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Supreme Court No. 84686-3  
Court of Appeals No. 64151-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiff/Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant/Respondent.

STATE FARM FIRE AND CASUALTY COMPANY'S  
ANSWER TO PETITION FOR REVIEW

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### **I. IDENTITY OF ANSWERING PARTY**

Respondent State Farm Fire and Casualty Company ("State Farm Fire") files this Answer to the Petition for Review.

### **II. SUMMARY OF GROUNDS FOR DENYING REVIEW**

The Court of Appeals correctly concluded that State Farm Fire had no obligation to pay a share of Ms. Matsyuk's legal expenses because her complaint allegations establish that she could not and did not recover and reimburse to State Farm Fire the personal injury protection ("PIP") payments it made on her behalf.

Ms. Matsyuk's Petition for Review merely quibbles with the Court of Appeals' decision, advancing the same erroneous argument that this Court's decisions regarding "common-fund" fee sharing compel a different result. Her conviction that the Court of Appeals got it wrong falls far short of showing that its decision: (i) conflicts with a decision of this Court, RAP 13.4(b)(1); (ii) involves an issue of substantial public interest that should be determined by this Court, RAP 13.4(b)(4); or (iii) conflicts with another Court of Appeals decision, RAP 13.4(b)(2). The Court should deny her Petition for Review.

### **III. ISSUES PRESENTED IF REVIEW IS GRANTED**

Ms. Matsyuk has misstated the issues before the Court if the Court grants review. State Farm Fire re-frames those issues as follows:

1. Did the Court of Appeals properly affirm the trial court's dismissal of Ms. Matsyuk's claims for fee sharing associated with her so-called "reimbursement" of State Farm Fire's PIP payments when, as a matter of law:

(a) State Farm Fire had no subrogation rights with respect to those payments and therefore had no right to reimbursement?

(b) Ms. Matsyuk's PIP payments did not come from a "collateral source" and thus could not have produced a recovery sufficient to reimburse State Farm Fire?

(c) State Farm Fire did not make any offset against a total award that included PIP payments?

2. Did the Court of Appeals properly affirm the trial court's dismissal of Ms. Matsyuk's breach of contract claim given the absence of any contractual fee-sharing language in the policy?

3. Did the Court of Appeals properly affirm the dismissal of Ms. Matsyuk's bad faith, Consumer Protection Act, and conversion claims where the release she executed expressly allowed her to reserve her claims against State Farm Fire, she has not alleged cognizable damages, and her allegations of causation and damages are legal conclusions the court was not required to accept?

#### IV. STATEMENT OF THE CASE

##### A. Factual Background

On May 20, 2008, State Farm Fire's policyholder, Omelyan Stremditskyy, was involved in an accident while driving a car in which Ms. Matsyuk was a passenger. Mr. Stremditskyy had purchased a State Farm Fire policy, which covered his vehicle. Mr. Stremditskyy—not Ms. Matsyuk—was the named insured and paid the premiums on that policy. CP 77 (Goodman Decl.) ¶ 4.<sup>1</sup> Mr. Stremditskyy's policy provided liability coverage whereby State Farm Fire agreed to pay damages for which Mr. Stremditskyy might be liable from operating his car. CP 77 ¶ 5; CP 86 (auto policy).

Mr. Stremditskyy's policy also included PIP coverage, which provided payment for certain reasonable, accident-related medical expenses not only for Mr. Stremditskyy, but also for his passengers, regardless of fault. CP 77 ¶ 6; CP 90. Ms. Matsyuk became a defined insured for that coverage under the policy, even though she was not a named insured on the policy and did not pay anything for that coverage. CP 78 ¶ 6. State Farm Fire paid \$1,874 under the PIP coverage of Mr.

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<sup>1</sup> As the Court of Appeals correctly observed, which Ms. Matsyuk does not dispute, the Court may consider the release and Mr. Stremditskyy's policy in evaluating State Farm Fire's motion to dismiss because Ms. Matsyuk incorporated them into her complaint, *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 329 n.2, 229 P.3d 893 (2010) (citing *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008)).

Stremditskyy's policy to cover medical expenses Ms. Matsyuk incurred as a result of the accident. CP 78 ¶ 7.

On October 21, 2008, Ms. Matsyuk sued State Farm Fire, purportedly on behalf of herself and a putative class of supposedly similarly situated individuals. CP 3-11. The Complaint alleged that Ms. Matsyuk had recovered from Mr. Stremditskyy and reimbursed State Farm Fire its PIP payments. CP 10-16. Ms. Matsyuk asserted various causes of action for State Farm Fire's alleged breach of its obligation to pay a pro rata share of her legal expenses. CP 8-10.

On December 19, 2008, two months after the filing of the Complaint, State Farm Fire agreed to settle Ms. Matsyuk's additional claims against Mr. Stremditskyy for a payment of \$4,000, above and beyond the \$1,874 in PIP benefits it had already paid. CP 32. Together, the PIP payments and the liability settlement added up to \$5,874, which Ms. Matsyuk characterized as the "total settlement" of her claims. CP 4.

**B. Proceedings Below**

On December 3, 2008, State Farm Fire filed a motion to dismiss for failure to state a claim. CP 14-22, 148-49. In its motion, State Farm Fire explained that *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), squarely held that where (as here) an insurance company pays for an injured passenger's medical expenses under the PIP coverage of the

alleged tortfeasor's policy, it may take into account the amount of those payments when settling the passenger's claim under the liability coverage of the same policy—without thereby assuming any obligation to reimburse a share of her legal expenses under the “common-fund” fee-sharing rule in *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). CP 14-22, 148-49.

On January 16, 2009, Ms. Matsyuk filed a motion for partial summary judgment, relying largely on this Court's decision in *Hamm v. State Farm Mutual Automobile Insurance Co.*, 151 Wn.2d 303, 88 P.3d 395 (2004). In that case this Court held that a PIP offset against an underinsured motorist (“UIM”) arbitration award for total damages, including amounts paid by PIP, effectively reimbursed PIP payments to a PIP insurer, triggering a “common-fund” fee-sharing obligation. Ms. Matsyuk argued that *Hamm* stood for the broad proposition that a PIP insurer is “reimbursed” its PIP payments any time it takes PIP payments into account in determining a liability payment under the same policy, thereby triggering a fee-sharing obligation. CP 33-44.

The trial court agreed with State Farm Fire that *Young* was consistent with and distinguishable from *Hamm*, granted State Farm Fire's motion to dismiss, and denied Ms. Matsyuk's motion for partial summary judgment. CP 138-39, 140-41.

On March 29, 2010, the Court of Appeals, Division I, affirmed. *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 229 P.3d 893 (2010). Division I correctly ruled that, unlike the PIP insured in *Hamm*, because State Farm Fire paid both Ms. Matsyuk's PIP and liability amounts under the alleged tortfeasor's insurance policy, the equitable considerations underlying common-fund fee-sharing are not present.

Specifically, Division I reasoned that because the source of Ms. Matsyuk's PIP payments was the tortfeasor's insurance policy, he could reduce his liability at trial by such payments, which would preclude Ms. Matsyuk from obtaining and reimbursing to State Farm Fire its PIP payments. *Id.* at 334. Having reimbursed nothing to State Farm Fire, it would have no obligation to pay a share of Ms. Matsyuk's attorney fees. *Id.* Division I observed that Ms. Matsyuk should not be able to recover in settlement more than she could through trial, and that to hold otherwise would discourage settlements in these circumstances. *Id.* at 335.

Division I also correctly held that State Farm Fire had no subrogation right against the tortfeasor since he was State Farm's insured; to do otherwise would defeat the purpose of insurance. *Id.* at 333. Thus Ms. Matsyuk could not have recovered from the tortfeasor and reimbursed to State Farm Fire PIP amounts it had no right to recover from the tortfeasor in the first place. *Id.*

## V. ARGUMENT

### A. Review Is Not Warranted Under RAP 13.4(b)(1) Because the Court of Appeals' Decision Does Not Conflict with a Decision of This Court.

#### 1. The Court of Appeals' Decision Is Consistent with This Court's Decisions in *Mahler*, *Winters*, and *Hamm*.

Ms. Matsyuk's insistence that she recovered from the tortfeasor and reimbursed to State Farm Fire its PIP payments reflects her deep misunderstanding of the equitable underpinnings of the common-fund doctrine. This Court has allowed common fund recoveries only where (i) the PIP insurer had a subrogation right against the tortfeasor because the tortfeasor *was not* its insured; (ii) the PIP carrier *did not* make PIP payments under the tortfeasor's policy, making it possible for the PIP insured to invoke the collateral source rule to obtain a double recovery of the medical special damages already paid by PIP; and (iii) the PIP carrier recouped its PIP payments from the PIP insured's recovery. *Mahler*, *Winters* and *Hamm* all fit neatly within these principles.

#### a. *Mahler*

*Mahler* considered two cases, each involving a fault-free plaintiff who collected PIP benefits for medical expenses under her own State Farm Mutual auto policy. Each plaintiff sued the driver of the other vehicle involved in her accident. In each case, a liability insurer other

than State Farm Mutual insured the tortfeasor driver. Thus, State Farm Mutual had a PIP subrogation right against the tortfeasors. 135 Wn.2d at 405-09. “In the insurance context, the doctrine of subrogation enables an insurer that has paid an insured’s loss pursuant to a policy ... to recoup the payment from the party responsible for the loss.” *Mahler*, 135 Wn.2d at 413 (internal quotations omitted). But an insurer may *not* subrogate against its own insured. *Id.* at 419. Each plaintiff settled her claim with the tortfeasor’s liability carrier. *Id.* at 407, 410.

The Court observed that, under the collateral source rule, the fact that the plaintiffs already had received PIP payments under their insurance policies did not prevent them from “subsequently recover[ing] special damages from the tortfeasor duplicating the PIP payments.” *Id.* at 412 n.4. Ordinarily the law prohibits duplicative recoveries for the same damages. *Pub. Employees Mut. Ins. Co. v. Kelly*, 60 Wn. App. 610, 618, 805 P.2d 822 (1991). 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. Even when someone other than the tortfeasor—that is, a collateral source—compensates an injured party sufficient to cover (for example) medical expenses, the injured party still may sue for the full extent of her injuries, even if it results in a duplicative recovery. Thus, each settlement *included* payments for

medical expenses that State Farm Mutual had paid with PIP under plaintiffs' policies. Based on standard subrogation principles, State Farm Mutual shared in its PIP insureds' recoveries by recouping from the tortfeasors' insurers' settlement payments its previous PIP payments. The Court held that State Farm Mutual was contractually obligated to pay a pro rata share of its insureds' legal expenses when its insureds recovered liability payments from tortfeasors from which they reimbursed the PIP payments. *Mahler*, 135 Wn.2d at 419.

The Court stated that this result was consistent with "the common fund doctrine, which, as an exception to the American Rule on fees in civil cases, applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves." *Id.* at 426-27.

**b. *Winters***

Sara Winters purchased her own automobile insurance policy from State Farm Mutual.<sup>2</sup> *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wash.2d 869, 872, 31 P.3d 1164 (2001). She was injured in a car accident with an insured driver. State Farm Mutual paid Ms. Winters under the PIP coverage of her own insurance policy for medical expenses and wage loss. *Id.* at 873. She also sued the driver and eventually convinced the driver's

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<sup>2</sup> As did Ms. Matsyuk in her Petition for Review (and as did this Court's *Hamm* decision), for simplicity this brief will discuss only Ms. Winters's facts, though the *Winters* decision involved two consolidated cases.

insurer to pay policy limits. *Id.* at 878. Believing she had not been fully compensated for her injuries, Ms. Winters pursued a UIM claim against State Farm Mutual.

The arbitrator awarded Winters total damages that included special medical damages already paid by PIP. *Id.* at 873. State Farm Mutual offset its earlier PIP payments from the award and paid only the difference. Ms. Winters argued that State Farm Mutual had no right to offset its earlier PIP payments. *Id.* at 873-74.

The Court of Appeals held that State Farm Mutual properly reduced the UIM award by the amount of PIP benefits it paid but that *Mahler's* principles required State Farm Mutual to pay a pro-rata share of Ms. Winters' legal expenses. *Id.* at 874. This Court affirmed. The Court framed its discussion (as it did in *Mahler*) by returning to basic principles underlying "common-fund" fee sharing. It reiterated that "[t]raditional 'subrogation' is an equitable doctrine involving three parties, permitting one who has paid benefits to one party to collect from another." *Id.* at 875. It reiterated that "[a]n insurer does not have a right of subrogation against its own insured" but acknowledged State Farm Mutual's subrogation right to be reimbursed its PIP payments by the at-fault driver, who was not its insured. *Id.* The Court also observed that "UIM payments are treated as if made by the tortfeasors," meaning that, as a

matter of law, the proceeds of the UIM claim came from the negligent driver not from the PIP insurer. *Id.* at 880.

Having reiterated these principles, the Court analyzed whether Ms. Winters' UIM claim created a common fund from which State Farm Mutual as PIP insurer recovered its PIP payments. The Court reasoned that State Farm Mutual in its capacity as PIP insurer could seek reimbursement of its PIP payments only where (as in Ms. Winters' case) the combined PIP proceeds, liability limits of the tortfeasor's policy, and the UIM arbitration award exceeded the plaintiff's total damages. *Id.* at 881. The Court did not allow State Farm Mutual to reduce the amount of its UIM obligation (which, after all, had been set by the arbitrator to *include* the medical and wage loss damages already covered by PIP). But it allowed State Farm Mutual effectively to pay the entire arbitration award (less the agreed set off of the tortfeasor's liability limits) in its capacity as UIM carrier—a payment deemed to come from the tortfeasor under Washington law—and reimburse itself in its capacity as PIP carrier by offsetting the PIP from the arbitration award.

**c. *Hamm***

In *Hamm*, the Court considered whether the common-fund fee-sharing rule applies when the tortfeasor is uninsured and the insured recovers only from a UIM carrier. 151 Wn.2d. at 307. Rebecca Hamm

was injured in an automobile accident with an uninsured motorist. State Farm Mutual insured Ms. Hamm under a policy that provided for both PIP and UIM coverage. *Id.* at 306. State Farm Mutual promptly paid Ms. Hamm's medical expenses under the PIP coverage of the policy. But Hamm also pursued a UIM claim, which resulted in an arbitration award for her total damages, *including* (because of the collateral source rule) the medical expenses already paid by PIP. *Id.* From the total award that State Farm Mutual owed in its capacity as UIM carrier, it offset the amount of PIP benefits it previously paid and paid only the balance. *Id.* at 306-07.

In deciding whether the PIP carrier had to share in its insured's attorneys' fees, the Court emphasized that, as in a case involving two different insurers, *the UIM carrier was obligated to pay the entire arbitration award for the plaintiff's total damages.* *Id.* at 311. The Court further explained that when the same carrier provides both PIP and UIM coverage to an insured under the same insurance policy, a PIP offset against the carrier's UIM liability (which encompasses the entire amount owed by the tortfeasor, including medical expenses paid by PIP) has the same function as if the UIM carrier paid the entire UIM award to plaintiff, with the plaintiff reimbursing the PIP amount. *Id.* at 318.

**d. Ms. Matsyuk Fails to Identify Any Conflict Between Division I's Opinion and the Foregoing Decisions of This Court.**

Ms. Matsyuk makes a number of superficial observations about *Winters* and *Hamm*, which only underscore how deeply her arguments fail to comprehend the doctrinal underpinnings of those cases.

*First*, she criticizes Division I for supposedly providing no meaningful evaluation of State Farm's obligations as her PIP insurer. Petition at 13. But Division I correctly analyzed that in State Farm Fire's capacity *as her PIP insurer*: (i) it had no right to subrogate against its own policyholder tortfeasor so there was no PIP subrogation interest for Ms. Matsyuk to recover and reimburse to State Farm Fire from the liability proceeds she obtained from the tortfeasor, 155 Wn. App. at 333; and (ii) Ms. Matsyuk could not invoke the collateral source rule since the source of her PIP coverage was the tortfeasor's policy. *Id.* at 334 (quoting *Maziarski v. Bair*, 83 Wn. App. 835, 841 n.8, 924 P.2d 409 (1996)).

*Second*, the fact that she is a defined PIP insured, does not alter this analysis for none of Division I's analyses turn on whether she was a PIP insured. Petition at 14. What matters is whether or not the tortfeasor purchased the policy because that determines whether State Farm Fire has

a subrogation right to recover from the alleged tortfeasor and whether the PIP recipient can invoke the collateral source rule.

*Third*, Ms. Matsyuk misses the point when she argues that under *Hamm* and *Winters* “the result in any particular instance should be the same whether the applicable coverages are supplied by one insurer or by two or more.” Petition at 14. Similarly, she takes out of context the *Hamm* Court’s consideration of whether a PIP insured would be worse off if she had been covered by separate carriers. *Id.* In *Hamm*, the Court expressed concern that a tort victim who spends money to *purchase* both PIP and UIM coverages should not be worse off than a tort victim who purchases PIP coverage and is hit by a fully insured driver. *See Hamm*, 151 Wn.2d at 315 (“The Court of Appeals’ outcome directly conflicts with the *Winters*’ holding that ‘[t]he insured should not be worse off simply because he or she purchased two coverages from the same insurer.’”) (quoting *Winters*, 144 Wn.2d at 882). Here, however, Ms. Matsyuk purchased *none* of the coverages at issue and recovered exactly the same amount as if she had prevailed at trial. As Division I aptly observed, to allow fee-sharing under the circumstances Ms. Matsyuk urges would discourage settlement and incent tortfeasors and their insurers to force plaintiffs to trial rather than settle.

**2. The Court of Appeals' Decision in *Young v. Teti* Is Consistent with *Hamm* and *Winters*.**

Ms. Matsyuk also asks that the Court grant review because *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), supposedly "cannot be squared" with *Hamm* and *Winters*. Petition at 15. She is mistaken.

*First*, Ms. Matsyuk argues that *Hamm* rejected the reasoning in *Young*. Specifically, she points out that in *Young* the Court concluded *Mahler* did not apply because the plaintiff's liability recovery did not benefit the PIP insurer, while in *Hamm* the Court concluded the plaintiff's UIM recovery *did* benefit the PIP insurer. Petition at 15-16. Again, Ms. Matsyuk ignores the importance of the source of the PIP funds.

In *Hamm* (as in *Winters*), arbitration awards were entered against the UIM carriers for the plaintiffs' full damages, including a double recovery for damages paid by PIP. Thus, the Court reasoned when the same carrier provides both PIP and UIM coverage, a PIP offset against the carrier's UIM liability has the same function as if the UIM carrier paid the entire UIM award to plaintiff, with the plaintiff reimbursing the PIP amount, which is a benefit to the PIP carrier. *Hamm*, 151 Wn.2d at 311.

In *Young*, by contrast, plaintiff's PIP benefits came from the PIP coverage of the tortfeasor's policy. *Young*, 104 Wn. App. at 725. As a result, the insurer had no subrogation interest for the plaintiff to recover.

Thus, the plaintiff could not (and did not) create a fund from which the PIP insurer could be reimbursed its PIP.

*Second*, Ms. Matsyuk focuses on the fact that the plaintiff in one of the consolidated cases in *Winters* did not purchase the policy under which he received PIP payments. Petition at 17. Again, Ms. Matsyuk fails to appreciate what matters is not whether the PIP recipient purchased the policy. Instead, what matters is whether the tortfeasor purchased the policy under which the plaintiff receives PIP payments, for that determines whether the PIP insurer has a subrogation interest to recover and whether the PIP insured can invoke the collateral source rule to make such a recovery.

At bottom, subrogation principles and the collateral source rule, which undergird this Court's decisions regarding common-fund fee sharing, refute each of Ms. Matsyuk's arguments as to why *Winters* and *Hamm* supposedly overruled *Young*, as Division I correctly appreciated.

**3. The Court of Appeals' Decision That Ms. Matsyuk States No Bad Faith Claim Is Consistent with This Court's Decision in *Coventry*.**

Ms. Matsyuk does not dispute that for her bad faith claim to survive, she must allege facts that, if proved, "show[] that State Farm's alleged misconduct was unreasonable, frivolous, or untenable." *Matsyuk*,

155 Wn. App. at 337 (citing *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 23, 25 P.3d 997 (2001)). Division I correctly concluded that Ms. Matsyuk cannot state a bad faith claim against State Farm Fire based on allegations that State Farm Fire supposedly asked her to release a non-existent claim for fee-sharing. *Id.* at 338. In light of the *Young* decision—controlling authority directly on point—it is not unreasonable, frivolous, or untenable for State Farm Fire to “refuse[] to do what it had no obligation at law to do.” *Id.*<sup>3</sup> As she did below, Ms. Matsyuk incorrectly urges that *Coventry Associates v. American States Insurance Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998), compels a different result.

*Coventry* held that a first-party insured may maintain a claim for bad faith claim investigation even if the insurer’s coverage denial is correct where “[t]he record establishes that Coventry incurred certain expenses as a result of American States’ bad faith investigation.” *Id.* at 279-83. In other words, in the absence of coverage, bad faith claim investigation might still cause harm giving rise to actionable bad faith. Harm is an essential element of a bad faith claim. *Id.* at 276.

In contrast here, as State Farm Fire argued below, Ms. Matsyuk has not and cannot allege that she suffered cognizable damage as a result

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<sup>3</sup> Although dismissal was proper even if this allegation were true, it is false. The record confirms that State Farm Fire allowed Ms. Matsyuk to reserve her non-existent *Mahler*-fee claims when she balked at signing State Farm Fire’s standard liability release. CP 32.

of State Farm Fire's supposed insistence that she release her non-existent *Mahler*-fee claims. Nor did State Farm concede that it acted in bad faith, as did the insurer in *Coventry*. *Id.* at 275. This case is nothing like *Coventry*.

**4. The Court of Appeals' Discussion of the Non-Duplication of Benefits Clause Does Not Conflict with *Hamm*.**

As discussed, in *Hamm* the insurer offset its prior PIP payments against the UIM arbitration award for the plaintiff's total damages. It did so based on a non-duplication of benefits clause which provided that the insurer need not pay again under UIM coverage the amounts it paid for the same damages under PIP coverage. *See Hamm*, 151 Wn.2d at 311 n.4; *see also Winters*, 144 Wn.2d at 876-77. In the present case, Division I correctly held that "here, the nonduplication of benefits clause was not a means of achieving reimbursement while avoiding fee sharing, as in *Hamm*" because State Farm Fire had no subrogation right against its insured driver, so it had no right to seek recovery from Ms. Matsyuk's liability recovery from its insured. *Matsyuk*, 155 Wn. App. at 332-33 (internal citation omitted).

Ms. Matsyuk claims that *Hamm* prohibits using a non-duplication of benefits clause to avoid fee sharing, Petition at 19, but this is no more than a restatement of her false premise that State Farm Fire has an

obligation to share fees in the first place, which it does not for she has not in any sense recovered and reimbursed to State Farm Fire its PIP payments.

She also argues that Mr. Stremditskyy's non-duplication of benefits clause applies only to *his* liability coverage and does not apply to *her*. *Id.* That is precisely the point. State Farm Fire's obligation *to Mr. Stremditskyy* to pay amounts under *his* liability coverage does not extend to damages State Farm Fire already paid under the PIP coverage of Mr. Stremditskyy's policy. Because State Farm Fire's obligation *to Mr. Stremditskyy* to pay for his liability could never result in a duplicative payment of Ms. Matsyuk's damages already paid for by Mr. Stremditskyy's PIP coverage, the non-duplication of benefits clause ensured that Ms. Matsyuk did not recover those amounts again when State Farm Fire settled her liability claim against Mr. Stremditskyy.

**B. Review Is Not Warranted Under RAP 13.4(b)(4) Because the Petition Does Not Present an Issue of Substantial Public Interest.**

Although Ms. Matsyuk gives lip service to RAP 13.4(b)(4)'s "substantial public interest" ground for review, Petition at 2-3, she makes no argument beyond her erroneous claim that Division I's decision conflicts with this Court's decisions. Ms. Matsyuk's inability to

comprehend the proper application of the common-fund fee-sharing rule does not present an issue of substantial public interest.

**C. Review Is Not Warranted Under RAP 13.4(b)(2) Because the Court of Appeals' Decision Does Not Conflict with Another Court of Appeals Decision.**

Division I's decision here is consistent with the only other Court of Appeals decision to address whether common-fund fee sharing applies when a plaintiff collects PIP and liability payments under the tortfeasor's insurance policy, i.e., the *Young* decision. Ms. Matsyuk's speculation that Division II *might* issue a conflicting decision *in the future* in another case, *Weismann v. Safeco Insurance Company of Illinois* (Div. II No. 39323-9-II), is no basis for review under RAP 13.4(b)(2). She merely states the obvious in observing that if the *Weismann* decision conflicts with Division I's decision in this case, then a conflict will exist between decisions of the Court of Appeals.

**VI. CONCLUSION**

For these reasons, State Farm Fire requests that the Court deny review.

RESPECTFULLY SUBMITTED this 6th day of July, 2010.

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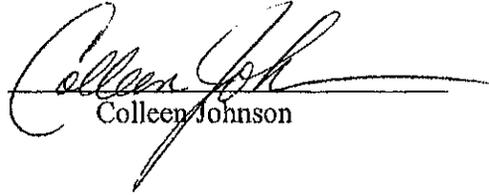
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~~I declare under penalty of perjury that on this day I caused a copy~~  
of the foregoing State Farm Fire and Casualty Company's Answer to  
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Colleen Johnson

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Rec. 7-6-10

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Please find attached for filing in the above referenced case State Farm Fire and Casualty Company's Answer to Petition for Review.

(Sent on behalf of Kenneth Payson, WSBA #26369, [kennethpayson@dwt.com](mailto:kennethpayson@dwt.com))

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