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'S SUPPLEMENTAL BRIEF PER RAP 13.7

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I. IDENTITY OF RESPONDENT

Respondent Safeco Insurance Company of Illinois (Safeco) was the Defendant in the Trial Court and Appellant in the Court of Appeals. Safeco issued an auto insurance policy to Darlene Kangas. That policy provided coverage for an accident that was Ms. Kangas' fault which caused injury to Karen Weismann. Safeco paid for Karen Weismann's medical bills under Ms. Kangas' personal injury protection coverage (PIP). Safeco asks that the Supreme Court affirm the Court of Appeals decision which found that Safeco could offset the PIP payments without paying a pro rata share of Plaintiff Weismann's attorney fees.

II. COURT OF APPEALS DECISION

In a published decision the Court of Appeals, Division II, reversed the trial court's summary judgment order that required Safeco to reduce its personal injury protection (PIP) offset by a pro rata share of Weismann's attorney fees, and rejected the contention that Division II's directly controlling *Young v. Teti*[1] decision has been impliedly overruled by the Supreme Court decision in *Hamm v. State Farm Mutual Automobile Insurance Co.*[2]:

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[1] *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001)
[2] *Hamm v. State Farm Mutual Automobile Insurance Co.,* 151 Wn.2d 303, 88 P.3d 395 (2004)

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.[3]

III. ISSUES REGARDING REVIEW

1. Because the law must be reasonably certain, consistent, and predictable, the doctrine of stare decisis provides that Courts may not lightly set aside precedent and should only do so where that precedent is both incorrect and harmful. When three Court of Appeals decisions have already established that pro rata fee sharing is not required when a tortfeasor's insurer pays PIP benefits should this Court respect that precedent?

2. The *Mahler, Winters, and Hamm* decisions all predicated an insurers' obligation to pay pro rata fees on the PIP insured's creation of a common fund that benefitted the insurer. Here, no common fund was created because fund was created entirely by the tortfeasor, Kangas. Given that, should this Court affirm the Court of Appeals and rule that pro rata fee sharing is not required?

3. The payments made by Kangas' insurance carrier on behalf of Kangas are subject to offset, and not from a collateral source. Where Weismann is not entitled to recover again for payments already made by the tortfeasor, is there a legal basis to impose pro rata fee sharing on PIP offsets to her total damages?

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[3] *Weismann v. Safeco Insurance Company of Illinois*, 157 Wn. App. 168, 236 P.3d 240, 241 (2010). A copy of the Court of Appeals decision is attached as Appendix A,

IV. STATEMENT OF THE CASE

On July 22, 2005, a vehicle covered under Darlene Kangas' Safeco auto policy, driven by Ms. Kangas, struck a motorized wheelchair operated by Karen Weismann, in Clark County, Washington.[4] The automobile collision with the motorized wheelchair caused injuries to Ms. Weismann.[5]

Following the collision, Ms. Weismann received personal injury protection (PIP) insurance benefits for $9,012.95 in medical bills under Ms. Kangas' Safeco policy.[6] She also sought additional damages against Ms. Kangas under the liability provision of Ms. Kangas' auto policy with Safeco.

On May 16, 2008, during ongoing settlement negotiations between Weismann and Safeco, Safeco's adjuster advised Weismann that the amount Safeco would pay Weismann in settlement of her claim against Kangas would be offset by $9,012.95, the amount of PIP benefits received by Weismann, without reduction of the offset by a proportionate share of Weismann's attorney fees and costs.[7] Weismann alleged such a reduction

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[4] CP 73
[5] CP 73
[6] CP 73
[7] CP 74

was required under Washington law.[8] Safeco answered that, specifically under *Young v. Teti,* no such reduction was required.[9]

On May 21, 2008, Weismann and Safeco entered into an agreement to settle Weismann's claim against Ms. Kangas for a total value of $44,521.19, with Safeco taking an offset of the entire PIP amount, $9,012.95, and paying Weismann and her attorney the difference, $35,508.24.[10]

Thereafter, Weismann and Safeco agreed that Weismann reserved the 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.[11] Weismann filed suit the following month.[12]

Weismann filed for summary judgment and requested the trial court to rule that *Young* was impliedly overruled by *Hamm.*[13] Safeco also filed a cross motion for summary judgment asking for a ruling confirming its rejection of Weismann's demand for pro rata fees was appropriate under existing law, and dismissing claims against Safeco for violation of the Insurance Fair Conduct Act.[14] The trial court denied Safeco's motion

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[8] CP 74
[9] CP 74
[10] CP 74
[11] CP 75; CP 151-152
[12] CP 1-5
[13] CP 12, 15
[14] CP 76

and granted Weismann's summary judgment; entered judgment against Safeco for a proportionate share of fees and costs; and refused to dismiss the bad faith claims.[15]

As discussed above, the Court of Appeals reversed the trial court's order, and, in doing so, the Court of Appeals (1) recognized that *Young v. Teti*[16] held that an offset was not required because no common fund is created when an injured person recovers both PIP benefits and a liability award from the tortfeasor's insurer, and (2) rejected the contention that the Supreme Court decision in *Hamm v. State Farm Mutual Automobile Insurance Co.,* had impliedly overruled *Young.*[17]

Weismann petitioned for Supreme Court review. The case was accepted for review on November 30, 2010, and consolidated with the Division I appeal in *Olga Matsyuk v. State Farm Fire & Casualty Company.*[18]

V. ARGUMENT

In addition to the reasoning set forth in the briefing to the Court of Appeals, the opinions of both the *Weismann* and *Matsyuk* courts indicate that those cases were correctly decided and should not be reversed because

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[15] CP 202-206; Also, per CR 54(b) and RAP 2.2(d), the trial court expressly determined there is no just reason to delay an appeal of the final judgment. CP 388-389
[16] 104 Wn. App. 721
[17] Appendix A: Court of Appeals Decision
[18] *Matsyuk v. State Farm Fire & Cas. Co,* 155 Wn. App. 324, 229 P.3d 893 (2010)

(1) all reported Washington decisions considering the issue have held that pro rata fee sharing is not required when the tortfeasor's insurer pays PIP benefits; because (2) when PIP payments are made by a tortfeasor's insurer the common fund doctrine does not apply, and requiring pro rata fee sharing would thus depart from the common fund requirement that runs through the *Mahler*[19], *Winters*[20], *and Hamm*[21] decisions; and because (3) payments made on behalf of the tortfeasor are not from a collateral source, and therefore, and are not recoverable as damages.

A. The Court of Appeals Decision Should Be Affirmed Because All Reported Decisions Considering The Issue Have Found that Pro Rata Fee Sharing Is Not Required In Cases Where The Tortfeasor's Insurer Pays PIP Benefits.

In 1998, the Washington Supreme Court in *Mahler v. Szucs,*[22] applied the common fund doctrine to hold that when an insurance company recouped PIP payments it made to its own insured from an award recovered from the tortfeasor that the insurer had to pay its proportionate share of the insured's litigation costs in collecting the award.[23] Since the 1998 *Mahler* decision, three reported Court of Appeals decisions, including the decision at issue here, have consistently held that no common fund is created when an injured party's medical bills are paid

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[19] *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998)
[20] *Winters v. State Farm*, 144 Wn.2d 869, 31 P.3d 1164 (2002)
[21] *Hamm*, 151 Wn.2d 303
[22] 135 Wn.2d 398
[23] *Mahler*, 135 Wn.2d at 405, 426-427

by a tortfeasor's insurance policy. Because there is no common fund, the courts have unanimously held that the insurer is not required to pay a pro rata share of the injured person's attorney fees when an award is offset by PIP payments from the tortfeasor's policy.

This rule was first articulated in the 2001 Division II case, *Young v. Teti.*[24] In *Young,* Allstate insured the driver, Teti, who caused an accident that injured his passenger, Young. Young obtained PIP benefits from Teti's insurer, Allstate, and also sued Teti for negligence. Allstate paid $9,386 in benefits to Young under Teti's PIP coverage.[25] Young obtained a jury verdict of $20,000 that included a double recovery of her medical expenses and wage loss that had already been paid by Allstate under Teti's PIP coverage.[26]

When Teti sought to offset the Allstate payments, the trial court allowed the offset, but, citing to *Mahler,*[27] held that the offset had to be reduced by a pro rata share of Young's attorney fees and costs.[28]

The Court of Appeals, however, distinguished *Mahler* and allowed a full offset for the $9,386 that had been paid in PIP without any reduction for pro rata attorney fees.[29]

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[24] 104 Wn. App. at 721
[25] *Young*, 104 Wn. App. at 723
[26] *Id.*
[27] 135 Wn.2d 398
[28] *Young*, 104 Wn. App. at 723-724

The Court of Appeals held that Young, the injured passenger, received PIP payments, not from her own insurer, as in *Mahler*, but rather from the tortfeasor's insurer.[30] The *Young* Court recognized that the lawsuit did not create a common fund which benefited the tortfeasor's insurer, Allstate, and recognized that the situation was different from that present in *Mahler*:

> 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.
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> ....
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> Rather than reimbursing Allstate, the proposed $9,386 offset simply relieved Allstate and Teti from having to pay Young *again* for the same $9,386 medical expenses and lost wages that it had already paid Young under Teti's PIP coverage.
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> ...
>
> Unlike *Mahler*, Young's litigation against Allstate's insured produced no additional party from whom Allstate could recoup any money. Thus, *Mahler* awards are inappropriate here, where an injured, faultless third person recovers only from the insured tortfeasor, rather than also from the injured party's own insurer. We hold that *Mahler* does not apply here and that Teti's offset should not have been reduced by Young's attorney fees and costs.[31]

The same result was recently reached by Division I in the *Matsyuk v. State Farm Fire & Casualty* case.[32] In *Matsyuk*, State Farm insured the tortfeasor, Stremditsky, who caused injury to his passenger, Matsyuk.

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[29] *Young*, 104 Wn. App. at 725-727
[30] *Young*, 104 Wn. App. at 725
[31] *Young*, 104 Wn. App. at 725-27 (footnotes omitted)(emphasis original)
[32] 155 Wn. App. at 324

State Farm paid Matsyuk $1,874 under the PIP coverage in the tortfeasor's auto policy:

> Olga Matsyuk and Omelyan Stremditskyy were in a car accident. Stremditskyy, the driver, was at fault and Matsyuk, the passenger, was injured. State Farm Fire & Casualty Company insured Stremditskyy's vehicle, including liability coverage and personal injury protection (PIP). PIP coverage was available to Matsyuk as an occupant in Stremditskyy's vehicle, making her an additional insured even though she was not named in the policy. State Farm paid Matsyuk $1,874 under the PIP coverage.[33]

State Farm then settled Matsyuk's claim against its insured, and the release provided that "For the sole consideration of Five Thousand Eight Hundred Seventy-Four and No/100th dollars ($5874) (Four Thousand and No/100th dollars ($4000) in addition to payments made/to be made under the Personal Injury Protection coverage in the amount of One Thousand Eight Hundred Seventy-four and No/100th Dollars ($1874))...Olga Matsyuk, the undersigned, hereby releases and forever discharges Omelyan Stremditskyy."[34] State Farm then gave Matsyuk a check for $4000 and stated it would not pay a pro rata share of Matsyuk's legal expenses.[35]

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[33] *Matsyuk*, 155 Wn. App. at 328
[34] *Matsyuk*, 155 Wn. App. at 328
[35] *Matsyuk*, 155 Wn. App. at 328

Consistently with the precedent established in *Young*, the *Matsyuk* Court ruled for the insurer, holding that no common fund was created and that the insurer had no obligation to pay a pro rata share of the injured person's attorney fees:

> Matsyuk was injured while riding as a passenger in a car. She recovered from the at-fault driver's insurance company, State Farm, under both the personal injury protection and liability coverages. Matsyuk then sought a pro rata share of her attorney fees from State Farm. Because Matsyuk's recovery of both liability and personal injury protection payments came from the tortfeasor's insurer, no common fund was created and fee sharing is not appropriate. The trial court properly granted State Farm's CR 12(b)(6) motion to dismiss her claims for attorney fees, breach of contract, conversion, bad faith, and Consumer Protection Act, chapter 19.86 RCW, violation and denied her motion for partial summary judgment on the attorney fees issue. We affirm.[36]

The Court of Appeals in the present case involving Safeco and Weismann likewise found that when PIP payments were made by the tortfeasor's insurer, no common fund was created and no fee sharing was required.[37]

The reasoning and results are fully consistent between the *Matsyuk* case, the *Young* case, and this present decision involving Safeco and Weismann.

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[36] *Matsyuk*, 155 Wn. App. at 327-328

[37] Appendix A: *Weismann* at pages 1-2, 5-9

No Washington Supreme Court case has ever held that a common fund was created and fee sharing was required in a situation where both PIP and liability payments were made by the tortfeasor's insurer. For example, in M*atsyuk*, the Court of Appeals noted that "*Young* was decided before *Winters* and *Hamm* and not expressly overruled by either."[38]

Further each of those three cases considered and rejected the argument that their results violated the common fund fee sharing logic first advanced in *Mahler*.

As discussed above, in *Young*, the Court of Appeals expressly rejected the contention that its decision was contrary to the holding in *Mahler*.[39]

And the *Young* court likewise rejected the contention that its decision was contrary to the reasoning of the *Winters* Court of Appeals decision (which was affirmed by the Supreme Court):

> Teti unnecessarily attempts to distance himself from our recent *Winters v. State Farm* holding that a common fund for the payment of *Mahler* expenses could be created from a third party tortfeasor's liability proceeds and the faultless insured's UIM award. 99 Wash.App. at 615, 994 P.2d 881. But we specifically stated in *Winters:* "Nothing in this opinion considers or addresses the at-fault PIP insured," the position occupied here by Teti. 99 Wash.App. at 611 n. 31, 994 P.2d 881.[40]

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[38] *Matsyuk*, 155 Wn. App. at 332, note 5
[39] *Young*, 104 Wn. App. at 727
[40] *Young*, 104 Wn. App. at 727, note 14

Likewise, the *Matsyuk* court expressly considered and rejected the contention that its position was contrary to *Hamm,* stating: "Matsyuk contends that the result in this case cannot be reconciled with the subsequent decision in *Hamm*. We disagree."[41]

Similarly, in the present case, the Court of Appeals also considered and rejected the contention that *Hamm* and *Winters* had overruled *Young*:

> 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.[42]

The Court of Appeals was correct in each instance. There is no conflict between this matter and the Supreme Court decisions in *Hamm*, or *Winters*, or *Mahler*.

Accordingly *Young, Matsyuk,* and *Weismann* have established consistent precedent providing that that pro rata fee sharing is not required when the tortfeasor's insurer pays PIP benefits.

While the Supreme Court has the power to set aside precedent, that is not done lightly because the law must be reasonably certain, consistent,

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[41] *Matsyuk*, 155 Wn. App. at 332-333
[42] Appendix A, *Weismann* at pages 8-9

and predictable.[43] The caution appropriate to overruling existing law is exemplified by the discussion in the recent *State v. Stalker* case, where the Court stated that precedent will only be overruled when such precedent is both incorrect and harmful:

> Our Supreme Court has held that it will overrule precedent only when such precedent is both incorrect and harmful. *Lunsford*, 166 Wash.2d at 278, 208 P.3d 1092. We apply the same standard for overruling precedent as does the Supreme Court. *See Little v. King*, 147 Wash.App. 883, 889, 198 P.3d 525 (2008) (overruling an earlier Court of Appeals decision). Therefore, we will abrogate the holding of a prior decision only if the party seeking to have the decision overruled has demonstrated that the precedent is both incorrect and harmful. *Kier*, 164 Wash.2d at 804-05, 194 P.3d 212.[44]

In this case, there no showing that the rule first set out nine years ago in *Young v. Teti* is incorrect and harmful. Both the doctrine of stare decisis and the reasoning set out by three separate Court of Appeals panels support the conclusion that a tortfeasor should be allowed to offset payments made on his behalf by his auto insurance company without paying additional fees and costs.

B. The Court Of Appeals Decision Should Be Affirmed Because The Common Fund Doctrine Does Not Apply When PIP Payments Are Made By A Tortfeasor's Insurer.

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[43] *State v. Stalker*, 152 Wn. App. 805, 811, 219 P.3d 722 (2009)
[44] *Stalker*, 152 Wn. App. at 811-812

The Court of Appeals correctly determined that no pro rata fee sharing was required because Weismann did not create any common fund that benefitted Safeco.

All the cases relied upon by Weismann - *Mahler v. Szucs*[45], *Winters v. State Farm Mutual Automobile Insurance Co.*[46], and *Hamm v. State Farm Mutual Automobile Insurance Co.*[47] - involve tortfeasors who were not insured for liability under the same policy that paid each plaintiff's PIP benefits. In those cases, when an ultimate recovery was obtained from the tortfeasor or UIM carrier, or combination of both, the insured's litigation actions benefitted the insurer by creating a common fund, and the insurer was thus obligated to pay a pro rata share of expenses when it sought reimbursement of the PIP benefits it paid earlier.[48]

By contrast, in this case, Safeco derived no benefit when Weismann initiated legal action against Safeco's insured Darlene Kangas. This is because, as recognized by the both *Weismann* and *Matsyuk* courts, an insurer does not have a right of subrogation against its own insured.[49]

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[45] *Mahler,* 135 Wn.2d 398
[46] *Winters,* 144 Wn.2d 869
[47] *Hamm,* 151 Wn.2d 303
[48] *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 (310-312); and *Hamm* and the uninsured tortfeasor)
[49] *See Matsyuk,* 155 Wn. App. at 333 ("an insurer has no right of subrogation against its own insured,")

Accordingly, as pointed out by the *Weismann* court, Weismann's initiation of litigation created no benefit or common fund for Safeco because as Safeco had no subrogation right, Safeco stood in no better position because of that litigation:

> ...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 (" '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))).
>
> 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.[50]

Further, the fact that the entire fund was created by a policy purchased by tortfeasor Kangas also demonstrates that the equitable "common fund" basis for fee sharing that was present in cases like *Mahler*, *Winters*, and *Hamm* is absent here.

As noted in the *Matsyuk* opinion, a person, like Weismann, who receives PIP benefits from a driver's policy is a "third party beneficiary of the insurance contract, not a party to the contract." As a third party

[50] Appendix A *Weismann*, at pages 8-9

beneficiary, Weismann did nothing to create the fund from which she was paid PIP benefits. And, as the *Matsyuk* court noted, under Washington law it is considered inequitable to require attorney fee sharing when the injured party has not done anything to create the common fund:

> None of the equitable considerations behind the fee sharing rule are present. In order to create an equitable need to share fees, the common fund must be created entirely by the efforts of the PIP insured. *Winters*, 144 Wash.2d at 881, 31 P.3d 1164. Here the PIP coverage was provided under the tortfeasor's policy and is deemed a fund created by the tortfeasor. *Maziarski v. Bair*, 83 Wash.App. 835, 841 n. 8, 924 P.2d 409 (1996). Because that portion of the fund is not attributable to the efforts of Matsyuk, it would be inequitable to award her fees for its recovery.[51]

Here, that equitable requirement for fee sharing was not met because the entire fund was created by the tortfeasor Darlene Kangas who purchased coverage from Safeco, and was not attributable to any efforts of Weismann.

C. The Court Of Appeals Decision Should Be Affirmed Because The Collateral Source Rule Does Not Apply To Payments Made On Behalf Of A Tortfeasor As Such Payments Reduce The Total Amount Owed Without A Right To Additional Fees And Costs.

Because payments from a fund created by a tortfeasor are not considered as coming from a collateral source,[52] the law allows for any

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[51] *Matsyuk*, 155 Wn. App. at 333

[52] *Lange v. Raef*, 34 Wn. App. 701, 704, 664 P.2d 1274 (1983) (*citing Ciminski v. SCO Corp.*, 90 Wn.2d 802, 804, 585 P.2d 1182 (1978).

recovery at trial to be reduced by the amount paid in PIP from the tortfeasor's insurer.[53]

For example, in a factually similar case decided before *Mahler*, *Maziarski v. Bair*,[54] the court noted that the collateral source rule was inapplicable where the PIP and liability payments were obtained from the tortfeasor's insurer:

> The collateral source rule provides that a tortfeasor may not reduce its liability due to payments received by the injured party from a collateral source... It applies when payment comes from a source independent of the tortfeasor... It does not apply here because, as noted in the text, the payments in issue here come from the [the tortfeasor] Bair's PIP coverage, and such coverage is a fund created by her.[55]

In a similar case, *Lange v. Raef*,[56] the court confirmed that the collateral source rule does not apply when PIP payments are made by the tortfeasor's insurer to the injured plaintiff, holding that, "[t]he jury therefore could have heard testimony as to the amount of the PIP payments and received instructions to exclude that amount from its verdict."[57]

Thus, if a case proceeds to trial, the tortfeasor's insurer would ultimately be responsible to pay a judgment that is reduced for the amount

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[53] *Id.*
[54] *Maziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996).
[55] *Maziarski*, 83 Wn. App. at 841, note 8 (internal citations omitted).
[56] *Lange*, 34 Wn. App. 701
[57] *Lange*, 34 Wn. App. at 704

in PIP payments the insurer has already made, and the insurer would not be responsible to pay any pro rata fee to achieve that reduction. The *Matsyuk* Court criticized the inconsistency which would result if a settling insurer were required to pay pro rata fees when an insurer would not face that obligation if the same result was achieved at trial, and held that the application of *Hamm* sought by the Plaintiff would deter settlement and that no equitable reason exits to impose fee sharing:

> Had this case gone to trial, Stremditskyy would have been entitled to introduce evidence of the PIP payments to Matsyuk made by his insurer, State Farm, and to have any liability judgment reduced by the amount of those payments. *Lange*, 34 Wash.App. at 704, 664 P.2d 1274. The ultimate liability payment recovered at trial would have been the same, and Matsyuk would have had no right to recover any attorney fees. *Norris*, 115 Wash.App. at 517, 63 P.3d 153. ...
>
> The resulting obligation to share in the plaintiff's attorney fees should be the same whether the recovery is obtained via settlement or trial. The application of *Hamm* sought by Matsyuk would yield inconsistent results and could deter settlement. Where PIP coverage and liability coverage both are attributable to the tortfeasor, we hold that no common fund exists and no equitable reason exists to impose fee sharing.[58]

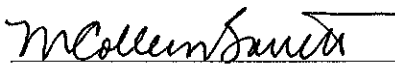
Taken together, the decision here in *Weismann* along with the decisions in *Matsyuk* and *Young*, have created a clear and consistent jurisprudence holding that no common fund is created and no fee sharing

[58] *Matsyuk*, 155 Wn. App. at 335

is required when an injured party receives PIP payments from a tortfeasor's insurer. Safeco asks the Supreme Court to affirm.

Respectfully submitted this 29th day of December, 2010.

BARRETT & WORDEN, P.S.



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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the Respondent Safeco's Supplemental Brief Per RAP 13.7 to be served via the methods below on the 30 day of December, 2010 on the following counsel/party of record:

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Stephanie Louie
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APPENDIX A

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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. Tett*, 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.

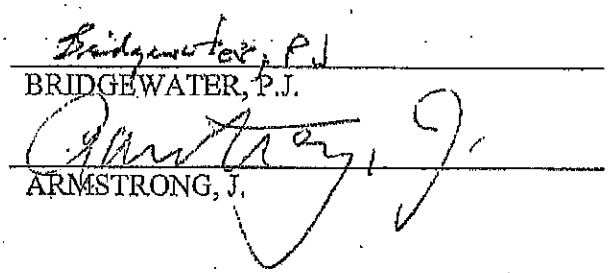
ATTORNEY FEES

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.

We concur:



BRIDGEWATER, P.J.

ARMSTRONG, J.