

No. 74407-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant

v.

ARIKA PRINCE,

Respondent

APPELLANT'S REPLY BRIEF

BENDELE & MENDEL, PLLC

By: James Mendel, WSBA No. 29223
Colin Hutchinson-Flaming, WSBA No. 45294
BENDELE & MENDEL, PLLC
200 West Mercer Street, Ste 411
Seattle, WA 98119

Attorneys for Appellant

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I. REPLY STATEMENT OF THE CASE

A. Respondent Misstates Appellant's Position on Coverage

Respondent appears to argue that Appellant had denied coverage when Appellant merely needed to investigate the circumstances surrounding the subject accident. Respondent admits in her Response Brief (*Resp. Br.*) that she was not the named insured on the policy and admits that an uninsured driver was the underlying tortfeasor, not Appellant. Respondent further acknowledges that Appellant responded to requests for admission that Respondent was insured under her parents' policy and that the uninsured driver was at fault. Respondent fails to identify any other efforts beyond issuance of requests for admission regarding determination of coverage. No coverage issues were raised during the MAR hearing and Appellant would have likely been precluded from raising this issue for the first time at trial following a *de novo*¹; however, Respondent fails to cite this in her discussion regarding a denial of coverage. Further, nothing in the record supports the assertion that coverage was an issue in pre-trial motions, during the trial or that it was even considered beyond the issuance of a couple of requests for admissions. Respondent's attempt to raise this issue is merely an attempt

¹ See for e.g. *Wilson v. Horsley*, 137 Wn.2d 500, 502-503, 974 P.2d 316 (1999)

to misdirect this Court's attention and to seek another avenue for fees and costs.

B. There is no Good Faith Dispute that Respondent was Fully Compensated

Respondent notes that she filed suit against Appellant for UIM benefits and that this matter proceeded to trial and a jury verdict was returned. The jury's verdict listed all amounts for special damages (disputed and undisputed) as well as general damages. This verdict lists the amount of money necessary to compensate the Respondent; therefore, there is no good faith dispute on the matter of full compensation for her claim, thus, her attempt to raise this issue is another attempt to misdirect this Court's attention.

C. Appellant is Not Objecting to Respondent's Fee Agreement

Respondent attempts to misconstrue the issues before this Court by characterizing Appellant's appeal as one of challenging her fee agreement. Appellant is not appealing the terms of any fee agreement or the contingency fee contained therein. Here, the issue is if the costs used in calculating the PIP offset were "reasonably incurred to generate [the common] fund."² Respondent attempts to argue lack of standing by

² *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 878, 31 P.3d 1164 (2001) (citing *Winters v. State Farm Mut. Auto. Ins. Co.*, 99 Wn. App. 602, 609, 994 P.2d 881 (2000); *Covell v. City of Seattle*, 127 Wn.2d 874, 891, 905 P.2d 324 (1995); *Bowles v. Department of Retirement Sys.*, 121 Wn.2d 52, 70-71, 847 P.2d 440 (1993); *Leischner v.*

mischaracterizing Appellant's objection to Respondent's improper costs as an objection of the fee agreement. Again, this appears to be another attempt to misdirect this Court's attention from the salient issues.

D. Respondent Admits to Premature and Improper Disclosure of Offer of Compromise

Respondent admits that she improperly and prematurely disclosed the post MAR Offer of Compromise to the trial court, but inexplicably argues that it should not matter as the timing did not affect the determination of offsets or any other issues that needed to be decided at the time it was disclosed because the trial court lacks any discretion in its decision making authority. To this extent Respondent puts forth the proposition that the trial court lacks any level of discretion in determining what expenses were "reasonably incurred" in determining if a PIP offset is warranted. Plainly put, Respondent argues and that she is entitled to erase a valid PIP offset claim with inflated, unwarranted, and unreasonable claim of litigation expenses and the trial court should be powerless in evaluating the proffered expenses.

Alldrige, 114 Wn.2d 753, 756-57, 790 P.2d 1234 (1990); *Miotke v. City of Spokane*, 101 Wn.2d 307, 339, 678 P.2d 803 (1984) (quoting *Public Util. Dist. No. 1 v. Kottsick*, 86 Wn.2d 388, 390-91, 545 P.2d 1 (1976)); *Painting & Decorating Contractors, Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 815, 638 P.2d 1220 (1982); *Seattle Trust & Sav. Bank v. McCarthy*, 94 Wn.2d 605, 612, 617 P.2d 1023 (1980)).

II. REPLY ARGUMENT

A. Appellant's Objection to Legal Expenses is Valid and the Trial Court Abused its Discretion

1. *Respondent's Arguments Regarding Standing and Full Compensation are Improper*

Respondent, for the first time in her Response Brief, appears to insinuate that Respondent has not been made whole, such that Appellant would not be entitled to a PIP offset. Additionally, Respondent has argued that Appellant lacks standing to object to the costs and fees proffered in relation to PIP offset calculations. These arguments were not made to the trial Court and should not be considered by this Court on appeal. Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978);³ RAP 2.5(a).

2. *Respondent's Arguments Regarding Standing and Full Compensation Fail*

First, Respondent filed suit under her UIM policy, and a jury returned a verdict for full satisfaction of her claims. There are no facts that have been submitted that support the contention that there are insufficient coverage limits or that the jury failed to provide compensation for the items requested (special and general damages); therefore, the jury verdict

³ An exception is noted for constitutional challenges made for the first time on appeal. There is no argument that this action involves any constitutional matter.

lists an amount of compensation for plaintiff to make her whole. In fact, since she did not have to pay for \$10,000 of her medical bills the verdict, on its face, would suggest that she is obtaining a windfall if this Court allows her to receive a 'double recovery.' Regardless, plaintiff has been made whole in either scenario.

Next, Respondent misapprehends the *Mahler v. Szucs* holding regarding standing. 135 Wn.2d 398, 957 P.2d 632 (1998) *overruled on other grounds*. In *Mahler*, defendant argued against paying a pro rata share of plaintiff's legal expenses because it would entitle plaintiff's counsel to an additional fee beyond those identified in the fee agreement between plaintiff and attorney. *Id.* at 429. The Court determined that defendant lacked standing to challenge the contents of the plaintiff's fee agreement. *Id.* Here, Appellant is not making any such objection. The argument and basis for this portion of the appeal is to insure that an insured is entitled to a pro rata share of "fees and costs **reasonably** incurred to generate [the common] fund." *Winters*, 144 Wn.2d at 877 (emphasis added).

Both parties agree that the equitable theory of the "common fund" is the basis for the award of pro rata legal expenses in this case and others involving calculating a PIP offset. *See Resp. Br.*, at n.7. The Washington Supreme Court has allowed challenges to the reasonableness of costs and

fees in relation to common fund cases. *See Bowles v. Washington Department of Revenue*, 121 Wn.2d 52, 70-72, 847 P.2d 440 (1993). As such, Respondent's arguments regarding a lack of standing to raise this issue or that she has not been made whole are without merit.

3. Respondent's Proffered Expenses were Not Reasonably Incurred

Here, at the trial court level, Appellant properly objected to unwarranted, unreasonable, and improper fees and costs used in determining if a PIP offset was available. Respondent failed to raise arguments that Appellant lacked standing or that Respondent was not made whole in response to Appellant's objection and motion practice. As such, Respondent should be precluded from bringing those arguments before this Court. Additionally, Appellant's objections were valid and such objections have been permitted by the Supreme Court in common fund cases.

Instead of attempting to support the trial court's consideration and allowance of Respondent's improper costs and fees, she attempts to bring arguments not raised at the trial level in order to draw light away from the ridiculous nature of her claimed costs. Respondent does not make even a cursory attempt to justify the request to consider alleged costs for copying, faxing, transferring documents to Dropbox (an online storage service);

parking charges; travel fees; messenger services; \$3,973.00 for an unknown 'consulting expert'; and records that were not offered as evidence by her at trial. Rather than spend even a page explaining why these expenses were "reasonably" incurred to generate the common fund, Respondent makes every effort to misdirect this Court's attention.

Respondent's motivation in proffering the inflated costs is abundantly clear: The Offer of Compromise was a mere few hundred dollars below the jury's verdict, and in order to keep the offer below the verdict, Respondent had to eliminate Appellant's entitlement to the offset of the \$10,000 it paid in medical expenses.

Respondent's proffered expenses need to be reasonably incurred in order to be allowed. An expense dump to inflate fees is not reasonable and should not be allowed.

As Respondent notes, Appellant provided citations from fee and cost applications under a plethora of doctrines and statutes that all preclude the costs proffered here in relation to calculating a PIP offset. Respondent has offered no authority allowing her proffered expenses. Despite this, the trial court apparently accepted Respondent's representations of costs carte blanche as there is no evidence in the record to indicate any of the requisite scrutiny was made to the egregious expenditures. The trial court abused its discretion when it failed to

scrutinize, eliminate or even provide an evaluation of these costs sufficient for review. Remand with instructions to only allow reasonable and appropriate costs is therefore appropriate.

4. Respondent has the Burden of Proof that Expenses were Reasonably Incurred

The burden of proving the reasonableness of costs and fees is upon the fee applicant. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993) (citing *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984)). In the context of calculating a PIP offset, an insured is entitled to a pro rata share of “fees and costs reasonably incurred to generate [the common] fund.” *Winters*, 144 Wn.2d at 877; see fn 1, *supra*.

While Appellant acknowledges that there appears to be no case directly on point regarding burden of proof in relation to PIP offset calculation, the citations above should reasonably lead to the determination that the burden of proof rests with the applicant. This is logical as the applicant will present evidence of fees and costs which he or she would like to have considered in calculating a PIP offset. It should be noted that Respondent, in response to Appellant’s motion for offset at trial, proffered declarations of counsel and documentation supporting the fees and costs allegedly incurred in this case. Respondent has provided no authority that Appellant should bear the burden of establishing the

unreasonableness of a cost and fee application, and, in fact, to the contrary, all reasonable interpretations of Washington case law indicate that Respondent, as applicant, has the burden of proving the reasonableness of the application.

5. *Fees and Costs used in Calculation of PIP Offset are Not Analogous to Olympic Fees and Costs*

In the absence of a contract, statute, or recognized ground of equity, a court will not award attorney fees as part of the cost of litigation. *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941). Historically, there were four equitable grounds for the award of fees and costs: bad faith conduct of the losing party, preservation of a common fund, protection of constitutional principles, and private attorney general actions. *Public Util. Dist. 1 v. Kottsick*, 86 Wn.2d 388, 545 P.2d 1 (1976). In Washington, the common fund doctrine was applied as early as 1911. *See Baker v. Seattle-Tacoma Power Co.*, 61 Wn. 578, 112 P. 647 (1911). The common fund doctrine provides that “when one person creates or preserves a fund from which another then takes, **the two should share, pro rata, the fees and costs reasonably incurred to generate that fund.**” *Winters*, 144 Wn.2d at 877 (emphasis added); *see* fn 1, *supra*. However, in *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, the Supreme Court created a narrow expansion to the no-attorney-fee-rule when an

insured is forced to incur the burden of legal action against their insurer to obtain the benefit of their insurance contracts. 117 Wn.2d 37, 811 P.2d 673 (1991).

As stated above, and acknowledged by Respondent, an insurer's obligation to pay a pro rata portion of its insured's legal expenses before claiming a PIP offset is found in the common fund doctrine. *Winters*, 144 Wn.2d at 877; however, despite acknowledging the application of the common fund doctrine, Respondent attempts to analogize costs recoverable in the context of a PIP offset with costs allowed under *Olympic*. See *Resp. Br.*, at 25.⁴ Respondent disregards the clear language of *Winters* and case law regarding the common fund doctrine and suggests the adoption of case law relating to the "narrow exception"⁵ of *Olympic* fees for purely self-serving reasons.⁶

Here, Respondent brought suit against Appellant to determine the value of her claim and not to determine the existence of coverage. As

⁴ Interesting, in the context *Olympic* fees and costs, a prevailing insured would submit an application therefor at the conclusion of the action against the insurer and would need to demonstrate the expenses incurred were attributable to the resolution of the coverage dispute. See *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014). This further undercuts Respondent's suggestion that the burden of proving costs were unreasonable should rest with Appellant. Respondent's burden of proof assertion appears entirely unsupported and contrary case law, reason, and logic.

⁵ *Public Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994); *Estate of Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 844 P.2d 403 (1993).

⁶ Respondent argues for application of *Olympic* fees because it would allow "compensation for all of the expenses necessary to establish coverage as part of those attorney fees which are reasonable." *Panorama v. Allstate Ins. Co.*, 144 Wn.2d 130, 144, 26 P.3d 910 (2001) (emphasis omitted).

such, *Olympic* fees are not applicable. Respondent's attempt to argue that suit was necessary to obtain coverage should carry no weight. Even a cursory review of the record indicates that this matter was one of a value dispute, not coverage. Further, Respondent called no witnesses and submitted no documentation that could lead any reasonable person to believe that this litigation pertained to a coverage determination. Clearly, this was a case of damages, and the verdict form makes that point obvious.

Additionally, *Olympic* fees would only be awarded for efforts made toward establishing coverage. *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014). Respondent has provided no evidence that any of the costs claimed were incurred and attributable to resolving a coverage dispute. Respondent has provided no evidence of any efforts relating to coverage beyond the issuance of one set of requests for admission, and there has been no evidence regarding any expenditure relating to that one piece of written discovery.

The language of *Winters*, a preeminent case of *Mahler's* progeny, could not be more clear regarding an insurer's responsibility to pay a pro rata share of only reasonably incurred expenses: "when one person creates or preserves a fund from which another then takes, **the two should share, pro rata, the fees and costs reasonably incurred to generate that fund.**" *Winters*, 144 Wn.2d at 877 (emphasis added); see fn 1, *supra*. The

determination of a PIP offset is based on the equitable principles of the common fund doctrine. *Olympic* fees play no part in determining what costs are included in determining the PIP offset. Respondent has provided no authority to support that assertion.

Respondent similarly provided no authority to support the proffered expenses in calculating the PIP offset. Respondent offered no legitimate explanation as to how such egregious expenditures were reasonably incurred to generate the common fund at trial. The trial court provided no evidence in the record to indicate any of the requisite scrutiny was made to the unreasonable expenditures. The trial court abused its discretion when it failed to scrutinize, eliminate or even provide an evaluation of these costs sufficient for review. Even a cursory review of the expenditures compared with the amounts in controversy flies in the face of reasonable expenses. Such expenditures applied in any other setting (i.e. operating a business, family budget or a city's economy) would not be accepted. Remand with instructions to only allow reasonable and appropriate costs is therefore appropriate.

B. The Trial Court Erred in Awarding MAR Fees

1. Determination of PIP Offset Involves Discretion of the Court

Respondent's argument regarding her premature and improper communication of her Offer of Compromise can be distilled down into

one statement: Determination of a PIP offset does not involve any level of discretion of the trial court; therefore, a premature and improper communication of an Offer of Compromise does not matter. *See Resp. Br.* at 32. This argument ignores the plain language regarding the creation of the common fund: “when one person creates or preserves a fund from which another then takes, **the two should share, pro rata, the fees and costs reasonably incurred to generate that fund.**” *Winters*, 144 Wn.2d at 877 (emphasis added); *see* fn 1, *supra*. The determination of what fees and costs are reasonably incurred to generate the common fund clearly involves a level of discretion by the trial court. Respondent’s assertion that it does not is frightening.

Even assuming, *arguendo*, that Respondent’s *Olympic* fees analogy is correct, there is still a level of discretion on the part of the trial court. As partially quoted by Respondent, *Panorama* states that an insured will “be compensated for **all** of the expenses *necessary* to establish coverage as part of those attorney fees which are *reasonable*.” *Panorama v. Allstate Ins. Co.*, 144 Wn.2d 130, 144, 26 P.3d 910 (2001) (*emphasis added*). Therefore, the determination of expenses that were *necessary* in the inclusion of fees that are *reasonable* again involves discretion of the trial court. There is no way to remove the trial court’s discretion under either standard.

Notwithstanding Respondent's regurgitation of her counsel's pitiful plea for mercy,⁷ she, vis-a-vis her attorneys, with knowledge and designed intent, disclosed and communicated her post-arbitration Offer of Compromise to the trial court for no other purpose other than affecting the trial court's decision to reduce the verdict to judgment and have her deemed as the prevailing party. This revelation to the trial court had a direct and immediate impact in its decision and the bell could not and cannot be un-rung.

An award of fees when the disclosure occurs is not warranted, and fee forfeiture is the appropriate remedy to nullify the callous and blatant disclosure. Such forfeiture is appropriate as this Court has already made abundantly clear in past opinions. As such, the trial court abused its discretion in awarding fees to Respondent after her premature and improper communication of her Offer of Compromise to the trial court in direct contravention of RCW 7.06.050(c).

2. Awarded Fees and Costs are Excessive and Not Supported by Adequate Findings

Respondent appears to concede that an applicant for fees and costs has the burden of proof regarding the reasonableness and authority for the application. *See Resp. Br.* at 33; however, Respondent then argues that the burden shifts on appeal to the party seeking to overturn the award. *See*

⁷ See footnote 2 on page 10 of Respondent's Brief.

Resp. Br. at 33. Respondent cites to *Berryman v. Metcalf* for this assertion; yet, this portion of the *Berryman* opinion is silent as to who carries the burden of proof on appeal. 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013). Rather, all that is stated supports the fact that Respondent bears the burden of proof: “The burden of demonstrating that a fee is reasonable is upon the fee applicant.” *Id.* at 657 (citing *Scott Fetzer Co.*, 122 Wn.2d at 151. Respondent has failed to provide any authority supporting a shift in the burden of proof regarding the reasonableness of fees on appeal.

Respondent then proceeds to concur with Appellant’s cited case law regarding standard of review, lodestar methodology, and consideration of the size of the amount in dispute in relation to the fees requested; however, Respondent fails to make any attempt to justify a fee application that was so grossly disproportionate to the value of the case. Respondent requested attorney fees of more than six times the amount of the jury’s valuation. Respondent makes no effort to explain how this should be possible in a case she acknowledged was worth \$17,499.00. Respondent demonstrated a lack of billing judgment, and the trial court’s award of the requested fees should necessitate remand as an abuse of discretion.

Additionally, Appellant raised a number of specific objections to Respondent’s billing entries that the trial court seemingly failed to

address. The trial court's lack of specificity in reducing a minute portion of Respondent's attorney hours without indicating where the reduction was occurring does not allow for adequate review. The trial court's lack of addressing the specific objections and not identifying where reductions occur does not create a record sufficient for review and thus was an abuse of discretion.

Lastly, Respondent makes not respond to Appellant's arguments regarding the fees awarded for non-attorney, administrative work. Respondent apparently concedes that award of these fees was error and should be overturned on appeal.

C. Respondent is Not Entitled to *Olympic* Fees and Costs

As stated above, in *Olympic*, the Supreme Court created a narrow expansion to the no-attorney-fee-rule in the situation where an insured is forced to incur the burden of legal action against their insurer to obtain the benefit of their insurance contracts. 117 Wn.2d 37. However, *Olympic* fees would only be awarded for efforts made toward establishing coverage. *Miller*, 180 Wn. App. 772.

Here, Respondent brought suit against Appellant to determine the value of her claim and not to determine the existence of coverage. As such, *Olympic* fees are not applicable. Respondent made no efforts toward establishing coverage beyond issuance of one set of requests for

admission. Coverage issues were not part of the MAR hearing, pre-trial motions or any portion of the trial proceedings. Respondent has not proffered any evidence regarding fees and costs associated with the sole effort of submitting a request for admission; therefore, Respondent has not established the necessary showing to even make such a request. Even a cursory review of the record indicates that this matter was one of a value of plaintiff's injuries from a car accident and not insurance coverage. Respondent's request is unwarranted, unsupported, and improper and should be denied.

D. Respondent is Not Entitled to Fees and Costs on Appeal

Appellant does not believe that Respondent is entitled to attorney fees and expenses on appeal. As stated above and in Appellant's Brief, Appellant should be entitled an offset that will result in an improvement of position post-trial de novo; and fee forfeiture should result after Respondent's improper and premature disclosure of her post-arbitration Offer of Compromise. Respondent should not be entitled to fees and costs below and similarly should not be entitled to fees and costs on Appeal.

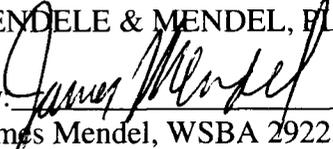
III. CONCLUSION

For the reasons stated here and in Appellant's Brief, Appellant requests that this Court find that the trial court abused its discretion by (1) failing to review Respondent's fees and costs sufficient for review

regarding Appellant's motion for offsets, and in turn, denying Appellant's motion for offsets; (2) awarding attorney fees after Respondent intentionally violated RCW 7.06.050 by disclosing and communicating her post-arbitration Offer of Compromise to the trial court prior to entry of judgment; and (3) failing to reduce its award for attorney fees and costs.

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BENDELE & MENDEL, PLLC

By: 

James Mendel, WSBA 29223

Colin Hutchinson-Flaming, WSBA 45294

200 W. Mercer Street, Suite 411

Seattle, WA 98119

T: (206) 420-4267

F: (206) 420-4375

E: james@benmenlaw.com

Attorneys for Defendant/Appellant