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No. [redacted]

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

REPLY BRIEF OF APPELLANT OLGA MATSYUK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ARGUMENT 3

A. RESOLUTION OF THE COMPETING INTERESTS HERE SHOULD BE INFORMED BY THE MADE WHOLE DOCTRINE 3

B. STATE FARM'S COLLATERAL SOURCE RULE ARGUMENT MISSES THE MARK 6

1. Collateral Source Rule Is Inapplicable Here 6

2. Collateral Source Rule Does Not Change Fact That PIP Was Paid By State Farm On Its Own Behalf 7

3. *Young v. Teti* Was Not Based on the Collateral Source Rule 9

C. STATE FARM CONFUSES SUBROGATION WITH A RIGHT TO SEEK REIMBURSEMENT 9

D. STATE FARM'S DESIRE TO CREATE DIFFERENT CLASSES OF INSUREDS SHOULD BE REJECTED 11

1. State Farm's "Two Classes" Approach Reveals Factual Shortcomings For State Farm 11

2. State Farm's "Two Classes" Approach Conflicts With Established Public Policy 13

3. State Farm's "Two Classes" Approach Conflicts With Supreme Court Precedent 16

E. THE POLICY LANGUAGE BASED CLAIM IS ADEQUATELY PLED 18

F. THE BAD FAITH CLAIM BASED ON STATE FARM'S MISCONDUCT IN REGARDS TO THE RELEASE IS ADEQUATELY PLED 20

III. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Bliss v. City of Newport,
58 Wn. App. 238, 792 P.2d 184 (1990) 8, 9

Brown v. Snohomish Cty. Phys. Corp.,
120 Wn.2d 747, 845 P.2d 334 (1993) 5

Elovich v. Nationwide Ins. Co.,
104 Wn.2d 543, 707 P.2d 1319 (1985) 5

Hamm v. State Farm Mut. Auto. Ins. Co.,
151 Wn.2d 303, 88 P.3d 395 (2004) 5, 8, 9, 17, 18

Johnson v. Weyerhaeuser Co.,
134 Wn.2d 795, 953 P.2d 800 (1998) 6

Jones v. Firemen's Relief Bd.,
48 Wn. App. 262, 738 P.2d 1068 (1987) 6

Lange v. Raef,
34 Wn. App. 701, 664 P.2d 1274 (1983) 8

Mahler v. Szucs,
135 Wn.2d 398, 957 P.2d 632 (1998) ..... passim

Maziarski v. Bair,
83 Wn. App. 835, 924 P.2d 409 (1996) 8, 9

Mazon v. Krafchick,
158 Wn.2d 440, 144 P.3d 1168 (2006) 6, 7

Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.,
83 Wn. App. 432, 922 P.2d 126 (1996) 5

Polygon NW. v. American Nat'l Fire Ins. Co.,
143 Wn. App. 753, 189 P.3d 777 (2008) 5

Puget Sound Energy v. ALBA Gen. Ins.,
149 Wn.2d 135, 68 P.3d 1061 (2003) 5

Sherry v. Financial Indem. Co.,
160 Wn.2d 611, 160 P.3d 31 (2007) 5

Thiringer v. American Motors Ins. Co.,
91 Wn.2d 215, 588 P.2d 191 (1978) 4, 5, 6

Weyerhaeuser v. Commercial Union Ins. Co.,
142 Wn.2d 654, 15 P.3d 115 (2000) 5

Winters v. State Farm Mut. Auto. Ins. Co.,
144 Wn.2d 869, 31 P.3d 1164 (2001) 5, 16, 17

Young v. Teti,
104 Wn. App. 721, 16 P.3d 1275 (2001) 9

Rules

CR 8 20

CR 12(b)(6) 24

I. INTRODUCTION

While the general facts of the underlying automobile accident seems to implicate three different relationships, it is important to recognize that only one of those relationships is actually involved in this case. The three relationships are:

> (i) Between Matsyuk and Stremditskyy (injured person and tortfeasor);
>
> (ii) Between Stremditskyy and State Farm (liable party and his liability insurer); and
>
> (iii) Between Matsyuk and State Farm (PIP insured and her PIP insurer).

Contrary to State Farm's efforts to confuse these separate and distinct relationships, the only relationship at issue here is the <u>third</u> one – between PIP insured and her PIP insurer – and it is the balance of these interests that are to be decided in this case.

State Farm essentially concedes that when an insurer recoups its payments out of funds recovered by its insured, it is obligated to pay its share of the legal expense the insured incurred to effect the recovery. In fact, State Farm does not really take issue with the line of *Mahler* legal expense sharing jurisprudence. Instead, State Farm focuses its efforts on trying to convince the Court that the facts of this case are outside that established line of jurisprudence.

State Farm argues that the key question is the source of the PIP money. Thus its argument rests on its initial assertion that the PIP money came from Stremditskyy. But the PIP money did not come from Stremditskyy: the PIP came from State Farm, and was paid on behalf of State Farm. To assert otherwise not only contradicts the plain facts, it contradicts State Farm's concession that Matsyuk is its PIP insured, and that State Farm paid the PIP because it was legally and contractually obligated directly to Matsyuk to do so. This failure of State Farm's initial premise necessarily defeats the remainder of its argument.

From its faulted assertion concerning the origin of the PIP money, State Farm invokes the collateral source rule in an attempt to further the argument. This effort fails, however, because the initial premise concerning the source of the PIP money is wrong. In addition, the argument fails because the collateral source rule – an evidentiary rule applicable in actions between an injured person and a tortfeasor – has no application in this suit; this suit concerns the balancing of the interests of an insured vis-à-vis her insurer.

A central part of State Farm's argument is its discussion of subrogation principles. The discussion misses the mark on several points. For example, State Farm fails to appreciate the distinction between subrogation and an insurer's contractual right to seek reimbursement – this

case concerns only the latter. Also, the underlying purpose of an insurer's right to seek reimbursement is to prevent the insured from receiving a double recovery – something that clearly has not occurred here with Matsyuk. Most importantly, State Farm fails to recognize that an insurer's interest in recovering its payments – whether through a contractual right to reimbursement, subrogation or otherwise – is in all cases entirely subordinate to the injured insured's overriding right to be made whole.

In fact, a common thread throughout State Farm's brief is its utter failure to account for the overriding public policy interest in seeing that injured persons are fully compensated. Similarly, State Farm fails to adequately account for the policy interest in seeing that insureds (as well as insurers) are treated uniformly is similar circumstances.

II. ARGUMENT

A. RESOLUTION OF THE COMPETING INTERESTS HERE SHOULD BE INFORMED BY THE MADE WHOLE DOCTRINE

Of all of the various interests implicated in this case, none has been identified that is of more paramount importance than Washington's interest in seeing injured persons fully compensated, or "made whole" for their loss. The made whole doctrine has long been recognized as a basic

tenet of Washington insurance law. In *Thiringer*,[1] decided thirty years ago, the Supreme Court was asked to weigh and determine the relative interests, as between an insurer and its insured, for the proceeds of a settlement of the insured's bodily injury claim. *Id.* at 216. The insured had effected a recovery from the tortfeasor, but since the amount was insufficient to fully compensate him for his loss, the insured sought payment from his insurer under his PIP coverage.[2] *Id.* at 217. The Court saw the issue as requiring a choice between the competing interests of the insured and insurer. *See id.* at 219 ("The decisive issue before us concerns the allocation of the proceeds of the settlement, as between the insured and the insurer."). Citing case law and treatises going back to 1933, the Court noted that the balance of interests in such cases had historically tilted in favor of insureds; specifically, the paramount interest in seeing the insured made whole:

> The general rule is that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort-feasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is <u>fully compensated</u> for his loss.

---

[1] *Thiringer v. American Motors Ins.*, 91 Wn.2d 215, 588 P.2d 191 (1978)

[2] The insurer had previously refused (wrongfully) to pay under PIP because the tortfeasor had insurance, and the insurer took the position that its insured had to first proceed against the tortfeasor. *See id.* at 216-17.

Id. at 219-20 (emphasis added; citations omitted). Ruling that the proceeds of the settlement should first go to the insured until he was fully compensated, the Court reaffirmed Washington's commitment to the made whole doctrine and the balance of interest favoring an insured over his insurer.[3] *See id.* at 217-18.

That an injured person's right to be made whole is a dominant public policy interest that takes precedence over an insurer's interests has been confirmed again and again, and continues to be a bedrock of Washington insurance law,[4] and thus should guide and inform the result in this case.

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[3] Another aspect of the balance tilting in favor of the insured is that the burden to establish full compensation is on the insurer. *See, e.g., Puget Sound Energy v. ALBA Gen. Ins.*, 149 Wn.2d 135, 142, 68 P.3d 1061 (2003); *Weyerhaeuser v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673-74, 15 P.3d 115 (2000); *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 451-52, 922 P.2d 126 (1996); *Brown v. Snohomish Cty. Phys. Corp.*, 120 Wn.2d 747, 758-59, 845 P.2d 334 (1993).

[4] *See, e.g., Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 625, 160 P.3d 31 (2007) ("We hold that an insurer is entitled to [seek recovery of its payments] <u>only</u> when its insureds are fully compensated...") (emphasis added); *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 309, 88 P.3d 395 (2004) (insurer may seek reimbursement for benefits previously paid "when the insured receives [a] full recovery"); *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 878-79, 31 P.3d 1164 (2001) (recognizing "the long established equitable principles set down by this Court [that a]n insurer is not entitled to recover until its insured is fully compensated and restored to his or her pre-accident position") (citing *Thiringer*, 91 Wn.2d at 219); *Weyerhaeuser v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 672, 15 P.3d 115 (2000) ("the insured must first be fully compensated for its loss before any setoff is ever allowed"); *Mahler v. Szucs*, 135 Wn.2d 398, 416-17, 957 P.2d 632 (1998) ("with respect to the allocation of benefits, we articulated a rule of full compensation, that is, no right of reimbursement existed for the insurer until the insured was fully compensated for a loss"); *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 556, 707 P.2d 1319 (1985) ("the insurance company's subrogation rights arise only after the plaintiffs have received full compensation for their injuries.") (citations omitted); *Polygon NW. v. American Nat'l Fire Ins. Co.*, 143 Wn. App. 753,

B. STATE FARM'S COLLATERAL SOURCE RULE ARGUMENT MISSES THE MARK

1. Collateral Source Rule Is Inapplicable Here

State Farm relies extensively on the collateral source rule. Its argument fails because, in the first instance, the collateral source rule is inapplicable to deciding the relative interests between a PIP insured and her PIP insurer that are at issue in this case.

The collateral source rule is a rule of evidence that applies in a case between an injured person and the tortfeasor. *See Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006) ("collateral source rule is an evidentiary principle ... as a means of ensuring that a fact finder will not reduce a defendant's liability because the claimant received money from other sources, such as insurance carriers.") (citing *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998)). The collateral source rule is not designed to be used as a sword by insurers to limit their responsibilities to their insureds. Indeed, "[i]n typical civil cases, the collateral source rule affords protection to injured parties." *Johnson*, 134 Wn.2d at 804 (emphasis added). Notwithstanding State

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782, 189 P.3d 777 (2008) (right of insurer to share in third party recoveries does not arise until the insured "has first been 'made whole'") (citation omitted); *Jones v. Firemen's Relief Bd.*, 48 Wn. App. 262, 268, 738 P.2d 1068 (1987) ("the policy of fully compensating victims has repeatedly been held by our courts to be extremely important") (citing *Thiringer*, 91 Wn.2d at 220).

Farm's attempt to use the rule in an offensive manner against its PIP insured, the collateral source rule does not operate as a cause of action. *See Mazon*, 158 Wn.2d at 452.

On its face, this case does not involve an action by an injured person against a tortfeasor (*i.e.*, Matsyuk versus Stremditskyy). It does not concern whether a tortfeasor is or is not entitled to a setoff at a trial to determine the extent of that tortfeasor's liability. This case concerns the relationship between a PIP insured and her PIP insurer (Matsyuk and State Farm). State Farm can refuse to acknowledge and address this relationship, but it cannot alter the fact of it.

2. Collateral Source Rule Does Not Change Fact That PIP Was Paid By State Farm On Its Own Behalf

Even if the collateral source rule had any bearing on this case, it could not change that the PIP payments were made by State Farm on its own behalf. State Farm made the payments because it, and it alone, was obligated to do so. Stremditskyy was not obligated to make the payments, nor, importantly, was State Farm obligated to make the payments on his behalf. The obligation ran directly from State Farm to Matsyuk, who alone had the right to enforce the obligation. That the payments were made pursuant to a policy allegedly listing Stremditskyy as the named insured is irrelevant.

State Farm cites three Court of Appeals opinions.[5] Notably, all three substantially pre-date *Hamm*; in fact, they pre-date the entire line of *Mahler* cases. Thus, none of them have the benefit of the analysis and guidance set out in the *Mahler* line of cases, or the statements of public policy recognized by them. In addition, in all three cases the question involves the relationship between an injured person and the tortfeasor, not the relationship between PIP insured and PIP insurer at issue here. As a result, none of the cases address the question presented here.

Furthermore, on a substantive basis, the cases provide little in the way of analysis for the proposition cited. For example, in *Lange*, the Court simply mentions, without analysis or discussion, that PIP payments come from the "defendant's insurer." *See, e.g.*, 34 Wn. App. at 705 (emphasis added). This statement does not comport with the reality that PIP payments are made by the PIP insured's insurer based on obligations directly owed to the PIP insured, or with the teaching of *Hamm* that each capacity in which an insurer acts (*e.g.*, PIP versus UIM) is considered separately in a *Mahler* analysis. *Maziarski* likewise contains no discussion or analysis, merely remarking in *dicta* that the PIP funds were created by the tortfeasor, even while pointing out that neither party in the

[5] *Maziarski v. Bair*, 83 Wn. App. 835, 924 P.2d 409 (1996), *Bliss v. City of Newport*, 58 Wn. App. 238, 792 P.2d 184 (1990), and *Lange v. Raef*, 34 Wn. App. 701, 664 P.2d 1274 (1983).

case even invoked the collateral source rule. *See* 83 Wn. App. at 841 n.8.[6] *Bliss* is completely off point. In that case, although not directly stated, it is apparent that the pre-trial payments had been made by the defendant's liability insurer in its capacity as liability insurer. *See* 58 Wn. App. at 239. That has no bearing on these facts, where the PIP was paid by Sate Farm under obligations it owed to Matsyuk as her PIP insurer.

3. *Young v. Teti* Was Not Based on the Collateral Source Rule

State Farm postures the *Young v. Teti* decision as being based on the collateral source rule. State Farm Br. at 25. This is not true. *Young* neither mentions nor otherwise references the collateral source rule. Rather, *Young* was plainly decided on reasoning squarely rejected by the Supreme Court in *Hamm*. *See* Matsyuk's Br. of App. at 20-24.

C. STATE FARM CONFUSES SUBROGATION WITH A RIGHT TO SEEK REIMBURSEMENT

State Farm asserts that this matter is controlled by principles of subrogation, and goes on to assert that since it cannot subrogate against its

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[6] Even so, the following observation in *Maziarski* is interesting:

> The answer to [the question there] turns on the relationship between liability coverage and PIP coverage. In analyzing that relationship, we rely not only on cases dealing with the relationship between liability coverage and PIP coverage, but also on cases dealing with the relationship between UIM coverage and PIP coverage. The two relationships are analogous, at least for purposes of this case, because each involves a fault-based form of coverage (liability or UIM) and a no-fault form of coverage (PIP).

83 Wn. App. at 841. To the extent this observation is valid, it points straight at *Hamm*.

own insured, *Mahler* fee sharing cannot apply. The argument makes no sense for several reasons, but the most obvious defect is that it confuses subrogation with a right to reimbursement. A right of subrogation, whether by equity or contract, concerns the insurer's right to directly pursue the tortfeasor for reimbursement of payments it has made to its insured. In contrast, and wholly apart from any subrogation rights, an insurer has the right (if provided in its insurance contract) to seek reimbursement from its insureds. While such terms are often used imprecisely when it makes no difference, the Court has made it clear that there is a difference. *See, e.g., Mahler*, 135 Wn.2d at 421. Here, just as in *Mahler*, the question does not concern whether the insurer has a right of subrogation against the tortfeasor, but concerns the "enforcement mechanism for the [insurer's] right of reimbursement" against its PIP insured. *Id.* at 412.

To the extent State Farm wishes the Court nevertheless be guided by principles of subrogation, the most applicable principle remains that subrogation is subordinate to the insured's right to be made whole.

D. STATE FARM'S DESIRE TO CREATE DIFFERENT CLASSES OF INSUREDS SHOULD BE REJECTED

State Farm contends that the dispositive question in this or any other such case turns on who paid for the insurance policy at issue.[7] To State Farm's reasoning, insureds should have different entitlements depending on what type of insured they are. In essence, State Farm seeks to create two classes of insureds: those of the first order ("named" insureds) and those of a lesser order (who State Farm derisively refers to as "serendipitous beneficiaries").

1. State Farm's "Two Classes" Approach Reveals Factual Shortcomings For State Farm

Following State Farm's proposed analysis means injecting into every case an inquiry to determine who actually provided the money to pay for the policy at issue. As discussed below, in addition to adding unnecessary complexity to every case, there are multiple problems with this contention. Moreover, even if State Farm fell back and contended that the dispositive question is actually who is named on the policy, as opposed to the messy question of who might have paid for it, the retreat would not remedy the underlying problems.[8]

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[7] At another point in its brief, State Farm states that the dispositive question is the source of the PIP payments. As shown repeatedly, that source is State Farm itself.

[8] In fact, to begin with, no longer looking at who actually paid for the policy completely eviscerates State Farm's (in any event fallacious) collateral source rule argument, because

Some of the problems State Farm's approach presents are factual, which are particularly significant given that State Farm cannot have factual issues resolved in its favor on a motion to dismiss. For example, one deficiency here is that there is no proof that Stremditskyy, even if he is the named insured (see below), is the one who actually provided the funds for the purchase of the insurance policy. It very well might be that some other person who might have reason to do so paid for it, such as his parents, another relative or someone living with him.[9] There is absolutely nothing to indicate that it was Stremditskyy, and we cannot simply presume this fact for purposes of State Farm's motion. Since according to State Farm this is the decisive factual question, State Farm's failure is significant.

Even if we look to the question of who is "named" on the policy, State Farm has failed there too, as it has not produced satisfactory evidence that Stremditskyy is actually the named insured here. Although State Farm has submitted what it represents as the insurance policy, it has

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someone cannot be said to have "created" insurance funds when they did not pay for the policy in the first place.

[9] For example, it is not at all unusual for parents to pay for their child's insurance policy. Similarly, there are many other circumstances where someone other than the "named" insured provides the funds for a policy, such as under an arrangement where roommates share the cost of a vehicle, or where someone provides the funds for their significant other's insurance policy.

not submitted, for example, the declarations page to establish that Stremditskyy is the named insured for it.[10]

2. State Farm's "Two Classes" Approach Conflicts With Established Public Policy

In addition to the foregoing factual problems, State Farm's attempt to establish two separate classes of "insureds" conflicts with important public policy concerns. In particular, State Farm's approach would result in injured insureds obtaining vastly different results even though, except for having one insurer involved instead of two, they are otherwise similarly situated. There are any number of examples that illustrate this problem.

For example, if a named insured was injured while riding as a passenger in his own car being driven by his neighbor, who was at fault for the accident.[11] The named insured would receive PIP under his policy, as well as make a liability recovery under the same policy.[12] Since the neighbor is not a named insured nor (presumably) paid for the policy, the named insured would have the benefit of *Mahler* and its progeny. If the named insured and the neighbour switched seats, however, and it was the

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[10] Or, if Stremditskyy is a named insured, is anyone else listed as a named insured?

[11] Essentially, presuming for the moment that Stremditskyy is the named insured, having him switch places with Matsyuk.

[12] Since the insurer would step in as liability insurer for the neighbor/driver.

named insured who was driving and the neighbor who suffered injury, the neighbor, according to State Farm, does not get the benefit of *Mahler*. Same car, same policy, same coverages, with each qualifying as insureds, yet dramatically different results based on nothing more than who was sitting in which seat. Such differing results represent the height of arbitrariness and caprice.

Another example is where there are three people in the car: the named insured as driver, and his named insured spouse and his child as passengers. If the named insured driver causes an accident that results in injury to his two family members, while both will receive PIP, and both can recover under the policy's liability coverage, according to State Farm's theory only the spouse[13] will get the benefit of *Mahler* – not the child.

In another situation, the named insured loans his car to another person, who then causes an accident injuring a passenger in the car. Although the driver is certainly an insured for liability purposes, since he is not the named insured and did not pay for the policy, State Farm's rule would result in the passenger having the benefit of *Mahler*. These examples illustrate that State Farm's two classes of insureds approach

[13] As a named insured.

leads to arbitrary, divergent results for two otherwise equally situated insureds. Such an outcome is unreasonable and inequitable, and contrary to Washington public policy.

In addition, State Farm's approach causes a bizarre result if a passenger, such as Matsyuk, has her own insurance to cover medical expense.[14] State Farm's approach would actually deny the passenger the benefit of her own insurance, and would actually render the passenger worse off because of the driver's PIP coverage. This is because the PIP coverage on the vehicle being driven will be primary. Thus, the passenger's medical expenses will be paid under it, notwithstanding the passenger's own insurance. According to State Farm, the passenger will not get the benefit of *Mahler* when she makes her liability recovery from the driver. In contrast, if the vehicle is not covered by PIP, then the passenger would have her medical expenses paid by her own insurance, and after making the liability recovery from the driver, the passenger would have the benefit of *Mahler*. The net effect is that an injured person is made worse off because the driver had PIP insurance. This is a ludicrous result.[15] Moreover, while these examples demonstrate the

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[14] For example, either PIP coverage on her own car, or traditional medical insurance. In this particular case, there is nothing in the record either way on this question.

[15] There is yet a different result if the driver has PIP, but the passenger's medical expenses are so high that she receives benefits under both his PIP and under her own

unfairness imposed on certain insureds as compared to others who are similarly situated, by corollary they also demonstrate that otherwise similarly situated insurers are also treated unequally.

3. State Farm's "Two Classes" Approach Conflicts With Supreme Court Precedent

Notwithstanding her indisputable status as an insured, State Farm paints Matsyuk and those like her as undeserving of the full benefit of an insurance policy if they didn't pay for it. Treating insureds differently based on whether they paid for the applicable policy, however, conflicts with previous Supreme Court treatment of such matters.

As noted previously, *Winters* was a consolidation of two cases, one involving a plaintiff named Winters, and the other involving a plaintiff named Perkins. In both cases, the respective PIP insureds sued to have State Farm bear its share of the legal expense they each incurred to effect a recovery under the State Farm policy's UIM coverage (the same policy that had provided the PIP). *See Winters*, 144 Wn.2d at 872-75. In its brief, State Farm limits its discussion to the facts pertaining to plaintiff Winters, disingenuously claiming it is doing so "[a]s did Ms. Matsyuk in her" brief "for simplicity." State Farm Br. at 19 n.3. Not quite.

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insurance. Under State Farm's rule she would have the benefit of *Mahler* for part of the PIP, but not for the other.

It's fairly evident why State Farm tries to keep the Court's attention from the facts pertaining to Perkins: in contrast to Winters, Perkins did not purchase the policy that provided him with the PIP benefits:

> Kyle Perkins was injured in an automobile accident while driving a vehicle owned by Glenn Smith. Like Winters, Glenn Smith purchased a State Farm automobile policy and paid for separate Liability, UIM and PIP coverages. Smith's policy covered Perkins, who was not at-fault in the accident. Because of his injuries, State Farm paid Perkins $18,480 in PIP benefits.

Id. at 874. In other words, Perkins was, as State Farm would say, merely a "serendipitous beneficiary." But it made absolutely no difference to the Court:

> Winters and Perkins ... create[d] a common fund for the benefit of their PIP carrier. Neither Winters nor Perkins would be fully compensated if forced to bear the entire litigation costs of the common fund. ... [A]s between the insured and the insurer, we balance their interests and decide that the insurer should pay its share of the costs associated with recovery.

Id. at 883.

In sum, State Farm's effort to distinguish insureds based on whether they paid for the policy has already been rejected by the Supreme Court (in a case involving State Farm). In fact, it appears that State Farm has been rebuffed twice on this argument. Although admittedly unclear from the opinion, the wording in *Hamm* (particularly the term "qualified")

strongly suggests that Hamm was not the policyholder either, but an insured as a result of being the vehicle at the time of the accident (just like Matsyuk):

> In November 1994, Rebecca Hamm was injured in an automobile accident with an uninsured motorist. Hamm qualified as an insured under a policy with State Farm Mutual Automobile Insurance Co. (State Farm) for both PIP benefits and UIM benefits.

Hamm, 151 Wn.2d at 306 (emphasis added).

At bottom, there is nothing in Washington law or public policy that permits the creation of different classes of insureds based on who paid for the policy, or that approves taking essentially equally situated insureds (or insurers) and rendering them better or worse off based on luck and happenstance. Moreover, doing so would be inconsistent with the previous treatment of such matters by the Supreme Court.

E. THE POLICY LANGUAGE BASED CLAIM IS ADEQUATELY PLED

State Farm provides little argument to address Matsyuk's claim that regardless of the requirements of Washington law, State Farm was obligated by its policy language to share in her legal expense. The basis of State Farm's argument is the assertion that it did not recover its PIP payments from Matsyuk's liability recovery. This does not comport with the facts.

The liability claim against Stremditskyy was settled for total consideration of $5,874 – the amount is plainly listed in the release ("For the sole consideration of Five Thousand Eight Hundred Seventy-Four and No/100th Dollars ($5,874.00)). State Farm only provided a check for $4,000, because $1,874 had already been paid by State Farm in connection with its PIP obligation to Matsyuk. In other words, State Farm offset the amount of the PIP it paid on its own behalf from the total liability settlement amount it was paying on Stremditskyy's behalf. Even were the fact of this offset not clear, at worst it would constitute a disputed issue of fact that State Farm is not entitled to have resolved in its favor on a motion to dismiss.

As to the substance of Matsyuk's argument that the policy language obligated State Farm to share in her legal expense, State Farm simply avers that it "does not contain" such language. State Farm Br. at 37. It provides no analysis of the relevant policy language, however, and in fact does not even recite the policy language in that part of its brief. Its inability to address the merits of this separate and alternative basis for relief is telling.

F. THE BAD FAITH CLAIM BASED ON STATE FARM'S MISCONDUCT IN REGARDS TO THE RELEASE IS ADEQUATELY PLED

This is another argument that State Farm responds to in mostly boilerplate fashion. In regard to the substance of the claim, State Farm asserts that Matsyuk has not adequately pled damages from the misconduct. This argument lacks merit.

Civil Rule 8 merely requires a short and plain statement showing entitlement to relief. Matsyuk's claim does that, specifically alleging damages as a result of the misconduct. State Farm's grievance seems merely to be that Matsyuk did not identify the specific nature or amount of damages in the Complaint, but has not cited any authority for this proposition, which is contrary to CR 8 and the ordinary course of pleading. The usual personal injury complaint for example, often says little more than the plaintiff was damaged as a result of defendant's negligence. State Farm has not shown why any more is required here.

In her opening brief, Matsyuk pointed out that the loss of use of funds constitutes cognizable damages. State Farm appears to concede the point, but argues that it is inapplicable because Matsyuk was not entitled to the liability settlement money until the parties reached an agreement. State Farm's argument reveals a fundamental misreading of Matsyuk's claim. Matsyuk and State Farm <u>had reached an agreement</u> on the liability

claim. State Farm then delayed Matsyuk's ability to obtain the proceeds of that settlement – to which they had already reached agreement – so as to try to extract from Matsyuk the release of the separate and unrelated claims she possessed against State Farm. State Farm pretends that the "settlement" of the liability claim was reached the day the release was signed. This is inaccurate.[16] As pled in the complaint, the parties reached agreement earlier, and the resulting delay was caused by State Farm's abuse of its position as holder of the liability funds to try to extract concessions that would benefit it in its capacity as Matsyuk's PIP insurer.

In short, Matsyuk pled damages as part of the cause of action. Nothing more is required. Furthermore, even if State Farm desired additional information on the nature of the damages pled, it would call for nothing more than a motion for a more definite statement, not a dismissal of the claim.

III. CONCLUSION

State Farm asks this Court to create two classes of insureds. If we believe that State Farm means what it says, State Farm would divide the two classes along the line of insureds who paid for a policy versus insureds who did not. The factual issues and logistical problems this

[16] State Farm's fundamental misunderstanding is no doubt why it keeps incorrectly chirping that "Matsyuk's lawyer had a theory in search of a settlement." State Farm Br. at 6.

framework unnecessarily injects into matters are significant. Indeed, every matter would involve a "case within a case" just to determine who paid for the policy. Moreover, notably for purposes of this case, State Farm has no valid evidence to establish who paid for the policy here.

In addition, the public policy considerations implicated by State Farm's approach are likewise significant. Contrary to public policy and equity, the ultimate recovery by otherwise similarly situated PIP insureds could vary dramatically as a result of the approach. Whereas in the single insurer case the insured will not be made whole under State Farm's approach, the same accident but with two insurers permits the insured to be fully compensated. Likewise, and also contrary to public policy, State Farm's approach results in a single insurer obtaining a result different (more favorable) than would two separate insurers in an otherwise similar situation.

Even if we believe State Farm misspoke and meant to say that it would divide the two classes along the line of "named" insureds versus all other insureds, it would not solve the most significant problem: that of different results for otherwise similarly situated PIP insureds (and its corollary: a single insurer obtaining a result different than would two separate insurers in the same situation).

It is important to be clear on the two competing interests at issue in

this case. This is not a contest between the injured person and the tortfeasor, or the tortfeasor and the tortfeasor's liability insurer. The competing interests here are those of a PIP insured and her PIP insurer. In that regard, Washington public policy mandates that the insured's interest in receiving full compensation reigns supreme, limited only by a prohibition on a double recovery. Because State Farm offset the PIP when it paid the liability settlement, Matsyuk plainly did not receive a double recovery. The only thing left is for State Farm to bear its share of legal expense so that Matsyuk is made whole.

The salient facts are actually quite straightforward. Matsyuk was State Farm's insured. State Farm paid her PIP under the obligations that it alone owed to Matsyuk as her insurer. When Matsyuk recovered from the liable party, State Farm exercised its right to seek reimbursement and recouped its PIP by offset. These facts place the case squarely within the rule of *Mahler*. Moreover, the application of *Mahler* and progeny to this situation results in a single, consistent rule that avoids both the needless complications and the violations of the identified public policy considerations.

Finally, standing independently is Matsyuk's claim based on State Farm's wrongful effort to hold up the payment of the liability settlement to try to extract a release of Matsyuk's claims against it as her PIP insurer.

The loss of use of funds for a period of time is a real and legally cognizable damage to Matsyuk sufficient to state a claim.

This case involves the natural conclusion of the *Mahler* line of cases, and the Court should reject State Farm's request to carve out an exception that does violence to longstanding public policy. Thus, for the reasons stated herein and in her opening brief, Matsyuk asks the Court to reverse the trial court's CR 12(b)(6) dismissal, and to also reverse the trial court's denial of Matsyuk's motion for partial summary judgment.

July 17, 2009.

s/ Matthew J. Ide, WSBA No. 26002
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* * *

DECLARATION OF SERVICE

I certify that on July 17, 2009, I caused to be filed with the Supreme Court of the State of Washington, via electronic filing, the foregoing Reply Brief of Appellant Olga Matsyuk, and caused to be served via first class mail, postage prepaid, a true and accurate copy to:

Kenneth E. Payson Hozaifa Y. Cassubhai Davis Wright Tremaine LLP Suite 2200 – 1201 Third Avenue Seattle, WA 98101-3045 Attorneys for Defendant/Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Seattle, Washington, this 17th day of July, 2009.

s/ Matthew J. Ide, WSBA No. 26002
Matthew J. Ide