

No. 39323-9-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

KAREN WEISMANN, *Respondent*

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, *Appellant*

APPELLANTS' BRIEF

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I. INTRODUCTION

An insurer must pay a proportionate share of attorneys' fees and costs when a common fund is created. But no common fund is created where both liability and PIP payments are made by the tortfeasor's insurer. Where there is no common fund, the insurer is entitled to offset all PIP payments without reduction for a pro rata share of fees and costs. Because Safeco Insurance Company of Illinois (hereinafter Safeco), as the tortfeasor's insurer, paid both liability and PIP payments to the tort victim, Safeco acted properly in offsetting its PIP payments without a reduction for pro rata fees and costs.

This court ruled in *Young v. Teti*¹ that an insurer may offset PIP payments made on behalf of the insured tortfeasor without paying a proportionate share of fees and costs. Despite this Division II authority directly on point, the trial court granted Plaintiff summary judgment and denied Safeco summary judgment based on the erroneous conclusion that *Hamm v. State Farm Mutual Automobile Insurance Co.*,² had impliedly overruled *Young*.

The trial court erred because *Young* has not been overruled by *Hamm*, and because *Young* is distinguishable from *Hamm*. In *Hamm*, the collateral source doctrine created a common fund and thus the need for pro

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

² 151 Wn.2d 303, 88 P.3d 395(2004).

rata fee-sharing, but in *Young*, and here, the PIP payments came from the tortfeasor's insurer such that the collateral source rule was inapplicable, and there was thus and no requirement for fee-sharing.

II. ASSIGNMENTS OF ERROR

Safeco makes the following assignments of error:

1. The trial court erred by granting Plaintiff Weismann's Motion for Partial Summary Judgment and ordering Safeco to pay pro rata attorneys fees on PIP payments made on behalf of the tortfeasor.
2. The trial court erred in denying Safeco's Motion for Summary Judgment seeking a ruling that Safeco was entitled to offset its PIP payments without paying pro rata fees.
3. The trial court erred by granting Plaintiff's Motion for attorney fees under *Olympic Steamship v. Centennial Insurance Co.*³

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1.a. Under *Young v. Teti*, because no common fund is created when recovery is obtained from the tortfeasor's insurer that also provided the PIP benefits, the insurer does not need to pay a share of fees when offsetting the PIP benefits paid. Weismann obtained PIP benefits and a recovery from Safeco, the tortfeasor's insurer. Did Safeco act properly when it did not pay a share of fees for the PIP benefits paid on behalf of its insured tortfeasor?
- 1.b. The trial court held that *Young* was impliedly overruled by *Hamm v. State Farm*. In *Hamm*, which did not mention *Young*, PIP benefits were extended under the insured's own insurance policy and the collateral source rule applied to those benefits. But in *Young*, PIP benefits were extended under the tortfeasor's insurance policy such that the collateral source rule did not apply. Given those differences, does *Young* remain good law and control this case?

³ *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 800 P.2d 673 (1991).

- 1.c. Fee-sharing is based upon subrogation principles. When a tortfeasor's carrier makes payments on behalf of the insured tortfeasor, the carrier has no right of subrogation from its own insured. Without a subrogation right, does the tortfeasor's carrier only owe additional uncompensated damages and therefore is able to offset PIP payments without pro rata attorney fees?
2. *Mahler* holds that the pro rata share of attorney's fees on PIP reimbursement involves the value of the insurer's reimbursement rights, and not coverage, and therefore *Olympic Steamship* fees are not available to the insured who prevails on the pro rata issue. *Mahler* is still good law, and the insured should not have prevailed on the pro rata issue. Should the Court overturn the trial court's decision to award *Olympic Steamship* fees?

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, within Clark County, Washington.⁴ Ms. Kangas' auto policy was issued in Illinois to a Washington resident.⁵ The automobile collision with the motorized wheelchair caused injuries to the Plaintiff.⁶

Following the collision, Plaintiff received PIP insurance benefits under Ms. Kangas' Safeco policy in the amount of \$9,012.95.⁷ Plaintiff is an "insured" by definition under the Personal Injury Protection Coverage Provision of the insurance contract issued to Ms. Kangas because she was

⁴ CP 73

⁵ CP 73

⁶ CP 73

⁷ CP 73

a pedestrian struck by Kangas' covered auto.⁸ Plaintiff is also a claimant under the liability portion of Ms. Kangas' policy, but is not an insured under that portion of the policy.⁹

On May 16, 2008, during ongoing settlement negotiations between Weismann and Safeco, Safeco's adjuster advised Weisman that the amount Safeco would pay Weismann in settlement of her claim against Kangas would be offset by \$9,012.95, the entire amount of PIP benefits received by Weismann, without reduction of the offset by a proportionate share of Weismann's attorney fees and costs.¹⁰ Weismann alleged such a reduction was required under Washington law.¹¹ Safeco alleged that, specifically under *Young v. Teti*, no such reduction was required.¹²

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, \$35,508.24.¹³

On May 30, 2008, Weismann sent notice to the office of the Insurance Commissioner and Safeco, alleging that Safeco's refusal to pay

⁸ CP 74

⁹ CP 74

¹⁰ CP 74

¹¹ CP 74

¹² CP 74

¹³ CP 74

a proportionate share of fees and costs constituted a violation of the Insurance Fair Conduct Act.¹⁴

On June 3, 2008, Safeco's claims analyst wrote to Weismann in response to the May 30, 2008, letter, stating that *Young v. Teti*, which holds that no common fund is created when an insurance company offsets PIP payments under these circumstances, appears to be the controlling law in Washington.¹⁵ Weismann continued to claim that *Young v. Teti* has been impliedly over ruled by a subsequent case, specifically *Hamm v. State Farm Mutual Automobile Insurance Co.*,¹⁶ Safeco timely reaffirmed its prior rejection of Weismann's request for a reduction of the PIP offset.¹⁷

On June 11, 2008, Weismann and Safeco entered an agreement that reserved Weismann 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.¹⁸ Weismann filed suit the following month.¹⁹

¹⁴ CP 74; CP 149-150

¹⁵ CP 74

¹⁶ CP 74-75

¹⁷ CP 75

¹⁸ CP 75; CP 151-152

¹⁹ CP 1-5.

Weismann filed for summary judgment and requested the trial court to rule that *Young* was impliedly overruled by *Hamm*.²⁰ 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.²¹ The trial court ruled that because it could not find any distinctions between the decisions in *Young* and *Hamm*, Weismann's summary judgment must be granted and judgment ordered against Safeco.²² Safeco was ordered to pay Weismann 1/3 of the PIP benefits offset as pro rata attorney fees and costs Weismann incurred in the claim.²³ Safeco's motion was denied.²⁴

Weismann moved for *Olympic Steamship*²⁵ fees based on the trial court's order granting summary judgment.²⁶ Weismann argued *Safeco Insurance Co. v. Woodley*²⁷ applies and, in opposition, Safeco argued *Mahler v. Szucs*²⁸ applies.²⁹ The trial court granted Weismann additional

²⁰ CP 12, 15

²¹ CP 76

²² 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

²³ CP 387-389

²⁴ CP 202-206

²⁵ *Olympic S.S. Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53-54, 800 P.2d 673 (1991).

²⁶ CP 223-230

²⁷ 150 Wn.2d 765, 82 P.3d 660 (2004).

²⁸ 135 Wn.2d 398, 957 P.2d 632 (1984).

²⁹ CP 223-230; CP 231-301

attorney fees.³⁰ Safeco also sought to stay entry of an order pending the outcome of an appeal arising out of a King County Superior Court decision holding the opposite of the Clark County Superior Court. Direct review by the Supreme Court is being sought by the Plaintiff in that case under *Olga Matsyuk v State Farm Fire and Casualty Co.*, Supreme Court No. 82819-9.³¹ The trial court denied Safeco's request for a stay.³² Safeco appeals to this Court.

V. ARGUMENT

When reviewing an order on summary judgment, the Court of Appeals makes the same inquiry as the trial court,³³ and considers all legal questions de novo.³⁴ Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party shows that he or she is "entitled to a judgment as a matter of law."³⁵

Under that standard, this Court should reverse the trial court's order and should instead rule that Safeco acted properly by offsetting all the PIP payments it made to Weismann without a reduction for a proportionate share of attorneys' fees and costs because (1) as is

³⁰ CP 384-386; CP 387-389

³¹ CP 368-379. At this time, the Supreme Court has neither accepted nor rejected the petition for direct review in that matter.

³² CP 386; CP 387-389

³³ *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006) (internal citations omitted).

³⁴ *Id.*

³⁵ CR 56(c).

exemplified by the *Young* decision, no common fund was created when both liability and PIP payments were obtained from tortfeasor's insurer, and thus Safeco was not obligated to pay a share of attorneys' fees and costs; (2) *Young* has not been overruled by *Hamm*, *Young* is distinguishable from *Hamm*, and *Young* remains good law; and (3) there is no basis for fee-sharing when the carrier has no subrogation right.

A. BECAUSE NO COMMON FUND WAS CREATED, SAFECO WAS NOT OBLIGATED TO PAY A PRO RATA SHARE OF ATTORNEYS' FEES AND COSTS

All the cases relied upon by Weismann and the trial court - *Mahler v. Szucs*³⁶, *Winters v. State Farm Mutual Automobile Insurance Co.*³⁷, and *Hamm v. State Farm Mutual Automobile Insurance Co.*³⁸ - 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, a common fund was created and the insurer was obligated to pay a pro rata share of expenses when it sought reimbursement of the PIP benefits it paid earlier.³⁹

By contrast, in this case, because the PIP benefits and the liability settlement were paid by the Kangas' insurer, no common fund was

³⁶ *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).

³⁷ *Winters v. State Farm*, 144 Wn.2d 869, 31 P.3d 1164 (2002).

³⁸ *Hamm v. State Farm*, 151 Wn.2d 303, 88 P.3d 395 (2004).

³⁹ *Hamm*, 151 Wn.2d. at 309-320.

created. The entire fund was created by Safeco, as the insurer for tortfeasor Darlene Kangas. Safeco directly paid Plaintiff for her medical expenses on behalf of its insured, Ms. Kangas. Thus, the only additional compensation Ms. Weismann is entitled to receive is any uncompensated medical or other special damages, and general damages. Having made PIP payments to Plaintiff, Safeco was entitled to offset the payments made from the ultimate recovery.⁴⁰

Under those circumstances and in the absence of a common fund, Safeco was not obligated to pay a pro rata share of Weismann's attorney fees and costs. This is illustrated by the decision in *Young*.

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.⁴¹ 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.⁴²

⁴⁰ See e.g., *Bliss v. City of Newport*, 58 Wn. App. 238, 241, 792 P.2d 184(1990)(payments may be credited against tortfeasor's liability because collateral source rule applies only to sources independent of the tortfeasor).

⁴¹ *Young*, 104 Wn.App. at 723

⁴² *Young*, 104 Wn.App. at 723

When Teti sought to offset the Allstate payments, the trial court allowed the offset, but, citing to *Mahler v. Szucs*,⁴³ held that the offset had to be reduced by a pro rata share of Young's attorney fees and costs.⁴⁴

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.⁴⁵

This Court held that Young, the injured passenger, received PIP payments, not from her own insurer, as in *Mahler*, but rather from the tortfeasor's insurer.⁴⁶ Further, since the tortfeasor's insurer did not benefit from the litigation brought by the passenger, *Mahler* did not apply, and the insurer did not need to share in the litigation costs.⁴⁷ Moreover, the *Young* Court recognized that the lawsuit did not create a common fund which benefited the tortfeasor's insurer, Allstate:

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.

....

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.

⁴³ 135 Wn.2d 398, 957 P.2d 632 (1998).

⁴⁴ *Young*, 104 Wn.App. at 723-724.

⁴⁵ *Young*, 104 Wn.App. at 725-727.

⁴⁶ *Young*, 104 Wn. App. at 725.

⁴⁷ *Young*, 104 Wn.App. at 725.

...

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.⁴⁸

Young should control the outcome of the present case because Ms.

Weismann is in exactly the same situation as was Young. In both cases:

(1) the injured individual was an insured by definition only for PIP benefits;

(2) the insured driver was the tortfeasor;

(3) the injured party received PIP benefits from the at-fault driver's insurer rather than her own carrier;

(4) the injured individual sought damages from the insured tortfeasor; and

(5) the same liability carrier for the tortfeasor that paid PIP benefits declined to pay a second time for medical expenses it had already paid to the injured party.

Accordingly, just as the plaintiff's verdict in *Young* was allowed to be reduced by the PIP benefits already paid by the tortfeasor's insurer without there being any obligation to pay the plaintiff a pro rata share of

⁴⁸ *Young*, 104 Wn. App. at 725-27 (footnotes omitted)(emphasis original).

attorney fees, this Court should likewise confirm that Safeco properly offset the entire PIP amount of \$9,012.95, and that Safeco was not obligated to pay a pro rata share of attorney fees and costs when taking that offset.

B. *YOUNG CONTROLS HERE BECAUSE IT HAS NOT BEEN OVERRULED BY HAMM, AND BECAUSE IT IS DISTINGUISHABLE FROM HAMM*

Young v. Teti is good law: *Young* followed and distinguished *Mahler v. Szucs*. *Young* has not been overruled by *Hamm*, and *Young* is distinguishable from *Hamm*.

Even though the Supreme Court decision in *Hamm* did not overrule, criticize, or even mention *Young*, the trial court here found in favor of Weismann and against Safeco based on the erroneous conclusion that *Hamm* had impliedly overruled *Young*:

[T]he Supreme Court in Hamm held that the insurer in its capacity as a PIP carrier must reduce its PIP lien by a proportionate share of Plaintiff's attorney's fees. "The insured should not be worse off simply because he or she purchased two coverages from the same insurer.

It appears to me that the court was treating the insurer "in its capacity as a PIP carrier," as a separate entity from the insurer "in its capacity as UIM carrier." [citations omitted]. The court in Hamm noted at page 133, in a footnote, "The dissent ignores that Winters already rejected the notion that a PIP carrier does not receive reimbursement from UIM payments when the PIP carrier and the UIM carrier are the same company."

Under this analysis, Hamm did in fact create a fund, the UIM recovery, from which the PIP carrier benefited, by reason of its reimbursement of the PIP payments, just as if the PIP carrier would have benefited from the recovery against a third party insurer, as in Mahler.

In Young v. Teti, Division II did not view the insurer as two entities, i.e. PIP carrier and liability carrier, but rather one entity, and held that the recovery against the tortfeasor's liability policy did not create a common fund from which the PIP carrier benefited. Division II instead viewed the PIP and liability payments as coming from one source.

Under the authority of Hamm, it does not appear to me that the Supreme Court would agree with Young vs. Teti, absent a different analysis.⁴⁹

There is a different analysis. The critical distinction between *Young* and *Hamm* is that in *Young* the tortfeasor's liability insurer was the sole source of the recovery, while in *Hamm* the injured party recovered PIP benefits from her own insurance policy and then recovered UIM benefits from her own policy that fully compensated her for all damages, including duplication of her PIP recovery. The important difference created by that distinction is the operation of the collateral source rule.

“Under the collateral source rule, a tortfeasor may not reduce damages, otherwise recoverable, to reflect payments received by plaintiff from a collateral source, that is, a source independent of the tortfeasor.”⁵⁰

⁴⁹ CP 204-205.

⁵⁰ *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)).

However, the collateral source rule does not apply where the source of the payments is the tortfeasor or a fund created by him or her to make such payments.⁵¹

For example, in a factually similar case decided before *Mahler, Maziarski v. Bair*,⁵² the court noted that the collateral source rule was inapplicable where the PIP and liability payments were obtained from the tortfeasor's insurer. That case involved an insured auto that struck and injured a bicyclist. The bicyclist received PIP benefits from the tortfeasor's insurer, and then brought a suit against the insured motorist. The court held that the collateral source rule did not apply when, as is true in the present case, the payments were made under the tortfeasor's PIP coverage:

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.⁵³

In a similar case, *Lange v. Raef*,⁵⁴ 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. The *Lange* court stated,

⁵¹ *Id.*

⁵² *Maziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996).

⁵³ *Maziarski*, 83 Wn.App. at 841 n.8 (internal citations omitted).

⁵⁴ *Lange v. Raef*, 34 Wn. App. 701, 664 P.2d 1274 (1983).

“[w]here the source of the collateral payments is the tortfeasor or a fund created by him to make such payments, however, the collateral source rule is inapplicable, and such payments may be proven at trial to prevent double recovery by the injured party from the tortfeasor.”⁵⁵ In *Lange*, the plaintiff passengers received PIP benefits from the tortfeasor’s insurer, and then brought suit against the insured driver. The court held 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.”⁵⁶

Following the reasoning of this line of cases, none of which have been overruled, where the PIP payments come from the tortfeasor’s policy, the collateral source rule does not apply, and thus there is no “common” fund because the entire fund was created by the tortfeasor. Because no common fund was created, it follows that there is no obligation to pay a proportionate share of attorneys’ fees and costs when offsetting PIP payments made on the tortfeasor’s behalf.

Moreover, the pro rata fee-sharing logic of cases like *Hamm* does not apply in cases where a tortfeasor and her insurer subtract the amount already paid in PIP from a settlement. The tortfeasor and her insurer are simply being relieved from paying twice for special damages already paid

⁵⁵ *Lange*, 34 Wn.App. at 704

⁵⁶ *Lange*, 34 Wn.App. at 704

under PIP. That point is illustrated in *Young*, where the Court stated that the PIP offset simply relieved the insurer from having to pay the plaintiff again:

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.⁵⁷

Here, Ms. Kangas created a fund to pay Ms. Weismann's medical bills and Ms. Kangas is entitled to credit for payments from that fund, just as she would be if the payment had come directly from her, instead of being made on her behalf by her insurance carrier. Ms. Weismann did not make any payments towards the fund, nor did any collateral source on Ms. Weismann's behalf. Therefore, the collateral source rule did not apply in this case.

By contrast, in *Mahler*, *Winters*, and *Hamm*, the PIP benefits came from the plaintiffs' insurers and by operation of the collateral source rule, those plaintiffs were all legally entitled to receive all damages, including those paid by PIP, from the tortfeasor. Plaintiffs' PIP carriers were then entitled to reimbursement from the total damages.

In *Winters* and *Hamm*, where the UIM carrier was standing in the shoes of the tortfeasor, the Supreme Court emphasized that the insured

⁵⁷ *Young*, 104 Wn.App. at 726 (italics original)

should not be in a different position because she bought both UIM and PIP insurance from the same carrier. But in the present case, the trial court put Ms. Weismann in a better position than she would have been if Ms. Kangas paid her out of her pocket directly, instead of through PIP insurance purchased by Ms. Kangas for her own protection.

Nothing in *Hamm* and no considerations of public policy require that Weismann now be made better off by having Safeco pay a portion of her attorney fees when Ms. Kangas (not Ms. Weismann) purchased a policy that provided Weismann quick payment of her medical expenses under its PIP coverage without regard to fault.

In contrast, when Hamm (the accident victim in *Hamm* who received PIP under her own policy) bought her PIP coverage, she was bargaining that her own insurer would pay her accident-related medical expenses promptly and without regard to fault. She paid for that coverage so she would not have to sue to get her medical bills paid. Absent fee-sharing, she would not get the benefit of her bargain because, in effect, she would have to pay fees for the cost of getting the PIP recovery. This is so because the medical expenses covered by PIP would be embedded within her total recovery and she would pay attorney fees on the full amount, including any amount to reimburse her own insurer for its PIP payments. But that is not the case here because Ms. Weismann made no such bargain

with Safeco, but instead reaped the benefits of a fund created by Ms. Kangas.

Accordingly, the reasoning that supported the requirement for fee-sharing in *Hamm* is absent in the present situation. In a case like *Hamm*, where the UIM and PIP carrier is the same, "...an offset against the UIM obligation, less a proportionate share of fees and costs, is an acceptable mechanism to account for the PIP reimbursement rights."⁵⁸ This is acceptable because the insured-plaintiff has paid premiums for both UIM and PIP coverages.

By contrast, when, as here, the PIP payments come from the tortfeasor's insurer and then the tortfeasor's insurer agrees to make additional payments for uncompensated damages, the collateral source rule does not apply, and there is thus no basis upon which to require fee-sharing. It is the collateral source rule that is the underpinning of the common fund theory. Without the operation of the collateral source rule, there is only one fund that Ms. Weismann is legally entitled to recover from Ms. Kangas: the fund made up of her remaining damages after Ms. Kangas is given credit for what she has already paid to Ms. Weismann.

It follows that, as exemplified by the decision in *Young*, in taking that credit, there is no obligation to pay a proportionate share of attorney

⁵⁸ *Hamm v. State Farm*, 151 Wn.2d at 311.

fees and costs because no common fund was created in the recovery efforts. Nothing in *Hamm* is inconsistent with that principal and the trial court was therefore wrong in construing *Hamm* as having impliedly overruled *Young*. Accordingly, the trial court's order should be reversed.

C. WHEN THE TORTFEASOR'S AUTO INSURANCE COMPANY PAYS THE TORT VICTIM PIP BENEFITS ON BEHALF OF ITS INSURED, THERE IS NO SUBROGATION RIGHT, AND THEREFORE NO BASIS FOR FEE-SHARING

In short, a tort victim who receives PIP payments under her own insurance policy may seek and recover from the tortfeasor her entire damages, including those for which her own PIP benefits already provided compensation—subject to the insurer's reimbursement right. In contrast, a tort victim who receives PIP payments under the tortfeasor's insurance policy (the position Ms. Weismann occupies here) may recover from the tortfeasor *only* her remaining, uncompensated damages. She cannot recover at all from the tortfeasor—for her own benefit or for the PIP insurer's benefit—the damages already paid by the PIP coverage of the tortfeasor's policy. For this additional reason, the trial court should have determined that no fee-sharing obligation arose in the circumstances of this case.

Mahler and its progeny grow directly out of subrogation principles. “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.”⁵⁹ The insurer may enforce its right to reimbursement in either of two ways: (1) if the insured/subrogor *does not* seek recovery from the tortfeasor (for example, if she is content with her insurance proceeds, as often occurs in the context of insured property damage losses), the insurer/subrogee may pursue an action in the subrogor's name against the tortfeasor to recover reimbursement for the payments it advanced to the insured/subrogor⁶⁰; or (2) if the insured/subrogor *does* seek recovery from the tortfeasor, the insurer/subrogee has a right to receive reimbursement from any recovery the insured/subrogor obtains from the tortfeasor remaining after the insured/subrogor is fully compensated for her loss.⁶¹

But an insurer does *not* have a right of subrogation against its own insured:

“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.”⁶²

⁵⁹ *Mahler*, 135 Wn.2d at 413 (internal quotations omitted) (alterations in original).

⁶⁰ *See, Id.*, at 415-18

⁶¹ *Id.*

⁶² *Id.* at 419 (quoting *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976); 16 George J. Couch, *Insurance* § 61:136, at 195-96 (2d ed. 1983)).

Thus, if its own insured bears responsibility for a loss, the insurer has no right to sue the insured to recoup its PIP payment. Indeed, such a suit would defeat the very purpose of insurance. Here, this principle precluded Safeco from seeking reimbursement from its policyholder, Ms. Kangas, for the PIP benefits it paid to Ms. Weismann under the Kangas policy.

D. THE TRIAL COURT ERRED IN AWARDING *OLYMPIC STEAMSHIP FEES*

If this Court reverses the trial court's decision then there would be no basis for any award to Weismann of attorney fees under the *Olympic Steamship* doctrine because Weismann would no longer be a prevailing party. Accordingly, the award of *Olympic Steamship* fees should be reversed in conjunction with a decision reversing the trial court's orders on summary judgment.

But even in the event that the trial court's order regarding pro rata fee-sharing were not reversed, it would still be an error to award *Olympic Steamship* fees, and the decision to award such fees should be reversed because such fees are not warranted by law.

- 1. This is not a coverage dispute, but rather a dispute over the value of Safeco's right to offset; thus, *Olympic Steamship* fees are not warranted.**

In *Olympic Steamship*, the Washington Supreme Court held "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorneys fees, regardless of whether the duty to defend is at issue."⁶³

In *Mahler*, the Washington Supreme Court held that the insurance carrier was required to pay a proportionate share of its insured's litigation expenses to recover its PIP reimbursement. However, the Supreme Court also held that its decision did not involve a coverage issue but a dispute over the amount of recovery, which did not warrant an award of attorney's fees.⁶⁴

The Mahler Court distinguished a coverage dispute from a case involving PIP subrogation by ruling as follows:

In this case, the dispute between Mahler and State Farm is not a coverage dispute, but rather a dispute over the value of State Farm's subrogation interest. Both Mahler and State Farm agree State Farm has a right to be reimbursed for PIP benefits paid to Mahler. The dispute between them boils down to the value of that right of reimbursement. Insofar as the principal focus of this dispute is the value of State Farm's subrogation interest, *Dayton* controls rather than *Olympic S.S./McGreevy*. Mahler is not entitled to fees under this theory.⁶⁵

⁶³ *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d at 54. See also, *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 28, 904 P.2d 731 (1995) (reaffirming *Olympic Steamship*).

⁶⁴ *Mahler*, supra. 135 Wn.2d at 431, citing *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 876 P.2d 896 (1994) (fees not recoverable for dispute over amount of recovery).

⁶⁵ *Mahler*, supra. 135 Wn.2d at 432.

The issue regarding *Olympic Steamship* fees before this Court is identical to the issue before the court in *Mahler*. This is not a coverage dispute between Safeco and the Plaintiff. Indeed, Plaintiff has stipulated to the fact that Safeco paid the Plaintiff PIP insurance benefits. Moreover, both Safeco and Plaintiff agree that Safeco has a right to an offset for the PIP payments. Like *Mahler*, the dispute between the parties boils down to the value of that PIP offset. As such, Plaintiff is not entitled to *Olympic Steamship* fees because the principal focus of this dispute is not coverage and thus *Olympic Steamship* does not control.

2. *Mahler* is still controlling law on this subject, has not been overturned and was not analyzed or mentioned by *Safeco v. Woodley*.

Plaintiff Weismann has cited to *Safeco v. Woodley* to argue that she is entitled to *Olympic Steamship* fees in this case. However, *Mahler v. Szucs*, as illustrated above, is controlling law on this issue and the case has not been overturned.

The *Mahler* Court did a full analysis on why *Olympic Steamship* fees should not be assessed and are not allowed when seeking pro rata attorney fees from PIP reimbursement. In contrast, *Woodley* summarily concludes that *Olympic Steamship* fees should be rewarded without mentioning the precedent established by *Mahler*. Indeed, *Woodley* does

not even cite to *Mahler's* analysis of *Olympic Steamship* fees, and *Olympic Steamship* fees were not even an issue in *Winters*⁶⁶ and *Hamm*⁶⁷. *Mahler* thus remains controlling law and should be followed.

3. Plaintiff cannot recover *Olympic Steamship* fees because the PIP benefits and liability settlement were paid by the tortfeasor and Plaintiff had no part in creating the common fund.

The cases relied upon by Plaintiff, specifically *Woodley* and *Winters*, involve tortfeasors who were not insured for liability under the same policy that paid Plaintiffs' PIP benefits. In those cases, when an ultimate recovery was obtained from the tortfeasor or UIM carrier, or combination of both, a common fund was created and the insurer was obligated to pay a pro rata share of expenses when it sought reimbursement of the PIP benefits it paid earlier.⁶⁸ Conversely, in this case, as discussed above, because the PIP benefits and the liability settlement were paid by the tortfeasor's insurer, no common fund was created.

The important difference between this case and *Woodley* is the operation of the collateral source rule. Where the PIP payments come from the tortfeasor's policy, the collateral source rule does not apply, and

⁶⁶ *Winters v. State Farm Mutual Auto Insurance Co.*, 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001).

⁶⁷ *Hamm v. State Farm Mutual Auto Insurance Co.*, *supra*.

⁶⁸ *Id.* at 321.

there is no common fund. Because no common fund was created where the PIP payments were made on the tortfeasor's behalf, it follows that the dispute between Safeco and Weisman is not a coverage dispute.

The trial court already awarded a pro rata share of the attorneys fees from Safeco's PIP offset, even though no common fund has been created. To extend that ruling to include *Olympic Steamship* fees would be inappropriate and in direct conflict with the ruling made in *Mahler v. Szucs*.

VI. CONCLUSION

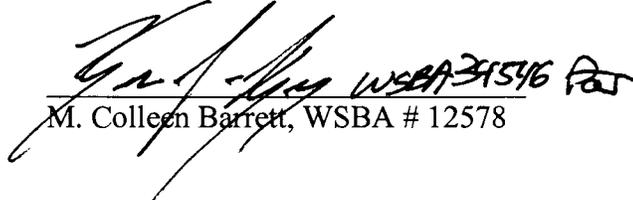
Young v. Teti is directly on point, has not been overruled, and allowed Safeco to offset the PIP payments made under the tortfeasor's policy without any obligation to pay the Plaintiff a pro rata share of attorney fees. Safeco acted properly and in accordance with that case law when it did not reduce the PIP offset.

The trial court erroneously rejected *Young* as having been impliedly overruled. For the aforementioned reasons, this Court should correct the trial court's error. In doing so, this Court should reverse the trial court's order granting Plaintiff summary judgment and awarding Plaintiff *Olympic Steamship* fees, and this Court should grant summary judgment to Safeco such that Plaintiff's complaint for breach of contract,

violations of the Consumer Protection Act, and violations of Insurance
Fair Conduct Act is dismissed.

Respectfully submitted this 6th day of August, 2009.

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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 Appellant's Brief to be served via the methods below on the 6th day of ~~July~~ AUGUST, 2009 on the following counsel/party of record:

PARTY/COUNSEL	METHOD OF DELIVERY
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