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SUPREME COURT
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May 16, 2011, 4:43 pm
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No. 84686-3
(Consolidated with No. 85012-7)

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SUPREME COURT OF THE STATE OF WASHINGTON

OLGA MATSYUK, individually,
and on behalf of all those similarly situated,

Petitioner,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

**PETITIONER OLGA MATSYUK'S ANSWER TO AMICUS BRIEF
OF WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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I. INTRODUCTION

Petitioner Olga Matsyuk, plaintiff and proposed class action representative below, submits this answer to the amicus brief filed by the Washington State Association for Justice Foundation (“WSAJF”). In summary, Matsyuk substantially agrees with the argument submitted by WSAJF.

II. ARGUMENT

A. There Are No “Lesser Classes” Of PIP Insureds

As pointed out by WSAJF, an “insured” for purposes of PIP coverage is defined by the PIP statute. It includes passengers in a covered vehicle, such as Ms. Matsyuk. RCW § 48.22.005(5)(b). There is nothing in the PIP statute that evidences an intent to create separate categories or classes of PIP insureds, or to treat PIP insureds differently for any reason, such as whether they purchased the insurance policy.¹

This principle of equal treatment of all “insureds” is consistent with and reflected in more recently enacted insurance law, such as the Insurance Fair Conduct Act (“IFCA”). The rights afforded under IFCA are equally available to “[a]ny first party claimant.” RCW § 48.30.015(1) (emphasis added). As WSAJF points out, there has been some not entirely

¹ This is also true under the definition of “insured” for the State Farm PIP coverage, which likewise does not indicate any different classes of, or different rights or entitlements for PIP insureds. *See* CP 90.

clear discussion of PIP insureds as “third party” beneficiaries of the insurance contract,² and whether any such discussion is meaningful in any event.³ In this context, the term third party “beneficiary” is not particularly apt or useful. The IFCA statute, for example, focuses on the person’s status as an insured, defining a “first party claimant” as any person “asserting a right to payment *as a covered person* under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.” RCW § 48.30.015(4) (emphasis added). In short, both PIP insureds here, Matsyuk and Weismann, are first party claimants, and under the foregoing guiding principles and contemporary Washington insurance law are entitled to the same treatment as any other PIP insured/claimant.

B. The Proportional Sharing Rule Is Meant Not Only To Treat All Insureds Equally, But To Treat All Insurers Equally As Well

WSAJF states that “Proportional sharing of legal expenses is necessary to assure full compensation for the plaintiff-insured and to avoid disadvantaging the plaintiff-insured solely because both liability and PIP

² State Farm has used that term and the term “serendipitous beneficiary,” even while acknowledging that Matsyuk is clearly an “insured” under the policy for purposes of PIP, and clearly a *first party claimant*.

³ The *Matsyuk* Court erroneously believed it was. *Matsyuk v. State Farm Fire and Cas. Co.*, 155 Wn. App. 324, 229 P.3d 893, *rev. granted*, 170 Wn.2d 1008 (2010).

coverages are provided by the same insurer.” WSAJF Br. at 5. Matsyuk takes no issue with this statement so far as it goes. But the equitable sharing rule is not designed solely to ensure that *insureds* are not disadvantaged in such a situation, but also to ensure that *two separate insurers* would not be disadvantaged in a similar situation. See, e.g., *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 317, 88 P.3d 395 (2004). Here, if State Farm as PIP insurer is permitted to avoid paying its share of legal expense for the liability recovery, it will obtain a windfall as compared to the result if two insurers had provided the PIP and liability coverages, respectively. Such an inequitable result was rejected in *Hamm*.

C. Matsyuk Should Not Be Disadvantaged Simply Because State Farm Provides The Two Coverages

WSAJF argues that absent application of the equitable legal expense sharing rule, Matsyuk (and Weismann) will be worse off as compared to if the two coverages were provided by two insurers. WSAJF Br. at 11. Although State Farm has argued otherwise and provided spurious, misstated tables,⁴ the tables below (which parallel Tables A & C in *Hamm*) clearly show that WSAJF is correct.

⁴ WSAJF also takes issue with State Farm’s tables. See WSAJF Br. at 16, n.12.

Table A		
PIP & Liability Payments From Two Separate Insurers: A & B		
Equitable Sharing Rule Applied		
PIP benefits from insurance company A	+	1,874.00
Liability recovery from insurance company B	+	5,874.00
Legal expense incurred to make liability recovery ⁵	-	1,958.00
Reimbursement to PIP carrier	-	1,874.00
PIP pro rata share of legal expenses	+	652.67
Matsyuk's total recovery	=	\$4,568.67

Table B		
PIP & Liability Payments From One Insurer (State Farm);		
Equitable Sharing Rule Avoided		
PIP benefits from State Farm	+	1,874.00
Liability recovery from State Farm	+	5,874.00
Legal expense incurred to make liability recovery	-	1,958.00
Reimbursement offset	-	1,874.00
PIP pro rata share of legal expenses	+	0.00
Matsyuk's total recovery	=	\$3,916.00

⁵ The actual legal expense by Ms. Matsyuk incurred is not part of the record, but is indicated as one-third of the recovery for purposes of the two tables.

Similarly, the tables above also reveal that the two separate insurance companies represented in Table A are disadvantaged as compared to State Farm in Table B (insurer A and B are collectively out of pocket \$4,652.67, while State Farm is only out of pocket \$4,000). As discussed above, such a result is likewise contrary to *Hamm* (a dilemma State Farm has never been able to address).

D. WSAJF Is Correct That The Reasoning Of *Young v. Teti* Is Untenable And Must Be Rejected

WSAJF argues the reasoning of *Young v. Teti*, which relied on distinguishing the PIP insured as not really an “insured” but as some sort of lesser “third party beneficiary,” is untenable under the PIP statute. *See* WSAJF Br. at 13. WSAJF accurately points out that the PIP statute is read into every insurance contract.⁶ *See* WSAJF Br. at 13 (citation omitted). For the reasons stated by WSAJF, and as discussed above, *supra*, Part II.A, WSAJF is correct. In short, Matsyuk⁷ is unquestionably an “insured” under the PIP statute, the undisputed facts of this case, and a first party claimant under policy and Washington insurance law.

⁶ WSAJF does not address Matsyuk’s separate contract-based argument. As noted above, Matsyuk contends that the language of the State Farm contract would independently require the result she seeks even if the insurance common law did not.

⁷ And Weismann as well.

E. WSAJF Is Correct That The Collateral Source Rule Has No Bearing Here

WSAJF points out that the *Matsyuk* decision is in part based on the collateral source rule. WSAJF Br. at 14. The collateral source rule is a rule of evidence applicable to an action between an injured plaintiff and the alleged tortfeasor defendant. In general, it “operates to prevent a defendant from receiving the benefit of payments made to a plaintiff from a source independent of the defendant.”⁸ *Xieng v. Peoples National Bank*, 120 Wn.2d 512, 523, 844 P.2d 389 (1993) (citing *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804, 585 P.2d 1182 (1978)).

WSAJF argues that it is doubtful the collateral source rule has any bearing on the right of reimbursement⁹ at issue here. *See* WSAJF Br. at 14-15. *Matsyuk* agrees that the collateral source rule has no bearing here.¹⁰ This case does not involve questions concerning the rights and

⁸ Underlying the rule is the rationale that if there is to be a windfall in a collateral payment situation, as between the tortfeasor and the injured plaintiff, the equities favor the injured plaintiff as the appropriate recipient of the windfall. *See id.* at 524 (citing *Ciminski*, 90 Wn.2d at 805-06).

⁹ WSAJF uses the more specific term “offset,” while *Matsyuk* more generically refers to the “right of reimbursement” through whatever mechanism (offset, set-off or actual reimbursement). No substantive difference is intended.

¹⁰ WSAJF notes that State Farm contends the offset here is authorized by the policy’s non-duplication of benefits clause. WSAJF Br. at 3. WSAJF apparently see the non-duplication provision for what it, at best, constitutes: just one of several potential mechanisms to seek reimbursement. *Se, e.g., e Hamm*, 151 Wn.2d at 311 n.4 (the particular mechanism employed to recoup payments cannot be used to avoid legal expense sharing). Thus, it alters nothing in the analysis. Even so, it is worth noting that the non-duplication of benefits argument was only made by State Farm after the *Matsyuk*

claims as between Ms. Matsyuk and Mr. Stremditskyy (*i.e.*, injured plaintiff and alleged tortfeasor). The question presented here concerns a right of reimbursement as between a PIP insured and her PIP insurer. The collateral source rule has nothing to say on that question.

Even so, there are two aspects of the repeated assertion of the collateral source argument that are worth noting. One is that, contrary to somewhat popular perception, *Young* does not employ or rely on the collateral source rule. Indeed, neither “collateral” nor “source” appear in the opinion. Instead, *Young* relies on the assertion that the PIP insurer had not benefited from the recovery because the PIP insurer was also the liability insurer, and plaintiff’s personal injury litigation had not produced an “additional party” from whom the PIP insurer could recoup its PIP payments. *Young*, 104 Wn.App. at 727. As established by WSAJF and throughout the briefing in this case, that reasoning was thoroughly discredited by *Hamm*.

In addition, even if the collateral source rule somehow applicable here, it would not provide the insurers a basis to avoid legal expense sharing. In *Xieng*, the plaintiff successfully sued for damages for employment discrimination under RCW § 49.60.180. *See* 120 Wn.2d at

Court included it in the opinion *sua sponte*, and the fact the provision does not even apply on the facts of this case was already established in Matsyuk’s Supplemental Brief. *See* Matsyuk Supp. Br. at 9-10.

515. On appeal, one issue was whether the employer could offset the damages awarded with payments made to the employee under a disability policy *purchased and paid for by the employer*. *Id.* at 515-16. The trial court held that the employer could not take the offset. *Id.* at 523. The defendant employer asserted this was error because the employer paid for the insurance policy, and thus the collateral source rule was inapplicable.

The Supreme Court observed that it had “not yet considered the applicability of the collateral source rule to payments made under a disability insurance policy paid for by an employer where the employer is also the defendant.” *Id.* at 524. Looking to federal law for guidance, the Court adopted a “nature of the benefit test.” *See id.* at 524-25. In short, the question in such an instance is whether the insurance was in the nature of a benefit, or in the nature of a plan to provide for the employer’s own indemnification. *See id.*

While the foregoing is inapplicable because this case is not between Matsyuk and Stremditsky, if the “nature of the benefit” test were applied to the PIP coverage by analogy, it would fall into the category of benefit, as opposed to indemnification of future liability. PIP coverage is no-fault coverage that by its nature is the antitheses of indemnification of future tort liability (often purchased as a “benefit” for the named insured and his or her passengers, among others PIP insureds).

V. CONCLUSION

WSAJF's brief provides accurate and important background on the equitable rule requiring proportionate sharing of legal expense by those who benefit from the monetary recovery effected as a result of those efforts. It accurately describes the development and extension of the rule through the *Mahler*, *Winters* and *Hamm* cases, and accurately points out that the rule is strongly informed by the principle of full compensation for injured persons. It also accurately explains why *Young* is contrary to these principles, and how the reasoning of *Young* (which is similar to the reasoning of the *Winters* and *Hamm* dissents) is expressly rejected by the majority in *Hamm*. As the WSAJF brief correctly argues, to be consistent with *Winters* and *Hamm*, the analysis here must acknowledge that the insurers acted in two separate and distinct capacities, under two separate and distinct coverages. The analysis thus framed properly, the inescapable conclusion is that the insurers benefited from the liability recoveries in their respective capacities as PIP insurers.

The WSAJF brief also highlights at least three other important points. One is that, by statute, an insured is an insured -- there is no basis under the PIP statute (or the insurance contract) for treating insureds differently depending on how they acquired their status as "insureds" (e.g., identified by name, or by the policy's definition of an insured). Another

point is that principles of subrogation have no relevance here, when the question involves the insurers' right to reimbursement. A third important point highlighted in the WSAJF brief is that the collateral source rule has no application to these actions between PIP insurers and their respective PIP insureds.

May 16, 2011.

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DECLARATION OF SERVICE

I certify that on May 16, 2011, I caused to be filed with the Court, via email, the foregoing Petitioner Olga Matsyuk's Answer to Amicus Brief of Washington State Association for Justice Foundation, and caused to be delivered, via email, a true and accurate copy to:

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Executed in Seattle, Washington, this 16th day of May, 2011.

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