

64344-4

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NO. 64344-4

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

REBECCA RIEBE,

Appellant,

v.

JENNIFER L. WEST AND CHRISTOPHER P. THOMAS, Wife and
Husband, and the Marital Community Composed Thereof,

Respondent,

And

NATIONWIDE INSURANCE COMPANY,

Intervenor

APPELLANT'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Appellant Riebe has repeatedly requested to enter into binding arbitration with her UIM insurer, Nationwide Insurance. Based on the contract between them, she has the right to choose to proceed in arbitration and she may pursue arbitration with Nationwide prior to a trial against the third party tortfeasor. *Hamilton v. Farmers Ins. Co. of Wash.*, 107 Wn.2d 721, 727, 733 P.2d 2 13 (1987); *Kraus v. Grange Ins. Assoc.*, 48 Wn. App. 883, 740 P.2d 918 (1987). The fact that Riebe filed suit against the third party tortfeasor is irrelevant to the arbitration demand. As long as the court finds that the language in the contract is clear and unambiguous, arbitration shall be ordered. *American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993).

The contract between Riebe and Nationwide provided that either party may elect to proceed through arbitration. If the court finds that a valid arbitration agreement exists the court must order arbitration. *Weiss v. Lonquist*, 153 Wn. App. 502, 510, 224 P.3d 787 (2009). *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 881, 224 P.3d 818 (2009).

Riebe has consistently requested arbitration with Nationwide - a verity that Nationwide ignores it is brief. It is undisputed that Riebe first demanded arbitration on May 29, 2009 and Nationwide did not respond. On June 17, Riebe filed a lawsuit against the third party tortfeasor. On

August 25, 3009, Ms. Holburn-Bernarding, counsel for Nationwide in this case, sent an email stating, “I do not believe that we should have the arbitration until the underlying matter is completed.” CP 48. Nationwide refused to take any steps to engage in arbitration with Riebe despite being aware of her desire for arbitration. Yet, now, Nationwide argues that it has always been amenable to arbitration. This is clearly untrue and contradicts the order of Judge Doyle which states, “Nationwide Insurance Company’s Motion to Dismiss Plaintiff’s Demand for Arbitration is GRANTED.” CP 61.

Since it appears that Nationwide now agrees to binding arbitration, this court has no reason not to order arbitration under RCW 7.04A.070. Further, because this is an issue of contractual rights and not of procedure, Nationwide should be required to pay reasonable attorneys fees and costs to Riebe per *Olympic Steamship v. Centennial Ins. Co.*, 117 Wash.2d 37, 81 1 P.2d 673 (1991).

Because only fees appear to be at issue, this matter could be resolved without oral argument.

ARGUMENT

A. Riebe has not waived her right to arbitration

Nationwide has argued that Riebe is estopped from compelling arbitration because she has filed a lawsuit against the third party. This is

contrary to case law. Arbitration with a UIM insurer and litigation with a third party tortfeasor are not mutually exclusive. A claimant is not required to commence arbitration against a UIM insurer prior to filing suit against the third party. Thomas Harris, 1-35 Washington Insurance Law § 35.2 (rev. ed. 2009), citing *Hamilton*, 107 Wn.2d 721 and *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 707 P.2d 1319 (1985). Therefore, filing an action against the third party does not render a claimant's request for arbitration against the UIM insurer waived.

Likewise, contrary to the August 25, 2009 email of Nationwide's counsel, Andrea Holburn-Bernarding, it is not necessary to litigate a suit against the third party tortfeasor prior to engaging in arbitration with the UIM insurer. In *Kraus*, the Grange attempted to avoid arbitration based on its argument that "the court should wait until the underlying lawsuit between [Kraus] and [the other driver] and his agents is resolved." *Kraus*, 48 Wn. App. at 885. The court disagreed and ordered the parties to arbitrate.

Nationwide contends that Riebe waived her right to arbitration because Nationwide "had no choice but to intervene or be bound by any excess judgment in the underlying tort action." Nationwide's Response Brief, p. 5. This statement is untrue. Nationwide could have avoided

litigation by simply agreeing to adhere to the insurance contract and participate in arbitration with the appellant when she requested it.

B. Riebe recognizes that Nationwide will not be bound by any subsequent court decision between Riebe and the third party tortfeasor.

Riebe has always intended that Nationwide only be bound by the arbitration award. In its original motion to dismiss Riebe's request for binding arbitration, Nationwide misstated current law and mistakenly argued that binding arbitration between the two parties could not result in a final award. Nationwide wrote,

" Under longstanding Washington law principles, plaintiff is not arguably whole and the Nationwide policy is not exhausted [following arbitration with the UIM insurer], so plaintiff proceeds to trial in this current action, forcing all of the same people and experts to testify once again."

CP 37.

This is a mischaracterization of Washington law. *Hamilton* 107 Wn.2d 721. Rather, it is settled case law that, if an insured chooses to enter into arbitration with her UIM insurer, all issues between the two parties will be resolved in arbitration. Harris, Washington Insurance Law Supplement to § 35.2, citing *DeVany v. Farmers Ins. Co.*, 134 Wn. App. 204, 208, 139 P.3d 352 (2006) and *Mathioudakis v. Fleming*, 140 Wn. App. 247, 161 P.3d 451 (2008).

Per Nationwide's brief, "Appellant has waived her right to arbitrate unless she agrees that Nationwide's obligation is extinguished after the arbitration award is rendered." Nationwide's Reply Brief, p. 8. Obviously, if arbitration occurs between Nationwide and Riebe, Nationwide will be bound by this award and will not need to participate in any subsequent litigation nor will it be bound by any future trial judgment against the third party.

Nationwide mischaracterizes Riebe's request and appears to have misread her appellate brief. She has neither demanded nor requested that Nationwide participate in both arbitration and a trial and then be bound by the higher award. Nowhere in her brief does Riebe imply that "if she does not totally exhaust the Nationwide UIM limits at arbitration, she can then proceed at trial against both the defendant tortfeasor and intervenor Nationwide." Nationwide Reply Brief, p. 8. Riebe has never argued this.

Contrary to Nationwide's reply brief, Riebe is not attempting to 'forum shop.' She wants arbitration with Nationwide. It is Nationwide that has refused to participate in arbitration and instead moved for a motion to dismiss the demand for arbitration. This was the very issue Judge Doyle ruled on in October 2009.

C. Riebe is entitled to an award of attorney fees under the Olympic Steamship Rule.

Olympic Steamship is directly on point. By refusing to engage in arbitration, Nationwide compelled Riebe to “assume the burden of legal action to obtain the full benefit of [her] insurance contract.” *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53, 81 P.2d 673 (1991). *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 28, 904 P.2d 731 (1995) (reaffirming *Olympic SS*).

Nationwide argues that this is a procedural issue and therefore *Olympic Steamship* fees are not owed. This statement is without merit. In its reply brief, Nationwide says that it has “never denied Appellant her UIM benefits under the policy.” Nationwide’s Response Brief, p. 11. One of Riebe’s rights under the insurance contract is the right to demand arbitration. Riebe has been compelled to litigate the arbitration issue because Nationwide refused to submit to arbitration as it was required to do by the plain language of the insurance contract.

Nationwide states that it “simply requested that appellant elect a remedy”, arbitration or trial. Nationwide’s Response Brief, p. 11. Riebe has always elected, and continues to elect, arbitration. Nationwide has consistently refused to participate in arbitration until its apparent acquiescence its response brief.

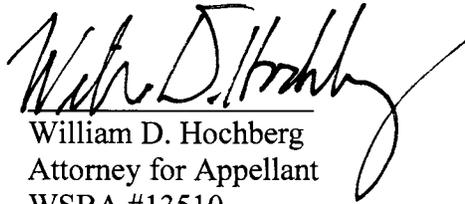
If Nationwide had agreed to arbitration at any point since it was first requested in May, 2009, Riebe would not have had to litigate this issue. The only reason this appeal exists is to force Nationwide to uphold its contractual responsibility to participate in arbitration. By disputing Riebe's right to request arbitration, Nationwide denied Riebe her contractually derived rights. Nationwide's sudden departure from the position it has held for almost a year is confounding and it should not be permitted to avoid paying fees by its attempt to rewrite history.

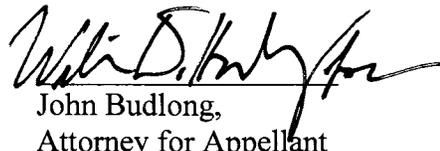
Because Nationwide has not honored its insurance contract, Riebe's appeal is not based on a procedural dispute, but is in fact based on a coverage dispute, *Olympic Steamship* fees are appropriate. *Godfrey v. Hartford Cas. Insurance Co.*, 142 Wn.2d 885, 899, 16 P.3d 617 (2001), *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 147, 930 P.2d 288 (1997). Therefore, Riebe respectfully reiterates her requests for reasonable fees and costs of appeal and in the trial court.

CONCLUSION

Appellant Rebecca Riebe respectfully requests the Court of Appeals to reverse the trial court's ruling denying her motion to compel arbitration, to order Nationwide to submit to arbitration, and to order *Olympic Steamship* attorney's fees and costs to Riebe in the trial court and on appeal.

Respectfully submitted this 2 day of April, 2010.


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