, and Safeco would receive a windfall compared to what the situation would be had it only provided PIP coverage. *Hamm*, 151 Wash.2d at 316, 88 P.3d 395, citing *Winters,* 144 Wash.2d at 882, 31 P.3d 1164. Had Ms. Weismann been covered by a PIP policy provided by Insurance Company X, Company X would have been reimbursed for the benefits it paid out from the fund generated by Ms. Weismann's settlement with Safeco. This hypothetical PIP insurer would, without question, have had to reduce its reimbursement right by its share of Ms. Weismann's fees and costs under *Mahler* and its progeny. *Winters* and *Hamm* make clear that that fact that two different types of coverage are provided by the same insurer should not serve to put the insured in a worse position, nor the insurer in a better one.

Safeco argues that the collateral source rule[5] negates its obligation to pay fees under *Hamm*, on the theory that the PIP benefits were not a

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[5] In short, the rule states that a tortfeasor may not reduce damages, otherwise recoverable by a plaintiff, to reflect payments received by the plaintiff from a source independent of the tortfeasor. 16 Wash. Prac.

collateral source, but rather payments from the tortfeasor or a fund created by her, thereby allowing her to take full credit for them. Safeco cites *Lange v. Raef*, 34 Wn. App. 701, 664 P.2d 1274 (1983), and *Miziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996)[6], and states that these cases control because they have not been explicitly overruled.[7]

In trying to support its position that no common fund was created because the PIP payments were not a collateral source, Safeco appears to think that its PIP payments were really an advance on the liability settlement, created by it or its insured's benevolence, from which it can offset fully. It also focuses on the fact that Ms. Weismann was not the person who paid the premiums. Safeco continues to ignore the fact, a fact which has been stipulated to by the parties, that Ms. Weismann was *an insured* under the policy. Safeco owed duties to Ms. Weismann, separate and apart from its duties to its other insured, Ms. Kangas. For the Court of

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Series §5.42. Such sources have been held to include workers compensation benefits, pension benefits, free medical services, health insurance benefits, and PIP benefits.

[6] To the extent *Lange* and *Miziarski* are inconsistent with *Winters* and *Hamm* they have been impliedly overruled, for the same reasons *Young* has been, as discussed *supra*.

[7] It should also be noted that *Young* court never mentioned the collateral source rule as a basis for its decision. *Young* was clearly based upon the erroneous conclusion that no common fund was created.

Appeals in this case (and in *Young*, and in *Matsyuk v. State Farm*, 155 Wn. App. 324, 229 P.3d 893 (Div. I, 2010)), this is the fundamental point it failed to understand. **Safeco was Ms. Weismann's insurance company under the PIP portion of the policy- she was an insured.**

"Insureds" come in myriad varieties under auto insurance policies, yet inevitably not all of them actually pay the premiums. This does not relegate the non-paying insureds to second-class citizen status, outsiders to the policy unable to access its full benefits. None of the seminal cases in the line that ushered in the new understanding of common fund creation were decided upon whether the PIP insured was the one who wrote the premium check.[8] Instead, the cases focus on the fact that insurers act in different capacities under different coverages, and are to be viewed in those different capacities sorting out issues about the source of payments to, and fee-sharing with, insureds. See *Hamm*, 151 Wash.2d at 312-13, 317, 319, 88 P.3d 395.

Ms. Weismann was a PIP insured, independent of whether there was to be any liability settlement, regardless of fault. The policy laid out what benefits she was owed as an insured; those benefits were owed when

[8] As noted *supra*, the PIP insured in *Perkins v. State Farm*, the companion case to *Winters*, was a permissive user of the named insured's vehicle. *Winters*, 144 Wn.2d at 874, 31 P.3d 1164

the medical bills were incurred and were not an item of "special damages" paid, in advance, by Safeco wearing its liability hat. Safeco-liability did not "pay twice" for the medical bills; Safeco-PIP paid them the first time and received credit for their repayment in the form of an offset against the liability payment. Under *Winters/Hamm* we know that just because Safeco's name appears on two different checks (liability and PIP) it doesn't mean the payments came from the same source. In order for Ms. Weismann not to be worse off than if the coverage were written by different insurers, one of the foundational principles of *Winters/Hamm*[9], Safeco must reduce its offset. Safeco-PIP is reimbursed less its share of fees and costs; it takes its reimbursement in the form of an offset to the liability obligation. The liability obligation is only decreased because it is the most efficient mechanism to reflect the PIP credit, not because any advances on liability had been made by Safeco.

Finally, the Court of appeals' primary stated reason for ruling against Ms. Weismann is that she:

> fails to recognize that in both *Hamm* and *Winters,* the *injured's* insurance company paid both PIP and UIM benefits, whereas in *Young* and in the present case, the

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[9] See *Hamm,* 151 Wash.2d at 316, 88 P.3d 395, citing *Winters,* 144 Wash.2d at 882, 31 P.3d 1164.

> *tortfeasor's* insurance company paid PIP benefits and a liability award. This is a meaningful distinction because, unlike the injured's PIP carriers in *Hamm, Winters,* and *Mahler,* the tortfeasor's PIP carriers in *Young* and in the present case do not have a third party against whom they can assert a subrogation right. *See Mahler,* 135 Wash.2d at 419, 957 P.2d 632, 966 P.2d 305....

2010 WL 2961615, Pg. 5. This is a red herring. *Hamm* was not decided based upon Hamm's carrier having someone to subrogate against. It was not mentioned as a rationale in the majority opinion, and the tortfeasor was uninsured, leaving as a practical matter no one to subrogate against. Pro rata fee sharing is based on equitable principles. *Hamm*, 151 Wn.2d at 319. The equities here mandate that *Hamm* control, and that Ms. Weismann as a PIP insured is treated as equitably as other insureds.

B. The Court should accept review under RAP 13.4(b)(4) because the Petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issue is one of substantial public interest because *Young*, *Matsyuk*, and the Court of Appeals decision in this case add unnecessary confusion and uncertainty to the Washington Supreme Court's well-established body of law regarding creation of a common fund by plaintiff/PIP insureds, and the PIP insurers' obligation to share in the costs of the fund's creation.

If the Court of Appeals decision (and *Young*, and *Matsyuk*) stands, an entire class of PIP insureds is reduced to second-class citizen status, based on the fact that, although they are insureds under the PIP policy, they are not the named, premium-paying insured. This Court has never said that distinction was of any importance. PIP insureds are entitled to the full benefits of the PIP policy (including the benefit of fee-sharing by the insurer) regardless of whether they paid the premiums. See *Winters*, 144 Wn.2d at 874, 31 P.3d 1164 (the PIP insured in *Perkins v. State Farm*, the companion case to *Winters*, was a permissive user of the named insured's vehicle, and as a borrower of the car almost assuredly did not pay the insurance premiums on it).

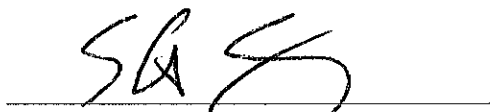
There are undoubtedly hundreds of thousands of named PIP insureds driving in this state, which means there are likely a huge number of potential non-named insureds riding as passengers or walking as pedestrians on our roadways. The PIP statute and Supreme Court case law give no indication that they are somehow "lesser" PIP-insureds by virtue of the fact that they did not pay the premiums, but the Court of Appeals has seized upon that very notion, apparently without fully comprehending the legal and logical ramifications. For example, if Ms. Weismann had been found to be comparatively at fault for the collision, under the Court of Appeals decision Safeco would still assert that Ms. Kangas was entitled

to a full offset for the PIP benefits it paid to Ms. Weismann. Safeco would be asking this court to disregard not only *Hamm*, but also the principles found in *Sherry v. Financial Indemnity,* 160 Wn.2d 611, 160 P.3d 31 (2007).[10]

VI. CONCLUSION

Petitioner respectfully ask the Court to grant review, reverse the decision of the Court of Appeals, and award Petitioner attorneys fees and costs on appeal pursuant to RAP 18.1(a)-(b), *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37811 P.2d 673 (1991), and *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004).

DATED this 26 day of August, 2010.



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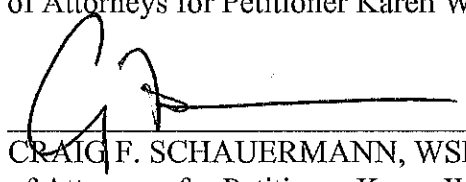
of Attorneys for Petitioner Karen Weismann



CRAIG F. SCHAUERMANN, WSBA 7396
of Attorneys for Petitioner Karen Weismann

[10] *Sherry* says that a liability/UIM recovery reduced by the percentage of the plaintiff's contributory fault is not "full compensation", so the PIP carrier is not entitled to reimbursement. If Ms. Weismann were partially at fault, Safeco-PIP, while not entitled to reimbursement under *Sherry*, could flout the principles of that case and demand a full reimbursement (in the form of a full offset), because Ms. Weismann was not the premium-paying variety of insured.

FILED
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DIVISION II

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STATE OF WASHINGTON

BY_____
DEPUTY

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. I hereby declare that I caused to be served a true copy of the within and foregoing document PETITION FOR REVIEW upon the following attorney(s) of record at the address(es) shown on the 26th day of August, 2010:

Colleen Barrett Barrett & Worden, PS 2101 Fourth Ave., Suite 700 Seattle, WA 98121	☐U.S. Mail, First Class, Postage Paid ☐Vancouver Legal Messengers ☒Hand Delivered by ABC Legal Services ☐FAX
Clerk Court of Appeals, Division II 950 Broadway Suite 300 MS TB 06 Tacoma, WA 98402-4427	☐U.S. Mail, First Class, Postage Paid ☐Vancouver Legal Messengers ☒Hand Delivered by ABC Legal Services ☐FAX

Linda Malattia

Date signed: 8-26-10

Place signed: 1700 East Fourth Plain Blvd.
Vancouver, Washington

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KAREN WEISMANN, Respondent. v. SAFECO INSURANCE COMPANY OF ILLINOIS, a foreign insurance company, Appellant.	No. 39323-9-II PUBLISHED OPINION

QUINN-BRINTNALL, J. — Tortfeasor's insurance company, Safeco Insurance Company of Illinois, appeals a trial court order granting summary judgment in favor of the injured party, Karen Weismann. In its summary judgment order, the trial court found that Safeco was required to reduce its personal injury protection (PIP) payment offset by a pro rata share of Weismann's attorney fees and costs and that Weismann was entitled to additional attorney fees under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Safeco asserts that the trial court erred in granting summary judgment in favor of Weismann because this court's decision in *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), held that no common fund is created where an injured person recovers both PIP benefits and a liability award from the tortfeasor's insurance company. Weismann asserts that the trial court properly granted summary judgment in her favor because our Supreme Court's decision in *Hamm v. State Farm Mutual*

Automobile Insurance Co., 151 Wn.2d 303, 308, 88 P.3d 395 (2004), impliedly overruled *Young*. We hold that *Hamm* is distinguishable from *Young* and that *Young* controls the outcome of this appeal. Accordingly, we reverse the trial court's summary judgment order and remand for entry of summary judgment in favor of Safeco.

FACTS

On July 22, 2005, in Clark County, Washington, Darlene Kangas struck Weismann with her car while Weismann was operating her motorized mobility device. Pursuant to Kangas's PIP policy,[1] Safeco paid Weismann $9,012.95 for injuries she sustained in the collision. Weismann is an "insured" by definition under Safeco's PIP policy because she was a pedestrian struck by Kangas's covered auto. But under Safeco's liability policy, Weismann is a claimant and is not an insured.

On May 16, 2008, during ongoing settlement negotiations between Weismann and Safeco, Safeco's adjuster advised Weismann's counsel that Safeco would offset[2] Weismann's settlement against Kangas by $9,012.95, the entire amount Safeco had paid her in PIP benefits, without reducing the offset by a proportionate share of her attorney fees and costs. Weismann asserted that Washington law required Safeco to reduce its offset by a proportionate share of her attorney fees and costs. Safeco responded that Washington law does not require such a reduction, citing this court's decision in *Young*, 104 Wn. App. 721.

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[1] PIP coverage generally provides benefits for the immediate costs of an automobile accident, including medical expenses and loss of income. *Hamm*, 151 Wn.2d at 308.

[2] "An 'offset' refers to a credit to which an insurer is entitled for payments made under one coverage against claims made under another coverage within the same policy." *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164, 63 P.3d 764 (2001).

On May 21, 2008, the parties agreed that Weismann's damages were $44,521.19. Safeco told Weismann that it would offset the entire PIP amount it had paid Weismann, $9,012.95, without reducing its offset by a proportionate share of her attorney fees and costs, and pay her the difference, $35,508.24. On May 30, 2008, Weismann sent notice to Safeco and the Office of the Insurance Commissioner, alleging that Safeco's refusal to pay a proportionate share of her attorney fees and costs violated the Insurance Fair Conduct Act, ch. 48.30 RCW.

On June 11, 2008, Weismann and Safeco entered an agreement reserving Weismann's right to bring an action against Safeco to determine whether it was required to reduce its offset for PIP payments by a proportionate share of attorney fees and costs. On July 10, 2008, Weismann filed her complaint against Safeco in the Clark County Superior Court.

On December 16, 2008, Weismann moved for summary judgment, asserting that, under *Hamm*, Safeco was required to reduce its PIP offset by a proportionate share of attorney fees and costs as a matter of law. Safeco filed a cross motion for summary judgment, asserting that *Young* was still controlling law and our Supreme Court's decision in *Hamm* did not overrule it.

The trial court ruled in Weismann's favor, finding that *Young* was no longer controlling under our Supreme Court's decisions in *Hamm* and *Winters v. State Farm Mutual Automobile Insurance Co.* 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001). Weismann moved for attorney fees under *Olympic Steamship*, 117 Wn.2d 37. The trial court's summary judgment order required Safeco to reduce its PIP offset by one-third for attorney fees and costs, and it awarded Weismann an additional $6,360 for attorney fees and costs under *Olympic Steamship*. Safeco timely appeals the trial court's summary judgment order.

ANALYSIS

Safeco contends that the trial court erred in requiring it to reduce its PIP offset by a pro rata share of Weismann's attorney fees and costs because, under this court's decision in *Young*, no common fund is created where an insured recovers both PIP benefits and a liability award from the tortfeasor's insurance company. Weismann responds that such a reduction is necessary under our Supreme Court's decision in *Hamm*, 151 Wn.2d 303, asserting that *Hamm* had impliedly overruled *Young*. Because the facts in *Young* are distinguishable from *Hamm*, and our Supreme Court did not impliedly overrule *Young*, *Young* controls. Accordingly, we hold that the trial court erred in granting Weismann's motion for summary judgment and reverse and remand for entry of summary judgment in favor of Safeco.[3]

We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 206, 11 P.3d 762, 27 P.3d 608 (2000). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Amalgamated Transit*, 142 Wn.2d at 206.

Under the American rule on fees in civil cases, which Washington follows, civil litigants are responsible for paying their own attorney fees and costs absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). The common fund doctrine is an exception to the American rule on civil

[3] Shortly before hearing oral arguments in this appeal, Division One of this court issued its opinion in *Matsyuk v. State Farm Fire & Casualty Co.*, 155 Wn. App. 324, 229 P.3d 893 (2010). *Matsyuk* is in accord with our decision here and similarly held that *Young* remains controlling authority after *Hamm* such that no common fund is created when an injured party recovers both PIP benefits and a liability award from the tortfeasor's insurance company.

fees and applies in cases "where litigants preserve or create a common fund for the benefit of others as well as themselves." *Mahler v. Szucs*, 135 Wn.2d 398, 427, 957 P.2d 632, 966 P.2d 305 (1998).

In *Mahler*, an insurance company sought reimbursement for PIP payments it had made to the injured after the injured recovered an award against the tortfeasor. 135 Wn.2d at 404-05. Our Supreme Court first determined that the insurance company had a right to recoup its PIP payment against the injured's recovery under general principles of subrogation:

> Subrogation is an equitable doctrine the essential purpose of which is to provide for a proper allocation of payment responsibility. It seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.

Mahler, 135 Wn.2d at 411.

> In the insurance context, the "doctrine of subrogation enables an insurer that has paid an insured's loss pursuant to a policy . . . to recoup the payment from the party responsible for the loss."

Mahler, 135 Wn.2d at 413 (alteration in original) (quoting Elaine M. Rinaldi, *Apportionment of Recovery Between Insured and Insurer in a Subrogation Case*, 29 TORT & INS. L.J. 803, 803 (1994)).

But our Supreme Court also held that before the insurance company could recoup its PIP payments, it had to reduce any recoupment amount by a proportionate share of the injured's litigation costs in collecting her award against the tortfeasor. *Mahler*, 135 Wn.2d at 405. The *Mahler* court thus applied the common fund doctrine where an insured's litigation had generated a fund of money paid by the tortfeasors that would compensate both the insured for her damages

and the insurer for its previous PIP payments.[4] Thus, where both an insured and insurer benefit from the insured's litigation, each is obligated to pay a proportionate share of the attorney fees and costs incurred to generate the common fund.

In *Young*, the injured plaintiff received PIP payments from the tortfeasor's insurance company as a third party beneficiary to the policy and later recovered damages against the tortfeasor, which the tortfeasor's insurance company paid. 104 Wn. App. at 723. This court held that the *Mahler* fee-sharing rule did not apply in this context, reasoning that

> Young, the injured plaintiff, initially received PIP payments, *not from her own insurer*, as in *Mahler*, but rather from the tortfeasor's insurer. Thus, when Young sued the tortfeasor, Teti, and recovered, *she did not create a fund* to benefit, or to reimburse, anyone other than herself. Young's jury verdict *increased* Teti's, and his insurer's, financial obligation to Young.

Young, 104 Wn. App. at 725 (footnote omitted).

Because Young's litigation did not create a common fund benefitting the insurer, this court held that the tortfeasor's insurance company could offset its liability award by its earlier PIP payment to Young without deducting a pro rata share of Young's attorney fees and costs. Weismann does not appear to contend that the facts in *Young* are distinguishable from the facts

[4] Although the *Mahler* court held that the insurance company had to reduce its reimbursement of PIP payments by a proportionate share of the injured's attorney fees and costs based on language in the injured's insurance policy, later cases make clear that the *Mahler* fee-sharing rule is based in equity and, thus, does not depend on specific language in an insurance policy. *See Hamm*, 151 Wn.2d at 310-11 ("*Winters* clarified that the pro rata sharing rule articulated in *Mahler* is based on equitable principles, not specific policy language." (citing *Winters*, 144 Wn.2d at 878-79)).

presented in this appeal,[5] but she asserts that *Young* is no longer good precedent following our Supreme Court's decisions in *Winters* and *Hamm*. We disagree.

In *Winters*, the injured received PIP payments from her own insurance company and later sought recovery for her injuries against the tortfeasor. 144 Wn.2d at 873. Because the tortfeasor's liability coverage did not fully compensate her for her injuries, Winters also filed a claim under her insurance company's underinsured motorist (UIM)[6] policy. *Winters*, 144 Wn.2d at 873. Our Supreme Court held that Winters's insurance company was entitled to offset its UIM award by its earlier PIP payment but that it had to reduce its offset by a proportionate share of Winters's litigation costs. *Winters*, 144 Wn.2d at 883. The *Winters* court reasoned that this reduction was necessary because Winters's litigation against the tortfeasor and her own insurance company in its UIM capacity created a common fund that benefitted both her and her insurance company in its PIP capacity. 144 Wn.2d at 883.

In reaching its decision, our Supreme Court first noted that UIM payments are treated as if made by the tortfeasor. *Winters*, 144 Wn.2d at 880 (citing *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 695, 926 P.2d 923 (1996)). Our Supreme Court stated,

> In cases where the tortfeasor has adequate insurance, the common fund created by a PIP insured consists entirely of proceeds recovered from the tortfeasor's liability carrier, who stands in the shoes of the tortfeasor. Thus, the payments are treated as if the tortfeasor made them.
>
> On the other hand, when a PIP insured creates a common fund from liability payments and UIM benefits, the common fund combines liability

[5] Although, unlike in *Young*, Safeco's PIP policy defines Weismann as an "insured" rather than as a third party beneficiary, this is not a meaningful distinction because Weismann, like Young, was not a party to the tortfeasor's insurance contract and received benefits from the PIP policy because the tortfeasor had contracted with her insurance company for PIP coverage.

[6] UIM is used as an acronym for both underinsured and uninsured motorist coverage.

> proceeds from the tortfeasor's insurance carrier and UIM proceeds from the insured's underinsured motorist carrier.
>
> . . . .
>
> . . . These pooled funds became the common fund from which the PIP insurer was able to recoup payments it had made.

Winters, 144 Wn.2d at 880-81.

In *Hamm*, our Supreme Court extended the equitable fee-sharing rule articulated in *Winters* to a case where the injured recovered both PIP benefits and UIM benefits from her insurance company. 151 Wn.2d at 306. In determining that a common fund was created where the injured recovered both PIP and UIM benefits from her own insurance company, our Supreme Court noted, as it did in *Winters*, that "[f]or purposes of UIM coverage, the insurance carrier is said to stand in the shoes of the tortfeasor, and payments made by the UIM carrier are treated as if they were made by the tortfeasor." *Hamm*, 151 Wn.2d at 308 (citing *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 529, 707 P.2d 125 (1985); *Winters*, 144 Wn.2d at 880).

Our Supreme Court further noted that had Hamm purchased PIP and UIM coverage from separate insurance companies, the PIP carrier would clearly benefit from Hamm's UIM award and, thus, the PIP carrier would have to share in Hamm's litigation costs against the UIM carrier in order to recoup its PIP payment. In applying the common fund doctrine where the injured purchased both PIP and UIM coverage from the same insurer, our Supreme Court reasoned that "'[t]he insured should not be worse off simply because he or she purchased two coverages from the same insurer.'" *Hamm*, 151 Wn.2d at 315 (alteration in original) (quoting *Winters*, 144 Wn.2d at 882).

In asserting that *Hamm* and *Winters* had impliedly overruled *Young*, Weismann fails to recognize that in both *Hamm* and *Winters*, the *injured's* insurance company paid both PIP and UIM benefits, whereas in *Young* and in the present case, the *tortfeasor's* insurance company paid

PIP benefits and a liability award. This is a meaningful distinction because, unlike the injured's PIP carriers in *Hamm*, *Winters*, and *Mahler*, the tortfeasor's PIP carriers in *Young* and in the present case do not have a third party against whom they can assert a subrogation right. *See Mahler*, 135 Wn.2d at 419 ("'No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.'" (quoting *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976))).[7]

Where an injured collects PIP benefits from the tortfeasor's insurer and later sues the tortfeasor, the PIP carrier stands in no better position because of the injured's litigation efforts and no common fund is created. Thus, instead of operating as a reimbursement from the tortfeasor, for which the insured's PIP carrier must share in litigation expenses, the offset taken here and in *Young* function to prevent the injured from receiving a double recovery. *See Young*, 104 Wn. App. at 726 ("Rather than reimbursing Allstate, the . . . offset simply relieved Allstate and Teti from having to pay Young *again* for the same . . . medical expenses and lost wages that it had already paid Young under Teti's PIP coverage."); *see also Lange v. Raef*, 34 Wn. App. 701, 704, 664 P.2d 1274 (1983) ("Where the source of the collateral payments is the tortfeasor or a fund created by him to make such payments, . . . such payments may be proven at trial to prevent double recovery.").

Because our Supreme Court has not overruled *Young*, and because *Young* controls here, the trial court erred in granting Weismann's summary judgment motion. Additionally, because

[7] Stated differently, when an injured must litigate to recover benefits from her own insurance company to whom she had been paying premiums, the equitable fee-sharing rule is triggered. But when an injured litigates to recover benefits from the tortfeasor's insurance company, to whom she has not been paying premiums, the equitable fee-sharing rule of *Hamm* and *Winters* does not apply.

Weismann had received the full benefit of Safeco's insurance policy, the trial court erred in finding she was entitled to attorney fees under *Olympic Steamship*. 117 Wn.2d at 54 ("An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees."). Because the record conclusively establishes that Safeco was not required to reduce its PIP offset by a pro rata share of Weismann's attorney fees and costs, we reverse the trial court's summary judgment order in favor of Weismann and remand for entry of summary judgment in favor of Safeco.

ATTORNEY FEES

Weismann requests attorney fees under RAP 18.1 and *Olympic Steamship*. For the reasons we stated above, we deny Weismann's request for attorney fees on appeal.

Reversed and remanded.

Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

We concur:

Bridgewater, P.J.
BRIDGEWATER, P.J.

Armstrong, J.
ARMSTRONG, J.