

NO. 48270-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TAYLOR R. GILBERT,

Appellant,

v.

BRIAN BLYTH, and JULIE BLYTH, husband and wife, and
MATTHEW BLYTH,

Respondents.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiff Taylor R. Gilbert was the passenger in a car driven by defendant Matthew Blyth. The car was owned and insured by Matthew Blyth's parents, defendants Brian Blyth and Julie Blyth. Matthew Blyth caused a motor vehicle collision when he failed to stop at a stop sign. Ms. Gilbert was injured when the car was struck in the intersection. Gilbert sued the Blyths for her injuries and damages resulting from the collision.

As a passenger in the car, Gilbert was an insured under the personal injury protection (PIP) coverage of the Blyths' policy with Allstate as well as under her own policy with USAA. Gilbert exhausted the Allstate PIP benefits of \$35,000, which was paid directly to her medical providers.

Shortly before trial, the Blyths offered to have judgment entered against them for \$55,249.00 but sought to have the judgment offset by the \$35,000 PIP benefits paid to Gilbert's medical providers by Allstate. Gilbert accepted the offer to have judgment entered against the Blyths for \$55,249.00, but disputed there were any legal grounds to offset the liability judgment against the Blyths by the PIP benefits paid to her medical providers. After a hearing on the matter, the trial court entered judgment and an order offsetting the judgment by the full \$35,000 PIP benefits Allstate paid to Gilbert's medical providers.

Gilbert appeals the order of offset because (1) tortfeasors are not entitled to have their liability judgments offset by PIP payments, (2) the dispute between plaintiff and Allstate as to whether the PIP insurer has a right to reimbursement is not properly before the court because the PIP insurer is not a party to the lawsuit, and (3) CR 68 does not authorize a non-party PIP insurer to violate the Consumer Protection Act and insurance regulations and to avoid application of well-established law.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in ordering the judgment entered against the tortfeasor defendants be offset by \$35,000 for PIP funds paid to plaintiff's medical providers.

Issues Pertaining to Assignments of Error

1. Does Washington treat payments made by a PIP insurer as being made by the tortfeasor entitling the tortfeasor to a setoff for the full amount of PIP benefits paid? (Assignment of Error No. 1)

2. Whether the well-established full compensation/made whole and pro rata legal expense sharing rules apply in cases where a PIP insurer also provides the tortfeasor's liability coverage? (Assignment of Error No. 1)

3. Whether the dispute regarding a right of reimbursement between plaintiff Gilbert and the non-party PIP insurer Allstate was properly before the trial court in plaintiff's lawsuit against the tortfeasor defendants Blyth? (Assignment of Error No. 1)

4. Whether a non-party PIP insurer may use CR 68 to avoid well-established law and to violate the Consumer Protection Act and insurance regulations? (Assignment of Error No. 1)

III. STATEMENT OF THE CASE

A. Plaintiff was injured in a July 2011 motor vehicle collision.

In July 2011, defendant Matthew Blyth was driving a car owned and insured by his parents, defendants Brian Blyth and Julie Blyth. Matthew Blyth failed to stop at a stop sign causing a t-bone type collision in the intersection. Plaintiff Taylor Gilbert was the front seat passenger in the car driven by defendant Blyth. Gilbert was injured in the collision.¹

B. Gilbert received PIP coverage from the same insurer that provided the Blyths' liability coverage.

The Blyths were insured by Allstate. The Blyths' insurance included liability coverage and personal injury protection (PIP) coverage. Gilbert received PIP coverage under the Blyths' Allstate policy. After the \$35,000 PIP benefits available to Gilbert under the Allstate policy were

¹ See CP 25-26.

exhausted, Gilbert received PIP coverage under a USAA policy and paid for medical expenses out of pocket.²

C. Gilbert filed suit against the Blyths and accepted the Blyths' offer to have judgment entered against them for \$55,249.00.

Gilbert filed suit against the Blyths seeking compensation for her injuries and damages caused by the collision. Gilbert did not assert any claims against Allstate, nor did Gilbert name Allstate as a party to the lawsuit. Further, Allstate did not intervene in the lawsuit.³

Initially, Allstate defense counsel emailed an "Offer of Settlement" to plaintiff's counsel. CP 21-23. Plaintiff's counsel sought clarification in an exchange of emails. CP 20-21. In response, Allstate defense counsel emailed an "Offer of Judgment." CP 18, 36-37. The Offer of Judgment provides in full:

Brian Blyth, Julie Blyth and Matthew Blyth, pursuant to CR 68, offers to allow judgment to be entered against them in this matter for \$55,249.00 (Fifty Five Thousand Two Hundred and Forty Nine Dollars and 00/100) Dollars. This \$55,249.00 is inclusive of \$35,000 in PIP benefits that have already been paid. [T]hus defendant offers \$20,249.00 new money after the offset of the \$35,000.00 already paid. This total amount includes taxable costs and Mahler fees and all other attorney fees incurred to date.

² See *Id.*

³ See *Id.*

This Offer of Judgment includes the entire claim of the plaintiff and any and all liens and/or subrogation interest of all parties, persons or entities.

These Defendants expressly deny liability and state that this Offer of Judgment is for purposes of settlement only.

CP 36 (emphasis added).

Plaintiff's counsel then wrote to Gilbert's PIP insurers requesting an acknowledgement that Gilbert would not be made whole if she accepted the offer to have judgment entered against the Blyths for \$55,249.00, and thus there would be no right to PIP reimbursement, or an acceptance of an assignment of Gilbert's claims in exchange for a payment to buyout Gilbert's claim against the tortfeasors. CP 25-26. USAA acknowledged no right to PIP reimbursement, under the circumstances, and Allstate did not respond. CP 19.

Gilbert filed the Offer of Judgment and Plaintiff's Notice of Acceptance of CR 68 Offer of Judgment. CP 34-35. Plaintiff's Notice of Acceptance of CR 68 Offer of Judgment provides in full:

Plaintiff, Taylor R. Gilbert, pursuant to CR 68, accepts Defendants Brian Blyth, Julie Blyth, and Matthew Blyth's offer to allow judgment to be entered against them in the amount of \$55,249.00 (Fifty Five Thousand Two Hundred Forty Nine 00/100 Dollars), including taxable costs and attorney fees.

Defendants are not entitled to an offset of the judgment because they have

paid no sums to Plaintiff. Allstate is not a party to this action, and Plaintiff does not agree to enter into an agreement with Allstate regarding disputed issues related to PIP benefits paid by Allstate.

CP 34 (emphasis added).

Gilbert moved for entry of judgment in the amount of \$55,249.00 against the Blyths under CR 68. CP 39-42. The Blyths responded that the judgment against them should be offset by the full amount of PIP benefits paid by Allstate. CP 27-32. Gilbert replied that the PIP benefits were not paid on behalf of the Blyths, and thus they were not entitled to an offset; that the PIP insurer Allstate was not a party to the lawsuit, and thus the dispute over its right of reimbursement was not before the court; and that CR 68 was limited to the named defendants. CP 11-16.

D. Over Gilbert's objection, the trial court offset the judgment against the Blyths by \$35,000 for the full amount of PIP benefits Allstate paid to Gilbert's medical providers.

On October 19, 2015, the trial court heard oral argument on the motion for entry of judgment. RP 1-15. The trial court entered judgment against the Blyths for \$55,249.00. CP 4-6. The trial court also entered an order offsetting the judgment by the full \$35,000 PIP benefits Allstate paid to Gilbert's medical providers. CP 7. Gilbert timely appealed.

IV. ARGUMENT

A. Standard of Review

Appellate courts review a trial court's decision to grant an offset for an abuse of discretion.⁴ A court abuses its discretion if its decision is not based upon tenable grounds or reasons.⁵ Issues involving construction of an offer of judgment are reviewed de novo, while factual disputes concerning the circumstances regarding offers of judgment are usually reviewed for clear error.⁶

B. The Blyths are not entitled to an offset for PIP funds Allstate paid to Gilbert's medical providers.

The trial court's decision to grant the tortfeasors an offset for payment of PIP benefits to plaintiff's medical providers lacks a tenable basis because it is well established under Washington law that: (a) unlike payments under liability and UIM coverage, payments under PIP coverage are not treated as having been made on behalf of the tortfeasor, even when the same insurer provides both liability and PIP coverage; (b) PIP insurers have no right to reimbursement until the injured party is fully compensated; and (c) PIP insurers must pay their pro rata share of legal expenses to obtain reimbursement. Additionally, there is no tenable basis for the grant of an offset because the dispute between Gilbert and the non-

⁴ *Eagle Point Condo Owners Assoc. v. Coy*, 102 Wn.App. 697, 701, 9 P.3d 898 (2000).

⁵ *Id.*

⁶ *Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wn.App. 261, 266, 131 P.3d 910 (2006).

party PIP insurer, Allstate, is not properly before the trial court and there is no legal basis for the trial court to ignore the explicit language of Gilbert's acceptance. Finally, the grant of an offset lacks a tenable basis because CR 68 is not a vehicle for non-party PIP insurers to avoid application of well-established law and to violate the Consumer Protection Act, RCW 19.86 and insurance regulations, such as WAC 284-30-330.

- 1. From *Mahler* to *Matsyuk*, the Washington Supreme Court has consistently recognized that PIP coverage is separate from liability or UIM coverage, even when provided by the same insurer.**

In establishing and extending the rule that PIP insurers must pay a pro rata share of legal expenses incurred by a PIP insured to create a common fund from which the PIP insurer has a right to reimbursement, the Washington Supreme Court has consistently recognized a distinction between payments made under PIP coverage versus payments made under liability or UIM coverage. Payments made from the tortfeasor's liability coverage or the injured insured's UIM coverage are treated as if made by the tortfeasor.⁷ Because liability and UIM payments are treated as if made by the tortfeasor, the carrier is entitled to setoff or credit the full amount of any recovery treated as if made by the tortfeasor and is not required to pay pro rata legal expenses to take the setoff or credit.⁸

⁷ *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 880, 31 P.3d 1164 (2001).

⁸ *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 308, 88 P.3d 395 (2004).

In contrast, payments made under PIP coverage are not treated as if made by the tortfeasor. A UIM carrier cannot setoff the full amount of PIP payments, even if the UIM and PIP carriers are one in the same.⁹ Rather, a PIP insurer may take an offset only if the PIP insured has been fully compensated and the PIP insurer pays its pro rata share of legal expenses incurred by the PIP insured to create a common fund.¹⁰

The *Winters* court held that the PIP insured should not be worse off simply because one insurance carrier provides two types of coverage, and the *Hamm* court reaffirmed this holding.¹¹ The *Hamm* court explicitly discussed the distinction between different types of coverage, even when provided by the same insurer, and made clear that the offset is for the benefit of the PIP insurer and not for the benefit of the insurer whose payments are treated as if made by the tortfeasor.¹²

In *Matsyuk*, the plaintiffs “recovered PIP funds as insured, under policies held by the tortfeasors, and then incurred [legal expenses] in recovering from the tortfeasors’ liability insurance provided by the same carrier.”¹³ This case presents the same circumstances. The court explicitly

⁹ *Hamm*, 151 Wn.2d at 309; *Winters*, 144 Wn.2d at 881-83.

¹⁰ See e.g., *Winters*, 144 Wn.2d 869.

¹¹ *Winters*, 144 Wn.2d at 882; *Hamm*, 151 Wn.2d at 317-18.

¹² *Hamm*, 151 Wn.2d at 322 (“An insurance company may not, however, style this offset as a reduction of an amount owed under UIM coverage, rather than a PIP reimbursement, in order to avoid paying a pro rata share of the insured legal expenses.”).

¹³ *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 647, 272 P.3d 802 (2012).

identifies the plaintiffs in *Matsyuk* as PIP insureds under the tortfeasors' policies, and the funds the insurers paid through the PIP policies held by the tortfeasors were not treated as if made by the tortfeasors entitling the insurers to take a full setoff. Rather, *Matsyuk* held PIP and liability policies are separate and the well-established rules of full compensation/made whole and pro rata legal expenses sharing apply.¹⁴

Applying the well-established law to this case, Allstate's PIP policy is separate from the liability policy; and payments made from the PIP policy should not be treated as if made by the Blyths entitling them to a full setoff. Rather, the PIP payments are subject to the well-established full compensation/made whole and pro rata legal expenses sharing rules. Accordingly, the trial court's order regarding offset lacks tenable grounds and should be reversed because it failed to apply and is contrary to these well-established and applicable rules.

2. PIP insurers in Washington have no right to reimbursement until the injured plaintiff has been fully compensated and made whole.

Since 1978, the Washington Supreme Court has repeatedly and consistently recognized and held that no right of reimbursement exists for a PIP insurer from a PIP insured until the insured is fully compensated for

¹⁴ *Matsyuk*, 173 Wn.2d at 655-56.

a loss.¹⁵ For example, in *Winters*, the court recognized the insurer may be entitled to an offset or credit for payments made under one coverage against claims made under another coverage, however, “whatever term is used, the insured must be fully compensated before the insurer may recoup benefits paid.”¹⁶

As addressed in more detail in Section C below, the issue of whether Gilbert has been fully compensated and made whole by a judgment of \$55,249.00 has not been decided and was not before the trial court. “A PIP insured creates a common fund when, after receiving PIP payments, he or she recovers full compensation from the tortfeasor.”¹⁷ Accordingly, until a plaintiff has been fully compensated, there is no common fund from which a PIP insurer has a right to reimbursement.¹⁸ Because there is no evidentiary finding that payments to satisfy the judgment Gilbert obtained through acceptance of an offer of judgment

¹⁵ *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 21-3, 25 P.3d 997 (2001) (“A PIP insured cannot be required to reimburse the insurer unless and until the insured is fully compensated.”); *Winters*, 144 Wn.2d at 876, 878-879 (long established principle that an insurer is not entitled to recover until its insured is fully compensated and made whole); *Mahler v. Szucs*, 135 Wn.2d 398, 417, 424, 957 P.2d 632 (1998) (“no right of reimbursement existed for the insurer until the insured was fully compensated”) and (citing *Thiringer* for the rule that an insurer is not entitled to any recovery of its PIP payments until its insured has been made whole).

¹⁶ *Winters*, 144 Wn.2d at 876.

¹⁷ *Winters*, 144 Wn.2d at 879.

¹⁸ *Matsyuk*, 173 Wn.2d at 650-652 (recognizing a common fund is created when the plaintiff recovers under a PIP policy and liability policy that fully compensates plaintiff, even if the insurer is on both sides of the ledger).

under CR 68 fully compensates Gilbert,¹⁹ the trial court's order regarding offset lacks tenable grounds and should be reversed.

3. PIP insurers must pay their pro rata share of legal expenses in order to be reimbursed from common funds secured by injured insureds.

In *Mahler*, the court established the pro rata legal expense sharing rule for cases in which the tortfeasor is fully insured.²⁰ In *Winters*, the court extended the rule to cases in which the tortfeasor is underinsured.²¹ In *Hamm*, the court extended the rule to cases where the tortfeasor is uninsured.²² In *Matsyuk*, the court extended the rule to cases like this one where the tortfeasor's liability carrier also provides PIP coverage to the injured party.²³

Before a PIP insurer is entitled to enforce a right of reimbursement from a common fund created by an injured PIP insured's efforts, it must pay its pro rata share of the legal expenses (both costs and attorney fees) incurred by the injured PIP insured to create the common fund; because if the insured is forced to pay the expenses associated with recovery for the PIP insurer, then the insured is left less than fully compensated in

¹⁹ See *Bierce v. Grubbs*, 84 Wn.App. 640, 929 P.2d 1142 (1997).

²⁰ *Mahler v. Szucs*, 135 Wn.2d at 424.

²¹ *Winters*, 144 Wn.2d at 882.

²² *Hamm*, 151 Wn.2d at 317-18.

²³ *Matsyuk*, 173 Wn.2d at 658.

violation of Washington's public policy and well-established full compensation/made whole rule.²⁴

Because the rule from *Matsyuk* applies to this case, if the PIP insurer, Allstate is able to establish that payment of the judgment fully compensates Gilbert, then in order for Allstate to enforce a right of reimbursement of PIP payments, Allstate must pay its pro rata share of the legal expenses Gilbert incurred to secure the judgment, which created the common fund. Because the trial court's order regarding offset fails to apply and is contrary to *Matsyuk* by forcing Gilbert to pay Allstate's pro rata share of legal expenses to obtain the judgment, it lacks tenable grounds and should be reversed.

4. **The Blyths' argument that they are entitled to a full setoff against the judgment for PIP funds Allstate paid to Gilbert's medical providers is without merit because it is undisputed that the payments were made under the PIP policy rather than the liability policy.**

Washington courts recognize PIP coverage and liability coverage as "distinct policies" with each policy treated as "a separate silo, so to speak."²⁵ It is undisputed that the \$35,000 Allstate paid to Gilbert's medical providers was paid under the PIP policy and not the liability policy. Thus, Washington courts do not treat the payments as if they were made by the tortfeasors. Because the payments were not made by the

²⁴ *Winters*, 144 Wn.2d at 878-79.

²⁵ *Matsyuk*, 173 Wn.2d at 655.

Blyths and are not treated as being made by the Blyths under Washington law, there is no tenable ground for setting off the judgment by the payments.

Whether Allstate has a right to reimbursement from payment of the judgment depends on its ability to prove that Gilbert was fully compensated and made whole by payment of the judgment and Allstate's payment of its pro rata share of legal expenses Gilbert incurred to secure payment of the judgment. As discussed below, because Allstate is not a party to this lawsuit and the acceptance of an offer of judgment does not establish that Gilbert was fully compensated and made whole, the trial court's order which implicitly addresses these issues is without tenable grounds and should be reversed.

C. The right of reimbursement dispute between Gilbert and Allstate, who is not a party to this lawsuit, was not before the trial court.

Parties injured in motor vehicle collisions have claims against the at-fault drivers/tortfeasors, but not against the tortfeasor's insurance carriers.²⁶ Accordingly, Gilbert, who was injured in a motor vehicle collision, filed claims in this lawsuit against the Blyths and not Allstate. The only parties to this lawsuit are Gilbert and the Blyths. Allstate, which provided the Blyths' liability coverage and PIP coverage to Gilbert, is not

²⁶ *Mahler*, 135 Wn.2d at 423.

a party to this lawsuit, and the dispute between Gilbert as PIP insured and Allstate as PIP insurer over a right of reimbursement was not before the trial court.

A PIP insurer may have a right to reimbursement if its policy so provides.²⁷ In this case, the issue of whether the non-party PIP insurer, Allstate, maintained a right to reimbursement is not before the court. The PIP policy is not in evidence and would not be admissible because it is not relevant to Gilbert's claims against the Blyths.

Further, even if Allstate, the PIP insurer, maintained a right to reimbursement in the policy, Allstate may not recover before Gilbert, the PIP insured, has been fully compensated.²⁸ Accepting an offer of judgment does not establish whether a plaintiff has been made whole and fully compensated.²⁹

In *Bierce*, the Court of Appeals was asked to decide if an insurer that made PIP payments was entitled to reimbursement out of an accepted offer of judgment without evidence or findings that the plaintiff had been fully compensated by the judgment.³⁰ *Bierce* recognized the well-

²⁷ *Winters*, 144 Wn.2d at 881; *Mahler*, 135 Wn.2d at 420.

²⁸ See *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 219-220, 588 P.2d 191 (1978)(articulating rule of full compensation).

²⁹ *Bierce v. Grubbs*, 84 Wn.App. 640, 642, 929 P.2d 1142 (1997); cf *Liberty*, 144 Wn.2d at 22-3 (holding no presumption of full compensation upon settlement acceptance and it was unknown if the plaintiffs had been fully compensated by the settlement).

³⁰ *Bierce*, 84 Wn.App. at 642.

established principle that PIP insurers may seek reimbursement only if the injured party has been fully compensated and made whole.³¹ Applying the rule, *Bierce* reversed the trial court's order requiring reimbursement to the PIP insurer because there was no evidentiary finding that the plaintiff was fully compensated by payment of the judgment.³²

Similarly in this case, there has been no jury trial or other evidentiary hearing to determine whether Gilbert is made whole and fully compensated by a judgment of \$55,249.00. Thus, there is no tenable basis for the trial court to implicitly reach such a conclusion.

Moreover, Washington courts recognize that noneconomic damages for personal injuries caused by auto collisions typically amount to many multiples of the economic damages.³³ For example, the plaintiff's noneconomic damages in *Mahler* were 4.8 times the amount of PIP benefits paid,³⁴ and the more recent examples in *Matsyuk* demonstrate noneconomic damages ranging from 2.1 to 3.9 times PIP benefits paid.³⁵ In this case, even if Gilbert's noneconomic damages are found to be equal to and not a multiple of the PIP benefits paid, then Gilbert is not fully

³¹ *Id.*

³² *Id.*, at 642-646.

³³ See e.g., *Mahler*, 135 Wn.2d at 414, 426 (“[T]he claimed noneconomic damages typically amount to many multiples of the economic damages and are almost always disputed because they are not objectively ascertainable.”).

³⁴ *Mahler*, 135 Wn.2d at 405-06 (\$4,173.32 in PIP benefits and \$24,250.00 settlement).

³⁵ *Matsyuk*, 173 Wn.2d at 648-49 (Matsyuk's general damages were 2.1 times PIP benefits; and Weismann's general damages were 3.9 times PIP benefits).

compensated by the judgment. Because Allstate is not a party to this lawsuit, the dispute between Allstate and Gilbert as to whether Allstate has a right of reimbursement for PIP benefits paid to plaintiff's medical providers was not before the trial court. There is no tenable basis for the trial court to determine Gilbert was fully compensated by the judgment, which is necessary before a right to reimbursement exists. Therefore, the order regarding offset should be reversed.

D. A non-party PIP insurer may not use CR 68 to avoid application of well-established law and to violate the Consumer Protection Act and insurance regulations.

CR 68 encourages parties to resolve their claims by shifting post offer costs to a plaintiff who rejects a defendant's CR 68 offer of judgment and does not achieve a more favorable result at trial.³⁶ Thus, in this case, as Allstate defense counsel clarified, if Gilbert rejected the Blyths' offer of judgment, Gilbert risked paying the Blyths' post offer costs if Gilbert did not achieve a result at trial more favorable than \$55,249.00. The purpose of the rule³⁷ is to allow parties to resolve the plaintiff's claims against the

³⁶ *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn.App. 571, 581, 271 P.3d 899 (2012).

³⁷ CR 68 provides in relevant part:

... a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the defendant party's offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. ... If the judgment finally obtained by the offeree is not more

defendants, not to allow a non-party PIP insurer to avoid application of well-established law and to violate the Consumer Protection Act, RCW 19.86, and insurance regulations such as WAC 284-30-330(12).

As discussed in Section B.2 above, it is well-established law in Washington that a PIP insurer is not entitled to a right of reimbursement until after an injured PIP insured has been fully compensated. CR 68 does not authorize a non-party insurer to avoid application of this rule. Nor is it likely that the Washington State Supreme Court would construe CR 68 to allow non-party PIP insurers to avoid the well-established rule in light of the court's consistent recognition of Washington's strong policy of fully compensating collision victims.³⁸

Similarly, CR 68 does not authorize a non-party PIP insurer to avoid application of the rule that a PIP insurer must pay its pro rata share of legal expenses to enforce a right of reimbursement. Washington courts do not allow PIP insurers to call a PIP reimbursement a reduction in an amount owed under liability coverage in order to avoid the pro rata legal expense sharing rule.³⁹ Further, it is unlikely that the Washington State Supreme Court would construe CR 68 as a vehicle for non-party PIP

favorable than the offer, the offeree must pay the costs incurred after the making of the offer. ...

³⁸ See e.g., *Jain v. State Farm*, 130 Wn.2d 688, 694, 926 P.2d 923 (1996).

³⁹ *Matsyuk*, 173 Wn.2d at 657; *Hamm*, 151 Wn.2d at 321 (an insurer cannot style a PIP offset as a UIM reduction in order to avoid paying its pro rata share of legal expenses).

insurers to avoid application of the pro rata legal expense sharing rule because in *Matsyuk* that court disapproved reducing a jury award by the full amount of PIP benefits paid under a policy held by the tortfeasor,⁴⁰ reaffirmed its holdings in *Hamm*,⁴¹ and extended the rule to cases, like this one, in which the tortfeasor's insurance carrier provides both liability coverage and PIP coverage.⁴²

An insured may pursue a single violation of insurance regulation WAC 284-30-330 as a per se unfair trade practice in violation of the Consumer Protection Act, RCW 19.86.⁴³ "Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage"⁴⁴ is defined "as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims."⁴⁵ It is a violation of the insurance regulation for an insurer to require the PIP insured to waive her objections to reimbursement and her claims for pro rata legal expenses if there is reimbursement (*i.e.* PIP

⁴⁰ *Matsyuk*, 173 Wn.2d at 654-55, 657 (disapproving *Young v. Teti*, 104 Wn.App. 721, 16 P.3d 1275 (2001)).

⁴¹ *Id.* at 650, 658, 663.

⁴² *Id.*

⁴³ *Industrial Indemnity Co., Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990).

⁴⁴ WAC 284-30-330(12).

⁴⁵ WAC 284-30-330.

benefits)⁴⁶ in order for the PIP insured to obtain benefits under another coverage such as liability.⁴⁷

CR 68 does not authorize PIP insurers to violate insurance regulations such as WAC 284-30-330(12) and the Consumer Protection Act, RCW 19.86. Gilbert explicitly stated in her notice of acceptance that while she accepted the Blyths' offer to have judgment entered against them for \$55,249.00, they were not entitled to an offset, and "[p]laintiff does not agree to enter into an agreement with Allstate regarding disputed issues related to PIP benefits paid by Allstate." CP 34. There are no tenable grounds for the trial court to ignore the explicit language of Gilbert's notice of acceptance⁴⁸ and to allow Allstate to avoid application of the well-established full compensation/made whole and pro rata legal expense sharing rules, and to violate WAC 284-30-330(12) and the Consumer Protection Act. Accordingly, the trial court's order regarding offset should be reversed.

⁴⁶ *Matsyuk*, 173 Wn.2d at 659 (PIP coverage includes the right to be fully compensated and pro rata share of legal expenses incurred to create a common fund).

⁴⁷ *See Jain*, 130 Wn.2d at 691 n.3.

⁴⁸ *See Hodge v. Development Services of America*, 65 Wn.App. 576, 583, 828 P.2d 1175 (1992).

E. Gilbert is entitled to her attorney fees on appeal under *Olympic Steamship* and *Matsyuk*.

Pursuant to RAP 18.1, Gilbert asks the Court of Appeals for an award of her attorney fees on appeal pursuant to *Olympic Steamship*⁴⁹ and *Matsyuk*.⁵⁰ *Olympic Steamship* fees are appropriate in this case because otherwise, Gilbert would not be made whole because the coverage she was entitled to receive⁵¹ would be reduced by the attorney fees she incurred to obtain the coverage. Moreover, *Olympic Steamship* fees are appropriate on appeal in this case because without the fees, Allstate has little economic incentive to provide coverage without a fight if the most Allstate would be required to pay if it lost the legal battle is the amount Allstate should have paid in the first place. Just as Weismann, a pedestrian insured under the tortfeasor's PIP policy, had a right to receive *Olympic Steamship* fees on appeal in *Matsyuk*, and for the same reasons,⁵² Gilbert has a right to receive *Olympic Steamship* fees on appeal in this case.

V. CONCLUSION

For the above reasons, the Court of Appeals should reverse the order regarding offset, award Gilbert *Olympic Steamship* fees, and remand for further proceedings consistent with its opinion.

⁴⁹ *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

⁵⁰ *Matsyuk*, 173 Wn.2d at 658-62.

⁵¹ See *Matsyuk*, 173 Wn.2d at 659 (PIP coverage includes right to be fully compensated and pro rata share of legal expenses incurred to create a common fund).

⁵² See *Matsyuk*, 173 Wn.2d 658-62.

RESPECTFULLY SUBMITTED this 21st day of March, 2016.

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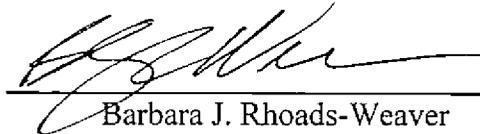
I hereby certify that on this 21st day of March, 2016, I caused to be sent for filing the foregoing OPENING BRIEF OF APPELLANT via first-class mail to the following:

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Washington State Court of Appeals, Division Two
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Tacoma, WA 98402-4454

I further certify that on this day, I caused the foregoing OPENING BRIEF OF APPELLANT to be sent for service via first-class mail to the following:

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Declared under penalty of perjury under the laws of the State of Washington and executed at Seattle, Washington, this 21st day of March, 2016.


Barbara J. Rhoads-Weaver

SUSTAINABLE LAW PLLC

March 21, 2016 - 9:12 AM

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