

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
May 16, 2011, 4:16 pm  
BY RONALD R. CARPENTER  
CLERK

No. 84686-3 (C/A No. 64151-4-I)  
(Consolidated with No. 85012-7 (C/A No. 39323-9-II))

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

STATE FARM FIRE & CASUALTY COMPANY,  
Defendant/Respondent.

KAREN WEISMANN, Plaintiff/Petitioner,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS,  
Defendant/Respondent.

STATE FARM FIRE AND CASUALTY COMPANY'S  
ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE  
ASSOCIATION FOR JUSTICE FOUNDATION

Kenneth E. Payson, WSBA #26369  
Stephen M. Rummage, WSBA #11168  
Roger A. Leishman, WSBA #19971  
Davis Wright Tremaine LLP  
Attorneys for Respondent  
State Farm Fire and Casualty Company

1201 Third Avenue, Suite 2200  
Seattle, Washington 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 3

    A. The Common-Fund Doctrine Does Not Apply When a Carrier Offsets PIP Benefits Against a Liability Claim Under the Liability Coverage of the Same Policy. ....3

        1. Neither State Farm Fire nor Safeco Benefited *in Their Capacity as PIP Carriers* from Their PIP Insureds' Liability Recoveries.....3

        2. Ms. Matsyuk and Ms. Weismann Received Full Compensation for Their Injuries; Awarding Common-Fund Fees Would Make Them More Than Fully Compensated. ....14

    B. The Court Should Reject WSAJF's Invitation to Expand the *Olympic Steamship* Rule Beyond Its Historical Limitations to Successful Coverage Challenges by Insureds. ....17

III. CONCLUSION..... 20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Bliss v. City of Newport</i> , 58 Wn. App. 238, 792 P.2d 184 (1990).....	8
<i>Ciminski v. SCI Corp.</i> , 90 Wn.2d 802, 585 P.2d 1182 (1978).....	8
<i>Consol. Freightways, Inc. v. Moore</i> , 38 Wn.2d 427, 229 P.2d 882 (1951).....	8, 11
<i>Denaxas v. Sandstone Court of Bellevue, L.L.C.</i> , 148 Wn.2d 654, 63 P.3d 125 (2003).....	20
<i>Hamm v. State Farm Mut. Auto. Ins. Co.</i> , 151 Wn.2d 303, 88 P.3d 395 (2004).....	passim
<i>Kirkpatrick v. Dep't. of Labor &amp; Indus.</i> , 48 Wn.2d 51, 290 P.2d 979 (1955).....	13
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	13
<i>Lange v. Raef</i> , 34 Wn. App. 701, 664 P.2d 1274 (1983).....	8
<i>Mahler v. Szucs</i> , 151 Wn.3d 398, 407, 957 P.2d 632 (1998).....	passim
<i>Matsyuk v. State Farm Fire &amp; Cas. Co.</i> , 155 Wn. App. 324, 229 P.3d 893 (2010).....	10, 11
<i>Maziarski v. Bair</i> , 83 Wn. App. 835, 924 P.2d 409 (1996).....	8
<i>Neigel v. Harrell</i> , 82 Wn. App. 782, 919 P.2d 630 (1996).....	12
<i>Nw. Collectors, Inc. v. Enders</i> , 74 Wn.2d 585, 446 P.2d 200 (1968).....	13

<i>Olympic S.S. Co. v. Centennial Ins. Co.</i> , 117 Wn. 37, 811 P.2d 673 (1991).....	passim
<i>Pub. Emps. Mut. Ins. Co. v. Kelly</i> , 60 Wn. App, 805 P.2d 822 (1991).....	7
<i>Safeco Ins. Co. v. Woodley</i> , 150 Wn.2d 765, 82 P.3d 660 (2004).....	17, 18, 19
<i>Sherry v. Fin. Indem. Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	7, 10, 14
<i>State v. King</i> , 167 Wn.2d 324, 219 P.3d 642 (2009).....	13
<i>Steckman v. Hart Brewing, Inc.</i> , 143 F.3d 1293 (9th Cir. 1998) .....	11
<i>Tank v. State Farm Fire &amp; Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	12
<i>Thiringer v. Am. Motors Ins. Co.</i> , 91 Wn.2d 215, 588 P.2d 191 (1978).....	7, 9
<i>Walker-Van Buren v. Am. Int'l Group, Inc.</i> , 123 Wn. App. 863, 866-68, 99 P.3d 1256 (2004).....	12
<i>Weismann v. Safeco Ins. Co. of Ill.</i> , 157 Wn. App. 168, 236 P.3d 240 (2010).....	10, 20
<i>Winters v. State Farm Mut. Auto. Ins. Co.</i> , 144 Wn.2d 869, 63 P.3d 764 (2001).....	passim

**RULES**

RAP 2.5(a) .....	13
RAP 18.1(b) .....	20

**TREATISES**

16 Wash. Prac., Tort Law & Practice § 5.42 (3d ed.).....	8
--	---

## I. INTRODUCTION

The Washington State Association for Justice Foundation's ("WSAJF") Brief of Amicus Curiae repeats the same arguments Ms. Matsyuk and Ms. Weismann advance in their briefs, in asking the Court to transform the "common fund" doctrine beyond its original purpose into an open-ended "equitable fee-shifting principle." Specifically, WSAJF urges that the common-fund fee-sharing rule should apply when a carrier offsets PIP benefits against liability coverage under the same policy. WSAJF argues: (i) that State Farm Fire and Safeco benefitted from such an offset in their capacity as PIP carriers; and (ii) that equitable fee-sharing is necessary to ensure that Plaintiffs Olga Matsyuk and Karen Weismann are fully compensated and are not "worse off" than had the liability and PIP coverages been paid under separate policies. WSAJF is wrong on both accounts.

*First*, the common-fund doctrine does not apply when a carrier offsets PIP benefits under a liability claim under the liability coverage of the same policy. Neither State Farm Fire nor Safeco benefitted in their capacity as PIP carriers from their PIP insureds' liability recoveries because: (i) Plaintiffs cannot invoke the collateral source rule to obtain duplicative recoveries of their medical expenses that State Farm Fire and Safeco already paid under the tortfeasors' policies; (ii) State Farm Fire and

Safeco in their capacity as PIP carriers did not (and could not) seek reimbursement of plaintiffs' PIP payments from the tortfeasors under whose insurance policies they paid PIP because an insurer does not have a subrogation right against its own insured; (iii) in Ms. Matsyuk's case, her settlement agreement makes clear that she agreed to accept an additional, incremental payment under the tortfeasor's (Mr. Stremditsky) liability coverage in addition to the PIP payments she already received in full satisfaction of her claims against him, imposing no duplicative payment obligation on State Farm Fire as liability carrier against which it could offset its prior PIP payments; and (iv) even if Ms. Matsyuk had obtained a liability judgment for her total damages, her right of recovery would be against the tortfeasor—not State Farm Fire—and State Farm Fire's contractual obligation to the tortfeasor relieves it of any obligation to make liability payments for damages it already paid under the PIP coverage of the same policy.

*Second*, Ms. Matsyuk and Ms. Weismann are in exactly the same position financially—fully compensated for their injuries—as if they had received PIP and liability payments under separate policies, actually reimbursed the PIP payments, and received a pro rata share of their legal expenses from the PIP carriers.

WSAJF also asks the Court to hold that, if equitable fee sharing

applies in these consolidated cases, attorney's fees under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), are awardable for "establish[ing] [plaintiffs'] entitlement to the equitable sharing rule." Amicus Br. at 16. The Court should reject WSAJF's invitation because it has never extended *Olympic Steamship* beyond insureds' successful fights to establish what they are owed under their insurance *contracts*. Moreover, with respect to Ms. Matsyuk, she has not requested fees on appeal so they are not awardable, regardless of how the Court rules on the *Olympic Steamship* question.

## II. ARGUMENT

### A. **The Common-Fund Doctrine Does Not Apply When a Carrier Offsets PIP Benefits Against a Liability Claim Under the Liability Coverage of the Same Policy.**

#### 1. **Neither State Farm Fire nor Safeco Benefited in Their Capacity as PIP Carriers from Their PIP Insureds' Liability Recoveries.**

WSAJF concedes that a carrier's equitable fee-sharing obligation does not arise unless its insured creates a "common fund" from which the carrier is benefited. Amicus Br. at 7. State Farm Fire and WSAJF are also in agreement that in the present circumstances the benefit is measured by whether the PIP insured through her and her attorney's efforts in fact or effect (1) recovered liability proceeds from the tortfeasor that included damages paid by PIP *and* (2) reimbursed that amount to the PIP carrier.

*Id.* State Farm Fire also agrees with WSAJF that when a carrier pays PIP and UIM or liability proceeds to the PIP insured under the same policy, one must look at the carrier in its separate capacities as PIP carrier on the one hand, and UIM or liability carrier on the other hand, to “focus[] on the benefit received by the insurer *in its capacity as PIP carrier.*” Amicus Br. at 9 (emphasis in original).

It is WSAJF, however, that improperly “collaps[es] the analysis of benefit under the insurers’ PIP and liability coverages” in concluding that Ms. Matsyuk and Ms. Weismann benefited State Farm Fire and Safeco, respectively, in their capacity as PIP carriers. Amicus Br. at 11. In contrast to the PIP carriers in *Mahler*, *Winters*, and *Hamm*, in the present case neither State Farm Fire nor Safeco *in their capacity as PIP carriers* benefited from Ms. Matsyuk’s or Ms. Weismann’s liability recoveries.

In *Mahler*, plaintiffs were injured by tortfeasors who were fully insured under policies separate from the policies under which plaintiffs’ medical expenses were paid. *Mahler v. Szucs*, 135 Wn.2d 398, 407, 409, 957 P.2d 632 (1998). They later recovered their full damages from the tortfeasors, including medical expenses already paid by PIP. *Id.* The PIP carriers sought reimbursement of the PIP benefits they paid from plaintiffs’ recoveries from the tortfeasors. *Id.* This Court concluded that plaintiffs’ recovery of the PIP carriers’ PIP payments from the tortfeasors

benefited the PIP carriers by the creation of a common fund from which the PIP carriers were reimbursed their PIP payments. *Id.* at 426-27, 428.

In *Winters*, plaintiffs were PIP insureds under policies separate from the tortfeasor's policies. *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 873, 874, 31 P.3d 1164 (2001). Plaintiffs received the liability limits of the tortfeasors' policies and presented UIM claims under the same policies under which they received PIP. *Id.* at 873, 874-75. The UIM arbitrators awarded total damages, including medical and wage loss damages already paid by PIP. *Id.* at 873, 875. With respect to plaintiffs' recoveries from the underinsured tortfeasors and UIM awards for total damages, this Court observed that "[t]hese pooled funds became the common fund from which the PIP insurer was able to recoup payments it had made." *Id.* at 881. As this Court explained:

In cases like *Winters*, where PIP coverage and UIM coverage are provided by the same insurance carrier, the reimbursement of the PIP carrier typically comes in the form of an offset applied to the UIM obligation. Even though the offset appears to result in a reduction to the UIM obligation, the offset functions as mechanism to account for the PIP reimbursement.

*Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 311, 88 P.3d 395 (2004). This Court reasoned that this was the functional equivalent of having the UIM carrier "pay the entire amount of the UIM award" and provide the PIP carrier "actual reimbursement." *Id.* Thus the carriers in

their capacity as PIP carriers benefited from the PIP insureds' efforts by effectively recouping their PIP payments.

In *Hamm*, the plaintiff was a PIP insured under a policy necessarily apart from the tortfeasor, as he was uninsured. *Hamm*, 151 Wn.2d at 306. The plaintiff presented a UIM claim under the same policy providing her PIP coverage. *Id.* The UIM arbitrator awarded the plaintiff her total damages, including medical expenses already paid by PIP. *Id.* As in *Winters*, this Court explained that the UIM carrier was obligated to pay the entire damages award, so offsetting the PIP payments simply relieved the carrier and its PIP insured of the trouble of having the UIM carrier tender a check for the PIP insured's total damages, including amounts paid by PIP, then having the PIP insured write a check back to the carrier in its PIP capacity to reimburse the earlier PIP payment:

The only difference between State Farm's position vis-à-vis two separate carriers providing the same types of coverage is that State Farm chose to receive its PIP reimbursement through an offset instead of the UIM carrier tendering a check for \$16,000.00 and the PIP carrier receiving a check for \$8,669.71.... Thus, in effect, Hamm received \$16,000.00 from State Farm in its capacity as UIM carrier and no money from State Farm as PIP carrier because, as PIP carrier, State Farm was reimbursed the entire amount of its prior PIP payments.

*Id.* at 318. Thus the PIP carrier benefited from effectively recovering its PIP payments from the PIP insured's total damages UIM recovery, which in turn triggered equitable fee sharing. *Id.*

In contrast, Ms. Matsyuk and Ms. Weismann did not and could not recover their total damages from the tortfeasors from which to reimburse the PIP payments State Farm Fire and Safeco made in their capacity as PIP carriers. Therefore, Plaintiffs' tort recoveries did not benefit Defendants in their capacity as PIP carriers. This is so for several reasons:

*First*, Plaintiffs cannot invoke the collateral source rule to obtain duplicative recoveries of their medical expenses that State Farm Fire and Safeco already paid under the tortfeasors' policies. Ordinarily the law prohibits duplicative recoveries for the same damages: "[A] party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery." *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 220, 588 P.2d 191 (1978); *see also Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 618, 160 P.3d 31 (2007) ("It is well established in Washington that insureds are not entitled to double recovery."); *Pub. Emps. Mut. Ins. Co. v. Kelly*, 60 Wn. App. 610, 618, 805 P.2d 822 (1991) ("[I]t is a basic principle of damages-tort and contract-that there shall be no double recovery for the same injury.").

Under the collateral source rule, however, "a party has a cause of action notwithstanding the payment of his loss by an insurance company." *Mahler*, 135 Wn.2d at 412 n.4 (citing *Consol. Freightways, Inc. v. Moore*, 38 Wn.2d 427, 430, 229 P.2d 882 (1951); *Ciminski v. SCI Corp.*, 90

Wn.2d 802, 585 P.2d 1182 (1978)). But a tort victim may not recover damages from a tortfeasor if the tortfeasor's insurance already has paid for those damages, since the payments in that case are not "collateral" but instead flow from the tortfeasor, notwithstanding that the payments necessarily are made based on the PIP recipients' status as a defined insured/third-party beneficiary under the policy (the position Ms. Matsyuk and Ms. Weismann occupy). As discussed in greater detail in State Farm Fire's Brief of Respondent at pages 14 through 17, Washington authority uniformly recognizes the distinction between collateral insurance sources and insurance sources attributable to the tortfeasor.<sup>1</sup>

WSAJF's remark that the collateral source rule has an evidentiary function (precluding introduction of collateral source payments at trial), Amicus Br. at 15, ignores that the collateral source rule *also* has a substantive aspect of allowing an accident victim whose damages have been paid by a source collateral to the tortfeasor to seek a duplicative

---

<sup>1</sup> See, e.g., *Mazlarski v. Bair*, 83 Wn. App. 835, 841 n.8, 924 P.2d 409 (1996) ("The collateral source rule ... does not apply here because ... the payments at issue here come from [the tortfeasor] Bair's PIP coverage, and such coverage is a fund created by her."); *Bliss v. City of Newport*, 58 Wn. App. 238, 241 n.2, 792 P.2d 184 (1990) ("The collateral source rule does not apply because the source of the collateral payments here is the [defendant] City's insurer, a fund created by the City by its insurance agreement."); *Lange v. Raef*, 34 Wn. App. 701, 704, 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 [PIP] payments . . . 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," but denying offset for failure to preserve objection); 16 WASH. PRAC., TORT LAW & PRAC. § 5.42 (2008) ("The collateral source rule does not apply where the source of the collateral payments is the tortfeasor or a fund created by him to make such payments.").

recovery from the tortfeasor, *Mahler*, 135 Wn.2d at 412 n.4, the ordinary bar to duplicative recoveries notwithstanding, *Thiringer*, 91 Wn.2d at 220. And WSAJF's argument that "the non-application of the collateral source rule does not give the tortfeasor or his insurer any greater right to offset than is already present in the language of the policy," Amicus Br. at 15, misses the point. Because Ms. Matsyuk and Ms. Weismann are unable to invoke the collateral source rule, they cannot obtain from the tortfeasors a double recovery of their medical damages in the first place, so State Farm Fire and Safeco in their capacity as liability carriers cannot find themselves in the position of the UIM carriers in *Winters* and *Hamm* of being obligated to pay total damages against which the PIP offset functionally reimburses the PIP carrier the PIP amounts advanced.

*Second*, State Farm Fire and Safeco in their capacity as PIP carriers did not (and could not) seek reimbursement of Plaintiffs' PIP payments from the tortfeasors under whose insurance policies they paid PIP because "[n]o right of subrogation can arise in favor of an insurer against its own insured." *Mahler*, 135 Wn.2d at 419; *see also Winters*, 144 Wn.2d at 876; *Sherry*, 160 Wn.2d at 618. In consequence, Ms. Matsyuk and Ms. Weismann cannot recover from the tortfeasors and reimburse to State Farm Fire and Safeco as PIP carriers money they had no right to be reimbursed in the first place.

WSAJF observes that the PIP insurer in *Hamm had the right to pursue subrogation against the tortfeasor* in support of its argument that the PIP carriers' inability to seek PIP subrogation from their insureds is "not relevant" and "should not make any difference." Amicus Br. at 14. But WSAJF's observation only underscores State Farm Fire's point here: *Winters* and *Hamm* involved cases where there *were* tortfeasors against whom the PIP carriers *could* pursue subrogation, but here there are not, as the Court of Appeals correctly concluded in both consolidated cases. *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 333, 229 P.3d 893 (2010); *Weismann v. Safeco Ins. Co. of Ill.*, 157 Wn. App. 168, 177, 236 P.3d 240 (2010). The purpose of allowing insureds the benefit of the collateral source rule is not to confer a windfall double recovery on them; rather it is to facilitate recovery of the carrier's subrogation interests against tortfeasors. "The purpose of this [collateral source] rule is to implement the insurance company's right of subrogation, and not to afford the respondent a double recovery." *Consol. Freightways*, 38 Wn.2d at 430.

*Third*, as Ms. Matsyuk's settlement agreement makes clear, she agreed to accept an additional, incremental payment of \$4,000 in addition to the \$1,874 in PIP payments she already received, in full satisfaction of her claims against Mr. Stremditsky, imposing no duplicative payment

obligation on State Farm Fire against which could offset its prior PIP payments. CP 32.<sup>2</sup> State Farm Fire advanced this argument throughout its appellate briefing. WSAJF, however, provides no rebuttal on this point, but instead moors its arguments around the faulty premise that State Farm Fire supposedly agreed to pay Ms. Matsyuk under Mr. Stremditskyy's liability coverage the amount of her total damages, including medical expenses it already paid under the PIP coverage of the same policy, before offsetting the PIP amount from its agreed liability payment amount.

*Fourth*, even if Ms. Matsyuk had obtained a liability judgment against *Mr. Stremditskyy* for her total damages of \$5,874, including a duplicative recovery of her medical expenses already paid by PIP, her right of recovery would be against Mr. Stremditskyy alone and not State Farm Fire: "Third-party claimants are not intended beneficiaries of liability policies and are owed no direct contractual obligation by insurers." *Walker-Van Buren v. Am. Int'l Group, Inc.*, 123 Wn. App. 863, 866-68, 99 P.3d 1256 (2004) (citing *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394-95, 715 P.2d 1133 (1986)); *see also Neigel v.*

---

<sup>2</sup> Ms. Matsyuk has never disputed that the trial court and the Court of Appeals properly considered her release agreement in resolving whether she failed to state a claim since she incorporated the settlement into her complaint. *Matsyuk*, 155 Wn. App. at 329 n.2. Nor do her conclusory allegations that she supposedly reimbursed State Farm Fire its PIP payments save her complaint, for the Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

*Harrell*, 82 Wn. App. 782, 783, 919 P.2d 630 (1996) (“an insurance company’s duty is to the insured, not to third-party claimants of the insured”) (citing *Tank*, 105 Wn.2d 381). The amount of money State Farm Fire would pay to Ms. Matsyuk under Mr. Stremditskyy’s liability coverage is defined by **Mr. Stremditskyy’s** contract with State Farm Fire. **His** non-duplication of benefits clause in **his** liability coverage provides State Farm Fire will not pay for damages it already paid under the PIP coverage of the same policy. CP 87. In other words, Ms. Matsyuk cannot recover from State Farm Fire’s payments under Mr. Stremditskyy’s liability coverage a duplicative recovery of her medical expenses from which to reimburse State Farm Fire in its capacity as PIP carrier the PIP payments it made to her. Unlike in *Hamm* where the PIP insured was also a first-party UIM insured with standing to challenge the non-duplication of benefits provision in **her** UIM coverage, here Ms. Matsyuk lacks standing to challenge the non-duplication of benefits provision in **Mr. Stremditskyy’s** liability coverage.

Moreover, neither WSAJF nor Ms. Matsyuk may challenge the non-duplication of benefits provision in Mr. Stremditskyy’s liability coverage since the issue was not raised below. *See Winters*, 144 Wn.2d at 877 n.3 (“Amicus Curiae Washington State Trial Lawyers Association argues that the Nonduplication of Benefits clause is impermissible ....

State Farm correctly points out that this argument was not raised below and we therefore do not reach this argument.”); *State v. King*, 167 Wn.2d 324, 329, 219 P.3d 642 (2009) (“In general, appellate courts will not consider issues raised for the first time on appeal.”); RAP 2.5(a).

In contrast, though State Farm Fire did not raise the non-duplication of benefits provision below, an appellate court can sustain the trial court’s judgment on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *see also Nw. Collectors, Inc. v. Enders*, 74 Wn.2d 585, 595, 446 P.2d 200 (1968) (“the trial court can be sustained on any ground within the proof”); *Kirkpatrick v. Dep’t of Labor & Indus.*, 48 Wn.2d 51, 53, 290 P.2d 979 (1955) (“[w]here a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition”).

In any event, the *Hamm* Court’s conclusion that the UIM non-duplication of benefits provision could not be used “as a limitation on UIM coverage,” *Hamm*, 151 Wn.2d at 311 n.4, merely reflects this Court’s long-standing protective stance against efforts to diminish UIM coverage given that UIM is a legislatively mandated “second layer of protection which ‘floats’ on the top of recovery from other sources.” *Sherry*, 160 Wn.2d at 623. State Farm Fire is aware of no corresponding legislative

mandate or public policy applicable to liability coverage. The Court, therefore, should reject WSAJF's bare insistence that the non-duplication of benefits clause in State Farm Fire's liability coverage should be treated the same as the non-duplication of benefits provision in the UIM coverage at issue in *Hamm*. See Amicus Br. at 13 n.8.

**2. Ms. Matsyuk and Ms. Weismann Received Full Compensation for Their Injuries; Awarding Common-Fund Fees Would Make Them More Than Fully Compensated.**

WSAJF insists that "[p]roportional 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 coverages are provided by the same insurer." Amicus Br. at 5. Though WSAJF repeats this refrain throughout its brief, it never explains why or how this is so. Its failure to provide any discussion or analysis beyond its conclusory pronouncement is not surprising because the proposition is demonstrably false.

As State Farm Fire showed in its Supplemental Brief at pages 12 through 15, Ms. Matsyuk is already fully compensated for her injuries without equitable fee sharing and is in *exactly* the same position as if she were to sue Mr. Stremditsky and obtain a judgment for \$5,874 (the sum of her \$1,874 PIP payments and \$4,000 recovery under the tortfeasor's

liability coverage), from which she were to reimburse State Farm Fire's PIP payments, *and had State Farm Fire paid a pro-rata share of her legal expenses*. Supp. Br. at 12-13 (*compare* Table A *with* Table B).

Indeed, the result would be the same had she recovered PIP under her own policy, recovered her total damages from Mr. Stremditskyy from which she reimbursed State Farm Fire its PIP payments and had State Farm Fire paid a pro-rate share of her legal expenses. *Id.* at 14-15 (Table C).

Although WSAJF meekly claims in a footnote that Tables A and B are "unhelpful" because they supposedly exclude damages covered by PIP and exclude legal expenses incurred to prove those damages, Amicus Br. at 16 n.12, WSAJF's unexplained criticism is misplaced. By definition Table A does not include a duplicative recovery of damages covered by PIP because it illustrates Ms. Matsyuk's actual circumstances where she received (as memorialized in the release she signed and incorporated into her complaint) \$1,874 in PIP and an additional incremental payment of \$4,000 under Mr. Stremditskyy's liability coverage without State Farm Fire's paying a pro rata share of her legal expenses. Supp. Br. at 13.

Table B illustrates Ms. Matsyuk's obtaining a judgment for her full \$5,184 total damages and recovering her total damages (including a duplicative payment for medical expenses already paid by PIP), and calculates her attorney's fees as one third of her total liability recovery,

with Ms. Matsyuk reimbursing State Farm Fire its PIP payments and State Farm Fire paying its pro rata share of her legal expenses. *Id.* at 14.

Significantly, WSAJF *does not* dispute that Table C—which shows Ms. Matsyuk’s total recovery if she were to have received PIP under *her own* policy, recovered her total damages from which she reimbursed her PIP and received pro rata fee sharing—accurately calculates Ms. Matsyuk’s total recovery in those circumstances in an amount that matches her total recovery in Tables A and B. *Id.* at 15.

Tellingly, its cryptic and unexplained criticism aside, WSAJF does not meaningfully engage with this analysis, nor does WSAJF offer any analysis of its own to give meaning to its bare claim that PIP insureds in Ms. Matsyuk’s circumstance “will be worse off than if they had received PIP benefits and liability coverage proceeds from different insurers” and, therefore, “will be deprived of full compensation.”<sup>3</sup>

---

<sup>3</sup> To supposedly illustrate how *Plaintiffs* would be in a worse position here than if they had obtained PIP benefits and liability coverage proceeds from separate insurers, WSAJF poses a hypothetical of a passenger who is injured by an at-fault driver and recovers PIP under her own PIP coverage as well as the driver’s PIP coverage by focusing on how *the PIP carriers* would be treated differently. Amicus Br. at 11 n.7. But this does nothing to show how plaintiffs are treated differently. In any event, the PIP carriers are treated the same in this hypothetical: only the PIP carrier who is reimbursed its PIP would be required to pay a pro rata share of the PIP insured’s legal expenses.

**B. The Court Should Reject WSAJF's Invitation to Expand the *Olympic Steamship* Rule Beyond Its Historical Limitations to Successful Coverage Challenges by Insureds.**

State Farm Fire joins Safeco in urging the Court to reject WSAJF's argument that *Safeco Insurance Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004), overruled *Mahler*'s analysis and holding on the availability of *Olympic Steamship* fees in equitable fee-sharing cases. In any event, however, *Woodley*'s award of *Olympic Steamship* fees may be distinguished from the present consolidated cases for the following reason: without pro-rata fee sharing the plaintiff in *Woodley* arguably did not receive all of the UIM benefits to which she was contractually due, while here Plaintiffs received all of the PIP amounts to which they were due and they have no contractual entitlement to the additional liability payments under the tortfeasors' liability coverages.

This Court held in its seminal *Olympic Steamship* decision that “[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.” 117 Wn.2d at 54 (*quoted in Mahler*, 135 Wn.2d at 430) (emphasis added).

*Mahler* held that the plaintiffs who successfully established their right to pro rata fee sharing for recovering from tortfeasors and reimbursing to their PIP carriers the PIP payments *were not* entitled to

fees under *Olympic Steamship* because “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.” *Maher*, 135 Wn.2d at 432.

In *Woodley*, this Court reasoned that:

“[i]f Safeco were not compelled to pay its pro rata share of legal expenses, Woodley would not receive the full benefit of her coverage. Accordingly, this case appears ‘more akin to a dispute over the vindication of policy provisions to which the insured is entitled (for which fees may be awarded) than a dispute over the amount of coverage (for which fees are not available).’”

150 Wn.2d at 774. The *Woodley* Court observed: “[t]he essential facts ... are nearly identical to the essential facts in *Winters*.” *Id.* at 771. As in *Winters*, in *Woodley* the PIP insured obtained a UIM award for her total damages, including medical expenses paid by PIP. Though the UIM carrier was obligated to pay the entire UIM award under plaintiff’s UIM coverage, it reduced its UIM payment by the amount of its PIP payments without paying a pro rata share of its insured’s legal expenses. *Id.* In other words, it withheld *contractual* UIM benefits to which the plaintiff eventually established she was entitled, which at least bears some relationship to the historic contours of *Olympic Steamship*’s focus on whether an insured had to litigate to establish her entitlement to coverage.

In the present case, however, Plaintiffs received all of the PIP benefits to which they were entitled, and they have no contractual right to

liability payments under the tortfeasors' policies. Therefore, unlike the plaintiffs in *Woodley*, *Winters*, and *Hamm*, in the present cases Plaintiffs seek additional payments from the tortfeasors' liability carriers, who owe Plaintiffs no contractual duty. "Third-party claimants are not intended beneficiaries of liability policies and are owed no direct contractual obligation by insurers." *Walker-Van Buren*, 123 Wn. App. at 866-68 (citing *Tank*, 105 Wn.2d at 394-95). Thus, even if Plaintiffs succeed in establishing their entitlement to equitable fee sharing, that would not be "more akin to a dispute over the vindication of policy provisions to which the insured is entitled." *Woodley*, 150 Wn.2d at 774. This Court has never extended *Olympic Steamship* beyond insureds' successful fights to establish what they are owed under their contracts with insurance companies, and should not do so here.

In any event, Ms. Matsyuk has not requested, and therefore cannot recover, attorney's fees on appeal, regardless of how the Court rules on the availability of *Olympic Steamship* fees in the consolidated *Weismann* case. Pursuant to RAP 18.1(b), a party seeking attorney's fees on appeal must devote a section of its opening brief to a request for such fees. A party who fails to comply with this procedure is not entitled to an award of attorney fees. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 671, 63 P.3d 125 (2003).

### III. CONCLUSION

Properly focusing on State Farm Fire and Safeco in their capacity as PIP carriers reveals that Plaintiffs did not and could not recover from the tortfeasors duplicative medical expense damages and reimburse State Farm Fire and Safeco their PIP payments. Thus Plaintiffs did not create a common fund for the benefit of State Farm Fire and Safeco in their PIP carrier role. Rather than leaving Plaintiffs less than fully compensated or “worse off” than if they had actually recovered and reimbursed the PIP payments in circumstances where the PIP and liability payments came from separate policies, declining to award common fund fees ensures that they are in exactly the same financial circumstance in both scenarios: fully compensated—no more, no less. If the Court nevertheless rules that one or both Plaintiffs are entitled to equitable fee sharing, *Olympic Steamship* attorney’s fees are not awardable for reasons discussed above.

RESPECTFULLY SUBMITTED this 16th day of May, 2011.

Davis Wright Tremaine LLP  
Attorneys for Respondent  
State Farm Fire and Casualty Company

By



Kenneth E. Payson, WSBA #26369  
Stephen M. Rummage, WSBA #11168  
Roger A. Leishman, WSBA #19971

PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing to be served upon the following counsel of record:

Matthew J. Ide	(X)	By U. S. Mail
Ide Law Office	( )	By Federal Express
801 Second Avenue, Suite 1502	( )	By Facsimile
Seattle, Washington 98104-1500	( )	By Messenger
<u>mjide@yahoo.com</u>	(X)	By E-Mail
David R. Hallowell	(X)	By U. S. Mail
Law Office of David R. Hallowell	( )	By Federal Express
801 Second Avenue, Suite 1502	( )	By Facsimile
Seattle, Washington 98104-1576	( )	By Messenger
<u>dhallowell@speakeasy.net</u>	(X)	By E-Mail
Craig F. Schauer mann	( )	By U. S. Mail
Schauer mann, Thayer & Jacobs, PS	( )	By Federal Express
1700 E. Fourth Plain Blvd.	( )	By Facsimile
Vancouver, Washington 98661	( )	By Messenger
<u>craigs@stips.com</u>	(X)	By E-Mail Only Per Agreement of Counsel
Gregory S. Worden/M. Colleen Barrett	(X)	By U. S. Mail
Barrett & Worden, P.S.	( )	By Federal Express
2101 4 <sup>th</sup> Avenue, Suite 700	( )	By Facsimile
Seattle, Washington 98121	( )	By Messenger
<u>gworden@barrett-worden.com</u>	(X)	By E-Mail
<u>cbarrett@barrett-worden.com</u>		

George M. Ahrend  
Gary N. Bloom  
Bryan P. Harnetiaux  
Ahrend Law Firm  
100 E Broadway Ave  
Moses Lake, WA 98837-1740  
[gahrend@ahrendlaw.com](mailto:gahrend@ahrendlaw.com)

By U. S. Mail  
 By Federal Express  
 By Facsimile  
 By Messenger  
 By E-Mail Only Per  
Agreement of  
Counsel

Dated at Seattle, Washington this 16th day of May, 2011.



Kenneth E. Payson