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IN THE SUPREME COURT OF THE STATE OF WASHINGTON RECEIVED BY E-MAIL

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

Plaintiff/Petitioner,

vs.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant/Respondent,

* * * * *

KAREN WEISMANN,

Plaintiff/Petitioner,

vs.

SAFECO INSURANCE COMPANY OF ILLINOIS,

Defendant/Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons and insureds, including an interest in proper interpretation and application of the rule requiring proportional sharing of legal expenses developed in Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998), Winters v. State Farm Mut. Auto. Ins. Co., 144 Wn.2d 869, 31 P.3d 1164 (2002), and Hamm v. State Farm Mut. Auto. Ins. Co., 151 Wn.2d 303, 88 P.3d 395 (2004). One of WSAJ Foundation's predecessors appeared as amicus curiae in each of the foregoing cases.

II. INTRODUCTION AND STATEMENT OF THE CASE

These consolidated cases present the Court with the opportunity to address whether the equitable rule requiring proportional sharing of legal expenses, developed in Mahler, Winters and Hamm, applies when a plaintiff-insured settles a personal injury claim with the tortfeasor and its liability insurer, and the liability insurer offsets from the liability

settlement the amount of Personal Injury Protection (PIP) benefits paid to the plaintiff-insured under separate coverage.¹

The facts are drawn from the published Court of Appeals decisions and the briefing of the parties. See Matsyuk v. State Farm Fire & Cas. Co., 155 Wn.App. 324, 229 P.3d 893, *review granted*, 170 Wn.2d 1008 (2010); Weismann v. Safeco Ins. Co., 157 Wn.App. 168, 236 P.3d 240, *review granted*, 170 Wn.2d 1010 (2010); Matsyuk Br. at 6-8; State Farm Br. at 5-8; Matsyuk Pet. for Rev. at 4-7; State Farm Ans. to Pet. for Rev. at 3-6; Matsyuk Supp. Br. at 3-4; State Farm Supp. Br. at 3-6; Safeco Br. at 3-7; Weismann Br. at 2-5; Weismann Pet. for Rev. at 1-5; Safeco Ans. to Pet for Rev. at 3-5; Safeco Supp. Br. at 3-5. The following facts are relevant to this amicus brief:

Re: Matsyuk v. State Farm

Olga Matsyuk (Matsyuk) was injured while riding as a passenger in a car driven by Omelyan Stremditskyy (Stremditskyy). She was an insured under Stremditskyy's PIP coverage with State Farm Fire & Casualty Company (State Farm), and she received \$1,874 in PIP benefits.²

Matsyuk sued Stremditskyy, and State Farm provided Stremditskyy's defense and liability coverage. Matsyuk settled her claims

¹ This amicus curiae brief uses "offset" in accordance with the definition provided in Winters, 144 Wn.2d at 876 (stating "[a]n 'offset' refers to a credit to which an insurer is entitled for payments made under one coverage against claims made under another coverage within the same policy").

² An "insured" under PIP coverage is statutorily defined to include passengers occupying an insured vehicle. See RCW 48.22.005(5)(b)(i). The full text of the current versions of RCW 48.22.005, RCW 48.22.085, and RCW 48.22.095, the key statutes regarding PIP coverage, are reproduced in the Appendix to this brief.

against Stremditsky for \$5,874. State Farm offset the settlement payment under Stremditsky's liability coverage by the amount paid under the PIP coverage, without paying a pro rata share of Matsyuk's legal expenses incurred in obtaining the liability recovery.

State Farm contends that the offset is authorized by the nonduplication of benefits provision of its liability coverage. See State Farm Supp. Br. at 14 n.7 & 16; State Farm Ans. to Pet. for Rev. at 18-19. There is also a reimbursement provision under State Farm's PIP coverage, and Matsyuk contends that the failure to pay a proportional share of expenses violates this provision. See Matsyuk Br. at 25-30; Matsyuk Reply Br. at 18-19; Matsyuk Supp. Br. at 8-10.

Matsyuk sued State Farm for bad faith, conversion, breach of contract, and violations of the Consumer Protection Act (CPA), Ch. 19.86 RCW. The superior court granted State Farm's CR 12(b)(6) motion and denied Matsyuk's motion for partial summary judgment. The Court of Appeals, Division I, affirmed, relying in part on the Division II opinion in Young v. Teti, 104 Wn.App. 721, 16 P.3d 1275 (2001).

Re: Weismann v. Safeco

Karen Weismann (Weismann) was a pedestrian when she was hit by a car driven by Darlene Kangas (Kangas). Weismann was an insured under Kangas's PIP coverage with Safeco Insurance Company of Illinois (Safeco), and she received \$9,012.95 in PIP benefits.³

³ An "insured" under PIP coverage is statutorily defined to include pedestrians hit by an insured vehicle. See RCW 48.22.005(5)(b)(ii).

Weismann also pursued a tort claim against Kangas, and Safeco provided Kangas's defense and liability coverage. During settlement negotiations regarding the tort claim, Safeco's liability adjuster informed Weismann's counsel that Safeco would offset any settlement by the entire amount of PIP benefits received, without reducing the offset by a pro rata share of legal expenses.⁴

Eventually, Safeco and Weismann reached an agreement that Weismann's damages were \$44,521.19, reserving Weismann's right to bring an action against Safeco to determine whether Safeco is obligated to reduce its offset by a pro rata share of legal expenses. The superior court ruled in favor of Weismann on cross motions for summary judgment, and also awarded attorney fees pursuant to Olympic Steamship Co. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991). The Court of Appeals, Division II, reversed, relying on Young.

Both Matsyuk and Weismann sought review in this Court, which was granted, and their cases have been consolidated for purposes of review.

⁴ There is uncertainty in the briefing regarding the basis for Safeco's offset of PIP benefits. On one hand, Safeco suggests the basis for offset is grounded in its rights as a liability insurer, but does not expressly reference a nonduplication of benefits provision. See Safeco Br. at 19-21. On the other hand, it appears to suggest its reimbursement provision may be inapplicable to Weismann. See Safeco Reply Br. at 4-5 & n.22. Given that there must be some contractual basis for the offset, see Sherry v. Financial Indem. Co., 160 Wn.2d 611, 618-19, 160 P.3d 31 (2007), this brief assumes for purposes of argument that a basis for Safeco's offset exists. Cf. Hamm, 151 Wn.2d at 311 n.4, 321; see also Young, 104 Wn.App. at 726 n.10 (explaining contractual basis for insurer's right to reimbursement).

III. ISSUES PRESENTED

1. Does the equitable rule requiring proportional sharing of legal expenses apply when a plaintiff-insured settles a personal injury claim with the tortfeasor and its liability insurer, and the liability insurer offsets from the liability settlement the amount of PIP benefits paid to the plaintiff-insured under separate coverage?
2. If so, is a plaintiff-insured entitled to an award of legal expenses from the PIP insurer pursuant to Olympic Steamship for establishing and enforcing her entitlement to proportional sharing of legal expenses in the underlying settlement?

See Matsyuk Pet. for Rev. at 3-4; Weismann Pet. for Rev. at 1.⁵

IV. SUMMARY OF ARGUMENT

Re: Equitable Sharing Rule

Under the reasoning of this Court's opinions in Mahler, Winters and Hamm, an insurer that offsets a settlement under its liability coverage by the amount of benefits paid to the plaintiff as an insured under PIP coverage contained in the same policy should be responsible to pay a proportional share of legal expenses incurred by the plaintiff-insured to obtain the settlement. Under this equitable sharing rule, the offset benefits the insurer *in its capacity as PIP insurer*. 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 coverages are provided by the same insurer.

⁵ Matsyuk makes a separate contractual argument for proportional sharing of legal expenses that is beyond the scope of this brief. See Matsyuk Br. at 25-30; Matsyuk Reply Br. at 18-19; Matsyuk Supp. Br. at 8-10.

Re: Olympic Steamship Fees

A plaintiff-insured who prevails in an action against the PIP insurer to establish or enforce her entitlement to proportional sharing of legal expenses, as distinguished from an action to establish the amount of such expenses, should be entitled to recover attorney fees and costs under this Court's opinion in Olympic Steamship.

V. ARGUMENT

A. **Overview Of This Court's Opinions In *Mahler*, *Winters* And *Hamm*, And The Equitable Sharing Rule.**

In Mahler, the Court required proportional sharing of legal expenses when the tortfeasor is fully insured and PIP benefits are reimbursed from a liability insurance settlement. See 135 Wn.2d at 424-27. In Winters, the Court required proportional sharing of legal expenses when the tortfeasor is underinsured and PIP benefits are offset against a combination of liability insurance coverage and underinsured motorist (UIM) benefits. See 144 Wn.2d at 875-83. More recently, in Hamm, the Court required proportional sharing of legal expenses when the tortfeasor is uninsured and PIP benefits are offset against UIM benefits alone. See 151 Wn.2d at 312-21.

The basis for the equitable rule requiring proportional sharing of legal expenses in these cases is the common fund doctrine.⁶ While the

⁶ Mahler, 135 Wn.2d at 426, describes the application of the common fund doctrine in this context as the "equitable sharing rule." See also Hamm, 151 Wn.2d at 310 (quoting Mahler formulation). The formula for determining a PIP insurer's proportional share of legal expenses under the equitable sharing rule is explained in this Court's opinion in Safeco Ins. Co. v. Woodley, 150 Wn.2d 765, 772-73, 82 P.3d 660 (2004).

basis for sharing expenses in Mahler appeared to be largely contractual, the Court also referenced the common fund doctrine. See 135 Wn.2d at 426-27 (stating “[t]his equitable sharing rule is based on the common fund doctrine”). Subsequently, in Winters and Hamm the Court clarified that the underlying basis for sharing expenses is the common fund doctrine. See Winters, 144 Wn.2d at 879 (explaining that Mahler “held that each party benefited from a common fund generated by the plaintiff, so each should pay a pro rata share of the expenses necessary to generate that fund”); Hamm, 151 Wn.2d at 320 (stating “[a]s Winters clarifies, the rule requiring a pro rata sharing of legal expenses is based on equitable principles and not on construction of specific policy language”).

The equitable sharing rule recognizes that the reimbursement or offset of PIP payments is a benefit to the insurer in its capacity as PIP carrier, regardless of the source of funds for the reimbursement or offset. See Mahler at 427 (stating “[t]he proper focus is the benefit received [a]gain, the proper focus is on the benefit to State Farm”); Winters at 877 (stating “[t]he common fund exception to the no-attorney-fees rule applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves”); Hamm at 313 (noting benefit to insurer “is a benefit to the PIP carrier, not the UIM carrier”).

The dissents in Winters and Hamm do not perceive any benefit to the insurer because the same insurer provided both PIP benefits and UIM benefits, from which the PIP offset was taken in whole (Hamm) or in part

(Winters). See Winters, 144 Wn.2d at 885 (Alexander, C.J., dissenting; stating “[t]he settlements ... did not, however, create or preserve a fund from which State Farm benefitted”); Hamm, 151 Wn.2d at 323, 330 (Sweeney, J.p.t., dissenting; similar); id. at 321, 332 (Madsen, J., dissenting; similar).

The majority opinions in Winters and Hamm reject the reasoning of the dissents because the dissents ignore the overarching principle of full compensation of the insured that underlies Mahler and the application of the common fund doctrine in this context. See Mahler at 417-18 (stating “[t]he enforcement of the [subrogation] interest ... is governed by the general public policy of full compensation of the insured”); Winters at 882 (stating “our cases have been based ... upon the principle that the insured should be fully compensated before the insurer is entitled to reimbursement”); Hamm at 311 (citing Mahler for the proposition that PIP reimbursement provisions are subject to “the public policy in Washington of full compensation of insureds”).

The principle of full compensation also underlies the statements in Winters and Hamm that an insured should not receive less compensation simply because multiple coverages are provided by a single insurer. See Winters at 882 (stating “[t]he insured should not be worse off simply because he or she purchased two coverages from the same insurer”); Hamm at 315 (stating “by not following Mahler and Winters, the Court of Appeals provides State Farm with a windfall when compared with

separate carriers and puts Hamm in a worse position than if she had been covered by separate carriers”).

The principle of full compensation of the insured narrows the Court’s analysis of benefit when applying the equitable sharing rule. Specifically, the Court focuses on the benefit received by the insurer *in its capacity as PIP carrier*, rather than any benefit to the insurer in general. See Winters at 882 (stating the insurer “seems to forget that it has written and received premiums for separate and different coverages”); Hamm at 313 (stating “[t]he offset at issue in this case ... is a benefit to the PIP carrier, not the UIM carrier”); see also Woodley, 150 Wn.2d at 772 (quoting Winters).

In Hamm, the Court specifically rejects the attempts by the insurers, lower courts, and the dissenting opinions to collapse the analysis of benefit under different coverages. See Hamm at 312 (rejecting Court of Appeals’ conclusion that insurer received no benefit, instead focusing solely on benefit to insurer in its capacity as PIP carrier); id. at 313 n.5 (criticizing dissent for not distinguishing between insurer’s separate roles as PIP and UIM carrier); id. at 319 (rejecting argument that insured did not benefit insurer in its capacity as UIM carrier “because the common fund benefit[t]ed State Farm in its capacity as PIP carrier, not as UIM carrier”).

Focusing on the benefit to the insurer in its capacity as PIP carrier is consistent with and supported by the well-recognized separation that exists between different coverages, even when the various coverages are

obtained from the same insurer and are part of a single policy. See e.g. Rones v. Safeco Ins. Co., 119 Wn.2d 650, 655-56, 835 P.2d 1036 (1992) (holding named insured who was injured while riding as passenger in her own car and made claim against her insurer under liability coverage was subject to tort statute of limitations, rather than longer contractual limitations period); Ellwein v. Hartford Acc. & Indem. Co., 142 Wn.2d 766, 781-82 & n.11, 15 P.3d 640 (2001) (finding bad faith as a matter of law when insurer used same expert retained to defend insured under liability coverage to oppose insured's UIM claim, disapproving the commingling of liability and UIM files), *overruled on other grounds*, Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003); Harris v. Drake, 152 Wn.2d 480, 489, 99 P.3d 872 (2004) (holding medical exam performed under PIP coverage is deemed to be work product in subsequent litigation against tortfeasor, noting that interests of PIP insurer and PIP insured are aligned in litigation against tortfeasor because PIP insurer is interested in recouping its PIP payments and PIP insured is interested in obtaining full compensation for his injuries).

With this understanding of the reasoning underlying Mahler, Winters and Hamm, the question becomes whether the equitable sharing rule applies in these consolidated cases.

B. The Reasoning Of *Mahler*, *Winters* And *Hamm* Applies With Equal Force Here, And The Equitable Sharing Rule Applies When PIP Benefits Are Offset Against Liability Coverage Under The Same Policy.

The Court of Appeals in Matsyuk and Weismann (and in Young), declines to apply the equitable sharing rule when the PIP offset is taken from liability coverage proceeds under the same policy. The reasoning in these opinions mirrors that of the *dissenting* opinions in Hamm and Winters, by collapsing the analysis of benefit under the insurers' PIP and liability coverages and assuming that the benefit under PIP coverage is eliminated by the detriment under liability coverage. See Matsyuk, 155 Wn.App. at 332 n.5 (discussing Young); *id.* at 336 (rejecting Matsyuk's argument that State Farm benefitted); Weismann, 157 Wn.App. at 175, 178 (relying on Young); see also Young, 104 Wn.App. at 723 & n.2, 727 & nn.12-13.

The Court should reject this reasoning and expressly disapprove of Young to the extent it is inconsistent with this Court's opinions. Otherwise, Matsyuk and Weismann would be in a worse position here than they would be if they had obtained PIP benefits and liability coverage proceeds from separate insurers.⁷ More importantly, they would be deprived of full compensation for their injuries.

⁷ A foreseeable fact pattern highlights an anomaly that would result from the proposed distinction between PIP coverage obtained under the named insured tortfeasor's policy and PIP coverage provided by others: A passenger suffers severe injuries in an accident caused by the driver of the vehicle. She exhausts the driver's PIP coverage as well as her own PIP coverage, and obtains a settlement or judgment from the driver, covered by the driver's liability insurance. If the equitable sharing rule does not apply to the driver's PIP carrier, then it will be treated differently than the passenger's PIP carrier. That is, the driver's PIP carrier will receive reimbursement or offset equal to 100% of PIP payments,

In applying the reasoning of Mahler, Winters and Hamm to the facts of these consolidated cases, the focus should be on the benefit to State Farm and Safeco *in their capacity as PIP insurers*. Because there would be no PIP offset from liability insurance proceeds without the settlements obtained by Matsyuk and Weismann, the settlements benefitted State Farm and Safeco as PIP insurers, and the amount of the offset should therefore be reduced by a proportional share of legal expenses incurred to obtain the settlements.

To a large extent, the analysis in Matsyuk and Weismann is based on the Division II opinion in Young. In Young, the court justified its decision in part on grounds that the injured plaintiff was not an “insured” under the PIP coverage procured by the tortfeasor, but rather was a third-party beneficiary of the PIP coverage. See 104 Wn.App. at 726-27. The significance of this distinction between an insured and a third-party beneficiary is not entirely clear from the Young decision, although it appears to be used to support an argument that there is no contractual basis for proportional sharing of legal expenses. See id. This also seems to be the basis for the holding in Matsyuk. See 155 Wn.App. at 333. However, in Weismann, 157 Wn.App. at 175 n.5, the court characterized the plaintiff as an insured under the PIP coverage, and determined that this is not a meaningful distinction.

while the passenger’s PIP carrier will receive reimbursement net of a proportional share of legal expenses.

Any distinction between an insured and a third-party beneficiary is untenable under the PIP statute, both now and at the time Young was decided. (Young does not reference these statutes.) From the enactment of the legislatively mandated PIP coverage option, pre-dating the decision in Young, “insureds” have been statutorily defined to include passengers such as Matsyuk and pedestrians such as Weismann. See Laws of 1993, ch. 242, §1(5)(b)(i)-(ii) (codified at RCW 48.22.005(5)(b)(i)-(ii)). The statute is read into insurance policies such as those issued by State Farm and Safeco. See Humleker v. Gallagher Bassett Services Inc., 159 Wn. App. 667, 682, 246 P.3d 249 (2011) (UIM case, stating “[a]s we have previously explained: ‘[The] insurance regulatory statutes are incorporated into the insurance policy’”).⁸

Moreover, whether or not Young’s (and Matsyuk’s) discussion of third-party beneficiaries is correct as a matter of contract law, the equitable sharing rule establishes a “floor” for reimbursement or offset of PIP benefits. An insurance contract may provide for greater protection for insureds than the rule established in Mahler and its progeny, but it may not provide less protection. See Hamm at 311 n.4 (declining to apply UIM nonduplication of benefits clause as basis for avoiding proportional sharing of legal expenses as PIP insurer).⁹

⁸ As Matsyuk points out in her briefing, the companion case in Winters (i.e., Perkins), involved an additional (small “r”) insured, as distinguished from a Named Insured, and this fact made no difference in the Court’s analysis. See Winters at 874-75 (describing facts of Perkins). It should not make any difference here either.

⁹ To the extent State Farm may rely on a nonduplication of benefits clause in its liability coverage to justify the offset, it should not be able to lower the floor set by the equitable sharing rule any more than the UIM insurer in Hamm. See 151 Wn.2d at 311 n.4.

In Matsyuk and Weismann, the Court of Appeals found it significant that there was no right of subrogation by the tortfeasors' insurers against the tortfeasors. See Matsyuk at 333; Weismann at 177. This distinction bears no relation to the benefit received by the insurer in its capacity as PIP carrier when the insurer takes an offset, and should not make any difference. This Court has recognized that the availability of subrogation is not relevant when an insurer recovers PIP benefits by means of reimbursement or offset. See Hamm at 319-20 (insurer's retention of right to pursue subrogation from tortfeasor does not eliminate obligation to pay proportional share of legal expenses for reimbursement of PIP benefits); Winters at 876 (reimbursement provisions of policy permit insurer to recover PIP benefits from money the insured collects from the tortfeasor, notwithstanding absence of viable subrogation claim against tortfeasor). State Farm's and Safeco's arguments that the absence of subrogation rights in this context renders the equitable sharing rule inapplicable should be rejected.¹⁰

In Matsyuk, the court based its decision in part on the non-application of the collateral source rule to PIP benefits provided by the tortfeasor's insurer. See Matsyuk at 334-35. In Weisman, Safeco makes a similar argument. See Safeco Supp. Br. at 16-18. In both cases, the argument focuses on two pre-Mahler decisions, Lange v. Raef, 34

¹⁰ The insurer may nonetheless have subrogation-like rights or rights of offset or reimbursement under the terms of its policy. See Sherry, 160 Wn.2d at 618-19. As noted at supra n.4, this brief assumes Safeco, like State Farm, has a contractual basis for offset of PIP benefits against Weisman's settlement.

Wn.App. 701, 664 P.2d 1274, *review granted*, 100 Wn.2d 1013, *dismissed on stipulation* (1983); and Maziarski v. Bair, 83 Wn.App. 835, 924 P.2d 409 (1996). Both Lange and Maziarski support non-application of the collateral source rule, and would appear to allow a judgment to be offset by the amount of benefits paid under a PIP policy procured by the tortfeasor, even though, under the facts, the plaintiffs' judgments in these cases were not so reduced. See Lange, 34 Wn.App. at 704-05; Maziarski, 83 Wn.App. at 841-43.

It is doubtful whether application of the collateral source rule has any bearing on the right of offset involved here. The collateral source rule is an evidentiary principle, not a cause of action. See Mazon v. Krafchick, 158 Wn.2d 440, 452; 144 P.3d 1168 (2006). Whether or not the collateral source rule applies, the proportional sharing of legal expenses is an entirely separate question. As is evident from Maziarski, 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. See 83 Wn.App. at 844 (stating "the applicable measure of damages is whatever Bair's policy says it is. If the policy says Maziarski can receive and retain PIP payments, as well as damages attributable to Bair's fault, that is the applicable measure of damages").¹¹ Under the

¹¹ See also Maziarski at 842-43 (stating "[n]othing in Washington law prohibits an insurer from agreeing to pay under both coverages, without offset. Although the law does not permit an insurer to coordinate coverages in such a way that an injured person will receive *less than* a tort measure of damages ... the law does not prevent an insurer from contracting in such a way that an injured person will receive *more than* a tort measure of damages"; footnotes omitted); Sherry, 160 Wn.2d at 618-19 (stating "[a]n insurer has no subrogation-like rights against its own insured unless provided for by contract [n]or

equitable sharing rule, an insurer cannot provide for reimbursement of PIP benefits using policy language that is contrary to the rule, and the principle of full compensation to an insured. See Hamm, 151 Wn.2d at 311 n.4.

In the final analysis, there is no principled reason why the equitable sharing rule should not apply in this context. If the rule is not applied to the facts of Matsyuk and Weismann, the plaintiff-insureds will be worse off than if they had received PIP benefits and liability coverage proceeds from different insurers, and will be deprived of full compensation, a result that this Court has previously rejected. See Winters, 144 Wn.2d at 882; Hamm, 151 Wn.2d at 314.¹²

C. *Olympic Steamship Fees Should Be Awarded In Cases Where The Plaintiff-Insured Must Pursue Litigation Against Its PIP Insurer To Establish Its Entitlement To The Equitable Sharing Rule, As Distinguished From Litigation To Establish The Amount Of Legal Expenses Awarded Under The Rule.*

The superior court awarded Olympic Steamship fees in the Weismann case based on the Supreme Court's decision in Woodley, but the Court of Appeals vacated the fee award in light of its decision. Safeco points out that Mahler declined to award fees under Olympic Steamship. See Mahler, 135 Wn.2d at 430-32. On the other hand, Weismann notes that Woodley reached exactly the opposite conclusion, without any

does an insurer have a right of offset, setoff, or reimbursement without an authorizing contract provision?").

¹² State Farm offers several tables purporting to show that Matsyuk would not be worse off. See State Farm Supp. Br. at 13-15. Tables A and B are unhelpful because, among other things: (1) they exclude damages covered by PIP from the amount recovered from the tortfeasor, even though these damages are, in fact, recoverable from the tortfeasor; and (2) they further exclude legal expenses incurred to prove these damages, even though the plaintiff is obligated to prove that they were proximately caused by the tortfeasor and were reasonable and necessary expenses.

discussion of Mahler. See Woodley, 150 Wn.2d at 774. To the extent that a conflict exists, Woodley should control because it is the Court's most recent pronouncement on the subject. See Lunsford v. Saberhagen Holdings, Inc., 166 Wn. 2d 264, 280, 208 P.3d 1092 (2009) (stating "[a] later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law").¹³

Moreover, Woodley is correct because it honors the distinction between disputes over coverage and disputes over value under this Court's Olympic Steamship jurisprudence. See Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Because Weismann seeks legal expenses from Safeco in its capacity as PIP insurer for the purpose of vindicating her legal entitlement to proportional sharing of legal expenses, as opposed to resolving a factual dispute over the amount of Safeco's proportionate share, she should be entitled to recover her attorney fees and costs in this action under Olympic Steamship.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve the equitable sharing rule and *Olympic Steamship* fees issues accordingly.

¹³ The rule stated in Lunsford applies unless the seemingly conflicting holdings can be harmonized. See 166 Wn.2d at 280-81. Here, Woodley and Mahler cannot be reconciled.

DATED this 26th day of April, 2011.


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For BRYAN P. HARNETIAUX, with authority


For GARY N. BLOOM, with authority

On behalf of WSAJ Foundation

Appendix

RCW 48.22.005. Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Automobile" means a passenger car as defined in RCW 46.04.382 registered or principally garaged in this state other than:

- (a) A farm-type tractor or other self-propelled equipment designed for use principally off public roads;
- (b) A vehicle operated on rails or crawler-treads;
- (c) A vehicle located for use as a residence;
- (d) A motor home as defined in RCW 46.04.305; or
- (e) A moped as defined in RCW 46.04.304.

(2) "Bodily injury" means bodily injury, sickness, or disease, including death at any time resulting from the injury, sickness, or disease.

(3) "Income continuation benefits" means payments for the insured's loss of income from work, because of bodily injury sustained by the insured in an automobile accident, less income earned during the benefit payment period. The combined weekly payment an insured may receive under personal injury protection coverage, worker's compensation, disability insurance, or other income continuation benefits may not exceed eighty-five percent of the insured's weekly income from work. The benefit payment period begins fourteen days after the date of the automobile accident and ends at the earliest of the following:

- (a) The date on which the insured is reasonably able to perform the duties of his or her usual occupation;
- (b) Fifty-four weeks from the date of the automobile accident; or
- (c) The date of the insured's death.

(4) "Insured automobile" means an automobile described on the declarations page of the policy.

(5) "Insured" means:

- (a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by

blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while:
(i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

(6) "Loss of services benefits" means reimbursement for payment to others, not members of the insured's household, for expenses reasonably incurred for services in lieu of those the insured would usually have performed for his or her household without compensation, provided the services are actually rendered. The maximum benefit is forty dollars per day. Reimbursement for loss of services ends the earliest of the following:

(a) The date on which the insured person is reasonably able to perform those services;

(b) Fifty-two weeks from the date of the automobile accident; or

(c) The date of the insured's death.

(7) "Medical and hospital benefits" means payments for all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident for health care services provided by persons licensed under Title 18 RCW, including pharmaceuticals, prosthetic devices and eye glasses, and necessary ambulance, hospital, and professional nursing service. Medical and hospital benefits are payable for expenses incurred within three years from the date of the automobile accident.

(8) "Automobile liability insurance policy" means a policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage suffered by any person and arising out of the ownership, maintenance, or use of an insured automobile. An automobile liability policy does not include:

(a) Vendors single interest or collateral protection coverage;

(b) General liability insurance; or

(c) Excess liability insurance, commonly known as an umbrella policy, where coverage applies only as excess to an underlying automobile policy.

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

(10) "Occupying" means in or upon or entering into or alighting from.

(11) "Pedestrian" means a natural person not occupying a motor vehicle as defined in RCW 46.04.320.

(12) "Personal injury protection" means the benefits described in this section and RCW 48.22.085 through 48.22.100. Payments made under personal injury protection coverage are limited to the actual amount of loss or expense incurred.

[2003 c 115 § 1, eff. July 27, 2003; 1993 c 242 § 1.]

RCW 48.22.085. Automobile liability insurance policy--Optional coverage for personal injury protection--Rejection by insured

(1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage is offered as an optional coverage.

(2) A named insured may reject, in writing, personal injury protection coverage and the requirements of subsection (1) of this section shall not apply. If a named insured rejects personal injury protection coverage:

(a) That rejection is valid and binding as to all levels of coverage and on all persons who might have otherwise been insured under such coverage; and

(b) The insurer is not required to include personal injury protection coverage in any supplemental, renewal, or replacement policy unless a named insured subsequently requests such coverage in writing.

[2003 c 115 § 2, eff. July 27, 2003; 1993 c 242 § 2.]

Wash. Rev. Code Ann. § 48.22.085 (West)

RCW 48.22.090. Personal Injury Protection Coverage – Exceptions

An insurer is not required to provide personal injury protection coverage to or on behalf of:

- (1) A person who intentionally causes injury to himself or herself;
- (2) A person who is injured while participating in a prearranged or organized racing or speed contest or in practice or preparation for such a contest;
- (3) A person whose bodily injury is due to war, whether or not declared, or to an act or condition incident to such circumstances;
- (4) A person whose bodily injury results from the radioactive, toxic, explosive, or other hazardous properties of nuclear material;
- (5) The named insured or a relative while occupying a motor vehicle owned by the named insured or furnished for the named insured's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made;
- (6) A relative while occupying a motor vehicle owned by the relative or furnished for the relative's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made; or
- (7) An insured whose bodily injury results or arises from the insured's use of an automobile in the commission of a felony.

[2003 c 115 § 3, eff. July 27, 2003; 1993 c 242 § 3.]