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STATE OF WASHINGTON

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No. 39323-9-II

WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO

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KAREN WEISMANN, *Respondent*

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, *Appellant*

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**APPELLANT'S BRIEF IN REPLY TO BRIEF OF RESPONDENT**

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## I. INTRODUCTION<sup>1</sup>

Ms. Weismann effectively concedes that *Young v. Teti*<sup>2</sup> precludes her fee sharing claim. In order to circumvent this Court's ruling in *Young*, she asserts that *Young* was impliedly overruled by the Supreme Court decisions in *Winters v. State Farm*<sup>3</sup> and *Hamm v. State Farm*.<sup>4</sup> However, her arguments fail to acknowledge the clear factual differences between *Young* and those later Supreme Court rulings, and the impact those differences have upon the creation of a common fund and the application of the collateral source rule.

Moreover, her position would require not only a finding that *Young* was impliedly overruled, but also a finding that this Court's decision in *Maziarski v. Bair*<sup>5</sup> and Division One's ruling in *Lange v. Raef*<sup>6</sup> were also impliedly overruled. Finally, Weismann fails to acknowledge that the Supreme Court's opinion in *Winters* affirmed (and heavily quoted from)

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<sup>1</sup> As noted in both Safeco's Appellant's Brief and Weisman's response, there is a pending appeal from the King County Superior Court involving these issues where the trial court reached the opposite conclusion from the court in this matter. See, Appellant's Brief at 7; Respondent's Brief, at 5n.1. See also, CP 231-42. The Supreme Court did not accept direct review; instead, the matter was transferred to Division One of the Court of Appeals. See, Order in *Matsyuk v. State Farm Fire & Cas. Co.*, Supr. Court Cause No. 82819-9.

<sup>2</sup> *Young v. Teti*, 104 Wn. App 721, 16 P.3d 1275 (2001).

<sup>3</sup> *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001).

<sup>4</sup> *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 88 P.3d 395(2004).

<sup>5</sup> *Maziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (Div. 2, 1996).

<sup>6</sup> *Lange v. Raef*, 34 Wn. App. 701, 664 P.2d 1274 (Div. 1, 1983).

this Court's earlier ruling in *Winters*.<sup>7</sup> This court's decision in *Young* was rendered after its decision in *Winters* and explicitly discussed and distinguished *Winters*.<sup>8</sup>

For these reasons, and the reasons set forth in Appellant's Brief, Safeco acted properly in offsetting its PIP payments without a reduction for pro rata fees and costs because Safeco was the tortfeasor's insurer and paid both liability and PIP payments to the tort victim. Accordingly, the trial court erred in granting summary judgment to Weismann. Further, Weismann is not entitled to attorneys fees under *Olympic Steamship*<sup>9</sup> because summary judgment was in error, and because this was not a coverage dispute pursuant to the holding in *Mahler v. Szucs*.<sup>10</sup>

## II. ARGUMENT

### A. Weismann's Arguments Necessarily Fail Unless *Young* Was Overruled

As noted above, Weismann's entire opposition hinges on her assertion that *Young* was impliedly overruled by the Supreme Court's rulings in *Winters* and *Hamm*. Weismann has effectively conceded that *Young* acts as a bar to her claim for pro rata fees. In fact, she does not even attempt to distinguish her position from that of the plaintiff in *Young*.

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<sup>7</sup> *Winters v. State Farm Mut. Auto Ins. Co.*, 99 Wn. App. 602, 994 P.2d 881, *affirmed*, 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001).

<sup>8</sup> *Young*, 104 Wn.App. at 727 n.14.

<sup>9</sup> *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

<sup>10</sup> *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).

The reason she does not, is because she cannot. This Court's ruling in *Young* is directly on point. As set forth in Safeco's Appellant's Brief, the facts in this matter and in *Young* are almost identical.<sup>11</sup> Absent a finding that *Young* has been overruled, it is clear that the trial court's rulings should be overturned and judgment should be entered for Safeco.

**B. Weismann's Analysis Glosses Over The Key Difference Between The Facts in *Young* And The Facts In *Winters* and *Hamm***

There is one key difference between the facts in *Young* and the facts in *Winters* and *Hamm*. In *Young*, as in the instant case, the tortfeasor's insurer is the one who made PIP payments and who was obligated to make liability payments.<sup>12</sup> In contrast, in *Winters*, neither the PIP payments to Ms. Winters nor the PIP payments to Mr. Perkins<sup>13</sup> were made under the tortfeasor's insurance policy.<sup>14</sup> Ms. Winters' PIP payments were made under a policy that she purchased, and Mr. Perkins received payments under a policy that was purchased by someone other than the tortfeasor.<sup>15</sup>

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<sup>11</sup> See, Appellant's Brief, at 9-12.

<sup>12</sup> *Young*, 104 Wn. App. at 725-727.

<sup>13</sup> Mr. Perkin's was the plaintiff in a different case against State Farm, which was consolidated with Ms. Winter's case when the Supreme Court accepted review. *Winters*, 144 Wn.2d at 874-75.

<sup>14</sup> See, *Winters*, 144 Wn.2d at 872-75.

<sup>15</sup> *Id.*

*Hamm* is similarly factually distinguishable because Ms. Hamm received PIP and UIM benefits under a policy of insurance that was not contracted for by the tortfeasor.<sup>16</sup>

Weismann glosses over this key difference in her response by focusing on liability payments in comparison to UIM payments and denying that there is any “...principled distinction between the present case and *Hamm*.”<sup>17</sup> The difference is the source of the PIP funds. Unlike the situation in *Winters* and *Hamm*, the tortfeasor was the source of the PIP funds paid to Weismann in this case and to Young in *Young v. Teti*.

Weismann asserts this key distinction does not matter because Safeco owed her duties separate and apart from its duties to Ms. Kangas.<sup>18</sup> Safeco admittedly owed duties to Ms. Weismann; however, those duties only existed because Ms. Kangas purchased insurance from Safeco and opted to have PIP coverage. Ms. Kangas is the named insured,<sup>19</sup> and it was up to her whether to accept or reject PIP coverage.<sup>20</sup> If Ms. Kangas had not contracted and paid for PIP coverage, then Weismann would not have been entitled to PIP benefits under the Safeco policy. Because of

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<sup>16</sup>*Hamm*, 151 Wn.2d at 306-07 The fact that the policy at issue in *Hamm* was not the tortfeasor’s policy of insurance is clear due to the fact that the Court notes that the tortfeasor was uninsured. See e.g., *Hamm*, 151 Wn.2d at 306-07.

<sup>17</sup> Respondent’s Brief, at 15-16.

<sup>18</sup> Respondent’s Brief, at 15 n.4.

<sup>19</sup> See, CP 91 (certified policy affidavit listing Ms. Kangas as named insured); CP 95 (policy declaration page identifying Ms. Kangas as insured).

<sup>20</sup> See, RCWA 48.22.085(1) (requiring PIP coverage to be offered as an optional coverage); RCWA 48.22.085(2) (stating that the named insured can reject PIP coverage).

Ms. Kangas' status as an insured, Safeco has no subrogation interest against her under law<sup>21</sup> or pursuant to the policy of insurance.<sup>22</sup>

Weismann would be entitled to a pro rata share of fees if she had created a common fund that would have compensated both her for her damages and Safeco for its PIP payments.<sup>23</sup> However, because the policy of insurance and Washington law specifically prevent Safeco from being able to recover PIP payments from its own insured, any fund created by Weismann by settling with Ms. Kangas could not compensate Safeco regardless of what capacity it was acting in. Just like the plaintiff's suit in *Young*, Weismann's actions against Ms. Kangas in this matter did not produce an additional party to reimburse Safeco.<sup>24</sup> No common fund was created.

Weismann's argument to the contrary not only requires that *Young* be overruled, but also necessarily requires that two other appellate court cases be overruled. It is only through the operation of the collateral source rule that an injured party may recover damages from a tortfeasor that have

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<sup>21</sup> *Mahler*, 135 Wn.2d at 419 (stating that, "[n]o right of subrogation can arise in favor of an insurer against its own insured...") (quoting, *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341, 346 (1976); and citing 16 George J. Couch, *Insurance* § 61:136, at 195-96 (2d ed. 1983)).

<sup>22</sup> See, CP 114 (**OUR RIGHT TO RECOVER PAYMENT**, subsection "A" of policy stating that Safeco will not use its right to recover damages from another if that other person is an insured under Part A of the policy). See also, CP 94-147 (certified copy of the policy).

<sup>23</sup> See, *Young*, 104 Wn. App. at 724-25, citing, *Mahler*, 135 Wn.2d at 426-27.

<sup>24</sup> *Young*, 104 Wn. App. at 725-27.

already been paid by someone else.<sup>25</sup> Pursuant to *Maziarski*<sup>26</sup> and *Lange*,<sup>27</sup> PIP payments made by the tortfeasor's carrier come from a fund created by the tortfeasor, not from a source independent of the tortfeasor. In these circumstances, the collateral source rule does not apply.<sup>28</sup>

In *Winters* and *Hamm*, the PIP insurer had a subrogation right against the tortfeasor, who was not an insured, and the PIP payments were not made under the tortfeasor's policy of insurance. That made it possible for the collateral source rule to operate and provide a double recovery for the damages already paid by PIP. It was from this resultant "common fund" that the PIP insurer was able to recover its initial payment.

By contrast, in *Young* and in this matter, the PIP insurer did not have a subrogation right against the tortfeasor because the tortfeasor was

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<sup>25</sup> See, *Mahler*, 135 Wn.2d at 412 n.4 ("It is a well settled rule in tort actions that a party has a cause of action notwithstanding the payment of his loss by an insurance company.") (quoting, *Consol. Freightways, Inc. v. Moore*, 38 Wn.2d 427, 430, 229 P.2d 882 (1951); and citing, *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 585 P.2d 1182 (1972)); cf. *Publ. Employees Mut. Ins. Co. V. Kelley*, 60 Wn. App. 610, 618, 805 P.2d 882 (1991) (stating that, "...it is a basic principle of damages—tort and contract—that there shall be no double recovery for the same injury.") (footnote omitted).

<sup>26</sup> *Maziarski*, 83 Wn. App. at 841 n.8 (finding that the collateral source rule did not apply because the payments came from the tortfeasor's PIP coverage, which was a fund created by the tortfeasor).

<sup>27</sup> *Lange*, 34 Wn. App. at 704-05 (finding that the jury could have heard evidence regarding PIP payments from the tortfeasor's insurer because the collateral source rule did not apply).

<sup>28</sup> *Maziarski*, 83 Wn. App. at 841; 841 n.8; *Lange*, 34 Wn. App. at 704-05. See also, *Bliss v. City of Newport*, 58 Wn. App. 238, 241 n.2, 792 P.2d 184(1990) (Stating in an unknown insurance context, that, "[t]he collateral source rule does not apply because the source of the collateral payments here is the [defendant's] ... insurer, a fund created by the [defendant]... by its insurance contract.") (citing, *Lange v. Raef*, 34 Wn. App. 701, 704, 664 P.2d 1274 (Div. 1, 1983)).

an insured. The PIP payments were made under the tortfeasor's policy of insurance, which was a fund created by the tortfeasor's insurance contract. This prevented the application of the collateral source rule, and prevented both Young and Weismann from recovering duplicate damages. Thus, there was no common fund from which the insurer could recoup any payments and no benefit to the insurer.

Accordingly, this Court ruled in *Young* that the reasoning of the Supreme Court in *Mahler* and this court in *Winters* did not apply. Thus, requiring the carrier to pay a proportionate share of fees was not appropriate.<sup>29</sup> Likewise, fee sharing is inappropriate in this matter. Weismann's arguments to the contrary fail not only because they do not take into account the foregoing, but also because her position does not recognize that the Supreme Court's rulings in *Winters* and *Hamm* were based upon this Court's earlier ruling in *Winters*, which was decided before *Young* and discussed in *Young*.

**C. *Young v. Tetti* was not overruled By *Winters* or By *Hamm***

In reaching its conclusion in *Winters*, the Supreme Court affirmed (and acknowledged that it liberally borrowed from) this Court's prior opinion in that matter.<sup>30</sup> This Court's opinion in *Winters* noted that the

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<sup>29</sup> *Young*, 104 Wn. App. at 725-727.

<sup>30</sup> *Winters*, 144 Wn.2d at 873; 876; 882. See also, *Winters*, 99 Wn. App. 602, 994 P.2d 881, affirmed, 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001).

opinion did not consider, nor address, the situation of an at-fault PIP insured.<sup>31</sup> After it reached its decision in *Winters*, this Court did consider the issue of an at-fault PIP insured in *Young*.<sup>32</sup> This Court concluded that pro rata sharing was not applicable "...where an injured faultless third person recovers only from the insured tortfeasor, rather than also from the injured party's own insurer."<sup>33</sup>

This Court also explicitly noted that its earlier holding in *Winters* did not apply to the position of Tetti in the *Young* case.<sup>34</sup> When the Supreme Court affirmed this Court's ruling in *Winters* the Court stated as follows, "[w]e agree with the Court of Appeals on the issues before us and have borrowed liberally from Judge Morgan's opinion."<sup>35</sup> If the Supreme Court affirmed this Court's earlier ruling in *Winters*, an opinion that specifically did not consider the issue of an at-fault PIP insured, then how exactly was the *Young* decision effectively overruled by the Supreme Court's decision in *Winters*? Simply put, it was not.

It is undisputed that *Hamm* extended the holding in *Winters*.<sup>36</sup> In fact, the Court of Appeals' prior ruling in *Hamm* was specifically

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<sup>31</sup> *Winters*, 99 Wn. App. at 611 n.31.

<sup>32</sup> *Young*, 104 Wn. App. at 727 n.14.

<sup>33</sup> *Id.*, at 727 (footnote omitted).

<sup>34</sup> *Id.*, at 727 n.14.

<sup>35</sup> *Winters*, 144 Wn.2d at 876.

<sup>36</sup> *Hamm*, 151 Wn.2d at 306.

overruled because it conflicted with *Winters*.<sup>37</sup> Nothing in *Hamm* is inconsistent with the Supreme Court's earlier opinion in *Winters*, nor is it inconsistent with this Court's *Winters* opinion, which specifically did not consider the situation in *Young* or this case. *Young* has not been overruled either explicitly or implicitly. The trial court erred in granting summary judgment to Weismann.

#### **D. Olympic Steamship Fees Were Improperly Awarded**

For the reasons set forth in Safeco's Appellant's Brief, Safeco asserts that it was error for the trial court to award fees under *Olympic Steamship*<sup>38</sup> given the clear holding in *Mahler*.<sup>39</sup> Even if this Court determines that *Olympic Steamship* fees were applicable based upon *Safeco Ins. Co. v. Woodley*,<sup>40</sup> the fee award should be overturned.

The award of *Olympic Steamship* fees in this matter was based upon the erroneous conclusion that *Young* had been impliedly overruled. Weismann admits that her fee argument hinges on her argument that *Young* was overruled.<sup>41</sup> Given that *Young* was not impliedly overruled by *Winters* or *Hamm*, Weismann is not entitled to *Olympic Steamship* fees in the trial court or here. This Court should overturn the trial court's grant of

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<sup>37</sup> *Hamm*, 151 Wn.2d at 315-18.

<sup>38</sup> *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

<sup>39</sup> *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).

<sup>40</sup> *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004).

<sup>41</sup> Respondent's Brief, at 24.

summary judgment to Weismann and its imposition of *Olympic Steamship* fees.

### III. CONCLUSION

Because the 2001 Division II opinion in *Young v. Teti* is controlling and has never been overruled, and because no common fund was created by the claimant, this Safeco asks this Court to reverse the trial court's order granting summary judgment and *Olympic Steamship* fees to Weismann. Safeco also respectfully requests that this Court grant summary judgment in favor of Safeco dismissing Plaintiff's complaint for breach of contract, violations of the Consumer Protection Act, and violations of Insurance Fair Conduct Act.

Respectfully submitted this 5<sup>th</sup> day of October, 2009.

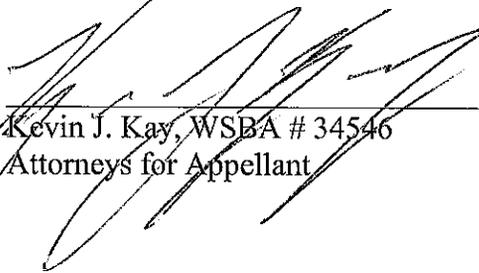
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**DECLARATION OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the Appellant's Brief to be served via the methods below on the 5<sup>th</sup> day of October, 2009 on the following counsel/party of record:

PARTY/COUNSEL	METHOD OF DELIVERY
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